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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

ROUNDTABLE ON MONOPSONY AND BUYER POWER

-- Note by the United States --

This note is submitted by the United States to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 21-23 October 2008.

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1. Introduction

1. The 1890 debates in both houses of the United States Congress demonstrated concern with the exercise of market power on both the buying and selling sides of the market.[1] Many legislators singled out large meat packers for condemnation, and they were condemned as much for reducing the prices paid to cattle farmers as for raising prices to consumers.[2] In response, Congress passed the Sherman Act, "aimed at preserving free and unfettered competition as the rule of trade."[3] "The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated."[4]

2. The Sherman Act prohibits anticompetitive agreements and exclusionary conduct and both may be found unlawful on the basis of effects on the buying side of the market. Buyer cartels are unlawful per se and prosecuted criminally. Other collaborations among competing buyers may be unlawful if they create market power on the buying side of the market. Single-competitor exclusionary conduct is unlawful if it maintains, creates, or threatens to create, a high degree of market power on the buying side of the market.

3. The Clayton Act prohibits mergers and acquisitions "having demonstrable anticompetitive effects"[5] and authorises the injunction of a proposed merger on the basis of a "prediction of the merger's impact on competition."[6] Mergers may be found unlawful on the basis that they are likely to create or enhance market power on the buying side of the market.

2. Monopsony and Buyer Power Concepts

4. A "monopsony" is a single (or dominant) buyer dealing with multiple sellers. In important respects, monopsony is the mirror image of monopoly.[7] In the simple textbook treatment, a monopolist forces up the market price for what it sells by restricting the amount it produces and thus moves up the market demand curve; a monopsonist forces down the market price for what it buys by restricting the amount it buys and thus moves down the input supply curve. Although output reduction is generally associated with both monopoly and monopsony, it need not occur with either. By practicing price discrimination, with all-or-nothing offers, a monopolist can extract the maximum from consumers, and a monopsonist can extract the maximum from suppliers, without any reduction in output.[8]

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1 *See* 21 CONGRESSIONAL RECORD 2461 (1890) (statement of Sen. 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.").

2 *See id.* at 2470 (statement of Sen. John H. Reagan), 2606 (statement of Sen. William M. Stewart), 4098 (statement of Rep. Ezra B. Taylor), 4099 (statement of Rep. Richard P. Bland); 4101 (statement of Rep. John T. Heard).

3 *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 104 n.27 (1984) (quoting *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4 (1958)).

4 *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982) (quoting *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)).

5 *Brown Shoe Co. v. United States*, 370 U.S. 294, 319 (1962).

6 *Federal Trade Commission v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967).

7 Ways in which monopsony does not mirror monopoly as a practical matter are discussed by Jonathan M. Jacobson & Gary J. Dorman, *Joint Purchasing, Monopsony and Antitrust*, 36 ANTITRUST BULLETIN 1, 10–17 (1991); Jonathan M. Jacobson & Gary J. Dorman, *Monopsony Revisited: A Comment on Blair & Harrison*, 37 ANTITRUST BULLETIN 151, 154–58 (1992); Roger G. Noll, *"Buyer Power" and Economic Policy*, 72 ANTITRUST L.J. 589 (2005).

8 *See* ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY: ANTITRUST LAW AND ECONOMICS 73–74 (1993).

5. The economic impact of monopsony depends somewhat on the monopsonist's position as a seller in the associated output market. If the monopsonist is a monopolist in the output market, restricting input purchases leads to reduction in output, which raises the price to downstream consumers. In contrast, if the monopsonist has no ability to affect the price in the output market, restricting input purchases has no impact on downstream consumers. This latter scenario can arise if the geographic scope of the relevant input market is far narrower than the geographic scope of the relevant output market. It also can arise if the monopsonist employs a different technology, using different inputs, than its output-market rivals.

6. In both economics and law, "market power" refers to the ability of a seller profitably to charge more than the competitive price for what it sells or to the ability of a buyer profitably to pay less than the competitive price for what it purchases. Market power is a matter of degree and is not of concern unless present to a significant degree. The degree of market power on the selling side of the market is determined mainly by the market demand curve, especially its elasticity. The degree of market power on the buying side of the market is determined mainly by the input supply curve, especially its elasticity. Substantial and durable market power on the part of a seller is "monopoly power," and substantial and durable market power on the part of a buyer is "monopsony power."

