



ICN Special Program for Kyoto Annual Conference

Report on Abuse of Superior Bargaining Position

Prepared by

Task Force for Abuse of Superior Bargaining Position



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I. INTRODUCTION

The ICN Steering Group approved the mandate of the Task Force for Abuse of Superior Bargaining Position in June 2007. As the mandate says, in markets where both larger firms and smaller firms operate, an issue of abuse of superior bargaining position (“ASBP”),¹ as opposed to more familiar abuse of dominance/monopolization issues, appears to have recently arisen in business to business relations in several jurisdictions particularly, but not limited to, in the retail sector in the wake of the emergence of large-scale retailers like hypermarkets.

However, views and rules on whether or how to address the issue of ASBP seem quite different among jurisdictions.

The first stage of this project is a fact-finding phase comparing legal frameworks and their enforcement activities of such regulations in the jurisdictions that employ them. Specifically, the main questions to be addressed in this paper are the following:

- (1) What does ASBP mean in business-to-business relations in various jurisdictions?
- (2) 1) (For those jurisdictions where such practices are regulated,) How are such practices regulated? And why?
2) (For those jurisdictions where such practices are not regulated,) Why are such practices not regulated?

The second stage of the project is to hold a ninety minute panel discussion as a Special Program during the 2008 ICN Kyoto Annual Conference, to discuss the issue of ASBP, especially whether and, if so, how we should address such practices under competition policy, based upon results of this report.

For the fact-finding exercise mentioned above, a special task force was established in August 2007 under the authorization of the ICN Steering Group. The mandate of this task force² is to conduct necessary questionnaire surveys among several jurisdictions and compile a descriptive report on the current status of regulations on ASBP.

¹ ASBP here 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, in Japan, ASBP includes acts such as request for provision of supplier’s labor without compensation and coercive collection of contributions, and exercising buying power. A party in the superior bargaining position does not necessarily have to be a dominant firm or firm with significant market power.

² The mandate is available at <http://www.icn-kyoto.org/documents/mandate.pdf>.

The task force comprises 15 competition agencies from Armenia, Austria, Belgium, Brazil, Canada, European Union, France, Germany, Japan, Latvia, Pakistan, Russia, Slovak Republic and United States.

The report, which is mainly intended to gain knowledge on and insight into regulations on ASBP, if any, in various jurisdictions, is based on responses of 32 ICN members³ to a questionnaire⁴ developed by the task force. As the mandate stipulates, this descriptive report aims to organize ICN members' responses basically according to subjects of the questionnaire, in terms of providing input for possible issues for the panel discussion at the Kyoto conference. We appreciate the time and effort that respondents have expended on answering questions presented in the questionnaire.

³ The competition agencies of Austria, Barbados, Belgium, Brazil, Canada, Chile, Croatia, Cyprus, Czech Republic, Egypt, European Union, France, Germany, Indonesia, Italy, Jamaica, Japan, Jersey, Korea, Latvia, New Zealand, Norway, Pakistan, Russia, Serbia, Singapore, Slovak Republic, Switzerland, Taiwan, Turkey, United Kingdom and United States responded to the questionnaire. The responses are available at:

<http://www.icn-kyoto.org/documents/abuse.html>

⁴ The questionnaire is available at: <http://www.icn-kyoto.org/documents/questionnaire.pdf>

II. CURRENT LEGAL SITUATION⁵

1. Overview of Regulation Status

A total of 32 jurisdictions responded to the survey. Although more comprehensive information will be indispensable for a full understanding of ASBP regulations, for the sake of organizing the questionnaire responses for the panel at the Kyoto conference, the questionnaire responses to question B.1 (1)⁶ could fall into one or more of the following four categories: 1) jurisdictions reporting specific provisions (“Specific Provisions Group”), 2) jurisdictions reporting no specific provisions (“No Specific Provisions Group”), 3) jurisdictions reporting the potential applicability of their general competition provisions (“General Competition Provisions Group”), and 4) jurisdictions reporting the potential applicability of non-competition provisions (“Non-Competition Provisions Group”). These categories are not mutually exclusive, and the responses of some jurisdictions place them in more than one category.

Of the 32 jurisdictions responding to the survey, seven jurisdictions (Austria, France, Germany, Italy, Japan, Korea and Slovak Republic) reported specific legal provisions relevant to the questionnaire’s definition of ASBP, placing them in Category 1. Two additional jurisdictions (Indonesia and Latvia) are considering or adopting specific provisions. Twenty-four jurisdictions⁷ fell under Category 2, responding that they do not have legal provisions governing ASBP.

Of the 24 jurisdictions reporting no specific provisions, 12 jurisdictions⁸ did not respond further to part B of the survey, while eleven⁹ jurisdictions along with two¹⁰

⁵ The general competition provisions concerning “abuse of dominance/monopolization” and non-competition provisions, such as contract-related provisions, are not discussed in detail in this paper as they are subject to the standard analytical approach already established in their respective fields and thus do not merit a special discussion in this paper. However, a number of jurisdictions without specific provisions on ASBP-type scenarios referenced their general competition laws, or non-competition provisions, in their questionnaire responses. Consequently, this paper focuses on the jurisdictions with specific provisions although the responses of jurisdictions responding on the basis of general competition provisions and non-competition provisions are also provided.

⁶ Most responses to question A have been integrated into the responses to B.1 (1). Accordingly, we summarized their responses to both question A and B.1 (1) and discussed them in this part.

⁷ Barbados, Belgium, Brazil, Canada, Chile, Croatia, Cyprus, Czech Republic, Egypt, European Union, Indonesia, Jamaica, Jersey, New Zealand, Norway, Pakistan, Russia, Serbia, Singapore, Switzerland, Taiwan, Turkey, United Kingdom and United States.

⁸ Barbados, Belgium, Cyprus, Czech Republic, Egypt, Jersey, Pakistan, Singapore, Switzerland, Turkey, United Kingdom and United States.

⁹ Brazil, Canada, Chile, Croatia, European Union, Indonesia, Jamaica, Norway, Russia, Serbia and Taiwan.

¹⁰ Austria and Italy.

of the seven jurisdictions reporting specific provisions noted that some forms of conduct that could be characterized as ASBP could be governed by their general competition laws on unilateral conduct. These jurisdictions responded to the questionnaire on the basis of their general competition provisions and their responses are included in Category 3. Finally, Category 4 consists of nine jurisdictions (Belgium, Brazil, Chile, Croatia, Czech Republic, Italy, New Zealand, Norway and Pakistan) from both categories 1 and 2 that noted the availability of non-competition provisions, such as contract law, business tort law or consumer protection legislation, to address some forms of conduct that could be characterized as ASBP.

A. Jurisdictions reporting specific provisions (Specific Provisions Group)

Seven jurisdictions (Austria, France, Germany, Italy, Japan, Korea and Slovak Republic) indicated that their laws contain specific provisions applying to conduct that falls under the questionnaire's definition of ASBP. Of these seven jurisdictions, three jurisdictions (Germany, Japan and Korea) employ such provisions as part of their competition law, and four employ them in other specific contexts such as protecting local suppliers in rural areas (Austria); tort liability under commercial code (France); a private civil remedy statute (Italy) and as an administrative regulation of retail chains (Slovak Republic). In addition, two jurisdictions (Indonesia and Latvia)¹¹ are in the process of considering or adopting specific provisions. The German Act against Restraints of Competition (ARC) provides for a prohibition of unfair hindrance, which applies to firms holding a superior bargaining position as well as dominant undertakings.¹² Regarding the

¹¹ Indonesia ("regulation on abuse of superior bargaining position will be implemented exclusively in retail industry if draft of presidential decree on modern market is enacted.") and Latvia in additional comments noted that on March 13 in 2008 the Parliament has adopted Amendments to the Competition Law.

¹² Section 20 (1) and (2) of Act against Restraints of Competition. According to these provisions, "a firm with superior bargaining power 'shall not directly or indirectly hinder in an unfair manner another undertaking in business activities which are usually open to similar undertakings, nor directly or indirectly treat it differently from similar undertakings without any objective justification.'" In addition, section 20 (3) sentence 2 of ARC "lays down a specific prohibition of demand-related abuse (e.g. the granting of special rebates)" and section 20 (4) of ARC "sets forth that firms with superior bargaining power shall not hinder small or medium-sized competitors, in particular by offering goods or services below cost price without objective justification and by implementing a cost-price squeeze." Germany also noted that section 3 of "Act against Unfair Competition (Unfair Trade Act) is a blanket clause which prohibits unfair trade practices that are liable to have more than an insubstantial impact on competition to the detriment of competitors, consumers or other market participants (e.g. pressure that impairs the freedom of choice of consumers or market participants, rebates which aim at hindering other market participants; examples for unfair competition are laid down in section 4 of the Act). The Act does not, however, expressly address abuse of superior bargaining power." In addition, "[t]he Bundeskartellamt is not competent to act on the basis

superior bargaining position, Germany responded that section 20 (2) of ARC “stipulates that a firm holds superior bargaining position if small or medium-sized enterprises as suppliers or purchasers of certain kinds of goods or commercial services depend on this firm in such a way that sufficient and reasonable possibilities of resorting to other undertakings do not exist.” The German authority also noted that “such dependence exists only if besides the undertaking allegedly holding a superior bargaining position in the relevant market no other undertakings exist which would be able and willing to supply the respective small or medium-sized undertaking on reasonable terms. Based on case law, several case groups are distinguished: Dependence on product line, dependence on a specific firm, scarcity dependence and demand-related dependence.” It should be noted that “the presumption” of a superior bargaining position “applies only to buyers” although “a supplier as well as buyer may hold a superior bargaining position in relation to another undertaking.” According to the law, a supplier of a certain kind of goods or commercial services shall be presumed to depend on a purchaser within the meaning of section 20 (2) of ARC “if this purchaser regularly obtains from this supplier, in addition to discounts customary in the trade or other remuneration, special benefits which are not granted to similar purchasers.”

In Japan the relevant act¹³ stipulates, in relatively concrete terms, that “[t]aking any act” specified in the statute is prohibited if the act is conducted “unjustly in the light of the normal business practices by making use of one’s superior bargaining position over the other party.”¹⁴ According to Japanese response, ASBP 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.”

Likewise, the Korean authority defines ASBP as “[a]n enterpriser’s act of unfairly

of the Unfair Trade Act, i.e. it can only serve as a basis for a claim in private litigation.”

¹³ Sec. 14 of General Designation, Article 19, Article 2 (9) of Antimonopoly Act.

¹⁴ ASBP is “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” as tending to impede fair competition.

taking advantage of its superior trade position when dealing with others.”¹⁵ The definition applies to “enterprisers” in both supplier and buyer sides of the market with some exceptions.

In Italy, unlawful exploitation of a situation of inequality of market power (ASBP) can be addressed through a private civil action for “injunctive relief and compensation for breach of section 9 of Law n. 192 of 18 June 1998, which prevents firms from exploiting a situation of ‘economic dependence’ of their customers or suppliers.”¹⁶ It should be noted that this provision applies only to business-to-business relations. The Italian Competition Authority has authority to intervene in this field only if the alleged abuse of economic dependence also has an impact on the protection of competition and the market.

In France “[a]buse of superior bargaining position comes under restrictive trade practices governed by civil law.” (article L. 442-6 #1 (2 b) of the Code of Commercial Law) Objectionable practices include: a) unfair discrimination; b) abuse of trade dependence (all forms: open list); c) subjecting a partner to unjustified obligations or trading conditions; d) sudden severance of established business relations¹⁷ (or the threat thereof); e) subjecting a partner to manifestly unfair terms of payment; and f) automatic debiting of suppliers by distributors.¹⁸

¹⁵ Monopoly Regulation and Fair Trade Act (MRFTA) “prohibits unfair business practices in principle and lists nine types of such acts, and the Enforcement Decree of the MRFTA divides unfair business practices common to all business areas into 28 types. Among them, five types of abuse of superior bargaining position are stipulated in the Enforcement Decree and they are specified in greater detail with examples in the Unfair Trade Practice Review Guideline.”

¹⁶ “Economic dependence” is defined by section 9(1) as: “the situation where an undertaking is capable of determining an excessive imbalance of rights and obligations in its commercial relations with another undertaking.”

¹⁷ The French authorities noted that “[t]he business relations concerned are usually between suppliers and supermarkets.”

¹⁸ The French authorities stated in additional comments that the French Commercial Code also contains an Article L 420-2 #2 which provides that “*is also prohibited, whenever it is susceptible to affect the functioning or the structure of competition, the abusive exploitation, by a company or group of companies, of the condition of economic dependence in which a customer company or supplier finds itself vis a vis such company. These abuses may consist of the refusal of sale, tied sales or the discriminatory practices mentioned in article L442-6*” of the French Code of Commercial Law (that includes the provisions of competition law). These provisions are enforced by the French Competition Council upon investigations by the DGCCRF (*Direction Generale de la Concurrence et la Consommation et de la Repression des Fraudes*). It should be noted here that ASBP, called “abuse of economic dependence,” which is considered as an anticompetitive practice in French Law (i.e. with reference to an abuse on a given relevant market), should not be confused with abuses in the relation to dependence, which is considered as a restrictive trade practice (i.e. in a bilateral contractual – or tort – perspective). So far, very few cases of abuse of economic dependence have been rendered by the French Competition Council since the 4 criteria required are rarely met. There criteria are (1) notoriety of the trading partner, (2) significance of its market share, (3) importance of the part of turnover achieved with this trading partner in the total turnover and (4) difficulty to find alternative commercial partners offering similar commercial solutions. In addition, it is not

The Slovak legal system contains sector-specific regulations, in the Act on Retail Chains, concerning abuse of economic power in connection with retail chains. These provisions are enforced by a state administration body¹⁹ rather than a competition agency. Pursuant to the Act, the abuse of economic power “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.” It should be noted that this definition applies only to “a purchaser.”

In Austria in addition to general competition law, the Federal Law for the Improvement of Local Supplies and the Competitive Conditions (“Nahversorgungs-Gesetz”)²⁰ prohibits a number of practices, e.g., discriminatory practices or demanding payments or services without equivalent. It should be noted that the Law is not primarily geared to protect competition but to protect local supplies in rural areas.

In addition, two jurisdictions are considering or adopting specific provisions falling within the questionnaire’s definition of ASBP. For example, Latvia noted in additional comments that on 13 March 2008 Parliament of the Republic of Latvia has adopted Amendments to the Competition Law. One of the main topics is the definition of dominant position with regard to the retail market and the prohibition of its abuse. The definition will apply only to the buyer side, namely to “such market participant or several market participants who, considering its (their) buying power and suppliers’ dependence in relevant market, is able to directly or indirectly apply or impose unfair and unjustified provisions, conditions or payments upon suppliers and can significantly hinder, restrict or distort competition in any relevant market in the territory of Latvia during sufficiently long period of time.”

Likewise, in Indonesia a regulation on ASBP in the retail industry is under consideration in the Draft of Presidential Decree on modern market.²¹

easy to evidence that commercial relationship between trading partners have an anticompetitive effect on the market.

¹⁹ The Ministry of Economy of the Slovak Republic.

²⁰ Even though the Austrian competition authority (the Federal Competition Authority) is entitled to enforce the relevant parts of the Law, “it shares this competence with a number of other entities and other potential applicants.”

²¹ See Indonesia’s response (“regulation on abuse of superior bargaining position will be implemented exclusively in retail industry if draft of presidential decree on modern market is enacted.”).

B. Jurisdictions reporting no specific provisions (No Specific Provisions Group)

Of the 32 jurisdictions responding to the survey, 24 jurisdictions²² indicated that their laws and regulations do not contain any specific prohibition against ASBP. Most agencies in those jurisdictions noted that ASBP is not an antitrust term or concept under the legal systems of those jurisdictions. In this category, 12 jurisdictions (Barbados, Belgium, Cyprus, Czech Republic, Egypt, Jersey, Pakistan, Singapore, Switzerland, Turkey, United Kingdom and United States) reported no applicable provisions and did not respond to the remainder of questionnaire section B. The remaining jurisdictions responded to the questionnaire on the basis of their general competition provisions, non-competition provisions, or both types of provisions, to the extent that these may apply to ASBP-type conduct.

