

# Legal Analysis of the Japanese Subcontract Act: Focus on the Grocery Industry

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Regulations of the grocery industry are one of the major concerns for competition authorities throughout the world. This article focuses on regulations governing unjust use of superior bargaining position in the grocery industry and studies the purpose and basis of the Subcontract Act as well as future challenges for the Act. The Subcontract Act is a law that regulates the Abuse of Superior Bargaining Position (ASBP) of the Antimonopoly Act (AMA), effectively playing an important role in regulating the unjust use of superior bargaining position. The relationship between the Subcontract Act and the ASBP of the AMA is deeply interwoven, both theoretically and pragmatically. For this reason, the two regulations need to be considered together. The ASBP under the AMA and the Subcontract Act is not only a protection law for small- and medium-sized enterprises but also a law to protect competition. Most cases in the field of grocery industry under the Subcontract Act concern reduction in subcontract cost or unjust lowering of price. The problem is that the enforcement of the Subcontract Act is weak. However, it has an advantage to rapidly solve problems through administrative measures.

## 1. Introduction

In 1956, the ‘Act against Delay in Payment of Subcontract Proceeds, Etc. to Subcontractors’ (Subcontract Act)<sup>1</sup> was established to regulate the abuse of superior bargaining position of parent companies against subcontractors. Parent companies, such as manufacturers and large-scale retailers, made subcontract agreements and then at times would unilaterally delay and cut the subcontract price. The ‘subcontract’ we are referring to here is a transaction involving the outsourcing of work by undertakers, such as manufacturing or repairing, to third parties.

The regulation of the Abuse of Superior Bargaining Position (ASBP) of the Antimonopoly Act (AMA)<sup>2</sup> and the Subcontract Act are not necessarily

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<sup>1</sup> Act No. 120 of June 1, 1956.

<sup>2</sup> The ASBP is prescribed in Article 2 (9) (v) of the AMA.

specific to Japan. In fact, other geographical regions such as the EU, the UK, Germany, France and South Korea have similar regulations<sup>3</sup>. In particular, regulations of large-scale retail grocery are a major concern for competition authorities throughout the world.<sup>4</sup>

In Japan, the unjust use of superior bargaining position by large-scale retailers and manufacturer is restricted by the ASBP of the AMA and the Subcontract Act. The Subcontract Act was developed as a special law to allow effective operation of the ASBP and to complement the AMA.

Competition authorities around the world are very interested in regulation of the grocery industry, regardless of whether they regulate unjust use of superior bargaining position. Consequently, this article focuses on regulations of unjust use of superior bargaining position on the grocery industry, studying the purpose and basis of the Subcontract Act and the future challenges it faces.

This article describes the established history of the Subcontract Act in Section 2. Furthermore, it overviews the contents of the Subcontract Act and demonstrates the kind of acts that are restricted in Section 3. After understanding the entire concept of the Subcontract Act, it examines the specific cases of the Subcontract Act in Section 4. Section 5 clarifies what the ASBP and the Subcontract Act protect. Section 6 explains the relationship between the Subcontract Act and the ASBP and challenges of the Subcontract Act. Section 7 concludes the discussion.

## 2. The Established History of the Subcontract Act

Around 1951, following World War II, Japan experienced serious

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<sup>3</sup> See Directive, 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on Combating Late Payment in Commercial Transactions [2011] OJ L48/1; Department for Business Innovation & Skills, Groceries Code Adjudicator, Groceries Supply Code of Practice (2009); Die §20 des Gesetz gegen Wettbewerbsbeschränkungen; L'article L. 420–2 et L. 442–6 du Code de commerce; Article 3-2, 23 of Korean Monopoly Regulation and Fair Trade Act.

