

**COMPLETED QUESTIONNAIRE  
ON ABUSE OF SUPERIOR BARGAINING POSITION  
(SPECIAL PROJECT)**

**BY  
COMMISSION FOR THE SUPERVISION OF BUSINESS COMPETITION,  
REPUBLIC INDONESIA**

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?

*Based on our perception “abuse of superior bargaining position” is every single activity of business actor on using or exploiting their bargaining position to determine their business policy. In Law No 5/1999 concerning prohibition of monopolistic practices and unfair business competition, abuse of superior bargaining position is not exclusively regulated. However various activities of abuse of bargaining position can be subject to others articles in Law No. 5/1999, especially related to market control. Based on the law, the object of the law is every business actor which falls in definition that stated by article 1 of the law. Therefore, this object can be applied to either supplier or buyer.*

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**

*As mentioned above, Law No. 5/1999 does not regulate abuse of superior bargaining position exclusively. But every types of the activities can be subject to other articles in this law. KPPU has not published guideline on implementation of abuse of superior bargaining position. Therefore KPPU has only released one guideline, which is guideline on collusive tender (bid-rigging)*

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

**No**

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

*By now, there is no other law that applied on abuse of superior bargaining position. However regulation on abuse of superior bargaining position will be implemented exclusively in retail industry if draft of presidential decree on modern market is enacted.*

*(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?

*Various activities of abuse of superior bargaining position and other activities are handled by Commission for the Supervision of Business Competition (KPPU) in line with the Law No. 5/1999 enforcement.*

(3) Why are such acts regulated?

*According to democracy in the field of economy that require equal opportunity for every citizen to participate in the process of production and marketing of goods and or services, in a fair, effective and efficient business environment, so as to be able to promote the growth of economy and the functioning of a reasonable market economy, the law regulated such acts that result in unfair business competition and potentially harmful to the interest of the public.*

(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.”

*Indirectly, this regulation can be associated with articles on market control and dominant position as stated by article 19 and 25 of the Law No. 5/1999. These articles stated:*

**Article 19**

*Business actors shall be prohibited from engaging in one or more activities, either individually or jointly with other business actors, which may result in monopolistic practices and or unfair business competition, in the following forms :*

- a. reject and or impede certain other business actors from conducting the same business activities in the relevant market; or*
- b. bar consumers or customers of their competitors from engaging in a business relationship with such business competitors; or*
- c. limit the distribution and or sales of goods and or services in the relevant market; or*
- d. engage in discriminatory practices towards certain business actors.*

**Article 25**

*(1) Business actors shall be prohibited from using dominant position either directly or indirectly to:*

- a. determine the conditions of trading with the intention of preventing and or barring consumers from obtaining competitive goods and or services, both in terms of price and quality; or*
- b. limiting markets and technology development; or*
- c. bar other potential business actors from entering the relevant market.*

*(2) Business actors shall have a dominant position as intended in paragraph (1) in the following events:*

- a. if one business actor or a group of business actors controls over 50% (fifty per cent) of the market segment of a certain type of goods or services; or*
- b. if two or three business actors or a group of business actors control over 75% (seventy-five per cent) of the market segment of a certain type of goods or services.*

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

*By now, there is no other regulation, however retail industry will be regulated exclusively by Draft of Presidential Decree which part of it will regulate abuse of superior bargaining position. In this draft, law enforcement for violations of the*

*regulation is also referring to the Law No. 5/1999 in which will be part of KPPU's jurisdiction.*

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<br>(e.g., percentage of the firm's total sales attributable to the allegedly abusive party) | <b>yes</b> |
| b. Probability of finding an alternative trade partner   | <b>yes</b> |
| c. Supply and demand forces of the product or service  | <b>yes</b> |
| d. Difference in scale of business between the parties   | <b>yes</b> |
| e. Harm to consumer welfare  | <b>yes</b> |
| 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.).

*Agreement of trading terms applied to goods suppliers by huge retailer*

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

**yes**

If yes, how are competitive effects demonstrated?

*Quantitative measurement on effects of competition is rarely used in case handling. KPPU tends to use qualitative and legal approach due to limitation of time on case handling that strictly limited by the law.*

(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.

