

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?

§ 20 (1) of the German Act against Restraints of Competition (ARC)¹ provides for a prohibition of unfair hindrance directed at dominant undertakings².

§ 20 (2) ARC provides that § 20 (1) ARC also applies to firms holding a superior bargaining position.

§ 20 (2) ARC stipulates that a firm holds a superior bargaining position if small or medium-sized enterprises as suppliers or purchasers of certain kinds of goods or commercial services depend on this firm in such a way that sufficient and reasonable possibilities of resorting to other undertakings do not exist (see § 20 (2) sentence 1 ARC). That means that such dependence exists only if besides the undertaking allegedly holding a superior bargaining position in the relevant market no other undertakings exist which would be able and willing to supply the respective small or medium-sized undertaking on reasonable terms. Based on case law, several case

¹ The ARC is available in English at

http://www.bundeskartellamt.de/wEnglisch/download/pdf/06_GWB_7_Novelle_e.pdf.

² § 19 ARC constitutes the general prohibition of any abuse of a dominant position.

groups are distinguished: Dependence on product line, dependence on a specific firm, scarcity dependence and demand-related dependence.

It follows from this that a supplier as well as a buyer may hold a superior bargaining position in relation to another undertaking. This undertaking must, however, be a small or medium sized enterprise. Otherwise, § 20 (2) in connection with § 20 (1) ARC is not applicable. Note, however, that this limitation does not apply to the newly amended § 20 (3) ARC³ which addresses the prohibition of passive discrimination by firms with superior market power.

§ 20 (2) sentence 2 ARC provides for a presumption of a superior bargaining position. It should be underlined, however, that the presumption applies only to buyers. According to the law, a supplier of a certain kind of goods or commercial services shall be presumed to depend on a purchaser within the meaning of § 20 (2) sentence 1 ARC if this purchaser regularly obtains from this supplier, in addition to discounts customary in the trade or other remuneration, special benefits which are not granted to similar purchasers.

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

See also below under (4); but note that there are no guidelines in this respect.

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

§§ 3 und 4 Act against Unfair Competition (see below under (4)).

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?

§ 20 (2) ARC stipulates that the blanket clause of § 20 (1) ARC is also applicable if an undertaking is not dominant but enjoys superior bargaining power (or “relative market power”). Thus, a firm with superior bargaining power “shall not directly or

³ The amendment is expected to enter into force on 1 January 2008 and is limited in time until 31 December 2012.

indirectly hinder in an unfair manner another undertaking in business activities which are usually open to similar undertakings, nor directly or indirectly treat it differently from similar undertakings without any objective justification". § 20 (3) sentence 2 ARC lays down a specific prohibition of demand-related abuse (e.g. the granting of special rebates), § 20 (4) ARC sets forth that firms with superior bargaining power shall not hinder small or medium-sized competitors, in particular by offering goods or services below cost price without objective justification and by implementing a cost-price squeeze.

The said provisions can be enforced by the competition authority but can also be invoked in private litigation.

§ 3 Act against Unfair Competition (Unfair Trade Act) is a blanket clause which prohibits unfair trade practices that are liable to have more than an insubstantial impact on competition to the detriment of competitors, consumers or other market participants (e.g. pressure that impairs the freedom of choice of consumers or market participants, rebates which aim at hindering other market participants; examples for unfair competition are laid down in § 4 of the Act). The Act does not, however, expressly address abuse of superior bargaining power.

The Bundeskartellamt is not competent to act on the basis of the Unfair Trade Act, i.e. it can only serve as a basis for a claim in private litigation.

(3) Why are such acts regulated?

The German legislator, when incorporating the § 20 (2) ARC into antitrust law in 1973, held the view that not only conduct by those undertakings holding a dominant position could distort competition. In fact, the conduct of undertakings, which were able to exercise market power only to a certain extent and in relation to certain undertakings was also deemed to be capable of having negative effects on competition.

(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.”

