Buyer Cartels Versus Buying Groups: Legal Distinctions, Competitive Realities, and Antitrust Policy

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BUYER CARTELS VERSUS BUYING GROUPS:
LEGAL DISTINCTIONS, COMPETITIVE REALITIES,
AND ANTITRUST POLICY

PETER C. CARSTENSEN*

ABSTRACT

The existence and exploitation of buyer power is emerging as an important concern for antitrust as the public enforcement of antitrust law itself is re-emerging as part of the renewed recognition that markets require rules in order to operate efficiently and in socially desirable ways. Buyer cartels are per se illegal but buying groups are subject to the “rule of reason” in antitrust law; yet, the two types of activity are hard to distinguish in a variety of circumstances. Moreover, neither courts nor commentators have provided very satisfactory explanations and justifications for the “per se” and “rule of reason” results. Indeed, in some circumstances, commentators and an occasional court have argued that buyers should be allowed to collude together simply to fix prices or allocate inputs. Conversely, many courts and commentators seem unaware of the potential risks that apparently legitimate buying groups can pose to the competitive process. The goal of this Article is to explicate, evaluate, and critique the differences between buyer cartels and buying groups and the resulting antitrust liability rules. First, effective policy must identify the factors both internal to such a group as well as the external market

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conditions that justify alternative characterization of the entity. Second, empirical studies and reported cases both demonstrate that buyer power arises from much smaller market shares than is usually associated with seller power. Third, the economic incentives of buyer cartels require modification of the standard predictions that antitrust law uses to facilitate the inference of agreement. Fourth, and finally, legitimate buying groups, although efficient responses to the needs of their participants, can also pose real threats to the long-term competitiveness of both the supply and demand sides of the market.
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INTRODUCTION

It is a felony, as well as a basis for treble damage liability, for buyers to agree on what they will pay for goods or services that they buy, or that they will not bid against each other for particular items at an auction.\(^1\) While not yet charged as felonies, agreements or understandings among competitors on pay levels for employees and agreements not to raid each other’s workforce are also violations of antitrust law.\(^2\) At the same time, the Department of Justice’s Antitrust Division has stated publicly that it will not object to the creation of “buying groups” that represent up to 35 percent of the total volume of purchases in particular markets.\(^3\)

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1. See, e.g., United States v. Crescent Amusement Co., 323 U.S. 173 (1944); Swift & Co. v. United States, 196 U.S. 375 (1905); Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979 (9th Cir. 2000); United States v. Romer, 148 F.3d 359 (4th Cir. 1998); Reid Bros. Logging Co. v. Ketchikan Pulp Co., 699 F.2d 1292 (9th Cir. 1983). A common form of an auction bidding agreement is that the participants agree on who will buy at the auction and then among themselves have a second auction to allocate the goods among the participants. For a detailed description of a bidding ring, see John Asker, A Study of the Internal Organization of a Bidding Cartel, AM. ECON. REV. (forthcoming), available at http://pages.stern.nyu.edu/~jasker/stamps070628.pdf. This second auction theoretically ensures that the item goes to the buyer with the highest value and so ensures that the overall transaction (initial sale to final owner) efficiently allocates the item to the highest valuing buyer. But Asker’s study suggests that in practice this is unlikely to occur. Id.


3. See Mark J. Botti, Observations on and from the Antitrust Division’s Buyer-Side Cases: How Can “Lower” Prices Violate the Antitrust Laws? (Paper presented at the
group, like the bidders at an auction, brings together a set of potentially competing buyers that pool their purchases and act together to negotiate prices for the inputs they seek even if the products so obtained will be shipped directly to each buyer and billed separately.4

Hence, as an initial matter, it may seem difficult to distinguish between the buyers at an auction who act collectively to decide on who and what they will pay for items, and a group of hospitals that pool their purchases and demand lower prices in return for the volume they offer.5 Yet, the auction-buying ring (cartel) is generally held to be illegal "per se" and a felony, while the buying group is subject to a "rule of reason" that currently entails a strong presumption of legality.6

What differentiates these situations is both the functional and legal characterization of the entity doing the buying. However, contemporary explanations and justifications for the "per se" and "rule of reason" results are not very satisfactorily explicated by either courts or commentators.7 Moreover, the distinction between these two types of buying activities is not always easily applied. Indeed, a nominally lawful buying group can become a cartel akin to the auction conspiracy.8 Conversely, a group of bidders at an auction might lawfully collaborate together to create a better (i.e., higher) bid for an item than any one individual bidder could offer.9


8. See In re Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 606 (7th Cir. 1997).

9. The use of joint bidding is seen frequently in construction and highway contracting where the buyer allows sellers to collaborate. Cf. Antonio Estache & Atsushi Imi, Joint Bidding in Infrastructure Procurement (World Bank, Policy Research, Working Paper No. WPS 4664), available at http://ssrn.com/abstract=1232760. On the buying side, whenever the things being sold are sold in a bundle, there is a plausible basis for a joint buying agreement in order to allow the most efficient use of the goods by combining the highest value a set of buyers would give for each component of the bundle. This can
Moreover, in some circumstances, commentators and an occasional court have argued that buyers should be allowed to collude together simply to fix prices or allocate inputs. Conversely, many courts and commentators seem unaware of the potential risks that apparently legitimate buying groups can pose to the competitive process.

The goal of this Article is to explicate, evaluate, and critique the differences between buyer cartels and buying groups and the resulting antitrust liability rules. First, it is important to appreciate the continuum of functions that a buying group can pursue and the implications of those functions for the competitive process. Hence, effective policy must identify the factors both internal to such a group, as well as the external market conditions that justify alternative characterization of the entity.

Second, empirical studies and reported cases both demonstrate that buyer power arises from much smaller market shares than is usually associated with seller power. The economic logic of buyer power causes make the seller better off than selling the bundle to a buyer who values only part and that must then resell the remainder. Such agreements can, however, also create antitrust issues. See, e.g., United States v. Seminole Fertilizer Corp., No. 97-1507-CIV-T-17E, 1997 WL 692953 (M.D. Fla. Sept. 19, 1997) (two potential bidders for assets to be sold in a bankruptcy auction agreed not to bid against each other and split the assets after the sale; the defendants ultimately entered into a consent decree).

10. See, e.g., Balmoral Cinema, Inc. v. Allied Artists Pictures Corp., 885 F.2d 313, 316-17 (6th Cir. 1989) (holding that an agreement allocating the rights to movies among theaters is not per se illegal); Alan Devlin, Questioning the Per Se Standard in Cases of Concerted Monopsony, 3 HASTINGS BUS. L.J. 223, 241-43 (2007) (arguing that the reduced costs resulting from monopsony should be considered in assessing the reasonableness of such collusion).

11. There is much debate among antitrust scholars as to whether antitrust should focus only on consumer welfare, see, e.g., Jack Kirkwood & Robert Lande, The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency, 84 NOTRE DAME L. REV. 191, 202-04, 206 (2008), or whether antitrust should focus on some broader total welfare measure. See, e.g., Michael Jacobs, An Essay on the Normative Foundations of Antitrust Economics, 74 N.C. L. REV. 219, 220 (1995); William Kovacic, The Modern Evolution of U.S. Competition Policy Enforcement Norms, 71 ANTITRUST L.J. 377, 464 (2003). The analysis of buyer power demonstrates the limits of this narrow price-theory-driven conceptualization of antitrust goals. Even though it is often the case that there is no current consumer harm from exploiting buyer power, and indeed the only immediate effect is to transfer surplus from seller to buyer without even changing the quantity sold, as in the auction example discussed at supra note 1, there is still long term harm to dynamic efficiency of the market. Hence, the better way to evaluate competition policy is to focus on the impact of particular conduct on the competitive process. Unnecessary interference with that process, which causes frustration of the market, is what antitrust seeks to outlaw. This topic is discussed further at infra notes 81-89 and accompanying text.

12. See infra notes 110-11.
this result.\textsuperscript{13} It has important policy implications for both the identification of buyer cartels controlling only modest shares of relevant input markets and for the assessment of the competitive risks that legitimate buyer groups can present.\textsuperscript{14}

Third, the economic incentives of buyer cartels require modification of the standard predictions that antitrust law uses to facilitate the inference of agreement.\textsuperscript{15} Basically, buyer cartels can include more participants and face lower risks of defections because of the inherent incentives of the participants.\textsuperscript{16} Moreover, the agreements themselves can be more informal, even tacit, for the same reason.\textsuperscript{17} Thus, the explication of buyer cartel issues requires a fuller recognition of the incentives that motivate and facilitate such conduct.\textsuperscript{18}

Fourth, and finally, legitimate buying groups, although efficient responses to the needs of their participants, can also pose real threats to the long-term competitiveness of both the supply and demand sides of the market.\textsuperscript{19} The prevailing assumption of antitrust law—that even very large buying groups are competitively benign—ignores the differences between buyer and seller power that result in competitive risks from buyer power at levels that arguably do not create serious concerns on the selling side.\textsuperscript{20} Hence, antitrust enforcement policy needs to recognize and articulate, more clearly than it does at present, the risks that powerful buyer groups pose and, in light of those risks, adopt better standards for judging the reasonableness of the conduct of any buying group.\textsuperscript{21}

The following analysis starts in Part I with an exposition of the differences between buyer cartels and buying groups based on the functional goals of these alternative buyer entities. Part I also focuses on how to differentiate ambiguous situations between the two types of buying entities. Part II addresses the analysis of buyer power itself, focusing on the evidence supporting the need for different metrics to measure whether a group of buyers have, or are likely to have, market power. Part II also explains why buyer cartels and buying groups have market power based on smaller market shares than are usually deemed relevant in assessing

\textsuperscript{13} See infra Part II.
\textsuperscript{14} See infra Part II.
\textsuperscript{15} See infra Part III.B.
\textsuperscript{16} See infra Part III.B.1.
\textsuperscript{17} See infra Part III.B.1.
\textsuperscript{18} See infra Part III.B.
\textsuperscript{19} See infra Part III.B.2.
\textsuperscript{20} See infra Part IV.
\textsuperscript{21} See infra Part V.
seller side power.

Part III examines competitive policy issues raised by both buyer cartels and buying groups. It reviews both the potential harm from buyer cartels and also summarizes the arguments advanced by some scholars for allowing such cartels in some contexts. In addition, Part III identifies and elaborates on the potential harms to competition that legitimate buying groups can create. Finally, Part III reviews how antitrust law has responded to both kinds of buying entities.

Part IV evaluates critically the policy arguments that have so far condemned all buyer cartels as per se illegal, while imposing a reasonableness standard on buying groups. This Part argues that proven cartels should continue to be per se illegal despite some theoretical arguments for excusing buyer collusion in some contexts. It explains why buyer cartels can be more inclusive and require less rigorous organization and policing than seller cartels. With respect to buyer groups, Part IV argues that the current rule of reason standards for judging the merits of such entities can be too tolerant of conduct that, in fact, is likely to have long run adverse effects on the competitive process. Hence, stricter standards are needed to limit those risks either through imposing lower thresholds for any safe harbor or by developing a stronger set of standards to govern buyer conduct so that it does not adversely affect the competitive process.