<sup>4</sup> See, e.g., Green Paper on Unfair Trading Practices in the Business-to-Business Food and Non-Food Supply Chain in Europe, COM (2013) 37 final; Department for Business Innovation & Skills, Groceries Code Adjudicator, Groceries Supply Code of Practice (2009); An FTC Staff Study, Slotting Allowances in the Retail Grocery Industry; Selected Case Studies in Five Product Categories (2003), A Report by FTC Staff, Report on the Federal Trade Commission Workshop on Slotting Allowances and Other Marketing Practices in the Grocery Industry (2001).

recession. The savings of funds gained by parent companies exploiting subcontractors became problematic. In response to this problem, the government decided to promote the payment of subcontract-related government contracts in the undersecretary conference of 1952, and the Banking Bureau of the Ministry of Finance followed this policy-related general contract, encouraging borrowers to promote the payment of subcontracts so as to prevent delay in payment.<sup>5</sup>

By the time the AMA was revised in 1953, eliminating abuse of the superior bargaining position of large-scale businesses required adding a provision relating to ‘dealing with the counterparty by unjustly using one’s superior bargaining position’. On the basis of this provision, the ASBP of the AMA and the Subcontract Act were brought into being.<sup>6</sup>

The Subcontract Act was enacted for the following reasons. First, parent companies often offer subcontracts via verbal negotiations or uncertain trading conditions and then force subcontractors to accept reductions in payment and changes in terms and conditions at the time of payment. Special legislation was necessary to clarify the terms and conditions of subcontracts to prevent such problems. Second, there was a need for a new law for authorities to conduct surveys in advance without having to wait for claims of unreasonable conduct of parent companies. Finally, it is better to encourage parent companies to improve the problem of delay in payment, which is the major issue surrounding subcontract transactions rather than the payment order of the Japan Fair Trade Commission (JFTC) proceeding in a quasi-judicial manner.<sup>7</sup>

The Subcontract Act was enacted in 1956 and its outline has been maintained since. The Subcontract Act is characterised such that it is limited to the content of each target transaction, defining the parent company and subcontractors involved by their respective amounts of capital. Furthermore, it provides the matters to be observed by parent companies and permits the JFTC to conduct an on-site inspection or survey. Through providing necessary recommendations by authorities, it encourages voluntary improvement of parent companies.<sup>8</sup>

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<sup>5</sup> See ISAO KASUBUCHI, YUKINARI SUGIYAMA, SHITAUKEHOU NO JITSUMU 1 (3<sup>rd</sup> ed. 2011).

<sup>6</sup> See KASUBUCHI, SUGIYAMA, *supra* note 1, at 1–2; KENJI KAWAGOE, SHITAUKETORIHAKI NO HOUMU 9–10 (2004).

<sup>7</sup> See KASUBUCHI, SUGIYAMA, *supra* note 1, at 3–4.

<sup>8</sup> See MASAKO WAKUI, *ANTIMONOPOLY LAW: COMPETITION LAW AND POLICY IN JAPAN*

In the revisions to the Subcontract Act made in 1962, the notion of a payment due date was clarified. In the 1965 revision, regulating subcontract transactions of parent companies through subsidiaries became possible. In accordance with changing economic conditions, further revisions were made in 1973, 1999 and 2000. In these more recent revisions, standards for the required capital amount for parent companies and subcontractors were raised. In the 2003 amendment, ‘information-based product creation contracts’ and ‘service contracts’ were added to the list of target transaction types. Furthermore, its ability to enforce regulations was strengthened at this time through the publishing of recommendation cases and raising fines for non-compliance.

Through a number of amendments, the area of application of the Subcontract Act has been extended to non-manufacturing industries such as information-based product creation contract and service contracts as well as manufacturing contracts and repair contracts. In that sense, it can be said that the Subcontract Act has become a law that has a character similar to that of general law.<sup>9</sup> In cases where the Subcontract Act and the ASBP of the AMA satisfy their requirements at the same time, which laws should be applied becomes a problematic question. This problem is compounded by the fact that the scope of the Subcontract Act has been expanded. In principle, the Subcontract Act, which is a special law, will be applied rather than the ASBP.<sup>10</sup> However, when a cease-and-desist order or a surcharge payment order is necessary for a case, it should be regulated via the ASBP of the AMA.<sup>11</sup>

### 3. Contents of the Subcontract Act

A summary of the contents of the current Subcontract Act is as follows. The purpose of the Subcontract Act is to ensure that transactions between main subcontracting entrepreneurs and subcontractors are fair and

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176-177 (2008).

<sup>9</sup> See Iwakazu Takahashi, *Kaisei Shitaukehō no Hyōka to Kadai*, 765 KOUSEITORIHIKI 17 (2014).

