Foreign Mergers that Harm Domestic Sellers

Ariana Vaisey[†]

Buyer power allows buyers to drive down prices by reducing purchases or exerting bargaining leverage. Mergers that harm sellers by creating buyer power—mergers to monopsony, using the term "monopsony" in a broad sense—are typically actionable under antitrust law. While antitrust law has conventionally focused on harms to consumers arising from monopoly, enforcement agencies are now more aggressively scrutinizing transactions for harms to sellers arising from monopsony. However, this paper identifies a set of transactions that continue to escape scrutiny: foreign mergers that harm domestic sellers.

Antitrust enforcement agencies typically learn about proposed mergers through premerger notification. In jurisdictions such as the United States and the European Union, parties to a merger that meets certain size thresholds must notify the jurisdiction's enforcement agency before completing the merger. The notification requirement helps avoid the unscrambling-the-egg problem by enabling antitrust enforcers to detect problematic mergers in time to seek preliminary relief. Reflecting the fact that U.S. and E.U. antitrust laws apply extraterritorially, both jurisdictions impose premerger notification on foreign merging parties when the turnover of those parties in the U.S. or the E.U. meets certain thresholds. As a result, the notification requirement captures foreign mergers that threaten to harm domestic consumers through higher import prices. But an unrecognized aspect of jurisdiction-wide turnover thresholds is that they may exclude foreign mergers that threaten to harm domestic sellers through lower export prices. For instance, if merging parties in X buy inputs from Y but do not sell outputs into Y, the merger would be exempt from premerger notification in Y due to insufficient turnover in Y, even though the merger could harm sellers in Y.

This notification gap matters because it may lead to underenforcement of mergers when the merging parties are in a different jurisdiction from their suppliers. The seller-side antitrust enforcement agency may not learn about the merger in time to seek effective relief. Meanwhile, the buyer-side agency would be unlikely to block a merger that only harms foreign sellers. To solve this underenforcement problem, enforcement agencies should monitor nonnotifiable mergers of foreign buyers. Jurisdictions should also consider adding an alternative notification threshold for foreign mergers that considers purchase volumes.

[†] B.A. 2017, The University of North Carolina at Chapel Hill; J.D. Candidate 2023, The University of Chicago Law School. I would like to thank Professors Adam Chilton and William Baude for their guidance.

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INTRODUCTION

Sony and AT&T announced in December 2020 that Sony's Funimation Global Group had agreed to purchase AT&T's Crunchyroll anime business for $1.2 billion.[1] The acquisition would allow Sony to expand a budding U.S. anime empire. Before the Crunchyroll deal, Sony already owned a substantial majority in stake Funimation, another major player in Western anime markets.[2] In a press release announcing the close of the Crunchyroll acquisition, Sony explained that: "The alignment of Crunchyroll and Funimation will enable us to get even closer to the creators and fans who are the heart of the anime community."[3] While a closer relationship with anime creators may benefit Sony, the same might not be true for creators. Consolidation means less competition for rights to anime titles, which could lead to lower licensing fees for anime content.[4] Overseas markets now make up half of anime demand, and a merger increases the level of concentration in that demand segment.[5] Nonetheless, the U.S. antitrust regulators who reviewed the merger decided not to challenge the deal, and it closed in August 2021.[6]

In the typical merger case, such as the airline mergers of the past decade, the main antitrust concern is that the merging parties will reduce output to raise the price above the level that would emerge in a competitive market.[7] This type of market power arises from monopoly (a single seller) or oligopoly (a few sellers). The Sony-Crunchyroll merger is different because a primary risk of the merger is that, through consolidation on the demand side of the market, the merging parties will acquire buyer power, or the ability to force anime creators to accept lower licensing fees. The term "buyer power" encompasses two concepts. First, when the market is a monopsony (a single buyer) or oligopoly (a few buyers), buyers may have the power to force sellers to reduce prices below competitive levels through reducing purchases, in a mirror of

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[1] Press Release, *AT&T to Sell Crunchyroll to Sony's Funimation Global Group*, AT&T (December 9, 2020), https://about.att.com/story/2020/att_sony_pictures_entertainment_inc_crunchyroll.html [https://perma.cc/434C-9G5J].

[2] Press Release, Sony Pictures Television Networks to Acquire Substantial Majority Stake in Funimation, Sony Pictures (July 31, 2017), https://www.sonypictures.com/corp/press_releases/2017/07_17/073117_funimation.html [https://perma.cc/E9BE-H3NB].

[3] Press Release, *Sony's Funimation Global Group Completes Acquisition of Crunchyroll from AT&T*, SONY PICTURES (August 9, 2021), https://www.sonypictures.com/corp/press_releases/2021/0809/sonysfunimationglobalgroupcompletesacquisitionofcrunchyrollfromatt [https://perma.cc/3V4C-SJZ5].

[4] Cecilia D'Anastasio, *Welcome to the Era of Big Anime*, WIRED (August 31, 2021), https://www.wired.com/story/funimation-crunchyroll-big-anime-era-is-here/ [https://perma.cc/CXU6-3XF8].

[5] *Id.*

[6] Press Release, *Sony's Funimation Global Group Completes Acquisition of Crunchyroll from AT&T*, SONY PICTURES (August 9, 2021), https://www.sonypictures.com/corp/press_releases/2021/0809/sonysfunimationglobalgroupcompletesacquisitionofcrunchyrollfromatt [https://perma.cc/3V4C-SJZ5]. The Department of Justice extended its review over concerns that the deal would allow Sony to control the anime market. Josh Sisco & Jessica Toonkel, *Sony's Hopes of Countering Netflix in Anime Market Delayed by Antitrust Probe*, THE INFORMATION (March 24, 2021), https://www.theinformation.com/articles/sonys-hopes-of-countering-netflix-in-anime-market-delayed-by-antitrust-probe.

[7] *See, e.g.*, United States v. US Airways Grp., Inc., 38 F. Supp. 3d 69, 72 (D.D.C. 2014) (granting final judgement in the settlement of a DOJ suit alleging that the US Airways-American Airlines merger would "lessen competition substantially for the sale of scheduled air passenger service").

monopoly or oligopoly conditions.[8] Second, "buyer power" can also refer to "bargaining power," or the ability of a large buyer to extract producer surplus without reducing purchases.[9]

Concern about monopsonization has a long history.[10] However, conventional antitrust enforcement in the United States and other countries has focused on monopolization.[11] This is changing. In recent years, commentators have urged global antitrust authorities to pay greater attention to buyer power, including in merger reviews.[12] Commentators have highlighted the rise to prominence of big-box retailers like Walmart,[13] the exploitation of farmers by large agricultural buyers,[14] and wage suppression by employers (buyers of labor)[15] as calls to action. Antitrust enforcement authorities are responding. For instance, the American antitrust authorities—the Antitrust Division of the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC")—updated their Horizontal Merger Guidelines in 2010 to include an explicit section on buy-side merger analysis for the first time.[16]

This paper adds to the discussion of buyer power and antitrust enforcement by examining the treatment of foreign mergers that harm domestic sellers. For instance, the Sony-Crunchyroll merger was a merger of two companies that distribute Japanese-created anime to American viewers. As a result of global economic integration, mergers increasingly affect competition in multiple jurisdictions. However, discussion about monopsony has so far ignored considerations unique to merger review of mergers among buyers that harm sellers in a different jurisdiction. This paper takes up the issue, and it identifies an underappreciated downside of merger policy: Antitrust regulators in the jurisdiction of the merging parties are unlikely to challenge an anticompetitive merger that harms foreign sellers. Regulators in the sellers' jurisdiction could step up to block the merger, but because premerger notification thresholds are based on jurisdiction-wide turnover, those regulators may not receive notice of the foreign merger in time to seek effective relief. This creates an enforcement gap.

