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Ex Post Assessment of European Competition Policy:
Buyer power in concentration cases

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Buyer power in concentration cases: an ex post review

Maurice de Valois Turk*, Ignacio Herrera Anchustegui∴

1 Introduction

Buyer power effects in competition law remain a relatively unexplored area of the literature and practice. Even more scarce are concentration cases—instances in which the ability of a buyer to decrease the prices it pays for a good by withholding demand or through bargaining tactics play a major role in the assessment of a concentration.

In this contribution, we focus on the retrospective analysis of three landmark buyer power concentration cases from the late 90s and early 2000s—*Enso/Stora*,[1] *Kesko/Tuko,*[2] and *Carrefour/Promodès*.[3] These cases are studied as they represent interesting, rare and somewhat dissimilar examples of merger control in which buyer power has played a role—and does so in its different aspects, either to declare a concentration compatible with the internal market as countervailing power, as in *Enso/Stora*, or prompting concerns due to their possible exertion with respect to suppliers and associated downstream and selling-side competition risks, as is the case in *Kesko/Tuko* and *Carrefour/Promodès,* two mergers in the flood supply sector. All these mergers are horizontal ones taking place between competitive undertakings and our analysis of buyer power effects reflect this transaction structure. That said, anti-competitive effects from changes in bargaining position are also assessed as part of non-horizontal mergers by the Commission often under 'partial foreclose concerns'.[4]

The objective of our study is, beyond discussing the merits of the case and the analysis made by the European Commission (hereafter 'the Commission'), to illustrate the ways in which buyer power can be assessed in mergers, and some regulatory developments that can be linked to some of these cases in the food supply chain. This is done as part of a review of the role of buyer power in mergers from an economic and legal perspective. Further, we make use of

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[1] COMP/M.1225—*Enso/Stora* (1999).
[2] COMP/M.784—*Kesko/Tuko* (1996).
[3] COMP/M. 1684—*Carrefour/Promodès* (2000).
[4] Examples of mergers involving vertical buyer power effects are: M/7194 *Liberty Global / Corelio / W&W / De Vijver Media* (2015); M/8323 *AT&T / Time Warner* (2017).

quantitative data to analyse the effect of buyer power in mergers and to evaluate the effects on rivals of the merging firms once a merger has been announced and then declared compatible with the market. Lastly, we look beyond the analysis of these three cases and discuss the adoption of the Unfair Trading Practices Directive[5] as a regulatory initiative undertaking by the EU to deal with competition risks, in a wide sense, which share resemblance to concepts discussed in *Kesko/Tuko* and *Carrefour/Promodès*.

2 Buyer power economics in a nutshell

Buyer power concerns the position of the purchaser with respect to the supplier of goods and services.[6] Suppliers and purchasers need to agree on the terms of their contract, and a number of factors can influence these negotiations.

In this sense, the notion of buyer power has many similarities with the notion of market power, which typically describers the degree to which a supplier can act independently of its users (and could be more accurately referred to as 'seller power'). In other words, buyer power is a form of market power given from a purchasing perspective that may have effects typically in the upstream (purchasing market), as well as potentially in the downstream (retailing market). Their common background can be found in the definition of dominance adopted by the ECJ in the seminal *United Brands v Commission* case when stating that 'a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of its consumers'.[7]

While the ECJ does not refer specifically to suppliers, the Merger Regulation[8] does so in article 2.1(b) when, among the different aspects to consider in a concentration case, it includes 'the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services'.

[5] Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain (OJ [2019] L 111/59).
[6] Herrera Anchustegui, I. (2017), *Buyer Power in EU Competition Law*, Institut de droit de la concurrence; Chen, Z. (2007), 'Buyer power: economic theory and antitrust policy', *Research in Law and Economics*, **22**:1, pp. 17–40; Chen, Z. (2008), 'Defining buyer power', *Antitrust Bulletin*, **53**:241, pp. 241–9; Blair, R. D. and Harrison, J. L. (2010), *Monopsony in law and economics*, Cambridge University Press; Noll, R. G. (2004–05), '"Buyer Power" and Economic Policy', *Antitrust Law Journal*, **72**, p. 589; OECD (2009), 'Policy Roundtables: Monopsony and Buyer Power (Fiscal and Enterprise Affairs. Committee on Competition Law and Policy Directorate for Financial ed., 2009)'.
[7] Judgment of 14 February 1978, *United Brands v Commission*, C-403/03, EU:C:1978:22.
[8] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

2.1 Two different economic models

In discussing buyer power, we distinguish—in line with previous authors[9]—two different economic concepts or theories: the monopsony model and bargaining power.

The monopsony model describes the behaviour of a market where a sole purchaser faces an upstream market with perfect competition among suppliers.[10] In this model, there is an upward sloping supply curve, meaning that the purchaser has an incentive to restrict its purchases as it can realise a lower price at lower quantities, implying a withholding effect. The monopsony model in its simplest form represents the mirror image of the monopoly model.[11]

The second model relates to bargaining power, also sometimes called 'countervailing power', identified as the newer approach to buyer power regulation by the Bundeskartellamt , the German national competition authority.[12] The notion of bargaining power describes the way in which the agreement between a purchaser and supplier differs depending on the characteristics of both parties.[13] Most bargaining models use a structure whereby both the supplier and the purchaser have an incentive to reach an agreement if it is, for each of these separately, more advantageous compared to the alternative of no deal (the so-called 'outside option'). The combined benefit that an agreement brings to the purchaser and the supplier is referred to as the 'surplus'. Many models exist that aim to predict the division of this surplus based on characteristics of the players.

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[9] Chen, Z. (2008), 'Defining buyer power', *Antitrust Bulletin*, **53**:241, pp. 241–9; OECD (2008); Kirkwood (2012); and Carlton et al. (2014).

[10] See also, for a discussion on the monopsony model, Blair, R. D. and Harrison, J. L. (2010), *Monopsony in law and economics*, Cambridge University Press; Quirk, J. P. (1987), *Intermediate Microeconomics*, Science Research Associates; Frank, R. H. and Glass, A. J. (1999), *Microeconomics and Behavior*, McGraw-Hill, pp. 503–8; Varian, H. R. (2006), *Intermediate Microeconomics: A Modern Approach*, W. W. Norton & Co, pp. 471–4; Bernheim, B. D. and Whinston, M. D. (2008), *Microeconomics*, McGraw-Hill Irwin, pp. 648–52; Pindyck, R. S. and Rubinfeld, D. L. (2009), *Microeconomics*, Pearson Prentice Hall, pp. 373–81.

[11] See also using this expression, among others, Blair, R. D. and Lopatka, J. E. (2008), 'Predatory Buying and the Antitrust Laws', *Utah Law Review*, **2**, p. 415–69; Capps, C. S. (2009), 'Buyer Power in Health Plan Mergers', *Journal of Competition Law and Economics*, **6**, pp. 375–6; Waterman, D. (1996), Local Monopsony and Free Riders, *Information Economics and Policy*, **8**, p. 337; Salop, S. C. (2004–05), 'Anticompetitive Overbuying by Power Buyers', *Antitrust Law Journal*, **72**, p. 669.

[12] Bundeskartellamt (2014), 'Summary of the Final Report of the Sector Inquiry into the Food Retail Sector', 24 September, p. 9.

[13] For a general discussion on bargaining power and the associated literature, see: [13] Herrera Anchustegui, I. (2017), *Buyer Power in EU Competition Law*, Institut de droit de la concurrence, paras 92–114.

2.2 Buyer power in merger control: theories of harm and countervailing effect

Following the reference to the position of suppliers in the Merger Regulation, it should come as no surprise that buyer power is also explored as part of merger reviews.[14]

More specifically, buyer power is considered in two different ways—as figuring in a theory of harm, or as a (positive) countervailing effect. Looking at theories of harm, we see three broad groups:

- reduction of volume;
- reduction of choice;
- foreclosure effects.

The first theory of harm relates to reduction of volume based on the monopsony model. From a welfare perspective, the reduction of output is a negative—as the term ‘deadweight loss’ aptly suggests. Looking at the specific context of merger control, the fact that the monopsony model involves a single bidder means that any merger leading such a position will raise competition concerns.

The second theory of harm relates to the reduction of choice. Inderst and Schaffer (2007) present a theory whereby post-merger, retailers limit their assortment in an effort to exercise increased buyer power. Inderst and Schaffer go on to argue that this leads to a welfare-reducing loss of product variety for consumers as suppliers may reduce product differentiation in anticipation of consolidation. This theory has been empirically tested by Argentesi et al. (2016) using data from Dutch supermarket mergers. The authors found a small negative effect of these mergers on choice.

The third theory of harm relates to foreclosure effects. These effects follow from an increase of bargaining power. A merger can lead to the outside options for one of the firms shifting, leading to a different outcome. The most obvious example of this is where a merger of purchasers allows these to secure lower prices from their suppliers (who face a more negative outside option as they would lose a larger volume following the inability to reach an agreement).[15]

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[14] Herrera Anchustegui, I. (2017), *Buyer Power in EU Competition Law*, Institut de droit de la concurrence; Herrera Anchustegui, I. (2018), ‘Buyer Power in Merger Control: An overview of EU and national case law’, *Concurrences: e-Competitions*, pp. 1–16; Ezrachi, A. and Ioannidou, M. (2014), ‘Buyer power in European Union merger control’, *European Competition Journal*, **10**:1, pp. 69–95; Kokkoris, I. (2009), ‘Buyer Power in UK Merger Control’, *European Competition Law Review*, **4**.

[15] The output effects of such a change in agreed terms are (all things being equal) presumed to be neutral. Inderst and Wey (2007) present a model where this negative change in outside options can induce suppliers to increase their output.

These lower prices may not support a theory of harm. However, these do form an intermediate step to different alternative theories of harm. The first is that the better terms are passed on to consumers but have the effect of pushing smaller purchasers out of the market as they struggle to match the lower consumer prices enabled by lower purchasing costs. The second is that suppliers, faced with lower margins from their sales to the merged entity, are forced to raise their prices to other purchasers, thus (as in the example above) creating a cost advantage to the merging firm, which could be applied anticompetitively. This is known as the waterbed effect.[16] In both of these examples, the underlying assumption is that the short-term benefits of having lower prices are outweighed by the long(er)-term effect of having a market with fewer players. This theory of harm appears to be touched upon by the Commission in two of the cases discussed in this chapter: *Kesko/Tuko*[17] and *Carrefour/Promodès*.[18]

Finally, the notion of countervailing buyer power describes the case where the increased bargaining power of the merged entity is believed to be constrained by a powerful purchaser.[19] It is based on the same economic theory of bargaining power, being an expression of it.[20] If it can be showed that these purchasers can sufficiently constrain the merging parties, there may be grounds to consider that the effect of the concentration is not harmful. Additionally, EU competition law seems to require some form of spillover of the countervailing buyer power benefits to other buyers with respect to the supplier, as discussed extensively by Herrera Anchustegui.[21] This form of buyer power exertion is explored further in this chapter in relation to the *Enso/Stora* merger.

[16] See, for instance, Dobson, P. and Inderst, R. (2007), 'Differential buyer power and the waterbed effect: do strong buyers benefit or harm consumers?', *European Competition Law Review*, **28**, p. 393; Inderst and Valletti (2011); Dobson, P. and Inderst, R. (2008), 'The Waterbed Effect: Where Buying and Selling Power Come Together', *Wisconsin Law Review*, p. 331; Genakos, C. and Valletti, T. (2012), 'Regulating prices in two-sided markets: The waterbed experience in mobile telephony', *Telecommunications Policy*, **36**, p. 360; Herrera Anchustegui, I. (2017), *Buyer Power in EU Competition Law*, Institut de droit de la concurrence, paras. 149–59.
[17] European Commission Decision of 20 November 1996 declaring a concentration to be incompatible with the common market (Case No IV/M.784—*Kesko/Tuko*) Council Regulation (EEC) No 4064/89.
[18] European Commission Decision of 25/01/2000 declaring a concentration to be compatible with the common market (Case No IV/M.1684—*** *Carrefour/Promodes*) according to Council Regulation (EEC) No 4064/89.
[19] Galbraith, J. K. (2010), Th*e Affluent Society & Other Writings 1952-1967: American Capitalism; The Great Crash, 1929; The Affluent Society; The New Industrial State*, Library of America.
[20] Herrera Anchustegui, I. (2017), *Buyer Power in EU Competition Law*, Institut de droit de la concurrence, para. 1078.
[21] Herrera Anchustegui, I. (2017), *Buyer Power in EU Competition Law*, Institut de droit de la concurrence, paras 1175–91.

3 Ex post reviews of mergers involving buyer power

Whereas there exist a number of papers on ex post review of mergers (e.g. Ilzkovitch and Dierx (2020)), and papers that discuss buyer power in mergers decisions (e.g. Carstensen (2004 and 2012),[22] Kokkoris (2006 and 2009),[23] Ezrachi and Iannadou (2014), Kirkwood (2012), Van Doorn (2015),[24] Herrera Anchustegui (2017 and 2018)), our paper is a first attempt to combine both fields from a law and economics perspective.

Ilzkovitz and Dierx (2020) cite previous reports by the Canadian Competition Bureau[25] and the New Zealand Commerce Commission[26] that reviewed past mergers Decisions and also touched on buyer power.

Neumann and Sanderson (2007) review three past merger cases from the Canadian Competition Bureau, which all saw an extensive review of potential competition concerns and were all cleared unconditionally. The three mergers related to horizontal transactions in the markets for commercial broadcast radio, coal, and finally concrete and other building materials. The authors indicate that countervailing buyer power plays a role in each of these three cases. Their assessment is limited to a review of the Decisions taken as they cite challenges to obtain post-merger pricing data required to conduct their own analyses.

Csorgo and Chitale (2017) review 18 past merger Decisions from the New Zealand Commerce Commission. Citing issues with the availability of data, the authors focus their review on whether anticipated market developments such as entry and/or increased imports did indeed materialise. In one of these Decisions, the issue of entry sponsored by a purchaser was investigated. While such entry did not materialise, the authors indicate that the purchaser continues to take the view it can (still) credibly sponsor entry should prices become too high.

This suggests that there limited empirical work on the ex post assessment of buyer power in mergers.

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[22] Carstensen, P. C. (2004), 'Buyer Power and Merger Analysis–The Need for Different Metrics', 2004 Workshop on Merger Enforcement held by the Antitrust Division and the Federal Trade Commission, USA; Carstensen, P. C. (2012), 'Buyer Power and the Horizontal Merger Guidelines: Minor Progress on an Important Issue', *University of Pennsylvania Journal of Business Law*, **14**, p. 775.
[23] Kokkoris, I. (2006), 'Buyer Power Assessment in Competition Law: A Boon or a Menace?', World Competition, **29**, p. 139; Kokkoris, I. (2009), 'Buyer Power in UK Merger Control', *European Competition Law Review*, **4**, p. 176.
[24] Van Doorn, F. (2015), *The Law and Economics of Buyer Power in EU Competition Policy*, Eleven International Publishing.
[25] See Neumann and Sanderson (2007).
[26] See Csorgo and Chitale (2017).

4 Assessing buyer power as a competition concern in supermarket mergers

Buyer power anticompetitive concerns have been particularly present in the supermarket sector.[27] From claims of abusive or unfair purchasing practices by supermarkets *vis-à-vis* food producers, to risks of anticompetitive buyer power-related exclusions targeting rival supermarkets or affecting suppliers, including the complex issue of private labels.[28]

Concentration cases also illustrate well buyer power competition issues. Notable examples of these are cases from the mid- and late-1990s in food retailing. We have chosen for our study to focus on two different cases that represent different angles and outcomes to the study of buyer power as an anticompetitive and exclusionary exertion of market power. First, we discuss the Finnish *Kesko/Tuko*—a case mixing concerns of both exclusionary and exploitative abuses—as it could have led to the creation of a dominant buyer.[29] This is followed by our discussion of the French *Carrefour/Promodès*—a case relevant due the discussion of anticompetitive and exploitative buyer power risks that rise at the 'threat point'—a proportion of sales that a buyer presents for a supplier, but which and unlike Kesko/Tuko, the merger would not have led to the creation or strengthening of a dominant position.

