



Addressing Concentration in Food Supply Chains

The Role of Competition Law in Tackling the Abuse of Buyer Power

SUMMARY

This note examines the subject of bargaining power in global food supply chains. It explores how the creation and abuse of dominant buyer power by global agribusiness firms can be addressed in competition law. Disproportionate buyer power, which arises from excessive buyer concentration in food supply chains (among commodity buyers, food processors and retailers), tends to depress prices that food producers at the bottom of those chains receive for their produce. This in turn means lower incomes for these producers, which may have an impact on their ability to invest for the future and climb up the value chain, and it may lead them to lower wages that they pay the workers that they employ. There is thus a direct link between the ability of competition regimes to address abuses of buyer power in supply chains, and the enjoyment of the right to adequate food. Such competition control should also be capable of being enforced even over conduct occurring outside the State, given that the effects of concentrated agribusiness buyer power are global. Finally, it is necessary for developing countries to put in place human rights-sensitive competition regimes, and they should be assisted to this end.

Some salient facts about agribusiness concentration

The merger at the beginning of 2010 between Cadbury and Kraft recalls a curious fact about global food supply chains: while there are very many farmers and consumers at either ends of the chains, the agribusiness corporations occupying strategic positions in the middle are exceedingly few. Governments across the world have slowly come to appreciate this fact and to explore its implications. As this note is being finalized, the U.S. Department of Justice and the U.S. Department of Agriculture are examining buyer power, concentration and vertical integration through a series of public workshops, the last of which will take place in December 2010¹. As U.S. Attorney General Eric Holder noted², this marks the first time in American history that both the Departments of Justice and Agriculture have dealt with the issue in a public setting³. Other executive and legislative bodies around the world also have expressed concern over agribusiness concentration: the European Parliament recently adopted a declaration requesting the European Commission to address “the abuse of power by large supermarkets operating in the European Union.”⁴

Concentration at certain segments is particularly striking in globalized food chains, as illustrated by the example of coffee. Coffee is grown by about 25 million producers. At the other end of the chain, there are around 500 million consumers of coffee. Yet, just four firms carry out 45% of all coffee roasting, and only four firms carry out 40% of all international coffee trading⁵. Similarly, just three companies control over 80% of the world's tea markets, and four companies control 40% of international trading in cocoa, 51% of cocoa grinding and 50% in confectionary manufacturing⁶. There are additional examples: in the Brazilian soybean market, roughly 200,000 farmers attempt to sell to five main commodity traders; in the Ivorian cocoa industry, three large transnational commodity buyers (ADM, Cargill and Barry Callebaut) dominate; and in 1996, two transnational food and beverage companies (Nestlé and Parmalat) controlled 53% of the Brazilian dairy processing market, driving off a large number of cooperatives, which had to sell their facilities to these companies⁷.

With regard to retailers, the top four retailers in the UK comprise 75% of the grocery market, while Walmart (a U.S.-based company) alone accounts for 6.1% of global retail sales⁸. Domination of food retailing by supermarkets is not unique to the developed world: 60% to 70% of food sales in Argentina and Brazil now pass through supermarkets, with many other developing countries following suit⁹. Such heavy concentration of commodity buyers, food processors and retailers turns them into “the narrow conduits through which goods must pass in order to reach the final consumer”¹⁰. It gives them tremendous power to set prices for the agricultural products they buy and process. Although concentrated agribusinesses such as seed manufacturers can, as monopoly sellers, also cause great distortions in global food markets¹¹, this briefing note will focus on the issue of buyer power.

The problems raised by buyer power

In general¹², dominant buyer power reduces producers' incomes. The downward pressure forces less efficient producers to merge, to cut costs or to exit the market, leaving the field open for more efficient ones. This process is sometimes considered beneficial insofar as the cost savings are then passed on to consumers. It must be noted however that this is not always the case in global agribusiness. For instance, between 1997 and 2002 farm prices for coffee beans fell by 80%, while retail prices for coffee dropped by 27%. At the same time in 2001, profits for Starbucks and

Nestlé rose by 41% and 20%, respectively¹³. In fact, as they are the gatekeepers through which sellers must go in order to have access to the global markets, large commodity buyers and processors, as well as retailers, tend to capture an increasingly large proportion of the value chain: while producers at one end are paid less, consumers at the other end don't necessarily benefit from lower prices.

The question explored in this briefing note is whether, and to what extent, the logic of efficiency, can be applied bluntly in all circumstances, or whether the specific situation of some developing countries warrants extra attention be paid to the consequences that buyer power may have on social and economic structures and, ultimately, on the livelihoods and rights of individuals residing in those countries.

