

## 1 Survey Overview and Methods

### 1) Survey Overview

Based on the amended Antimonopoly Act (hereinafter the “AMA”) that was enforced on January 1, 2010, the abuse of superior bargaining position was enshrined into law as Article 2, paragraph (9), item (v) of the AMA and was newly subject to surcharge payment order based on the stipulations of Article 20-6 of the same law. Accordingly, the Japan Fair Trade Commission (hereinafter the “JFTC”) formulated and published “Guidelines Concerning Abuse of a Superior Bargaining Position under the Antimonopoly Act” (hereinafter referred to as “Guidelines”) on November 30, 2010, from the perspectives of further ensuring transparency in operating laws and improving predictability of enterprises, and has promoted prevention of violating acts by clarifying the concepts related to abuse of a superior bargaining position.

Against violations related to abuse of a superior bargaining position, strict actions are taken, such as a cease and desist order and/or surcharge payment order.

The JFTC, upon implementing a survey to comprehend the actual state of trades in fields of trades where examples that can be linked to abuse of a superior bargaining position have been observed, found that in the “Report on Fact-Finding Survey on the Trades between Large-Scale Retailers and Suppliers” (published May 2010), there were responses such that there are “some requests that seem unjust in trades with lodging operators and food service operators.” With regard to those in the lodging business such as hotels, etc., in the “Report on Fact-Finding Survey on the Trades between Hotels/Inns and Suppliers” (published May 2012), “requests for purchasing and utilizing products and services such as Christmas cakes and traditional New Year’s dishes are broadly made, and among such requests, there are those that are relentless or unilateral.”

Based on these fact-finding surveys, as there is the possibility that behavior that can be linked to abuse of a superior bargaining position is carried out even in trades between food service operators and suppliers, the JFTC has decided to conduct a survey on the actual state of trades between food service operators and suppliers.

### 2) Survey Method

A written survey was implemented during the survey period of July 1, 2011 to June 30, 2012 aimed at enterprises who continuously deliver and provide products and services (hereinafter “suppliers”) in relation to food service operators (with a capital of at least 50 million yen). In addition, among the suppliers who responded to the written survey, hearings were implemented for 27 suppliers who provided concrete responses on the contents of requests, etc. from food service operators.

Number of suppliers to whom the survey was sent (A)	Number of respondents (B) (B/A)	Number of suppliers subject to the survey (C) (C/A)
5,586 suppliers	2,045 suppliers (36.6%)	1,141 suppliers (20.4%)

Note 1: Among the 2,045 suppliers from whom responses were received, those that directly deliver products, etc. to food service operators were considered as being subject to survey, excluding those who have closed down their business and those who deliver products to food service operators through a wholesale distributor.

Note 2: With regard to the 1,141 suppliers subject to survey, when looking at their capital, 80.7% make up those with a capital of 100 million yen or less; when looking at the number of employees, 74.2% make up those with 100 or fewer employees.

### 3) Survey Contents

Focus was placed on trades<sup>1</sup> with food service operators ranked in the top five in terms of annual volume of business (all food service operators in cases where there are less than five with whom trades are conducted), and by concentrating on each of the actions<sup>2</sup> that are given in the Guidelines as examples of types of actions that constitute abuse of a superior bargaining position, the state of requests, etc. from food service operators with whom trades are conducted was surveyed.

### 4) Food Service Operators in This Survey

In this survey, the following enterprises were considered as being food service operators.

1. Enterprises who provide food, etc. (prepared in response to customers' orders) consumed in stores such as restaurants (Enterprises corresponding to "Eating and Drinking Places" in "Middle Division" of the "Japan Standard Industrial Classification" as revised in November 2007; hereinafter referred to as "Industrial Classification".)
2. Enterprises who provide food, etc. (in addition to food, etc. prepared in response to customers' orders, includes those that are made beforehand) that is consumed elsewhere, such as at home, at the workplace, outdoors, etc. (Enterprises corresponding to "Food Take Out and Delivery Places" and "Retail Trade (Food and Beverage)" in "Middle Division" of Industrial Classification)

With regard to 2., such enterprises are subject to survey as there are some information indicating that they request suppliers to provide monetary contribution.