Four central conclusions emerge from this analysis. First, it can be difficult to distinguish buyer cartels from legitimate buying groups in many circumstances, but cartels should remain per se illegal. Second, buyer cartels can involve larger and less well organized groups than standard cartel theory postulates. Third, buyer power in either a cartel or buying group context can exist at lower levels of apparent concentration than is customarily assumed. Fourth, legitimate buying groups create significant competitive risks meriting stricter scrutiny of such organizations than they have traditionally been accorded.

I. DISTINGUISHING BETWEEN BUYER CARTELS AND BUYING GROUPS

The distinction between a cartel and a buying group is easy at an abstract, conceptual level. However, in application, the two types of

22. See infra Part I.C.
23. See infra Part II.
24. See infra Part II.
25. See infra Part III.B.2.
26. See Piraino, Buyers' Competitive Conduct, supra note 4, at 1131-32.
activities exist in a continuum from a pure cartel to a buying group that involves significant integration on the part of the participants and acts only to facilitate buying in a competitive supply market. The central problems in characterization are that form and function are not congruent, and buyers have no incentive to differentiate the basis on which they obtain lower input prices. Hence, a group that is functionally a buying group can appear to be little more than a cartel while it is equally possible to dress up a cartel to look like a buying group. After briefly describing the conceptual categories, this Part will examine some of the problems of accurate characterization that can and have arisen in various contexts.

A. A Buyers' Cartel

The basic concept of a cartel is that it is a group of competitors who have agreed to limit or eliminate their competition in some economically relevant dimension. The only objective of such a combination is to create, allocate, and exploit power in the market. Thus defined, this concept is more inclusive than a price fixing cartel of standard legal analysis. Some cartels work more effectively by allocating customers or suppliers, agreeing on the composition of the output or input ratios, or sharing information to ensure standardization of operations that indirectly ensure uniformity of costs and then prices. Indeed, buyers sometimes use their collective power to exclude or restrain their competitors in the markets where they buy goods or otherwise regulate the non-price dimensions of the supply market.

A buyers' cartel focuses on the input side of the market rather than the output. The objective of such a group is to eliminate competition in some aspect of their input purchases in order to reduce the prices associated with

30. See, e.g., Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212-13 (1959) (holding that buyer induced or coerced suppliers to engage in a collective refusal to deal); Montague v. Lowry, 193 U.S. 38, 45 (1904) (holding that buyer organization induced sellers to refuse to deal with non-participants and to enforce resale price maintenance); Toys "R" Us, Inc. v. FTC, 221 F.3d 928, 936-38 (7th Cir. 2000) (holding that major toy buyer induced sellers of toys to agree to refuse to sell selected toys to competitors of the buyer).
such purchases or otherwise control supplier conduct.\textsuperscript{31} Lowering such prices does not directly affect the prices that individual participants will charge for their outputs. Downstream prices are a function of the market or markets in which such sales are made.\textsuperscript{32} An important preliminary point, therefore, is that buyers might collude to drive down prices even though they sell in highly competitive markets where cartelization is unlikely.\textsuperscript{33} In addition, buyer collusion is likely to eventually reduce the total output in the market due to such conduct. The likelihood of this effect and its substantiability are functions of the elasticity of supply, as will be discussed subsequently. But if buyers cause a sufficient reduction in output, this can affect the downstream market by increasing scarcity of the product made with that input, resulting in higher prices for the remaining production.\textsuperscript{34}

Examples abound of buyer combinations. One of the earliest private antitrust cases challenged a buying cartel of mantel and fireplace tile retailers.\textsuperscript{35} This group insisted that the manufacturers only deal with its members, thereby boycotting all that group’s competitors. The manufacturers were also required to adopt and enforce resale price maintenance. This is a more effective way for retailers to police a resale cartel than to use direct action.\textsuperscript{36} Thus, the buyer cartel sought to control input prices and the retail market for the products. Another early case involved the Eastern States Retail Lumber Dealers’ Association that used its buying

\begin{itemize}
\item \textsuperscript{31} See Vogel v. Am. Soc. of Appraisers, 744 F.2d 598, 601 (7th Cir. 1984).
\item \textsuperscript{32} See, e.g., Devlin, \textit{supra} note 10, at 233.
\item \textsuperscript{33} A good example is the timber buyers cartel in Alaska that drove down the price of trees in specific regions where those companies operated, but which had no effect on the overall price of the lumber produced from those trees, as that lumber competed in a much more inclusive geographic market. Reid Bros. Logging Co. v. Ketchikan Pulp Co., 699 F.2d 1292, 1303 (9th Cir. 1983); \textit{cf.} Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312 (2007) (finding that buyer of timber was able to drive competitors from the market by bidding up the price of logs while reselling resulting lumber in a market where it presumably had no market power, but proof did not satisfy narrow requirements for antitrust monopolization claim).
\item \textsuperscript{34} This effect is discussed in ROGER D. BLAIR & JEFFERY L. HARRISON, MONOPSONY: ANTITRUST LAW AND ECONOMICS 36-42 (1993). \textit{See also} Richard Sexton & Mingxia Zhang, \textit{An Assessment of the Impact of Food Industry Market Power on U.S. Consumers}, 17 \textit{Agribusiness} 59 (2001); Chris Doyle & Martijn A. Han, \textit{Expropriating Monopoly Rents through Stable Buyer Groups} (Amsterdam Ctr. for L. & Econ., Working Paper No. 2009-03).
\item \textsuperscript{35} Montague v. Lowry, 193 U.S. 38 (1904).
\end{itemize}
power to compel lumber companies to refuse to deal with wholesalers that chose to combine wholesaling and retailing. Thus, like the mantel case, this cartel used its buyer power to eliminate potentially more efficient competition.

Other buyer cartels have focused on labor or agricultural inputs. Several cases have challenged the practices of hospitals and other employers of nurses that alleged they engaged in collective wage setting outside of a union contract. A recent case also upheld a complaint challenging as a buyer cartel a scheme to coordinate job classifications and consequent wage rates for various types of professional workers in the energy industries. Similar cartels have been documented in agriculture with respect to blueberries in Maine and tobacco in the southeast. Another classic case involved an agreement to set the percentage of Durham wheat in macaroni and spaghetti when that type of wheat was in short supply. Finally, there are a number of auction cartels such as that involving postage stamps.

As these examples suggest, buyer cartels can use their power directly to lower prices paid by the participants, and/or they can use the power to regulate aspects of competition in the downstream markets. The uses of cartel power will vary depending on the goals and interests of the participants, but also, importantly, on the nature of the supply market. If supply is relatively price inelastic, then colluding buyers have a strong incentive to drive down price because it will not significantly reduce the

37. E. States Retail Lumber Dealers’ Ass’n v. United States, 234 U.S. 600 (1914).
38. See, e.g., Fleischman v. Albany Med. Ctr., No. 1:06-CV-765, 2009 WL 1362801 (N.D.N.Y. May 14, 2009). Where a union represents employees, industry wide bargaining is lawful if in conformity with the National Labor Relations Act, and exempt from antitrust liability. This is an example of countervailing power which some scholars use to justify more pervasive use of buyer cartels as well. See JOHN K. GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER 109-12 (1952).
41. Id.; see also DeLoach v. Lorillard Tobacco Co., 391 F.3d 551, 554 (4th Cir. 2004).
42. Nat’l Macaroni Mfrs. Ass’n v. FTC, 345 F.2d 421, 426-27 (7th Cir. 1965) (holding that an agreement of macaroni producers to reduce the amount of durum wheat purchased as an input for pasta production was per se unlawful).
supply of the input. In other cases, supply may be more price elastic and so reducing price would result in an inadequate supply; but the buyers can still use their collective power to compel their suppliers to discriminate in price or refuse to deal with new entrants or marginal buyers. The risk to the seller is that the marginal gain from such sales will not offset the risk of loss associated with the refusal of major established customers to continue to buy from the seller. Thus, supply elasticity will affect the goals of a cartel but will not necessarily deter it from coming into being.

Another type of buyer cartel occurs when an agent coordinates the buying of goods or services for an economically significant group of buyers. The consolidation of demand means that the agent wields substantial economic power in bargaining on behalf of its principals. If the agent’s role is only to exploit that collective power by forcing down input prices, it is acting as cartel coordinator. The agent may also use its power to demand that the sellers provide the agent with extra benefits. This can occur when the principals are not fully aware of the fact that the agent has created buyer power by its pooling of demand. This kind of cartel occurred recently in the high-end business liability insurance market where the agents induced the insurers to create a seller cartel, then the agents allocated the business among the insurers and collected extra compensation based on the cartel overcharges imposed on their principals.

The hallmark of the cartel is that the buyers have only coordinated their buying in order to exercise power over sellers. The clearest cases involve situations where each buyer undertakes all the actual buying activity that is necessary to obtain supplies. Thus, the buyers have in no

44. Alternatively, if the buyers can obtain additional inputs from some other market such that they can exploit one set of suppliers while filling their residual supply needs from another more competitive market, then they will be somewhat less concerned about the supplier reaction, although even then, if there is a very substantial reduction in supply, driving down prices will not make sense.

45. The ability to buy in volume gives a cartel significant leverage over any individual seller because that seller must engage in a costly and time consuming search for other buyers. See Peter C. Carstensen, Buyer Power, Competition Policy, and Antitrust: The Competitive Effects of Discrimination Among Suppliers, 53 ANTITRUST BULL. 271, 281, 284 (2008).

46. BLAIR & HARRISON, supra note 34. Doyle & Han, supra note 34, posit a buyer cartel that requires suppliers to raise their prices, thus causing some reduction in sales, but capturing significant monopsony profits which are then rebated to the buyers in the form of slotting fees or other kickbacks.

way integrated any part of their buying activity.

B. Legitimate Buying Groups

The fundamental distinction between a legitimate buyer group and a cartel is that the group acts to gain the efficiencies of a joint enterprise.48 These efficiencies include the efficiencies achieved by the supplier (passed on at a lower price) resulting from longer production runs, reduction in transaction costs, lower costs per unit of quality control including protecting against defective or dangerous products, better priorities from shipping services based on the volume involved, and improved ability to develop new products.49 The buyer participants have engaged in a partial integration of their input function by creating or participating in the buying group.

Overt buyer groups are ones that are self-consciously organized. They occur in a number of retail activities. Two prominent examples are Topco, which provided a joint buying program for its mid-sized grocery store members as well as creating house brands for them,50 and Northwest Wholesale Stationers which provided buying, warehousing, and delivery services to retail stationery stores in the Pacific Northwest.51 Other examples include cooperative buying groups in auto parts and hardware.52

A second type of buying group is one that is the creation of an entrepreneurial actor that sponsors the group and acts as its agent.


