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*Aravind R. Ganesh** & *Natalie Harsdorf Enderndorf***/****

I. – Introduction

Never before in human history have so many food consumers and so many food producers transacted with one other through the agency of so few middlemen. Consider the following figures : A 2008 report by the World Bank estimated that of the 2.5 billion people around the world who farmed for a living, [1] coffee growers numbered about 25 million. Consumers of coffee numbered around 500 million. However, just four firms controlled 45% of the entire global coffee roasting industry, and the same number of firms ran 40% of all international coffee trading. [2] The report also stated that the market shares of the top four firms were 40% in international trading in cocoa, 51% in cocoa grinding, and 50% in confectionary manufacturing. [3] Moreover, just three companies controlled over 80% of the world's tea markets.

Apart from heavy concentration in the food processing segment of agricultural supply chains, we have also witnessed increasing consolidation among retail supermarkets. The German as well as the Austrian markets show a very high level of concentration. In Germany, the four biggest retailers hold around 85% of the market [4]

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1 World Bank, "World Development Report 2008 : Agriculture for Development", (November 2007), 3, and 29. See also Sophia Tickell, Fairtrade in perspective, (2004) Sustainability Radar; *op. cit.* Liz Dodd & Samuel Asfaha, Rebalancing the Supply Chain : buyer power, commodities, and competition policy, South Centre & Traidcraft, (April 2008), 9.

2 World Development Report 2008, 135-136.

3 *Id*.

4 Bundeskartellamt-Lebensmitteleinzelhandel, "Pressmeldung: Bundeskartellamt untersucht Beschaffungsmärkte im Lebensmitteleinzelhandel", http ://www.bundeskartellamt.de/wDeutsch/download/pdf/Presse/2011/2011-02-14_PM_SU_ LEH__Final.pdf, 14th February 2011.

(compared to eight holding 70% in 1999 [5]) while in Austria the three biggest retailers hold around 83%. This phenomenon, which used to be more commonly associated with European markets, has spread all over the world. A proposed merger between Wal-Mart, the giant US retail conglomerate and Massmart, a South African wholesaler and retailer of groceries, liqour and general merchandise has hit a barrier, having been approved only subject to conditions by the Competition Tribunal of South Africa, and foundered against procedural issues in Namibia. [6]

Staying in Europe however, there have been several investigations of supermarkets by competition regulatory bodies in the UK, Germany, the Netherlands and Austria in recent years. In addition, a majority of the members of the European Parliament adopted a declaration in 2008 requesting the European Commission to address "the abuse of power by large supermarkets operating in the European Union." [7] In February 2011, the German Bundeskartellamt (BKA) announced the start of an in-depth sector inquiry into the retail sector. [8] According to the President of the BKA, Andreas Mundt, the inquiry aimed at throwing light on the power balance or imbalance between retailers and producers, and it would focus on answering specific questions such as what the market position of certain retailers (including their partners) is with regard to certain product groups. The BKA would begin by investigating the extent to which certain retailers benefit from their buying conditions compared to competitors. The next step will be to analyse the consequences of such benefits for the downstream market. [9] Two mergers in the retail sector, EDEKA/Plus [10] and EDEKA/Trinkgut, [11] were cleared by the BKA subject to conditions. In 2008, the Austrian Bundeswettbewerbsbehörde (BWB) conducted an inquiry into the retail sector which looked at buyer power with

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5 Vanessa von Schlippenbach and Ferdinand Pavel, "Konzentration im Lebensmitteleinzelhandel : Hersteller sitzen am kürzeren Hebel", *Wochenbericht des DIW Berlin* Nr. 13/2011, 1.

6 See respectively, *Walmart Stores Inc / Massmart holdings*, Case No: 73/LM/Dec10 (29 June 2011) (Competition Tribunal of South Africa); *Namibian Competition Commission and Another* v. *Wal-Mart Stores Incorporated* (SA 41/2011) [2011] NASC 11 (4 November 2011) (Supreme Court of Namibia); South Africa: Appeal Against Wal-Mart and Massmart Merger in South Africa, AllAfrica.com, October 20th, 2011, http://allafrica.com/stories/201110201426.html (last accessed February 1st, 2012).

7 Declaration tabled by Caroline Lucas (Verts/ALE/UK), Gyula Hegyi (PSE/HU), Janusz Wojciechowski (UEN/PL), Harlem Désir (PSE/FR) and Hélène Flautre (Verts/ALE/FR) pursuant to Rule 116 of the European Parliament's Rules of Procedure, EP reference number : DCL-0088/2007 / P6-TA-PROV(2008)0054.

8 See *supra* note 4, at 1.

9 *Id.*, at 2.

10 Bundeskartellamt 2. Beschlussabteilung B 2 – 333/07; http ://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion08/B2-333-07_Internet.pdf.

11 Bundeskartellamt 2. Beschlussabteilung B 2 – 47250 – Fa –52/10; http ://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion10/B02-052-10.pdf.

regard to specific product groups, such as dairy products, beer and others. [12] The inquiry confirmed the existence of buyer power, varying to a certain extent depending on the product group. It also showed that the conditions foreseen in the contracts differed widely and were often neither transparent nor clear cut, for the most part coming down to conditions having an effect on the price. [13] In March 2011, a merger between two wholesalers was cleared by the BWB only subject to extensive conditions. [14] The relevant geographic market was defined at 30 km from each business location for the market without delivery and 100 km for the delivery market.

The animating principle behind most contemporary competition regimes including those [15] of the European Union, is for the most part, [16] the protection of the interests of end consumers. The most unequivocal affirmation of this intellectual foundation was articulated by Joaquín Almunia, the European Commissioner for Competition Policy, in a speech given in Poznan in November 2011 :

"Consumer welfare is not just a catchy phrase. It is the cornerstone, the guiding principle of EU competition policy. In all our cases we start by looking at the likelihood of 'harm' to consumers. What we want to know is to what extent the merger, agreement or practice in question can reduce choice, increase prices or stifle innovation....Understandably, not all our cases deal with consumer products. We often look at intermediate markets – involving raw materials or essential inputs – where the 'consumers' are corporate customers seeking competitive conditions of supply. I would like to make one point clear here : the role of competition authorities is not to deliver these benefits directly to consumers, but to create the best conditions for a well-functioning market. The Commission, together with National Competition Authorities, do this by ensuring that companies compete rather than collude; that market power is not abused or acquired through anticompetitive mergers; and that – when efficiencies are claimed – they are passed onto customers." [17] (internal paragraphs removed)

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12 Bundeswettbewerbsbehörde, Allgemeine Untersuchung des österreichen Lebensmitteleinzelhandels unter besonderer berücksichtigung des Aspekts der Nachfragemarkt, http ://www.bwb.gv.at/Untersuchungen/Lebensmittelhandel/Documents/Lebensmittelhandel%20Endbericht.pdf, June 2007, 6-7.

13 *Id.*, at 20-21.

14 Bundeswettbewerbsbehörde, "Marktabgrenzung im Bereich LGH"; http ://www.bwb.gv.at/Fachinformationen/Standpunkte/Seiten/MarktabgrenzungimBereichLGH.aspx, last visited February 1st 2012.

15 The use of the plural is intended to take account of the national competition regimes.

16 Of late, there have been a number of departures from this general disposition. These shall be considered briefly in the final Section IV to this note.

17 SPEECH/11/803, *What's in it for Consumers? European Competition and Consumer Day Poznan November 2011* (November 24, 2011) available at http ://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/803&format=HTML&aged=0&language=EN&guiLanguage=en. (last accessed November 28th, 2011) *See* also UK Competition Commission, describing competition as "a process of rivalry between firms... seeking to win customers' business over time." (Merger References : Competition Commission Guidelines (June 2003, CC 2), §1.20; and Market Investigation References : Competition Commission Guidelines (June 2003, CC 2), §1.16); U.S.

