REBALANCING THE SUPPLY CHAIN:
buyer power, commodities and competition policy

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About the South Centre

In August 1995, the South Centre became a permanent intergovernmental organization of developing countries. In pursuing its objectives of promoting South solidarity, South-South co-operation, and coordinated participation by developing countries in international forums, the South Centre prepares, publishes and distributes information, strategic analyses and recommendations on international economic, social and political matters of concern to the South.

The South Centre enjoys support from the governments of its member countries and of other countries of the South and is in regular working contact with the Group of 77 and the Non-Aligned Movement. Its studies and publications benefit from technical and intellectual capacities existing within South governments and institutions and among individuals of the South. Through working group sessions and consultations that involve experts from different parts of the South, and also from the North, common challenges faced by the South are studied and experience and knowledge are shared.

About Traidcraft

Traidcraft Exchange is the UK’s only development charity specialising in making trade work for the poor. In collaboration with local partners we work to create opportunities for poor people to harness the benefits of trade, helping them to develop sustainable livelihoods. Traidcraft also aims to use the experience of its sister fair trade company, Traidcraft plc, to improve wider trade practices. Traidcraft’s Policy Unit conducts research and advocacy work to improve trade rules and the practice of companies.

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Glossary of terms

FAO – Food and Agriculture Organisation
Monopoly – When a single firm has selling power
Monopsony – The buying form of monopoly, when a single firm has buying power
OECD – Organisation for Economic Co-operation and Development
Oligopoly – A market dominated by a few sellers
Oligopsony – A market in which there are few buyers
Own-label – Range of products carrying the retailer’s label and produced to retailer’s specification; typically, but not necessarily, sold at lower price than main brand competition (UK Competition Commission)
Transnational corporation (TNC) – An enterprise with activities in two or more countries with an ability to influence others (UN definition)
Vertical integration – A single firm undertaking successive stages in the chain of a product’s production
UNCTAD – United Nations Conference on Trade and Development
Rebalancing the supply chain: buyer power, commodities and competition policy

Summary

The power of increasingly concentrated retail and processor buyers in global agricultural supply chains allows them to exert pressure on their immediate suppliers, which can then be passed down the supply chain to vulnerable commodity producers and their workers. Traidcraft and the South Centre are concerned about the impacts of this on some of the most vulnerable producers in the world, particularly as their ability to organise and respond collectively is being increasingly limited. In assessing the potential of competition policy to act as a check on the exercise of this buyer power, the paper finds clear opportunities, in particular for tackling the accumulation of power which is one of the root causes of the problem. However there are also clear limitations (both conceptual and practical) which need to be addressed if competition policy is to be effective, these include: competition policy’s consumer focus; its lack of dedicated instruments to assess and deter buyer (as opposed to seller) power; the ‘fear’ associated with buyer power, resource constraints and most fundamentally the need to recognise the global nature of trade either through expanding the scope of national laws or thought the establishment of an international competition agreement or authority.

Section 1 of this paper will outline the problems that buyer power and corporate concentration present for commodity producers in developing countries. Section 2 outlines different approaches to competition policy and assesses its usefulness and weaknesses in tackling buyer power. Section 3 presents a series of case studies outlining successful attempts to use competition policy to tackle buyer power and Section 4 offers conclusions and recommendations.

Introduction

This paper is an attempt to explore the extent to which competition policy can be used to address problems caused by corporate concentration and the exercise of ‘buyer power’ in agricultural commodity markets. It assesses the conceptual and practical opportunities of current competition policy to tackle this phenomenon and also highlights its limitations. This is a difficult and complex area. Many studies that have looked into the adverse affects of buyer power and corporate concentration on commodity producers have suggested that competition policy may offer a useful avenue for investigation. This study is therefore an attempt to do this and should be seen as a contribution to the debate.

For many policy makers international negotiations on competition policy are now unfortunately associated with the “Singapore Issues” debate at the World Trade Organisation (WTO). The Singapore Agenda on competition policy was an attempt to achieve multilateral agreement on competition law. It was not the first attempt to do so, the Havana Charter of 1947/48 contained provisions which would have bound each member to prevent practices affecting international trade which restrained competition, limited access to markets, or fostered monopolistic control, and in 1980 the United Nations agreed the “Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (the UNCTAD Code).” The Singapore Agenda contained provisions similar in content and approach to US Anti-trust law than to the relatively developing-country friendly UNCTAD Code and also omitted many of the more pro-development aspects of the Code. The approach taken by the Singapore discussions would not have addressed problems of market concentration in the hands of a few transnational companies and may in fact have exacerbated problems by emphasising market access aspects and reducing the policy options available to developing country governments. Therefore, its successful dismissal by developing countries at the Cancun Ministerial in 2003 was commendable.

This paper takes a different approach. It assesses the extent to which governments could use competition policy instruments as a way of regulating the power and practices of powerful transnational and national retailers and food processors. As discussed in the subsequent sections, it is clear that there are high levels of concentration in these sectors and there is real concern that some companies may be abusing their dominant position more frequently than the number of cases suggests and that these practices may have impacts right down the supply chain. These nodes of concentration may be amongst sellers (for example of inputs such as seeds and fertilisers to producers) or amongst buyers (processors or retailers who buy a farmer’s produce). Both can be a problem for primary producers of agricultural products, but this paper will focus exclusively on buyer power.