<sup>10</sup> See JFTC, Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act § I 1. n5 (2010)

<sup>11</sup> See Takahashi, *supra* note 9, at 20.

that the interests of subcontractors are protected.<sup>12</sup> In cases of goods manufacturing or other contracts, information-based product creation contracts and service contracts specified by a Cabinet Order<sup>13</sup> (creating programs such as video games, accounting software, transportation, goods storage in warehouse and information processing), a ‘main subcontracting entrepreneur’ is defined as one who falls into any of the following categories: (i) any entrepreneur with capital exceeding 300 million yen who concludes a manufacturing or other contract with any individual or entrepreneur with capital of not more than 300 million yen and (ii) any entrepreneur who has capital exceeding 10 million yen but not 300 million yen who concludes a manufacturing or other contract with any individual or entrepreneur with capital of not more than 10 million.<sup>14</sup>

Furthermore, in case of information-based product creation contracts and service contracts not specified by the Cabinet Order (for example, movies, TV programs, etc.), ‘main subcontracting entrepreneurs’ include: (iii) entrepreneurs with capital exceeding 50 million yen who conclude an information-based product creation contract or a service contract with any individual or entrepreneur with capital of not more than 50 million yen and (iv) entrepreneurs with capital exceeding 10 million yen but not 50 million yen who conclude an information-based product creation contract or service contract with any individual or entrepreneur with capital of not more than 10 million yen.<sup>15</sup>

Main subcontracting entrepreneurs must deliver and preserve a document for the subcontractor in cases where it has concluded that a manufacturing or other contract under Article 3 (Delivery of documents) and Article 5 (Preparation and preservation of documents) of the Subcontract Act applies. The date of payment of the subcontract is fixed at 60 days. When a main subcontracting entrepreneur has not paid the subcontract proceeds to

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<sup>12</sup> Article 1 of the Subcontract Act reads as follows. ‘The purpose of this act is, by preventing a delay in payment of subcontract proceeds, etc., to ensure that transaction between main subcontracting entrepreneurs and subcontractors are fair and, at the same time, to protect the interests of the subcontractors, thereby contributing to the sound development of the national economy’.

<sup>13</sup> Cabinet Order No. 5 of Jan. 4, 2001 (last revised by Cabinet order No. 452 of 3 October 2003).

<sup>14</sup> Article 2 (7)(i),(ii) of the Subcontract Act.

<sup>15</sup> Article 2 (7)(iii),(iv) of the Subcontract Act.

the subcontractor by the date of payment, it must pay interest<sup>16</sup> for the delay.

Furthermore, no main subcontracting entrepreneurs may affect any one of the following acts: (i) refusing to receive work from a subcontractor without reasons attributable to the subcontractor, (ii) failing to make payment of subcontract proceeds after lapse of the date of payment; (iii) reducing the amount of subcontract proceeds without reasons attributable to the subcontractor, (iv) causing a subcontractor to take back goods relating to its work after receiving the work from the said subcontractor without reasons attributable to the subcontractor, (v) unjustly setting subcontract proceeds at a level conspicuously lower than the price ordinarily paid for the same or similar content of work, (vi) coercing the subcontractor to purchase designated goods or to use designated services and (vii) countermeasures against informing the JFTC or the Director-General of the Small and Medium-Sized Enterprise Agency of such facts concerning violation of the Subcontract Act.<sup>17</sup>

The JFTC and the Director-General of the Small and Medium-Sized Enterprise Agency may cause a main subcontracting entrepreneur to submit a report on its transactions or may demand that its officials conduct an on-site inspection or survey under Article 9 of the Subcontract Act. Furthermore, the JFTC may recommend that the main subcontracting entrepreneur cease disadvantageous treatment and take other necessary measures. In cases where a document is not delivered or preserved violating Articles 3 or 5 of the Subcontract Act, a representative, agent, employee or any other worker of a main subcontracting entrepreneur shall be punished by a fine of not more than 500 million yen under Article 10 of the Subcontracting Act.

#### 4. The Subcontract Act in the Grocery Industry

This section focuses on the cases of the grocery industry as competition authorities throughout the world are highly interested in this area. In Japan, there are many Subcontract Act grocery store cases in which there is a reduction in

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<sup>16</sup> The rate is 14.6% per year according to the rules of JFTC (rule no. 1 of 15 May 1962, last revised by rule no. 1 of 8 May 1970).