The impact of buyer power on the structure of supply chains has been well documented. Studies have shown that the practice of dominant UK grocery retailers of passing on to Kenyan producers the cost of compliance with the retailers' private standards on hygiene, food safety and traceability has resulted in food production shifting from smallholders to large farms, often owned by the exporters, as well as the acquisition by such exporters of their own production capacity¹⁴. In short, small farmers are being kicked off global grocery supply chains, often leading to increased rural poverty.

The downward pressure on farm gate prices – the price paid to the farmer for his or her produce – has other perverse effects. In an effort to reduce costs, food manufacturers may dispense with proper environmental precautions in dumping waste materials, or poor farmers may resort to child labour. For example, agricultural wages were so severely depressed as a result of buyer concentration in the cocoa market in Cote d'Ivoire that small-hold cocoa farmers reportedly resorted to using child labour, leading to violations of the 1989 Convention on the Rights of the Child¹⁵. It should be remembered that the vast majority of child labour takes place in agriculture: 70% of all working children, or 132 million boys and girls between the ages of 5 and 14¹⁶.

The damage caused by buyer power is exacerbated by the “commodity problem,” i.e., the tendency to increase the supply of many agricultural commodities in response to price reductions. For instance, although causality is difficult to establish, a study by ActionAid and the South Centre has demonstrated a positive correlation between increased buyer concentration in coffee markets and the ever-decreasing value of the finished coffee product that reaches farmers¹⁷. Coffee is the prime example of this phenomenon. Coffee is best cultivated on land

that is hilly and located at high altitudes, making it difficult for farmers to grow anything else commercially. Thus, should coffee prices fall due to an increase in buyer bargaining strength, farmers would have little alternatives to cultivate other crops. Instead, farmers produce even more coffee in an attempt to earn short-term income to meet daily expenses, and thereby cause oversupply and further depression of coffee prices, even below the average cost of production. 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, invariably means the uprooting of entire villages and resettlement in urban slums¹⁸.

Because of these impacts, the passivity of States in the face of abuses of buyer power may be seen as a failure to comply with their obligation to protect the right to adequate food of those who depend on farming for their livelihoods, and who may have no opportunities outside of agriculture to achieve a decent standard of living.

Buyers who have achieved a dominant position vis-à-vis certain suppliers – suppliers who, in turn, have few possibilities other than to go through these buyers if they seek access to markets for their produce – may be tempted to abuse their position in order to extract a disproportionate amount of value from the producer – paying less although prices on the markets may be high, while at the same time shifting all the risks of lower market prices on the shoulders of the producer. The specific kinds of conduct amounting to abuses of buyer power go beyond pricing, however, and they are almost innumerable. They include dominant buyers demanding such large volume discounts that suppliers are obliged to raise prices for other buyers (the “waterbed effect”)¹⁹, retrospectively adjusting terms of supply to pass on costs and risks to suppliers²⁰, or methods of off-market direct contracting that result in reducing transparency in agricultural markets²¹.

The past few years have seen a number of attempts by legislative, judicial and quasi-judicial bodies around the world to tackle excessive buyer power in food supply chains. Apart from the the U.S. Department of Justice/ Department of Agriculture workshops on antitrust and the Declaration of the European Parliament mentioned previously, there have been specific sectoral investigations such as the Groceries Market Investigations of 2000 and 2008 by the UK Competition Commission. In the UK, a revised Groceries Supply Code of Practice (GSCOP) entered into force on 4 February 2010²², and the Government approved in August 2010 plans for an Ombudsman tasked with receiving complaints from suppliers²³.

Apart from these, fair trade and competition authorities in South Korea, Taiwan and Thailand have brought actions against buyers abusing their market strength. Between 1999 and 2001, the Korean Fair Trade Commission (KFTC) prosecuted Walmart and Carrefour for, among others, unfair refusal to receive products, unfair return of products, unfair price reductions, unfair passing on of advertising fees to producers. The KFTC imposed fines on both Walmart-Korea and Carrefour-Korea and, more interestingly, ordered both companies to publicise their abusive conduct by taking out advertisements in newspapers²⁴. In Taiwan, a commission established pursuant to the Fair Trade Law of 1991 identified six types of unfair retailer practice, ranging from charging improper fees to unreasonable penalties for supply shortages. The Taiwanese commission has since published a set of guidelines for charging additional fees by retail chains²⁵. In Thailand, a specialised commission was tasked with studying the issue of buyer power after competition authorities received a spate of complaints regarding unfair trade practices²⁶.