C. Jurisdictions reporting the potential applicability of general competition provisions to ASBP-type conduct (General Competition Provisions Group)

Although twenty-four agencies indicated that their legislation does not provide for specific provisions on ASBP, eleven²³ of these jurisdictions in addition to two jurisdictions (Austria and Italy) reporting specific provisions responded to the questionnaire on the basis of their general competition provisions on unilateral conduct. These jurisdictions indicated the potential applicability of their general unilateral conduct competition provisions, such as abuse of dominance, to some forms of conduct that could be characterized as ASBP. All of these jurisdictions made clear that a violation would not be found under their laws unless the conduct met the criteria under their general competition provisions. In other words, these provisions differ from the specific provisions discussed in category 1 because establishing dominance or substantial market power serves as a filter for the applicability of these provisions.

For example, the Canadian competition authority indicated that “[i]f ...we focus on the example of the exercise of buying power as a form of ‘abuse of superior bargaining position,’ then the Act [Canadian Competition Act] could apply.”²⁴ Canada noted that buyer power is not in itself an offense under the Canadian Competition Act. Rather, it is a concept that can be used in the Competition

²² Barbados, Belgium, Brazil, Canada, Chile, Croatia, Cyprus, Czech Republic, Egypt, European Union, Indonesia, Jamaica, Jersey, New Zealand, Norway, Pakistan, Russia, Serbia, Singapore, Switzerland, Taiwan, Turkey, United Kingdom and United States.

²³ Brazil, Canada, Chile, Croatia (clarified in additional comments), European Union, Indonesia, Jamaica, Norway, Russia, Serbia and Taiwan.

²⁴ In their terms, buyer power can be defined as “ability to reduce the price to below a supplier’s normal selling price, or more generally the ability to obtain trade terms more favourable than a supplier’s normal trade terms.”

Bureau’s analysis under various sections – such as in mergers (monopsony power), cartels (buyer cartel), or abuse of dominance (raising rivals’ costs or predation).

Similarly, under EC law, “abuses of superior bargaining position” are conceptually governed by general competition rules such as rules on abuse of a dominant position. Article 82 EC Treaty prohibits any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it as it may affect trade between Member States.²⁵ Under EC law, “abusive behavior can only constitute an infringement if performed by a dominant firm. Dominance assessment thus serves as a filter when analyzing unilateral conduct cases.” They have raised “exclusive supply obligations,” “predatory overbuying,” “raising rivals costs through overbuying” and “refusal to purchase by a vertically integrated buyer to raise rivals’ costs” as examples of the exercise of buyer power.

By the same token, Russia responded that “[t]he ‘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...is interpreted as exploitative behavior with regards to entities integrated vertically to the abuser, i.e. its customers or suppliers.” Accordingly, Article 10 (3) of the Law on Protection of Competition, which is applicable to entities having dominant position in the market, could apply to ASBP.

The competition law of Austria, the Austrian Cartel Act, provides that “dominance is also given in a situation where a company has superior position on the market vis-à-vis their suppliers or customers, in particular when the affected suppliers or customers are dependent on the maintenance of business relations with this company in order to avoid very heavy financial losses.” The Act “explicitly incorporates the concept of economic dependency in its definition of a dominant market position,” thus viewing “economic dependency” as potentially indicative of a dominant market position rather than as abusive conduct. The Austrian concept of “economic dependency” applies to both sides of the market (buyers and sellers).

Chile also noted that “[t]he applicability of article 3 of Competition Law²⁶ to situations of abuse of superior bargaining position must not be discarded, although

²⁵ Article 82 EC Treaty covers both exclusionary and exploitative abuses. According to their explanation, “exclusionary abuses are practices aimed at foreclosing competitors from the market or marginalizing them, ultimately causing harm to consumers. Exploitative abuses involve a dominant firm which exploits the opportunities provided for by its significant market power in order to harm consumers directly, for example by imposing excessive prices.”

²⁶ Article 3 of the competition act provides that “[a]ny person who enters into or executes, whether individually or collectively, any deed, act or contract that prevents, restricts or hinders free competition, or tends to produce such effects, will be subject to the measures prescribed by ...this law, notwithstanding the other corrective or restrictive measures that may be imposed in each case.”

the Competition Court has applied it to only one case.” In that case, the competition court of Chile analyzed “the relationship between supermarket chains with significant market power and their providers, considering anticompetitive conditions unilaterally determined by the buyer, once the merchandise has been delivered, referred to the ex-post determination of prices and rebates.”

The Brazilian authority responded that under the Brazilian Competition Law (Law 8884/94) “there are four broad effects / purposes that may constitute antitrust violations. These are when firms (i) ‘limit, restrain or in any way injure open competition or free enterprise’; (ii) ‘control a relevant market of a certain product or service’; (iii) ‘arbitrarily increase profits’; (iv) ‘or abuse of their dominant position.’ Therefore, an ‘abuse of superior bargaining position’ claim could be based on any of these effects / purposes, even though there is not a clear definition of the infraction.” Under Brazilian law, “[i]t is important to note that for any and all kinds of anticompetitive conducts, the Brazilian competition authorities require the party to be a dominant firm or to have market power.”

The Indonesian response indicated that various activities of abuse of bargaining position can be subject to articles related to “market control” in their competition law (Law No 5/1999) concerning prohibition of “monopolistic practices” and “unfair business competition.”

The Taiwanese response stated that ASBP would be governed by general competition provisions such as Article 19, or the unfair trade provisions under Article 24, of the Taiwan Fair Trade Act. It noted that an abusive conduct of advantageous market position is regulated when it results in harming effective competition or undermining fair trading order in the relevant market even if the abuse stems from privately-negotiated contract between the enterprise and its trade partner.²⁷ “[B]ased on those cases the TFTC dealt with, most abusive conduct of superior market position only undermines fair trading order, rather than market competition mechanism.”

The agency responses from Jamaica and Serbia indicated that general competition provisions on abuse of a dominant position could apply to ASBP. For example, the Jamaican authority replied that “abuse of superior bargaining position, as described, could be properly scrutinized under our abuse of dominance provisions” (emphasis in original). By the same token, the Serbian authority stated that, while ASBP is not defined under its law, it is “covered by the provisions applying to abuse of dominant position.” In order for the competition authority to deal with such a case, however, the “party abusing its bargaining position has to be in a dominant position.”

²⁷ The TFTC classifies ASBP into two categories, namely “abuse of relative market position” and “abuse of advantageous market information.”

Norway responded that it does not recognize the concept of “superior bargaining position.” Norway cited “the most relevant acts for protection against abuse of superior bargaining position” to be the Norwegian Acts on Agreements of 1918, the Norwegian Marketing Control Act of 1972, and abuse of a dominant position under the Norwegian Competition Act of 2004. Norway responded to the questionnaire by referencing all three acts.

D. Jurisdictions reporting the potential applicability of non-competition provisions to ASBP-type conduct (Non-Competition Provisions Group)

Nine²⁸ jurisdictions responding to the questionnaire noted the availability of non-competition laws, such as private civil actions under contract law, business tort law, or consumer protection legislation to address some forms of conduct that could be characterized as ASBP.

For example, in New Zealand ASBP could be dealt with “under the English rules of common law in relation to commercial and contract law.” According to New Zealand’s response, these common law rules include “some equity law protections relating to such matters as oppression and unconscionability.”²⁹

Similarly, in Norway “the weaker contract party might seek protection through Norwegian Act on Agreements of 1918.” In accordance with the Act, a contract may be “set aside or amended if it would be unreasonable or in conflict with good business practice to maintain the contract.” The term “unreasonable or in conflict with good business practice” could relate to ASBP in certain cases. In addition, it is suggested that the Norwegian Marketing Control Act³⁰ could also at least theoretically be applicable to ASBP.

In Italy unlawful exploitation of a situation of inequality of market power can be addressed through “ordinary remedies against unfair contractual terms, excessive prices or refusal to deal by legal monopolists pursuant to the Civil Code.”

Similarly, the agency responses from Brazil, Chile and Czech Republic indicated that non-competition provisions could apply to ASBP. For example, in Chile “private law establishes some mechanisms to protect the weak bargaining party

²⁸ Belgium, Brazil, Chile, Croatia (clarified in additional comments), Czech Republic, Italy, New Zealand, Norway and Pakistan.

²⁹ “Common law unconscionability relates to the formation of a contract while oppression may apply more generally to include the performance of the contract.”

³⁰ The Norwegian Marketing Control Act states that “[i]n the conduct of business no act may be performed which is in conflict with good business practice among businesspersons or which is unfair on consumers or which is otherwise in conflict with good marketing practice.”

against abusive clauses. Such corrective mechanisms consider implying a good faith term into contracts as a general clause (1546 of Civil Code), and a contractual interpretation rule which provides that ambiguous or uncertain terms should be interpreted against the party that included them in the contract (1566 of Civil Code).”

On the other hand, Pakistan’s response referred to laws on consumer protection, stating that “[u]nder the Consumer Protection Laws that cover certain unfair trade practices, some abusive practices that may qualify as an abuse of a dominant position (such as tying) can be considered. However, this is regardless of the market power of undertakings.” Similarly, in Belgium under the Unfair Trade Practices and Consumer Protection Act “some abusive practices that may qualify as an abuse of a dominant position (such as tying) can be sanctioned regardless of the market power of parties.”

2. Reasons For and Against Specific Provisions

A. Reasons for adopting specific provisions

ICN members that enacted specific provisions prohibiting ASBP were asked in question B.1. (3) to provide the reasons why they have adopted those provisions. Among the seven jurisdictions in the Specific Provisions Group, two jurisdictions (Japan and Germany) seemingly relate the objective of regulations to infringement of competition,³¹ whereas four jurisdictions (France, Italy, Korea and Slovak Republic) appear to explain the objective from a viewpoint of exploitation of the trade partner.

Japan in response to question B.1 (3), explaining in concrete terms the underlying rationales for the specific provisions against ASBP, stated that the underlying rationales for the regulation of ASBP as “Unfair Trade Practices” stem from the idea that ASBP undermines “the foundation of the free competition” where the parties to transactions determine transaction terms or conditions based on their free

³¹ Latvia, although their Amendments to the Competition Law are not yet enacted, can be included in this group. In additional comments, Latvia elaborated the situation behind the submission of the Amendments to the Competition Law as harmful to competition as follows: “in Latvian retail market significant buying power is concentrated in the hands of couple of very powerful supermarket chains (disproportionate to the large number of small and medium sized producers and suppliers), distorting fair balance in the market, creating significant barriers to entry and limiting the choice of suppliers. Large retailers with superior bargaining power, by setting unfair contractual obligations and ungrounded payments, create the situation which has negative effects, not only in the upstream market (foreclosing smaller suppliers, forcing them to agree with reduced supply prices close to cost price, thus influencing ability of producers to invest and grow etc.) but also to consumers because of reduced product variety and increasing prices.”

and independent business judgment. The response adds that “[i]t 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 disadvantages on the other party would be in the advantageous position in terms of condition of competition through the different means from price and quality.” These are the reasons cited by the JFTC for why ASBP needs to be addressed under the competition policy in Japan.³²

By the same token, Germany explained that “[t]he German legislator, when incorporating the section 20 (2) ARC into antitrust law in 1973, held the view that not only conduct by those undertakings holding a dominant position could distort competition. In fact, the conduct of undertakings, which were able to exercise market power only to a certain extent and in relation to certain undertakings was also deemed to be capable of having negative effects on competition.”

On the other hand, Italy stated that “[t]he rules on abuse of economic dependence mirror rather closely the legal discipline of unfair terms in consumer contracts. The rationale underpinning the relevant provisions is that in long-term contractual relations characterized by a significant imbalance in the bargaining position of the parties some firms may indeed be in the same position as end consumers vis-à-vis their contractual counterpart and should therefore be granted some protection against the risk of exploitation.”

Similarly, the Slovak authority noted that “an effort to adjust conduct of retail chains in contractual relations with their suppliers has been the aim of the Act [on Retail Chains] since retail chains in connection with their suppliers in trade contracts abuse economic power through inappropriate and non-balanced conditions.”

The Korean response articulated that “[i]f the difference between bargaining

³² In Japan, competition authority does not intervene in the bargain negotiated and concluded between two contracting parties just because the bargain is disadvantageous to one party. They interfere with the cases where the bargain struck between the parties is economically unsound and would not have been seen but for ASBP. See also footnote 59 for exemplary cases.

positions of transaction parties is large enough to restrict free decision making of one party, and if one party takes advantage of this gap to put the other party at a disadvantage, for instance by unilaterally coercing product purchase, or to intervene in the other's management, the other party's spontaneous development basis is undermined and fair transaction order is also disturbed.” Likewise, the French authority stated that restrictive trade practices are regulated “because they are held to be restraint of trade between two partners.”

B. Reasons for not adopting specific provisions

ICN members that did not enact specific provisions prohibiting ASBP were asked in question C to explain the reason why they have taken those approaches toward this issue as a policy. The reasons for not adopting specific provisions can be divided into three groups, i.e., 1) the existing laws and regulations have been working properly; 2) ASBP rules viewed as harmful to efficient bargaining between contracting parties and 3) concern of confusion or incoherence between ASBP and unilateral conduct or other provisions.

(1) Existing rules suffice

Switzerland's agency responded that application of “general provisions which deal with the unlawful practices of enterprises which have a dominant position” is “sufficient to assure the competition on the market.”

Turkey's agency has an analogous view to Switzerland that “[c]urrently 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.”

The Czech Republic explained that “the present competition law provides the Office [the Office of the Protection of Competition], as a supervisory body in this field, with fully sufficient instruments for prevention and recourse of such trading chains practices if they constitute public offences of competition (abuse of dominance) by course of law on the Protection of Competition.”

New Zealand does not “prohibit an abuse of a superior bargaining position in statute for business to business relations, as the current common law of equity has been operating effectively.” They suggested that “[t]he common law allows the courts to determine the difficult issue of what is oppressive or unconscionable conduct on a case by case basis.”

Russian explanation of not having specific provisions on abuse of superior bargaining position is based on a perception that only a company(s) with substantial degree of market power can effectively exploit vertically integrated upstream and downstream trade partners and, therefore, general behavioral legal provisions for market dominant firms suffice. Thus Article 10 and 11 of the "Law on Protection of Competition" are applied in case where such exploitive behavior is undertaken by dominant firms individually or collectively.

(2) ASBP rules viewed as harmful to efficient bargaining between contracting parties

In the United Kingdom, “[s]ubject to exceptional circumstances, UK contract and competition law will not intervene to correct the terms of bargains. Abuse of dominant position law in the UK is geared primarily to preventing exclusionary conduct, rather than protecting undertakings in weaker economic positions from those with superior economic bargaining positions.”

Similarly, the United States responded in extensive terms from the economic point of view that “[t]he objective of United States antitrust laws in general, and Section 2 of the Sherman Act in particular, is the protection of competition and consumer welfare” and thus “U.S. antitrust law is not concerned with particular outcomes of contractual negotiations between parties unless such terms would have the effect of harming the competitive process and thereby reduce consumer welfare. With regard to contracts between parties at different levels of the manufacturing-distribution chain (that is, between non-competitors), it is highly unlikely that particular provisions of such contracts will have anticompetitive effects. To the contrary, contracts between parties at different levels of the manufacturing-distribution chain are likely to reflect an efficient allocation of risks and duties among the parties. U.S. antitrust law would not interfere in the bargain struck between two contracting parties, absent a showing of substantial competitive harm (rather than harm to specific competitors). Moreover, in the absence of harm to competition, governments generally should make every effort not to interfere in privately-negotiated contracts. The package of terms that make up a contract between parties in a vertical relationship reflects the parties’ agreement as to how to allocate rights and risks between them in an efficient manner. If a particular provision is deemed by the government to be an ‘abuse of a superior bargaining position’ and therefore not available for use in a contract, the parties likely would adjust other terms of the contract, such as by adjusting the contract price. The result may be a less efficient contract with higher contracting costs and both parties potentially worse off. Ultimately, the quality-adjusted price to the ultimate consumer would tend to increase, a result antithetical to the goals of U.S. competition policy.”

