Horizontal Merger Guidelines: The Omitted Dimension of Buyer Power
Comments Submitted to the FTC and DOJ

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One of the stated goals of the Horizontal Merger Guidelines' review process is to "reflect and incorporate learning and experience gained since 1992." In light of that goal, it is striking that neither the questions posed by the agencies in their September 22, 2009 document *Questions for Public Comment* nor, so far as I have learned, in the panels created at the various workshops, have the agencies addressed the problems for analysis presented by the buying side implications of mergers. This omission is even more striking in light of Question 12 which recognizes that "large buyers" can "negotiate more favorable terms" in comparison with other, equally efficient, but smaller firms. Yet nothing in the other questions asks whether mergers that create such buying power ought themselves be subject to a focused and specific analysis.

The only reference to buying side merger effects in the Guidelines themselves is on pages 2-3 (section 0.1):

> The exercise of market power by buyers ("monopsony power") has adverse effects comparable to those associated with the exercise of market power by sellers. In order to assess potential monopsony concerns, the Agency will apply an analytical framework analogous to the framework of these Guidelines.

Since 1992, however, the agencies, in particular the DOJ, have brought several merger cases with major or even exclusive buying side orientation. The market analysis and competitive effects

analysis implicit in those cases reflects different metrics and standards for evaluating such mergers.[1] In addition, three major court of appeals decisions,[2] including an FTC case, have highlighted the ways in which buyer power exists and can cause harm at levels or involving a number of participants substantially at variance from the levels and numbers considered relevant to seller side power. In 2004, the prior administration deemed buyer power a sufficiently important topic that it included it in a workshop on merger enforcement.[3] Certainly the learning from those cases and the workshop should now be distilled and included in a new version of the Guidelines that would elaborate on what an "analogous" framework is in practice.

Moreover, Roger Blair and Jeffrey Harrison published their book, MONOPSONY AND ANTITRUST in 1993, after the promulgation of the current edition of the Guidelines, in which they developed economic models reflecting the competitive analysis of buyer conduct and the implications of buyer mergers. The academic literature in both law and economics has produced

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[1] I am aware of the following merger cases, all from DOJ: United States v. Aetna, Civil Action No 3-99CV 1398-H (N.D. Texas, 1999) (acquisition of health care operations allowed subject to divestiture of some assets); United States v. Cargill, Civil No. 99-1875 (GK) (D.D.C. 2000) (acquisition of Continental Grain subject to some divestiture); United States v. JBS Swift, Case No.: l:08-cv-05992 (N.D. Ill. 2008)(acquisition of National Beef challenged and acquisition abandoned). The FTC has claimed that it is attentive to buyer side issues, but its apparent failure to focus on those issues in grocery mergers suggests that it has not developed as much analytic capacity or interest as the DOJ.

[2] Knevelbaard Dairies v. Kraft Foods, Inc. 232 F.3d 979 (9th Cir. 2000) (conspiracy and monopoly claims under state antitrust law upheld charging unlawful manipulation of the market for cheese causing lower prices for milk); Todd v. Exxon, 275 F.3d 191 (2nd Cir. 2000)(reversing dismissal of class action charging collusion among employers of technical workers to establish uniform job classifications and related pay grades); Toys R Us v. FTC, 221 F.3d 928 (7th Cir. 2000)(upholding FTC finding of violation based on use of buyer power to coerce suppliers to boycott competitors of major customer).

[3] FTC/DOJ Joint Workshop on Merger Enforcement, February 17-19, 2004, materials available at http://www.ftc.gov/bc/mergerenforce/presentations/index.shtm

books and articles[4] that further enrich the analysis of the implications of buyer side mergers for competition including the potential impacts on innovation (see Question 15). Several empirical studies have shown that buyer power has significant effect on input prices.[5]

In sum, this is an area of merger enforcement that is still too much ignored both in enforcement decisions and in articulating a relevant framework for analysis. These comments will briefly summarize the key issues that ought to be addressed in revising the merger guidelines.