§ 20 (1) and (2) ARC (Prohibition of Discrimination, Prohibition of Unfair Hindrance)

- (1) Dominant undertakings, associations of competing undertakings within the meaning of §§ 2, 3, and 28(1) and undertakings which set retail prices pursuant to § 28(2), or § 30(1) sentence 1, shall not directly or indirectly hinder in an unfair manner another undertaking in business activities which are usually open to similar undertakings, nor directly or indirectly treat it differently from similar undertakings without any objective justification.
- (2) Paragraph 1 shall also apply to undertakings and associations of undertakings insofar as small or medium-sized enterprises as suppliers or purchasers of certain kinds of goods or commercial services depend on them in such a way that sufficient and reasonable possibilities of resorting to other undertakings do not exist. A supplier of a certain kind of goods or commercial services shall be presumed to depend on a purchaser within the meaning of sentence 1 if this purchaser regularly obtains from this supplier, in addition to discounts customary in the trade or other remuneration, special benefits which are not granted to similar purchasers.
- (3) Dominant undertakings and associations of undertakings within the meaning of paragraph 1 shall not use their market position to invite or to cause other undertakings in business activities to grant them advantages without any objective justification. Sentence 1 shall also apply to undertakings and associations of undertakings in relation to the undertakings which depend on them⁴.
- (4) Undertakings with superior market power in relation to small and medium-sized competitors shall not use their market position directly or indirectly to hinder such competitors in an unfair manner. An unfair hindrance within the meaning of sentence 1 exists in particular if an undertaking
 1. offers foodstuffs within the meaning of Section 2 (2) of the Law on Foodstuffs and Feedstuffs below its cost price or
 2. offers other goods or commercial services not merely occasionally below its cost price or
 3. demands from small or medium-sized undertakings competing with it in the downstream market in the sale of goods or provision of commercial services a

⁴ § 20 (3) sentence 2, as amended, is expected to enter into force on 1 January 2008.

higher price for its supplies than it otherwise offers in this market, unless this is objectively justified. The offer of foodstuffs below cost price is objectively justified if this is likely to prevent their deterioration or impending unsaleability by the retailer through their timely sale. This applies to other comparably serious cases. Unfair hindrance does not apply in cases where foodstuffs are supplied to non-profit institutions for use within the scope of their responsibilities⁵.

§ 3 Unfair Trade Act (Prohibition of unfair competition)

Unfair competitive practices that are capable of not insignificantly impairing competition to the disadvantage of competitors, consumers or other market participants, are impermissible.

§ 4 Unfair Trade Act (Examples of unfair competition)

Unfairness within the meaning of Section 3 particularly involves any person who

1. carries out competitive practices that are capable of impairing the freedom of decision of consumers or other market participants through the exercise of pressure, in a ruthless way, or through other unreasonable, subjective influence;

...

4. does not clearly and unambiguously provide the conditions for taking advantage of sales promotions such as price reductions, premiums or gifts;

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

The competition authorities may act solely on the basis of the Competition Act (ARC).

In private litigation, however, the provisions of both, the Competition Act (ARC) and the Unfair Trade Act can be invoked. The same behaviour may thus be prohibited under the provisions of both acts. However, broadly speaking, if the behaviour is in compliance with antitrust rules, further specific circumstances will have to be demonstrated to show that there is a liability under the provisions of the unfair competition law rules of the Unfair Trade Act.

2.

⁵ § 20 (4) sentence 2, as amended, is expected to enter into force on 1 January 2008.

(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 ⁶
e. Harm to consumer welfare	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.).

- Demanding retrospective rebates (so called “tapping a company for rebates”)
- Refusal to supply undertakings with “must-stock” items
- Abusive and unjustified setting of sales prices by a franchisor
- Agreements on an exclusive purchasing obligation within a franchising system
- Purchasing benefits are not passed on to the franchisee
- Manufacturers requiring trading firms to comply with their provisions in terms of quantities and turnovers on the type of resale; e.g. the setting of a maximum threshold for internet sales without any objective justification
- Deliberate non-disclosure of interface information in the software sector by a car manufacturer
- The use of pressure

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

A hindrance according to § 20 (2) in connection with § 20 (1) ARC by a firm enjoying superior bargaining power is a market behaviour which is likely to have objectively negative effects on the hindered firm. However, such a behaviour is not abusive

⁶ The business partner of the undertaking with superior market power must, in general, be a small or medium-sized company, but see the newly amended § 20 (3) sentence 2 ARC.

solely because of negative effects on a firm. Rather it has to be determined whether the behaviour constitutes objectively justified competition on the merits or not⁷.

In order to establish whether that is the case, the competition authority has to balance all the interests of the undertakings involved i.e. especially the economic and competitive interests of the dominant firm and its competitors (e.g. the degree of dependence of the small or medium-sized undertaking on a given supplier/purchaser enjoying superior bargaining power, alternative resources and degree of (likely) hindrance/foreclosure effect etc.). In balancing the different interests, the aim of the ARC to ensure competition and open markets is given due weight.