In this article, we shall adopt the consumer welfare-based conception of competition law, as opposed to the ordoliberal philosophies that prevailed in the US until the Reagan administration [18] or those regimes aimed at repairing social inequality. [19] The first order of business will be to survey the economic theory behind monopsony, to demonstrate its harms to consumer welfare. We shall also consider the effects of monopsony particular to food and agricultural markets. Second, we shall explore if there is anything at all that competition law can do about these effects, and if so, whether European competition regimes exploit all the regulatory tools available to them. Thirdly and finally, we shall take a look the consumerist conception of competition law to see how much it captures of the broad range of interests consumers actually possess.

II. – Consumer harms arising from buyer power in food supply chains

A. – Monopsony in Theory

EU competition law has, until relatively recently, generally tended to view monopsony as a benign, pro-competitive force, or, at the very least, a matter of little or no competitive concern. According to this general scheme, the downward pressure the dominant buyer exerts upon producers forces the less efficient among them to merge, achieve economies of scale, cut costs, or exit the market, leaving the more efficient ones behind. Such buyer power, it is argued, is especially beneficial if it provides a

7th Circuit in *University Life Insurance Co. v. Unimarc Ltd.*, 699 F.2d 846, 853 (7th Cir. 1983) defining competition as "a state in which consumer interests are well-served rather than as a process of rivalry that is diminished by the elimination of even one tiny rival."

18 In *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958), the US Supreme Court held that the goals of Antitrust law were "to yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."

19 See South African Competition Act 1998, section 2 of which aims to "promote and maintain competition in the Republic in order… (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and (f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons". Moreover, section 12A(3) of the Act on merger control requires consideration by the Competition Commission or Tribunal of whether the proposed merger has an effect on "the ability of small businesses or firms controlled or owned by historically disadvantaged persons to come competitive." Ch. 4, part B of the Act allows the Competition Tribunal to exempt for up to five years otherwise anticompetitive agreements if they, inter alia, promote "the ability of small businesses and or firms controlled or owned by historically disadvantaged persons…" The "historically disadvantaged" are those who were "disadvantaged by unfair discrimination on the basis of race" before the coming into force of the post-apartheid Interim Constitution of 1993.

countervailing force against powerful dominant sellers. [20] These arguments implicitly assume that there will be savings, and that they will somehow be passed on to end consumers.

The traditional, relaxed attitude of EU competition law towards monopsony is demonstrated by the relative absence of case-law on buyer power, at least as compared to the US, where concentrated buyer power featured prominently among the major concerns of the legislators who promoted the Sherman Act, [21] and where it is still litigated regularly before the courts. Although the Commission has dealt with monopsony issues on a number of occasions in its capacity as the merger regulatory, [22] the European Courts have broached the subject only very occasionally, such as in *Kesko v Commission*, [23] where the General Court (ex Court of First Instance) dealt with procedural and jurisdictional questions rather than substantive issues of monopsony. The closest one can find to a mention of buyer power of the non-countervailing variety in the jurisprudence of the Court of Justice (ECJ) is the following comment made in passing by Advocate-General Maduro in *Fenin* :

"...the existence of a monopsony does not pose a serious threat to competition since it does not necessarily have any effect on the downstream market. Furthermore, an undertaking in a monopsonistic position has no interest in bringing such pressure to bear on its suppliers that they become obliged to leave the upstream market." [24]

This passage deserves close reading. The first assumption is that monopsonies do not *necessarily* have any effect upon end consumers where they already exist, as opposed to when they are in the process of coming into being through merger or other combina-

20 Case T-342/99, *Airtours* v *Commission* [2006] ECR II-2585, §277 (General Court), Case 322/81, *Michelin* v *Commission* [1983] ECR 3461, §73; Case T-228/97, *Irish Sugar* v *Commission* [1999] ECR II-2969, §114; Opinion of Advocate-General Mischo, Case C-163/99, *Portugal* v *Commission* [2001] ECR I-2618, §106.

21 See 21 Congressional Record 2461 (1890), statement of Senator John Sherman : "These trusts and combinations ... operate as a double-edged sword. They increase beyond reason the cost of necessaries of life and business, and they decrease the cost of raw material, the farm products of the country. They regulate prices at will, depress the price of what they buy and increase the price of what they sell." *Id.* 2457, statement of Representative Taylor : (speaking of "trusts") "... this monster robs the farmer on the one hand and the consumer on the other."

22 See Commission decisions in the mergers of *Kesko/Tuko* (November 1996) [Commission prohibits merger of two large Finnish chains on the grounds that they would be able to reduce input prices "to an extent that no rival could match", thus precluding new market entry]; *Blokker/Toys 'R' Us* (June 1997) [Commission prevents merger of two Dutch toy retailers because market power over suppliers were not complemented by economies of scale in purchasing]; *Rewe/Meinl* (Feb 1999) [Merger of Austrian food retailers approved with conditions]; *Carrefour/Promodes* (June 2001).

23 Case T-22/97, *Kesko* v *Commission* (1999).

24 Opinion of Advocate-General Maduro in Case C-205/03 P, *Fenin* v *Commission* (2005), §66.

tion. The second is that monopsonists are harmless because they are incentivised not to exploit their suppliers so excessively that they leave the market.

The central fault with this general characterization of monopsony with the broader concept of buyer power is that it conflates situations where there is competition between sellers with those where there isn't. Chen provides perhaps the best description of this dynamic :

"Buyer power is the ability of a buyer to reduce price profitably below a supplier's normal selling price, or more generally the ability to obtain terms of supply more favourable than a supplier's normal terms. The normal selling price, in turn, is defined as the supplier's profit-maximising price in the absence of buyer power. In the case where there is perfect competition among suppliers, the normal selling price is the competitive price, and buyer power is monopsony power. On the other hand, in the case where competition among suppliers is imperfect, the normal selling price is above the competitive price, and the buyer is countervailing power." [25]

Essentially, "countervailing buyer power" differs conceptually from monopsony. The former envisages a tug-of-war between a powerful seller on the one hand, and a powerful buyer on the other. It is basically one-on-one bargaining against someone equally powerful, where it is assumed the seller will ask for the moon, the buyer will offer peanuts, and the resulting deal will meet somewhere sensible in the middle. Monopsony on the other hand, envisages a powerful buyer transacting with one or several sellers who lack market power. This distinction has important implications for any analysis of effects on consumer welfare.

B. – Effects upon downstream markets : The Conventional Picture

The standard microeconomic model stipulates that in order to maximise profits, a buyer trading in a market will continue to purchase inputs until the cost of buying one additional unit of output completely wipes out the increase in revenue it gains from the output it produces. In the language of economics, buyers purchase at the point where their marginal factor cost (MFC) equates their marginal revenue product (MRP). In a competitive purchasing market, where numerous buyers compete with each other for the input, any increased price offered by a particular buyer to a particular seller will have to be matched with identical increases by all other buyers to all other sellers. Thus, from the perspective of a particular buyer, the MFC and supply curves in a perfectly competitive purchasing market are identical. Such a market allocates resources efficiently, because the amount of input the buyer is willing to purchase, as determined

[25] Zhiqi Chen, "Defining Buyer Power", (2008) 53 *Antitrust Bull.* 241, 247.

by the point at which his MFC and MRP equalize, is precisely equivalent to the amount sellers are willing to supply.

In monopsonistic markets where there is only one buyer, sellers do not have a choice. Consider a small, remote town dominated by a single coal mine. [26] In this scenario, if the monopsonistic buyer (M) of labour decides to hire an additional worker, it must offer a higher wage, because the supply curve is upward-sloping. However, this wage increase must be offered to all other employees. If not, the other employees will quit and the employer would have to re-hire them at the higher wage. As such, when M hires one more worker, the addition to M's wage bill includes more than just the higher wage demanded by the new employee. In other words, there is a gulf between what the sellers are willing to supply and what M is willing to purchase : M's MFC curve is higher than the supply curve. Thus, at the point of profit maximisation, M purchases significantly less than what sellers are willing to supply, in the process reducing the price that the producers of those inputs obtain. Put another way, M will restrict its demand to the point where the cost to it of suppliers dropping out equates to the benefit to it of the price savings from the low prices asked for by the sellers who remain in the market. Due to the reduction in the amount of inputs, the output produced by M will similarly fall below that of what society as a whole could have produced given the resources at its disposal. If this is the case, it means that end users are paying more than they would otherwise have done, for the same amount of end product. As such, the default position indicated by the standard economic model is that the monopsonist in an upstream market necessarily and by default has effects upon downstream markets, even if that monopsonist does not wield monopoly power in them.