<sup>17</sup> Article 4 (1) (i)-(vii) of the Subcontract Act.

subcontract price, referred to as a ‘rebate’.

The case of York-Benimaru is instructive.<sup>18</sup> York-Benimaru<sup>19</sup> is a supermarket that has commissioned the production of food products to be sold in the company. It reduced the subcontract price via a ‘rebate’ to ensure that it maintained sales promotion expenses of its own.<sup>20</sup> In the case of Co-op Sapporo,<sup>21</sup> a consumers’ cooperative, the subcontract price was reduced as a monthly rebate or an annual rebate, even though there is no responsibility for subcontractors.<sup>22</sup> Furthermore, in the case of Daiso I,<sup>23</sup> Daiso<sup>24</sup> entrust subcontractors with production such as production of daily necessities of the house brand. Daiso reduced its subcontracting price as a rebate without any fault by subcontractors.<sup>25</sup> Moreover, in the cases of the supermarkets Nishitetsu Store<sup>26</sup> and Torisen,<sup>27</sup> subcontract price was reduced as a rebate to ensure maximising of profits. JFTC found that these reductions of subcontract price are illegal under Article 4 (2) of the Subcontract Act.

In addition to reductions in the subcontract price on the pretence of a ‘rebate’, such acts are designed to ensure the implementation cost of the anniversary of foundation project,<sup>28</sup> the operational cost of the electronic order system<sup>29</sup> and the cost of stickers for sorting of the logistics system.<sup>30</sup>

Furthermore, in the case of Daiso II,<sup>31</sup> Daiso took back the subcontracted products after receiving them, using sluggish sales or unsalable goods as a reason. In none of these cases could a reason be attributed to subcontractors. Furthermore, Daiso unilaterally set a unit price approximately 59-67% lower than the unit price

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<sup>18</sup> JFTC Annual Report of FY2013 (JFTC, 27 June 2013).

<sup>19</sup> The total amount of capital of York-Benimaru is about 9 billion 930 million yen.

<sup>20</sup> The total amount of reduced price against 12 subcontractors is about 170 million yen.

<sup>21</sup> JFTC Annual Report of FY2012 (JFTC, 22 June 2012).

<sup>22</sup> The total sum of the reduced money amounts to approximately 28 million yen for 8 subcontractors.

<sup>23</sup> JFTC Annual Report of FY2011 (JFTC, 27 March 2012).

<sup>24</sup> The total amount of capital of Daiso is 2 billion 700 million yen.

<sup>25</sup> The total sum of the reduced money amounts to approximately 280 million yen for 178 subcontractors.

<sup>26</sup> JFTC Annual Report of FY2010 (JFTC, 30 March 2011).

<sup>27</sup> JFTC Annual Report of FY2009 (JFTC, 2 February 2010).

<sup>28</sup> Torisen, JFTC Annual Report of FY2009 (JFTC, 2 February 2010).

<sup>29</sup> Nishitetsu, JFTC Annual Report of FY2010 (JFTC, 30 March 2011); Torisen, JFTC Annual Report of FY2009 (JFTC, 2 Feb. 2010).

<sup>30</sup> Torisen, JFTC Annual Report of FY2009 (JFTC, 2 February 2010).

<sup>31</sup> JFTC website (JFTC, 15 July 2014), available at

< <http://www.jftc.go.jp/houdou/pressrelease/h26/jul/140715.html> > (last accessed 29 April 2015).

decided before ordering in consultation with subcontractors. Daiso ordered the subcontracted products at the lower price, using slow sales as a reason. JFTC found that the return and haggling engaged in by Daiso constituted violation of Articles 4 (iv) and (v) of the Subcontract Act.<sup>32</sup>

As described above, most grocery store cases under the Subcontract Act involve reduction in subcontract cost or unjustly lowering of prices paid.<sup>33</sup> The problem indicated by the repetition of violation in the case of Daiso I and II is that enforcement under the Subcontract Act is weak. However, the Subcontract Act has an advantage of rapidly settling problems through administrative measures.