It must be underlined that no effects on consumer welfare have to be shown. The German ARC has the aim to ensure competition as such with the view that effective competition serves consumer interests best.

If yes, how are competitive effects demonstrated?

See above under (3).

(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.

If the competition authority, in an administrative proceedings, finds that an undertaking enjoying superior bargaining power has e.g. unfairly hindered a business partner according to § 20 (2) in connection with § 20 (1) ARC, it may require the undertakings or associations of undertakings to bring to an end the respective infringement (§ 32 (1) ARC, so called cease-and-desist order). For this purpose, it may impose on undertakings all measures which are necessary to effectively bring the infringement to an end and are proportionate to the infringement established (§ 32 (2) ARC). That means that the authority may simply order the firm to end a given behaviour or may order the firm to do something, e.g. supply a customer with a certain product or to provide a given service to this customer. The authority may also order interim measures (§ 32 lit. a ARC) which shall be limited in time and should normally not exceed one year.

The authority may also, in an administrative fine proceedings, impose administrative fines (e.g. if the infringement is serious or continued).

⁷ Federal Court of Justice (FCJ), judgment of 22 November 1981, Original-VW-Ersatzteile II.

In private litigation the claimant may base its claim, e.g. to be supplied with a certain product by a given supplier on § 20 (2) in conjunction with § 20 (1) ARC.

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

If yes, please explain how.

The competition authority, when applying § 20 (2) in connection with § 20 (1) ARC balances the interests of the undertakings involved, i.e. especially the economic and competitive interests of the dominant firm and its competitors.

In this respect, possible justifications are examined and taken into account when assessing whether the conduct in question constitutes an unfair hindrance of the firm that depends on the undertaking holding a superior bargaining 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.

In the past ten years the Bundeskartellamt has examined 39 cases of “abuse of superior bargaining position”. Three of these cases ended with a decision that the conduct violated antitrust rules:

- Praktiker Baumärkte/Franchisesystem (2006)
- RMS Radio/Aachener Lokalsender (2001)
- Metro MGE Einkaufs GmbH (1999)

Another five cases ended in a settlement with relief (without a formal decision⁸) :

- Sternjakob/Schulranzen (2006)
- Adam Opel AG/Software DMS (2006)
- Karstadt Quelle AG (2003)

⁸ Only since the entry into force of the revised ARC in 2005 can the *Bundeskartellamt* issue decisions stating that on the basis of information available to it, the conditions for a prohibition decision pursuant to § 20 ARC are not satisfied (see § 32 lit. c ARC). Prior to this, proceedings were either closed or ended by prohibition decisions (administrative proceedings).

- Deutscher Tischtennis Bund (2001)
- Tierfutter „Royal Canin“ (2001)

In the other cases, a violation of antitrust rules could not be substantiated.

(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.

In the following, the recent cases in the practice of the Bundeskartellamt are illustrated:

Praktiker Baumärkte GmbH (2006)⁹

In May 2006 the Bundeskartellamt prohibited Praktiker Baumärkte GmbH (Praktiker) from unfairly hindering franchisees. Praktiker is active throughout Germany as a franchisor vis-a-vis independent franchisees whose goods are supplied by Praktiker. At the same time the DIY stores operated by Praktiker offer the same products the company supplies to its franchisees. Praktiker thus operates a dual distribution system. The franchisees were considered to be companies depending on Praktiker as they were obliged to purchase most of their product range from Praktiker during the term of the franchise agreement. The franchisees were unfairly hindered within the meaning of Section 20(1) of the ARC as the prices charged by Praktiker for the supply of goods from the system’s basic product range exceeded the sales or advertising prices charged by competing DIY stores which are operated by Praktiker. There was no objective justification for this. Furthermore, Praktiker unfairly hindered individual franchisees within the franchise system by imposing a 100 per cent obligation to purchase goods from the system’s product range on them. At the same time the purchasing benefits gained from supplies to franchisees or associated companies were not passed on to the relevant franchisees. The franchisees with a 100 per cent purchasing obligation were therefore discriminated against without any objective justification vis-à-vis other franchise partners of Praktiker which only have an 80 per cent purchasing obligation. In its consideration of all interests involved which must be carried out to establish unfair hindrance, the Bundeskartellamt also took into account the generally positive competitive role played by franchising systems. This, however, is called into question if the system’s benefits remain solely

⁹ Decision of 8 May 2006, B 9-149/04, Praktiker Baumärkte GmbH. The decision is available in German at <http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell06/B9-149-04.pdf>

with the franchisor, in particular in the dual distribution system where the franchisor is the supplier/wholesaler and at the same time a competitor of his franchisees.

