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Abuse of economic dependence (superior bargaining position) in competition law: concerns, benefits, and safeguards

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ABSTRACT

Abuse of economic dependence, or abuse of superior bargaining position, has increasingly been introduced as a standalone prohibition within competition law across jurisdictions. This article explores why such dependence-centred competition rules are adopted, with what policy objectives, and how implementing jurisdictions address the concerns raised about them. It first maps legislative and institutional designs across 34 jurisdictions and identifies 13 systems with explicit provisions for abuse of dependence, operating alongside abuse of dominance. It then discusses the principal concerns surrounding such rules and weighs them against their complementary benefits, taking into account internal safeguards used in practice. This article notes that, while the concerns are reasonable and may justify non-adoption, this does not, in itself, mean that adoption is inherently misguided. It highlights that dependence-centred rules have complementary advantages—bringing the vertical power-over dimension to the centre of power analysis and enabling a more flexible, dynamic assessment of competitive harm—and that, with safeguards, such as structural power and impact screens, the concerns can be mitigated in practice. It concludes that, when so designed, dependence-centred rules can serve as a balanced complement and outlines directions for future research.

KEYWORDS: abuse of economic dependence; superior bargaining position; relative market power; unilateral conduct; vertical competition; exploitative abuse; competition law enforcement
JEL CLASSIFICATIONS: K21, K12, K23, L40, L41, L42, L49, O57

1. INTRODUCTION

Competition law, or antitrust,[1] has lately undergone notable shifts amid a broader trend toward stronger enforcement. These include the long-awaited return of section 2 enforcement

[1] The terms 'competition law' and 'antitrust' are used interchangeably in this article. Both refer to legal prohibitions on abuse of dominance or monopolisation, anticompetitive agreements, and merger control. The term *competition law* may sometimes be used in a broader sense than *antitrust* to encompass adjacent regimes such as unfair trade practices under Korea's Monopoly Regulation and Fair Trade Act (MRFTA) or Japan's Act on Prohibition of Private Monopolization and

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under the Sherman Act,[2] the consolidation of the self-preferencing theory of harm in the enforcement of Article 102 of the Treaty on the Functioning of the European Union (TFEU),[3] the emerging practice of invoking exploitative abuse,[4] and the infusion of regulatory elements.[5] Alongside these headline-grabbing developments, a quieter yet consequential change has also been emerging at the regional and national levels: the growing adoption and entrenchment of dependence-centred abuse prohibitions, often labelled 'abuse of economic dependence' or 'abuse of superior bargaining position'.[6]

Over the last decade, a growing number of jurisdictions have codified or refined standalone dependence-centred rules, which capture unilateral conduct arising from vertical, relational power, even in the absence of dominance. For example, China's 2025 revision of the Anti-Unfair Competition Law introduced the concept of 'abuse of superior position' by large companies (albeit in a far more limited and targeted manner than in earlier drafts).[7] In Japan, following its recent victories before the appellate court,[8] the Japan Fair Trade Commission (JFTC) ended its long-standing light-touch approach and revived formal enforcement of abuse of superior bargaining position by issuing a corrective order and imposing a surcharge in the *Harley-Davidson Japan* case.[9] In Europe, Belgium and Switzerland

Maintenance of Fair Trade (AMA), both of which were inspired by s 5 of the US Federal Trade Commission Act (FTC Act). For a brief definitional account, see Eleanor M Fox, 'Antitrust' (Competition Law Dictionary, Concurrences, Art. N° 20093) <https://www.concurrences.com/en/dictionary/Antitrust> accessed 25 February 2026.

[2] *United States of America v Google LLC*, No 1:20-cv-03010 (D DC, 5 August 2024) (search); *United States of America v Google LLC*, No 1:23-cv-00108 (ED Va, 17 April 2025) (ad tech); *United States of America v Google LLC*, No 1:20-cv-03010 (D DC, 2 September 2025) (Remedies Opinion by Judge Amit P Mehta).

[3] Judgment of 10 September 2024, *Google and Alphabet v Commission*, C-48/22 P, EU:C:2024:726 (*Google Shopping*). Also see Seoul High Court Decision 2021Nu36129 Decided 14 December 2022 (*Naver Shopping*), revd Supreme Court Decision 2023Du32709 Decided 16 October 2025. The Supreme Court's official English translation is available at <https://eng.scourt.go.kr/eng/supreme/decisions/NewDecisionsView.work?seq=6049&mode=6&searchWord=2023Du32709>. Also see the author's commentary, Sangyun Lee, 'Korea's NAVER Shopping: A Misguided Replica of the EU's Google Shopping Decision?' (*Truth on the Market*, 28 October 2025) <https://truthonthemarket.com/2025/10/28/koreas-naver-shopping-a-misguided-replica-of-the-eus-google-shopping-decision/> or <https://ssrn.com/abstract=5715223>. All URLs were accessed on 25 February 2026.