50. See United States v. Topco Assocs., Inc., 405 U.S. 596, 598 (1972); see also Peter C. Carstensen & Harry First, Rambling Through Economic Theory: Topco's Closer Look, in ANTITRUST STORIES 171 (Eleanor Fox & Dan Crane eds., 2007).


Sometimes these arrangements take the form of a franchise type of relationship, such as the IGA or Piggly Wiggly grocery chains. Here the upstream coordinator offers prospective (or actual) participants in the downstream market the ability to have an important part of the provision of inputs administered by a third party with more efficient skills. This is a form of partial vertical integration. As in the direct buyer groups, the economic logic is that some functions (here supplying important categories of inputs including potentially branding and advertising) have significant economies of scale and scope, and so produce the gains from participation. But other aspects of the business create diseconomies of scale, and so by separating them, the resulting partially integrated enterprises are more efficient at both levels than would be a fully integrated enterprise. The evidence from the grocery business is that in the 1950s and 1960s, at least, national chains were less efficient than regional chains overall. In part, the explanation is that the regional chains used buying groups to get the efficiency of the national chains but avoided the inefficiencies of a central management trying to coordinate retailing operations in a number of diverse and dispersed local markets.

As will be discussed in more detail below, there are no fixed parameters for a buying group. A legitimate group does involve some integration of activities, but the specific activities to integrate will be a function of the economic logic of the particular enterprise. One way to distinguish the buying group is to focus on its functional goals. If it exists to consolidate, coordinate, and administer the buying activities of its participants such that they are making some investment in and sharing some productive activities with the venture, then it is prima facie a buying group. When the group exists only to agree on how the parties will conduct their own purchases, it is prima facie a cartel.

C. Distinguishing Buying Groups from Cartels

Because of the flexibility inherent in the organization of a legitimate


54. Carstensen & First, supra note 50, at 178-79.


buying group, there can be significant difficulty in distinguishing such entities from cartels. Moreover, once a group has the appearance of a buying group, it can also impose other restraints on its suppliers such as requiring them to refuse to deal with non-members or requiring more favorable terms than other buyers. In addition, the group may engage in coordinating downstream competition through various restraints including resale price controls or territorial allocation. There are plausible theoretical arguments in support of many of those restraints as necessary to facilitate the legitimate interests of the group. Thus, many groups of competitors that desire to coordinate their buying activities can with only modest planning create an entity that has the appearance of being a buying group rather than a naked cartel.

Nevertheless, it is possible to characterize some agreements among buyers as nothing but cartels. The central preliminary factual question is whether the group has integrated any of its buying activity. In situations where there is no integration, but only an agreement about how each independent participant will behave as a buyer, then the resulting entity is a pure cartel. This is true whether the group has agreed to coordinate job and wage classifications, engaged in refusals to deal to enforce regulations on downstream competition, set input proportions to reduce the price of a scarce input, or allocated bidding or other options among the participants. Indeed, when a group is primarily focused on using its buyer power to regulate competition in the downstream market, the cartel characterization is easier than when the group focuses more directly on input prices.

In contrast, a basic buying group is readily distinguishable when its purchases involve a modest share of the total market. This is particularly true when the sellers are likely to experience economies resulting from larger orders and would generally welcome volume buyers. In addition, where the elasticity of supply is substantial, such as when the sellers will substantially reduce production of the input if price is depressed below a reasonably profitable level, the plausibility of a buying group being a

57. See Davidow, supra note 48, at 270.
60. See, e.g., E. States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914); see also Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 209 (1959).
61. Nat'l Macaroni Mfrs. Ass'n v. FTC, 345 F.2d 421, 422-23 (7th Cir. 1965).
legitimate method of seeking economies and efficiencies in the trans-
actional aspects of buying becomes more likely. This would also likely
create higher net profits (and increased output) to producers while at the
same time holding the total cost (price plus transactional expenses) down
for buyers. Again, the specific focus on the activities and functions of the
buying group will be important because even in elastic supply markets, a
buyers’ cartel controlling a sufficient share of the buying side might well
impose its will on producers with respect to non-price aspects of
competition.

However, apparently legitimate buying groups can easily implement
cartelistic restraints. Indeed, such an organization can provide a cover for
an ongoing buyers’ cartel either as the primary or a significant secondary
objective for the group. Indeed, given their underlying goal of reducing
the cost of inputs, the buying group with any appreciable buying power
will have an incentive to use that power to reduce prices further by pure
exercise of its power. Of course, if the suppliers respond by reducing
output, then the buying group must ration supply among its members or
find a way to induce increased output despite lower prices. One solution
that can apply is to use an “all or nothing” contract. The buyer offers to
take only the quantity it desires and otherwise refuses to buy at all. So
long as the offered price approximates the seller’s average total cost, it is
likely to take the offer even though the marginal cost of the incremental
units exceeds the price received. The effect of such contracts in the short
run is to transfer producer surplus to the buyer, but in the long run it
results in disincentives for the producer to remain in the market given the
reduced reward. Thus, the use of such contracts can harm the competitive
process over time. Of course, if the producer achieves economies of
scale or scope through a large volume contract, an “all or nothing” offer
provides a contractual means for the buying group to capture some or all
of the efficiency gain that results from their joint purchase. Hence, the
elasticity of supply and the consequences for efficiency of increased
output are important characteristics in differentiating the competitive

63. See infra note 114 and accompanying text.
64. BLAIR & HARRISON, supra note 34.
65. The use of such a contract implies that diseconomies of scale exist for the
producer. Thus, under standard price theory, the producer would reduce output to a level
consistent with the marginal cost of the unit produced. The “all or nothing” contract
denies the producer the opportunity to refine its production to fit the price offered and
discipline the buyer who wants a greater quantity but who will not pay for it.
66. The analysis of such contracts is found in Carstensen, supra note 45, at 282-83,
298-99, and BLAIR & HARRISON, supra note 34, at 73-75.
67. Carstensen, supra note 45, at 301-02.
implications of apparently similar actions.

This potential to mask a cartel or cartelistic components within an apparently legitimate venture is a significant factor in understanding why antitrust enforcers developed "safe harbor" standards that create a presumption of legitimacy for entities that buy no more than some fraction of the total supplies being purchased in the market.\(^{68}\) Such a system assumes that buyers that collectively take no more than the safe harbor percentage will lack the power to impose conditions that unduly restrict access to input markets for either buyers or sellers. So long as the safe harbor does no more than create a presumption of legality for the venture, it is probably a useful enforcement screen. But as shown subsequently in this Article, the screen needs to be set in terms of the actual risk of abuse of buyer power whether the group has legitimate functions or not. Moreover, this screen should be understood as creating no more than a presumption of lawfulness for the group.\(^{69}\)

II. APPROPRIATE METRICS FOR MEASURING BUYER POWER

A central fact about buying and selling is that the buyer is the party that decides when, how much, and from whom to buy. Thus, buyers have power in the market whenever that discretionary power has significance for sellers.\(^{70}\) It follows that a buying group can achieve significant buyer

\(^{68}\) See Thomas A. Piraino, Jr., Beyond Per Se, Rule of Reason or Merger Analysis: A New Antitrust Standard for Joint Ventures, 76 MINN. L. REV. 1, 41 n.184 (1991) (noting that "[a] few federal courts have held that" buying groups lacking market power were not deemed illegal and that the European Economic Community and Japan have safe harbor provisions for "firms that lack significant market power").

\(^{69}\) As articulated in the health care guidelines, up to a 35 percent share of purchases in any product line will leave a buyer group presumptively lawful. Moreover, the definition of a buying group is not well developed, nor are criteria laid down that such a presumptively legal entity must satisfy. This latter omission is troublesome because it leaves the door open to creating apparently lawful entities that only operate to limit buyer competition for inputs. Further, if several buying groups buy from the same vendor, they can create serious market foreclosure problems that adversely affect the competitive process. See Julie C. Klish, Serving Economic Efficiencies or Anticompetitive Purposes? The Future of Group Purchasing Organizations and the Antitrust Safety Zone, 2 IND. HEALTH L. REV. 173 (2005).

\(^{70}\) One interesting illustration of this power in a non-economic context is Texas' power over high school and grade school textbooks. By regulating the content of such texts and establishing a list of approved books, Texas can and does control the content of textbooks, despite its relatively modest share of total public school enrollment. Texas' buyer power is substantial even though no conventional antitrust specialist would regard the state as constituting a sufficiently large part of the total textbook market for textbooks to possess buyer power. See Stephanie Simon, The Culture Wars' New Front: U.S.
power when it has a modest share of the total input market. Data from the United Kingdom suggests that buyers taking as little as 10 percent of the total sales of grocery products had significant buyer power.\textsuperscript{71} The *Toys R Us* case and the older *Klor's* case also demonstrate that important buyers can exercise significant power even if they do not buy very large shares of the inputs involved.\textsuperscript{72}

More formal economic modeling shows that both demand and supply elasticity are important factors in specifying the degree of buyer power that a firm or group of firms will have.\textsuperscript{73} This suggests that some capacity to affect prices will arise from many buying groups and cartels even when they do not take a share of the total input market that would trigger concern if looked at on the seller side. Supply inelasticity is a particularly relevant part of the buyer power analysis. The more a producer is committed for the intermediate or longer term to a set quantity of output, the greater is the capacity of even relatively small volume buyers to exercise buyer power.\textsuperscript{74} In addition, optimal output is a function of plant size, but when there are significant diseconomies involved in reducing production below the optimal level, such a producer is very vulnerable to buyer power. In such a situation, the seller has particular incentive to


\textsuperscript{71} Dobson, \textit{supra} note 55, at 537.

\textsuperscript{72} Toys “R” Us, Inc. v. FTC, 221 F.3d 928, 937 (7th Cir. 2000) (holding that market share of about 20 percent of all toys sold in the United States conferred sufficient power to impose anticompetitive restraints on suppliers); Klor’s, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 & n.7 (1959) (finding that even where no market shares were given, the defendant, a large department store chain, one of many retailers of appliances in California, still had sufficient buyer power to induce suppliers to collude to exclude a competitor of the large buyer).

\textsuperscript{73} BLAIR \& HARRISON, \textit{supra} note 34, at 47-61 (providing formulas and illustrating the interaction between supply and demand elasticity).

