

**AN OVERVIEW OF THE AMBIGUOUS ROLE
OF BUYER POWER THROUGH THE
PERSPECTIVE OF EU COMPETITION LAW**

Central Research Question: In which situations should buyer power be seen in either a positive or negative light, and does current EU competition law provide for an appropriate legal framework to find the right balance between limiting the harmful side of buyer power, yet at the same time allowing the beneficial effects of buyer power to flourish?

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TABLE OF CONTENTS

CHAPTER I: INTRODUCTION.....	3
1.1 Importance of the Topic.....	3
1.2 Methodology.....	4
1.3 Outline.....	5
CHAPTER II: BUYER POWER EXPLAINED.....	6
2.1 The Essence of Competition.....	6
2.2 Definition of Buyer Power.....	7
CHAPTER III: ECONOMIC THEORIES ON BUYER POWER.....	9
3.1 Monopsony Power.....	9
3.2 Countervailing Buyer Power.....	11
3.3 Waterbed Effect.....	13
3.4 Anti-Waterbed Effect.....	15
3.5 Dynamic Efficiency.....	15
CHAPTER IV: COMPETITION POLICY DESIGN.....	18
4.1 Regulation Issues.....	18
4.2 Welfare Standards.....	19
4.3 General Rules of EU Competition Law.....	20
CHAPTER V: BUYER POWER IN EU COMPETITION LAW.....	24
5.1 Buyer Collusion.....	24
5.2 Exclusionary Buyer Conduct.....	28
5.3 Mergers involving Buyer Power.....	33
CONCLUSION.....	37
BIBLIOGRAPHY.....	39

CHAPTER I: INTRODUCTION

1.1 Importance of the Topic

This thesis covers the topic of buyer power, which refers to the ability of firms to obtain more favourable terms of trade from their suppliers. The emphasis will be upon the positive and negative role which buyer power can play, while at the same time it will be described how the European Union (EU) is currently dealing with the issue of buyer power within the framework of the EU.

While the primary focus of antitrust research has historically been on the selling side, the issue of buyer power has become more prominent in recent times.¹ One of the reasons for this switch is that in the past few decades, Europe has witnessed a transformation of an ongoing process towards consolidation in its intermediate purchasing sectors. In many industries, suppliers are now confronted with increasingly powerful buyers.² Whilst the emergence of large buyers evidentially comes at the expense of smaller competitors, it has also raised considerable concerns amongst primary producers and intermediate suppliers alike, who now face a market with fewer alternative sales channels in order to reach their final consumers. The increase in market power has improved the ability of firms to exercise buyer power and thereby potentially reduce the profitability and contractual freedom of their suppliers. The latter are becoming more economically dependent on buyers, who have become unavoidable trading partners. Naturally, suppliers in such a situation often claim that they are being exploited by these powerful buyers. EU competition law and its enforcers have largely remained silent on these peculiar results of the exercise of buyer power. In fact, competition policy in the Union even seems to move towards a more economics-oriented approach, in which the focus is not on the various producers, suppliers and purchasers, but on the safeguarding of the effective competitive process and consumer welfare.³ This only serves to intensify the concerns on the economic situation of the producers and suppliers.⁴

However, as many of these intermediate markets continue to get dominated by a limited amount of big companies,⁵ it is not surprising that the concept of buyer power is starting to get more attention from academics and competition authorities.⁶ And deservedly so, because only on rare occasions do manufacturers actually sell their products directly to the final consumers. Instead, goods typically only reach end consumers after involvement of several levels of distribution. At each level in the distribution channel, competitive forces are at play, which all have an impact upon factors such as the price, the quality, and the variety of the products that are ultimately made available to the final consumers. However, until recently, the literature seemed to have ignored the distribution and retailing activities for the most part. With firms being treated either as competing directly for the patronage of final consumers, or as selling through a retailing industry which is considered to be no more than a transparent window to the marketplace.⁷ The renewed scrutiny by academics not only

1 I. Kokkoris [2006], 'Buyer Power Assessment in Competition Law: A Boon or a Menace?', *World Competition*, 29(1), p. 139.

2 P. Dobson and R. Inderst [2008], 'The Waterbed Effect: Where Buying and Selling Power Come Together', *Wisconsin Law Review*, p. 332.

3 F. van Doorn, *The Law and Economics of Buyer Power in EU Competition Policy* (1st edn, Eleven International Publishing 2015) pp. 13-14.

4 *Ibid.* pp. 21-22.

5 Kokkoris, 'Buyer Power Assessment in Competition Law: A Boon or a Menace?' (n. 1) p. 139.

6 Dobson and Inderst, 'The Waterbed Effect: Where Buying and Selling Power Come Together' (n. 2) p. 332.

7 C. Doyle and R. Inderst [2007], 'Some Economics on the Treatment of Buyer Power in Antitrust', *European*

focuses on the concept of buyer power, but also on the current substantive legal framework of EU competition law, which some consider to be too narrow and unfit to properly deal with the harmful effects of purchasing power. It can be reasoned that the traditional rules on competition law were intended to address market power on the seller side and appear to be ill-suited for dealing with market power by firms in their relation with their suppliers.⁸

However, in marked contrast to the exercise of seller power, which typically fails to deliver benefits to consumers, the effects from the exercise of buyer power are not necessarily bad for consumers. Large retailers and buying groups often portray themselves as 'consumer's champions', exercising their buyer power as a means to deliver better conditions to end consumers.⁹ Viewing buyer power in this perspective would mean that it actually promotes economic efficiency. In such a scenario, competition policy should not intervene with buyer power, and might even want to stimulate it.¹⁰

The concept of buyer power can thus have an ambiguous role, which makes it controversial whether the existence of buyer power should be cherished or whether it requires interference from competition authorities.¹¹ This dubious situation could be solved by assessing the impact of buyer power on a case-by-case basis. Such an analysis should involve a detailed assessment of the chance of a distortion of competition in both upstream and downstream markets. Above all, there should be no presumption from the outset that the existence of buyer power is per se harmful to the competitive process and consumer welfare.¹²

With this thesis I hope to provide an elaborate overview of both the beneficial and harmful effects of buyer power. Once it has been established in which situation either the positive or negative effects of buyer power arise, the next step would be to review the current legal framework of EU competition law on the issue of buyer power. Having considered the law, the final step is to assess whether the enforcement of these EU competition rules coincides with restricting the harmful effects of buyer power, but at the same time promoting its positive effects. The exact research question is therefore: "In which situations should buyer power be seen in either a positive or negative light, and does current EU competition law provide for an appropriate legal framework to find the right balance between limiting the harmful effects of buyer power, yet at the same time allowing the beneficial effects of buyer power to flourish?"

1.2 Methodology

The purpose of this research is to look at the concept of buyer power from a predominantly legal perspective. More precisely: the current substantive legal framework of EU competition will be analysed so as to determine in what way the law addresses the harmful effects of buyer power, yet at the same time allows the positive effects of buyer power to continue to exist. In terms of the exact scope of the research, the main focus will be on general EU competition law, as laid down in the Treaty of the Functioning of the European Union (TFEU)¹³, the EU Merger Regulation (EUMR)¹⁴

Competition Law Review, 28(3), p. 210.

8 Van Doorn (n. 3) pp. 21-22.

9 P. Dobson and R. Inderst [2007], 'Differential Buyer Power and the Waterbed Effect: Do Strong Buyers Benefit or Harm Consumers?', *European Competition Law Review*, 28(7), p. 393.

10 Van Doorn (n. 3) p. 75.

11 Dobson and Inderst, 'The Waterbed Effect: Where Buying and Selling Power Come Together' (n. 2) p. 355.

12 Kokkoris, 'Buyer Power Assessment in Competition Law: A Boon or a Menace?' (n. 1) p. 140; A. Overd [2001], 'Buyer power', *European Competition Law Review*, 22(6), p. 249.

13 Consolidated Version of the Treaty on the Functioning of the European Union, OJ [2008] C-115/47.

14 Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings, [2004] OJ L-124/1.

and in various notices and guidelines issued by the European Commission. While for the duration of this thesis some minor comparisons between EU competition law and national competition law, or between the EU and antitrust rules in the United States, might arise, a general comparative method of research will not be utilised, the main focus will remain with Union law.

In addition to looking at the legal side of buyer power, the use of economics in the research of such a concept is simply inevitable. The combination of using both law and economics is known as the 'law and economics' approach. This approach is an interdisciplinary method of research which uses economic concepts within the broader analysis of the law.¹⁵ Law and economics is dedicated to appraising instead of just finding the law. As such it tends to rely on existing positivist statements of the law. It refers to economic analysis to attempt to explain the law in its current form, and based upon this analysis, it can give a judgement on how the law ought to be in terms of approaching the most economic efficient result. One should take into consideration that the law is about more than just economic efficiency though, other policy considerations are at stake as well, which means that the results of the economic research should be carefully interpreted within the broader perspective of 'well-being', which encompasses more than just economic welfare.¹⁶

1.3 Outline

This research paper will begin by setting out the essence of competition in general. In this case it is important to come to an agreement on what constitutes as economic efficiency, which will be a vital term in order to find out whether buyer power is to be viewed as a boon or a menace. Secondly, this thesis will move towards the more specific topic of buyer power itself. The different interpretations on the possible definitions of the term will be discussed in order to come to a satisfactory and inclusive definition for buyer power. The third chapter will discuss the economic literature on the concept of buyer power and its potential competition concerns. The first two sections cover the two main forms of buyer power, with section 3.3 and 3.4 discussing the waterbed and anti-waterbed effects respectively. The last section covers the more special case of dynamic efficiency. Furthermore, chapter 4 provides some general thoughts on how competition policy and competition authorities could optimally regulate, formulate and execute the law in terms of dealing with buyer power. It will also be discussed here what the appropriate welfare standard would be in order to judge the effects of buyer power. Lastly, section 4.3 will provide an introduction to the legal framework of EU competition law and which authorities are responsible for its enforcement. Chapter 5 will then assess the current legal framework of EU competition law in more detail, in particular in relation to three forms: collusion, exclusionary conduct and mergers. This entails that there will be an assessment of whether and to what extent the current competition provisions of Articles 101 and 102 TFEU, as well as the EUMR, can be applied to the issues of buyer power. This thesis will end with a conclusion in which a concise summary of the main findings will be given, and it will also formulate a conclusion about whether the research question was answered in a satisfactory manner. Depending on the outcome of this, some advice might even be given about whether changes in the current regulatory framework are desirable.

¹⁵ Van Doorn (n. 3) pp. 26-27.

¹⁶ R. Cryer and others, *Research Methodologies in EU and International Law* (1st edn, Hart Publishing 2011) pp. 83-84; Van Doorn (n. 3) p. 29

CHAPTER II: BUYER POWER EXPLAINED

2.1 The Essence of Competition

Central to the idea of a market is the process of rivalry between firms that is referred to as 'competition'. The latter term is presumed to promote 'economic efficiency'. In the most desirable situation one would have a perfectly competitive market, in which firms would be unable to alter market outcomes.¹⁷

The 'static equilibrium models' demonstrate that the market mechanism are capable of achieving 'Pareto Efficiency', which is a situation in which no one can be better off without making someone else worse off.¹⁸ However, it must be pointed out that a perfectly competitive market is mainly theoretical; the conditions for perfect competition are extremely unlikely to occur in practice. Various unrealistic assumptions are therefore made about the structure of the market with the theory of perfect competition,¹⁹ but in reality there are usually some 'static inefficiencies' around which distort the competitive process. Static inefficiencies could be divided into productive and allocative inefficiencies. 'Productive efficiency', also known as 'technical efficiency', requires that firms can produce no more output from the given inputs. Put simply, productive efficiency is optimal when the economy utilises resources in the least expensive way possible.²⁰ The second form is 'allocative efficiency', which implies that producers produce the amount that consumers desire.²¹ When there is allocative inefficiency, society's resources are not distributed in the most efficient way possible; the economy is performing below its full potential, which gives rise to the phenomenon of a 'deadweight loss'. Such a situation of harm to economic efficiency arises when there is market failure, an example of that is when either the seller or the buyer possesses market power.²² Under the traditional models of static equilibrium, market failure in competition typically does not encourage economic efficiency and intervention from competition authorities might be warranted.²³ In fact, under the static equilibrium models the conclusion may be drawn that competition policy should pursue the elimination of all forms of market power, so as to acquire the most economically efficient situation.²⁴

However, static equilibrium models have one important shortcoming: they are mainly theoretical and therefore unable to take real world dynamics into account. Competition is not a static concept, but instead, a dynamic one. Costs are not fixed in the real world, they change continuously. Competition therefore does not result in an 'end state' or equilibrium. In reality, competition is an ongoing process of rivalry in which firms constantly have to create and adopt new technologies, products and processes in order to gain a competitive advantage over their competitors. The extent to which firms introduce these new products and process is referred to as dynamic efficiency. This innovation process might clash with certain allocative and productive efficiencies.²⁵ The impact of

17 R. Whish and D. Bailey, *Competition Law* (7th edn, Oxford University Press 2012) pp. 4-5; Van Doorn (n. 3) p. 36

18 Whish and Bailey (n. 17) pp. 4-5; Van Doorn (n. 3) pp. 36-37.

19 Whish and Bailey (n. 17) pp. 7-8.

20 B. Orbach [2010], 'The Antitrust Consumer Welfare Paradox', *Journal of Competition Law & Economics*, 7(1), p. 141.

21 Van Doorn (n. 3) p. 38.

22 Whish and Bailey (n. 17) p. 6.

23 Van Doorn (n. 3) p. 39.

24 Ibid. pp. 45-48.

25 Ibid. pp. 48-49.

innovation on overall economic efficiency could even come to dominate that of static efficiency. That entails that new products and processes may have a much more significant impact on welfare, certainly in the long run, than any likely variation in price or output.²⁶ The efficiency trade-offs between productive, allocative and dynamic efficiencies is thus something which competition authorities need to scrutinise in order to evaluate economic efficiency results in total.²⁷