I. Market Definition

Both the product and geographic dimensions of the market in a buying power evaluation need to start from the central fact that the focus of concern is the buying side of the merged firm. The buyers might not compete at all in the downstream markets because either they use the inputs in

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[4] See, e.g., *Symposium: Buyer Power and Antitrust*, 72 ANTITRUST L. J. 505 (2004); Zhiqi Chen, *Buyer Power: Economic Theory and Antitrust Policy*, 22 RES. L. & ECON. 17 (2007); Robert C. Marshall & Michael J. Meurer, Bidder Collusion and Antitrust Law: Refining the Analysis of Price Fixing to Account for Special Features of Auction Markets, 72 ANTITRUST L. J. 83 (2004). Agricultural economists have been particularly attentive to these issues. See, e.g., ROGER CLARKE, ET AL, BUYER POWER AND COMPETITION IN EUROPEAN FOOD RETAILING (2002); Richard Sexton & Mingxia Zhang, An Assessment of the Impact of Food Industry Market Power on U.S. Consumers, 17 AGRIBUSINESS 59 (2001). My own contributions to this discussion include participation in the Workshop reference in note 3, supra, and two articles: *Buyer Power, Competition Policy, and Antitrust: The Competitive Effects of Discrimination among Suppliers*, 53 ANTITRUST BULL.271 (2008); and *Buyer Cartels versus Buying Groups: Legal Distinctions, Competitive Realities, and Antitrust Policy*, 1 WILLIAM & MARY BUS. L. BUS. L. REV. forthcoming 2010.

[5] C. Edward Fee & Shawn Thomas, *Sources of Gains in Horizontal Mergers: Evidence from Customer, Supplier, and Rival Firms*, 74 J. FIN. ECON. 423, 424-27 (2004). Other scholars have found substantial losses to sellers resulting from buyer cartels. *See,* John E. Kwoka, Jr., *The Price Effects of Bidding Conspiracies: Evidence from Real Estate Auction "Knockouts*", 42 ANTITRUST BULL. 503 (1997) (finding a 32% price decrease resulted from bid-rigging in real estate auctions); Jon P. Nelson, *Comparative Antitrust Damages in Bid-Rigging Cases: Some Findings from a Used Vehicle Auction*, 38 Antitrust Bull. 369, 386, 392-94 (1993) (finding a significant price decrease resulted from bid-rigging in auctions for used police cars).

different outputs or because they sell their outputs in different geographic markets. Alternatively, the merged entities' outputs may be sold in sufficiently workably competitive downstream markets that post-merger there is no concern on the selling side. This, however, does not affect their interest or potential ability to exercise buyer power. Rather the focus has to be on the role of merging firms as buyers; if they buy a significant quantity of the same or related inputs, then in combination they might have buyer power. Hence, both the product and geographic dimensions of the buying market must be investigated from the perspective of where a seller might look for alternative buyers. The well known SSNIP test needs to be reversed and adapted to the buying side process. The question must be what product and geographic scope must a buyer have to exercise monopsony power over the relevant group of sellers? In some circumstances, where costs of transportation are low and the uses of an input are varied, the buying side market may be much broader in both geographic and buyer participation terms than the resulting selling markets. However, in many other situations either the product line or the geographic area or both will be much narrower than any downstream market into which the input included in some final good is sold.

A. Product Market Definition

When defining buyer product markets, the crucial question ought to be the alternatives open to the producer of the inputs used by the merging buyers. In some cases, the producers may have a great deal of flexibility to adapt their production to yield different products useful as inputs by various other buyers. If, in addition, entry by these producers into those alternative outlet markets is relatively easy, then either such related markets should be included in the basic product market or other appropriate account of such seller flexibility should be taken. But, it is likely often to be the case that the producer is relatively specialized in a line or lines of products and shifting production

will not be feasible.