Likewise, Canada responded that “[i]f a firm has a superior bargaining position and is able to extract lower prices as a result, this is not seen as anti-competitive under Canadian law (unless, ..., as a result of a merger, the merged entity is placed in a position where it is likely to be able to depress input prices below their competitive levels).”

(3) Concern of confusion or incoherence with unilateral conduct or other relevant provisions

Belgium reported that the introduction of an ASBP-provision was “discussed when preparing the new competition act of 2006, but it was decided that such provision would only be justified in case of a very superior bargaining position.” However, these considerations were abandoned because “a provision on the abuse of a superior bargaining position was deemed to create confusion concerning the scope of the provision on the abuse of dominance.”

Croatia did not adopt an ASBP-provision because it believes that “[t]he EU competition legislation and the provisions of the Article 82 of the EC Treaty do not recognize this concept either.” In order to guarantee coherence between Croatian and EU competition legislation, Croatia refrained from adopting such a provision during its “process of harmonization of legislation with the relevant EU legislation (Community *acquis*).”

Singapore stated that there is “no concept such as ‘abuse of superior bargaining position’ under Singapore’s Competition Act,” and that “[a] distinction must be made” between ASBP and abuse of dominance. Singapore pointed out that its competition law “prohibits any conduct on the part of one or more undertakings which amounts to an abuse of a dominant position [emphasis in original] in any market in Singapore.” It further stressed that, in addition, its law on unilateral conduct is “concerned only with exclusionary abuses, and not exploitative abuses.”

III. ANALYSIS OF ABUSE OF SUPERIOR BARGAINING POSITION AND ANALYSIS OF SIMILAR CONDUCT UNDER GENERAL COMPETITION PROVISIONS

1. A. Criteria for Assessing Superior Bargaining Position

ICN members were asked in question B.2 (1) to identify what criteria they use in order to assess superior bargaining position. Of the seven agencies reporting specific provisions, most identified multiple criteria that are used to assess ASBP.³³ Six of the seven agencies in the Specific Provisions Group reported consideration of the “probability of finding an alternative trade partner.” Five of the seven agencies (France, Germany, Italy, Japan and Korea) have identified “degree of trade dependence on the firm by the other,” “supply and demand forces of the product or service” and “difference in scale of business between the parties”³⁴ as relevant criteria while Japan has raised “position of the abusing firm in the industry” as a criterion as well.

B. Treatment of Similar Scenarios under General Competition Provisions

Among the thirteen jurisdictions in the General Competition Provisions Group, the eleven jurisdictions responding to this portion of the questionnaire³⁵ identified multiple factors that are considered under their general competition laws. All eleven cited “supply and demand forces of the product or service” as relevant criteria. Ten jurisdictions³⁶ cited “probability of finding an alternative trade partner,” while eight jurisdictions³⁷ identified “harm to consumer welfare” as a criterion. Eight agencies³⁸ identified “degree of trade dependence on the firm by the other,” while seven agencies³⁹ consider the “difference in scale of business

³³ Slovak Republic identified only one criterion – “probability of finding an alternative trade partner.” See also the response from Italy (“[w]hile only lack of choice is expressly considered by the law as a criterion for the assessment of economic dependence, the relevant provision is formulated in such a way to make clear that other criteria may be considered as well on a case by case basis.”)

³⁴ In additional comments, the French authorities noted that in 2001 the new Economic Regulations Act (“*loi NRE*”) deleted from article L 420-2#2 the requirement that the company doesn’t have any “equivalent solution” to establish the state or situation of economic dependency. However, the French Competition Council has adopted a restrictive interpretation considering that the situation of economic dependency notably imply an absence of equivalent solution that remains to be evidenced amongst the 4 criteria mentioned in footnote 18.

³⁵ Croatia and Serbia did not respond to this portion of the questionnaire.

³⁶ Austria, Brazil, Canada, Chile, European Union, Indonesia, Italy, Jamaica, Russia and Taiwan.

³⁷ Austria, Brazil, Chile, Indonesia, Italy, Jamaica, Norway and Russia.

³⁸ Austria, Brazil, Chile, European Union, Indonesia, Italy, Russia and Taiwan.

³⁹ Austria, Brazil, European Union, Indonesia, Italy, Russia and Taiwan.

between the parties.” Chile also listed “barriers to entry in the market of supermarkets and exit barriers of its providers” as a criterion. Three jurisdictions (Canada, European Union and Russia) noted that a number of factors, not necessarily limited to the listed factors, are considered under their general competition laws.⁴⁰ Likewise, Brazil responded that it applies the rule of reason, under which all listed criteria could be observed.

2. A. Describing the Abusive Conduct

Regarding abusive conduct, ICN members were asked in question B.2 (2) to describe conduct that constitutes ASBP. Of the seven agencies in the Specific Provisions Group, Japan enumerated conduct such as “unjust coercive sales,” “unjust request for provision of labor,” “unjust request for contributions,” and “unfavorable treatment in response to refusal of requests” as abusive conduct. Similarly, Korea specified that examples of conduct that constitutes ASBP include “coercion to purchase” (*e.g.* act of coercing sales agencies to purchase goods in stock), “coercion to provide benefit” (*e.g.* act of demanding money and other articles like monetary contributions and sponsorship or entertainment irrelevant to transactions from suppliers of goods or services), and “offering disadvantages” (*e.g.* a transaction party’s delayed payment of service fee and failure to pay late payment penalty for a long time). The response from Austria stated that it has no case law regarding ASBP so far, and no legal definition except that the Federal Law protecting local supplies prohibits “practices such as discriminatory practices or demanding payments or services without equivalent.” In the Slovak Republic, 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; and
- 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.

Italian legislation⁴¹ on “economic dependence” provides that “[t]he abuse can also consist in the refusal to supply or to buy, in the imposition of unjustifiably

⁴⁰ Canada’s Competition Bureau considers a number of qualitative and quantitative factors with an emphasis placed on market share, and other indicators of market power, and barriers to entry.

⁴¹ Section 9 of Law n. 192 of 18 June 1998.

burdensome or discriminatory contractual conditions, or in the arbitrary severance of existing commercial relations.”

Germany identified the examples of conduct as follows:

- a) demanding retrospective rebates (so called “tapping a company for rebates”);
- b) refusal to supply undertakings with “must-stock” items;
- c) abusive and unjustified setting of sales prices by a franchisor;
- d) agreements on an exclusive purchasing obligation within a franchising system;
- e) purchasing benefits are not passed on to the franchisee;
- f) manufacturers requiring trading firms to comply with their provisions in terms of quantities and turnovers on the type of resale; e.g. the setting of a maximum threshold for internet sales without any objective justification;
- g) deliberate non-disclosure of interface information in the software sector by a car manufacturer; and
- h) the use of pressure.

In France examples of abusive conduct under restrictive trade practices include:

- a) unfair discrimination;
- b) abuse of trade dependence (all forms: open list);
- c) subjecting a partner to unjustified obligations or trading conditions;
- d) sudden severance of established business relations⁴² (or the threat thereof);
- e) subjecting a partner to manifestly unfair terms of payment; and
- f) automatic debiting of suppliers by distributors.

In additional comments, the Latvian authority provided the example of ASBP as follows:

- a) unfair and unjustified provisions concerning return of goods;
- b) demanding unfair and unjustified payments for goods location in retail trade area;
- c) requiring unfair and unjustified payments for entering into contract;
- d) requiring payments for supply of goods for newly opened retail trade area;
- e) unfair and unduly long payment terms for supplied goods; and
- f) imposition of unfair and unjustified sanctions for violation of provisions of transaction.

⁴² The French authorities noted that “[t]he business relations concerned are usually between suppliers and supermarkets.”

B. Analysis of Conduct under General Competition Provisions

The thirteen jurisdictions in the General Competition Provisions Group responded to this question on the basis of their general competition provisions. The Canadian authority noted that “an example of ‘abuse of buying power’ would be the existence of a monopsony concern in the case of merger, buyer cartels, and a mechanism by which rivals’ costs might be raised or a case of predation in the context of abuse.”

Chile responded that in one case its Competition Court found “conditions unilaterally determined by the buyer, once the merchandise has been delivered, referred to the ‘ex-post’ determination of prices and rebates, were anticompetitive.”

The EC response explained extensively that “[p]owerful buyers could be characterized as dominant vis-à-vis their suppliers whether or not they are with respect to their customers. In addition, their suppliers could possibly be abused either through ‘exploitation’ (i.e. prices below competitive levels) or through exclusion (i.e. efforts to discourage others from offering them access to consumers)...Besides imposing lower prices on input suppliers a dominant buyer may employ a number of practices other than pricing behavior, with potentially anti-competitive effects. Examples of strategic buyer behavior include (a) exclusive selling obligations, (b) predatory overbuying of inputs or (c) raising rivals costs through overbuying or (d) refusal to purchase. These practices may serve a number of different purposes. Some can enhance efficiencies, some can distort competition, while others allow buyers to obtain a greater share of profits, so-called rent shifting.”

The Indonesian authority indicated in broader terms that “agreement of trading terms applied to goods suppliers by huge retailer” constitutes ASBP.

The Taiwanese authority responded that, based upon their experiences, conduct such as “improper restraint on trade partner’s business activity by arrangements such as tying and exclusive dealing” and “improper imposition of additional fees by distribution enterprises” could be regarded as ASBP.

3. A. Effects on Competition in Jurisdictions with Specific Provisions

ICN members were asked in question B.2 (3) whether effects on competition, including harm to consumer welfare, must be demonstrated in order to prove ASBP. Among the seven agencies in the Specific Provisions Group, only Germany has responded positively while Austria, France, Italy, Japan, Korea and the Slovak

Republic have responded negatively.⁴³ Germany indicated that, in order to establish whether “a market behavior” constitutes “objectively justified competition on the merits or not, the competition authority has to balance all the interests of the undertakings involved i.e. especially the economic and competitive interests of the dominant firm and its competitors (e.g. the degree of dependence of the small or medium-sized undertaking on a given supplier/purchaser enjoying superior bargaining power, alternative resources and degree of (likely) hindrance/foreclosure effect etc.).” On the other hand, concerning effects on competition, Italy noted that “no effect on competition needs to be demonstrated when a case is brought before a civil court under the heading of economic dependence. However, ... the Italian Competition Authority is competent to intervene in this field only if the alleged abuse of economic dependence has an impact on the protection of competition and the market.” Japan explained that under its law “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.” Likewise, in France,⁴⁴ unless ASBP falls within the abuse of economic dependence practice, since the existence of a competitive advantage or disadvantage is obvious once the discriminatory nature of the practice has been established, there is “no need to demonstrate the existence of a competitive advantage or disadvantage.”⁴⁵

B. Effects on Competition in Jurisdictions with General Competition Provisions

Nearly all of the thirteen jurisdictions⁴⁶ in the General Competition Provisions Group indicated that effects on competition must be demonstrated in order to prove that conduct that could be characterized as ASBP is a violation of their general competition laws.⁴⁷ For example, the Austrian agency responded that “the

⁴³ In Austria, the effect is not required to be shown for establishing infringements of the Federal Law protecting local supplies, but the specific objectives pursued by this law (protection of local supply in rural areas) need to be taken into account when interpreting its provisions. Also in Korea, effects on competition are considered but not required. 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.

⁴⁴ See footnote 18 (practice’s effects on competition).

⁴⁵ However, according to the Versailles Court of Appeal, “the plaintiff must prove that the businesses having gained an advantage are the victim’s competitors.”

⁴⁶ Austria, Brazil, Canada, Chile, European Union, Indonesia, Italy, Jamaica, Norway and Russia.

⁴⁷ But see responses from Jamaica (“[w]e do not have to show that harm has already taken place; it is sufficient to show that harm is likely to take place.”); Norway (“[i]t is sufficient to demonstrate that the abuse potentially can restrict competition by making probable that the abuse is capable of having, or probably will have such effect.”); and Taiwan (if ASBP is classified as “unfair trade” rather than anticompetitive, proof of competitive effects is not

assessment of anticompetitive effects embracing those on consumer welfare will be required” because “the abuse of a superior bargaining position constitutes a specific type of abuse of a dominant market position.” Indonesian agency responded positively, stating that qualitative and legal rather than quantitative approaches tend to be utilized as measurement of effects on competition. The Canadian authority noted that, in assessing an abuse of buying power, “[t]he potential anti-competitive acts...are subject to the scrutiny of determining their effect on competition” although “[h]arm to consumer welfare need not be explicitly demonstrated.” EC stated that “[f]or both exclusionary and exploitative abuses the likelihood of anti-competitive effects is an important integral part of the assessment.”

4. A. Sanctions/Remedies in Jurisdictions with Specific Provisions

ICN members were asked in question B.2 (4) to describe the type and nature of sanctions imposed on ASBP. Sanctions attached to breaches of specific provisions can be diverse. In Japan, ASBP 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.” In Korea, the competition authority can order measures necessary to correct violations such as “price reduction,” “cease and desist order,” “removal of contract clause(s)” and “public announcement of remedy imposition.” In addition, they can impose surcharges up to two percent of the average turnover of the violator for the last three business years.⁴⁸ In Germany, if the competition authority, in an administrative proceeding, finds that an undertaking enjoying superior bargaining power has e.g. unfairly hindered a business partner, “it may require the undertakings to bring to an end the respective infringement (cease and desist order). For this purpose, it may impose on undertakings all measures which are necessary to effectively bring the infringement to an end and are proportionate to the infringement established.” In Austria, infringement of the Federal Law protecting local supplies is subject to prohibition. In the Slovak Republic the Act on Retail Chains determines only fines. When they impose a fine, the seriousness, method, duration and potential consequences of violation of the Act especially are taken in regard. In Italy, if formal proceedings are initiated by the Italian Competition Authority pursuant to legislation on “economic dependence,” administrative fines can be imposed upon the infringer. In France, one of the competition authorities⁴⁹ can request the court to order cessation of the practices, have the illegal clauses or contracts declared void, demand restitution of money paid without legal cause and demand a civil fine of up to 2 million euros. In case the ASBP falls within the scope of economic

required.). The TFTC noted that all cases in which it has found infringements have been classified as unfair trade rather than anticompetitive conduct.

⁴⁸ The violator is also subject to imprisonment of less than two years or fine of less than 150 million won.

⁴⁹ The Minister for the Economy.

dependence practice, the French Competition Council (FCC) has jurisdiction to decide on the case.⁵⁰ Should the FCC sanction the infringer of the said practice, it may impose either a fine up to 10% of the worldwide turnover of the group of the company concerned or, if the infringer is an individual, a fine amounting to a maximum of 75,000 euros and a sentence of a maximum of 4 years imprisonment. In addition, the FCC may pronounce an injunction to stop the illegal practice.

B. Sanctions/Remedies in Jurisdictions with General Competition Provisions

Among the thirteen jurisdictions in the General Competition Provisions Group, the EC commission “may consider, besides fines, behavioural or structural remedies.”⁵¹ In Brazil sanctions for antitrust violations include fines, “a half- page publication of the summary sentence in a court-appointed newspaper” and “annotation of the violation on the Brazilian Consumer Protection list.” In Indonesia, sanctions tend to be an administrative sanction such as ordering to business actors to stop activities and fine order. Russian response stated that “concluding an agreement limiting competition and contradicting to the antimonopoly legislation of the RF [Russian Federation] 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.” In Austria, an abuse of a dominant market position under the Cartel Act is subject to prohibition, remedies and/or fines. Similarly, in Taiwan the competition authority could order the violators to cease or rectify their conduct, or take necessary corrective measures. The violation is also subject to an administrative fine of not less than fifty thousand but not more than twenty-five million New Taiwan Dollars.

5. A. Consideration of Countervailing Power in Jurisdictions with Specific Provisions

ICN members were asked in question B.3 whether agencies 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. Among the seven

⁵⁰ Clarified in additional comments.