[4] See eg, *Apple – App Store Practices (music streaming)* (Case AT.40437) Commission Decision COM (2024) 1307 final (4 March 2024); *Facebook Marketplace* (Case AT.40684) Commission Decision COM (2024) 8053 final (14 November 2024).

[5] Most notably, see Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (DMA); Also, see Japan's Act on Promotion of Competition for Specified Smartphone Software (Act No 58 of 2024) (MSCA).

[6] Vassili Moussi and Atsushi Yamada, 'Abuse of Economic Dependence' (Competition Law, Concurrences, article no 86372) <https://www.concurrences.com/en/dictionary/abuse-of-economic-dependence> accessed 25 February 2026.

[7] The full text of the revised Anti-Unfair Competition Law 2025 is available at <https://www.spp.gov.cn/spp/fl/202506/t20250627_699862.shtml> accessed 25 February 2026. For further details, see nn 64–66.

[8] See eg, Tokyo High Court, Heisei 31 (Gyo-ke) No 13 (*Ralse*), 3 March 2021, 67 Shinketsushū 444, <https://snk.jftc.go.jp/DC005/R030303H31G09000013_> and Sachiko Sakamaki, 'Japanese Retailer Edion Loses Appeal against JFTC at Appellate Court' (*MLex*, 12 September 2025) <https://www.mlex.com/mlex/articles/2387268/japanese-retailer-edion-loses-appeal-against-jftc-at-appellate-court>. The URLs were accessed on 25 February 2026.

[9] Japan Fair Trade Commission, 'JFTC Issues a Cease and Desist Order and a Surcharge Payment Order to Harley-Davidson Japan K.K.' (Press release, 18 September 2025) <https://www.jftc.go.jp/en/pressreleases/yearly-2025/September/250918.html> accessed 25 February 2026. It appears to be the first decision on abuse of superior bargaining position to impose a cease-and-desist order and a surcharge since the early-2010s quintet—*Sanyo-Marunaka* (22 June 2011), *Toys'R'Us* (13 December 2011), *Edion* (16 February 2012), *Ralse* (3 July 2013), and *Direx* (5 June 2014)—after which formal ASBP enforcement largely went dormant, amid unexpected appeals and legal uncertainty. Indeed, since *Direx* in 2014, the JFTC has not imposed formal sanctions on abuse of a superior bargaining position, instead resolving matters through commitment decisions. As for more detailed discussions of the JFTC's five ASBP cases, see Masako Wakui and Thomas K Cheng, 'Regulating Abuse of Superior Bargaining Position under the Japanese Competition Law: An Anomaly or a Necessity' (2015) 3 Journal of Antitrust Enforcement 302. For reference, Korea also has a rule addressing abuse of superior bargaining position within its competition law framework, the MRFTA. However, its comparative context is distinct. Unlike other jurisdictions, Korea has enforced the provision very vigorously over a long period and has faced concerns and criticisms about over-enforcement and the need to improve coherence. As the 2008 ICN report shows, Korea's public enforcement record is a clear outlier compared to other jurisdictions. For illustration, the 2008 ICN report records 98 cases in Japan over the preceding 10 years, of which 12 resulted in agency decisions, and 39 cases were examined in Germany, of which only 3 ended with violation decisions. In contrast, Korea recorded 2,382 cases received by the authority, of which 360 resulted in corrective orders, including 75 cases accompanied by surcharges (administrative fines). International Competition Network Task Force for Abuse of Superior Bargaining Position, 'Report on Abuse of Superior Bargaining Position' (Presented at the 7th Annual Conference, Kyoto,

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have introduced new provisions, which have already given rise to several cases,[10] while Germany, Austria, and Italy have updated their existing frameworks, reflecting digital-platform-related contexts.[11] Meanwhile, the Common Market for Eastern and Southern Africa (COMESA) adopted a stand-alone prohibition on abuse of economic dependence within its revised competition law framework in December 2025.[12]

Notwithstanding these developments, the global discourse appears to remain somewhat preoccupied with abuse of dominance, or monopolization, while discussion of dependence-centred rules remains fragmented and outside the mainstream. Although the literature on dependence-centred rules has grown rapidly, much of it remains region-specific or otherwise peripheral.[13] The marginalization of this issue may be attributable to concerns about its overlap with mere contractual, private disputes and the view that sectoral regulations can address any lacuna that might arise. This is illustrated by the fact that many jurisdictions still have not adopted, nor even considered adopting, a dependence-centred prohibition in their competition law framework.

