Regulating abuse of superior bargaining position under the Japanese competition law: an anomaly or a necessity?

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ABSTRACT
Abuse of superior bargaining position has long been a controversial area of Japanese competition law. Even though it is by no means unique to Japan—Korea, Taiwan, France, and Germany among others also have similar regulation—Japan’s abuse regulation has tended to attract more attention globally. One of the main sources of controversy for abuse regulation is whether it is consistent with competition law, and whether it serves any useful economic purpose. This article attempts to address this long-standing debate by examining whether abuse regulation is consistent with the various objectives of competition law and other economic rationales. Having determined that these objectives and rationales provide at best tenuous justifications for abuse regulation, or are inconsistent with the Japan Fair Trade Commission’s current enforcement practices, it proceeds to argue that abuse regulation can be best justified as a supplement to deficient contract law enforcement, which many commentators have noted is particularly serious for small- and medium-sized enterprises in Japan.

KEYWORDS: Bargaining position, unfair trading term, buying power, abuse

JEL CLASSIFICATION: K21

I. INTRODUCTION
Regulating abuse of superior bargaining position has always been a somewhat distinctive, and controversial, feature of Japanese competition law. Although it is by no means unique globally, it seems to have attracted more attention than other comparable provisions in other competition law regimes, most notably at the International
Competition Network meeting in Kyoto in 2008. The controversy stems from the fact that abuse of superior bargaining position has always sat uncomfortably within competition law. It aims to regulate conduct by powerful firms, but it does not require the establishment of monopoly power or dominance. Instead, it requires the establishment of this somewhat nebulous concept of superior bargaining position. Nor does it require a showing of anti-competitive effects of the conduct at issue. All that is required is a showing that the conduct is somehow unfair and oppressive under some seemingly ill-defined standard. Yet, unfair trade practices by large retailers, or firms with superior bargaining power in general, have plagued other jurisdictions as well, including the UK, Australia, and some continental European countries. Therefore, it may be hasty to dismiss it as a mere anomaly or misguided venture.

The regulation of abuse of superior bargaining position in Japan deserves yet greater attention in light of the recent reform to the Anti-Monopoly Act (AMA), which for the first time allows the Japan Fair Trade Commission (JFTC) to impose surcharges for infringement. Enforcement against abuse of superior bargaining position is no longer a toothless tiger and now has some serious bite, as evident in some of the cases in which the JFTC imposed substantial surcharges. Since then, the JFTC has taken formal enforcement measures against five retailers.1

This article examines how Article 2(9)5 of the AMA, the relevant provision governing abuse of superior bargaining position, is enforced by the JFTC, referring mainly to the five aforementioned cases and a set of guidelines published by the JFTC since 2010.2 It further assesses whether the regulation of abuse of superior bargaining position can be reconciled with the general focus of competition law on the competitive process and consumer welfare, and alternatively, whether it can be justified by other economic rationale such as prevention of misalignment of economic incentives or protection against expropriation of relationship-specific investments. Having established that none of these rationale and justifications can adequately account for the regulation of abuse of superior bargaining position, this article puts forward the argument that abuse regulation can be best explained as a supplement to deficient contract law enforcement. In light of various characteristics in the Japanese legal system, it is argued that weaker contractual parties often cannot adequately protect their interests and effectively guard against ex post opportunistic behaviour. Regulatory intervention is, therefore, called for.

1 Sanyo-Marunaka Co Ltd, Japan Fair Trade Commission (JFTC) Cease and desist order (hereinafter referred to as Sanyo-Marunaka) and Surcharge payment order, 22 June 2011; Toys"R"Us-Japan, Ltd, JFTC Cease and desist order (hereinafter referred to as Toys"R"Us) and Surcharge payment order, 13 December 2011; Edion Corporation, JFTC Cease and desist order (hereinafter referred to as Edion) and Surcharge payment order, 16 February 2012; Ralse Company, JFTC Cease and desist order (hereinafter referred to as Ralse) and Surcharge payment order, 3 July 2013; Direx Corporation, JFTC Cease and desist order (hereinafter referred to as Direx) and Surcharge payment order, 5 June 2014.

2 The JFTC Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act (AMA), 30 November 2010 (hereinafter referred to as JFTC Guidelines).
II. SUBSTANTIVE PROVISIONS IN THE AMA AND THEIR INTERPRETATION

The statutory provision

The AMA prohibits abuse of a superior bargaining position against a trading partner as specified in Article 2(5):

(5) Taking any act specified in one of the following, unjustly in light of the normal business practices by making use of one’s superior bargaining position over the other party:

a. Causing the said party in regular transactions (including a party with whom one intends to have regular transactions newly; the same shall apply in (b) below) to purchase goods or services other than the one pertaining to the said transactions

b. Causing the said party in regular transactions to provide for oneself money, services or other economic benefits

c. Refusing to receive goods pertaining to transactions from the said party, causing the said party to take back the goods pertaining to the transactions after receiving the said goods from the said party, delaying the payment of the transactions to the said party or reducing the amount of the said payment, or otherwise establishing or changing trade terms or executing transactions in a way disadvantageous to the said party.4

Typically, the provision is applied to a mass retailer’s abusive conduct against its suppliers, such as retrospective discounts, requiring monetary contribution or dispatch of employees from the suppliers when the retailer is opening a new or refurbished store, and compelling the suppliers to purchase products unrelated to those stipulated in the contract. While the application of the provision is not limited to the relationship between retailers and suppliers, the majority of cases involve such a relationship.

Elements of the offence

Superior bargaining position

Superior bargaining position may exist without market power. The former is understood as meaning either market power or strength relative to particular trading partners. There were indeed some instances where the offender would not have had market power. In the Direx case, the retailer was ranked fifth in fiscal year (FY) 2009–2010 and fourth in FY 2011–2012 among the general discounters that sold groceries and clothes.5 In the Ralse case, the retailer was ranked third among grocery retailers in the Hokkaido prefecture.6 While the assessment of market power normally entails delineation of the relevant market, the relevant market is not defined

3 The materials in this section are all based on the translation done by one of the authors, except for references to the JFTC Guidelines.

4 Before the AMA amendment in 2009, the abuse of a superior bargaining position was specified in the JFTC General Designation in Point 14.

5 Direx (n 1).

6 Ralse (n 1).
when evaluating the superior bargaining position. In the Direx and Ralse cases, it was not clear if general discounters and the Hokkaido prefecture would have constituted the relevant product and geographic markets. Market definition and market power assessment was similarly absent in the Marunaka and Toys"R"Us cases and in the Edion case.7

The JFTC Guidelines state that a superior bargaining position is found ‘(i) where the supplier needs to continue transactions with the retailer, as discontinuing the transaction substantially impedes the supplier’s business and (ii) thus, the supplier finds it difficult to reject the retailer’s request, although it causes substantial disadvantage to the supplier.’8 In its assessment, the JFTC takes into account such factors as the supplier’s degree of dependence on the commercial relationship with the retailer at issue, the retailer’s position in the market, the possibility for the supplier to replace the trading partner, and other facts indicating the supplier’s need to continue transactions with the retailer.9 The fact that the supplier is larger in company size than the retailer does not negate the possibility of the retailer’s superior bargaining position over the supplier.10

The supplier’s acceptance of the retailer’s disadvantageous request suggests that the trading relationship with the retailer at issue is very important for the supplier. The JFTC regards this factor as one of the grounds for finding a superior bargaining position. However, analysis of this factor overlaps with the assessment of the existence of unfair or abusive conduct on the part of the retailer. Therefore, assessing factor (i) is critical at this stage. The above-noted factors, such as the degree of dependence, can be understood as particularly relevant to the assessment of factor (i).

None of these factors is supposed to be necessary or sufficient. A practitioner points out that the JFTC identifies a superior bargaining position if the supplier accepts the retailer’s disadvantageous request, plus any concrete evidence that demonstrates the supplier’s need to trade with the retailer.11 One of the factors—some or all the suppliers find it difficult to replace the retailers—has been found in all the five recent cases. Thus, the JFTC seems to consider this factor particularly relevant and

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7 It is noteworthy that in the merger cases which require the JFTC to define the relevant market and assess the existence likelihood of market power, the assessments were conducted in a different manner. For instance, in the merger between Sanyo-Marunaka and Aeon, the JFTC found that the relevant service market to be that of comprising supermarkets and that retailers in the neighbouring markets (such as do-it-yourself (DIY) stores, convenience stores, and drugstores) were exerting competitive constraints over the supermarkets. Acquisition of Shares of Sanyo-Marunaka Co, Ltd by Aeon Co, Ltd, Case 9, Merger Case Report FY2011, JFTC, 20 June 2012. Similarly, in the electronic appliance companies’ merger case, the JFTC found that the relevant service market consisted of mass retailers that dealt with consumer electronic appliances and that the retailers in neighbouring markets (such as general supermarkets, DIY stores, and discounters) were exerting competitive pressure on restraints over the consumer electronic appliance retailers. Acquisition of Shares of Best Denki Co, Ltd by Yamada Denki Co, Ltd Case 9, Merger Case Report FY2012, JFTC, 5 June 2013.

8 JFTC Guidelines (n 2) sII-1.

9 ibid sII-2.

10 ibid.

perhaps even necessary.\textsuperscript{12} Despite these factors, two overriding questions remain: to what extent should retailer substitution be difficult for the supplier and how dependent does the supplier have to be to claim that the retailer abused its superior bargaining position. However, neither the JFTC Guidelines nor its published cases address these two questions. For instance, the degree of dependence can be measured by dividing the supplier’s sales to a particular retailer by the supplier’s overall sales. Yet, the JFTC has never specified a threshold percentage. According to a practitioner, in some cases, the JFTC regarded 8–10\% as sufficient to demonstrate the relevant degree of dependence.\textsuperscript{13}

In all five recent cases, the JFTC found that discontinuing trade with the retailer at issue would have substantially impeded the supplier’s business. Therefore, the supplier was compelled to accept the retailer’s disadvantageous request and the supplier had an inferior bargaining position relative to the retailer. Apart from market position, as previously explained, the following factors were taken into account in reaching the final outcome.