It is this consideration which disproves the initially plausible notion of the monopsonist passing on savings to end consumers. The Court of Appeals for the U.S. 6th Circuit failed to grasp this in *Balmoral Cinema*, [27] where it assumed that a collusive monopsony among movie theatres bidding for films offered by distributors "may lower prices to movie goers at the box office and may serve rather than undermine consumer welfare." [28] The opinion seems to assume that lower input prices always equate to lower prices for consumers, and therefore fails to consider whether the lower input

26 This example, taken from labour markets, is intended to demonstrate in a simplified way the point that a monopsonist obtains lower prices by purchasing a lesser quantity than a competitive buyer. Readers should bear in mind certain important differences between labour markets and product markets. In product markets, producers have the choice to sell their product by themselves or via a retail distribution channel. If they rely on retail distribution, the producer may run into a concentration of control over available distribution channels, which creates monopsony. Workers on the other hand, do not have a choice of distribution channel for an product which they produce ; instead, *they* are an input factor of production.

27 *Balmoral Cinema* v. *Allied Artists Pictures*, 885 F.2d 313, (6th Cir. 1989).

28 *Id*. at 317.

prices are being obtained by depressing the quantity of inputs purchased, which would make the end product scarce and more expensive for end consumers. Of course, if M is also dominant in the downstream market, [29] the welfare of end consumers will be adversely affected by "double marginalisation" – a second diminution in quantity of the end product available, due to the fact that monopoly sellers tend to depress the quantity of their output in order to maximise their profits. [30]

Empirical studies of agricultural markets appear to bear out this theory. Cost savings derived from driving down supplier prices tend to be retained by both input processors and end retailers. For instance, although farm gate prices for coffee beans fell by 80% between 1997 and 2002, retail prices for coffee dropped only 27%. At the same time in 2001, Starbucks' and Nestlé's profits rose by 41% and 20% respectively. [31] In the retail sector, one explanation offered for this phenomenon is that when prices rise, retail consumers tend to shop around in search of a better bargain, thus pressuring retailers into raising prices in unison. However, the argument goes, when prices fall, they do not shop around quite so much, leading to less pressure to decrease prices all at the same time. [32] According to this argument, the cause of price-"stickiness" is not market dominance, but the fact that consumers are willing to pay a little more rather than trudge wearily from supermarket to supermarket, comparing prices on boxes of cornflakes. But this merely begs the question : in a competitive and efficient market, which by definition sends accurate price signals to all parties, including consumers, such price-stickiness should be negligible. A market is efficient only if it incentivises all parties, including end consumers, to act efficiently.

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29 A firm can wield monopsony or dominant buyer power in its input markets while having little or no seller power in the downstream product market. Consider a milk pasteurising plant. The input – fresh milk – is highly perishable, and can be viably transported only over a short range before it becomes unsaleable. If there are no other milk processing plants in within this geographical range, that plant will wield monopsony power. However, pasteurised milk is much less perishable, and can be transported nationally, or even globally. As such, the plant will probably not have any market power in its downstream market.

30 R. SEXTON and M. ZHANG, "An Assessment of the impact of Food Industry Market Power on U.S. Consumers", 17 *Agribusiness* 59 (2001); rebutting O. WILLIAMSON, "Economies as an Antitrust Defence : the Welfare Trade-Offs", 50 *Am. Econ. Rev.* 18 (1966). Whereas Williamson argues that both total welfare as well as efficiency are enhanced where market power increases, Sexton and Zhang show that "only extraordinary increases in efficiency could possibly offset the deadweight welfare loss" the occurs when a firm is has power on both buying and selling markets. *Op. cit.* Peter CARSTENSEN, "Buyer Power, Competition Policy and Antitrust : the competitive effects of discrimination among suppliers", (2008) 53 *Antitrust Bull.* 271, 283, fn. 26.

31 Celine CHARVERIAT, "Bitter Coffee : How the Poor are Paying for the Slump in Coffee Prices", (May 16, 2001) Oxfam, 5-6; *op. cit.* Paul ROBERTS, *The End of Food : The Coming Crisis in the World Food Industry* (2008), 159.

32 OECD Policy Roundtable on Competition and Regulation in Agriculture : Monopsony Buying and Joint Selling (2004), 8.

There are however, a number of means by which M can, at least in theory, maintain the amount of input purchase at levels normal in competitive markets, and certain features of many agricultural markets lend themselves to such methods. The first of these is price discrimination, while the second relates to the peculiar price responsiveness of certain commodities.

1. — *Price Discrimination*

The reason why levels of inputs in monopsonistic upstream markets are reduced is because at the price offered by M, some who would otherwise have produced the input, decide not to do so. M must therefore obtain its inputs from the remaining suppliers who are willing and able to supply at that low price. If, on the other hand, it was possible for M to offer each producer precisely the price he or she were willing to accept in order to begin to produce, there would be no reduction at all in the level of input from what would obtain in a perfectly competitive market. [33] The process of offering producers the exact price at which they are willing to begin to supply can be carried out, to varying levels of accuracy, by off-market transactions such as direct contracting, where M deals directly with each supplier or with a group of similarly situated suppliers. [34] As such, no diminution in immediate end consumer welfare arises as a result of M's monopsony power in its upstream input market.

Firstly, and most obviously, perfect price discrimination, *i.e.* the perfect congruence of M's offer with the price at which each individual seller is willing to begin to produce, is unlikely to occur in practice. Secondly, nothing comes for free : the avoidance of an immediate reduction in consumer welfare is purchased only at the cost of long-term consumer harms. By setting the prices of input at precisely the level where suppliers are willing to begin to produce, M appropriates all producer welfare. Thus, the producers may have nothing to set aside for such things as research and innovation, or even the replacement of deteriorating capital equipment. As such, over time, the quality of goods enjoyed by end consumers will decline, and suppliers will either exit the market or consolidate, while new entrants are discouraged from replacing them for want of an incentive to do so. If suppliers react to such buyer power by merging and combining among themselves, end consumers can expect their choices to diminish far more rapidly.

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33 Roger D. BLAIR & Jeffery L. HARRISON, *Monopsony in Law and Economics*, 83-85 (2010), citing Milton Friedman, *Price Theory* 16 (1976).

34 CARSTENSEN, *supra* note 30, 283-284. Carstensen observes the use of "all-or-nothing" clauses in various American agricultural markets between buyers and producers, whereby the buyer requires the seller to supply his total production.

Food markets are especially prone to price discrimination due to the perception by producers that they gain security and price stability by dealing contractually rather than on the open market.

2. – *The Commodity Problem*

The tendency of monopsony to reduce the quantities of inputs made available to society can be reversed in instances of the "commodity problem"; *i.e.* by the tendency of the supply of many agricultural commodities to increase in response to a reduction in price. This is especially prevalent in markets where suppliers are numerous and have considerable "sunk" costs making market exit prohibitively expensive, and where the product of each producer cannot easily be differentiated from those of another.

Coffee is perhaps the best example of this phenomenon. The land on which coffee is cultivated is generally very hilly and located at high altitudes, making it difficult for farmers to grow anything else commercially. Thus, should the price of coffee fall for whatever reason, the farmers cannot respond by cultivating other crops. Instead, given that they have to eat every day, pay the rent on the land, etc, they will produce even more coffee in an attempt to maintain their income in the short-term. This winds up causing oversupply and depressing coffee prices further, even below the average cost of production. It will continue until the marginal cost of production exceeds the marginal revenue thereby obtained – *i.e.* when the revenue gained by producing one more sack of beans is not enough to cover the expense of producing that one extra sack. In essence, producer welfare is appropriated again and again in a vicious circle ending only when producers "leave the market", which, in the case of Kenyan coffee farmers, means the uprooting of entire villages and their resettlement in urban slums. [35] A recent study by ActionAid and the South Centre demonstrated a positive correlation between concentration in coffee markets and the ever-decreasing proportion of the value of the finished coffee product that reaches farmers. [36]

Of course, such systematic attrition of farmers' incomes breeds a great many evils for those farmers and their societies, ranging from food manufacturers dispensing with proper environmental precautions in dumping waste materials in order to save costs, or poor farmers making their children work on the farm. [37] But how does the com-

[35] See *e.g.* Catherine GRESSER and Sophia TICKELL, *Mugged : Poverty in Your Coffee Cup*, Oxfam International, (Oxford, 2002), 22-23; Raj PATEL, Stuffed and Starved, 8-11.