4.1 *Kesko/Tuko*

4.1.1 The operation and the parties

On 20 November 1996 the Commission declared the concentration between Kesko Oy and Tuko Oy, two companies at the time incorporated and mostly operating in Finland in the fields

[27] Young B, 'Supermarket Buyer Power' Competition Law Insight [2013], p. 13; Berasategi J, *Supermarket Power: Serving Consumers or Harming Competition* (2014); European Commission, *Green Paper on Unfair Trading Practices in the Business-to-Business Food and Non-Food supply Chain in Europe* (2013); Daskalova V, 'The New Directive on Unfair Trading Practices in Food and EU Competition Law: Complementary or Divergent Normative Frameworks?' Journal of European Competition Law & Practice [2019]; Center for Antitrust and Regulatory Studies, Legislation Covering Business-to-business Unfair Trading Practices in the Food Supply Chain in Central and Easter European Countries (2019); Schebesta H and others, 'Unfair Trading Practices in the Food Supply Chain: Regulating Right?' 9 European Journal of Risk Regulation [2018], 690; Gjendemsjø R and Herrera Anchustegui I, 'The Scope for National Regulation of Unfair Trading Practices' in Giertsen J and others (eds), *Festskrift til 50-årsjubileet for jurist-utdanningen ved Universitetet i Bergen* (Fagbokforlaget 2019); Gjendemsjø, R. and Herrera Anchustegui, I. (2020), 'Regulating the food supply chain in Europe and the Unfair Trading Practices Directive', *Revue européenne de droit de la consummation*, pp. 165–88.

[28] Ezrachi, A. and De Jong, K. (2012), 'Buyer power, private labels and the welfare consequences of quality erosion', *European Competition Law Review*, **33**, p. 257; Möschel, W. (2014), 'Market definition with branded goods and private label products', *European Competition Law Review*, **35**, p. 29; Meza, S. and Sudhir, K. (2010), 'Do private labels increase retailer bargaining power?', *Quantitative Marketing and Economics*, **8**, p. 333; Dobson, P. and Chakraborty, R. (2015), 'Assessing brand and private label competition', *European Competition Law Review*, **36**:2, pp. 76–81.

[29] See also discussing the case: Ezrachi, A. and Ioannidou, M. (2014), 'Buyer power in European Union merger control', *European Competition Journal*, **10**:1, pp. 78–9.

of 'retail sales of daily consumer goods and/or specialty goods'[30] and the 'wholesale and retail of daily consumer goods and speciality goods'[31] respectively. On 27 May 1996, 'Kesko acquired 56,3% of Tuko's share capital, thereby obtaining 59.3% of the voting rights, and direct control of Tuko'.[32]

At the time, the operation constituted a concentration with no community dimension pursuant to Article 1 of the then Merger Regulation. However, the Commission found that '[t]he acquisition of Tuko by Kesko will *create foreclosure effects for new entrants*, including potential entrants from other Member States, in particular on the Finnish markets for daily consumer goods'.[33]

Both Kesko and Tuko were at the time part of several 'international purchasing organisations',[34] with other companies in the EEA market, reinforcing their buyer power as members of these alliances.

Kesko and its affiliates, independent entrepreneurs but contractually bound to Kesko, operated through a collaboration scheme called the 'K-block'.[35] A similar modality was the one used by Tuko and its retailer agents.[36] Despite the agents being somewhat independent, the pricing, purchasing and retailing strategies were centrally planned. In this sense, the Commission concluded that for the K-block, 'Kesko, as the central organ of the Kesko group has responsibility for the planning and execution of changes to the overall group structure',[37] being all independent retailers bound and loyal to Kesko. A similar conclusion was reached regarding the Tuko retailers and its 'T-block' system.[38]

4.1.2 Relevant markets assessed

The assessment of the concentration was particularly important when it came to the relevant markets to be assessed. *Kesko/Tuko* is a prime example showing the dualistic nature of buyer power cases and how the existence of selling market power in a retailing end consumers market exacerbates the risk of abuse of buyer market power by retailers. This logic was also stressed in the Decision by the Commission when it maintained that:[39]

[30] (Case No IV/M.784—*Kesko/Tuko*), para. 5.
[31] (Case No IV/M.784—*Kesko/Tuko*), para. 6.
[32] (Case No IV/M.784—*Kesko/Tuko*), para. 7.
[33] (Case No IV/M.784—*Kesko/Tuko*), para. 11 (emphasis added).
[34] (Case No IV/M.784—*Kesko/Tuko*), para. 12.
[35] (Case No IV/M.784—*Kesko/Tuko*), paras 5 and 39.
[36] (Case No IV/M.784—*Kesko/Tuko*), paras 6 and 39.
[37] (Case No IV/M.784—*Kesko/Tuko*), para. 63.
[38] (Case No IV/M.784—*Kesko/Tuko*), para. 65.
[39] (Case No IV/M.784—*Kesko/Tuko*), para. 38.

> the three daily consumer markets […] are vertically connected in such a way that the that the position of Kesko and Tuko on the retail market for daily consumer goods creates the basis for their positions on the procurement markets (e.g. vis-à-vis suppliers of daily consumer goods). Conversely *their position at the procurement level significantly affects their position at retail level*.

Kesko argued first that the operation was to be assessed only at the wholesale but not at a retail level.[40] If accepted, this would not have fully captured all of the markets involved or the full effects of the merger. Due to this, the Commission rejected this,[41] and proposed the assessment in three markets, only one of them relevant for buyer power assessment—the retail market for daily consumed goods; the market for cash and carry sales of daily consumed goods as sellers; and the markets for procurement of daily consumer goods as buyers.

Selling markets

The retail market for daily consumer goods for the operation was defined as comprising the provision for end consumers of fresh and dry food-stuffs and non-food household consumables sold in supermarkets—not including specialised stores, kiosks or petrol stations.[42] Geographically, this market was defined as covering all of Finland and was not based on national, regional or local levels as the market shares of Kesko and Tuko remained constant through the whole of the country.[43]

At the time of the merger in Finland, this retail market for daily consumer goods was one of the most concentrated in Europe.[44] If the concentration had taken place, the 'K-block would account for at least 55% […] of all sales of daily consumer goods in Finland'.[45] Not only would this have reached the presumption of dominance,[46] but the combined market share would have trebled the shares of the second largest competitor, SOK, with 21.9% of the market share.

On the other hand, the *wholesale market* for cash and carry sales of daily goods consisted in a situation in which 'customers provide the transport themselves, and pay for the goods in cash rather than on credit', particularly used for smaller buyers that will later on resell to end consumers, typically represented by smaller companies and in the industrial household business (hotels, restaurants, hospitals). In this market, the main purchases from both Kesko and Tuko were dry food products, amounting to 60–70% of the volume of sales in this market.[47]

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[40] (Case No IV/M.784—*Kesko/Tuko*), para. 14.
[41] (Case No IV/M.784—*Kesko/Tuko*), para. 15.
[42] (Case No IV/M.784—*Kesko/Tuko*), para. 20.
[43] (Case No IV/M.784—*Kesko/Tuko*), para. 22.
[44] (Case No IV/M.784—*Kesko/Tuko*), para. 93.
[45] (Case No IV/M.784—*Kesko/Tuko*), para. 93, emphasis added.
[46] Judgment of 3 July 1991 in AKZO v Commission, C-62/86, EU:C:1991:286, para. 60.
[47] (Case No IV/M.784—*Kesko/Tuko*), paras 24–8.

Importantly, customers in this market were found to be captive in practice as they would not be able to switch easily to 'classic' wholesaling due to storage and financial means,[48] highlighting the dependence in which they were as buyers but not as sellers *vis-à-vis* the proposed merger parties. Geographically, the cash and carry market was assessed regionally and not nationally due to the long distances and low population density in Finland.

Only the market for procurement of daily consumer goods had a particular buyer-orientated perspective. This market involved the sale of daily consumer goods by producers to wholesalers, retailers and other business. Due to the specificity of the purchases, each product or product group was seen as 'an individual product market'.[49] However, due to the characteristics in Finland, the Commission concluded that it was 'not necessary to assess the impact of the concentration on each individual product or group of products. It is sufficient to assess the impact of the increased buying power, brought about by the new demand structure, across the whole range of daily consumer goods'.[50] This purchasing market was found to be Finland as a whole.

4.1.3 Theor(ies) of harm

Selling-side concerns

The Commission's investigation focused on the creation of what would have been at the time a dominant position in the retail market for daily consumer goods. Such a dominant position would have led to a price increase in the food retailing market, affecting end consumers. Unequivocally, the Commission stated that:[51]

> The combined market share of Kesko and Tuko of at least 55%, whether assessed at local, regional or national level creates a presumption of dominance. This presumption is further strengthened by Kesko's and Tuko's position as regards large retail outlets, their control of a significant part of all business premises suited for retail outlets in Finland, their customer loyalty schemes and private label products, their distribution systems and, not least, by the position of their central organs as buyers of daily consumer goods.

This large market power, reaching dominance, and the relatively small size of the competitors, led the Commission to conclude that no competitor would have been able to 'restrict Kesko's behaviour in the market in any significant way, and in particular if it were to increase consumer prices'.[52]

[48] (Case No IV/M.784—*Kesko/Tuko*), para. 29.
[49] (Case No IV/M.784—*Kesko/Tuko*), para. 34.
[50] (Case No IV/M.784—*Kesko/Tuko*), para. 34.
[51] (Case No IV/M.784—*Kesko/Tuko*), para. 106. See also remarking this point in the decision and linking it buyer power: Ezrachi, A. and Ioannidou, M. (2014), 'Buyer power in European Union merger control', *European Competition Journal*, **10**:1, p. 79.
[52] (Case No IV/M.784—*Kesko/Tuko*), para. 137.

This conclusion applied for Kesko as a retailer/seller but not as a buyer. In addition to pure market shares and the risk of a price increase without being constrained by its much smaller rivals, entry barriers were present in the market—preventing new entrants from accessing the market. We consider these entry barriers in our discussion below.

Entry barriers

The Commission stressed that allowing such concentration would have led to the creation of significant entry barriers in the food retailing market, particularly because it would have allowed the merged entity to control and have presence throughout Finland in large establishments, defined as those larger than 1,000m^2.[53]

Furthermore, due to the nature of the food retailing business in Finland and the difficulty of acquiring the necessary authorisation from local governments to operate such a business, the fact that both Kesko and Tuko controlled significant number of business premises was also seen as a way to 'maintain and increase the strength of the dominant position held by Kesko and Tuko'.[54]

The use of loyalty schemes, in the form of the K-advantage card—with 600,000 issued—created a loyalty-inducing effect for customers. Additionally, it provided Kesko with personalised information about its customers and their purchasing patterns to a 'level which none of its competitors can match'.[55]

The presence of Kesko's private brands, accounting for up to 20–30% of all its sales, was seen as another key barrier to competition. Some of these products were found to be exclusive, which not only could have raised issues of entry barriers, but could grant Kesko the possibility to 'price a greater proportion of its sales without having the need to take into account the reaction of its competitors in the same way as with branded products'.[56] This situation along with the buyer power-related effects of private labels, was also seen as a cause for anticompetitive concern in the food retailing market.

Lastly, the food retailing market was affected due to the presence of Kesko's subsidiary as a distributor/transporter of goods, controlling the two only systems in Finland for distribution for frozen foods. The acquisition would have allowed Kesko to influence the way in which frozen

[53] (Case No IV/M.784—*Kesko/Tuko*), paras 106–12.
[54] (Case No IV/M.784—*Kesko/Tuko*), para. 118.
[55] (Case No IV/M.784—*Kesko/Tuko*), para. 121.
[56] (Case No IV/M.784—*Kesko/Tuko*), para. 130.

goods were transported, increasing third party retailers' dependence on Kesko and constituting a 'significant barrier to entry on the retail market'.[57]

The analysis in the cash and carry market was not very different either. This was a 'very concentrated' market in which Kesko and Tuko clearly dominated the distribution outlets and in which there were very few other cash and carry outlets among three other groups. With the concentration, the merged entity would have reached a combined market share of over 80% across the country, and at least 50% in each of the different Finnish regions.

Buyer-side concerns

Buyer power was also a factor when evaluating the merger and determining that it would have led to the creation of a dominant position in the three markets that were investigated. While these concerns were not the main reason to block the merger, they were of some importance. As stressed by the Commission, the 'main competitive concerns identified by the Commission concerns the retail market, which is the main market, in terms of turnover as well as [the] direct impact on Finnish consumers'.[58] The case also illustrates well the complex relation of reinforcement that buyer power and seller power have when combined in a single entity.[59]

Buyer power concerns were raised by the Commission in all studied markets. The focus of this analysis, however, was the markets for procurement of daily consumer goods. Food retailing distribution happens mostly through supermarkets and *Kesko/Tuko*, in which they would have had 55% of the national market share, followed by cash and carry, in which it reached 80% of the Finnish market.

Interestingly, the Commission combined concerns about possible exploitation of dependent suppliers, even though there was no mention of how this could have taken place, which in other cases has been discussed based on the theory of monopsony practices or abusive (and unfair) purchasing conditions. Kesko would have used the buyer power to the detriment of competitors as retailers in the downstream market to further weaken 'the position of its competitors' in the long term.[60]

The Commission directly linked seller market power to the granting of buyer power when it held that such position 'guarantees Kesko **an extremely powerful negotiating position *vis-à-vis* the producers of daily consumer goods**'.[61]

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[57] (Case No IV/M.784—*Kesko/Tuko*), para. 132.
[58] (Case No IV/M.784—*Kesko/Tuko*), para. 170.
[59] Herrera Anchustegui refers to this as the 'hourglass effect' in Herrera Anchustegui, I. (2017), *Buyer Power in EU Competition Law*, Institut de droit de la concurrence. See also: Van Doorn, F. (2015), *The Law and Economics of Buyer Power in EU Competition Policy*, Eleven International Publishing, pp. 163–4.
[60] (Case No IV/M.784—*Kesko/Tuko*), para. 153.
[61] (Case No IV/M.784—*Kesko/Tuko*), para. 146, emphasis added.

This buyer power surges based on volume of purchases and the centralised way Kesko acquires goods for its suppliers. The Decision shows how 'the majority of the suppliers (including several major multinationals) that replied to the Commission's investigation indicated that *they depend* on Kesko and Tuko for approximately 50–75% of their total sales in Finland'.[62] Furthermore, most of these suppliers would not have been able to switch to another buyer if *Kesko/Tuko* had exerted exploitative buyer power.[63] Dependence was the crucial factor for assessing risks of buyer market power abuse—even though some large sellers were *not* as they had countervailing (seller) power.[64]

Private labels not only granted some market power *vis-à-vis* downstream consumers but also buyer market power in relation to the suppliers of the proposed entity, especially in combination with loyalty scheme programmes.[65] This dual nature of supplier and retailer for private goods grants them privileged information about their rivals (who produce branded goods). For the Commission, this 'increases the leverage enjoyed by retailers over branded goods producers'.[66]

Despite these concerns, for the Commission these buyer power risks pertain to the procurement of daily consumer goods alone and in themselves do not appear to be enough to block the merger. Instead, and as we will see below, the emphasis seems to have been placed on the fact that 'given that the concentration would lead to dominant positions on the retail and cash and carry markets, the Commission is of the opinion that the increased buying power of Kesko would further reinforce the dominant position of Kesko on the retail and cash and carry markets'.[67]

In the retail of daily consumer goods—the core of the case—buyer power increase also played a role. If the merger would have been approved, the new entity would have become a market gatekeeper and necessary trading partner, being a retailer with with 55% of the market. This 'gatekeeper effect' would be further increased by the combination of the successful Kesko and Tuko private label products, which could be used as a tool when negotiating with suppliers to achieve additional concessions on, *inter alia*, reduced prices or increased marketing support'.[68]

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62 (Case No IV/M.784—*Kesko/Tuko*), para. 148, emphasis added.
63 (Case No IV/M.784—*Kesko/Tuko*), para. 151.
64 (Case No IV/M.784—*Kesko/Tuko*), para. 150.
65 See also on this: Ezrachi, A. and Ioannidou, M. (2014), 'Buyer power in European Union merger control', *European Competition Journal*, **10**:1, p. 79.
66 (Case No IV/M.784—*Kesko/Tuko*), para. 152.
67 (Case No IV/M.784—*Kesko/Tuko*), para. 153.
68 (Case No IV/M.784—*Kesko/Tuko*), para. 133.