Regarding difficulty of substitution, in all five cases, it was found that the supplier had difficulty securing the turnover that was equivalent to the one with the retailer at issue by beginning trade with other retailers or increasing the trading volume with incumbent retailers. In four out of five cases, this situation held true for some suppliers, while in the most recent \textit{Direx} case, it was found to be true for all suppliers. In none of these cases was it noted to what extent the turnover would have decreased and how long the supplier would have suffered from it.\textsuperscript{14}

In all five cases, the JFTC noted the suppliers’ high degree of dependence on trading with the retailers at issue. Again, the JFTC did not clarify what percentage of dependence was sufficient to indicate a superior bargaining position in any of these cases. In fact, the JFTC has never specified any percentage in its published documents. In the \textit{Ralse} and \textit{Marunaka} cases, the degree of dependence was measured in relation to the supplier’s regional branches or regional offices.\textsuperscript{15} For example, in the \textit{Ralse} case, the JFTC found that the supplier’s regional branches were selling a large share of products to Ralse, and regarded this as one of the factors in establishing its superior bargaining position.

In the \textit{Edion}, \textit{Ralse}, and \textit{Direx} cases, the JFTC noted that some of the aggrieved suppliers were selling large quantities of products to the retailers.\textsuperscript{16} According to the JFTC Guidelines, such a fact can demonstrate a supplier’s need to trade with a retailer.\textsuperscript{17} In the \textit{Edion} and \textit{Marunaka} cases, the JFTC referred to the increasing number of the retailer’s stores, whereas in the \textit{Direx} and \textit{Ralse} cases, the retailer’s

\begin{itemize}
  \item \textsuperscript{12} ibid, 67.
  \item \textsuperscript{13} Presentation of Tetsuya Nagasawa at the Annual Conference of the Japan Association of Economic Law 2014 (Toyama University, 18 October 2014).
  \item \textsuperscript{14} \textit{Direx} (n 1).
  \item \textsuperscript{15} \textit{Ralse} and \textit{Sanyo-Marunaka} (n 1).
  \item \textsuperscript{16} \textit{Edion, Direx and Ralse} (n 1).
  \item \textsuperscript{17} JFTC Guidelines (n 2) sII 1(4). Note that the JFTC is not concerned about the proportion of a supplier’s sales accounted for by a retailer, but about absolute quantity. In a way, absolute quantity is much less indicative of a supplier’s need to trade with a retailer. Nonetheless, the current JFTC practice is to focus on absolute quantity.
\end{itemize}
turnover was increasing.\textsuperscript{18} According to the JFTC Guidelines, such facts can also demonstrate the supplier’s need to trade with the retailer.\textsuperscript{19} Lastly, the supplier’s hope to retain or increase its sales to the retailer was noted in the \textit{Marunaka} and \textit{Toys"R"Us} cases.\textsuperscript{20}

\textit{Making use of superior bargaining position in the course of the abusive conduct}

Article 2(9)\textsuperscript{5} states that an infringement may be found when the retailer ‘makes use of’ its superior bargaining position for the purpose of perpetrating the proscribed practices. However, this factor has been largely overlooked by the JFTC and it has been considered that the superior bargaining position is used to effectuate the abusive conduct if such a position, as well as abusive conduct, is found.\textsuperscript{21} In effect, the JFTC has tacitly ignored this factor.

\textit{‘Unjustly’: inhibition of fair competition}

Infringement is found only when the practice is conducted ‘unjustly in light of the normal business practices’.\textsuperscript{22} In this context, ‘normal business practices’ imply those that are recognized as ‘normal’ in view of a fair competition system. Not every activity that is common in practice is regarded as ‘normal business practice’. For example, suppliers customarily dispatch their employees to help retailers to open new and refurbished stores. Despite this, imposing such a requirement on suppliers may be deemed unjust in light of the normal business practices, as discussed below.

The legislative history of the AMA suggests that the phrase ‘unjustly in light of the normal business practices’ was inserted to refer to ‘having the tendency to inhibit fair competition’ (Article 2(9)\textsuperscript{6}).\textsuperscript{23} Although this is a well-accepted view, the concept of fair competition and its impediment is open ended. Thus, a more concrete interpretation is necessary. Among the diverse views regarding the meaning of impediment of fair competition, three theories are particularly influential. First, the tendency to inhibit fair competition in the context of Article 2(9)\textsuperscript{5} is manifested when the retailer impairs its trading partners’ free and independent business judgments and thus infringes on the fundamentals of free competition.\textsuperscript{24} Secondly, abusing a superior bargaining position distorts competition by creating the possibility of a retailer holding a more advantageous position over its rivals, while the supplier is left in a disadvantageous position relative to its competitors.\textsuperscript{25} However, this is only a concern if only some of the suppliers are subject to the abuse. If all the suppliers are

\begin{itemize}
\item \textsuperscript{18} Edion, Sanyo-Marunaka, Direx and Ralse (n 1).
\item \textsuperscript{19} JFTC Guidelines (n 17).
\item \textsuperscript{20} Sanyo-Marunaka and Toys‘R’Us (n 10).
\item \textsuperscript{21} JFTC Guidelines (n 2) sII 3.
\item \textsuperscript{22} ibid sIII.
\item \textsuperscript{24} Negishi, ibid 497; Kanai and others, ibid 265; Kawahama and others, ibid 178.
\item \textsuperscript{25} See, eg ‘Toshihiro Okada, Recent Developments in the Regulation of Abuse of Superior Bargaining Position’ in (n 11) vol 3, 7 [original in Japanese].
\end{itemize}
subject to the same abuse, as in the *Direx* case, none of the suppliers will be disadvantaged vis-à-vis their competitors. Thirdly, the tendency to inhibit fair competition is demonstrated when the retailer imposes on the suppliers either an unreasonably excessive disadvantage or one that is unexpected by the suppliers.26

The first position is based on the understanding that free competition cannot exist when an entrepreneur’s free and independent business judgement is suppressed.27 This widely accepted view was indeed adopted when the prevailing concept of unfair trade practices was established under the AMA in 1982.28 However, the theory is too abstract and concepts such as ‘fundamentals of free competition’ cannot serve as a criterion for determining whether a retailer has infringed the AMA. In this sense, the theory can be regarded only as proffering a rationale for regulating abuse of superior bargaining position under the AMA. Indeed, the JFTC has never conducted a specific assessment of the impairment of the fundamentals of free competition. The second theory also cannot function as a criterion for assessing illegality. The JFTC does not investigate if the practice at issue would have created an advantageous or disadvantageous position for a party relative to its competitors. If this theory is formulated as referring to a mere possibility, it cannot function as a legal criterion, since any abusive practice will always have the possibility of creating some advantages or disadvantages. Meanwhile, the third theory appears to work as a criterion for legality. Indeed, the JFTC uses this concept in its guidelines to classify certain conduct as unjust practices.29 A retailer’s abusive practice can cause an unreasonable or unexpected disadvantage to the supplier in various ways. Thus, the factors that need to be taken into account in the evaluation will vary by the type of practice. The evaluative approach for typical abusive practices is explained below.

**Practices indicated under Article 2(9)5**

Violation is predicated on the conduct falling within the scope of Article 2(9)5(a)–(c). This requirement is easily satisfied, as the provisions, particularly Article 2(9)5(c), broadly cover any practice to establish trading terms or transaction that will cause a disadvantage to the trading partner.

For practices mentioned under Article 2(9)5(a) and (b), ‘regular transactions’ or a continuous trading relationship is necessary to substantiate the violation. When the Act was legislated, it was explained that without a continuous trading relationship, the cited practices, such as forced purchases and obtaining financial benefit from a trading partner, would not even take place to begin with. This requirement obviously makes sense as it would be difficult to argue that a supplier has any degree of dependency on a particular retailer if the supplier has only entered into one or a handful of transactions with the retailer. Only when a supplier is in a continuous trading relationship with the retailer can the supplier be said to depend on the retailer.

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27 Negishi (n 24); Kanai and others (n 26); Kawahama and others (n 23) 275.


29 See Section Abusive practices and their unjust nature, for detail.
As clearly written in the provisions, the continuous relationship does not have to be pre-existent. Mere intention to establish a continuous trading relationship suffices. This is clearly problematic as allowing this requirement to be met by a mere unilateral intention to enter into a continuous relationship effectively eviscerates the requirement. This watering down would have been less problematic if the intention is required to be mutual or bilateral, or if unilateral, at least reasonable. It would make a mockery of this requirement if it could be met by an unreasonable and unrealistic intention to enter into a continuous trading relationship on the part of one party, when the counterparty has never signalled any intention for the transaction to be more than one time. This is ultimately, however, not a significant issue as presumably the supplier will have a difficult time demonstrating dependency if the parties have only transacted once or a few times, despite the supplier’s subjective intention.

Prevalence of the practice

No provision expressly imposes a prevalence requirement. However, in all of the JFTC cases, the number of suppliers was large and the practices were conducted for a substantial period of time and often systematically. It has been understood that it is only a matter of the JFTC’s priority to enforce the law against practices that have widespread impact. However, some may maintain that the prevalence of the practice is required to substantiate an AMA violation, since fair competition cannot be impeded by a few isolated instances of abusive practice. One JFTC case appeared to support such a position.

Compulsion by the retailer against the supplier

Obviously, any conduct that is voluntarily performed by the supplier cannot be the basis for establishing an illegal abusive practice. In all five cases, the JFTC found that the suppliers were requested by the retailer to do something and were compelled to accede to the request. Compulsion may be found if the supplier in fact did not have any option but to comply with the retailer’s request. The lack of option obviously cannot be taken literally. The supplier always has the option of saying no to the retailer and risks losing all the retailer’s business. Therefore, the real question is not whether the supplier has options, but whether the supplier can remain viable.