Footnotes

1 According to the OECD (1981), buyer power is a situation which exists when a firm or a group of firms, either because it has a dominant position as a purchaser of a product or service or because it has strategic or leverage advantages as a result of its size or other characteristics, is able to obtain from a supplier more favourable terms than those available to other buyers.

2 This paper defines agricultural commodities fairly broadly as undifferentiated, largely unprocessed agricultural products, including tropical beverage crops (tea, cocoa, cotton), sugar, cereals, meat, dairy products, rice, grain, rubber, fibres (cotton, jute, sisal), oil crops, fruits and horticulture crops. These products can be traded either in bulk or increasingly as part of ‘buyer driven supply chains’ involving the same products, but with a greater degree of retailer-led standardisation. See Vorley 2004 for a fuller explanation of these terms.

What gives companies buyer power?

As the definitions imply, buyer power stems from a number of factors, including a company's size, lack of competition in a particular market or the supplier's relative dependent position which allows the buyer to play a 'gatekeeper' role between the supplier and the consumer. If a company is the only buyer in a market it is in a 'monopsony' position. This rarely occurs in practice and more often there are small numbers of concentrated buyers who dominate a particular market. This is known as 'oligopsony.' Buyer power can also be created when a group of buyers who in other aspects are competitors agree to collaborate in their purchasing. This can take the form of 'buying groups' or 'buying alliances'. The power of a buyer is situation-specific. It relates not only to market power, but to the relative position of the supplier. Even a small retailer with tiny market share can exercise buyer power if it takes half a supplier's output.

Suppliers of differentiated products or those with recognised brands are better able to withstand the pressure of dominant buyers. In contrast, producers supplying undifferentiated bulk commodity products are extremely vulnerable. In 'buyer-driven' supply chains the supplier is kept vulnerable by having to comply with buyer-specific standards, which reduces their ability to sell elsewhere and therefore increases their dependence on that particular buyer.

“Small producers, in particular, are likely to suffer when they are unable to resist retailer buyer power, forcing them to cut prices to the point where only the most efficient can survive. The longer-term effect will be to threaten the viability even of efficient producers when investments are undermined by inability to recover fixed costs as a result of being forced to price at (short-term) marginal cost.”

Footnotes

Transmission of risk and shifting power

Buyer power can be exercised at any point in a supply chain. In particular it seems to be prevalent at the agricultural processing, manufacturing and retail levels. This may be because these are the more capital-intensive parts of the chain and entry costs are high, leading to high levels of concentration. The impact of buyer power can also be transmitted along long and complex supply chains and felt by primary producers. So buyer power exerted by a retailer in France, can affect a powerful brand manufacturer located far away from the point of production. The transmission of risk and shifting of power is a mechanism common to all levels of the supply chain. This may be because these are the more capital-intensive parts of the chain and entry costs are high, leading to high levels of concentration. 

There seems to be a shift in buyer power towards the retail end of the supply chain and away from the traditionally dominant processors.14 However it is also clear that increasing concentration at the retail level is in turn driving concentration at the manufacturing level as well. For example Planet Retail observes that the pressure for the likes of Wal-Mart, Tesco and Carrefour are thought to be a motivating factor behind the 2005 link up between Procter and Gamble and Gillette.15 Retailer power is also accelerating the drive towards vertical integration in particular supply chains, for example the banana giant Dole's move into processing is thought to be in part a response to supermarket price pressures. It also seems to be the case that consolidation at the retail level with growing demands for private standards and traceability requirements is driving consolidation amongst suppliers – often in favour of large exporting firms whilst pushing smallholder farmers out of supply chains.9

How companies maintain buyer power

Large companies are able to maintain and increase their power by virtue of their size. This enables them to negotiate larger volume related discounts, which means in turn that they are able to offer lower prices than those offered by smaller rivals, which in turn increases the dominant buyer’s market share and so on. Firms also engage in behaviour described below which has the effect (intended or not) of increasing and sustaining their ability to exercise buyer power.

Mergers and acquisitions:
The growth in mergers and acquisitions (for example SuperValu’s acquisition of Albertson's in the United States in 2006 and Edeka acquiring SPAR Germany in 2005) has contributed to an increase in market share and buyer power amongst retailers. This shift is also occurring in the developing world where aggressive investment in the retail sector in Latin America, South East Asia, and to some extent in Africa has lead to increased market concentration at the retail end of commodity value chains.16

Sourcing globally:
Purchasers can increase their power by buying their raw materials from multiple sources. This allows them to avoid dependence on a single or a few suppliers and enables them to extract the lowest possible prices, forcing suppliers to compete fiercely both within and between countries. This practice is particularly seen where the buyer (for example a brand or a processor) is sourcing undifferentiated commodity products. In the tea industry for example, certain types of tea used for particular blends are not substitutable. This allows the buyer to play suppliers off against each other. Farmers do not possess the reciprocal power to play one agribusiness giant off against another.

Footnotes

9 UK Competition Commission enquiry into the groceries market, (February 2008) “Provisional decision on remedies relating to supply chain practices”.
11 Planet Retail (2006), “Global Retail Concentration”.
12 Planet Retail (2006), “Global Retail Concentration”.
Rise of own-label products:
By developing own-label products, retailers are able to capture more of the value on those products and are increasingly displacing traditional brands. In doing this they become a competitor, as well as a buyer, in relation to their suppliers. This increases their buyer power in several ways. They can refuse to buy products from suppliers because they can offer an own-label product, the development of their product with manufacturers gives them critical information about the cost make-up behind that product, and because they are the final decision makers in the retail pricing of products they can price their own-label product below that of branded competitors.