7. The term "buyer power" describes either market power or "bargaining power" on the buying side of the market.[9] The latter form of buyer power is the ability of a buyer to negotiate a favourable price that is nevertheless above the competitive level.[10] The term "countervailing power" was coined to describe the latter form of buyer power when it has the effect of mitigating the adverse effects of seller power on the opposite side of the same market.[11]

3. Buyer Cartels

8. Cartels have always been a major focus of antitrust enforcement in the United States, and buyer cartels have always been treated just as seller cartels. One of the earliest Sherman Act cases involved, among other things, a conspiracy among meat packers to reduce the price they paid for cattle.[12] The per se rule against cartel activity began to emerge in the early decisions interpreting the Act,[13] and it has never distinguished between seller cartels and buyer cartels.[14] All cartel activity is prohibited because of its "threat to the central nervous system of the economy."[15]

9. In 1948 the Supreme Court of the United States specifically addressed price fixing by competing buyers.[16] Within a highly localised market, growers of sugar beets could sell to only three refiners, and the three refiners entered into a price-fixing arrangement. Because the refiners sold sugar in competition with other refiners throughout the United States, their price fixing affected the price they paid to growers but not the price at which they sold refined sugar. The Supreme Court held that: "It is clear that the agreement is the sort of combination condemned by the [Sherman] Act, even though the price-fixing was by purchasers,

9 *See, e.g.*, ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 323 (2007).

10 *See, e.g.*, Zhiqi Chen, *Buyer Power: Economic Theory and Antitrust Policy*, *in* 22 RESEARCH IN LAW AND ECONOMICS 17, 19–20 (2007).

11 JOHN K. GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER 111–23 (1952).

12 *United States v. Swift & Co.*, 122 F. 529 (C.C.N.D. Ill. 1903), *aff'd*, 196 U.S. 375 (1905).

13 *See United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 331 (1897).

14 *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940) ("Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.").

15 *Id.* at 225 n.59.

16 *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948).

and the persons specially injured . . . are sellers, not customers or consumers."[17] The Court also declared that the effects of the price fixing "fall squarely within the Sherman Act's prohibitions, creating the very injuries they were designed to prevent."[18] Modern court decisions agree that the per se rule against cartel activity makes no distinction between seller cartels and buyer cartels.[19]

10. The U.S. Department of Justice makes no distinction between seller cartels and buyer cartels in its cartel enforcement program. During the 11-year period 1997–2006, the Department brought 70 criminal cases against buyer cartels. All involved collusion among bidders in auctions; 51 involved real estate foreclosure auctions. The limited evidence on buyer cartels in auction settings suggests that they have had substantial competitive effects. A study of real estate auctions found that bid rigging reduced winning bids an average of 32%.[20] A study of auctions for used police cars found that bid rigging reduced winning bids by 17–28%.[21]

4. Purchaser Collaborations Other than Cartels

11. Section 1 of the Sherman Act prohibits any "contract, combination . . . or conspiracy, in restraint of trade." The three named forms of conduct "are understood to embrace a single concept"—that of an agreement among distinct economic entities,[22] and Section 1 is read "to outlaw only unreasonable restraints."[23] The "criterion to be used in judging the validity of a restraint of trade is its impact on competition."[24] A "horizontal restraint—an agreement among competitors on the way in which they will compete with one another"[25]—is the type of restraint most likely to be found unreasonable. Horizontal restraints other than cartels can be deemed unreasonable per se, but "[r]esort to *per se* rules is confined to restraints . . . 'that would always or almost always tend to restrict competition and decrease output.' To justify a *per se* prohibition a restraint must have 'manifestly anticompetitive' effects and 'lack . . . any redeeming virtue.'"[26]

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17 *Id.* at 235 (footnotes omitted).

18 *Id.* at 242.