\textsuperscript{74} For example, buyer power particularly affects farmers. See AMERICAN ANTITRUST INSTITUTE, \textit{THE NEXT ANTITRUST AGENDA: THE AMERICAN ANTITRUST INSTITUTE’S TRANSITION REPORT ON COMPETITION POLICY TO THE 44TH PRESIDENT OF THE UNITED STATES} 290-305 (2008), \textit{available at} http://www.antitrustinstitute.org/Archives/transition-report.ashx. Crops reflect a basically committed output set at the time of planting, regardless of the price of the crops at the time of harvest. Chickens mature in only a few months, but a farmer makes long-term capital investments (sunk costs) in hen houses financed by bank loans, thus imposing the economic necessity of operating at or near full capacity. \textit{Id.} at 304. In the case of beef cattle, the production cycle is approximately three years from gestation until slaughter. \textit{Id.} at 291. Upon gestation, little opportunity exists to speed up or slow down the process. Dairy cows produce milk for years, so the output of the dairy industry is also largely a given over any period of time. \textit{Id.} at 299-304. Farmers, therefore, are particularly vulnerable to buyer power.
retain the necessary volume to achieve efficient production.

Some buyer power is not necessarily undesirable from the perspective of maintaining a workable competitive process.\textsuperscript{75} When buyers confront sellers with modestly large market shares, there is likely to be sufficient countervailing power such that the resulting prices are consistent with a reasonable measure of the costs of production.\textsuperscript{76} In most input markets, the transactions take place in one-on-one sales where both buyer and seller have some flexibility as to price.\textsuperscript{77} In such situations, there is no inherent market price. Thus, some power that assists the buyer in negotiation is not itself unreasonable or undesirable. For this reason, it makes little sense from a broader public policy perspective to challenge every legitimate small buying group that has some power with respect to every condition it might impose on its suppliers. However, it is also important, based on the foregoing empirical and anecdotal evidence, that any presumptive safe harbor be narrowly defined, both as to the scope of the harbor and the strength of the presumption, in order to avoid the potentially significant competitive risks that in fact arise from buying groups, whatever their intended function, once they obtain 15 to 20 percent of the market.

The product and geographic boundaries of input markets can be, and often are, quite different from the boundaries of the downstream markets into which the products made from these inputs are sold. In the case of agricultural products, the initial geographic dimensions of the market are often very confined because many products and animals cannot be transported very far before processing. In contrast, the market for manufactured components can be global even if the final product, whether a computer or processed food, is sold in a very localized retail market.

Closely related is the need to have an appropriate product market definition. Product inputs can have a variety of uses (e.g., milk yields cheese, butter, and ice cream) that are not very competitive in the downstream market, yet the input can be used in any of the outputs. Hence, the relevant product market should not be equated with any specific output use. On the other hand, some inputs such as specific grocery products or any other retail item do not define the scope of the

\textsuperscript{75} See Devlin, supra note 10, at 232-33.

\textsuperscript{76} Id. at 233.

\textsuperscript{77} Some inputs are sold in truly transactional, public markets with posted prices such as those seen in securities and commodities futures markets. But, more frequently, the posted price in exchange transactions provides the basis for a negotiated, off-exchange deal. For example, most beef cattle today are sold subject to various kinds of forward looking contractual arrangements in which the price term is based on a market price but then subject to various adjustments. Id. at 297.
output market but are distinct products from an intermediate buyer-
processor's perspective. A retailer cannot substitute pork for beef at the
meat counter or men's running shoes for women's dress shoes. Thus, the
specific input, even if it is only a component becomes a separate product
market from the perspective of the buyer and seller.

The central observation is that competition policy focused on the input
side of the market needs to have appropriate metrics for defining the
markets in both product and geographic terms. It also must employ
measures of market power that are appropriate to the buying side of the
market. The data strongly supports the conclusion that modest shares
(from the selling perspective) create significant potential buyer power.
Hence, any presumptions of lawfulness must be appropriately confined to
situations where the buyer or buying group has less than 15 percent of the
relevant input market.

III. THE MERITS AND DEMERITS OF BUYER CARTELS AND BUYING GROUPS

A. Buyer Cartels—Competitive Harms, Market Justifications

1. The Negative Views

The conventional analysis of buyer cartels is that they cause economic
harm similar to that resulting from seller cartels. But just like seller cartels,
some scholars defend buyer cartels as enhancing efficiency in some
circumstances.78 Some buyer organizations, such as independent pharm-
acies, have sought antitrust immunity for proposed cartels.79 So far,
Congress has not granted such rights.

The economic argument against buyer cartels rests on an assumption
about the nature of producer response that creates a demonstrable welfare
harm. The standard argument assumes that buyers purchase in discrete
units and that the buyers resell in a market in which they are the only
sellers. Under these assumptions, when the price paid for inputs is
reduced, output of that commodity declines. As a result, the static
comparison of a world with and without a buyer cartel shows that the

78. See Devlin, supra note 10.
79. In October of 2007, the House Judiciary Committee held a hearing to consider
legislation that would legalize a cartel among independent pharmacies. See Impact of Our
Antitrust Laws on Community Pharmacies and Their Patients: Hearing Before the Task
Force on Antitrust and Competition Policy of the H. Comm. on the Judiciary, 110th
pdf/CHRD-110hhrg11038336.pdf [hereinafter Impact of Antitrust Laws].
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The cartel causes a reduction in production and a consequent increase in price to consumers. On that basis, it is possible to reach the conclusion that buyer cartels harm consumers by causing lower output and higher prices.

The force of this comparative statics argument is contingent on the validity of its factual assumptions. As a result, it loses force if either the buyers can compel the producers to deliver approximately the same output at the lower price or the buyers compete in a resale market with many other producers such that the resale price is set competitively and the cartel has no incentive or capacity to raise the prices of its output.80

When buyers can make an "all or nothing" offer to a producer that has increasing marginal cost, the buyer can offer to buy a large volume at a price equal to the average cost of production. It will be rational for the producer to accept this offer and deliver the same quantity that it would have delivered at a market price equal to the marginal cost of its last unit.81 This means the buyer can induce a level of production comparable to the competitive level, but at the same time transfer all the inframarginal gain (Riccardian Rents) to themselves.82 From the perspective of comparative statics, there is no efficiency harm because there is the same production and price is not increased. There is a transfer of surplus from seller to buyer, but the contemporary economic welfare model is not concerned about that.83


81. In conventional price theory, the marginal cost of the final unit sold sets the price for all units in an optimally efficient, competitive market. If the cost of producing other units is lower, then the producer realizes a profit on those units. This provides an important incentive to innovate and improve the efficiency of production since the efficient producer with lower costs retains the gain from its efficient production given the market price set by the cost of the marginal unit.

82. For a discussion of the different types of gains that buyers might transfer, see Roger G. Noll, "Buyer Power" and Economic Policy, 72 ANTITRUST L.J. 589, 592-94 (2005). If producers have economies of scale at the prevailing market price, each will have an interest in producing more at a lower price so long as the price reduction does not exceed the efficiency gain to the producer. For more discussion, see Carstensen, supra note 45.

83. Kirkwood & Lande, supra note 11, argue that transfers of consumer surplus resulting from anticompetitive conduct by sellers is a proper basis for antitrust concern. Ironically, they are reluctant to accept a similar argument when it comes to transfers of producer surplus. Their premise is that buyer power will often result in lower prices to the final consumer. The empirical basis for this assumption is not evident. It is likely that some retail market contexts do in fact make it more likely that the lower costs of inputs will result in lower final prices. But even then, there is a real question of whether the long run interest in an efficient, dynamic, and equitable market process is well served when buyers use their power to extract all the producer surplus of their suppliers. This question
A second weakness in the standard story is its assumption that the buying market and the markets in which the buyers resell are congruent with each other, i.e., that the buyers compete in the same buying and selling markets without any other competitors. This is often very far from an accurate description. Buying markets can be quite narrow in both geographic and product terms, but the market for the product being sold can be much larger and subject to more competition from other sources and substitutes. Where such conditions exist, the buyers’ cartel can depress the price of inputs in a distinct input market, but may face effective competition in the output market. Faced with such a situation, the cartel will depress input prices but sell at the market price. Assuming that there is no “all or nothing” buying, the cartel’s output will be lower than it would have been, but this will not noticeably affect the output market if it is workably competitive. Here again there is a wealth transfer from sellers to buyers, and a dynamic harm to aggregate efficiency as the afflicted producers reduce output that would have been economically rational had there been perfect competition in the market for the input. But consumers are unaffected in the static short run.

By focusing on economic measures of welfare, whether total, producer, or consumer welfare, the argument that buyer cartels are necessarily undesirable is not strong. Hence, much of the rhetorical basis for condemning buyer cartels is based on an appeal to symmetry with the condemnation of seller cartels. This is the oft reiterated claim that monopsony and monopoly are “mirror images.” This claim has a logic in that both kinds of exploitation can result in harms to aggregate welfare. However, it is highly misleading in that it ignores the ways in which those harms occur which, as shown above, vary significantly with whether one is looking at buyer power or seller power. Moreover, the amount of power necessary to create adverse competitive effects is significantly different in the two domains. This leads to a serious risk of false positives with respect to buyer power. For present purposes, the central point is that conventional static economic analysis does not provide a robust basis for condemning categorically buyer cartels.

A great debate exists among scholars of antitrust law and economics

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84. Many agricultural products fit this model, as well as other low value, bulky inputs, or ones that spoil easily.
85. See, e.g., Noll, supra note 82, at 589-92 (arguing for a symmetrical monopsony and monopoly policy).
86. Id. at 589.
87. See supra notes 56-60 and accompanying text.
concerning the question of whether antitrust should concern itself with consumer harms narrowly defined or with the aggregate harm to economic welfare. Both concepts are static and highly abstracted. They do underscore a basic observation that restraints which raise prices to consumers, reduce choices, exclude competition, etc., are generally undesirable. The proponents of an aggregate view would like to balance all gains and losses to all stakeholders. These proponents particularly like this approach when applied to complex cases, usually involving monopolistic practices or restraints subject to a rule of reason analysis. They assume that such aggregate impact information can be produced and so in its absence would presume that conduct that potentially could have positive as well as negative effects is likely to be positive and so lawful.

Opponents of the aggregate view focus on whether consumers have increased burdens, either in terms of prices or choices, as the basis to condemn specific acts or practices. This position draws on parts of the legislative history of the Sherman Act. This position also rests on a more skeptical view about the underlying merits of such conduct. In general, these scholars believe that the competitive process is adversely affected by more of these business practices despite having potential justification. Another strand of this view is that there are often less anticompetitive ways to achieve any legitimate business objective. Hence, the specific conduct imposing costs on consumers is not essential to the efficient operation of the market.