A problem for competition law

At present, many competition regimes consider that the main or even sole aim of competition law is the maximisation of consumer welfare²⁷. Competition law thus conceived can be of some use as a tool for addressing excessive buyer power. For instance, the UK Competition Commission’s²⁸ regulation of certain abusive practices by large supermarket retailers in the UK resulted from an understanding that certain practices by dominant buyers transferred so much risk and uncertainty to producers that they could result in the following harms to consumers²⁹: higher sale prices, reductions in quality or choice for consumers, or decreased level of investment and innovation by producers. All these tend to happen if the dominant buyer is also dominant on the selling market, or if the whittling away of producer welfare has taken place for so long that significant supplier exit and/or consolidation has occurred, thereby reducing consumer choice and quality. It has also been argued that dominant buyers may possess the ability to dictate to consumers the choice of products that come to market, and that the success of product innovations may be dependent largely upon these dominant buyers’ reactions³⁰.

The difficulty with the consumer welfare standard is that it concentrates attention on the demand side. Practices are deemed acceptable, even when adopted by dominant firms, as long as consumers benefit, or where there is an appearance that some of the advantages obtained by the firm might be passed on to consumers. The consumer

welfare standard pays insufficient attention to the potential harms suffered by small farmers, even though they are the ones most obviously affected by excessive concentration in the food chains. Indeed, some groups of smallholders, who are the least competitive, may be relegated to low-value segments of the market or driven out of business altogether in situations where the buyer uses its dominant position to push down farm gate prices. It should be recalled, however, that the right to adequate food, as protected in international law, is not only about poor consumers having access to food at an affordable price ; it is also about those depending on farming for their livelihoods having sufficient incomes to allow them to purchase food. This dimension is of particular importance in many developing countries, where there are few alternatives to farming for populations in the rural areas, and where poverty is still predominantly located within this group of the population.

Where abuses of dominant positions lead to such consequences, competition regimes should be improved to comport with general human rights principles of equality and non-discrimination, and to facilitate the realization of human rights, including among others the right to food, the right to work and the right to development. The UNCTAD Model Competition Law³¹ provides an example: the Model Law aims to prevent anti-competitive practices that “unduly restrain competition, adversely affecting... [amongst other things] economic development”³².

An even clearer example is the South African Competition Act 1998, which aims to “promote and maintain competition in the Republic in order... (c) to provide employment and advance the social and economic welfare of South Africans... (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.”³³ Such competition regimes are feasible: the South African Competition Commission has launched investigations into a number of milk processors for, among other things, allegedly colluding to fix the purchase price of milk, as well as imposing upon dairy farmers contracts requiring them to supply their total milk production³⁴. The Commission also recently began an investigation into the supermarket industry, specifically citing as a concern the exclusion of small producers from access to retail shelves as a result of buyer power concentration³⁵.

Clearly, competition control vis-à-vis other regulatory regimes, and competition control of food supply chain issues vis-à-vis other competition issues may vary,

depending on the particular developmental context of the state in question³⁶. It is beyond question, however, that competition control must be an essential component of any strategy to remedy structural flaws where they exist. In developed countries, producer welfare concerns need be considered as an additional nuance where dominant buyer conduct results in harms to producers and to the long term welfare of consumers, or where it threatens the right to a decent standard of living, including the right to adequate food, of overseas producers. However, in countries where the food insecurity is widespread in the rural areas and where violations of the right to adequate food of small-scale farmers are common, competition control of buyer power must be more than just a nuance or an exception to the general rule; it should be an integral part of the competition regime. One possible solution could be for developing countries to identify dominant buyer firms and impose the following special legal duties upon them. These may include duties to refrain from:

- a) directly or indirectly imposing unfair purchasing or selling prices or other unfair trading conditions;
- b) limiting production, markets or technical development to the prejudice of suppliers;
- c) applying dissimilar conditions to equivalent transactions with other trading parties, resulting in those parties being placed at a competitive disadvantage; and
- d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Transnational issues

The globalization of the food supply chains requires that competition law regimes be given extraterritorial reach, commensurate with the scope of activities of the market actors concerned.

The deficiency of a solely consumer-oriented competition regime is again demonstrated: if a dominant buyer engages in conduct that harms producers in country A, but which affects consumer welfare only in country B (because the products are exported), a consumer-oriented competition regime in country A would be rendered toothless. Countries exporting agricultural commodities therefore should not adopt competition laws focused on consumer welfare on the model proposed by the OECD. They should instead seek to ensure that, in the competition law regime that they

set up, they offer a sufficient high level of protection of their producers against abuses of dominant positions by commodity buyers, food processors or retailers, as part of their obligation to protect the right to food under their jurisdiction.

Some argue that under a logical distribution of global competition control, anti-competitive conduct is “penalised under the antitrust laws of the importing jurisdiction that suffers the anticompetitive effects.”³⁷ To simplify for the purpose of demonstration, this argument states that the appropriate response would be for competition authorities in country B to control the anti-competitive behaviour for its consumer welfare effects in country B. This argument assumes that the competition authorities in country B: (1) have the technical capacity; and (2) have theories of jurisdiction and substantive competition law rules allowing them to control such conduct. These assumptions do not hold, even in States with sophisticated competition regimes.