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[8] *See* Roger G. Noll, *Buyer Power and Economic Policy*, 72 ANTITRUST L.J. 589, 589 (2005) (describing the standard definition of "buyer power").

[9] Recent literature on buyer power uses the term "buyer power" to refer to bargaining power as well as buyer power that arises from classical monopsony or oligopsony. *See generally, e.g.*, C. Scott Hemphill & Nancy L. Rose, *Mergers that Harm Sellers*, 127 YALE L.J. 2078 (2018); John B. Kirkwood, *Powerful Buyers and Merger Enforcement*, 92 B.U. L.R. 1485 (2012).

[10] British economist Joan Robinson first introduced the term "monopsony" in 1933. JOAN ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION 215 (1933). And in 1949, the federal government won the first of its antitrust suits against the Great Atlantic and Pacific Tea Company (A&P) on the grounds that A&P had violated the Sherman Act, 15 U.S.C. §§ 1-38, by using its size to obtain lower prices on wholesale purchases of food products than were available to others. United States v. New York Great At. & Pac. Tea Co., 173 F.2d 79 (7th Cir. 1949).

[11] *See Buyer Power: The New Kid on the Block*, *in* AM. ANTITRUST INST., THE NEXT ANTITRUST AGENDA: THE AMERICAN ANTITRUST INSTITUTE'S TRANSITION REPORT ON COMPETITION POLICY TO THE 44TH PRESIDENT 95 (Albert A. Foer ed., 2008) (noting that "cases against buyers have been much less common than cases against sellers"); PETER C. CARSTENSEN, COMPETITION POLICY AND THE CONTROL OF BUYER POWER: A GLOBAL ISSUE 1 (2017) (noting that "conventional thinking about competition policy has emphasized the market distortion of seller power, " while "the exploitation of buyer power" has been "less appreciated").

[12] *See generally, e.g.*, Hemphill & Rose, *supra* note 9;, CARSTENSEN, *supra* note 11; FREDERIK VAN DOORN, THE LAW AND ECONOMICS OF BUYER POWER IN EU COMPETITION POLICY (2015). Kirkwood, *supra* note 9.

[13] *See, e.g.*, CARSTENSEN, *supra* note 11, at 7–8; Kirkwood, *supra* note 11, at 1487–88.

[14] *See, e.g.*, CARSTENSEN, *supra* note 11, at 2–4.

[15] *Id.* at 4–6; *see also generally* ERIC A. POSNER, HOW ANTITRUST FAILED WORKERS 14–17 (2021); Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536 (2018).

[16] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010), ftc.gov/os/2010/08/100819hmg.pdf [hereinafter U.S. Horizontal Merger Guidelines].

Parts I and II provide the economic and legal groundwork for the paper. Part I identifies four versions of monopsony with different effects: classical monopsony with downstream harms, classical monopsony without downstream harms, discriminatory monopsony, and bilateral monopoly. Part II describes the merger control regimes in the United States and the European Union as they relate to mergers that create different versions of monopsony.

Part III explains why foreign mergers to monopsony that harm domestic sellers are likely to be underenforced compared to domestic mergers with domestic effects. This Part identifies premerger notification thresholds based on turnover as a contributing factor to underenforcement of (1) mergers to classical monopsony without downstream harms and (2) mergers to discriminatory monopsony. In the fully domestic context, U.S. and/or E.U. regulators have challenged (or signaled their willingness to challenge) these types of mergers based on likely harm to sellers. However, when the merging parties are foreign buyers (without more), pre-merger notification is not currently mandated, so regulators may never learn about the merger in time to seek effective relief. Part III then identifies two solutions. First, in jurisdictions where antitrust enforcement agencies have the power to review mergers that fall below mandatory notification thresholds, agencies should develop processes to monitor nonreportable foreign mergers that could harm domestic export sellers. Antitrust enforcement agencies have already adopted this approach to address the problem of nonreportable "killer acquisitions,"[17] but agencies have not realized that other types of anticompetitive acquisitions may also be missed. Second, jurisdictions should consider adding alternative merger notification thresholds based on jurisdiction-wide purchase volumes.

I. THE PROBLEM OF BUYER POWER

The economics of buyer power is well developed in the literature. Broadly speaking, markets with buyer power differ from the benchmark model of perfect competition because the demand side of the market is concentrated—in a pure monopsony, the market contains a single buyer.[18] The market could be an input market or a final products market.[19] This paper focuses on the case in which a buyer purchases an input that it uses to produce a final product, although the analysis would extend to more complex cases.

This Part distinguishes different versions of buyer power. The basic model is classical monopsony, which is the mirror image of monopsony. It assumes an upward-sloping supply curve, atomistic sellers, and transactions based on a single unit price. In this model, the profit-maximizing monopsonist typically purchases fewer inputs at a lower price compared to perfect competition, which leads to reduced downstream output and higher prices for downstream consumers. However, in certain scenarios, input suppliers can be harmed by classical monopsony without noticeably impacting output or downstream consumers. Finally, some markets do not fit the classical monopsony model because sellers are differentiated and transactions are mediated through bilateral bargaining. Here, the source of buyer power is bargaining leverage in bilateral negotiations. An exercise of bargaining leverage still harms input suppliers, but it could increase total output and benefit downstream consumers.

[17] OECD, START-UPS, KILLER ACQUISITIONS AND MERGER CONTROL—NOTE BY THE UNITED STATES 12–13 (2020).

[18] Noll, *supra* note 8, at 589.

[19] A consumer cartel with significant monopsony power is unlikely to be feasible. *Id.*

A. Classical Monopsony with and Without Downstream Harms

In the classical model of monopsony, a single buyer of an input faces many competitive, atomistic suppliers. While pure monopsony requires a single buyer, the basic insights of the classical model are also applicable to markets with a dominant buyer and fringe buyers or with collusive monopsony.[20] The model assumes that the monopsonist sets a single unit price and suppliers respond by deciding how many inputs to sell.[21] The monopsonist realizes that if it restricts purchases, it will usually be able to pay less for each unit. Assuming that the supply of the input is rising in price, the profit-maximizing strategy for the monopolist is to offer a lower price and restrict input purchases. If the monopsonist has market power in the downstream market, then its exercise of monopsony power upstream will lead to lower output and higher prices downstream. To explain why, a more technical discussion follows.

