10. COMPETITION LAW

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Overview

10.1 In the past 12 months, the Competition Commission of Singapore ("CCS") has not issued as many decisions but the few that have been issued have led to important developments. This update examines the cases and developments in the last year, adopting a similar approach as the prior update and touches on, *inter alia*, market definition, anti-competitive agreements, abuse of dominance, substantial lessening of competition and brings up some new issues that were looked at recently.

Market definition

10.2 Market definition is critical in any competition analysis. The CCS employs the small but significant and non-transitory increase in price test or hypothetical monopolist test to define markets. From a practical perspective, the CCS has acknowledged that the hypothetical monopolist test only provides "an appropriate frame of reference for competition analysis" (Competition Commission of Singapore, *CCS Guidelines on Market Definition* (June 2007) at para 2.9). The CCS recognises that the presumptions employed in the hypothetical monopolist test cannot be applied mechanically in its market analysis and will adjust the test to suit the qualitative and quantitative characteristics of each specific focal product and market. The market definition analysis has primarily been in relation to anti-competitive agreements rather than on dominance.

Application to a s 34 prohibition

10.3 In the context of a s 34 prohibition of the Competition Act (Cap 50B, 2006 Rev Ed), market definition serves two main purposes: (a) to determine whether an agreement and/or concerted practice has an "appreciable effect on competition"; and (b) to identify the relevant turnover of the infringing party in order to calculate the appropriate penalty.

10.4 In the 2013 bid-rigging case, *ie*, *Collusive Tendering (Bid-rigging) in Motor Vehicle Public Auctions* CCS 500/003/10 (28 March 2013) ("*Motor Vehicles*"), the CCS has maintained (at para 71) its existing stand that a distinct market definition is not necessary for the CCS to establish an infringement of a s 34 prohibition. The CCS has reiterated that the very nature of price-fixing, collusive tendering or bid-rigging, market sharing or output limitations are regarded as preventing, restricting or distorting competition appreciably. As such, in such instances, the purpose of defining the market is to determine the appropriate level of penalties to be meted out.

10.5 Separately, in reviewing notifications involving the aviation industry, the CCS has also demonstrated a consistent approach to its previous decisions relating to co-operative agreements between airlines by following the origin and destination ("OD") pair market definition. The two notifications in the aviation industry in 2013 are *Notification for Decision by Emirates and Qantas Airways Ltd of their Proposed Conduct* CCS 400/006/12 (28 March 2013) ("*Qantas-Emirates*") and *Notification for Decision by Qantas Airways and Jetstar Airways of their Proposed Conduct* CCS 400/02/12 (5 September 2013) ("*Qantas-Jetstar*").

10.6 Additionally, in *Qantas-Emirates*, the CCS once again recognised that the carriage of passengers and the carriage of freight were two different markets. The two markets were identified as follows: Air Passenger Services Market ("APSM") and Air Freight Services Market ("AFSM"). The reason for the different markets lay primarily in the fact that air freight services are "less time sensitive" and frequently "involves transportation to multiple locations 'behind' and 'beyond' the points of origin and destination".

10.7 Another market that the CCS reviewed in 2013 concerned the "payment system industry". In *Notification for Decision by Visa Worldwide Pte Ltd of its Multilateral Interchange Fee system* CCS 400/001/06 (3 September 2013) ("*Visa*"), using the hypothetical monopolist test, the CCS examined the various activities that a card network could engage in and the different services that they could provide. It then concluded on the facts and information available that the "payment system industry" could be divided into three different markets, namely, Card Scheme Administration Services, Card Issuing Service and Merchant Acquiring Services.

Application to a s 54 prohibition

10.8 In the context of a s 54 prohibition, the CCS defines the market to evaluate likely changes in the competitive landscape after the merger. As such, the CCS focuses on the areas of overlap in the merger parties' activities, and ascertains whether the merger will result in an increase in

prices, reduction in supply or poorer quality of services to the detriment of consumers. The CCS also assesses whether any anti-competitive effects will affect or spill over to related markets such as complementary upstream or downstream markets. Herein lies the difference in the way the CCS will assess the likely competitive effects arising from a merger compared to the s 34 and s 47 prohibitions.