30 The tendency already existed before 2010. For example, the monetary contributions collected by retailers amounted to JPY54 million in the Eco’s case and more than JPY500 million in the Valor case. Similarly, the number of employees dispatched was 13,500 in the Royal Home Centre case and 166,000 in the Yamada case. Re Royal Home Center Co, Ltd, JFTC Cease and Desist Order of 30 July 2010; Re Yamada Denki Co Ltd, JFTC Cease and Desist Order of 30 June 2008; Eco’s Co Ltd, JFTC Cease and Desist Order of 23 June 2008; Re Valor Co Ltd, JFTC Cease and Desist Order of 13 October 2006.
31 Negishi (n 23) 498–99; Kanai and others (n 23) 357.
32 Re Fujitaya Co Ltd, JFTC Hearing Decision, 28 February 1992. It was a tie-in case to which art 19 (provision on unfair trade practices) was applied.
33 The JFTC establishes compulsion by means of an information request order addressed to suppliers. When issuing the order, the JFTC gives multiple choices to the supplier: (i) the supplier had been notified by the retailer that the latter would retaliate, by way of terminating the trading relationship or reducing the trading volume or amount, if the supplier did not comply with the request; (ii) the supplier had in fact experienced such retaliation in the past; or (iii) the supplier had heard that it had happened to other suppliers or the supplier believed that the retailer might retaliate. See Nagasawa (n 11) 63.
without the retailer’s business. This effectively refers back to the degree of depend-
ency and the existence of a superior bargaining position. For instance, in the Ralse case, the retailer sent a letter of ‘request for help at our stores’ and asked if the sup-
plier could send their employees to them. Despite the seemingly voluntary nature of
the request, the JFTC nonetheless determined that the letter required such a
dispatch.34

Abusive practices and their unjust nature

Forced purchase or usage
The practice stated under Article 2(9)5(a) arises when the supplier is forced to pur-
chase or use goods or services that are distinct from the subject matter of the supply
contract. The supplier may be forced to procure such goods or services either from
the counterparty or from a designated third party. Such forced purchase is con-
sidered unjust when it imposes a disadvantage on the trading partner by compelling
the partner to buy products unnecessarily.35 In contrast, it is considered legal to re-
quire a supplier to use certain raw materials or production facilities to ensure product
quality, even if the usage requirement is tantamount to demanding the purchase of
materials or use of facilities from specific companies.36 In practice, the majority of
cases involving illegal, forced purchases relate to goods that have nothing to do with
the subject matter of the original contract.37

In the Sanyo-Marunaka case,38 Sanyo-Marunaka, a retailer selling groceries and
clothes, required suppliers to purchase Christmas goods from it. The suppliers were
notified of the minimum purchase volume or a certain specified volume. In the Ralse
case,39 Ralse, a retailer of groceries and clothes in the Hokkaido area, required its
suppliers to buy business suits from it and repeatedly pressed those that had not met
the target to make further purchases. Eighteen suppliers complied with the request
and bought business suits over two years for an amount of at least JPY1.9 million.

Procuring money unjustly from suppliers (forced contribution of expenses)
A retailer’s practice to cause its suppliers to pay money unjustly to it is prohibited
under Article 2(9)5(b). A retailer often engages in such practice under the guise of a
‘contribution fee’ at the time of the retailer’s opening of new or refurbished stores.

34 Ralse (n 1).
35 JFTC Guidelines (n 2) sIV 1(1).
36 ibid sIV 1(2).
37 The JFTC used to apply the Specific Designations for Large–scale Retailers, referred to in Section
Specific Designations for Large-scale Retailers of the article, to the practice of forced purchases. Cases
decided under the Specific Designations include the case against Valor, a retailer running supermarket
and DIY stores, on the ground of forcing its suppliers to buy gift products and coupons for goods
amounting to about JPY17.1 million in June 2005 and JPY14.9 million from October to November, 2005
(Re Valor Co Ltd n 30); and the case against Daiwa, an everyday sundries retailer, on the ground of forcing
its suppliers to buy various products including electrical appliances, clothes, and paintings (Re Daiwa,
JFTC Cease and desist order, 5 March 2009). Other forced purchase cases committed by retailers include
Re Sanyo-Marunaka Co Ltd, JFTC Recommendation Decision, 15 April 2004 and Re Mitsukoshi Co Ltd,
38 Sanyo-Marunaka (n 1).
39 Ralse (n 1).
The JFTC Guidelines state that the contribution fee is unjust ‘when (i) the parties had not specified the contribution amount, the basis for its calculation, its purpose and so forth; thus, the contribution causes an unexpected disadvantage to the other party or (ii) the contribution causes the other party an unreasonable disadvantage in light of its direct advantage accruing to the other party (emphasis added)’. \(^{40}\) The disadvantage is unexpected if the extent and scope of its burden or risk, or the method of calculation had not been agreed upon in advance. Even when the supplier was anticipating a certain type of burden to be imposed, the burden is considered unexpected if the conditions and terms of such an imposition were not made clear beforehand. \(^{41}\)

In a way, this prohibition can be quite easily circumvented if the retailer stipulates all these fees and their calculation methodology in advance in the initial supply contract. Presumably given the superior bargaining power of the retailer, the supplier would have no alternative but to acquiesce to these demands. \(^{42}\) Furthermore, the advantage that the suppliers will obtain by incurring the expense is taken into account in the assessment of unreasonableness, on the condition that the advantage is a ‘direct’ one. \(^{43}\) Examples of direct advantage include the increase in the supplier’s sales of the product when the supplier contributes towards the retailer’s advertising activities to promote the supplier’s product. In contrast, the retailer’s favourable treatment of the supplier in the future is deemed to be an indirect advantage. \(^{44}\)

The following recent cases illustrate unlawful procurement of contribution. In the Sanyo-Marunaka case, \(^{45}\) Sanyo-Marunaka requested money from its suppliers to finance advertising balloons to promote its new shop and the events it organized, such as kids’ Japanese-chess tournament and ladies’ tennis tournament. About 130 suppliers acceded to the requests and paid Sanyo-Marunaka a total of approximately JPY32 million over three years. In the Ralse case, \(^{46}\) Ralse required suppliers to pay a contribution fee for store opening sales. The suppliers complied, paying a total of at least JPY76 million in about three years. Finally, in the Direx case, \(^{47}\) Direx requested its suppliers to pay a contribution fee for store closing sales. Direx set the amount by applying a certain discount rate to the sales that each supplier made to Direx. A total of 66 suppliers complied with the request, paying a total of at least JPY40 million in about three and a half years. Direx also requested that the suppliers pay a contribution when its store caught fire. The required amount was calculated according to the prices of the products sold by the suppliers to Direx, which became unsellable because of the fire. A total of 48 suppliers acceded to the request and paid at least JPY11 million in total.

\(^{40}\) JFTC Guidelines (n 2) sIV 2(1)A.
\(^{41}\) ibid sIV 2(1).
\(^{42}\) In fact, the retailer need not even go through the trouble of stipulating all these contributions in the contract. The retailer can achieve the equivalent of contribution fees simply by bargaining for a lower contract price. It is unclear to what extent retailers will circumvent the prohibition of contribution fees and other monetary benefits by doing that.
\(^{43}\) JFTC Guidelines (n 40).
\(^{44}\) JFTC Guidelines (n 9).
\(^{45}\) Sanyo-Marunaka (n 1).
\(^{46}\) Ralse (n 1).
\(^{47}\) Direx (n 1).
In all these cases (except the Direx fire incident), the JFTC suggested that the advantage provided by the suppliers was not proportionate to the benefits they obtained. More specifically, the JFTC found that the suppliers gained no advantage, in terms of promoting their products, or less advantage, relative to the burden imposed on the suppliers in the Sanyo-Marunaka and Direx cases. In the Ralse case, the JFTC noted that Ralse made the request without considering any advantage that the suppliers would obtain through product promotion. The JFTC also pointed out that Ralse and Direx (store closing sales) did not clearly inform their suppliers beforehand about the purpose of and the basis for the calculation of contribution fees.

Procuring services unjustly from suppliers (forced dispatch of employees)

A retailer’s practice of procuring service unjustly from its suppliers is prohibited under Article 2(9)5(b). Typically, the retailer requests the suppliers to send over their employees and engages them to work under its instruction. The work assigned to the employees may include replenishment and arrangement of goods at newly opened and refurbished stores, as well as customer services. The JFTC Guidelines state that the retailer’s request for the services of its suppliers’ employees is unjust ‘when (i) the party had not specified on what occasions and under what conditions such a request would be made, thus causing unexpected disadvantage to the other party, or (ii) the dispatch causes the other party unreasonable disadvantage in light of the direct advantage created from the dispatch (emphasis added).’ In contrast, according to the JFTC, it is considered lawful from the standpoint of reasonableness and expectation when the request is made in compliance with preset terms and conditions, which need to ensure that the supplier obtains some tangible benefit from the offer of service. Such conditions include specifying the compensation to be paid to the suppliers and ensuring that they benefit from the dispatch. For example, a supplier can utilize its knowledge of its own products and promote them or be given the chance to learn about customers’ needs.

The disadvantage is unexpected if the conditions had not been clarified. For instance, in the Ralse case, the retailer asked the suppliers in writing whether or not they would be able to dispatch their employees and assigned the workload according to the suppliers’ answers. The JFTC still decided that the terms and conditions of the dispatch were not clear in that letter. In assessing whether or not the disadvantage is unreasonable, the method of allocating the cost for the dispatch is relevant. In all the recent cases, the retailers bore no or little cost. The assessment is typically made with reference to substance over form. In the Ralse case, Ralse handed over an invoice to its suppliers for intended future payments. Nonetheless, the JFTC found that Ralse incurred minimal cost, since the suppliers would find it difficult to request the payment. Indeed, it was not made in most cases.

48 JFTC Guidelines (n 2) sIV 2(2)A.
49 ibid sIV 2(2)B.
50 Ralse (n 1).
51 ibid.
Recent cases of forced dispatch of employees include the following. In the *Edion* case, Edion requested that suppliers send over some of their employees, who then helped to shelf goods and engaged in other preparations for Edion’s renovated or newly opened stores. At least 11,172 employees were dispatched, who provided services at 133 Edion stores between 9 September 2008 and 30 November 2010. In the *Sanyo-Marunaka* case, Sanyo-Marunaka requested the assistance of their suppliers’ employees during store openings or renovations, rearrangement of product displays on shelves, etc. About 140 suppliers dispatched a total of about 4200 employees over the course of three and a half years. In the *Ralse* case, Ralse requested the services of its suppliers’ employees during the opening of new and refurbished stores. A total of 53 suppliers, whose bargaining positions were inferior to that of Ralse, dispatched a total of at least 1800 employees to 15 stores over a three-year period. In the *Direx* case, Direx requested suppliers for their employees’ help in shelving goods during the opening of new and refurbished stores. A total of 78 suppliers dispatched at least 8000 employees to 135 stores over a period of three and a half years.

In all four cases, the suppliers dispatched their employees without any terms and conditions being agreed upon in advance. The retailers also incurred no or minimal cost. In three of the four (*Sanyo-Marunaka, Ralse, and Direx*) cases, the JFTC noted that the dispatched employees shelved products that were not supplied by their respective employers. Furthermore, in the *Edion* and *Sanyo-Marunaka* cases, the employees engaged in work in which they had no expertise. Although opening new and refurbished stores might result in increased demand for the suppliers’ products, it is uncertain whether this benefit would justify the burden borne by the suppliers. The details of the cases have not been published and there is no way to verify this point.