⁵¹ “Remedies imposed by competition authorities seek to remove the consequences of infringements and restore competition on the market to the status quo ante. The ECJ has specified the powers conferred on the Commission to ‘effectively bring the infringement to an end’ (Article 7 of Regulation 1/2003) as follows:

- The requirement to end the infringement, which may include an order to do certain acts or provide certain advantages which have been wrongfully withheld as well as prohibiting the continuation of certain action, practices or situations which are contrary to the Treaty;
- The prevention of its repetition; and
- The elimination of its consequences.”

agencies in the Specific Provisions Group, two agencies (Germany and Italy) responded positively while four agencies (France, Japan, Korea and Slovak Republic) responded negatively. For example, the German agency’s response states that the competition authority “balances the interest of the undertakings involved, i.e. especially the economic and competitive interests of the dominant firm and its competitors. In this respect, possible justifications are examined and taken into account when assessing whether the conduct in question constitutes an unfair hindrance of the firm that depends on the undertaking holding a superior bargaining position.” The Slovak Republic noted that “[t]here is not mention of possibility to countervail superior bargaining position in the Act [Act on Retail Chains]. 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.”

B. Consideration of Countervailing Power in Jurisdictions with General Competition Provisions

Among the thirteen jurisdictions in the General Competition Provisions Group, nine jurisdictions responded that countervailing power is considered in assessing competitive effects under their general competition provisions.⁵² For example, Canada responded that countervailing buyer power is also assessed by the Bureau. “The Bureau’s *Enforcement Guidelines: The Abuse of Dominance Provisions (Section 78 and 79 of the Competition Act)* state that ‘it is difficult to measure market power directly; consequently, a number of indications – both qualitative and quantitative – of market power are normally relied upon. These indicators include (...) customer and supplier countervailing power.’ ” In Brazil “[w]hen assessing case of abusive conduct, authorities must demonstrate the Article 20 effects / purposes. It is true that sometimes a firm which appears to have a dominant position may not in fact be able to exercise said position due to buyer or seller power. In abusive conduct cases, the market structure is studied along with the firm in question, in order to avoid erroneous conclusions.” Of the other four, in Norway countervailing power is not considered.⁵³

6. Relationship Between “Abuse of Superior Bargaining Position” and “Abuse of Dominance/Monopolization”

A. Jurisdictions with Specific Provisions

ICN members were asked in question B.6 to explain the relationship between ASBP

⁵² Austria, Brazil, Canada, European Union, Indonesia, Italy, Jamaica, Russia and Taiwan.

⁵³ Chile responded that it has “no experience in assessing cases of abusive conduct.” Croatia and Serbia did not respond to this portion of the survey.

and “abuse of dominance/monopolization.” The theoretical relationship between specific provisions on ASBP and competition rules regulating unilateral conduct is not clear from the responses. Among the seven agencies in the Specific Provisions Group, the Slovak Republic responded that “there is not direct continuity or relationships between abuse of bargaining position and abuse of a dominant position” since both are “assessed pursuant to two autonomous acts” and “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.”

In Japan ASBP is different from “private monopolization”⁵⁴ (Japanese equivalent of “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 the other 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 has superior bargaining position relative to the other party in business relationship.

2) Difference in conduct

‘Abuse of superior bargaining position’ requires that a party engage in conduct unjustly disadvantageous to the other 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.”

⁵⁴ Article 2 (5) of the AMA.

Similarly, Italy responded that “there is no theoretical overlap between abuse of economic dependence and abuse of dominant position as far as the interests at stake are concerned. While the provisions on abuse of economic dependence are intended to protect the individual interests of undertakings affected by the exploitative behaviour of a firm enjoying superior market power, competition rules are meant to protect and enhance consumer welfare: therefore, in dominance cases, the alleged abuse will only constitute a breach of the relevant legal provisions when it is likely to result in consumer harm.”

Likewise, in France “[t]here is no direct relationship” between ASBP and “abuse of dominance/monopolization.” The response from France adds that “the first is prosecuted as a restrictive trade practice but this does not necessarily rule out a prosecution for abuse of dominant position.”

In Korea, “[d]etermination of bargaining position requiring regulation can be done based on either the entire market or the individual transaction.” “Abuse of dominance/monopolization” looks at “the concerned enterpriser’s market dominance in the related market” while ASBP examines “the difference in position between the concerned enterpriser and its transaction counterpart.” In other words, “determination of illegality of abuse of superior bargaining position, for which transaction parties’ relative position matters, requires examination of unfairness of individual transactions rather than of the entire market competition situation.”

By contrast, in Germany, the relationship of the two provisions is very close. The provision addressing ASBP (section 20 (2) of ARC) refers to the provision governing the conduct of dominant firms (section 20 (1) of ARC). German response mentioned that “section 20 (2) ARC effectively widens the scope of application of section 20 (1) ARC with the effect that not only dominant but also such firms with a superior bargaining position are prohibited from unfairly hindering business partners which depend on them.”

In additional comments, the Latvian authority noted that, alongside with the general definition of dominant, Amendments to the Competition Law introduced new concept – dominant position in retail market because, under the terms of Latvian retail market situation, general dominant position rules were not sufficient as none of the groceries chains have a dominant position. The novel definition and prohibition of ASBP in the retail market is very close to the prohibition of the general dominant position. The only difference is that the latter applies to monopolies only (only one company [or several companies in case of collective dominance] may be dominant in the relevant market) while Amendments to Competition Law apply to oligopolies (maybe two or more companies who are capable of abusing its market power).

B. Jurisdictions with General Competition Provisions

Most of the thirteen jurisdictions in the General Competition Provisions Group do not have specific provisions, and therefore responded that they don't distinguish between ASBP and abuse of dominance. In those jurisdictions, ASBP-type conduct would not constitute a violation unless it met the requirements for abuse of dominance. Thus, Brazil responded that ASBP cases may be classified as an "abuse of dominance/monopolization."⁵⁵ The Canadian authority indicated that "alleged anti-competitive practices – such as an abuse of monopsony power – by one large buyer or by a group of buyers that collectively possess buyer power may be investigated under the abuse of dominance provision." Similarly, the EC noted that "[w]ithin EU Law there are no separate laws that relate or refer to the concept of 'superior bargaining position.' It can therefore be presumed that all anti-competitive conduct, whether or not in the context of business to business bargaining falls under Article 82." Austria responded that "the abuse of a superior bargaining position is a sub-category of the general prohibition of abuse of dominance." Also Indonesia responded that both activities are deeply connected with each other since ASBP activity can be a part of abuse of dominant position activity. They have suggested that the difference between two concepts lies in the market share threshold.

⁵⁵ Jamaica, Norway, Russia and Serbia appear to be in the same position.

IV. ENFORCEMENT

1. Competition Agency Role in Enforcement

Among the seven jurisdictions in the Specific Provisions Group, three jurisdictions⁵⁶ responded to question B.1 (2) that competition agencies are authorized to handle or enforce specific provisions on ASBP under the rubric of competition policy.⁵⁷ Of the remaining four jurisdictions, the Italian Competition Authority is competent to apply such provisions only when there is detriment to competition or the market. Otherwise, the matter is left entirely to the civil courts. In France, restrictive trade practices are classified as special torts, which may be “referred to the courts not only by the allegedly injured parties but also by the Public Prosecutor’s Department, Minister for the Economy, and the chairperson of the Competition Council (*Conseil de la Concurrence*).” In the Slovak Republic the Ministry of Economy, which is not a competition authority, enforces the Act on Retail Chains. In Austria, even though the competition authority is entitled to enforce the relevant parts of the Federal Law protecting local supplies, “it shares this competence with a number of other entities and other potential applicants.”

In the General Competition Provisions Group, as its name suggests, only competition authorities handle or enforce their general competition provisions which could potentially apply to ASBP-type conduct. By contrast, competition authorities in the Non-Competition Provisions Group are generally not charged with enforcement of those provisions. Enforcement of non-competition provisions is normally left to the courts in the context of private claims. For example, Norway responded that the Norwegian competition authority does not handle or enforce the Norwegian Marketing Control Act and the Norwegian Act on Agreements.

2. Number of Cases

ICN members were asked in question B.4 to provide the number of ASBP cases that they have decided or reviewed (beyond a preliminary investigation). Among

⁵⁶ Germany, Japan and Korea.

⁵⁷ But see German response (“[t]he Bundeskartellamt is not competent to act on the basis of the Unfair Trade Act, i.e. it can only serve as a basis for a claim in private litigation.”). See also Italian agency’s response (“[a]ll contracts and agreements instrumental to an abuse of economic dependence are void. The general competence to hear cases relating to alleged abuses of economic dependence, including damages actions thereby, lies with the ordinary civil courts. However, whenever the abuse of economic dependence may be relevant for the protection of competition and the market, the Italian Competition Authority can open formal proceedings against the alleged infringer, using the investigative powers granted by the Competition Act 1990.”)

the seven agencies in the Specific Provisions Group, the Italian competition authority has never initiated proceedings pursuant to legislation on “economic dependence.”⁵⁸ Likewise, the Slovak Ministry of Economy has not issued any decisions so far under the Act on Retail Chains.

By contrast, the Japanese authority has decided more than 12 cases⁵⁹ over the past 10 years.⁶⁰ German competition authority has examined 39 cases and 3 of them ended with a decision that the conduct violated antitrust rules. In Korea, more than 2,300 cases⁶¹ were received, and “corrective orders were imposed on 360 of them (corrective orders and surcharges imposed together in 75 cases).” In France, “[t]wenty-five to thirty judgments have been delivered every year since 2001.”

In the General Competition Provisions Group, the responding jurisdictions largely reported on cases involving claims of abuse of dominance by buyers. Austria reported one pending case noting that, although a number of complaints have been filed, investigations have not exceeded a preliminary stage. The Indonesian authority identified one case⁶² fitting within the questionnaire definition of ASBP over the past 10 years. The Brazilian authority noted that it is currently conducting a preliminary investigation on a couple of cases involving supermarket chains that impose clauses on their suppliers. According to them, “[t]he clauses covered a wide range of practices which include, among others, special discounts,

⁵⁸ However, the Italian Competition Authority has no data as to private litigation in civil courts, which is bound to cover the vast majority of ASBP cases in the Italian experience. The Italian authority commented that “the fact that the Authority has never initiated proceedings under this section might indicate that the vast majority of cases involving an abuse of economic dependence having an impact on competition can be dealt effectively through the competition rules...”

⁵⁹ For example, in *Sumitomo Mitsui*, the Japan Fair Trade Commission (JFTC) issued a cease and desist order in 2005 to a bank (Sumitomo Mitsui Banking Corporation) who demanded that entrepreneurs purchase a derivative financial commodity (interest swap). In this case, the entrepreneurs have been in a long term relationship with the bank in financial transactions thereby placing the entrepreneurs in the inferior position to the bank due to the heavy reliance on the bank’s financial support. The bank coercively demanded, explicitly or implicitly, the entrepreneurs to purchase the derivative financial commodity by proposing that loan advanced to the entrepreneurs are conditioned upon their purchase of the derivative financial commodity. If the entrepreneurs did not purchase the commodity, their requests for a loan would be handled in a much more unfavorable manner than it would have been if they purchased the same. Under those circumstances, the entrepreneurs had no choice but to purchase the derivative financial commodity. In *Don Quixote*, the JFTC also issued a cease and desist order in 2007 to a retailer (Don Quixote) who forced some of its suppliers that had been in a relatively weaker bargaining position to dispatch their employees and other staff to assist Don Quixote in building product displays when Don Quixote opened new retail outlets.

⁶⁰ The number of cases in the past 10 years amounts 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.

⁶¹ The exact number is “2,382” in total.

⁶² *Carrefour*, Case No. 02/KPPU-L/2005.

matching competitors' prices, and free merchandise.” The EC noted that “[a]rticle 82 is clearly intended to be applied to both buying and selling activity but there are very few cases where the EU Commission has found conduct by a dominant buyer abusive under Article 82.”⁶³⁶⁴ Norway reported one abuse of dominance case⁶⁵ which refers to bargaining position in business to business relations. This case is currently pending before Norwegian courts.

On the other hand, Taiwan responded that the number of ASBP cases decided or reviewed over the past 10 years has amounted to 29. Of these, 8 cases concerned infringement on abuse of relative market position, 9 cases concerned abuse of advantageous market information, and 12 cases resulted in a finding of no violation. All cases in which infringements were found were classified as unfair competitive practices rather than anticompetitive conduct.

3. Private Enforcement

ICN members were asked in question B.5 if their jurisdictions allow private cases challenging ASBP. Six agencies (Austria, France, Germany, Italy, Japan and Slovak Republic) in the Specific Provisions Group responded that they allow private cases to challenge ASBP. In Germany, “private litigation is of great importance in the area of abuse of a superior bargaining position.” Similarly, all agencies in the General Competition Provisions Group responding to this question responded that private action is allowed to enforce the general competition laws, at least in some circumstances.⁶⁶

⁶³ See the EU cases:

British Airways (see Case 94/04 British Airways v Commission; judgment of the ECJ of 15 March 2007) available at <http://ec.europa.eu/comm/competition/court/index.html>

Merger investigations Tetra Laval, Kesko/Tuko or Rewe Meinl, Carrefour-Promodès available at:

http://ec.europa.eu/comm/competition/mergers/cases/decisions/m2416_en.pdf

http://ec.europa.eu/comm/competition/mergers/cases/decisions/m784_19961120_610_en.pdf

http://ec.europa.eu/comm/competition/mergers/cases/decisions/m1221_19990203_600_en.pdf

http://ec.europa.eu/comm/competition/mergers/cases/decisions/m1684_6_fr.pdf

⁶⁴ See also Russian cases: *Gasprom* (Nov. 2007) available at

http://www.fas.gov.ru/news/n_16103.shtml; *Russian Railways* (June 2006) available at

http://www.fas.gov.ru/news/n_15352.shtml; and *Akbarstorg* (Jan. 2008) (provided in the additional comments).

⁶⁵ *TINE* (Feb.2007); see also *ACNielsen* (April 2007).

⁶⁶ Croatia and Serbia did not respond to this portion of the questionnaire.

V. ADDITIONAL COMMENTS

The following ICN member jurisdictions provided us with thoughtful comments on the issue of ASBP:

Croatia provided comments that “[t]he proposed concept of the abuse of a bargaining power is an interesting one because it gives different aspect of the possible abuse which is not only based on the dominant position. This might particularly be interesting for the smaller markets where the prevailing number of companies are not in a dominant position. Hence, the concept of ‘abuse of superior bargaining position’ could be taken into consideration in future legislative developments in Croatia.”

New Zealand noted that “[i]nequality in bargaining positions is not uncommon in many commercial transactions. Often this arises from information asymmetries, where one party to the transaction has more or better information than the other party. In New Zealand, many sectors where transactions are characterized by information asymmetries have engaged in self-regulation or voluntary practices to address these problems. An example is the Franchise Association of New Zealand Inc where members comply with a code of practice and code of ethics, including an agreed dispute resolution process.”

Russia commented that “[t]he 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.”

The United States noted that “the concept of an abuse of a superior bargaining position is very vague, and that any regulation of such ‘abuse’ is likely to introduce a great deal of uncertainty into the market regarding how best and most efficiently to negotiate contracts with smaller counterparts. Substantial uncertainty is inherent both in determining when a party is in a ‘superior bargaining position’ (particularly where there is no market power requirement), and in assessing when particular contract terms would be deemed to be ‘abusive.’ These uncertainties are likely to raise the costs of contracting, to the detriment of parties and ultimately consumers.”

