

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?

*The term “abuse of superior bargaining position” is not in principle explicitly defined in the Slovak rule of law. The term “abuse of economic power”, which relates only to conduct of a retail chain operator is the closest term to it periphrastically.*

*The term abuse of economic power in connection with retail chains is adjusted in the Act No. 358/2003 Coll. on Retail Chains in the wording of the Act No. 543/2004 Coll. (hereinafter only “the Act” or “the Act on Retail Chains”).*

*Pursuant to the Act the economic power abuse shall be the conduct of an operator of a retail chain in connection with its supplier in which the retail chain operator abuses a negotiation advantage arising out of its economic power within contract conclusion with the supplier and enforces more advantageous conditions than those it could achieve without such negotiation advantage.*

*This definition applies only to a purchaser (trader). From reasoning report it arises that prevention of non-acceptable conduct of retail chains in connection with suppliers has been the intention of this Act.*

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? *No*

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

*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?

*The Antimonopoly Office of the Slovak Republic is not authorized to act in the meaning of this Act. The Ministry of Economy of the Slovak Republic performs control over observance of the Act on Retail Chains.*

(3) Why are such acts regulated?

*According to the reasoning report an effort to adjust conduct of retail chains in contractual relations with their suppliers has been the aim of the Act, since retail chains in connection with their suppliers in trade contracts abuse economic power through inappropriate and non-balanced conditions.*

(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.”

*See enclosure*

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

*If abuse of bargaining (negotiation) power was part of abuse of a dominant position practice, such conduct would be assessed also in standard way pursuant to the Act on Protection of Competition. Otherwise such conduct can be assessed only in case of retail chains through the Act on Retail Chains.*

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

*An abuse of the economic power is in particular:*

- a) extortion of inappropriate advantageous business conditions or assertion of discriminatory business conditions during identical or comparable fulfilment towards individual suppliers,*
- b) extortion of the obligations in a contract with a supplier not relating to contract subject*
- c) forcing the supplier to sell the goods for a price lower than the production or purchase prices,*
- d) transfer of sanctions imposed on an operator of a retail chain to a supplier, if they were not imposed by supervision authorities in connection with supplier’s responsibility*

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

*No*

*Pursuant to the Act on Retail Chains the Ministry of Economy of the Slovak Republic as authorized state body for the area of application of the Act on Retail Chains does not examine impact on 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.

*The Act on Retail Chains determines only one type of sanctions, namely fines. A fine may be imposed on a retail chain operator from SKK 1,000,000 up to SKK 10,000,000 for abuse of economic power. For repeated violation of the same obligation in the course of twelve months a fine increased to double of the amount shall be imposed.*

*Imposing a fine, the seriousness, method, duration and potential consequences of violation of the Act especially, are taken in regard.*

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?

*No*

*There is not mention of possibility to countervail superior bargaining position in the Act. It is not possible to assess to what extent the given factor is considered in decision making practice due to lack of practical experiences in application of this Act.*

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.

*Any case has been solved from the day of effect of this Act in September 2003.*

(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.

*As the decisions in the matter have not been issued so far, neither decisions, nor cases are available.*

5. Does your jurisdiction allow private cases challenging “abuse of superior bargaining position”?

*Yes*

*Affected subjects may submit private-legal damage action to court.*

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.

*Not applicable in the Slovak Republic, the Antimonopoly Office of the Slovak Republic is not authorized to submit complaint to court in such cases.*

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

*The Antimonopoly Office of the Slovak Republic does not have information about existence of such private claims.*

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

*There is not direct continuity or relationships between abuse of bargaining position and abuse of a dominant position in the Slovak rule of law. “Abuse of superior bargaining position” and “abuse of dominance/monopolization” are assessed pursuant to two autonomous acts and as it has been stated above abuse of superior bargaining position lies within the authority of the Ministry of Economy of the Slovak Republic and second practice – abuse of dominance/monopolization lies within the authority of the Antimonopoly Office of the Slovak Republic.*

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.