In the market for cash and carry sales, similar buyer power issues as discussed above in the market of retail of daily consumer goods would have arisen. This was due to the fact that the merged entity would have been able to foreclose its rivals and act as a gatekeeper.[69]

Lastly, buyer power was also a concern for potential competition from foreign undertakings. The buyer power of the proposed entity would have been 'one of the most significant barriers to foreign entry, since one of the key questions for any potential entrant will be to secure access to daily consumer goods at prices which allows such an entrant to effectively compete with Kesko' in the investigated markets.[70]

4.1.4 Outcome

Despite some offered commitments involving the divestiture of its assets and the creation of a new block of retailers on the market,[71] the assessment by the Commission concluded that the merger was contrary to EU law and it was therefore declared to be incompatible with the common market. In addition, as the concentration had been implemented *before* the Commission established its ruling on the case, measures to restore the situation as if the fusion had not taken place were implemented. Kesko appealed the Decision before the General Court, but the action was dismissed in its entirety.[72]

4.2 Carrefour/Promodès

4.2.1 Operation and the parties

On 30 August 1999, Promodès, a French food retailer with 8–13% market share domestically, gave the green light to its acquisition by its major rival Carrefour, another French food retailer with about 12–17% of the French food retailing market share.[73] As we discuss in detail below, the merger operation entailed some market power abuse risks in two markets. Yet a dominant position would not have emerged in either the upstream or the downstream market.[74] A first market power abuse risk pertained to food distribution/retailing *vis-à-vis* end consumers (downstream market) due to possible price increases and existing barriers of entry; and a second market power abuse risk pertained to the purchasing (upstream) market in which the merged entity could abuse its buyer power *vis-à-vis* its suppliers as well as associated exclusionary risks for other large buyers that compete with it as a food retailer in the downstream market. Despite the concerns in both markets, in which buyer power was one

[69] (Case No IV/M.784—*Kesko/Tuko*), para. 144.
[70] (Case No IV/M.784—*Kesko/Tuko*), para. 158.
[71] Ezrachi, A. and Ioannidou, M. (2014), 'Buyer power in European Union merger control', *European Competition Journal*, **10**:1, p. 79.
[72] Judgment of 15 December 1999, Kesko v Commission, T-22/97, EU:T:1999:327.
[73] COMP/M. 1684—*Carrefour/Promodès*, full (French version) of 25 January 2000.
[74] Ezrachi, A. and Ioannidou, M. (2014), 'Buyer power in European Union merger control', *European Competition Journal*, **10**:1, p. 81.

aspect but not the sole aspect considered, the operation was declared compatible with the market as it did not create or strengthen a dominant position in the French food retailing market.

As announced, the operation was to create a single group that would have control over more than a quarter of the French food retailing market and which would form the largest retail group in the European Community at the same time. The merger had a community dimension with an estimate combined worldwide of €5bn.[75] Due to this, it fell within the scope of the Council Regulation on the control of concentrations between undertakings (Merger Regulation).[76] Pursuant to Article 4(1) of Merger Control Regulation of 1989, this acquisition was reported to the Commission to be assessed on 5 October 1999.[77]

At the time of the notification, Carrefour and Promodès were holding companies specialised in retail activities carried out across France, Spain, Italy, Greece and Portugal.[78] They centred their activities in large stores combining food and non-food products (predominantly hypermarkets and supermarkets) that covered a total area exceeding 4.1m square metres—almost double of the shopping space of the largest rival (Intermarket).[79] Through the similar business models of the merging retailers and the considerable gains resulting from the acquisition, Carrefour was set to take a leading role in the French market, increasing the number of its selling points by 150%.

Two main markets were seen as being affected by the operation, both related to food retailing.[80] On the one hand, the distribution market ('le marché aval') in which supermarkets are in contact with end consumers as suppliers of food stuff, i.e.: the downstream retailing market. On the other hand, the purchasing market ('le marché amont'), in which supermarkets acquire goods from food suppliers and product producers. This is an aspect that, as in *Kesko/Tuko*, reinforces buyer power exertion risks in both associated markets, as well as creating some gatekeeper effects.[81]

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[75] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), para. 6.
[76] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ L 395, 30.12.1989, p. 1).
[77] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), para. 1.
[78] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), para. 8.
[79] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), para. 39.
[80] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), para. 8.
[81] For a discussion regarding gatekeeping and buyer power see: Grimes WS, 'Buyer Power and Retail Gatekeeper Power: Protecting Competition and The Atomistic Seller' 72 Antitrust Law Journal [2004–05], 563; Herrera Anchustegui, I. (2017), *Buyer Power in EU Competition Law*, Institut de droit de la concurrence, paras 440–8.

Relevant market delimitation

As already mentioned, two markets were the focus of the assessment, both of them associated with food retailing. The investigation distinguished a distribution market in which both parties act as retailers *vis-à-vis* end consumers.[82] Here, the Decision distinguishes small local stores from medium and large stores (supermarkets and hypermarkets), these later being the focus of the analysis.

However, unlike in *Kesko/Tuko* case, the definition of the market was supplemented with groups of products.[83] The Commission subscribed to the catalogue of 23 groups suggested by the parties, simultaneously recognising different dynamics between each group.[84] The justification of this approach stems from the usual broad range of merchandises offered in supermarkets or big-box stores, including not only groceries but also department store goods.

In the national food retailing (distribution) market the Commission assessed the market shares of both Carrefour and Promodès by taking into account both the surface of shops in the country as well as the market shares as sellers. Carrefour had between 10% and 15% in surface, while in sales it represented 12–17%, while Promodès had 8–13% and 8–13% respectively. Together, the merged entity would have reached between 25% and 30% both in surfaces and sales.[85] Post-merger, the joint entities would become France's largest food retailing distributor,[86] with Intermarché, Casino and Leclerc not too far behind in a market that is not hugely concentrated (with percentages between 10% and 20% of the market).

Additionally, an upstream purchasing market—in which buyer power played a key role—was defined as the sale of goods by producers to the distributors, small retailers or other types of larger buyers (hotels or restaurants).[87] In this product market, the Commission took account of the degree of flexibility left to the suppliers' appreciation after the operation, as the flexibility varies from product to product (or sector to sector).[88] This level of discretion is crucial, as highlighted by the Commission and surveyed suppliers, as the change of distributor (buyer) would be troublesome (the change can be associated with modification to product size, package or label design)—and as a result it would also require considerable investment.[89]

[82] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), paras 9–13.
[83] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), para. 16.
[84] For instance, products categorised as appliances (RTV or household appliances) or textile comprised a fraction of hypermarket sales, and had other (specialised) outlets—contrary to most of the groceries (see (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), para. 94).
[85] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), para. 36.
[86] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), para. 40.
[87] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), para. 14.
[88] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), para. 15.
[89] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), para. 20.

Market delimitation accounting for differences in each product group was particularly useful in assessing the position of suppliers confronted by the merger of Carrefour and Promodès—companies that jointly held 25–30% of market share.

Regarding the geographical market, the assessment is based on a study at the national level of competition, in line with the view presented by parties on the one hand and suppliers on the other.[90] The Commission noted that activities such as advertising campaigns, launches of new products and customer loyalty policies are predominantly carried out on the national level.[91] Its Decision reiterates finding of the case *Rewe/Meinl*,[92] stressing that the supply should be considered on the national level,[93] because distributors exercise their buyer power rather domestically than locally or regionally.[94] On the other hand, for the downstream market, the Commission did not raise serious doubts, regardless of geographical delimitation.[95]

4.2.2 Theories of harm

As in *Kesko/Tuko*, the Commission assessed competitive risks both in the market regarding food retailing (distribution) and the purchasing market. This reinforces the proposition that buyer power has, yet again, a clear dual effect in markets, and that buyer market power typically reinforces seller market power.

Due to the nature of our analysis, there is only a short discussion of the concerns regarding seller market power. In the downstream market, the concerns were about price increases as well as entry barriers and foreclosure effects *vis-à-vis* other food retailers. Of particular importance for this were that: (i) Carrefour and Promodès were the only actors present in all the markets of different food distribution models (hypermarkets, supermarkets, large stores and small proximity stores);[96] (ii) the new entity would be the leader of the hypermarket segment with a market share of 25–35%;[97] (iii) it would have a particularly strong opinion regarding fidelity cards;[98] a more integrated structured than its rivals;[99] or (iv) more financial strength than its competitors.[100]

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[90] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), para. 31.
[91] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), para. 25.
[92] Rewe/Meinl, Commission Decision 1999/674/EC [1999] OJ L274/1.
[93] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), para. 28.
[94] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), para. 30.
[95] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), para. 27. For the analysis of catchment areas in local downstream markets in present case, the Commission referred to the French and Spanish authorities, as they requested ((Decision 1999/C359/10, *Carrefour/Promodès* [2000]), para. 34 and 108).
[96] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), paras 56–9.
[97] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), paras 57–63.
[98] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), paras 63–5.
[99] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), paras 66–9.
[100] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), paras 70–5.

Concerning the purchasing market, the concern expressed was on the ability of the new entity to exert pernicious buyer market power over providers of the merged entity, to the point that they could be exploited as being in a 'de facto situation of "economic dependence"'.[101] We discuss this in further detail below.

The major anticompetitive effect preliminarily found in the assessment of the operation was to strengthen Carrefour's position in relation to its suppliers, as well as competitors, in particular in France. Two factors played a major role here.

On the one hand, Carrefour owned 42% of shares in another competitor, Cora,[102] another food retailer present in the distribution/downstream market with a market share in France of about 5–10%.[103] Even though Carrefour was not a majority shareholder, it could have a considerable influence on the decision-making processes in Cora. Additionally, it could have undermined Cora's competitiveness in the retail markets, casting some doubts on Carrefour's position *vis-à-vis* its competitors (and suppliers). Because of that, the company committed to tender its Cora's shares.[104]

The second concern regarded the situation of small and medium suppliers who could find themselves in the disadvantageous position upon the acquisition. The Commission provided the detailed rationale and justification of this concern in its Decision from 25 January 2000.

Buyer-power concerns: the menace point or spiral effect

Pernicious possible effects derived from the exertion of buyer power in the upstream purchasing market were the subject of extensive analysis in the Decision, focusing on what the Commission called 'taux de "menace"' or the 'threat point',[105] also known as the 'spiral effect'.[106] This theory concerns the threat point or ability to exert abusive buyer power against suppliers that could be in a situation of economic dependence was firstly used in another supermarket merger case, *Rewe/Meinl*, an operation that, despite concerns about buyer power abuse, was declared compatible with the internal market.[107] According to this spiral or threat point effect, buyer power upstream increases market concentration downstream, leading to a vicious circle of more retailer power and the capacity to later on reap monopoly profits from end consumers due to the creation of entry and exit barriers.[108]

[101] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), para. 52.
[102] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), para. 83.
[103] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), para. 36.
[104] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), para. 90.
[105] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), paras 52–5.
[106] See also on this issue: Ezrachi, A. and Ioannidou, M. (2014), 'Buyer power in European Union merger control', *European Competition Journal*, **10**:1, p. 81.
[107] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), para. 52.
[108] Herrera Anchustegui, I. (2017), *Buyer Power in EU Competition Law*, Institut de droit de la concurrence, p. 67.

The Commission consulted with the suppliers regarding the point at which they considered the loss a customer to represent 'a threat for the existence of their business'. In this case, suppliers indicated that when a buyer represents 20–22% of their turnover, they would be in a state of 'economic dependence' regarding said buyer. Interestingly, the same average threshold resulted from the surveys of suppliers in *Rewe/Meinl* case'.[109]

Based on this, the Commission concluded that 'when a distributor exceeds such threshold [22%] of the turnover of one of its suppliers', there is a situation of economic dependence[110]—a figure that sows resemblance with that of national rules dealing with relative dominance, but which does not exist in EU competition law.

This threshold was reached regarding some particular types of products related to the drugstore, hygiene, dry groceries and perfumery sectors.[111] None of the merging entity competitors as buyers and retailers would have achieved more than 20% of this turnover representation in most product groups, reinforcing the strong buying position of the merging parties.[112]

As remarked by Herrera Anchustegui before:[113]

> Importantly, and a factor that may easily be overlooked, is that this 22% does not represent the undertaking's market shares in the purchasing market but instead *represents the ratio of sales that a buyer signifies for a particular buyer*. However, this situation was not isolated concerning a single supplier of a single product (which qualifies as an individual market) but happened in at least ten of the markets affected by the merger. In practice, this may imply that even a buyer with a small total purchasing market share may still have *relative* buyer power vis-à-vis a particular supplier but not *general* buyer power. Yet and at least for concentration assessments, relative buyer power may be an issue that can, along with other circumstances, imply that the operation may not be compatible with the internal market.

Lastly, the Commission reinforced its argument by stressing the relationship between buyer power and seller power—which has been called by Herrera Anchustegui the 'hourglass effect'. Explicitly, the Commission stated that due to Carrefour's specific advantages in the downstream markets, these could 'strengthen the new downstream entity and, consequently, have a significant impact on its position *vis-à-vis* its suppliers'.[114]

Two other aspects were discussed that are linked to buyer power concerns. Firstly, after the acquisition Carrefour was also expected to enjoy some specific advantages stemming from its

[109] (Decision 1999/674/EC, *Rewe/Meinl* [1999]), para. 101.
[110] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), para. 52.
[111] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), para. 53.
[112] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), para. 54.
[113] Herrera Anchustegui, I. (2017), *Buyer Power in EU Competition Law*, Institut de droit de la concurrence, pp. 175–6.
[114] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), para. 55.

new position in the market and reinforcing its buyer power. Chiefly, these advantages were linked to two determinants: the scale of the new group (the higher the purchase volume, the more preferential conditions offered by suppliers),[115] and a profitable emphasis on hypermarkets in the business model (the more substantial the area of a selling point, the broader range of suppliers' products that might be presented—hence, the greater interest in commercial relations with such a distributor).[116]

Secondly, the substantial sales area allowed Carrefour to introduce profitable private labels. In principle, Carrefour's presence in the offer leaves the retailer greater room for manoeuvre and strengthens its power over suppliers.[117] Essentially, it allows the company to obtain more generous concessions from its suppliers as a part of the bargain offsetting private label policy.

Additionally, and as part of an analysis related to a possible existence of collective dominance that was dismissed, the Commission raised the fact that with respect to suppliers other competitors of the merging parties reached the 'threat point'. It went further and argued that due to the new market structure after the concentration, 'many supplies two, three or four customers representing, each, such a large part of their total sales that the refusal of listing of a only one of them would create insurmountable difficulties for the suppliers concerned'.[118] As a consequence, suppliers would not only face a threat related to the loss of a single, large client, but the turnover in one product group might almost entirely depend on two or three players only. Therefore, it seems that the Commission makes use of the threat (risk) rate to determine and assess structural challenges in the market, while the meaning of this rate in individual merger cases is limited.[119]

Buyer power concerns were also briefly mentioned when reviewing the effects of the operation in Spain.[120] In the segments of 'drugstore', 'self-service perishable products' and 'dry groceries', the merging parties also reached the threat point, putting their suppliers in a situation of economic dependence. The Commission also stressed that competitors to the margining entities had a proportion of sales that did not reach the threat point between 20% and 22%.