2.2 Definition of Buyer Power

The usual situation which alerts competition authorities is the one in which the seller exercises its market power towards customers that have no market power. However, while this situation generally applies to customers in their role as final consumers, most markets are more complex and consist of multiple transactions throughout the distribution chain. Depending on the situation on the market, certain customers might be able to exercise buyer power on a so-called 'input market'. This market, alternatively known as 'procurement market', concerns the market where firms buy the required inputs from their suppliers; inputs which they need in order to be able to sell their products on their 'output markets'.²⁸

The term 'buyer power' has been employed in a variety of ways and the literature has recognised numerous definitions, and while all these definitions seem to share the basic thought that buyer power is about market power on the purchasing side of the market, the interpretation of the exact meaning of market power tends to differ among academics.²⁹

One way of defining buyer power is to look at the traditional definition of market power on the seller side, and invert it to refer to the power on the buyer side. Market power on the seller side entails the ability of a firm to set prices profitably above competitive levels; also known as 'monopoly power'. Inverting this definition, buyer power could be defined as the ability of a buyer to force sellers to reduce price below the level that would normally emerge in a competitive market; so-called 'monopsony power'. This form of buyer power arises from a monopsony, oligopsony, or an otherwise dominant buyer and could be characterised as the demand-side mirror image of monopoly, oligopoly, or an otherwise dominant seller.³⁰ Similar to a monopoly, the motivation behind monopsony behaviour is to transfer wealth from one side of the market to the other.³¹ However, the above mentioned definition is generally considered too narrow, since the exercise of buyer power may also involve non-price elements, which could for example manifest itself in the contractual obligations that retailers are able to place upon suppliers.³²

Several authors have proposed an alternative definition for the understanding of buyer power. Buyer power could be seen as an instrument to obtain a concession from the opposite party by being able to credibly threaten to impose a cost or withhold a benefit, in case the seller does not grant a concession.³³ This version of buyer power is known as bargaining power or countervailing buyer

26 Ibid. p. 51.

27 Ibid. pp. 48-49.

28 Ibid. pp. 76-77.

29 Z. Chen [2008], 'Defining buyer power', *Antitrust Bulletin*, 53(2), p. 242.

30 R. Noll [2005], "'Buyer Power" and Economic Policy', *Antitrust Law Journal*, 72(2), p. 589; Chen (n. 29) p. 242; Ibid. footnote 4; M. Stucke [2012], 'Looking at the Monopsony in the Mirror', *Emory Law Journal*, 62(191), p. 1516.

31 R. Noll (n. 30) p. 589.

32 P. Dobson [2005], 'Exploiting Buyer Power: Lessons from the British Grocery Trade', *Antitrust Law Journal*, 72(2), p. 532.

33 J. Kirkwood [2005], 'Buyer Power and Exclusionary Conduct: Should Brook Group Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding?', *Antitrust Law Journal*, 72(2). pp. 638-639.

power, and can only be exercised in case of an imperfect market amongst suppliers. This concept differs from monopsony power because the benefit obtained from the exercise of bargaining power is achieved through the threat of reducing the quantity of purchase and not the actual deed as in the monopsony power situation.³⁴

These two scenarios of buyer power could also be simultaneously classified into one overarching definition,³⁵ something which *Chen* has actually done in his paper on the definition of buyer power. In addition to that, he also acknowledges the symmetric side of the conventional definition of market power, in the sense that buyer power is seen as the opposite of seller power.³⁶

The most encompassing definition has therefore been issued by *Chen*: “Buyer power is the ability of a buyer to reduce price profitably below a supplier's normal selling price, or more generally the ability to obtain terms of supply more favourable than a supplier's normal terms. The normal selling price, in turn, is defined as the supplier's profit-maximising price in the absence of buyer power. In the case where there is perfect competition among suppliers, the normal selling price of a supplier is the competitive price, and the buyer power is monopsony power. On the other hand, in the case where competition among suppliers is imperfect, the normal selling price is above the competitive price, and the buyer power is countervailing power.”³⁷

The distinction between monopsony power and countervailing power is crucial in understanding the economic effects of buyer power, because these effects turn out to be rather different depending on whether it is monopsony or countervailing power which gets exercised.³⁸

34 *Chen* (n. 29) p. 244.

35 *Kirkwood* (n. 33) p. 637.

36 *Chen* (n. 29) p. 246.

37 *Ibid.* p. 247.

38 *Ibid.*

CHAPTER III:

ECONOMIC THEORIES ON BUYER POWER

3.1 Monopsony Power

Having established in the previous section that buyer power could take the form of monopsony power and countervailing buyer power, the discussion can now turn to the effects that these two scenarios have on economic efficiency. The outcome of such a research will give an indication when exactly buyer power should be seen as a concern within the context of competition policy.³⁹

It can be recalled here that the standard textbook model of monopsony power is viewed as market power which is exercised by buyers in their relation with suppliers who have no seller power of their own.⁴⁰ For analytical convenience, it is necessary that the effects of monopsony power on economic efficiency are described in a simplified manner. This section will first analyse the situation in which a sole purchaser faces several perfectly competitive sellers. This situation can be referred to as the 'single or pure monopsony' scenario, where the monopsonist thus has monopsony power on its input market. However, the monopsonist would lack seller power on its output market.⁴¹

The key difference between a buyer with monopsony power and a competitive purchaser are not their intentions, after all, any firm will seek to maximise its profits, but instead concerns the consequences of their profit-maximising behaviour. The competitive purchaser cannot influence the output and input price, which is unlike the situation of the monopsonist, who can depress the input price below the competitive level by strategically withholding demand.⁴² It has an incentive to do so because an increase in the quantity of goods purchased will make it tempting for the suppliers to increase the price that gets charged for each unit. In order for the monopsonist to maximise its profits by making suppliers in the upstream market charge less for their goods, it should therefore purchase fewer units.⁴³

This reduction of the amount of inputs the monopsonist wishes to buy depresses the input price to a level which is below the competitive price. This leads to a transfer of welfare from the suppliers to the buyer, who thus generates more economic profit in this scenario. This shift of welfare does not involve a net welfare loss, because the loss in producer surplus is compensated for by the increase in buyer surplus. This change in the distribution of welfare is therefore not immediately a concern for competition policy.⁴⁴ However, since the lower input price is achieved by limiting the amount of purchases, there is also a net loss in total surplus, which is the sum of buyer and supplier surplus. The exercise of monopsony power thus gets accompanied by a deadweight loss. Monopsony power therefore harms economic efficiency, because it reduces allocative efficiency.⁴⁵

When a monopsonist thus acquires lower input prices via the exercise of monopsony power, this could lead to the assumption that monopsony power benefits consumers, because the lower input

39 Van Doorn (n. 3) p. 84.

40 Ibid.

41 Ibid. pp. 84-85.

42 Kokkoris, 'Buyer Power Assessment in Competition Law: A Boon or a Menace?' (n. 1) p. 144; Van Doorn (n. 3). pp. 85-87.

43 Noll (n. 30) p. 595.

44 Van Doorn (n. 3) pp. 85-87.

45 Ibid.

prices could be passed on to them in the form of lower output prices. However, such a surmise does not always hold true. When a firm with monopsony power increases its production on the output market, it requires additional units from the input market and this increased demand on the procurement market will raise input prices. Obviously, that is an undesirable effect for the monopsonist, who is therefore better served with reducing production on the output market below the level that a firm would pick in the absence of monopsony power. In such a scenario the lower input price does not pass on to consumers and monopsony power therefore does not translate to an increase in consumer welfare.⁴⁶

However, this does not mean that consumers are necessarily harmed by the exercise of monopsony power. As long as the output market is sufficiently competitive, then the monopsonist does not directly affect market conditions in the output market. So even when the monopsonist reduces output, the output price will not be affected, because downstream rivals of the monopsonist can compensate for the reduced output by expanding their own output until the competitive level is reached again.⁴⁷

This argument could be countered by the assumption that monopsony power might indirectly harm consumers. This could occur in the situation where the monopsonist's rivals are not as efficient. This could lead to them having to resort to using less productive inputs in order to increase their output. The price for consumers will be higher in such a situation than it would have been in the absence of monopsony power.⁴⁸

The conclusion that monopsony power does not directly harm consumers, but can harm them indirectly, only applies in perfectly competitive output markets. However, when a firm has monopsony power on the upstream market, this usually implies that the output market is not perfectly competitive, because the emergence of buyer power will often lead to also developing some degree of market power on the downstream market, a phenomenon known as 'successive power'.⁴⁹

In its most extreme form, one could even consider a firm to be the single purchaser in its input market, while at the same time also being the single seller in its output market. This peculiar situation of being both a monopsonist and a monopolist is referred to as the firm being a 'monemporist'.⁵⁰ Such a firm can therefore affect outcomes in both the input and in the output market. The monemporist will need to recognise that an increase in its overall production causes a raise in the input price and a decrease in its output price. The 'single monopoly profit theory' developed by the Chicago school states that an upstream monopolist is already able to capture all the monopoly profits from the industry simply by pricing the input that it sells to the downstream firms at the monopoly level. However, modern economic theory disputes the validity of this theorem, stating that it is only true under limited economic circumstances. The monemporist will therefore be tempted to reduce output even further than in the simple monopsony model, which leads to higher prices downstream and even more allocative inefficiencies.⁵¹

46 S. Salop [2005], 'Anticompetitive Overbuying by Power Buyers', *Antitrust Law Journal*, 72(2), pp. 669-715; D. Carlton and M. Israel [2011], 'Proper Treatment of Buyer Power in Merger Review', *Review of Industrial Organization*, 39(127), p. 129; Van Doorn (n. 3) p. 88.

47 Dobson Consulting [1999], *Buying Power and Its Impact on Competition in the Food Retail Distribution Sector of the European Union*, Prepared for the European Commission – DGIV, Study Contract No. IV/98/ETD/078, pp. 8-13.

48 R. Blair and J. Harrison, *Monopsony in Law and Economics* (1st edn, Cambridge University Press 2010) pp. 45-48.

49 I. Kokkoris [2009], 'Buyer power in UK merger control', *European Competition Law Review*, 30(4), p. 177; A. Nichol [1943], 'Review of A Theoretical Analysis of Imperfect Competition with Special Application to the Agricultural Industries by W. Nicholls', *Journal of Political Economy*, 51(1), pp. 82-84.

50 Nichol (n. 49) pp. 82-84.

51 Dobson Consulting (n. 47) pp. 9-10; Stucke (n. 30) p. 1523; R. Pitofsky, *How the Chicago School Overshot the*

3.2 Countervailing Buyer Power

The exercise of buyer power in relation to suppliers that have seller power is commonly referred to as countervailing buyer power or bargaining power. In the absence of such countervailing power, the seller would have been able to exercise monopoly power. Countervailing buyer power is therefore exercised in an environment where there is market power on both the selling and purchasing side of the market, which is also known as 'bilateral market power'. In this situation, both the buyers and the sellers are able to affect market outcomes, but they are also capable to restrict each other from doing so. Therefore, one can expect purchasers and sellers to acknowledge the other party's influence on the market, recognise their mutual interdependence, and engage in bilateral cooperation in the bargaining process, with neither side being in a position to impose a price that is either too high or too low.⁵²

In its most extreme form there is a so-called 'bilateral monopoly',⁵³ within which a monopolist trades with a monopsonist. If the monopsonist is also the single seller in the downstream market, it is known as a 'monemporist'. Due to both the buyer and the seller having market power, neither of them can be expected to act as a perfect competitor and respond as a price-taker, which is why there is a need to negotiate in order to maximise their joint profit.⁵⁴ Provided that the bargaining process does not lead to inefficiencies, the parties would set the quantity of inputs at the level which maximises their joint profits. The subsequent outcome of the negotiations on the exact input price, which will distribute the surplus among the parties, will depend on the bargaining strength of each party.⁵⁵

In that regard, it might be logical to assume that the size of the buyer can provide a good measure of its bargaining power. However, a simple comparison of the fraction of a party's total business for which the other side accounts for will most likely not adequately reflect its bargaining strength. Generally, what constitutes bargaining power is not so much the percentage of current business that a buyer or seller would lose, but whether the respective party can find equally attractive opportunities to replace that which has been lost.⁵⁶

Bilateral monopoly will lead to a higher degree of economic efficiency than in a situation of single monopoly or single monopsony. Countervailing buyer power is therefore seen as a more acceptable defence mechanism to seller power and is definitely preferable to monopsony power, because it is based upon the threat of reducing output, but as its actual objective it will try to maintain or even increase purchases.⁵⁷ Countervailing buyer power is thus capable of mitigating the harmful effects of monopoly power and promotes economic efficiency.⁵⁸

However, if the purchaser is also a monemporist, then the beneficial effects of countervailing power on the input market could possibly be offset by harm to economic efficiency on the output market, because the monemporist can behave like a monopolist on that downstream market.⁵⁹ Particularly in

Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust (1st edn, Oxford University Press 2008) pp. 144-145; Van Doorn (n. 3) pp. 89-90

52 Kokkoris, 'Buyer Power Assessment in Competition Law: A Boon or a Menace?' (n. 1) p. 141; Van Doorn (n. 3) pp. 91-92.

53 Noll (n. 30) pp. 602-606.

54 Kokkoris, 'Buyer Power Assessment in Competition Law: A Boon or a Menace?' (n. 1) p. 141; Van Doorn (n. 3) pp. 92-93.

55 Van Doorn (n. 3) pp. 92-93.

56 Doyle and Inderst (n. 7) pp. 214-215.

57 Chen (n. 29) p. 244.

58 Van Doorn (n. 3) p. 95.

59 *Ibid.* p. 95.

situations where the upstream product is a necessary input for all competitive substitutes in the final product market, and if the geographic market for the final product is not significantly larger than the geographic market of the input, then monopsonisation of the input necessarily risks monopolisation of the final product.⁶⁰

One could also imagine the situation where the buyer possesses no monopoly power on the downstream market. Countervailing buyer power in such a scenario does not get burdened with additional allocative inefficiency on the output market and could thus be seen as a positive development for economic efficiency and end consumers.⁶¹ For countervailing buyer power to be beneficial for consumers, buyers thus need to have substantial bargaining power, but at the same time face substantial price competition in the end product market.⁶²

