# Regulating Abuse of Bargaining Position through the Competition Law: Japanese Regulation in Comparison with the EU's Exploitative Abuse Regulation

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#### Introduction

In addressing vertical restraints--restraints agreed between enterprises in vertical relation (typically, a seller and its buyers)--the Japanese competition agency (Fair Trade Commission: JFTC) has utilized, in addition to regulation against competition restraints, the regulation against "abuse of superior bargaining position" (hereinafter "SBP abuse"). This regulation does not aim at competition restraints (emanating from cooperation or exclusion); instead, it aims at business methods that the JFTC judges as abusive to the weaker trading partners, regardless of their effect on competition.

The SBP abuse regulation has occupied a prominent place in JFTC's enforcement of the Japanese competition law—the Antimonopoly Act (hereinafter, AMA). This regulation, moreover, has international significance since a number of Asian countries have adopted similar regulation, most notably Republic of Korea, which followed Japan in adopting almost exactly the same regulation.<sup>2</sup>

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<sup>&</sup>lt;sup>1</sup> Article 2-9 (v) of the Japanese competition law (Antimonopoly Act: AMA), translation available at

http://www.jftc.go.jp/en/legislation\_gls/amended\_ama09/index.html (accessed 8 May 2015).

<sup>&</sup>lt;sup>2</sup> Article 23 (1) (iv) of the Korean competition law (Monopoly Regulations and Fair Trade Act), which prohibits "abuse of trading positions".

The SBP abuse belongs to the realm of exploitative abuse, as distinct from exclusionary abuse that forms an integral part of competition restraints. Exploitative abuse has been regulated not only by the JFTC but also by the European Commission (but not by the US antitrust agencies). Even so, the JFTC has applied this regulation quite actively; in contrast to the hesitant way the European Commission has exercised its exploitative abuse regulation. This article evaluates JFTC's SBP abuse regulation through comparing it with European Commission's exploitative abuse regulation.

#### II. SBP Abuse Characterized as Exploitative Abuse

SBP-abuse regulation has functioned as regulation against exploitative abuse, which corresponds with the European Commission's regulation on exploitative abuse: conduct whereby the dominant undertaking takes advantage of its market power to exploit its trading partners or customers.<sup>3</sup> This interpretation<sup>4</sup> has not been officially endorsed by the JFTC. Nevertheless, multiple evidences support this interpretation.

First, the JFTC has assigned a special category for SBP abuse within its unfair-trade-practices regulation—"Infringement of the Basis for Free Competition", as opposed to the most important category of unfair-trade-practices— "competition-reducing restraints", namely competition-restraints realized through cooperative or exclusionary conduct.<sup>5</sup> The phrase ("Infringement of the Basis for Free Competition") is a catchall phrase, useful only for distinguishing the addressed abuse from the dominant category of abuse—exclusionary one, which forms competition restraints, together with cooperative conduct.

Jones, A., and Sufrin, B., EU Competition Law: Text, Cases and Materials (5th ed., Oxford Univ. Press, 2014), p. 367.

<sup>&</sup>lt;sup>4</sup> Tadashi Shiraishi has long maintained that SBP abuse concerns exploitative abuse (which is comparable to the EU exploitative abuse); Most recently, Tadashi Shiraishi, "Dominant position and Superior Bargaining position (Shihaiteki Chii To Yuetsuteki Chii)", 57 Japan Economic Law Association Journal (Nihon-Keizaiho Gakkai-Nenpo) 46 (2014).

<sup>&</sup>lt;sup>5</sup> See JFTC Intellectual Property Guidelines, at Part 4 (1) (iii) (explaining that unfair-trade-practices comprise not only competition reducing practices but also "infringement of the basis for free competition"), translation available at http://www.jftc.go.jp/en/legislation\_gls/imonopoly\_guidelines.files/070928\_IP\_Guideli ne.pdf (accessed 8 May 2015).

Second, the JFTC's Guidelines on SBP abuse ("SBP Guidelines") imply that the abuse belongs to exploitative abuse, because it depicts "disadvantages" inflicted on the abuser's trading partners (typically, small suppliers to the large retailer), not those inflicted on the abuser's competitors (typically, other large retailers): SBP Guidelines define the abuse as "the acts of imposing on the trading partner any disadvantage, unjustly in light of normal business practices". The trading partners, that the JFTC has protected, have exclusively been small-and-medium enterprises (SMEs); no SBP abuse cases have adressed abuse toward general consumers. Indeed, damages to competition or consumer-welfare have never been examined by the JFTC in its SBP abuse regulation; unreasonableness of inflicted damages has been determined by the JFTC without regard to the damage's effect on either competition or consumer welfare.