Interestingly, the Commission did not discuss in the Decision how this economic dependence could be exploited, either in the French or Spanish markets. However, it can be inferred that it would have been an exploitative exertion of buyer power *vis-à-vis* suppliers, akin to those of unfair purchasing practices that are often associated with food retailing, and which we will discuss further.

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[115] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), paras 45–6.
[116] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), para. 63.
[117] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), para. 75.
[118] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), para. 97.
[119] In this case, the French retail market after entry into force of the so-called *Galland Law*, see (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), para. 100–4.
[120] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), para. 127.

4.2.3 Searching for solutions

Despite the upstream and downstream competition risks that were generated by the proposed operation, the assessment made by the Commission indicates that, in general, this would have been a concentration not leading to the creation or strengthening of a dominant position. Again, the concerns about economic dependence in the upstream market, from the text of the Decision, seem to indicate that the concern was limited to some type of products and little was said *how* such dependence could be abused.

However, the merging parties offered a series of commitments to mitigate any risks associated with the concentration. As remarked by Herrera Anchustegui before, none of them were linked directly to buyer power abuses as, '[t]he commitments addressed the buyer dependence indirectly as it was ordered to divest some stores that represented alternative buyers for the suppliers who would have been less dependent on the single entity'.[121]

In general, Carrefour pledged not to modify the contracts concluded with suppliers that were in force on a day of the Decision of the Commission. Annex 2 outlines the main characteristics of that commitment, specifying which suppliers are subjects to it, what is the duration as well as further details, dispute resolution clause,[122] and exceptions.[123] This pledge was meant to serve as protection for small and medium suppliers,[124] the turnover of which did not exceed EUR 1.5bn, and was designed to temporarily (and effectively) limit a buyer power of the new Carrefour/Promodès group *vis-á-vis* suppliers.

5 Countervailing buyer power as a defence in cardboard mergers

Unlike in the previous two cases, buyer power themes arising in mergers may be used by merging parties and competition authorities to determine whether a power buyer may sufficiently neutralise or countervail risks of anticompetitive seller power. The Enso/Stora merger[125] in which two entitied involved in the forest industry and manufacturing of paper and pulp board, is a classic example of sufficient countervailing buyer power exerted by TetraPak (a buyer of liquid packaging board). [126]

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[121] Herrera Anchustegui, I. (2017), *Buyer Power in EU Competition Law*, Institut de droit de la concurrence, pp. 186–7.
[122] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), Annex 2, para. B.
[123] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), Annex 2, para. A2.
[124] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), para. 135.
[125] COMMISSION DECISION of 25 November 1998declaring a concentration to be compatible with the common market and the functioning of theEEA Agreement(Case No IV/M.1225—Enso/Stora) (OJ [1999] L 254/9).
[126] See also highlighting this: Ezrachi, A. and Ioannidou, M. (2014), 'Buyer power in European Union merger control', *European Competition Journal*, **10**:1, p. 85; Baker, S. and Lofaro, A. (2000), 'Buyer power and the Enso/Stora decision', *European Competition Law Review* , **21**, p. 187.

5.1 *Enso/Stora*: the merging parties and the operation

On 18 June 1998, Enso Oyj ('Enso') and Stora Kopparbergs Bergslags AB ('Stora') notified the European Commission their intention to fully merge creating a new company, Stora Enso Oyj ('Stora Enso'), pursuant to Article 4 of the then in force Regulation 4064/89 ('the Merger Regulation'). Enso and Stora were both companies involved in the forestry business. Enso, a company incorporated in Finland, and operating and owning production plants in Europe as well as Asia, was involved in 'activities Consist[ing] of wood procurement, paper and board manufacturing, pulp and sawmilling' as well as being a merchant.[127] Stora was a Swedish corporation with production plants in Europe as well as Canada and operating in the forest industry, particularly regarding production of paper and board as well as active in sawmilling.[128]

The concentration was configured as a public bid for all of Stora's shares and reaching a community dimension with a global turnover above €5bn; on acquisition, former Stora's shareholders would receive newly issued shares in Enso, becoming Stora a subsidiary wholly owned by Enso. Interesting, the largest shareholder of the proposed entity was to be the Finnish State with 17,6% of the shares and 21% of the voting rights.[129]

5.2 Markets affected by the concentration

As a whole, the operation had an impact in several markets: newsprint, magazine papers, fine papers, corrugating raw materials, consumer packaging and pulp. In the assessment, the European Commission focused on some of these sub-markets: newsprint (paper for newspapers), magazine paper, and consumer packaging board. In the case of newsprints, magazine paper, and non-liquid packaging board the EU Commission found that the merger, despite the parties now increasing their market presence and under some risks of leading to an 'oligopolitically dominant position'. Interestingly, in these cases, and particularly in the case of newsprint, countervailing buyer power was briefly assessed as an element to determine the compatibility of the operation in these markets.

Newsprint market

In the case of newsprint, the proporsed entity would have had between 20% and 30% market shares—with a few other competitors having markets shares of 10–20% such as UPM–Kymmene, or 10–15% for Norske Skog. This led the Commission to conclude that this market was 'fairly concentrated. The six leading producers account for about 75%'.[130] Such

[127] Case No IV/M.1225—Enso/Stora, para. 3.
[128] Case No IV/M.1225—Enso/Stora, para. 4.
[129] Case No IV/M.1225—Enso/Stora, para. 6.
[130] Case No IV/M.1225—Enso/Stora, para. 61.

concentration levels led the Commission to find such a selling market to constitute an oligopoly formed by the six largest newspaper sellers —accounting for up to 75% of the market.[131] In contrast to the selling side, the Commission found that there were two large buyers, accounting for about 25–35% of the market—who 'are a source of stability, and therefore security, since losing or partly losing a large customer could cause substantial problems for a supplier to fill its mill capacity. Suppliers are, therefore, very sensitive to losing large customers'.[132]

The Commission assessed whether the concentration in this oligopolistic market could lead to an increase in prices *vis-à-vis* the largest buyers, increasing the overall market price level. The Commission found that 'the characteristics of the newsprint market indicate a market with few incentives for the members of the oligopoly to compete'.[133] Moderate growth, supply-side concentration and therefore buyer power (although not discussed), product homogeneity, and technology maturity contribute to this as well as an increase 'in the Herfindahl–Hirschman Index of 313 points'.[134] Despite this, the concentration was found 'not to lead to the creation or strengthening of an oligopolistically dominant position'.[135] This was the case as there was no price market transparency, some potential competition from outside the Union, and some limited '**countervailing purchasing power of the largest buyers appears to exist**, too'.[136]

In the Decision, there is no discussion of the assessment of said existence of countervailing buyer power in the newsprint market. We assume that this mentioning in passing was based on the relatively purchasing market concentration with two large players and in which size (market shares) and the fact that these buyers 'buy volumes that could fill the complete capacity of some of the large producers',[137] were the main buyer power sources evaluated.

Magazine paper

Paper used for magazine and its production was another of the EEA affected matters. The merging parties would have reached a market share of approximately 20–25%—based on these low thresholds and the market conditions it concluded in a very small assessment that the 'operation does not lead to the creation or strengthening of an oligopolistically dominant position in the market of magazine paper'.[138]

[131] Case No IV/M.1225—Enso/Stora, para. 65.
[132] Case No IV/M.1225—*Enso/Stora*, para. 64.
[133] Case No IV/M.1225—*Enso/Stora*, para. 67.
[134] Case No IV/M.1225—*Enso/Stora*, para. 67.
[135] Case No IV/M.1225—*Enso/Stora*, para. 68.
[136] Case No IV/M.1225—*Enso/Stora*, para. 68 (emphasis added).
[137] Case No IV/M.1225—*Enso/Stora*, para. 63.
[138] Case No IV/M.1225—*Enso/Stora*, para. 71.

Non-liquid packaging board

In this market, after the concentration the parties would 'only achieve a market share [of 25–35%]* in the EEA'.[139] As the margining parties produce different goods with these characteristics, there would be very little overlapping in the specialised Non-liquid packaging board products, leading to the conclusion that the merger would not create competition risks.

Liquid packaging board

It was the liquid packaging board the core of the assessment—both regarding the merger leading to the creation or strengthening of a dominant position as well as the reasons why countervailing buyer power could neutralise such dominance. Thus, our analysis of the case as well the effects of the measures focus on this relevant product and geographic market.

Liquid packaging board was considered at the time a type of consumer packing board different to Non-liquid packaging board. These are boards made of virgin fibres, recycled fibres or a mix of them. Board is converted into carton, cups, boxes, etc, which are later sold to 'producers of food and non-food consumer products, including nonliquid and liquid foods, cigarettes, cosmetics and pharmaceuticals'.[140] In particular, liquid packing products are used to pack juices and milk, for example. Two types were identified, those aseptic packaging systems and the fresh packaging systems. The former has a long shelf life of up to two years, while the fresh packaging systems have a much shorter life of no longer than two weeks.[141] Board for packaging liquids contain a plastic coating or aluminium laminate. Furthermore, the Commission found these types of liquid packaging board do have differences to other boards and are not interchangeable as 'liquid packaging board must have a particularly high absorption resistance'.[142] Also, this type of packing as it contains food must comply with bacteriological, food-law and environmental requirements.

Customers for this kind of product are not diaries. Instead, they are converters and packagers, such as at the time Tetra Pak, SIG Combibloc and Elopak.[143] These buyers of board do not switch between packing materials and stick to their chosen one, making board not substitutable by glass or plastic, for example.

Geographic market for liquid packaging board

Enso and Stora submitted in their request for evaluation of the concentration that the relevant geographical market for liquid packaging board be a global one, based on a high level of

[139] Case No IV/M.1225—*Enso/Stora*, para. 72.
[140] Case No IV/M.1225—*Enso/Stora*, para. 18.
[141] Case No IV/M.1225—*Enso/Stora*, para. 22.
[142] Case No IV/M.1225—*Enso/Stora*, para. 25.
[143] Case No IV/M.1225—*Enso/Stora*, para. 33.

exports and imports in the EEA market.[144] Buyers of liquid packaging board, however, argued that outsourcing these materials from outside of Europe was not cost attractive due to transportation costs, duties and even environmental costs.[145] Furthermore, the Commission stressed that due to the existing European regulations, 'board grades in the EEA are developed to meet certain environmental requirements, which is not necessarily the case outside Europe'.[146] This, along costs, made imports to Europe of liquid packaging board from the US difficult and unlikely. Because of this, the relevant market for this product was defined to be only the EEA.[147]

5.3 Theory of harm that would have prevented the concentration to take place absent countervailing buyer power

As discussed, only the liquid packaging board relevant market as defined by the Commission raised anticompetitive concerns that could have led to declaring the merger as incompatible with the EU and EEA law.

In the EEA market the Commission estimated that 'the parties' market share in liquid packaging board applications would be [between 50% and 70%],* a position far ahead of the other players in the market', and which were much smaller in comparison.[148] Indication of such market shares threshold is usually synonym of dominance, and which would have led this concentration to be declared incompatible.

The Commission in this case did not proposed a clear theory of harm for the case—arguably because under the operation the merged entity would have reached a market position that would have been seen as creating a dominant position. This would be sufficient for the concentration to be prohibited under the regime at the time.

Potential competition

In this selling-market power-oriented assessment the Commission stressed several factors that would have allowed the merged undertaking to behave independently of its competitors in the future.

Entry barriers in this market were high—construction of a board machine, for example, reached 300m–400m ECU and were also highly specialised. The fact that there is little grow in demand and that in this industry economies scale are necessary were also seen as detrimental for new

[144] Case No IV/M.1225—*Enso/Stora*, paras 52–3.
[145] Case No IV/M.1225—*Enso/Stora*, para. 56.
[146] Case No IV/M.1225—*Enso/Stora*, para. 57.
[147] Case No IV/M.1225—*Enso/Stora*, para. 59.
[148] Case No IV/M.1225—*Enso/Stora*, para. 73.

entry.[149] These observations led the Commission to affirm the existence of barriers of entry hindering the entrance of new rivals in this liquid packaging board market.

The position of potential rivals was also discussed. This included both current rivals in the European market and potential rivals from outside of the EEA. For both, one factor taken into account was the time needed to enter the market, several years due to the specificities of producing the board mill combined by the need for investment into an item which would be a sunk cost.[150] Also for both, not much discussion on the competitive risks of the merger nor the strategies to be adopted by rivals after were thoroughly discussed.

In the case of existing rivals in the EEA, Korsnäs and AssiDomän, the merging parties argued that these entities had capacity to increase their production and had recently increased capacity as well. The Commission obtained evidence from them indicating that such an increase in production capacity was due to an increase in demand.[151] Additionally, the positions of other producers of board—but not of liquid packaging board—were evaluated and it was concluded that these entities would not enter this specific market.

One potential rival identified outside of the Union was a Russian undertaking, which produced a product of inferior quality and not suitable for the European market.[152] A Polish board producer was also evaluated (before Poland was an EU member), but this entity did not produce liquid packaging board and will not be able to export liquid packaging board to the EEA within the foreseeable future.[153]

5.4 Buyer power to the rescue?

The concentration thus appeared to be headed towards approval with serious commitments regarding the liquid packaging board market. However, the countervailing buyer power of a very large buyer, Tetra Pak, entered into the assessment to neutralise anticompetitive risks arising from the merger.[154] However, other two smaller buyers were also found to have some degree of buyer power.

The Commission stressed that:[155]

[149] Case No IV/M.1225—*Enso/Stora*, para. 75.
[150] Case No IV/M.1225—*Enso/Stora*, para. 78.
[151] Case No IV/M.1225—*Enso/Stora*, para. 81.
[152] Case No IV/M.1225—*Enso/Stora*, para. 79.
[153] Case No IV/M.1225—*Enso/Stora*, para. 80.
[154] See also stressing this when discussing dominance as a concept: Monti, G. (2006), 'The Concept of Dominance in Article 82', *European Competition Journal*, **2**, pp. 31 and 36–8.
[155] Case No IV/M.1225—*Enso/Stora*, para. 84 (emphasis added).

> Buyers of liquid packaging board are few and the market is *dominated by Tetra Pak*, which represents an estimated market share of *close to [between 60% and 80%]**. The other main buyers of liquid packaging board are Elopak and SIG Combibloc with about [between 10% and 20%]* of the EEA market each. After the merger *the structure of the supply-side will mirror the structure of the demand-side of the market*.