National and cross border collaboration:
By strategically collaborating (which companies do to improve economies of scale, reduce transactional costs etc.) firms are able to reinforce their dominant position. This may take the form of ‘buyer groups’ or ‘buying alliances’. Buyer groups purchase collectively on behalf of members that remain independent retailers while buying alliances tend to have only one member from any country (i.e. generally they are not direct competitors). This practice has the effect of reducing options for suppliers and so increases the buyer power of those participating.

“Seen in this light, it is not just the activity of international expansion by the leading multinational retailers that is driving greater integration of markets on the procurement side, but also alliances of nominally independent retailers.”

Buyer power and the commodity problem
Two and a half billion people make their living by producing primary agricultural commodities. As many as 43 developing countries depend on a single agricultural commodity export for more than 20 percent of their total export revenues. Commodity production is characterised by large numbers of producers, producing largely undifferentiated products. They are often vulnerable and the high costs of exiting commodity production and lack of alternative livelihoods means that they may continue to produce even when the market price is below their cost of production. They will compensate for low prices by producing more, exacerbating oversupply. Despite recent price rises for some commodities (especially those used in the manufacture of bio fuels and also minerals), there is debate about how long this peak will last, and for many tropical products the long term price trend continues to be downwards, punctuated by increasingly volatile short term price fluctuations. The former reduces producers’ living standards while the latter makes it very difficult for them to plan. In addition, commodity producers also appear to be receiving a low and declining proportion of the final product price (see figure below).

There are many reasons for the long term price declines and low proportion of the final retail price for tropical agricultural commodity producers, including oversupply and the collapse of international supply agreements. However the combination of corporate concentration and increased farmer disorganisation is particularly of interest in terms of competition policy. The relationship between concentration and lower prices is complicated, but ActionAid and the South Centre have recently traced the trends and linked levels of corporate concentration directly with declining prices in the coffee market.

Examples of corporate concentration in commodity supply chains

Processor concentration
• 4 international coffee roasters account for 45% of total coffee roasting
• 2 companies account for 74% of cotton ginning capacity in Zambia
• 3 companies control 50% of cocoa processing globally
• 5 companies control 80% of the world market for bananas

Retailer concentration
• The top ten retailers in the EU now account for over 30 per cent of sales of all food and daily goods
• In the UK the top four retailers account for 75 per cent of the grocery market
• Wal-Mart accounts for 6.1 per cent of global retail sales

Footnotes
16 Planet Retail (2006), “Global Retail Concentration”.
Various factors have exacerbated the trend towards corporate concentration. Economic liberalisation has accelerated cross border mergers and acquisitions (usually between companies headquartered in rich countries), which have now reached unprecedented levels. This is not likely to lead to the stated aim of liberalisation which is more competitive markets. The push towards privatisation in many developing countries has had similar effects, replacing public monopolies with private ones instead of fostering greater competition. In agriculture this has impacted on the ability of producers to counter corporate concentration as state marketing boards have been abolished and there has been strong opposition to producer or farmer organisations in both the developed and developing worlds. For example in the late-1990s co-operatives processed two thirds of Canadian milk; today that is down to 42%. The situation is more striking in Sub-Saharan Africa where the advent of neo-liberalism under the IMF/World Bank-led structural adjustment programmes swept many state marketing boards from the continent. The weakening or abolishing of the marketing boards has left producers isolated, disorganised and has limited their ability to bargain collectively. So while upstream stages of the supply chain have become more concentrated, competition amongst suppliers has intensified at national and international levels, allowing buyers to play producers off against each other, extract better terms and transfer value from upstream stages of the supply chain to downstream levels. This has important implications for global income inequality when those farmers are located in developing countries, while the processors, international traders and retailers are mostly located in developed countries. A World Bank report estimated that divergence between producer and consumer prices may have cost commodity-exporting countries more than $100 billion a year.

Buyer power has many negative impacts which can be transmitted through the supply chain. They include increased costs for suppliers, uncertainty which reduces incentives for investment and innovation, financial distress including high levels of debt and insolvency, as well as transfer of commercial pressures onto workers in the form of low wages, short term contracts and delayed wage payments.

Footnotes
28 Quoted in Fox and Vorley (2004), “Concentration in food supply and retail chains” DFID.
Section 2: Competition policy and buyer power

Introduction to competition policy

Competition policy is one aspect of an overall policy framework. History, legal traditions and social and economic needs differ among countries and also over time. Competition policy regimes around the world reflect these different realities. This makes it difficult to generalise about competition policy. However broadly speaking the purpose of competition policy has historically included a notion of public good or public interest. Recently amongst certain countries, especially those following the OECD model, there has been a narrowing of the aims of competition policy to focus on the promotion of economic efficiency and consumer welfare. Most competition laws cover a few central issues: mergers (which can produce anti-competitive effects for example by preventing the entry of smaller players); anti-competitive practices (such as price fixing and cartels) and abuse of dominance. Not all countries have competition policies, but there was a rapid rise in this number during the 1990s structural adjustment period, in response to the wave of privatisation (and its failure to lead to a competitive environment) and in response to the Asian financial crisis. Those countries that have introduced laws have been influenced variously by US, EU, Germany, Japan, but also South Korea and multilateral bodies including the OECD, World Bank and UNCTAD.  