**Late payment, retrospective discounts, and return of goods**

Article 2(9)5(c) typically deals with situations where the obligation is not performed as agreed, such as late payment and retrospective discounts. Article 2(9)5(c) applies not only to breach of contract, but also to its retrospective amendment. For example, if the retailer requires suppliers to postpone its payment date, the retailer’s practice itself to impose such a retrospective change can constitute a violation. Often, the

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52 *Edion* (n 1).
53 *Sanyo-Marunaka* (n 1).
54 *Ralse* (n 1).
55 *Direx* (n 1).
56 These cases are in line with the provisions at point 7 of the Specific Designations for Large–scale Retailers, detailed below, in which it is provided that causing suppliers to dispatch their employees is legal where ‘(i) with the prior consent of the supplier, the large-scale retailer assigns dispatched employees solely to sales operations of those goods delivered by the supplier (or sales and inventory operations for those goods if the dispatched employees of the supplier are regularly stationed at a store of the large-scale retailer), and limited to the extent that enables effective use of sales techniques or other ability possessed by the dispatched employees that leads to direct benefits for the supplier’, or where ‘(ii) the large-scale retailer reaches a prior agreement with the supplier with respect to the dispatch terms and conditions, such as the types of duties assigned to dispatched employees, working hours and the period of dispatch, and it pays the cost generally required for the dispatch of employees’.
57 JFTC Guidelines (n 2) sIV 3(3)A.
provision applies to retrospective discounts and return of goods. Recently, the JFTC found the following violations.

In the *Toys”R”Us-Japan* case,58 Toys ‘R’ Us engaged in illegal price reduction for the goods that it had sold at discounted prices. The discounted goods were unsalable inventory, unsold seasonal goods, etc. The reduction was made against the originally agreed payable price. A reduction worth JPY407.46 million was imposed on 80 suppliers. Toys ‘R’ Us also returned unsalable inventory and unsold seasonal goods, valued at JPY 233.20 million, to 63 suppliers. The JFTC specifically noted that the returns were made without the suppliers’ request and did not result in any direct advantage to them. In the *Sanyo-Marunaka* case,59 Sanyo-Marunaka engaged in illegal price reduction for the goods that it had sold at discounted prices, in account of seasonal replacement of products and inventory clearance sale during store renovations. The reduction rate was set at 50% of the original price when Sanyo-Marunaka procured the seasonal products and at the same amount as the reduced prices for the inventory clearance sales. In total, about JPY4.1 million was deducted from the payments to 20 suppliers. Sanyo-Marunaka also returned to the suppliers the food products that had not been sold by the cut-off date it had set unilaterally. In both cases, the JFTC noted no justifiable reason to hold the suppliers accountable for the price reduction and the returned goods. Furthermore, the JFTC pointed out that the retailers and the suppliers had not agreed in advance on the conditions for returning unsold goods and that the retailers did not compensate the suppliers for their losses.60

### III. SECTOR-SPECIFIC REGULATION: SUBCONTRACT ACT AND SPECIFIC DESIGNATIONS FOR THE RETAIL SECTOR

In addition to Article 2(9)5, two complementary sets of rules are applicable to retailers. These are the JFTC’s Specific Designations for (i) Large-scale Retailers and (ii) the Subcontract Act.

#### Specific Designations for Large-scale Retailers

Article 2(9)6 authorizes the JFTC to add to the list of unfair trade practices. By virtue of this provision, the JFTC promulgated the Specific Designations for Department Stores in 1948, which was replaced by the Specific Designations for Large-scale Retailers in 2005.61 With respect to practices falling within one of those

58 *Toys”R”Us* (n 1).
59 *Sanyo-Marunaka* (n 1).
60 These are in line with the provisions at point 1 of the Specific Designations for the Larger scale Retailers, detailed below, in which it is provided that returning goods are lawful in any of the following cases: where such return is made: (i) ‘for a reason attributable to the supplier’; (ii) ‘in accordance with fixed conditions for return based on an agreement with the supplier at the time of purchasing the goods’; (iii) ‘with the supplier’s prior consent, provided that the large-scale retailer accepts the loss that would normally be incurred by the supplier arising from the return of goods already delivered’, or (iv) ‘at the request of the supplier, provided that the disposal of the returned goods leads to direct benefits for the supplier’.
61 The latter applies to ‘an entrepreneur that engages in the retail sale of goods that are used by general consumers on a daily basis, including any retailer engaged in a designated chain business that exceeds the size threshold provided in the designation’. The threshold is met either for (i) an entrepreneur with sales of JPY10 billion or more in its last completed FY or (ii) an entrepreneur owning a store that falls under
stipulated in the Designations, the JFTC can only issue a cease and desist order, but not a surcharge payment order. The Designations describe illegal practices more specifically than Article 2(9)5, while all the designated practices are also covered by Article 2(9)5. When the surcharge system was introduced in 2010, the JFTC decided that it would prosecute practices under Article 2(9)5 as much as possible so that surcharges could be imposed on the offender. For this reason, the retail sector-specific designations have not been applied since then.

**The Subcontract Act**

The Subcontract Act can be applied to cases in which the retailer commissions the manufacture of the products that it sells. One area in which such type of commissioning is common is private-label products, of which several cases are known.62 In total, at least 25 retailers have been found to have violated the Subcontract Act since 2010.

The Subcontract Act complements Article 2(9)5 by categorically regulating companies that satisfy the size requirement, regardless of whether it has a superior bargaining position. In relation to a manufacturing subcontract, the act is applicable when the retailer, whose capital exceeds JPY300 million, commissions the manufacture of goods from a company whose capital does not exceed JPY300 million, or when the retailer, whose capital is between JPY10 million and JPY300 million, commissions the manufacture of goods from a manufacturer whose capital does not exceed JPY10 million.

Entrepreneurs to which the Subcontract Act applies are prohibited from engaging in the following practices: refusal to take the commissioned products, late payment, retrospective discounts, return of goods, setting the price substantially lower than that of the equivalent product or the market price, forced purchase or usage, and compelling the subcontractor to provide it with economic benefits such as contribution fee and dispatch of employees (Articles 4(1) and (2)). In a way, regulating the contract price renders the Subcontract Act more coherent than the abuse of superior bargaining position provisions as many of the prohibited abuses under the AMA effectively amount to a price reduction, which means that the retailer could easily circumvent the prohibitions by simply bargaining for a lower initial supply price. Furthermore, the Act provides that the commissioning party must fix the payment date within 60 days of receipt of the commissioned goods, deliver to the subcontractor a document prescribing the details of the transaction upon the conclusion of the contract, keep transaction records for two years, and in case of a delay in payment, pay interest at a rate of 14.6%.

either of these two descriptions: (a) one with a floor space of 3000 m² or more within the limits of the Tokyo metropolitan area (special wards only) and designated cities prescribed in para 1, art 252–19 of the Local Governmental Act or (b) one with a floor space of 1500 m² or more within the limits of cities other than those falling under (a), towns and villages.

Among the violations committed by retailers under the Subcontract Act since 2010, retrospective discounts have been the most common. A substantial number of the cases involved contribution fees.63

Price reduction

In some of the cases, price reductions have been made in lieu of rebate64 or for the purpose of inventory clearance sale and other promotional sales.65 The JFTC Subcontract Act’s enforcement guidelines state that discount and payment of rebates are not prohibited on reasonable grounds, such as volume discount, and when its terms and conditions have been agreed on and specified clearly in writing beforehand. The above-mentioned violations were found because the exonerating circumstances were absent. In other cases, the prices were reduced to cover the cost of the services allegedly provided by the retailers. These services included placing orders with the suppliers66 and issuing and processing sales slips67. In all these cases, the retailers had repaid the reduced amounts to the suppliers by the time the JFTC issued the recommendations.

Forced provision of financial benefits

The practice of causing a supplier to provide financial benefits typically arises during inventory clearance sales and other promotional events. For example, there have been cases in which the suppliers paid the costs of promotional materials,68 or postage costs for the retailer to return the products to them, where the return itself had no basis in the contract.69 In all cases, the retailers had returned the money to the suppliers by the time the JFTC issued the recommendations.70

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63 Retrospective discounts and contribution fees are closely related in practice. If the retailer deducts the amount which is to be paid as a contribution fee, the JFTC regards the practice as price reduction, while the payment of the contribution fee can be made in the form of a price reduction. See eg JFTC Press Release, ‘Recommendations to Kyowa Co, Ltd’ (7 December 2011) (wholesaler-subcontractors case); JFTC Press Release, ‘Recommendations to Consumer Co-operative Union Shikoku Co-op business association’ (29 June 2011).
68 ‘Recommendations to The Japanese Consumer Co-operative Union’ (n 65).
69 ‘Recommendations to Right-on Co, Ltd’ (n 64); ‘Recommendations to Nissen Co Ltd’ (n 66).
70 There are instances in which other types of violations were found. For example, in the Palemo case, the supplier dispatched its employees upon the retailer’s request and the employees engaged in data input relating to placement of orders. See ‘Recommendations to Palemo Co, Ltd’ (n 65).
V. DOES ABUSE OF SUPERIOR BARGAINING POSITION BELONG TO COMPETITION LAW?

One question that has long cast a shadow over abuse of superior bargaining position is whether it belongs to competition law at all. The obvious criticism of abuse of superior bargaining position as a competition law doctrine is that these abuses in most cases do not seem to result in harm to competition or loss in consumer welfare. In the typical case of abuse of superior bargaining position, if a powerful buyer manages to extract greater discounts or command the employees of its suppliers to assist in shop opening or other activities, there would seem to be no consumer harm so long as these abuses do not affect the downstream output price paid by consumers. And it would seem that in most cases there would be little downstream effect. If anything, if the powerful buyer, who very often is a retailer, passes on its savings to consumers, consumers could be better off. And this would be the case so long as the downstream retail market is competitive. Given that superior bargaining position is not contingent on market power, a competitive downstream market cannot be ruled out simply because a retailer has been found to have a superior bargaining position.

The concept of a superior bargaining position also does not sit well with conventional competition law principles. Market power is not required to establish a superior bargaining position. When the JFTC enforces the abuse regulation, it does not establish market power, a dominant position in the relevant market in which the practice is likely to have an adverse competitive effect. The analysis is not concerned with the state of competition in the wider market and the interactions between the firm with a superior bargaining position and its competitors. It is instead focused on the relationship between two contractual parties, one of which is alleged to wield substantially greater bargaining power than the other. A superior bargaining position is hence quite different from a dominant position under EU law or monopoly power under US law. Abuse regulation addresses neither practices that establish, maintain, or strengthen market power by excluding competitors, nor those ‘reducing competition in a market already weakened by the presence of the company concerned’. The JFTC does not establish exclusion or weakening of competition in a relevant market. Typical abusive practices are not conduct that will establish or entrench market power by restricting competition.

