

Can Buyer Power be used as a Defence?

**Chang, Cindy and Seah, Terence
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Director, Legal & Enforcement Division

The Competition Commission of Singapore
45 Maxwell Road
#09-01 The URA Centre
Singapore 069118

Email: ccs_feedback@ccs.gov.sg

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Key Words

- Can “buyer power” be used as a “defence” by undertakings on the opposite end of buyer power to avoid the finding of an infringement under the Singapore Competition Act?
- Buyer power defence arguments made to the Competition Commission of Singapore to date have been met with varying degrees of success.
- This article touches on buyer power defence arguments in the context of cases relating to anti-competitive agreements; abuse of dominance; and mergers which substantially lessen competition.

Introduction

1. In April 2013, the Competition Appeals Board (“CAB”) in Singapore issued its decision in relation to the Infringement Decision of the Competition Commission of Singapore (“CCS”) against 11 modelling agencies in Singapore for breaching the Singapore Competition Act (Cap. 50B) (the “Act”). The modelling agencies were found by CCS to have infringed section 34 of the Act (which prohibits, amongst other things, price-fixing activities) for agreeing to fix the rates of modelling services in Singapore. In the course of investigations by CCS, the parties revealed that their trade association known as the Association of Modelling Industry Professionals (“AMIP”) was set up to standardise rates, prevent price undercutting, and to raise and fix model rates offered to the clients so that the AMIP members would be in a better bargaining position vis-à-vis the clients.¹ The parties made the argument that their actions had no significant effect on customers because the AMIP had no bargaining clout against major publishers and against influential fashion show choreographers. However, given that the parties in this case had entered into a hardcore price-fixing agreement, it was immaterial whether or not the agreement actually had an effect on competition.² That said, the case raises an interesting question of whether buyer power can ever be used as a “defence”³ by undertakings to enter into agreements which may otherwise fall afoul of section 34 of the Act.

2. This article defines buyer power and covers the instances where the concept of buyer power is applied in the context of Singapore competition law. The discussion will first be on how buyer power is commonly used by undertakings as a possible defence, or more precisely, as a way to avoid the finding of an infringement, under section 47 (prohibition against the abuse of a dominant position) and section 54 (prohibition against mergers which substantially lessen competition) of the Act. The discussion then comes back to the earlier question of whether buyer power can be used as a defence by undertakings to enter into agreements which have as their object or effect the prevention, restriction or distortion of competition within Singapore.

¹ *Re Price fixing of rates of modelling services in Singapore by Modelling Agencies* [2011] SGCCS 11, at [112].

² This point will be discussed more fully below.

³ Throughout this article, the word “defence” is used loosely to mean a way to avoid the finding of an infringement.

3. In doing so, this article will make comparisons and references to the position that has been taken in the European Union (“EU”). Specifically, as the Act was based largely on the competition provisions of the Treaty on the Functioning of the European Union (“TFEU”)⁴, the manner in which the Act is applied in Singapore is similar to how the TFEU has been applied in the EU (with some distinctions).

What is ‘Buyer Power’?

4. Buyer power typically refers to the situation which exists when a firm or a group of firms are able to obtain from suppliers more favourable terms than those available to other buyers or would otherwise be expected under normal competitive conditions.⁵ An Organisation for Economic Co-operation and Development (“OECD”) report similarly defines buyer power as the situation:

*“which exists when a firm or a group of firms, either because it has a dominant position as a purchaser of a product or a service or because it has strategic or leverage advantages as a result of its size or other characteristics, is able to obtain from a supplier more favourable terms than those available to other buyers”.*⁶

5. Generally, buyer power can be categorised into either monopsony power or countervailing buyer power. The distinction between the two lies in the competitive structure of the suppliers at the upstream level to the buyers i.e. whether the suppliers have market power. Monopsony power occurs when suppliers at the upstream level are sufficiently competitive and one dominant buyer or group of buyers is able to sustain purchase prices at below competitive levels. This can be seen as analogous to monopoly power. Countervailing buyer power, on the other hand, occurs when there are supplier(s) with market power at the upstream level and they face one or a few strong buyers downstream. This article will make reference to both monopsony power and countervailing buyer power.