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<sup>1</sup> The concept of trades in this survey is such that a single trade is considered as being a trading relationship between a specific supplier and a food service operator; when looking at the state of trades between 1,141 suppliers subject to survey and food service operators (individual food service operators ranked the top five highest in terms of annual volume of business), there were a total of 4,310 trades subject to survey.

<sup>2</sup> Eight types of actions consisting of "forced purchase/use," "request for payment of monetary contribution," "request for dispatch of employees, etc.," "refusal to receive goods," "return of goods," "delay in payment," "price reduction," and "unilateral decision on a consideration for transactions."

## 2 Summary of Survey Results and Assessment

### 1) State of Actions That Can Be Linked to Abuse of Superior Bargaining Position

- (1) In 10.7% of the trades subject to survey (total of 4,310 trades), there has been some sort of action<sup>3</sup> that can be linked to abuse of a superior bargaining position by a food service operator with whom trades are conducted. The actual state of trades was one where actions corresponding to “forced purchase/use” in particular were carried out more frequently in relation to other types of actions.

Figure 1 Ratio of types of actions among trades in which there were actions that could be linked to abuse of a superior bargaining position (multiple responses possible)

Total number of trades = 4,310 (Of which, 3,746 were “Refusal to receive goods” or “Return of goods”)

Trades in which there was one of the actions on the right

Forced purchase/use

Request for payment of monetary contribution

Request for dispatch of employees, etc.

Refusal to receive goods

Return of goods

Delay in payment

Price reduction

Unilateral decision on a consideration for transactions

Note: For “Refusal to receive goods” and “Return of goods,” since only trades consisting of “delivery of products” is targeted due to the nature of the actions, the total number of trades, upon excluding those related to “provision of services,” is 3,746. (The concept regarding the total number of trades pertaining to “Refusal to receive goods” and “Return of goods” is the same as for Figure 2 and Figure 3.)

From among the suppliers subject to survey (1,141 suppliers), 21.4% had experienced some action from food service operators with whom they conducted trades that can be linked to abuse of a superior bargaining position.

- (2) When focusing on the “Middle division” of “Industrial Classification” regarding the actual state of trades in (1) above, there were actions that can be linked to abuse of a superior bargaining position of approximately the same extent as “Eating and Drinking Places”, not only for “Eating and Drinking Places” but for “ready-made meals” (a format where food, etc. that is consumed elsewhere, such as at home, at the workplace, outdoors, etc. is provided) that correspond to “Food Take Out and Delivery Services” and “Retail Trade (Food and Beverage)” as well.

Figure 2 Ratio of types of actions among trades in which there were actions that could be linked to abuse of a superior bargaining position (Middle division, multiple answers possible)

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<sup>3</sup> The premise is that food service operators have a superior bargaining position in terms of trades over suppliers. The same applies to the concept of “actions that can be linked to abuse of a superior bargaining position” mentioned afterwards in 2) and 3).

Breakdown of total number of trades [4,310] (For “Refusal to receive goods” and “Return of goods”, breakdown for [3,746])

Eating and drinking places 3,453 (2,972 for “Refusal to receive goods” and “Return of goods”)

Food take out and delivery services 635 (572 for “Refusal to receive goods” and “Return of goods”)

Retail trade (food and beverages) 222 (202 for “Refusal to receive goods” and “Return of goods”)

Trades in which there was one of the actions on the right

- Forced purchase/use
- Request for payment of monetary contribution
- Request for dispatch of employees, etc.
- Refusal to receive goods
- Return of goods
- Delay in payment
- Price reduction
- Unilateral decision on a consideration for transactions

- (3) Among the trades subject to survey (total of 4,310 trades), the percentage of trades in which there was some action that can be linked to abuse of a superior bargaining position was highest for “Drinking houses and beer hall,” “‘Sushi’ bars,” and “Eating places,” by industry sector<sup>4</sup> of the food service operator with whom trades are conducted (the top three industry sectors with the highest percentages were extracted).
- With regard to “Drinking houses and beer hall” in particular, this industry sector falls within the top three highest percentages of seven types of actions, upon excluding “Request for dispatch of employees, etc.,” indicating that there were actions that can be linked to abuse of a superior bargaining position through various means.