[36] Samuel ASFAHA, *Commodities dependence and development : some suggestions on how to tackle the commodities problems* (2008), South Centre & ActionAid.

[37] See Olivier DE SCHUTTER, *Addressing Concentration in Food Supply Chains. The Role of Competition Law in Tackling the Abuse of Buyer Power* (December 1, 2010), available at : http ://www.srfood.org/images/stories/pdf/otherdocuments/20101201_briefing-note-03_en.pdf; New York University

modity problem, tragic as it is for Kenyan farmers, affect consumers in Europe? Again, it is in the long-term reductions in product choice and quality. It has been reported that since the 1990s, the supply of high quality arabica coffee from Kenya has been replaced to a significant extent with cheaper but lower quality robusto beans from Vietnam. Losses in quality were masked by additional processing by firms further up the supply chains, and the addition of cream, artificial flavourings and sugar. [38] Although consumers still get their coffee, their range of choice and quality has been altered. The downward and upward spirals respectively of price and quantity of supply are unsustainable. The uprooting of entire villages and resettlement of Kenyan coffee farmers in urban slums means the loss of a high quality brand or product for European consumers.

An example of long-term, prospective effects being taken seriously by competition authorities and tribunals may be found in the UK Competition Commission's regulation of certain abusive practices by large supermarket retailers in the 2008 Groceries Market Investigation – such practices were held to transfer so much risk and uncertainty to producers that they threatened the abovementioned harms to consumers. [39]

Clearly, monopsony *necessarily* has adverse effects upon consumer welfare – at best, they may be postponed. Nonetheless, the second limb of Advocate General Maduro's argument remains – *i.e.* that M will not squeeze its suppliers too much because it has an interest in maintaining viable sources of supply. It is indeed counter-intuitive that a commercial actor would conduct its business in a way which drives its suppliers to extinction. However, like the notion that monopsonists pass savings on to end consumers, this too may be an illusion.

Firstly, we have reason to think that a firm which gets into particular habits and practices in dealing with its suppliers over a long period of time will likely find it difficult to alter them. In the 2008 Groceries Market Investigation, the UK Competition Commission found that of the 52 practices identified in a similar market investigation carried out in 2000 and accordingly listed in the Supermarkets Code of Practice (SCOP), 20 of them were still being widely practiced eight years later at the time of the 2008 investigation. [40] Second, the very fact that fundamental patterns of supply are changed, especially by off-market pricing, can work to the temporary benefit of dominant buy-

Law Students for Human Rights, *Transnational Corporations and the Right to Food* (2009), 3, available at : www.chrgj.org/publications/docs/TNCsandRTF.pdf. *Op. cit.* Christian Parenti, "Chocolate's bittersweet economy : Seven years after the industry agreed to abolish child labor, little progress has been made", *Fortune* (Feb. 15, 2008) 1. As a result of concentration among buyers in the cocoa market in Cote d'Ivoire, agricultural wages were so severely depressed that that there were reports of smallhold cocoa farmers resorting to child labour.

38 The End of Food, 157-158.

39 UK Competition Commission, Groceries Market Investigation (2008), §9.5, 157.

40 UK Competition Commission, Groceries Market Investigation (2008), §9.63, at 169.

ers. A change in the quantity of inputs made available by suppliers may deny competing buyers access to those critical outputs. [41] Thirdly, as the Commission acknowledged in *Rewe/Meinl*, dominant buyers possess the ability to dictate to consumers the choice of products that come to market, and the success of product innovations may be dependent largely upon their reactions. [42] Instead of conserving sources of supply, dominant actors in the middle of food chains may have the option of tweaking demand patterns for the end product : recall the replacement of *arabica* with lower quality, processed, sugary *robusto*-based coffee drinks. In this regard, monopsonists on agricultural markets arguably fulfill to an extent greater than most other undertakings the classic definition of "dominance" in *Hoffmann-La Roche* : they can prevent effective competition on the markets they act in because they have the power to behave to an appreciable extent independently of their competitors, customers, and ultimately, consumers. [43] Finally, it must be said that the events of the past three years have not exactly inspired confidence in the propensity of profit-making corporations to align the short-term interests of corporate officers with the long-term interests of the firm. Nothing particularly seems to distinguish major agribusinesses in this regard.

III. – Competition responses

While it is one thing to recognize the consumer welfare harms caused by monopsony, it is completely another matter to ask if it is possible to remedy them through competition law. A cardinal principle of economic regulation is that the solution must not cost more than the problem. The standard response of competition and world antitrust regimes to dominant market power is that although mergers and combinations resulting in the formation of anti-competitive dominant market power should be prohibited, where it is already in existence, the mere fact of dominance should not give rise to antitrust liability – only the "abuse" of such dominance should.

In the following paragraphs, we shall consider those forms of market conduct by dominant buyers which can represent, more or less arguably, abuses of dominant positions.

Abuse 1 : *Retrospective adjustments to terms of supply*

In retail markets, suppliers make investment decisions based on variable market conditions. All decisions are made by estimating the likely returns and balancing them

41 Blair & Harrison, *Monopsony in Law and Economics*, *supra* note 33, 85.
42 Case No. IV/M.1221, *Rewe/Meinl*, (1999) Commission Decision, §74.
43 Case 85/76 *Hoffmann-La Roche*, ECR 461, §§ 34-5.

against the risks involved by that particular course of conduct. Retail buyers on the other hand, have strong incentives, given the stressful nature of the sales market, to pass risks and unexpected costs onto their suppliers. Such conduct will have the effect of capturing excessive supplier welfare, thereby removing seller's incentive to invest in capital equipment and innovation. [44]

According to the UK Competition Commission, retrospective adjustments to the terms of supply were the primary means by which excessive appropriation of producer welfare is facilitated. [45] The retrospective amendment of previously agreed upon supply terms in favour of retailers invariably shifts risk and adds costs to suppliers. [46] The Competition Commission was particularly concerned by the tendency of such practices (including the explicit imposition by contract of excessive risk and costs upon suppliers) to cultivate moral hazard on the part of the retailer, because the retailer has the ability to affect the amount of risk, but no incentive to minimize it because it has been transferred to the seller. [47] Moreover, these costs lie much more heavily upon suppliers than on retailers.

Examples of risks passed to sellers by retailers include losses due to theft or accounting error of stock already delivered to the retailer; [48] the imposition of charges and penalties by retailers upon suppliers for customer complaints, without giving those suppliers an opportunity to verify whether they were indeed responsible for the fault giving rise to the complaint, [49] and compensation obligations upon the seller when product sales or profits fall below that anticipated by retailers.

Abuse 2 : *Stocking/slotting fees and "Category captainship" agreements*

Retailers may increase the price of access to their shelves and thereby transfer wealth from sellers to retailers by charging sellers a fee for stocking their products. Moreover, in retail markets, the practice of appointing "category captains" goes one step further by making such captains in charge of managing their particular category. Managerial costs are effectively transferred from retailers to sellers.

More pointedly, this relationship highlights the dynamics of dominance for both retailer and seller. The buyer will be interested in appointing a certain seller as a cate-

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44 UK Competition Commission, Groceries Market Investigation (2008), §§ 9.41 and 9.46 at 164.

45 Of the 52 practices investigated by the Commission, 26 were concerned with "practices that have the potential to create uncertainty for suppliers regarding their revenues or costs as a result of the transfer of excessive risks or unexpected costs to suppliers". See UK Competition Commission, Groceries Market Investigation (2008), §9.52, at 166-67.