Economic Effects of ‘Buyer Power’

Monopsony Power

6. The traditional microeconomic concept of monopsony power is mirrored to that of monopoly power. Consider the following figure which is commonly used to depict the harmful welfare loss arising from the exercise of monopoly power (Figure 1) and compare it to that depicting a monopsony further below (Figure 2).

⁴ Also, the United Kingdom Competition Act 1998.

⁵ Dobson, P. W., Waterson, M., & Chu, A. (1998) ‘The welfare consequences of the exercise of buyer power’, Office of Fair Trading Research Paper 16.

⁶ OECD (1981) ‘Buying power: The exercise of market power by dominant buyers’, Report of the Committee of Experts on Restrictive Practices.

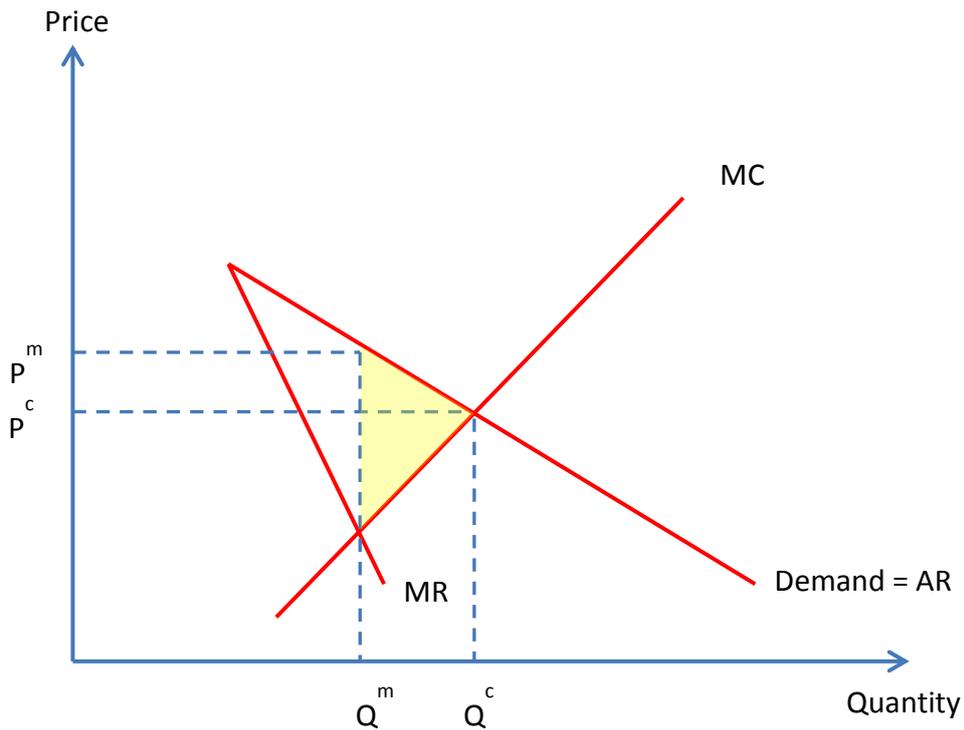


Figure 1: Theory of Monopoly

7. In summary, as compared to a competitive and optimal market situation, where the price charged is P^c and quantity purchased is Q^c , a monopoly will be able to charge a higher price (P^m) and produce a lesser quantity of goods (Q^m) leading to deadweight welfare loss associated with the highlighted triangle.

