

QUESTIONNAIRE  
ON ABUSE OF SUPERIOR BARGAINING POSITION  
(SPECIAL PROJECT)

This questionnaire seeks information on the analysis and treatment of “abuse of superior bargaining position” in business to business relations in ICN member jurisdictions. In jurisdictions that regulate “abuse of superior bargaining position,” the concept typically includes, but is not limited to, a situation in which a party makes use of its superior bargaining position relative to another party with whom it maintains a continuous business relationship to take any act such as to unjustly, in light of normal business practices, cause the other party to provide money, service or other economic benefits. (For example, acts such as request for provision of supplier’s labor without compensation and coercive collection of contributions, exercising buying power, are considered abusive in Japan.) A party in the superior bargaining position does not necessarily have to be a dominant firm or firm with significant market power.

A. How, if at all, is “abuse of superior bargaining position” defined in business to business relations in your jurisdiction? Does the definition apply to (a) both supplier and buyer sides of the market or (b) to one of these sides only? If option (b) is chosen, to what side of the market does it apply in your jurisdiction and what are the reasons for applying the concept solely to it?

**§ 4 para 3 of the Austrian Cartel Act provides for that dominance is also given in a situation where a company has a superior position on the market vis-à-vis their suppliers or customers, in particular when the affected suppliers or customers are dependent on the maintenance of business relations with this company in order to avoid very heavy financial losses. The Austrian Cartel Act therefore explicitly incorporates the concept of economic dependency in its definition of a dominant market position applying to both sides of the market (buyers and sellers - option a). There is no specific provision defining the abuse of a superior bargaining position, however.**

**In this context it shall be noted that another law, not primarily aimed at protecting competition but local supply (the so-called “Nahversorgungs-Gesetz”), prohibits a number of practices, such as e.g. discriminatory practices or demanding payments or services without equivalent. These rules may also be enforced by the Competition Authority. Market dominance is no essential criteria for these rules to apply.**

B.

1.

(1) Does your jurisdiction have:

a. Competition laws and/or guidelines that apply to the prohibition of “abuse of superior bargaining position” in business to business relations? **see above in A)**

b. Other laws and regulations that apply to the prohibition of “abuse of superior bargaining position”? **see above in A)**

*If “no” for both a. and b., please proceed to question C.*

*(For those jurisdictions where such acts mentioned above are regulated, please respond to the following questions.)*

(2) How are such acts regulated, including whether these rules are handled by the competition agency and/or handled under the rubric of competition policy?

**See comments in A); Alleged abuses of a superior bargaining position (as defined in § 4/3 Austrian Cartel Act) and infringements of the law protecting local supplies fall within the competences of the Competition Authorities.**

(3) Why are such acts regulated?

**Possible abuses of superior bargaining positions have always been a political concern in Austria; this led to the inclusion of the concept of economic dependency into the Cartel Act and to the competence of the Competition Authority to pursue infringements of the Act on the protection of local supplies likewise.**

(4) Please provide the text (in English if available) of your jurisdiction’s rules (including rules other than competition laws) on “abuse of superior bargaining position.”

**No English translation available.**

(5) If there are different regimes to address this situation (competition law and other laws) how are competences defined/interventions coordinated?

**The Superior Court (OGH 3.4.2001, 4 Ob 34/01f ) held in one of its rulings that the Cartel Act’s general rules on abusive behaviour do not derogate those contained in the Act protecting Local Supplies insofar as the latter also apply to behaviour of non-dominant undertakings and moreover specify the prohibited conduct.**

2.

(1) Which of the following criteria do you use to assess superior bargaining position? Please mention for each criteria whether it is relevant under the competition law and/or different laws governing “abuse of superior bargaining position.”

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|---|---|
| a. Degree of trade dependence on the firm by the other<br>( <i>e.g.</i> , percentage of the firm’s total sales attributable to the allegedly abusive party) | <b>to be taken into account<br/>(no thresholds defined<br/>by law or guidelines,<br/>however)</b> |
| b. Probability of finding an alternative trade partner  | <b>to be taken into account<br/>(not required by law or<br/>guidelines though)</b>                |
| c. Supply and demand forces of the product or service   | <b>to be taken into account</b>   |
| d. Difference in scale of business between the parties  | <b>to be taken into account</b>   |
| e. Harm to consumer welfare   | <b>to be taken into account</b>   |
| f. Other – please explain   |   |

(2) Please specify examples of conduct that constitutes “abuse of superior bargaining position” (i.e., request for provision of supplier’s labor without compensation, coercive collection of contributions, etc.).

**No case law regarding the abuse of superior bargaining position so far; no legal definition except the one contained in the Act protecting local supplies (see above Point A).**

(3) Must effects on competition, including harm to consumer welfare, be demonstrated in order to prove “abuse of superior bargaining position”?

**Since the abuse of a superior bargaining position constitutes a specific type of abuse of a dominant market position the assessment of anticompetitive effects embracing those on consumer welfare will be required.**

**For establishing infringements of the Act protecting Local Supply such proof is not required, but the specific objectives pursued by this law (protection of local supply in rural areas) need to be taken into account when interpreting its provisions.**

If yes, how are competitive effects demonstrated?

**No case law so far.**

(4) What sanctions are imposed on firms if they commit “abuse of superior bargaining position” in your jurisdiction? Please describe the type and nature of the sanction imposed.

**Abuse of dominant market positions under the Cartel Act: prohibition, remedies and/or fines**

**Infringement of the Act protecting Local Supply: prohibition**

3. When assessing cases of abusive conduct, does your agency also take into account positive aspects of (countervailing) buyer (or seller) power which may lead to the conclusion that a superior bargaining position does not exist?

If yes, please explain how.

**Yes, insofar as an economic analysis is required to apply and interpret the prohibition provisions of the Cartel Act as to the abuse of a dominant market position.**

4.

(1) To the extent possible, please provide the number of “abuse of superior bargaining position” cases your agency decided or reviewed (beyond a preliminary investigation) during the past 10 years.

**One pending case; a number of complaints have been filed but investigations have not exceeded a preliminary stage.**

(2) Please provide a short English summary of the leading “abuse of superior bargaining position” decisions/cases in your jurisdiction and, if possible, a link to the English translation/press release.

**No (leading) decisions so far.**

5. Does your jurisdiction allow private cases challenging “abuse of superior bargaining position”? **yes**

If so:

a. Please explain whether elements of the private action differ from those required for a similar claim brought by a competition or other regulatory agency.

**No major differences (except minor procedural ones)**

b. Please provide a description of representative examples of private claims, as available.

**No such cases.**

6. What is the relationship between “abuse of superior bargaining position” and “abuse of dominance/monopolization” in your jurisdiction?

**Compare point A as to the specific provision regarding dominance based on a superior bargaining position (of a supplier or buyer). No specific conduct-related provisions > the abuse of a superior bargaining position is thus a sub-category of the general prohibition of abuse of dominance.**

C. If your answer to question B.1.a. and b. is “no” (meaning that your jurisdiction does not prohibit acts that would fall within the “abuse of superior bargaining position” concept in your jurisdiction), please explain why.

D. Please add any comments you may have on the subject.