10.9 In *Notification for Decision: Acquisition by Micron Technology Inc of Elpida Memory Inc* CCS 400/009/12 (30 January 2013) ("*Micron-Elpida*"), the CCS examined the Dynamic Random Access Memory ("DRAM") market and determined that it could be viewed as a whole product market without the need to further segregate the market. In doing so, the CCS noted the similar approach the European Commission ("EC") took in its own decision involving the DRAM market. Specifically, the EC had in *Case No Comp/jv.44 – Hitachi/NEC-DRAM/JV* considered the existence of different sub-categories according to size, applications and end-products, but ultimately did not find it necessary to further delineate the DRAM market.

10.10 There have been instances where the CCS considered it unnecessary to determine the precise relevant market and left open the point of exact delineation. For instance, in *Notification for Decision: Acquisition by Fincantieri-Cantieri Navali SpA of STX OSV Holdings Ltd* CCS 400/001/13 (28 February 2013) ("*Fincantieri*"), the CCS considered that it was unnecessary to determine whether the product market constituted shipbuilding or ship repair and conversion services since there was no competition concerns regardless of which product or geographic definition was used. A key reason for this was because there was very limited overlap between the activities of the parties.

Section 34 – Prohibition of anti-competitive agreements

10.11 Section 34 of the Competition 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.

Agreements and concerted practices

10.12 An agreement is formed once parties mutually agree on their course of behaviour in the market, whether formally, informally or through concerted practice. In most of its investigations in relation to price-fixing or bid-rigging, the CCS has clarified that the s 34 prohibition applies to agreements and concerted practices either disjunctively or conjunctively. In *Motor Vehicles*, CCS maintained the position established by its previous decisions: that it is not necessary to

characterise anti-competitive conduct as one that is exclusively an agreement or concerted practice since the two concepts may overlap with each other.

Object or effect of preventing, restricting or distorting competition

10.13 The CCS found in *Collusive Tendering (Bid-rigging) for Termite Treatment/Control Services by Certain Pest Control Operators in Singapore* CCS 600/008/06 (9 January 2008) at para 49 that the object of an agreement or concerted practice is not based on the "subjective intention of the parties when entering into an agreement, but [rather on] the objective meaning and purpose of the agreement considered in the economic context in which it is to be applied". This was subsequently applied in *Price Fixing in Bus Services from Singapore to Malaysia and Southern Thailand* CCS 500/003/08 (3 November 2009) ("*Express Bus Operators*") at para 71, *Collusive Tendering (Bid-rigging) in Electrical and Building Works* CCS 500/001/09 (4 June 2010) at para 49 and *Fixing of Monthly Salaries of New Indonesian Foreign Domestic Workers by Employment Agencies* CCS 500/001/11 (30 September 2011) at para 61. Where an agreement has as its object the restriction of competition, the CCS can find an infringement of s 34 without having to prove an anti-competitive effect.

10.14 The CCS adopted this same approach in *Motor Vehicles* (above, para 10.4). In this case, the CCS found on the facts that there was an agreement or a concerted practice to restrict the parties from bidding against each other in public auctions. Once a bid was won, the parties would then conduct their own private auctions and distribute the profits amongst themselves. Such conduct was found to be within the bid-suppression category of anti-competitive conduct. In arriving at this conclusion (at para 42), the CCS made a reference to the approach in *Joined Cases CE/3123-03 and CE/3645-03 Collusive Tendering for Flat Roof and Car Park Surfacing Contracts in England and Scotland* (22 February 2006) where the Office of Fair Trading ("OFT") listed out four general types of arrangements that result in a pre-selected party winning a bid, namely, "cover bidding, bid-suppression, bid-rotation and market division or sharing".