For instance, the U.S. “effects” doctrine of jurisdiction (see box 1) may preclude competition control of excessive buyer power, even though there could be consumer effects within U.S. territory³⁸. Although the EU’s case-law on jurisdiction is more suitable for establishing the necessary competition control³⁹, it should be noted that the assertion of jurisdiction over a given firm is quite a different matter from whether the substantive law controls its conduct, and EU law imposes overly generous substantive presumptions, thus weakening EU competition control of abusive buyer conduct in developing countries⁴⁰.

Instead, substantive competition laws should recognise that consumer harms arising from excessive buyer concentration are incipient and therefore indeterminate in character, but that this indeterminacy should not be a reason for failing to control such conduct. A more enriched conception of consumer welfare is needed – one that takes account of consumers’ interests in sustainability – rather than focussing purely upon short-term price changes. An important example of this more enriched concept of consumer harm in application may be found, for instance, in the UK Groceries Market Investigation (2008), where the UK Competition Commission held that it was authorised to find an “Adverse Effect on Competition” without having to “identify specific harm to the interests of” consumers⁴¹.

Even under the EU’s “implementation” theory of competition jurisdiction and a more appropriate substantive law regime, significant loopholes would remain. Competition authorities in developed States would be able to assert jurisdiction over and control

abusive buyer conduct for long-term indirect harm to domestic consumer welfare, but they would still be powerless to act in the name of the foreign producers whose welfare is being directly and adversely affected. To do so might amount to an exercise of extraterritorial jurisdiction in violation of the principles of the equality of States and of non-interference with domestic affairs. This has two implications. First, competition authorities may be unable to take action against agribusinesses whose conduct harms foreign producers, but either has no legally recognisable adverse effect upon domestic consumers, or whose domestic market presences fall below relevant thresholds. Second, and more importantly, States may be unable to award damages to foreign claimants who suffer competitive harm elsewhere⁴². It is therefore imperative that developing countries, where the majority of impoverished farmers are located, set up credible competition authorities of their own.

A number of factors currently hinder the adoption by source countries of competition regimes that protect their consumers from abuses of dominant positions by buyers in global supply chains. First, competition control requires more than competition law regimes: it also requires well resourced and independent competition authorities⁴³, which may be costly for some developing countries⁴⁴. Second, there may not be the political will on the part of developing countries to challenge the dominance of the largest actors controlling international agricultural markets, since these firms provide access to the global markets and may work in collaboration with local intermediaries that are linked to the government.

In discharging their obligation of international cooperation and assistance, developed countries should offer assistance to developing ones to defray the costs of maintaining and staffing credible competition authorities; developing countries in turn should accept that it is their duty to protect their producers from the impacts of concentration in the food chains, and they should seek such support as part of discharging their obligation to protect the right to adequate food. Such assistance may come from the United Nations Conference on Trade and Development (UNCTAD), which offers technical training courses on competition law and policy to judges, enforcement-officials and other decision-makers from developing countries with respect to adopting, maintaining and improving national competition law systems⁴⁵. Other methods of advancing growth of competition law in developing countries would be to adopt international cooperation agreements by which States parties agree to assist each other with respect to producing and exchanging documentary evidence, and even to apply the other country’s competition laws where appropriate⁴⁶.

Conclusions

Excessive buyer concentration in global food supply chains tends to depress prices that food producers at the bottom of those chains receive for their produce. This in turn means lower incomes for these producers. As a result, the least competitive of these producers may be forced out of business, or they may be relegated to subsistence agriculture, and the inequalities in rural areas in which poverty is concentrated in developing countries may increase. For other suppliers seeking to join global supply chains, abuses of buyer power leading to depressed farm gate prices may have an impact on their ability to invest for the future and climb up the value chain, and it may lead them to lower the wages of their workers, or at least, not to increase such wages as much as they should. There is thus a direct link between the ability of competition regimes to address abuses of buyer power in supply chains, and the ability for the development of global supply chains to contribute to an increase in the enjoyment of the right to a decent standard of living, including a right to adequate food, in poor agriculture-based countries: global food supply chains will contribute significantly to the reduction of rural poverty only to the extent that such abuses are effectively combated through competition law regimes that are designed to be consistent with the obligation of States to protect the right to adequate food. Accordingly,

1. **All States should have in place credible competition and merger regulation authorities**, which restrain the creation and abuse of dominant buyer power, with a view to protecting small-scale farmers from such abuse.
2. **Developed countries in particular should avoid creating high barriers to assert jurisdiction, as well as**

substantive rules of competition law that leave abusive buyer behaviour in developing countries unchecked.