*Sanctions on violations of Law UU No. 5/1999 tend to be an administrative sanction, such as ordering to business actors to stop activities and fine order. The fine order is ranged between minimum of Rp. 1.000.000.000,- (one billion Rupiahs) and maximum fine of Rp Rp. 25.000.000.000,- (twenty five billion Rupiahs). Law No. 5/1999 prohibited us to impose fine order beyond this limit. However, KPPU through Article 47.2.f also can impose compensation for any infringement of the Law.*

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.

*On handling cases KPPU always consider positive aspect to ensure decision independency and availability of a balance conclusion based on opinions and evidences that presented by both side. Generally KPPU put emphasis on motive/reason that motivates business actor activity and the effect which strengthen the statement. If presented opinion and evidence are reasonable and widely accepted, it is not impossible an activity may not be qualified as violations. For example, KPPU has justified a business actor behavior to other business actor because of its bad reputation.*

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.

*KPPU has decided or reviewed several cases relating market control (approximately 21 cases), but using your definition on abuse of superior bargaining position, **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 (ICN)**, KPPU has decided one case of abuse of superior bargaining position for the last seven years since KPPU established .*

(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.

**Case No. 02/KPPU-L/2005:** *the allegation of violating Law No. 5/1999 regarding Prohibition of Monopoly Practice and Unfair Business Competition related to agreement of trading terms applied to goods suppliers by PT. Carrefour Indonesia (Carrefour).*

*This case started from a report submitted to KPPU on October 20, 2004 focusing on allegation of violating Article 19 letter a (reject and or impede certain other business actors from conducting the same business activities in the relevant market), Article 19 letter b (bar consumers or customers of their competitors from engaging in a business relationship with such business competitors) and Article 25 sub-section (1) letter a (having dominant position in determining the conditions of trading with the intention of preventing and or barring consumers from obtaining competitive goods and or services, both in terms of prices and quality) of Law No. 5/1999 conducted by Carrefour (as the Reported Party) in determining trading terms to goods suppliers.*

*Based on investigation result, the Commission Council found facts that Carrefour carried out business relation of purchasing and selling product with its suppliers using sell-off system. This business relation was stated in written agreement named National Contract mentioning trading terms which can be negotiated with supplier such as : listing fee, fixed rebate, minus margin, term of payment, regular discount, common assortment cost, opening cost/new store and penalty. As mentioned in their report, suppliers deemed that the trading terms was difficult to be applied, particularly on item requiring listing fee and minus margin, because every year Carrefour does adding item type, increasing cost and percentage of fee trading terms.*

*Listing fee pursuant to Carrefour was suppliers fee to supply new product in Carrefour and having function as guarantee if the products were not sold out. Listing fee was only determined once and not refundable. Some suppliers were understood with listing fee condition as item registration fee for product supplied to Carrefour. Listing fee was applied to suppliers for per-item of product per- Reported Party's shop. The fee amount was different between small and big suppliers. Listing fee was not applied to all suppliers. Carrefour's revenue from this listing fee term in 2004 was 25 billions Rupiahs.*

*Minus margin was suppliers' guarantee to Carrefour that their product selling price was the lowest selling price. If Carrefour obtained written evidence that its competitor could sell the same product with cheaper price than Carrefour's purchasing price, Carrefour had a right to ask compensation from suppliers as amount as difference*

*price between Carrefour's purchasing price with competitor's selling price. Compensation obtained by Carrefour through applying minus margin sanction was suppliers' invoice deduction without giving a chance to suppliers to prove that suppliers did not conduct discrimination of selling price. Invoice deduction was calculated by multiplying price difference with amount of the suppliers' rest of product in Carrefour shop. Carrefour's objective applied minus margin was to keep cheaper selling price among its competitors. Carrefour's revenue from applying minus margin sanction, from 99 suppliers agreed on requirement of minus margin in 2004 was 1.9 billion Rupiahs.*

*The relevant market in this market was hypermarket retail which competed directly in Jakarta, Tangerang, Bandung, Surabaya and Medan for household necessity product such as food and beverage products in instant package, staple food, fresh product, household product and electronics. Carrefour competitors in hypermarket retail market were Giant, Hypermart and Clubstore. The Commission Council did not include Makro and Alfa, because their concepts did not compete with hypermarket directly. Makro recognized with wholesaler concept and Alfa with rebate storehouse concept.*