To be sure, these concerns are reasonable, and non-adoption may be a rational response. Still, it does not follow that adoption is inherently misguided. Indeed, a closer examination of the actual dependence-centred rules and their enforcement practices in implementing jurisdictions suggests that these concerns can be effectively managed with appropriate internal safeguards.

Against this backdrop, this study explores why, and with what policy objectives, some jurisdictions have chosen to adopt dependence-centred rules as an additional standalone abuse prohibition, and how their systems have responded to commonly raised concerns about the rules. The analysis proceeds in the following steps: first, Section 2 maps the legislative and institutional landscape across jurisdictions; secondly, Section 3 discusses the principal concerns surrounding dependence-centred rules and weighs them against their substantive benefits, taking into account the internal safeguards introduced to mitigate the

Japan, 14–16 April 2008) 31 <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/11/SP_ASBP2008.pdf> accessed 25 February 2026 (2008 ICN Report).

[10] For reference, see the opinion of the Belgian Central Council of the Economy on the first four years of experience with the abuse of the economic dependence rule. Conseil central de l'économie, 'Avis: Évaluation de la loi B2B (volet « abus de dépendance économique »)' CCE 2025-0720 MED (27 mars 2025) <https://www.ccecrb.fgov.be/dpics/fichiers/2025-04-02-02-47-26_doc25720fr.pdf> accessed 25 February 2026. Also, the Swiss competition authority has recently issued an updated guidance document for the prohibition on abuse of relative market power. Wettbewerbskommission (WEKO) – Sekretariat, 'Merkblatt und Formular: Relative Marktmacht' (vom 6. Dezember 2021, revidiert am 4. Februar 2025) <https://www.weko.admin.ch/weko/de/home/anzeigen/relative_marktmacht.html> accessed 25 February 2026.

[11] Bundeskartellamt, 'National Abuse Control and Relative Market Power in the European Context – Background paper of the Meeting of the Working Group on Competition Law' (26 September 2024) 17 (concerning Austria's 2021 amendment to the Cartel Act), 18–9 (concerning Italy's 2022 amendment), 30, 34–35, 39, 41–42 (concerning the 10th amendment to the Act against Restraints of Competition (GWB) in 2021).

[12] Regulation 37 of the COMESA Competition and Consumer Protection Regulations, 2025. Also see COMESA Competition Commission, 'Repeal of the COMESA Competition Regulations and Rules and Adoption of New Regulations and Rules' (Press release, CCC/PR/12/3/2025, 8 December 2025) <https://comesacompetition.org/wp-content/uploads/2025/12/CCCC.PR_8.12.25.-Repeal-and-Adoptions-of-new-Regulations-.pdf> accessed 25 February 2026. In fact, such dependence-centred abuse prohibitions are not new in the African continent's competition regime. A report observes that, as of December 2020, Algeria, Angola, Mozambique, and Tunisia already included abuse of economic dependence provisions in their competition law frameworks. Baker McKenzie, 'An Overview of Competition & Antitrust Regulations and Developments in Africa: 2021' (2021) <https://www.bakermckenzie.com/-/media/files/insight/publications/2021/05/competitioninafricareport16apr21_003_12211.pdf> accessed 25 February 2026.

[13] A detailed list of prior studies reviewed for this research can be found in Sangyun Lee, 'Incorporating Abuse of Economic Dependence into Competition Law' (PhD thesis, Korea University 2023) 5–7. See also, for recent discussions in the context of digital markets: Carmen Estevan de Quesada, 'Economic Dependence in Digital Markets' (2024) 55 International Review of Intellectual Property and Competition Law 1599 (arguing that abuse of economic dependence can serve as a valuable competition law tool, and proposing a methodology, while limiting the analysis to European laws and the digital markets); Qian Li and Caroline Cauffman, 'Abuse of Relative Dominance by Digital Platforms: A Law and Economics Perspective' (2025) 74 GRUR International 217 (in the EU's context, highlighting an enforcement and regulatory gap between art 102 TFEU and the DMA, discussing the need to introduce an 'abuse of relative dominance' prohibition within the EU-level competition framework).

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concerns. Section 4 concludes that dependence-centred rules can serve as a complement to the prohibition on abuse of dominance, and it outlines directions for future research.

2. LEGISLATIVE AND INSTITUTIONAL LANDSCAPE

Scope and terminology

This study limits its focus to discrete legal tools for dependence-centred abuse, introduced as a standalone, cross-sectoral instrument operating in parallel with classical dominance-based rules (including monopolization). This limitation is motivated by the central question of why some jurisdictions have chosen to establish a standalone prohibition on abuse of dependence, alongside abuse of dominance, and what justifies such a distinct standard.

