

Abuse of Superior Bargaining Position and the Japanese Antitrust Law

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1. What is abuse of superior bargaining position (ASBP)?

- The constituent elements of ASBP are: (a) superior bargaining position and (b) its unreasonable use in a particular transaction. Impact of such conduct may be limited to a particular transaction.
- It is different from monopoly and dominant position in that monopoly and dominant position require a domination of an enterprise with market power and anticompetitive impact *in a market as a whole* but ASBP requires only impact *in a particular transaction*.

2. Examples of ASBP(submitted by the Japanese delegation to the 2008 ICN Conference)

- (1) Small suppliers were required by a large retailer to dispatch their employees to assist the retailer in product display and routine stocktaking, at the supplier's cost or they were required to offer money contributions for the opening of new stores by the retailer. If suppliers do not contribute financially, the retailers will cease to carry suppliers' products.
- (2) Small firms having a long term relationship with a bank and heavily depending on the bank's financial support would have difficulty getting financial support from other banks. The firms are faced with the proposal that (a) the bank will lend the firms the money only if they agree to buy from the bank non investment grade bonds with a high risk of default and (b) the bank will handle the loan request from the firms in an unfavorable manner if the firms do not buy the non investment grade bonds.

3. Historical evolution of ASBP in Japan

- An episode of the word “competition” in Fukujo Jiden (1899) (Autobiography of Fukuzawa Yukichi) (English translation: *The Autobiography of Yukichi Fukuzawa*, Columbia Univ. Press, 1966).
- Original JAML (1947): (a) cartel *per se* illegal, (b) unduly big business subject to dissolution, (c) strict control of M&A and (d) prohibition of unfair methods of competition
- Relaxation by the amendment of 1953: (a) *per se* illegality of cartels abolished, (b) depression cartels and rationalization cartels permitted, (c) dissolution of unduly big business abolished, (d) M&A control relaxed, (e) RPM exempted but (e) prohibition of unfair methods of competition changed to prohibition of unfair business practices
- Although the 1953 amendment relaxed JAML, the control of unfair business practice (esp. abuse of bargaining power) was strengthened. “Unfair methods of competition”(original JAML) → “unfair business practices”(amended JAML), the scope was widened. In 1956, the Subcontractors’ Law was enacted as a supplemental legislation to JAML.
- The 1953 amendment is a sign that JAML began to deviate from U.S. model and develop its own features.

4. Definition of ASBP in JAML

- Art. 2:9:5 of JAML: A transaction in which a party possessing superior bargaining position uses its bargaining position on the other party to the transaction unreasonably and contrary to normal commercial customs :
- (a) forcing the other party engaged in continuous transaction to purchase commodity or services other than those that are the object of the transaction in question, (b) forcing such other party to provide money, services or other economic advantages or (c) to refuse to accept the commodity which is the object of the transaction, to force the other party to accept again the commodity after receiving that commodity, to delay payment , reduce the amount of payment or otherwise set, change or execute conditions of transaction in such a way as to cause disadvantage to the other party.
- Art. 20-6 of JAML: A violation is subject to JFTC cease-and-desist order and administrative surcharge (1% of the amount of transaction).

5. Features of ASBP

- Superior bargaining position in a transaction, not necessarily dominant position in a market. An party with inferior position is coerced into accepting conditions which it would not have accepted if there were an alternative way (if there were competition).
- A small business entity may be in superior bargaining position in relation to an even smaller entity even if it does not have power to impact a market.
- Coerced parties depend on the coercing party as purchaser or supplier. They are in “captivity”. Somewhat akin to “essential facility” but, unlike essential facility, the foreclosure of a market as the whole is not required.
- Key words: “coercion, dependency, locked in, asymmetry of bargaining positions between parties and a particular transaction rather than a market as a whole”

6. Subcontractors' Law

- Formerly “Act against Delay in Payment of Subcontract Proceeds, etc. to Subcontractors”, a supplemental legislation to JAML enacted in 1956 designed to protect subcontractors from ASBP of large manufacturers.
- This law prohibits manufacturers using subcontractors from refusal to receive products, delay in payment to subcontractors, reduction of payment, returning goods received, beating down purchase prices, coercing of purchase of goods, reprisal, demand for early settlement of account in respect of supply of materials, imposing a non-discountable check, demand for unreasonable economic advantages.
- In cases of violation, JFTC issues warning requesting malefactors to cease and desist from conducts in question. A soft law approach
- This law has been actively used to protect subcontractors. In 2013, investigation was conducted in 5478 cases, issued warning in 10 cases and, in 4949 cases, issued administrative guidance for the rectification of wrongs.