Reductions of consumer welfare resulting from abuses of buyer power occur only in the long-term, and as an indirect consequence of the appropriation of producer welfare. It is therefore inappropriate to focus competition regimes on consumer protection alone. Instead, developed countries, especially those where dominant agribusiness buyers are domiciled, should be more active in addressing the creation, maintenance and abuse of such buyer power, with a view not only to protecting the suppliers, particularly in developing countries, from the impacts of abuses of dominant positions, but also to ensuring the longer term stability of supply for consumers.

3. **Developing countries** where food insecurity is widespread in the rural areas and where violations of the right to adequate food of small-scale farmers are common, **may wish to create competition regimes that impose on buyers specific duties**, or subject them to specific types of control, in certain supply chains or for certain commodities that are particularly important to the revenues of small-scale farmers, with a view to preventing types of conduct which result in harms to the welfare of producers.
4. **Developed countries should assist developing States** to create and maintain credible competition and merger regulation authorities, and developing countries should seek and cooperate with such initiatives. The institutions built with the assistance of developed countries, however, should not follow a purely consumerist model of competition law typical of similar bodies in developed countries at present, but must seek to protect a minimum level of producer welfare.

Box 1: Theories of Jurisdiction and Substantive Law in the U.S. and EU

U.S. courts established very early on that they had jurisdiction to control conduct occurring outside U.S. borders, but which nonetheless created effects within it – the “effect” doctrine of jurisdiction⁴⁷. Subsequent legislative and judicial developments, however, effectively limited the scope of the “effects” doctrine of jurisdiction. These included §6a of the Foreign Trade Antitrust Amendment Act of 1982, which provided that territorial jurisdiction could be established only where extraterritorial conduct had “direct, substantial and reasonably foreseeable effect” on trade or commerce in the U.S., and the judgment in *Hartford Fire Insurance*⁴⁸, limiting antitrust control to conduct that “was meant to produce and did in fact produce some substantial effect in the United States”.

There is considerable uncertainty over the scope of the extraterritorial application of U.S. Antitrust law at present, but the U.S. 9th Circuit Court of Appeals in *US v. LSL Biotechnologies*⁴⁹ recently interpreted the above developments to mean that jurisdiction cannot be asserted over foreign conduct that produces only remote effects on consumers in the U.S. That case involved a contract clause imposed by the defendant U.S.

corporation upon Hazera, a foreign supplier-developer of tomato seeds, preventing it from supplying any other buyer in the U.S. The U.S. argued, amongst other things, that the clause “makes less likely possible innovations from Hazera in the creation of heartier tomato seeds ‘that will allow consumers to enjoy higher quality, better tasting winter tomatoes and that will allow United States farmers to grow long shelf-life tomatoes.’” Judge Tallman, writing for the majority, rejected this argument, stating that the “delay of possible innovations does not have a direct effect on American commerce”⁵⁰ (emphasis added).

Clearly, this line of reasoning renders impossible control over conduct of dominant agribusiness buyers in foreign countries on the rationale of consumer welfare protection, because, as mentioned in the main text, the harms to consumers from such conduct, which includes a reduction of capital replacement similar to the decline in innovation in *U.S. v. LSL*, occurs only in the long-run and indirectly.

In contrast, states may consider the practice of the European Court of Justice in the *Wood Pulp*⁵¹ case, where it established objective territorial jurisdiction on the basis that a concerted practice between several non-EU undertakings begun outside of the EU had been implemented in it. Another example of the EU’s more expansive approach to assertion of jurisdiction is *Gencor v Lonrho*⁵², where the Court held that application of the EU’s merger laws to two South African mining companies was “justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the (EU)”. The court however interpreted the criterion of “immediacy” to pertain not so much to economic effects, but to the structure of the market: “the concentration would have had the direct and immediate effect of creating the conditions in which abuses were not only possible but economically rational”⁵³. As for the criterion of substantiality, it was not necessary for the “substantial” effect to be immediately discernible: the creation of a duopoly in world platinum and rhodium markets as a result of the merger would only occur in the “medium term”, but the scale and importance of that prospect was substantial enough to justify assertion of jurisdiction⁵⁴.

Asserting jurisdiction over particular conduct is one thing; whether or not that conduct is prohibited by the law is a different matter altogether. In this regard, the EU’s substantive law leaves something to be desired, notwithstanding the adoption of the new Regulation 330/2010 on Vertical Restraints⁵⁵. Both the new Regulation 330/2010 and the expired Regulation 2790/99 on Vertical Restraints⁵⁶ establish 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. However, according to the European Commission’s Vertical Restraints Guidelines⁵⁷ to the expired regulation, the market share of the buyer was considered only if the vertical restraint concerned contained an exclusive supply obligation, and the safe harbour was available for buyers with a market share of up to 30%. Regulation 2790/99 expired on 31 May 2010. The new Regulation 330/2010, as interpreted via the Commission’s new Guidelines⁵⁸, is an improvement in that it 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.”⁵⁹ This means that the buyer’s market share is relevant for determining the legality of all vertical agreements exceeding the market share threshold, and not just those that contain exclusive supply clauses. However, the market share threshold for the “safe harbour” remains the same at 30%. Moreover, the new guidelines set out a *de minimis* market share threshold of 15%⁶⁰. The inadequacy of this is clear 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 sellers⁶¹.