The term 'abuse of dependence' is used here to encompass a range of dependence-centred concepts, such as abuse of economic dependence (as in Belgium and France), superior bargaining position (as in Japan and Korea), or relative market power (as in Austria, Switzerland, and Germany),[14] provided that they function as legal bases for competition law enforcement, in particular through public investigation and sanctions, or litigation brought by competition authorities.[15] Doctrines of unfair competition or analogous private law doctrines are excluded from the focus of this study, except insofar as they operate as legal bases for addressing abuse of economic dependence or superior bargaining position.

No distinction is drawn between dominance and monopoly power, both of which are generally captured by the notion of 'substantial market power',[16] since the focus of this study lies in their contrast with dependence-centred rules, rather than in differences between the two.

This study does not cover cases in which dependence is treated merely as a factor *within* dominance assessments, such as those under Article 102 TFEU[17] (possibly influenced by the theory of *partenaire obligatoire*).[18] Nor does it address situations in which abuse of dependence is incidentally dealt with through vertical agreements. This distinction is drawn because the core inquiry here is not how concerns about abuse of dependence can be

[14] See Table 1.

[15] Competition law enforcement systems can be classified into three basic institutional models: (i) the bifurcated judicial model, where specialised investigative and enforcement agencies, such as the US Department of Justice, must bring complaints before general courts and seek remedies there; (ii) the bifurcated agency model, where investigative and enforcement agencies bring complaints before separate, specialised adjudicative bodies, such as the Canadian Competition Tribunal; and (iii) the integrated agency model, where a single agency undertakes investigative, enforcement, and adjudicative functions, as in the EU (with limited national exceptions like Austria) and East Asian jurisdictions including Korea, Japan, and Taiwan. See Michael J Trebilcock and Edward M Iacobucci, 'Designing Competition Law Institutions: Values, Structure, and Mandate' (2010) 41 Loyola University Chicago Law Journal 455, 459ff.

[16] See eg, International Competition Network, Unilateral Conduct Working Group, 'Dominance/Substantial Market Power Analysis Pursuant to Unilateral Conduct Laws: Recommended Practices' (July 2018) <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/UCWG_RP_DomMarPower.pdf> accessed 25 February 2026 (ICN Recommended Practices).

[17] See eg, Judgment of 11 November 1986, *British Leyland plc v Commission*, C-226/84, EU:C:1986:421, para 9; Judgment of 10 July 1991, *RTE v Commission*, T-69/89, EU:T:1991:39 (known as the *Magill* case; upheld by the Court of Justice, Judgment of April 6, 1995, *RTE and ITP v Commission*, C-241/91 P, EU:C:1995:98), para 63; Judgment of 21 October 1997, *Deutsche Bahn v Commission*, T-229/94, EU:T:1997:155 (the appeal was dismissed by the Order of 27 April 1999, *Deutsche Bahn v Commission*, C-436/97 P, EU:C:1999:205), para 57; Judgment of 12 December 2000, *Aéroports de Paris v Commission*, T-128/98, EU:T:2000:290, para 165. See also, Priyanshi, 'Abuse of Superior Bargaining Position in Digital Markets: A Way forward for India' (October 2022) *CPI Columns South Asia* 1–5. In this study, Priyanshi reviews five digital dominance cases where, as she understands it, abuse of superior bargaining position is addressed within the dominance framework in India.

[18] As Lúcio Tomé Feteira explains, the proponents of the *partenaire obligatoire* theory argued that what undertakings dominate is not a relevant market but their economically dependent trading partners. They took the view that vertical bilateral market power should therefore be treated as equivalent to dominance; otherwise, the analysis would risk producing an artificially narrow market definition, amounting to a merely formalistic solution to the real underlying problem of economic dependence. Although this approach has not been endorsed by the European Commission or the Court of Justice of the European Union, economic dependence has, nonetheless, in certain cases and alongside other factors, been taken into account as supporting a finding of dominance. Lúcio Tomé Feteira, *The Interplay between European and National Competition Law after Regulation 1/2003: "United (Should) We Stand?"* (Kluwer Law International 2015) 125–129.

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accommodated within existing dominance-based frameworks, but why, notwithstanding such avenues, some jurisdictions have chosen to introduce such a *sui generis* prohibition on abuse of dependence within competition law. Additionally, for the sake of analytical coherence, the analysis does not extend to unilateral conduct that is conceptually closer to collusion than to abuse, such as invitations to collude.

Legislative landscape

With this scope defined, the author's previous study surveyed competition rules in 34 jurisdictions[19] selected by reference to the Global Competition Review Rating Enforcement, which assesses the quality of public competition law enforcement. This selection criterion, based on the Enforcement Rating, was considered an appropriate basis for defining the comparative set, given that this article evaluates whether a dependence-centred prohibition is suitable as a competition law tool subject to public investigation and sanctions. The survey results, as updated in this article, are as follows.