However, while in some circumstances the function of the monopsony as a counteracting force to monopoly power can benefit consumers, it is important to realise that in any event, a bilateral monopoly is unlikely to duplicate the outcome of a competitive market or vertical integration, and has the added disadvantage of creating risks of its own.⁶³ Some of these additional inefficiencies which could arise in a bilateral monopoly are negotiation failures during the bargaining process. The use of negotiations instead of other market processes usually increases transactions cost. With the regular market processes, parties receive information about the other firm during their numerous dealings with one another. This information enables participants in the market to form reliable expectations about their future transactions. The downside of a bilateral monopoly is that the absence of information results in the parties having different expectations about what equates to a reasonable or realistic transaction. These mutually inconsistent expectations could thus lead to an inability to reach a mutually beneficial agreement.⁶⁴ Likewise, in principle all lawsuits should settle because litigation imposes unwanted costs on both sides, yet often parties are not able to reach a negotiated settlement, again because of dissimilar expectations about the outcome of the litigation process.⁶⁵

Whether the effects of bilateral monopoly as a whole will maximise welfare is thus somewhat of a conundrum. It is in any case preferable to have competition on both sides of the market. It could therefore be argued that instead of trying to combat one distortion of competition by allowing an opposite one, an alternative approach would be to resist any increase of market power whatsoever, and instead rely on market forces to slowly erode the power on the other side of the market. However, leaving the reduction of market power in the hands of the competitive process may in reality not always lead to the desired outcome if market forces prove incapable of reducing market power, which means that government intervention might be necessary through antitrust regulation.⁶⁶

It should be noted that the above mentioned theory on countervailing buyer power with regard to a bilateral monopoly is mainly theoretical. In reality bargaining power is far more likely to be exercised in a market which consists of multiple buyers and sellers. The scenario where there are a relatively small number of buyers and sellers is called a 'bilateral oligopoly'. An oligopsony in such a market will not use its countervailing buyer power in order to affect the uniform market price,

60 Noll (n. 30) pp. 607-608.

61 Dobson Consulting (n. 47) p. 17.

62 Kokkoris, 'Buyer Power Assessment in Competition Law: A Boon or a Menace?' (n. 1) p. 143.

63 M. Schwartz [2004], 'Should Antitrust Assess Buyer Market Power Differently than Seller Market Power?', *Paper Presented at DOJ/FTC Workshop on Merger Enforcement, Washington DC*, p. 3; Noll (n. 30) p. 613.

64 Kokkoris, 'Buyer Power Assessment in Competition Law: A Boon or a Menace?' (n. 1) pp. 151-152; Noll (n. 30). p. 607.

65 Noll (n. 30). p. 607.

66 Schwartz (n. 63) p. 3.

since any effort to reduce the input price would also be beneficial to its rivals. Instead, bargaining power is usually exercised for the purpose of obtaining discounts through bilateral negotiations between a buyer and a seller.⁶⁷

The effects of countervailing buyer power in this context could be better analysed through a so-called 'bargaining framework'. In which the ability of the buyer to acquire more favourable terms of trade depends on its relative bargaining strength compared to suppliers and competing buyers. This consideration of relative bargaining power in both a vertical and horizontal sense is fundamental towards determining the ultimate effects on consumers.⁶⁸ Such bargaining power depends on various factors. One of those sources is formed by the 'outside options' of buyers. That means that if a buyer can easily switch to another supplier or market, then it may be in a better position to demand a discount. A buyer can do so if its total size on the market is relatively large, or if it acts as a 'gatekeeper' to a substantial part of the supplier's potential market and can thus not easily be side-stepped. This principle works both ways though, in that numerous outside options for the supplier might limit buyer's bargaining power.⁶⁹

3.3 Waterbed Effect

Since the negotiations between buyers and sellers discuss individual discounts, they presumably do not affect the trading conditions for other buyers and thus do not make the end consumers worse off. However, recent contributions in the economic literature seems to suggest otherwise. For instance, substantial differences in bargaining strength amongst buyers, also known as 'differential buyer power', could cause a 'waterbed-effect' to occur. According to this theory, a very large buyer could demand more advantageous terms of trade, which would put its competitors at a disadvantage, which in turn might lessen downstream competition and eventually harm consumer welfare.⁷⁰

The granting of a discount to a powerful buyer may force suppliers to raise their prices towards smaller buyers in order to recoup for the lost revenue. This adverse effect on the smaller buyer reduces their bargaining power, which would enhance the relative bargaining power of the large purchaser even further.⁷¹ This allows the large firm to acquire even greater discounts, which again comes at the expense of its smaller rivals;⁷² this process might continue endlessly and turn into a spiral effect,⁷³ in which the exercise of buyer power gradually leads to a decrease of the number of smaller buyers and the overall intensity of competition on the retail market.⁷⁴

The theory explained above in which the increase of prices for smaller purchasers in order to compensate the suppliers for giving a discount to larger purchasers is not entirely satisfying. It leaves open the question as to why the supplier would all of a sudden be able to command higher prices from other buyers. If this price increase is feasible, why then could the supplier not have

67 Van Doorn (n. 3) pp. 95-96.

68 Dobson and Inderst, 'Differential Buyer Power and the Waterbed Effect: Do Strong Buyers Benefit or Harm Consumers?' (n. 9) p. 393; Van Doorn (n. 3) pp. 96-97

69 Dobson and Inderst, 'Differential Buyer Power and the Waterbed Effect: Do Strong Buyers Benefit or Harm Consumers?' (n. 9) pp. 395-396.

70 Van Doorn (n. 3) p. 97.

71 Ibid. p. 97.

72 Overd (n. 12) p. 250.

73 A. Ezrachi [2012], 'Buying Alliances and Input Price Fixing: In Search of a European Enforcement Standard', *Journal of European Competition Law & Economics*, 8(1), p. 52.

74 A. Pera and V. Bonfitto [2011], 'Buyer power in anti-trust investigations: a review', *European Competition Law Review*, 32(8), p. 416; Van Doorn (n. 3). p. 97.

attempted to raise its prices beforehand?⁷⁵

One explanation could be that the obtained discount allows the large buyer to reduce prices or provide better services, which attracts additional business and therefore obtain a larger share of the final market. Some of this increased business will come at the expense of its less powerful rivals, which would lead to these buyers having a decreased scale of activity. Furthermore, due to the presence of economies of scale amongst suppliers, the volume requested by buyers could have a key impact on potential discounts being given on input prices. The development of smaller firms having a reduced demand for volume would make their business less attractive for suppliers. This would trigger a further round of market share adjustments, which would further reduce the bargaining power of the weaker buyers versus their suppliers, which would lead those suppliers to charge an even higher price to these buyers.⁷⁶

Alternatively, a waterbed effect could also occur through an adjustment amongst suppliers. Due to the large buyers increasing their market power and thus being able to extract better terms, some suppliers may no longer find it profitable to remain in the market. They might therefore exit the market, or be forced to merge their operations with rival suppliers, or even refrain from entering the market in the first place. These developments would make the upstream market more concentrated, which in turn increases the bargaining power of the remaining suppliers due to them now having a larger share of the total business. Absent any scale effects, this will not necessarily have direct implications on the wholesale price which buyers have to pay. However, since there are now fewer suppliers on the market, the outside options of buyers to switch towards other suppliers will be reduced. It can be through this mechanism that smaller buyers in particular will be adversely affected. On the other hand, for the large buyer the initial increase in bargaining power would still be sufficient to ensure that his own wholesale price remains lower even after the adjustment in the upstream market.⁷⁷

It should also be remarked that a powerful buyer becoming even more competitive versus its rivals is not necessarily bad news for final consumers. First of all, the powerful purchaser may pass on some of the discount it received into lower retail prices, because this makes his position on the downstream market more competitive. Secondly, while the smaller rivals will optimally want to respond to a price increase on the upstream market by passing on some of these higher costs to consumers, they could also consider to actually lower their retail prices. The reason behind this is that they now also face more aggressive competition from the large buyer in the downstream market, since that buyer can offer lower prices due to its improved terms of trade on the upstream market. In order to recapture some of their otherwise lost market share, less powerful buyers need to become more appealing towards their consumers. Granted, in the situation where weaker rivals endure too much pressure from the exercise of market power by a powerful rival, and are thus forced to exit or cut back on the amount of their offering, then consumers will be harmed.⁷⁸

75 Dobson and Inderst, 'Differential Buyer Power and the Waterbed Effect: Do Strong Buyers Benefit or Harm Consumers?' (n. 9) p. 397; Dobson and Inderst, 'The Waterbed Effect: Where Buying and Selling Power Come Together' (n. 1) p. 342.

76 Dobson and Inderst, 'Differential Buyer Power and the Waterbed Effect: Do Strong Buyers Benefit or Harm Consumers?' (n. 9) p. 398; Dobson and Inderst, 'The Waterbed Effect: Where Buying and Selling Power Come Together' (n. 1) p. 347; Van Doorn (n. 3) p. 98.

77 Dobson and Inderst, 'Differential Buyer Power and the Waterbed Effect: Do Strong Buyers Benefit or Harm Consumers?' (n. 9) p. 397; Van Doorn (n. 3) p. 98.

78 Dobson and Inderst, 'Differential Buyer Power and the Waterbed Effect: Do Strong Buyers Benefit or Harm Consumers?' (n. 9) pp. 394, 398; R. Inderst and T. Valletti [2011], 'Buyer Power and the 'Waterbed Effect'', *Journal of Industrial Economics*, 59(1), p. 2.

3.4 Anti-Waterbed Effect

There is also an opposing view in which there might be instances where differential buyer power could instead lead to an 'anti-waterbed effect. This theory presumes that the ability of a powerful buyer to negotiate discounts will actually benefit its rival buyers by making further discounts to those buyers more likely. If it becomes public knowledge that one retailer has been granted a discount by the supplier, then this undermines its bargaining position towards competing buyers. Some of these other buyers could then prove to be successful in pushing through the same discounts for themselves.⁷⁹ However, the size of those discounts and other concessions will depend on how strong the other buyers are in the market and whether they can thus negotiate with the supplier on relatively equal terms. When a supplier faces a broadly symmetric oligopsony market, waterbed effects are far less likely to occur compared to the situation where the market conditions are significantly skewed between buyers.⁸⁰

The situation in which there is a powerful buyer demanding discounts is seen as undesirable by suppliers. It is in their interest to prevent one buyer from becoming so large that the exercise of their market power will have a negative impact on the profitability of smaller and less powerful rivals, possibly even up to the point where they have to exit the market. To prevent these developments on the retail level from happening, instead of further turning the screws on smaller buyers to compensate for lost revenue from discounts to large buyers, suppliers might actually prefer to offer lower prices to those smaller buyers. Offering them more attractive terms of trade might aid in keeping them active and therefore preserve a competitive downstream market. This ensures that suppliers retain alternative channels to reach consumers and thereby protect their long-term bargaining position.⁸¹ The problem with this theory is that giving smaller buyers additional discounts undermines supplier's profits in the short run and unless the supply side is relatively concentrated, it is unlikely that any individual supplier would sacrifice its short-term profits in order to provide a public service for its rival suppliers.⁸²

3.5 Dynamic Efficiency

A special category in regard to the exercise of buyer power are its effects upon dynamic efficiency. The relation between competition, market power and innovation can be illustrated by two opposing views. On one end of the spectrum there is the view expressed by *Arrow* that market power distorts the incentive to innovate. A firm with a significant degree of unchallenged market power would be less willing to invest in innovation compared to a competitive firm because it has less to gain. If the firm has a reasonably secure position on the market, then the additional profit that it receives from research and development (R&D) might not even be sufficient to cover its initial investment. This might not make it worthwhile to spend money on new products and processes. In marked contrast to the firm with market power, firms which operate in a more competitive environment have a stronger incentive to invest, because innovative products allow them to get a competitive advantage over their rivals. Competition thus drives innovation according to this theory.⁸³

79 Doyle and Inderst (n. 7) footnote 29.

80 Dobson and Inderst, 'Differential Buyer Power and the Waterbed Effect: Do Strong Buyers Benefit or Harm Consumers?' (n. 9) p. 399; Dobson and Inderst, 'The Waterbed Effect: Where Buying and Selling Power Come Together' (n. 1) pp. 353-354; Van Doorn (n. 3) pp. 98-99.

81 Dobson and Inderst, 'The Waterbed Effect: Where Buying and Selling Power Come Together' (n. 1) p. 354; Van Doorn (n. 3) pp. 98-99.

82 Dobson and Inderst, 'Differential Buyer Power and the Waterbed Effect: Do Strong Buyers Benefit or Harm Consumers?' (n. 9) p. 399; Van Doorn (n. 3) pp. 98-99.