VI. CONCLUSION

Seven survey respondents (Austria, France, Germany, Italy, Japan, Korea and Slovak Republic) reported that they have specific provisions relevant to the concept of ASBP and two additional jurisdictions (Indonesia and Latvia) are currently considering or adopting specific provisions. The reasons offered by these jurisdictions for their various provisions include:

- To protect competition from negative effects of contract terms that would not occur in the absence of ASBP (Japan)
- To prevent negative competitive effects by non-dominant firms that may distort competition by exercising market power only to a certain extent and only in relation to certain undertakings (Germany)
- To protect against exploitation of trade partners (France, Italy, Korea and Slovak Republic)

On the other hand, 24 of the 32 survey respondents reported that they do not recognize ASBP as an autonomous legal concept in their jurisdictions. Among the reasons offered by some of these jurisdictions for the absence of specific legal provisions on ASBP are:

- Reluctance to interfere with the contractual freedom between private parties (Chile, U.S., U.K.)
- ASBP-type conduct is not considered anticompetitive absent market impact (Canada, U.S.)
- Contracts among non-competitors are unlikely to have anticompetitive effects and therefore do not implicate the objectives of competition law (U.S.)
- Concept of ASBP would introduce confusion and/or uncertainty into the market (Belgium, U.S.)
- Contract disputes involve private harm and case-by-case circumstances that are effectively dealt with through private enforcement (New Zealand)
- General competition law is sufficient to assure competition (Czech Republic, Switzerland, Turkey)

Thirteen of the 32 survey respondents noted that conduct that could be characterized as ASBP may be caught under their general unilateral conduct provisions (particularly abuse of dominance), as opposed to ASBP rules, and therefore responded to the questionnaire on the basis of their general competition provisions.⁶⁷ In almost all these jurisdictions, the application of these rules requires a finding of a dominant position. Nine jurisdictions (Belgium, Brazil, Chile, Croatia, Czech Republic, Italy, New Zealand, Norway and Pakistan), both

⁶⁷ Austria, Brazil, Canada, Chile, Croatia, European Union, Indonesia, Italy, Jamaica, Norway, Russia, Serbia and Taiwan.

with and without specific provisions, noted the availability of private rights of action under general contract, commercial and other non-competition laws for companies facing particular forms of abuse in allegedly unequal contract relationships.

The jurisdictions reporting specific provisions generally reported consideration of multiple criteria in determining superior bargaining position. The commonly employed criterion for the assessment of superior bargaining position among those jurisdictions was “probability of finding an alternative trade partner.” The examples of conduct that constitutes ASBP varied among jurisdictions although some similarities would be identified in the very abstract level. Among the seven jurisdictions reporting specific provisions, only one jurisdiction (Germany) required effects on competition to prove ASBP while the other six jurisdictions (Austria, France, Italy, Japan, Korea and Slovak Republic) do not require effects on competition to be demonstrated.

The type and nature of sanctions varied among jurisdictions reporting specific provisions from cease and desist orders to fines. Countervailing power was considered in two of seven jurisdictions (Germany and Italy) reporting specific provisions.

The relationship between specific provisions and general competition rules is not clear from the responses. Among the seven jurisdictions reporting specific provisions, five jurisdictions (France, Italy, Japan, Korea and Slovak Republic) indicated no direct relationship between ASBP and “abuse of dominance/monopolization” while one jurisdiction (Germany) identified the close relationship between them.

Among the seven jurisdictions reporting specific provisions, three jurisdictions (Germany, Japan and Korea) handle or enforce those provisions through their competition agencies. The remaining four jurisdictions have either assigned enforcement to a non-competition agency (Slovak Republic), have provisions intended to be enforced primarily through private civil actions although, should the alleged ASBP also affect competition, such provisions could also be enforced by the competition agency (Italy), or allocate enforcement authority to competition authorities as well as other entities (Austria and France).

Among the seven jurisdictions reporting specific provisions, four agencies (France, Germany, Japan and Korea) actively enforce the provision while one agency (Italy) has practically no enforcement experiences since most cases are litigated in civil courts or, when a particular ASBP also affected competition (and therefore the competition authority had jurisdiction), the case had been always treated under the more traditional antitrust provisions (abuse of a dominant position). All but one (Korea) jurisdictions reporting specific provisions allow private cases to challenge

ASBP-type conduct.

Appendix A: Overview of Regulation Status

	Specific Provisions		III. General Competition Provisions (e.g. abuse of dominance/monopolization)	IV. Non-Competition Provisions (e.g. contract law, business tort law, consumer protection law)
	I.	II.		
1. Austria	Federal Law for the Improvement of Local Supplies and the Competitive Conditions ("Nahversorgungs-Gesetz")		Sec. 4 of Austrian Cartel Act	
2. Barbados		No		Unfair Trade Practices and Consumer Protection Act
3. Belgium		No		Civil Law
4. Brazil		No	Law 8884/94	
5. Canada		No	Competition Act	
6. Chile		No	Art. 3 of Competition Law	Civil Code
7. Croatia		No	Art. 16 of Croatian Competition Act	Art. 70 of Trading Act
8. Cyprus		No		
9. Czech Rep.		No		Act No. 513/1991 Coll. Commercial Code
10. Egypt		No		
11. E.U.		No	Art. 82 EC Treaty	
12. France	Art. L442-6 of Commercial Code			
13. Germany	Art. 20 (1), (2) of German Act Against Restraints of Competition			
14. Indonesia		No	Art. 19, 25 of Law No 5/1999	
15. Italy	Sec. 9 of Law n. 192 of 18 June 1998		Sec. 3 of Competition Act 1990	Civil Code
16. Jamaica		No	Sec. 19, 20 of Fair Competition Act	
17. Japan	Sec. 14 of General Designation, Art.19, 2 (9) of Antimonopoly Act			
18. Jersey		No		
19. Korea	Art. 36 of Designation of Unfair Business Practices, Art. 23 (1) of Monopoly Regulation and Fair Trade Act			
20. Latvia			Adopted*	
21. N.Z.		No		Commerce Act 1986
22. Norway		No	Sec. 11 of Norwegian Competition Act	Sec.36 of Norwegian Act on Agreements, Sec.1 of Norwegian Marketing Control Act
23. Pakistan		No		Consumer Protection Laws
24. Russia		No		
25. Serbia		No	Art. 10, 11 of Law on Protection of Competition	
26. Singapore		No	Art. 18 of Law on Protection of Competition	
27. Slovak Rep.	Act on Retail Chains			
28. Switzerland		No		
29. Taiwan		No	Art. 19, 24 of Taiwan Fair Trade Act	
30. Turkey		No		
31. U.K.		No		
32. U.S.		No		
Total	7	24	13	9

*Art. 13 of **Competition Law** (not enacted as of 13 March, 2008)

Appendix C: Summary Chart² for Category III

Category III: General Competition Provisions Group

	Criteria under General Competition Provisions						Effects	Sanctions/Remedies					Countervailing Power	Who Enforces?		Number of Cases Involving ASBP-Type Conduct			Private Enforcement		
	a	b	c	d	e	f		g	h	i	j	k		l	Competition Authority	Other	m	n		o	p
1. Austria	X	X	X	X	X		X	X					X	X	1*				X		
2. Brazil	X	X	X	X	X		X	X		X			X	X	some*				X		
3. Canada		X	X		X	X	X	X	X				X						Limited		
4. Chile	X	X	X		X	X	X						X						X		
5. Croatia																					
6. E.U.	X	X	X	X	X	X	X	X					X						X		
7. Indonesia	X	X	X	X	X		X	X					X		1	1			X		
8. Italy	X	X	X	X	X		X						X						X		
9. Jamaica		X	X		X		X						X						X		
10. Norway			X		X		X	X			X					1			X		
11. Russia	X	X	X	X	X	X	X	X				X	X						X		
12. Serbia																					
13. Taiwan	X	X	X	X			X	X	X				X		29	17	12		X		
Total	8	10	11	7	8	4	10	6	9	2	0	1	3	9	13	0	(30)	19	12	0	11
	a. Degree of dependence b. Probability of finding an alternative c. Supply and demand forces d. Difference in scale of business e. Harm to consumer welfare f. Other						g. Cease/desist (prohibition) h. Fines i. Imprisonment j. Surcharge k. Public announcement l. Other								m. Reviewed n. Violation o. No violation p. Settlement * pending						

² The chart in this Appendix is an abridged summary of the questionnaire responses, but the questionnaire responses themselves, which are posted on the INC Kyoto website, should be referenced for more detailed information. These simplified chart entries cannot fully reflect the complexity of each agency's approach or adequately capture the differences between jurisdictions in the way they apply each criterion.

Appendix D

TASK FORCE FOR ABUSE OF SUPERIOR/DOMINANT BARGAINING POSITION DRAFT MANDATE

1. In the markets where both of the larger firms and smaller firms operate, an issue of abuse of superior/dominant bargaining position, as opposed to more familiar abuse of dominant/monopolization issues, appears to have recently arisen in business to business relations in several jurisdictions particularly, but not limited to, in the retail sector in the wake of the emergence of large-scale retailers like hypermarkets.
2. However, the views and rules on whether or how to address the issue of abuse of superior/dominant bargaining position seem quite different among jurisdictions. In certain jurisdictions, such practice or part of it is handled by competition authorities under competition policy, often in special statutory provisions, or by other government agencies/branches under other policy perspectives. In other jurisdictions, none of such practice is regulated, and solving the problems caused by them, if any, is basically left to the market and private litigation.
3. Thus, it would be useful to look into the different approaches to abuse of superior/dominant bargaining position among the jurisdictions, from the viewpoint of helping further develop our thoughts on the possible scope of the competition policy/authorities, as another attempt for enhancing mutual understanding of competition law and policy.
4. **The main questions to be addressed** in this work would be the following:
 - (1) What does “abuse of superior/dominant bargaining position” mean in business to business relations in various jurisdictions?
 - (2) 1) (For those jurisdictions where such practices mentioned above (1) are regulated,) How are such practices regulated? And why?
2) (For those jurisdictions where such practices mentioned above (1) are not regulated,) Why are such practices not regulated?
 - (3) Whether and/or how should we address such practices under competition policy? And why or why not? For example, do such practices affect consumer welfare, and if so, how?
5. This work is mainly intended to gain knowledge on and insight into regulations on abuse of superior/dominant bargaining position, if any, in various jurisdictions. **The first stage** is fact-finding of legal frameworks and their enforcements of such regulations (corresponding to (1) and (2) above). **The second stage** is to hold one-and-a-half-hour panel discussion as Special Program during the 2008 ICN Kyoto Annual Conference, to discuss the question (3) above, based upon the results of the fact-finding of the first stage.
6. **For taking a fact-finding exercise mentioned above to prepare the ground for Special Program panel discussion, a special task force is to be established under the authorization of the ICN Steering Group. The mandate of this task force is to conduct necessary questionnaire survey among several jurisdictions and compile a descriptive report on the current status on regulations on abuse of superior/dominant bargaining position.**
7. The task force pays due attention to the interests of **agencies from developing economies**. To this end, the task force will encourage the active participation by these agencies in its proceedings.

Appendix E

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?

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 yes/no
(e.g., percentage of the firm’s total sales attributable to the allegedly abusive party)
- 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.

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

Appendix F: Relevant Provisions

Canada:

Competition Act

Section 45 of the Act dealing with Conspiracy states:

Everyone who conspires, combines, agrees or arranges with another person

(a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,

(b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,

(c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or

(d) to otherwise restrain or injure competition unduly,

is guilty of an indictable offence and is liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or both.

Section 47 defines bid-rigging as follows:

(1) In this section, “bid-rigging” means

(a) an agreement or arrangement between or among two or more persons whereby one or more of those persons agrees or undertakes not to submit a bid in response to a call or request for bids or tenders, or

(b) the submission, in response to a call or request for bids or tenders, or bids or tenders that are arrived at by the agreement or arrangement between or among two or more bidders or tenderers, where the agreement or arrangement is not made known to the person calling for or requesting the bids or tenders at or before the time when any bid or tender is made by any person who is a party to the agreement or arrangement.

(2) Every one who is a party to bid rigging is guilty of an indictable offence and liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both.

Section 75 (1) Jurisdiction of the Tribunal where refusal to deal – Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that

(a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,

(b) the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,

(c) the person referred to in a paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of the product,

(d) the product is in ample supply, and

(e) the refusal to deal is having or is likely to have an adverse effect on competition in the market, the Tribunal may order that one or more suppliers of the product in the markets accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.

Section 77 (1) Definitions - For the purposes of this section,

“exclusive dealing” means

(a) any practice whereby a supplier or a product, as a condition of supplying the product to a customer, requires that customer to

(i) deal only or primarily in products supplied by or designated by the supplier or the supplier’s nominee, or

(ii) refrain from dealing in a specified class or kind of product exempt as supplied by the supplier or the nominee, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the product to the customer on more favourable

terms or conditions if the customer agrees to meet the conditions set out in either of those subparagraphs;

“market restriction” means any practice whereby a supplier or a product, as a condition of supplying the product to a customer, requires that customer to supply any product only in a defined market, or exacts a penalty or any kind from the customer if he supplies any product outside a defined market;

“tied selling” means

(a) any practice whereby a supplier of a product, as a condition of supplying the product (the “tying” product) to a customer, requires that customer to

(i) acquire any other product from the supplier or the supplier’s nominee, or

(ii) refrain from using or distributing, in conjunction with the tying product, another product that is not of a brand or manufacture designated by the supplier or the nominee, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a) (i) or (ii) by offering to supply the tying product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs.

(2) Exclusive dealing and tied selling - Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that exclusive dealing or tied selling, because it is engaged in by a major supplier or a product in a market or because it is widespread in a market, is likely to

(a) impede entry into or expansion of sales of a product in a market, or

(b) have any other exclusionary effect in a market,

with the result that competition is likely to be lessened substantially, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in that exclusive dealing or tied selling and containing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market.

(3) Market restriction – Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that market restriction, because it is engaged in by a major supplier of a product or because it is widespread in relation to the product, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in market restriction and containing any other requirement that, in its opinion, is necessary to restore or stimulate competition in relation to the product.

Section 79 (1): Prohibition where abuse of dominant position - Where, on application by the Commissioner, the Tribunal finds that

(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,

(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and

(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

Section 84: Where, on application by the Commissioner, the Tribunal finds that a supplier outside Canada has refused to supply a product or otherwise discriminated in the supply of a product to a person in Canada (the “first” person) at the instance of and by reason of the exertion of buying power outside Canada by another person, the Tribunal may order any person in Canada (the “second” person) by whom or on whose behalf or for whose benefit the buying power was exerted (a) to sell any such product of the supplier that the second person has obtained or obtains to the first person at the laid-down cost in Canada to the second person of the product and on the same terms and conditions as the second person obtained or obtains from the supplier; or (b) not to deal or to cease to deal, in Canada, in that product of the supplier.

Section 92 (1) Order - Where, on application by the Commissioner, the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially

- (a) in a trade, industry or profession,
- (b) among the sources from which a trade, industry or profession obtains a product,
- (c) among the outlets through which a trade, industry or profession disposes of a product, or
- (d) otherwise than as described in paragraphs (a) to (c), the Tribunal may, subject to section 94 and 96,
- (e) in the case of a completed merger, order any party to the merger or any other person
 - (i) to dissolve the merger in such manner as the Tribunal directs,
 - (ii) dispose of assets or shares designated by the Tribunal in such a manner as the Tribunal direct, or
 - iii) in addition to or in lieu of the action referred to in subparagraph (i) or (ii), with the consent of the person against whom the order is directed and the Commissioner, to take any other action, or
- (f) in the case of a proposed merger, make an order directed against any party to the proposed merger or any other person
 - (i) ordering the person against whom the order is directed not to proceed with the merger,
 - (ii) ordering the person against whom the order is directed not to proceed with a part of the merger, or
 - (iii) in addition to or in lieu of the order referred to in subparagraph (ii), either or both
 - (A) prohibiting the person against whom the order is directed, should the merger or part thereof be completed, from doing any act or thing the prohibition of which the Tribunal determines to be necessary to ensure that the merger or part thereof does not prevent or lessen competition substantially, or
 - (B) with the consent of the person against whom the order is directed and the Commissioner, ordering the person to take any other action.

Chile:

Article 1546 of *Civil Code* provides “Contracts must be executed on good faith, therefore, they obligate the parties not only to what they expressed, but also to all those things that derive from the obligation’s nature, or those things that in accordance with the law or good uses that belong to it”.

Article 1566 of *Civil Code* provides “Ambiguous or uncertain clauses of contracts written by one of the parties, creditor or debtor, must be interpreted against him, if the ambiguity derives from an explanation that he should have given” (Subsection 2).

Article 3° of *the Competition Act* provides that "Any person who enters into or executes, whether individually or collectively, any deed, act or contract that prevents, restricts or hinders free competition, or tends to produce such effects, will be subject to the measures prescribed by article 26 of this law, notwithstanding the other corrective or restrictive measures that may be imposed in each case" (Subsection 1).

