

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 labour 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 comes under restrictive trade practices governed by civil law. Objectionable practices include:

- *Unfair discrimination,*
- *Abuse of trade dependence (all forms: open list)*
- *Subjecting a partner to unjustified obligations or trading conditions,*
- *Sudden severance of established business relations (or the threat thereof),*
- *Subjecting a partner to manifestly unfair terms of payment,*
- *Automatic debiting of suppliers by distributors.*

The business relations concerned are usually between suppliers and supermarkets.

It should straight away be noted that Article 36 of an order of 1 December 1986 provided for “*prohibition*” of what it considered to be intrinsically anti-competitive behaviour such as refusal to sell, discriminatory practices, tied selling and bundling. The order decreed the latter to be special torts, punishable by civil or commercial courts under a special procedure (cases could thus be referred to the courts not only by the allegedly injured parties but also by the Public Prosecutor’s Department, Minister for the Economy and the chairperson of the Competition Council (*Conseil de la Concurrence*) if any of the latter came across a prohibited practice in matters under their jurisdiction; these provisions

have been extensively taken up by Article L.442-6-III of the Commercial Code). A law of 1 July 1996 tried to counteract supermarket abuses by enacting new prohibitions.

The law of 15 May 2001 added to this list in turn. At the same time it gave the public authorities empowered to refer cases to the competent court (the Minister for the Economy and the Public Prosecutor's Department) the authority not only to have the cessation of the relevant practices ordered but also to have the illegal clauses or contracts declared void and to ask for restitution of money paid without legal cause, redress for damage incurred, and a civil fine of up to 2 million euros (Article L.442-6-III).

However, neither the above New Economic Regulations Act nor the SME Act (Law No. 2005-882 of 2 August 2005) restored criminal offences in this field. The behaviour currently covered by Article L.442-6 in Book IV, Title IV of the Commercial Code is still tort.

On the contrary, the SME Act, through the eighth subparagraph that it added to Article L.442-6-I of the Commercial Code, was aimed at a new restrictive trade practice: preventing a supplier's customer from exacting compensation if the conditions for compensation under civil law were not met and the supplier was unable to ascertain the substance of the claim giving rise to his debt to the customer. This measure was taken to combat the practice of some distributors who would automatically debit their suppliers and who had become more numerous because of the many penalties generally laid down by distributors in their terms of purchase.

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
- b. Other laws and regulations that apply to the prohibition of "abuse of superior bargaining position"? Yes

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?

The Minister for the Economy has the authority to act on behalf of public economic policy in his or her capacity as the competition authority.

(3) Why are such acts regulated?

These practices are regulated because they are held to be restraint of trade between two partners.

(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."

The rules on abuse of superior bargaining position come under restrictive trade practices (Commercial Code, Book IV, Title IV). These rules require redress not only for discrimination but also for advantages without counter-concessions and for sudden severance of business relations:

Article L442-6

I. - Liability shall be incurred by the tortfeasor and redress for the damage caused shall be provided by any producer, trader, manufacturer or person recorded in the trade register:

1. Offering to or obtaining from an economic partner, prices, payment times or terms and conditions of sale or purchase that are discriminatory and unjustified by any real counter-concessions, thus creating a competitive advantage or disadvantage for this partner;

2.a) Obtaining or attempting to obtain from a trading partner any advantage unmatched by a commercial service actually rendered or manifestly disproportionate to the value of the service rendered. Such an advantage may, for example, consist in a contribution, unjustified by a common interest and without a proportionate counter-concession, to the financing of a sales promotion, an acquisition or an investment, particularly in connection with the renovation of shops or the merging of businesses, central listing units or central purchasing units. Such an advantage may also consist in artificial aggregation of turnover or the demand that a trading partner fall into line with the trading conditions obtained by other customers;

b) Abusing a partner's trade dependence or the business's own superior bargaining position by subjecting the partner to unjustified obligations or trading conditions, for example, by imposing disproportionate penalties for breach of contractual commitments. Linking the sales display of more than one product to the granting of an advantage is an abuse of superior bargaining position if it tends to restrict access of similar products to points of sale;

3. Obtaining or attempting to obtain an advantage as a precondition for placing orders without a written undertaking covering a proportionate volume of purchases and, where appropriate, without a service requested by the supplier and covered by an agreement in writing;

4. Obtaining or attempting to obtain, with the threat of sudden total or partial severance of business relations, prices, payment times, terms of sale or conditions of business cooperation

that are obviously exceptions to the general conditions of sale;