Abuse of the superior bargaining position occurs within a vertical relationship. Most of the abuses reported in superior bargaining position cases have taken place in vertical relationships between suppliers and a powerful buyer. However, one

72 See JFTC Guidelines (n 2) sII.B 1 for detail.
74 See n 72.
75 It might be noteworthy to add that, under Japanese law, the word ‘bargain’ contained in the term ‘superior bargaining position’ is understood to imply the actual transaction. The ‘bargaining’ process between cartel conspirators, eg is not included in this understanding. Transactions between cooperators which are also in a competitive relationship can be caught by the abuse regulation, though there has been no such instance where the JFTC took formal measure. This is presumably because competitors are less likely to be in a position of economic dependency on each other absent a more permanent kind of collaborative
obvious difference between abuse of superior bargaining position and regulation of vertical restraints is that under the latter, the focus is usually how the agreement between an upstream firm and a downstream firm affects competition in the upstream or the downstream market.\textsuperscript{76} Under abuse of superior bargaining position, the concern is not how the practice affects competition in general, but one of the contractual parties itself. In practice, regulation of abuse of superior bargaining position imposes greater restrictions on vertical restraints than on horizontal restraints, which is inconsistent with mainstream competition law thinking that horizontal restraints are more likely to cause competitive harm.\textsuperscript{77}

Japanese academia is divided on whether regulation of abuse of the superior bargaining position is consistent with competition law. The mainstream critique shares the view that competition law is intended to address anti-competitive conduct that would restrict or lessen competition and establish market power. The major provisions of the AMA are understood to exist to protect free and fair competition by prohibiting anti-competitive or unfair conduct, such as deceptive tactics. Professor Shigekazu Imamura, one of the pioneers of competition law in Japan, indeed asserted that regulating abuse of the superior bargaining position is different from other AMA regulations, as free and fair competition is not the focus under abuse regulation.\textsuperscript{78} Subsequently, the Antimonopoly Law Study Group (which was formed by the JFTC before 1982, when it was deciding what conduct should be regulated as unfair trade practices) went one step further and argued that regulation of abuse of the superior bargaining position tends to impede competition because it impinges on the ability of competitors to make business decisions freely and independently, and hence undermines the fundamentals of free competition.\textsuperscript{79}

There are two levels in which to approach the question of whether regulation of abuse of superior bargaining position belongs to competition law. The first is whether the existing decisional practices of the JFTC in this area can be somehow reconciled with conventional competition law principles and, in particular, the protection of consumer welfare. If not, the obvious question to ask is whether abuse of superior bargaining position can be adjusted to conform with mainstream competition law without losing its main purpose or function. In other words, the question is whether a reformed approach to abuse of superior bargaining position can be justified on the grounds of consumer welfare or perhaps other economic justifications. For example, while the aforementioned criticism suggests that regulation of abuse of superior bargaining position may have negligible short-term impact on consumer

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\textsuperscript{77} \textit{Leegin Creative Leather Products v PSKS} (2007) 551 US 877, 888.


\textsuperscript{79} Dokusenkinshi ho kenkyu kai (n 28) I 2.
welfare, such abuses may result in the distortion of competition at the supplier level, with longer term implications for production and investments by upstream suppliers. Allocative efficiency at the supplier level may be undermined. It is possible to reconcile abuse of superior bargaining position with protection of consumer welfare if one takes a longer term perspective. If this attempt at reconciliation proves futile, one can still search for alternative justifications for enforcing against abuse of superior bargaining position. These justifications may include supplementing ineffective contract law enforcement. This may be necessary because, for some reason, contract law is unable to provide effective protection to the weaker parties in contractual negotiations from exploitation. Abuse of superior bargaining position can be viewed as an extension of competition law that tackles problems straddling both competition law and contract law.

**Abuse of superior bargaining position as a competition law violation**

**Regulation of buyer power**

Given that most of the abuse of superior bargaining position cases involve exploitative practices by powerful buyers, the most obvious way to reconcile these cases with mainstream competition law is to view regulation of superior bargaining position as regulation of monopsonistic abuses and buyer power issues in general. If one accepts that competition law does concern itself with buyer power issues, at least in some instances, and with monopsonies in particular, then it may be possible to square abuse of superior bargaining position with competition law.\(^{80}\) There is increasing concern across the globe about abuse of monopsony power by powerful buyers. In fact, if the source of buyer power is true monopsony power, then an argument can be made that the class that is intended to be protected is not consumers, but the small and powerless suppliers. The principal focus of analysis would then be upstream and not downstream.\(^{81}\) If this were true, the JFTC’s relatively cavalier approach to what constitutes an abuse under this provision, without any attempt to demonstrate consumer harm, may also be justified. This view may be supported on the grounds that there is no provision in the AMA that regulate monopsonistic exploitation, even if it does result in deadweight loss and allocative inefficiency.\(^{82}\)

Attempting to justify abuse of superior bargaining position as regulation of monopsonistic abuses runs into the immediate problem of what could justify the regulation under the relaxed standard of a superior bargaining position. As in other

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82 Private monopolization requires exclusion or control of another company, as well as the establishment, maintenance, or enhancement of market power. Typical monopolistic and monopsonistic exploitation (abuse) would not satisfy these requirements, as it neither excludes nor controls other companies and it is only a result (or exercise) of market power, which differs from the acquisition of market power, etc.
jurisdictions, AMA scholars recognize that regulating exploitation and interfering with contractual terms is a difficult task. From a comparative law standpoint, too, such broad abuse regulation stands out. The JFTC does not examine whether or not the retailer holds market power in the buyer’s market. It does not even try to delineate the relevant market. Abuse of superior bargaining position provisions do not require proof of market power, either on the seller’s or the buyer’s side, to establish a violation. As stated earlier, an entrepreneur is deemed to be in a superior bargaining position relative to a counterparty when the counterparty is reliant on a continuous trading relationship with the entrepreneur and finds it difficult to reject the entrepreneur’s demand despite its unfairness. Although the JFTC considers whether the supplier can replace the retailer, the assessment falls short of the kind of analysis that will be performed to determine the existence of market power in the procurement market. Market power may be taken into consideration. It is, however, not a decisive factor.

It is clear from the JFTC’s decisional practices and the Guidelines that an entrepreneur may be found to possess a superior bargaining position even if it lacks market power. In none of the cases in which the JFTC condemned a business practice as an abuse of superior bargaining position did the JFTC focus on the market position of the entrepreneur. There was no attempt to demonstrate that the firms at issue possessed the ability to control prices or exclude rivals in the relevant market. The factors that are often taken into consideration include the volume of sales achieved by an entrepreneur and the extent to which the counterparty depends on a continual business relationship with the entrepreneur. The existence of a superior bargaining position is determined with reference to the extent to which the counterparty may replace business with the entrepreneur at issue with transactions with other parties, and curiously, whether the counterparty expects to maintain or increase sales to the offending entrepreneur. The JFTC’s inquiry focuses on different considerations from those that are relevant in a market power assessment, even though degree of dependency can be said to be related to market power in some ways. Specifically, the JFTC does not seem to examine if the retailer’s bargaining power can endure for a period of time, say one year, and enable it to adjust the price lower than the competitive level. This issue is signified by the absence of an examination of the likelihood of new entry into the market and other competitive constraints such as competitive pressure exerted from a neighbouring market. In any case, difficulty in substitution may be only one of the factors that may have led the JFTC to find a superior bargaining position. Other factors include the growth of the retailer’s business, the supplier’s hope to increase its business with the retailer, and the number of stores run by the entrepreneur. These are hardly factors that would feature in market power analysis. Yet, this list of factors is consistently applied in recent cases.

84 JFTC Guidelines (n 2) sII.B 1.
85 ibid, sII 2(1) and II 2(2).
86 ibid, sII 2(1)–(3).
87 JFTC Guidelines (n 84).
One of the factors for determining dependency—the extent to which sales to the offending entrepreneur can be effectively replaced—is arguably an indirect way to gauge the entrepreneur’s market power, at least in the upstream supply market. The larger is the market share of an entrepreneur in the upstream supply market, the more difficult it will be for a supplier to replace sales to that entrepreneur. Presumably it will be extremely difficult for a supplier to replace an entrepreneur that accounts for more than 70%, 80% of the purchases in the market. The extent to which sales to the entrepreneur can be effectively replaced is, however, at best a poor proxy for market power in the upstream supply market. The reason is as follows. The ease with which a supplier can replace sales to an entrepreneur depends on two factors, the proportion of overall purchases in the market accounted for by the entrepreneur and the overall size of the supplier’s sales. Irreplaceability may be due to the entrepreneur’s share of the overall purchases or the size of the supplier’s sale. If a supplier’s sales account for a large proportion in the upstream supply market, it may have difficulty replacing the entrepreneur with other firms. A supplier which accounts for 51% of the overall supply in the market and sells all of its supplies to one buyer will not be able to replace its sales to that entrepreneur. But this irreplaceability is more accurately attributable to the size of the supplier’s sales than anything else. To be fair to the JFTC, if a supplier accounts for such a large portion of the supply, it is unlikely that the entrepreneur will be found to hold a superior bargaining position. Therefore, it is likely that if the JFTC finds a supplier to be unable to replace its sales to an entrepreneur, it is due to the large market share of the entrepreneur on the buyer’s side.

What is more curious is the factor that the supplier expects to maintain or increase sales to the particular entrepreneur. Presumably the JFTC only takes into account reasonable expectations, and not completely unfounded ones that were formed due to no action on the part of the entrepreneur. If the concern is that the supplier has made relationship-specific investment in reliance on the expectation of continual sales to the entrepreneur, then the actual concern is not the expectations but the existence of relationship-specific investment. Absent such investment, it is unclear why the supplier’s expectations should matter so long as the supplier can find an alternative buyer to replace sales to the entrepreneur. Furthermore, the distinction between maintenance of sales and expected increase of sales is perhaps even more unusual. It is unclear why the supplier’s expectations of increased sales should be relevant unless the entrepreneur has made promises of increased purchases and the supplier, in reliance upon such a promise, proceeds to invest to enlarge its production capacity. Even then, if the supplier can find an alternative buyer to purchase the additional goods, the construction of new capacity does not increase the degree of dependency of the supplier on the entrepreneur.