Against this interpretation, the JFTC itself has maintained that the SBP abuse may be characterized as competition-restraint, for the reason that this abuse unfairly advantages the abusers against abusers' competitors—thus effectively forming exclusionary abuse. However, this claimed link to exclusionary restraint proves to be too indirect, because the JFTC has automatically linked existence of the SBP abuse to its exclusionary effect, without conducting a case-by-case examination. Such automatic linkage to exclusionary effect may not be supported, since illegality of exclusionary conduct needs to be determined after balancing the conduct's exclusionary effect against its pro-competitive effects, whereas SBP abuse regulation does not balance exclusionary effect against pro-competitive effects.

Regarding how to place exploitative-abuse regulation within the aim of the competition law, the European Commission has come to focus on consumer welfare as the objective of the EU competition law, thus decreasing the role of exploitative-abuse regulation. The JFTC, by contrast, has never advocated prioritizing consumer welfare as the objective of the AMA, resulting in continuing to put emphasis on SBP abuse regulation, which general public as well as Japanese government officials (particularly at the

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<sup>8</sup> Jones and Sufrin, supra note 3, p. 372.

<sup>&</sup>lt;sup>6</sup> JFTC Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act (November 30, 2010) (hereinafter "SBP Guidelines"), at I-1, translation available at

http://www.jftc.go.jp/en/legislation\_gls/imonopoly\_guidelines.files/101130GL.pdf (accessed 8 May 2015).

<sup>&</sup>lt;sup>7</sup> SBP Guidelines, at I-1 ("[SBP abuse puts] the party having superior bargaining position in an advantageous competitive position against its competitors").

Small-and-Medium Enterprise Agency in the Ministry of Economy, Trade and Industry) have perceived to be aimed at protecting SMEs.

#### III. Difficulty in Identifying Unreasonable Exploitation

As the SBP abuse is equivalent to exploitative abuse, JFTC's regulation shares with European Commission's regulation the same difficulty in establishing proper standard for identifying unreasonable exploitation. This is because enterprises that lawfully have acquired dominant positions are entitled to exploit their dominant positions in setting terms-and-conditions of trade (hereinafter "trading-terms"); otherwise, enterprises would lose incentive to grow through innovations. These dominant enterprises, therefore, should not be prohibited from exploiting their dominance; they may only be prohibited from engaging in "unreasonable" exploitation. However, standards for identifying "unreasonable" exploitation intrinsically constitute of subjective judgments.

#### A. Meaninglessness of "the normal business practices"

Indeed, the definition of unreasonable exploitation offered by the relevant AMA Article (which the SBP Guidelines copied) is useless for determining its boundaries: the relevant AMA Article, in essence, characterizes trading-terms as abusive when they inflict "disadvantage" on the trading partner to the degree that the disadvantage is deemed unfair "in light of the normal business practices". In this definition, the standard for identifying unreasonable (or "unfair") abuse may be found only in the phrase "in light of the normal business practices" because "disadvantageous" trading-terms merely denote that the trading partner did not like the trading-terms (but, accepted it). And, in all negotiations, each trading party cannot hope to get all they want; negotiations can be reached to conclusion only when each trading party concedes that it cannot get all it wants.

Then, the phrase "normal business practices" holds the key to bouldering a range of unreasonable abuse. Yet this phrase is intrinsically ambiguous because discrepancies exist among business people regarding perception of abnormal business-practices, excepting those in breach of criminal or civil laws. Indeed, the SBP Guidelines effectively stripped any meaning from this phrase, by stating that the "normal business practices" do not mean prevalent trading practices, but the normalness is assessed from

<sup>&</sup>lt;sup>9</sup> The AMA Article 2-9 (v).

the standpoint of fairness. <sup>10</sup> In short, the Guidelines equated "normal business practices" with "reasonable business practices", effectively stripping any meaning from this phrase.

Consequently, we need to elicit standards on unreasonable disadvantages from the examples offered by the SBP Guidelines (comprising both actual and hypothetical examples). These examples may be classified into two types<sup>11</sup>: the first type comprises manners or procedures in reaching agreement on trading-terms; the second type comprises substance of trading-terms

# B. How to Identify Unreasonable Procedures in Reaching Agreement on Trading-Terms

The first type of unreasonableness (depicted by the examples in the SBP Guidelines) concerns manners or procedures by which enterprises (predominantly, large-scale retailers) agree trading-terms with trading partners (predominantly, small-and-medium suppliers to large-scale retailers).

Examples contained in the Guidelines signify that trading-terms imposed on trading partners unexpectedly or suddenly, without detailing the substance in contracts, tends be condemned as unreasonable. The relevant depictions in the Guidelines include the following: (1) "the conditions for the dispatch of sales personnel have not been made clear between the enterprise [namely, the large-scale retailer] and the trading partner [the small-and-medium supplier]"<sup>12</sup>; (2) SBP abuse is not identified "when an enterprise has made an agreement regarding the conditions for the dispatch of sales personnel in advance with the trading partner and pays the expenses normally required for such dispatch."<sup>13</sup>; (3) "In supplying goods, an enterprise unilaterally forces, without

<sup>&</sup>lt;sup>10</sup> The SBP Guidelines, III.