| Number of developing countries that have adopted competition laws, as of June 2000 |
|-----------------------------------------|---------|---------|---------|---------|---------|--------|--------|
| Pre-1950s | 1950s | 1960s | 1970s | 1980s | 1990s | Under preparation | Total |
| Asia/Pacific | 0 | 0 | 2 | 2 | 14 | 6 | 26 |
| Central/Eastern Europe | 0 | 0 | 0 | 1 | 16 | 1 | 18 |
| Latin America & Caribbean | 1 | 2 | 1 | 1 | 0 | 6 | 21 |
| Africa | 0 | 1 | 0 | 1 | 2 | 10 | 28 |
| Total | 1 | 3 | 3 | 4 | 5 | 50 | 93 |

Footnotes
Principles and practice of competition policy

Jurisdiction
The implementation of competition policy is limited by jurisdiction which is usually national. Although there are bilateral and regional competition agreements and some broader regional and bilateral trade agreements include sections on competition, the aim of these is usually limited to voluntary co-operation and facilitating market access for firms rather than providing instruments that would allow regulation or sanction. Sometimes there is tension between the national and regional levels and occasionally there are disputes about which level has authority. At the multilateral level the first attempt to introduce competition rules was the Havana Charter, which was negotiated in 1947/8 to lay down the blueprint for the International Trade Organization (ITO). This did include regulatory aspects, requiring nations to take appropriate measures against transnational restrictive business practices including price-fixing and market access limiting restraints. However, the Havana Charter was never adopted because the United States withdrew support. In 1980 the United Nations Conference on Trade and Development (UNCTAD) presented a “Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (the UNCTAD Code)” to the United Nations General Assembly. The General Assembly accepted the UNCTAD Code as a non-binding recommendation. The rules provided for in the code have the explicit objective of furthering the trade and development of developing countries. However, support to the Code was short-lived due to a shift of approach by the US.

Exemptions
In some countries certain sectors are completely exempted from the remit of competition policy. These are called ‘carve outs’ and one of the most common has been agriculture. Traditionally this has been to help farmers and to protect the non-economic gains from agriculture including food security and environmental protection. For example, Article 36 of the Consolidated Treaty of the European Union states that provisions on competition law shall apply to production of and trade in agricultural products only to the extent determined by the Council within the framework of ensuring a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture. There are similar provisions in the United States and Japan. However, few developing countries have such carve outs, and the trend is turning against them, irrespective of their usefulness for countries at different stages of development.

Powers and resources
Competition authorities broadly judge cases against their remit (for example, consumer welfare) and on whether they are likely to have anti-competitive effects. To do this they normally rely on the party affected by the anti-competitive behaviour to make a complaint to competition authorities, but authorities can also take the initiative to set up regulatory bodies or watchdogs to monitor particular markets. The sanctions available to authorities vary from country to country and can be quite wide-ranging for example some can prevent an action or in rare cases order the reorganisation or break up of a company (in merger cases for example), or they can impose fines on companies found guilty of abuse of dominance. In some instances fines are related to the turnover of a company and can be significant. However, in practice investigating and successfully prosecuting cases can be very difficult and requires considerable time and resources. In some situations investigation of an entire market is required. In many countries, including developed ones, the resources available to competition authorities are limited.

Competition policy and buyer power
The debate as to whether competition policy is capable of dealing with the problem of buyer power in its present form depends partly on the model of competition policy chosen. The OECD model tends to be more consumer (rather than supplier) focused although it does specify clear punishments for abuse of dominance, including in situations of oligopsony. The UNCTAD model is more flexible and explicit about dealing with TNC dominance. There is debate among competition policy experts as to whether buyer power should be treated differently from seller power. Carstensen has argued that similar analytical tools can be used, but that different metrics (benchmarks) are needed to measure the different types of effect and that in terms of ‘diagnosis’ firms need a considerably smaller market share to exert buyer than seller power. In contrast the OECD concludes that monopsony buying problems can be addressed using the same basic antitrust and benchmarks for measuring effects as that used for addressing monopoly selling problems.

Competition policy opportunities
Competition policy as currently conceived can clearly be used to tackle a number of the problems outlined as associated with buyer power, by restraining the formation of a dominant position through mergers and by preventing or circumscribing some of the practices associated with abuse of that dominant position. Competition policy is therefore an important tool for policy makers. Section Three will provide examples where competition policy has been used to tackle the exercise of buyer power in both developed and developing countries.

Footnotes

Footnotes
**Competition policy limitations**

In its current form, competition policy has a number of limitations for dealing with buyer power.

1. Buyer power versus seller power

   Competition authorities tend to focus on the problem of seller power rather than buyer power. This is because usually they are tasked with ensuring that the consumer is protected. This consideration is often reduced in practice to achieving low consumer prices rather than other factors such as ensuring choice or quality. As long as the consumer is getting low prices, competition authorities have little reason to act. Indeed the emphasis on consumer welfare means that many of the practices carried out by firms when exercising buyer power would be considered pro-competitive. Where there is recognition of the existence of the problem of buyer power, the trend advocated by powerful entities such as the OECD is to use the same tools as that used for seller power. But some suggest that the low number of buyer power cases points to the weakness of the current instruments rather than the absence of the problem.

   "Both buyers and retailers are increasingly influencing the process of production, with the result that farmers feel that not only are their margins being reduced but their independence to govern their own commercial activity is more limited than in the recent past. On occasion, price-fixing among buyers has been found and prosecuted in many OECD jurisdictions. Given the difficulty of identifying local price-fixing agreements, there may be more price-fixing activity by agricultural buyers than has been prosecuted."