10.15 Further, the CCS made references to similar bid-rigging or suppression cases from different jurisdictions including Australia and the US, where the facts of the cases were similar if not identical to the present one. After examining the various authorities, the CCS endorsed the view that such conduct was anti-competitive "*per se*" or by "purpose" and thus, there was no need for CCS to prove the existence of anti-competitive effects caused by the infringement: *Motor Vehicles* at para 61.

10.16 In *Visa* (above, para 10.7), which was a notification decision rather than an investigation, CCS took the view that the Visa multilateral interchange fee system had not resulted in an appreciable adverse effect in Singapore. Specifically, CCS expressed the view that bilaterally negotiated interchange fees only between banks that are both issuers and acquirers in Singapore did not result in appreciable adverse effect on competition in Singapore in any of the relevant markets considered and no violation was found.

Net economic benefit

10.17 An agreement that falls within the scope of a s 34 prohibition may be exempted if it produces net economic benefits. The onus falls on the undertaking claiming for an exemption to prove that it satisfies the requirements to produce net economic benefits. In its assessment of whether net economic benefits exist, the CCS will determine, on balance, whether the anti-competitive practice will contribute to improving production or distribution or promote technical or economic progress. The CCS will also determine whether such benefits can be derived from other alternative methods without resorting to the anti-competitive practices or whether they afford the undertaking concerned the possibility of eliminating competition in respect of a substantial part of the goods and services in question.

10.18 In *Motor Vehicles* at paras 402–403, one of the infringing parties submitted that the amount of the penalties in this case should be reduced compared to other similar situations because the infringing parties were merely trying to "reduce the cost of their supplies and ultimately with the effect of reducing costs to consumers". The CCS rejected these arguments, stating that there was "no evidence" of this and that the "burden of proving" the submissions lay on the infringing parties, to which neither the party making the submission nor the other infringing parties had adduced any evidence.

10.19 In *Qantas-Emirates* (above, para 10.5), the CCS was of the view that the proposed alliance between the two airlines would raise competition concerns and infringe the s 34 prohibition, particularly with regards to co-ordination on air fares and capacity for the routes that are shared by both parties. However, there was also recognition that airline alliances bring about greater options in flights with more connectivity, thus enhancing consumer benefits. To the extent, however, that the co-ordination would result in a risk of harm to consumers such as possible reduction in capacity available and running the risk of higher pricing given the removal of competitors, the net economic benefit test would not be satisfied. In this *Qantas-Emirates* case, where routes were found as potentially not contributing towards net economic benefits, the CCS was willing to consider the offer of commitments

which would then tilt the balance in favour of the net economic benefit test. On the facts, the parties and the CCS agreed on the commitment to maintain and "in certain circumstances, increase the seat capacity on the relevant flights". From this, the CCS found that the proposed alliance would result in a net economic benefit and thus be exempted from the s 34 prohibition.

10.20 Similarly, in *Qantas-Jetstar* (above, para 10.5), the CCS granted the two airlines involved in the proposed conduct an exemption from the s 34 prohibition on the basis of the presence of net economic benefits, having considered multiple permutations and the proposed alliance framework put forth by the parties.

Section 47 prohibition – Abuse of dominance

10.21 Section 47(1) of the Competition Act prohibits any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in any market in Singapore. To establish an infringement of an abuse of dominance, the undertaking must be in a dominant position, whether in Singapore or elsewhere, and the dominant undertaking must be shown to have abused this dominance. A market share of 60% or more provides a benchmark that there may be dominance. Other facts are also looked at, including market power, the presence of strong buyer power and the intensity of entry barriers.

10.22 In Singapore, *Abuse of a Dominant Position by SISTIC.com Pte Ltd* CCS 600/008/07 (4 June 2010) ("*SISTIC*") remains the first and only public decision involving the abuse of a dominant position. An important point from this case is the CCS's clarification that the s 47 prohibition would remain applicable even if an undertaking abuses its dominance through clauses in an agreement with a statutory body. Specifically, the incorporated arm of a statutory body, or an entity in which a statutory body has an interest, which unilaterally acted to impose exclusive dealing obligations whether on that statutory body or otherwise, cannot be excluded under s 33(4) of the Competition Act.

