

ABUSE OF SUPERIOR BARGAINING POSITION: DOES THE ASBP INDEED HARM THE COMPETITION?

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Abstract

While some scholars suggest that the concept of Abuse of Superior Bargaining Position (ASBP) bears significant similarities to exploitative forms of abuse of a dominant market position, other scholars argue that there is still controversy and a lack of clarity surrounding the ASBP concept itself. Given this ambiguity in the doctrine, these scholars advocate for a sensible approach that focuses on the actual intended meaning and practical enforcement of ASBP, without unfairly prejudicing or treating any interested parties involved. Through this comparative examination of the legal frameworks and jurisprudential approaches in Japan and Uzbekistan, the article endeavors to shed light on the nuances, similarities, and differences in how ASBP is perceived and operationalized in these two countries. By doing so, the article hopes to contribute to a better understanding of the ASBP doctrine and potentially identify areas where further harmonization or clarification may be needed across jurisdictions.

Keywords: competition law, digitalization, online platforms (marketplaces), market aggregators, market boundary, free goods and services etc.

Introduction

The issue of exploiting an advantageous bargaining stance in contractual relationships, commonly referred to as "Abuse of Superior Bargaining Position" (ASBP), is gaining increasing attention in Uzbekistan new competition regime. The concept stems from Japan and South Korea where the concept is broadly recognized and implemented. At first glance, the use of the term "abuse" in conjunction with "superior position" may give the impression that ASBP is similar to the concept of abuse of dominance, which is prevalent in some major legal systems. However, the application of the concept of ASBP does not necessitate a party's dominant market position. Rather, ASBP bears closer resemblance to the legal concept of "abuse of economic dependence," which is recognized in jurisdictions such as France and

Germany, wherein the focus is on exploiting a party's state of economic reliance or dependence, rather than on market dominance per se.

However, there are some scholars who suggest that ASBP is actually quite similar to exploitative forms of abuse of a dominant market position. On the other hand, some other scholars argue that there is still controversy and a lack of clarity surrounding the ASBP concept itself. Given this ambiguity in the doctrine, these scholars argue that the concept should be approached sensibly, focusing on the actual intended meaning and practical enforcement of ASBP without prejudice or unfair treatment toward any interested parties involved.

Given the lack of conceptual clarity and differing scholarly perspectives around the doctrine, this article intends to conduct a comparative analysis of how the doctrine is understood and applied across different jurisdictions. Specifically, it aims to explore how the legislation in Japan and Uzbekistan defines, interprets, and enforces the concept of ASBP.

ASBP IN JAPAN

In Japan, Abuse of Superior Bargaining Position (ASBP) is recognized as a type of Unfair Trade Practice under Article 19 of the Anti-Monopoly Act (AMA). The AMA has a unique feature in that, in addition to the two conventional categories of competition law concepts – horizontal collusion and unilateral conduct by an entity with market power, both of which impose a substantial restraint on competition. The ASBP is provided among the third category called Unfair Trade Practices.

The AMA encompasses various types of Unfair Trade Practices conduct that harm competition, some of which overlap with the concept of Private Monopolization. However, the required threshold for the level of harm to competition is lower for Unfair Trade Practices. Specifically, while Private Monopolization requires the conduct to substantially restrain competition, Unfair Trade Practices only necessitate that the conduct has a “tendency to impede competition.” Under this framework, ASBP is treated as one of the Unfair Trade Practices regulated by the AMA. This means that, unlike the stricter standards for Private Monopolization, the ASBP is subject to a lower threshold of merely having a tendency to impede competition, rather than being required to substantially restrain it.

Article 2(9) of the Japanese Anti-Monopoly Act (AMA) defines the term ASBP as follows:

It refers to any act falling under one of the specified categories, including:

“(v) Engaging in any of the following acts by unjustly exploiting one's superior bargaining position over the counterparty, in contravention of normal business practices:

- (a) Compelling the counterparty, with whom one has or intends to have continuous transactions, to purchase goods or services unrelated to the transactions in question.
- (b) Requiring the counterparty, with whom one has continuous transactions, to provide money, services, or other economic benefits.
- (c) Refusing to accept goods in transactions with the counterparty, forcing the counterparty to take back goods after receiving them, delaying payments to the counterparty, reducing

the amount of payment, or otherwise establishing or modifying trade terms or executing transactions in a manner disadvantageous to the counterparty.”