Consider the classic example of a coal mine in a company town.[22] The mine produces coal by employing labor and machinery. The additional output of coal made possible by hiring another worker is the marginal value of product.[23] To hire the new employee, the mine must pay a higher wage, but the mine cannot just pay the higher wage to the added worker; it must pay all its workers the higher wage.[24] The increase in total expenditures when employment expands—the wage of the new employee plus the increment to the wage of the other employees—is referred to as the marginal factor cost.[25] The mine will hire the quantity of workers that equates the marginal value of product to the marginal factor cost. The marginal factor cost exceeds the wage, so the wage of the last worker hired will be less than her stand-alone value to the mine (the competitive wage). Because the mine sets the wage rate below the competitive level, it will hire fewer workers than it would absent its monopsony power.[26]

What happens in the downstream market? Some courts have mistakenly concluded that lower input costs will be passed through to final consumers as reduced prices in the downstream market.[27] This conclusion is wrong because the market price in the downstream market is determined by the market structure of that market, not the input market. When a monopsonist firm purchases less of one input, it will produce less output, assuming that other inputs in the production of the output are imperfect substitutes.[28] Accordingly, if the firm has market power in the final products market (i.e., it faces a downward-sloping demand curve), the firm's reduced output of the downstream product will cause prices to rise for downstream consumers.[29] If the downstream market is competitive, the effect on downstream consumers will be neutral. This is

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[20] ROGER D. BLAIR & CHRISTINE PIETTE DURRANCE, *The Economics of Monopsony*, *in* ISSUES IN COMPETITION LAW AND POLICY 394, 402–03 (W. Dale Collins ed. 2010). The National Collegiate Athletic Association (NCAA), major league baseball, and antique dealers are all examples of collusive monopsony. *Id.* at 404.

[21] Noll, *supra* note 8, at 594.

[22] *See, e.g.*, *id.*; Hemphill & Rose, *supra* note 9, at 2084; Orley C. Ashenfelter et al., *Labor Market Monopsony*, 28 J. LABOR ECON. 203, 204 (2010).

[23] BLAIR & DURRANCE, *supra* note 20, at 395.

[24] Employers cannot easily wage discriminate. *See* POSNER, *supra* note 15, at 23.

[25] *Id.*

[26] *Id.*

[27] *See, e.g.*, Kartell v. Blue Shield of Mass., Inc., 749 F.2d 922 (1st Cir. 1984) (concluding that insurer monopsony power leading to reductions in physicians' fees must benefit consumers by lowering their price of care); Balmoral Cinema v. Allied Artists Pictures, 885 F.2d 312, 316–17 (6th Cir. 1989) (noting that the practice of the colluding buyers "may simply lower prices paid by exhibitors to distributors," which "may lower prices to move goers at the box office and may serve rather than undermine consumer welfare").

[28] Noll, *supra* note 8, at 596.

[29] BLAIR & DURRANCE, *supra* note 20, at 398.

because a reduction in total output and an increase in price in the downstream market will not be sustainable. High final products prices will encourage established producers to expand production or will attract new entrants.[30] As a result, in this scenario, the monopsonist's cutback in output will not noticeably raise final products prices, and the economic harm may appear isolated to sellers and to lost efficiency in the input market.[31]

For antitrust purposes, the important point is that an exercise of classical monopsony power always leads to lower output and prices in the upstream market, while downstream purchasers may be harmed and never benefit.

B. Bargaining Leverage

An extension of the classical model of monopsony is to bilateral bargaining. In the classical model, the buyer reduces purchases to depress the price of inputs. This model assumes a single unit price, but in many input markets where monopsony is a concern, such as local food processing[32] or managed care insurers,[33] the single-price assumption does not hold. Rather, the common practice is for buyers and sellers to negotiate contracts that specify price and quantity. The source of buyer power here is bargaining leverage, not classical monopsony power. Through bargaining, the buyer can depress input prices without reducing purchases, and an exercise of bargaining leverage could even lead to increased purchases, benefiting downstream consumers (but still harming input suppliers). This Section considers two market forms with bargaining leverage: discriminatory monopsony and bilateral monopoly.

1. Discriminatory monopsony.

Price discrimination through all-or-nothing offers allows the buyer to extract surplus from its suppliers while maintaining its level of purchases.[34] The buyer offers its suppliers a contract to supply the same quantity of output that would be supplied in a competitive market, but at a lower price. When the credible alternative is to sell nothing at all, a supplier will accept a price at least equal to the average cost of supply, which is lower than the marginal cost of the last unit.[35] In the single-price case, lower-cost suppliers keep surplus, or the difference between the price they are just willing to accept and the price they receive. Perfect price discrimination allows the buyer to capture the full surplus. To succeed, the buyer must be able to observe the cost function of each separate supplier and offer each a different price. The short-term consequence of this form of buyer power is purely distributive: a transfer of surplus to the buyer. Because the quantity of inputs brought to market is the same as under competition, output and price in the downstream market are unaffected, and downstream purchasers are unharmed.[36]

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[30] Noll, *supra* note 8, at 597.

[31] Technically, the new equilibrium will be one in which some production with low productivity is brought onto the market, while higher productivity production of the monopsonist is taken off the market. This will cause lower overall productivity in the final-products market and higher prices to consumers than would be the case if the monopsonist firm did not exercise monopsony power. *See* Noll, *supra* note 8, at 597. Whether higher final products prices are noticeable depends on the size of the overall productivity loss in the final-products market.

[32] *See generally, e.g.*, Mandeville Island Farms v. Am. Crystal Sugar Co., 334 U.S. 219 (1948).

[33] *See generally, e.g.*, *Kartell*, 749 F.2d; All Care Nursing Service v. Bethesda Memorial Hospital, 887 F.2d 1535 (11th Cir. 1989).

[34] BLAIR & DURRANCE, *supra* note 20, at 399–402.

[35] *Id.* at 402.

[36] For instance, in *Mandeville Island Farms*, the plaintiff's complaint alleged that the collusive contracts had no effect on the national price of refined sugar.

However, in the long run, the buyer's extraction of producer surplus may discourage entry by suppliers, which could impact consumers through reduced supplier competition.[37]

2. Bilateral monopoly.

Bilateral monopoly describes the situation where both buyers and sellers have market power. For instance, in retailing, both big-box retailers and producers of branded differentiated products may have market power.[38] In 1952, in *American Capitalism: The Concept of Countervailing Power*, John Kenneth Galbraith argued that by exercising "countervailing power," large retailers are able to lower the prices they pay their suppliers and pass these savings onto their customers.[39] On a theoretical level, this outcome is possible.[40] Consider the example of a pure monopoly in an input market. Presumably, the monopolist pushes the price above the competitive level by reducing input sales, which distorts the market. If the buyers merge, they may be able to force the monopolist to lower the price. Any lower price that is between the monopoly price and the competitive price will allow the buyer to purchase more input, leading to higher output and lower prices in the downstream market.[41] This scenario gives rise to welfare conflict between input suppliers and downstream purchasers.

In practice, the consequences of buyer consolidation that creates countervailing power are mixed. When the number of buyers is reduced in an input market, remaining buyers may gain both countervailing power against their suppliers and market power against their consumers.[42] Whether downstream prices will ultimately rise or fall depends on which effect dominates.[43] But it remains important for antitrust analysis that downstream purchasers can benefit from bilateral monopoly, as the next Part discusses.

II. DOMESTIC BUYERS, DOMESTIC SELLERS

Mergers are one of the major categories of activities regulated by antitrust laws, along with abuse of dominance and anticompetitive agreements. The United States has exercised control over mergers since the Clayton Act of 1914.[44] Many other jurisdictions began adding merger control to their competition policies starting in the mid-1980s.[45] The European Union adopted a merger review regime in 1990.[46] As of 2010, 126 countries producing 95% of world

[37] BLAIR & DURRANCE, *supra* note 20, at 402; Noll, *supra* note 8, at 606; *Kartell*, 749 F.2d at 923–24 (plaintiffs contending that Blue Shield's all-or-nothing rates were so low as to discourage entry into the physician services market).

