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Title: Abuse of Superior Bargaining Position (ASBP): What Can We Learn from Our Trading Partners?

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Abstract: U.S. antitrust law does not provide a remedy for a firm's abuse of its superior bargaining position (ASBP) *vis a vis* another, weaker firm. Several of our major trading partners do have such a provision and there is enough to be learned from their experience and from investigations by academics and international institutions to warrant a careful examination of how such a provision could be made to work within an American framework.

Keywords: vertical restraints, buyer power, superior bargaining position

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**Abuse of Superior Bargaining Position (ASBP):
What Can We Learn from Our Trading Partners?**

Albert A. Foer*

A factsheet issued by candidate Hillary Clinton in 2016 proposed that the systematic breach of contract by a large business, harming a small business, should be made an actionable deceptive trade practice.¹ The proposal targeted developer/candidate Donald Trump, whom Clinton accused of accepting the benefit of performance by “painters, waiters, plumbers – people who needed the money, and didn’t get it – not because he couldn’t pay them, but because he could stiff them.”² Although the weaker contractor can in theory sue for breach, this developer’s command of expensive heavy-hitting attorneys and his reputation for sending them into battle with orders to crush the opponent usually makes litigation financially infeasible—not to mention the possible hope for additional business from Trump in the future.

A question about this proposal from a business reporter started me thinking about the kinds of abuses any business may face when it is dependent on a relationship with a

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¹ “Hillary believes that when large firms use their market power to systematically breach their contracts with smaller contractors—either failing to pay in due course, or failing to pay in full for services rendered—this is a form of deceptive trade practice that should be recognized by federal law and penalized by federal authorities. Hillary will ensure that agencies like the Federal Trade Commission (FTC) and Department of Justice have sufficient statutory authority to investigate patterns or practices of such misconduct, and to bring enforcement actions where appropriate.” Factsheets, *Making Sure Small Businesses Get Paid—Not Stiffed*, <https://www.hillaryclinton.com/briefing/factsheets/2016/07/07/making-sure-small-businesses-get-paid-not-stiffed/>, last visited Aug. 14, 2016.

² *Id.* The Clinton proposal did not find its way into the National Democratic Party’s 2016 platform, although for the first time in 28 years, the platform contains an antitrust plank that promises the Democrats “will make competition policy and antitrust stronger and more responsive.” *2016 Democratic Party Platform, July 21, 2016*, at 12, <https://www.demconvention.com/wp-content/uploads/2016/07/Democratic-Party-Platform-7.21.16-no-lines.pdf> (last visited Aug. 14, 2016).

much stronger commercial actor.³ Frequently reported examples include not only retrospective discounts of the type the Clinton factsheet describes, but unilateral *ex post* revisions to the contract and extra-contractual demands such as return of goods, delay in payment, compelled purchases, and forced dispatch of employees. How is it that our laws have failed to provide practical remedies in these frequently cited situations? If we care, what types of reform should be pursued?

This paper begins with a brief discussion of two transformations, one in industrial organization and the other in economic theory, which explain how the context for antitrust policy has changed with regard to vertical relationships. In the second section, we look at foreign laws relating to Abuse of Superior Bargaining Position (“ASBP”) paying special attention to the conflicting views of major trading partners such as Japan, Germany, and South Korea, and Bulgaria on the one hand, and the United States on the other. A closer focus on Japanese experience occupies the third section and is followed by a look at the most recent process of adopting an ASBP law – in Bulgaria. Section five considers the availability or not of U.S. laws to deal with ASBP issues, including contract law, and honing in on both prongs of Section 5 of the Federal Trade Commission (“FTC”) Act, “unfair or deceptive acts and practices” and “unfair methods of competition” as offering the most promise.⁴ The sixth section offers specific recommendations, followed by a conclusion.

I. Two Crucial Transformations

Two transformations, one in the economy’s **industrial organization structure** and the other in **economic theory**, have left the party in the inferior bargaining position largely without meaningful defense. The Clinton proposal addresses only a piece of the larger problem. It is time to recognize that a serious gap exists in the law regulating vertical relations and to consider responsive actions.

³ See Robb Mandelbaum, *Hillary Clinton Has a Plan for Small Businesses and the Big Businesses That Cheat Them*, <http://www.forbes.com/sites/robbmandelbaum/2016/08/23/hillary-clinton-has-a-plan-for-small-businesses-and-the-big-businesses-that-cheat-them/#4631a05d44c3> (August 23, 2016, 1:00 pm).

⁴ 15 U.S.C. sec. 45(a)(1).

The **structural transformation** is the explosive growth in frequency and size of the Power Buyer. For most of our history, in the relationship between suppliers and retailers, the suppliers held most of the power. They tended to be large manufacturers who could define the terms of trade with retailers based on the bargaining strength provided by their ability simply to refuse to deal, which has protection under what is known as the Colgate Doctrine.⁵ Antitrust law grew up in the late 19th century around the concept that powerful sellers needed to be regulated in the interests of fairness to small businesses and consumers and to protect the polity against concentrated economic power. Only in recent years has the balance of economic power substantially shifted to giant retailers, led by Walmart and Amazon, whose command over access to consumers on a national and international scale, whether in-store or on-line, represents so large a portion of sales that their suppliers have little or no leverage in negotiating.⁶ The evolution of the Internet and networks with two-facing markets has created new issues of b2b imbalance, e.g., the imbalance between Uber's platform and its independent drivers, or between credit card networks and merchants who feel compelled to accept the major cards.