## 5. The Purposes and Basis of the ASBP and the Subcontract Act

As can be seen from the enactment history of the Subcontract Act in Section 2, the purpose of the Act is to regulate the abuse of superior bargaining position for subcontractors who are not on a level playing field with parent companies. This problem cannot be always settled by contracts when there is an unequal relationship between two parties. The status of superior bargaining position is often found, and being in a superior bargaining position is not in itself illegal. The ASBP of the AMA and the Subcontract Act regulate unfair contract terms and conducts that cannot happen without an unequal relationship.<sup>34</sup>

In contrast, the question is whether the ASBP of the AMA and the Subcontract Act protect ‘competitors’ or ‘small- and medium-sized enterprises’, not ‘competition’. However, this indication is not necessarily right. This is because the parent company that is under the burden of subcontractors can gain an advantage over competitors who do not exploit subcontractors by abusing a superior bargaining position. This will eventually cause an adverse effect on competition. The JFTC is believed to be standing in such an opinion.<sup>35</sup> However, this opinion only gestures at an indirect harm to competition.

In this regard, one of the perspectives asserts that there is a hindrance to competition in which the superior bargaining position is abused regarding the

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<sup>32</sup> The total of the cost of unjustly lowering price amounts to approximately 6.57 million yen for two subcontractors.

<sup>33</sup> The issue of unfair return is also found in the case of Daiso II.

<sup>34</sup> See AKIRA NEGISHI, MASAYUKI FUNADA, DOKUSENKINSHIHOU GAISETSU [JAPANESE ANTITRUST LAW] 292-293 (4<sup>th</sup> ed. 2010).

<sup>35</sup> JFTC, Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act § I,1 (2010).

hold-up problem.<sup>36</sup> The hold-up problem concerns the whole society falling into under-investment by avoiding relationship-specific investments in an incomplete contract. For example, imagine that A and B are in a transaction of manufacturing goods and that B makes a relationship-specific investment. In this transaction, A can cut its price because A knows that B is unable to refuse the deal as long as the price exceeds its average variable cost. This is because the cost of relationship-specific investment is sunk. B then predicts that it will be locked into the transaction and will be unable to change the trading partner. Eventually, B does not accept the deal, given that there is a risk of hold-up in the incomplete contract.<sup>37</sup>

If the hold-up problem cannot be evaded, the possibility of achieving an efficient allocation of resources by regulation of the ASBP under the AMA and the Subcontract Act is highlighted.<sup>38</sup> In particular, in a subcontracting deal, as we have seen in Section 4, most cases violating the Subcontract Act reduce subcontract price without reasons attributable to subcontractors. As most subcontractors produce subcontracted products with relationship-specific investments, the risk of hold-up problems in the subcontracting deal is considered to be a significant risk to bear.

Certainly, there are some cases without large relationship-specific investments, such as in the case of abuse of the superior bargaining position of large-scale retailers against suppliers.<sup>39</sup> In these cases, the suppliers manufacture general purpose products. However, even if the hold-up problem does not occur, it is noted that the regulations of the ASBP under the AMA and the Subcontract Act may enhance social welfare when social welfare is reduced by obstructing a new entry.<sup>40</sup>

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<sup>36</sup> See AKIRA GOTO, DOKUSENKINSHIHOU TO NIHON KEIZAI [ANTIMONOPOLY ACT AND THE JAPANESE ECONOMY] 108-109 (2013), FUMIO SENSUI, BASIC KEIZAIHOU [THE BASIC ECONOMIC LAW] 276-277 (Noboru Kawahama et al. eds., 4<sup>th</sup> ed. 2014), HIROYUKI OKAMURO, SHUYA HAYASHI, DOKUSENKINSHIHOU NO KEIZAIGAKU [ECONOMIC IMPACT OF THE ANTIMONOPOLY LAW] 275-276 (Yosuke Okada, Shuya Hayashi eds., 2009).

<sup>37</sup> See HIROYUKI ODAGIRI, KYOUSOU SEISAKU RON 140-143 (2008), Goto, supra note 36, at 110-111.

<sup>38</sup> See MOTOSHIGE ITO, KAZUAKI KAGAMI, KAISHAHOU NO KEIZAIGAKU 411-418 (Yoshiro Miwa, Hideki Kanda, Noriyuki Yanagawa, eds., 1998), RYUHEI WAKABAYASHI, NIHON NO KYOSO SEISAKU 119-125 (Akira Goto, Kotaro Suzumura eds., 1999), OKAMURO, HAYASHI, supra note 36, at 276.