7. Unfair Business Practices Exercised by Large Scale Retailers (JFTC Designation, 2005)

- Unreasonably returning of goods purchased by the retailer
- Unreasonable demand for reducing suppliers' sales prices
- Unreasonably coercing suppliers to supply goods by consignment contracts
- Unreasonably beating down of retailers' purchase prices
- Unreasonable refusal to accept goods by the retailer after purchase contracts have been duly entered
- Forcing suppliers to purchase goods from the retailer
- Forcing suppliers to dispatch their employees to render services to the retailer at the expenses of suppliers
- Forcing suppliers to contribute money, services or other economic advantages
- Treating suppliers disadvantageously for the reason that they did not abide by the above requirements
- Reprisal to suppliers for the reason that they reported the above practices to JFTC

8. Why is ASBP so important in Japan?

- Victims of ASBP are small subcontractors and suppliers who supply goods to large manufacturers and retailers (supermarkets, department stores, convenience store chains). They are small businesses.
- Importance of medium and small business (referred to as “small business”): capital of 3 hundred million yen (about \$ 3 million) or employees of 300 or less.
- In 2013: there were 3,850,000 small business in Japan.
- Small business occupy 99.7 % of the total number of business enterprises in Japan and large enterprises share only 0.3%. They occupy 69.7% of the total employment in Japan and large business 30.3%
- The above figures show that the promotion and protection of small business is a very important political, economic and social policy.

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- Small business compete with large business in some areas such as Pop and Mon stores competing with large supermarket and, in other areas, work for large business such as subcontractors and distributors/dealers.
- When serving as subcontractors or dealers for large business, the difference of bargaining positions between them affect adversely the position of small business *vis-à-vis* large business.
- Controlling ASBP is a main pillar of the policy of protecting small business in their transactions with large enterprises.

9. Example of Toyota Motor Company

- Toyota Motor Company is an assembler, design cars and make engines. It has a large number of subcontractors who supply parts and components.
- Toyota has about 30,000 subcontractors.
- The subcontractor system is a large business group.
- This is a vertically organized supply chain system.
- Subcontractors are divided into (a) primary subcontractors and (b) secondary subcontractors. There are 4,935 primary subcontractors and 24,380 subcontractors.
- Situations with other large manufacturers (Nissan, Toshiba, Hitachi, Mitsubishi, Panasonic etc.) are more or less similar to this.

10. Features of vertically and hierarchically organized subcontractors (dealers) system

- Lack of horizontal mobility, e.g., subcontractors/ dealers cannot easily shift to other systems.
- Feature of Japanese society as a vertical and hierarchical society: an individual (and an enterprise) belongs to a vertically organized group (keiretsu) which is led by a leader and in which ranking within the hierarchy in the group is important (Prof. Chie Nakane: *The Human Relationships in Vertical Society* (1967)). For each subcontractor, the identity with the group such as “Mitsubishi Group” or “Toyota Group” is a key factor to keep up reputation and confidence. Prof. Nakane’s theory is a bit old but similar features in economic society still linger.
- Social stigma attached to shut down of business (not as much as before but still some).
- Subcontractors (dealers) are often in debt to banks or manufacturers. Unless and until they have paid out their debt, they cannot move out. Labor practices: hard to discharge employees (This situation is changing, though).
- They are sociologically and economically “locked in” or in “captivity”. This creates exit barriers and make it difficult for them to shift to other groups or shut down business. This condition necessitates the control of ASBP in Japan more than other countries (such as U.S.).