Tetsuya Nagasawa's article gave me inspiration for this classification: Tetsuya Nagasawa, "Practical Issues in Determining SBP Abuse (Yuetsuteki-Chii No Ranyo Nintei Niokeru Jitsumujo No Ronten)", <u>Japan Economic Law Association Annual Report</u> (Nippon Keizaiho Gakkai Nenpo), Vol. 35 (2014), p. 60. The SBP Guidelines themselves do not offer such classification.

<sup>&</sup>lt;sup>12</sup> The SBP Guidelines, IV-2 (2).

<sup>&</sup>lt;sup>13</sup> The SBP Guidelines, IV-2 (2) (I modified, here and in the following parts, the official JFTC English translation of the Guidelines, in order to better reflect the meaning of the original Japanese).

sufficient discussion, the trading partner to collect (without compensation) industrial waste that the partner has no legal obligation to collect."

These examples, in effect, would result in obliging large-scale retailers (and other dominant enterprises) to specify their trading-terms in the original contracts with trading partners (mostly, small-and-medium suppliers). In addition, prior to changing contract-terms, large-scale retailers are obliged to offer ample time to their suppliers for adjusting to new contract-terms. Otherwise, suppliers who complain of unreasonable disadvantage would convince the JFTC to identify unreasonable disadvantage—leading to determination of illegal abuse

The problem with inflicting such obligation is that enterprises often need to flexibly negotiate trading-terms without prescribing them in the contract. Moreover, judgment on whether ample time was offered before concluding trading-terms is intrinsically subjective.

Clearly unreasonable-procedures would be identified only for occasions in which a trading partner imposes trading-terms that breach contracts. However, for contracts-breach, trading parties can easily prevail in courts; the JFTC should not intervene into private contract-breach cases.

In conclusion, lack of contract may not be utilized as the decisive factor for identifying unreasonable procedures; but may be utilized as a reinforcing factor in identifying unreasonableness in substance of trading-terms.

#### C. How to Determine Unreasonableness in Substance of Trading-Terms

Procedural-fairness (in concluding a contract) itself is not sufficient for convincing the JFTC to determine as fair the trading-terms. This is because the contract may have been unfairly forced upon SMEs by large-scale enterprises. The JFTC has been judging unreasonableness in trading-terms, from overall circumstances including benefits given to the trading partners.

The SBP Guidelines depict unreasonable trading-terms through, among others, following examples: (1) "the trading party [typically a supplier to a large-scale retailer]

<sup>&</sup>lt;sup>14</sup> The SBP Guidelines, IV-2 (3) Example 5.

cannot refuse the request offered by the trading partner [a large-scale retailer] to purchase the partner's merchandise, from concerns about possible effects on future transactions, even when the merchandise has no value for the party's business"<sup>15</sup>: (2) "the trading party [typically, a large manufacturer] refuses to receive all or part of the contracted goods without justifiable grounds, and the trading partner [typically, a subcontractor] is obliged to accede to the refusal from concerns about the effects on future transactions", (3) "the burden to be borne by the trading party [a supplier to a large-scale retailer] exceeds the scope as deemed reasonable considering the direct benefit [accruing to the supplier's dispatching its sales-personnel]"<sup>17</sup>

These delineations on unreasonable trading-terms fail to offer objectively clear standards. First, the fact that a trading party (typically a small-and-medium supplier to a large-scale retailer) was obliged to accept the trading-terms "contrary to its genuine will" merely signifies that the supplier did not like the trading-terms offered by the large-scale retailer (but anyway accepted it). This subjective perception on the side of SMEs is insufficient for proving unreasonableness of the trading-terms. Second, the statement that the disadvantage is "exceeding the scope as deemed reasonable" begs the question of how to determine that the disadvantage is beyond reasonable.

## IV. JFTC's SBP Abuse Cases--7-Eleven Japan and Other Representative Cases

Since the SBP Guidelines do not offer objective standards for identifying unreasonable trading-terms, we have to seek guidance in actual JFTC decisions.

One of the most noteworthy JFTC decisions on SBP is Seven-Eleven Japan (2009). 18 This decision concerns restraint initiated by a major franchiser (of a convenience-store chain), which prohibited the franchisees from making sales of food-merchandises at reduced prices, when their sell-by-dates are approaching. At the same time, the

<sup>&</sup>lt;sup>15</sup> The SBP Guidelines, IV-1 (1).

<sup>&</sup>lt;sup>16</sup> The SBP Guidelines, IV-3 (1) (i).