*The Commission Council found facts that Carrefour had market power compared with Hypermart, Giant and Clubstore, because Carrefour had the greatest number of shops, strategic location with high convenience and facility completeness level, Carrefour also had total of product item which was more complete than others instead. With the market power, it caused dependence for suppliers who want their products can be sold and displayed in Carrefour. This dependence was due to many Carrefour shops opened, consequently Carrefour had more powerful in access ability to sell products to consumers so that suppliers can sell more product in Carrefour. Besides, Carrefour can be promotion location for suppliers products and their new products.*

*With the superior, Carrefour own bargaining power toward suppliers in negotiating item trading terms. The facts founded in investigation, Carrefour used its bargaining power to push down suppliers in order to accept the addition of item trading terms, cost increase and percentage of fee trading terms. Form of pressure conducted such as : holding the payment in due, breaking the cooperation one side not to sell suppliers' products by not issuing purchase order, decreasing order amount of suppliers' product item.*

*There was a activity to impede Carrefour's competitor to have the same business activity in relevant market.*

*It was shown by applying minus margin requirement causing one of suppliers terminating its business to supply Carrefour's competitor which sells with lower price than Carrefour's selling price for the same product.*

*Considering that Carrefour had market power in relevant market, the Commission Council stated that Carrefour in carrying out its business activity needs to pay closer attention to the following issues :*

- 1. every item of trading terms applied to suppliers should provide added value for both Carrefour and suppliers (partnership win-win solution);*
- 2. not doing a such difficulty to suppliers particularly small and medium business category when conducts negotiating;*
- 3. not applying excessive trading terms to suppliers.*

*As mentioned in the decision, the Commission conducted appraisal many regulations related to private markets operating which have not been managed effectively. For that reason, the Commission Council provided advice and suggestion regarding :*

- 1. Executing the existing private market regulation effectively;*
- 2. Formulating and issuing regulation on private market issue applied in national scope;*
- 3. Formulating and issuing provision regulating definition, system, determination of amount and listing fee particularly to suppliers categorized small and medium business so instruments used to impede suppliers who want their products to be sold and displayed in modern retail market.*

*Finally, based on the results of investigation in this case, the Commission Council decided that:*

- 1. Stating that the Reported Party was legally and convincible proven to violate Article 19 letter a of Law No 5/1999;*

*Business actors shall be prohibited from engaging in one or more activities, either individually or jointly with other business actors, which may result in monopolistic practices and or unfair business competition, in the following forms :*

a. *reject and or impede certain other business actors from conducting the same business activities in the relevant market*

2. *Stating that the Reported Party was not proven violating Article 19 letter b of Law No. 5/1999;*

*Business actors shall be prohibited from engaging in one or more activities, either individually or jointly with other business actors, which may result in monopolistic practices and or unfair business competition, in the following forms :*

b. *bar consumers or customers of their competitors from engaging in a business relationship with such business competitors*

3. *Stating that the Reported Party was not proven violating Article 25 sub-section (1) letter a of Law No. 5/1999;*

(1) *Business actors shall be prohibited from using dominant position either directly or indirectly to:*

a. *determine the conditions of trading with the intention of preventing and or barring consumers from obtaining competitive goods and or services, both in terms of price and quality*

4. *Instructing the Reported Party to terminate activity applying minus margin term to suppliers;*

5. *Imposing sanction to the Reported Party as amount as Rp. 1.500.000.000,- (one billion five hundreds millions Rupiahs) that has to be paid to State Cash Treasury.*

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.

*Law No. 5/1999 does not enable and regulate private cases, but there is an*

*indirect way that enable private cases, which is through the private law. Private law is not handled by KPPU but district court or court of commerce. Private cases should be related to violations of Law No. 5/1999. Nevertheless, before that, this case must be decided its competition aspects through a Decision by KPPU. Therefore, this private action will not be a competition case; hence will be a private case, such as an allegation for compensation.*

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

*None available*

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

*Both activities is deeply connected each other, while abuse of superior bargaining position activity can be a part of abuse of dominant position activity. The difference located on market share measurement; abuse of dominant position is guilty if it done by business actor with defined market share (50% if market share controlled by one business actor and 75% if market share controlled by two or more business actors)*

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.

*None available*