The **transformation in economic theory** came through the gradual development of neoclassical economic theory and the triumph of one school in particular, the Chicago School of law and economics, which moved its intellectual furniture into political power during the Reagan Administration and to a large extent continues to dominate antitrust thinking.⁷ An essential feature of the Chicago School was its focus on horizontal collusion while at the same time denigrating issues relating to monopolization or vertical restraints.

⁵ U.S. v. Colgate & Co., 250 U.S. 300 (1919) (A company may unilaterally terminate business with any other company without triggering a violation of the antitrust laws. This created a narrow exception to the per se illegality of vertical price restraints that existed long prior to the *Leegin* decision, by allowing a supplier merely to say it will not deal with resellers that charge less than the supplier's stipulated price, provided it did not discriminate among suppliers.)

⁶ The American Antitrust Institute ("AAI") played a role in placing the issue of buyer power on the antitrust map. Its 2004 conference, <http://www.antitrustinstitute.org/events/5th-annual-conference-buyer-power-and-antitrust>, led to a symposium report in 72 ANTITRUST L.J. 505-744 (2005), including Albert A. Foer, *Introduction to Symposium on Buyer Power and Antitrust*, *id.* at 505. A follow-up symposium in 2007 is available at http://www.antitrustinstitute.org/sites/default/files/OpeningPlenary_0.pdf. Analysis of buyer power implications has often entered into AAI's intervention arguments, for example, comments on the Comcast/Time Warner Cable merger, <http://www.antitrustinstitute.org/congtent/antitrust-experts-urge-federal-communications-commission-reject-comcast-time-warner-cable-0>.

⁷ *See, e.g.*, MARC ALLEN EISNER, ANTITRUST AND THE TRIUMPH OF ECONOMICS.

A specific target of the Chicago School's antipathy was the Robinson-Patman ("R-P") Act, a Depression-era statute intended to protect small businesses against what was then the emerging buyer power of chain supermarkets and other chain retailers. The R-P Act is easy enough to criticize because of its complex drafting and because it can be used to protect inefficient businesses to the possible detriment of the type of consumer welfare (meaning, essentially, efficiency for producers) that the Chicago School defined as the ultimate objective of antitrust enforcement. Although the R-P Act contains efforts to protect small businesses against the abuse of buyer power, it is primarily the horizontal competitor of the chain store who is promised protection, not the supplier, and in any event today R-P is virtually a dead letter, particularly in regard to federal enforcement policy. (Private civil cases are still brought occasionally, with great difficulty and little noteworthy success.)

In essence, the Chicago School holds that vertical relationships between firms are a matter of voluntary negotiation and as a matter of first principle contracts should be upheld, even if utterly one-sided. Retail price maintenance (i.e., the right of a manufacturer to terminate a retailer who discounts from the manufacturer's suggested retail price) was for many years considered an example of *per se* illegal price-fixing, but the Supreme Court now holds it generally reasonable, hence legal, for manufacturers to control the retailers they contract with by setting the retail price.⁸ This may sound like a victory for suppliers, but manufacturers generally want to maximize their own output, which is facilitated by a competitive retail level; they can be intimidated into enforcing a retail price maintenance regime by threats from giant retailers that they will delist the manufacturer unless it stops dealing with small retailers who compete at the retail level by discounting.

In recent years, the Supreme Court has gone even further in altering the balance between giant retailers and their suppliers by holding that contracts may contain mandatory

⁸ *Leegin Creative Leather Products v. PSKS*, 551 U.S. 877 (2007) (vertical price restraints subject to rule of reason rather than *per se* illegal).

arbitration clauses and such clauses may preclude class arbitrations.⁹ What this means in practice is that it has arguably become legal malpractice for attorneys not to counsel their corporate clients that they should insert class-preclusive mandatory arbitration clauses into every contract. Such provisions have priority over both state unconscionable contract statutes and federal antitrust laws. The result is the shriveling of the ability of suppliers to bring class actions—the only realistic litigation weapon-- against the powerful buyers they deal with and are dependent upon.

Given (1) the increasing ubiquity of on-line contracts that are not subject to negotiation (i.e., contracts of adhesion), (2) the well-known and ever-increasing expense of antitrust litigation, (3) the incentive that power buyers have to fight aggressively to protect their standard contracts, (4) the disappearance of vertical class actions, and (5) the inability of individual suppliers to justify the risks and expense of litigation-- we are now in a realm entirely different from 1890 or 1914 when the U.S. antitrust laws were written.

