

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?

As a term “superior bargaining position” and its abuse are not used in the Russian competition law and enforcement practices. Therefore, applicably to the Russian legislation and enforcement practices the term “superior bargaining position” will be further used in quotes. The “superior bargaining position” can be enjoyed by an entity having substantial market power (in other words the entity cannot have “superior bargaining position unless it is dominant) and the abuse of this position in the context of this question is interpreted as exploitive behavior with regards to entities integrated vertically to the abuser, i.e. its customers or suppliers. This concept is applied to the supplier side (when the abuser is the supplier) and to the buyer side (when the abuser is the buyer). Article 10 (3) of the Law on Protection of Competition prohibits (applicably to the entities having dominant position in the market) “imposing on a counter party of contractual terms which are unprofitable for the latter or not connected with the subject of agreement (economically or technologically unjustified and (or) not provided for directly by the federal laws, statutory legal acts of the President of the Russian Federation, statutory legal acts of the Government of the Russian Federation, statutory legal acts of the authorized federal bodies of executive authority or judicial acts, requirements on transfer of financial assets, other property, including property rights, as well as consent to conclude a contract on conditions of including in it of provisions, concerning the commodity in which the counter party is not interested and other requirements).”

Additionally to that the abuse of “superior bargaining position” is addressed by Article 11. “Prohibition of Agreements Restricting Competition or Concerted Practices of Economic Entities.”

The Article (Part 1) stipulates that “Agreements between economic entities or concerted practices of economic entities in the commodity market are forbidden if such agreements or concerted practices lead or can lead to: ... (5) imposing on a counterparty of contractual terms which are disadvantageous for the latter or are not connected with the subject of agreement (unjustified requirements of transfer of funds, other property, including property rights, as well as consent to conclude a contract on conditions of including in it of provisions, concerning the commodity in which the counterparty is not interested and other requirements) ...” Noteworthy is that proof of dominance of the abuser in the market is not required for applying Article 11 (5).

Obviously these provisions concern non-price forms of exploitation of vertically integrated entities that are in our opinion are most relevant to the purposes of this question. These provisions complement to the Russian law has provisions against exploitation by means of setting monopoly high (the supplier side) and monopoly low (the buyer side) prices.

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”? **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?

Enforcement of Articles 10 and 11 is a mandatory responsibility of the competition agency – FAS-Russia. In accordance with Chapter 6 of the Law “On Protection of Competition.” At the same time FAS is also responsible for development and implementation of competition policy, including non-price exploitation of entities vertically integrated to the abuser.

(3) Why are such acts regulated?

The main purpose of this regulation is to protect the entity vertically integrated to the abuser from non-price forms of exploitation.

(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.”

Article 10 (3) of the Law on Protection of Competition prohibits (applicably to the entities having dominant position in the market) “imposing on a counter party of contractual terms which are unprofitable for the latter or not connected with the subject of agreement (economically or technologically unjustified and (or) not provided for directly by the federal laws, statutory legal acts of the President of the Russian Federation, statutory legal acts of the Government of the Russian Federation, statutory legal acts of the authorized federal bodies of executive authority or judicial acts, requirements on transfer of financial assets, other property, including property rights, as well as consent to conclude a contract on conditions of including in it of provisions, concerning the commodity in which the counter party is not interested and other requirements).”

Article 11 “Prohibition of Agreements Restricting Competition or Concerted Practices of Economic Entities” (Part 1) stipulates that “Agreements between economic entities or concerted practices of economic entities in the commodity market are forbidden if such agreements or concerted practices lead or can lead to: ... (5) imposing on a counterparty of contractual terms which are disadvantageous for the latter or are not connected with the subject of agreement (unjustified requirements of transfer of funds, other property, including property rights, as well as consent to conclude a contract on conditions of including in it of provisions, concerning the commodity in which the counterparty is not interested and other requirements) ...”

The complete text of the Law “On protection of competition” and the Articles mentioned above are available at [www.fas.gov.ru](http://www.fas.gov.ru) .

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

The exploitive behavior is generally addressed by the competition law. The abuser is assumed to be a market dominant firm for application of Article 10 though the proof of dominance is not required for application of Article 11.

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 yes

- (*e.g.*, percentage of the firm’s total sales attributable to the allegedly abusive party)
- |  |     |
|--|-----|
| 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                            | yes |
| f. Other – please explain                              |     |

All these criteria are relevant in the context of the Russian competition law. Though the factors (a) – (e) may be considered in the assessment of dominant position in specific cases they are not formulated in the Russian Law and/or guiding documents in the way they are presented in this Question.