The potential inflexibility of output is illustrated in agriculture where a chicken operation can not easily convert to turkeys and would be totally useless for dairy cattle or hogs. In contrast, a crop farmer can switch from soybeans to corn or related crops within a season based on predictions of relative prices and costs. However, when there is consolidation among grain buyers, such that the same small set of buyers are taking the soybeans, corn, wheat, and sorghum, the flexibility to switch among crops is of little relevance.

B. Geographic Market Definition

As in the case of product market definition, the challenge is to understand where sellers can realistically look for alternative outlets for their goods. In a recent merger analysis the DOJ claimed that mature hogs could be shipped over 400 miles to a slaughter facility. As a result, it claimed that the merger of the only two major buyers of hogs in the Southeastern United States would not affect buyer power. Those knowledgeable of the business regarded this claim as highly questionable. In the long run, the risks of weight loss, death, as well as the high cost of long distance shipping of live animals made this an impractical option for a large scale hog producer in the region.[6] Logistical considerations may also make it important that other inputs be produced close the place of consumption. Recent experience with weather and other disruptions has reinforced the recognition of the risks associated with long distance supply chains in many situations.

On the other hand, some products, as the recent problems with Melamine from China

[6] I interviewed a number of economists who were expert on the hog and pork markets. While some did not see serious competitive issues with respect to the Midwest (the other region where the two firms competed as buyers), there was substantial consensus that hog producers in the Southeast would be adversely effected. Because of its traditional secrecy, the DOJ did not reveal the basis on which it reached a different result.

illustrate, can move vast distances. In general the primary characteristic of products having a global market are that they are relative to their value of low weight and consumed in relatively low volume. Hence, their transportation in a global market is feasible.

Government inspection and certification requirements can introduce another level of complication in defining geographic markets. For example, genetically modified crops and animals can not be sold in some countries and even when saleable, often must be registered and approved for sale in the consuming country. The cost, burden and delay in such registration may effectively limit the market in which inputs can be sold even if there are no physical barriers.

C. Conclusions about Market Definition

In sum, buyer side market definition is roughly "analogous" to that on the seller side. But both the product and geographic dimensions can be and often are quite different from the downstream selling side markets in which the parties are involved. As a result, the evaluation of the merger must focus on input rather than output markets but even more importantly must focus on where sellers can sell and not where buyers might buy. Finally, as discussed subsequently in terms of competitive effects, the SSNIP test needs to be modified to take account of input substitution by buyers. Hence, if a buyer can obtain some necessary part of its input from some out of market source and that source has relatively good price elasticity of production, then exercise of power over a set of sellers who could reduce output substantially might still implicate buyer power as the buyer need only consider the trade-off of the input cost savings from reducing prices with a lower volume in the captive market and replacing lost input by reference to the price of the other market source. In short, the buying side market must be carefully defined in terms of the economic realities facing producers. Nothing less will permit objectively reliable evaluation of the merits of mergers affecting buying

power.

II. Competitive Effects

Before considering the structural thresholds that should trigger more focused inquiry concerning a merger or acquisition involving buyer power issues, it is essential to consider the kinds of adverse competitive effects such transactions could produce and the probability of their occurring under a range of market structures. From this inquiry should come a buyer side set of concentration measures that would provide relevant standards for further investigation.

As with seller side mergers, buyer side mergers involving significant change in the structure of the buying side can result in both unilateral and coordinated anticompetitive effects. The challenge is to make an appropriate analysis of the market context in order to determine whether such effects "may substantially lessen competition" or "tend to create a monopoly."

A. Coordinated Effects

As suggested previously, the nature of buying inputs in contrast to selling outputs creates a different set of incentives with respect to cheating on a tacit collusion to restrict price or allocate suppliers. Basically, the immediate effect of "cheating" is to raise input costs or even create a trade war if one buyer "poaches" on the sources of supply tacitly assigned to another buyer. Thus, the gains to the deviant can occur only after the input is converted to an output (often requiring that other costly inputs also be acquired). Hence, retaliation can be more effective because of the inherent lags. Moreover, because most goods are not sold in anonymous open markets, but rather involve direct transactions, those firms wishing to enforce a tacit understanding can target the specific suppliers of the deviant. This is akin to the "involuntary base-point pricing" system used to enforce delivered pricing schemes.