<sup>&</sup>lt;sup>17</sup> The SBP Guidelines, IV-2 (2).

<sup>&</sup>lt;sup>18</sup> JFTC Remedy Order against Seven-Eleven Japan Co., Ltd (22 June 2009), 56 (2) Shinketsushu 6, translation available at http://www.jftc.go.jp/en/pressreleases/yearly-2009/jun/individual-000052.html (accessed 24 January 2015).

franchisees are contractually obligated to bear the cost of discarded merchandises. As a result, the prohibition on reduced-price sales decreases profit to the franchisees.

The JFTC determined that the prohibition of reduced-price sales constitutes unreasonable trading-terms (leading to SBP abuse), on the grounds that the prohibition "has the franchisees lose opportunities to reduce the loss [emanating from the value of discarded merchandise], through exercising their own rational business judgment." <sup>19</sup>

This reasoning for identifying unreasonable trading-terms is unconvincing, given the nature of franchising business, which requires standardization of franchisees' business methods; franchising business, by its nature, requires reducing freedom of franchisees to "exercise their own rational business judgment".

Moreover, prohibition of reduced-price sales may be defended on the grounds that the prohibition has the marketing merit of demonstrating to customers that the franchise-chain prioritizes freshness of its food-merchandise over discounted prices. Categorically prohibiting such a business-method robs franchisers of flexibility in calibrating their business methods.

Another business method cracked down by the JFTC (through the SBP regulation) is large-scale retailers' practice of urging their suppliers to dispatch their sales-force. For example, in *Sanyo-Marunaka*<sup>20</sup> the JFTC determined a supermarket-chain's demand to its suppliers for dispatching their sales-force as unreasonable (leading to determination of SBP abuse). In this and similar cases, the JFTC has determined the practice unreasonable on the grounds that large-scale retailers have not paid compensation to their suppliers for the cost of dispatching their sales-force.

Owing to these JFTC decisions, Japanese large-scale retailers are now obliged to pay compensation to suppliers for their dispatch of sales-force. Even when suppliers voluntarily propose to dispatch their sale force, big-scale retailers would hesitate to meet their request, for fear that the JFTC would find that voluntariness was not genuine, but was forced upon by the retailers. However, dispatching sales-force often brings beneficial effects to suppliers themselves, through promoting their merchandise against

<sup>&</sup>lt;sup>19</sup> Id. at 2 [Outline of the Violation].

<sup>&</sup>lt;sup>20</sup> JFTC Remedy Order against Sanyo-Marunaka (22 June 2011), 58 (1) Shinketsushu 193.

those of rival suppliers. JFTC's prohibition of sales-force dispatch (without compensation) is another example of robbing businesses flexibility in choice of their business methods.

### V. What the JFTC Can Learn from the European Commission

European Commission's exploitative-abuse regulation shares the same weakness as JFTC's SBP abuse regulation; the fact that not only Japan but also the EU has regulated exploitative abuse cannot be put up in support of Japanese abuse regulation. Still, the European Commission has considerably refined its abuse regulation, leading to more sensible approach than that of the JFTC; the JFTC might learn from the European Commission.

A. European Commission's Regulation of Exploitative Abuse—Transition from "Reasonableness Test" to "Disproportionately Disadvantageous Test"

The EU competition law aims its abuse regulation (exercised through Article 102 TFEU) at not only exclusionary abuse but also exploitative abuse. Even so, the European Commission has taken increasingly hesitant stance towards condemning exploitative abuse. As the reason for this hesitancy, the Commission in its submission to the Organization for Economic Cooperation and Development (OECD) indicated two factors: (1) practical difficulties facing competition authorities in intervening against exploitative conduct; (2) positive effects of high prices and high profits in a market economy. <sup>22</sup>

Still, as an apparently reverse move, one may point out Commission's recent intervention into distribution practices of large-scale retailers.<sup>23</sup> However, this

Article 102 TFEU does not define "abuse", but the Article has been interpreted by the EU court and scholars to comprise exploitative abuse: See Jones, A., and Sufrin, B., EU Competition Law: Text, Cases and Materials (5th ed., Oxford Univ. Press, 2014), p. 367.

The European Commission, "Excessive Prices -- European Union" submission to OECD (17 October 2011), Competition Committee, Working Party No. 2 on Competition and Regulation, paras 8-10.