The merging parties argued that in such scenario all their buyers, but particularly Tetra Pak 'exercise considerable buyer power that prevents the producers of liquid packaging board from increasing prices'.[156]

In the analysis of the *sufficiency* of countervailing buyer power to offset the negative effects of the merger the Commission adopted a comparison approach, arguably inspired in the mirror-image of the market structure.[157] Importantly, the Commission stressed that existence of buyer power alone is not sufficient, but that such market power most be at least sufficient to 'neutralise the potential increase in market power of the merger between Stora and Enso'.[158]

Several factors were taken into account to conclude that Tetra Pak as well as two other much smaller buyers, Elopak and SIG Combibloc, had 'sufficient countervailing buyer power to remove the possibility of the parties' exercising market power'.[159]

Dependence

The Commission discussed the existence of some form of dependence between the parties. The concept of economic dependence is not rare to buyer power cases as we discussed before in the supermarket mergers analysed, and it is linked to the idea of an uneven bargaining position in which one party can force onto the other into accepting some contractual condition.[160]

In this case, the Commission found that due to the mirror image there was a *mutual dependence* between buyers and sellers in relations there were built over the years and were of a 'long-term nature and [in which] switching supplier of liquid packaging board is rare'.[161] Buyer and sellers

[156] Case No IV/M.1225—*Enso/Stora*, para. 85.
[157] For a thorough discussion on the sufficiency needed for countervailing buyer power to offset benefits and the associated test found in the Commission's practice see: Anchustegui, I. (2017), *Buyer Power in EU Competition Law*, Institut de droit de la concurrence, paras. 1159–74.
[158] Case No IV/M.1225—*Enso/Stora*, para. 92.
[159] Case No IV/M.1225—*Enso/Stora*, para. 97 (emphasis added).
[160] For some literature dealing with the issue of economic dependence in general, see: Këllezi P, 'Abuse below the Threshold of Dominance? Market Power, Market Dominance, and Abuse of Economic Dependence' in Mackenrodt M-O, Gallego BC and Enchelmaier S (eds), Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms? (Springer 2008); Falce, V. (2015), *The Italian Regulation Against the Abuse of Economic Dependence*; Bakhoum M. (2018), 'Abuse without dominance in competition law: abuse of economic dependence and its interface with abuse of dominance', in F. D. Porto and R. Podszun (eds), *Abusive Practices in Competition Law*, Edward Elgar Publishing.
[161] Case No IV/M.1225—*Enso/Stora*, para. 86.

explained that switching suppliers of board was complex and time consuming, besides of being capital intensive too.

Long term relationships, while not being a buyer power factor, were stressed in the analysis as connected to the idea of mutual dependence. Based on these types of relationships, producers of board tended to divide their production into specialised lines to supply specific buyers—tailoring their equipment to their needs.

Proportion of sales a buyer represents and sponsoring of entry as measures of countervailing buyer power

The role of Tetra Pak as a large buyer of liquid packaging board was highlighted. Tetra Pak acquired more than 50% of its demand from Stora and Enso. This represented 'the whole output of several board machines and about [more than 50%]* of the parties' total output for the EEA',[162] in a 50 versus 50 percent scenario. Losing such a large customer was found to be a major issue; the industry is based on economies of scale in which large suppliers need high rates of capacity utilisation and in which finding new buyers in the short term is not feasible.[163]

Not only Tetra Pak was a buyer representing at least half to the sales of the merging parties, but also due to its purchasing volume 'it would have the option of developing new capacity with other existing or new suppliers, should the parties attempt to exercise market power'.[164] This outside option tends to be the most important element for countervailing buyer power to be exerted.

Other buyers' situations

Instead of limiting the analysis to the sufficiency of countervailing by a single buyer, the Commission also assessed the purchasing power of two other much smaller customers of the merging entities, Elopak and SIG Combiblock. This is connected to the spillover effect requirement found in other countervailing buyer power cases.[165]

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[162] Case No IV/M.1225—*Enso/Stora*, para. 90.
[163] Case No IV/M.1225—*Enso/Stora*, para. 90. See also stressing the importance of capacity in the *Enso/Stora* case: Motta, M. (2006), *Competition Policy: Theory and Practice*, Cambridge University Press, p. 122.
[164] Case No IV/M.1225—*Enso/Stora*, para. 91. See also the commentary of this aspect of the case in Baker and Lofaro (2000), p. 188.
[165] For some cases requiring some degree of spillover of the countervailing power see: Commission Decision of 22 July 1992 relating to a proceeding under Council Regulation (EEC) No 4064/89 (Case No IV/M.190—*Nestlé/Perrier*) [1992] OJ L 356/1; Commission Decision of Non-opposition to a notified concentration M.4057—*Korsnäs/Assidomän Cartonboard* [2006] OJ C 209/12; Commission Decision of 31 January 2001 declaring a concentration to be incompatible with the common market and the functioning of the EEA Agreement (Case COMP/M.2097 *SCA/Metsä Tissue*) [2001] OJ L 57/1; Commission Decision of 3 April 2001 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (Case COMP/M.2139—*Bombardier/ADtranz*) [2002] OJ L 69/50.

The Commission noticed that the merger could 'weaken the buyer power of Elopak' because it ran joint converting activities in Lahti in Finland with Enso.[166] Although they were much smaller buyers, their orders were able to fill the capacity of a board machine. Due to these large volumes, it would be difficult for these companies to find alternative suppliers, but also meant that they could switch to other suppliers who would start producing liquid packaging board.[167] Also, as these buyers had suppliers outside of the EEA, this 'strengthens their countervailing buyer power' through dual sourcing strategies.

However, unlike Tetra Pak, these small buyers would have had only one actual EEA liquid packaging board in the EEA and have much smaller volumes. So, while they had some buyer power to counter a price increase, the merger would have shifted the balance (and arguably eliminated the sufficiency even if not discussed) between the parties.

At the same time, for the merging parties it was important to not exert selling market power against these smaller buyers to 'not to become completely dependent on Tetra Pak'.[168] This was interpreted by the Commission as a side effect of Tetra Pak's countervailing buyer power that would 'to a certain extent, spill over to Elopak and SIG Combibloc as well'.[169]

Therefore, the Commission concluded that while the merger will create a large supplier in the liquid cardboard market with more than 50% of the market shares, the exceptional market structure present meant that buyers had 'sufficient countervailing buyer power to remove the possibility of the parties' exercising market power'.[170]

5.5 Remedies adopted in the concentration

Despite the sufficiency of the countervailing buyer power to remove the only anticompetitive concerns raised in this operation—that one of increase in prices in the liquid packing cardboard—the merging parties decided to submit measures to facilitate the merger. These commitments, at the time named 'undertakings' partially addressed issues related to the reduction in buyer power by the two smaller clients, Elopak and SIG Combiblock.

First, Enso and Stora committed to create a 'a price protection mechanism for the smaller customers for a period of five years from the date of the completion of the merger'.[171] This mechanism implied that price increases to large buyers would not be smaller than to small customers in a percentage base, effectively neutralising the larger buyer power of Tetra Pak. Also, price decreases would follow same patterns. Yet, some exceptions to this promise

[166] Case No IV/M.1225—*Enso/Stora*, para. 93.
[167] Case No IV/M.1225—*Enso/Stora*, para. 94.
[168] Case No IV/M.1225—*Enso/Stora*, para. 96.
[169] Case No IV/M.1225—*Enso/Stora*, para. 96.
[170] Case No IV/M.1225—*Enso/Stora*, para. 97.
[171] Case No IV/M.1225—*Enso/Stora*, para. 101(a).

applied, upon notification to the Commission. Also, this price protection mechanism was to be audited annually yearly.[172]

Furthermore, the merging parties also committed not to hinder the opening of a duty-free quota on imports of liquid packaging board within the Community.[173]

Lastly, Enso and Elopak had some joint activities in Finland, which were seeing as detrimental for Elopak to exert some buyer power. Because of this, Enso agreed to 'to sell its entire interest in these activities to Elopak. Such a sale would remove any concerns that this link would reduce the countervailing buyer power of Elopak',[174] if the merger were to be accepted.

6 Role of buyer power in mergers and their review

The study of the effect of buyer power presents a number of practical challenges. This relates to a number of methodological and practical issues.

The key methodological challenge is how to isolate the effect of any changes in buyer power from the wider effects of the merger. To date, most quantitative ex post reviews of merger Decisions look at the effect of consumer prices. A good example is Allain et al. (2017) who discuss the effects of the Carrefour/Promodès merger on the French market for supermarkets. Similarly, Skrainka (2012) contains a discussion of welfare effects of UK supermarket merger between Morrison and Safeway.

Looking at the foreclosure theories of harm, the prediction is for prices to be lower post-merger as the predation strategy for the merging firms is implemented. But these prices may also be affected efficiencies incurred as part of the merger (Barros et al. (2006)).

Similarly, the prediction of countervailing buyer power is limited to no effect on prices post-merger; but this could equally be explained by the merging firms not being able to exploit an (expected) increase in market power.

This implies that any comparison of prices before and after the merger will not yield specific insights related to buyer power. Difference-in-difference would be an option. However, we see similar challenges as to isolate the effect of buyer power, one needs similar mergers that differ only with respect to the degree of buyer power (and not market power). For instance, in both the *Kesko/Tuko* case as well as the *Carrefour/Promodès* case, the Commission also identified (unilateral) competition concerns related to the market for the provision of daily consumer

[172] Case No IV/M.1225—*Enso/Stora*, para. 101(a).
[173] Case No IV/M.1225—*Enso/Stora*, para. 101(b).
[174] Case No IV/M.1225—*Enso/Stora*, para. 101(c).

goods. Our research suggests this is common amongst transaction in this time period such as also present in the *Rewe/Meinl* buyer power case and which, despite some concerns related to the spiral effect, was declared compatible with the internal market.[175]

However, it follows from the brief discussion of buyer power above that the effect of buyer power may not be consumer prices but on other elements such as assortment. Argentesi et al. (2016) investigate the effect of a Dutch supermarket merger on assortment.

The second issue is that buyer power is typically one of the theories of harm in a concentration. To measure the effect of a merger on buyer power based on bargaining theory, one would ideally understand the change in outside options for both firms to then be able to establish whether the merger has led to a change in the distribution of the surplus. With some exceptions for raw materials which are traded[176], most data on procurement terms are private.

Finally, we note that one of the two cases in our sample where buyer power was a theory of harm, *Kesko/Tuko*, is a prohibition case meaning that there is no clear counterfactual to study.[177]

Nonetheless, this chapter combines a number of strands of economic research to provide an overview of the role of buyer power in mergers. First of all, we present an overview of papers investigating the determinants of merger decisions. A number of these papers also touch on buyer power thus providing insight into how prevalent the topic of buyer power is and the effect it had on the outcome of a merger. Second, we discuss a number of papers that aim to quantify the effect of a merger on suppliers of the merging firms. Finally, we discuss a number of papers on the rationale for mergers and acquisitions to explore to what extent the pursuit of an increased bargaining position versus suppliers is an objective. We use this research as a backdrop for a discussion of increased concentration in the European food retailing industry.

6.1 Quantitative analyses of past merger Decisions

To assess the prevalence of buyer power in merger reviews and the effect of buyer power on the outcome of merger Decisions, we have done a review of a group of papers that analyse past EU mergers Decisions to assess which elements are relevant in determining their outcome.

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[175] See discussing this case: Ezrachi, A. and Ioannidou, M. (2014), 'Buyer power in European Union merger control', *European Competition Journal*, **10**:1, p. 76; Herrera Anchustegui, I. (2017), *Buyer Power in EU Competition Law*, Institut de droit de la concurrence.
[176] See for instance Lloyd et al. (2009) for a number of food items.
[177] We note that the merger was implemented ahead of the Commission's prohibition decision meaning that there was a period where the firms were merged. However, we consider that this period of several months during a competition investigation was not sufficient to study the effect of the combination.

These papers use different samples of case (EU only versus EU and USA; phase 1 vs phase 2 vs both). The common approach is these studies define a dependent variable to designate that the merger is challenged. This would mean a prohibition, a conditional approval or a withdrawal. These papers use a range of explanatory variables. The most frequent are market share, concentration levels and barriers to entry. Beyond that there is variation between the studies to include variables such as before or after the 2004 reform of the EUMR, 'political' factor such as the nationality of the firms involved. Some of the papers also include explanatory variables that link to buyer power.

Author(s)	Sample	Selected parameters
Lindsay et al. (2003)	245 EU merger Decisions between 2000 and 2002	Market share, HHI, barriers to entry, buyer power
Bergman et al. (2005)	96 EU merger Decisions between 1990 and 2002	Market share, vertical mergers, collusion, nationality, undertakings
Fernandez et al. (2008)	50 EU merger Decisions between 2005 and 2006	Market share, vertical mergers, entry barriers, nationality
Bergman et al. (2010)	109 EU phase II horizontal merger Decisions between 1990 and 2004	Market share, entry barriers, unilateral effects, buyer sophistication
Szuecs (2012)	309 EU mergers between 1991 and 2007	Dominant firm, entry barriers, HHI
Mai (2016)	341 EU horizontal merger Decisions between 1990 and 2012	Market share, entry barriers, 2004 EUMR reform
Mini (2018)	13,818 horizontally affected markets in 1,670 EU merger Decisions between 1990 and 2013	Market share, HHI, IP, industry
Bergman et al. (2019)	151 EU phase II mergers between 1990 and 2013	Market share, entry barriers, unilateral effects, buyer sophistication
Cottyn (2019)	1,113 horizontally affected markets from 160 EU phase 1 merger Decisions between 1992 and 2013	Market share, entry barriers, industry, countervailing effects
Affeldt et al. (2020)	30,995 markets from 5,109 EU merger Decisions between 1990 and 2014	HHI, markets with concerns, entry barriers

Lindsay et al. (2003) use a random sample of 245 European Commission merger Decisions between 1 January 2000 and 30 June 2002. One of the hypotheses the authors test relates to countervailing buyer power:

> (H4) Buyer power arises when customers can readily adopt strategies which would defeat any attempt by the merged group to exercise market power. We expected that buyer power itself would rarely be sufficient to justify clearing a transaction without undertakings when the merger resulted in high market shares because, in such cases, customers generally cannot defeat attempts by the merged group to exercise market power. We therefore expected the study to show that buyer power was relevant in moderate to highly concentrated markets or in combination with other factors which together serve as a competitive constraint on the activities of the merged group.

The authors conclude that the buyer power variable is not significant in any of the model specifications and suggest these results are surprising in view of qualitative analysis at the same.

Bergman et al. (2010) aim to compare the outcomes of merger review by the European Commission versus the US Federal Trade Commission (FTC). Their dataset includes horizontal mergers between 1990 and 2004, which have been subjected to a full review (e.g. phase II review with the Commission and/or second request with the FTC). Their model includes a parameter called Sophistication, which appears to relate to the scope for buyers to exercise countervailing buyer power:

> Sophistication denotes that the decisions or memoranda highlighted the potential for buyers to affect the competitive process in their markets. Because sophisticated buyers might disrupt anti-competitive price increases, a negative impact on the probability of challenge is expected for this variable.

Whereas the Sophistication variable is significant for the US models, it is not for the EU models. The authors offer no explanation for this difference.

Mini (2018) derive their dataset from all EU decisions between 21 September 1990 (the start date of the EUMR) and 31 December 2013. After filtering for horizontal overlap markets and decisions with sufficient information, they end up with a sample of 1,670 distinct mergers. They aim to separate out cases where the effect on position of the merging firms as buyers (as opposed to sellers) was discussed (e.g. monopsony) by introducing a dummy variable.

This Procurement variable appears to be significant (either at the 1% or the 5% level—see Table 4) for all of his regressions. Interestingly, the sign switches from positive to negative (with the difference also being significant) between the subset of cases before and after the 2004 reform of the EUMR. This suggests that post 2004 EUMR reform the group of cases where buyer power was explored saw a lower likelihood of getting challenged (given that dependent variable is 0 when merger is cleared). The authors suggest that the limited number of observations may explain this change in sign.

Following Bergman et al. (2010), Bergman et al. (2019) study a sample of EU 151 phase II merger decisions as well as 260 FTC decisions from the period 1999 to the end of 2013. As before, their model includes an explanatory variable '*Customer Sophistication*'—we consider this variable to aim to capture a review of countervailing buyer power.

They go on to conclude that the Customer Sophistication variable does not have a significant effect on the EU outcome. However, the authors do find a significant result for their sample of FTC cases. These results are in line with the results of Bergman et al. (2010).

Cottyn (2019) uses a sample of 160 randomly selected EU phase I decisions from the period 1992 to 2013. For each of these decisions, they collect data on the relevant markets discussed in these decisions leading to a sample of 1,113 horizontally affected relevant markets.

They introduce an explanatory dummy variable to capture a collection of countervailing factors, including but not limited to, countervailing buyer power. Other factors included are efficiencies and failing firm defence. Their results show that this variable had a significant negative sign (i.e. supporting clearance) for the models based on cases from after the 2004 reform of the EUMR. This effect is so large that a further simulation shows that the inclusion of this variable had a similar effect on the likelihood of clearance compared to a reduction in combined post-merger market share of 40 percentage points.