Under an abuse of dominant position analysis per Article 102 TFEU (ex Article 82 EC), the difficulty lies in showing a “detrimental effect upon trade” within the EU, which is taken to mean an adverse effect upon consumers. Consider for instance the opinion of Advocate General Miguel Poiares Maduro in *FENIN*, where he opines that “...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.”⁶² It has been the constant argument of this briefing note that the first contention is incorrect, and that the second is wildly optimistic. The market is good at encouraging actions that produce short-term benefits; it is not good at obliging its actors to take into account long-term considerations.

Notes

1. See US. DoJ website: <http://www.justice.gov/atr/public/workshops/ag2010/index.htm#dates>.
2. Prepared Remarks of U.S. Attorney General Eric Holder, DoJ and USDA Agriculture Workshop, Ankeny, Iowa, (March 12, 2010). Available at <http://www.justice.gov/ag/speeches/2010/ag-speech-100312.html>.
3. This is, however, not the first time U.S. governmental institutions have broached the issue. The U.S. Senate had previously conducted a number of hearings into concentration in agricultural markets over the course of the last decade: U.S. Senate Judiciary Committee Hearing, "Ensuring Competitive and Open Agricultural Markets: Are Meat Packers Abusing Market Power?" Sioux Falls, South Dakota, (August 23, 2002); U.S. Senate Judiciary Committee Hearing, "Monopsony in Markets for Agricultural Products: A serious Problem in Need of a Remedy", (October 30, 2003); U.S. Senate Judiciary Committee Hearing, "Concentration in Agriculture and an Examination of the JBS/Swift Acquisitions", (May 7, 2008).
4. 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. See M. Vander Stichele and B. Young, "The Abuse of Supermarket Buyer Power in the EU Food Retail Sector: Preliminary Survey of Evidence", Agribusiness Accountability Initiative (March 2009, Amsterdam).
5. World Bank, World Development Report 2008: Agriculture for Development, Washington DC, 2007, 135 – 136.
6. Id.
7. See P. Gibbon, The Commodity Question: New Thinking on Old Problems, Human Development Report Office, Occasional Paper, 2005/13; Bill Vorley, Food Inc.: Corporate Concentration From Farm to Consumer, United Kingdom Food Group, 2003, <http://www.ukfg.org.uk/docs/UKFG-Foodinc-Nov03.pdf>; Mary Hendrickson et al., The Global Food System and Nodes of Power, 2008, available at SSRN: <http://ssrn.com/abstract=1337273>; Molly Anderson, A Question of Governance : To Protect Agribusiness Profits or the Right to Food ?, Agribusiness Action Initiatives, 2009; A. Sheldon and R. Sperling, "Estimating the Extent of Imperfect Competition in the Food Industry: What Have We Learned?", Journal of Agricultural Economics, vol. 54 No. 1 (2003). See also Agribusiness and the right to food, Report of the Special Rapporteur on the right to food to the Human Rights Council, A/HRC/13/33, 22 December 2009, at footnote 14, 5.
8. L. Dodd & S. Asfaha, Rebalancing the Supply Chain: buyer power, commodities, and competition policy, South Centre & Traidcraft, (April 2008), 11.
9. World Development Report 2008, supra note 5, 135.
10. P. Carstensen, "Buyer Power, Competition Policy and Antitrust: the competitive effects of discrimination among suppliers", Antitrust Bulletin Vol. 53, 271 (2008), at 277.
11. "Seed policies and the right to food: enhancing agrobiodiversity and encouraging innovation", Report of the Special Rapporteur on the right to food to the General Assembly, A/64/170, 10.
12. In certain situations, producers may fare better under a monopsonistic market (a market with only one buyer) rather than under an oligopolistic market (a market with a small number of powerful buyers). An example of this would be agricultural marketing boards run in the public interest, rather than for a profit motive. See S. Murphy, "Concentrated Market Power and Agricultural Trade", Ecofair Trade Dialogue, Discussion Paper No. 1, (2006), 31–32, available at <<http://www.tradeobservatory.org/library.cfm?refid=89014>>.
13. C. Charveriat, Bitter Coffee: How the Poor are Paying for the Slump in Coffee Prices, (May 16, 2001) Oxfam; op. cit P. Roberts, "The End of Food: The Coming Crisis in the World Food Industry", Bloomsbury, (2008), 159. Also see, for the interested reader, the OECD Policy Roundtable on Competition and Regulation in Agriculture: Monopsony Buying and Joint Selling (2004) acknowledges this phenomenon at p. 8, but remarks that it is not clear that it is a result of buyer power. Instead, it suggests may be the result of retail consumer behaviour, the theory being 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 are decreasing, they cease to shop around, such that there is no pressure to similarly decrease prices all at the same time. Be that as it may, the salient point is that savings are simply not being passed on to retail consumers. This is not supposed to happen in a competitive and efficient market.
14. C. Dolan & J. Humphrey, "Changing Governance Patterns in the Trade in Fresh Vegetables between Africa and the United Kingdom", Globalisation & Poverty (2004), 17 – 18.
15. See New York University 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 labour, little progress has been made", Fortune (Feb. 15, 2008) 1.
16. International Programme on the Elimination of Child Labour, ILO: <http://www.ilo.org/ipec/areas/Agriculture/lang--en/index.htm>. A recent ILO document states that an estimated 26.4% of children between the ages of 5 and 14 in Africa are victims of child labour, most of them in agriculture. Lack of income for the family is of course among the main reasons for the deterioration of the child labour situation in Africa: "Action against child labour 2008 – 2009: IPEC progress and future priorities", International Programme on the Elimination of Child Labour (Geneva, February 2010), 17.
17. S. Asfaha, Commodities dependence and development: some suggestions on how to tackle the commodities problems, South Centre & ActionAid, (2008).
18. See e.g. C. Gresser and S. Tickell, Mugged: Poverty in Your Coffee Cup, Oxfam International, (Oxford, 2002), 22 – 23; Raj Patel, "Stuffed and Starved", Portobello, (London, 2007), 8 – 11; and Asfaha, supra note 17, 10 – 11.