II. What Foreign Laws Might Teach Us: Abuse of Superior Bargaining Position

The modern imbalance between power buyers and their suppliers has been recognized by law in Austria, France, Germany, Italy, Japan, Korea, the Slovak Republic, and Taiwan.¹⁰ The International Competition Network (ICN) issued a report on what is known as Abuse of Superior Bargaining Position (or ASBP) in conjunction with its 2008

⁹ *American Express Co. v. Italian Colors Restaurant*, 570 US ___, 133 S.Ct.2304 (2013). (Federal Arbitration Act of 1925 does not permit courts to invalidate waiver of class arbitration on the ground that the plaintiff's cost of individually arbitrating a federal statutory antitrust claim exceeds the potential recovery.)

¹⁰ For discussions of Abuse of Superior Bargaining Position, see Masako Wakui and Thomas K. Cheng, *Regulating abuse of superior bargaining position under the Japanese competition law: an anomaly or a necessity?* J. ANTITRUST ENFORCEMENT, 2015, 1-32 (2015), 10.1093/jaenfo/jnv022; Mitsuo Matsushita, *Abuse of Superior Bargaining Position –in the Context of Different Antitrust Philosophies-*, presented to the 2015 ASCOLA conference in Tokyo, Japan, to be published in a forthcoming ASCOLA book (text in author's files), slide presentation at <http://ascola-tokyo-conference-2015.meiji.jp>; and Yee Wah Chin, *What Role for Abuse of Superior Bargaining Position Laws?*, 256 N.Y.L.J. , July 6, 2016. A recent paper that deals with the food sector and also reviews how the authorities in the E.U., Italy, Germany, Spain, and the U.K. define bargaining power is Ioannis Lianos and Claudio Lombardi, *Superior Bargaining Power and the Global Food Value Chain. The Wuthering Heights of Holistic Competition Law?* <https://www.ucl.ac.uk/cles/research-paper-series/research-papers/cles-1-2016>.

conference.¹¹ Of the 32 jurisdictions responding to a survey, seven reported specific legal provisions relevant to the questionnaire's definition of ASBP.¹² Our major trading partners-- Germany, Japan and Korea--employed such provisions as part of their competition law while four others employed ASBP in other contexts such as protecting local suppliers in rural areas, tort liability under commercial code, a private civil remedy statute, and as an administrative regulation of retail chains. The Report simply conveys the survey results without taking a position and although there was discussion of the Report at the conference, no action was taken.

Professor Mitsuo Matsushita has compared the Japanese and U.S. views that were advocated at the ICN, placing them in the context of differing philosophies of the purposes of antitrust law.¹³ He summarizes the Japanese view in this way:

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

¹¹ ICN Task Force for Abuse of Superior Bargaining Position, *Report on Abuse of Superior Bargaining Position*, April 14-16, 2008, www.internationalcompetitionnetwork.org.

¹² The ICN Task Force's questionnaire requested respondents to provide their own definition of ASBP, but offered the following guidance in Appendix E of the Report:

This questionnaire seeks information on the analysis and treatment of "abuse of superior bargaining position" in business to business relations in ICN member jurisdictions. In jurisdictions that regulate "abuse of superior bargaining position," the concept typically includes, but is not limited to, a situation in which a party makes use of its superior bargaining position relative to another party with whom it maintains a continuous business relationship to take any act such as to unjustly, in light of normal business practices, cause the other party to provide money, service or other economic benefits. (For example, acts such as request for provision of supplier's labor without compensation and coercive collection of contributions, exercising buying power, are considered abusive in Japan.) A party in the superior bargaining position does not necessarily have to be a dominant firm or firm with significant market power.

¹³ Matsushita, cited in fn 10 *supra*.

position in terms of condition of competition through the different means from price and quality.”

And he summarizes the U.S. view:

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

It is clear that ASBP does not fit within the still-prevailing Chicago School heritage in the U.S. and many of the other nations that participate in the ICN. First, ASBP is not about monopoly (U.S.) or dominance (E.U.) although in situations where the buyer holds a sufficient share of the relevant market, ASBP situations may come within those frameworks. Rather, ASBP is about relative positions of power within a vertical channel, and it is possible, even likely, that the buyer would not qualify as generally dominant in Europe, much less as a monopolist in the U.S.

Second, because most economists do not perceive that vertical relatives are in competition with one another, there is no direct sense in which ASBP affects “competition” so much as it affects one particular company’s ability to compete.¹⁴ If the Chicago School mantra prevails, that antitrust is about protecting competition, not protecting competitors, then ASBP could rarely be relevant. Later I will argue that it is the competitive process that is affected, with direct effects on how competition is carried out and longer term effects if, *e.g.*, a high proportion of suppliers are eliminated from the market by virtue of a power buyer’s abusive practices. Additionally, there may be effects on competition at the buyer’s level if the buyer chooses to pass on its lower input prices to its consumers, thereby gaining market share at the expense of competitors. But many ASBP issues do not realistically have

¹⁴ The late Robert Steiner argued that supplier and buyer are engaged in “vertical competition” over who will get how much of the consumer’s dollar, an argument he backed up empirically by showing whether the manufacturer or the retailer controlled marketing and received the larger portion of the final price. Robert L. Steiner, *The Evolution and Applications of Dual-Stage Thinking*, 49 ANTITRUST BULL. 877, 897 (2004).

competitive effects, as currently required in the U.S. and the majority of antitrust regimes worldwide.