Figure 3 Percentages by industry sector of food service operators with whom trades were conducted in which there were actions that can be linked to abuse of a superior bargaining position (Multiple responses possible)

Trades in which there was one of the actions on the right

- Forced purchase/use
- Request for payment of monetary contribution
- Request for dispatch of employees, etc.
- Refusal to receive goods
- Return of goods
- Delay in payment
- Price reduction
- Unilateral decision on a consideration for transactions

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<sup>4</sup> In this survey, “Eating places,” etc. in the “Small division” on Industrial Classification is considered as being industry sectors, and the state of each industry sector is analyzed.

Breakdown of total number of trades (For “Refusal to receive goods” and “Return of goods”, breakdown for [3,746])

Pubs and beer hall 508 (445)

“Sushi” bars 276 (253)

Diners and restaurants 1,090 (934)

Specialty restaurants 1,037 (888)

“Soba” and “udon” (Japanese noodles) restaurants 137 (129)

Bars, piano bars and night clubs 34 (31)

Coffee shops 143 (122)

Other eateries 228 (170)

Food take out services 230 (204)

Food delivery services 405 (368)

Other food and beverage retailers 222 (202)

(The numbers within the parentheses indicate values for “Refusal to receive goods” and “Return of goods”)

Pubs and beer hall

“Sushi” bar

Eating places

“Sushi” bar

Pubs and beer hall

Eating places

Miscellaneous retail trade (food and beverage)

Pubs and beer hall

Food take out services

Food take out services

Eating places

Pubs and beer hall

Specialty restaurants

Food take out services

Pubs and beer hall

Food take out services

“Soba” and “udon” (Japanese noodles) restaurants

Coffee shops

Pubs and beer hall

Miscellaneous retail trade (food and beverage)

“Soba” and “udon” (Japanese noodles) restaurants

Coffee shops

Pubs and beer hall

Pubs and beer hall

Food delivery services

Miscellaneous retail trade (food and beverage)

## 2) State of Each Type of Action

### (1) Forced Purchase/use

- a. As products, etc. of which the purchase and use were forced from food service operators, there was a particularly large number of responses indicating that the purchases of seasonal products (New Year’s food, Christmas cakes, etc.) was

requested. In addition, the results of hearings conducted with suppliers were characterized by a large number of responses indicating that they were requested to purchase “New Year’s food,” as demonstrated in the specific response examples below.

- We were sent a document requesting that we purchase New Year’s food at the end of the year from a food service operator<sup>5</sup> who manages a chain of *izakayas*, or Japanese-style pubs, and afterwards we received a phone call from them asking us to “please buy some New Year’s food as sales for such food are slow.” Since we conduct a great deal of business with this food service operator from among all the food service operators that we deal with, and we consider them as being a partner with whom we want to expand trade in the future, we ended up making purchases per their request.
- We received a request from a food service operator who manages a chain of *kaiten-zushi* restaurants to purchase New Year’s food. First, a document about purchasing New Year’s food was sent to the person in charge at our company, and afterwards the said food service operator called the person in charge of sales at our company and said, “Please buy our New Year’s food.” We do not want any New Year’s food, but we purchased some using company expenses.
- Every year, from a food service operator who provides food to hospitals and to employee cafeterias at companies, we are asked to purchase New Year’s food that they manufacture. When this happens, although they do not tell us directly, “We will no longer do business with you if you do not buy our New Year’s food,” they use phrases such as, “You’ve been buying it every year” and “There are other potential competitors to make a deal with” forcing us to purchase the food. Thus, we have been purchasing New Year’s food from them every year.

In addition to New Year’s food, we are also asked to buy event tickets to parties that are hosted by enterprises who are customers of the food service operator as well as meal tickets that can be used at restaurants, etc. run by the food service operator.