10.23 There have been investigations involving dominance from time to time. However, these have generally either been closed off or settled. The results remain confidential as there has been no public decision.

Section 54 prohibition – Mergers and acquisitions

10.24 Section 54 of the Competition Act prohibits mergers that are likely to result in a substantial lessening of competition in any market in Singapore. There have been a number of prior decisions which have explained what amounts to a merger, and have been discussed in a

previous update. In 2013, the CCS cleared two more merger notifications, *ie*, *Fincantieri* (above, para 10.10) and *Micron-Elpida* (above, para 10.9), with one decision pending a Phase II Review, *ie*, *Proposed Acquisition by SATS Airport Services Pte Ltd and SATS-Creuers Cruise Services Pte Ltd of Singapore Cruise Centre Pte Ltd* CCS 400/002/13 (10 October 2013) ("*SATS-SCC*").

10.25 *Micron-Elpida* is an interesting case to the extent that it was found that Elpida would have exited the market as it was failing. Yet the decision was not made, as it was notified on the basis of a failing firm defence. Nevertheless, the CCS did look into the fact that as the assessment progressed, Elpida had proceeded to file for bankruptcy.

10.26 There is no mandatory notification requirement in Singapore. The CCS leaves the discretion to the merger parties to assess the potential anti-competitive threat arising from their merger and decide whether to notify and seek certainty from the CCS *vis-à-vis* their transaction or otherwise.

Substantial lessening of competition

10.27 In assessing whether there is a substantial lessening of competition, indicative thresholds have been provided, namely, where the merged entity has a post-merger market share of 40% or where the merged entity has a post-merger share of between 20% and 40%, and the post-merger combined market share of the three largest firms is 70% or more. In modifications to the merger guidelines issued in June 2012, the CCS has indicated that there will be no substantial lessening of competition where in the financial year preceding the transaction, the Singapore turnover for the merger parties is below $5m, and their combined worldwide turnover is below $50m. This was introduced at the same time the CCS indicated that it would take a more proactive stance of reviewing mergers which are not notified in Singapore.

10.28 In ascertaining whether the relevant thresholds have been crossed, the CCS has indicated that the relevant geographic market can go beyond Singapore. Thus, in both the merger notifications that the CCS cleared in 2013, *ie*, *Fincantieri* and *Micron-Elpida*, the relevant geographic market was not confined to Singapore. In *Micro-Elpida*, the CCS found (at para 49) that the relevant geographic market was worldwide due to the fact that both suppliers and customers in the product market "operated on a global scale". In *Fincantieri*, while the CCS left the precise geographic definition open, it was noted (at para 38) that the CCS's investigations indicated that the relevant geographic market was "wider than Singapore and possibly global".

10.29 Apart from the indicative thresholds, in its assessment of whether a horizontal merger might lead to a substantial lessening of competition, the CCS will analyse other factors such as barriers to entry and expansion, countervailing buyer power and whether there would be non-coordinated or co-ordinated effects arising from the merger.

10.30 In *Micron-Elpida*, the CCS examined the facts and concluded that the risk of non-coordinated effects as a result of the merger was low despite the relatively high barriers to entry. This was due to the strong countervailing buyer power in the market, where the customers were usually sophisticated ones who source from a number of producers to reduce over-reliance on any one producer. In addition, there was an over-supply of the products in the market. For the same reasons, the CCS also concluded that the risk of co-ordinated effects in the relevant market was low. It noted that competitors were likely to compete by pricing and product differentiation and, thus, there was practically a disincentive to co-ordinate.

10.31 In *Fincantieri*, the CCS concluded (at para 45) that, given the low worldwide market share of the merged entity, the limited product overlap between the parties before the merger and the lack of sales in Singapore over the past decade, there was little competition concern relating to the merger. Furthermore, no concerns were raised in the responses to the CCS's consultation by other parties operating in the industry.