Third, and perhaps most important from a philosophical perspective, ASBP does not fit into the Chicago School condition that competition policy should have a single-minded objective of promoting efficiency.¹⁵ Countries that have adopted ASBP take into account such additional values as promotion of competition, consumer welfare (meaning, broadly, benefits to consumers and not merely an efficient economy), freedom of undertakings and individuals, egalitarianism, fairness in transactions, and a pluralistic society.¹⁶

There may be a variety of reasons why a country would be committed to a market economy but not to an efficiency-only goal. For instance, Professor Matsushita points out that in Japan the economic structure has long been characterized by the dominance of large businesses over small businesses within severe dependency structures. In Germany, the post-war Ordo-Liberal philosophy heavily influenced emergence of a social market economy, very different from the Nazi period where individuals' freedom was suppressed. Ordo-Liberals argued with much success for private economic powers to be controlled by law while, in other economic areas, the direct state intervention should be kept at a minimum.¹⁷

Thus the controversy over ASBP significantly reflects cultural, political, and historical differences among nations. Professor Matsushita observes:

ASBP is one of the most interesting areas in antitrust law to see how much harmonization and convergence should be pursued among nations and how much indigenous features should be retained. In other words, how much diversity should be kept in diversity when legislators of antitrust laws in the world seek for “unity in diversity”.

¹⁵ See Albert A. Foer, *On the Inefficiencies of Efficiency as the Single-minded Goal of Antitrust*, 60 ANTITRUST BULL. 103 (2015).

¹⁶ Factors cited by Matsushita, fn 10 *supra* at 5.

¹⁷ DAVID J. GERBER, *GLOBAL COMPETITION: LAW, MARKETS, AND GLOBALIZATION* 167-75(2010) (“The core idea was that the law should prevent deviations from what the ordoliberals called ‘complete competition,’ ie competition in which no firm has sufficient power to manipulate prices or other conditions of competition.”)

III. Experience in Japan

The Japanese antimonopoly law's prohibition of abuse of a superior bargaining position against a trading partner is discussed at length by Wakui and Cheng.¹⁸ Typically, they find that

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 as relationship.¹⁹

Wakui and Cheng pay particular attention to five recent cases where the JFTC found that discontinuing trade with the retailer at issue would have substantially impeded the supplier's business. In all of these cases, it was found that the supplier was compelled to accept the retailer's disadvantageous request. However neither in these cases nor in the JFTC Guidelines was it made clear to what extent the retailer substitution must be made difficult for the supplier nor how dependent the supplier must be for the abuse of superior bargaining power to be established.²⁰

Under the JFTC Guidelines, infringement is found only when the practice is conducted "unjustly in light of the normal business practices."²¹ Wakui and Cheng suggest that this is too open-ended and that a more concrete interpretation is necessary.²²

Wakui and Cheng note "the obvious criticism" of ASBP that "these abuses in most cases do not seem to result in harm to competition or loss in consumer welfare."²³ That is, if

¹⁸ Wakui and Cheng, fn 10 *supra*, at 4 *et seq.* In addition to Article 2(5) of the Anti-Monopoly Act, there are substantial guidelines issued by the JFTC that are discussed in their article.

¹⁹ *Id.*, 3.

²⁰ *Id.*, 5.

²¹ *Id.*, 6.

²² *Id.*, 6. They elaborate through review of specific abusive practices at 7- 13. Two complementary sets of rules are applicable to retailers, with more specific guidance for (1) Large-scale Retailers and (ii) the Subcontract Act, discussed at 13- 15.

a powerful buyer extracts large discounts or other special benefits, there would seem to be no consumer harm so long as these abuses do not affect the downstream output price paid by consumers. Indeed, if the powerful buyer is a retailer in a competitive market, it probably passes on its savings to consumers. Moreover, ASBP “does not sit well with conventional competition law principles,” in that market power is not required to establish superior bargaining position.²⁴ The authors report that Japanese academia is divided on whether ASBP is consistent with competition law.²⁵

IV. Bulgaria

The Government of Bulgaria was concerned that large retail chains may be using their superior bargaining position to dictate the terms of contractual relations with their suppliers. On July 9, 2015, the Bulgarian Parliament adopted a package of measures including an amendment to the Protection of Competition Act that prohibits ASBP.²⁶ In considering how to deal with ASBP, Bulgaria asked the World Bank for its opinion, which led to a 94-page report, “Addressing Unfair Trading Practices in Bulgaria.”²⁷ The report

²³ *Id.*, 16.

²⁴ *Id.*, 16.

²⁵ *Id.*, 16.