When applied to buyer power cases, the debate is largely circular and unhelpful. The consumer effect focus denies that many buyer cartels harm the economy because their only static effect is to transfer producer surplus from one class of producer (the up-stream entity) to another producer (the down-stream entity). The aggregate effect position, while more support-

88. The latest installment in this debate is Kirkwood & Lande, supra note 11.
89. See, e.g., Jacobs, supra note 11.
90. See, e.g., Kirkwood & Lande, supra note 11.
92. See Kirkwood & Lande, supra note 11. Kirkwood and Lande assert, "[t]he primary goal of antitrust is to protect consumers from paying higher prices," and so they contend that only a "few" circumstances justify protecting sellers from buyer power. Id. at 196, 208. Moreover, they focus exclusively on "small businesses." Id. at 209. Ultimately, however, they agree that buyer cartels are illegal regardless of their effect on consumers although they do not address the competitive implications of buyer groups. Id. Hence, they do not examine fully the impact of buyer power on the longer-term competitiveness of the market place even though they recognize the importance of a focus on market dynamics. Id. at 209-10. See also Devlin, supra note 10.
ive of the validity of condemning buyer cartels and other restraints on input suppliers, insists on a total accounting for costs and benefits to the overall economy in the short run. Such a calculus is both very difficult and may, because so much of the initial harm is only wealth transfer, lead to significant tolerance of cartels on the buying side where there is no showing of reduced output. In effect, this argument is what prevailed in the Weyerhaeuser case in the Supreme Court.93

Two other policy arguments, however, support a broader condemnation of buyer cartels. First, a primary concern of antitrust law—some would argue its central concern—is the protection and advancement of economic competition as a process.94 In one way, the dispute concerning the choice of aggregate welfare or consumer welfare reflects contending positions on the scope of concern about competition as a process. The aggregate welfare position is one that is more tolerant of acts and practices that demonstrably interfere with competition because of the assumption of the relative, overall perfection of the market process. Hence, disruptions are expected to be temporary and self-corrected. The consumer welfare position is more consistent with skepticism about the self-correcting nature of the market and so looks for immediate effects as proof of market failure and the need for legal remedy. That latter position is more consistent with the historical roots of antitrust law and the initial interpretations of the Sherman Act.95 Indeed, as Kirkwood has shown in
other writings, the courts have generally ignored the welfare debate and focused on the assessment of harm to the competitive process as the touchstone of evaluation. The competitive process criterion is particularly helpful in arguing for a strong policy of prohibition of buyer cartels. Such cartels, like seller cartels, substitute private agreements for the market process. They create the kind of risks to that process that the Supreme Court has repeatedly identified.

Second, from the perspective of dynamic economics, a buyer cartel distorts incentives and causes a misallocation of economic rewards over time. As such, it weakens the core goals of a competitive markets system. This policy focuses on the dynamic interest in having proper incentives to invest in activities and develop new, innovative solutions to problems. Buyer cartels, however they operate, diminish the rewards to the producer below the level that a competitive market would have provided. As such, they send the wrong signal to investors and innovators. Indeed, the strategic responses to cartels, such as vertical integration, while rational in context of responding to a buyer cartel, in dynamic terms can result in further distortions of the market process away from the best structural options.

2. The Justification for Buyer Cartels

The primary argument for buyer cartels rests on notions of countervailing power. Essentially, if a group of small, powerless buyers face a monopoly or oligopoly supplier, then individually they are powerless to bargain for better prices and larger outputs. The small buyers are compelled to pay the monopoly or oligopoly price demanded by the sellers. However, if these individual buyers can group together and make a

98. See generally BLAIR & HARRISON, supra note 34.
99. Cf. Omega Envtl., Inc. v. Gibarco, Inc., 127 F.3d. 1157 (9th Cir. 1997) (upholding a vertical exclusive dealing foreclosing alternative distribution plan under antitrust law even though serious questions existed as to whether this integration served efficiency interests of consumers).
100. GALBRAITH, supra note 38, at 109-12 (1952).
creditable threat that they would withhold their purchases unless lower prices and greater quantity were offered, they might succeed in bargaining down prices and increasing output.\textsuperscript{102}

Recently, independent pharmacies sought an antitrust exemption in order to collaborate together to bargain over prices with wholesalers.\textsuperscript{103} Their argument was that the sellers are oligopolists who engage in both price discrimination and impose excessive prices on independent retailers.\textsuperscript{104} The belief is that if they were allowed to band together, independent pharmacies would obtain lower prices for the prescription drugs they resell.\textsuperscript{105} Lower prices in turn would allow them to increase sales volume as well as obtain a higher margin on sales. Since many drugs are unique, the merits of this claim may be questionable, but the concept is clear enough.\textsuperscript{106}

The underlying model is again a static comparative welfare one. The assumption is that the successful buyer cartel will induce the seller to reduce prices and increase output such that the market moves toward the price and output that would exist if the industry was competitive.\textsuperscript{107} This is a bargaining model in which the assumption is that the buyers' cartel would have sufficient power to compel the seller to reduce prices and increase output.\textsuperscript{108} Such an outcome is contingent on the relative options of each side as well as its bargaining skill. In general, a group held together only by a cartelistic objective is often thought to be fragile and easily disrupted.\textsuperscript{109} A powerful seller could disrupt such a group by offering some participants secret discounts if they would defect. The short-run gain to the defector would include getting a head start in

\textsuperscript{102} Baker, Farrell & Shapiro, \textit{supra} note 101, at 638-46.
\textsuperscript{103} \textit{See Impact of Antitrust Laws, supra} note 79.
\textsuperscript{104} \textit{Id.} at 82-83 (statement of David A. Balto).
\textsuperscript{105} \textit{Id.} at 11 (statement of Del. Anthony Weiner, Member, H. Comm. on the Judiciary).
\textsuperscript{106} The argument draws strength by analogy from the exemptions given to farm cooperatives and labor unions who engage in collective bargaining over prices or wages. It is worth noting that unions are rapidly declining in the American economy which suggests that they have not proven very effective means to achieve market power for workers when facing strong buyers. Similarly, except where protected by a federally enforced marketing order, it appears that farm cooperatives have not had much capacity to generate higher prices for farmers via bargaining. \textit{See ABA Section of Antitrust Law, Federal Statutory Exemptions from Antitrust Law, 87-131} (2007).
\textsuperscript{107} \textit{See Devlin, supra} note 10.
\textsuperscript{108} \textit{Id.}
competing with the other members of the group in processing the input and having saleable output. Thus, even if authorized, such cartels might prove ineffective, as farmer cooperatives have been when they are not supported by express government regulation that restricts competition. 10

From a dynamic perspective, the argument that a cartel is a reasonable response to sellers' power assumes that the other alternative responses such as creating a cooperative entity to compete in the area of market power, 11 sponsoring entry, or finding substitute inputs, are not viable options over the long run. By focusing on the short run, the case for a buyer cartel can emerge as a strong one because in the short run no other alternative exists.12 However, the fact that a monopolist is making monopoly profits ought, over time, to induce entry or innovation that reduces or avoids the need for the monopolized product. Hence, unless there is a strong argument that the seller's power is not likely to dissipate for a long period of time, the justification for a buyer cartel is weak. 13

Finally, if there is a need for any countervailing, cartelistic power, then there is a very serious concern with allowing private parties to engage in such activities without ongoing public supervision. Thus, where public policy saw monopoly or cartel organization as necessary for the selling side of markets, it has usually provided for regulation of prices and services. This is the history of railroads, airlines, natural gas, electricity,


11. For example, in the early 1900s when farm-to-market transportation was costly and slow, farmers often faced monopoly grain buyers who exploited their power by paying low prices relative to the prevailing market price for grain. In response, many farmers organized cooperative elevators that provided a means to avoid the monopsony bottleneck and facilitated sales into the large national market for grain. Because of the cooperative organization, there was no incentive to exploit buyer power. See Peter C. Carstensen, The Content of the Hollow Core of Antitrust: The Chicago Board of Trade Case and the Meaning of the "Rule of Reason" in Restraint of Trade Analysis, in 15 RES. L. & ECON. 1, 22-23 (Richard O. Zerbe, Jr. & Victor P. Goldberg eds., 1992).

12. Donald Baker has argued that the use of access rules should be limited on networks because of the potential for creating competing networks. Donald I. Baker, Compulsory Access to Network Joint Ventures Under the Sherman Act: Rules or Roulette?, 1993 UTAH L. REV. 999, 1127-28. The same argument applies to other issues in buyer power contexts.

13. In addition, a buyer cartel can result in coordination on the selling side of the market if the buyers constitute a substantial part of the resale market as well. If that occurs, the buyer cartel would morph into a seller cartel whose function is to raise price and reduce output to the customers of its participants.
insurance, and telecommunications.\textsuperscript{114} To be sure, in all the foregoing industries, more recent experience is that more competition provides a better set of incentives than command and control regulation.\textsuperscript{115} But in these transforming industries, the central insight is that there is and ought to be direct oversight of how those markets operate, often to the exclusion of antitrust.\textsuperscript{116} Indeed, in some highly competitive markets, the courts have decided that the regulatory regime necessary to assure the integrity of those markets preempts antitrust law.\textsuperscript{117} Hence if there are inherent obstacles in moving selling markets toward more competitive structure and conduct such that a buyer cartel is the least worst option for establishing equitable prices and services, then there ought to be an appropriate public regulatory body to oversee that process since the interests of private parties will not necessarily be congruent with the public interest.

\textbf{B. Buying Groups—Efficiency Gains and Competitive Risks}

In the case of buying groups there are a number of efficiency arguments that justify such organizations, but there are also some competitive risks that frequently go unrecognized or unduly minimized.

\textit{1. Efficiency Gain from Buying Groups}

A buying group can reduce transaction costs by using a single buyer to obtain inputs. As long as the participants in the group require similar inputs, the result can be a more efficient system. There are coordination

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\item \textsuperscript{114} Both farmers through the Capper-Volstead Act, 7 U.S.C. §§ 291-92 (2006), and labor unions through the National Labor Relations Act, 29 U.S.C. §§ 151-69 (2006), are authorized to create cartels under limited conditions. Only rarely has this authority provided significant benefit to the favored groups. See, e.g., ABA SECTION OF ANTI-TRUST LAW, supra note 106, at 127-29 (discussing how farm cooperatives in general have not achieved significant exploitation of the market with the possible exception of some specialized crops and dairy where related legislation creates enforceable constraints on entry and expansion of production).
\item \textsuperscript{115} See generally Peter C. Cartensen, Reflections on Mergers and Competition in Formerly Regulated Industries, in COMPETITION POLICY AND MERGER ANALYSIS IN DEREGRULATED AND NEWLY COMPETITIVE INDUSTRIES 225, 226 (Peter C. Carstensen & Susan Beth Farmer eds., 2008).
\item \textsuperscript{116} See, e.g., Verizon Commc’n Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 412 (2004).
\item \textsuperscript{117} See, e.g., Credit Suisse Sec. (USA), LLC v. Billing, 551 U.S. 264, 273-77 (2007) (holding that securities law precludes antitrust claims where investment banks formed syndicates to help execute IPOs for hundreds of technology related companies).
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issues, however. A centralized buying system must in some way marshal orders and have a coordinated way to distribute the inputs among the participants in the group as well as assure payment for those products. Thus, depending on the scale of purchases and the range or variety of inputs required, the participants may or may not find a buying group to be useful. Indeed, where the only advantage of the group is savings in the transactional and distributional dimensions, the market will provide a good test for participants. For example, Northwest Wholesale Stationers, a cooperative located in the Pacific Northwest, bought and warehoused a variety of stationary store supplies and provided prompt delivery from its warehouse to individual stores so that they got the advantages of the full line of products readily available. 118 Thus, membership would be desirable if the efficiency gains in the buying, transportation, warehousing, and distribution of these products exceeded the costs of membership, including any limitations on the variety of products available through the cooperative, or any restraints on buying outside the group. 119 Other buying groups for retailers exist and can provide all these functions or only those that are more efficiently handled on a combined basis. 120