Croatia:

The Competition Act of the Republic of Croatia envisages only the abuse of dominant position as defined in the Article 16 which is consistent with the Article 82 of the EC Treaty. Article 16 reads as follows:

“Abuse of a Dominant Position

- (1) Any abuse by one or more undertakings of a dominant position in the relevant market shall be prohibited.
- (2) The abuse referred to in paragraph (1) of this Article may, in particular, consist of:
 - 1. directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
 - 2. limiting production, markets or technical development to the prejudice of consumers;
 - 3. applying dissimilar conditions to equivalent transactions with other undertakings, thereby placing them at a competitive disadvantage;

4. making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

European Union:

Article 82 EC Treaty:

"Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

France:

Article L442-6, Book IV, Title IV of the Commercial Code:

I. - Liability shall be incurred by the tortfeasor and redress for the damage caused shall be provided by any producer, trader, manufacturer or person recorded in the trade register:

1. Offering to or obtaining from an economic partner, prices, payment times or terms and conditions of sale or purchase that are discriminatory and unjustified by any real counter-concessions, thus creating a competitive advantage or disadvantage for this partner;

2.a) Obtaining or attempting to obtain from a trading partner any advantage unmatched by a commercial service actually rendered or manifestly disproportionate to the value of the service rendered. Such an advantage may, for example, consist in a contribution, unjustified by a common interest and without a proportionate counter-concession, to the financing of a sales promotion, an acquisition or an investment, particularly in connection with the renovation of shops or the merging of businesses, central listing units or central purchasing units. Such an advantage may also consist in artificial aggregation of turnover or the demand that a trading partner fall into line with the trading conditions obtained by other customers;

b) Abusing a partner's trade dependence or the business's own superior bargaining position by subjecting the partner to unjustified obligations or trading conditions, for example, by imposing disproportionate penalties for breach of contractual commitments. Linking the sales display of more than one product to the granting of an advantage is an abuse of superior bargaining position if it tends to restrict access of similar products to points of sale;

3. Obtaining or attempting to obtain an advantage as a precondition for placing orders without a written undertaking covering a proportionate volume of purchases and, where appropriate, without a service requested by the supplier and covered by an agreement in writing;

4. Obtaining or attempting to obtain, with the threat of sudden total or partial severance of business relations, prices, payment times, terms of sale or conditions of business cooperation that are obviously exceptions to the general conditions of sale;

5. Suddenly severing established business relations, even in part, without written notice taking into account the length of these business relations and respecting the minimum period of notice laid down by inter-trade agreements with reference to commercial practice. When these business relations concern supply of the distributor's own-label products, the minimum period of notice shall be double that which would be applicable if the products supplied were not own-label. In the absence of inter-trade agreements, orders issued by the Minister for the Economy may fix a minimum period of notice for each category of products, taking into account commercial practice, and regulate the terms on which business relations are severed, for example with reference to their length. The above provisions shall not stand in the way of termination without notice in the event of failure by the other party to meet its obligations or in the event of force majeure. When

business relations are severed as a result of competitive procurement through electronic auctioning, the minimum period of notice shall be double that arising out of application of the provisions of this subparagraph where the original period of notice is less than six months and at least one year in other cases;

(...)

7. Subjecting a partner to terms of payment that are clearly unfair in the light of good business practice and which depart from the time-limit specified in the eighth subparagraph of Article L.441-6 to the creditor's detriment and without an objective reason;

8. Refusing or returning goods or automatically deducting from the total amount of the supplier's invoice the penalties or allowances for failure to meet the delivery date or for non-conformity of goods when the debt is not unquestionable, specified and payable and without the supplier even having been able to ascertain the substance of the relevant claim.

II. - Clauses and contracts shall be void if they provide for the possibility for a producer, trader, manufacturer or person recorded in the trade register to:

a) Backdate rebates, discounts or business cooperation agreements;

b) Obtain payment of a listing fee prior to the placing of any orders;

c) Prohibit the other party to the contract from assigning to third parties claims that it holds on the producer, trader, manufacturer or person recorded in the trade register.

The voiding of clauses relating to payment shall entail application of the time-limit specified in the second subparagraph of Article L.441-6 unless the court dealing with the case can find evidence of an agreement on different terms that are fair.

III. - Actions may be brought before a competent civil or commercial court by any persons having established an interest, by the Public Prosecutor's Department, by the Minister for the Economy and by the chairperson of the Competition Council if any of the latter come across a practice referred to in this article in matters coming under their jurisdiction. When bringing the action, the Minister for the Economy and the Public Prosecutor's Department can request the court dealing with the case to order cessation of the practices specified in this article. They can also, for all these practices, have the illegal clauses or contracts declared void, demand restitution of money paid without legal cause and demand a civil fine of up to 2 million euros. Redress for damage incurred may also be demanded. In every case, it is for the service provider, producer, trader, manufacturer or person recorded in the trade register claiming discharge from liability to produce evidence of the act that brought about termination of this liability.

IV. - The urgent applications judge can order cessation of unfair or discriminatory practices and any other interim measure.

Germany:

§ 20 (1) and (2) ARC (Prohibition of Discrimination, Prohibition of Unfair Hindrance)

(1) Dominant undertakings, associations of competing undertakings within the meaning of §§ 2, 3, and 28(1) and undertakings which set retail prices pursuant to § 28(2), or § 30(1) sentence 1, shall not directly or indirectly hinder in an unfair manner another undertaking in business activities which are usually open to similar undertakings, nor directly or indirectly treat it differently from similar undertakings without any objective justification.

(2) Paragraph 1 shall also apply to undertakings and associations of undertakings insofar as small or medium-sized enterprises as suppliers or purchasers of certain kinds of goods or commercial services depend on them in such a way that sufficient and reasonable possibilities of resorting to other undertakings do not exist. A supplier of a certain kind of goods or commercial services shall be presumed to depend on a purchaser within the meaning of sentence 1 if this purchaser regularly obtains from this supplier, in addition to discounts customary in the trade or other remuneration, special benefits which are not granted to similar purchasers.

(3) Dominant undertakings and associations of undertakings within the meaning of paragraph 1 shall not use their market position to invite or to cause other undertakings in business activities to grant them advantages without any objective justification. Sentence 1 shall also apply to undertakings and associations of undertakings in relation to the undertakings which depend on

them.

(4) Undertakings with superior market power in relation to small and medium-sized competitors shall not use their market position directly or indirectly to hinder such competitors in an unfair manner. An unfair hindrance within the meaning of sentence 1 exists in particular if an undertaking

1. offers foodstuffs within the meaning of Section 2 (2) of the Law on Foodstuffs and Feedstuffs below its cost price or
2. offers other goods or commercial services not merely occasionally below its cost price or
3. demands from small or medium-sized undertakings competing with it in the downstream market in the sale of goods or provision of commercial services a higher price for its supplies than it otherwise offers in this market, unless this is objectively justified. The offer of foodstuffs below cost price is objectively justified if this is likely to prevent their deterioration or impending unsaleability by the retailer through their timely sale. This applies to other comparably serious cases. Unfair hindrance does not apply in cases where foodstuffs are supplied to non-profit institutions for use within the scope of their responsibilities.

§ 3 Unfair Trade Act (Prohibition of unfair competition)

Unfair competitive practices that are capable of not insignificantly impairing competition to the disadvantage of competitors, consumers or other market participants, are impermissible.

§ 4 Unfair Trade Act (Examples of unfair competition)

Unfairness within the meaning of Section 3 particularly involves any person who 1. carries out competitive practices that are capable of impairing the freedom of decision of consumers or other market participants through the exercise of pressure, in a ruthless way, or through other unreasonable, subjective influence;

...

4. does not clearly and unambiguously provide the conditions for taking advantage of sales promotions such as price reductions, premiums or gifts;

Indonesia:

Law No. 5/1999

Article 19

Business actors shall be prohibited from engaging in one or more activities, either individually or jointly with other business actors, which may result in monopolistic practices and or unfair business competition, in the following forms:

- a. reject and or impede certain other business actors from conducting the same business activities in the relevant market; or
- b. bar consumers or customers of their competitors from engaging in a business relationship with such business competitors; or
- c. limit the distribution and or sales of goods and or services in the relevant market; or
- d. engage in discriminatory practices towards certain business actors.

Article 25

(1) Business actors shall be prohibited from using dominant position either directly or indirectly to:

- a. determine the conditions of trading with the intention of preventing and or barring consumers from obtaining competitive goods and or services, both in terms of price and quality; or
- b. limiting markets and technology development; or
- c. bar other potential business actors from entering the relevant market.

(2) Business actors shall have a dominant position as intended in paragraph (1) in the following events:

- a. if one business actor or a group of business actors controls over 50% (fifty per cent) of the market segment of a certain type of goods or services; or
- b. if two or three business actors or a group of business actors control over 75% (seventy-five per cent) of the market segment of a certain type of goods or services.

Italy:

Section 9 of *Law n. 192 of 18 June 1998*

(1) The abuse by one or more undertakings of the situation of economic dependence of their business clients or suppliers is prohibited ... Economic dependence is assessed taking into account also the actual chance of the aggrieved party to have access to satisfactory alternatives on the market.

(2) The abuse can also consist in the refusal to supply or to buy, in the imposition of unjustifiably burdensome or discriminatory contractual conditions, or in the arbitrary severance of existing commercial relations.

Jamaica:

Section 20 (1) of the *Fair Competition Act* 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.”

Japan:

Antimonopoly Act

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”

Korea:

Monopoly Regulation and Fair Trade Act

-Act

Article 23 *Prohibition of Unfair Business Practices*

(1) No enterpriser shall commit any act falling under any of the following subparagraphs and that is likely to impede fair trade (hereinafter referred to as “unfair business practices”), or make an affiliated company or other enterprisers perform such an act: <amended on 1996.12.30, 1999.2.5, 2007.4.13>

4. An act making a trade with a transacting partner by unfairly taking advantage of his position in the business area;

- *Enforcement Decree*

Article 36 *Designation of Unfair Business Practices*

(1) The types of and criteria for Unfair Business Practices of Article 23 (Prohibition of Unfair Business Practices), Paragraph (2) of the Act are as listed in Appendix 1.

[Appendix 1]

6. Abusing Dominant Position

“Unreasonably taking advantage of one’s bargaining position in transacting with others” as stipulated in Subparagraph 4 of Article 23 (Prohibition on Unfair Business Practices) Paragraph (1) of the Act means as follows:

(1) Coercion to purchase

One forces one's transacting partner to purchase commodities or services which the partner does not wish to purchase.

(2) Coercion to provide benefit

One forces one's transacting partner to provide one with economic benefits such as money, commodities or services.

(3) Coercion of sales target

Concerning the commodities or services which one supplies, one designates to one's transacting partner a target for their transaction and forces the partner to fulfill the target.

(4) Offering disadvantages

By methods other than those in the above Subparagraphs 1 to 3, one establishes or alters transaction conditions to the disadvantage of one's transacting partner, or gives the partner disadvantages in the execution process of the transaction.

(5) Interference in management

Interfering in the management activities of transaction partners by requiring one's approval or directions in hiring or firing officers or employees of the transacting partner, or by restricting manufacturing articles, scale of facility, production quantity or content of transaction

- *Unfair Trade Practice Review Guideline*

Concretizing the above Act and the Enforcement Decree, the KFTC has established the Unfair Trade Practice Review Guideline to provide explanations and the criteria for determination of illegality with examples for each type of act (details too long to be introduced here).

Latvia:

Amendments to the Competition Law of the Republic of Latvia adopted by the Saeima (Parliament) on 13 March 2008.

Article 13. Prohibition of abuse of dominant position

(2) Such market participant or several market participants who, considering its (their) buying power and suppliers dependence in relevant market, is able directly or indirectly apply or impose unfair and unjustified provisions, conditions or payments upon suppliers and can significantly hinder, restrict or distort competition in any relevant market in the territory of Latvia during sufficiently long period of time, has dominant position in retail market. Any market participant having dominant position in retail market is prohibited to abuse it in the territory of Latvia. Abuse of dominant position in retail market may occur as:

- 1) application or imposition of unfair and unjustified provisions concerning return of goods, unless low-quality good or new good is returned, unknown to customer, delivery or increase of delivery of which is initiated by supplier;
- 2) application or imposition of unfair and unjustified payments for goods location in retail trade area, unless these payments are justified with promotion in the market of new good, unknown to the consumers;
- 3) application or imposition of unfair and unjustified payments for entering into contract, unless these payment terms are justified with entering into contract with new supplier which therefore has to be especially evaluated;
- 4) application or imposition of unfair and unjustified payments for supply of goods for newly opened retail trade area;
- 5) application or imposition of unfair and unduly long payment terms for supplied goods;
- 6) application or imposition of unfair and unjustified sanctions for violation of provisions of transaction.

Norway:

Norwegian Competition Act, section 11:

Any abuse by one or more undertakings of a dominant position is prohibited. Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties; thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Norwegian Act on Agreements, section 36:

An agreement may be wholly or partially set aside or amended if it would be unreasonable or conflict with generally accepted business practice to invoke it. The same applies to unilaterally binding dispositions.

When making a decision, account will be taken not only of the contents of the agreement, the positions of the parties and the circumstances prevailing at the time of conclusion of the agreement, but also of subsequent events and circumstances in general. The rules in the first and second paragraphs apply correspondingly if it would be unreasonable to uphold the usage of trade or other custom of contract law.

Norwegian Marketing Control Act, section 1, subsection 1:

In the conduct of business no act may be performed which is in conflict with good business practice among businesspersons or which is unfair on consumers or which is otherwise in conflict with good marketing practice.

Russia:

Article 10 (3) of the *Law on Protection of Competition* prohibits (applicable 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) ...”

Serbia:

Law on Protection of Competition

"Prohibition on Abuse of Dominant Position

Article 18

The abuse of dominant position on relevant market is prohibited.

The abuse of dominant position on relevant market of goods and/or services are considered to be such practices which restrict, distort or prevent competition, particularly such which:

- 1) directly or indirectly impose unreasonable purchase or selling price or other unreasonable conditions;
- 2) limit production, markets or technical development thus causing harm to consumers;
- 3) apply dissimilar conditions to identical transactions with other trading parties, thereby placing them at a competitive disadvantage on market;
- 4) make the conclusions of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial customs, have no connection with the subject of such contracts."

Slovak Republic:

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 fulfillment 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.

Switzerland:

ACart

Article 7: Unlawful practices of enterprises having a dominant position

1. Practices of enterprises having a dominant position are deemed unlawful when such enterprises, through the abuse of their position, prevent other enterprises from entering or competing in the market or when they injure trading partners.

2. The following in particular may constitute unlawful practices:

- refusal to deal (e.g. refusal to supply or buy goods);
- discrimination between trading partners with regard to prices or other conditions of trade;
- the imposition of unfair prices or other unfair conditions of trade;
- the under-cutting of prices or other conditions directed against a specific competitor;
- restrictions on production, outlets or technical development;
- the conclusion of contracts only on condition that partners agree to supply additional goods or services.

Taiwan:

- *The Taiwan Fair Trade Act*

Subparagraph 6 of Article 19:

No enterprise shall have any of the following acts which is likely to lessen competition or to impede fair competition: (6) limiting its trading counterparts' business activity improperly by means of the requirements of business engagement.

Article 24:

In addition to what is provided for in this Law, no enterprise shall otherwise have any deceptive or obviously unfair conduct that is able to affect trading order.

- *Enforcement Rules*

Article 27:

Restrictions" as used in Subparagraph 6, Article 19, of the Law refers to the circumstances under which an enterprise engages in restrictive activity in regards to tie-ins, exclusive dealing, territory, customers, use, or otherwise.

In determining whether the restrictions mentioned in the preceding paragraph are reasonable, the totality of such factors as the intent, purposes, and market position of the parties, the structure of the market to which they belong, the characteristics of the goods, and the impact that carrying out such restrictions would have on market competition shall be considered.

- *Guideline* (please refer to the appendix)

The TFTC issued some guidelines on abusing superior market position: for instance "Principles for Cases Concerning Additional Fees Charged By Distribution

Businesses By the Fair Trade Commission” and “Fair Trade Commission Guidelines on the Application of Article 24 of the Fair Trade Law” are the most important representative among them.