5. Suddenly severing established business relations, even in part, without written notice taking into account the length of these business relations and respecting the minimum period of notice laid down by inter-trade agreements with reference to commercial practice. When these business relations concern supply of the distributor's own-label products, the minimum period of notice shall be double that which would be applicable if the products supplied were not own-label. In the absence of inter-trade agreements, orders issued by the Minister for the Economy may fix a minimum period of notice for each category of products, taking into account commercial practice, and regulate the terms on which business relations are severed, for example with reference to their length. The above provisions shall not stand in the way of termination without notice in the event of failure by the other party to meet its obligations or in the event of force majeure. When business relations are severed as a result of competitive procurement through electronic auctioning, the minimum period of notice shall be double that arising out of application of the provisions of this subparagraph where the original period of notice is less than six months and at least one year in other cases;

(...)

7. Subjecting a partner to terms of payment that are clearly unfair in the light of good business practice and which depart from the time-limit specified in the eighth subparagraph of Article L.441-6 to the creditor's detriment and without an objective reason;

8. Refusing or returning goods or automatically deducting from the total amount of the supplier's invoice the penalties or allowances for failure to meet the delivery date or for non-conformity of goods when the debt is not unquestionable, specified and payable and without the supplier even having been able to ascertain the substance of the relevant claim.

II. - Clauses and contracts shall be void if they provide for the possibility for a producer, trader, manufacturer or person recorded in the trade register to:

a) Backdate rebates, discounts or business cooperation agreements;

b) Obtain payment of a listing fee prior to the placing of any orders;

c) Prohibit the other party to the contract from assigning to third parties claims that it holds on the producer, trader, manufacturer or person recorded in the trade register.

The voiding of clauses relating to payment shall entail application of the time-limit specified in the second subparagraph of Article L.441-6 unless the court dealing with the case can find evidence of an agreement on different terms that are fair.

III. - Actions may be brought before a competent civil or commercial court by any persons having established an interest, by the Public Prosecutor's Department, by the Minister for the Economy and by the chairperson of the Competition Council if any of the latter come across a practice referred to in this article in matters coming under their jurisdiction. When bringing the action, the Minister for the Economy and the Public Prosecutor's Department can request the court dealing with the case to order cessation of the practices specified in this

article. They can also, for all these practices, have the illegal clauses or contracts declared void, demand restitution of money paid without legal cause and demand a civil fine of up to 2 million euros. Redress for damage incurred may also be demanded. In every case, it is for the service provider, producer, trader, manufacturer or person recorded in the trade register claiming discharge from liability to produce evidence of the act that brought about termination of this liability.

IV. - The urgent applications judge can order cessation of unfair or discriminatory practices and any other interim measure.

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

All restrictive trade practices come under the same rules: Book IV of the Commercial Code.

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 |
| 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 | Yes |
| e. Harm to consumer welfare | No |

f. Other – please explain

The civil courts assess dependence on an individual basis and may take into account criteria other than those listed above.

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

See practices specified above.

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

No

The courts have facilitated application of Article L.442-6-I.1 by accepting that there is no need for the minister or the firm concerned to demonstrate the existence of damage caused by the practice.

Advantage or disadvantage is directly connected with proven discrimination. There is therefore no need to demonstrate the existence of a competitive advantage or disadvantage. The position of the courts on this matter is now settled, since the Versailles Court of Appeal recently pointed out that the existence of a competitive advantage or disadvantage was obvious once the discriminatory nature of the practice had been established. However, the plaintiff must prove that the businesses having gained an advantage are the victim's competitors.

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.

The Minister for the Economy and the Public Prosecutor's Department can request the court dealing with the case to order cessation of the practices specified in this article. They can also, for all these practices, have the illegal clauses or contracts declared void, demand restitution of money paid without legal cause and demand a civil fine of up to 2 million euros. Redress for damage incurred may also be demanded.

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?

No

It is the civil courts that assess these various aspects rather than the competition authority itself.

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.

Twenty-five to thirty judgments have been delivered every year since 2001, when the

New Economic Regulations Act came into force.

(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

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.

The actions referred to above are those in which the Minister for the Economy is a party.

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

No information available.

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

There is no direct relationship between these two types of abuse: the first is prosecuted as a restrictive trade practice but this does not necessarily rule out a prosecution for abuse of dominant position.

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.