European Commission, Press release (15 July 2014), "European Commission to tackle unfair practices in the food supply chain", available at <a href="http://europa.eu/rapid/press-release\_IP-14-831\_en.htm">http://europa.eu/rapid/press-release\_IP-14-831\_en.htm</a> (accessed 8 March 2015).

intervention for "protection of small food producers and retailers" has been exercised outside the Commission's competition policy (domain of Directorate-General for Competition: DG Competition), without basing the intervention on competition policy against monopsony (buyer) power. By comparison with such Commission interventions outside competition policy, its competition law enforcement has demonstrated distinctly stronger points, in that it has relatively clear principles clarified over time, with limited discretion, free from burdensome overregulation.<sup>24</sup>

Exploitative-abuse tackled by the Commission comprises two types: (1) Excessive prices (namely, too high prices); (2) Unfair trading-terms-and-conditions.<sup>25</sup> The former (excessive prices) has dominated the EU cases; the latter (unfair trading-terms) has been extremely rare.<sup>26</sup> By contrast, the JFTC has exclusively targeted the latter (unfair trading-terms), revealing JFTC's intention to protect SMEs (rather than general consumers) in exercising its SBP regulation.

For identifying abusive trading-terms, the Commission has adopted "reasonableness test", which Robert O'Donoghue and Jorge Padilla point out, has its origin in *Tetra Pak II*<sup>27</sup>. In this case, the Commission determined as abusive trading-terms imposed by a dominant manufacturer of carton-machines on the machine purchasers, whereby ways of utilizing the machines were limited through long-term lease (and other obligations). O'Donoghue and Padilla deduced from this case that the Commission adopted the basic principle that trading-terms need to be "reasonably necessary in view of the object of the contract". This "reasonable test" was paraphrased as "indispensable test" by these authors, regarding the Commission's determination of abuse in trading-terms imposed by a copyright-collection organization, which limited freedom of copyright holders. <sup>29</sup>

More recently, P. Hubert and M.L. Combet pointed out that the Commission adopted "common sense" (rather than economic analysis) for determining abuse in trading-terms,

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<sup>&</sup>lt;sup>24</sup> See Mario Monti, "The bold Brussels 'eurocrats' who command the world's respect", *Financial Times* (24 April 2015).

See Robert O'Donoghue and Jorge Padilla, <u>The Law and Economics of Article 82</u> <u>EC (Hart Publishing, 2006)</u>, p. 195

Robert O'Donoghue and Jorge Padilla, <u>The Law and Economics of Article 82 EC</u> (Hart Publishing, 2006), p. 646.

Tetra Pak II, OJ 1992 L 72/1, on appeal Case T-83/91, Tetra Pak v. Commission [1994] ECR II-755.

O'Donoghue and Jorge Padilla, supra note 25, p. 652.

<sup>&</sup>lt;sup>29</sup> O'Donoghue and Jorge Padilla, supra note 25, p. 649.

which was disproportionately inferior compared to quality and other benefits given to contracting parties.<sup>30</sup> Commission decisions adopting similar standard include *United Brands*, in which ban on the sale of green bananas was determined as abusive, for the reason that the ban went beyond the objective of quality control.<sup>31</sup> More recent *DSD* case presents a departure from older cases, in that disproportionately high royalty and other trading-terms (regarding a recycling trademark) were determined abusive.<sup>32</sup>

All these reasonable (or common-sense) tests leave significant uncertainty regarding detailed application,<sup>33</sup> in the same way as is the case with JFTC's "beyond reasonable" test. Still, compared with the JFTC, the European Commission has come to show more cautious attitude in finding exploitative-abuse: the Commission (typically in *DSD*) has come to find abuse only for instances where disproportionately disadvantageous conditions were inflicted on trading partners.

EU's experience on the exploitative abuse regulation presents a lesson to the JFTC: No objectively clear standard may be found for identifying abusive trading-terms; still, overuse of abuse regulation may be mitigated through adopting the "disproportionately disadvantageous" test (in contrast to simple reasonable-test).

# B. Need to Emulate EU's Hesitant Stance towards Exploitative-Abuse Regulation

Even with the "disproportionately disadvantageous" test, determination of exploitative abuse is inherently based on subjective judgment, given that legitimate monopolists are entitled to exploit their dominant positions. Therefore, competition agencies need to limit their enforcement to the extent minimally necessary. And this is how the European Commission has come to enforce its exploitative regulation: the Commission has taken increasingly hesitant stance towards exploitative-abuse regulation.

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 $<sup>^{30}\,</sup>$  P. Hubert and M.L. Combet, "Exploitative abuse: The end of the Paradox?" (2011) Concurrences N° 1-2011, ??, 46

<sup>&</sup>lt;sup>31</sup> United Brands Company and United Brands Continental BV v. Commission, case 27/76, ECR 1978 p. 00207.

<sup>&</sup>lt;sup>32</sup> <u>DSD</u>, Dec. 2001/463/EC, para. 112.

O'Donoghue and Jorge Padilla, supra note 25, p. 650.