Ancillary restrictions

10.32 Ancillary restrictions concluded in conjunction with a merger are excluded from the s 34 and s 47 prohibitions under the Competition Act. To qualify for this exclusion, the restriction must be directly related and necessary for the implementation of the merger. In its assessment of *Fincantieri*, the CCS considered various ancillary restrictions contained in the share purchase agreements entered into by the merger parties.

10.33 As the nature of the ancillary restriction has been redacted from the decision, one can only assume that it was a form of non-compete. The CCS has tended to be cautious in permitting non-compete restrictions as an ancillary unless the time period is a relatively short one. To this end, on the facts, the CCS took the view (at para 50) that the ancillary was of a:

> … reasonable amount of time for Fincantieri to establish a reputation with STX OSV's customers separate and apart from that currently held by STX OSV, given the lengthy delivery time for orders in the commercial shipbuilding industry.

Financial penalties

Calculation of financial penalty for price-fixing practices

10.34 In calculating the financial penalty, the CCS will start with a base figure, which is determined by taking a percentage of the infringing party's relevant turnover, applying a multiplier for the duration of the infringement and then adjusting that figure to take into account similar factors such as deterrence and aggravating and mitigating considerations. For ease of reference, the calculation of the penalty can be represented using the following formula: Penalty = [(relevant turnover × base figure × duration of infringement) × adjustment factor] + (aggravating factors – mitigating factors).

Relevant turnover

10.35 What constitutes an infringing party's relevant turnover is dependent on the CCS's definition of the relevant product and geographical markets of the goods and services provided by the infringing party. As stated in *Price-fixing in Modelling Services* CCS 500/002/09 (23 November 2011) ("*Modelling Agencies*") *Express Bus Operators* (above, para 10.13), the CCS will usually consider the infringing party's focal product and focal area only.

10.36 Yet, recognising that precise market definitions are not always possible, the CCS has adopted the UK's position set out in *Argos Ltd & Littlewoods Ltd v Office of Fair Trading* [2005] CAT 13 in *Modelling Agencies* and held that where the anti-competitive conduct involves price-fixing, the definition of the relevant product market is not intrinsic to the determination of liability. Thus, it will be sufficient for the CCS to show that it had a reasonable basis for identifying a certain product market for the purposes of calculating the financial penalty. Similarly, in *Employment Agencies* (above, para 10.13), the CCS stated that where a party is unable or unwilling to provide information to determine the relevant turnover, the CCS will impose a penalty that will reflect the seriousness of the infringement and with a view to deter the undertaking as well as other undertakings from engaging in similar practices. In such a case, the CCS will consider the turnover of the other parties that are party to the infringement in estimating the same as those undertakings that were unable or unwilling to provide the CCS with the necessary information on their relevant turnover.

10.37 At the appeal level in *Modelling Agencies* (Appeal No 2 of 2012), the appellants submitted before the Competition Appeals Board ("CAB") that the relevant turnover should exclude amounts received by the model agency which were collected on behalf of and/or as

beneficiary for the model in question and the model's foreign mother agent. As such, the appellants argued that the CCS should have measured their penalties against their net profits rather than their gross profits. By not doing so, the appellants stated (at para 110) that the penalties imposed were "excessive and disproportionate". In support of this argument, the appellants cited the decision of the UK Competition Appeals Tribunal ("CAT") in *Hays plc v Office of the Fair Trading* [2011] CAT 8 ("*Hays*"). However, the CAB rejected these arguments and upheld the use of the gross turnover as the basis of measurement. The CAB stated that *Hays* was distinguishable from the present case and the use of net turnover as the basis for calculation of financial penalties was justified on the unique facts of that case. For instance, the fees in the present case were negotiated and solely determined by the appellants while the salaries of the workers were determined by the clients in *Hays*. Further, the recruitment agencies in *Hays* acted more in the capacity of a middlemen whilst the appellants here were not "mere intermediaries but [were] the responsible entitles for the modeling services": at para 121.