11. Does ASBP come within the scope of antitrust policy?

- Question: ASBP imposes hardship on a weaker party in a transaction but may have little impact on competition in a market as a whole. Then why should antitrust policy be concerned with it?
- If it is a problem of a particular transaction and fairness and equity among the parties and nothing more, should this not be an issue of civil law (common law) rather than antitrust law.

12. ASBP in various jurisdictions

- Whether or not ASBP should be prohibited by antitrust laws is a controversial issue.
- ICN survey in 2008: Among 32 countries, 7 have a specific provision in their competition law prohibiting ASBP, 2 are considering the adoption of such provisions and all others do not have such provisions.
- Therefore, the countries in which a specific legislation is enforced to prohibit ASBP is minority.
- Those which do not have such provisions believe that provisions in their antitrust laws on abuse of dominant position can deal with abusive conducts of dominant enterprises. Some others believe that if an enterprise has no dominant position in a market and its conduct does not have a substantial effect on that market, antitrust laws should not interfere with transaction between private parties.

13. Views on ASBP in ICN Report – (1)

Skepticism to ASBP: U.S. position

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

(2) Proponent of prohibiting ASBP- Japanese position

- “...abuse of superior bargaining position infringes the foundation of the free competition where the parties to transactions determine transaction terms or conditions based on their free and independent business judgment. ...[In] cases where a party in a superior bargaining position over the other part, by using that position, restrains the independent business activities of the other part and forces the other part to accept disadvantages that it would not if the competition worked properly, its conduct prevents the other party from competing freely and independently. The other party on which the disadvantages are imposed would be in the disadvantageous position in terms of condition of competition with its competitors. On the other hand, the party imposing disadvantages on the other party would be in the disadvantageous position in terms of condition of competition through the different means from price and quality.”

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- In Japan, ASBP comes under the category of unfair business practices as defined in Art. 2:9:6 of JAML: a constituent element of unfair business practices is that there is a risk (or threat) (osore) of impediment to competition. “Osore”= possibility and does not have to be probability.
- JFTC view and the prevailing views in Japan: ASBP is a conduct which deprives the independence and freedom of decision-making which is the foundation of competition and a free market.
- ASBP does not protect competition that actually operates in a market. It tries to preserve conditions or order conducive to competition.
- (Question) Is ASBP the only condition that makes conducive conditions for competition ? How about the prohibition of fraud, tort, contract breach and infringement of IP rights ? Should antitrust include all of them?

14. Antitrust philosophies

- Whether or not the application of antitrust laws to ASBP is justified depends on what antitrust philosophy one takes.
- Is antitrust aimed at promoting efficiency, consumer welfare, freedom, egalitarianism, fairness, pluralistic society, or other kinds of value?
- Are those competing values compatible with each other? If not, which one should you give priority?

15. Precursors of antitrust philosophy

- Emergence of “Trusts” in 1879’s Standard Trust, Sugar Trust, etc.: Ruthless competition, the weak are victims of the strong, the survival of the fittest! “Social Darwinism” (“The Law of Jungle”?)
- A proponent of Social Darwinism in America: Andrew Carnegie, “Wealth” in *North American Review*, CXLVIII (1889): The weak should go out and this contributes to the progress of society.
- Reactions to Social Darwinism: Henry Demarest Lloyd: *Wealth against Commonwealth* (1894): “Liberty produces wealth, and wealth destroys liberty”. A sharp criticism of the Standard Oil Trust.
- “Anti-Trust Movements”: the farmers (The Granger Movement), the small businesses and labors threatened by Trusts, especially the Railroad Trust.

16. What were their concerns?

- Freedom of small business threatened by “Trusts”
- Fear of monopoly and fear of bigness, threat to the existence and freedom of small business
- Political concern, e.g., “Trusts” gain political power and exert undue influence on legislatures (especially state legislature)
- Egalitarianism and pluralism
- A cynical view: “Corporations...were pictured as fat, greedy men preying upon the poor. Therefore, there had to be a crusade against them. That crusade resulted in the antitrust laws. ▪ ▪ ▪ The antitrust laws, being a preaching device, naturally performed only the function of preaching.” (Thurman Arnold: *The Folklore of Capitalism* (1937), pp. 210-212)