In essence, this provision prohibits the abuse of a superior bargaining position by engaging in specific unfair practices, such as tying unrelated products/services, imposing economic burdens, or creating disadvantageous trade conditions for the counterparty, which contravene normal business practices. The key elements are the existence of a superior bargaining position, the unjust exploitation of that position, and the deviation from accepted norms of business conduct.

Under this article, the elements of the ASBP can be broken down into three key components:

1. **Superior Bargaining Position:** The existence of a superior bargaining position held by one party over the counterparty in the transaction or business relationship.
2. **Abusive Conduct:** The conduct or action undertaken by the party with the superior bargaining position must impose a disadvantage or detriment on the counterparty. This conduct is considered abusive in nature.
3. **Deviation from Normal Business Practices:** The abusive conduct perpetrated by exploiting the superior bargaining position must be deemed unjust or unreasonable in light of established normal business practices and norms within the relevant industry or commercial context.

Superior bargaining position

Unlike the typical assessment of market power, which necessitates the delineation and definition of the relevant market, the evaluation of superior bargaining position does not require the explicit demarcation of the relevant market. In cases such as Direx and Ralse, it remained unclear whether general discounters and the geographical region of Hokkaido prefecture would have constituted the appropriate relevant product and geographic markets respectively. Similarly, in cases like Marunaka, Toys"R"Us, and Edion, there was an absence of market definition and assessment of market power when determining the existence of a superior bargaining position. The legal practice in determining whether one party (Party A) possesses a superior bargaining position over another party (Party B) involves considering the following factors:

- 1) Party B's level of dependence on transactions with Party A, typically measured by calculating the ratio of Party B's sales with Party A to Party B's total sales volume.
- 2) Party A's position and standing within the relevant market, usually assessed by analyzing its market share and ranking among competitors.
- 3) Party B's ability to switch to alternate business counterparts instead of Party A, taking into account the feasibility of Party B initiating or increasing transactions with parties other than Party A, as well as any investments Party B has made specifically in relation to its transactions with Party A.
- 4) Any other circumstances indicating Party B's need or compulsion to conduct transactions with Party A, including factors such as:
 - The volume of sales Party B makes with Party A
 - The potential for future growth and business expansion with Party A

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- The importance for Party B to handle the specific goods or services involved in transactions with Party A
 - The possibility of Party B enhancing its credibility or reputation by being associated with Party A
 - The disparity in the overall business sizes and scales of operations between Party A and Party B.

Despite the considerations mentioned, two fundamental questions persist: first, to what extent should it be challenging for the supplier to find alternative retailers, and second, how reliant must the supplier be to claim that the retailer has misused its dominant bargaining position. However, the Japan Fair Trade Commission (JFTC) Guidelines and its case reports do not address these issues directly. Nonetheless, according to practical approach, in certain instances, the JFTC has deemed a dependence level of 8-10% sufficient to illustrate the relevant degree of reliance.

The shortcoming in the multifaceted approach to evaluating superior bargaining positions highlights the complexity and contextual specificity involved in such assessments. The lack of a need for explicit market delineation underscores the focus on relational dynamics and dependency factors, rather than strict market metrics. This paradigm shift in legal and economic analysis reflects the evolving understanding of market power and competitive relationships in contemporary business environments.

Abuse of “normal business practices”

Infringement or violation of fair competition rules is determined only when a business practice is carried out in an unjust manner, considering what is considered normal and accepted in that particular industry or market. The term “normal business practices” refers to those practices that are recognized as standard and fair within a system that promotes fair competition. However, not every common or widespread activity necessarily qualifies as a “normal business practice.” For instance, while it may be customary for suppliers to send their employees to assist retailers in setting up new or renovated stores, imposing such a requirement on suppliers could still be regarded as unjust and contrary to normal business practices.