19 *See, e.g.*, *Todd v. Exxon Corp.*, 275 F.3d 191, 201 (2d Cir. 2001) ("a horizontal conspiracy among buyers to stifle competition is as unlawful as one among sellers"); *Vogel v. American Society of Appraisers*, 744 F.2d 598, 601 (7th Cir. 1984) (Posner, J.) ("[B]uyer cartels, the object of which is to force the prices that suppliers charge the members of the cartel below the competitive level, are illegal per se. Just as a sellers' cartel enables the charging of monopoly prices, a buyers' cartel enables the charging of monopsony prices."); *International Outsourcing Services, LLC v. Blistex, Inc.*, 420 F. Supp. 2d 860, 864 (N.D. Ill. 2006) ("The broad prohibition against price fixing also extends to the less common situation of price fixing among horizontal competitors who are buyers.").

20 John E. Kwoka, Jr., *The Price Effect of Bidding Conspiracies: Evidence from Real Estate "Knockouts*," 42 ANTITRUST BULLETIN 503 (1997).

21 Jon P. Nelson, *Comparative Antitrust Damages in Bid-Rigging Cases: Some Findings from a Used Vehicle Auction*, 38 ANTITRUST BULLETIN 369 (1993).

22 6 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1400a, at 1; ¶ 1403 (2d ed. 2003).

23 *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

24 *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 104 (1984). *See Board of Trade of the City of Chicago v. United States*, 246 U.S. 231, 238 (1918) ("The true test for legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.").

25 *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 99 (1984).

26 *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2713 (2007) (quoting *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723 (1988); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 (1977); and *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289 (1985)).

12. Relatively few cases have considered non-cartel horizontal restraints by competing buyers.[27] An important recent case involved a rule adopted by an organisation of colleges effectively limiting wages paid to a category of basketball coaches.[28] The court of appeals held that the per se rule did not apply because the organisation's rules "serve the procompetitive purpose of making college sports available;"[29] however, the court held that an anticompetitive effect had been shown through evidence of reduced salaries for some coaches.[30] Consequently, the court held that the restraint was unlawful unless adequately justified, and the court rejected the organisation's proffered justifications. The court rejected the justification that the rule reduced the schools' costs because doing otherwise would permit "any group of competing buyers [to] agree on maximum prices" and thereby "rob[] the suppliers of the normal fruits of their enterprises."[31]

13. A common form of horizontal restraint imposed by competing buyers involves a purchasing cooperative. The Supreme Court has observed that "purchasing cooperatives . . . are not a form of concerted activity likely to result in predominantly anticompetitive effects" but rather increase economic efficiency.[32] The federal enforcement agencies in the United States have advised that purchasing cooperatives generally "do not raise antitrust concerns and indeed may be procompetitive" because they "may enable participants to centralise ordering, to combine warehousing or distribution functions more efficiently, or to achieve other efficiencies."[33] The agencies are concerned, however, about the possibility that purchasing cooperatives "create or increase market power" in purchasing.[34] But this concern arises only if the cooperative accounts for a significant share of total purchases. In the context of "joint purchasing arrangements among hospitals or other health care providers," the agencies have stated that, absent extraordinary circumstances, they will not challenge joint purchasing on the basis of buyer market power if "the purchases account for less than 35 percent of the total sales of the purchased product or service in the relevant market."[35]

5. Merger Enforcement

14. Section 7 of the Clayton Act prohibits mergers and acquisitions the effect of which may be "substantially to lessen competition." Section 7 is enforced principally by the federal enforcement agencies, which have promulgated guidelines explaining how they assess the likely competitive effects of mergers.[36] The guidelines state that their "unifying theme . . . is that mergers should not be permitted to

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27 An exhaustive survey of the cases is presented by Jonathan M. Jacobson & Gary J. Dorman, *Joint Purchasing, Monopsony and Antitrust*, 36 ANTITRUST BULLETIN 1, 25–36 (1991).

28 *Law v. National Collegiate Athletic Ass'n*, 134 F.3d 1010 (10th Cir. 1998).

29 *Id.* at 1016–19.

30 *Id.* at 1019–20.

31 *Id.* at 1022.

32 *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 295 (1985).