[38] Noll, *supra* note 8, at 610; Kirkwood, *supra* note 11, at 1489.

[39] JOHN KENNETH GALBRAITH, AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWER (1952).

[40] *See* Noll, *supra* note 8, at 606–07; *see also* ROMAN INDERST & GREG SHAFFER, *Buyer Power in Merger Control*, *in* ISSUES IN COMPETITION LAW AND POLICY 1161, 1628–1634 (W. Dale Collins ed. 2010); Kirkwood, *supra* note 11, at 1500–06.

[41] *Id.* at 607.

[42] Zhiqi Chen, *Buyer Power: Economic Theory and Antitrust Policy*, 22 RSCH. IN L. & ECON. 17, 24 (2007). In addition, in markets with product differentiation, like retailing, the exercise of countervailing power by a buyer against its input suppliers may reduce product diversity. *Id.*

[43] *Id.*; *see also generally* Thomas von Ungern-Sternberg, *Countervailing Power Revisited*, 14 INT'L J. INDUSTRIAL ORG. 507 (1996).

[44] 15 U.S.C. §§ 12-27.

[45] MICHAL S. GAL, COMPETITION POLICY FOR SMALL MARKET ECONOMIES 196 (2003).

[46] Anu Bradford, Adam S. Chilton, Christopher Megaw & Nathaniel Sokol, *Competition Law Gone Global: Introducing the Comparative Competition Law and Enforcement Datasets*, 16 J. EMPIRICAL LEGAL STUD. 411, 435 (2019).

GDP had adopted antitrust laws, and, of these, at least 106 engaged in merger control.[47] In general, when large firms agree to merge, they are required to notify antitrust regulators ahead of the merger.[48] The regulators then review the merger proposal and decide whether to block the merger or allow it to proceed based on predictions about the future effects of the combined entity's behavior in the marketplace. Buyer power is explored as part of merger review.

This Part describes the merger review regimes in the United States and the European Union because these are the world's largest and most influential antitrust regulators.[49] This Part focuses on merger review of domestic mergers that harm domestic sellers. The next Part will explore how merger review of foreign mergers that harm domestic sellers differs.

A. The United States

1. Merger review regime.

Section 7 of the Clayton Act prohibits mergers "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." The Act is triggered by an acquisition of equity shares or productive assets.[50] The prohibition captures both the creation of unilateral monopsony power and the creation or changing of market conditions that would increase the possibility of collusion or coordination among buyers.

Before 1976, many merger cases were litigated under the Clayton Act.[51] However, concern over the unscrambling-the-egg problem led to the Hart-Scott-Rodino Act of 1976 (the "HSR Act"), which amended the Clayton Act to mandate preconsummation notification for mergers over certain inflation-adjusted size thresholds.[52] As of 2022, parties to a proposed transaction must notify FTC and DOJ about their transaction whenever (1) the size of the transaction is more than $403.9 million or (2) the size of the transaction is more than $101 million, the total assets or annual net sales of one party to the transaction equal $202 million or more, and the total assets or annual net sales of the other party to the transaction equal $20.2 million or more.[53] Some stock or asset purchases are exempt, as are purchases of some types of real property.[54] A transaction does not have to be subject to premerger notification under the HSR Act for FTC or DOJ to review and, if necessary, challenge the merger under Section 7 of the Clayton Act, but the agencies rarely review nonnotifiable transactions.[55]

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[47] Anu Bradford & Adam S. Chilton, *Competition Law Around the World from 1889 to 2010: The Competition Law Index*, 14 J. COMP. L. & ECON. 393, 393, 402 (2018).

[48] As of 2010, 84 countries required premerger notification. *Id.* at 402.

[49] *See generally* Anu Bradford, Adam Chilton, Katerina Linos & Alexander Weaver, *The Global Dominance of European Competition Law Over American Antitrust Law*, 16 J. EMPIRICAL LEGAL STUD. 731 (2019).

[50] 5 PHILLIPE E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1201a (4th ed. 2016).

[51] *See, e.g.,* Brown Shoe Co. v. United States, 370 U.S. 294 (1962) (the first merger case after the Clayton Act was amended in 1950 to cover the acquisition of assets).

[52] 15 U.S.C. § 18a.

[53] Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 87 Fed. Reg. 3541, 3541 (Feb. 23, 2022).

[54] 15 U.S.C. § 18a(c).

[55] From 2015 to 2020, FTC conducted in-depth review of 15 nonnotifiable transactions and 117 notified transactions while DOJ conduct in-depth review of 18 nonnotifiable transactions and 124 notified transactions. OECD, START-UPS, KILLER ACQUISITIONS AND MERGER CONTROL—NOTE BY THE UNITED STATES 13 (2020).

The typical U.S. merger review process proceeds in five steps.[56] The first step is filing notice of a proposed deal if the filing thresholds are met. After filing, the parties must generally wait 30 days or until the agencies grant early termination to consummate the deal. Second, the merger is cleared to either DOJ or FTC, who can then obtain non-public information from the parties or other sources. Third, after preliminary review, the agency may either (1) grant early termination; (2) allow the initial waiting period to expire; or (3) issue a Request for Additional Information ("Second Request") to each party. Fourth, once both parties have substantially complied with the Second Request, the agency generally has an additional 30 days to review the merger, although this time may be extended by agreement. Finally, in step five, the agency may either (1) close the investigation and let the deal go forward unchallenged; (2) approve the deal subject to negotiated conditions, such as divestiture of certain assets; or (3) file for a preliminary injunction against the merger in federal court pending an administrative trial. DOJ cannot file administrative complaints and must go to court to enjoin a merger.

The HSR Act changed merger control from a court-driven process to an agency-driven process. Most merger challenges never reach the courts. In fiscal year 2019, 2,089 transactions were reported under the HSR Act.[57] The agencies challenged 38 transactions, and a significant majority of the challenges resulted in negotiated settlement. FTC filed an administrative complaint and authorized staff to seek a preliminary injunction in only two cases, while DOJ sued to enjoin only three transactions.[58]

2. Application of the Clayton Act to mergers that create buyer power.

The Clayton Act's merger prohibition is not self-defining, and its meaning must be gleaned from other sources. U.S. antitrust agencies and courts have elaborated the Clayton Act over time through interpretation and, while these interpretations are subject to change, they provide valuable information about how the Clayton Act is likely to be enforced, so they are the focus of this Section. Since the ascendency of the Chicago School of antitrust analysis in the late 1970s, U.S. antitrust law has focused on the consumer welfare standard.[59] The meaning of the consumer welfare standard is ambiguous. Some commentators and courts have suggested that antitrust serves only the welfare of downstream purchasers or final consumers.[60] However, FTC's and DOJ's Horizontal Merger Guidelines espouse a broader view of the harms relevant to merger review. The Guidelines state that the agencies do not "evaluate the competitive effects of mergers between competing buyers strictly, or even primarily, on the basis of effects in the downstream markets in which the merging firms sell."[61] This suggests that the agencies evaluate buy-side and sell-side harms symmetrically and that merger-created harm to input suppliers

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[56] *Premerger Notification and the Merger Review Process*, FTC, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers/premerger-notification-merger-review-process [https://perma.cc/SPN9-7Z4E].