17. The Harvard School

- In a way, the Harvard School inherited the sentiments of the precursors and organized them into a systematic antitrust theory.
- C. Kaysen & D. Turner: *Antitrust Policy* (1959)
- The goals of antitrust: (a) desirable economic results, i.e., efficiency, progress, stability and equitable distribution of income, (b) promoting competitive process, (c) fair conduct and (d) limiting big business. This is a multi-value concept.
- It proposes limiting business power as the end in itself. Participants of a market should be ruled by the impersonal market forces rather than a dominant enterprise's arbitrary and capricious decision. "The rule of market" is preferred rather than "the rule of man". In this way, competition is "a code of fair dealings".

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- Another goal is fair conduct. This concept involves equal treatment and reasonable return. This leads to the principle that there should be no undue advantages and disadvantages to participants in a market.
- “...delays, refusals to deal, representations which fall short of complete candor, and the like, can be turned uniformly to the advantage of the powerful bargainer, because his partner in the transaction would be even worse off if he did not accept the terms imposed.” (Kaysen & Turner, p. 17)
- “...if the prevention of unfair conduct is a distinct policy aim, it must refer to the kind of characteristics of transactions...in terms of equal treatment of those similarly situated.” (Kaysen & Turner, *ibid.*)
- Still another goal is limiting big business. This transcends the limiting of market power and aims at limiting “political power” of large business.

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- “...a proper distribution of power between large and small business is rationalized in terms of certain Jeffersonian symbols of wide political appeal and great persistence in American life: business units are politically irresponsible, and therefore, large powerful business units are dangerous. The political and social power of the independent proprietor is the foundation of democracy; therefore his power as against that of the corporate bureaucrat must be maintained or re-established.” (Kaysen & Turner, pp. 17-18)
- “Public policy...can place limitations on the conduct of large businesses, especially on conduct viewed as having a competitive impact on small businesses.” (Kaysen & Turner, p. 18)
- *Alcoa, United Shoe, Cellophane, Paramount, National Lead Cases*

18. The Chicago School

- Robert H. Bork: *The Antitrust Paradox* (1978); Richard A. Posner: *Antitrust Law-An Economic Perspective* (1976), U.S. Justice Department: *Competition and Monopoly: Single Firm Conduct Under Section 2 of the Sherman Act* (2008) and great many others
- *Summum Bonum* of the Chicago School: promotion of economic efficiency and maximization of output
- A single-value concept rather than a multi-value concept
- Strict prohibition of horizontal cartels.
- Lenient attitude toward monopoly (*Trinco & Linkline*)
- Vertical restraints: heavy emphasis on inter-brand competition (*Sylvania & Leegin*)
- Economic efficiency is equated with consumer welfare.
- Cautious and minimum intervention, strong belief in the dynamism and contestability of market. Monopoly will be restrained and corrected by the market without intervention of law.

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- Monopoly may be the result of renovation and efficiency and is a legitimate reward for them.
- Monopoly is vulnerable to new entrants. Not necessarily inimical to free society.
- Protection of the weak (small enterprise) does not promote efficiency in economy.
- Fairness is elusive and not a measureable concept. Too much emphasis on equality and fairness in particular transactions may lead to excessive intervention of law into the operation of the market.
- In 1980's, William Baxter (then U.S. Assistant Att'y General) spoke in Tokyo and stated that, in most cases, efficiency coincides with fairness.
- Criticism to the Chicago School: Harry First, Eleanor Fox & Robert Pitofsky (eds.), *Revitalizing Antitrust in its Second Century* (1991); Robert Pitofsky (ed.), *How the Chicago School Overshot the Mark-The Effect of Conservative Economic Analysis on U.S. Antitrust* (2008)

19. Ordo-Liberalism - Social Market Economy

- German/EU idea: Eucken, Boehm, Erhard, Mueller-Armack, Roepke, etc.
- Angela Merkel's speech on the Treaty of Lisbon, 24 April 2008, before the Bundestag: "The basic principle of social market economy is an orderly competition. We must transmit this principle to the European Union."
- Rely on Iwakazu Takahashi: *The Establishment and Structure of the German Law against Restraints of Competition* (in Japanese, 1997) & David Gerber: *Law and Competition in Twenties Century Europe* (1998)
- Ordo-Liberalism criticizes both *laissez-faire* and dirigisme and chooses the third way. *Laissez-fair* created a jungle society and dirigisme destroyed democracy and subjected the society to arbitrary control of the few.
- Disciplines of the market through the maintenance of competition by law (not by direct intervention through price control and so on) is the foundation of freedom. State should control private economic powers (monopoly & cartels) as well as minimizing direct state intervention into the economy.