Various scholarly studies provide further support for this conclusion. Marshall and Muerer present a model of bidding auctions in which it is not possible to disrupt the conspiracy.[7] Asker's study of a postal buyers cartel found that it was possible to sustain the cartel even when there was turnover among the participants.[8] Finally, Huunicut and others found that there was very substantial stability in the identity of the buyer from cattle feedlots.[9] This is consistent with a form of tacit allocation among cattle buyers.

Thus, the probability of tacit collusion is significant whenever there are relatively few buyers. This is especially likely when there are numerous sellers which makes it more feasible to allocate suppliers and make each highly dependent on its continued relationship with the specific buyer. In this, the coordinated effect of allocation is prelude to the use of unilateral power to further exploit the upstream supplier. Moreover, the coordination can take the form of standardizing input elements or even contract terms in ways that increase the relative gain to the coordinating buyers. Again the because of the costs of deviating from such collective conduct, the risks of harm to competition are greater than they would be in seller side contexts and can occur even with moderately large numbers of buyers relative to what standard theory predicts on the selling side.

The fundamental implication is that where the merged buyer reduces the number of competing buyers in any relevant input market to a modest number (but one substantially larger than appears used in seller mergers) there is a cognizable risk of coordinated conduct. Only if the sellers

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[7] Marshall & Muerer, supra note 4.

[8] John Asker, *A Study of the Internal Organization of a Bidding Cartel*, AM. ECON. REV. forthcoming.

[9] Lynn Hunnicut, DeVon Baily, & Michelle Crook, Rigidity in Packer-Feedlot Relationships, 36 J. AG. & APPLIED ECON. 627 (2004).

can convert their productive capacity to other product lines easily and with a reasonable prospect of selling the resulting output is there likely to be a significant constraint on the incentive of such buyers to coordinate their buying actions.

B. Unilateral Effects

A central element of efficient product markets is the capacity of buyers to pay different prices for inputs as their demand increases or decreases. The alternative in context of rising prices is that all prior inputs must be repriced to the new, higher price. Hence, the incremental unit drives up the cost of all units. This is a particularly challenging issue in labor markets where uniform pay levels are more common.[10] But for other inputs, purchased in a sequential way, the price will vary overtime. This smooths out demand and encourages the marginal purchase.

But this same capacity to pay different prices is central to the risks that merged buyers will present to the competitive process. In consequence the analysis of potential unilateral effects is complex and contingent on the options available to both buyers and sellers. The greater the price elasticity of supply, the less likely are the effects to be significantly adverse. Thus, the focus is on the ability of sellers to adjust output in the face of lower prices.[11]

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[10] This fact may explain why price fixing and other coordination is a recurring issue in labor markets as illustrated in the *Todd* case.

[11] Another application of the unilateral effects framework would focus on the potential impact on suppliers if the merging firms were leading buyers of different inputs where each type of input was the closest alternative product line for suppliers to offer in the event that their primary line was subject to monposony or oligopsony effects. In such a case, by having substantial stakes in the two input lines the merged firm would be more able to impose its will on its suppliers given the combined domination of the purchases of the next best alternative output for the producers.

One strategy that can limit the flexibility of sellers is the use of an all or nothing contract.[12] Basically, the buyer offers to buy a set quantity of goods at a set price. The price approximates the average cost of production for the seller. If the cost of production involves increasing marginal costs, this means that the marginal good is being sold for a price below its marginal cost. If the producer can recover its average cost of production and has no reasonably feasible alternative outlet for its good, it will accept this contract. The effect, in the first instance, is to retain output at a level approximating that of a competitive market for the good, but lower the price to the buyer. The buyer has appropriated the efficiency gains of the producer. One might therefore label this a wealth transfer and take the position that it has no long run competitive implications. However, the more appropriate analysis from the perspective of the competitive process is that this transfer has a long run negative effect since it denies to the efficient producer the opportunity to receive the reward for its effort. Ultimately, this will discourage investment and innovation in a market subject to such appropriation.