83 J. Baker [2007], 'Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation', *Antitrust Law Journal*, 74(3), p. 575; K. Arrow [1962], 'Economic Welfare and the Allocation of Resources for Invention', in: Nelson, R., *The Rate*

A specific concern within the context of buyer power is that the possession of substantial buyer power amongst retailers will stifle the incentives for suppliers to invest and innovate. This argument can be supported by the theory on the 'holdup problem'. This means that if a suppliers' investment in R&D involves sunk costs, it may not need to recover its investment in the short run, but in the long run it will definitely need to recover all of its costs if it wants to stay in business. If suppliers anticipate that a powerful buyer will show opportunistic behaviour in order to exploit supplier commitments, which in turn will make innovation investments unprofitable and have a detrimental effect on efficiency, suppliers may decide to postpone or even forgo investments completely.⁸⁴ Firms are especially vulnerable to the holdup problem if the supplier does not have attractive alternatives to turn to, in order to sell their products. Buyer power can harm dynamic efficiency in this way.⁸⁵

On the other side of the spectrum there is an alternative view which claims that it is not competition but market power that promotes innovation. This theory states that the presence of large firms may actually result in more innovation than in the situation of a more competitive market. This stands in stark contrast to the view expressed above whereby the exercise of buyer power is presumed to stifle suppliers' investment incentives.⁸⁶

There are several arguments in support of this viewpoint. First of all, larger firms have better capabilities to finance large R&D projects compared to smaller firms. When competition on the market is intense, companies will be discouraged to invest in innovation, since there is the fear that rivals will simply use its ideas and therefore free-ride on the investment. This is less of an issue when the market contains fewer competitive players.⁸⁷ Because of the very costly and highly risky nature of R&D investments, firms will typically only sponsor research if they anticipate profit that well exceeds the corresponding costs. *Schumpeter* claimed that innovation can be the result of 'creative destruction', which means that newer and superior technologies continuously supplant the old. Accordingly, firms which achieve certain results in this process and undertakings which are most responsive towards the consumer preferences will earn monopoly profit and acquire buyer power. The very possibility of earning such large profits is the whole reason that induces firms to invest in innovation in the first place. Market power could therefore arise as the result of a firm's superior efficiency in the competitive process.⁸⁸ A systematic policy to cut back or eliminate this reward afterwards would reduce the intensity of technological competition and thereby potentially weaken economic efficiency in the long run.⁸⁹ The ability to exercise market power may thus be needed in order to help a firm to recoup its investment costs, while economic efficiency may require the competitive process to develop market power in order to promote dynamic efficiency.⁹⁰ Furthermore, investments in technologies that allow a firm to utilise economies of scale or scope will typically enhance economic efficiency, yet at the same time also result in an increase of market power.⁹¹ Moreover, the presence of fewer but larger firms may also help to overcome some of the underlying contractual problems between suppliers and buyers that usually arise. Transaction costs

and Direction of Inventive Activity: Economic and Social Factors, Princeton, N.J.: National Bureau of Economic Research, p. 619; Van Doorn (n. 3) pp. 49-51.

84 J. Church and R. Ware, *Industrial Organisation: A Strategic Approach* (1st edn, McGraw-Hill 2000), p. 72; Dobson Consulting (n. 47) p. 14; Van Doorn (n. 3) p. 100.

85 Church and Ware (n. 84) p. 72; Van Doorn (n. 3) p. 100.

86 R. Inderst and C. Wey [2011], 'Countervailing Power and Dynamic Efficiency', *Journal of the European Economic Association*, 9(4), p. 715.

87 Van Doorn (n. 3) pp. 49-51.

88 Noll (n. 30) pp. 608-609; J. Schumpeter, *The Theory of Economic Development. An Inquiry into Profits, Capital, Credit, Interest, and the Business Cycle* (1st edn, Harvard University Press 1934); Van Doorn (n. 3). pp. 49-50, 101.

89 Noll (n. 304) pp. 608-609.

90 Van Doorn (n. 3) pp. 49-51, 101.

91 *Ibid.* p. 50.

and coordination problems could be reduced in this way, thereby allowing for more efficient contracting on how to share the costs and profits of new investments. Finally, firms may also be more willing to share sensitive information with only a selected number of trading partners, thereby providing a better overall framework for long-term investment.⁹²

Looking at it more specifically in terms of market power on the buying side, the presence of substantial buyer power may actually keep suppliers alert and thereby increase their incentives to invest.⁹³ Such incentives should depend less on the overall level of its profits and more on how well the supplier can cope with losing that retailer's channel to final consumers.⁹⁴ While the exercise of buyer power will indeed hurt the profitability of suppliers in the short-term, this may give them an increased incentive to invest in R&D.⁹⁵ As long as the supplier continues with its inferior product, it may be difficult to create additional sales elsewhere in order to compensate for the lost distribution channel. Likewise, selling more through other retailers may then only become possible at a severely reduced price. It is therefore necessary for suppliers to increase their own bargaining power towards the main retailer by becoming a more attractive trading partner. It can do so by producing more cost-efficient technologies or new products and processes.⁹⁶ In this way the supplier's products become more attractive to buyers and this will not only improve its own situation, but may also enhance the ability of the supplier to inflict losses on the powerful buyer by only supplying to its rival buyers. This will improve their position on the market and thus undermine the influence of the powerful buyer.⁹⁷ Large buyers who thus see a decline in their potential outside options, might now be tempted to make additional investments towards innovation themselves in order to regain their buyer power.⁹⁸

While dynamic efficiency is thus significant for the competitive process, it is difficult to measure, predict and appraise its exact effects.⁹⁹ Taking the two theories together, it could therefore be reasoned that depending on the circumstances, competition and market power could both stimulate and distort incentives to innovate. Empirical studies seem to indicate that in most markets innovation is the greatest neither in very competitive nor in monopolistic industries, but in industries with an oligopolistic market structure, this entails that there exists an 'inverted U' relationship between competition and innovation.¹⁰⁰

Finally, buyers should realise that harming competition among their suppliers may ultimately end up impairing their own interests. Exercising buyer power could thus adversely affect buyers themselves in the long run. This situation could occur when suppliers decide to cut back on their investment due to the pressure they face from buyers. And knowing that it are the powerful buyers in particular who are able to extract a large share of the joint future profits, they are the ones who feel the negative effects of suppliers reducing investment the most. Buyers should therefore have a huge incentive to ensure that the total level of profits are optimal. Taking this into consideration, the alacrity of buyers to use their market power might become more subdued, mainly because there is a real fear that the exercise of buyer power would compromise the possibility of further investments by suppliers.¹⁰¹

92 Doyle and Inderst (n. 7) p. 216.

93 Inderst and Wey (n. 86) p. 703.

94 Doyle and Inderst (n. 7) p. 217.

95 Van Doorn (n. 3) pp. 100-101.

96 Doyle and Inderst (n. 7) p. 217; Van Doorn (n. 3) pp. 100-101.

97 Van Doorn (n. 3) pp. 100-101.

98 Doyle and Inderst (n. 7) p. 217.

99 Ezrachi (n. 73) p. 54.

100 Van Doorn (n. 3) p. 50.

101 Doyle and Inderst (n. 7) p. 217.

CHAPTER IV: COMPETITION POLICY DESIGN

4.1 Regulation Issues

In order to shield the competitive process from anti-competitive behaviour which hurts economic efficiency, competition authorities require a set of legal rules which they can enforce. How competition authorities should enforce those rules is a matter of great importance. Following the wrong form of competition policy could even be counterproductive, with the enforcement of the rules doing more harm than good to economic efficiency. One could distinguish between two types of enforcement errors. With the first type buyer conduct gets prohibited while in reality it is actually not anti-competitive, this is known as 'over-enforcement'. In contrast, the other type concerns the failure to prohibit behaviour which is anti-competitive, also known as 'under-enforcement'. The harm to economic efficiency that gets associated with these two types of errors are referred to as 'error costs'.¹⁰²

The simplest type of competition rules are known as 'per se rules'. With these rules, the conduct of firms will either always be legitimate or always illegitimate, without considering the actual effects of the behaviour in individual cases. However, such an approach is very likely to induce imperfect decision-making. As has previously been mentioned, exercising buyer power does not necessarily lead to harmful results for economic efficiency, in fact the use of countervailing buyer power in particular might even be beneficial. A pure form of per se rules on the exercise of buyer power will therefore not lead to the most optimal results for economic efficiency.¹⁰³

In order to mitigate error costs, competition policy should resort to more differentiated rules on competition. A higher degree of differentiation of the competition rules requires more criteria to be assessed and a more specific case analysis by the competition authorities compared to per se rules. In its most extreme form this may even amount to a 'rule of reason'. Under such a rule, a competition authority must engage in a full-scale market analysis in each individual case. Such an analysis involves finding all possible positive and negative effects of firm behaviour in order to ascertain its effect on economic efficiency.¹⁰⁴

While a high degree of differentiation reduces error costs, this comes at the expense of an increase in 'regulation costs'. These costs are caused by the formulation and enforcement of competition rules. Not only the competition authorities face an increase in regulation costs under a higher level of differentiation, but firms are also affected, for example by requiring them to regularly consult professional legal advisors in order to comply with the more complex legal framework. Another disadvantage of more differentiated rules is that it leads to legal uncertainty on the outcome of a case.¹⁰⁵

While per se rules and the rule of reason describe the more extreme variants of rule-making, a more realistic approach would be to have a mixed version. The basic idea is that the optimal rule is characterised by the minimisation of both error and regulation costs.¹⁰⁶ Accordingly, if a certain

102 Van Doorn (n. 3) p. 58.

103 Ibid.

104 Ibid. p. 59.

105 Ibid. pp. 59-60.

106 A. Christiansen and W. Kerber [2006], 'Competition Policy with Optimally Differentiated Rules instead of "Per Se Rules vs Rule of Reason"', *Journal of Competition Law and Economics*, 2(2), p. 223.

conduct can usually be expected to harm or promote economic efficiency, then competition policy could take the form of a rebuttable per se rule, which implies that the rule should be regarded as either legal or illegal, unless convincing arguments to the contrary are brought up. One could also imagine the situation where simple rules do not suffice because it is relatively difficult to ascertain whether the behaviour is anti-competitive. Having a more structured rule of reason, in which the investigation is restricted to certain simple criteria, could be an intermediate solution in such a scenario.¹⁰⁷

4.2 Welfare Standards

Apart from the situation where per se rules apply, competition authorities have a certain amount of discretion in enforcing the rules and are therefore expected to engage in a degree of case-by-case analysis. Through the assessment of specific criteria, the competition authorities attempt to establish whether economic efficiency is harmed.¹⁰⁸ This is needed because buyer conduct that may amount to anti-competitive behaviour, may also provide substantial efficiency gains.¹⁰⁹ The Commission performs this assessment by using a welfare standard. However, the question of what exactly would be an appropriate standard to use is seen as problematic.¹¹⁰

There are two major groups of thoughts. On the one side, an appropriate welfare standard should take the form of 'consumer welfare'. The other side asserts that the appropriate meaning should be a 'total welfare' standard, also known as 'aggregate welfare'.¹¹¹ The former standard requires condemnation of firm behaviour if this results in a reduction of the welfare of buyers in a particular market. Under the latter standard, business conduct will be penalised if this results in a decrease in the aggregate welfare of both buyers and sellers.¹¹² Thus, the total welfare standard views wealth transfers between consumers and sellers as irrelevant.¹¹³

Even though consumer welfare is considered to be one of the most important goals of EU competition policy, it remains a vague term.¹¹⁴ The definition of consumers in particular has proved to be a major source of confusion.¹¹⁵ The consumer welfare standard in its broadest form would condemn conduct that reduces the welfare of all purchasers. Since the consumer welfare standard would then focus on buyer surplus, the extraction of surplus by the powerful buyer may inflict harm upon economic efficiency, but benefits the buyer that exercises its market power. If consumer welfare simply means purchaser welfare, then there is indeed an increase in consumer welfare if the purchasing company increases its surplus.¹¹⁶ The application of such a consumer welfare standard could mean that competition authorities mistakenly allow conduct that is harmful to the market as a whole; a case of under-enforcement.¹¹⁷

Therefore, a different interpretation of the consumer welfare standard which addresses this particular problem has been developed. In this alternative view, the concept of consumers should

107 Van Doorn (n. 3) p. 59.

108 Ibid. p. 63.

109 Ibid. p. 119.

110 Ibid. p. 63.

111 Orbach (n. 20) p. 137; Van Doorn (n. 3) p. 63.

112 Van Doorn (n. 3) p. 63.

113 Orbach (n. 20) p. 138.

114 V. Daskalova [2015], 'Consumer Welfare in EU Competition Law: What Is It (Not) About?', *Competition Law Review*, 11(1), pp. 132, 147.

115 Orbach (n. 20) p. 163; Daskalova (n. 114) p. 136.

116 Daskalova (n. 114) pp. 137-138; Van Doorn (n. 3) p. 120.

117 Van Doorn (n. 3) p. 120.

not include intermediate purchasers, but should merely entail end-users, which are the final consumers at the end of the distribution chain that ultimately buy the product for consumption and not for production.¹¹⁸ The total welfare standard and the consumer welfare standard explained above generally do not lead to different decisions in the buyer power context, but there are a few situations where this distinction does matter.¹¹⁹

Such a scenario could arise when monopsony power on the input market is not accompanied with buyer power on the output market and where the downstream market is thus competitive. In such a scenario, the anti-competitive buyer conduct does not directly harm consumer welfare. For example, because rivals on the downstream market expand their output in order to compensate for the reduction in purchases by the monopsonist. Final consumers are not affected by buyer power in such a situation and according to this consumer welfare standard, such anti-competitive buyer conduct may not be noticed by competition authorities; another case of under-enforcement.¹²⁰ Another issue arises when in order to apply a consumer welfare standard which puts end-users at the heart of the analysis, competition enforcers should conduct a separate analysis, in order to ascertain that the harm inflicted in a higher stage of the distribution cycle made it all the way down to the final consumer. However, because only a small percentage of all companies sell directly to final consumers, the calculation of the exact damages is a complex, expensive and time-consuming exercise for competition authorities, who often have to operate on a limited budget and with limited resources.¹²¹

4.3 General Overview of EU Competition Law

The legal framework of EU competition law is laid down in the TFEU and underlying legal texts such as Regulations, Notices and Guidelines. These texts get interpreted through the rulings of the European Courts: the General Court, previously known as the Court of First Instance, and the European Court of Justice (ECJ). The substantive legal framework of the EU in regards to competition law could principally be divided into three pillars: Article 101 TFEU, Article 102 TFEU and the EU Merger Regulation.¹²²

Article 101 TFEU is seen as the principal instrument to eradicate anti-competitive behaviour by cartels and through vertical agreements. The first section of the Article prohibits: “all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction, or distortion of competition within the internal market.”¹²³ Pursuant to the second section, such prohibited agreements are automatically void.¹²⁴

The first requirement of Article 101 TFEU is that it catches agreements which are made by 'undertakings'. However, the Treaty does not further define this term, which means that we must look at the interpretation given by the Union Courts and the competition authorities. In *Höfner*, the ECJ defined the term broadly as covering any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.¹²⁵