[57] FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, HART-SCOTT-RODINO ANNUAL REPORT 1 (2019), https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019_0.pdf.

[58] *Id.* at 2–3.

[59] Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PENN. L.R. 925, 932–34 (1978); *see also* William E. Kovacic & Carl Shapiro, Antitrust Policy: A Century of Economic and Legal Thinking, 14 J. ECON. PERSPECTIVES 43 (2000).

[60] *See, e.g.*, Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336 (2010).

[61] U.S. Horizontal Merger Guidelines, *supra* note 16, at 33.

would be sufficient for them to challenge a merger. Agency enforcement actions confirm that the agencies will challenge a merger to classical monopsony without downstream harms. Likewise, courts have not required downstream harm to invoke the Clayton Act's merger prohibition. However, the agencies' treatment of increased buy-side bargaining leverage is more ambiguous, especially in the case of bilateral monopoly, given possible downstream benefits.

Where the input market harm is lower prices and output—the harm that arises from an exercise of classical monopsony power—, agencies and federal courts have treated the harm as sufficient to trigger the Clayton Act's merger prohibition. DOJ and FTC have challenged mergers that threated to increase classical monopsony power among grain traders,[62] chicken processors,[63] health insurers,[64] and book publishers[65] without attempting to measure or demonstrate output market harms. In the few merger-to-classical-monopsony challenges that have reached federal courts, courts have not required such a showing. In *United States v. Pennzoil Co.* and *United States v. Rice Growers Association of California*, district courts rejected mergers of buyers of crude oil and paddy rice, respectively, based only on input market harms arising from classical monopsony.[66] In *Pennzoil*, the district court specifically rejected Pennzoil Company's argument that the output market must be considered.[67] Overall, this evidence makes it clear that input market harms from classical monopsony can support a merger challenge under Section 7 of the Clayton Act, with or without accompanying downstream harms.

In the discriminatory monopsony scenario, the short-term harm is limited to a wealth transfer from suppliers to buyers in the input market, with no quantity effect. Symmetric treatment of buy-side and sell-side harms would mean that this harm is actionable because courts have not required a quantity effect on the sell side—a merger to monopoly that leads to pure wealth transfer from consumers to sellers is actionable.[68] Adopting a symmetric approach, DOJ challenged the Anthem-Cigna merger based in part on the allegation that the merger would enhance buy-side bargaining leverage in the purchase of hospital and physician services.[69]

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[62] Complaint at 1, 2, United States v. Cargill, Inc., No. 99-cv-01875 (D.D.C. June 30, 2000) (alleging that the merger of Cargill and Continental Grain Company would "substantially lessen competition for grain purchasing services," so that "American farmers likely [would] receive lower prices for their grain and oilseed crops").

[63] Complaint, United States v. George's Foods, LLC, No. 11-cv-00043 (W.D. Va. May 10, 2011).

[64] Revised Competitive Impact Statement, United States v. Aetna Inc., No. 3-99CV1398-H, 1999 WL 1419046, at *15 (N.D. Tex. Dec. 7, 1999) (describing DOJ's allegation that "Aetna's acquisition of Prudential will also consolidate its purchasing power over physicians' services in Houston and Dallas, enabling the merged entity to unduly reduce the rates paid for those services").

[65] Complaint, United States v. Bertelsmann SE & CO. KGaA, No. 21-cv-02886 (D.D.C. Nov. 11, 2021).

[66] United States v. Pennzoil Co., 252 F. Supp. 962, 985, 988 (W.D. Pa. 1965) (agreeing with DOJ that the merger Pennzoil and Kendall, two purchasers and refiners of Penn Grade crude oil, would "substantially lessen competition in the purchase of Penn Grade crude in the Penn Grade crude producing area"); 1986 WL 12562, at *12 (E.D. Cal. Jan. 31, 1986) (holding that the proposed merger of two firms engaged in the purchase, milling, and resale of rice violated Clayton Act § 7 because "the effect of such acquisition may be substantially to lessen competition in the market for the purchase or acquisition for milling of paddy rice grown in California").

[67] Pennzoil Company argued that "there can be no line of commerce [or market] without regard to the end use of the raw material," or the final product, based on the absence of precedents that addressed input markets. *Id.* at 970. The district court rejected this argument, reasoning that:

> Any line of commerce definition which ignores the sellers (producers) and focuses on what the buyers (refiners) do or can do is meaningless. Here the producers produce and sell Penn Grade crude. Similarly the refiners purchase and refine only Penn Grade crude. It is only within this framework, this line of commerce, that these particular competitive forces move.
>
> *Id.* at 973

[68] Hemphill & Rose, *supra* note 9, at 2103.

[69] Complaint at 26–27, United States v. Anthem, Inc., No. 1:16-cv-01493 (D.D.C. July 21, 2016).

However, FTC has sometimes suggested that a reduction in input quantity purchased is necessary to challenge a merger of buyers (an asymmetric approach). In a 2004 statement closing a merger investigation, FTC distinguished a classical monopsony outcome from bargaining leverage, stating that "competition and consumers [do not] suffer when the increased bargaining power of large buyers allows them to obtain lower input prices without decreasing overall input purchases."[70] This FTC position is out of step with the Horizontal Merger Guidelines, which seem to endorse symmetric treatment of buy- and sell-side harms. In addition, there is no convincing reason to distinguish consumer-to-seller wealth transfers from supplier-to-purchaser wealth transfers. It seems likely that a symmetric approach will prevail in time.

Finally, is countervailing power a defense to an otherwise anticompetitive merger to monopsony? In the Horizontal Merger Guidelines, the antitrust agencies note that they "consider the possibility that powerful buyers may constrain the ability of the merging parties to raise prices," although they "do not presume that the presence of powerful buyers alone forestalls adverse competitive effects flowing from the merger."[71] Parallel language is not included regarding powerful sellers. However, a symmetric approach would similarly consider the possibility that a merger of buyers could create countervailing power in an input market with a preexisting monopoly on the sell side. This suggests that U.S. antitrust enforcers might allow a merger to monopsony based on evidence of merger-created countervailing power.

To summarize, at the domestic level, the U.S. antitrust agencies are likely to challenge mergers that create classical monopsony power with or without downstream effects and, probably, mergers that lead to discriminatory monopsony through enhanced buy-side bargaining leverage. However, the agencies might be willing to allow mergers of buyers that lead to bilateral monopoly based on a countervailing power argument.

B. The European Union

1. Merger review regime.

The European Union adopted merger review in December 1989, and the regulation was entered into force in September 1990. Article 2(3) of the E.U. Merger Regulation ("EUMR") prohibits mergers where "[the] concentration would significantly impede effective competition, in particular by the creation or strengthening of a dominant position, in the common market or in a substantial part of it."[72] This language tracks the Clayton Act.[73] The European Union also adopted premerger notification. Parties to a proposed merger must notify the European Commission about their transaction whenever (1) the combined annual worldwide revenue of the parties exceeds €5 billion and the aggregate Community-wide revenue of each of at least two of the parties exceeds €250 million, or (2) the combined annual revenue of the parties exceeds €2.5 billion on a worldwide basis and €100 million in each of at least three member states, with more than €25 million in each of the three states, and the Community-wide revenue of each of at

[70] *Statement of the FTC, Caremark Rx, Inc./AdvancePCS,* File No. 031 0239, FED. TRADE COMM'N, 2 (Feb. 11, 2004), https://www.ftc.gov/sites/default/files/documents/cases/2004/02/040211ftcstatement0310239.pdf [http://perma.cc/65BG-8Z46].

