

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?

Answer:

“Abuse of superior bargaining position” is not defined in Jamaican competition legislation. Our competition legislation, the Fair Competition Act (FCA), addresses an “abuse of a dominant position.” Our responses to each question in this survey will be in relation to abuse of dominance since abuse of superior bargaining position, as described, could be properly scrutinized under our abuse of dominance provisions.

Section 19 of the FCA defines a dominant firm as one which “...if by itself or with an interconnected company, it occupies such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors.”

(a) The definition applies to both supplier and buyer sides of the market.

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

Ans:

Yes, effectively The Fair Competition Act prohibits “abuse of superior bargaining position” if the enterprise is dominant in the relevant market in that the Act prohibits abuse of its position.

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.

Ans:

The Telecommunications Act (TA). One of the stated functions of the Office of Utilities Regulation (OUR), the regulatory body which enforces the TA, is to “promote competition among carriers and service providers” [Section 4(1)(f)]. Whereas the TA requires that dominance be determined as set out under Section 19 of the FCA, “abuse of a superior bargaining position” is not explicitly mentioned in that act.

*(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?

Ans:

Abuse of a dominant position is handled exclusively by the competition agency (FTC).

(3) Why are such acts regulated?

Ans:

These acts are “regulated” because of the harm/ adverse effect that the conduct of a dominant firm can cause in the relevant market.

(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.”

Ans:

Section 20 (1) of the FCA states that

“ An enterprise abuses a dominant position if it impedes the maintenance or development of effective competition in a market and in particular but without prejudice to the generality of the foregoing, if it—

- (a) restricts the entry of any person into that or any other market;
- (b) prevents or deters any person from engaging in competitive conduct in that or any other market;
- (c) eliminates or removes any person from that or any other market;
- (d) directly or indirectly imposes unfair purchase or selling prices or other

- uncompetitive practices;
- (e) limits production of goods or services to the prejudice of consumers;
- (f) makes the conclusion of agreements subject to acceptance by other parties of supplementary obligations which by their nature, or according to commercial usage, have no connection with the subject of such agreements.”

Guidelines for enforcing abuse of dominance provisions, among other things, is available in our publication “The Fair Competition Act: A Guide to Anti-Competitive Practices” which is available for download at <http://www.jftc.com>.

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

Ans:

But for the telecommunications industry in respect of which Section 5 of the TA requires that the sector regulator consult with the Jamaica Fair Trading Commission, on any matter that is of “substantial competitive significance to the provision of specified services, interventions by the competition agency and sector regulators in matters regarding anticompetitive conduct in the specific sector are undefined and uncoordinated.

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.”

Ans:

In what follows, we respond regarding criteria used to assess “market dominance”

- |  |                        |
|--|------------------------|
| 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) | <a href="#">yes/no</a> |
| b. Probability of finding an alternative trade partner   | <a href="#">yes/no</a> |
| c. Supply and demand forces of the product or service  | <a href="#">yes/no</a> |
| d. Difference in scale of business between the parties   | <a href="#">yes/no</a> |
| e. Harm to consumer welfare  | <a href="#">yes/no</a> |
| 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.).

Ans:

As mentioned previously, abuse of superior bargaining position is not a term used in the competition legislation in Jamaica. See response to question 4 in Section B above for a non-exhaustive list of examples of conducts that constitute abuse of a dominant position.

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

yes/no

No. We do not have to show that harm has already taken place; it is sufficient to show that harm is likely to take place.

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.

Ans:

Only civil sanctions are allowed. The FCA permits the Court to impose a fine of up to five million Jamaican dollars [This is equivalent to United States Dollars 69,444.44] in the case of an enterprise other than an individual and a fine of up to one million Jamaican dollars [United States Dollars 13,888.89] in the case of an individual, for any contravention of the FCA.

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.

Ans:

Under the FCA, an enterprise may not be treated as abusing a dominant position if, among other things, it:

- (i) “...is engaged in pursuant only to the exercise of any right or enjoyment of an interest derived under any Act pertaining to intellectual or industrial property” [Section 21(3), FCA]; or
- (ii) “...is a result of superior competitive performance” [Section 21 (2)]; or
- (iii) “...was exclusively directed to improving the production or distribution of goods

or to promoting technical or economic progress; and consumers were allowed a fair share of the resulting benefit" [Section 20(2)].

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.

Ans:

We have reviewed abuse of dominance cases not cases of "abuse of 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.

Not applicable.

5. Does your jurisdiction allow private cases challenging "abuse of superior bargaining position"? yes/no

Answer is subject to answers already provided, indicating that the FCA does not contain a concept known as "abuse of superior bargaining position"

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.

Ans:

The elements required for a private action for abuse of a dominant position are identical to those required for a claim brought by our competition agency.

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

Ans:

We do not know of any private claim of abuse of a superior bargaining power.

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

Ans:

In Jamaica, "abuse of a superior bargaining position" could be investigated only as an instance of "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.

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