While many jurisdictions, including the USA[20] and the European Union (EU),[21] refrain from introducing a standalone prohibition on abuse of dependence, relying instead on

[19] The 34 jurisdictions that were subject to the research are as follows: Australia, Austria, Belgium, Brazil, Canada, Chile, Colombia, the EU, France, Germany, Greece, India, Israel, Italy, Japan, Korea, Latvia, Lithuania, Mexico, the Netherlands, New Zealand, Norway, Peru, Poland, Portugal, Romania, Russia, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, the UK, and the US. These jurisdictions were selected based on the Global Competition Review's 2020 Rating Enforcement. See Lee (n 13) 81.

[20] The USA has no general law dealing with dependence or relative market power at the federal level. Depending on one's perspective, the 2022 Policy Statement, which broadens the scope of the 'unfair methods of competition' under s 5 of the FTC Act, along with the FTC's renewed enforcement of the Robinson Patman Act, may signal a possible shift in the future. Yet, it remains uncertain whether courts will endorse such attempts. See Federal Trade Commission, 'Policy Statement Regarding the Scope of Unfair Methods of Competition Under s 5 of the Federal Trade Commission Act' (Commission File No P221202, 10 November 2022) <https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf> accessed 25 February 2026, and *Federal Trade Commission v. Southern Glazer's Wine & Spirits, LLC*, Case No. 8:24-cv-02684 (CD Cal filed 12 December 2024) (This action marked the first use of the Robinson Patman Act in over 25 years. The FTC voted 3–2 to sue the largest wine and spirits distributor, Southern Glazer, alleging that it violated the Act by offering discounts and rebates in a discriminatory manner, thereby favouring large retailers while harming small, independent retailers. As of 25 February 2026, the case remains pending, and the district court denied the defendant's motion to dismiss on 17 April 2025). By way of background, the FTC's past attempts to expand the scope of the standalone s 5 'unfair methods of competition' provision beyond the reach of the Sherman or Clayton Acts, beginning with *Sperry & Hutchinson* in 1972, ultimately ended in failure in the so-called 'trifecta' of precedents in the early 1980s—*Official Airline Guides*, *Boise Cascade*, *Ethyl*. See Lina M Khan and others, 'Statement of Chair Lina M Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M Bedoya On the Adoption of the Statement of Enforcement Policy Regarding Unfair Methods of Competition under Section 5 of the FTC Act' (Federal Trade Commission, 10 November 2022) 3 <https://www.ftc.gov/system/files/ftc_gov/pdf/Section5PolicyStmtKhanSlaughterBedoyaStmt.pdf> accessed 25 February 2026. Also see Maureen K Ohlhausen, 'Section 5 of the FTC Act: principles of navigation' (2014) 2 Journal of Antitrust Enforcement 1, 3–4; Or Brook and Magali Eben, 'Abuse without dominance and monopolisation without monopoly' in Pinar Akman, Or Brook and Konstantinos Stylianou (eds), *Research Handbook on Abuse of Dominance and Monopolization* (Edward Elgar 2022) ch III C.

[21] The EU's Member States have adopted and operated standalone dependence-centred rules under art 3(2) of Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in arts 81 and 82 of the Treaty. That said, at the Union level, no corresponding dependence-centred prohibition departing from the abuse of dominance standard has been adopted within the EU competition law framework (see n 17). Outside competition law, there have been broader policy discussions on 'unfair trading practices' since 2009. See, especially, European Commission, 'Green Paper on Unfair Trading Practices in the Business-to-Business Food and Non-Food Supply Chain in Europe' COM (2013) 37 final (Green Paper) (which followed the Commission's 2009 Communication, 'A Better Functioning Food Supply Chain in Europe' COM (2009) 591). In the Green Paper, the Commission explored unfair trading practices for the first time on a cross-sectoral basis and acknowledged that bargaining power asymmetries may give rise to harmful effects in both food and non-food sectors, with particularly disproportionate impacts on small- and medium-sized enterprises (SMEs). Specifically, the term 'unfair trading practices' was understood as meaning 'practices that grossly deviate from good commercial conduct and are contrary to good faith and fair dealing', which 'are typically imposed in a situation of imbalance by a stronger party on a weaker one and can exist from any side of the B2B relationship and at any stage in the supply chain'. And the Green Paper found that, across sectors and types of conduct, 'a common denominator for most' unfair trading practices is indicated as '[t]he transfer of costs incurred and the shift of entrepreneurial risk to the weaker party in the relationship'. See Green Paper 3 and 21. These debates, however, did not lead to the adoption of an EU-level competition law prohibition on abuse of dependence; instead, they culminated in sector-specific regulatory interventions narrowly targeting problematic practices in particular contexts, such as Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain (UTPs Directive) and Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (P2B Regulation). For detailed analyses of the two legislative

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dominance rules or sector-specific regulation, the survey shows that 13 jurisdictions[22] have already incorporated explicit provisions on abuse of dependence into competition law. Some operate the prohibition in close proximity to the abuse of dominance rule, while others place it outside the classical antitrust framework, such as laws on unfair competition, unfair trade practices, or subcontracting relationships, yet still ensure its enforceability through the same competition law mechanisms. Table 1 summarizes these results.