²⁶ See Anton P. Petrov (Baker & McKenzie), Bulgaria: new regulation against abuse of economic dependence, www.Lexology.com/library/detail.aspx?g=55bcbcd2-115d-49cf-8041-a5ef650c7d64 (visited Sept. 15, 2016) and Tom Webb, Bulgaria restricts abuse of stronger bargaining position, *Global Competition Review*, July 31, 2015, <http://globalcompetitionreview.com/news/article/39188/bulgaria-restricts-abuse-stronger-bargaining-position> (visited Sept. 15, 2016).

²⁷ Competition Knowledge and Advisory Services Program, The World Bank, *Addressing Unfair Trading Practices in Bulgaria*, Report No. 87870-BG, April 30, 2014. This first reports on workshop proceedings that took into account practices in Italy, the Czech Republic, and Hungary and contributions from the World Bank and the OECD. A second chapter reviewed selecting European policies in addressing unfair trading practices and options for Bulgaria. Chapter three presents various methodological issues in the determination of significant market power, and a conclusion presents the World Bank’s opinions alluded to in the text above.

proposed six options for Bulgaria, which are worth summarizing here and presenting in full in a footnote.²⁸

Option 1: *Enrich the commercial law with specific provisions, prohibiting unfair trading practices in business-to-business relations.*

Option 2: *Amend the competition law to introduce the concept of ‘economic dependence’.*

²⁸ *Id.* at 12.

Option 1: *Enrich the commercial law with specific provisions, prohibiting unfair trading practices in business-to-business relations.* Unfair trading practices in business-to-business relations are defined in the legislation on commercial contracts and the Commission for Protection of Competition is tasked with enforcing these provisions in cases where business conduct affects overall competition.

Option 2: *Amend the competition law to introduce the concept of ‘economic dependence’.* With this option, the Commission for Protection of Competition could apply provisions on ‘abuse of market dominance’, even in cases where the dominance test is not met, by finding that ‘economic dependence’ exists in buyer-supplier relations. However, addressing unfair trading practices through antitrust law enforcement is associated with risks that the work of the Commission for protection of Competition is politicized and the impartiality of the competition authority is questioned. Also, it is likely that the competition authority would be overburdened by a large number of cases requesting the attention to the practices of ‘abusive’ large buyers. This could ultimately backlog the system and hamper enforcement.

Option 3: *Enhance the authority of the Commission for Protection of Competition to apply legal instruments on unfair competition practices.* Implementing this option would be associated with significant reform efforts, in terms of associated changes of both, competition and consumer protection laws, and in terms of enhancing the capacity of the Commission for Protection of Competition in the consumer protection area.

Option 4: *Promote codes of conduct applicable to trading relations of businesses.*

This is the option implemented in the United Kingdom, where voluntary codes of business conduct, aimed at tackling imbalances in the supply chain, favor suppliers and prevent retailers from unduly shifting costs and risks onto suppliers.

Option 5: *Adopt national rules aligned with the debated EU-level rules on unfair trading practices.* Such an option, however, would delay significantly designing a solution to address unfair trading practices in business relations in Bulgaria as it is unclear when (and whether) such EU-wide rules would be adopted.

Option 6: *Adopt sector specific legislation to introduce the concept of ‘significant market power’.* The Commission for Protection of Competition could be tasked with enforcing sector rules that introduce the concept of ‘significant market power’ in business-to-business relations. It is important to note that this ‘least preferred’ option, albeit endorsing the introduction of the concept of ‘significant market power’ in Bulgaria, is distinctly different from the approach proposed in the draft bill for amending the law on the Protection of Competition submitted to Parliament by a group of Members of Parliament on March 7, 2014. Under the draft bill ‘significant market power’ is proposed as a general competition law instrument applicable to all sectors and markets. In the Czech and Hungarian cases ‘significant market power’ is introduced through sector legislation on the agriculture and food retail sectors, and the competition authority, as in the Czech case, is tasked with enforcement of such sector legislation. In the Hungarian case, a separate agency is tasked with enforcement. A draft bill recently submitted to the Bulgarian parliament proposes an approach that will likely put a significant strain on the Commission for Protection of Competition, both in terms of capacity and resources.

Option 3: *Enhance the authority of the Commission for Protection of Competition to apply legal instruments on unfair competition practices.*

Option 4: *Promote codes of conduct applicable to trading relations of businesses.*

Option 5: *Adopt national rules aligned with the debated EU-level rules on unfair trading practices.*

Option 6: *Adopt sector specific legislation to introduce the concept of ‘significant market power’.*

The World Bank ultimately “established that addressing unfair trading practices through commercial courts was likely the most viable and effective option for Bulgaria.”²⁹ Bulgaria did not follow this recommendation by passing a law giving the Commission for Protection of Competition (“CPC”) new authority to define “superior bargaining position” (“SBP”, instead of “significant market power”, which was the language used in the original drafts of the bill). I gather from a report on the new law by a business consultancy that “the abuse of dependence can be regarded as a form of unfair competition in vertical relations between non-competitors;” that “the application of the new rules is limited to situations where the negative effect of the UTPs [unfair trade practices] in the long run would also harm consumers.,” and that there must be an “absence of adequate alternatives for the weaker party.”³⁰ The law contemplated that the Commission would issue a special methodology for determining SBP and forms of abusive behavior.

