

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?

**“Abuse of superior bargaining position” refers to a situation in which a party makes use of its superior bargaining position relative to another party to take unjustly in light of normal business practices, any act specified as follows:**

- a. Causing the other party to purchase a commodity or service**
- b. Causing the other party to provide economic benefits**
- c. Setting or changing transaction terms in a way disadvantageous to the other party**
- d. In addition to any act above, imposing a disadvantage on the other party regarding terms or execution of transaction**
- e. Interfering with the appointment of officers of the other company**

**The definition applies equally 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

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?

**Those acts above are prohibited as “Unfair Trade Practices” under “Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (AMA),” and those are designated by the Japan Fair Trade Commission (JFTC) in its notification. In addition, “Act Against Delay in Payment of Subcontract Proceeds, etc. to Subcontractors” has been also enacted as a special law. Those acts are handled by the JFTC.**

**Regarding “Act Against Delay in Payment of Subcontract Proceeds, etc. to Subcontractors,” Small and Medium Enterprise Agency has also investigative power, and under “Construction Industry Law” Minister of Land, Infrastructure and Transport as well as prefectural governors have regulatory power over conduct, which is similar to what is prohibited in “Act Against Delay in Payment of Subcontract Proceeds, etc. to Subcontractors.”**

(3) Why are such acts regulated?

**The underlying rationales for the regulation of “abuse of superior bargaining position” as “Unfair Trade Practices” derive from the fact that “abuse of superior bargaining position” infringes the foundation of the free competition where the parties to transactions determine transaction terms or conditions based on their free and independent business judgment.**

**It is normal that there exists a difference in bargaining position between the parties to transactions and thus, as a reflection of the situation, it would not raise competition policy issues even if transaction terms or conditions are set disadvantageously to one party over the other.**

**However, in cases where a party in a superior bargaining position over the other party, by making use of that position, restrains the independent business**

**activities of the other party and forces the other party to accept disadvantages that it would not if the competition worked properly, its conduct prevents the other party from competing freely and independently.**

**The other party on whom the disadvantages are imposed would be in the disadvantageous position in terms of condition of competition with its competitors. On the other hand, the party imposing disadvantage on the other would be in the advantageous position in terms of condition of competition through the different means from the price and quality.**

**Although it does not necessarily directly lead to the infringement of the competition in the market, “abuse of superior bargaining position” needs to be regulated as it infringes the prerequisite for 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.”

**A. “Act on Prohibition of Private Monopolization and Maintenance of Fair Trade ”**

**Article 19 [Prohibition of unfair trade practices]**

**No entrepreneur shall employ unfair trade practices.**

**a. Section 14 [Abuse of Superior Bargaining Position] of “Unfair Trade Practices” [General Designation]**

**Taking any act specified in one of the following paragraphs, unjustly in the light of the normal business practices by making use of one’s dominant bargaining position over the other party:**

- (1) Causing the said party in continuous transaction to purchase a commodity or service other than the one involved in the said transaction;**
- (2) Causing the said party in continuous transaction to provide for oneself money, service or other economic benefits;**
- (3) Setting or changing transaction terms in a way disadvantageous to the said party;**
- (4) In addition to any act coming under the preceding three paragraphs, imposing a disadvantage on the said party regarding terms or execution of**

transaction; or

(5) Causing a company which is one's other transacting party to follow one's direction in advance, or to get one's approval, regarding the appointment of officers of the said company (meaning those as defined by Subsection 3 of Section 2 of the Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade).

b. "Designation of Specific Unfair Trade Practices by Large-Scale Retailers Relating to the Trade with Suppliers"

c. "Designation of Specific Unfair Trade Practices When Specified Shippers Assign the Transport and Custody of Articles"

d. "Designation of Specific Unfair Trade Practices in the Newspaper Business"

B. "Act Against Delay in Payment of Subcontract Proceeds, etc. to Subcontractors"

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

Regarding the violation of provisions under "Construction Industry Law," Minister of Land, Infrastructure and Transport makes a request to the JFTC to take actions and thus the JFTC issues a cease and desist order if it finds the violations of AMA.

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) | 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: **Position of the abusing firm in the relevant market**

(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.).

**The following conduct could constitute “abuse of superior bargaining position.”**

**Unjust coercive sales**

**Unjust request for provision of labor**

**Unjust request for contributions**

**Beating suppliers down on price**

**Unjust price reduction**

**Unjust return of goods**

**Unfavorable treatment in response to refusal of requests**

**Unfavorable treatment in response to notification to the JFTC**

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

yes/no

**If “superior bargaining position” and “abusive conduct” are found, the relevant conduct violates the provision of “abuse of superior bargaining position,” tending to impede fair competition.**

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.

**“Abuse of superior bargaining position” is subject to cease and desist order, which is an administrative measure, and the fact related to violation, the necessary measure taken and the names of the firms are made public. Although there is no criminal sanction or surcharge for the violation, the firms are subject to criminal sanction and/or civil penalty if the firms do not obey**

**cease and desist order.**

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.

**The number of cases concerning “abuse of superior bargaining position” handled by the JFTC in FY 1998-2007 (as of October) amounted to 98, including 12 cases resulting in agency decisions, 8 cases resulting in warnings, 68 cases resulting in cautions and 10 cases resulting in cease of investigation.**

**Note 1: If the JFTC finds suspected violation, then it issues “warning” to entrepreneur(s) concerned and guides them to take elimination measures (a “warning” is considered an administrative guidance).**

**Note 2: If the JFTC does not find violation but finds conduct which may lead to violation, then it issues “caution” as a preventive measure for it (a “caution” is more lenient than “warning,” and not considered an administrative guidance).**

(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.