118 Daskalova (n. 114) pp. 137-138; Van Doorn (n. 3) p. 120.

119 Van Doorn (n. 3) pp. 121-122.

120 Ibid. pp. 121-122.

121 Daskalova (n. 114) pp. 137-138, 145.

122 Van Doorn (n. 3) pp. 130-131

123 Article 101(1) TFEU.

124 Article 101(3) TFEU.

125 Case C-41/90, *Höfner and Elser v. Macroton GmbH* [1991] ECR I-1979, para. 21.

The term 'economic activity' has some characteristic features that need to be fulfilled. It requires the offering of goods or services on a given market and this activity must be carried out by a private undertaking in order to make profits.¹²⁶ It is important to clarify in this context that state-owned corporations and private bodies vested with public power are excluded from this definition when they exercise their public law powers,¹²⁷ but if they operate in a commercial context they will be considered as undertakings within the definition of 101.¹²⁸

The term 'offering' mentioned above obviously refers to the selling side of the market. Whether the purchasing of those goods or services can therefore amount to economic activity, and thus whether firms involved in buying behaviour can legally be seen as undertakings, is something which is discussed in the *FENIN* case.¹²⁹ The ECJ stated that it was not the purchasing function but the supply function that determines whether economic activity is carried out, even though such an entity may wield considerable economic power.¹³⁰ In *Selex*, the ECJ stressed that the purchasing activity only amounts to an economic activity if the subsequent use of the purchased goods results in economic activity.¹³¹ While this interpretation is peculiar from an economic perspective, due to purchasing activity potentially having substantial effects on economic efficiency, this reasoning from the Court achieves the following results: it excludes from the scope of EU competition law the purchasing by final consumers, who typically have no buyer power, and purchasing by the state, for which specific public procurement rules apply in the EU.¹³²

Article 101(1) TFEU further requires that the agreement, decision, or concerted practice, terms which are broadly interpreted and could be both horizontal and vertical,¹³³ must have the object or effect of preventing, restricting, or distorting competition.¹³⁴ It is clear that these are alternative, and not cumulative, requirements, which means that this part must be read disjunctively.¹³⁵ If the object of the agreement is anti-competitive, then it could be condemned without further deliberation of market circumstances,¹³⁶ since certain conduct can be regarded by its very nature as being injurious to the proper function of the market.¹³⁷ This is a version of the previously described per se illegal rules.¹³⁸

When it is not evident that an agreement is anti-competitive by object, then it is necessary to analyse its effects.¹³⁹ In addition, the agreement, decision, or concerted practice must have an effect on trade between Member States, otherwise the matter will be handled by the domestic competition authorities of the relevant State. This hurdle is not difficult to overcome, since the Court has

126 Case C-67/96, *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, Jacobs AG, para. 311.

127 Case C-309/99, *Wouters v. Algemene Raad van de Nederlandsche Orde van Advocaten* [2002] ECR I-1577, para. 57; Whish and Bailey (n. 17) p. 89.

128 P. Craig and G. de Búrca, *EU Law: Text, Cases and Materials* (5th edn, Oxford University Press 2011) pp. 961-962.

129 Van Doorn (n. 3) p. 136.

130 Case T-319/99, *FENIN v. Commission* [2003] ECR II-351, para. 37.

131 Case C-113/07, *Selex Sistemi Integrati SpA v. Commission* [2009] ECR I-2207, para. 102.

132 Van Doorn (n. 3) pp. 136-137.

133 Whish and Bailey (n. 17) pp. 99, 117.

134 Article 101(1) TFEU.

135 Case C-56/65, *Société La Technique Minière v. Maschinenbau Ulm GmbH* [1966] ECR 235, pp. 249-250; Whish and Bailey (n. 17) p. 118.

136 Cases 56/64 and 58/64, *Etablissements Consten SARL and Grundig-Verkaufs-GmbH v. Commission* [1966] ECR 299, p. 342.

137 Craig and de Búrca, (n. 128) pp. 975-976.

138 See section 4.1.

139 Craig and de Búrca, (n. 128) p. 977.

adopted a broad test.¹⁴⁰ This inter-Member State trade clause is vital in EU competition law since it defines the boundaries between the competences of EU and national law.¹⁴¹ The final requirement is the 'de minimis doctrine', which states that the agreement must have an appreciable impact on competition.¹⁴²

If the criteria of Article 101(1) have been satisfied, the agreement will be prohibited unless it satisfies the requirements of Article 101(3). For this legal exception to be applicable, four conditions must be satisfied:¹⁴³ It must improve the production or distribution of goods or promote technical or economic progress; secondly, the consumers must receive a fair share of the resulting benefits; furthermore, the restrictions must be indispensable to the fulfilment of the objectives of the agreement; and finally, the agreement should not lead to the elimination of competition in respect to a substantial part of the products.¹⁴⁴ Instead of having to follow these four steps, the Commission, acting under powers conferred upon it by regulations of the Council, has the competence to establish certain block exemptions. These exemptions obviate the need for a separate analysis by automatically excluding certain types of agreements from the ambit of Article 101(1).¹⁴⁵

Article 102 TFEU is concerned with unilateral conduct of dominant firms which act in an abusive manner.¹⁴⁶ The provision states that: "any abuse by one or more undertakings of a dominant position within the internal market shall be prohibited as incompatible in so far as it affects trade between Member States."¹⁴⁷ The concept of undertaking has already been explained under the chapeau of Article 101 TFEU, the same reference could be made to the effect on trade between Member States. An important requirement is the presence of a dominant position.

To properly assess its position it must first become clear on what market the firm is operating, there are three variables which need to be clarified: the product market, the geographical market, and the temporal factor. The general approach of the Commission and the ECJ has been to focus upon interchangeability in order to determine the relevant market.¹⁴⁸ In order to address anti-competitive conduct by a buyer, the general test of looking at whether goods are interchangeable with other products must be reversed, in the sense that it is now the supply side which gets investigated. The starting point is therefore the seller and not the buyer. In terms of the product dimension it needs to be assessed whether suppliers would refuse to sell to their buyers and instead switch to selling to other buyers, which use the input for a different purpose. Similarly, for the geographical market the test is whether sellers would sell to other buyers in different geographic areas, which use the input for a similar purpose, when faced with a permanent price cut.¹⁴⁹ The European Commission has recognised that econometric techniques such as the Small but Significant Non-transitory Decrease in Price (SSNDP) test could be helpful in defining the market.¹⁵⁰

Once the relevant market has been defined, it must then be decided whether the undertaking is

140 Ibid. p. 983.

141 Case 22/78, *Hugin Kassaregister AB and Hugin Cash Registers Ltd v. Commission* [1979] ECR 1869, p. 1899; Whish and Bailey (n. 17) p. 144.

142 Case C-5/69, *Völk v. Vervaecke* [1969] ECR 295; Whish and Bailey (n. 17) pp. 140-144.

143 Craig and de Búrca, (n. 128) p. 984.

144 Article 101(3) TFEU.

145 Craig and de Búrca, (n. 128) p. 987; Whish and Bailey (n. 17) p. 168.

146 Whish and Bailey (n. 17) p. 173.

147 Article 102 TFEU.

148 Craig and de Búrca, (n. 128) p. 1012.

149 Van Doorn (n. 3) p. 137-138.

150 Commission's *Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements* (Guidelines on Horizontal Agreements), OJ [2011] C-11/1, paras. 197-199; Kokkoris, 'Buyer Power Assessment in Competition Law: A Boon or a Menace?' (n. 1) pp. 147-148.

dominant within that market. For this it is necessary to measure to a certain extent the firm's market power. According to the Court, a dominant position relates to “a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customer and ultimately of its consumers.”¹⁵¹ An undertaking will only be condemned if it has abused its dominant position.¹⁵² According to the ECJ in *Hoffmann-La Roche* the concept of abuse must be broadly formulated.¹⁵³ Finally, it must be remarked that Article 102 does not have an equivalent to Article 101(3). To compensate for this absence, the Court and Commission can apply the concepts of objective justification and proportionality to provide some flexibility.¹⁵⁴

Mergers are the final component of EU competition law. There are three variants of mergers: the horizontal mergers are those between companies on a similar market level exercising the same function; vertical mergers are between companies that operate at different distributive levels of the same product market; while conglomerate mergers are between firms that have no link with one another in any product market. The rules on mergers at the European level are mainly contained in the EUMR, which will only be applicable if there is a concentration.¹⁵⁵ The concept of a concentration is defined in Article 3, which states that a concentration shall be considered to arise where a permanent change of control results from either a complete merger of previously independent undertakings, or the acquisition of one or more undertakings by a person or multiple persons already in control of at least one undertaking or by one or more undertakings itself.¹⁵⁶

151 Case C-27/76, *United Brands Company and United Brands Continentaal BV v. Commission* [1978] ECR 207, para. 65; Case 85/76, *Hoffman-La Roche & CO AG v. Commission* [1979] ECR 461, para. 38.

152 Craig and de Búrca, (n. 128) p. 1024.

153 Case 85/76, *Hoffman-La Roche & CO AG v. Commission* [1979] ECR 461, para. 91.

154 Craig and de Búrca, (n. 128) p. 1041.

155 *Ibid.* p. 1049.

156 Article 3(1) EUMR.

CHAPTER V: BUYER POWER IN EU COMPETITION LAW

5.1 Buyer Collusion

The first type of buyer conduct that could be identified as a potential competition concern is collusion. When rival buyers engage in collusion, they agree on the material terms on which they compete on their input market in order to jointly exert buyer power. Collusion thus enables firms to create, strengthen or maintain market power.¹⁵⁷ Unless collusion is accompanied by overriding efficiency gains, jointly exerting market power can be harmful to both static and dynamic efficiency.¹⁵⁸ It should also be noted that collusion may be easier to sustain when it involves an explicit agreement between firms instead of a tacit agreement.¹⁵⁹ A buyer cartel is a special case of explicit collusion and could take many forms.¹⁶⁰

It is important to acknowledge that when horizontal competitors enter into cooperation agreements with one another, substantial efficiency gains could be yielded.¹⁶¹ Horizontal cooperation can be a means to share risk, save costs, increase investments, collect knowledge, enhance the quality and variety of products, and speed up the innovation process.¹⁶² However, horizontal cooperation agreements could also lead to competition problems.¹⁶³ This ambiguous role of horizontal cooperation agreements provide a challenge for the Commission in terms of taking both its adverse and pro-competitive effects into account. The cartel prohibition of Article 101 TFEU provides the legal framework for this balanced assessment.¹⁶⁴

One of the most blatant and undesirable examples of collusion is that rival buyers could eliminate price competition on their input markets by agreeing on their input prices: so-called input price fixing.¹⁶⁵ Article 101(1)(a) TFEU expressly identifies the direct or indirect fixing of purchase prices as conduct that may in particular restrict competition within the common market.¹⁶⁶ Perhaps due to this explicit reference in Article 101, the fixing of input prices has typically been asserted as conduct that should be judged as having the object of restricting competition, so there is generally no need to also show that input price fixing has the effect of restricting competition.¹⁶⁷

Alternatively, undertakings could eliminate competition by agreeing to apportion particular markets between themselves, which is known as horizontal market-sharing. This entails that they agree not to operate on some procurement markets so to create, strengthen or maintain buyer power in other markets.¹⁶⁸ They are specifically mentioned in the Treaty.¹⁶⁹ While market sharing generally comes with anti-competitive effects, there are some exceptional cases in which horizontal market sharing should be permitted because it enhances efficiency, for instance by enabling undertakings to

157 Van Doorn (n. 3) p. 103.

158 Ibid. pp. 51-52, 105.

159 Ibid. p. 104.

160 Ibid.

161 Ibid. p. 105.

162 Guidelines on Horizontal Agreements, para. 2.

163 Guidelines on Horizontal Agreements, para. 3.

164 Whish and Bailey (n. 17) p. 585.

165 Van Doorn (n. 3) pp. 51-52, 104.

166 Article 101(1)(a) TFEU.

167 Whish and Bailey (n. 13) p. 523; Ezrachi (n. 73) p. 55.

168 Van Doorn (n. 3) pp. 51-52.

169 Article 101(1)(c) TFEU.

compete more effectively with large undertakings through combining their advertising and promotion efforts.¹⁷⁰

Collusion between buyers could also show itself on 'bidding markets'. Transactions take place on these market through specific bidding processes such as an auction. Collusion on bidding markets is referred to as 'bid rigging'. This entails that firms agree on a specific bid or agree not to bid against each other, so as to obtain the input product against a very low price.¹⁷¹

A distinction could be drawn in terms of the characterisation of an infringement between the above mentioned forms of buyers' cartels and mere joint purchasing.¹⁷² A buyers' cartel involves an agreement in which the buyers do not organise, consolidate or integrate their purchasing or any other functional activity, which is unlike a joint purchasing agreement. Likewise, in a buyers' cartel, maximum purchasing quotas are frequently imposed, whereas in joint purchasing agreements, higher volumes of purchases are more beneficial for the members of the agreement.¹⁷³

Within the context of buyer power, efficiency gains from cooperation between rival buyers may especially be obtained when undertakings engage in these so-called joint purchasing agreements. These purchasing collaborations are often concluded by small and medium-sized enterprises to jointly purchase units in order to present a collective front to the suppliers, thereby improving their bargaining position in negotiations and in doing so achieving similar volumes and discounts as bigger traders.¹⁷⁴ Such agreements do not necessarily raise antitrust concerns and are normally pro-competitive.¹⁷⁵ These buying alliances could enable participants to achieve economies of scale,¹⁷⁶ among others due to the centralisation of ordering and by combining storage, transaction and transportation functions.¹⁷⁷ In addition, the sharing of buying price information is likely to increase pressure on suppliers to reduce price discrimination among buyers, which enhances allocative efficiency.¹⁷⁸ Joint purchasing will also free up resources in order to encourage dynamic efficiency in the long term.¹⁷⁹ Moreover, when suppliers have monopsony power, joint purchasing may allow buyers to create countervailing buyer power and thereby mitigate the harmful effects of suppliers' market power. However, if suppliers have no market power, then joint purchasing typically harms economic efficiency through the exercise of monopsony power. Furthermore, due to the fact that joint purchasing could also cause the firms involved to obtain similar cost structures, joint purchasing may also facilitate collusion on the output market.¹⁸⁰

The Guidelines on horizontal agreements set out three potential concerns raised by joint purchasing agreements.¹⁸¹ The first arises in the purchaser's selling market: when downstream competitors purchase a large part of their products together, their incentives for price competition on the selling market may be severely reduced. Especially in the situation where the parties have a significant degree of market power on the selling market, then the lower purchase prices achieved by the joint

170 Whish and Bailey (n. 17) pp. 530-531.

171 Van Doorn (n. 3) p. 104.

172 I. Kokkoris [2007], 'Purchase price fixing: a per se infringement?', *European Competition Law Review*, 28(9), p. 473.