33 FEDERAL TRADE COMMISSION & U.S. DEPARTMENT OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 3.31(a) (April 2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.

34 *Id.* The agencies also are concerned about the possibility that purchasing cooperatives "may facilitate collusion by standardizing participants' costs or by enhancing the ability to project or monitor a participant's output level through knowledge of its input purchases." *Id.*

35 U.S. DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE statement 7 (August 1996), *available at* http://www.usdoj.gov/atr/public/guidelines/1791.pdf. The Department of Justice had long applied this rule more broadly, as stated in a October 21, 1985 speech by Deputy Assistant Attorney General Charles F. Rule. To guard against the possibility that joint purchasing facilitates downstream pricing coordination, the agencies apply a second condition, which is that "the cost of the products and services purchased jointly accounts for less than 20 percent of the total revenues from all products or services sold by each competing participant in the joint purchasing arrangement."

36 U.S. DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES (April 1992, revised

create or enhance market power or to facilitate its exercise" and indicate that market power encompasses both the ability of sellers to maintain prices above the competitive level and the ability of buyers to maintain prices below the competitive level."[37] Rather than detailing the agencies' approach to the assessment of buying-side competitive effects, the guidelines just state that the agencies "apply an analytical framework analogous to the framework" set out for assessing selling-side effects.[38]

15. The delineation of the relevant market for the analysis of buying-side competitive effects is very similar to the delineation of the relevant market for the analysis of selling-side competitive effects. The process begins by identifying a product of interest and the location at which it is bought. For example, with an agricultural product, that location could be a processing facility. One then asks whether a hypothetical monopsonist at that location would maximise profits by reducing the price paid below prevailing levels. The answer normally is no, because there is an actual monopsonist at the location, and it already is maximising its profit. Assuming that the product scope of the market already is fairly clear, one then gradually expands the region within which there is a hypothetical monopsonist, continually asking whether it would maximise profits by reducing the price paid below prevailing levels. The smallest region for which the answer is yes, or some slightly larger region, is the relevant geographic market for the starting location.

16. The primary factual issues in delineating the geographic scope of the relevant market for the analysis of buying-side competitive effects typically relate to transportation. In most cases, sellers can find alternative purchasers, but if they are too far away, they may not be economically viable alternatives. The time frame for analysis also is important in evaluating sellers' alternatives. Over a very short period of time, sellers of an already produced perishable product may be easily exploited, but one-time exploitation is not properly viewed as the exercise of market power. The relevant time frame may be a year or more for determining whether sellers can adjust their production levels and possibly reallocate resources to the production of other products. Monopsony power exists only if the relevant productive resources (what the monopsonist buys or what is used to produce what the monopsonist buys) can be exploited over a long period of time because they cannot easily be moved or converted to other productive uses.

17. A relatively small number of mergers have been challenged wholly or partially on the basis that they would create or enhance market power on the buying side of the market. The most recent example is the merger of two companies offering competing health insurance plans. The U.S. Department of Justice challenged the merger on the basis of likely anticompetitive effects in the sale of health insurance and also in the purchase of physicians services.[39] In an earlier case, the Department challenged the merger of two of the largest purchasers of grain in the United States. The complaint alleged that competition would be lessened substantially in the purchase of particular grains within five specific areas within which the companies proposing to merge accounted for a large portion, and in some cases nearly all, of total purchases.[40] The Federal Trade Commission challenged the merger of two large oil companies, alleging

April 1997), *available at* http://www.usdoj.gov/atr/public/guidelines/hmg.pdf.

37 *Id.* § 0.1.

38 *Id.*

39 *United States v. UnitedHealth Group Inc. and PacifiCare Health Systems* (filed Dec. 20, 2005), http://www.usdoj.gov/atr/cases/f213800/213815.pdf (complaint), 71 FEDERAL REGISTER 13,991 (2006) (competitive impact statement), 2006-1 Trade Cases (CCH) ¶ 75,255 (final judgment). A similar case is *United States v. Aetna Inc. and The Prudential Insurance Co. of America* (filed June 21, 1999), http://www.usdoj.gov/atr/cases/f2500/2501.pdf (complaint), 64 FEDERAL REGISTER 44,946 (1999) (competitive impact statement), 1999-2 Trade Cases (CCH) ¶ 72,730 (revised final judgment).

