

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?

In Chile there is no legal definition of “abuse of superior bargaining position” in business to business relations. In accordance with the basic principle of contractual liberty, the terms of freely agreed contracts among individuals are binding to them.

Nevertheless, private law establishes some mechanisms to protect the weak bargaining party against abusive clauses. Such corrective mechanisms consider implying a good faith term into contracts as a general clause (1546 of Civil Code), and a contractual interpretation rule which provides that ambiguous or uncertain terms should be interpreted against the party that included them in the contract (1566 of Civil Code).

The applicability of article 3° of Competition Law to situations of abuse of superior bargaining position must not be discarded, although the Competition Court has applied it to only one case. In its Sentence N° 9, the Tribunal, analyzed the relationship between supermarket chains with significant market power and their providers, considering anticompetitive conditions unilaterally determined by the buyer, once the merchandise has been delivered, referred to the *ex -post* determination of prices and rebates.

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Besides that, some old Competition Commission's decisions (the Commission was replaced by the present Tribunal) considered some specific clauses, which providers usually imposed to retailers to be abusive, on the basis that these terms reduced the liberty to bargain and to compete in the downstream market.

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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?

(a) Corrective measures mentioned above are applicable to both supplier and buyer side.

(b) N/A.

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? **No.**

b. Other laws and regulations that apply to the prohibition of “abuse of superior bargaining position”? **Yes, besides (i) the good faith implied term established in article 1546 of the Civil Code; (ii) the *contra proferetem* interpretation rule mentioned above, and (iii) article 3° of Competition Law, (iv) Consumers Protection Law defines and forbids abusive clauses in standard form contracts. Nevertheless, Consumers Protection Law is not applicable in business to business relations.**

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? **If an “abuse of a superior bargaining position” prevents, restricts or hinders free competition, or tends to produce such effects, it can be deemed an infraction to article 3° of Competition Law, and handled by competition authorities.**

(3) Why are such acts regulated? **As said in answer to question A, such acts are not**

explicitly 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".

Article 1546 of Civil Code provides "*Contracts must be executed on good faith, therefore, they obligate the parties not only to what they expressed, but also to all those things that derive from the obligation's nature, or those things that in accordance with the law or good uses that belong to it*".

Article 1566 of Civil Code provides "*Ambiguous or uncertain clauses of contracts written by one of the parties, creditor or debtor, must be interpreted against him, if the ambiguity derives from an explanation that he should have given*" (Subsection 2).

Article 3° of the Competition Act provides that "*Any person who enters into or executes, whether individually or collectively, any deed, act or contract that prevents, restricts or hinders free competition, or tends to produce such effects, will be subject to the measures prescribed by article 26 of this law, notwithstanding the other corrective or restrictive measures that may be imposed in each case*" (Subsection 1).

(5) If there are different regimes to address this situation (competition law and other laws) how are competences defined/interventions coordinated? There is no such competences issue, because the Competition Law regime is oriented to punish infractions, while the Civil Code provisions mentioned above ensures that the formation of a contract and the selection of its terms are the result of the free will of the parties.

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." There is only the above mentioned case of supermarket chains with significant market power. Therefore, the following answer will refer to that case.

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

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f. Other – please explain: barriers to entry in the market of supermarkets and exit barriers of its providers.

(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.).

Sentence N° 9 decided that conditions unilaterally determined by the buyer, once the merchandise has been delivered, referred to the “ex –post” determination of prices and rebates, were anticompetitive.

(3) Must effects on competition, including harm to consumer welfare, be demonstrated in order to prove “abuse of superior bargaining position”? There is no experience in assessing a superior bargaining position. However, in accordance with article 3° of Competition Law, actual or potential effects should be considered to assess an infraction.

If yes, how are competitive effects demonstrated? In accordance with article 22° of the Competition Law, all the evidence that might be useful to establish the pertinent facts is admissible.

(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. There is no experience in assessing a superior bargaining position.

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? There is no experience in assessing cases of abusive conduct.

If yes, please explain how. N/A

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. Competition Court has no experience in assessing a superior bargaining position.

(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. [N/A](#)

5. Does your jurisdiction allow private cases challenging “abuse of superior bargaining position”? [Yes. Private cases can be initiated before Civil Court to challenge abusive clauses of contracts.](#)

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.

[N/A](#)

b. Please provide a description of representative examples of private claims, as available. [N/A](#)

6. What is the relationship between “abuse of superior bargaining position” and “abuse of dominance/monopolization” in your jurisdiction? [There is no experience in assessing the differences between “abuse of superior bargaining position” and “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. [N/A](#)

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

[No comments.](#)