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- Social market economy emphasizes the freedom and independence of individuals as the fundamental value of the society. Society in which “a humane, freedom-based order” and the freedom of human personality is promoted is the best. This seems as much a political and ethical as economic ideology.
- Competition and the market mechanism provide the safeguard for the freedom of individuals (enterprises) against arbitrariness and caprice of the few hands (of government and private powers). In particular, the freedom of market entry/exit, right to engage in transactions, access to the market, freedom of contract, respect of private property are the principal components.
- Some common ground with the Harvard School.

20. Japanese ideology on ASBP

- No systematic theory on ASBP except that of Prof. Akira Shoda (1929-2009): *The Antimonopoly Law* (1956) (1966, rev. ed.) (1980, rev. ed.)
- The key word: *correction of inequality* between large and small business
- The modern capitalism (the civil law system) created the double-tiered dominance /dependency relationship and thus inequality:
- (a) the total dominance in which monopoly & cartel dominate a market and subject small enterprises and consumers under their domineering power (i.e., control of the market and abuse of dominant position there)
- (b) a particular dominance in which a larger business dominates over a smaller business in a particular transaction and impose disadvantageous terms on it (i.e., ASBP).
- Shoda argues that both kinds of dominance reinforce each other and deprive small business the freedom of conduct and deprive them of equality and independence which is the basis of competition and free market.

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- The purpose of economic law (JAML) is to rectify this inequality and restore independence and equality.
- To regulate the dominance in market and to regulate dominance in a particular transaction should act together to restore equality and independence of market participants. The maintenance of competition is the bulwark for economic democracy - the ultimate goal of JAML.
- Unique feature: Emphasizes the importance of particular dominance and argues that correction of particular dominance goes hand in hand with the correction of total dominance.
- In his eyes, ASBP plays a key role and is a main pillar of JAML.
- This ideology reflects the structure of the Japanese economy in 1950-1990.

21. Competing principles of antitrust philosophy

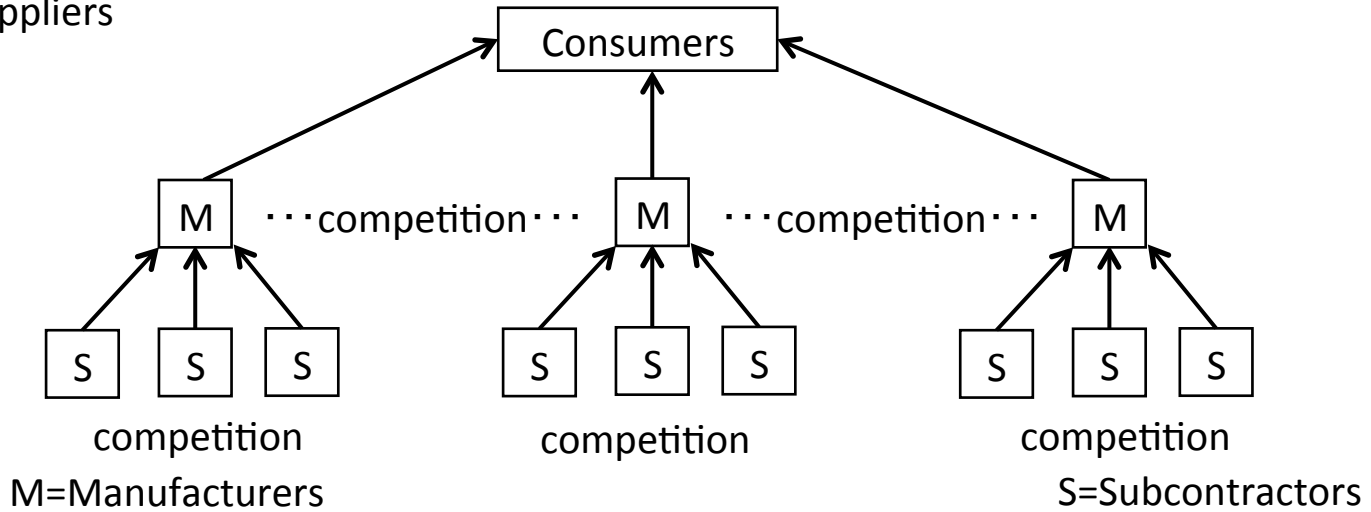
- (a) Fear of the Bigness and avoidance of concentration of economic powers
- (b) Orderly competition
- (c) Pluralism and openness – economic democracy
- (d) Fairness and egalitarianism – equality and independence of market participants
- (e) Efficiency – maximization of output
- Those principles are partly compatible but partly inconsistent with each other. Each country decides the optimum mix suitable for that country.