40 *United States v. Cargill, Inc. and Continental Grain Co.* (filed July 8, 1999), http://www.usdoj.gov/atr/cases/f2500/2552.htm (complaint), 64 FEDERAL REGISTER 44,046 (1999) (competitive impact statement), 2000-2 Trade Cases (CCH) ¶ 72,967 (final judgment).

that the merger would lessen competition in, among other things, bidding for rights to explore the Alaskan North Slope.[41]

18. In recent decades, only one government merger challenge clearly focused on the buying side of the market was litigated to judgment.[42] In 1984 the Department of Justice challenged a transaction involving rice milling operations. The Department alleged that it would substantially lessen competition in two relevant markets in which the merging firms competed as sellers and one relevant market in which they competed as buyers. The court held the merger unlawful solely on the basis of its likely anticompetitive effects in this third market—the "purchase or other acquisition for milling of paddy rice grown in California."[43]

19. Although mergers are rarely challenged in the United States on the basis that they create or enhance market power on the buying side of the market, the subject of buyer power often is raised nonetheless. Mergers that are challenged on the basis of anticompetitive effects on the selling side of the market often are defended on the basis that buyer power will mitigate or even preclude those effects. The federal enforcement agencies, however, have concluded that: "Large buyers rarely can negate the likelihood that an otherwise anticompetitive merger between sellers would harm at least some buyers. Most markets with large buyers also have other buyers against which market power can be exercised even if some large buyers could protect themselves. Moreover, even very large buyers may be unable to thwart the exercise of market power."[44] Although buyer power has been cited by several decisions as one factor supporting the rejection of merger challenges,[45] other decisions have explained that the presence of powerful buyers is apt to affect only the pattern of anticompetitive price increases following a merger.[46]

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41 *In re BP Amoco, p.l.c.* , FTC Docket No. C-3938 (filed Aug. 25, 2000). Materials related to the case are available at http://www.ftc.gov/os/caselist/c3938.shtm.

42 In another litigated case, the Department of Justice argued that the anticompetitive effects of the consummated merger of motion picture exhibitors were largely in the licensing of films from distributors. The district court, however, was confused about what was being argued, and the court of appeals held against the Department on the basis that entry would prevent any lasting anticompetitive effects. *United States v. Syufy Enterprises*, 712 F. Supp. 1386 (N.D. Cal. 1989), *aff'd*, 903 F.2d 659 (9th Cir. 1990).

43 *United States v. Rice Growers Ass'n of California*, 1986-2 Trade Cases (CCH) ¶ 67,288 (E.D. Cal. 1986).

44 U.S. DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES 17–18 (Mar. 2006), *available at* http://www.usdoj.gov/atr/public/guidelines/215247.pdf.

45 *Federal Trade Commission v. Foster*, 2007-1 Trade Cases (CCH) ¶ 75,725, at 107,991–92 (D.N.M. 2007); *United States v. Archer-Daniels-Midland Co.*, 781 F. Supp. 1400, 1422 (S.D. Iowa 1991); *United States v. Country Lake Foods, Inc.*, 754 F. Supp. 669, 674 (D. Minn. 1990).

46 *See Federal Trade Commission v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 59–61 (D.D.C. 1998); *United States v. United Tote, Inc.*, 768 F. Supp. 1064, 1085 (D. Del. 1991); *Federal Trade Commission v. Bass Brothers Enterprises, Inc.*, 1984-1 Trade Cases (CCH) ¶ 66,041, at 68, 614–15 (N.D. Ohio 1984).