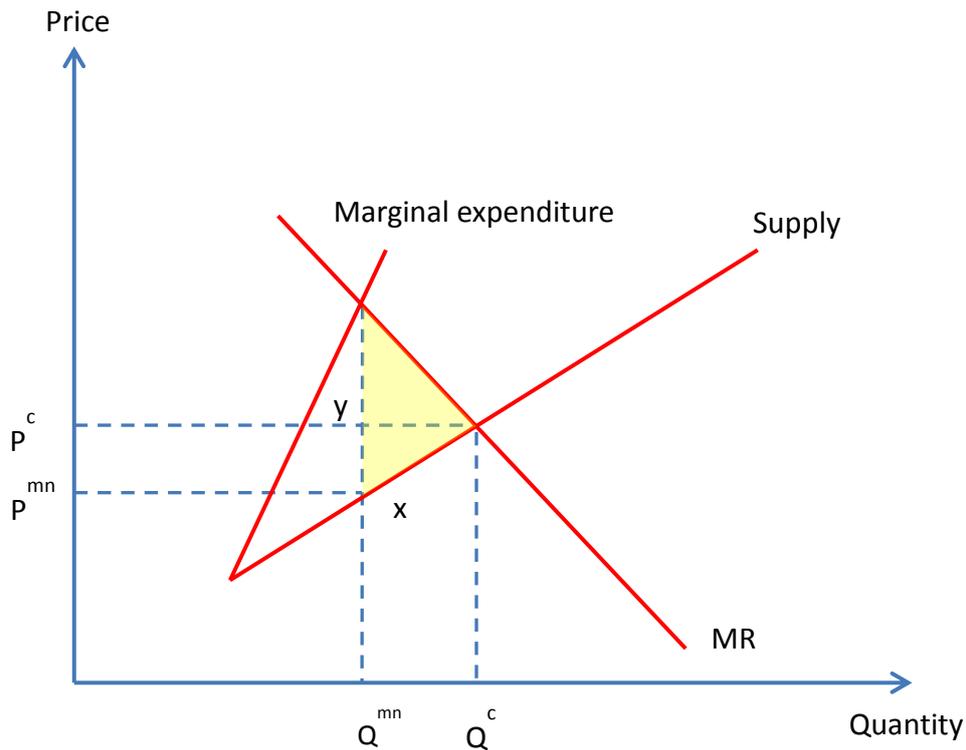


Figure 2: Theory of Monopsony

8. Similarly, there is an associated welfare loss in the monopsony situation and the monopsonist is able in this case to restrict the quantity purchased to Q^{mn} . By doing so, the price charged will also be pushed down to P^{mn} . Although lower prices appear to be beneficial from a ‘consumer’ welfare point of view as evidenced by the wealth transfer from seller to buyer (rectangle $xP^{mn}P^cy$), however from a total welfare point of view there is still an associated welfare loss that accrues neither to the seller or buyer. Also, if we assume that the monopsonist is an intermediate buyer and it on-sells the products to a further downstream market, the monopsony welfare loss will exist even if the monopsonist faces a competitive structure in the downstream market.

9. Further, notwithstanding whether the benefits of monopsony buying are eventually passed on to consumers (if the monopsonist is an intermediate purchaser), there is also a concern on the long term viability of firms within the supplying industry which may be undermined by the exercise of buying power, as well as the producer investments when opportunistic behaviour by buyers is anticipated.

Countervailing Buyer Power

10. The analysis of the economics effects of countervailing buyer power is slightly less straightforward. On one hand, economists argue that retailers, by exercising countervailing buyer power, would be able to lower the prices paid to suppliers and in turn pass on savings

to their customers. However, several papers⁷ have concluded that increased concentration at the retail level i.e. more countervailing buyer power by the retailers, does not necessarily lead to lower prices for consumers; under certain conditions it may in fact lead to higher prices.

11. The papers suggest that there are two opposing forces of retailer consolidation on consumer prices and economic welfare. When the number of retailers is reduced, the remaining retailers gain both countervailing power against their suppliers and market power against consumers. The countervailing power over the suppliers tends to reduce wholesale prices, which can lead to lower consumer prices when there is intense competition in the downstream market which is commonly used in merger analysis as one of the factors against non-coordinated effects. On the flip side, increased market power in the retail market allows the retailers to boost margins, which tends to push up retail prices. Which effect dominates will depend on the intensity of the downstream competition – the former effect is stronger when the downstream market is competitive, otherwise the latter effect dominates and buyer power leads to higher prices for consumers.⁸

Applicability of the Concept of Buyer Power to the Prohibition against an Abuse of a Dominant Position

12. Section 47 of the Act prohibits any conduct on the part of one or more undertakings, which is an abuse of a dominant position, in any market in Singapore. There is a two-step test to assess whether the section 47 prohibition applies: (1) whether an undertaking is dominant in a relevant market, either in Singapore or elsewhere; and (2) if it is, whether it is abusing that dominant position in a market in Singapore.⁹

13. When assessing dominance of an undertaking, the existence of powerful buyers (and the extent to which that constrains an undertaking's ability to profitably sustain prices above competitive levels) is considered. Paragraph 3.14 of the *CCS Guidelines on the Section 47 Prohibition* states that:

“3.14 The strength of buyers and the structure of the buyers' side of the market may constrain the market power of a seller. Buyer power requires that the buyer has a choice between alternate sellers. A buyer's bargaining strength might be enhanced if:

- the buyer is well-informed about alternative sources of supply and could readily, at little cost to itself, switch substantial purchases from one seller to another while continuing to meet its needs;*

⁷ See von Ungern-Sternberg, T. (1996) 'Countervailing power revisited', *International Journal of Industrial Organisation*, 14, 507-520. Also see Dobson, P. W., Waterson, M. (1997), 'Countervailing power and consumer prices', *Economic Journal*, 107, 418-430.