Another unilateral effect that is a function of mergers creating buyer power is an upstream impact stemming from the consolidation of buying resulting from the merger. The consolidated firm can centralize its buying reducing the number of suppliers. In doing so, it can generate substantial competition among its potential suppliers. The winner of that race is now a much more significant buyer of upstream inputs to its product. As a result it now has buyer power and an obvious incentive to exploit that power. It can do so by driving down input prices through exercise of buyer power in those input markets where it has sufficient dominance to impose its will while making up the lost

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[12] See, ROGER D. BLAIR, JEFFERY L. HARRISON, MONOPSONY: ANTITRUST LAW AND ECONOMICS, 73 (1993); C. Robert Taylor, *Monopsony and the All or Nothing Supply Curve: Putting the Squeeze on Suppliers*, Auburn University Working Paper. June, 2003.

volume from purchases in other more competitive markets as described above. Alternatively, it can employ all or nothing contracts to retain the same volume of inputs, but reducing the total price paid per unit from what would have been required in a competitive market. The central implication of this scenario is that a merger creating buyer power may have its primary effect in upstream markets one or two steps removed from the buyer's direct input market.[13]

Finally, a buyer may use its power, as Broadway-Hale and Toys R Us did, to demand other kinds of exclusionary favors from its suppliers.[14] In these situations, price may be less important to the buyer than is the protection of its position in the retail market from competition. Hence, the buyer uses its power to demand either coordinated or unilateral refusals to deal with its competitors as the price of its continued patronage. From the perspective of a rational seller, there is a manifest trade-off between the gains from a continued course of dealing with the large volume buyer and the potential to develop other markets. The most likely result of that balancing is to support the incumbent buyer's demands to exclude new or marginal competitors.

C. Summary on Competitive Effects

Central to the analysis of the competitive impact of buyer power is the capacity of the buyer to be the decision maker about purchases. This insight demands that those evaluating the likely

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[13] An illustration of this kind of secondary effect is the history of cheese price manipulation. Here the immediate effect was to drive down the price of cheese paid to cheese makers, but dairy farmers bore the ultimate burden as cheese companies reduced the price they paid for milk. See, WILLARD F. MUELLER, BRUCE MARION, MAQBOOL SIAL, & F. GEITHMAN, CHEESE PRICING: A STUDY OF THE NATIONAL CHEESE EXCHANGE (Report to the Wisconsin Department of Agriculture, Trade, and Consumer Protection Investigation into Cheese Prices) (1996).

[14] Klor's v. Broadway-Hale Stores, 359 U.S. 207 (1959); Toys R Us v. FTC, 221 F.3d 928 (7th Cir. 2000).

effects of mergers where the resulting firm will be a substantial buyer of any type of input must consider the risks associated with such discretionary actions. Both the probability of coordinated effects and the potential for unilateral effects having significant capacity to distort the efficient and dynamic operation of upstream input markets exists whenever the merger will result in even a moderate increase in concentration in buying markets. Such effects are not, of course, necessarily probable. Other market characteristics, as discussed earlier, may modify or even make impractical the use of buyer power to achieve any anticompetitive effect. But, the central point is that such effects require careful examination. Such an examination is not recognized or defined in the current Guidelines.