In this respect, it should be noted that the imposition of abuses on the supplier does not mean that the retailer is earning supra-competitive profits by suppressing the purchase volume. The JFTC focuses only on particular aspects of a transaction relating to the abuse and compares the benefits and costs borne by the retailer from its action. This localized assessment will not establish the existence of the

88 The JFTC does not explain how it ascertains the supplier’s expectations.
supra-competitive profits earned by the retailer through the whole transaction. Even when the retailer is indeed earning economic profits, it does not mean that it is accomplished with its market power.\(^8^9\)

**Anti-competitive effect of abusive conduct**

A further obstacle to squaring the law of abuse of superior bargaining position with principles of conventional competition law is that the kind of conduct that has been found to be abusive rarely exerts much competitive harm. As mentioned earlier, abuse of superior bargaining position takes place in a vertical context. However, typical vertical restraints such as resale price maintenance and territorial restrictions do not feature in abuse regulation. These restraints are not listed under Article 2(9)\(^5\) and the JFTC has never found such conduct within the retailer–supplier context to be in violation of the provision. Although the abusive conduct no doubt compromises the supplier at issue, rarely does it have much impact on the rest of the market. Some examples of conduct that have been deemed to be abusive by the JFTC include forced purchases, retrospective discounts, unjustified return of goods, requests for the dispatch of employees, and requests for payment of monetary contribution.\(^9^0\) Forced purchases may sound like reciprocal dealings. Yet, unlike under US law, under abuse regulation it is not required to consider the foreclosure effect on the market.\(^9^1\) For the rest of the practices, it is difficult to imagine how these abuses might harm the competitive process or reduce consumer welfare. Most of the practices, such as requirement of contribution fees, forced dispatch of employees, and retrospective discounts, will have no anti-competitive effect, either through anti-competitive exclusion of competitors or by lessening intra- or inter-brand competition. Unlike typical vertical restraints, practices regulated under the abuse of superior bargaining position do not affect the way in which suppliers compete against each other. For example, unlike exclusive dealing and tying, these practices do not restrict the supplier from dealing with an entrepreneur’s competitors\(^9^2\); the exploited supplier would rather have stronger incentives to deal with those competitors. More generally, the assessment of exclusionary effect or any restrictive effect on intra-brand competition necessitates examining how widely the retailer’s restriction covers the market, since a small coverage will have no impact.\(^9^3\) Such an assessment entails a market power analysis, which, as mentioned earlier, is never done in abuse of superior bargaining position cases. Assessment of anti-competitive effect thus has never featured in the JFTC cases under Article 2(9)\(^5\).

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90 From FY2009 to FY2013, the JFTC suspected 244 violations of abuse of superior bargaining position and issued warnings. In FY2013 alone, the JFTC issued 58 violation warnings and of these 58 cases, 38 were forced purchase cases, 27 were request for monetary contribution cases, 15 were request for dispatch of employees cases, and six were unjustified return of goods cases. (Note: The total number does not match ‘58’ as some of the companies engaged in more than one type of violations.)

91 Hovenkamp, (n 73) s10.8.

92 ibid ss10.6a and 10.9b.

93 Sullivan and Grimes (n 76) s6.3.
Retrospective discounts may raise price discrimination issues in some circumstances. Forced monetary contributions and dispatch of employees could be seen as the equivalent of price discrimination. Abuse regulation differs from price discrimination regulation, however, in that it does not require any proof of distortion or exclusion of competition, or primary- or secondary-line injury as under US law. It is not necessary to show precisely how a discriminatory practice would give the entrepreneur a competitive advantage against its competitors.

In fact, the legal standard for determining whether a certain business conduct constitutes an abuse is not whether it creates competitive harm, but whether it is ‘unjust in light of normal business practice’. Unjustness is understood to mean inhibition of fair competition, which is in turn defined as impairing a trading partner’s free and independent business judgment and infringing on the fundamentals of free competition. The benchmark against which unjustness is measured—normal business practices—is a normative and not an empirical concept. What matters is not whether a particular practice is prevalent. This is important because if it seems to be the case, some of the reported abuses are fairly common, and may constitute normal business practices if the term is understood as an empirical concept. A business practice is only regarded as ‘normal’ if it accords with the principle of free and fair competition. In practice, unjustness in light of normal business practices seems to refer to the free choice of the counterparty.

Prevention of distortion in the upstream market

Competition law of course is not only concerned with short-run consumer welfare. Regulation of abuse of superior bargaining position may be justified by its long-term welfare benefits. In particular, the long-term benefits exist in two forms. First, it may be argued that abuse of superior bargaining position will eventually force smaller suppliers to go out of business, leaving the supplier level more concentrated. Therefore, regulation of abuse of superior bargaining position is justified as a means of protecting the competitive landscape of the supplier market. Secondly, regulating abuse of superior bargaining position ensures continual investment and innovation by the suppliers. The argument is that suppliers to these powerful entrepreneurs refrain from investing in the supply relationship or pursuing innovations for fear that their effort will be expropriated by the powerful entrepreneur. This second justification will be dealt with in the next section.

94 Hovenkamp (n 73) s14.6c.
95 The JFTC suggests in its Guidelines that a reason for the prohibition of abuse lies in stopping the entrepreneur from ‘put[ting] the [counterparty] in a disadvantageous competitive position against its competitors, while putting the [entrepreneur] in an advantageous competitive position against its competitors.’ However, it should be noted that this is only one of the rationales given for abuse regulation and, in any case, facts supporting the claim that the conduct would create competitive disadvantage for competitors are usually not established when the JFTC enforces the law. Also, while the contractual term with suppliers would give the entrepreneur a competitive advantage in the short term by affecting the entrepreneur’s marginal cost, the JFTC intervenes in cases where the conduct would affect only fixed costs or the total return.
96 See Section ‘Unjustly’: inhibition of fair competition.
97 ibid.
98 JFTC Guidelines (n 2) sIII.
Regarding the first possible long-term effect of abuse of superior bargaining position as a justification for abuse regulation, the obvious response is that the downstream entrepreneur has no reason to prefer a more concentrated market on the supplier level. An entrepreneur benefits from an abundance of competitive suppliers, which keep prices down and provide more diverse sources of supply for the entrepreneur. Hence, a rational entrepreneur has no incentive to drive its upstream suppliers out of business. Rationally, it would prefer to squeeze the suppliers dry without driving them out of business. Moreover, this theory presumes that a powerful entrepreneur will practice abuse of superior bargaining position selectively, targeting only some suppliers but not others. Such behaviour would seem to be counter-intuitive as an entrepreneur presumably would want to extract the most benefit from all of its suppliers. In fact, some recent cases suggest that abuse is not limited to a selected group of suppliers. Entrepreneurs do practice market-wide abuses.

The entrepreneur of course may miscalculate and drive its bargains so hard that it inadvertently bankrupts an upstream supplier. Even if that were true, one may question whether competition law should protect the entrepreneur from its own follies and mistakes. If its miscalculation results in it paying a higher input price, but leaving everyone else in the market unaffected, there is insufficient reason for competition law to intervene. The effect of an entrepreneur’s miscalculation of course need not be confined to itself; other downstream retailers may be similarly affected. To the extent that an entrepreneur’s abuse of superior bargaining position raises its rivals’ costs and results in higher prices for consumers that could be a valid reason for competition law intervention.99 A cursory review of the JFTC’s enforcement record indicates that the JFTC has paid scant attention to the effect of an entrepreneur’s abuse of superior bargaining position on other downstream rivals. Therefore, while this justification may be theoretically valid, it is inconsistent with the JFTC’s enforcement record. In any case, there is little basis for the belief that downstream entrepreneurs systematically miscalculate and inadvertently drive suppliers out of business.

Moreover, this effect justifies regulation of abuse of superior bargaining position to the extent that these abuses are so deleterious to the suppliers that are put at risk of going out of business. In other words, the abuse must be so costly that it risks pushing an otherwise profitable supplier into losses to justify intervention. This still leaves many abuses of superior bargaining position unaccounted for. It is unlikely that the forced dispatch of employees or the payment of promotional expenses on an occasional basis would bankrupt a supplier and drive it out of business. If the rationale for regulating abuses of superior bargaining position is to protect the financial well-being of suppliers from bankruptcy threats, then there seems to be no strong justification for prohibiting these abuses. It is of course possible for the combined effects of these abuses to have serious deleterious financial impact on the suppliers. And the JFTC may justify regulating abuses of superior bargaining position on an aggregate basis. However, again, a review of the JFTC’s decisional practices does not reveal a focus on the financial impact of the abuses on the suppliers.

Therefore, prevention of market concentration at the supplier level does not seem to provide a strong justification for regulating abuse of superior bargaining position.

**Justification by other economic rationale**

**Prevention of over-investment and moral hazard**

Apart from impact on competition and consumer welfare, regulation of abuse of superior bargaining position could be justified on allocative efficiency grounds. The argument is that if the firm or entrepreneur that enjoys the benefits of investment in certain activity does not bear its costs, there is likely to be over-investment of resources in that activity. In the context of abuse of superior bargaining position, the kind of conduct that is most easily accounted for by this justification is forced dispatch of employees and requests for monetary contributions for promotional activities. The rule relating to contribution fees and forced dispatch of employees may enhance economic efficiencies by ensuring that retailers make efficient decisions concerning the relevant events (including opening and refurbishing stores and rearranging shelves and products) and associated services. If the entrepreneur is not responsible for the labour costs of the dispatched employees or the monetary contributions for promotional activities, it will be likely to over-invest in shop opening (dispatch of employees is usually requested for the opening of new shops) and promotional activities, leading to an inefficient allocation of resources.100 In this context, abuse regulation corrects the misalignment of incentives and may render the retailer’s decision-making more efficient. That may provide sufficient justification for condemning abuse of superior bargaining position. There are problems, however, with this justification. Defenders of the entrepreneur’s practices may argue that the costs of the dispatched labour and the monetary contributions have already been taken into account in the contract price paid by the entrepreneur to the suppliers. There is hence no misallocation of resources. The entrepreneur indirectly bears the costs of its own shop opening or promotional activities.

The flaw in this response is that the entrepreneur would only pay the suppliers in advance by way of the contract price for the future right to obtain these services if, for some reason, the suppliers are more efficient in providing them than the entrepreneur. There seems to be no *a priori* reason to believe that the employees at a grocery supplier are more competent in opening new retail shops and shelving stock than the employees of the retailers themselves. There seems to be even fewer valid reasons why the entrepreneur would need to pay the suppliers in advance by way of the contract price just to obtain the same money back later in the form of monetary contributions for promotional activities. This would only seem to be rational if the suppliers obtain a higher return on investment for the same capital than does the entrepreneur. Again, there is no *a priori* reason to believe that the suppliers are more efficient investors of capital than the entrepreneur.