[71] U.S. Horizontal Merger Guidelines, *supra* note 16, at 27.

[72] Council Regulation No. 139/2004 2004 O.J. (L 24) 1, 1.

[73] The E.U. Merger Regulation was revised in 2004 to, like the Clayton Act, capture mergers that significantly lessen competition but fall short of creating a dominant position, or monopoly. The original merger regulation, adopted in 1990, prohibited mergers that "create or strengthen a dominant position as a result of which effective competition would be significantly impeded." Council Regulation No. 4064/89, 1989 O.J. (L 395).

least two of the parties exceeds €100 million.[74] Mergers that fall under the above turnover thresholds may still qualify for examination under member states' merger control systems. In addition, under Article 22 of the EUMR, the European Commission has the power to challenge a merger that falls below E.U. or national turnover thresholds upon the referral of one or more member states, if certain conditions are satisfied.[75]

The European Commission's merger review process proceeds in two phases.[76] In Phase I, after notification, the Commission has 25 working days to analyze the deal. The investigation may rely on requests for information from the merging parties or third parties and contacts with market participants. After completing its Phase I investigation, the Commission may (1) clear the merger unconditionally; (2) clear the merger subject to remedies, such as divestment of assets; or (3) open a Phase II investigation. A Phase II investigation involves more extensive data gathering and, at this stage, the Commission analyzes claimed merger-related efficiencies. The Commission has 90 days to complete the Phase II investigation, although this time can be extended. Following the investigation, the Commission may (1) unconditionally clear the merger; (2) approve the merger subject to remedies; or (3) prohibit the merger.

The Commission does not need to go to court to enjoin a merger. However, its decisions are subject to judicial review by the European General Court and, ultimately, the Court of Justice of the European Union.[77] Like in the United States, mergers are rarely litigated in court. More than 90% of all cases are resolved in Phase I, usually without remedies.[78]

2. Application of the EUMR to mergers that create buyer power.

The European Commission specifically mentions in its Horizontal Merger Guidelines that buyer power may form a concern.[79] According to the Commission, "a merger that creates or strengthens the market power of a buyer may significantly impede effective competition, in particular by creating or strengthening a dominant position."[80] The Guidelines emphasize the risk of the merged firm exercising classical monopsony with downstream harms. The E.U. Guidelines explain that "[t]he merged firm may be in a position to obtain lower prices by reducing its purchase of inputs," which "may, in turn, lead it also to lower its level of output in the final product market, and thus harm consumer welfare."[81] However, the Guidelines also recognize potential benefits to downstream purchasers from countervailing power. They note that "[i]f increased buyer power lowers input costs without restricting downstream competition or total output, then a proportion of these cost reductions are likely to be passed onto consumers in the form of lower prices."[82] The emphasis on downstream harms in the Guidelines raises questions about how the Commission will assess mergers among buyers that may not affect

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[74] Council Regulation No. 139/2004, 2004 O.J. (L 24) 1, 6.

[75] The merger must affect trade between member states and threaten to significantly affect competition within the member state(s) making the request. *Id.* at 18.

[76] EUROPEAN COMMISSION, COMPETITION: MERGER CONTROL PROCEDURES 1–3 (2013), https://ec.europa.eu/competition-policy/system/files/2021-02/merger_control_procedures_en.pdf.

[77] *Id.*

[78] *Id.*

[79] Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentration Between Undertakings, 2004 O.J. (C 31) 5, ¶ 61–62 [hereinafter E.U. Horizontal Merger Guidelines].

[80] *Id.* at para. 61.

[81] *Id.*

[82] *Id.*

downstream purchasers, i.e., classical monopsony when the output market is competitive and discriminatory monopsonization that is unaccompanied by quantity effects.[83]

While the Guidelines are ambiguous, the Commission's contribution to the 2008 OECD Roundtable on Monopsony and Buyer Power clarified that harm to downstream purchasers is not necessary for it to challenge a merger. The Commission acknowledged that "[i]n some cases a firm may possess buyer power vis-à-vis its suppliers but not also possess market power downstream. For example, when the geographic boundaries of the upstream and downstream markets differ, the merged entity may hold buyer power, without having any market power as subsequent seller."[84] In this scenario, prices are unlikely to rise for downstream purchasers. The Commission noted that, in practice, it faced such a scenario in its review of the Sovion-Sudfleish merger but still investigated the merger.[85] Both Sovion and Sudfleish were active in slaughtering pigs and cattle and in the processing, production, and sale of meat. The Commission explained that, in its review, it analyzed whether the merged firm would be able to depress prices paid to Bavarian farmers delivering pigs to slaughterhouses, but it found sufficient space capacity at competing slaughterhouses to discipline the market, so allowed the merger.[86]

In its OECD roundtable contribution, the European Commission also explicitly addressed discriminatory monopsony. The Commission focused on potential dynamic effects. It noted that while "[short-term] effects are purely distributional rather than absolute, [ ] it may be argued that these distributional effects can lead to inefficiencies in the longer run" because "[l]ower input prices may slow the rate of innovation and the adoption of socially desirable product improvements."[87] However, the Commission noted that "[s]o far, evidence seen by the Commission does not point to such dynamic effects."[88] Thus, it seemingly rejected the risk of dynamic effects from discriminatory monopsony as too theoretical to form the basis for a merger challenge. The Commission's focus on dynamic effects suggests that it may not view purely distributional effects (i.e., wealth transfers), unaccompanied by total welfare loss to society, as an antitrust problem. Altogether, this leaves uncertainty about whether the Commission would challenge a merger based on the risk of discriminatory monopsony.

In sum, at the domestic level, the Commission seems willing to block mergers that would create classical monopsony power whether or not downstream purchasers would be harmed. However, the Commission seems less likely to block a merger of buyers that would lead to increased bargaining leverage on the buy side of the market, in either the discriminatory monopsony or the bilateral monopoly scenario.

III. FOREIGN BUYERS, DOMESTIC SELLERS

The economic models discussed in Part I are constant no matter the jurisdiction of the merging buyers, the upstream input suppliers, or the downstream purchasers. However, the antitrust enforcement decisions discussed in Part II are affected by the jurisdictions of the various

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[83] In addition, in three landmark buyer power concentration cases from the late 1990s and early 2000s—*Kesko/Tuko*, *Rewe/Meinl*, and *Carrefour/Promodes*—, the European Commission appeared to focus on the welfare of downstream purchasers because the Commission emphasized that increased buyer power among the merging parties could reinforce market power in the downstream output market. DOORN, *supra* note 12, at 167.

[84] OECD, POLICY ROUNDTABLES: MONOPSONY AND BUYER POWER 256–57 (2008), https://www.oecd.org/daf/competition/44445750.pdf.

[85] *Id.* at 257.

[86] *Id.*

[87] *Id.* at 260.