173 Ibid. p. 477.

174 Guidelines on Horizontal Agreements, para. 116; Ezrachi (n. 73) p. 47.

175 Kokkoris, 'Purchase price fixing: a per se infringement?' (n. 172) p. 474.

176 Ibid. p. 477.

177 Guidelines on Horizontal Agreements, para. 217.

178 Kokkoris, 'Purchase price fixing: a per se infringement?' (n. 172) p. 474.

179 Van Doorn (n. 3) p. 105.

180 Ibid.

181 Whish and Bailey (n. 17) p. 604.

purchasing arrangement are unlikely to be passed on to consumers.¹⁸² Secondly the Commission is concerned that if the parties have a significant degree of buying power, they may pressurise suppliers into reducing the range or quality of products they produce, which may bring about restrictive effects on competition such as quality reductions, the lessening of efforts to innovate, and ultimately result in sub-optimal supply.¹⁸³ Such pressure may manifest itself in the reduction of the quality of output sold to the buyers in order for the suppliers to regain profitability. Such 'quality erosion' directly affects consumers. The ways in which quality erosion may materialise could be in the form of 'undetected quality erosion' or be part of a process of 'agreed quality erosion'.¹⁸⁴ The first situation could be tempting for suppliers when the product is not quality dependent and the buyer does not possess the technology or incentive to screen the quality of the product, the reductions in quality may largely remain undetected. Even when the product is monitored by the buyers and the sellers thus are likely to refrain from quality erosion in their dealing with that buyer, they could still try to balance their books by reducing the quality of output sold to other buyers. In such instances, quality erosion represents an externality of the buyer power. An alternative option concerns a scenario in which the interests of the buyer and the seller align and both agree to reduce the quality of the product. This could occur when the buyer, under pressure to reduce its outlet price, is demanding lower input costs from the sellers. They, in turn, communicate the impossibility of decreasing the price without compromise on quality. Subject to the buyer having no viable outside options, agreed quality erosion may then provide a mutually beneficial solution to the detriment of consumers.¹⁸⁵ And lastly, the agreements between rival buyers could be used to foreclose competing purchasers by limiting their access to efficient suppliers or essential input.¹⁸⁶

There is a certain amount of discrepancy in the legal and academic community regarding purchase price fixing. The current framework is somewhat hazy in that it does not provide a clear dividing line between the object and effect approach in regard to price fixing.¹⁸⁷

Competition legislation and case law thus provide conflicting signals as to whether the treatment of an infringement involving fixing of purchase prices can be considered to be a per se infringement, in other words, an infringement by object.¹⁸⁸ In particular, the characterisation of purchase price fixing agreements seems to be different in the text of Article 101(1) TFEU and the Guidelines on horizontal agreements. According to the Treaty, agreements that directly or indirectly fix purchase prices constitute infringements of competition law.¹⁸⁹ However, the Commission diverges from the text of Article 101(1) and seemingly implies that such agreements are only seen as restrictions of competition by object if the cooperation does not truly concern joint buying, but serves instead as a tool to engage in a disguised cartel, such as otherwise prohibited price fixing, output limitation or market allocation.¹⁹⁰ There is thus a disagreement on the crucial question of what type of enforcement standard should be applicable in instances in which input price fixing does not result in downstream collusion.¹⁹¹

As has been stated above, the Commission rules that purchasing agreements would be unlikely to

182 Guidelines on Horizontal Agreements, para. 201.

183 Guidelines on Horizontal Agreements, para. 202.

184 A. Ezrachi and K. de Jong [2012], 'Buyer power, private labels and the welfare consequences of quality erosion', *European Competition Law Review*, 33(5), pp. 258-259.

185 Ezrachi and de Jong (n. 184) p. 259.

186 Guidelines on Horizontal Agreements, para. 203.

187 Ezrachi (n. 73) pp. 60, 63.

188 Kokkoris, 'Purchase price fixing: a per se infringement?' (n. 172) p. 473.

189 Article 101(1)(a) TFEU.

190 Guidelines on Horizontal Agreements, para. 205.

191 Ezrachi (n. 73) p. 63.

have as their object the restriction of competition, unless they amounted to a disguised cartel.¹⁹² Such an approach supports buying groups which are price-takers, but would condemn price-makers.¹⁹³ Price-taking represents an amalgamation of orders that lead to discounts, benefits, and improved trade conditions. This differs from price-making, which involves input price fixing.¹⁹⁴ The assumption that forms the core of this approach is that the costs of collusive price fixing will outweigh any benefits and that efficiencies derived from a buying alliance can be attained without the need to fix the input price.¹⁹⁵ An agreement to fix purchase prices should therefore be treated as a per se infringement, whereas a joint purchasing agreement is dealt with more leniently through an effects assessment.¹⁹⁶

However, there is also an alternative view in the literature, according to which joint purchasing involving the fixing of purchase pricing can be considered to constitute a per se infringement, irrespective of the creation of a disguised cartel in the downstream market.¹⁹⁷

Furthermore, the effects of joint purchasing should be considered in the context of the relevant procurement market, but it may also be necessary to look at the selling market in case the parties to the joint purchasing agreement are also actively competing on that market.¹⁹⁸ It should be noted however that joint purchasing arrangements are less likely to give rise to competition concerns when the parties do not have market power on the selling side of the market.¹⁹⁹ Presumably for this reason, the Commission considers it in most cases unlikely that market power exists if the combined market share of the parties does not exceed 15 percent on both the purchasing and on the selling market. Provided that coordination amongst rival buyers does not have as its object the restriction of competition, the conditions of Article 101(3) are fulfilled and the Commission is therefore unlikely to target these joint purchasing arrangements between firms with a market share lower than 15 percent on both markets.²⁰⁰

Regarding the role of welfare standards in terms of the treatment of buyer collusion, the formulation of Article 101 is crucial. It should be recalled here that Article 101(1) does not stipulate exactly which welfare standard is to be applied, but instead requires certain conditions to be satisfied, among which is the choice between restriction by object or effect.²⁰¹ It can further be remarked that the European Commission appears to apply the consumer welfare standard in its enforcement practice. The Commission has emphasised that it takes the likelihood of harmful effects on the downstream market into consideration. In *Italian Raw Tobacco*, the Commission took into consideration that the existence of the purchasing cartel could potentially be detrimental to consumers.²⁰²

However, as has been explained earlier, buyer cartels do not necessarily harm the welfare of final consumers in all instances. In particular when there is no selling power on the output market, the requirement of consumer harm might lead to a failure to prohibit specific buyer cartels that may inflict substantial harm to economic efficiency in aggregate. Thus, if firm cooperation can only fall

192 Kokkoris, 'Purchase price fixing: a per se infringement?' (n. 172) pp. 478, 486.

193 Ezrachi (n. 73) p. 58.

194 Ibid. p. 69; Ibid. footnote 57.

195 Ibid. p. 58.

196 Kokkoris, 'Purchase price fixing: a per se infringement?' (n. 172) p. 478; Guidelines on Horizontal Agreements, paras. 206-207.

197 Kokkoris, 'Purchase price fixing: a per se infringement?' (n. 172) pp. 473, 477, 486-487.

198 Guidelines on Horizontal Agreements, paras. 198-199.

199 Guidelines on Horizontal Agreements, para. 204.

200 Guidelines on Horizontal Agreements, para. 208.

201 Van Doorn (n. 3) p. 144.

202 Case COMP/C.38.281/B.2, *Raw Tobacco Italy*, OJ L353/45, para. 282.

under Article 101(1) if it affects final consumer welfare, then this approach might lead to under-enforcement.²⁰³ This concern has been mitigated by the *T-Mobile* and *GlaxoSmithKline* judgements, where the ECJ clarified that harm to consumer prices and therefore consumer welfare is not a necessary condition for establishing that conduct has as its object the restriction of competition.²⁰⁴

This initial focus on consumer welfare under Article 101(1) probably finds its source in the formulation of Article 101(3), where an explicit reference to consumer welfare is made in the sense of allowing consumers to receive a fair share of the resulting benefit.²⁰⁵ These benefits must be passed on to the parties' customers to an extent that at least compensates them for any actual or likely negative impact caused by the restriction on competition; the net effect of the agreement must at least be neutral.²⁰⁶ In its Guidelines on horizontal agreements the Commission takes it one step further by requiring the efficiency gains to actually outweigh the restrictive effects caused by the joint purchasing arrangement.²⁰⁷ This requirement of Article 101(3) that efficiency gains must be passed on to consumers might lead to a situation where the Commission chooses to ignore efficiency gains that are not passed on. This could result in the wrongful prohibition of conduct that does not harm economic efficiency and therefore induce over-enforcement.²⁰⁸

5.2 Exclusionary Buyer Conduct

The second category of company behaviour that may amount to anti-competitive behaviour is exclusionary conduct. This essentially entails that a firm with a very high degree of market power has the ability to either exclude its competitors, or to deter potential entrants from entering the same or an adjacent market.²⁰⁹ Such firms may have an incentive to harm the competitive process by incurring a short term sacrifice in the form of an economic loss or lower profit, so as to force another firm to exit or to deter entry on the market. Exclusionary conduct could thus involve an act that on the outset would make no economic sense, except for the tendency to eliminate or lessen competition, but after which these initial losses can be recouped due to the ability of the firm to exercise considerable market power.²¹⁰

It is vital to realise that the treatment of exclusionary conduct in EU competition law is dispersed. Vertical agreements are made between multiple parties at differing levels of the production process, the restraints on competition that come with these agreements are usually addressed under Article 101 TFEU, the application of which is without prejudice to the application of Article 102 TFEU.²¹¹ This latter Article covers exclusionary conduct if it concerns unilateral behaviour. It should further be noted that within the specific context of buyer conduct, exclusionary conduct may concern practices that are analogues to exclusionary conduct by a seller.²¹²

Exclusionary conduct can take many different forms, with all these various practices being largely

203 Van Doorn (n. 3) p. 145.

204 Case C-8/08, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v. Raad van Bestuur van de Nederlandse Mededingsautoriteit* [2009] ECR I-4529, paras. 36-39; Case C-501/06 P, *GlaxoSmithKline v. Commission* [2009] ECR I-9291, para. 104.

205 Article 101(3) TFEU; Van Doorn (n. 3) p. 146.

206 Commission's *Guidelines on the application of Article 101(3) TFEU* (Guidelines on the application of Article 101(3)), OJ [2004] C-101/97, para. 85.

207 Guidelines on Horizontal Agreements, para. 219.

208 Van Doorn (n. 3) p. 148.

209 Van Doorn (n. 3) pp. 53-54, 149.

210 Ibid. pp. 54-55.

211 Ibid. p. 150.

212 Ibid. p. 152.

interchangeable. When foreclosure is targeted at a rival buyer, a firm may choose between a variety of strategies such as exclusivity contracts, fidelity rates or predatory buying. Alternatively, when exclusionary conduct is aimed at a firm operating on an adjacent market, the excluding firm might resort to refusal to deal, tying or reciprocal dealing.²¹³

Vertical restraints often have positive effects. Buyers are often able to take a free ride on the investment of another buyer. An exclusive distribution agreements may be used to prevent this problem of free-riding from happening. Economies of scale could also be achieved. Vertical externalities issue could be solved, Through selective distribution one could promote the brand image of a product and increase its attractiveness to consumers by bringing about uniformity and quality standardisation.²¹⁴

In terms of vertical agreements, negative effects are likely to occur when at least one of the parties has some degree of market power and the agreement contributes to the creation, maintenance or strengthening of that market power or allows the parties to exploit it.²¹⁵ Paragraph 100 of the Guidelines on Vertical Restraints notes four possible negative effects. These could consist of anti-competitive foreclosure of other suppliers or buyers by raising barriers to entry, softening of competition, possibly through a facilitation of both explicit and tacit collusion, often referred to as a reduction of inter-brand competition in case of suppliers and intra-brand competition in case of buyers, and lastly, the creation of obstacles to market integration²¹⁶

Article 101 may specifically apply to exclusivity contracts such as exclusive distribution, selective distribution, most-favoured-customer clauses and resale price maintenance. In its Guidelines on Vertical Restraints, the Commission specifically recognises that these practices may lead to competition problems that have been identified within the context of buyer power. For instance, the Commission notes its concern that these practices might under certain circumstances lead to the anti-competitive foreclosure of other distributors.²¹⁷ This also holds for obligations concerning exclusive supply,²¹⁸ upfront access payments, which are fees to obtain access to the distribution network, such as slotting allowances,²¹⁹ and exclusive customer allocation, which entails the sale to only one distributor for resale to a particular group of customers.²²⁰ In the situation in which exclusionary conduct is aimed at the exit of a rival buyer, referred to as 'horizontal exclusion', the most logical strategy would be for the buyer to impose or demand exclusivity contracts from its suppliers. With an 'exclusive distribution agreement', a buyer might foreclose its rivals by demanding from its suppliers the sole right to sell their products. De facto similar results may also be achieved by other contractual obligations, such as demanding specific selection criteria for distributors, also known as 'selective distribution', or demanding contractual obligations for the supplier not to sell to another retailer at a lower price, which is the 'most-favoured-customer' clause, or to sell on an output market only at a minimum or fixed resale price, which is 'resale price maintenance'.²²¹

In terms of Article 101(3) TFEU, the Commission has primarily used block exemptions to deal with

213 Van Doorn (n. 3) p. 149.

214 Commission's *Guidelines on Vertical Restraints* (Guidelines on Vertical Restraints), OJ [2010] C-130/1, paras. 106-107; Whish and Bailey (n. 17) pp. 627-628.