46 *Id*. §9.45 at 165.

47 *Id*. §9.47.

48 *Id*. §9.48.

49 *Id*. §9.49.

gory captain only if it is capable of generating maximal revenue for it from that category, and the category captain must ensure that it makes money for the retailer. On the other hand, the seller is interested in being the category captain only if that particular retailer has substantial sales. [50] This means that exclusionary incentives exist on both sides. The retailer would appreciate any action by the seller that raises prices for its competitors, and the seller will appreciate if the retailer reduces its purchases from competing sellers. Such a "symbiotic relationship" [51] means that excluded sellers are separated from their established customer base and must expend resources in establishing new ones, perhaps in new regions, given that retailers often control particular geographical regions.

Abuse 3 : *Predatory buying*

Predatory buying is best understood as the mirror-image of predatory selling by a powerful seller. The predatory seller, to summarise, temporarily sells at a sub-optimal price or even a loss, undercutting its competitors long enough that they go out of business. At this point, it charges a monopoly price, which may more than cover the losses sustained during the period of predation. The predatory buyer on the other hand, temporarily raises the price it offers for inputs, thereby choking off access to its competitors in that market. Once those competitors have been killed off, it may be left as the only player on both the upstream and the downstream market.

The most well-known consideration of this problem comes from over the Atlantic. The U.S. Supreme Court examined such an allegation in *Weyerhaeuser Co.* v. *Ross-Simmons Hardwood Lumber Co*, [52] holding eventually, that in order to win on a claim of predatory bidding, a "plaintiff must prove that the alleged predatory bidding led to below-cost pricing of the predator's outputs. That is, the predator's bidding on the buying side must have caused the cost of the relevant output to rise above the revenues generated in the sale of those outputs." [53] As Blair and Harrison note, this ignores the possibility that the buyer might be able to generate super-normal profit due to a dominant position on the downstream market, as well as the possibility that the buyer may be able to offset the high cost of bidding on that input by obtaining competitive prices on other inputs. [54]

50 Carstensen, *supra* note 30, 292.
51 *Id.*, 293.
52 127, S. Ct. 1069, 549 U.S. 312, 166 L. Ed. 2d 911 (2007).
53 127 S. Ct., at 1078.
54 Blair & Harrison, *supra* note 33, 77.

In any case, predatory bidding does not appear to be a significant problem on European food markets, and the discussion of it here was meant simply to draw a contrast between it, and the next type buyer power abuse market : "waterbedding".

Abuse 4 : *Waterbed effects*

The "waterbed" theory imagines a dominant buyer demanding from sellers a discount from the market price that reflects the entire savings made by the seller due to economies of scale resulting from the larger order. [55] This effectively means that the dominant buyer alone captures the savings or an inequitably large proportion thereof, meaning further that the seller cannot share these savings with other buyers. This then puts non-dominant buyers at a competitive disadvantage in the downstream market, leading to the acquisition by the firm of dominance on both the buying and selling markets. Waterbedding differs from predatory buying, in that the dominant buyer, instead of temporarily offering a high price for its inputs, demands an extremely low price.

It should be noted that the disadvantage borne by smaller buyers need not necessarily manifest itself in price increases; they may come in the form of shortages in supply to smaller buyers because of volume purchases by large, dominant ones, or in poorer service by sellers to smaller buyers.

According to the Working Paper on the Waterbed Effect (henceforth Working Paper) the intuitive explanation for the waterbed effect is as the result of a "virtuous circle" [56] caused by some buyers being larger than others. A refusal by a seller to supply would affect a large buyer less than it would affect a small buyer. As such, small buyers are in a worse bargaining position than large ones, and are not able to demand the same low prices extracted by large buyers. These lower input costs will be passed on to the buyer's own customers in the form of lower prices, thus reinforcing the large buyer's competitive edge. As large buyers become even larger (*i.e.* by retailers opening more outlets), their bargaining power increases, as does their competitive advantage over small buyers. [57] Accordingly, evidence of a waterbed effect would not be simply a difference in selling prices between dominant and non-dominant buyers, but a tendency by sellers to increase selling prices to non-dominant buyers in response to a discount given to a dominant buyer. No competition concern is raised if the seller simply refrains from extending the discount to the non-dominant buyers. This pricing strategy would pro-

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[55] Such a "discount" may be an explicit reduction in price, or it may come in the form of passing on to the seller certain costs associated with functions normally carried out by the buyer, *i.e.* grading of the livestock, stocking of shelves, etc.

[56] Paul DOBSON, "Exploiting Buyer Power : Lessons from the British Grocery Trade" (2005) 72 *Antitrust L. J.* 532, 554. The circle would presumably be vicious from the perspective of small sellers.

[57] UK Competition Commission, Working Paper on Waterbed Effect (2008), 3-4. Note that the Working Paper was dealing with such effects in the context of retail markets.

duce exclusionary effects at no short-term cost to the dominant buyer, because that firm will actually be able to acquire its inputs or goods for retail at a cheaper rate thereby. Thus there is no concern raised over the likelihood of recoupment of the costs of pursuing the exclusionary strategy, because there are no such incurred costs.

However, the Working Paper of the UK Competition Commission criticised a number of assumptions underlying the model. The first was that it presumed that buyers were buying directly from a monopolistic seller without considering the differences in competition in the upstream market or conducting a formal analysis of the wholesale sector. [58] Also criticised was the assumption that supply contracts take the form of linear prices rather than more complex arrangements such as lump-sum discount payments by sellers to buyers. According to the Competition Commission, where discounts take the form of lump sum payments, savings cannot be passed on to end consumers. Instead, the Commission considered that the waterbed effect is likely to occur only where the large buyers *"extract discounts that affect the unit price paid to suppliers"*. [59]

The Commission appears to assume that consumer welfare is adversely affected only if smaller buyers end up having to charge higher prices to the end consumer. Smaller buyers may very well react by lowering prices to end consumers in an attempt to undermine the large buyer's dominant position, thus setting off a price war. Consumer welfare may nevertheless be diminished in a number of other ways : [60] for instance, if the downstream market is sufficiently concentrated, dominant buyers will face less pressure from their competitors, meaning that there will be little incentive for them to pass on cost savings to the end consumer. Alternatively, consumer welfare may be diminished if such "waterbedding" results in sellers leaving the market or foregoing investment in capital replacement and innovation. Consumers may thus be left with less choice in products, retail outlets, or lower quality products. [61]

The main criticism the Commission had to offer was that the above model failed to consider the presence of a large wholesale sector, which could potentially use their market power to offset that enjoyed by large retailers. [62] Another serious objection highlighted by the Commission was the assumption of fixed switching costs for buyers; it held that this assumption does not appear to obtain in practice. [63] However, Dobson notes that the Competition Commission lent credence to the waterbed theory in its

[58] *Id.* 5.
[59] *Id.* 6.
[60] *Id.* 6-7.
[61] DOBSON, *Exploiting Buyer Power*, *supra* note 56, 556.
[62] UK Competition Commission, Working Paper on Waterbed Effect (2008), 11.
[63] *Id.*

2003 Safeways inquiry, where it found that Tesco's price advantage over its smaller rivals had "widened somewhat" as its market share increased. [64]

As a matter of theory, it may be argued that the "waterbedding" theory does not hold water; the only reason why a seller can be forced into increasing prices for its smaller buyers in order to fund a discount to its larger buyer is, if the seller is selling to that largest buyer at a price below its cost of production. Thus, the waterbed theory invites us to believe that food sellers will readily sell the largest portion of their output at a loss, to which one must observe that this is hardly rational behaviour, and allegations thereof should therefore be viewed sceptically. Rather, it may be said that instances of sellers increasing prices to smaller buyers in response to discounts to larger buyers occur purely because it is within the power of the seller to do so, rather than because the seller is forced to do so.