The regulation of unjustified return of goods and retrospective price discounts may also enhance efficiency by making the retailer more careful in placing orders. It may also address a moral hazard problem by encouraging the retailer to manage the

shrinkage issue better and reduce the loss of sales opportunities.\textsuperscript{101} It is, however, unclear how prevalent such inefficiencies and moral hazard are. Over the long term, any retailer’s inefficiencies in placing orders and stock management practices should be disciplined through natural selection in the marketplace. Suppliers naturally have the incentive to trade with more efficient retailers. The retailers, too, should be motivated to achieve better outcomes and gain greater profits. It is even more uncertain whether abuse regulation is indeed improving the situation. The JFTC does not examine if such inefficiencies exist. In any case, it will be very difficult for a competition agency to make such an assessment. One possible alternative is to focus on whether costs and risks are properly allocated so that retailers and suppliers are rightly incentivized, as well as to investigate if there is any reason that the inefficiencies are likely to endure. The JFTC’s current assessment does not seem to deal with these questions.

\textit{Prevention of expropriation of relationship-specific investment}

Regarding the encouragement of investment rationale for regulating abuses of superior bargaining position, the argument is that these abuses expropriate relationship-specific investments made by the suppliers in their relationships with the entrepreneurs. Retrospective changes to contractual terms, such as retrospective price reductions and return of goods, as well as unexpected disadvantages by requiring contribution fees and dispatch of employees, may discourage suppliers from making relationship-specific investments due to the uncertainty about the returns they will obtain.\textsuperscript{102} When the investment is made specifically for trade with a particular retailer, the retailer needs to reassure the supplier that the latter will profit and not be exploited by the retailer after the supplier advances the cost and loses the option of initiating transactions with other retailers. Otherwise, knowing that their investments are vulnerable to expropriation by the entrepreneurs, the suppliers will refrain from making them in the first place.\textsuperscript{103} To the extent that such investments are efficiency enhancing, the deterrent effect resulting from expropriation would be highly undesirable. Is this a valid justification for regulating abuses of superior bargaining position in Japan? Is this a plausible justification as a theoretical matter? Does it comport with the JFTC’s decisional practices?

From a theoretical perspective, an entrepreneur will have no incentive to expropriate a relationship-specific investment if it shares the benefit of the investment and the investment can only be made by the supplier. Or to be more precise, the entrepreneur will not expropriate the relationship-specific investment made by the supplier if its benefit from expropriation is outweighed by the loss of the benefit derived from the investment by the entrepreneur. Just what sort of investment is being contemplated here? It could be an improvement in the distribution of the product that reduces transportation costs. It could be an adaptation in the production process to

\textsuperscript{101} Frank Knight, \textit{Risk, Uncertainty, and Profit} (1st edn, Harper & Row 1965) 260.
the specific requirements of the entrepreneur that render the product more attractive to consumers. As a theoretical matter, it is impossible to rule out expropriation. One can imagine that many of these investments can only be made by the supplier. And given the entrepreneur's superior bargaining power, one would imagine that the entrepreneur would be able to obtain from the supplier some of the benefits from these investments. Therefore, one may be inclined to think that the entrepreneur will not have the incentive to expropriate the supplier's relationship-specific investment. However, it is impossible to conclude a priori that the benefit from expropriation is always outweighed by the loss of benefit derived from the relationship-specific investment. It is thus impossible to conclude that expropriation of relationship-specific investment by an entrepreneur will not happen. However, the parties involved may be able to resolve their problems by means of contracts.104 Or retailers may be disciplined by reputational risks.105 If a retailer acquires a reputation of habitually expropriating relationship-specific investments, suppliers may refrain from trading with it.

Again, the main problem with squaring the abuse of superior bargaining position regulation with this proffered justification is the incongruence between the JFTC's decisional practices and the justification. The JFTC does not seem to focus on conduct that more likely constitutes expropriation of relationship-specific investment. The range of conduct usually targeted by the abuse of superior bargaining position regulation, such as retrospective discounts, forced purchases, unjustified return of goods, dispatch of employees, and contribution of promotional expenses, is more appropriately considered as general exploitation by the entrepreneur than conduct specifically tailored to extract relationship-specific investment. Moreover, the JFTC does not seem to take into account the existence of relationship-specific investment in its enforcement approach. If the JFTC were genuinely concerned about relationship-specific investment, one would expect the JFTC to incorporate the existence of such investment in the definition of superior bargaining position, that is, an entrepreneur would be deemed to hold a superior bargaining position if its supplier has made a relationship-specific investment that is vulnerable to expropriation. However, an examination of the JFTC's decisional practices reveals no such focus on the existence of relationship-specific investment. Although the standard of unexpectedness may relate to this rationale, unexpectedness according to the JFTC's guidelines and decisional practices means that the terms and conditions for a supplier to bear the costs of a particular event have not been clarified.106 The possibility that the supplier may have taken account of the risks in its calculation is not considered by the JFTC. Therefore, it is possible for the JFTC to find a violation when, despite the supplier's expectation of the retailer's unilateral requirement for the supplier to bear the costs, the supplier still makes the relationship-specific investment, thinking it is profitable.

106 See JFTC Guidelines (n 2) ssII.C 2 and 3 for detail.
overall. This is not easily reconciled with the relationship-specific investment theory. Therefore, the avoidance of expropriation of supplier’s relationship-specific investment by the entrepreneur is again unlikely to be a plausible justification for the regulation of abuse of superior bargaining position in Japan.

VI. ABUSE REGULATION AS A SUPPLEMENT TO CONTRACT LAW ENFORCEMENT

Having ruled out all these competition- and efficiency-related justifications for the regulation of abuse of superior bargaining position, it would seem that abuse regulation does not fit into mainstream competition law as it is generally understood. However, that does not mean that abuse regulation serves no useful purpose or is completely devoid of justification. It remains to be determined what is the most plausible theoretical justification for it. In the end, the most plausible justification seems to be that it is a supplement to the deficient enforcement of contract law in Japan.

Japanese contract law tends to fail to give sufficient protection to the supplier. Results of a JFTC survey suggest that breach of contract by retailers is quite common. For example, out of 2228 suppliers dealing with large-scale retailers, 5.9% thought retailers returned goods illegally whereas 3% had been victims of illegal price reduction during the previous year. Although no data exists on how many suppliers have resorted to the civil justice system, reportedly few have done so.107 The general consensus in Japan is that people should have better access to the civil justice system and that time and cost are major obstacles.108 Surveys have confirmed that time and cost are among the causes that make potential litigants reluctant to sue.109 Against

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107 It has been recognized that the civil justice system is not accessible to the SMEs. See eg The Round-Table for Better Access to the Civil Justice: Final Report (2013) 5. The view has confirmed by a survey, which shows the SME’s reluctance to bring the case where they face the legal issues. The Japan Bar Association. Small and medium-sized enterprises (SMEs) appear to be reluctant to consult lawyers. For instance, a 2008 report showed that more than 50% of the SMEs who encountered legal issues failed to consult any lawyer and 34.3% of these SMEs mentioned expensive fees as a reason to forgo consultations. See The Japan Bar Association, Report on SMEs’ Need for Lawyers: Nation-Wide Survey Result (2008) <www.nichibenren.or.jp/library/ia/fjba_info/publication/data/chusho_chousakkekka.pdf> accessed 17 January 2015.

108 See eg The Round Table, Final Report (n 107) <http://minjishihoukon.com/wp-content/uploads/1030_houkoku.pdf> accessed 17 January 2015 (Note: The Round-Table consists of academics and members of business, labour, consumer, and Japan Bar associations.).

109 See Society for the Study of the Civil Procedural System (ed), Report on Japan’s 2011 Civil Litigation Survey (Shoijihomu, 2013) 70–71. In 2012, the average time required to obtain judgments at courts of first instance in civil cases was 7.8 months and, specifically in cases claiming violations in payment of sale, 8.1 months. See General Secretariat of the Supreme Court, Report on the Expediting of Trials (2013) 18–19 <www.courts.go.jp/about/siryo/hokoku_05_hokokusyo/index.html> accessed 17 January 2015. While the cost of proceedings paid to the court are to be borne by the losing party, each litigant normally has to bear the cost of legal fees paid to his or her lawyer, who is free to set the amount. According to a third survey in 2009, about half of lawyers charged 0.7–1 million yen in retainer fees and 2 million yen in reward money for litigation to recover 20 million unpaid sales-proceeds in commercial contracts. See The Japan Federation of Bar Associations, The Expected Legal Fees for Small and Medium Sized Enterprises: Standard Fees Calculated Based on Survey Results (2009) 12–13 <www.nichibenren.or.jp/library/ia/attorneys_fee/data/smeguide.pdf> accessed 17 January 2015. The same survey showed that about 80% of lawyers charged 250–350 thousand yen in retainer fees and about half charged 0.5–0.6 million yen in success fees for cases recovering 5 million sales proceeds through the alternative
this background, abuse regulation under the AMA supplements contract law by prohibiting an entrepreneur from unilaterally changing the contract term and from requesting unexpected expenditure by the supplier by way of a monetary contribution or a dispatch of employees.

The JFTC’s practice is in accordance with this view. In the cases where the JFTC did take formal measures, the offending entrepreneur had imposed on the supplier some economic burden that was not specified in the contract. Return of the goods, price reduction, and delay in payment, which were found to be illegal abuses under the AMA, were likely to be breaches of the contract. Similarly, the request for economic benefit or dispatch of employees would not have had any legal force, not only because it breached the AMA\textsuperscript{110}, but also because there was no contractual obligation for the supplier to do so. The JFTC ties this lack of contractual basis to the concept of unexpectedness, which is used to determine whether fair competition has been inhibited. The emphasis on advanced negotiation and notice and clear documentation underlying the notion of unexpectedness seems to be motivated by a desire to force the parties to stay within the confines of a contract. Return of goods, delay in payment, retrospective discounts, and requests for economic benefit that are not in the contract are, by nature, economic burden that is unexpected at the time of the conclusion of the contract. The JFTC takes the position that such conduct is unjust and illegal when it causes the supplier economic losses that are not expected in advance. Implicit in this criterion seems to be an acknowledgement that contract law enforcement is ineffective in preventing the stronger contractual party from imposing extra-contractual demands or \textit{ex post} revisions to the contract. Considering the length and costs of civil litigation in Japan, it is probable that the supplier would not be able to rely on civil remedies. Moreover, in light of the considerable differences in bargaining power, the supplier may be inhibited from bringing a breach of contract action against the powerful buyer. Intimidation is often present in these contractual relationships. Abuse enforcement can obviate the need for contract action by allowing the supplier to complain to the JFTC and the JFTC to bring enforcement action without divulging the identity of the complainant. This renders the public enforcement option much more effective. Interventions by the JFTC in these cases seem to complement the function of the civil justice system.