This summary highlights that the limited body of empirical papers that investigate (countervailing) buyer power show appear to give mixed results with respect to significance.

6.2 The effect of merger announcements on suppliers

There exists a large body of economic literature looking at the effects on various types of announcements on share prices. Where this methodology was initially developed to efficiency of financial markets in absorbing new information, the outcomes are also used to inform on the significance of the effect itself. For example, an event study looking at the development of the share prices of firms announcing acquisitions are used to reflect to the benefits of mergers.

Various authors have also explored and/or applied the application of the event study methodology to the competitive assessment of mergers. For example, an increase in the share price of a firm announcing an acquisition may reflect that investors believe the merged entity will see improved performance following an increase in market power.

In similar vein, a number of papers exist that investigate the effect of merger announcements on the share price of suppliers of the acquirer/merging firms. In similar vein as the previous example, these results could indicate whether investors consider that the outlook for these suppliers would change as a consequence of a merger involving their clients.

Fee and Thomas (2004) and Shahrur (2005) present similar analyses. Both authors aim to infer the objective of the transaction by measuring the share price effect around announcement. Fee and Thomas (2004) also look at subsequent performance of suppliers.[178] For the purposes of our discussion on the role of buyer power in mergers, we combine the hypothesis identified in both papers. The authors explore the effect on suppliers in the following scenarios.

The first scenario is called 'Productive Efficiency' and is used to describe the outcome of a merger aimed at improving efficiencies within the merging firms. Both papers suggest that this should not affect suppliers in first instance. Both authors do suggest a second order effect in that the performance of the merged firm may lead it to increase or decrease its output.

The second scenario is called 'Collusion' and is used to capture those mergers that aims to restriction competition and thus increase monopoly rents. Both authors predict a negative result for suppliers in this scenario as the merged firm is expected to reduce its output following its improved market position.

The third and fourth scenario look at buyer power. Shahrur (2005) presents only one scenario 'Monopsonistic Collusion' to describe those mergers that create a larger buyer, which will intensify competition amongst suppliers. Fee and Thomas (2004) present two scenarios for two possible outcomes of a merger for suppliers of the merging firms. The first is 'Buying Power' and indicates an outcome where the merging firms use their improved bargaining position to extract better terms for their (remaining) suppliers. While we discussed monopsony and bargaining position separately in the earlier part of this chapter, we consider that the two scenarios here are similar in that they both predict suppliers to be negatively affected by a merger. Fee and Thomas (2004) also include a fourth scenario 'Purchasing Efficiencies' to describe an outcome where the merging firm and the (remaining) supplier(s) benefit from economies of scale post-merger.

Fee and Thomas (2004) use a database containing 554 transactions between 1980 and 1997—looking only at transactions where both the bidder and the target are listed on a US stock exchange. Customers are identified based on the requirement that publicly traded firms disclose customers representing more than 10% of total sales (avg. 0.40 customers per deal). Suppliers are identified by inverting this relationship (avg. 1.09 suppliers per deal).

In terms of effects on customers, the authors find no significant effects for their entire sample in terms of abnormal share price returns around the announcement date or cash flow to sales in

178 The other relevant methodological difference relates to the classification of suppliers. Where Fee and Thomas (2004) use company disclosures indicating significant suppliers, Sharur (2005) uses benchmark input-output accounts of the US economy (i.e. which SIC codes buy/sell from which SIC codes) meaning that all firms with the same SIC industry code are considered to be suppliers of the merging firms.

subsequent years. This would support the 'Productive Efficiency' scenario where suppliers are not affected by mergers.

However, a further test into the distribution of this result suggests that the average contains a relatively high proportion of cases where suppliers see a negative share price result and a relatively lower number of cases where suppliers' share price benefits. These authors consider that these results could indicate that the suppliers will be able to mitigate any longer-term negative consequences (for instance by merging themselves). In terms of cash flows, there is a significant negative effect for the first year.

One subgroup showing significant negative results both in terms of share price response and cash flow is the group of 'Terminated Suppliers': these are firms which are not listed as suppliers in the financial disclosure of the merged firm in the year following the merger.

The second set of supplier results aims to explain these effects by looking at a set of explanatory variables such as percentage of sales to the merging firms, the status of Terminated Supplier and market concentration. The overall regression results are weak, but the model includes variables for each of these three elements with significant values.

The third set of supplier results is based on similar regressions but for subgroups of the sample. The explanatory value of the model now increases, in particular for the set of mergers where pre-merger the market in which the merging firms operate in is already concentrated (defined as value of industry HHI over 2,000). This result suggests that the negative effects for suppliers are more pronounced for market that are already concentrated. The authors go on to conclude that this result suggests that the efficiency gains of mergers come to some extent at the expense of suppliers.

The fourth set of analysis looks at which factors explain whether a supplier continued to work with the merging firms or not (and thus end up as a Terminated Supplier). Their results show that suppliers serving only the target have a lower chance of staying on compared to those firms supplying the bidder. Firms supplying both the bidder and the target have the highest probability of staying on (as opposed to supplying only the bidder or the target). Other elements that increase the likelihood of staying on as a supplier are percentage of sales as well as continuity (i.e. number of years as a supplier).

Shahrur (2005) uses a dataset of 463 horizontal transactions involving US-listed bidders and targets between 1987 and 1999. Suppliers are defined using input-output tables meaning that these relate to a group of firms with the same industry code, which is earmarked as an industry supplying the merging firms.

The overall results for share price effect (cumulative average return) are not significant for a short window around the announcement date. However, the authors find significant negative results for two subsets in one of the time periods considered[179]. The first subset is referred to as 'Main Suppliers' and relates to the SIC code for which the dollar amount of output sold to the merging firms' industry divided by the merging firms' industry's total output. The second subset is referred to as 'Dependent Suppliers' and relates to the SIC code for which the dollar amount of output sold to the merging firms' industry divided the suppliers' industry's total output. These are -0.48% for the 'Main Suppliers' group of firms and -0.95% for the 'Dependent Suppliers' group of firms. However, the results in for both of these groups show a significant spread with 45% of the observations being positive. Looking at the various different scenarios for mergers discussed above, the overall results would support the 'Productive Efficiency' scenario, whereas the results for the subgroups suggest otherwise and point to either of the scenarios related to buyer power.

The authors go on to divide their total sample is transactions where the overall share price response (defined as positive combined market value or wealth effect or CWE) was positive or negative. The share price effect for suppliers was significantly negative for the group of negative CWE mergers. The result for 'Main Suppliers' was -2.76% and for 'Dependent Suppliers' -4.23% for the same announcement window as referred to above. However, the variation of positive and negative results in this average continues to be significant suggesting this division may explain only part of the effect. The share price effect in case of positive CWE mergers was +1.06% for 'Main Suppliers' and +1.28% for 'Dependent Suppliers' for the same announcement window. The variation effect for these findings are less pronounced as compared to the negative CWE mergers group. Overall, these results suggest that suppliers are expected to do as well as the merging firms. In other words, if the markets expect the merger to generate positive effects (as measured by a positive CWE), suppliers as group are believed to profit as well and vice versa.

In a next step, the authors aim to explain the share price effect for the groups of 'Main Suppliers' and 'Dependent Suppliers' using a number of parameters as explanatory variables in a regression model. This model includes one significant variable that captures both the level of concentration in the supplier industry as well as the change in concentration in the (downstream) market of the merger. This combined variable has a negative coefficient. This suggests that mergers leading to a large change in the HHI index of the (downstream) industry of the merging firms combined with a concentrated suppliers' industry leads to a large negative share price effect for suppliers. These results suggests that the relative market share/position of suppliers and their customers matters in terms of the bargaining outcome post-merger, or more specifically: a merger leading to customers significantly increasing in size compared to their large suppliers is expected to lead to a negative share price effect for these suppliers.

[179] This period runs from ten days before the announcement date to ten days after.

Bernile and Lyandres (2019) use a dataset of 480 horizontal mergers between 1996 and 2005.[180] For this dataset of mergers, they have identified 1,523 suppliers to the bidder and/or the target firm.

The authors find a significant negative share price effect for suppliers, which are identified on an individual level as in Fee and Thomas (2004). The percentage range between -1.57% for the period covering one day before and after the announcement date (-1,1) and -4.26% for the period (-20,20). However, these results represent the average of unweighted observations. When the relative size of suppliers' market value is used to calculate weighted average results, these are closer to zero and not consistently significant. This latter finding is line with the findings of Fee and Thomas (2004) and Shahrur (2005).

With looking to explain these results using regression analysis, a number of explanatory variables generate statistically significant effects. The first variable is the present value of the expected efficiency gains from the merging firms, which has a positive coefficient. This appears to be in line with the findings of Shahrur (2005) for the subgroup of mergers with a positive combined wealth/market capitalisation effect. The second relates to the degree of product similarity between bidder and target. The sign of the coefficient is positive suggesting the higher the degree of similarity, the higher the degree of a positive share price response for suppliers. The authors acknowledge that this finding does not align with a buyer power explanation, which would see increased product similarity lead to an improved bargaining position post-merger. This latter effect may well be captured by the third significant variable: the change in HHI, which has a negative coefficient. The final significant variable is linked to the size of the supplier measured as the logarithm of sales. This variable has a positive coefficient meaning that the share price response is more positive with the suppliers' sales. Looking at Fee and Thomas (2004) this variable may be a proxy for the likelihood of the supply relationship continuing or the bargaining power of the supplier.

One paper that employs an event study approach but does not measure share price effects its Bhattacharyya and Nain (2011). The authors study the effects on supplier profitability and prices following US horizontal mergers. The authors use transaction data between 1984 and 2003 to select 259 industries that have experienced one or more significant jumps in horizontal merger activity in a specific quarter during the research period.

The authors find a significant negative effect of downstream consolidation on the cash flow margins of suppliers to the merging firms. These suppliers are grouped in supplier industries using the same approach as Shahrur (2005). To establish whether this negative profitability is driven by increased buyer power from the merged customers of the supplying firm, the authors

[180] Although the authors are silent on this point, we deduct from the various data sources used that these mergers were between US-listed firms.

go on to look for changes in the level of prices. The authors find that price levels for firms affected by downstream consolidations decrease in the years of the merger compared to a sample of suppliers that are not dependent on the merging firms. The difference over the entire three-year period is estimated at 3.6%.

In a subsequent analysis, the authors aim to establish whether the negative price effect can be explained by increased bargaining power from their merged customers. The authors find that the negative price effect is more pronounced for supply industries with a relatively higher levels of concentration (measured either in terms of HHI or combined market share of the largest four firms).

Finally, the authors look at whether there is a link between the negative price effect and changes in concentration in the supply industry. They find that the price decline post downstream consolidation is larger when the level of concentration in the supply market had been increasing in the period up to the downstream merger. Similarly, suppliers experiencing increased horizontal merger activity prior to downstream consolidation see larger negative price effects following from this downstream consolidation.

This latter finding introduces a dynamic element in that it considers how upstream and downstream consolidation interact, which is the key topic of the next section.

6.3 Buyer power as a driver for concentrations

Another perspective on buyer power is to reflect to what extent it could be the driver for merger activity. Whereas the general question of why firms pursue acquisitions has been researched extensively, there is a smaller group of papers exploring the question to what extent buyer power could be a driver for concentrations.

It is believed that Galbraith (1952) already predicted such a pattern as part of his work on buyer power.[181]

Oeberg and Holstrom (2006) discuss the notion of parallel M&A and explore how mergers among customers lead to mergers among suppliers, and reverse. Their paper uses empirical data from six case studies, including the Enso–Stora merger. The authors consider that mergers are contagious.

Ahern and Harford (2014) investigate the role of interindustry relations in explaining merger waves. Their research also covers a scenario where merger waves do not move through

[181] See: Ahern and Harford (2014): ‘Galbraith (1952) predicts that industry consolidation in an upstream industry leads to consolidation in a downstream industry to counteract the monopoly power created through the initial consolidation’.

industries via vertical mergers, but rather that concentration amongst suppliers prompts increased concentration amongst customers.

The authors develop a sample of 51,002 transactions between US firms from 1986 to 2010 and overlay this with US data on industry linkage (input–output data tables from the Bureau of Economic Analysis).

The authors find that the merger activity in what they label as 'close' industries (i.e. a lower number of links the input output tables) has a strong positive effect on an industry's level of merger activity one year later. They also find an effect for 'distant' industries where the effect is relatively muted and has a larger time lag (i.e. two to three years).

Moreover, and in contrast to the notion of parallel M&A, the authors find that the effect is stronger in one direction. Their results show that this effect is stronger coming from supplier links as opposed to customer links: in other words, firm appear to respond more to upstream consolidation compared to downstream consolidation.

Hiu et al. (2019) investigate the effect of consolidation amongst customers on the supplying firm's profitability. They find that major customer concentration is negatively associated with the supplier firm's profitability but positively associated with the major customers' profitability. They go on to demonstrate that these effects weaken as the supplier firm's own power grows over its relationship with major customers.

The authors use two datasets: the first uses static industry data and the second uses data from horizontal customer mergers. The conclusions are supported by both data sets.

6.4 Further analysis

We have further explored this hypothesis for the industries involved in the three mergers that are the focus of this chapter. To this end, we have investigated whether a Granger causality exists in the series of mergers in two sets of industries. Granger causality shows whether one time series (for instance, upstream mergers) precedes another time series (downstream mergers). This method allows us to explore whether the two time series are related without the need to populate a broader model aimed at explaining the (other) drivers of upstream or downstream merger activity as is the case with many of the research discussed above.

The first set of the two industries looked at relates to the (downstream) supermarket sector and the (upstream) food and beverage industry in line with the *Kesko/Tuko* case and Carrefour–Promodès merger. The second set relates to the (downstream) market of packaging and the (upstream) market of paper products in line with role of TetraPak as the firm exercising countervailing buyer power in the Enso–Stora merger.

The aim of this analysis is to explore whether there exists an ex post effect of these transactions in that they are linked to further consolidation amongst the parallel industry.

We use a dataset of completed mergers obtained from Dealogic between 1995 and 2020 for each of the four industries.[182] Following the focus on European Commission cases, we selected transactions where the bidder and/or target are active in Europe.[183] Finally, we deploy a number of filters to arrive with a set of horizontal transaction[184] leading to a transfer of control.[185] Table 0.1 contains an overview of the number of mergers in the dataset for each sector.

Table 0.1 Overview of number of mergers in dataset

Industry		**Number of mergers in dataset**
Industry pair 'Food retailing'	Food and Beverage (upstream)	7,643
	Supermarket (downstream)	899
Industry pair 'Forestry and Paper'	Forestry and Paper—Pulp and Paper (upstream)	233
	Forestry and Paper—Packaging (downstream)	465

The mergers in the dataset for each sector are grouped using the announcement date.

We also collected data on transaction values. However, due to the limited disclosure, the resulting data sets are significantly smaller and more sporadic, and hence unfortunately not suitable to account for in the analysis.

182 Using the field 'Announcement Date'.
183 Using the fields 'Bidder Region' or 'Acq Subsidiary Region' and 'Target Region'.
184 Mergers involving at least one vertically integrated firm (e.g. active in both Supermarket and Food and Beverage) are removed from the data. Horizontal mergers are then identified by selecting those transactions for which the industry classification for the target as well as the acquiring firm are the same. For acquirors this is done using the fields 'Acq Subsidiary Specific Industry Group' if subsidiary information is available and 'Acq Specific Industry Group' if subsidiary information is not available and for targets the 'Target Specific Industry Group'. Note that if a firm is active in multiple industries, but is not a vertically integrated firm (e.g. Supermarket as well as finance), it is treated as a firm active in the downstream Supermarket industry.
185 Transactions leading to a chance of control are identified by selecting those transactions where the share interest transferred exceeds 50% using the field 'Acquired Stake' and where the share interest passes the 50% mark following the transaction using the fields 'Initial Stake' and 'Final Stake'.