Appendix:

Fair Trade Commission Guidelines on Additional Fees Charged by Distribution Enterprises

1. Purpose of the Guidelines

The Guidelines have been specially adopted to prevent distribution enterprises from abusing advantageous positions in the market by improperly charging suppliers additional fees, and thereby to maintain the market trading order and ensure fair competition.

2. Definition of distribution enterprise

The term "distribution enterprises" as used in these Guidelines refer hypermarkets, to convenience stores, supermarkets, department stores, consumer cooperatives , and all other enterprises engaged in general merchandise delivery and selling business..

3. Definition of additional fees

The term "additional fees" as used in the Guidelines, with the exception of amounts payable for goods by the distribution enterprises, refers to fees charged to suppliers by distribution enterprises, or to deductions made from amounts payable for goods, or to all kinds of fees demanded of suppliers by distribution enterprises by other means.

4. Factors to be considered in determination of advantageous market position

In determining whether a distribution enterprise holds an advantageous position in the market, the following factors must be considered: the comparative scales and market shares of the distribution enterprise and supplier; the supplier's degree of dependence on the distribution enterprise; the supplier's ability to change its sales channel; and supply of and demand for the goods.

5. Entering into written agreements

When a distribution enterprise asks a supplier to bear additional fees, it should first negotiate with the supplier with respect to the type of additional fee, its use, and the amount of the fee (or the method of its calculation), and enter into a written agreement with the supplier.

6. Provision of information for direct debiting of additional fees

When a distribution enterprise charges its supplier additional fees by directly debiting its account payable for goods purchased, it must provide information regarding the deduction prior to deducting the additional fees.

7. Practices constituting improper charging of additional fees

Under anyone of the following circumstances, a distribution enterprise shall be deemed to be improperly charging additional fees:

- (1) the fees charged are not directly related to promoting the sale of the goods;
- (2) the fees charged are contributions to equipment, research and development, or promotional activities, and while of benefit to the supplier in promoting sale of goods or reducing operating costs, the amount of the fees exceeds in value the tangible benefit that the supplier may reasonably expect to derive from paying such contributions;
- (3) the fees charged are for the sole purpose of achieving target figures or other accounting measures at the end of a fiscal year;
- (4) when, despite the supplier being under no obligation, a reduction in the purchase price is demanded by the distributor for already-delivered goods; or
- (5) fees are charged in a manner contrary to normal trading principles or commercial ethics.

8. Violation of the Guidelines

If a distribution enterprise having an advantageous market position charges suppliers additional fees in a manner not in accordance with Points 5 and 6 of the Guidelines or is found to be in violation of Point 7 such that the distribution enterprise market order is impacted, the distribution enterprise shall possibly deemed to be in violation of Article 19(1)(vi) or Article 24 of the Fair Trade Law.

Principles Governing the Application of Article 24 of the Fair Trade Act

1. (Purpose)

Article 24 of the Fair Trade Act (hereinafter, “Article 24”) is a general provision. These Principles are specially promulgated to facilitate its concrete and clear-cut application.

2. (Basic spirit of the application of Article 24)

To clarify the distinction between Article 24 and related provisions of other laws and regulations such as the Civil Code and the Consumer Protection Law, the requirement of “sufficient to affect trading order” should be the first criterion applied when screening for the applicability of the Fair Trade Act or Article 24. In other words, the Commission will review a case under Article 24 only if the act at issue is sufficient to affect trading order in the market. If the requirement of “sufficient to affect trading order” is not met, remedy should be sought under the Civil Code, Consumer Protection Law, or other laws or regulations.

On condition that the requirement of “sufficient to affect the trading order” is met, then, to ascertain the scope governed by Article 24, it is necessary to examine whether the alleged illegal practice could not be not fully corrected by, first, provisions concerning restrictive competition (e.g. monopoly, cartel, and vertical restraints on competition) and, second, provisions concerning unfair competition (e.g. commercial imitation, false advertising, business defamation). Thus, the distinction in the application of Article 24 and other articles of the Fair Trade Act is that Article 24 is applicable only as a supplementary provision, i.e. applicable only to acts that are out of the reach of other articles of the Fair Trade Act.

If a certain unlawful act is caught by other provisions in the Fair Trade Act, meaning either that the application of those specific provisions could fully establishes the illegality of the act, or the illegal contents of the alleged act could be exhaustively regulated by those provisions, there are no grounds for the supplementary application of Article 24. Conversely, only if those specific provisions fail to evaluate the alleged unlawful act in its entirety will there be room for the supplementary application of Article 24.

With respect to the issue of “protecting consumers interest,” the applicability of Article 24 will be determined by examining whether the enterprise concerned is abusing its advantageous position to use “deceptive” or “obviously unfair” sales tactics to harm consumers’ interest, and the requirement of “sufficient to affect trading order” has accordingly been met.

3. (Clarification of overlapping laws)

The application of Article 24 frequently gives rise to the question of overlapping with other laws, and should be resolved according to the following factors:

(1) Contracts between enterprises or enterprises and consumers are trade terms agreed upon by both parties out of their own free will. Regardless of whether their contents are obviously unfair or whether they are subsequently performed, contractual behavior should in principle be regulated by contract law. Article 24 is applicable only in exceptional circumstances where the behavior threatens the competitive order or market trading order. If obviously unfair content of a contract fails to meet the requirement of “sufficient to affect trading order,” it should be resolved through civil remedies proceedings. Only if this requirement is met and public interests are at stake should Article 24 be invoked.

(2) Although protecting consumers’ interest is among the legislative purposes expressly set forth in Article 1 of the Fair Trade Law, it is necessary to distinguish between the core legal interests protected by the Fair Trade Act and those protected by the [Consumer Protection Law]. Article 24

should be invoked only in cases where the requirement of “sufficient to affect trading order” is met and where, moreover, the conduct by nature has a bearing on the public interest. Examples would be where an enterprise’s relatively advantageous market position vis-a-vis its consumers is so endemic to the industry that consumers’ interest is harmed due to over-reliance or the lack of alternatives. .

(3) Owners of intellectual property rights are entitled under relevant intellectual property laws to inform whoever might have infringed their rights to terminate the infringements. However, if prior to any confirmation and notification proceedings being undertaken, the owner makes outright oral or written representation directed at its competitor’s distributors or consumers (trading counterparts or potential trading counterparts) alleging that a competitor has infringed its rights or interests, and provide no basis for the recipient to form a reasonable judgment, constitute an abuse of intellectual property rights to create unfair competition, and are governed by Article 24. The prerequisite for invoking Article 24 with respect to oral or written warnings regarding intellectual property rights is the improper exercise of such warnings that could lead to unfair competition. Whether the Fair Trade Act has been violated should be determined merely by whether in formality the proper procedures have been followed for exercising such rights, and will not include the consideration of whether any infringement has actually occurred.

4. (Distinctions of the applicability of Article 24 vis-a-vis other articles of the Fair Trade Act)

Application of Article 24 should be guided by the principle of “supplementariness ,” meaning that Article 24 is applicable only to unlawful acts that could not be completely covered by the other articles of the Fair Trade Act. If a certain unlawful act could be completely covered by the other individual articles of the Fair Trade Act—that is, if the illegality of alleged acts could be comprehensively evaluated or exhaustively regulated by those articles—then those articles will take precedence and there are no grounds for supplementary application of Article 24. Conversely, if those articles fail to regulate the illegality of the act, Article 24 may then come into play.

5. (Factors to be considered in determining “sufficient to affect trading order”)

“Trading order” as used in Article 24 refers to trading behavior that comports with good moral ethics of society and business competition ethics centered on efficient competition. Its concrete content is the type of trading order that is in conformity with social ethics, and upon which the spirit of free and fair competition rely. When determining “sufficient to affect trading order,” consideration should be given to whether it is sufficient to affect the overall trading order (e.g. the number of victims, the quantity and degree of harm caused, the deterrent effect on other enterprises, and whether specific organizations or groups have been targeted by the alleged deceptive or patently unfair acts) or whether the case would affect a majority of future potential victims before invoking Article 24; however, the trading order has in fact been affected is not required. For single, individual, non-recurring trade disputes, on the other hand, civil remedies should be pursued rather than the application of Article 24.

6. (Factors to be considered in determining “deceptive”)

“Deceptive” as used in Article 24 refers to acts of engaging in trade with trading counterparts by misleading them through active deception or through passive concealment of material trading information.

“Material trading information” as used in the preceding paragraph refers to the important trading information sufficient to affect trading decisions. Whether an act is “misleading” should be determined by whether objectively there is a reasonable likelihood (and not merely some possibility) that it would mislead the general public or deceive trading counterparts, together with the evaluation of trading counterparts’ ability of judgment based on the “reasonable judgment” standard (An extremely low level of care should not be taken as the standard.) Common types of such acts include:

- (1) Impersonating or free riding on the credibility of another entity.
- (2) Disingenuous sales tactics.
- (3) Concealing material trading information.

7. (Factors to be considered in determining “obviously unfair”)

“Obviously unfair” as used in Article 24 refers to engaging in competition or commercial transactions by obviously unfair means. Its most common and concrete types fall into three general categories:

(1) Unfair competitive conduct contrary to business competition ethics

(i) Exploiting the fruits of others’ work

The determination of illegality should in principle consider the following factors: (1) the work that have been free ridden upon or imitated to a substantial degree must be those that the enterprises have already exerted a substantial degree of efforts in those work and thereby created a certain economic interest in them that had already been exploited by the alleged free-riding or imitating acts; and (2) the free-riding or imitating acts could mislead trading counterparts into believing that the goods or services come from the same source or product line or an affiliated enterprise. However, even where the above two criteria are not met, a violation may still be found in cases where the means employed are highly reprehensible (e.g. complete imitation), and determination should be made based on the various facts in each individual case. Common types of such conduct are as follows:

a. Free riding on the business reputation of another:

Determination of whether business reputation is protected by Article 24 should take into account of whether it is a substantially well-known brand in the market and whether it would create quality connection among related enterprises or consumers in the market.

b. Imitation to a substantial degree:

Determination of imitation to a substantial degree should examine in totality (1) whether the imitation reaches the level of “exactly alike” or “highly similar”; (2) the relevance and proportionality between the efforts exerted and cost incurred by the imitator and its resulting competitive advantage or benefit; and (3) the uniqueness and state of possession of the imitated work in terms of market competition.

c. Acts of taking advantage of the work of another person to promote one’s own goods or services.

(ii) Impeding fair competition with the purpose of harming competitors

Common types of such conduct are as follows:

a. Improper comparative advertising:

Comparative advertising that, rather than making false representations about one’s own or another’s goods or services, employs different means or standards of measurement to compare identical goods, or that highlights only those main categories of comparison in which one’s own product fares more favorably, while deliberately disregarding those categories in which the competitor compares favorably, with the intent of creating an unfair overall impression of the comparison results, and where the legal requirements of Article 22 of the Fair Trade Act are not met.

b. Making representations to trading counterparts of a competitor alleging that the competitor’s infringement of intellectual property rights:

It is a legitimate exercise of legal rights for an intellectual property rights holder who discovers goods in the market with a potential to infringe his intellectual property rights to give notification of the infringement, with a request for its removal, to the directly infringing manufacturer or, in the case of imported goods, to the importer or agent having equivalent status. Regardless of whether the allegations are true or false, it is a dispute over intellectual property rights, to which Article 24 does not apply. If, on the other hand, the holder makes representations (regardless of whether written or oral) to dealers or consumers (i.e. trading counterparts or potential trading counterparts of a competitor) who might indirectly infringe his rights, alleging, without undertaking the prerequisite confirmation and notification procedures, that the competitor has infringed his rights, such conduct—if sufficient to raise concerns in the minds of the competitor’s trading counterparts or to cause them to refuse to trade with the competitor—would constitute obviously unfair acts under Article 24.

(2) Engaging in trade by means contrary to social ethics

Common types of such conduct include carrying out trading by means of coercing or harassing a trading counterpart to suppress the trading counterpart's free will regarding whether to trade.

(3) Abusing an advantageous market position to engage in unfair trade

An enterprise holding market power or advantageous market information takes advantage of the information asymmetry or other relative trading disadvantage on the side of its trading counterpart (an enterprise or consumer) to engage in unfair trade. Commonly seen types of such conduct are as follows:

- (i) where an enterprise provides imperfect substitutes for basic necessities or services or does business in a manner contrary to business ethics or public order and good morals during a time when market mechanisms failed and market supply and demand are not in equilibrium;
- (ii) Obviously unfair conduct resulting from non-transparency of information.

Appendix G: Relevant Cases

Canada:

When it comes to litigated cases involving buyer power, the 1960 price fixing case of *Abitibi (R.v.Abitibi Power and Paper Co. Ltd. et al. (1960), 131 C.C.C. 201.)* is a good example. In *Abitibi*, seventeen paper companies conspired and fixed the maximum price they would pay for pulpwood. Many of the suppliers affected were small players in the industry with no apparent market power. The defendants however accounted for 55 to 65 % of the total pulpwood purchases during the time of the agreement (1947-54). Fines varying from \$8,000 to \$25,000 were imposed.

European Union:

British Airways (see Case 94/04 *British Airways v Commission*; judgment of the ECJ of 15 March 2007)

<http://ec.europa.eu/comm/competition/court/index.html>

Merger investigations Tetra Laval, Kesko/Tuko or Rewe Meinl, Carrefour-Promodès:

http://ec.europa.eu/comm/competition/mergers/cases/decisions/m2416_en.pdf

http://ec.europa.eu/comm/competition/mergers/cases/decisions/m784_19961120_610_en.pdf

http://ec.europa.eu/comm/competition/mergers/cases/decisions/m1221_19990203_600_en.pdf

http://ec.europa.eu/comm/competition/mergers/cases/decisions/m1684_6_fr.pdf

Germany:

Praktiker Baumärkte GmbH (2006)

In May 2006 the Bundeskartellamt prohibited Praktiker Baumärkte GmbH (Praktiker) from unfairly hindering franchisees. Praktiker is active throughout Germany as a franchisor vis-a-vis independent franchisees whose goods are supplied by Praktiker. At the same time the DIY stores operated by Praktiker offer the same products the company supplies to its franchisees. Praktiker thus operates a dual distribution system. The franchisees were considered to be companies depending on Praktiker as they were obliged to purchase most of their product range from Praktiker during the term of the franchise agreement. The franchisees were unfairly hindered within the meaning of Section 20(1) of the ARC as the prices charged by Praktiker for the supply of goods from the system's basic product range exceeded the sales or advertising prices charged by competing DIY stores which are operated by Praktiker. There was no objective justification for this. Furthermore, Praktiker unfairly hindered individual franchisees within the franchise system by imposing a 100 per cent obligation to purchase goods from the system's product range on them. At the same time the purchasing benefits gained from supplies to franchisees or associated companies were not passed on to the relevant franchisees. The franchisees with a 100 per cent purchasing obligation were therefore discriminated against without any objective justification vis-à-vis other franchise partners of Praktiker which only have an 80 per cent purchasing obligation. In its consideration of all interests involved which must be carried out to establish unfair hindrance, the Bundeskartellamt also took into account the generally positive competitive role played by franchising systems. This, however, is called into question if the system's benefits remain solely with the franchisor, in particular in the dual distribution system where the franchisor is the supplier/wholesaler and at the same time a competitor of his franchisees.

Adam Opel AG/Software DMS (2006)

In the proceedings against Adam Opel AG (Opel) the Bundeskartellamt investigated a possible hindrance in the sector of car repair garages caused by detailed IT provisions for garages and the non-disclosure of interface information. Opel had recommended three different so-called Dealer Management Systems (DMS) for use in car repair garages. DMS is a software to be used in the operation of garages. It is meant to facilitate e.g. the order of spare parts and the processing of work covered by warranty. It is essential for the garages' work that the software they use can communicate with the respective manufacturer's systems as an extensive exchange of data is required. Opel disclosed the required interface information solely to the three suppliers recommended by Opel and refused to disclose this information to other IT companies. Garages

which used the DMS supplied by other software companies were thus excluded from the exchange of data with Opel systems. The Bundeskartellamt considered this as a hindrance and discrimination of alternative DMS suppliers and the companies they serviced. According to the Bundeskartellamt this practice was also likely to counteract the objective of the European Union's automotive block exemption regulation, i.e. the promotion of sales of different brands. Opel was seen as a company with a superior bargaining position as it is the only supplier of the required interface information. After Opel had generally agreed to provide the IT companies concerned with the required interface information, the proceedings could be discontinued in 2006.