Nonetheless, it is acknowledged that supplement to contract law enforcement provides a better justification for some parts of abuse regulation than others. It obviously provides strong justification for abuses that amount to \textit{ex post} revision of the contract such as unjustified return of goods and retrospective discounts. As for compelled purchases, forced dispatch of employees and forced monetary contributions, it seems that in most recent cases, the requirements were not documented in the original contracts and an enforcement focus on advance notice and proper

\begin{footnotesize}
\begin{enumerate}
\item A contractual term that violates the AMA is not always invalid. In the traditional view, public law does not automatically affect the validity of a contract, and the AMA was categorized as public in nature. There is thus room for arguing that a contractual term in breach of the AMA is still valid between the parties. Although the modern view supports the alternate proposition that an AMA violation invalidates a contract term, the issue of validity still remains unclear.
\end{enumerate}
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documentation would effectively control these abuses. However, it is possible that given the parties’ imbalanced bargaining positions, the retailers would be able to impose these demanding terms *ex ante* with proper documentation. In that case, applying unexpectedness as a criterion for legality may be insufficient to stop these practices and there will be a need to resort to scrutinizing contractual terms on substantive fairness grounds.

The JFTC has in fact done so to some extent. It has applied another standard of unjustness—‘imposing unreasonable economic loss’—and, from this standpoint, it argues that return of goods and price reductions that are made in accordance with the contract may be deemed unjust and illegal when the agreed contractual term imposes unreasonable economic loss on the supplier. The obvious, and extremely difficult, question then is what constitutes an unreasonable economic loss. In a way, the significance of this question is currently downplayed in light of the fact that most (if not all) of the JFTC cases in practice feature exploitation that is both unstipulated in the contract and unreasonable (eg the supplier is forced to buy things that would have no economic value at all, such as paintings, hotel vouchers, unsold inventory, etc.). Thus, unexpectedness alone is sufficient to condemn these practices. If, as it may happen, retailers move to stipulate all their current ‘abusive’ practices in the supply contract *ex ante*, the JFTC will no longer be able to rely on unexpectedness as the basis for intervention and will have to venture into regulation of substantive contract terms on the grounds of unfairness and unconscionability. For that to be done soundly and effectively, the JFTC must offer a defensible and legally operationalizable definition of unreasonableness or unfairness.

The JFTC currently offers a range of criteria for determining whether certain practices are unjust. For example, for compelled purchases of goods, the JFTC deems it unjust if the goods being required to be purchased have nothing to do with the underlying contract. For forced contribution of expenses, the JFTC deems it unjust if the incurrence of expenses redounds no direct advantage to the suppliers. For forced dispatch of employees, the JFTC deems it unjust if the supplier does not receive any tangible benefit and the retailer does not bear the cost of the workers. These criteria are beset with problems. First, there is no clear-cut definition of direct advantage and tangible benefit. What constitutes direct advantage or tangible benefit will probably have to be determined on a case-by-case basis, which obviously renders compliance difficult. Moreover, the current definition of a direct advantage is also problematic. While the JFTC does not consider the retailer’s favourable treatment of the supplier in the future to be a direct advantage, it is unclear why that should be so. Secondly, and more importantly, the prohibition of these three abuses can be effectively circumvented with a lower contractual price bargained for in the initial supply contract. For example, the initial contract price can be reduced by the amount that is expected to be paid by the supplier for the purchase of goods or the

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111 Yet, it is possible that the fact that these demands have all been made *ex post* informally may suggest that the suppliers would be able to resist the imposition of these demands in the original contract negotiation and a focus on unexpectedness would provide sufficient protection to the suppliers. Whether that is true remains to be seen.
contribution of expenses. Short of directly regulating the contract price, which is done under the Subcontract Act, the regulation of compelled purchases, forced contribution of expenses, and forced dispatch of employees can be effectively circumvented.112 And if the suppliers are unable to resist these demands *ex post* due to the retailer’s superior bargaining position, there seems to be no reason to think that the suppliers would be able to do so *ex ante*. The regulation of abuse of superior bargaining position may not be able to protect the suppliers after all.

One can perhaps rely less on the concept of unreasonableness or unjustness by applying a more stringent standard for superior bargaining position. However, this is again where the JFTC has fallen short. Setting aside the difficult question of how bargaining power should be measured, if it is agreed that the amount of a supplier’s business accounted for by a particular retailer should be the correct reference point, it only makes sense to use the proportion or percentage of sales, instead of absolute quantity, accounted for by a retailer as the measure. Yet, under the current JFTC practices, a large absolute quantity suffices. It may perhaps make sense to stipulate a threshold percentage of a supplier’s sales accounted for by a retailer as a safe harbour or as the basis of a presumption of superior bargaining position. However, the JFTC has so far not done so. If it is true, as according to a practitioner, that the JFTC regards 8–10% as sufficient for constituting a superior bargaining position, the bar is clearly too low. It is difficult to imagine how a supplier would be unable to channel 8–10% of its sales elsewhere without suffering severe economic burden.

Overall, one may argue that the JFTC decisional practice on the abuse of superior bargaining position is rather opaque and lacks rigour. It also relies on a number of open-ended concepts the application of which is highly fact specific and perhaps haphazard. This renders it very difficult for parties to predict in the future what types of conduct would be deemed to be abuses. The existing cases have largely involved *ex post* imposition of new demands or requests for benefit. They thus make for fairly easy cases for the JFTC to condemn. What would be much more difficult for the JFTC is *ex ante* conduct that is nonetheless unjust and inhibits fair competition. The current decisional practice provides little guidance on what kind of *ex ante* conduct would be deemed abusive.

In the ideal world, one would prefer to rely on contract law and the civil justice system in general to deal with contract law issues. However, if reforms are difficult to accomplish within contract law, an alternative would be public enforcement. Abuse regulation may help contract law function better by providing additional tools for contractual enforcement and by encouraging the parties to maintain better documentation. This is important because competition does not function well when contracts are not complied with. Most business activities and investments are made on the assumption of compliance with contractual terms.113 The rules of contract law generally encourage investment by the contractual parties.114 Usually once a contract is concluded, some investment will be made. For instance, the supplier might produce

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112 On this ground, the Subcontract Act is probably more intellectually coherent than the abuse of superior bargaining position provisions in the AMA.
113 Shavell (n 100) 296–99.
114 ibid, 298–99.
goods to order and keep them until delivery to the buyer becomes due, while the buyer might start to design manufacturing lines with a view of incorporating the input from that supplier. Otherwise there would be no need for a contract and companies could just rely on the spot market. Contract law encourages investment by ensuring that contractual parties can obtain what they have bargained for before they invest. In cases where relationship-specific investment is necessary, contract law provides protection to the potential investor from ex-post opportunistic behaviour or hold-ups, and thus promotes investment.

However, sometimes contract law does not offer sufficient protection from opportunistic behaviour. This deficiency is in fact well documented by noted economists such as Nobel Laureate such as Oliver Williamson. The reasons for this shortcoming include the time and costs it takes to write and enforce a contract, and judges’ unwillingness to enforce the contract (particularly where a breach of contract is hard to verify, and where the substance of the contract is hard to ascertain). Since the costs of litigation are not proportionate to the size of the enterprise, small businesses tend to be at a cost disadvantage when pursuing this option. Small businesses may need public intervention to help protect themselves from opportunistic behaviour in a contractual setting.

Yet, while relying on public intervention to protect weaker contractual parties from ex post opportunism may be defensible, using government regulation to scrutinize contractual terms on substantive fairness grounds is a different proposition altogether. Setting aside the ideological debate about whether it is the government’s business to regulate private contractual terms, the JFTC has so far not convincingly demonstrated that it has found a workable and principled approach to do so. In the absence of such an approach, a considerable part of the current abuse of superior bargaining position decisional practices stands on shaky grounds. This is all the more important in light of the introduction of surcharges for abuse of superior bargaining position. There is an urgent need for the JFTC to re-examine its current enforcement practices. This need is all the more pressing given the risk that abuse regulation may go too far and inhibit efficient transactions that benefit consumers. The risk of over-regulation is considerable in Japan in the context of supplier–retailer relationships due to the former’s considerable political influence. The AMA aims ‘to promote the democratic and wholesome development of the national economy as well as to assure the interests of general consumers’.

115 ibid.
116 Klein, Crawford and Alchian (n 104).
118 ibid 15–23; Oliver Hart, Firms, Contracts, and Financial Structure (1st edn, OUP 1995) 73–85; Shavell (n 100) 299–304.
119 Their political influence was exemplified when the small- and medium-sized companies pushed for the implementation of surcharge penalty under art 2(9)5, particularly referring to the retailer’s abusive practices against the suppliers. See Masaru Oikawa, ‘The JFTC Superior Position Abuse Guidelines for the Small and Medium Sized Enterprises’ (2011) [Tyuusyo Jigyosha kara Mita Yuuetuteki Chii Ranyo Guidelines], 724 Kosei Torihiki 39, 39.
120 AMA, art 1.
VII. CONCLUSION

The fact that regulation of abuse of superior bargaining position cannot be justified by conventional competition law principles and economic rationale does not mean that it serves no useful purpose. In light of the characteristics of the Japanese legal system, there are reasons to believe that weaker contractual parties are often unable to protect themselves from *ex post* opportunistic behaviour by the parties with greater bargaining power. If contract law cannot provide an adequate remedy, regulation of abuse of superior bargaining position, as an adjunct to competition law, may step in. Yet, this does not mean that there is no room for improvement in the JFTC’s current enforcement approach. The JFTC should be required to provide more principled justifications for intervention and to establish the relevant facts more clearly. The JFTC’s current approach leaves much to be desired, with the definition of superior bargaining position lacking rigour and the concept of unjustness incoherent. The need for clarification takes on greater urgency where the scope of Article 2(9)5 is not limited to supplier–retailer relationships; it has been applied in other contexts as well, including franchising businesses and financial services. In fact, in theory, it may even be applied to business-to-consumer transactions. A more principled and transparent approach will not only enable critical evaluation of the enforcement practices, but will also help to avoid over-regulation.

121 Re Seven-Eleven Japan Co, Ltd, JFTC Cease and desist order, of 22 June 2009.
123 Kanai and others (n 23) 350.