Figure 0.1 Overview of number of transactions per quarter: Forestry and Paper

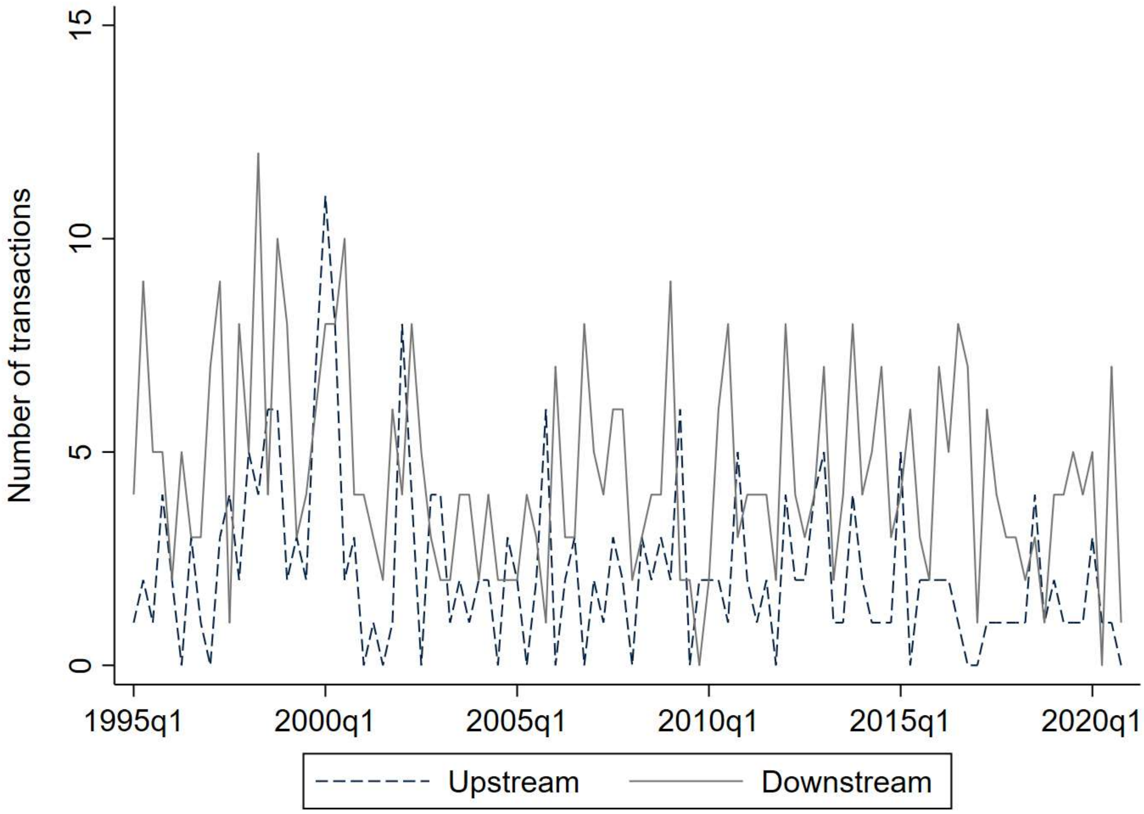
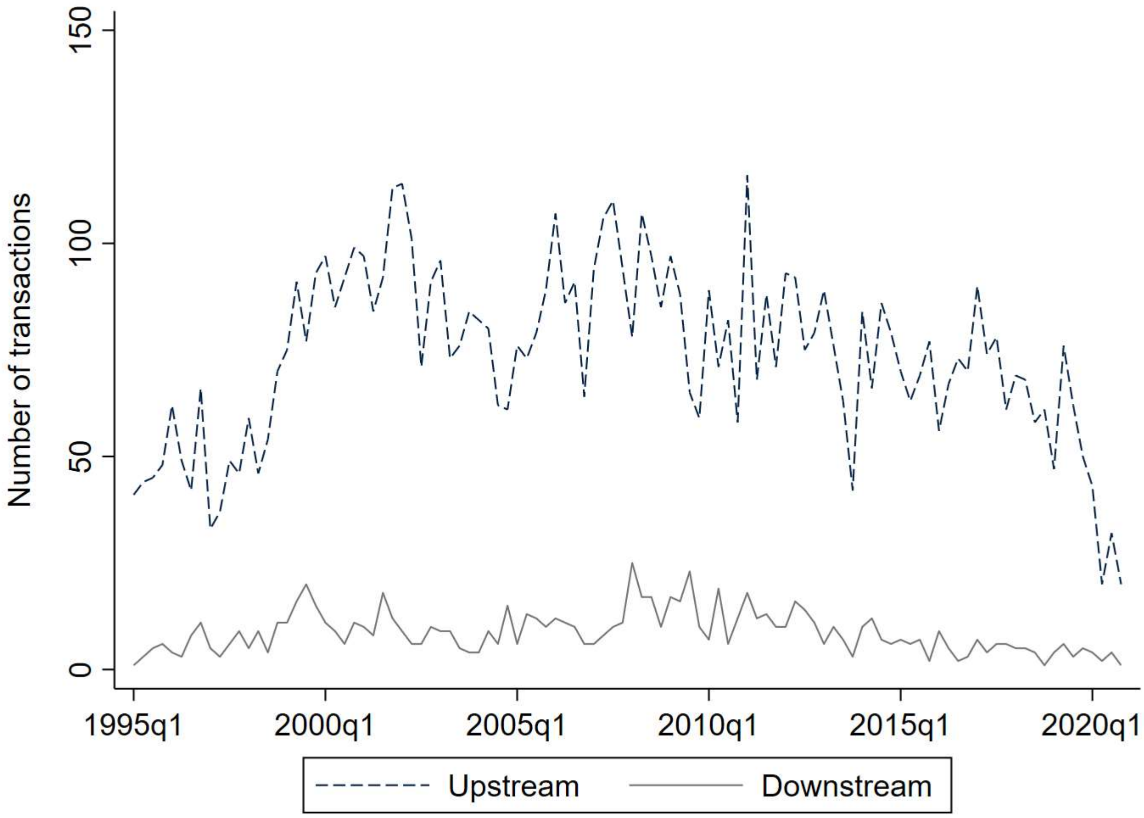


Figure 0.1 shows the number of transactions for the pair of Forest and Paper industries with horizontal mergers in the Pulp and Paper industry sector earmarked as Upstream and Downstream containing horizontal mergers in the Packaging industry sector.

Figure 0.2 shows a similar overview with horizontal mergers in the Food and Beverage industry sector earmarked under Upstream and horizontal supermarket mergers grouped as Downstream.

An immediate observation is that the number of upstream transactions in the food retailing example is much higher compared to the number of downstream transactions. This can be explained by the fact that supermarkets have a wide range of suppliers (as opposed to producers of cardboard packaging).

Figure* 0.2 *Overview of number of transactions per quarter: Food Retailing



Econometric analyses

To be able to find support for our hypothesis that there is a link between the pace of upstream merger activity and downstream merger activity, we perform a Granger causality test.

Before a Granger causality test can be employed, the underlying statistical assumptions of this test have to be shown to hold. A core assumption of the Granger causality test is *stationarity*—this implies that the statistical properties of each of the time series are constant over time. If one of these time series would be non-stationary, then any relationship with another time series found in the Granger causality test would be considered weaker. To test for stationarity, we deploy the augmented Dicky–Fuller test.

We perform these tests on different time periods. The Granger causality test explores the link between two time series of data. First, we have grouped the merger data in the number of transactions in two time intervals: per month as well as per quarter. In a second step, we explore different lags to explore Granger causality for different combinations of time periods (i.e. one up to six monthly and quarterly back).

Finally, we have also explored Granger causality not between individual time periods, but also between the sum of transactions in combined periods (moving sum) and the average number of transactions in past periods. These additional time periods were included to explore whether merger activity in one part of the value chain may be driven more by sustained levels of merger activity over multiple time periods as opposed to a single period. We find that these results for these modified time periods generate significant results for the Dicky–Fuller test and Granger causality, the patterns found in these results across the different time periods tested leads us to conclude that these results are not meaningful.

We find that both the monthly and quarterly time series for both upstream and downstream mergers in the Forest and Paper industry pair are stationary. In the case of food retailing, the quarterly time series for Food and Beverage firms shows relatively high p-values suggesting that the upstream time series is non-stationary. As such, any further results using this quarterly time series requires more cautious interpretation. An overview of the results of the various augmented Dicky–Fuller tests can be found in Annex 1.

Now that the degree to which the underlying assumptions hold has been established, the Granger causality test can be performed. The test itself focuses on the interplay between the time series for upstream and downstream horizontal merger activity for both industries using a Granger causality test. This test allows us to explore the relationship in either direction (e.g. upstream granger causes downstream or vice versa). The test also allows us to look at different time lags (e.g. upstream merger activity leads to downstream merger activity x periods later). Here we have tested for periods up to six months as well as three quarters. The results of the various Granger tests are summarised in Annex 1.

The results for food retailing show statistically significant results using the monthly time series for both directions as well with multiple lag periods. This provides support for the starting hypothesis. The results for the different lag periods are statistically stronger for the direction where upstream causes downstream horizontal mergers. This result also supports the notion of circularity as suggested in Oeberg and Holstrom (2006). Looking at the quarterly time series for food retailing reveals that the results are statistically weaker across the board. While we would accept granger causality at the 10% statistical significance level, the upstream series is non-stationary, as previously explained. A single quarter produces the most statistically robust outcome.

The results for the Forest and Paper industry are weaker across the board for both directions and various time lags. One possible explanation is that these time series have less observations. The most robust results for the monthly and quarterly time series relates to upstream causing downstream horizontal mergers in the very short term (i.e. with a lag of one period).

Whilst our dataset is limited as it focuses on only two pairs of upstream and downstream sectors, the results do provide support for the hypothesis and/or intuition raised in the literature that mergers in connected parts of the value chain lead to consolidation amongst suppliers and customers.

7 Beyond an ex post analysis, measures taken, and lessons learnt? The Unfair Trading Practices Directive as a spillover?

7.1 Unfair trading practices and its connection to *Kesko/Tuko* and *Carrefour/Promodès*

Buyer power concerns are still rarely discussed in the enforcement of competition law, both in Europe and in the USA.[186] However, the food retailing sector is perhaps a rare exception in this regard. *Kesko/Tuko* and *Carrefour/Promodès*, along the example of *Rewe/Meil*, were examples in the late 90s and early 2000s of a, at least, competition policy buzz related to the negative and exploitative effects—*vis-à-vis* end consumers but even more so small food producers—of buyer power.

Concerns regarding the imposition of exploitative or *unfair* purchasing practices by supermarket chains and food distributors over small food producers have been voiced at the national and European level. These debates have taken place in and outside of the EU Competition Law/Policy agenda. Despite the competition policy debate and interest, European (but also national) cases related to breaches of competition (antitrust) law have remained scant.[187]

Instead, these issues have been approached from a different perspective related to aspects of *unfair* competition, contractual fairness and ethical purchasing.[188] These discussions have also been centred on imbalances in the relations between small food suppliers and large food

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[186] For a global perspective on buyer power matters see: Carstensen P. C. (2017), *Competition Policy and the Control of Buyer Power: A Global Issue*, Edward Elgar.

[187] See Italianer, Alexander (Director-General for Competition, European Commission), at https://ec.europa.eu/competition/speeches/text/sp2014_04_en.pdf (accessed 11 January 2021): 'A third, more general question that had to be kept in mind is: to what extent are we really dealing with problems of competition, and to what extent with unfair trading practices? Simply put, competition law deals with overall effects on the markets. Consumers suffer because a lack of competition leads to higher prices, stifles innovation and reduces choice. Unfair trading laws deal with fairness in individual business relationships, for instance, when a big supplier bullies a retailer into stocking a product'.

[188] See, inter alia, Herrera Anchustegui, I. and Gjendemsjø, R. (Special Issue Editors, 2019), Unfair Trading Practices in the Food Supply Chain, Concurrences N. 3 On-Topic, **5**, and the contributions included therein; Gjendemsjø, R. and Herrera Anchustegui, I. (2020), 'Regulating the food supply chain in Europe and the Unfair Trading Practices Directive', *Revue européenne de droit de la consummation*, pp. 165–88; Daskalova V. (2019), 'The New Directive on Unfair Trading Practices in Food and EU Competition Law: Complementary or Divergent Normative Frameworks?', *Journal of European Competition Law & Practice*; Schebesta, H. et al. (2018), 'Unfair Trading Practices in the Food Supply Chain: Regulating Right?', *European Journal of Risk Regulation*, 9, p. 690; European Commission (2016), 'Report from the Commission to the European Parliament and the Council on unfair business-to-business trading practices in the food supply chain'; European Commission (2014), 'Study on the Legal Framework Covering Business-To-Business Unfair Trading Practices in the Retail Supply Chain'; European Commission (2014), 'Tackling Unfair Trading Practices in the Business-to-Business food supply chain'.

distributors and supermarket chains that allow these latter to impose unfair contractual and non-contractual conditions.
Unfair purchasing practices are conduct that takes place in contractual and extra-contractual relationships in which there is a transfer of profit or risk with adequate compensation, to such a degree that it becomes unfair and contrary to good commercial practices. These practices take many forms and shapes, as discussed in the literature:[189]

> Some of the practices deal with imposition of charges, others with delays in payment and other contractual obligations, some with refusing to purchase a good or deciding to terminate a contractual relationship with no or inadequate grounds, while others deal with vagueness in contractual terms, intellectual property related abuses or conduct as refusing to have the contract in writing.

In neither the *Kesko/Tuko* and *Carrefour/Promodès* merger Decisions there is an extensive or explicit analysis concerning unfair purchasing practices. However, implicitly in *Kesko/Tuko* and more directly in *Carrefour/Promodès* linked to the 'threat point' concept, there is a connection between the risks of buyer power exertion and dependence with unfair trading practices. If a supplier is dependent on a buyer, then this latter would be able to extract extraordinary price or risk concessions, for example, to avoid being de-listed. In this sense, *Carrefour/Promodès* considers some of the unfair practices in the relation between the new group and its suppliers. The Commission noted prospectively that downstream merger might lead to a dominant position of the new entity in terms of the information it can gather about suppliers. Subsequently, it would affect the negotiation of purchasing conditions between the two parties, where one of them has considerably more data at its disposal.[190] More related to risks of imposing unfair purchasing are the commitments made in which the merging entity agreed to not delist products or suppliers,[191] as well as not to modify contractual conditions on volume, price or delivery times.[192]

7.2 The Directive in a nutshell

After some years of political discussions, the European Commission, DG Agriculture (and not DG Competition) proposed a Directive on Unfair Trading Practices in the Agricultural and Food Supply Chain that ultimately came into force in 2019.[193]

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[189] Gjendemsjø, R. and Herrera Anchustegui, I. (2020), 'Regulating the food supply chain in Europe and the Unfair Trading Practices Directive', *Revue européenne de droit de la consummation*, p. 167.
[190] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), para. 104.
[191] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), Annex 2, para. 1.
[192] (Decision 1999/C359/10, *Carrefour/Promodès* [2000]), Annex 2, para. 2.
[193] Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain (OJ [2019] L 111/59).