*As it has been mentioned above (B.1.b.) Slovak rule of law does not directly adjust the problems relating to abuse of superior bargaining position in principle. The Act, according to which we have answered above mentioned questions, relates only to position of retail chains towards their suppliers and in this specific case it adjusts “abuse of economic power” and*

*“abuse of bargaining advantage”.*

*The Act is criticized for many reasons, in particular for discrimination, since it relates only to retail chains. The Act as such is nearly not applied at all. Considering the mentioned facts, its amendment is being prepared nowadays.*

# **358/2003 Coll.**

## **Act**

of July 4 2003

### **on Retail Chains**

Amendment: 543/2004 Coll.

The National Council of the Slovak Republic has passed the following Act:

#### **§ 1**

##### **Object of this Act**

This Act governs:

- a) method of assessment and prevention of abuse of economic power by retail chains in their commercial activities with their suppliers,
- b) goods labelling with seller identification,
- c) supervision over observance of this Act.

#### **§ 2**

##### **Definitions of terms**

For the purposes of this Act the following terms have the following meaning:

- a) Commercial operation is a space in which an entrepreneur sells goods with payment in cash, if this commercial operation is accessible by public,
- b) Retail chain is a commercial operation, or a group of commercial operations using the same or mutually interchangeable identification by a trade name, or are being operated by the same entrepreneur or mutually interconnected entrepreneurs by property or personnel, or a trade alliance, if such entrepreneur or group of entrepreneurs have economic power,
- c) Entrepreneurs connected by property
  1. natural person or a legal person having directly or indirectly share in the equity or in voting rights of another legal person, allowing to have a decisive influence on its activity, or
  2. legal persons, in which the same natural person has directly or indirectly a share in equity or in voting rights, allowing to exercise decisive influence on their activity, or
  3. natural persons or legal persons having directly or indirectly a share in equity or in voting rights of the same legal person, allowing them to exercise decisive influence on its activity,
- d) Personally interconnected entrepreneurs
  1. close persons, 1)
  2. natural persons and legal persons, if the natural person or its close person is directly or indirectly participating in the management or control of a legal person,
  3. legal persons, if the same natural person or his/her close persons participate directly or indirectly in management or control of the legal person
- e) Trade alliance – a group of commercial operations operated by several natural persons or legal persons with independent legal entity status, not being entrepreneurs interconnected by property or personally, associated for the purpose of joint purchase of goods, or otherwise utilizing advantages of harmonized procedure in relation to the supplier of goods,
- f) Operator of a commercial operation or a retail chain – a natural person or a legal person, if in the retail chain the goods are being sold by several natural persons or legal persons, each one of these persons is considered to be a retail chain operator,
- g) Price for purchase and sale of goods - price according to special regulation, 5)
- h) Economic power – the position of an operator of a retail chain in connection with its supplier on a

basis of which a supplier depends on an operator of a retail chain, because there is not possibility for it to offer goods to the other entrepreneur in the relevant market, therefore it is forced to provide an operator of a retail chain with more advantageous conditions than those it would provide the other entrepreneur with.

### **§ 3 Abuse of Economic Power**

(1) Economic power abuse shall be the conduct of an operator of a retail chain in connection with its supplier in which the retail chain operator abuses a negotiation advantage arising out of its economic power within contract conclusion with the supplier and enforces more advantageous conditions than those it could achieve without such negotiation advantage.

(2) An abuse of the economic power shall be in particular:

- a) extortion of inappropriately advantageous business conditions or assertion of discriminatory business conditions during identical or comparable fulfilment towards individual suppliers,
- b) extortion of the obligations in a contract with a supplier not relating to contract subject
- c) forcing the supplier to sell the goods for a price lower than the production or purchase prices,
- d) transfer of sanctions imposed on an operator of a retail chain to a supplier, if they were not imposed by supervision authorities in connection with supplier's responsibility.

(3) Abuse of economic power is contrary to rules of fair business connections 5a) and shall be prohibited.

### **§ 4 Labelling goods with the label of a retail chain**

(1) Labelling goods with the label of a retail chain is labelling with a trade name, a business name, a trade mark or other feature of:

- a) the retail chain, by entrepreneurs linked with it by property or personally who offer goods for sale,
- b) the commercial operation, in which goods are offered for sale.

(2) If goods are labelled only with the label of a retail chain, retail chain is considered to be producer.

(3) Labelling goods pursuant to the special regulations is not touched by this. 5b)

### **§ 5 Supervision over observance of this Act**

(1) Supervision over observance of this Act is performed by the Ministry.

