

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?

The «abuse of superior bargaining position» is not defined in the Croatian legislation. This form of an abuse is not recognized neither in the Competition Act, nor in the Company Act or Criminal Code of the Republic of Croatia.

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**✓

The Competition Act of the Republic of Croatia envisages only the abuse of dominant position as defined in the Article 16 which is consistent with the Article 82 of the EC Treaty. Article 16 reads as follows:

«Abuse of a Dominant Position

(1) Any abuse by one or more undertakings of a dominant position in the relevant market shall be prohibited.

(2) The abuse referred to in paragraph (1) of this Article may, in particular, consist of:

1. directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

2. **limiting production, markets or technical development to the prejudice of consumers;**
3. **applying dissimilar conditions to equivalent transactions with other undertakings, thereby placing them at a competitive disadvantage;**
4. **making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”**

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.

(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?

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.”

- | | |
|--|--------|
| 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/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.).

(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?

(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.

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.

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.

(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.

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.

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

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

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.

The current Croatian legislation recognizes only the concept of abuse of a dominant position in the Competition Act. The Criminal Code in the Article 288 defines the abuse of a monopolistic position in the market as a criminal offence. The other relevant provisions of the Criminal Code about the criminal offences in business transactions are Article 280 which recognizes violation of equality in performing economic activities and Article 289 that deals with unfair competition in foreign trade operations. However, none of those directly takes into account an aspect of an abuse of a superior bargaining position.

In more general terms, the business transactions are dealt with in the Company Act for undertakings and Obligatory Relations Act for the natural persons.

The EU competition legislation and the provisions of the Article 82 of the EC Treaty do not recognize this concept either. Consequently, one of the reasons that Croatia has not yet developed this concept is the process of harmonization of legislation with the relevant EU legislation (*Community acquis*).

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

The proposed concept of the abuse of a bargaining power is an interesting one because it gives different aspect of the possible abuse which is not only based on the dominant position. This might particularly be interesting for the smaller markets where the prevailing number of companies are not in a dominant position. Hence, the concept of “abuse of superior bargaining position” could be taken into consideration in future legislative developments in Croatia.