⁸ See Chen, Z. 'Buyer power: Economic theory and antitrust policy', *Research in Law and Economics*, volume 22 (2007), 17-40.

⁹ *CCS Guidelines on the Section 47 Prohibition* paragraph 3.1.

- *the buyer could commence production of the item itself, or “sponsor” new entry by another seller relatively quickly, for example, through a long-term contract, without incurring substantial sunk costs (i.e. irretrievable costs);*
- *the buyer is an important outlet for the seller, that is, the seller would be willing to cede better terms to the buyer in order to retain the opportunity to sell to that buyer;*
- *the buyer can intensify competition among sellers through establishing a procurement auction or purchasing through a competitive tender.”*

14. In this regard, it may be possible for an undertaking to use buyer power as a “defence” in relation to the section 47 prohibition. In particular, the undertaking may argue that the existence of countervailing buyer power is an indication that it is not in a dominant position. Where the undertaking is not dominant, it will not be found to have infringed section 47 of the Act, regardless of whether its conduct amounts to an abuse. A good case example of this is as follows.

15. In May 2012, the CAB issued its very first decision; and the decision was in relation to an appeal brought by SISTIC.com Pte Ltd (“SISTIC”) (the largest ticketing service and solution provider in Singapore¹⁰) against CCS’s decision that SISTIC contravened section 47 of the Act for abusing its dominant position via a series of exclusive agreements. SISTIC acts as a middleman between two groups of customers – event promoters and ticket buyers – by providing them a platform to buy and sell tickets. SISTIC had entered into exclusive agreements with two major venue operators, the Esplanade Co. Ltd (“TECL”) and the Singapore Sports Council (“SSC”), which contain explicit restrictions requiring all events held at the Esplanade and the Singapore Indoor Stadium respectively to use SISTIC as the sole ticketing service provider. Further, SISTIC had 17 other agreements with event organisers that contained explicit restrictions requiring the event organisers concerned to use SISTIC as the sole ticketing service provider for all their events.

16. In assessing SISTIC’s dominance, CCS had found that ticket buyers, who are usually individual persons, have negligible bargaining power, due to the small volume of tickets purchased by each buyer. Event promoters are also unlikely to have significant buyer power against SISTIC (demand from event promoters is highly fragmented¹¹). On the other hand, TECL and SSC have strong bargaining power (not ‘buyer power’, since they are not strictly SISTIC’s buyers). However, they have little incentive to exercise their power against SISTIC because the profit and loss implications would be borne by event promoters (SISTIC’s buyers).¹²

17. SISTIC argued that the ability and incentive of the venue operators to easily switch ticketing services, or to supply their own ticketing services, countervail any market power that SISTIC might otherwise have had. In SISTIC’s submission, both TECL and SSC have the ability and the incentive to credibly threaten SISTIC with such a switch such as to

¹⁰ SISTIC handles more than 90% of all events staged in Singapore.

¹¹ No single event promoter accounts for more than 5-15% of SISTIC’s ticket sales (in terms of number of tickets sold) during the relevant assessment period.