[88] *Id.*

parties. This is because, in a merger with multijurisdictional effects, the welfare effects of the merger can be unevenly distributed across jurisdictions. As a matter of policy and law, antitrust enforcement agencies do not consider solely foreign effects when making enforcement decisions. Therefore, the jurisdiction of the merging buyers, the upstream input suppliers, and the downstream purchasers could be determinative of whether FTC or DOJ, the European Commission, or another agency challenges a proposed merger. For simplicity, this Part focuses on mergers where the merging buyers and the downstream purchasers are all located in one "buyer" jurisdiction, while the input suppliers are all located in one "seller" jurisdiction.

Mergers to monopsony can be divided into two types based on the location of the monopsony-related welfare effects of the merger. The welfare effects in the sellers' jurisdiction, where the input suppliers are located, are always negative. However, welfare effects could be negative, positive, or neutral in the buyers' jurisdiction, depending on the version of monopsony conduct. Type one encompasses mergers with negative welfare effects in both the sellers' and the buyers' jurisdiction. Classical monopsony with downstream harm is an example. Type two encompasses mergers with positive or neutral welfare effects in the buyers' jurisdiction and negative welfare effects in the sellers' jurisdiction. Classical monopsony without downstream harms, discriminatory monopsony, and bilateral monopoly are all examples.

Type one mergers are easy cases because the interests of the sellers' jurisdiction, the buyers' jurisdiction, and worldwide welfare are aligned. However, type two mergers are more difficult because of welfare conflict between the sellers' jurisdiction and the buyers' jurisdiction. These difficult cases are the focus of this Part. Part III.A. explains why the buyers' jurisdiction will not challenge type two mergers. Part III.B turns to the sellers' jurisdiction. The effects doctrine would provide the government with jurisdiction to review—and block—a type two foreign merger. However, the antitrust agency in the sellers' jurisdiction may never learn about the merger in advance. This is because typical filing thresholds for premerger notification are based on revenue (relevant to sell-side effects), not expenditures (relevant to buy-side effects). The result is likely underenforcement of anticompetitive buy-side mergers. The Sony-Funimation merger discussed in the introduction may represent an example of a merger that may fall into this enforcement gap. Based on these observations, Part II.C makes two suggestions. First, antitrust regulators should develop processes to track and, if necessary, challenge mergers of foreign buyers that are not captured by mandatory premerger notification thresholds. Regulators have already adopted such processes to address "killer acquisitions" that are not subject to premerger review.[89] Second, in the longer term, jurisdictions should also consider adjusting premerger notification thresholds to capture expenditures.

A. In the Buyers' Jurisdiction

In the context of mergers among sellers, scholars have pointed out that "if the home firms are an oligopoly and there are no [merging] firms in the foreign country, then it may be in the interest of the home country to allow a merger among the firms in order to obtain the monopoly profits from export sales."[90] There is parallel but less recognized problem in the context of

[89] *See, e.g.,* OECD, START-UPS, KILLER ACQUISITIONS AND MERGER CONTROL—NOTE BY THE UNITED STATES 12–13 (2020).

[90] Eric Bond, *Trade Policy and Competition Policy: Conflict vs. Mutual Support*, *in* THE INT'L HANDBOOK OF COMPETITION 108, 120 (Manfred Neumann & Jurgen Weigand eds., 2013). *But see generally* Anu Bradford, Robert J. Jackson Jr., & Jonathan Zytnick, *Is E.U. Merger Control Used for Protectionism? An Empirical Analysis*, 15 J. LEGAL STUD. 165 (2018) (finding no evidence that the European Commission has systematically used its authority

mergers among buyers. If the merging firms are an oligopsony, the home jurisdiction may have an incentive to allow a merger among the firms in order to obtain monopsony profits from import purchases, provided that, if the monopsonized market is an input market, domestic downstream purchasers are unharmed. Thus, in the case of classical monopsony without downstream harms—and, in the United States, discriminatory monopsony—, the home country may approve a multijurisdictional merger that it would block if the market participants were all domestic.

This dynamic is not just a matter of incentives, but also law. For instance, in 1982, the United States enacted the Foreign Trade Antitrust Improvements Act (FTAIA),[91] which amended the Sherman Act to clarify that it applies only to actions that harm domestic markets.[92] The FTAIA did not address the reach of the Clayton Act. Nevertheless, DOJ's and FTC's Guidelines for International Enforcement and Cooperation state the agencies "apply the [same] principles . . . when making enforcement decisions regarding mergers and acquisitions involving trade or commerce with foreign nations."[93] This suggests that, from the perspective of DOJ and FTC, domestic market harms are required to legally block a merger.

B. In the Sellers' Jurisdiction

For mergers that harm sellers, the solution to the incentives problem described in Part III.A has been the effects doctrine, along with filing thresholds for premerger notification that capture foreign mergers. The effects doctrine applies equally to buy-side and sell-side harms. However, because filing thresholds are set based on revenue in the jurisdiction, they are not set up to capture potential buy-side harms arising from foreign mergers. This may contribute to an enforcement gap for mergers to monopsony with multijurisdictional effects that does not exist to the same extent for mergers to monopoly.

The effects doctrine permits courts to exercise prescriptive jurisdiction when an activity has direct or substantial effects within the court's jurisdiction. The doctrine originated in the United States in the antitrust context. In *Alcoa*, the Second Circuit held that the Sherman Act applied to foreign conduct affecting the United States.[94] Early U.S. assertions of extraterritorial jurisdiction based on the effects test led to fierce protest from other countries. European states enacted blocking statutes that included clawback provisions for recovering foreign antitrust fines or that barred providing information to foreign regulators.[95] In time, however, the European Union adopted an implementation test that resembles the modern U.S. effects test.[96]

The effects doctrine provides the authority for antitrust regulators to block or impose significant conditions on mergers outside the territory of the regulator. For instance, in 2001, the

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to protectionist ends, based on an empirical analysis of the over 5,000 mergers reported to the European Commission between 1990 and 2014).

[91] 15 U.S.C. §§ 6(a).

[92] The FTAIA exempts export commerce that does not have a "direct, substantial, and reasonably foreseeable effect" in the United States from the reach of the Sherman Act and FTC Act. *Id.*; *see also* F. Hoffman-LaRoche Ltd. v. Empagran S.A., 542 U.S. 155, 159 (2004) (holding a foreign plaintiff could not bring a Sherman Act claim based on foreign harms arising from price fixing that were independent from domestic antitrust harms).

[93] U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for International Enforcement and Cooperation (2017), https://www.ftc.gov/system/files/documents/public_statements/1049863/international_guidelines_2017.pdf.

[94] United States v. Aluminum Co. of Am. (Alcoa), 148 F.2d 416, 443 (2d Cir. 1945) ("[I]t is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its border that has consequences within its borders that the state reprehends.").

[95] *Extraterritoriality*, 124 HARV. L. REV. 1226, 1255 (2011).

[96] *Id.*

European Union rejected the GTE-Honeywell merger, which involved two U.S. firms, after the merger was already cleared by DOJ.[97] Regulators in jurisdictions such as the European Union regularly review foreign-to-foreign mergers—since 2005, more than 200 non-E.U. headquartered companies have been involved in E.U. merger filings each year.[98] However, no jurisdiction has ever blocked a foreign merger on account of domestic buy-side harms. The lack of enforcement may reflect the conventional focus of antitrust enforcement on monopoly over monopsony. However, another reason for asymmetry may be that antitrust regulators are unaware of foreign-to-foreign mergers involving companies that import heavily from the regulator's jurisdiction, which are the companies likely to create buy-side harms.

