# *Buyer Power: Should the Seller Beware?*

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# Two Key Issues

Should Agencies and Courts Use

1. the Same Market Share Thresholds for Monopolization and Monopsonization Claims?
2. a Consumer Welfare Objective for Evaluating Buyer Power Claims?

# Economic Concerns

- Economic concerns of the textbook monopsony are
  - transferring wealth from suppliers to monopsonist;
  - deadweight welfare loss (since fewer of suppliers' widgets are produced and sold).

# Economic Concerns

- One issue is that significant buyer power, even to point of monopsony, does not always lead to less output of the sellers' goods or the total output of the monopsonist's goods.
  1. The supply curve of widgets may be *perfectly inelastic.*
  2. Monopsonist, like a monopolist, can price discriminate $\rightarrow$ pay each widget seller only the minimum amount needed for that seller to produce the widget.
  3. The "commodity problem."

# Other Economic Concerns

- One issue is the effect of monopsony power on downstream consumers.
  - Clearly the case when monopsonist is also a monopolist.
  - Jack Kirkwood's paper on how buyer power can lead to downstream market power and ultimately a monopsony/monopoly.
  - Roger Noll's work on the inefficiencies arising from monopsony:
    1. when other suppliers outside the monopsonized market replace the lost production at a higher cost.
    2. the opportunity cost of suppliers who now devote resources in competitive markets to produce more of the output when their resources could be profitably devoted to other uses.
    3. suppliers have less money to purchase goods and services.

# Social and Moral Concerns

- The downward pressure on the seller's price can lead to other undesirable effects.
  - Increase in negative externalities
  - Concerns over sustainability
    - increased soil erosion,
    - reduced biodiversity,
    - deforestation,
    - water, soil, and air pollution.
  - Human rights concerns over buyer power:
    - Child labor.
    - Sellers' loss of economic liberty & basic human rights, such as the right to food, work, and development.

# Legal Implications of Buyer Power

- *United States v. Grinnell Corp.*
- Antitrust plaintiff under sec. 2 must prove:
    1. defendant possesses monopsony power &

    2. “the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”

Proving Monopsony Power

Types of Evidence

- Direct
- Circum-stantial

# Proving Monopsony Power

- Issue = should courts rely on minimum market share thresholds
  - If courts presume that a 50 percent market share is insufficient for monopolization claims, should they make the same presumption for monopsonization claims?

# Market Share Thresholds

- EC Vertical Guidelines
  - sellers’ and buyers’ market shares are “decisive” in determining if the block exemption applies.
  - If the buyer's share in the market where it purchases goods or services is 30 percent or less, its conduct, except for certain hardcore restrictions of competition, is presumptively legal.

- One U.S. district court recently dismissed a section 2 claim because the market share of around 40 percent did not meet “the threshold of what it takes to establish monopoly or monopsony power.”

# Blair and Harrison's BPI

- Buying Power Index -- the percentage deviation from the competitive result

$$s/(\varepsilon+\eta(1-s))$$

*S* = buyer's market share,

$\eta$ = elasticity of demand of the fringe buyers

$\varepsilon$ = overall elasticity of supply

# Sliding Scale

The lower the alleged monopsonist's market share, the higher the plaintiff's burden in showing that

- fringe buyers are unable to acquire more of the sellers' output &
- the sellers' lack of alternatives to selling in the affected market (being unable to easily and cheaply produce and sell other products).

# Rule of Thumb

- $Monopsony = Coercion$
- Coercion implicitly incorporates both $\eta$ and $\varepsilon$:
  - as the sellers' price is depressed there remain few alternative buyers or alternative selling opportunities to rescue the sellers from exploitation and their captivity to the buyer.

# 2nd Issue: What Harm Counts

- As the German Bundeskartellamt observed, one must discuss abuses of buyer power in terms of the basic objectives of competition law.

- Should courts and agencies reconcile abuse of monopsony power claims with a consumer welfare objective?

# Problems with a Consumer Welfare Screen

- Buyer cartels
- Lack of consensus over
  - what *consumer welfare* actually means,
  - who the consumers are, or
  - how to measure consumer welfare
- Risk of false negatives
- Risk of false positives
- Rule of law concerns

# Consumer Welfare & Neoclassical Economic Theory

- Consumers are interested only about maximizing their wealth.
  - Do not care whether the farmers' families can eat better, keep their kids in school, improve their health and housing, and invest in the future.
  - Would not differentiate between Fair Trade coffee and regular coffee.

# Consumer Welfare & Behavioral Economics

- Consumers, the behavioral economics literature shows, are not solely concerned about promoting their economic self-interest.
  - Concerns over fairness
  - Economically benefit from the exploitation of sellers, but nonetheless object to such exploitation.

- Consequently, a true consumer welfare standard must incorporate consumers' other-regarding behavior.

# Alternatives to a Consumer Welfare Screen

1. Legislative
   – assign buyer power problems in specific industries to a regulatory agency, and
   – design laws, as in Japan and Korea, that specifically address common complaints in particular sectors of powerful buyers.
2. Causation Standard
   – Agencies and Courts develop their causation standard—
     - Whether defendant's specific conduct is reasonably capable of contributing significantly to its maintaining or attaining monopsony power?