Aggravating and mitigating factors

10.38 The CCS will consider whether any aggravating or mitigating factors exist and either increase or reduce the financial penalties accordingly. Over the last year, the CCS has continued to regard the involvement of the infringing parties' directors and management as an aggravating factor in increasing the financial penalties of the infringing party. The issue is whether the involvement of a director should be viewed automatically as an aggravating factor or whether it must depend on the facts and circumstances of each case.

10.39 This issue was revisited in the *Modelling Agencies* appeals, where the appellants argued that the CCS made an error in increasing the penalty due to the involvement of the directors in the infringement. The CCS took the view that the involvement of directors and senior management, without more, would be sufficient to qualify as a general aggravating factor and contended that the point made in the earlier *SISTIC* (above, para 10.22) appeal (Appeal No 1 of 2010) was limited to that case and not applicable in the current appeal. However, the CAB concluded that, contrary to the contentions by the CCS, the point made in the *SISTIC* appeal applied equally in this case and the consideration of a director's involvement as an aggravating factor does not automatically constitute an aggravating factor but must depend on the facts and circumstances of each case.

Settlements and commitments

10.40 Following the commencement of an investigation by the CCS, the parties subject to the investigation may provide a commitment/undertaking to the CCS to address the competition concerns identified by the CCS. In such a case, the CCS may decide to close its investigation.

10.41 To illustrate this point, in January 2013, the CCS announced that it had dropped its investigation into the local soft drinks market after receiving assurances from Coca Cola Singapore Beverages that it would amend its supply agreements to remove potentially anti-competitive provisions.

10.42 Another illustration was further provided in November 2013, in relation to a non-compete clause between Heineken International BV ("Heineken") and Fraser and Neave Ltd ("F&N"). This non-compete clause was part of a merger transaction, which had been notified and cleared by the CCS in 2012. However, the CCS had, at that time, stated that the non-compete clause which restricted Heineken, *ie*, the purchaser, from manufacturing, distributing and selling soft drinks, in competition with F&N, *ie*, the seller, for a period of two years following from the transaction did not qualify as an ancillary restriction as its aim was not to protect the buyer but rather to protect the seller. The clause was, therefore, not cleared together with the merger. In January 2013, the CCS commenced an investigation into the non-compete clause. To alleviate the anti-competitive concerns identified by the CCS, F&N formally undertook to the CCS not to enforce the clause with respect to Singapore. On that basis, the CCS ceased its investigation.

10.43 While the CCS may not pursue investigations in exchange for a commitment/undertaking from the parties concerned, it is important to note that, in such instances, the CCS will still continue to monitor the parties' commercial activities, and will not hesitate to re-open its investigations if the parties fail to comply with their commitments/undertakings, or where there is a material change in the circumstances surrounding the commitment/undertaking.

Possibility of buyer power acting as a defence

10.44 An interesting point was made in the recent *Modelling Agencies* appeal case, where the appellants made an argument that their actions had no substantial effect on the customers because the latter had significant countervailing buyer power. However, as the case was categorised as a hard-core price-fixing agreement, which was anti-competitive by object, the effect on the customers was considered irrelevant.

10.45 In light of this, the CCS published a paper, "Can Buyer Power Be Used as a Defence?" *Occasional Paper Series* (8 January 2014) ("the Paper"), wherein it examined the possibility of buyer power acting as a defence by parties who engage in activities that may fall foul of the Competition Act. Though the Paper is non-binding and not to be used as guidance, the points it raises are instructive in the way a party may frame its contentions.

Application to a s 34 prohibition

10.46 The Paper notes that, firstly, such a defence would not apply in a "hardcore-type" offence as effect does not need to be established, since such offences are anti-competitive "*per se*" or "by purpose". However, the Paper also notes (at paras 30–33) that the concept of buyer power can still be used in relation with, or to support, the net economic benefit exemption provided for under para 9 of the Third Sched to the Competition Act.