<sup>39</sup> See ODAGIRI, supra note 37, at 150, 153. He points out this dealing with the case of Mituskoshi (29 Shinketsushu 31 (JFTC, 17 Jun. 1982)) and DonQuixote Co., Ltd. (54 Shinketsushu 182 (JFTC, 22 Jun. 2007)).

<sup>40</sup> See Philippe Aghion and Patrick Bolton, *Contracts as a Barrier to Entry*, 77 AM. ECON. REV. 388-401 (1987), Toshihiro Matsumura, *Yuetsutekichii no Ranyo no*

In this manner, the ASBP under the AMA and the Subcontract Act is not only a small- and medium-sized enterprise protection law but also a law to protect competition.

## 6. Current Situation and Problems in the Subcontract Act

This section describes some problems the Subcontract Act faces after clarifying the relationship between the Subcontract Act and the ASBP of the AMA. This is necessary because the relationship between the two laws is deepened along with the revision of the Subcontract Act.

From a theoretical perspective, after finding the superior bargaining position recognised by capital divisions, a violating act will infringe the Subcontract Act without considering substantial illegality of the act, so long as it falls into the prohibited conducts prescribed under the Subcontract Act.

In contrast, under the ASBP of the AMA, which is one of the Unfair Trade Practices, the superior bargaining position is determined by considering the following: (i) the degree of dependence between parties, (ii) position in the market, (iii) the possibility of changing its business counterpart and (iv) other facts indicating the need for transactions. After finding the superior bargaining position, a violating act will infringe the AMA considering substantial illegality of the act when it falls into the prohibited conducts prescribed under the AMA.

In the case of designation of Specific Unfair Trade Practices by Large-Scale Retailers Relating to Trade with Suppliers (the Large Retailer Designation),<sup>41</sup> the superior bargaining position is determined by considering (i) the degree of dependence between parties, (ii) position in the market, (iii) the possibility of changing its business counterpart and (iv) other facts indicating the need for transactions. These factors are the same as that of superior bargaining position under the ASBP of the AMA. However, a violating act will infringe on the AMA

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*Keizaibunseki* [*Economic Analysis of Abuse of Dominant Bargaining Position*], 27 THE ANNUAL OF THE JAPAN ASSOCIATION OF ECONOMIC LAW 96-99 (2006),

OKAMURO, HAYASHI, *supra* note 36, at 276, 287.

<sup>41</sup> JFTC Notification No. 11 of 2005. Specific designation is applied to a specific range of businesses such as newspapers and large-scale retailers. Large-scale retailers are: (i) entrepreneurs with sales of more than 10 billion yen in their previous fiscal year and (ii) (a) a store with a floor space of more than 3,000m<sup>2</sup> within the Tokyo metropolitan area and designated cities prescribed in the Local Governmental Act (Japanese Act No. 67 of 1947), or (b) with a floor space of more than 1,500m<sup>2</sup> within cities other than those described in (a).

without considering substantial illegality of the act so long as it counts as prohibited conduct prescribed under the Large Retailer Designation.<sup>42</sup> Thus, it is noted that the modal structures of the Subcontract Act and the Large Retailer Designation are similar.<sup>43</sup>

Furthermore, from the perspective of the actual situation, the Subcontract Act is evaluated as playing a central role rather than a complementary role in the ASBP of the AMA in the regulation of unjust use of a superior bargaining position.<sup>44</sup>

In this manner, the relationship between the Subcontract Act and the ASBP of the AMA is deep, from both theoretical and pragmatic perspectives. Thus, the two regulations need to be understood in an integral manner.<sup>45</sup> However, even if we understand the Subcontract Act and the ASBP of the AMA integrally, there is a grey area that does not fall into the capital section of the Subcontract Act and does not clearly violate the AMA.<sup>46</sup> As for the grey area, either regulation of the Subcontract Act or the ASBP of the AMA is necessary in future.<sup>47</sup>

Moreover, some individuals question the rationality of judging a superior bargaining position only by capital division.<sup>48</sup> Certainly, as capital division is rigid and formal, there could be cases where a substantial position in a transaction is obscure. However, there is a reason to solve problems quickly by reducing the burden of proof of the JFTC in verifying a superior bargaining position because the Subcontract Act emphasises the prevention of violations. Furthermore, it should be noted that acts of violation are explained in detail in the guidelines concerning the Subcontract Act, and the guidelines secure predictability.<sup>49</sup> In terms of future issues, finding a superior bargaining position based on the actual situation at hand will be