A brief comparative overview

As regards the first-category rules, the findings show that, in Europe, France,[23] and Germany[24] are regarded as the most important references. They served as key models when Belgium and Switzerland introduced their own provisions.[25] While the Portuguese rule appears to have been modelled on the French rule,[26] Austria's system resembles that of Germany.[27]

It was also observed that these rules share a notable feature: their proximity to the prohibition on abuse of dominance. Placed alongside the dominance provisions, they operate on a similar legal basis. For instance, Austria and Switzerland stipulate the concept of 'relative market power'[28] and then extend the reach of the abuse of dominance prohibition to cover its abuse.[29] Germany explicitly connects section 19(1) and (2) with section 20(1), (1a), and (2), thereby broadening the scope of dominance abuse to cases of relative market power and economic dependence, including data access dependency. Belgium, France, and Portugal maintain this alignment by requiring an impact on competition.[30]

trajectories, see eg Ignacio Herrera Anchustegui and Ronny Gjendemsjø, 'Evaluating the Commission's Proposal for a Directive on Unfair Trading Practices. Competition in Fairness?' (2018) 2 European Competition and Regulatory Law Review 280; European Commission, 'Impact Assessment, Initiative to Improve the Food Supply Chain (Unfair Trading Practices), Accompanying the Document: Proposal for a Directive of the European Parliament and of the Council on Unfair Trading Practices in Business-to-Business Relationships in the Food Supply Chain' (Commission Staff Working Document) SWD (2018) 92 final; European Commission, 'Impact Assessment, Accompanying the document: Proposal for a Regulation on promoting fairness and transparency for business users of online intermediation services' (Staff Working Document) SWD (2018) 138 final.

[22] Or 14, if one includes s 5 of the US FTC Act. For discussion, see Lee (n 13) 147–150.

[23] The French prohibition on the 'abusive exploitation of a state of economic dependence' was introduced in 1986 by Ordonnance n° 86-1243 du 1er décembre 1986, art 8, and later codified in the Code de commerce as art L. 420-2 by Ordonnance n° 2000-912 du 18 septembre 2000.

[24] The German prohibition on abuse of relative market power was introduced in 1973 and has since been expanded over the years. Bundeskartellamt (n 11) 30.

[25] In its explanatory memorandum, Belgium's House of Representatives (*Chambre des représentants*) states that its proposal—including illustrative examples and assessment factors—is inspired by German, Austrian, and French case-law and is based on a comparative analysis of Member States' rules. See Chambre des représentants de Belgique, PROPOSITION DE LOI modifiant le Code de droit économique en ce qui concerne les abus de dépendance économique, les clauses abusives et les pratiques du marché déloyales entre entreprises, Doc 54 3595/001 (22 février 2019) 5, 12–3. As for Switzerland, the Federal Council (*Bundesrat*)'s submission explicitly indicates that Switzerland's law on relative market power, in the Cartel Act, art 4(2bis), is modelled after s 20(1) of GWB. Bundesrat, 'Botschaft zur Volksinitiative «Stop der Hochpreisinsel–für faire Preise (Fair-Preis-Initiative)» und zum indirekten Gegenvorschlag (Änderung des Kartellgesetzes)' (29. Mai 2019) BBI 2019 4877, 4940.

[26] The Portuguese rule was originally introduced in 1993. It was substantially reformulated into the current form in 2003 (Law No 18/2003, art 7), before being carried forward into Law No 19/2012, art 12. See António Nogueira Leite, 'Política de Concorrência e Política Industrial' (Novembro 1996) Gabinete de Estudos e Prospectiva Económica, Documento de Trabalho DT 1-96, 12 <https://www.gee.gov.pt/pt/documentos/estudos-e-seminarios/historico/documentos-de-trabalho/5267-politica-de-concorrencia-e-politica-industrial/file> accessed 25 February 2026; Miguel Moura e Silva, 'Os abusos de exploração sobre os consumidores: Uma revolução silenciosa no novo regime nacional de proibição do abuso de posição dominante?' (2012) (9) Revista de Concorrência & Regulação 81, 89; Miguel Gorjão-Henriques, 'The Portuguese Supreme Court clarifies the conditions regarding the existence of an abuse of economic dependence (Toyota Portugal)' (June 2013) e-Competitions N° 57300, 1 <https://www.servulo.com/xms/files/OLD/publicacoes/Artigos_/Artigos_2014/EC_MGH_e_Competitions_08_04_2014.pdf> accessed 25 February 2026.