10.47 In relation to agreements which do not have the object of restricting competition, the CCS would have to demonstrate that there are adverse effects on competition as a result of such an agreement. The Paper notes (at paras 36–38) that in these cases, the existence of strong countervailing buyer power can be used to argue that that means there are no material or "appreciable adverse" anti-competitive effects and, thus, no infringement can be found.

Application to a s 47 prohibition

10.48 The s 47 prohibition forbids any conduct by a party or parties which amounts to an abuse of dominance. In this context, the Paper notes (at para 14) that the existence of countervailing buyer power can be used to contend that the party is not in a dominant position and, thus, unable to infringe the s 47 prohibition. As provided for in the *CCS Guidelines on the Section 47 Prohibition* (June 2007) at para 3.14, the strength of the buyers is a relevant factor "which may constrain the market power of a seller".

10.49 An illustration of this argument can be seen in the *SISTIC* appeal where SISTIC contended that the venue operators could easily change ticketing services or provide their own services and, thus, had countervailing buyer power against which SISTIC could have no dominance. In that case, the CCS argued otherwise as the venue operators, who had strong bargaining power, were not strictly speaking buyers and since the "profit and loss implications" were on the event promoters, who were SISTIC buyers, they had little motivation to exercise their position against SISTIC.

10.50 In the appeal, the CAB decided in favour of the CCS. Nevertheless, it is instructive of how one can frame a countervailing buyer power argument in defence of a s 47 infringement.

Application to a s 54 prohibition

10.51 A merger or acquisition violates the s 54 prohibition if it causes or will cause a substantial lessening of competition. In this context, the Paper notes (at para 19) that countervailing buyer power will normally be factored in when the CCS evaluates whether the proposed transaction will bring about both co-ordinated and non-coordinated adverse effects on competition. For instance, the existence of strong countervailing buyer power could be sufficient to dissuade the parties from co-ordinating as customers would simply switch to other suppliers. Furthermore, the *CCS Guidelines on the Substantive Assessment of Mergers* (June 2007) at paras 7.13 and 7.14 provide illustrations in which countervailing buyer power can constrain the ability of suppliers to affect pricing.

10.52 Also, the Paper notes (at para 21) that many parties have used the existence of countervailing buyer power as a defence to demonstrate that the transaction would not cause any substantial lessening of competition as the merged entity would not enjoy any significant increase in non-coordinated market power. For instance, in the recent *Micron-Elpida* decision (above, para 10.9), CCS noted that there was countervailing buyer power in the ability to "switch suppliers by original equipment manufacturers". The CCS then concluded that as a result of this, the proposed transaction would be unlikely to lead to any substantial lessening of competition as the consolidated party would not be able to freely increase prices in the market.

Concept of a single economic entity

10.53 In its past decisions, *ie*, *Notification for Decision by Qantas and Orangestar Investment Holdings of their Co-operation Agreement* CCS 400/003/06 (5 March 2007) ("*Qantas-Orangestar*"), *Express Bus Operators* (above, para 10.13) and *SISTIC*, the CCS noted that the US and EU jurisdictions applied the single economic entity doctrine. In relation to anti-competitive agreements, it can be applied defensively to exclude parent companies and their subsidiaries or principals and agents from the purview of the s 34 prohibition, or as justification for the competition authority to render one undertaking liable for another undertaking's anti-competitive actions.

10.54 This fact can be seen in the recent *Proposed Infringement Decision against Ball and Roller Bearings Manufacturers* on 16 December

2013. This case is notable as it is the first cartel case where the parties involved are international parent companies and their Singapore-based subsidiaries. Here, the CCS found that the companies infringed a s 34 prohibition by engaging in anti-competitive agreements relating to pricing and illegal exchange of information, so as to keep each party's share of the market and to protect profit and sales. In its proposed decision, the CCS found *both* the parent and subsidiary companies jointly and severally liable for the infringement.

10.55 While the proposed infringement decision is not final and the parties have been given time to make their submissions, if it is upheld, this decision would be an illustration of the application of the single economic entity doctrine justifying the rendering of one undertaking liable for another undertaking in a s 34 infringement.