   Thus a narrow interpretation of the aim of competition policy limits its usefulness in tackling the problem of buyer power. There are some interesting exceptions to this which are explored in the next section.

2. Problems of market definition and market dominance measures

   To prove an incidence of buyer power, it may be necessary to show that the firm exercising the power is in a dominant position within a market. Thus how the ‘relevant’ market is defined and how dominance is measured are both of critical importance. Markets are usually defined as geographic, (for example local), or as product markets (for example ‘the grocery sector’). Different countries have different approaches for establishing market dominance. Some use quantitative measures, others qualitative and there are wide disparities between the level of market share at which a firm is considered to be dominant – from as low as 20% to as high as 70%.

   If a market is defined too widely or the measure of market dominance is set too high this makes it difficult to prove buyer power. This has resource implications for the competition authorities too. For example it could be very difficult or very costly to prove that a single firm is dominant across the entire EU market, but that does not mean it cannot be exercising buyer power. It should be noted that most analysts agree that because of the variety of ways that buyer power can be exercised as well as the issue of supplier dependence, it is possible for a firm to exert buyer power at levels of market share much lower than that of seller power.

   Linked to this is another weakness of the current competition law approach when trying to apply it to buyer power. Usually any assessment of market dominance takes a horizontal approach – that is it looks to see whether a firm or group of firms are able to exert anti-competitive power at a certain point in a supply chain. There are also rules governing vertical agreements that might have an anti-competitive effect – for example in the OECD model law the ‘threshold’ for judging dominance in a vertical agreement is that at least one of the parties holds a dominant position in a market (35%) or that similar agreements are widespread and this affects competition. However these are not widely implemented in buyer power cases. Vertical integration leading to dominance is particularly relevant in smaller economies where the impacts of agreements on economic competition may be more keenly felt.

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**Footnotes**


3. Problems of jurisdiction

Competition policy requires modernisation if it is to adequately tackle the challenges presented by globalisation. Supply chains increasingly involve actors from multiple countries and companies themselves are increasingly transnational.

"A key feature of globalisation is that its economic and organisational 'glue' is increasingly associated with complex networks of suppliers who produce in globally dispersed locations in accordance with the demands of lead firms. These firms either dominate important national markets (such as the principal supermarket chains in Britain), or more likely are TNCs with broad international remits." 42

This leads to a number of challenges when trying to use competition policy to tackle buyer power. By definition the ‘victims’ of buyer power are suppliers and in today’s supply chains the more powerful actors are likely to be located in developed countries and the suppliers in developing countries. At present competition policies are applied only against anticompetitive conduct which adversely affects markets in the country or region where the competition authority concerned has competence. Thus, the competition authority will assert competence over anticompetitive conduct by sellers overseas which adversely affects buyers or consumers based within its territory. In the case of the US, the competition authorities will also assert jurisdiction over anticompetitive conduct by foreign buyers which adversely affects exports from the US. However, no competition authority will take enforcement action against anticompetitive conduct by national buyers which adversely affects sellers based in another country or jurisdiction. Again there are some important exceptions to this rule which are explored in the next section. While the unilateral application of competition laws on foreign firms or in foreign territory has been a subject of intense debate in the past, competition authorities in major developed countries (or the EU) routinely enforce their laws in such situations – so there should be no insurmountable legal obstacles to smaller countries acting in the same manner. In practice, however, given deficits in enforcement capacity and power asymmetries, it can be expected that smaller countries will face problems in the application and the likelihood of a successful prosecution of anticompetitive practices by TNCs involved in commodity supply chains.

4. Capacity limitations

There have been very few prosecutions of buyer power – including in developed countries – because investigating cases is difficult, time consuming and extremely expensive. Access to information is often a problem. This is compounded when companies lobby against such investigations or mount legal challenges. Capacity problems are particularly an issue in relation to buyer power, because by definition the buyers tend to be very powerful. In some developing countries the situation may be compounded by the fact that competition laws are relatively new and authorities are under-resourced. Because of this, the success of developing countries in detecting and sanctioning anticompetitive behaviours has been poor to date, but there are some notable exceptions outlined in Section Three.

5. Climate of fear at the macro and micro levels

In today’s markets where developing countries are often engaged in fierce competition to attract foreign direct investment, multinational companies have great power. Investigations into buyer power at whatever level may frighten away potential investors or multinational companies may threaten to move if their dominant position or potentially unfair practices are questioned. This is a real disincentive to developing countries to use competition law as a way of tackling buyer power. Similarly at the micro level, producers or suppliers often fear to make official complaints to authorities about abusive buying practices for fear that they may be delisted or blacklisted by other competitors. The OECD found that insufficient protection for complainants was a problem in buyer power cases:

"Often, as with many other sectors of antitrust law enforcement, official complaints to authorities are not made as individual producers often fear that they may be delisted from their major buyer and blacklisted by other competitors." 43

Most current competition law relies heavily on complaints by those affected by anti-competitive behaviour or abuse of dominance. This is a real problem in applying competition policy to buyer power cases as those affected may be unwilling to come forward. This ‘complaints-driven’ system does not work and many argue that proactive regulation is the only realistic way of addressing this climate of fear. Some interesting attempts to tackle this issue are outlined in the next section.