¹² *Re Abuse of a Dominant Position by SISTIC com Pte Ltd* [2010] SGCCS 3, at [6.6].

competitively constrain SISTIC's actions.¹³

18. The question before the CAB was whether the threat on the part of the venue operators switching to another ticketing service provider is credible and realistic as opposed to a mere theoretical possibility.¹⁴ On the facts of the case, particularly the fact that TECL holds 35% and SSC holds the remaining 65% of the shares in SISTIC, and the lack of evidence to show any incident where the two operators have tried to constrain SISTIC, the CAB decided in CCS's favour.¹⁵

Applicability of the Concept of Buyer Power to the Prohibition against Mergers which Substantially Lessen Competition

19. A merger infringes the section 54 prohibition if it has resulted, or may be expected to result, in a substantial lessening of competition ("SLC"). Buyer power is normally considered when assessing whether a merger will bring about both coordinated and non-coordinated effects. For the former, the conditions of competition in the market should be conducive to coordination in order to sustain the undertakings' coordinated behaviour; and the presence of a strong customer (with buyer power) might be enough to render coordination impossible.¹⁶

20. Where a merger might be expected to result in non-coordinated anti-competitive effects, it will be necessary to consider whether countervailing buyer power and/or other relevant factors could offset this effect. In particular, paragraphs 7.13 and 7.14 of the *CCS Guidelines on the Substantive Assessment of Mergers* read as follows:

"7.13 The ability of a merged entity to raise prices may be constrained by the countervailing power of customers. There are different ways in which a powerful customer might be able to discipline supplier pricing:

- Most commonly, customers can simply switch, or credibly threaten to switch their demand or a part thereof to another supplier, especially if the customers are well-informed about alternative sources of supply;*
- Even where customers have no choice but to purchase the supplier's products, the customers may still be able to constrain prices if they are able to impose substantial costs on the supplier, for example, by refusing to buy other products produced by the supplier or by delaying purchases;*
- Customers may be able to impose costs on the supplier through their own retail practices, for example, by positioning the supplier's products in less favourable parts of their shops;*

¹³ *Re Abuse of a Dominant Position by SISTIC.com Pte Ltd* [2012] SGCAB 1, at [163] and [185].

¹⁴ [2012] SGCAB 1, at [231].

¹⁵ [2012] SGCAB 1, at [244].

¹⁶ *CCS Guidelines on the Substantive Assessment of Mergers* paragraph 6.13.

- Customers might threaten to enter the market themselves, sell own-label products or sponsor market entry by covering the costs of entry, for example, through offering the new entrant a long-term contract; or
- Customers can intensify competition among suppliers through establishing a procurement auction or purchasing through a competitive tender.

7.14 Overall, the key questions are whether customers will have a sufficiently strong post-merger bargaining position and how much it has changed as a result of the merger...”.

21. In many of the merger notifications to CCS, merger parties have relied on the “defence” that because of the countervailing buyer power of downstream customers, the merged entity would not enjoy any significant increase in non-coordinated market power post-merger and therefore argues that the merger would not result in a SLC. In the assessment of the recent *Proposed Acquisition by Micron Technology, Inc. of Elpida Memory, Inc.*, CCS had taken into consideration countervailing buyer power argument in that the ability to switch suppliers by original equipment manufacturers would mean that the merging parties would likely be constrained in any increase in prices post-merger in coming to the eventual conclusion that the merger would not lead to any SLC.

22. Therefore, it is possible for merging/merged undertakings to use buyer power as a “defence” in relation to the section 54 prohibition. First, countervailing buyer power may render coordination by undertakings unsustainable, and as such, minimise coordinated effects such that there is no finding of SLC. Secondly, where a merger might be expected to result in non-coordinated anti-competitive effects, countervailing buyer power may offset the effects.

Applicability of the Concept of Buyer Power to the Prohibition Against Anti-Competitive Agreements

23. Section 34 of the Act prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore.

24. The burden is on CCS to prove on a balance of probabilities that an agreement¹⁷ had **either the object or effect** of restricting competition. Where there is a restriction of competition by object, it is unnecessary for CCS to prove that the agreement would have an anti-competitive effect in order to find an infringement of section 34 of the Act.¹⁸

25. While the wording of section 34 does not require an agreement to have an appreciable adverse effect on competition to be prohibited, paragraph 2.18 of the *CCS Guidelines on the Section 34 Prohibition* states that:

“...An agreement will fall within the scope of the section 34 prohibition if it has as its

¹⁷ Throughout this article, “agreement(s)” is used loosely to include agreement(s) between undertakings, decision(s) by association(s) of undertakings and/or concerted practice(s).

¹⁸ *Re Certain Pest Control Operators in Singapore* [2008] SGCCS 1, at [49].