6. Single-Firm Exclusionary Conduct

20. Section 2 of the Sherman Act makes it unlawful to "monopolize, or attempt to monopolize," and both offenses entail the use of "anticompetitive" or "exclusionary" practices.[47] Modern decisions hold that "a practice is 'anticompetitive' only if it harms the competitive process."[48] Single-firm exclusionary conduct can take myriad forms. Some involve the use of buyer power in dealing with key input suppliers to negotiate exclusive arrangements or otherwise to disadvantage rivals.[49] Very few cases have addressed single-firm exclusionary conduct designed to create or preserve monopsony power.[50]

21. In one of the very few monopolisation cases, the Supreme Court reversed a court of appeals decision upholding a jury verdict finding Weyerhaeuser Co. had unlawfully obtained a monopsony in the purchase of red alder logs.[51] Red alder is the most commercially important species of hardwood in the western United States. Specialised sawmills convert red alder logs into lumber used to manufacture items such as furniture and kitchen cabinets. After several years of increasing prices for logs and decreasing lumber prices, one of Weyerhaeuser's rivals exited the market and filed suit alleging "predatory bidding," which the court of appeals defined as a scheme in which "a firm pays more for materials in the short term" to "squeeze out" competitors and "[i]n the long run . . . recoup the higher costs by paying less for the materials."[52]

22. The Supreme Court observed that "predatory bidding mirrors predatory pricing" in several important respects.[53] Like predatory pricing, the Court explained, a successful predatory bidding scheme is unlikely to occur because it "requires a buyer of inputs to suffer losses today on the chance that it will reap supracompetitive profits in the future."[54] Like the aggressive price cutting in predatory pricing, "actions taken in a predatory-bidding scheme are often the very essence of competition."[55] The Court stressed in particular that aggressive bidding, or pricing, may be "essential to competition and innovation on the buy

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47 The elements of the monopolization offense are: "the possession of monopoly power in the relevant market" and "the acquisition or maintenance of that power" through anticompetitive conduct. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004). The elements of the attempt to monopolize offense are: "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

48 *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 21 (1st Cir. 1990) (Breyer, C.J.). *See United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc) ("to be deemed as exclusionary, a monopolist's act must have an 'anticompetitive effect.' That is, it must harm the competitive *process* and thereby harm consumers.").

49 *See, e.g.*, *Schine Chain Theatres v. United States*, 334 U.S. 110, 114–16 (1948); *United States v. Griffith*, 334 U.S. 100, 104–05 (1948); *United States v. Crescent Amusement Co.*, 323 U.S. 173, 181–82 (1944); *Toys 'R' Us, Inc.*, 126 F.T.C. 415, 592–96 (1998), *aff'd*, 221 F.3d 928 (7th Cir. 2000); Steven C. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 ANTITRUST L.J. 669 (2005).

50 Of interest is *Telecor Communications, Inc. v. Southwestern Bell Telephone Co.*, 305 F.3d 1124 (10th Cir. 2002). The case involved monopolization of pay phone services and focused on harm to those who derived income from allowing their property to be used as pay phone locations. The court specifically held that no adverse effect need be shown on pay phone users. *Id*. at 1133–34.

51 *Confederated Tribes of Siletz Indians v. Weyerhaeuser Co.*, 411 F.3d 1030 (9th Cir. 2005). The jury found that Weyerhaeuser had not monopolized the downstream lumber market.

52 *Id.* at 1037–38.

53 *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069, 1077 (2007).

54 *Id.*

55 *Id.*

side of the market,"[56] and it observed that "[h]higher prices for inputs obviously benefit existing sellers of the inputs."[57]

23. The Supreme Court reasoned that the "general theoretical similarities of monopoly and monopsony combined with the theoretical and practical similarities of predatory pricing and predatory bidding" lead to applying the same sort of test for both.[58] Thus, the Court held that a plaintiff "must prove that . . . the predator's bidding on the buy side . . . caused the cost of the relevant output to rise above the revenue generated in the sale of those outputs" and "that the defendant has a dangerous probability of recouping the losses incurred in bidding up input prices through the exercise of monopsony power."[59] The Court thus rejected jury instructions used by the trial court that would have permitted the jury to find an antitrust violation if it found that Weyerhaeuser merely "purchased more logs than it needed or paid a higher price for logs than necessary, in order to prevent [the plaintiff] from obtaining the logs [it] needed at a fair price."