- We are asked to purchase New Year’s food every year from a food service operator who manages a chain of take-away sushi stores. Between October and November, we receive a pamphlet on New Year’s food, and at the same time, we receive a phone call from the food service operator asking us, “You purchased XX amount last year, how many will you take this year?” Since it appears as though this food service operator records how many New Year’s dishes its suppliers purchase, we feel as though we have to buy some when we are asked by them.

- b. As methods for requesting for purchase and use of goods, etc. in all industry sectors with the exception of “soba” and “udon” (Japanese noodle) restaurants, the majority of responses consisted of one where requests for purchase/use were made by a buyer of the food service operator (including superiors, etc.

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<sup>5</sup> In this survey, refers to a food service operator who manages multiple stores in the same industry sector.

who may have an impact on purchase transactions), and the following concrete examples of responses were given.

- We were sent a note asking us to buy New Year's food along with a catalog of the food from the buyer of a food service operator that manages a chain of take-away *bento* stores, in the name of the head of the General Affairs Department of the same company, and an e-mail was sent to the person in charge of sales at our company asking us to purchase New Year's food this year as well. Since the annual amount of trade with this food service operator amounts to several hundreds of millions of yen, and they are an important partner, we end up purchasing some New Year's food.
  - We were asked to purchase meal tickets that can be used at stores run by a food service operator who manages a chain of *kaiten-zushi* stores. This was an oral request by the buying representative of the food service operator, and our company buys about 100,000 yen worth of meal tickets that are 1,000 yen each every year.
  - Every year, a food service operator who manages a chain of restaurants asks us to buy New Year's food. In the past, this request was made in writing under the name of the company president, but since they probably thought that this kind of action was problematic, the requests now come in an oral form from the person in charge of the purchasing department. These requests are worded in way such as, "We will have to reexamine business with you if you refuse to make a purchase," and thus, our company ends up buying about 10 New Year's food sets (that cost about 25,000 yen each).
- c. Requests for purchase and use made to suppliers that can be linked to abuse of a superior bargaining position were made by food service operators of all industry sectors. It is observed that food service operators who manage a chain of restaurants in particular, whose industry sector is "eating places," "drinking houses and beer hall," or "'sushi' bar" made such requests for purchase and use extensively toward their suppliers. In addition to the concrete examples of responses mentioned in a. and b., the following examples were also demonstrated in these three industry sectors.
- We were once asked to purchase meal tickets (meal tickets that are sold toward suppliers rather than general consumers) that can be used at the stores of a food service operator who manages a chain of *izakaya* Japanese-style pubs. This request was made out to "All business partners" and sent from the head of their business division. Our company could not refuse this request upon considering the continuation of our business with this food service operator, and we ended up purchasing the meal tickets.
  - From a food service operator who manages a chain of *izakaya* Japanese-style pubs, we received information on an opening reception of their stores when their chain stores would open, approximately twice a month (these receptions were of a scale of a few hundred people where suppliers gather to eat and drink). These receptions were on a pay-your-own-way basis, and cost from 10,000 yen to 12,000 yen. Our company pays for the

expenses and fundamentally, the persons in charge of sales who receive the invites end up going to the receptions.