One important practical implication of buyer side mergers is that sellers may be more reluctant to complain because of the risks of adverse reactions from the parties to the merger. If the merger is consummated despite the complaint, the merged firm may well refuse to buy at all or impose onerous conditions on its purchases. Even if the merger is stopped, the two firms may still refuse to deal or deal on harsher terms with a complainant. The central difference is that the buyer retains, post-merger discretion of buy or not buy. This is different from the seller side merger where the customer is the party with discretion in any situation short of monopoly. This fact about future relationships means that evaluation should rest more on presumptions arising from market position and other objective criteria and less on whether there are complaints from sellers of inputs.

III. Levels of Presumptive Harm

Central to the understanding of the levels of increased concentration that create risks of competitive harm is the recognition that buyers have discretion to decide from whom to buy. They can employ this discretion in both coordinated and unilateral ways, as discussed above. But what

is essential at the first step is to realize that this capacity to choose among potential suppliers can create a great deal of power even when the buyer's market share is modest by seller side measures.[15] Indeed, the reason that fairly high market shares are used in assessing when seller combinations create risks of competitive harm is because buyers have the discretion to switch suppliers and thus de-stabilize the potential market power effects of a selling side merger.

In the UK single firm market shares of less than 10% of all of some class of groceries purchased in the country have produced significant unilateral buyer power effects.[16] In *Toys R Us*, the market share that allowed the firm to impose anticompetitive restraints on its suppliers was about 20% of the national market for toys. While no market share is reported in the *Klors* case, it is unlikely that Broadway-Hale dominated the retail appliance market in California or nationally, but it still had the power to coerce its suppliers into agreeing to cut off Klors. These cases suggest that unilateral effects are possible from mergers resulting in control over 10% to 20% of the buying market.

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[15] A buyer able to affect 10% or more of producer's output assuming any kind of economies of scale has the potential for considerable leverage over that seller. Another relevant condition is whether there is another outlet for this production that is easily accessible. Manifestly, in most industrial situations, a change in output for a producer in the 10% or greater range is likely to result in significant short-term impact at the very least. With longer term impact uncertain, under such circumstances every major buyer has significant leverage over such a producer. When the buyer takes a much higher percentage of a specific sellers output, the dislocation resulting from the lost sales opportunity will be even greater assuming the seller has relatively few alternative outlets readily available.

[16] Paul Dobson, *Exploiting Buyer Power: Lessons from the British Grocery Trade*, 72 ANTITRUST L. J. 529, 535 (2005). One might question whether there is any reason to think that smaller markets in terms to total sales volume may result in buyer power at smaller market shares than would be the case in markets with larger total volumes. This is the kind of question that ought to be under consideration in rethinking the merger guidelines, but to date has received no noticeable attention.

Economies and dis-economies in production affect the unilateral market power of buyers. A plausible reason for the power of a 10% buyer in the retail grocery business is that a threatened reduction in volume of 10% could cause a firm significant dis-economies of scale especially if it will be difficult to find an alternative outlet for that quantity of production. If a supplier serves a group of buyers where none takes a very large volume, the total volume of purchases can allow the supplier to achieve scale economies, but if two of those buyers combine so that after their combination their combined purchases would significantly affect the volume of sales for the producer, then the producer will become dependent on the merged buyer's continued patronage.[17] This in turn can confer on such a buyer a great deal of buyer power with respect to that seller. The extent of that power will be a function of the dis-economies that might result from reduction in output as well as the potential that the producer can find other outlets for its products. This is the converse of the committed and uncommitted entrant analysis, but now it must be framed in terms of committed and uncommitted buyers. This raises a host of questions specific to the capacity of a firm to become a volume buyer of an input.

The implication of these studies and examples is that mergers that create buyer control over 15% to 20% of an input market merit a focused review with respect to potential unilateral effects. As Blair and Harrison have shown, the relative levels of elasticity on both the supply and demand side very much affect the level of power that will result.[18] Supply side market structure may also be

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[17] This effect is most likely in contexts such as grocery retailing where the seller already is selling to other major outlets. Hence, the lost sales can not easily or readily be recouped by adding other outlets.