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<sup>42</sup> See, e.g., Valor 53 Shinketsushu 881 (JFTC, 13 Oct. 2006); Nishimuta 53 Shinketsushu 911 (JFTC, 27 March 2007); Marukyo 55 Shinketsushu 684 (JFTC, 23 June 2008); Eco-s 55 Shinketsushu 684 (JFTC, 23 June 2008). See also cases of the designation of Specific Unfair Trade Practices in the Department Store Business (JFTC Notification No. 7 of 1954), which is the predecessor of the Large Retailer Designation, Posful 51 Shinketsushu 408 (JFTC, 14 April 2004); Uny Co., Ltd. 51 Shinketsushu 543 (JFTC, 1 Jan. 2005); Fuji 52 Shinketsushu 376 (JFTC, 12 May 2005).

<sup>43</sup> See Naokazu Yokota, *Saikin no Yuetsutekichii no Rannyoukisei no Doukou*, 757 KOUSEITORIHIKI 16 (2013).

<sup>44</sup> See Akira Negishi, *Yuetsutekichii no Rannyoukisei ni-kakawaru Shoronten [Several Issues concerning Abuse of Dominant Bargaining Position]*, 27 THE ANNUAL OF THE JAPAN ASSOCIATION OF ECONOMIC LAW 24 (2006).

<sup>45</sup> See Takahashi, *supra* note 9, at 19.

<sup>46</sup> See Tadashi Shiraishi, Tetsuya Nagasawa, Daisuke Korenaga, *Yuetsutekichirannyo o-meguru Jitsumutekikadai*, 1442 JURIST 28 (2012), Takahashi, *supra* note 9 at 19.

<sup>47</sup> See Takahashi, *supra* note 9, at 19.

<sup>48</sup> See Kaoru Hattori, *Bengoshi kara-mita Shitaukehō*, 721 KOUSEITORIHIKI 23 (2010).

<sup>49</sup> Secretary General Notice No.18 of 2003.

required along with rapid problem resolution.

Although it is advantageous that the Subcontract Act can solve problems quickly by administrative measures using a recommendation system, enforcement of the Act is weak because the fine applied for not issuing documents concerning the contents of agreement is only 500 million yen. For this reason, repetition of violations of Subcontract Act is witnessed.<sup>50</sup> It is necessary to balance the act's reinforcement with prevention of violation and quick problem-solving.

## 7. Conclusion

Through a number of amendments, the area of application of Subcontract Act has been extended to non-manufacturing industries, and the Subcontract Act has become a law with a character akin to that of general law. The relationship between the Subcontract Act and the ASBP of the AMA is deep from both theoretical and pragmatic perspectives. For this reason, the two regulations need to be understood in an integral manner.

Most cases in the grocery industry under the Subcontract Act involve reduction in subcontract cost or unjust lowering of prices. The problem is that enforcement under the Subcontract Act is weak, though the Subcontract Act has an advantage of rapidly solving problems through administrative measures.

In terms of future issues, determining superior bargaining position based on actual situation will be required along with rapid problem resolution. It is necessary to balance the act's reinforcement with prevention of violation and quick problem solving.

The Subcontract Act is a law that regulates the ASBP of the AMA effectively and plays an important role in regulating the unjust use of superior bargaining position. Therefore, it should secure the interests of small- and medium-sized enterprises through ensuring fair competition processes and not just protection of small and medium-sized enterprises.<sup>51</sup> The theories and operational experiences in the Japanese context are significant for competition authorities throughout the world who are interested in measures for regulating the grocery

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<sup>50</sup> See, e.g., Daiso I, JFTC Annual Report of FY2011 (JFTC, 27 March 2012); Daiso II, JFTC website (JFTC, 15 July 2014), available at < <http://www.jftc.go.jp/houdou/pressrelease/h26/jul/140715.html>> (last accessed 29 April 2015).

<sup>51</sup> See Iwakazu Takahashi, Takahide Matsuyama et al., *Shitaukehokaisei no Igi to Kadai*, 634 KOUSEITORIHAKI 18 (2003); Yokota, *supra* note 43, at 14.

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