19. See P. W. Dobson & R. Inderst, "Differential Buyer Power and the Waterbed Effect: Do Strong Buyers Benefit or Harm Consumers?" *European Competition Law Review*, Vol. 28 (2007), 393; P. Dobson & R. Inderst, "The Waterbed Effect: Where Buying and Selling Power Come Together", *Wisconsin Law Review* (2008), 331. As a result of dominant buyers being supplied at lower prices than non-dominant ones, dominant buyers are able to pass on cost savings to end consumers, which only increases the dominant buyer's market share in the downstream market. Thus a vicious circle is set into motion.
20. Of the 52 practices investigated by the UK Competition 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.
21. Carstensen, *supra* note 10, 283 – 284.
22. Website of the UK Competition Commission: <http://www.competition-commission.org.uk/inquiries/ref2006/grocery/groceries_inquiry_news.htm>.
23. Rebecca Smithers, "Grocery suppliers get Ombudsman for disputes with supermarkets" *Guardian* (Aug. 3, 2010). Available at: <<http://www.guardian.co.uk/business/2010/aug/03/supermarkets-ombudsman-retail-industry>>.
24. S. K. Jhong, "Anti-competitive practices at the distribution sector in developing countries", (2003) APEC Training Program on Competition Policy paper, 9 – 10. *Op. cit.* Dodd & Asfaha, *supra* note 8, 23.
25. G. Lin, "Taiwan's Competition Law Enforcement Experience and Cases in Retailing Business" (2003) APEC Training Program on Competition Policy paper, 2 – 5. *Op. cit.* Dodd & Asfaha, *supra* note 8, 23.
26. Note submitted by Thailand, "How enforcement against private anti-competitive practice has contributed to economic development", (2004) OECD Global Forum on Competition.
27. See OECD Roundtable (2004), *supra* note 13. For an especially simple and clear statement of this general philosophy of competition control, see the note submitted by the European Commission to the OECD Competition Committee for its meeting held on 21 – 23 October 2008, ¶ 4–7.
28. The UK Competition Commission is an independent public body established under UK law to ensure "healthy competition between companies in the UK for the benefit of companies, customers and the economy". See <http://www.competition-commission.org.uk/about_us/index.htm>.
29. UK Competition Commission, *Groceries Market Investigation* (2008) ¶ 9.5, 157.
30. Case No. IV/M.1221, *Rewe/Meinl*, (1999) Commission Decision, ¶ 74.
31. TD/RBP/CONF.5/7/Rev.3, Model Law on Competition, United Nations Conference on trade and Development, United Nations (New York and Geneva, 2007). See also TD/RBP/CONF.10/Rev.2, The United Nations Set of Principles and Rules on Competition, United Nations Conference on trade and Development, United Nations (Geneva, 2000). The UNCTAD Model Law is a voluntary, non-legally binding code meant to set out core principles of national competition regimes.
32. *Id.* Chapter I.
33. South African Competition Act 1998, § 2.
34. Press Statement, "Milk Cartel Hearings Set", Competition Commission of South Africa, (7 Feb 2008). A date was set for a hearing before the South African Competition Tribunal in September 2008, and a final judgment is currently pending. The investigation has, however, been beset by procedural defects, with the South African Supreme Court of Appeal ruling that the Competition Commission's initiation of the complaint against two of the alleged cartel members, as well as the referral of those complaints to the Competition Tribunal, had been improper: *Woodlands Dairy v Milkwood Dairy* (105/2010) [2010] ZASCA 104 (13 September 2010).
35. Press Statement, "Competition Commission to probe the supermarket industry", Competition Commission of South Africa, (29 June 2009).
36. See A. Singh, R. Dhumale, "Competition Policy, Development and Developing Countries", T.R.A.D.E. Working Paper No. 7, South Centre (November, 1999).
37. E. Elhauge & D. Geradin, *Global Competition Law and Economics*, Hart Publishing, (2007), 1012.
38. See Box 1 for a more detailed legal exposition.
39. *Id.*
40. *Id.*
41. UK Competition Commission, *Groceries Market Investigation* (2008) ¶ 7, Appendix 2.2, 2.
42. See *F Hoffmann-La Roche v. Empagran SA*, 542 U.S. 155, (2004), where the US Supreme Court construed the Foreign Trade Antitrust Improvements Act to mean that the foreign plaintiffs in the case could not bring suit, because they had suffered harm in Ukraine, Panama, Australia, Ecuador, etc, but not in the US.
43. Markus W. Gehring, Sustainable Competition Law, conference paper for the 2003 Fifth Session of the Ministerial Conference of the World Trade Organisation, (Cancun, Sept. 10-14, 2003) 2.
44. Stewart, J. Clarke and S. Joekes, *Competition Law in Action: Experiences from Developing Countries* (International Development and Research Centre, Ottawa, 2007), 26–41.
45. UNCTAD Model Law, *supra* note 31, Section E, ¶¶ 7 – 9; Section F, ¶¶ 6 & 7, which provide for the exchange of competition expertise between states, the setting up and financing of courses under the aegis of the UN. See also the UNCTAD website on training courses offered in Geneva or by correspondence: <<http://www.unctad.org/Templates/Page.asp?intItemID=4116&lang=1>>.