The legislative record suggests that the phrase “unjustly in light of normal business practices” was incorporated to encompass practices that impede “a fair competition”. The author offers three prominent theories explanations for what constitutes an impediment to fair competition:

1. A business practice obstructs fair competition when it compromises the freedom and autonomy of a retailer's trading partners in making independent business decisions, thereby violating the fundamental principles of free competition.
2. Exploiting a superior bargaining position distorts competition by conferring an advantageous stance upon a retailer over its rivals, while simultaneously placing suppliers in a disadvantageous position relative to their competitors. However, this concern arises only if the exploitation targets specific suppliers selectively, rather than affecting all

suppliers equally. If all suppliers are subjected to the same exploitative practice (as in the Direx case), none of them are relatively disadvantaged compared to their competitors.

3.A practice exhibits a tendency to inhibit fair competition when a retailer imposes an unreasonably excessive burden or disadvantage on suppliers, or subjects them to conditions that the suppliers could not have reasonably anticipated or expected.

Disadvantageous conduct (abusive conduct)

The Anti-Monopoly Act (AMA) enumerates examples of disadvantageous behavior under Article 2(9)(v) Items (a)–(c), and the AMA Guidelines further expand on these examples. Nevertheless, the latter part of Item (c) serves as a broad, inclusive provision, stating: “otherwise establishing or changing trade terms or executing transactions in a way disadvantageous to the counterparty.” Consequently, the critical factor in identifying abusive conduct is whether the action is “disadvantageous to the counterparty.”

The specific examples outlined by the AMA and the Guidelines for Abusive Superior Bargaining Position (ASBP) include:

1.Forcing Party B, with whom Party A has ongoing transactions, to purchase goods or services unrelated to the existing transaction (as per Item (a) of Article 2(9)(v)) (compulsory purchase or use).

2.Coercing Party B, with whom Party A regularly conducts business, to provide Party A with money, services, or other economic benefits (as per Item (b) of Article 2(9)(v)) (demand for economic benefits).

Based on these examples, experts point to two key aspects to identify disadvantageous conduct:

- (i) whether the disadvantage is unexpected by the other party, making it hard for them to foresee it ahead of time; and
- (ii) whether the disadvantage places an excessive burden on the other party, beyond what is reasonable considering the direct benefit they receive.

As discussed earlier, the provision for ASBP is ambiguous. Despite attempts to clarify it through amendments and the JFTC’s ASBP Guidelines, there is still significant room for interpretation, and it lacks the clarity needed for predictable enforcement. Although the JFTC has made some efforts to address this by creating specific provisions for certain types of entities and behaviors, further simplification and clarification are necessary.

While the JFTC has been proactive in enforcing these clearer regulations, it has not been as active in areas that are not explicitly covered. This highlights the challenges in enforcing ASBP rules and explains the historical trend where many cases involved transactions between large-scale retailers and their suppliers. This trend has become more pronounced, especially after the introduction of administrative fines and the complexities of dealing with legal challenges from involved parties in court.

ASBP IN UZBEKISTAN

The new “Competition Law” of the Republic of Uzbekistan introduces a concept in Article 14 that diverges from the traditional notion of dominant market position – the concept of

“superior bargaining power.” In the context of a new law, the ability of an economic entity or a group of individuals, which does not possess a superior position, to unilaterally influence the terms of a transaction, the region where the goods are sold, and the setting of prices, is recognized as a superior bargaining power.