The first decision under the new law was on May 26, 2016, when the CPC imposed a pecuniary sanction of Siemens Bulgaria, a non-dominant company that had a long-standing relationship with the claimant, which had been awarded a contract for maintenance and repair works of a Siemens steam turbine by a heating company. Siemens Bulgaria was an unsuccessful bidder, but it was also the only source that could provide the replacement parts for the turbine and, after supplying the parts under previous contracts, it now refused to supply them to the claimant. The CPC held that the superior bargaining position was established by the fact that the claimant could only negotiate with Siemens Bulgaria as the exclusive supplier of the part. The respondent’s behavior was contrary to good faith (a

²⁹ *Id.* at 13.

³⁰ Pavlov, note 26. Pavlov points out that “victims” of UTPs can be undertakings on all levels of the supply chain, not merely suppliers.

requirement of the ASBP law) because its unjustified refusal to deal was in the context of long-standing commercial relations and its participation in the tender procedure demonstrated it was capable of supplying the products at issue. This also established that its behavior did not have objectively justifiable economic grounds. The weaker party suffered damages by not being able to fulfil its contractual obligations. And finally, the refusal to supply could also damage the interest of consumers because the repair works of the heating company's turbine were delayed. The penalty could have ranged between approximately EUR 5,100 and EUR 25,500; the CPC imposed an intermediate sanction of approximately EUR 17,900.³¹

IV. Setting the Table: ASBP and the U.S.

Before moving on, let's face the question of why contract law is not sufficient to resolve the common ASBP complaints. Common law defenses in contract cases include duress, lack of consideration, and (sometimes) unconscionability. These give the victim the right to have a contract abrogated. The issue in the ASBP cases, however, usually won't be resolved by this sort of remedy, since it is the insistence of the buyer that reconstructs or diverges from the contract. The supplier wants the contract adhered to, and nothing more. Moreover, even if contract law provided a sufficient remedy, the problem would remain, as in the Trump unilaterally imposed discount illustration, that the calculation of expense, delay, and risk of litigation *vis a vis* the prospective damage award makes impractical a breach of contract case that is not part of a class action.³² Contract law has not provided and is not likely to provide a solution to the abuse that can be imposed by superior bargaining position.

³¹ Gabriela Edreva, First sanction for abuse of superior bargaining position imposed by the Bulgarian competition authority, C'M'S' Law-Now, [https://cms-lawnow.com/ealerts/2016/06/first-sanction-for-abuse-of-superior-bargaining-position.\(06.06.2016\)](https://cms-lawnow.com/ealerts/2016/06/first-sanction-for-abuse-of-superior-bargaining-position.(06.06.2016)).

³² A theory of "efficient breach of contract" associated with the Chicago School has been the subject of controversy. The theory justifies breach of contract, even if the contract does not so provide, on grounds of efficiency, provided damages are paid. An article criticizing the theory argues that the theory fails on grounds of efficiency: "But the gains here are generally illusory because the unilateral decision by the promisor provokes a dispute over damages that may end in costly litigation." Daniel Friedmann, 18 J. LEGAL STUDIES 1, 24 (1989).

Yee Wah Chin reviews the state of ASBP in the U.S., concluding that “while there is no general law in the United States regarding a use of superior bargaining position, the concern exists and is addressed in many states for specific industries in which there is a conclusion that a superior bargaining position is common.”³³ The three federal laws that seem most relevant are the Lanham Act,³⁴ the FTC Act,³⁵ and the Robinson-Patman Act.³⁶

The Lanham Act protects against unfair competition which is concerned with injuries to business reputation and present and future sales as a direct result of another’s false or misleading statements.³⁷ There are many states with similar laws. The problems for applicability to ASBP are that (a) injury to the supplier’s reputation is not usually at issue and (b) most of the ASBP situations do not involve false advertising or false or misleading statements.

Section 5 of the FTC Act prohibits both unfair methods of competition and unfair or deceptive acts or practices in commerce. Could ASBP situations be covered by Section 5 as “unfair or deceptive acts or practices”? The Clinton proposal suggests that possibility in the narrow case of a powerful business refusing on a systematic basis to pay suppliers according to contract. If a Donald Trump routinely enters contracts that say one thing while he intends not to abide by the payment clause, this could arguably be the basis for finding a deceptive practice, which could allow the FTC to impose injunctive relief or possibly also to obtain a financial remedy, “consumer redress.” Many states also have similar laws. A limitation is the fact that the FTC interprets “unfair or deceptive acts or practices” as those

³³ Yee Wah Chin, fn 10 *supra*.

³⁴ 15 U.S.C. sec. 1127.

³⁵ 15 U.S.C. sec. 45.

³⁶ 15 U.S.C. sec 13. The Robinson-Patman Act prohibits price discrimination among similarly situated customers that might injure competition, the discriminatory provision of or payment for services, and inducing or knowingly receiving discriminatory prices. Although in theory it can reach certain abuses of buyer power, it seems unlikely to be either relevant to or effective in ASBP situations.