6. Weak consideration of public interest or developmental objectives

As has been described, competition policy, particularly in the OECD tradition, is focused on economic efficiency and consumer welfare. The OECD’s model competition law states its objectives as follows: "This law is intended to maintain and enhance competition in order ultimately to enhance consumer welfare”. This narrow focus is increasingly accompanied by the involvement of economists and formal economic models in an attempt to quantify competitive and anti-competitive effects. 44

This narrow scope of competition policy is a relatively recent phenomenon. Both in the US and European Union competition policy was initially established with wider considerations of public interest. In the UK it was as recently as the 2003 Enterprise Act that the test applied to mergers was changed from one premised on “public interest” to “significant lessening of competition”. This trend limits the usefulness of competition law as a way of tackling buyer power, as this would require greater consideration of suppliers. On this point the European Economic and Social Committee concluded that “One area of competition law that should be looked at is the definition of public interest. It should not be confined to prices and market forces only.”

Today some countries and institutions are reclaiming the space for pro-development competition policy objectives. For example South Africa’s post-apartheid competition law includes wide-ranging social objectives, including employment generation, support for small enterprises and empowerment of previously disadvantaged communities. Similarly the UNCTAD model competition law has the broader aim of ‘economic development’ rather than ‘economic efficiency and consumer welfare’. These examples are discussed further in Section Three.

Footnotes


This section outlines some recent innovative examples where competition policy has been successfully used by developing and developed country authorities to tackle buyer power and its impacts down the supply chain.48 Some of these case studies show how existing competition policy has been used to tackle buyer power – for example the EU’s use of merger controls, other examples show how countries are tightening or adapting existing policies to take into consideration the growing phenomenon of buyer power particularly at the retail level (Thailand, Taiwan, Korea, UK), and at the processor level (South Africa). Other examples point to where competition authorities have deliberately tackled some of the weaknesses identified in the preceding chapter, these include the EU’s use of extra-territoriality, South Africa’s use of leniency programme and Germany’s consideration of economic dependency.

1. Retailer power accumulation prevented

Almost all attempts to curb buyer power have addressed the symptoms rather than the key cause of the problem – that is the concentration itself. European Union competition authorities have on occasion taken action against retail mergers, for example the European Commission prohibited the proposed merger between Kesko and Tuko in Finland which would have offered the combined enterprise a national market share of 60%. When Rewé’s acquired Julius Meinl in Austria, they were required to divest stores in regions where the combined enterprise would control 65% or more of sales. However the European Commission has also allowed mergers that have had a significant concentrating effect to proceed unhindered, notably Metro/Makro and CarrefourPromodes.49 These examples show merger control being used to tackle seller, rather than buyer power, but in doing so they have the impact of reducing the significance of the players’ buyer power too.

2. Competition authorities tackle multinational retailer buyer power

Thailand: Following a number of complaints relating to unfair trade practices in the wholesale and retail trade in Thailand, the competition authorities assessed whether the Thai Trade Competition Act was able to address these unfair practices. The Act’s lack of clarity became evident and a specialized Commission was established to study the issue of buyer power. The Commission drafted guidelines of what practices should be regarded as unfair and explicitly brought buyer power abuses under the remit of competition authorities. The Commission also provided a clear definition of which business practices are deemed to constitute abuse of buyer power making it easier to undertake litigation against cases of this nature in the future.47

Taiwan: The Taiwanese fair trade law was enacted in 1991 and implemented in 1992. The law covers a wide range of antitrust as well as unfair competition practices. The law established a Commission which clearly set out what are considered as prohibited practices. This was updated following a survey of relationships between retailers and suppliers in which six types of unfair practice were identified including charging of improper fees and unreasonable penalties for supply shortages. In response to continued complaints by suppliers regarding improper ‘additional fees’, the Commission has now established guidelines for additional fees charged by chain stores.48

Korea: Korea has guidelines for establishing market dominance, clear benchmarks for what constitutes the abuse of buyer power and prohibits certain practices even when a retailer is not in a dominant market position.47 This clear legal framework enabled the Korean Fair Trade Commission (KFTC) to establish and prosecute anti-competitive behaviour by the powerful multinational companies Wal-Mart and Carrefour. Wal-Mart-Korea was found guilty of unfair acts including refusal to receive products, unfair return of products, unfair price reductions after purchase and unfairly passing on advertising fees to suppliers. The KFTC ordered Wal-Mart-Korea to suspend these activities and imposed a US$1.6 million fine. KFTC also ordered Wal-Mart-Korea to announce publicly (in the form a two major newspaper advertisements) that it had violated the fair trade law. In a similar case the KFTC tackled buyer power involving Korea-Carrefour. In 2001 Korea-Carrefour was found to have unreasonably reduced the price for relevant products of 112 suppliers by approximately US$1 million. The KFTC ordered them to desist from this activity and imposed a US$63,000 fine and also ordered it to publicise this in the newspapers.49

Footnotes

47 Thailand contribution (2004), “How enforcement against private anti-competitive practice has contributed to economic development” OECD Global Forum on Competition. 48 Lin, G. (2003), “Taiwan’s Competition Law Enforcement Experience and Cases in Retailing Business” paper for APEC Training Program on Competition Policy. 49 The criteria for the prohibition against abuse of market dominating positions includes: Unreasonably fix, maintain, or alter the price of a good or service fees; Unreasonably control the sale of goods or rendering of services; Unreasonably interfere with the business activities of other enterprises; Unreasonably hinder the entry of new competitors; Unfair trade practices include Unreasonably refuse to transact with or discriminate against a certain transaction partner; Unreasonably engage in activities to eliminate competition; Unreasonably induce or coerce customers of competitors to deal with oneself; Unreasonably take advantage of one’s bargaining position in transactions with others; Interact with others on terms and conditions which unreasonably restrict or disrupt their business activities; Use advertisements or make representations that are false or which may deceive or mislead consumers with respect to the enterprise or its goods or services. 50 Jhong, K. S. (2003), “Anti-competitive practices at the distribution sector in developing countries.”
3. Tackling buyer power of processors