By contrast, the JFTC has sustained active enforcement against SBP abuse, within JFTC's overall enforcement.<sup>34</sup> JFTC's active enforcement, with its ambiguous standard on unfairness, accompanied with mandatory fines (of substantial amount)<sup>35</sup>, has induced large-scale retailers (as well as producers) to shy away from utilizing business-methods which might be taken as abusive by SMEs (typically, suppliers to large-scale retailers).

Inhibiting business-methods disliked by SMEs may be deemed appropriate for the SMEs protection policy. However, such a policy does not accord with the competition policy that prioritizes consumer welfare, because many business-methods disliked by SMEs promote efficiency, leading to consumer welfare. Hence the US antitrust agencies have shunned regulating exploitative abuse. Likewise, the European Commission has increasingly eschewed exercising exploitative-abuse regulation.

There exists a sound reason behind the US and EU competition agencies' increasing focus on consumer welfare; pure SMEs-protection policy, at the expense of consumer welfare, ends up prohibiting all business methods that SMEs do not like. The JFTC might proclaim adherence to consumer-welfare objective of competition policy; concomitantly the JFTC might minimize use of SBP-abuse regulation. Still, the JFTC is obliged to implement SBP-abuse regulation because the regulation is stipulated in the AMA, and is supported by populism-oriented public opinion.<sup>36</sup>

In order to balance these conflicting needs, the JFTC might emulate the European Commission on its hesitant stance toward exploitative-abuse regulation, through first limiting determination of abuse to cases where "disproportionate disadvantages" are

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<sup>&</sup>lt;sup>34</sup> The JFTC, under the leadership of the former Chairman, set up within its Secretariat "Work force against Abuse of Superior Bargaining Position", which has been maintained under the current Chairman.

The AMA amendment (in 2009) created fines targeted on SBP abuse, amount of which is calculated as one percent of sales amount during the interval of law infringement. The amount of fine may become substantial, as shown in the case against Sanyo-Marunaka (JFTC Remedy Order and Fine payment Order, 22 June 2011, 58 (1) Shinketsushu 251, 358), where the fine surpassed 200 million yen—approximately 2 million US dollars.

Akira Goto (formerly one of the JFTC Commissioners) pointed out inherent tendency of overregulation of the SBP abuse, due to the public sentiment supporting protection of weak SMEs, which is intuitive to apprehend compare to abstract merit of competition—Akira Goto, <u>The Antimonopoly Act and the Japanese Economy</u> (Dokusen Kinshi Ho to Nihon Keizai) (2013), p. 112.

inflicted on SMEs. This adoption would decrease cases in which abuse is determined by the JFTC.

The counterargument often raised in Japan is that SBP-abuse condemnation by the JFTC has functioned as an efficient public enforcement against abusive trading-terms, which cannot be practically addressed by SMEs themselves through resorting to tort (or contract breach) suits, due to high costs of litigation.

This counterargument is misguided on multiple grounds. First, competition agency's intervention into private tort cases compromises consumer welfare—the ultimate objective of the competition law. Second, competition agency's intervention into private tort cases leads to less human (as well as budgetary) resources devoted to genuine competition law cases. Third, Japanese litigation system has been going through considerable modernization, thanks to reforms of Japanese legal system, which have effected to increase number of private attorneys. Against this background, JFTC's continued active intervention into private cases works toward maintaining status quo; against promoting efficient litigation system.

In this regard, Akinori Uesugi (former Director-General of the FTC Secretariat) aptly pointed out: "The JFTC need to limit enforcement against SBP abuse to cases in which trading parties' resort to litigation is infeasible, thus necessitating JFTC's intervention", and in Japan, consistent increase in number of attorneys (brought about by the Bar Examination reform) has considerably facilitated SMEs' utilizing litigation to resolve business conflicts.

#### VI. Superior Bargaining Position: Is It Different From Dominant Position?

As a prerequisite for identifying abusive (or monopolizing) conduct, the EU as well as the US competition agencies have required that targeted enterprises hold market power ("dominant position" in the EU terminology). Market power includes monopsony power, which concerns power held by dominant buyers over their suppliers. This prerequisite derives from the perception that abusive practices can be sustained only when they are exercised by dominant enterprises; otherwise abused enterprises can simply switch its

Akinori Uesugi, <u>Control of Monopolization under the Antimonopoly Act: Theory and Practices</u> (Dokkinho Niyoru Dokusenkoui Kisei No Riron to Jitsumu) (2013), p. 423.

trade from the abuser to alternative enterprises. This is why case law on Article 102 TFEU has defined a dominant company as "an unavoidable trading partner". 38