A buying cooperative, however, also has the capacity to bargain for prices. Contrary to the abstract model of competitive prices in which all prices result from a market bidding process that results in a single price known to all buyers and sellers, in a workably competitive market the seller almost always has some discretion in setting price. 121 In particular, a seller may find it attractive to lower prices slightly to gain a large order that will ensure more efficient volume in the production facility. A buyer seeking a large volume may itself do a better job of searching the market for suppliers, therefore getting a more active bidding process as a result. This suggests then, that in a market where competition is imperfect but workable, buyers can gain price advantages by employing more sophisticated and effective searches for the inputs they need. At the same

119. In order to obtain the economies of scale that are possible for buying groups they may need to have their participants agree to focus some or all of their purchases on the buyer group.
120. For example, Topco provides buying services, including quality control, and coordinates the development of new products, but the grocery items are shipped directly to the warehouse of the participating mid-sized chains or, in a few instances, wholesalers serving smaller chains. See Topco.com, About Topco, http://www.topco.com/about.htm (last visited Feb. 6, 2010). The gains to Topco’s members come from the selective coordination of services. Id.
121. See generally supra Part II.
time, sellers can in fact profit from making larger sales at lower prices when the transaction reduces selling costs and/or when the resulting volume is itself a source of efficiency in the production process.

Hence, once it is appreciated that the market for most products has a number of imperfections such that "perfect" competition is an irrelevant abstraction, then the use of collective buying that marshals demand can enhance efficiency with respect to the pricing of the goods in question. Indeed, any system that moves a market process closer to the abstraction is likely to have much the same effect. The use of internet business-to-business venues where buyers can post their needs and sellers can respond illustrates a different mechanism that can achieve comparable results without any buyer collaboration.122

2. The Competitive Risks from Buying Groups

By marshaling a significant share of the market for an input, a buying group can also create a variety of competitive risks in both the upstream supply market(s) and the downstream market(s) in which its participants compete. The central economic fact is that as the volume of sales taken by a single buyer increases, the power of that buyer over the suppliers also increases. With increased power, the buyer can impose onerous conditions on the sellers that directly affect the price paid, require restrictions on access to the inputs that foreclose competitors in the buying market, and/or use control of significant inputs to achieve coordination of competition in the downstream market. The most obvious risk is that the buying group will exploit its power to drive down prices below a competitive level. This can occur whenever the group can exploit some subset of sellers who have few alternatives, provided the buyers are willing to reduce output as supply declines, have alternative sources of supply, or can employ "all or nothing" contracts. The buying group gains economically whether the reason for the lower prices is transactional efficiency, productive efficiency, or exploitation of a power buying position. Either way, the pecuniary gain from the use of buyer power results in lower input costs to the buyers.

A second related risk, illustrated in a number of cases, is the use of buyer power to impose additional exclusions of competition. This is the

122. Of course, such sites also provide potential means to coordinate both input prices and therefore stabilize output prices. The FTC has discussed some of these risks in its report on these operations. FTC STAFF REPORT, ENTERING THE 21ST CENTURY: COMPETITION POLICY IN THE WORLD OF B2B ELECTRONIC MARKETPLACES (Oct. 2000), http://www.ftc.gov/os/2000/10/b2breport.pdf.
use that Broadway-Hale made of its power as an appliance buyer.\textsuperscript{123} Toys "R" Us imposed a similar type of restraint on its suppliers by requiring that they not provide popular toys to low price, discount retailers that competed with Toys "R" Us.\textsuperscript{124} Such practices are of long standing, as illustrated by two prominent Supreme Court cases.\textsuperscript{125} In context of a legitimate buying group, such exclusionary conduct can take the form of exclusive dealings or other comparable arrangements that preclude sales of key inputs to competitors of the buyers. A somewhat less restrictive option would be to demand "most favored nation" treatment that effectively limits the capacity of the supplier to discount the input to other buyers.\textsuperscript{126} Again, this is not to suggest that in the context of a legitimate buying group some restraints on the freedom of suppliers might not be reasonable and essential to the efficient operation of the agreement. One can imagine that, as the buyers obtained goods with greater differentiation, they would be more concerned in retaining the rights to those products to avoid risks of free-riding or other strategic conduct by either the producer or competing buyers.\textsuperscript{127} Hence, the challenge once again is to find a reasonable basis to differentiate between the reasonably necessary restraints and those that simply protect a group of powerful buyers from threats of entry and competition in their downstream market.

Another risk that the \textit{Topco} case illustrates is that of using the buying group to allocate downstream markets or set resale prices.\textsuperscript{128} Topco's members used their annual meeting to allocate and re-allocate territory so

\begin{itemize}
\item \textsuperscript{123} Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 209 (1959).
\item \textsuperscript{124} Toys "R" Us, Inc. v. FTC, 221 F.3d 928, 930-32 (7th Cir. 2000).
\item \textsuperscript{125} E. States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 606 (1914); Montague v. Lowery, 193 U.S. 38, 38 (1904).
\item \textsuperscript{126} The term "most favored nation" is borrowed from international trade agreements that require participating countries to give the other participating country the same treatment as the most favored country. In antitrust analysis, the term applies to any contract that requires a seller to give the buyer the best price it has given any other buyer. \textit{See} Anthony J. Dennis, \textit{Most Favored Nation Contract Clauses Under the Antitrust Laws}, 20 U. DAYTON L. REV. 821, 822 (1995). This requirement usually includes a period of time so that a buyer gets the benefit of any lower price charged in some succeeding period of time, e.g., six months. For a fuller discussion of the topic, see \textit{Lawrence Anthony Sullivan & Warren S. Grimes, The Law Of Antitrust: An Integrated Handbook} 446-449 (2000).
\item \textsuperscript{127} One hypothetical example would be a group that invested in research and development to create an improved input. Having done so, it would be rational to insist that the contract producer only provide that input to the group that had invested in and taken the risks with respect to the innovative input.
\item \textsuperscript{128} \textit{See} United States v. Topco Assocs., Inc., 405 U.S. 596 (1972).
\end{itemize}
that they could avoid competing with each other.  

There was no justification for such a territorial allocation based on the legitimate activities of Topco, which served its members by developing and buying house-brand groceries. It is unlikely the resulting territorial assignments created a great amount of market power given the presence of other grocery chains in those markets, but such an allocation of territories among the most efficient group of retailers would come at a low cost given that they had meetings for a number of other legitimate reasons, and the expected gain of limiting or eliminating head-to-head competition was greater than the costs associated with reaching these agreements.

Because input costs are often a significant factor in the pricing of downstream products, a buying group also provides a means to coordinate such prices, create a culture of price stability and avoidance of competition. Such consequences imply that the members of the group have a significant position in the downstream markets such that they can plausibly coordinate their prices. One important way that buying groups can contribute to tacit price collusion is that they can reduce the number of completely independent actors in the market. The buying group coordinates the input purchases of its members and so yields common costs for them. If these costs are a substantial part of the total cost of the products being sold, this assures the participants that they are all proceeding with relatively uniform costs. If there are relatively few competitors not in the group serving the downstream markets or if the other competitors are also parts of comparable buying groups, it is more feasible to have tacit price coordination than if all competitors were independently buying their inputs.

Buyers can also bundle their input purchases in ways that may yield pecuniary gain. For example, by bundling inputs with a high level of competition with those over which the producer has significant market power, the buying group may get favorable prices for the package. But the economic cost is the lost opportunity for competing input suppliers in the competitive market to get access to the opportunity to make sales. The buyers may actually favor such a system because it can stabilize the upstream market and so reduce the risk of a competitive input source disrupting downstream competition that has become tacitly collusive. This

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129. Id. at 601-03.
130. Carstensen & First, supra note 50, at 182-85.
131. See id. Topco still operates and is larger than ever, but now its members freely compete with each other. One important strategy that Topco now uses is creating retailer specific house brands to avoid any concerns about strategic exploitation of prior promotional investments.
would be particularly attractive if the downstream market was characterized by inelastic demand and informational or other asymmetries that resulted in prices above current costs. Limiting entry into the upstream input market would then serve the interest of the downstream producers because it would reduce the risk of price or product competition breaking out.

In the same vein, it is possible to imagine buying groups using their power to discourage innovation in the input markets. New inputs might require investment in a new plant or equipment and might alter the barriers to entry. Using their buyer power to insist on limits to the kinds of innovation that suppliers engage in would reduce the risk of that kind of disruptive innovation from occurring. Here again, the point is not that such conduct will occur or that it is likely to be effective in many market contexts even if attempted. Rather, the point is that a legitimate buying group having buyer power has an incentive to consider the full range of ways in which its power can be used to protect its participants from the risks of competition. Thus, this analysis motivates a policy conclusion that even legitimate buying groups raise sufficient competitive risks to warrant strict review.

If there are relatively few buyer groups active in an input market, they can collectively, but not necessarily collusively, foreclose technological competition in the input market if they all select the same supplier. This will foreclose entry and indeed eliminate existing competition. The resulting monopoly price from the supplier will force up downstream prices, but the buyers, because of their buyer power, may be able to bargain for a substantial share of that profit. An illustrative example occurred in the automotive sandpaper market where a firm with a deep pocket made very attractive long-term offers to buyers.132 This forced out the more poorly financed leading incumbent and ultimately resulted in nearly 100 percent of the sales captured by the entrant.133 The excluded competitor claimed that the entrant then shared a substantial part of its projected monopoly profits with its buyers.134 This of course created a community of interest in which the buyers had no incentive to seek competitive supplies so long as they collectively dominated the downstream retail market for this product.135

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132. NicSand, Inc. v. 3M Co., 507 F.3d 442, 448-49 (6th Cir. 2007).
133. Id. at 447-49.
134. Id.
135. These effects, discussed in Klish, supra note 69, assume that the downstream firms are not subject to easy competitive entry. In the sandpaper case, as in the case of hospital supplies discussed by Klish, there is no incentive to make entry into the
IV. CURRENT ANTITRUST POLICY ON BUYER GROUPS

A. Buyer Cartels

Contemporary antitrust policy is that buyer cartels are per se illegal and are often treated as criminal offenses. This is true even if the buyers could make a plausible showing that they are acting together to counteract seller monopoly or oligopoly power. The rational for this absolute prohibition is the impossibility of differentiating between legitimate efforts to create countervailing power and collusive efforts to exploit buyer power.