Adam Opel AG/Software DMS (2006)

In the proceedings against Adam Opel AG (Opel) the Bundeskartellamt investigated a possible hindrance in the sector of car repair garages caused by detailed IT provisions for garages and the non-disclosure of interface information. Opel had recommended three different so-called Dealer Management Systems (DMS) for use in car repair garages. DMS is a software to be used in the operation of garages. It is meant to facilitate e.g. the order of spare parts and the processing of work covered by warranty. It is essential for the garages' work that the software they use can communicate with the respective manufacturer's systems as an extensive exchange of data is required. Opel disclosed the required interface information solely to the three suppliers recommended by Opel and refused to disclose this information to other IT companies. Garages which used the DMS supplied by other software companies were thus excluded from the exchange of data with Opel systems. The Bundeskartellamt considered this as a hindrance and discrimination of alternative DMS suppliers and the companies they serviced. According to the Bundeskartellamt this practice was also likely to counteract the objective of the European Union's automotive block exemption regulation, i.e. the promotion of sales of different brands. Opel was seen as a company with a superior bargaining position as it is the only supplier of the required interface information. After Opel had generally agreed to provide the IT companies concerned with the required interface information, the proceedings could be discontinued in 2006.

RMS Radio/Aachener Lokalsender (2001)¹⁰

With its decision of 15 August 2001 the Bundeskartellamt prohibited RMS Radio Marketing Service GmbH & Co. KG (RMS) from refusing to market radio advertising time of two radio stations based in Aachen to advertising customers which were interested in broadcasting their radio advertising at cross-regional or national level. RMS was de facto the only company to offer radio advertising time to be broadcasted at cross-regional and national level. As RMS marketed other stations' advertising time, the Bundeskartellamt considered this as an unequal treatment of the two Aachen-based radio stations vis-à-vis other radio stations. The Bundeskartellamt's

¹⁰ The complete decision in German is available at

http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell03/B6_127_99.pdf.

decision was confirmed by the Higher Regional Court in a decision on the costs.

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 difference.

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

Private litigation is of great importance in the area of abuse of a superior bargaining position. Thus, a great many important decisions were issued as a result of private claims. In recent years, such decisions have predominantly dealt with the question of refusal to supply with “must-stock” items.

In that regard it was of particular interest which products (in particular branded products or products by a certain manufacturer) constitute such important products that specialist retailers must be able to offer at least one such product to their customers to be able to compete effectively (so-called *Spitzengruppenabhängigkeit*, i.e. dependence on leading products or producers).

If such a dependence on leading products or producers exists, a retailer may claim to be supplied by every single one of the respective producers. According to the Federal Court of Justice (in a case concerning design furniture) such dependence suggests itself if 80% of specialist retailers stock the product of the defendant¹¹. For the finding of a dependence it is, however, necessary that the retailer is dependent on stocking precisely the product of one or several manufacturers/brands¹².

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

The relationship with one provision governing the conduct of dominant firms, § 20 (1)

¹¹ FCJ, judgment of 9 May 2000, Designer-Polstermöbel, WuW/E DE-R 481, see also FCJ, judgment of 4 November 2003, Depotkosmetik, WuW/E DE-R 1203.

¹² Düsseldorf Higher Regional Court, judgment of 29 October 2003, VI-U (Kart) 30/00, Rolex-Uhren.

ARC, is a very close one. § 20 (2) ARC, which addresses the abuse of a superior bargaining position refers to § 20 (1) ARC stating that unfair hindrance is not only prohibited when the firm which is allegedly hindering another firm holds a dominant position. § 20 (2) ARC effectively widens the scope of application of § 20 (1) ARC with the effect that not only dominant but also such firms with a superior bargaining position are prohibited from unfairly hindering business partners which depend on them.

§ 19 ARC also deals with the abuse of a dominant position but is not applicable if the firm in question only has superior bargaining power but is not dominant.

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.

[deliberately left open]