[27] See eg, Eckart Bueren and others, 'Relative Marktmacht im D-A-CH-Rechtsraum: Rechtsvergleichung, Ökonomie und Digitalisierung' (2021) 19 *ZWeR* 173.

[28] Austrian Cartel Act 2005, s 4a; Swiss Cartel Act, art 4(2).

[29] Austrian Cartel Act 2005, s 5; Swiss Cartel Act, art 7.

[30] See Belgian Code of Economic Law, art IV.2/1 ('… where competition may be affected on the Belgian market concerned or a substantial part thereof'); French Commercial Code, art L. 420-2 ('Moreover, since it is capable of affecting the operation of the structure of competition') (The French rule's English translation is from the European Court of Justice's Judgment of 24 October 2018, *Apple Sales International and Others*, C595/17, EU:C:2018:854, para 7); Portuguese

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Table 1. Abuse of dependence provisions across jurisdictions.

Approach	Jurisdiction	Legal Provision	Reference Year
Integrated provisions within competition law	Austria	**Cartel Act 2005, section 4a** (titled 'Relative market power') **and section 5** (prohibiting abuse of a dominant market position)	2021 (relocated to a standalone provision)
	Belgium	**Code of Economic Law, Article I.6, 17°** (defining 'Position of economic dependence') **and Article IV.2/1** (prohibiting 'abuse of a position of economic dependence')	2019 (adopted; in force 2020)
	France	**Commercial Code, Article L. 420-2, para 2** (prohibiting "abusive exploitation … of the state of economic dependence")	1986 (introduced; codified as L. 420-2 in 2000)
	Germany	**Act against Restraints of Competition (GWB), section 20(1), (1a), and (2)** (prohibiting conduct of undertakings with relative market power)	2021 (substantially extended; originally introduced in 1973)
	Portugal	**Competition Act (Law No 19/2012), Article 12** (titled 'Abuse of economic dependence')	2003 (current form; originally introduced in 1993)
	Switzerland	**Cartel Act, Article 4(2bis)** (defining 'an undertaking with relative market power') **and Article 7** (titled "Unlawful practices by dominant undertakings and undertakings with relative market power")	2021 (adopted; in force 2022)

(continued)

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Table 1. (continued)

Approach	Jurisdiction	Legal Provision	Reference Year
External provisions enforced through competition law	Australia	**Australian Consumer Law (ACL), section 21** (titled 'Unconscionable conduct in connection with goods or services') **and section 22(1)(a)** (listing 'the relative strengths of the bargaining positions of the supplier and the customer' as a consideration)	2011 (recodified; originally inserted in 1986)
	Italy	**Subcontracting Act (Law No 192/1998), Article 9** (titled 'Abuse of economic dependence') **and Article 9(3-bis)** (nexus to public competition law enforcement)	2022 (strengthened; originally inserted in 1998)
	Japan	**Anti-Monopoly Act (AMA), Article 2(9)(v)** (stipulating ' … unjust use of one's bargaining position' as an unfair trade practice) **and Article 19** (prohibiting unfair trade practices)	2009 (codified; originally introduced in 1953)
	Korea	**Monopoly Regulation and Fair Trade Act (MRFTA), Article 45(1)(6)** (prohibiting 'Making transactions … by unfairly taking advantage of the bargaining position … ' as an unfair trade practice)	1980 (introduced; in force 1981)
	New Zealand	**Fair Trading Act 1986 (FTA), section 7** (titled 'Unconscionable conduct') **and section 8(1)(a)** (listing 'the relative bargaining power of the person engaging in the conduct' as a factor)	2021 (inserted; in force 2022)
	Romania	**Unfair Competition Law (Law No 11/1991), Article 1^1 d** (defining 'superior negotiating position'), **Article 2(3)** (prohibiting its exploitation as an unfair competition practice), **and Article 3^1(1)–(2)** (nexus to public competition law enforcement)	2022 (introduced)
	Spain	**Unfair Competition Act 3/1991, Article 16(2)** (stipulating 'the exploitation of the situation of economic dependence' as unfair) **and Competition Act 15/2007, Article 3** (nexus to public competition law enforcement)	2007 (current framework; originally introduced in 1991)

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Meanwhile, the second-category rules show more diverse and distinct approaches. For example, Italy,[31] Romania,[32] and Spain,[33] unlike other European jurisdictions mentioned above, locate equivalent provisions outside classical competition law—in subcontracting (Italy) or unfair-competition statutes (Spain and Romania)—and link them back to competition law by empowering their competition authorities to enforce the rules where there is an impact on competition or a public interest nexus.[34] Absent that threshold, matters are handled primarily through private actions before civil courts.