The potential unfairness of this absolute policy is offset by the fact that Congress has shown itself willing to grant antitrust exemptions for a few situations where buyer power is a major source of concern. Thus labor unions can engage in collective bargaining on an industry-wide basis in order to redress some of the great buyer power that employers have. Of course, to take advantage of this authorization, employees must decide that belonging to a union with the resulting costs and limitations will be worth the benefits. Similar exemptions exist for farm cooperatives and fishermen’s joint efforts to withstand buyer power. It is notable that the focus in all these cases is on sellers facing buyer power and not on buyers needing power. But recently, the independent pharmacies sought to get a statute permitting them to create a buyers’ cartel. However, that effort did not succeed in the face of strong opposition from the Department of Justice, among others.

In the cases of labor, agriculture, and fishing, however, the results have been disappointing from the perspective of countervailing power. Workers have been reluctant to join unions, and employers have been effective in discouraging unionization. In agriculture, low barriers to entry downstream market only to market the specific product. Hence, the buyers-resellers can gain significant monopoly profits from such sales. A more general model of this conduct is found in Doyle & Han, supra note 34.

136. See Vogel v. Am. Soc’y of Appraisers, 744 F.2d 598, 601 (7th Cir. 1984) (“[B]uyer cartels, the object of which is to force the prices that suppliers charge the members of the cartel below the competitive level, are illegal per se.”).


139. See supra note 79.

140. See, e.g., Impact of Antitrust Laws, supra note 79, at 53-76 (statement of David Wales, Deputy Director, Bureau of Competition, FTC) (stating the Commission’s opposition to a buyers’ cartel for independent pharmacies because it threatens to raise prices to consumers).
and the inherent openness of farm cooperatives have limited their capacity to raise prices above prevailing market levels. In the case of fishermen, courts have construed the statute in such a manner as to render the statute largely useless. Given the weakness of any pure cartel arrangement and its vulnerability to selective action by the buyers or sellers on the other side, it is probable that if a group of buyers really need bargaining power, they need to do more than collude to insist upon lower prices.

The examples of labor, farming, and fishing as well as the pharmacy claim all involve efforts to create overt agreements with antitrust immunity. These cases all involve very large groups of actors with diverse interests and motivations. In an earlier era, the pharmacies did act as a group to use their buyer power to coerce over the counter drug producers to create and enforce resale price maintenance. Other comparable retailer groups lacked the internal cohesion to impose similar restraints in the gasoline and grocery retailing industry.

These observations are suggestive that the parameters of buyer cartels may be different from those found in seller cartels. Indeed, the incentives to create and adhere to a buyer cartel are significantly different from those in a seller cartel. Defection by a seller from a price fixing or market allocating cartel results in a direct and immediate increase in sales and revenue. This is economically rational when the seller projects that its profits in the short run will exceed whatever reaction will subsequently occur. In contrast, a defecting buyer faces basically higher prices as it bids up input prices in order to achieve a larger volume of production. Larger production, however, means that the volume in the market into which the product will resell will also increase. Hence, the product faces higher input

141. See ABA SECTION OF ANTITRUST LAW, supra note 106, at 107-10; see also MUELLER, HELMBERGER & PATTerson, supra note 110.
142. See Jonathan H. Adler, Conservation Through Collusion: Antitrust as an Obstacle to Marine Resource Conservation, 61 WASH. & LEE L. REV. 3 (2004). But some evidence of other government sponsored collective efforts have resulted in more conservation and indirectly facilitated fishermen in obtaining better prices for their catches. Id. at 41-49.
143. The intuition is that if a group of buyers face a powerful seller, the seller can break up the buyer cartel by offering discounts to selected buyers. The further assumption is that there are many buyers and a single dominant seller. In such a situation the argument for a buyer cartel is most powerful as a source of countervailing power. But, given many buyers, the risk of defection by a sufficient number of buyers to cause the cartel to become ineffective is a strong possibility since the only link among the buyers is their individual interest in lower prices.
144. PALAMOUNTAIN, supra note 36, at 238-39 (discussing how when Pepsodent sought to eliminate resale price maintenance in California, the retail druggists essentially boycotted all of Pepsodent’s products until Pepsodent restored RPM).
145. See generally id.
prices and constant or lower resale prices. Even so, it is possible that the marginal increase in costs will be more than offset by the opportunity to make more sales at slightly lower prices. This two step process of gaining from defection, however, means that there are greater incentives to remain loyal to the conspiracy. 146

Some courts have recognized the implications of this analysis and allowed cases to proceed against alleged buying cartel schemes when the number of participants and their arguably different interests would make a seller cartel implausible. One illustrative case is *Todd v. Exxon Corp.*, in which the plaintiffs alleged that the defendant oil and gas companies shared detailed information about job descriptions and wage scales in order to stabilize and restrain competition for skilled engineers and other workers in the oil and gas industry. 147 The Second Circuit, in reversing summary judgment against the plaintiffs, focused on the common incentive of the participants to control wages and not engage in competition for workers. 148 In this example, supply may well have been moderately elastic and the gain to the employer from hiring any particular potential employee very minor. Hence, the incentive to defect from such an understanding would be very limited, and common interest in reducing wage costs would allow firms with relatively disparate interests to cooperate with a shared expectation of loyalty to the scheme.

The implications of recognizing that tacit and secret collusion may be more rational and less vulnerable to opportunistic behavior by the participants has significant implications for antitrust policy. First, it would suggest that courts should be more hesitant to reject buyer side conspiracy theories based on arguments that large numbers and diverse economic goals make collusion implausible. 149 Second, it means that public enforcement of antitrust law should look critically at buyer side information exchanges 150 because those can facilitate the creation and enforcement of naked restraints on competition on the buyer side when such a claim would be questionable with respect to comparable information sharing among competing sellers. 151 These questions are explored further in the

147. 275 F.3d 191, 195 (2d Cir. 2001).
148. Id. at 208-09.
149. Thus, applying the stricter pleading standards of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556-57 (2007), should not result in dismissal of complaints charging collusion merely because a selling side conspiracy involving many parties or a wide range of economic interests would be implausible.
next part.

There is a counter concern with too easy an inference of collusion. In some contexts, conduct may be rational unilateral conduct, but all or most firms in an industry engage in the same conduct. This consciously parallel conduct would not create an inference of collusion unless there is a basis to conclude that the conduct only made sense if engaged in collectively. The parallel behavior of a set of leading high tech firms in refusing to solicit the employees of other such firms to switch employers is an illustration. There are some plausible unilateral reasons for such conduct, but it also reduces the risk of competing on salary and benefits for a set of workers with similar skills. Such competition likely would raise the average wage level and, over time, probably would leave the companies with roughly similar sets of workers. Hence, there is a clear incentive not to engage in competition for the services of such workers.

B. Buying Groups

Although buying cartels are per se illegal and, as noted above, tacit collusion among buyers is plausible under a wider range of business situations than is the case with seller conspiracies, the current antitrust law provides a broad tolerance for any enterprise that holds itself out as a buying group, even when the group takes a large share of the input market. The Antitrust Division guidelines for health care provide a "safety zone" for any buying group that takes less than 35 percent of the sales in the input market. Thus, such an input market could have as few as three buying groups and still not raise antitrust concerns under those guidelines.

The case law is dispersed and not well focused on the issue of the reasonableness of buying groups as such. The case most on-point is


152. See John E. Lopatka & William H. Page, Economic Authority and the Limits of Expertise in Antitrust Cases, 90 CORNELL L. REV. 617, 677-79 (2005) (discussing courts' unwillingness to infer tacit collusion without evidence of certain plus factors thus excluding the possibility that defendants "engaged in lawful conscious parallelism").


154. See, e.g., Kang, supra note 2.

Northwest Wholesale Stationers v. Pacific Stationary, in which the plaintiff's theory was that because the organization did not adhere to appropriate procedures for excluding the plaintiff, there was a per se violation of the antitrust law. In reversing the Ninth Circuit, which had accepted that theory, the Court emphasized that this buying group was a private economic venture that was not required to have any specific process for excluding its members. The Court also concluded that the case could continue on a rule of reason basis if the plaintiff could allege that either the refusal to deal itself was pretextual (i.e., that it was in furtherance of an anticompetitive conspiracy of the membership), or that the venture had market power in the upstream office supply market such that participation was essential to the economic survival of the retailers of such goods. Interestingly, the case history contains no record after remand, suggesting that on remand, the plaintiff apparently could not sustain either theory and the case disappeared. In praising the buying group, the Supreme Court focused on its potential efficiency as a buyer and the potential effect of exclusion on the capacity to compete in the downstream market for office supplies. Thus, like Topco, an earlier buying group case, there was no attention to the potential competitive implications of the buying group as a buyer. One might then infer from these cases that the only competitive risk raised by buying groups is that they can affect downstream competition. However, as discussed earlier,
buying groups can impose a variety of adverse, competitive effects on both upstream suppliers and competing buyers. Yet, the overall sense is that there is a strong presumption of legality with respect to conduct and practices toward suppliers for most groups that claim to be a buying group. Given the lack of comprehensive data, it is difficult to discern whether this is a result of a lack of challenges or because cases involving such issues have emphasized other concerns, leaving the upstream effects under-discussed. The current inventory of illustrative cases comes largely from standard-setting organizations that are collective buyers of key technology licenses, and athletics, both amateur and professional.

One area where the issues of buyer power have emerged in several cases involves the creation of standards using patented components. The standard-setters offer to take a single patented component and include it in the standard. This gives the collective buyer a strong bargaining position as long as the buyers have choices for their standard and are aware of the intellectual property rights claimed by a producer. In that context, two problems can arise: (1) depressed prices below a reasonable competitive level, and (2) abuse of the buying power to favor the technology of insiders. The first risk is probably of a low order since, by definition, the seller has a strong argument if its technology is the preferred option. The result is a bargaining process in which there is unlikely to be a clearly “correct” price. Indeed, except in the patent hold-up cases where the concern is the exploitation of patent rights disclosed only after the standard was adopted, there appears to be little concern about this issue.

Exclusionary decisions, in contrast, have resulted in a moderate amount of litigation. Here the concern is that the purchase has an inherent exclusionary effect in terms of the standard being created and, therefore, has a significant impact on the economic results of individual firms.

In amateur athletics, the dominant organization for college sports is the National Collegiate Athletic Association (NCAA). It is more of a regulatory agency with de facto authorization to control some aspects of

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164. Id. at 124.
165. See, e.g., id. at 126.
college sports than it is a true joint venture. Nevertheless, many observers regard it as a joint venture that produces college athletics. Its participants are "buyers" of college-age athletes, and the NCAA's role is to regulate the buyers in that market. But it has also sought to regulate a number of other ways in which colleges might compete on the buying side. These regulations serve to control the overall costs of producing athletic programs and therefore increase the gain (or reduce the loss) to the members. Although imposing low salaries on college athletes and related restraints on their freedom have been upheld, the NCAA's effort to restrict salaries for assistant coaches in basketball was struck down as an illegal restraint.