[18] B LAIR & HARRISON, supra note 12, 36-42; see also, Richard Sexton & Mingxia Zhang, supra note 4.

relevant as a concentrated supply side may produce countervailing power, but such power may result in higher consumer prices as the concentrated buyers and concentrated sellers collectively raise input prices and find ways to share the over charge even if the downstream market appears competitive.[19] The problem of buying side "efficiencies" is discussed below.

Secondly, as *Todd* teaches, it is possible for a more dispersed set of buyers to find it rational to coordinate their buying activities than would be the likely case on selling side of the market. This occurs for a couple of interrelated reasons. Buyers generally share an interest in reducing input prices, especially when lower prices, e.g., wages, do not trigger a significant decrease in supply. Closely related, the benefit of cheating on a price reducing understanding is minimal. The immediate effect is to increase the costs of the deviant. If that deviant is selling into a competitive output market, its costs will go up and so its margin will decrease. Only if any resulting output increase were very substantial and durable would the deviant expect to gain. Thus, input collusion is more self-policing and so can accommodate many more parties than would output collusion.[20] Hence, lower levels of concentration can create risks of coordinated effects. This also provides a reason for looking at mergers involving competing buyers even when the overall market for inputs would not appear concentrated from the perspective of conventional seller side analysis.

This is not to say that all mergers resulting in a 10% or 20% control of the input market should be presumed to be illegal. It is to urge that such mergers need more inquiry than they now receive. The central point of this section is to emphasize that the "analogous" standard that would

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[19] See, Chris Doyle & Martijn A Han, Expropriating Monopoly Rents through Stable Buyer Groups, Amsterdam Center for L & Econ Working Paper No. 2009-03 (2009).

[20] This analysis is developed by Marshall & Muerer, supra note 4, in context of auctions.

trigger further review of the merits of a merger where there is demonstrable increase in concentration on the buyer side is substantially lower than the comparable measure on the selling side. Put in somewhat different terms, a reduction from 6 to 5 substantial buyers should be a cause for concern. Even greater concern should exist when the reduction in buyers results in a universe of major buyers that is 4 or fewer.

IV. Efficiency Concerns

Contemporary merger policy assumes that most mergers result in real efficiency gains to the parties. This premise is empirically questionable.[21] But given its significance in actual enforcement decisions, it is important to define carefully the kinds of efficiencies that buying side mergers might legitimately claim. These efficiencies can arise from transactional cost savings or, in some circumstances, economies of scale or scope that upstream suppliers might achieve and share given a large assured volume of business.

Such real gains need to be distinguished from the wealth transfers that result from the exercise of monopsony power. Such power can force down the price of inputs transferring upstream producer wealth to the downstream buyer. The gain to the buyer is at best a pecuniary gain and does not involve in change in the social costs of production. It is likely, however, that much of the gain that merging parties will claim to arise from their combination upon careful examination will be merely a wealth transfer. As such it should not be accepted as a justification for the merger. In fact, such gains provide direct evidence such a merger will result in buyer power that the merged entity intends to exploit.

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[21] F. M. Scherer, *Some Principles for Post-Chicago Antitrust Analysis*, 52 CASE WEST. RES. L. J. 5, 11- 22 (2001).

Conclusion

The review and workshop process for reconsidering the Horizontal Merger Guidelines is an important step in reviving and focusing merger enforcement. The all but exclusive focus on the selling side of the market in which the only role conceived for buyers is their possible ameliorating effect on anticompetitive seller mergers reflects a narrow and conventional vision held by those defining the questions to be considered. However, it is not too late to include in the on-going revision process a more open and naunced view of the potential adverse competitive effects that mergers can create. To do this, the review process must take seriously the risks that mergers creating increased buyer power present and expand on the "analogous" framework necessary to evaluate those consequences of mergers.

This statement raises some of those issues and suggests how such mergers should be examined on their merits. A well informed merger review process will develop these issues further and provide guidance to potential merger partners, their lawyers, and the agency staff.