46. See the Closer Economic Relations Agreement, entered into force between Australia and New Zealand on 1 January 1983.
47. *United States v. Aluminum Co. of America (Alcoa)* 148 F 2d 416, (2d Cir. 1945) 444.
48. *Hartford Fire Insurance Co., v. California*, 509 US 764 (1993).
49. *United States v. LSL Biotechnologies*, 379 F.3d 672 (9th Cir. 2004).
50. *Id.*, ¶¶ 45 – 46.
51. *Case 114/85 Ahlström Oy v Commission* [1988] ECR 5193 (Wood Pulp) (Court of Justice of the European Communities, now European Union).
52. *Case T-102/96, Gencor Ltd. v Commission* [1999] II-753 (Court of First Instance, now General Court of the European Union).
53. *Id.*, ¶ 94.
54. *Id.*, ¶¶ 96 – 98.
55. Commission Regulation 330/2010, OJ [2010] L 102/1. Entered into force on 1st June 2010.
56. Commission Regulation 2790/99, OJ [1999] L 336/21, [2000] 4 CMLR 398. Expired 31st May 2010.
57. Commission Notice, Guidelines on Vertical Restraints, OJ [2000] C 291/1, [2000] 5 CMLR 1074, ¶ 21. The guidelines set out the Commission's interpretation of the regulation. Although they are not binding on the EU's courts, they are highly influential.
58. Commission Notice, Guidelines on Vertical Restraints, Brussels, SEC (2010) 411. Available at <http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf>.
59. *Id.*, ¶ 23.
60. *Id.*, ¶¶ 8 – 11
61. UK Competition Commission, *Groceries Market Investigation* (2000), ¶2.458.
62. *Case C-205/03 P, FENIN v Commission*, Opinion of Advocate –General Maduro (10 Nov 2005), ¶ 66.

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Olivier De Schutter was appointed the UN Special Rapporteur on the right to food in March 2008 by the United Nations Human Rights Council. He is independent from any government or organization, and he reports to the Human Rights Council and to the UN General Assembly. All reports are available on <http://www2.ohchr.org/english/issues/food/annual.htm>. See <http://www.srfood.org> for a thematic classification of all reports and statements of the Special Rapporteur. The Special Rapporteur can be contacted on srfood@ohchr.org