*object or effect the **appreciable** prevention, restriction or distortion of competition unless it is excluded or exempted”.*

26. Notwithstanding, if the agreement involves price-fixing, market sharing, output limitation or bid-rigging (i.e. one of the “hardcore cartel infringements”) then appreciability is presumed.¹⁹ That said, it is important to note that appreciability is **not** presumed in all cases where the agreement has the object of restricting competition.²⁰

27. It is also noteworthy that paragraph 9 of the Third Schedule of the Act provides for an exclusion which is specific to the application of the section 34 prohibition i.e. the Net Economic Benefit (“NEB”) exclusion. Essentially, the section 34 prohibition does not apply to any agreement or conduct which:

- (i) contributes to improving production or distribution or promoting technical or economic progress (efficiencies);
- (ii) does not impose restrictions which are not indispensable to the attainment of these objectives; and
- (iii) does not afford the possibility of eliminating competition in respect of a substantial part of the products in question.

28. The burden is on parties claiming the benefit of the exclusion to show that the above conditions have been met.²¹ It should be noted that the NEB exclusion under the Act is similar to the Article 101(3) TFEU save that the Act does not require a fair share of the resulting benefits to be passed on to consumers.

Buyer power as a “Defence”

29. With the above framework in mind, it is foreseeable that the manner in which the concept of buyer power can be used as a “defence” depends on the type of agreement in question; in particular, whether it is one which is restrictive of competition by object or by effect. And if it is the former, whether it is one of the hardcore cartel infringements.

Restriction of competition by object

30. Agreements to fix selling prices to counteract the dominant position of buyers would amount to a price-fixing agreement under the Act. This is a hardcore cartel infringement. Generally, where it has been established that an undertaking is a party to an agreement which appreciably²² restricts competition by object, the only real defence available to the undertaking is the satisfaction of the NEB requirements under the Third Schedule of the Act.

¹⁹ *CCS Guidelines on the Section 34 Prohibition* paragraph 2.20.

²⁰ An example of such a case would be *CCS’s Ferry Operators Case* where the exchange of sensitive price information done with the object of restricting competition – but appreciability is not presumed (since information exchange is not one of the “hardcore” offences).

²¹ Competition Regulations 2007, regulation 21.

²² As mentioned above, appreciability is **not** presumed in all cases where the agreement has the object of restricting competition. Where the offence is not a hardcore offence, the parties involved may argue that the presence of buyer power means that they do not have market power; and as such, there is no appreciable restriction of competition. See paragraph 37 below.

31. Similarly, in the EU, agreements to fix selling prices to counteract the dominant position of buyers are prohibited. *One such example is joint selling (or commercialisation²³) agreements. According to the Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements* (“the EC Horizontal Guidelines”), the effects of commercialisation agreements which relate to selling prices are generally no different from an object agreement to fix prices and therefore should similarly be treated as such.²⁴ Regardless of whether the buyers are dominant in the downstream market, an agreement between sellers to jointly sell products at a fixed price is a restriction by object; and will infringe Article 101 of the TFEU unless Article 101(3) is satisfied.²⁵

32. In short, where the NEB requirements are not met, the existence of buyer power *cannot* in itself be used as a justification for agreements which appreciably restrict competition by object. As can be seen in the *Modelling Agencies* case example mentioned above, the parties’ arguments that the price-fixing was done so that members of the AMIP would be in a better bargaining position vis-à-vis their clients; and that the AMIP had no bargaining clout against major publishers and influential fashion show choreographers (and as such their actions had no significant effect on customers), were not successful.

33. Therefore, the next question is whether buyer power can be raised in support of NEB arguments by the undertakings.²⁶ In relation to the third limb of the NEB requirements, paragraph 10.13 of the *Guidelines on the Section 34 Prohibition* states that:

“[i]n assessing whether there might be substantial elimination of competition, the appropriate definition of the relevant market is important. Evaluation under this criterion may require an analysis of the degree of market power that parties enjoy, before and after the agreements. This involves a study of the various sources of competitive constraints, such as other competitors (using market share as an indicator), entry barriers and buyer power etc...” [Emphasis added].

34. Note, however, that the three limbs of the NEB requirements are cumulative. While it appears that buyer power may be used to argue that there is no substantial elimination of competition (in satisfying the third limb of the NEB requirements), the crux of the NEB test is the first limb i.e. whether the agreement leads to efficiencies (which offset the restriction of competition brought about by the agreement).