From another perspective, competition laws, before setting their predominant goal as consumer welfare, were originally demanded by citizens from their concern over concentration of economic power—as is manifested by the origin of the US antitrust laws. Today's economy, however, cannot afford maintaining industries composed of only SMEs, at the expense of scale-efficiencies and innovations. Addressed economic power, consequently, has come to be interpreted as market power—power to unilaterally impose trading-terms on other enterprises as well as on consumers. The transformed concept of economic power (namely, market power) needs to be regulated for protecting individual choice—competition law's objective alternative to consumer-welfare. From these considerations, setting market power as a prerequisite for intervention by competition agencies is now widely considered imperative for avoiding over-regulation (at least, against unilateral conduct).<sup>39</sup>

By contrast, the Japanese competition law (as is the case with the Korean competition law) has incorporated unfair-trade-practices clause, which does not require market power as a prerequisite for condemning unilateral conduct (as well as vertical agreements). Consequently, the JFTC does not limit condemnation of SBP abuse (which forms a subgroup within unfair-trade-practices) to enterprises with market power; the SBP Guidelines (based on the AMA Article 2-9 (5)) proclaim: "In order for one party to a transaction (Party A) to have superior bargaining position over the other party (Party B), it is construed that Party A does not need to have a market-dominant position [...] but only needs to have a relatively superior bargaining position as compared to the other trading party."<sup>40</sup>

Eg., "An undertaking which has a very large market share and hold it for some time [...] is by virtue of that share in a position of strength which makes it an unavoidable trading partner" (Case 85/76 *Hoffman-La-Roche & Co AG v Commission* [1979] ECR 461, para. 41): See Jones, A., and Sufrin, B., EU Competition Law: Text, Cases and Materials (5th ed., Oxford Univ. Press, 2014), p.359.

<sup>&</sup>lt;sup>39</sup> See, for instance, Einer Elhauge and Damien Geradin, <u>Global Competition Law and Economics</u> (2<sup>nd</sup> edition, 2011), p. 276.

<sup>&</sup>lt;sup>40</sup> The SBP Guidelines, II-1.

Superior Bargaining Position (SBP), thus distinguished from market power, begs the question of how wide area SBP covers beyond the boundary of market power. On this question, the SBP Guidelines put forth the following definition of SBP: "[SBP] means such a case where if Party A makes a request that is substantially disadvantageous for Party B, Party B would be unable to avoid accepting such a request from fear that Party B would encounter substantial impediment to its business from discontinuing transaction with Party A."<sup>41</sup>

This definition of SBP, in pointing out business impediment to the trading partner from discontinuing transaction with the abuser, is similar to the dominant position emanating from "locked-in" situation. And indeed the SBP Guidelines points out: "Party B's large investment specifically tailored to business with Party A fortifies Party B's need to continue to deal with Party A; thus Party B would encounter considerable impediments to its business in case it is obliged to discontinue dealing with Party A". This situation indicates "locked-in" situation derived from investment specifically tailored to a particular trading partner. Such locked-in situation creates market power because the enterprise (mostly a small-and-medium supplier) is "locked-in" to its current trading partner (typically, a large-scale retailer). Market power, then, may be identified to be held by the large-scale retailer because the relevant market is composed of supply to the single retailer.

Market power emanating from such "locked-in" situation was famously identified in the US Supreme Court *Kodak* decision<sup>43</sup>, which found that purchasers of Kodak copy-machines were "locked-in" to the Kodak machines<sup>44</sup>; therefore, the Kodak machines (instead of all the copy-machines where Kodak occupies only a miniscule market share) were found to constitute the relevant market.

Nevertheless, despite conspicuous role of "locked-in" emanated market power, the JFTC, both in its SBP Guidelines and actual cases, has never limited determination of SBP to locked-in situations, but included wide-range of situations where SMEs would

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<sup>&</sup>lt;sup>41</sup> Id (I modified, here and in the following parts, the official JFTC English translation of the Guidelines, in order to better reflect the meaning of the original Japanese).

<sup>&</sup>lt;sup>42</sup> The SBP Guidelines, II-2 (3).

Eastman Kodak Co. v. Image Technical Services, Inc. 504 U.S. 451 (1992).

Id. at 476 (customers that had already purchased Kodak photocopiers were "locked in" to their machines and thus could avoid purchasing Kodak's aftermarket parts only by enduring the high "switching costs" of changing to a different brand of photocopier.)

encounter some degree of hardship from discontinuing transaction with the alleged abuser. Such a wide interpretation of SBP has resulted in allowing the JFTC to loosely identify locked-in situations, thereby finding SBPs in situations where rigorous examination would negate market power.

Seven-Eleven Japan<sup>45</sup> (2009) is a case in point. In this case, the JFTC did not examine whether the allegedly abusive trading-term (prohibition of reduced-price sale) was prescribed in the original franchising-contract; the JFTC determined this prohibition as unreasonable, irrespective of whether the prohibition was prescribed in the franchising contract. Nevertheless, in case the trading-term was prescribed in the original contract, a locked-in situation may not be identified, because the franchisees could choose not to enter into a contract with the franchisor; instead, the franchisees could approach alternative franchisors (or pursue other businesses). Still, based on the current official interpretation of SBP, the JFTC would prevail even if the defendant challenged the JFTC decision on the grounds of lacking market power.

