

Abuse of Superior Bargaining Position under the Anti-monopoly Act

For the session on excessive prices, the ICN annual conference in Porto in 2017

Naoko TERANISHI

Chief Deputy Director of Trade Practices Division,
Trade Practices Department, the Japan Fair Trade Commission

The views expressed in this presentation are solely mine and do not necessarily reflect the views of the JFTC.

Unfair pricing in Japan

- The JFTC is generally cautious to directly intervene in prices.
- Some excessive prices may be exceptionally regulated if it constitutes abuse of superior bargaining position of the Antimonopoly Act (AMA).

AMA Article 2 (9) (v) (c)

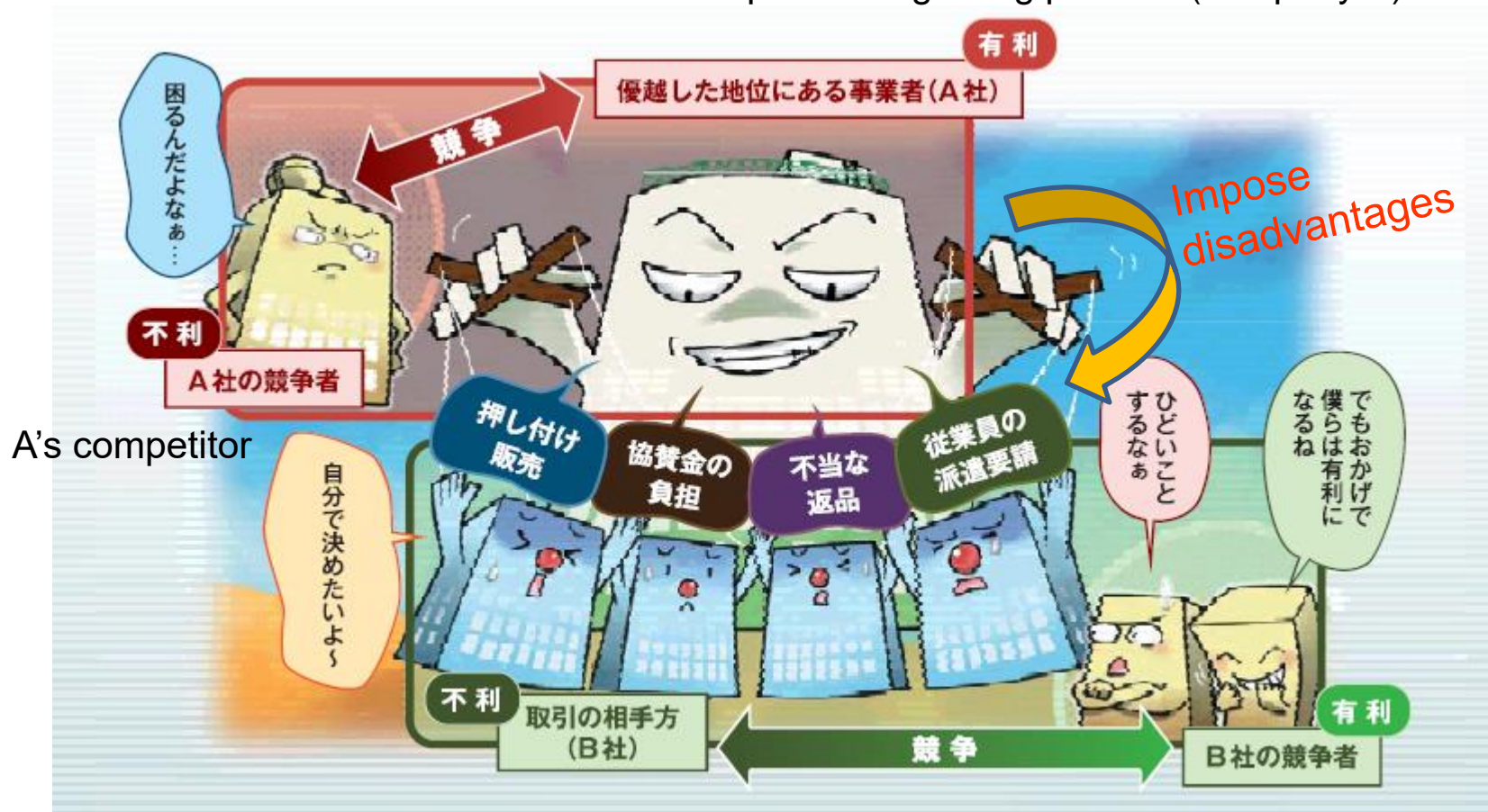
(9) The term "unfair trade practices" as used in this Act means an act falling under any of the following items:

(v) Engaging in any act specified in one of the following by making use of one's superior bargaining position over the counterparty unjustly, in light of normal business practices:

(c) Refusing to receive goods in transactions with said counterparty, causing said counterparty to take back such goods after receiving them from said counterparty, delaying payment to said counterparty or reducing the amount of payment, or otherwise establishing or changing trade terms or executing transactions in a way disadvantageous to said counterparty

Abuse of Superior Bargaining Position

A business in a superior bargaining position (company A)



Trading partners of A (company B, C, D...) Competitors of B, C, D...