In 2005 the South African Competition Commission began investigations into eight dairy processors (including a number of subsidiaries of multinational companies) for alleged price fixing. In December 2006 the case was referred to the Competition Tribunal for prosecution and a date in September 2008 has been set for the hearing. The processors are accused, either together or individually, of various infringements of South African Competition Law, including abuse of their dominant position with suppliers and colluding to fix purchase prices. Thus the case involves a group displaying both buyer and seller power simultaneously.

The tribunal will assess the following allegations that:

- companies’ exchanged sensitive information on procurement prices of raw milk and this enabled competitors to co-ordinate their pricing strategies to fix the purchase price of raw milk.
- two of the companies abused their respective dominant positions in exclusive agreements that compelled producers to supply them their total milk production. Producers were prevented from selling surplus raw milk at competitive prices to third parties or consumers directly. This practice also prevents the entry of smaller milk processors and distributors into the market.
- companies entered into long-term milk supply and exchange agreements to sell their surplus milk to each other rather than at lower prices to end users. This arrangement enabled colluding firms to maintain the price of milk at artificially high levels.
- two companies reached an agreement regarding the selling price of UHT “long life” milk ultimately resulting in the consumer paying higher prices for UHT Milk.
- two companies agreed to fix the selling price of UHT milk and allocated geographic areas in which they would not compete in selling UHT milk. This eliminates price competition resulting in consumers paying more.
- three of the companies co-ordinated the removal of surplus milk from the market. Surplus removal of milk, decreases supply and this keeps prices high. It therefore constitutes indirect price fixing.

The Competition Commission is seeking to impose a fine which could be up to 10 per cent of the companies’ turnover.52 The Milk Producers’ Organisation of South Africa has since lodged a complaint against several major South African supermarket chains, alleging fixing of milk prices.52

4. First steps in tackling the problem of global supply chains

EU: In a number of instances the EU has applied its competition law to actors outside of its market, although not in clear cases of buyer power. In 1985 the European Commission imposed fines on wood pulp producers situated outside the region (in the United States, Canada and Scandinavia) for price fixing arrangements despite the fact that some of the companies had no subsidiaries in the EU, on the basis that the arrangement was “implemented” in the EU market and that the effect of the parties activities on trade between the EU member states was “not only substantial, but intended, and was the primary and direct result of the agreement and practices.” In 1999 the EU successfully challenged a merger between two South African platinum companies (Gencor and Lonrho) despite the fact that the South African Competition Authorities had allowed it. The EU argued that the merger would have created disruption in the European market.53 This clearly shows that extraterritorial application of competition laws is possible. It also poses a potential threat to developing country suppliers who may work together to counter buyer power, as they could be prosecuted as an export cartel.

UK: Suppliers based outside the UK can seek redress under the existing UK Supermarkets Code of Practice. This is because the legal obligations to comply with the Code falls on UK supermarkets and is therefore clearly under the Competition Commission’s jurisdiction. The same principle applies to the ombudsman that the Commission is proposing as part of its latest investigation into the grocery sector. This is a unique example and demonstrates that existing legal frameworks can allow governments of countries in which global sourcing companies are headquartered to establish binding rules that would protect overseas suppliers.

5. Tackling capacity constraints through leniency programmes

Competition law investigations are complex and costly. In particular finding substantial and credible evidence on issues such as price-fixing behaviour is difficult. Incorporating leniency programs into competition laws can be important as this encourages those with hard evidence – that is those who were engaging in the antitrust activity – to receive amnesty from government penalties if they admit the illegal activity and provide evidence that enables a case to be established against other firms. This can be particularly important in developing countries where capacity limitation is a critical constraint to the enforcement of competition law. Scott Hammond, Deputy Assistant Attorney General for Criminal Enforcement in the Antitrust Division of the US Department of Justice characterizes, leniency program as “the most effective competition policy tool”. In South Africa’s investigation of the previously mentioned milk processors, the Competition Commission benefited from one of the firms which applied for the corporate leniency program. The firm is due to give evidence in exchange for immunity in upcoming court hearings. However leniency only works when coupled with strong enforcement, otherwise those engaging in antitrust activity have no incentive to seek it. Developing countries’ limited enforcement capacity and other constraints therefore reduce the effectiveness of any leniency programmes they adopt.
6. Using public scrutiny as a deterrent
The remedy that the Korean Fair Trade Commission took against Wal-Mart-Korea and Carrefour-Korea is interesting in that it involved bringing the unfair and abusive act to public attention. In both cases, the KFTC ordered that the violation of the fair trade law by the retailers be acknowledged publicly through statements in two major newspapers. They hope that the negative publicity may serve as deterrent for further violations by these or other organisations with buyer power. It also gives the KFTC credibility in the eyes of the public and could encourage other suppliers to bring cases.