215 Guidelines on Vertical Restraints, para. 97.

216 Whish and Bailey (n. 17) p. 626.

217 Guidelines on Vertical Restraints, para. 151.

218 Guidelines on Vertical Restraints, para. 193.

219 Guidelines on Vertical Restraints, para. 204.

220 Guidelines on Vertical Restraints, para. 168.

221 Van Doorn (n. 3) p. 106.

vertical restraints.²²² There is no need to consider the application of Article 101(1) to agreements that are within the safe haven of the block exemption.²²³ Most vertical agreements where the market share is below 15 percent fall outside Article 101(1) altogether, while those agreements that are caught by 101(1) could still be block exempted under Regulation 330/2010²²⁴, provided that the supplier's and the buyer's market share is below 30 percent and that the agreement does not contain any of the 'hardcore' restrictions set out in this Regulation.²²⁵ Hardcore restrictions such as resale price maintenance are presumed to always infringe Article 101(1) and do not qualify for the criteria of paragraph (3).²²⁶

It is clear that exclusive dealing agreements are also capable of infringing Article 102, it can apply to an exclusive supply obligation, but also to an exclusive purchasing obligation. A difference between the application of Article 101 and 102 TFEU to exclusive dealing agreements is that in Article 101 both of the parties to the agreement will have committed an infringement and will be liable accordingly, in the case of Article 102 however, it is the dominant firm that infringes the competition rules, competition enforcement thus focuses on the dominant firm's unilateral behaviour.²²⁷

The elements of dominance and abuse in Article 102 TFEU require a relatively high degree of case-specific analysis in order to establish an infringement. The European Commission seems to focus in its enforcement of Article 102 on the effects of specific practices on consumer welfare. Indeed, in its Guidance Paper on Article 102, the Commission states that its enforcement practice focuses on situations where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers.²²⁸

*British Airways*²²⁹ is one of very few cases in the EU, if not the only one, that has been explicitly recognised as a case involving abusive behaviour by a dominant buyer on an input market. In *British Airways*, the Commission and Courts take the position that consumer harm does not necessarily have to be required to come to a violation of Article 102 TFEU: Provision 102 is aimed not only at practices which may cause prejudice to consumers directly, but also at those which are detrimental to them through their impact on the competitive structure.²³⁰ This mitigates concerns of under-enforcement.

As far as countervailing buyer power is concerned, countervailing power is less likely to be the case in cases involving dominance, since any countervailing power is likely to have been exercised by the time there is evidence of dominance in the market.²³¹

222 Craig and de Búrca, (n. 128) p. 989.

223 Guidelines on Vertical Restraints, para. 110.

224 Commission Regulation No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practice.

225 Vertical Regulation No 330/2010, Articles 2-4; Whish and Bailey (n. 17) p. 682.

226 Vertical Regulation No 330/2010, Article 4.

227 Whish and Bailey (n. 17) pp. 682-683.

228 *Guidance Paper on Article 102 Guidance on the Commission's enforcement priorities in applying Article 102 of the TFEU to abusive exclusionary conduct by dominant undertakings* (Guidance Paper on Article 102), OJ [2009] C-45/02, para. 19; Van Doorn (n. 3) pp. 156-157.

229 *Virgin/British Airways* [2000] OJ L30/1; Case T-219/99, *British Airways v. Commission* [2003] ECR II-5917; Case C-95/04 P, *British Airways v. Commission* [2007] ECR I-2331.

230 C-95/04 P, *British Airways v. Commission* [2007] ECR I-2331, para. 106.

231 Kokkoris, 'Buyer Power Assessment in Competition Law: A Boon or a Menace?' (n. 1) p. 153.

To return to the subject of specific conducts, a buyer might also be able to foreclose an opponent by engaging in fidelity rebates towards its suppliers. Fidelity rebates, interchangeably known as loyalty rebates, usually involve a firm granting customers whose purchases exceed a certain threshold a rebate on additional purchases, known as 'incremental rebates', or on all purchases, the so-called 'retroactive rebates'.²³² The Commission has recognised that fidelity rebates can have similar effects on an procurement market.²³³ Fidelity rebates could also lead to foreclosure of a rival.²³⁴ If a firm has a large non-contestable share, then a very aggressive, retroactive pricing scheme, might amount to anti-competitive behaviour, giving that this is not replicable for rivals due to scale economies.²³⁵ The Commission also emphasises that fidelity rebates can promote economic efficiency, loyalty rebates could for instance allow a firm to offer competitive prices, so that lower prices are offered for units for which the supply is unlikely to change, and higher prices are offered to suppliers that are more likely to switch.²³⁶ The Commission will consider claims made by dominant undertakings that rebate systems achieve advantages which are passed on to customer.²³⁷

Furthermore, there is also the option for a firm to engage in predation, in order to gain or solidify monopsony power on the input market. In such a scenario a buyer might cause a rival's exit from the market, or permanently shrink its capacity, through substantially increasing its own purchases of a particular input, known as 'anti-competitive or predatory overbuying'.²³⁸ There is also a closely related issue where overbuying inputs could be used as an exclusionary strategy in order to raise rivals' costs (RRC) and thereby gain market power, this time in the output market.²³⁹ There is a difference between the two strategies in terms of their targeted markets. The target for predatory overbuying is buyer power in the input market, while the target for RRC overbuying is seller power in the output market.²⁴⁰ Since successful predatory buying requires a firm to increase its own costs, it might be a strategy that is too expensive for some firms. After all, the predating buyer will have to increase the price for all its purchases, which tends to attract even more supply, and moreover requires costly decisions on what to do with the excessive amounts of inputs. The profitability of predation is therefore questionable.²⁴¹ In its Guidance Paper on Article 102, the Commission explains that it will intervene where there is evidence showing that a dominant undertaking engages in predatory conduct.²⁴²

Unlike predatory pricing, the strategy of predatory overbuying does not necessarily harm consumers. A monopolist engaged in predatory pricing in the output market attempts to recoup its investment directly from the consumers. In contrast, predatory overbuying does not necessarily inflict adverse effects upon consumers. In fact, during the 'predatory period', when the firm purchases more of the input than it would otherwise, consumers generally benefit from lower prices if the firm uses its increased input purchases to produce more output. However, during the 'recoupment period', the firm could exercise monopsony power due to facing less competition in the input market. Consumers could potentially be harmed in the recoupment period, but such harm does not necessarily offset the benefits which were already received during the 'predatory period'.²⁴³ Although

232 Guidance Paper on Article 102, para. 37.

233 *Virgin/British Airways* [2000] OJ L30/1; Case T-219/99, *British Airways v. Commission* [2003] ECR II-5917; Case C-95/04 P, *British Airways v. Commission* [2007] ECR I-2331.

234 Guidance Paper on Article 102, para. 40.

235 Van Doorn (n. 3) p. 107.

236 Van Doorn (n. 3) p. 107.

237 Guidance Paper on Article 102, para. 46.

238 S. Salop (n. 46) pp. 669, 675; Van Doorn (n. 3) p. 106.

239 S. Salop (n. 46) p. 669.

240 *Ibid.* p. 671.

241 Whish and Bailey (n. 17) p. 240; Van Doorn (n. 3) pp. 107-108.

242 Guidance Paper on Article 102, para. 63.

243 *Ibid.* pp. 671, 676.

predatory overbuying does not necessarily harm consumers, successful overbuying clearly hurts the rival buyers in the input market. They face artificially higher input costs during the predatory period and are likely to reduce their output as a result. Because they exited the market or permanently reduced their capacity, they are now unable to offset these harms during the recoupment period.²⁴⁴

The impact of predatory conduct on input suppliers varies over time: during the predatory period the suppliers benefit from the increased demand and higher prices. However, when the recoupment period arises, the input suppliers are harmed and face a reduced demand for their inputs. Mainly because a lot of rival input buyers have exited from the market or cut back their capacity, and also because the strong buyer which survives is now capable of exercising monopsony power by reducing its own input purchases in order to reduce the price it must pay for the products it continues to buy. Consequently, it is not clear whether input suppliers are put in a worse or better position by a successful predatory overbuying strategy.²⁴⁵

A firm engaging in successful RRC overbuying of inputs raises its rivals' input costs and gives the firm the market power to raise or maintain a supracompetitive price in the output market. If rivals must pay more for inputs, they will have the incentive to reduce their input purchases and production of output. In this way, the overbuying firm may be able to charge a higher output price and reduce consumer welfare.²⁴⁶

It could also be conceivable that a firm with a very high degree of buyer power has the ability and the incentive to foreclose a firm that is not a direct rival, but instead operates on a different stage in the same distribution cycle or operates on another market entirely. Such an exclusion on adjacent markets could occur when exclusionary conduct is targeted at a firm that operates on a level higher in the distribution chain than the excluding firm. The most straightforward method to do so is a refusal to deal. By simply refusing to buy a specific supplier's product or service, thereby reducing its demand below a certain threshold, it might be forced to exit the market. Similar result might be achieved by only agreeing to buy the supplier's product or service under terms of trade that are de facto equivalent to a refusal to deal, for instance by offering extremely low prices, or charging very high upfront access payments, also known as slotting allowances.²⁴⁷ The economic phenomenon of a margin squeeze deserves a mention as well. A margin squeeze can occur where a company supplies a vital input to undertakings that compete with it in the downstream market. Refusal to deal and conduct that has an equivalent effect, including margin squeezing, can be challenged under Article 102 TFEU.²⁴⁸

An alternative strategy for an undertaking is to leverage its buyer power on another market. This could happen in the form of tying, bundling and reciprocal dealing, practices which are typically addressed under Article 102(d) TFEU,²⁴⁹ but in limited scenarios they could also be applied under Article 101(1)(e).²⁵⁰ With tying, a firm with a high degree of buyer power might extend its market power onto another input market by conditioning the purchase of a product or service on the agreement that the supplier also sells another product to that buyer on another market.²⁵¹ The Commission will intervene when a dominant undertaking's tying practice involve distinct products

244 Salop (n. 46) pp. 676-677.

245 Ibid. p. 677.

246 Ibid. p. 671.

247 Van Doorn (n. 3) p. 108; Guidelines on Vertical Restraints, para. 205.

248 Guidelines on Vertical Restraints, para. 205; Case C-280/08, *Deutsche Telekom AG v. Commission* [2010] ECR I-000, [2010] 5 CMLR 1495, paras. 77-96; Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige* [2011] ECR I-000, [2011] 4 CMLR 982, para. 31; Whish and Bailey (n. 17) pp. 754-757.

249 Guidance Paper on Article 102, paras. 47-62.

250 Whish and Bailey (n. 17) pp. 690-691.

251 Van Doorn (n. 3) p. 108.

and is likely to lead to anti-competitive foreclosure.²⁵² According to the Commission, bundling usually refers to the way products are offered and priced by the dominant undertaking, which can have similar effects as tying.²⁵³ There are two types of bundling imaginable: Firstly, pure bundling, which occurs where it is only possible to purchase the products together. And secondly, mixed bundling, which entails that the products can be sold separately, but the buyer receives a discount when they are sold together.²⁵⁴ Similarly, reciprocal dealing means that a buyer will only purchase from a supplier if the supplier agrees to also purchase a product or service from the first buyer.²⁵⁵

While tying and reciprocal dealing could promote economic efficiency by having a packaged deal, something which is more attractive because there are economies of scale or scope to be achieved. Economic theory generally suggests that both these practices are not very straightforward as an exclusionary strategy. This is so, because excluding your rival on the adjacent market could also simply have happened by resorting to predatory buying in the tying situation, or predatory pricing in the reciprocal dealing case, some scepticism is therefore in place in regards to the use of these practices in order to gain market power.²⁵⁶

5.3 Mergers involving Buyer Power

The third situation that may amount to an anti-competitive outcome concerns mergers. The term merger can be divided into two separate concepts. The first is a merger itself, which is a combination of two or more firms, in which the assets and liabilities of the selling firm are absorbed by the buying one to form a joint entity. Alternatively, a merger could also be achieved in the form of an acquisition, which entails the purchase of the assets of a company by another firm.²⁵⁷

Mergers could potentially result in some sort of harm to the competitive process. After all, the aim of mergers is to bring together the ownership and management of two or more firms. As a result, instead of expanding through the competitive process, a merger therefore allows a firm to take away the business of another firm at the price of the transaction. While mergers may allow firms to create, strengthen or maintain seller power, they may also lead to a gain in buyer power. However, whether or not a merger increases market power and harms economic efficiency mainly depends on whether it involves direct competitors or firms operating on different stages in the distribution chain. The former is known as a horizontal merger, the latter is referred to as a vertical merger.²⁵⁸

Both horizontal and vertical are addressed under the EUMR. Article 2(1) EUMR stipulates various factors that the European Commission must take into account in its enforcement of the EUMR, including the market position of the undertakings concerned, barriers to entry and potential efficiency gains. Article 2(3) declares that concentrations with a Community dimension which would significantly impede effective competition in the common market, in particular as a result of the creation or strengthening of a dominant position, are deemed to be incompatible with the common market. The Commission further elaborates its approach towards horizontal and vertical mergers in its Horizontal Merger Guidelines and its Non-Horizontal Merger Guidelines, respectively.²⁵⁹

252 Ibid. p. 154.

253 Guidance Paper on Article 102, paras. 47-62.

254 Whish and Bailey (n. 17) p. 689.

255 Van Doorn (n. 3) p. 108.

256 Ibid. p. 110.

257 A. Sherman, *Mergers & Acquisitions, From A to Z* (3rd edn, American Management Association 2011) pp. 1-3.

258 Van Doorn (n. 3) pp. 55, 111, 161.

259 Ibid. p. 162.

The specific reference in Article 2(3) EUMR to the creation or strengthening of a 'dominant position' does not preclude the assessment of mergers that do not create or strengthen dominance, thereby mitigating the risk of under-enforcement. The presence of a dominant position is a primary form of competitive harm, but the relevant factors that need to be taken into account are not to be interpreted as a 'checklist' that is to be mechanically applied in each and every case.²⁶⁰ Instead the Commission stresses that the competitive analysis in each case will be based on an overall assessment of the foreseeable impact of the merger in the light of the relevant factors and conditions, which may inter alia involve an assessment of market shares and concentration threshold, the likelihood of anti-competitive effects, possible countervailing market power, the likelihood of entry and the likelihood of efficiency gains.²⁶¹