However, the foregoing argument becomes shaky if one contemplates the existence of production traps similar to the commodity problem for food processors and other sellers servicing retailers. In the very short term, falling prices may encourage such sellers to produce more, in order to maintain a level of income, if there are no alternative uses for the seller's machinery and equipment. A cotton gin cannot be turned into an oil-press overnight. Given the reality of sunk costs, they will continue to produce, at least until the price they obtain falls below the marginal cost of production.

With regard to enforcement, competition law faces a big problem in fashioning effective remedies for such abusive pricing practices of individual firms. Firstly, as may be gleaned from the above discussion, it may be difficult to distinguish an abusive price from a legitimate price extracted by a large buyer on account of its purchasing economies of scale. One crucial factor should be whether the seller increases costs to small buyers in response to discounts given to large buyers. The Working Paper also observes that "buyer size reflects buyer power" [65] meaning that measures of market size can be an additional guide as to whether or not a measure has the potential to be an abusive practice. [66] However, structure measurements like buyer size (market shares) alone cannot constitute definitive proof of buyer power. Market delineation by the SSNIP-Test infers the relevant market from market conduct, and not *vice versa*. This means that really the only thing one can prove is how big a buyer happens to be. Thus,

[64] UK Competition Commission, Safeways inquiry, at §6.65. *Op. cit.* DOBSON, *Exploiting Buyer Power*, *supra* note 56, 555.

[65] UK Competition Commission, Working Paper on Waterbed Effect (2008), 19.

[66] *Id.* The Working Paper concluded that the "material detriment to UK consumers of groceries" was, "at this stage", likely to be very small, in light of the objections to a number of the assumptions underlying the waterbed argument. It is to be noted that the Commission did not dismiss the argument out of hand, but maintained that it was dependent upon further empirical research, such that it would "continue to analyse suppliers' price data". At 20.

more is needed before one can prove whether a seller increased costs to small buyers in response to discounts given to large buyers.

Lastly there is the matter of fashioning a remedy. Competition authorities around the world are rightfully wary of directly setting sale prices. One possibility would be to ensure that there is only one sale price offered by the seller. This is the approach favoured by the U.S. Robinson-Patman Act. [67] However, in requiring that sellers do not offer different prices for identical goods to different buyers, the Act places the burden of compliance upon victims of buyer power abuse. On the other hand, the Act does prohibit inducements to seller discrimination, and it is argued that it may be used to control buyer power accordingly. [68] But more importantly, the problem with such a solution is that it runs the risk of over-regulation – it prohibits legitimate uses of purchasing economies of scale that may benefit both sellers and end consumers.

Off-market contracts reducing market transparency

Off-market contracts are the primary means by which buyers can force their suppliers onto their all-or-nothing curves. Such contracts involve the buyer requiring of the seller a minimum total level of output before it will buy anything at all. Whereas the increased production levels demanded of the seller means that economies of scale are exploited, the benefits derived from it are entirely captured by the buyer. Effectively, the buyer obtains a level of supply that would be available only in a competitive market, except without paying a competitive price for it. [69]

Such arrangements are common in U.S. poultry markets where contracts for poultry-raising involve an exclusive buyer determining the number of chickens to place with each individual farmer. [70] In the context of retail markets, such contracts tend to result in the producer/seller transferring the higher marginal costs of its increased production to other retailers who do not have buyer power, causing a retail "waterbed" effect. [71]

Also important in this regard are confidentiality clauses, which increase the "switching costs" borne by producers by reducing the amount of transparency in the market. They work particularly to the disadvantage of sellers, by leaving them unable to com-

67 Robinson-Patman Act of 1936 (or Anti-Price Discrimination Act, Pub. L. No. 74-692, 49 Stat. 1526) (codified at 15 U.S.C. §13).

68 Carstensen, *supra* note 30, 329-330.

69 *Id.*, 283-284.

70 R. I. Roth, "Redressing Unfairness in the New Agricultural Labor Arrangements : An Overview of Litigation Seeking Remedies for Contract Poultry Growers", 25 *U. Mem. L. Rev.* 1207 (1995).

71 See generally Paul Dobson & Roman Inderst, "Differential Buyer Power and the Waterbed Effect : Do Strong Buyers Benefit or Harm Consumers?", 28 *Eur. Competition L. Rev.* 393 (2007); and Paul Dobson & Roman Inderst, "The Waterbed Effect : Where Buying and Selling Power Come Together", *Wisconsin L. Rev.* 331 (2008).

pare the various options available to them. [72] The secrecy also allows buyers to set prices differently for different producers. Increasing transparency in food markets will allow sellers to be able to bargain for more value should they come to find out that other sellers are obtaining more favourable terms. Moreover, increasing transparency in markets allows disfavoured sellers to realise that they are being disfavoured, and either adapt so as to remove the feature that leads to the differential treatment, or exit the market. Moreover, the proliferation of confidentiality clauses in individual contracts may lead to prices on public markets and commodity exchanges becoming unreflective of the actual demand for the particular input.

One argument that may be offered in support of off-market contracting is that such clauses are necessary in order to ensure stability of supply. Of course, the facts of specific cases may differ, but on the whole, one finds this argument quite unconvincing, because under closer examination, it is actually an acknowledgement of the abusive nature of the conduct. It is essentially an admission that the buyer is shifting the entire burden of the risk of *e.g.* a poor harvest or crop onto the seller. If the buyer wishes to ensure the stability of the source of supply, the efficient course of action would be to pay a premium to the seller. In this regard, some distinction should be made between such contracts, and those that include some level of consideration paid to producers, such as cheap credit facilities for purchasing agricultural inputs, in exchange for security of supply.

According to Carstensen, such contract clauses do not present much of an enforcement problem for competition law. The remedy may come in the form of a simple injunction or a regulation prohibiting buyers from buying other than in set quantities, and requiring them to accept tenders from all potential sellers. [73] A *caveat* must be made to this general rule for "contract farming", where buyers provide other valuable consideration to farmers such as access to cheap credit and other inputs. [74] In these cases, there is more scope to say that buyers are properly compensating producers.

A. — THE DIFFICULTY IN ESTABLISHING CONSUMER HARMS ARISING FROM DOMINANT BUYER CONDUCT

One argument against the use of competition law to address consumer harms arising from abuses of monopsony power relies upon the fact that most of the consumer harms arising from dominant buyer conduct are uncertain, and manifest only in the long-run. This poses the question of how to calibrate competition control in the present, given

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72 CARSTENSEN, *supra* note 30, at 281.

73 CARSTENSEN, *supra* note 30, 318.

74 Olivier DE SCHUTTER, *"Agribusiness and the Right to Food" Report of the Special Rapporteur on the Right to Food to the Human Rights Council*, A/13/33, 17, §§ 43-45 (22 December 2009).

that the goal of attaining efficient and competitive markets is undermined by excessive regulation, just as much as it is by under-regulation. Consider again the example of the Kenyan coffee producers. Suppose a new source of *arabica* had been developed somewhere else in the interim. If so, consumer welfare would not have been affected in the end, meaning that competition control, if imposed, would have been excessive and destructive of welfare. Given the profoundly speculative *pro futuro* nature of the competition harms, one might argue that it is only right for EU and most national competition laws to require a showing of identifiable and likely harms to consumer welfare, *i.e. de minimis* and appreciability thresholds, before they control conduct complained of as an abuse of a dominant position. [75]

However, the use of competition controls to prevent the occurrence of presently unquantifiable future harms is the very basis of merger regulation.

It may be argued, assuming the existence of credible merger regulation, that it should suffice for competition control of abuses of dominance to apply when consumer harms arising from buyer power reach some adequate level of "ripeness". This poses the risk that by the time the consumer harms manifest themselves in higher prices and reduced choice and/or quality, too many producers may have left the market or consolidated in order for remedies to have any corrective effect. It may be far too late to do anything. To take the example of the Kenyan coffee farmers, it is reasonably clear that the consumer harms of higher prices and reduced availability of high quality arabica coffee will kick in only after significant numbers of producers have consolidated, or left the market altogether (*i.e.*, left their mountain villages and settled in towns). It is, at the best of times, difficult in the extreme to undo mergers and would often severely harm the businesses involved. Moreover it would be almost impossible to undo the impact on the market. For instance, it would be very hard to entice former farmers to return to their villages.