(2) Other Types of Actions

- a. It is observed that the actual state is one where actions that can be linked to abuse of a superior bargaining position are being carried out such as when new stores of a food service operator with whom trade is conducted are opened. With regard to “request for payment of monetary contribution,” there is a high percentage of requests where such payment is requested beforehand when the amount, basis of calculations, objectives, etc. are not clear for new openings of stores, openings of remodeled stores, and food fairs, etc. by food service operators. The following concrete responses were also given as examples.
- There are times when we are requested by a food service operator who manages a chain of family restaurants to provide funds for the opening of a new restaurant, etc. upon being presented with a concrete amount. Our company is aware that this amount exceeds the range acknowledged as being a rational amount, but since we want to continue business with this food service operator, there was an instance where we provided an amount within a range of 100,000 yen.
  - We are asked by a food service operator who manages a chain of specialty food restaurants to deliver products for 0 yen for a given time period after they open a new store. Since we cannot suspend business with this food service operator, we oblige to their request.
  - A food service operator who manages a chain of *kaiten-zushi* restaurants requested us to dispatch employees when they opened a new store, asking us to “please help [them] on opening day since it appears as though [they] may not have enough people to assist with customers.” We thought that this was only for the opening day and dispatched some of our employees, but we were asked to do the same thing the following day, and then ended up assisting them for a week after they opened. The food service operator thought that it was only natural that we would dispatch our employees free of charge, and we could not charge them for the costs that were incurred in dispatching our employees.
  - There are times when goods are returned to us whenever a restaurant in a chain of *izakaya* Japanese-style pubs opens and closes. For example, if the shop name changes due to an opening or a closing of a store, their relationship with their partners does not change, but the goods that we deliver change and those that are left over are returned to us without refund.
- b. It was observed that due to actions that can be linked to abuse of a superior bargaining position, food service operators are shifting the burdens associated with risks in their own business to their suppliers. For example, the biggest factor behind “refusal to receive goods” is the fact that the goods have become unnecessary due to the food service operator halting sales or slack sales of the food that used that product. In addition, a high percentage of the reasons behind “return of goods” and “price reduction” consisted of goods being returned because they became unnecessary after the sales period for a seasonal menu



had passed, and price reductions resulting from the food service operator's own circumstances such as worsening of performance and insufficient budget, etc. In addition, the following kinds of concrete responses were given.

- We were once asked by a food service operator who manages a chain of *izakaya* Japanese-style pubs that if they had leftover goods from their seasonal menu as sales were not as strong as expected, they would not be able to sell the goods, so would we take the goods back? Our company does not want to accept returns, but as we took future business into consideration, we accepted their returns. Also, since it is often the case that the goods that are used in seasonal menus are PB products that were manufactured and produced based on specifications from our partners, it is not possible to divert them towards other businesses.

### 3) Points to Remember Regarding Compliance

There were some examples such as one where the master chef for a food service operator utilized the fact that he has purchasing authority in trades with suppliers and requested suppliers to provide monetary payment, as well as one where the president of a food service operator made a personal request to a supplier that had nothing to do with business but rather a private matter at the president's home<sup>6</sup>.

These are broadly considered as being issues in terms of enterprises' compliance, and also suggest that there is a lack of compliance with regulations regarding abuse of a superior bargaining position by managers.

### 3 Approaches by the JFTC

- 1) Based on the results of this survey, it became clear that there are actions that can be linked to abuse of a superior bargaining position in trades between food service operators and suppliers. In particular, it was found that food service operators who manage chains and whose industry sector corresponds to "eating places," "drinking houses and beer hall" and "sushi bar" carry out "forced purchase/use" broadly, which can be linked to abuse of a superior bargaining position.

As a result, the JFTC will encourage food service operators to conduct inspections on the actual state of trades with their own suppliers and carry out the following in relation to relevant trade associations by publishing the results of this survey based on a perspective of preventing violations.

- (1) Workshops aimed at food service operators will be implemented by sector, fairness in trades between food service operators and suppliers will be promoted, and efforts will be made to prevent violations. In particular, for food service operators who are in industry sectors in which actions that can be linked to abuse of a superior bargaining position are observed, active participation in such workshops will be encouraged.
- (2) The results of this survey will be reported to associations of food service operators and the contents of the Guidelines will be explained. In addition, voluntary approaches oriented toward making trades fairer in the industry will be requested, such as by

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<sup>6</sup> Even for "forced purchase/use," there were case examples where suppliers are requested to purchase or use goods, etc. personally for the executives of a food service operator or of a group company of a food service operator.

thoroughly raising awareness regarding the results of this survey and the contents of the Guidelines to affiliated members.

- 2) Focus will continue to be placed on the actual state of trades between food service operators and suppliers, and strict action will be taken in cases where actions that appear to be linked to a violation of the AMA are acknowledged.