***Don Quixote Co., Ltd (Consent Decision issued on June 22, 2007)***

**The JFTC issued a recommendation for the elimination of misconduct to Don Quixote Co. Ltd. based on that firm’s violations of Section 19 of the AMA on March 9 in 2005 and issued a consent decision on June 22 in 2007. The summary of the violation is as follows:**

**(1) Don Quixote has been forcing some of its suppliers that are in a relatively weaker bargaining position to dispatch their employees and other staff to assist in the opening of new Don Quixote retail outlets by having them build product**

displays. The affected suppliers deal in personal effects, daily use miscellaneous goods, household electrical products, food products and other items whose suppliers have ongoing business relations with Don Quixote.

(2) Don Quixote has been forcing the aforementioned suppliers to dispatch employees and other staff to conduct Don Quixote's routine stocktaking and for routine product display change activities, by exploiting its trade relationships.

(3) Don Quixote has been forcing the aforementioned suppliers to retroactively offer support money for newly opened retail outlets with neither prior notification of the amount nor the basis for calculation nor an accounting how the money is used. The actual amount of support money for a given store has been calculated by multiplying the amount of their initial deliveries to that outlet by a certain rate or alternatively has been set at one percent of the cumulative amount of their deliveries over a certain period, by exploiting its trade relationships.

*Sumitomo Mitsui Banking Corporation (Recommendation Decision issued on December 26, 2005)*

The JFTC issued a recommendation for the elimination of misconduct to Sumitomo Mitsui Banking Corporation based on that firm's violations of Section 19 of the AMA on December 2 in 2005 and issued a recommendation decision on December 26 in the same year. The summary of the violation is as follows:

Sumitomo Mitsui Banking Corporation demanded that entrepreneurs in a financial relationship with the bank and in an inferior bargaining position to the bank purchase a derivative financial commodity (interest swap). It did so by proposing that said entrepreneurs should purchase the commodity during the process of moving forward with financial procedures and by directly expressing and/or suggesting that the entrepreneurs' purchase of the commodity was a condition for receiving a loan, and that if the entrepreneurs did not purchase the commodity, their requests for a loan would be handled in an unfavorable manner. This left the entrepreneurs with no choice but to purchase the commodity.

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.

### **1) Injunction**

**Art. 24 of the Antimonopoly Act provides that “[a] person whose interests are infringed or likely to be infringed by an act in violation of the provisions of ...Article 19 and who is thereby suffering or likely to suffer extreme damages is entitled to seek the suspension or prevention of such infringement from an entrepreneur... that infringe or is likely to infringe such interests. “Abuse of superior bargaining position” is one of “unfair trade practices” prohibited by Article 19.**

### **2) Damages**

**The violation of Art.19 is generally subject to damage suit as tort in accordance with Art. 709 of Civil Law. Moreover, Art. 25 stipulates that “[a]ny entrepreneur that has committed an act in violation of the provisions of Articles...19...shall be liable for damages suffered by another party.”**

**It is understood that the violation of the AMA constitutes tort because it usually entails infringement of interest of others that deserves legal protection and thus the victims of the violation of the AMA including “abuse of superior bargaining position” can file damage suit against the violator in accordance with Art. 709 of Civil Law.**

**In addition, the AMA allows the victims to file no-fault liability damage suit against violators with the view to mitigating the burden of proof (Art. 25). However, as opposed to Art.709 of Civil Law, the right to claim for damages may not be alleged in court until the cease and desist order or decision issued by the JFTC has become final and binding.**

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

**“Abuse of superior bargaining position” is different from “abuse of dominance/monopolization” in terms of 1) position of the firms, 2) conduct and 3) market effect**

**1) Difference in position**

**“Abuse of superior bargaining position” requires that a party have a superior bargaining position relative to another party in business relationship. However, the party does not necessarily have to be in a dominant position in the relevant market.**

**On the other hand, “private monopolization” does not require that a party have superior bargaining position relative to another party in business relationship.**

**2) Difference in conduct**

**“Abuse of superior bargaining position” requires that a party engage in conduct unjustly disadvantageous to another party in terms of transaction terms or conditions.**

**On the other hand, “private monopolization” requires business activities, by which any entrepreneur, individually or by combination or conspiracy with other entrepreneurs, or by any other manner, excludes or controls the business activities of other entrepreneurs.**

**3) Difference in market effect**

**In case of “abuse of superior bargaining position,” if the requirements of 1) position and 2) conduct are satisfied, the relevant conduct violates the provision of “abuse of superior bargaining position,” tending to impede fair competition.**

**On the other hand, “private monopolization” requires a substantial restraint of competition in any particular field of trade.**

**Although both provisions can be applied conceptually in a case, there has been no such case so far. They are considered to have no direct relationship with each other since the elements are different.**

**Note 1: “Exclusion” under “private monopolization” is interpreted as making it difficult for other firms to continue their business activities or preventing other firms from entering the market. “Control” is interpreted as depriving other**

**firms of their freedom of decision-making concerning their business activities and forcing them to obey the controller's intent.**

**Note 2: With respect to the meaning of "substantial restraint of competition" under "private monopolization," there are court rulings that defined it as a state in which there actually appears or at least is going to emerge a situation in which a specific firm or trade association can control the market by controlling the price, quality, quantity or other conditions at its own will and freely to a certain degree (Refer to Tokyo High Court ruling on the Toho-Subaru case on September 19, 1951 and Tokyo High Court ruling on the Toho-Shinto case on December 7, 1953). It is understood that the expression refers to achieving, maintaining and strengthening the state of market dominance as depicted by these rulings (JFTC Decision on Nippon Telegraph and Telephone East Corporation case on March 26, 2007).**

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.

**We hope that this special project provides a good venue for our mutual understanding of abuse of superior bargaining position.**