

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?

“Abuse of superior bargaining position”, as proposed in the questionnaire, is not legally defined in our jurisdiction. The abuse of bargaining position would be applied to both supplier and buyer sides of the market. It is important to note that for any and all kinds of anticompetitive conducts, the Brazilian competition authorities require the party to be a dominant firm or to have market power.

In order to analyze an “abuse of superior bargaining position” claim, the Brazilian Competition authorities rely on a case-by-case analysis which will consider all of the relevant circumstances surrounding the claim.

The Brazilian Competition Law (Law 8.884/94) does not contain the term “abuse of superior bargaining position”. Nonetheless, it states that there are four broad effects / purposes that may constitute antitrust violations. These are when firms (i) “limit, restrain or in any way injure open competition or free enterprise”; (ii) “control a relevant market of a certain product or service”; (iii) “arbitrarily increase profits”; (iv) “or abuse of their dominant position”. Therefore, an “abuse of superior bargaining position” claim could be based on any of these effects / purposes, even though there is not a clear definition of the infraction such as you

have in Japan.

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? yes/no
- b. Other laws and regulations that apply to the prohibition of “abuse of superior bargaining position”? yes/no

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

Yes. As stated above, Brazil’s competition law does provide for an “abuse of superior bargaining position” claim, although not in those words. Whether the aforementioned effects/purposes are present, the party can be liable for the infraction.

Generally speaking, the civil law determines that any party shall be liable for harming the other party (e.g. supplier/buyer).

*(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?

(3) Why are such acts regulated?

(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.”

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

Not Applicable.

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.”

Not applicable. However, since Brazil applies the rule of reason, all those criteria could be observed.

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|--|--------|
| a. Degree of trade dependence on the firm by the other<br>(e.g., percentage of the firm's total sales attributable to the allegedly abusive party) | yes/no |
| b. Probability of finding an alternative trade partner   | yes/no |
| c. Supply and demand forces of the product or service  | yes/no |
| d. Difference in scale of business between the parties   | yes/no |
| e. Harm to consumer welfare  | yes/no |
| 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.).

Not applicable.

As mentioned before, “abuse of superior bargaining position” is not included in the Brazilian Competition Law in and of itself. Nonetheless, it is spread throughout the Law and can be found in different antitrust violations. As mentioned, for an antitrust violation to be characterized, it is necessary to demonstrate the aforementioned effects/purposes listed in Article 20.

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

yes/no

If yes, how are competitive effects demonstrated?

Please see the answer above.

(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.

The sanctions imposed on firms if they commit any antitrust violation are stated in the Articles 23 and 24 of the Brazilian Competition Law:

(i) fines, defined as such:

- (a) for companies: a fine between one and thirty percent of the gross revenue, excluding all tax, of the last financial year. The fine must by no means be lower than the advantage obtained from the underlying violation, if the advantage is measurable;
  - (b) for managers directly or indirectly responsible for their company's violation: a fine ranging from ten to fifty percent of the fine imposed on their company, which shall be imposed on the exclusively on the manager and is his personal responsibility; and
  - (c) in the case of other individuals or other public or private legal entities, as well as any *de facto* or *de jure* associations of entities or persons, even temporary ones, which may or may not be held legally responsible, that do not engage in business activities, when it is not possible to use the gross sales value, the fine will be between 6,000 (six thousand) to 6,000,000 (six million) UFIR or the equivalent in any other index which replaces it.
- (ii) at the violator's expense, a half-page publication of the summary sentence in a court-appointed newspaper for two consecutive days, from one to three consecutive weeks;
  - (iii) ineligibility for official financing or participation in bidding processes involving purchases, sales, work, services or utility concessions with the federal, state or municipal authorities and related entities, for a period equal to, or exceeding, five years;
  - (iv) annotation of the violation on the Brazilian Consumer Protection list;
  - (v) recommendation that the proper public agencies: (a) grant compulsory licenses for patents held by the infractor; and (b) deny the infractor the possibility of paying federal overdue debts in instalments, or order the total or partial cancellation of tax incentives or public subsidies;
  - (vi) the company's spin-off, transfer of corporate control, sale of assets, partial discontinuance of activities, or any other antitrust measure required for such purposes.

Furthermore, private claims may be filed against the company in order to recoup the damages it caused to the petitioner.

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?

yes/no

If yes, please explain how.

Yes. When assessing cases of abusive conduct, authorities must demonstrate the Article 20 effects/purposes. It is true that sometimes a firm which appears to have a dominant position may not in fact be able to exercise said position due to buyer or seller power. In abusive conduct cases, the market structure is studied along with the firm in question, in order to avoid erroneous conclusions.

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.

A case involving “abuse of superior bargaining position” has never been decided or reviewed. Nonetheless, a couple of cases are currently undergoing a preliminary investigation.<sup>1</sup> Both cases involve supermarket chains that impose clauses on their suppliers. The clauses covered a wide range of practices which include, among others, special discounts, matching competitors’ prices, and free merchandise.

(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.

Please see the answer above.

5. Does your jurisdiction allow private cases challenging “abuse of superior bargaining position”? [yes/no](#)

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.

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<sup>1</sup> Administrative Proceedings 08012.005647/2004-32 and 08012.000073/2002-44.

A claimant may bring a case challenging any antitrust infringement in order to recover losses. This possibility is not restricted to “abuse of superior bargaining position” claims, but applies to any antitrust conduct.

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

So far, there have been no such claims relating to “abuse of superior bargaining position”.

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

“Abuse of superior bargaining position” cases may be classified as an “abuse of dominance/monopolization”. Nonetheless, antitrust analysis in Brazil is conducted on a case-by-case basis.

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.

Not applicable.

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

Not applicable.