7. Buyer Power in Distribution

24. Recent academic and policy discussions of the impact of buyer power in distribution bring a fresh perspective and refined tools to issues debated in the United States throughout much of the last century in connection with the rise of chain stores. Their growth, and the discounts and other concessions they negotiated from suppliers, led to intense scrutiny by Congress and the federal enforcement agencies. In 1936 this scrutiny resulted in the Robinson-Patman Act. Subject to defences, it prohibits charging different prices to competing retailers as well as offering retailers various other concessions.[60] The wisdom of the Robinson-Patman Act has been questioned many times,[61] and last year a bipartisan commission appointed by Congress and the President recommended its repeal.[62]

25. Particular attention was focused on the Great Atlantic & Pacific Tea Co. (A&P), which operated over ten thousand grocery stores during much of the 1920s and 1930s. In 1938 the Federal Trade Commission issued a cease and desist order against A&P to prevent it from accepting discounts and other concessions from suppliers in violation of the Robinson-Patman Act.[63] In 1944 the U.S. Department of Justice charged that A&P violated sections 1 and 2 of the Sherman Act. The Department alleged, and the court found, that many of A&P's practices were unlawful, including extracting concessions from suppliers.[64] The wisdom of the Department's case was hotly debated for more than a decade, after which no academic consensus emerged.[65] What did emerge was agreement that "on average it was probably true

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56 *Id.*

57 *Id.* at 1077 n.4.

58 *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069, 1077–78 (2007).

59 *Id.* at 1078.

60 *See generally* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 483–548 (6th ed. 2007).

61 In 1977 the Department of Justice concluded that the Act had produced significant anticompetitive effects to the detriment of competition and consumers. U.S. DEPARTMENT OF JUSTICE, REPORT ON THE ROBINSON-PATMAN ACT 99–100, 260 (1977). For economic analyses with similar conclusions, see Daniel P. O'Brien & Greg Shaffer, *The Welfare Effects of Forbidding Discriminatory Discounts: A Secondary Line Analysis of Robinson-Patman*, 10 JOURNAL OF LAW, ECONOMICS, & ORGANIZATION 296 (1994); Marius Schwartz, *The Perverse Effects of the Robinson-Patman Act*, 31 ANTITRUST BULLETIN 733 (1986).

62 ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 311–32 (2007).

63 *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F.2d 667 (3d Cir. 1939) (affirming order).

64 *United States v. New York Great Atlantic & Pacific Tea Co.*, 67 F. Supp. 626 (1946), *aff'd*, 173 F.2d 79 (7th Cir. 1949). *See generally* MORRIS A. ADELMAN, A&P: A STUDY IN PRICE-COST BEHAVIOR AND PUBLIC POLICY (1959).

65 With respect to buyer power issues, two notable scholarly contributions were: Morris A. Adelman, *The A&P Case: A Study in Applied Economic Theory*, 63 QUARTERLY JOURNAL OF ECONOMICS 238, 247–57 (1949); Joel B. Dirlam & Alfred E. Kahn, *Antitrust Law and the Big Buyer: Another Look at the A&P Case*, 60 JOURNAL OF POLITICAL ECONOMY

that the countervailing power of the chains was no more than enough to extract from suppliers what they saved them in cost."[66]

26. Recent scholarship on buyer power in distribution applies the tools of modern economics. For example, buyer power now is often approached from the perspective of the economic theory of bargaining.[67] A critical insight from economic theory is that the negotiation between a buyer and seller is over the division of their incremental gains from making the sale.[68] The incremental gains depend on the alternatives the buyer and seller have to dealing with each other. A buyer or seller is in a strong bargaining position if it can make a comparable deal on good terms with another party.