22. Is ASBP compatible with efficiency principle?

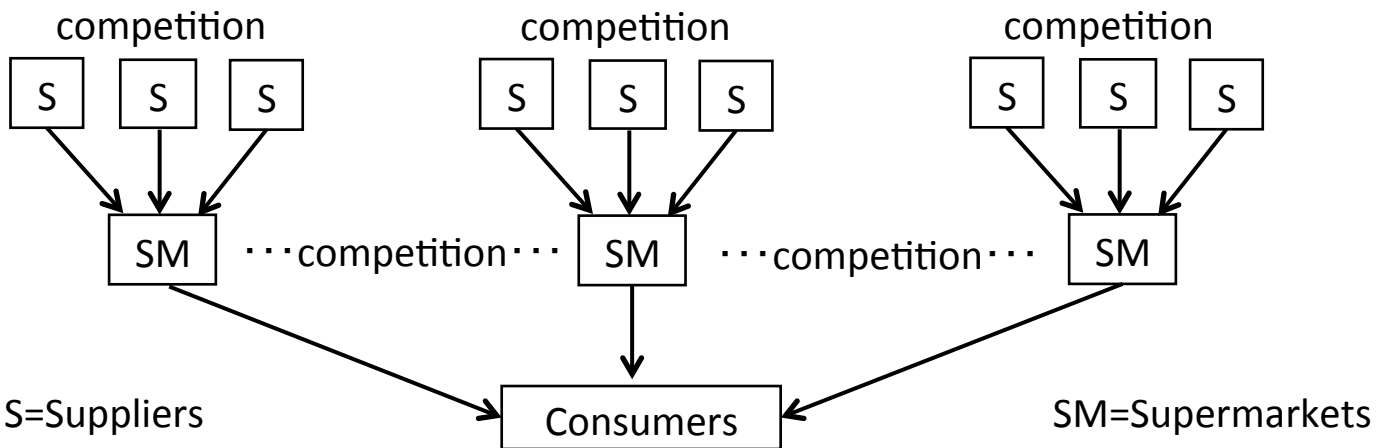
- Efficiency is a goal of every antitrust philosophy. The question is whether this should be the only or the primary goal of antitrust.
- ASBP may result in a short-run reduction of costs for dominant manufacturer/retailer and thus enhance competitiveness provided that there is “inter-brand competition”.
- In a long-run, ASBP may impair incentive and power of subcontractors and distributors and thus decline of competitiveness of dominant manufacturer/retailer. This may or may not happen. At best, whether or not ASBP impede competitiveness in this sense is uncertain.
- Hard to justify ASBP by the efficiency theory

Diagram of the Relationship between ASBP & Efficiency

1. Manufacturers & Suppliers



2. Suppliers & Supermarkets



23. How is ASBP justified?

- ASBP sways heavily toward fairness and egalitarianism (equality and independence).
- Does ASBP promote efficiency? May or may not but often it does not.
- ASBP and anti-concentration of economic powers? ASBP and the anti-bigness idea aim at different goals. How relevant is this to ASBP?
- ASBP can be best explained by fairness, egalitarianism and independence.
- How much importance should one give to those values depends on each jurisdiction to decide.
- Japan is one the jurisdictions that emphasize them.