A consumer welfare-oriented competition regime should, in light of the above considerations, adopt a preventative approach to abuses of buyer power, and the remedies proposed would be prophylactic in nature. An important example of this more enriched conception of consumer harm in application may be found in the UK Groceries Market Investigation (2008), where the UK Competition Commission held that it was authorized to find an "Adverse Effect on Competition" (AEC) without having to "identify specific harm to the interests of" consumers. [76]

75 Philip MARSDEN, "*Microsoft* v. *Commission* – With Great Power Comes Great Responsibility" (Oct. 2007), *Competition Law Insight* 3, 4.

76 UK Competition Commission, Groceries Market Investigation (2008) §7, Appendix 2.2, 2.

Indeed, there have even been certain rumblings in this direction by the ECJ with regard to Article 101 TFEU (ex Article 81 EC) : in the 2009 *GlaxoSmithKline* case, [77] the Court held that *"there is nothing in that provision* [Article 101 TFEU] *to indicate that only those agreements which deprive consumers of certain advantages may have an anti-competitive object."* [78] It added also that *"it must be borne in mind that the Court has held that, like other competition rules laid down in the Treaty,* [Article 101 TFEU] *aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such. Consequently, for finding that an agreement has an anti-competitive object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price."* [79]

However, such developments have yet to properly filter into Article 102 TFEU (ex Article 82 EC) jurisprudence. Under an abuse of dominant position analysis via Article 102 TFEU, the difficulty lies in showing a *"detrimental effect upon trade"* within the EU, understood as an adverse effect upon consumers. This difficulty could be avoided by bringing the analysis under Article 101 TFEU (ex Article 81 EC). This may be demonstrated by drawing a parallel with the Sherman Act. Carstensen notes that the advantage of using § 1 of the Sherman Act (prohibiting anticompetitive agreements) is that it requires far less of a showing of market power than would be required under § 2 (establishing the monopolization offence). Moreover, it would allow courts to be able to use a Microsoft [80] analytical framework while relying on the smaller threshold of market power allowed under § 1 [81] (prohibiting combinations). As per the analysis in Microsoft, the question of whether such an agreement is anti-competitive or abusive may be answered in the affirmative if (1) the plaintiff or competition authority is able to show harm to competition (not just competitors) in both theory and fact; (2) the defendant firm is either unable to show that there is a legitimate business justification for its conduct; or (3) the plaintiff is able to show that the reasons put forward by the defendant are mere pretexts, or that the same pro-competitive business reasons could have been accomplished by less anti-competitive means. [82]

77 Joined Cases C-501/06 P, C-513/06 P, C-515/06 P, and C-519/06 P (6 October 2009). See also Case C-8/08, *T-Mobile Netherlands and others* (4 June 2009) §§ 38-39; and Case C-95/04, *British Airways* v. *Commission* (15 March 2007).

78 Joined Cases C-501/06 P, C-513/06 P, C-515/06 P, and C-519/06 P, §63.

79 *Id*.

80 *Microsoft* v. *U.S.*, 253 F.3d 34, 58-59 (D.C. Cir. 1999).

81 CARSTENSEN, *supra* note 30, 322-23. See *U.S.* v. *Visa U.S.A.*, Inc., 344 F.3d 229 (2nd Cir. 2003), where the court held that dominant credit card issuers had unreasonably refused to allow participating banks to join other credit card networks).

82 Such an "economic approach" to the determination of abuses of dominant positions under Art. 102 TFEU (ex Art. 82 EC) has not filtered through to all EU institutions. The EAGCP Consultation Paper "An Economic Approach to Article 82" (July 2005), questioning the prior practice of holding certain activities as *per se* abusive and disregarding possible pro-competitive effects, is not a binding legal

Given that most of the kinds of conduct identified as abusive, such as all-or-nothing contracts and waterbedding schemes, are generally concluded between buyers and their upstream suppliers, the obvious Article 101 TFEU category under which they may be addressed is that of vertical agreements. At present, courts are generally reluctant to scrutinise such agreements, because it is breezily assumed that such practices are generally welfare-improving. [83] Indeed, many vertical combinations do provide pro-competitive benefits such as the avoidance of duplication, the eradication of double profit margins and many others. For this reason, EU competition regulators will in principle not control such vertical agreements absent a showing that the party benefiting from the restraint possesses market power.

The current Regulation 330/2010 on Vertical Restraints distinguishes itself from the now-expired Regulation 2790/99. [84] The expired Regulation established a "safe harbour", or presumption of legality for certain vertical agreements depending on the market share of the supplier or buyer and the nature of the vertical restriction, which, when interpreted according to the European Commission's Vertical Restraints Guidelines [85] stipulated that the market share of the buyer is considered only if the vertical restraint concerned contained an exclusive supply obligation. Moreover, a safe harbour was available for buyers with a market share of up to 30%. The new regulation, which came into effect in May 2010, as interpreted by the new Commission Guidelines, [86] provides for the buyer's market share to be relevant where it *"purchases the contract goods or services which determine the applicability of the block exemption*." [87] This is a marked change even upon draft versions of the new guidelines, which considered the buyer's market share only where it resells the goods or services, or if those goods are inputs

authority, as is the Commission's discussion paper on the application of Art. 102 TFEU (December 2005). At present, only the Commission adheres to an economic approach to Art. 102 TFEU; the General Court and the ECJ appear to remain wedded to the legalistic approach. See Case T-340/03 *France Télécom s.a.* v. *Commission* and Case T-201/04 *Microsoft Corp* v. *Commission* (General Court), as well as Case C-95/04 *British Airways* v. *Commission* (ECJ). It is submitted that the economic approach is preferable from a purely theoretical point of view. However, proving harm to competition may be very difficult, especially if it is as remote and indirect (as may be the case in all-or nothing contracts), meaning that in practice, there is the danger of under-regulation if one takes the economic approach.

83 There is an important, if dated, school of thought that argues that vertical restraints should be investigated only where the producer wields market power : see *e.g.* White, "Vertical Restraints in Antitrust Law – a Coherent Model", (1981) 26 *Antitrust Bull.* 327; Easterbrook, "Vertical Agreements and the Rule of Reason", (1984) 53 *Antitrust L. J.* 135.

84 Commission Regulation 2790/99, *OJ* [1999] L 336/21, [2000] 4 *CMLR* 398. Expired 31st May 2010.

85 Commission Notice, Guidelines on Vertical Restraints, *OJ* [2000] C 291/1, [2000] 5 *CMLR* 1074, §21.

86 Commission Notice, Guidelines on Vertical Restraints, Brussels, SEC (2010) 411. Available at http :/ /ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf.

87 *Id.* §23.

into the buyer's own product. [88] However, the buyer market share threshold for the "safe harbour" remains the same at 30%. Moreover, the draft guidelines set out a *de minimis* market share threshold of 15% [89], under which the transaction is presumed to have no effect on trade within the common market. The adequacy of this becomes questionable when one observes that the UK Groceries Market Investigation of 2000 found that retail grocers with as little as 8% of the total retail market had substantial buyer power over sellers. [90]

IV. – Revisiting consumer welfare

This paper broadly suggests that more often than not, monopsony in food markets tends to reduce consumer welfare. However, under certain circumstances, abusive practices by monopsony buyers in food markets might be severely detrimental to the interests of producers, but have no effect or only a vague and uncertain effect on the welfare of consumers. Would competition regulation on the basis of consumer welfare protection really be warranted in these outlying instances?

Lest we forget, the people who produce our food are also food consumers. A survey done by the UN Millennium Project in 2005 found that farmers cultivating small patches of land ("smallholders") and landless agricultural workers together made up around 70% of the people suffering from hunger in that year, [91] and there is every indication that such widespread hunger and famine is not due to food production being unable to catch up with population growth. Rather, this paper believes that the starvation of millions despite there being more than enough food to go around for everyone is besides many other factors partly due to dreadful misallocation via unjust and dysfunctional markets. [92]

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88 Draft Commission Notice, Guidelines on Vertical Restraints, §23.

