Buyer Power in Competition Law
St Catherine’s College, Oxford
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Thank you, Ariel, and good morning, ladies and gentlemen. I have one small point to mention at the outset, and that is that I am now retired from Europe Economics. I wasn’t when Ariel invited me to make this presentation, but I am now, and this may well be the last public presentation I make, on this or any other subject.

I was asked to cover these topics – a tall order in a short space of time, and it turned out to be more challenging than I had expected, solely because of the problems I had in getting suitably aggregated, up-to-date data. In fact, it is the difficulties I
encountered in data gathering which have shaped the framework I suggest for our discussions today.

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I suppose somebody has to offer up a definition of buyer power, so I volunteer this one, from the European Commission. I chose it because it seems OK to me as a simple, straightforward form of words but also because it hints at the things that might matter in consequence of buyer power – its capacity to deliver consumer and even supplier benefit on the one hand, and detriment to both groups on the other.

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Where does buyer power occur?

- Almost anywhere!
- Noted in the literature from 1990s on…
  - Wholesale e-books
  - Cocoa
  - Waste wood (US and now UK)
  - Groceries
  - Numerous others
- I have found it impossible to summarise meaningfully by sector or by geography
One of the things Ariel asked me to do was to examine where buyer power occurs, and, on the back of that, to portray the trends in it. From all that I read, buyer power can arise in just about any jurisdiction and in just about any sector. I have no basis for saying that buyer power is more prevalent in one region than another, or in one sector rather than another.

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One thing that is clear, however, is that organisations that exert buyer power often exert retail power too, and that buyer and retailer power are mutually reinforcing. There are some examples, which I will deal with briefly towards the end of my presentation, where an organisation has buyer power but not seller power, but these are a category of exceptions that we may not wish to bother with very much today.

We saw a moment ago the EC’s assertion that buyer power when combined with seller power can be pernicious. “When a strong buyer faces weak sellers the outcome can be worse than when the buyer is not powerful. The effects of a buyer’s strength also depend on whether the buyer, in turn, has seller power on a downstream market.”

The supermarket sector, possibly to a greater extent than all others, bears this out. Over decades, supermarkets in the developed industrial world have taken retail market share from smaller stores, independent or otherwise, to an extent where we now see more than 70 per cent of a national grocery market held by four or so players – sometimes five but also, sometimes, three.

And with such retail power comes buyer power, inevitably so. While the largest supermarket groups, or the buying groups that they contact with, deal daily with the largest branded good suppliers, the supply side is, as a robust generality much more fragmented than the distribution sector. The UK Competition Commission, in its two recent studies of supermarkets, estimated that there were over 7,000 suppliers of
food or food products in the UK – and although the number is steadily going down, it is still a number in the thousands rather than the hundreds. The imbalance of bargaining power is thus colossal.

However, I cannot say to you that buyer power has increased in step with seller power, although intuitively one would think that it has. The problem is that down the years we – that is the collective we: competition authorities, economists, academics, and, at the bottom of the heap, consultants like myself – have not developed a consistent and systematic analysis of buyer power.

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To come back to the grocery sector, the UK Competition Commission determined in 2000 that buyer power existed when a buyer (in this case a supermarket buyer) held 8 per cent or more of a given supply market. When the same Commission – albeit with different panel members – considered the grocery market between 2006 and 2008, it ignored the 8 per cent judgment of its predecessors and settled for a correlation that it found satisfactory between buying volume and terms of trade. As an aside, both panels found sustained abuse of suppliers by supermarkets with buyer power, but did not attempt to relate the scale of abuse with the scale of buyer power – and in fact very little has been done (as I shall go on to say later) about the abuse.
To get a wider view on all this, I reviewed US and EU literature, and came across two US pieces that I thought might reverberate today. The first is a memorable few sentences written by a US academic for the DoJ. In all innocence I appropriated this quotation before I realised that the author is none other than Professor Peter Carstensen, who is speaking here later today. I just hope Peter hasn’t changed his mind since I lifted his quotation into my slide.

On the other hand, there are other views. Take a look at this quotation, which is part of an FTC submission in 2008 to an OECD Round Table. I agree entirely that finding solutions is easier than identifying problems, but my own experience is that competition authorities have allied themselves with the thinking expressed by the
FTC – not that the FTC is the only body to have voiced it, of course. Far from it, especially in the EU.

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One might ask what the biggest brand owners do about the exploitation of buyer power, and the answer appears to be: not very much. They put up with it, and in the main they are reluctant to speak out against it: the UK Competition Commission in its 2008 report had identified a climate of fear during its draft stages, then, astonishingly, airbrushed all that out of the final report. I have no idea why. Other suppliers have thrown in half the towel and produce private label products for supermarkets – though I acknowledge that others refuse to do this. There is not much evidence, either, that buyer power, in the grocery sector at least, has provoked consolidation that otherwise would not have occurred. I cite the Kraft-Cadbury merger here but this deal is not alone in confirming the point.
What have the regulatory authorities done? Not much either. By and large the evidence suggests that they duck the issue – fearing that solutions could be worse than the problems – or play it long.

Where remedies are attempted, as in UK groceries, weak remedies have been attempted, and even then pretty slowly. We have in this country buyer power abuses that have persisted for over 20 years. The EU too is adept at playing matters long.
I said earlier that there were some instances where buyer power exists but is not exploited, and I will deal just briefly with a couple of these. As the cynics among you will no doubt have worked out, the only organisations that enjoy monopsony power without retail power, and without apparent recognition of what they could do with their buyer power, and get away with it year in year out – are Governments.

In the UK, doubt is frequently cast on the ability of the Ministry of Defence to exploit its buyer power intelligently. Here’s an academic view, from Professor Keith Hartley. His wording is quite restrained, but the underlining is mine.
The Department of Health fares a little better, though only a little. This is from the Management School at the University of Bradford. In summary, one might say that when buyer power is exploited the consumer loses, and when it is not the taxpayer loses. What a life! Perhaps one might swap Tesco for the MoD to see if matters improve.

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Conclusions

- Buyer power is much less well documented than retailer power
- It is a messy, high-risk subject which appears to daunt regulatory authorities
  - they do little and/or play it long
- But abuses persist for decades
  - they affect consumers as well as suppliers

To sum up, I would say that in the commercial world buyer power is not well documented but that regulatory authorities find it difficult to deal with, so the detriments that spring from it, whether for suppliers or consumers, tend to be virulent and to live long.

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Some subjects for the day

- Can we develop a better framework for the analysis of buyer power?
- If yes, would competition authorities apply it?
- How to get disadvantaged parties to speak out and supply the evidence?
- How can the interests of consumers and suppliers be safeguarded over the long term?
So far as today is concerned, here are my suggestions for matters that we might tackle. Can we develop a better analytical framework? Can we make it such that competition authorities might apply it? Can we get disadvantaged suppliers to speak out? And how does one safeguard the long term rather than settle for the expedience of settling for the short term?

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Ladies and gentlemen, thank you very much.

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