The Directive is an instrument that proposes a regulation of contractual and non-contractual practices—prohibiting some and subjective others to a previous agreement in clear and unambiguous terms among the parties in the supply or a subsequent arrangement. As designed, the Directive is a minimum protection standard or minimum harmonisation instruments as each Member State 'may introduce stricter rules against unfair trading practice to ensure a higher level of protection of food suppliers, as long as those provisions are compatible with the internal market'.[194]

Such protection is achieved by 'creating a list of prohibited practices and secondly by making other practices subject to a previous and unambiguous agreement between the supplier and the buyer. The Directive also requires the designation of an enforcement agency with sufficient powers to ensure compliance with the norms'.[195] All these practices are said to deviate grossly from good commercial conduct, being contrary to good faith and fair dealing and unilaterally imposed by one trading partner on another.[196] Nine practices are included in the 'black list' of the Directive, implying that they would not be allowed in bilateral relations. These includes instances such as late payments, cancelling orders of perishable foods, unilateral and retroactive changes of the terms of the supply agreement and requesting payments related to the deterioration or loss, or both' that occurs on the buyer's premises or after ownership has been transferred to the buyer, for example. Six other practices are prohibited unless the parties have agreed to them clearly and unambiguously, in either the original supply agreement or in a subsequent one. These practices are related to issues such as requiring payments, imposing charges or foregoing payments from the buyer to the supplier, all of them shifting the profit distribution in a contract.

Concerning the scope of application of the Directive, some resemblance can be shed to these food retailing mergers by focusing on big vs small, which is an element of economic dependence. The Directive seeks to target the bargaining power differences between large and powerful buyers with respect to smaller suppliers based on a 'cascade' system in which turnover has been used as a proxy for bargaining power.[197] However, unlike in *Kesko/Tuko, Rewe/Meinl* or *Carrefour/Promodès*, no references to a threat point or a specific percentage of sales a buyer represents for a supplier is made.

[194] Herrera Anchustegui, Ignacio; Gjendemsjø, Ronny, Foreword in the Unfair trading practices in the food supply chain, Special Issue of Concurrences (No. 3—2019), para. 10.
[195] Gjendemsjø, R. and Herrera Anchustegui, I. (2020), 'Regulating the food supply chain in Europe and the Unfair Trading Practices Directive', *Revue européenne de droit de la consummation*, p. 179.
[196] Article 1 of the Directive 2019/633.
[197] Herrera Anchustegui, I. (2017), *Buyer Power in EU Competition Law*, Institut de droit de la concurrence; Gjendemsjø, R. (2019), foreword in 'Unfair trading practices in the food supply chain', Special Issue of *Concurrences* (No. 3—2019), para. 7.

7.3 Influence of the merger Decisions in the Directive?

The use of economic thresholds serves to illustrate a similar concern as expressed in these merger cases, that related to the possibility of abuse of economic dependence or even risks of relative dominance—issues which are not under the scope of EU competition law but that are covered under antitrust provisions in some member states, with the example of German as its most salient representative. It is, therefore, through the associated risk of imposing UTPs and this link to the idea of economic dependence and imbalance that a connection is made between the foreseen risks in food retailing—as identified explicitly in *Carrefour/Promodès* and *Rewe/Meinl*, and hinted at in *Kesko/Tuko*—and unfair purchasing practices can be made.

In the cases assessed in this chapter, buyer power concerns were found to be affecting not only the upstream (purchasing market) but also, directly or indirectly, the downstream market. In the retailing market, the competitive risks arose from the fact that as a powerful buyer with also market power in a related downstream market, buyer power could be used to foreclose other rivals—with less buyer market power—as they would receive worse purchasing conditions, for example. In the upstream market, the concerns raised in both cases were linked to the ability of a powerful buyer to extract better and presumable exploitative rents from their suppliers. This was particularly the point made by the Commission regarding the threat point in which the main issue was the existence of a *relative* dominant position generated by the fact that a supplier is in economic dependence from a buyer when the latter represents at least 22% of the former's turnover.

Economic dependence related to this threat point might be the main reason why powerful buyers are able to impose on certain suppliers conditions that appear to be unfair in a bilateral relationship because they are not properly compensated or retributed. In case the supplier does not agree to the buyer's requirement, the buyer may delist its products or simply stop purchasing goods from it.

Accordingly, the Commission's theory about the threat point used in these merger cases appears to have served as both an example of rules regarding unfair competition and inspiration for solutions to the particularities of food retailing from a wide competition policy perspective. Curiously, and as mentioned before, no examples of possible unfair (and anticompetitive) purchasing practices were explicitly discussed.

Likewise, in the Directive there is no explicit mention of the idea of the threat point. Instead, a 'cascade system' could be inspired on this appreciation that that a difference in volume (turnover) is representative of bargaining power. However, the threat point is probably a better indicator as it measures a degree of dependence between the buyer and the supplier and not about the turnover of firms in general.

7.4 A change of regulatory tactic?

The Unfair Trading Practices Directive marks a stricter and different method for dealing with risks associated with buyer power exertion in the food retail chain that were generally not captured by EU competition (antitrust) law—either because the buyer was not dominant, or because (in the case of concentrations among undertakings with large buyer power) it did not significantly impede effective competition in the upstream market (or the downstream market due to associated risks of buyer power advantages).

The Directive combines both 'blacklisted' practices with others available only upon previous agreement between the parties, creating, therefore, a distinction on the severity and *unfairness* among them. Connected to this, the Directive through ex ante regulation would address risks that have been associated in the past to the merger of large buyers in the supermarket chain, which could narrow even further the quite limited role buyer power has played as a source of competition risks in food retailing cases.

Interestingly, this change in regulatory tactic to address buyer power issues in food retailing does not seem to arise from a vast source of European or even national competition law cases in which risks of monopsony or bargaining power have been brought forward nor *true* antitrust concerns. Thus, the Directive does not seem to be a regulatory response linked to an unusually large amount of anticompetitive buyer power cases or future anticompetitive buyer power risks associated with food retailing mergers.

8 Conclusion

Buyer power concerns in competition law are rare – even though there have been waves of interest on an industry level. For the most part, buyer (bargaining) power tends to be welfare enhancing as parties to a bilateral commercial relationship negotiate terms of the trade and the buyer power extracts supra-competitive profits that would have been kept by the supplier. If competition downstream for that buyer exists, at least part of those supra-competitive profits will be passed on to end consumers in the form of lower prices and/or better products. However, buyer power can also lead to instances in which, either because there is a demand withholding to reduce prices – as it occurs in the monopsony model – or because there is an abusive or unfair purchasing behaviour, its exertion can be detrimental to competition and welfare. Mergers are no exception to this situation as we discuss in Section 3 of this chapter. The literature and the antitrust practice in Europe show how buyer power effects are factored into the analysis of whether a concentration is compatible or not with the internal market. However, despite being mentioned somewhat often, buyer power is rarely a key aspect on the outcome of a decision.

In this contribution we have aimed at discussing three landmark buyer power related concentration cases which are exceptional in the practice due to the importance given to purchasing side competition concerns. These are the two food retailing cases of *Kesko/Tuko,* and *Carrefour/Promodès,* and the cardboard case of *Enso/Stora.* We discussed these cases to understand which theories of harm and market effects were raised by the Commission in the assessment and the strength of such analysis.

On the one hand, in the food retailing cases we see how the Commission's concern regarding buyer power are focused on downstream effects and foreclosure of rivals of what would have been a dominant buyer and retailer in *Kesko/Tuko*. In this case, the Commission resorted to buyer power risks as an additional concern related to selling side competitive issues. In this light, buyer power reinforced seller market power as the proposed entity would have been able to act as a gatekeeper, foreclosing food retailers downstream through their use of buyer power and purchasing volume. Also, due to their large buying power and proportion of market shares, *Kesko/Tuko* would have been able to extract very advantageous bargaining terms from *dependent* suppliers.

The idea of buyer power induced dependence was again discussed in the subsequent case of *Carrefour/Promodès,* also in food retailing. Unlike in *Kesko/Tuko*, the concentration was not likely to lead to the creation or strengthening of a dominant position in the food retailing sector. However, it could lead to some exploitative and unfair exertion of buyer power abuse against food suppliers. The Commission resorted to a *threat point* theory according to which when a buyer represents 22% of a supplier's business, this latter becomes dependent and likely to be on a situation of economic dependence. Economic dependence shares similarities with the figure of relative dominance as not all suppliers would be dependent on a specific buyer and the nature of the relationship is bilateral but not *erga omnes*. Being dependent and under the risk of the *threat point,* a buyer could impose unfair trading practices to its suppliers. Also, in *Carrefour/Promodès,* the Commission stressed the connection existing between seller and buyer power in a reinforcing mechanism by referring to the 'spiral effect'.

Both *Kesko/Tuko* and *Carrefour/Promodès* were buyer power pioneer cases in the food retailing sector – along with *Rewe/Meinl*. In these cases, the commonality is the risk of exerting exploitative and to some degree 'unfair' bargaining power over a weak and dependent supplier. In none of these cases were buyer power concerns in and of themselves sufficient to render the concentration incompatible with the internal market. The buyer power risks were seen as an additional factor to seller and downstream concerns. Also, the discussion in the analyzed cases remained somewhat superficial yet logically sound. The Commission does not seem to have needed a very detailed analysis of buyer power effects because it was not crucial to the investigation, even in the case of *Kesko/Tuko.* Furthermore, the buyer power analysis did not anchored on concerns about monopsony power exertions. Rather, the discussion was mostly tied to two concepts: i) the idea of economic dependence of weak suppliers – with some hints to unfair purchasing practices; ii) and the issue of gatekeeping and use of buyer power to reinforce a strong position in a retailing market – issues which with the surge of online retailing and antitrust start to resurface again.

Enso/Stora constitutes perhaps the most representative of merger cases related to the topic of countervailing buyer power as it was the main reason to allow a merger between sellers of cardboard to take place. The Commission evaluated the position of TetraPak as a large purchaser with sufficient buyer power as to offset any potential risks of selling side market power abuses. Doing so, it applied a comparison test which, in this particular case, was centred on the market symmetry between one very large buyer and one future very large seller. Interesting, the Commission also required for countervailing buyer power to be sufficient that it benefited other smaller buyers, with the spill over effect. In retrospective, *Enso/Stora* represents a very rare case of a mirror market structure and a somewhat limited and simplified analysis of countervailing buyer power. Other cases have gone beyond and brought further finesses to the discussion on the sufficiency of countervailing buyer power. However, in this case the Commission does not seem to have needed a much more complex analysis to reach a similar conclusion.

We go on to establish the wider prominence of buyer power considerations in EU merger decisions. Our review of the economic literature highlights that buyer power is not a standard component of the research. Moreover, those papers were buyer power or a combination of elements including buyer power are discussed do not appear to consistently show a significant effect.

We consider that these findings shine a wider light on the topic buyer power in that while the concept is well understood, it appears more difficult to quantify and/or research. Unfortunately, the three horizontal merger cases at the focus of our review presented challenges in establishing the effect of buyer power and its role in ex-post effects of these mergers. This is confirmed by those ex-post reviews of merger decisions that touch on the topic of buyer power in mergers.

This prompted us to shift perspectives in an attempt to better understand how other parties reflect on the role of buyer power in mergers. First, we look at the investment community and discuss a number of papers that look at the share price response of suppliers to mergers of their (downstream) clients. Here we find a body of literature, although focused on US firms and transactions. These suggest that shareholders do actively consider the fate of suppliers in mergers.

Second, we look at the business community and discuss a number of papers that look at the role that buyer power plays as a driver of merger waves. Research using US transaction data suggests this is the case. As part of this paper, we conduct a similar experiment using data on EU transactions in the two industry pairs focused in our three cases. The first set of the two industries looked at relates to the (downstream) supermarket sector and the (upstream) food and beverage industry in line with the *Kesko/Tuko* case and *Carrefour/Promodès* merger. The second set relates to the (downstream) market of packaging and the (upstream) market of paper products in line with role of Tetra Pak as the firm exercising countervailing buyer power in the *Enso/Stora* merger. Our experiment also establishes a link between merger activity in one layer of the value chain and subsequent merger activity in the related upstream or downstream industry layer. This appears to support the prediction attributed to Galbraith (1952) that mergers from clients would spur consolidation amongst suppliers, which would in turn spur further consolidation amongst clients.

Furthermore, in our paper we see a link between buyer power concerns observed in the two food retailing cases studied and the relatively new rules on the food supply chain. While the adoption of the Unfair Trading Practices Directive cannot be said to derive from these concentrations, its content resounds with the concerns raised by the Commission in these cases. The Directive seeks to prevent instances of unfair or exploitative buyer power exertion from food retailers over food suppliers. This is done through prohibiting some conducts and subjective others to previous agreements between the parties effectively restricting buyer power exertion. These measures were adopted not on the basis of antitrust rules but rather unfair competition law, showing a broader and less economic efficiency driven focus anchored on the idea of fairness.

As such our modest contribution of the literature is to establish the gap between the various strands of economic research on mergers and buyer power. Somewhat ironically, these findings suggest that the topic of buyer power would benefit from further research to better understand the effect of buyer power on post-merger performance of firms. We will leave this challenge for (more) resourceful researchers.

Lastly, as mentioned at the start of this section, the topic of buyer power has been explored in the context of food retailing, as well as more recently in the digital/online industry. In both these cases, the relative size of downstream retailers and upstream producers appears to be a key driver and the discussion is focused on the gatekeeper role of large buyers. It appears that this discussion, in particular related to the digital/online sector as illustrated by the Proposal for a Regulation on Contestable and Fair Markets in the Digital Sector,[198] has generated increased policy debate on the notion of relative market power and issues of unfairness.

[198] European Commission, Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act) COM/2020/842 final (2020).

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Annex 1

Results of Dicky–Fuller test for stationarity

Industry	Time interval	Lags	Upstream mergers (p-value)	Downstream mergers (p-value)
Supermarket / Food	Monthly	1	0%	0%
Supermarket / Food	Monthly	2	0%	0%
Supermarket / Food	Monthly	3	1%	0%
Supermarket / Food	Monthly	4	1%	0%
Supermarket / Food	Monthly	5	11%	0%
Supermarket / Food	Monthly	6	8%	0%
Paper / Packaging (update)	Monthly	1	0%	0%
Paper / Packaging (update)	Monthly	2	0%	0%
Paper / Packaging (update)	Monthly	3	0%	0%
Paper / Packaging (update)	Monthly	4	0%	0%
Paper / Packaging (update)	Monthly	5	0%	0%
Paper / Packaging (update)	Monthly	6	0%	0%
Supermarket / Food	Quarterly	1	12%	0%
Supermarket / Food	Quarterly	2	27%	4%
Supermarket / Food	Quarterly	3	61%	9%
Paper / Packaging (update)	Quarterly	1	0%	0%
Paper / Packaging (update)	Quarterly	2	0%	0%
Paper / Packaging (update)	Quarterly	3	0%	0%

P-values below or equal to 1%, 5% and 10% indicate significance at the 1% level, 5% level and 10% level, respectively.

Results of Granger test for causality

Industry	Time interval	Lags	U granger causes D (p-value)	D granger causes U (p-value)
Supermarket / Food	Monthly	1	0%	0%
Supermarket / Food	Monthly	2	0%	0%
Supermarket / Food	Monthly	3	0%	0%
Supermarket / Food	Monthly	4	1%	2%
Supermarket / Food	Monthly	5	1%	19%
Supermarket / Food	Monthly	6	0%	0%
Paper / Packaging (update)	Monthly	1	0%	15%
Paper / Packaging (update)	Monthly	2	14%	4%
Paper / Packaging (update)	Monthly	3	17%	10%
Paper / Packaging (update)	Monthly	4	15%	7%
Paper / Packaging (update)	Monthly	5	0%	17%
Paper / Packaging (update)	Monthly	6	19%	32%
Supermarket / Food	Quarterly	1	1%	1%
Supermarket / Food	Quarterly	2	3%	7%
Supermarket / Food	Quarterly	3	8%	0%
Paper / Packaging (update)	Quarterly	1	0%	3%
Paper / Packaging (update)	Quarterly	2	2%	29%
Paper / Packaging (update)	Quarterly	3	85%	68%

P-values below or equal to 1%, 5% and 10% indicate significance at the 1% level, 5% level and 10% level, respectively.