By contrast, consumer-welfare oriented competition agencies would demand that "locked-in" situations (leading to market power) should be identified only through rigorous scrutiny. This is because loose identification of locked-in situations leads to excessive protection of SMEs, resulting in overregulation, at the expense of consumer-welfare.

A case in point is the British Office of Fair Trading (OFT), regarding its case of *The Association of British Travel Agents and British Airways plc*<sup>46</sup>, in which the OFT determined it unlikely that British Airways had monopsony power over travel agents, because the agents could switch their services to other airlines. If the OFT had adhered to the JFTC-like loose standard for identifying locked-in situations, the OFT would have determined that British Airways had monopsony power, for the reason that travel agents encountered a small degree of hardship in switching their services to other airlines.

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<sup>&</sup>lt;sup>45</sup> Supra note 18.

<sup>&</sup>lt;sup>46</sup> Office of Fair Trading, CA98/19/2002, December 11, 2002.

Another case in point is the US antitrust post-*Kodak* decisions, which have denied locked-in situations, resulting in negating market power. <sup>47</sup> In these post-*Kodak* cases, contracting parties were informed of trading-terms at the original-contract stage. For instance, in *Queen City Pizza*, *Inc. v. Domino's Pizza*, Inc. <sup>48</sup>, the court negated "lock-in" because the franchisor informed (through the original franchise agreement) franchisees of its power to control input purchases.

By contrast, JFTC stance of detaching "superior bargaining position" from market power has resulted in its identifying SBPs whenever SMEs encountered slight degrees of hardship in switching their dealings from the alleged abusers (typically large -scale retailers) to other retailers. Enforcement against SBPs, thus detached from market-power, has transformed the JFTC into general guardian of fair trading-terms. And, fairness regulation, detached from consumer-welfare objective, has inherent tendency towards overregulation, at the sacrifice of consumer welfare. With a view to setting consumer-welfare (or alternatively, individual choice) as the objective of the competition law, the JFTC might shift its stance towards admitting that SBP constitutes a subset of market power.

Furthermore, in *Seven-Eleven Japan* and similar cases, the logic espoused by the JFTC (for identifying SBP) is as follows: the fact that SMEs were obliged to accept unwelcome conditions testifies that the trading partner (typically, a large-scale retailer) holds "superior bargaining power". <sup>49</sup> This circular reasoning has robbed SBP of any limiting effect (even though less effective than market power requirement) on JFTC's utilization of SBP abuse regulation.

Nevertheless, market power needs to be set up as a precondition for condemning unilateral conduct in order to utilize the condition as a safeguard against competition agencies' overregulation. By this analogy, SBP needs to be identified independent from identification of unreasonable abuse, in order that need for SBP identification works as a safeguard against JFTC's overregulation.

<sup>&</sup>lt;sup>47</sup> See D.A.J. Goldfine and K.M. Vorrasi, "The Fall of the Kodak Aftermarket Doctrine: Dying A Slow Death in the Lower Courts", 72 Antitrust Law Journal 209(2004).

<sup>&</sup>lt;sup>48</sup>124 F. 3d 430, 440 (3d Cir.1997).

<sup>&</sup>lt;sup>49</sup> See SBP Guidelines, II-1 (SBP means that the trading party is unable to avoid accepting such a request that is disadvantageous to the party).

#### VII. Conclusions

JFTC's SBP-abuse regulation and the European Commission's exploitative-abuse regulation share the same weakness regarding subjective nature of standards for identifying illegal abuse. Still, the European Commission, by contrast with the JFTC, has adopted increasingly hesitant stance towards exploitative-abuse regulation. Regulation of exploitative abuse (including SBP abuse) needs to be exercised hesitantly, in order to minimize sacrifice to consumer welfare.

Consumer-welfare oriented competition law also would demand that superior bargaining position (SBP) be interpreted as a subset of market power (or dominant position), because economically feasible interpretation is that SBP emanates from locked-in situations. The JFTC's denial to equate SBP with dominant position has allowed the JFTC to identify SBP whenever the JFTC identifies unreasonable (or unfair) trading-terms, thus transforming the SBP abuse regulation to a general regulation against unfair trading-terms. This has resulted in transforming the JFTC from competition agency to an agency watching on unfair trading-terms, resulting in overly intervening into business methods, with sacrifices to consumer welfare.

The JFTC might emulate the European Commission in minimizing use of SBP abuse regulation; at least, limiting the regulation to instances where SMEs are not able to feasibly utilize litigation to resolve their business conflicts with large-scale retailers or producers.