³⁷ See *Lexmark International v. Static Control Components*, 572 U.S. ____ , 134 S. Ct. 1377 (2014).

which take advantage of a consumer.³⁸ Trump’s plumbers and other contractors are categorized as suppliers, not consumers. Under a definition of ASBP such as used by the Bulgarians, anyone in the supply chain could be a victim with standing to recover.

Putting the last point aside, in theory at least, power buyers would have a way around a holding based on deception: they could systematically disclose within the four corners of a contract all of the abuses that they might utilize. Such a contract, ugly as it may be, would not be deceptive but would it be “unfair” under the FTC Act or “unconscionable” as a contract? The contract question takes us back to whether arbitration clauses have in effect taken away the ability to rely on unconscionability defenses under state laws by disallowing class-wide arbitration.³⁹ Amendment of the Arbitration Act to overturn the Supreme Court’s interpretation, may be necessary to fix this problem.

A more interesting question is whether the unfair competition jurisdiction of Section 5 could be employed against the array of practices covered by ASBP. In 2015 the FTC issued a Statement of Enforcement Principles Regarding “Unfair Methods of Competition,” which set out three principles it will follow: (a) the public policy underlying the antitrust laws, that of promoting consumer welfare; (b) whether the conduct has caused or is likely to cause harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications; and (c) the FTC is less likely to challenge conduct as an unfair method of competition on a standalone basis if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm from the act or practice.⁴⁰

³⁸ See *A Brief Overview of the Federal Trade Commission’s Investigative and Law Enforcement Authority (Revised, July 2008)*, <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority>. (“‘Unfair’ practices are defined as those that “cause[] or [are] likely to cause **substantial injury** to consumers which is **not reasonably avoidable** by consumers themselves and **not outweighed by countervailing benefits** to consumers or to competition”(15 U.S.C. Sec. 45(n)).”)

³⁹ Discussion in text at note 9 supra, and *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011) (Federal Arbitration Act of 1925 preempts state laws that prohibit contracts from disallowing class-wide arbitration.)

⁴⁰ <https://www.ftc.gov/system/files/documents/public-statements/735201/150813section5enforcement.pdf>.

Taking these three criteria in reverse order, we have seen that ASBP does not fit comfortably into today's standard interpretation of the antitrust laws, so enforcement of the Sherman Act or Clayton Act is probably not sufficient unless the threshold market share required for monopsony can be met. (What this share is has not been clearly established although many commentators refer to monopsony as the mirror image of monopoly, implying that the threshold should be as high for buyers as it is for sellers, a questionable assertion.) The conduct is also not likely to harm competition, since standard antitrust does not consider vertical relationships to be competitive. We will return to this question. Finally comes the matter of whether consumer welfare is harmed by ASBP. If consumer welfare is interpreted in the manner advocated by the Chicago School, ASBP would have to affect output and prices, which would be rare in situations where monopsony is not found. And where monopsony is found, it may be a defense that the buyer in its other role as seller passed on its input savings to end-use consumers.⁴¹

Fortunately, broader understandings of consumer welfare also have support, so that, for example, many scholars and courts uphold the idea that antitrust is not only about price, but also quality, service, choice, and innovation, and that it is appropriate to look to long term effects as well as near-term. I would argue that competitive process rather than narrowly interpreted consumer welfare is the principal objective of the antitrust laws.⁴² In this light, one can make several points in favor of applying “unfair methods of competition” to ASBP.

First, the very word “unfair” in Section 5 invites ethical judgment, and it would be difficult to argue that there are no situations in which a powerful buyer uses muscle that goes beyond customary business practice in ways that most people would say are unjust. (How frequently this occurs can be studied empirically.) Even if “unfair” is interpreted to mean “inefficient” – as some Chicago School advocates seem to believe—the standard for ASBP

⁴¹ *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007) (Plaintiff alleging predatory buying—overbuying a raw material in order to drive up price and drive its competitors out of business—must prove that defendant caused the price to consumers to rise and is likely to recoup the costs incurred in such a scheme.)

⁴² Albert A. Foer, *The goals of antitrust: thoughts on consumer welfare in the US*, in PHILIP MARSDEN (ED), *HANDBOOK OF RESEARCH IN TRANS-ATLANTIC ANTITRUST* 566 (2006).

could be written to specifically include weighing the role of efficiency as one defensive justification.

Taking the long view, what would happen if a power buyer is able to weaken enough suppliers so that the supplier level consolidates, and competition at that level is reduced? One can answer that this would likely require cognizable market power on the part of the buyer or that it would be against the buyer's interest to weaken competition at the supplier level. As to the first, however, there may be aspects of a vertical relationship where market power as traditionally understood is absent, but the supplier's dependency on the outlet is critical to the ability to continue in business. As to the second, there are many instances where a supplier in fact was put out of business or forced to give up independence by being acquired. The buyer may make a mistake as to how far it can push or may be driven by near-term benefits and simply not care if the supplier drops out.⁴³

Another long view factor is the role of investment. Where there is a continuing relationship anticipated with a particular buyer, the supplier may sink costs, e.g. of expanding its line of production, to meet the requirements of the buyer. Threatening to terminate the relationship unless new demands are met sounds more like unfair bullying than the level playing field ideal of competition.

