

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 substantive provisions of the Act no 4054 on the Protection of Competition (the Competition Act) are presented under articles 4, 6 and 7. Article 4 deals with restrictive agreements and concerted practices, article 6 prohibits the abuse of dominant position whereas article 7 regulates mergers and acquisitions.

Abuse of superior bargaining position is not defined in our jurisdiction. The Competition Act prohibits the abuse of dominant position and not the superior bargaining position of a non-dominant firm which was a policy choice of the law makers.

Acts such as request for provision of supplier’s labor without compensation and coercive collection of contributions, exercising buying power are considered within the scope of the Turkish Competition Act only if the party in the superior bargaining position is a dominant firm. During its 10 years of enforcement, the Turkish Competition Authority (TCA) received such complaints especially in the retail sector of Fast Moving Consumer Goods (FMCG). But such complaints regarding the parties are not covered within the scope of the Competition Act unless they have a dominant position. The dominant position is defined as “the power of one or more undertakings in a particular market to determine economic parameters such as price,

supply, the amount of production and distribution, by acting independently of their competitors and customers” according to article 3 of the Competition 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?
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?

(3) Why are such acts regulated?

(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.”

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

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 (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

(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.).

(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?

(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.

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.

(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.

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.

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

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.

As explained under Q A, “abuse of superior bargaining position” is not defined in our jurisdiction, thus the Turkish jurisdiction does not prohibit acts that would fall within the abuse of superior bargaining position concept. In brief, the Competition Act prohibits only the abuse of dominant position and not the superior bargaining position of a non-dominant firm. In general, abuse of superior bargaining position related practices are seen in the retailer-supplier relationship. Therefore, brief information concerning the situation in the retail and supplier sectors in Turkey is given under Annex I.

Currently, the practices applied by retail companies that are potentially anti-competitive (price flexing, listing fees, slotting fees, etc.) do not distort competition in the retail market seriously, because these companies seem to lack a significant degree of market power. If this situation changes and the retail companies become dominant, then the Competition Board could scrutinize their activities upon on its own initiative and/or through complaints filed with it.

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

Extracts from the study on “Fast Moving Consumer Goods- Competitive Conditions and Policies”¹

The study² on FMCG sector shows that the conduct of firms in the retail and supplier sectors has received considerable attention due to its direct impact on consumers. This study highlights that most of these complaints brought before the Competition Board (the decision making body of the TCA) are about below-cost selling and discriminatory practices.

The common feature of below-cost selling complaints is the claim that hypermarkets sell their products at excessively low prices that may force small retailers to exit from the market. According to Competition Act, below cost selling or excessively low prices can be deemed as the violation of the law only if the undertaking concerned has a dominant position in the relevant market. The Competition Board rejected all complaints about below-cost selling as out of scope by arguing that the dominant position of any hypermarket in the relevant market is unlikely because of low concentration ratios in the market, low entry barriers and dynamic market conditions.

Other main complaints brought before the Competition Board are concerned with discriminatory practices carried out by suppliers against small retailers in favor of large retailers. Complaints were generally brought by small retailers of the Chamber of Small Grocery Shops. They claimed that suppliers sell their products under more favorable terms to large retailers. The Competition Board deemed almost all these complaints as out of scope because it decided that small retailers and large retailers are not in equivalent position because of differences in their sizes, volumes of purchased products, product diversity.

In fact, as can be seen from the explanations above there is no special legislation regulating the abuse of superior bargaining position in Turkey. Nevertheless, the attempt to introduce a law regarding establishment of large retailers will be discussed below as to its relevance to the subject in question³.

There have been several attempts to introduce a law for the establishment of large retailers in

¹ Fast Moving Consumer Goods, Competitive Conditions and Policies prepared by Aydın Çelen, Tarkan Erdoğan and Erol Taymaz in “Competitiveness and Regulation” TEPAV publications 2007, can be reached at <http://www.tepav.org.tr/tur/admin/dosyabul/upload/FMCG%20Paper.pdf>

² Ibid.

³ Ibid.

Turkey and three draft laws were brought before the Competition Board in recent years. The common aim of these drafts was to help small retailers (groceries, green groceries...) by forcing large stores to be located “outside” the city.

The first draft law prepared in 2001 aimed at regulating the establishment of stores having a sales area greater than 250 m² subject to the permission obtained from a Board composed of the Municipality, Chamber of Commerce, Competition Board and consumer associations. This Board would give its decision by considering the location (its distance to the city centre), demand and supply conditions in the city concerned, and the competitiveness of small retailers. The same procedure would apply to the stores that are larger than 1000 m² that would be located 5 km away from the city centre.

The second draft law was prepared by Ministry of Trade and Industry in 2003. The difference between the first and second laws was the fact the latter one did not envisage any special Board. It assigned the authority to the governor or the Ministry of Industry and Trade according to size of large stores. It also included provisions that prohibited certain forms of conduct (predatory pricing tactics, etc.) that could be addressed indirectly under the Competition Act.

The last draft law was put on the agenda in 2004. Those above-mentioned prohibitions were excluded from draft law after the Competition Board’s objections. Although there are some improvements in the new draft law, the Competition Board opposed to two issues concerning restriction of private label sales by large stores (the draft law envisaged 20 percent limit for private label sales) and limitations on low-price sales promotions. The Competition Board states that these restrictions harm consumers (by preventing price competition) and small and medium-sized manufactures (who can gain competitive advantage by producing private label products for large retailers). It seems that the law is not agenda of the government, and is not likely to be enacted in recent future.

According to the results of the survey carried out in the study on “Fast Moving Consumer Goods”⁴, most of the retailers and suppliers stated that they welcome a law on regulating the retail market, restrictions on different forms of competitive practices and on the location of large stores need to be tackled with care. Since the competition law provides sufficient safeguards against any anti-competitive behavior, there may not be any need to introduce additional general restrictions. The idea of protecting small retailers by imposing a ban on the

⁴ Ibid.

establishment of new large stores around the city center is also questionable because it basically helps the incumbent large retailers.

CONCLUSION:

There are some practices applied by retail companies that are potentially anti-competitive (price flexing, listing fees, slotting fees, etc.). However, these practices do not distort competition in the retail market seriously, because these companies seem to lack a significant degree of market power. There are some practices applied by supplier companies that are potentially anti-competitive (discounts based on exclusivity agreements, shelf area, product range, etc.). These practices could distort competition because of high level of concentration in certain markets. These markets need to be scrutinized closely by the TCA to guarantee further development of the retail market.