(2) Please specify examples of conduct that constitutes “abuse of superior bargaining position”

According to Article 11 abuses of “superior bargaining position” include but are not limited to imposing “unjustified requirements of transfer of funds, other property, including property rights, as well as consent to conclude a contract on conditions of including in it of provisions, concerning the commodity in which the counterparty is not interested and other requirements.”

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

*yes/no*

If yes, how are competitive effects demonstrated?

According to Article 14.32 of the Code of the Russian Federation on Administrative Violations the violation should have effects on competition for imposing penalty on the violator.

(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.

According to the Article 14.32 of the Code of the Russian Federation on Administrative Violations concluding an agreement limiting competition and contradicting to the antimonopoly legislation of the RF is penalized by fine of from 17 to 20 thousand roubles or disqualification for 3 years for physical persons and by fine from 1 to 15 percent of the annual revenues of the violator received in the relevant market.

One of the recent examples of applying this regulation is FAS decision on imposing the fine on closed type joint stock company “Insurance Group “Avandard-Garant” in the amount of 4 058 595 roubles and on its Chairman of the Board in the amount of 17 000 roubles for the violation of point 5 of Part 1 of Article 11. The violation consisted in “Insurance Group “Avandard-Garant” entering into agreements with banks providing that the banks borrowers must purchase an insurance policy from “Insurance Group “Avandard-Garant” for the vehicles pledged as collateral for bank loans.

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.

Effects on competition and/or consumer welfare must be shown for applying Article 14.32 of the Code of the Russian Federation on Administrative Violations. If the abuse is countervailed by the counterpart’s buyer or seller power these effects will not take place.

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.

Since the term “abuse of superior bargaining position” is not used in the Russian legal practice and the currently effective legislation was adopted about 1,5 years ago these statistics are not readily available.

(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.

A short English summary of one of the most recent cases was provided to exemplify the answer for Question 2.4. Some more examples include but are not limited to the following:

- In November 2007 FAS issued an injunction to “Gasprom” open-type joint stock company to cease violation of part 1 of the Article 10 of the Law “On Protection of Competition” with regards to “Kazanorgsintez” open-type joint stock company whose interests were affected by the violation. “Gasprom” violated the Law by unjustified refusal to conclude an

agreement on supplying ethane to “Kazanorgsintez” and attempt to impose the latter an agreement on processing ethane into polyethylene. FAS ordered “Gasprom”: (1) to cease the agreement with “Kazanorgsintez” on processing ethane into polyethylene; (2) desist further imposition on “Kazanorgsintez” economically or technologically unbeneficial and/or violating “Kazanorgsintez’s” interests terms of agreements; (3) conclude the agreement on shipment ethane to “Kazanorgsintez” in volume corresponding to “Gasprom” technical and economic capacity at a price not exceeding 20% of the cost of production of ethane by “Orengurgasprom” (“Gasprom” subsidiary shipping ethane to “Kazanorgsintez”); (4) not to change contractual terms of shipment ethane to “Kazanorgsintez” by “Orenburggasprom” for production of polyethylene; (5) receive FAS agreement in 30 days prior to any change in price caused by an increase of “Gasprom” production costs; (6) inform FAS on fulfillment of the requirements provided for by the injunction in 2 months from the date of its issuing. (See [http://www.fas.gov.ru/news/n\\_16103.shtml](http://www.fas.gov.ru/news/n_16103.shtml) for the press-release in Russian.)

- June 27, 2006 St. Petersburg FAS Department issued injunction to “Russian Railways” open type joint stock company to cease abusing practices violating Article 5 of the Law “On Competition and Restricting Monopolistic Practices in Commodity Markets” (currently superceded by the Law “On Protection of Competition”). The case was brought about to FAS by owners or renters of postal and cargo rail road carriages alleging the Russian Railroads of imposition of an unjustified demand to weight the carriages after loading at scales belonging to “Petro-Vid” company charging payment for this service. (See [http://www.fas.gov.ru/news/n\\_15352.shtml](http://www.fas.gov.ru/news/n_15352.shtml) for press release in Russian.)

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.

A private plaintiff normally applies to FAS form protecting their interests against the alleged violators (see the second example provided in the response for the previous Question). Though significant number of cases are brought about on FAS own initiative.