²³ These commercialisation agreements typically involve agreements/co-operation between competitors for the joint determination of selling, distribution or promotion of their products. One example of commercialisation agreements is the joint selling of the commercial rights of the UEFA Champions League by UEFA on behalf of the football clubs involved in the league [COMP/C.2-37.398]. UEFA argued that the joint selling arrangement provides the consumer with the benefit of league focused media products from the pan-European football club competition that is sold via a single point of sale and which could not otherwise be produced and distributed equally efficiently.

²⁴ *EC Horizontal Guidelines*, paragraphs 234 and 235.

²⁵ Interestingly, the EC appears to treat joint selling at a fixed price differently from joint purchasing amongst buyers at a fixed price. Paragraph 206 of the *EC Horizontal Guidelines* states that in relation to joint purchasing agreements, “an assessment is required as to whether the agreement is likely to give rise to restrictive effects on competition within the meaning of Article 101(1)...”.

²⁶ Although the European Commission has found in several cases that joint selling agreements satisfy Article 101(3), it appears that none of the agreements benefited from Article 101(3) because of buyer power arguments. See *Cekanan* - OJ [1990] L 299/64, [1992] 4 CMLR 406 and *UIP* – OJ [1989] L 226/25, [1990] 4 CLMR 749.

35. Theoretically, a group of sellers can invoke the argument that because a monopsonist or a group of oligopsonists is inherently inefficient (i.e. buying at lower than optimal prices and quantity), a price or non-price agreement between sellers to, for example, increase the quantity purchased can satisfy the first limb of the NEB requirements. This is because their agreement is one which contributes to improving production or distribution or promoting technical or economic progress. In this regard, paragraph 10.6 of the *CCS Guidelines on the Section 34 Prohibition* provides examples of improvements in production or distribution; and the examples include “*lower costs from longer production or delivery runs, or from changes in the methods of production or distribution; improvements in product quality; or increases in the range of products produced*”. It remains to be seen whether such an argument would be successful in Singapore.

Restriction of competition by effect

36. In relation to agreements which do **not** have the object of restricting competition, it may be possible for undertakings to argue that the existence of buyer power means that their agreement is not likely to give rise to an appreciable effect of prevention, restriction or distortion of competition (i.e. no liability on their part).

37. It is possible for undertakings to argue that the presence of strong buyer power means that their agreement is not likely to give rise to an **appreciable** effect on competition. Paragraph 2.21 of the *CCS Guidelines on the Section 34 Prohibition* states that:

*“The fact that the market shares of the parties to an agreement exceed the threshold levels mentioned in paragraph 2.19 does not necessarily mean that the effect of that agreement on competition is appreciable. Other factors may be considered in determining whether the agreement has an appreciable effect, for example, market power of the parties to the agreement, the content of the agreement and the structure of the market or markets affected by the agreement, such as entry conditions or **the characteristics of buyers and the structure of the buyers’ side of the market**”* [Emphasis added].

38. For completeness, it should be noted that for agreements which do not restrict competition by object, the burden is on CCS to show that the agreement does indeed have an adverse effect on competition. While it may not strictly be a “defence”, it is also conceivable that the presence of strong buyer(s) may in some cases mean that an agreement may have no anti-competitive (or even have pro-competitive) effects on competition.

Conclusion

39. In conclusion, it appears that the concept of buyer power can, under certain limited circumstances, be used as a “defence” by undertakings on the opposite end of buyer power to avoid the finding of an infringement under the Singapore Competition Act:

- i) Section 47: the undertaking may argue that the existence of countervailing buyer power is an indication that it is not in a dominant position. Where the undertaking is not dominant, it will not be found to have infringed section 47

of the Act, regardless of whether its conduct amounts to an abuse.

- ii) Section 54: Countervailing buyer power may render coordination by undertakings unsustainable, and as such, minimise coordinated effects such that there is no finding of SLC. Also, where a merger might be expected to result in non-coordinated anti-competitive effects, countervailing buyer power may offset the effects.
- iii) Section 34: With the exception of situations where hardcore offences are involved, buyer power may be raised to argue that there is no **appreciable** adverse effect on competition (either by object or effect). Buyer power can also conceivably be raised to support NEB arguments. In particular, it may be argued that due to the presence of strong buyer power, the agreement does not afford undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.