27. It was long assumed that larger buyers necessarily would be in a stronger bargaining position than smaller ones, but recent scholarship teaches that large size is neither necessary nor sufficient to confer a strong bargaining position.[69] Suppose that, if a seller fails to strike a deal with a particular large buyer, the seller's best alternative is not to produce the particular product at all, and therefore not to incur the associated fixed costs. In that situation, the large buyer ends up paying a share of the seller's fixed costs, while the remaining buyers do not because the fixed costs will be incurred even if no deal is struck with them.[70] Alternatively, suppose that, if a seller fails to strike a deal with any particular buyer, its best alternative is to reduce production by the amount the buyer would have purchased. In that event, larger buyers can end up paying more per unit if the seller's marginal cost is decreasing because the average cost of producing the incremental units sold to the large buyer exceed the average cost of the incremental units sold to smaller buyers.[71] Empirical research finds that this latter phenomenon exists with respect to cable television advertising, so larger cable operators pay more.[72]

28. Recent scholarship on buyer power has identified a potential effect from the exercise of buyer power that had not been considered previously.[73] This so-called "waterbed effect" operates through feedback between competition in the input market and competition in the output market.[74] According to proponents of this theory, a lower input price for a powerful retailer reduces its retail price, which increases

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118 (1952).

66 JOEL B. DIRLAM & ALFRED E. KAHN, FAIR COMPETITION: THE LAW AND ECONOMICS OF ANTITRUST POLICY 239 (1954).

67 *See, e.g.*, Roman Inderst & Nicola Mazzarotto, Buyer Power in Distribution, *in* 3 ISSUES IN COMPETITION LAW AND POLICY 1953 (W. Dale Collins ed., 2008); Chris Doyle & Roman Inderst, *Some Economics on the Treatment of Buyer Power in Antitrust*, 28 EUROPEAN COMPETITION LAW REVIEW 210 (2007).

68 For an accessible presentation of bargaining theory, see, e.g., SAMUEL BOWLES, MICROECONOMICS: BEHAVIOR, INSTITUTIONS, AND EVOLUTION 167–83 (2004). For more technical treatments, see MARTIN J. OSBORNE & ARIEL RUBINSTEIN, BARGAINING AND MARKETS (1990); John C. Harsanyi, *Bargaining*, *in* 1 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 190 (John Eatwell et al. eds., 1987).

69 *See, e.g.*, Zhiqi Chen, *Buyer Power: Economic Theory and Antitrust Policy*, *in* 22 RESEARCH IN LAW AND ECONOMICS 17, 31 (2007).

70 *See* Alexander Raskovich, *Pivotal Buyers and Bargaining Position*, 51 JOURNAL OF INDUSTRIAL ECONOMICS 405 (2003).

71 *See* Tasneem Chipty & Christopher M. Snyder, *The Role of Firm Size in Bilateral Bargaining: A Study of the Cable Television Industry*, 81 REVIEW OF ECONOMICS AND STATISTICS 326 (1999).

72 *Id.*

73 Recent scholarship also formalizes and clarifies effects that were already reasonably well understood. For example, the exercise of buyer power can allow a large buyer to grow and enhance its buyer power. *See* Roman Inderst, *Leveraging Buyer Power*, 25 INTERNATIONAL JOURNAL OF INDUSTRIAL ORGANIZATION 908 (2007). In addition, if seller profitability is reduced by the exercise of buyer power, the result over time may be reduced investment and innovation.

74 *See* Paul W. Dobson & Roman Inderst, *The Waterbed Effect: Where Buying and Selling Power Come Together*, 2008 WISCONSIN LAW REVIEW 331; Paul W. Dobson & Roman Inderst, *Differential Buying Power and the Waterbed Effect: Do Strong Buyers Benefit or Harm Consumers?*, 28 EUROPEAN COMPETITION LAW REVIEW 393 (2007); Roman Inderst & Tommaso M. Valletti, Buyer Power and the "Waterbed Effect," CEIS Research Paper No. 107 (January 2008), *available at* http://ssrn.com/abstract=1113318.

its sales, and that reduces the bargaining power of already less powerful downstream rivals and so weakens competition in the relevant retailing markets. These proponents suggest an effect that is based on the assumption that larger size confers upon a retailer greater bargaining power, although they acknowledge that there is no particular reason to believe that is true.

29. Recent scholarship does not indicate that competitive concerns relating to buyer power in distribution warrant either broad limitations on the purchasing practices of large retailers or any sort of presumption that a particular practice by a large retailer is anticompetitive. In addition, there may not be a sound basis for reliably concluding in a particular case that the waterbed effect has occurred. Yet there is ample reason to believe that errors in imposing liability or in formulating remedies could undermine price competition.