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

See the answer to the previous Question.

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

The Russian antitrust legislation and enforcement practices are based on Article 8 of the Constitution of the Russian Federation providing that:

“In the Russian Federation guarantees shall be provided for the integrity of the economic space, a free flow of goods, services and financial resources, support for competition, and the freedom of economic activity.”

Thus, basing on this principle “abuse of superior bargaining position” may originate only in the course of an arm’s length transaction between independent parties pursuing solely their own material interest and not basing on other principles that may stem from non-capitalist relationships or be rooted in tradition. Basing on this assumption in the context of “abuses of superior bargaining position” the Russian enforcement practices focus on non-price exploitive abuses conducted mainly by market dominant firms, though Article 11 of the Law “On Protection of Competition” does not directly indicate on the necessity for proof of dominance for its application. Moreover, effects on competition should be shown in any case in order to impose sanctions on the alleged violator. And Article 5 of the Law “On Protection of Competition” provides for safe harbor thresholds below which the firms’ individual or concerted conduct cannot affect competition and/or consumer welfare (please refer to [www.fas.gov.ru](http://www.fas.gov.ru) for the English translation of the text of the Law and its Articles cited):

“The position of an economic entity (except a financial organization) whose share in the certain commodity market does not exceed thirty five per cent cannot be recognized as dominant, except the cases...” of collective dominance provided for as follows:

“The position of each of several economic entities (except financial organizations) is recognized dominant if all of the conditions below apply to the entity:

1) the aggregate share of not more than three economic entities, share of each of these exceeds the shares of the other economic entities in this market, exceeds fifty per cent, or the aggregate share of not more than five economic entities, the share of each of these exceeds the shares of the other economic entities in the relevant commodity market, exceeds seventy per cent (this provision is not applied if the share of at least one of the aforementioned economic entities is less than eight per cent);

2) during a long period (during not less than a year or in case this period is less than a year during the period of the relevant commodity market existence) the relevant sizes of such economic entities’ shares are stable or subjected to insignificant changes, as well as access of new

competitors to the relevant commodity market is impeded;

3) the commodity sold or purchased by economic entities cannot be substituted with another commodity in the process of consumption (including consumption for production purposes), growth of the commodity price does not condition corresponding to such growth reduction in demand for this commodity, information about the price, conditions of selling or purchasing of this commodity in the relevant commodity market is available to indefinite group of persons.”

Thus, we assume that any attempts to abuse on suppliers or customers by a company below this thresholds cannot be sustainable since the abused party will always have a possibility to turn to an alternative trade partner. This principle applies to both price and non-price abuses provided for in Articles 10 and 11 of the Law “On Protection of Competition”, including “imposing on a counterparty of contractual terms which are disadvantageous for the latter or are not connected with the subject of agreement (unjustified requirements of transfer of funds, other property, including property rights, as well as consent to conclude a contract on conditions of including in it of provisions, concerning the commodity in which the counterparty is not interested and other requirements) ...” (the latter most relevant to the purposes of this questionnaire).

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.

Our jurisdiction **does** prohibit acts that would fall within the “abuse of superior bargaining position” concept as presented in this Questionnaire applicably to a market dominant firm.

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

The responses and citations from the Russian legislation presented above provide evidence that its implicit assumption regarding the “abuse of superior bargaining position” is that the abuser can be only a market dominant firm because alternatively the abused party would turn to another trade partner and, thus, the abuse cannot be sustainable and the attempt of abuse successful. In other words “superiority” in the bargaining position cannot be obtained by an entity operating in the free enterprise society in other way than by means of market dominance.

The possibility of “abuse of superior bargaining position” by non-dominant firm theoretically may result from numerous factors that are beyond antitrust legislation or technical mistakes, including but not limited to:

- Government interference giving special contractual privileges to certain types of enterprises

subject to their industrial or geographic affiliation (not a case for Russia)

- Ways of bargaining and establishing contractual relationship that are rooted in pre-capitalist traditions (not a case for Russia)
- Private coercion to deal (that is subject to criminal penalty and contradicts to the Constitution of the Russian Federation)
- Mistakes in defining the relevant market and/or drawbacks in national antitrust legislation leading to underenforcement and mistakes in dominance assessment
- Erroneous application of antitrust analysis to actually related trade parties as though they were unrelated, i.e. failure to reveal actual relationship between them or lack of evidence of this relationship.