24. ASBP is closely related to the Civil Law (Common Law) principles

- Unconscionable conduct, abuse of rights, unclean hands, torts and *in pari delicto*, etc.

- *In re the Banana Wholesalers Association*, S. Ct. Dec., 30 July 1940:

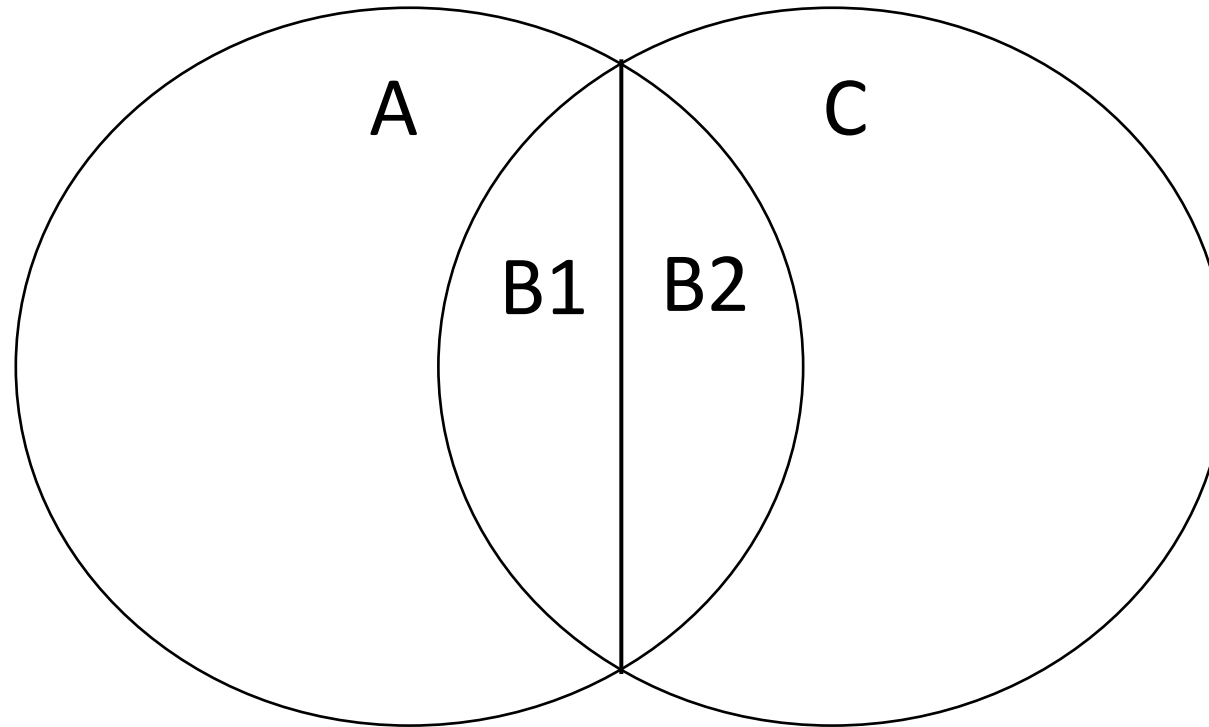
Boycott by the Association held as abuse of superior bargaining position and contrary to the public order = a tort.

- *In re Gifu Small Business Cooperative*, S. Ct. Dec., 20 June 1977:

Bank loan conditioned on deposit of money by the borrower in the account of lender held as amounting to ASBP and thus a violation of JAML and, at the same time, a violation of the Anti-Usury Law (part of the Civil Law)

These decisions show overlapping areas of the Civil Law and ASBP.

Diagram of the Relationship between Civil Law and Competition Law



A=Civil Law

C=Competition Law

B1, B2=Mixed Area of Civil Law & Competition Law

B1=Area where matters indirectly related to competition policy

B2=Area where matters directly related to competition policy

B1=ASBP, Unconscionable Conducts

B2=Cartels, RPM, Deceptive Practices