Ultimately, we need to be talking about whether we prefer for our marketplace to be regulated by some reasonable legal standards or the law of the jungle. Our system has often confronted this quandary and come up with solutions: e.g., the concept of the "business affected by a public interest" which would justify regulation; special duties imposed on common carriers such as ferrymen or hotelkeepers; laws specifically directed to the protection of consumers or to classes of businesses such as franchisees. While there is no common law of fair trading as such, our history gives support for the development of remedies as new methods of unfair commercial actions evolve and are recognized as important.

⁴³ See Albert A. Foer, *Mr. Magoo Visits Wal-Mart: Finding the Right Lens for Antitrust*, 39 CONN. L. REV. 1307, 3123-26 (2007).

Clearly there are concerns about the implications of importing ASBP into the U.S. legal system. These must be addressed in any serious reform proposal.

Yee Wah Chin, for example, supports the view that “a law that penalizes the unilateral actions of [a buyer who extracts more favorable terms], that otherwise lacks market power, cannot only lead to inappropriate government intervention into routine business decisions and agreements, but also increase the risk of chilling pro-competitive conduct.”⁴⁴ Further, an ASBP prohibition “may deter companies from doing business with small- or medium-sized counterparties, distributors or suppliers that the law ostensibly seeks to protect, thereby hurting economic efficiency and consumer welfare, as well as the small businesses that such a prohibition may be intended to protect.”⁴⁵

Nevertheless, she says, if ASBP is adopted, the framework should require that the abuse should be excused if it results in enhanced efficiency and increased consumer welfare. Or, she suggests, another approach may be to focus on the industries and businesses where concerns seem to be concentrated and adopt laws such as franchise regulatory laws for those industries, establishing *ex ante* what is legal.⁴⁶

Wakui and Cheng also conclude, after finding that ASBP does not fit comfortably into competition law, that ASBP laws may serve a useful purpose, in the light of the characteristics of the Japanese legal system where the weaker contractual parties are often unable to protect themselves and contract law cannot provide an adequate remedy. They suggest that the JFTC should be required to provide more principled justifications for intervention and to establish the relevant facts more clearly, developing a more principled and transparent approach.⁴⁷

⁴⁴ Yee Wah Chin, note 4, *supra*.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Wakui and Cheng, note 4 *supra*, 32.

V. Recommendations and Conclusions

From this discussion, I propose the following recommendations for the U.S.:

- (1) Empirical information on the frequency and impact of the various forms of ASBP should be gathered by the FTC in public workshops and by formal investigation, including evidence of how ASBP has been enforced in other jurisdictions and the effects. The workshops would take into account current protections (or not) under civil contract and tort law and should lead to a public staff report including findings of fact and staff recommendations as to how the Commission should go forward (if at all), e.g., by enforcement actions aimed at specific conduct, by publishing guidance as to how the FTC will interpret Section 5 in this area, by rulemaking, or (if Section 5 cannot be utilized) by formal recommendation to Congress.
- (2) Critical issues in regard to possible reforms include: narrowing the vagueness of any standards so that every contract cannot be questioned; defining as clearly as possible how much dependency and what level of coercion is challengeable; and designing procedures that are relatively quick and inexpensive.
- (3) With regard to any substantial problems empirically identified, an enforcement strategy should be considered under Section 5. Such guidance or rule should provide as much transparency and specificity as possible so that parties will generally be able to predict *ex ante* what types of situations and practices will be deemed by the FTC to be abusive. Creation of a safe harbor should specify that a claim will be dismissed upon a showing that the supplier has at least one reasonably feasible alternative outlet. A claim may be defeated upon a showing that reasonably anticipated significant efficiencies will be created and passed on in largest part to consumers.
- (4) Legislative consideration should be given to providing a private remedy as well as any clarification or expansion of FTC jurisdiction. The costs of litigation and the ability of small businesses to recover losses created by ASBP should be paramount. The ability to aggregate claims in litigation or at least in arbitration must be made available, with treble damages for clear abuses as a deterrent. This

is likely to be the most controversial aspect of reform and might well be delayed until experience has been gained under whatever FTC program is effectuated.

VI. Conclusion

This discussion is intended to awaken the U.S. antitrust community to the need to see certain vertical relationships with new eyes that recognize a realm of injustice that is currently beyond practical remedy and to take advantage of foreign experience with Abuse of Superior Bargaining Position laws. It recognizes that ASBP does not fit comfortably within the current U.S. antitrust framework but nevertheless suggests a step-by-step process for accumulating the factual background that can be built upon to design remedies that meet a comfortable point between being too inclusive or too imprecise or too burdensome on the one hand, or too narrow or impractical on the other. Happy mediums are not necessarily easy to achieve, but that is not a justification for avoiding the effort.