Statutory requirements of the abuse of superior bargaining position

Abuse of superior bargaining position

1) Superior bargaining position



2) Abuse (disadvantage)



3) Unjustness

Unilateral imposition of extremely high prices

- Unilateral imposition of extremely high prices on trading partners is listed as one of disadvantages which may be regulated as abuse of superior bargaining position.

Guidelines Concerning Abuse of Superior Bargaining Position

IV. 3 (5) (a)

(5) Other establishments, etc. of trade terms in a way disadvantageous to the transacting party

A. Unilateral decision on a consideration for transactions

(a) In the case where an entrepreneur who has superior bargaining position in transactions against a transacting party unilaterally requests a transacting party to carry out transactions for either an extremely low or extremely high consideration, and if it is unavoidable for the transacting party to accept the request from concerns about the possible effects on future transactions, such act would unjustly impose a disadvantage on the transacting party in light of normal business practices, and would cause a problem as abuse of superior bargaining position.

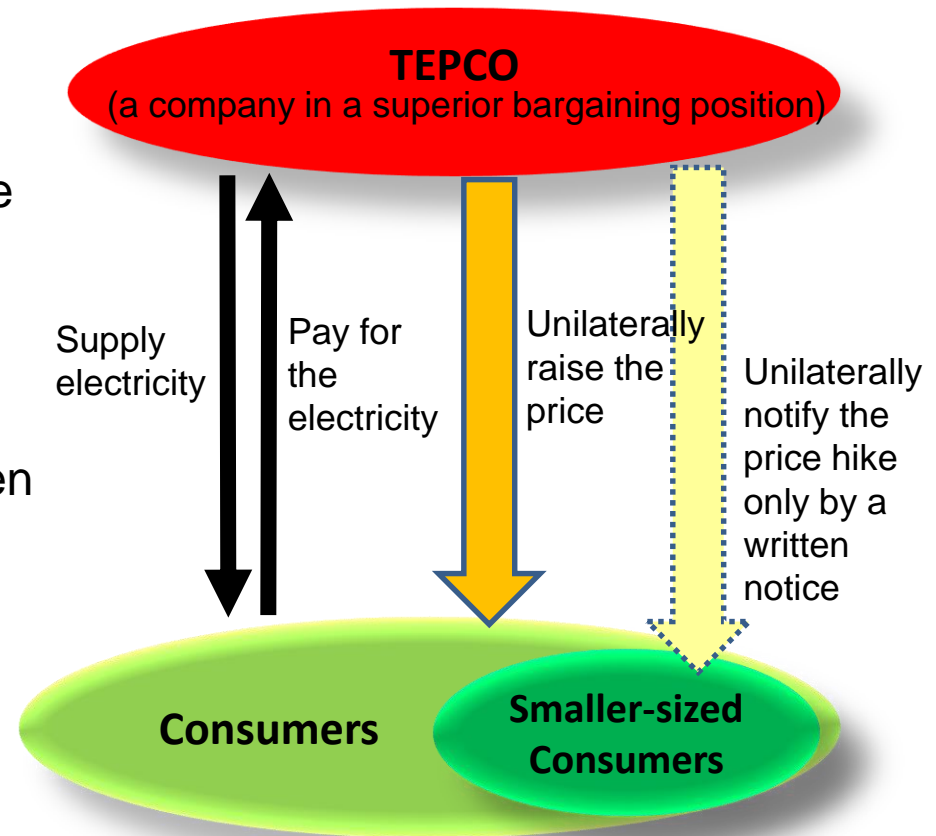
Factors for consideration

- whether the undertaking in a superior bargaining position has sufficient negotiation with the trading partners when deciding on the prices
- the degree of the difference between the normal price and the price under investigation
- the supply-and-demand relationship of the product.

Guidelines Concerning Abuse of Superior Bargaining Position, IV. 3 (5) (a)
Whether or not such act constitutes abuse of superior bargaining position is determined after comprehensively considering the method for deciding on the consideration, such as whether or not the entrepreneur conducted sufficient discussions with the transacting party when deciding on the consideration, as well as whether or not the consideration is discriminatory in comparison to the consideration for other transacting parties, whether or not the consideration is lower than the transacting party's purchase price, the difference between the normal purchase price or selling price, and the supply-and-demand relationship of the goods or services subject to the transactions.

A case example- a warning against TEPCO (2012)

- TEPCO had provided 94% of the electricity used in the Tokyo metropolitan region.
- TEPCO unilaterally decided to raise the price of its electricity significantly even during the contract period.
 - Especially to its smaller-sized customers, it only requested the price increase by a unilateral written notice.
- The JFTC pointed out that such behavior by TEPCO might lead to a violation of the abuse of superior bargaining position and requested TEPCO to disclose enough information on the price increase to its customers.



Thank you very much