(2) The Ministry may initiate the proceedings pursuant to this Act on its own initiative and on a basis of incentive submitted by a supplier of a retail chain operator or on a basis of suggestion submitted by the other legal person.

(3) Operator of a retail chain and legal person, who submitted incentive are participants to the proceedings pursuant to par. 2.

(4) The Ministry performs supervision over observance of this Act through staff members authorized for this.

(3) Authorized staff members of the Ministry according to par.2 during their performance of supervision are authorized, in a necessary scope, to:

- a) enter the premises, establishments and operations, land plots and to other premises of entrepreneurs, if they directly relate to the subject of supervision; inviolability of the residence must not be touched by performance of this authorization,
- b) request provision of documents, other written materials, statements and information, including supplier contracts, necessary for performing supervision from the entrepreneur and its employees within a specified period of time, for documents and information containing business secret and classified information it is necessary to follow the procedure set by special regulations, 6)
- c) request from the entrepreneur, its employees, as well as from the other state authorities cooperation necessary for performing the function of supervision.

## **§ 6 Fines**

- (1) The Ministry shall impose a fine to the retail chain operator from SKK 1,000,000 up to SKK 10,000,000 for violation of obligation according to the articles 3 and 4.
- (2) Imposing a fine, the seriousness, method, duration and potential consequences of violation of obligation especially, are taken in regard.
- (3) For repeated violation of the same obligation in the course of twelve months the Ministry shall impose a fine increased to double of the amount stated in par. 1.
- (4) Fine may be imposed within one year from the date, when the Ministry found violation of obligation, however not later than within three years from the date, when violation of obligation occurred.
- (5) Income from fines imposed according to this Act is revenue of the state budget; the Ministry carries out their administration.

## **§ 6a Common Provision**

A special regulation on administrative proceedings, 8) shall apply to the action, unless otherwise provided for by this Act.

## **§ 7 Transitional provision**

Retail chain operators, who operate commercial operations established prior to the effect of this Act, are obliged not later than within three months from the date of coming into effect of this Act to harmonize their contracts concluded prior to its effect with the provisions of this Act, and to meet conditions and obligations provided for by this Act, except the obligation according to the article 4, which they are obliged to meet within six months from the date of effect of this Act.

## **§ 7a Transitional provisions effective from November 1, 2004**

Retail chain operators are obliged to harmonize contracts concluded before November 1, 2004 with this Act within three months from the date of effect of this Act.

## **§ 8 Effect of this Act**

This Act comes into effect on September 1, 2003.

The Act No. 543/2004 Coll. comes into effect on November 1, 2004.

**Rudolf Schuster**  
**Viliam Veteška**  
**Mikuláš Dzurinda**

- 1) § 116 and 117 of the Civil Code.
- 2) § 2 par. 1 of the Act of the National Council of the Slovak Republic No. 152/1995 Coll. on Foodstuffs.
- 3) § 14 of the Act of the National Council of the Slovak Republic No. 272/1994 Coll. on Protection of Health of Public in the wording of the Act No. 514/2001 Coll.
- 4) Numeral indications 3401, 3402, 3404 and 3406 of the Appendix No. 1 of Regulation of the Government of the Slovak Republic No. 728/2002 Coll., by which Customs Tariff is issued.
- 5) § 2 par.2 of the Act of the National Council of the SR No.18/1996 Coll. on Prices as later amended.
- 5a) § 264 and 265 of the Commercial Code.
- 5b) For example § 9 of the National Council of the Slovak Republic No. 152/1995 Coll. on Foodstuffs in the wording of further laws, § 25 and 29 of the Act No. 163/2001 Coll. on Chemical Agents and Chemical Formulations in the wording of the Act No. 128/2002 Coll.
- 6) Act No.241/2001 Coll. on Protection of Classified Information and on changes and amendments to certain laws in the wording of further laws.
- 7) Act No.128/2002 Coll. on State Control over Internal Market in the matters of Consumer Protection and on change and amendments to certain laws in the wording of the Act No. 284/2002 Coll.
- 8) Act No. 71/1967 Coll. on Administrative Proceedings (Administrative Order) in the wording of further laws.