RMS Radio/Aachener Lokalsender (2001)

With its decision of 15 August 2001 the Bundeskartellamt prohibited RMS Radio Marketing Service GmbH & Co. KG (RMS) from refusing to market radio advertising time of two radio stations based in Aachen to advertising customers which were interested in broadcasting their radio advertising at cross-regional or national level. RMS was de facto the only company to offer radio advertising time to be broadcasted at cross-regional and national level. As RMS marketed other stations' advertising time, the Bundeskartellamt considered this as an unequal treatment of the two Aachen-based radio stations vis-à-vis other radio stations. The Bundeskartellamt's decision was confirmed by the Higher Regional Court in a decision on the costs.

Indonesia:

Case No. 02/KPPU-L/2005: the allegation of violating Law No. 5/1999 regarding Prohibition of Monopoly Practice and Unfair Business Competition related to agreement of trading terms applied to goods suppliers by PT. Carrefour Indonesia (Carrefour).

This case started from a report submitted to KPPU on October 20, 2004 focusing on allegation of violating Article 19 letter a (reject and or impede certain other business actors from conducting the same business activities in the relevant market), Article 19 letter b (bar consumers or customers of their competitors from engaging in a business relationship with such business competitors) and Article 25 sub-section (1) letter a (having dominant position in determining the conditions of trading with the intention of preventing and or barring consumers from obtaining competitive goods and or services, both in terms of prices and quality) of Law No. 5/1999 conducted by Carrefour (as the Reported Party) in determining trading terms to goods suppliers. Based on investigation result, the Commission Council found facts that Carrefour carried out business relation of purchasing and selling product with its suppliers using sell-off system. This business relation was stated in written agreement named National Contract mentioning trading terms which can be negotiated with supplier such as : listing fee, fixed rebate, minus margin, term of payment, regular discount, common assortment cost, opening cost/new store and penalty. As mentioned in their report, suppliers deemed that the trading terms was difficult to be applied, particularly on item requiring listing fee and minus margin, because every year Carrefour does adding item type, increasing cost and percentage of fee trading terms. Listing fee pursuant to Carrefour was suppliers fee to supply new product in Carrefour and having function as guarantee if the products were not sold out. Listing fee was only determined once and not refundable. Some suppliers were understood with listing fee condition as item registration fee for product supplied to Carrefour. Listing fee was applied to suppliers for per-item of product per- Reported Party's shop. The fee amount was different between small and big suppliers. Listing fee was not applied to all suppliers. Carrefour's revenue from this listing fee term in 2004 was 25 billions Rupiahs.

Minus margin was suppliers' guarantee to Carrefour that their product selling price was the lowest selling price. If Carrefour obtained written evidence that its competitor could sell the same product with cheaper price than Carrefour's purchasing price, Carrefour had a right to ask compensation from suppliers as amount as difference price between Carrefour's purchasing price with competitor's selling price. Compensation obtained by Carrefour through applying minus margin sanction was suppliers' invoice deduction without giving a chance to suppliers to prove that suppliers did not conduct discrimination of selling price. Invoice deduction was calculated by multiplying price difference with amount of the suppliers' rest of product in Carrefour shop. Carrefour's objective applied minus margin was to keep cheaper selling price among its competitors. Carrefour's revenue from applying minus margin sanction, from 99 suppliers agreed

on requirement of minus margin in 2004 was 1.9 billion Rupiahs.

The relevant market in this market was hypermarket retail which competed directly in Jakarta, Tangerang, Bandung, Surabaya and Medan for household necessity product such as food and beverage products in instant package, staple food, fresh product, household product and electronics. Carrefour competitors in hypermarket retail market were Giant, Hypermart and Clubstore. The Commission Council did not include Makro and Alfa, because their concepts did not compete with hypermarket directly. Makro recognized with wholesaler concept and Alfa with rebate storehouse concept.

The Commission Council found facts that Carrefour had market power compared with Hypermart, Giant and Clubstore, because Carrefour had the greatest number of shops, strategic location with high convenience and facility completeness level, Carrefour also had total of product item which was more complete than others instead. With the market power, it caused dependence for suppliers who want their products can be sold and displayed in Carrefour. This dependence was due to many Carrefour shops opened, consequently Carrefour had more powerful in access ability to sell products to consumers so that suppliers can sell more product in Carrefour. Besides, Carrefour can be promotion location for suppliers products and their new products. With the superior, Carrefour own bargaining power toward suppliers in negotiating item trading terms. The facts founded in investigation, Carrefour used its bargaining power to push down suppliers in order to accept the addition of item trading terms, cost increase and percentage of fee trading terms. Form of pressure conducted such as : holding the payment in due, breaking the cooperation one side not to sell suppliers' products by not issuing purchase order, decreasing order amount of suppliers' product item.

There was a activity to impede Carrefour's competitor to have the same business activity in relevant market. It was shown by applying minus margin requirement causing one of suppliers terminating its business to supply Carrefour's competitor which sells with lower price than Carrefour's selling price for the same product. Considering that Carrefour had market power in relevant market, the Commission Council stated that Carrefour in carrying out its business activity needs to pay closer attention to the following issues :

1. every item of trading terms applied to suppliers should provide added value for both Carrefour and suppliers (partnership win-win solution);
2. not doing a such difficulty to suppliers particularly small and medium business category when conducts negotiating;
3. not applying excessive trading terms to suppliers.

As mentioned in the decision, the Commission conducted appraisal many regulations related to private markets operating which have not been managed effectively. For that reason, the Commission Council provided advice and suggestion regarding :

1. Executing the existing private market regulation effectively;
2. Formulating and issuing regulation on private market issue applied in national scope;
3. Formulating and issuing provision regulating definition, system, determination of amount and listing fee particularly to suppliers categorized small and medium business so instruments used to impede suppliers who want their products to be sold and displayed in modern retail market.

Finally, based on the results of investigation in this case, the Commission Council decided that:

1. Stating that the Reported Party was legally and convincible proven to violate Article 19 letter a of Law No 5/1999;

Business actors shall be prohibited from engaging in one or more activities, either individually or jointly with other business actors, which may result in monopolistic practices and or unfair business competition, in the following forms :

- a. reject and or impede certain other business actors from conducting the same business activities in the relevant market

2. Stating that the Reported Party was not proven violating Article 19 letter b of Law No. 5/1999; Business actors shall be prohibited from engaging in one or more activities, either individually or jointly with other business actors, which may result in monopolistic practices and or unfair business competition, in the following forms :

- b. bar consumers or customers of their competitors from engaging in a business relationship with

such business competitors

3. Stating that the Reported Party was not proven violating Article 25 sub-section (1) letter a of Law No. 5/1999;

(1) Business actors shall be prohibited from using dominant position either directly or indirectly to:

a. determine the conditions of trading with the intention of preventing and or barring consumers from obtaining competitive goods and or services, both in terms of price and quality

4. Instructing the Reported Party to terminate activity applying minus margin term to suppliers;

5. Imposing sanction to the Reported Party as amount as Rp. 1.500.000.000,- (one billion five hundreds millions Rupiahs) that has to be paid to State Cash Treasury.

Japan:

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.

Korea:

1. Abuse of superior bargaining position by LG Telecom

A. Findings

LG Telecom took advantage of its superior bargaining position to set a transaction condition that each sales agency must attract at least 30 new subscribers a month. In 194 occasions, LG Telecom suspended payment of sales commissions to 75 agencies that failed to fulfill that quota, which amount to 830 million won in total, and it also canceled agency contract with 65 agencies despite remaining contract period.

B. Decision

LG Telecom's act is in violation of the MRFTA because it involved LG Telecom's abuse of its superior bargaining position in the forms of unilateral decision of contract terms that are disadvantageous to the counterpart, sales agencies, and infliction of damage to agencies in the course of implementing the contract (violation of Article 23 (1)-4 of the MRFTA).

C. Remedies

The KFTC ordered LG Telecom to immediately remove unfair terms of agency contract that it unilaterally set and to notify all of its sales agencies of the remedies it received from the KFTC.

2. Unfair subcontract transaction by Hyundai-Kia Automotive Group

A. Findings

(1) In the face of low profitability of its small sedan model Click, Hyundai Motor established a goal to save 24.2 billion won from the materials cost of Click parts. Then it decided to cut the unit price of parts by 3.5 percent in order to achieve that goal and unilaterally lowered unit supply price of 26 subcontract suppliers, including Korea Industrial Co., by 3.4 percent.

(2) To boost profitability of its model Optima, Kia Motors orally agreed with subcontractors in advance to lower the unit price of Optima parts supplied by 34 subcontractors as a policy and instead to raise the unit price of parts for other models including Sorento and Carnival, after which payments will be made to subcontractors so that they would not see loss from the price cut. However, unlike the agreement, Kia Motors did not raise the Sorento and Carnival parts' unit price at all or did not raise the price enough to match the price cut in the Optima parts' unit price. This resulted in a total loss of 2.585 billion won for Kia's 34 subcontractors.

B. Decision

Hyundai Motor's act involves uniform-rate unit price cut without justifiable reasons while Kia Motors' act is unreasonable determination of subcontract price by deceptive terms of transaction.

C. Remedies

(1) Hyundai Motor: imposed with a surcharge of 1.669 billion won, ordered to pay 4.5 billion won as contract price and late payment penalty

(2) ordered to notify all subcontractors of its violation of the law

(3) Corrective order: cease and desist order

Norway:

The first case is the NCA's report on slotting allowances (payments for shelf space) in the grocery trade published in 2005. The report is available in Norwegian only. The Norwegian grocery market is distinguished by the fact that four nationwide chains account for more than 98 percent of turnover, and that it is difficult for new chains to enter the market. The report analyses the competitive effects of listing payments in the Norwegian grocery market. Listing payments encompass a whole spectrum of discounts, bonuses and up-front payments, which suppliers pay in order to obtain a favourable placement in the shelves of the retail chains. Listing payments may foreclose smaller suppliers, leading to a smaller product range and reduced competition. Several suppliers in the Norwegian grocery market have a market share so high that they are dominant in some product markets. Dominant suppliers may therefore infringe the Competition Act, section 11, when paying for shelf space. We enclose a short information summary in English regarding the report of listing payments.

The second case was revealed while producing the above report on payments for shelf space, and is about the grocery chains' exchange of weekly price information through the marketing information company ACNielsen. The ACNielsen case is not an abuse of dominance case. Exchange of information can be regarded as an infringement of the competition law prohibiting cooperation which limits competition, the Competition Act, section 10. The information exchange in this case makes the market more transparent for the chains, allowing them to react quickly to

any price changes made by a competitor. Reduced uncertainty in the market is a factor in decreasing competition. The NCA considered intervening in the supermarket chains' exchange of information, but after having been presented the NCA's assessment, the parties themselves chose to amend the practice. ACNielsen and the supermarket chains agreed to make essential changes in the reporting process. Information will now be less detailed and less up-to-date, and consequently less likely to damage competition. We enclose a short summary in English regarding the ACNielsen case. We also enclose the English public version of the letter sent ACNielsen from NCA. Furthermore we would like to mention another case related to the above two cases, and which constitutes "abuse of superior bargaining position". The NCA decided in February 2007 to impose a fine of NOK 45 million to the main Norwegian dairy producer TINE for violation of the Competition Act, section 10 and 11. TINE entered into an agreement with one of the four nationwide grocery chains, REMA 1000, in which TINE became the sole supplier of cheese to REMA 1000. The NCA found that TINE had abused its dominant position by entering into this agreement. The case is currently pending before Norwegian courts.

Russia:

In January 2008 Tatarstan Division of the Russian FAS revealed a collusion between "Akbarstorg," "Magnit," "Paterson," "Perecrestok," and "Optovik" trade networks against suppliers. The Tatarstan FAS Division accused the companies controlling these networks of violation Section 5 of Part 1 of Article 11 of the Law "On Protection of Competition" prohibiting concerted activities leading to imposition unfavorable conditions on trade partners (i.e. parties vertically integrated to the violator(s) both in upstream and downstream manner) and issued the violator companies a cease and desist order. The prohibited practices by the networks included: requesting fees from retailers for each newly opened store as a condition for supplying goods; 100% return of products unsold by the network to suppliers; request of deferral of payment for the goods supplied to the network for 30 days; request for commodity credit; request for 10% discount from the price of goods supplied to the network in case the later undertakes an advertising campaign of these goods. The Tatarstan FAS accusation of the networks of collusion was based on the apparent similarity of terms of their standard agreements with vertically integrated partners. These actions are against the above mentioned provisions of Article 11 that precludes agreements and/or concerted actions between entities in the relevant market in case these arrangements lead or may lead to economically and technically unjustified refusal to deal with specific buyers or sellers, price (tariffs) maintenance, precluding other entities from entering or leaving the market.

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 "Orengurggasprom" ("Gasprom" subsidiary shipping ethane to "Kazanorgsintez"); (4) not to change contractual terms of shipment ethane to "Kazanorgsintez" by "Orengurggasprom" 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 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 superseded 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 for press release in Russian.)

Taiwan:

Case: RT-Mart International Ltd. abuses its relative superior position to improperly charge its suppliers additional fees, an obviously unfair conduct that is sufficient to adversely affect trading order, in violation of the FTA

Summary:

1) The TFTC received a complaint against RT-Mart International Ltd. (hereinafter referred to as RT-Mart) from one of its supplier, alleging that RT-Mart took advantage of its superior position and has unilaterally established a standard contract, improperly collected high additional fees from its suppliers, a suspicion of violating the FTA. Upon the investigation, the TFTC found that RT-Mart has determined various additional fees calculating at a fixed percentage of purchased amount in the contract, in addition to this, the contract also include a clause of “lowest sponsor fee”, that is, the supplier has to pay RT-Mart a minimum amount of additional fees regardless of whether RT-Mart’s actual purchase for the current year has attained the estimated purchase amount.

2) Grounds of disposition:

a. After a comprehensive view of the comparative business scale and market share of RT-Mart and its suppliers; also the suppliers’ degree of dependence on RT-Mart in trading, the TFTC determines that it shows that RT-Mart possesses relative superior position in the market.

b. RT-Mart, without taking into consideration that its suppliers may encounter irresistible causes that lead to sales changes during the year, has collected “lowest sponsor fee” from its suppliers. The suppliers, under the pressure of wishing to continue trading with RT-Mart, have accepted the trading clauses involuntarily. Therefore, regardless of whether the actual amount purchased by RT-Mart has reached the estimated amount; the suppliers have to pay the aforementioned additional fees, seemingly a clause that guarantees the lowest profit for RT-Mart, thus, the aforementioned “lowest sponsor fee” is obviously unreasonable. Also, for some suppliers, the actual sales are not as estimated due to possible over-estimation of market condition and the products are new to the market, or because of supply-cut and shortage that further lead to the estimated sales figures are unattainable. But, RT-Mart will still deduct the lowest sponsor fee from the payments to suppliers at the year-end settlement of accounts. It is more evidence that RT-Mart, in accordance with the estimated purchased amount, has actually collected “lowest sponsor fee” from its suppliers. It is difficult to conclude that the additional fees are charged complying with the principle of “proportionality”.

c. RT-Mart in this case, relying on its relative advantageous position in market, has not considered the actual sales difficulties of its suppliers and charged “lowest sponsor fees” on the basis of the estimated purchased amounts, collecting from its supplier an additional fee that exceeds the direct profit earned from the sales. Such conduct has imposed extra burden on suppliers, increased suppliers’ operating costs and therefore eroded their normal operating profits. Furthermore, RT-Mart takes advantage of its suppliers’ that they are under the pressure of looking forward to maintain the existing business relations, coerces them to bear the aforementioned additional fees and thus impairs the nature of market competition. Such conduct is rebuked bArticle 24 of the FTA.