Uzbek law has limited record on the anticompetitive effects of ASBP, resulting in a scarcity of academic research on the subject. However, several years ago, some authors published an analytical article discussing the introduction of antitrust restrictions on retail trade networks, which is closely related to ASBP issue. According to authors’ market analysis, currently the influence of retail chains in the food product market is increasing. For example, the number of outlets of one of the major retail chains in Uzbekistan has nearly tripled in just two years. At the same time, there are some issues associated with the activities of large retail chains. Due to their ability to purchase goods in large volumes, these retail chains can significantly impact the competitive environment of the retail market. The emergence of a retail chain typically has a serious effect on smaller local stores in the area, often forcing them to lower their prices initially and eventually leading them to cease operations as they are unable to compete with the larger chains. As a result, the pool of buyers for suppliers’ products narrows, making the suppliers increasingly dependent on the retail chains. This gives the retail chains a “superior position” in their contractual relationships with suppliers (manufacturers). Consequently, this allows the retail chains to impose discriminatory and unfavorable contract terms on the suppliers.

Authors analyze that the discriminatory conditions can include setting different delivery terms by the retail chain for suppliers of the same type of product, imposing different liabilities for identical contract breaches, and other similar conditions. Unfavorable contract terms might involve prohibiting suppliers from entering into delivery contracts with other retail chains, requiring suppliers to provide information about contracts with other retailers, demanding price reductions to levels that harm the supplier (manufacturer), returning unsold or expired products to the supplier, and unjustifiably delaying payments. Additionally, unfair practices in the trade sector include not providing clear and uniform selection criteria to suppliers, unjustifiably rejecting suppliers’ proposals, and demanding additional payments for the right to supply.

Authors at that time suggested incorporating into competition legislation provisions for holding economic entities accountable for violating antitrust rules, even if they do not hold a “dominant position” but possess a “superior position” in trade negotiations. Now, such rule and liability are in place.

The new regulation provided additional clarification on the criteria for establishing an Abusive Superior Bargaining Position (ASBP). According to the rule, “In the goods or financial market, an economic entity or a group of individuals is deemed to possess superior bargaining power over their counterparties if one or more of the following conditions are met:

- They have the ability to unilaterally influence the terms of the contract during negotiations with their counterparties;

- They have the ability to unilaterally determine the geographical area where the goods are sold;

- They have the ability to unilaterally influence the setting of prices.”

However, this development has led to the emergence of new challenges thus, while applying this article, two fundamental questions arise:

1. Could the application of this article be considered a violation of the freedom to conclusion of a contract in entrepreneurial activities?

2. How does the application of “superior bargaining position” to actions arising from entrepreneurial business dealings between two entities in a free contractual relationship affect the overall competitive environment?

The recent regulatory update, which aims to clarify the criteria for identifying an ASBP has undoubtedly provided more concrete guidelines for determining when an entity holds a superior bargaining position in the goods and financial markets. While this clarification is a significant step towards more transparent and fair market practices, it also brings to light new challenges and critical considerations.

Firstly, there is a concern regarding the potential infringement on the freedom of contract in entrepreneurial activities. The ability to negotiate terms freely is a cornerstone of business autonomy and economic liberty. By introducing stringent criteria for what constitutes a superior bargaining position, the regulation may inadvertently restrict businesses' capacity to negotiate contracts that best suit their interests and operational strategies. This could lead to an over-regulation scenario, where the freedom to conclude contracts is compromised under the guise of preventing abuse of power. The challenge lies in balancing the protection against unfair practices with the preservation of contractual freedom.

Secondly, the impact of this regulation on the overall competitive environment is another crucial aspect that warrants examination. The application of the “superior bargaining position” criteria to business dealings between two entities in a free contractual relationship might deter companies from engaging in aggressive but fair competitive practices that are essential for innovation and growth. There is a risk that such regulations could stifle competition by penalizing firms simply for being more successful or better positioned in the market. Instead of fostering a healthy competitive environment, this could lead to market stagnation, where companies are hesitant to leverage their strengths for fear of regulatory repercussions.

CONCLUSION

while the new regulation on ASBP provides a clearer framework for identifying and addressing superior bargaining power, it also raises significant concerns regarding the potential restriction of contractual freedom and the unintended consequences on market competition. It is imperative that future amendments and the application of this rule are carefully considered to ensure that they promote fairness without undermining the fundamental principles of free market competition and entrepreneurial autonomy.

Balancing these interests will be key to achieving a regulatory environment that supports both fair play and economic dynamism.

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