In the United States, an acquisition of foreign assets is exempt from the HSR Act's premerger notification requirement unless the acquired assets, plus any other foreign assets acquired from the same person in a separate transaction near in time, generated sales "in or into the [United States]" in the most recent fiscal year greater than the HSR size-of-transaction threshold (in 2022, $101 million).[99] If both parties to a merger are foreign, the transaction is generally exempt if (a) both parties' aggregate sales in or into the United States are less than the HSR size-of-person threshold (in 2022, $222.02 million) and (b) both parties' aggregate total assets in the United States are also less than this threshold in the most recent fiscal year.[100] Similarly, in the European Union, the premerger notification requirement cannot be triggered until the aggregate revenue of the merging parties in the European Union exceeds at least €100 million.[101] These thresholds treat exporting firms and importing firms, and therefore the risks from monopoly and monopsony, asymmetrically.

C. Solutions to Underenforcement

In the United States, the European Union, and other jurisdictions, transactions that fall under premerger notification thresholds may still be reviewable.[102] In these jurisdictions, a solution to the underenforcement problem identified in this Part is for antitrust regulators to monitor nonnotifiable foreign mergers of major buyers. If a merger is a merger to monopsony that harms foreign exporters, then the antitrust enforcement agency in the jurisdiction of the exporters ("seller-side enforcer") should consider challenging the merger. Where the version of monopsony created by the merger is classical monopsony with downstream harms, then the seller-side enforcer could rely on the enforcement agency in the home jurisdiction of the merging parties ("buyer-side enforcer") to block the merger. The seller-side enforcer could still assist the buyer-side enforcer with information collection and other aspects of an investigation. But where the version of monopsony is classical monopsony without downstream harms or discriminatory monopsony, then the seller-side enforcer may need to challenge the merger unilaterally, like the European Union in the GTE-Honeywell case.

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[97] For an analysis of the European Union's GTE-Honeywell decision, see generally Stefan Schmitz, *How Dare They? European Merger Control and the European Commission's Blocking of the General Electric/Honeywell Merger*, 23 U. PA. J. INT'L ECON. L. 325 (2002).

[98] OECD, CHALLENGES OF INTERNATIONAL CO-OPERATION IN COMPETITION LAW ENFORCEMENT 32 (2014), https://www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf.

[99] 16 C.F.R.§ 802.50; Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 87 Fed. Reg. at 3541.

[100] *Id.*

[101] Council Regulation No. 139/2004, 2004 O.J. (L 24) 1, 6.

[102] *See* discussion *supra* Part II.

Jurisdictions such as the United States and the European Union already review nonnotifiable mergers in some cases. Recent attention has focused on "killer acquisitions," or cases where an incumbent firm acquires another, smaller firm to discontinue the target's projects, thereby preventing future competition from emerging.[103] These acquisitions may fall below statutory notification thresholds in jurisdictions where the target is a nascent competitor because the target earns no or little revenue at the time of acquisition. Concerned that these acquisitions are escaping scrutiny, enforcement agencies have begun reviewing these mergers outside of the traditional process. Most notably, the European Commission recently accepted a referral from France, which was joined by several other countries, to review Illumina's proposed acquisitions of Grail, even though the transaction did not meet the EUMR's notification thresholds or any relevant national thresholds.[104] In addition, the United States noted in its contribution to a 2020 OECD roundtable on killer acquisitions that had conducted in-depth review of 33 nonnotifiable transactions over the past five years.[105] Thus, the groundwork is laid for antitrust enforcement agencies to review and, if necessary, challenge nonnotifiable mergers to monopsony.

There are several ways for agency staff to learn about potentially anticompetitive transactions outside of statutorily mandated premerger notification. First, agency staff could learn about such transactions through trade press or other media. Agencies should ensure that their subscription packages include subscriptions to publications that report on international transactions that do not meet notification thresholds. Second, complaints from industry participants provide another avenue for staff to learn about potentially anticompetitive transactions. To encourage high-quality complaints, agencies should educate industry participants about the antitrust laws, especially in industries that are the most vulnerable to the formation of monopsonistic markets, such as agriculture.[106]

In addition, jurisdictions should consider adding alternative premerger notification thresholds based on jurisdiction-wide purchase volumes, as a supplement to existing thresholds based on jurisdiction-wide turnover. Adding alternative notification thresholds would contribute to symmetric treatment of monopoly and monopsony in merger review, which is the direction antitrust law is moving.[107] However, the benefit of premerger notification must be weighed against the added administrative burden on merging parties. For mergers involving international trade or commerce, merger review is already extremely costly due to the increasing number of jurisdictions that have adopted traditional premerger notification systems.

Finally, it is important to acknowledge that the solutions proposed in this Part are based within the current system of unilateral antitrust enforcement. There are many problems associated with unilateral enforcement. For instance, firms with global reach may decide to go through with mergers no matter the economic consequences to a particular country, especially if

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[103] *See generally* Colleen Cunningham, Florian Edere, & Song Ma, *Killer Acquisitions*, 129 J. POL. ECON. 649 (2021) (coining the term "killer acquisitions" and studying the phenomenon in the pharmaceutical industry).

[104] *See* Case T-227/21, Illumina, Inc. v European Commission, 2022 ECLI:EU:T:2022:447 (GC July 13, 2022).

[105] OECD, START-UPS, KILLER ACQUISITIONS AND MERGER CONTROL—NOTE BY THE UNITED STATES 12–13 (2020).

[106] *See* OLIVIER DE SCHUTTER, ADDRESSING CONCENTRATION IN FOOD SUPPLY CHAINS: THE ROLE OF COMPETITION LAW IN TACKLING THE ABUSE OF BUYER POWER 1 (2010), http://www.srfood.org/index.php/en/documents-issued/briefing-notes (noting that while there are many suppliers and customers in global food supply chains, intermediary corporations are few).

[107] *See* discussion *supra* Part II.

that country has a small economy.[108] Thus, the solutions proposed in this Part may not be practical for smaller jurisdictions. However, this and other broader issues related to unilateral antitrust enforcement are beyond the scope of this paper.

CONCLUSION

Antitrust law is not well equipped in a world of unilateral enforcement to deal with mergers that harm foreign sellers. On both sides of the Atlantic, antitrust enforcement authorities agree that mergers to monopsony may violate antitrust laws even in the absence of harm to downstream purchasers and should be blocked. However, an underappreciated enforcement problem arises for these mergers when the merging parties are located in a different jurisdiction from their suppliers. The jurisdiction that is home to the merging parties is unlikely to block the merger, but the jurisdiction that is home to the suppliers may never learn about the merger through premerger notification, allowing the merger to escape scrutiny. A solution to this problem is for antitrust enforcement agencies to monitor and, if necessary, review and then challenge nonnotifiable mergers of foreign buyers. In addition, jurisdictions should consider amending premerger notification thresholds to trigger based on purchase volumes.

[108] *See* D. Daniel Sokol, *Monopolists without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L.J. 37, 62 (2007).