Since horizontal mergers directly reduce the number of rivals on a market, they are typically more likely to allow firms to gain market power than vertical mergers. The phenomenon that a horizontal merger allows the newly merged entity to enhance its buyer power by removing important competitive constraints is referred to as the 'unilateral or non-coordinated effect' of a merger. Moreover, horizontal mergers can also have so-called 'coordinated effects', this happens when market conditions are affected in a way in which there is a decreased number of buyers, which may in turn facilitate collusion between rival purchasers, and make it easier to sustain and thus indirectly cause an improvement in buyer power.²⁶²

Although most horizontal mergers increase buyer power at least to some extent, they are not necessarily harmful to economic efficiency since they may allow the merged firm to exercise countervailing buyer power. In the situation that suppliers have monopoly power, mergers between rival buyers may be cleared if their countervailing power can mitigate the adverse impact of the concentrated suppliers on competition.²⁶³ Furthermore, horizontal mergers provide considerable scope for gains in productive and dynamic efficiency. Mergers between rival buyers can give rise to considerable cost savings or allow the firms involved to achieve larger volumes and utilise economies of scale. This increases productive efficiency, but may also free up resources for R&D investments and therefore potentially promote dynamic efficiency.²⁶⁴

With regard to horizontal mergers, the Commission has specifically mentioned that not only seller power, but buyer power, too, may form a specific concern.²⁶⁵ 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. The Commission stresses that the merged firm may be in a position to obtain lower prices by reducing its purchase of inputs. The Commission therefore explicitly recognises the risk that the merged entity may enjoy monopsony power. However the Commission also recognises that mergers can promote economic efficiency, for instance because they can allow firms to develop countervailing buyer power. The Commission's conclusions acknowledge that a purely supply side approach is not valid when customers are more than the small and essentially passive recipients of offers from suppliers. A more careful analysis of the buying-side of the market is needed when the customers themselves can

260 *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings* (Horizontal Merger Guidelines), OJ [2004] C-31/03, paras. 2, 13; Van Doorn (n. 3) p. 162.

261 Horizontal Merger Guidelines, para. 11; Van Doorn (n. 3) pp. 162-163.

262 Horizontal Merger Guidelines, paras. 24, 42; Kokkoris, 'Buyer power in UK merger control' (n. 49) p. 177; Whish and Bailey (n. 17) pp. 869-870; Van Doorn (n. 3) pp. 56, 111-112.

263 Kokkoris, 'Buyer Power Assessment in Competition Law: A Boon or a Menace?' (n. 1) p. 159; Van Doorn (n. 3) pp. 56, 111-112.

264 Van Doorn (n. 3) p. 112.

265 Horizontal Merger Guidelines, paras. 61-63.

play an active role in influencing the structure of the supply side of the market.²⁶⁶ For the Commission to take account of efficiency claims in its assessment of a merger and be in a position to reach the conclusion that as a consequence of efficiency there are no ground for declaring the merger to be incompatible with the common market, the efficiency have to benefit consumers, be merger-specific and be verifiable. These conditions are cumulative.²⁶⁷

With regard to vertical mergers, the Commission explains its approach in its Non-Horizontal Merger Guidelines. Since vertical mergers do not concern direct rivals, they generally do not result in the loss of direct competition between the merging firms in the same relevant market.²⁶⁸ Vertical mergers are therefore generally less likely to significantly impede effective competition than horizontal mergers.²⁶⁹ In fact, there are a number of reasons why efficiency gains typically play an even more prominent role in the context vertical mergers.²⁷⁰ Just like horizontal mergers, vertical ones tend to free up resources that can be used to invest in more cost-efficiency technologies and new products and processes. Also, economic literature recognises that vertical mergers may mitigate non-price externalities, such as when retailers free ride on each other's provision of services. Presumably, the most well-known situation in which vertical mergers solve a vertical price externality involves the so-called 'double marginalisation' scenario in which successive firms in the distribution chain have seller power and there is little or no buyer power. In this scenario, the profit-maximising behaviour of the firms induces them to both charge monopoly prices, thereby causing a reduction of output and allocative efficiency on both the upstream and the downstream level. Following vertical integration, the two firms will only exercise monopoly power on one stage of the distribution chain, thereby improving economic efficiency.²⁷¹ Furthermore, the decision to merge could help to avoid recurring negotiations between buyer and seller in a bargaining process. Finally, as has already been noted in the seller power scenario of double marginalisation, vertical mergers may help the firms involved to solve a vertical price externality they may otherwise impose on each other and therefore often promote allocative efficiency.²⁷²

In very specific circumstances, non-horizontal mergers might provide the merged entity with both the ability and the incentive to engage in exclusionary conduct that could be harmful to consumers.²⁷³ With vertical integration, the Commission distinguishes between merged entities engaging in so-called 'input foreclosure' or 'customer foreclosure', in order to increase buyer power.²⁷⁴ With the former the merged entity would make it difficult for rival buyers to obtain necessary input. This makes it harder for them to compete in that market.²⁷⁵ While the latter concept would prevent rival suppliers from getting access to sufficient output channels.²⁷⁶ The assessment of both input and customer foreclosure requires an analysis of whether the merged entity would have, post-merger, the ability to foreclose access, something which requires a significant degree of market power.²⁷⁷ Secondly, the analysis also scrutinises whether the merged firm has an incentive to

266 S. Baker and A. Lofaro [2000], 'Buyer power and the Enso/Stora decision', *European Competition Law Review*, 21(3), pp. 187-189.

267 Horizontal Merger Guidelines, para. 78.

268 *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings* (Non-Horizontal Merger Guidelines), OJ [2008] C-265/07, para. 12.

269 Van Doorn (n. 3) p. 112; Non-Horizontal Merger Guidelines, para. paras. 11-14, 52-57.

270 Non-Horizontal Merger Guidelines, para. 12.

271 Van Doorn (n. 3) p. 56.

272 Ibid. p. 112.

273 Non-Horizontal Merger Guidelines, para. 15.

274 Van Doorn (n. 3) p. 165.

275 Non-Horizontal Merger Guidelines, para. 31; Whish and Bailey (n. 17) p. 878.

276 Van Doorn (n. 3) pp. 114-115; Non-Horizontal Guidelines, paras. 58, 60-77.

277 Non-Horizontal Merger Guidelines, paras. 33-39; Whish and Bailey (n. 17) p. 878.

foreclose, in other words whether it is a profitable tactic to use.²⁷⁸ And finally, it must be assessed what kind of overall impact a foreclosure strategy is likely to have on effective competition.²⁷⁹ The Commission also considers that vertical integration might make it easier for firms on the market to reach collusive outcomes.²⁸⁰

In any case, the Guidelines state that the Commission is unlikely to have competition concerns where the market share of the new entity after the merger would be below 30 percent.²⁸¹ It can further be remarked that even when the joined undertaking goes beyond this percentage, there is still no presumption from the outset against a merger above the 30 percent threshold.²⁸²

Although Article 2 EUMR contains no prescription of a specific welfare standard for assessing anti-competitive effects, the Commission appears to focus in its enforcement practice on the effects on consumer welfare. The European Commission stresses that due to the interconnection between input and output markets, the increase in buyer power could reinforce market power on the output market and thus harm consumer welfare.²⁸³ However, this raises the question whether the Commission will also assess potential anti-competitive effects in the absence of consumer harm, if not, that could lead to under-enforcement of mergers. However, it is relevant to acknowledge the Commission's contribution for the 2008 OECD Roundtable on Monopsony and Buyer Power. Here, the Commission stated that the “ultimate end user of any product should be at the centre of competition law” and that it should therefore specifically address buyer power only in the presence of consumer harm.²⁸⁴ However, the Commission also noted that “in some cases a firm may possess buyer power upstream vis-a-vis its suppliers but not also possess market power downstream”.²⁸⁵

In its contribution for the Roundtable, as well as in its approach in the *Sovion/Sudfleisch*²⁸⁶ merger, the Commission therefore recognised that there may be a need to assess potential anti-competitive effects of a merger involving buyer power in the absence of harm to consumer welfare, in particular when there is no market power on the output market. This indicates that the Commission is conscious of the risk that an approach that considers consumer harm a necessary requirement for establishing a significant impediment to effective competition might induce under-enforcement of anti-competitive mergers. However, since the Commission's Horizontal Merger Guidelines do not clearly state that the Commission may analyse anti-competitive effects of mergers involving buyer power in the absence of consumer harm, there appears to be a discrepancy with the Commission's actual approach.²⁸⁷

278 Non-Horizontal Merger Guidelines, paras. 40-46; Whish and Bailey (n. 17) p. 878.

279 Non-Horizontal Merger Guidelines, paras. 47-51, 52-57; Whish and Bailey (n. 17) p. 878.

280 Non-Horizontal Merger Guidelines, para. 79.

281 Non-Horizontal Guidelines, para. 25.

282 Non-Horizontal Guidelines, para. 27.

283 Case IV/M.784, *Kesko/Tuko* [1997] OJ L10/53; Case IV/M.1221, *Rewe/Meinl* [1999] OJ L274/1; Case COMP/M.1684, *Carrefour/Promodes* [2000] OJ C164/5; Horizontal Guidelines, para. 61.

284 OECD (2008), *Roundtable on Monopsony and Buyer Power*, pp. 255-256.

285 OECD (2008), *Roundtable on Monopsony and Buyer Power*, pp. 256-257.

286 Case COMP/M.3968, *Sovion/Sudfleisch* [2006] OJ C124/33.

287 Van Doorn (n. 3) pp. 166-169.

Conclusion

This thesis has focused on the subject matter of buyer power through the perspective of a law and economics approach. Buyer power is nowadays considered to be a hot topic within the EU, with the intermediate purchasing side of the market having witnessed a severe increase in concentration in recent years, in particular with the European retail sector. In that regard it is remarkable that the Commission has not made major changes in its approach towards buyer power in order to adapt to these new realities on the market-place. On the contrary, EU competition policy seems to have moved towards an approach in which the focus is on maintaining the effective competitive process and the protection of consumer welfare, instead of protecting market-players from competition. In that regard one could wonder whether the substantive legal framework of EU competition law is still sufficiently equipped to deal with the present issues of buyer power.

The discussion on the appropriate treatment of buyer power by EU regulators is a complex one. After all, the economic effects of purchasing power are ambiguous: depending on the situation, it is capable of being both a boon and a menace to the market and final consumers. As a result, the research question was: “In which situations should buyer power be seen in either a positive or negative light, and does current EU competition law provide for an appropriate legal framework to find the right balance between limiting the harmful effects of buyer power, yet at the same time allowing the beneficial effects of buyer power to flourish?”

It is crucial to understand that buyer power could be separated into two different forms. On the one hand there is monopsony power, which is buyer power enjoyed by a purchaser in relation to sellers that have no market power. The exercise of this form of buyer power typically harms economic efficiency. However, there is also countervailing buyer power, which is buyer power in the relation with suppliers that have seller power. Such countervailing buyer power tends to promote economic efficiency, because it prevents the seller from exercising monopoly power. It must be stated that these remarks are generalisations, as the welfare effect depends on the details of an given situation. At a more general level, the effects of buyer power are still somewhat dubious, with opposing theoretical analyses preaching different results, as shown by the discussion on the waterbed effect, the anti-waterbed effect and the effects of buyer power on dynamic efficiency.

It is generally understood that competition promotes economic efficiency. Accordingly, EU competition policy should refrain from challenging market power that is the result of a firm's superior efficiency. Instead, regulators should address anti-competitive behaviour which allows companies to create, strengthen or maintain buyer power by harming the competitive process. This thesis has identified three categories that can result in anti-competitive outcomes: collusion, exclusionary conduct and mergers.

Buyer collusion involves the coordination between rival purchasers on the terms on which they compete on their input market in order to jointly exert buyer power. The legal framework of the EU covers this competition concern under Article 101 TFEU. Exclusionary buyer conduct concerns the ability of a company with a high degree of market power to exclude a rival purchaser or to deter potential entrants from the market. The treatment of exclusionary conduct is dispersed, with vertical restraints qualifying as an agreement being under the scope of Article 101 TFEU, whereas unilateral behaviour gets addressed under Article 102 TFEU. Mergers could also give rise to buyer power issues, in particular the horizontal version may pose such concerns. Both horizontal and vertical mergers are covered by the EUMR.

Based upon the above reasoning, it seems that the current substantive legal framework is capable of addressing the potential harmful effects of purchasing power in relation to anti-competitive conduct. It can therefore be concluded that buyer power concerns are sufficiently addressed under the legal framework of the EU, although there remain doubts as to its actual implementation by the Commission.

In relation to that, a final critical comment must be issued regarding the consumer welfare standard used. Although the legal framework technically does not prescribe a specific welfare standard to be applied, in practice the European Commission seems to consider that harm to consumer welfare is a necessary requirement in order to establish anti-competitive effects. There are two main issues with applying this type of welfare standard as opposed to a total welfare standard. One could imagine the situation where buyer conduct gives rise to efficiency gains that do not necessarily benefit end-users. Applying a consumer welfare standard would then result in wrongfully prohibiting behaviour that actually benefits economic efficiency as a whole. Not taking these efficiency gains into account because they are not passed on to consumers would then lead to over-enforcement. The second scenario is that anti-competitive buyer conduct may create monopsony power, which typically harms economic efficiency, but does not necessarily affect consumers. In such a situation there is a risk of under-enforcement.

However, there are signs that the European Commission is aware of this problem and might consider assessing harm on an input market even when there is no disadvantage to final consumers. This does mean that there is currently a discrepancy between the actual treatment of buyer conduct and the approach outlined by the Commission in its guidelines. This contradiction should be rectified, for instance by explicitly stating in the Commission's guidelines that while the application of a consumer welfare standard is preferable, harm to economic efficiency may also be evaluated if it does not impact final consumers.

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