In the case of professional football, the courts have on several occasions struck down as unreasonable specific practices affecting the market for player services. On the other hand, entry and some compensation rules have been upheld as aspects of labor-management relations shielded from antitrust law by the labor exemption. Still, those cases also illustrate how the buyers have used their power to affect the market for player services, even if the specific conduct was not reviewable under the antitrust laws. Baseball, although exempt from antitrust law, has experienced similar concerns for abuse of buyer power.

167. See Carstensen & Roth, supra note 157, at 402-08.
168. See, e.g., Smith v. Nat'l Collegiate Athletic Ass'n, 139 F.3d 180, 185 (3d Cir. 1998) (holding Sherman Act inapplicable to NCAA eligibility requirements). In football and many other college sports, there are naked restraints on college athletes. The case of basketball is more complex because all teams adhering to the payment constraints are eligible to participate in post-season tournaments. Id. Thus, the NCAA's regulation of college sports is more in the tradition of the New York Stock Exchange's regulation of the ethics of its members and their trading partners that was the focus of the Silver case than the joint ventures that constitute most of America's professional league sports. For a fuller development of the regulatory exemption from antitrust's condemnation of cartels, see Carstensen & Roth, supra note 157.
172. Flood v. Kuhn, 407 U.S. 258, 282 (1972); Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 209 (1922) (holding baseball was not commerce as the term was understood at that time). The holding has come to be interpreted as exempting baseball from antitrust law.
Congressional hearings have focused on the potential for abuse of buying power in hospital supplies. The competitive problems that were identified first involved foreclosure of potential competition in the supply market resulting from bundling and requirements contracts that limited the freedom of hospitals to accept attractive alternatives. Second, the organizers of these buying groups appeared to have made very large profits on the purchase and resale of supplies to the hospitals.

A similar problem unfolded in the insurance industry. Again the source of anticompetitive harm was the role of insurance agents specializing in handling large firm policy purchases. The relatively few agents engaging in this specialized business each controlled a sufficient volume of insurance purchases that they were able to compel insurers to accept a market allocation scheme promoted by the agents in which the insurers rigged bids and then shared the resulting overcharges with the agents.

Thus, despite the common view that most buying groups are lawful with respect to their upstream activities, the reality is that when the courts have made more focused inquiry, the results are a more critical evaluation of the resulting restraints. However, these episodic interventions have not led to a more calibrated standard for evaluating buyer groups. Many scholars of a variety of ideological perspectives seem to share this benign view of buyer groups. These scholars seem to have focused only on the positive part of buying groups and ignored the potential for a variety of downsides that they might create for competition.

V. RETHINKING ANTITRUST POLICY

Two areas of antitrust law as they relate to buyer cartels and buyer groups need thoughtful reappraisal today. First, there is greater potential for tacit and loose conspiracy to create buyer cartels than the current law recognizes. Second, buyer groups, when they have more than a modest share of the input market, can in fact raise serious competitive issues.

175. See Lozano, supra note 47.
176. Id.
177. Id.
178. See, e.g., Jacobson & Dorman, supra note 6, at 23, 40.
179. E.g., id.; Kirkwood & Lande, supra note 11, at 192, 196, 234; see also, Department of Justice and Federal Trade Commission, supra note 155.
A third topic has been explored already and motivates a third concern. Investigators need to distinguish carefully between cartelistic buying arrangements and ones that are legitimate buying groups. At the margin it is going to be very difficult to tell the difference. Hence, some rules of thumb based on market share are in fact plausible, but as repeatedly pointed out in the preceding discussion, the current level for such a presumption is much too generous.

A. The Potential for Buyer Side Conspiracy

The general paucity of buyer side cases stands in stark contrast to data from merger analysis which shows that the most significant cost savings comes from reduction in input costs. 180 This would suggest that there is the substantial potential for price-affecting conspiracies among competing buyers. Indeed, there are a number of examples in the beef-processing market of tacitly conclusive conduct among the three or four major buyers that resulted in significantly depressed prices. 181

In addition to looking more critically at interdependent buying practices, it is also important to consider the kinds of remedies that might be practical from a judicial perspective. This is an issue especially in tacit collusion contexts where the industry structure is such that some interdependence in buying decisions is largely unavoidable. But it is often possible to increase the transparency of buying practices that facilitate such collusion. 182 Remedies focused on eliminating such practices will not


181. R-CALF, an advocacy group for farmers raising beef, has provided a detailed analysis of how buyer power works in that industry. Its submission in connection with the JBS-National and Smithfield beef merger contains detailed assertions of how beef buyers manipulated the prices for fed cattle. Concentration in Agriculture and an Examination of the JBS/SWIFT Acquisition: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the Comm. on the Judiciary, 110th Cong. 131-65 (2008) (statement of Bill Bullard, CEO, Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America).

entirely eliminate the potential for tacit collusion, especially given the fact that defection is much less likely in buyer side tacit collusion. However, it can increase the potential for more competition among buyers to secure important inputs.

In certain markets, market conduct regulation already exists. This is true in some vulnerable agricultural commodity markets. In such markets, the demonstration of serious tacit collusion problems ought to lead to market facilitating regulation that make it more difficult for the buyers to collude. Admittedly, this has not happened as of yet because of the political influence of the large buyers. But there are proposals that could limit both strategic buying and other practices that frustrate the competitive process.

B. Stricter Review of the Competitive Impact of Buyer Groups

The second important insight, that the evaluation of competitive risks presented by legitimate buying groups contributes to forward looking policies, is that there ought to be closer scrutiny of such groups because of their potential to create anticompetitive effects in both upstream and downstream markets. The current policy of a strong presumption of legality if a group has some formal characteristics of a legitimate joint venture and has a market share in the buying market below a very generous threshold results in a policy that runs serious risks of "false positives."  

The literature of buyer power confirmed in part by the reported cases suggests that such power arises at market shares well below the current thresholds. Indeed, in some recent health care cases the government itself has objected to mergers or acquisitions where the post-merger share of the input market was below the guideline threshold set forth in the health care guidelines. Other analyses have, in particular, pointed to the hospital supply markets as ones that have experienced significant exclusionary effects as a result of large buying groups.

The hard task for antitrust evaluation of such organizations is that they

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184. See supra notes 69-74 and accompanying text.
185. Botti, supra note 3, at 11 (discussing DOJ challenge to the merger of United Health and PacifiCare).
186. See Klish, supra note 69, at 176.
can and do serve legitimate functions that facilitate the efficient working of the competitive process. Thus, the challenge is to have some screens or filters that allow investigation to focus on those buying groups that are most likely to raise competitive concerns.

The first screen ought to be the share of the input market being taken by the buying group. Moreover, there needs to be a distinct calibration of the scale that creates concerns on the buying side rather than a mere extension of rules of thumb drawn from the selling side. In general, if the buying group is taking more than a modest percentage of the output in the relevant market, say 15 percent or more, there are real risks of exploitation and so the buying arrangement should be carefully examined to ensure that it is in fact legitimate and that its buying practices do not impose unnecessary limits on the competitive process.

The second screen ought to be an evaluation of the input market itself. A rough estimate of the elasticity of supply and the barriers to exit on the supply side are important criteria. When supply is inelastic and there are constraints on expanding or contracting output, there are greater potentials for anticompetitive conduct exploiting suppliers.

The effect of this shift in perspective on buying groups is that, like contemporary merger analysis, the structural fact of market share would create a need to look carefully at how the specific group operates including its buying practices as well as whether it might facilitate downstream coordination among its participants or achieve exclusion of competitors. These issues are currently recognized in the health care guidelines which are the only ones that speak very directly to buying groups. The key difference between the very tolerant view of those guidelines and this analysis is that it argues that the competitive risks are greater and the potential for their occurring arises at lower levels of market concentration than contemporary policy would suggest.

Finally, the scope and range of scale economies in the supply market are a final screen. When there are such economies, there are both incentives for legitimate efficiency enhancing transactions and for anticompetitive use of control over the volume of business necessary to achieve scale economy. In such situations, the key competitive risk resides in exclusionary agreements that foreclose competitors of the buying group from gaining access to the output of the larger scale producers.

Ultimately, the goal of these three screens is to focus inquiry onto the kinds of buyer groups that contain the most risk of anticompetitive conduct. Even then, the goal should not be to eliminate an efficiency-

187. See Department of Justice and Federal Trade Commission, supra note 155 at 1-2.
enhancing buyer group because it creates risks of anticompetitive conduct, but rather, to focus on the ways to avoid or reduce the risks of such conduct. Topco is an illustration. The venture was prohibited from engaging in market allocation, but continued to survive and prosper because its members found its other services very valuable. These screens then provide the basis to identify the kinds of buying groups that most merit review.

CONCLUSION

Both legitimate buying groups and buyers’ cartels present serious challenges to maintaining a strong and viable competitive process. Despite occasional plausible arguments to create countervailing buyer power, the demands of a workable competitive process preclude the courts from accepting any such justification as a defense. Hence, on their merits, naked restraints of competition by buyers must be absolutely illegal. In addition, the incentives of buyers are likely to make tacit collusion more feasible and attractive to larger groups of buyers than are ordinarily found in seller side cartels. Thus, enforcement authorities ought to look more broadly at the impact of parallel buying practices especially in markets with relatively few buyers and many sellers.

In contrast to naked restraints of competition by buyers, legitimate buying groups provide transactional efficiency as well as some negotiating capacity that individual small volume buyers lack. As such they can make a real contribution to the overall competitive process. However, given the different ways in which such groups can be constituted that run the range from substantial integration of buying services to very limited agency, it is hard sometimes to differentiate between legitimate joint buying ventures and naked restraints of buyer competition. For this reason, it is not irrational to create a market share screen to help identify the kinds of arrangements, whether legitimate or not, that merit further review. Thus, the general thrust of current enforcement is appropriate, but it uses a market share derived from seller side analogies that are far too generous given the different capacity of buyer groups to impose harms on both upstream and downstream markets. Ultimately, what is likely to be most helpful is a set of guidelines for buying groups generally derived from those already in use for the health care industry that provide guidance to those organizing such groups so that they can avoid the kinds of practices

189. Carstensen & First, supra note 50, at 201-02.
that are most likely to adversely affect competition.

The final but important point that this examination has emphasized is that buying side issues are more pervasive and significant for competition than contemporary policy makers have acknowledged. Indeed, the preoccupation with "consumer" interests, however defined, has led to a disproportionate focus on the selling side of the market and an underappreciation of the risks to sellers when buyers collude. It is time to re-strike the balance and emphasize more fully the need for careful review of buyer side conduct.