89 *Id.* §§ 8-11.

90 UK Competition Commission, Groceries Market Investigation (2000), §2.458. Market definition plays an important role in deciding whether the safe harbor applies. Much depends on whether one defines the market between producers and retailers or between producers and end consumers. Moreover, it is interesting to note that the block exemption requires competition authorities to define the relevant market in Article 101 TFEU cases, even though that article does not clearly impose such a requirement.

91 See UN Millennium Project, *Halving Hunger : It Can be Done*, Summary Version of the Report of the Task Force on Hunger, (2005) The Earth Institute, Columbia University, 6.

92 Amartya Sen, *Development as Freedom* (1999), 160-188. See also Susan George, *How the Other Half Dies*, London : Penguin (1991), 23; Susan Marks & Andrew Clapham, *International Human Rights Lexicon* (2005), 167. Sen observes that colonial administrators in Bengal during the 1943 famine *"were so impressed by the fact that there was no significant food output decline… that they failed to anticipate – and for some months even refused to recognize – the famine as it hit Bengal with stormy severity." Development as Freedom*, 209. Moreover, he notes that that the Bangladesh famine of 1974 occurred at a time period

Some of the arguments made in the paper certainly have a strained, procrustean feel to them. For instance, consider the section of this paper that considers business practices exploiting the "commodity problem" in coffee-producing regions, potentially resulting in widespread poverty, deprivation and misery. The consumer welfare-based objection to them was that they inexorably lead to the loss of certain brands and goods to European consumers. While this perhaps does not capture the full extent of the objection to such conduct, under the consumer welfare-oriented conception, competition law has a restricted scope of application and addresses only a limited range of issues. For instance, Scheelings and Wright argue, admittedly in the context of vertical restraints conceived as forms of exclusionary (rather than exploitative) conduct, that "antitrust analysis need only be concerned with the welfare of the final consumer. The end consumer only cares about the quality, quantity, and price of the final product. What transpires upstream in the process of producing the final product is irrelevant to the consumer of the final good." [93]

Nonetheless, despite the financial collapses of 2008 and 2011, [94] it appears that a significant number of consumers do take into account the circumstances under which their food was produced. Fairtrade and other labels for ethical food production have proliferated in recent years. It accounted for approximately 1.5 billion USD in 2007, and covered an increasingly large number of commodities and mechanisms. [95] Moreover, between 2006 and 2007, fair trade sales increased by 127%, and retail volume jumped by 72%. [96] In Europe alone, growth averaged 50% over the past 6 years prior to 2009. [97] Of course, it would be unrealistic and unreasonable to expect such altruistic behaviour from all consumers. This paper does not advocate the establishment of a republic of virtue.

What it does suggest, however, is a closer look at consumer entitlements. One might consider the obligations arising under the international human right to food when discussing consumer welfare, set out in Article 25(1) of the Universal Declaration of

of "peak food availability", food having been available in greater quantities than at any other time between the years 1971 and 1976 : *id.* 165.

93 Richard SCHEELINGS & Joshua D. WRIGHT, "*Sui Generis*? : An Antitrust Analysis of Buyer Power in the United States and European Union", (2006) 39 *Akron L. Rev.* 207, 212.

94 See *e.g.* Guardian, Fairtrade's annual sales defy recession to pass £1bn, (February 27, 2011), available at : http ://www.guardian.co.uk/business/2011/feb/28/fairtrade-sales-rise-despite-recession.

95 See, for useful studies, Laura T. RAYNOLDS, Douglas MURRAY, and John WILKINSON (eds), *Fair Trade. The challenges of transforming globalization*, (2007) Routledge, London and New York.

96 Lorenzo BECCHETTI & Pierluigi CONZO, "Market Access, Organic Farming and Productivity : The Determinants of Creation of Economic Value on a Sample of Fair Trade Affiliated Thai Farmers", (2009) *CREI Working Paper* No. 3/2009, 2.

97 *Id*.

Human Rights (UDHR), [98] and Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). [99] The right to food has been interpreted by the U.N. Committee on Economic, Social, and Cultural Rights (the institution charged with providing official interpretations of the ICESCR) as obliging states to ensure the "physical and economic access at all times to adequate food or means for its procurement", [100] such obligation being "inseparable from social justice, requiring the adoption of appropriate economic, environmental and social policies, at *both the national and international levels*, oriented to the eradication of poverty and the fulfilment of all human rights for all". [101] The duty is required to be fulfilled "individually and *through international assistance and cooperation*." [102] Therefore, although this obligation primarily addresses each individual state to take the necessary measures to ensure access to food for its citizens, there is also an international component.

In their recent book on monopsony, Blair and Harrison struggle with the question of when antitrust intervention is warranted. As they note, the "fact that switching costs are a source of monopsony power does not resolve the issue of whether an antitrust response is warranted. Instead, it raises one of the more perplexing problems in antitrust. Simply put, the question is : When is the perceived market power the type to which antitrust laws should respond?" [103] The duty to protect the international human rights of persons affected by the conduct of corporations domiciled in their territory can provide an answer, and should be taken into account in this discussion. This is perhaps especially most true of the EU legal order, which enshrines respect for fundamental rights as a *general principle* of EU law.

Certainly, it may be said that Article 6(3) TEU, which is the textual basis for the recognition of fundamental rights as a general principle of EU law, mentions only the rights in the European Convention on Human Rights (ECHR), and the common constitutional traditions of the Member States. But the ECJ has long since interpreted this provision to mean that in the application of the general principles of EU law, it "takes account" those international instruments concerning the protection of human rights

[98] G.A. Res. 217A (III), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

[99] Dec. 16, 1966, 993 U.N.T.S. 3.

[100] U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ. Soc. and Cultural Rights, *General Comment No. 12 : The Right to Adequate Food*, §10, U.N. Doc. E/C.12.1999/5 (May. 12, 1999), §6. General comments of the Committee on Economic, Social and Cultural Rights are non-binding, and therefore constitute only "soft" law.

[101] *Id.* §4.

[102] Art. 2(1), ICESCR. The "fundamental" right to be free from hunger, in contrast, must be vindicated immediately : *General Comment No. 12*, §6.

[103] BLAIR & HARRISON, *supra* note 33, 175.

which bind all the Member States. [104] In particular, the ICCPR has been taken into account in this way on numerous occasions. [105] Every single Member State of the European Union is a party to the ICESCR. As Advocate-General Sharpston has observed :

"The Court has held that the International Covenant on Civil and Political Rights (ICCPR) is one of the international instruments for the protection of human rights of which it takes account in applying the general principles of Community law. It seems to me that the same should hold good for the ICESCR which, like the ICCPR, binds each individual Member State." [106]

As a matter of principle, A-G Sharpston's argument is extremely compelling. Even better, it may be useful.

V. – Conclusion

Food markets fulfill particularly important needs for consumers all over the world. Competition authorities therefore need to be especially vigilant in their merger control to grasp possible negative future developments in their assessment. Long term effects need to be taken into account, as short-sighted decisions may have highly negative consequences. Such *ex ante* control may be extremely difficult to conduct, but is nevertheless necessary in order to ensure that competition remains on markets like retail, where a trend towards concentration has become visible. However, even *ex post* control under 102 TFEU raises many questions, as not all conduct can easily be placed into abuse or non-abuse categories. Nevertheless, it is hoped that this paper will have highlighted some burning issues at the centre of food security, but which are also relevant to the daily work of competition authorities and businesses concerned.

104 Case C-540/03 *Parliament* v. *Council* [2006] ECR I-5769, §37 (finding the Convention on the Rights of the Child to be taken into account in application of general principles of Community law).

105 See *e.g.* Case C-297/88 *Orkem* v. *Commission* [1989] ECR 3283 §31; Joined Cases C-297/88 *Dzodzi* [1990] ECR I-3763, §68; Case C-249/96 *Grant* [1998] ECR I-621, §44.

106 Case C-72/08, *Nicolas Bressol and Others and Céline Chaverot and Others* v. *Gouvernement de la Communauté française*, Opinion of Advocate General Eleanor Sharpston, §136.