7. Tackling the ‘climate of fear’
The UK Competition Commission has proposed measures as part of its most recent investigation which would help to tackle the ‘climate of fear’ felt by suppliers through the establishment of an ombudsman for the supermarket sector. The proposed ombudsman would monitor the trading relationships between retailers and their suppliers against a new Groceries Supply Code of Practice (GSCOP). It is envisioned that suppliers at all levels of a supply chain serving the UK market can raise a complaint anonymously with the ombudsman. The ombudsman would then investigate the complaint and if appropriate produce guidance to prevent further bad practice before it is repeated more widely. They would also be able to prosecute retailers of breaches of the GSCOP. If a supplier’s complaint is related to behaviour that only they have experienced however, they will be required to initiate a ‘dispute’ in order to pursue compensation. At this point their complaint will have to become attributable.

8. Designing competition policies to promote the public interest
There are some interesting exceptions to the dominant model of competition policy favouring consumer protection.

South Africa: South Africa's competition policy was developed through a three-year consultation process with industry and trades unions. Its Competition Act allows (and in some cases demands) that issues such as empowerment, employment and impact on small and medium enterprises (SMEs) be taken into consideration in decisions. Consumer interests are also included not only in terms of price, but also in terms of product choice.55

Germany: Amendments to Germany's Act against Restraints on Competition (ARC) have enabled authorities to protect small and medium sized businesses against aggressive competition by those in a dominant position. The Act now prevents dominant firms from using their position to demand preferential terms "without objective justification". This law is instructive and unique in that it explicitly acknowledges problems created in situations of "economic dependence" where suppliers lack reasonable opportunity to resort to others sources. This approach is part of a wider German policy by which companies are held accountable to shareholders, but also to employees, customers and suppliers.56 There are no cases yet where this economic dependence law has been implemented, but it may be the case that it acts as a deterrent. There are similar provisions in Australia, Portugal and France.

Footnotes

Section 4: Conclusions and recommendations

Conclusions
Competition policy is to some extent a contested field, with different bodies trying to mould it to fit their wider vision and different countries having different needs at different stages of development. It is therefore important that Governments are able to retain the flexibility and policy space to ensure that their competition policy can contribute to their wider economic development and industrialisation strategies.

Buyer power is just one problem that developing country commodity producers face and there are many other policy interventions that can be employed to support them that are not covered in this paper, for example corporate responsibility legislation, diversification and value-addition, exploration of niche markets, contract law and industrial and agricultural policy. However it is clear that competition policy does merit serious consideration by Governments (whether in developed or developing countries) who want to tackle the impacts that the exercise of buyer power has on vulnerable actors in agricultural commodity supply chains. There is clearly a need for modernization so that competition policy overcomes the constraints outlined in this paper and comes up to date with the realities of international trade. But the examples given show that where Governments recognize and tackle these weaknesses, competition policy can be a responsive and useful tool in tackling the growing phenomenon of buyer power.

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<tr>
<th>What competition policy can do</th>
<th>Where competition policy needs work</th>
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<td>Tackle the build up of power through monitoring and blocking mergers and acquisitions and reorganizing or breaking up companies</td>
<td>To enable competition authorities to take action against buyer power affecting suppliers at home, but exerted by companies elsewhere</td>
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<tr>
<td>Stop and punish abuses of dominant position</td>
<td>Ensure available instruments and definitions adequately take into consideration impacts on suppliers as well as consumers</td>
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<tr>
<td>Set up regulators, watch dogs, adjudicators etc.</td>
<td>To tackle the problems of climate of fear</td>
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<tr>
<td>Tackle buyer power if the effects are felt in the home market</td>
<td>Most competition authorities need additional authority and capacity, particularly when tackling powerful and well-resourced companies</td>
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Recommendations

Competition policy makers and experts around the world should consider:
- the idea of an international competition agreement with provisions that would be able to tackle the transnational effects of the exercise of buyer power
- how to ensure competition policy aims are broadened beyond consumer welfare to include consideration of suppliers’ concerns
- how to be more proactive and ensure protection in buyer power cases

Developed country governments should consider:
- supporting international action to tackle buyer power
- undertaking a review of national and regional competition policies to account for changes in national and international market structures and allow greater recognition of supplier interests
- broadening competition laws to cover the behaviour of economic actors based in their country which have impacts elsewhere
- responding positively to requests for co-operation from suppliers impacted by buyers within their market
- refraining from taking action against cooperation by developing country producers in response to buyer power

Developing country governments should consider:
- supporting international action to tackle buyer power
- reviewing national competition laws to ensure that they are able to deal with the buyer power phenomenon. In particular through:
  - incorporating a clear definition of buyer power and its abuses
  - providing for sufficient protection for those wanting to bring buyer power cases
  - extending the scope of competition law to cover firms outside its own jurisdiction, as appropriate
- developing or strengthening competition laws as part of their economic development or industrialization plan
- approaching competition authorities in countries where buyers are situated to request co-operation in cases affecting their suppliers
- developing regional responses as a way of overcoming the disadvantages of being a small or vulnerable economy

Towards international action on buyer power

An international legal framework for competition policy could be critical to address the issue of buyer concentration in global commodity value chains. In this regard, Singh has suggested the establishment of an independent international agreement or institution. This would require full consultation with developing countries and the involvement of relevant civil society organisations. The 1980 UNCTAD’s Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (the UNCTAD Code), which is supportive of the issues facing developing countries could be used as a reference for starting discussions on this.  

“...to secure development gains in the developing world, it may be necessary under some circumstances to intervene in the home bases of lead companies and their intermediaries. In this sense competition and regulation policies developed by the British government and applied to, say, British supermarket chains, may be at least as important as policy initiatives taken in the countries that supply them with their produce.”

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