East Asian jurisdictions, Japan and Korea, adopt yet another distinct approach: they broaden the scope of their competition law frameworks to encompass unfair trade practices, in addition to classical antitrust violations, and thereby avoid, at least at the statutory level, the additional nexus requirement found in Italy, Spain, or Romania.[35] Historically, this approach was inspired by the 'unfair methods of competition' rule under section 5 of the US Federal Trade Commission Act.[36] Yet, given that the abuse of a superior bargaining position, one form of unfair trade practices, was first devised in Japan in 1953 and later codified as a statutory prohibition in 2009[37] (and later transplanted into Korea in 1980 with other unfair trade practices rules),[38] their model merits distinct attention.

Competition Act (Law No 19/2012), art 12 (' … to the extent that such a practice affects the way the market or competition operate').

[31] Subcontracting Act (Law No 192/1998), art 9. This provision was inserted in 1998. Valeria Falce, 'The Italian regulation against the abuse of economic dependence at the crossroads' in Fabiana Di Porto and Rupprecht Podszun (eds), *Abusive Practices in Competition Law* (ASCOLA Competition Law series, Edward Elgar 2018) 375.

[32] The Romanian rule addressing abuse of dependence, the prohibition on 'abusive exploitation of superior negotiating position', was adopted in 2022 by way of an emergency government ordinance (No 84/2022). This prohibition is placed in the Romanian Unfair Competition Law (Law No 11/1991) and is therefore typically situated within the private litigation framework. Nevertheless, where the alleged conduct affects the 'public interest', including the 'proper functioning of the market', the prohibition may also be enforced by Consiliul Concurenței, the Romanian competition authority. See Unfair Competition Law (Law No 11/1991), Arts 1^1 d, 2(3), and 3^1(1), (2); Ana-Maria Baciu and Ana-Maria Corugă, 'Opinie: Protecția consumatorilor, riscul speculativ și practicile de concurență neloială–joncționarea unor concepte cheie cu impact major asupra practicilor comerciale' *Ziarul Financiar* (28 June 2022) <https://www.zf.ro/opinii/opinie-protectia-consumatorilor-riscul-speculativ-si-practicile-de-20956400> accessed 25 February 2026. It has been observed that the authority has already launched several investigations under this framework, including the first one concerning the medical oxygen market. See Consiliul Concurenței, 'The Competition Council Assesses a Case of Abuse of a Superior Bargaining Position on the Medical Oxygen Market' (Press release, June 2024) <https://www.consiliulconcurentei.ro/wp-content/uploads/2024/06/Eng-oxygen-insp-2024.pdf> accessed 25 February 2026.

[33] The Spanish rule on abuse of economic dependence was codified in art 16(2) of the Unfair Competition Act 3/1991 (Ley 3/1991, de 10 de enero, de Competencia Desleal) in 1991. A parallel prohibition also existed under Spanish competition law—namely, the Competition Act 16/1989 (Ley de Defensa de la Competencia 1989)—from 1999 (effective 2000) to 2007. After 2007, however, the specific provision was removed from competition law, leaving the rule solely in the Unfair Competition Act, as is the case today. Since 2007, abuse of economic dependence has been treated as a competition law violation subject to public enforcement by the Spanish competition authority, only insofar as it affects the public interest through a distortion of free competition, pursuant to art 3 of the Competition Act 15/2007 (Ley de Defensa de la Competencia 2007). See Andrea Renda and others, *Study on the Legal Framework Covering Business-to-Business Unfair Trading Practices in the Retail Supply Chain: Final Report* (European Commission, 26 February 2014) 53–4 <https://www.europarl.europa.eu/meetdocs/2014_2019/documents/imco/dv/com-140711-study-utp-legal-framework_/com-140711-study-utp-legal-framework_en.pdf> accessed 25 February 2026.

[34] In Italy, this means cases 'relevant to the protection of competition and the free market' (Subcontracting Act (Law No 192/1998), art 9(3)); in Spain, unfair competition conduct (including abuse of economic dependence) that 'affect[s] the public interest by the distortion of free competition' (Competition Act 15/2007, art 3); and in Romania, 'when there is a public interest consisting in an impairment of the proper functioning of the market'. (Unfair Competition Law (Law No 11/1991), art 3^1(1)).

[35] That said, in Japan and Korea, questions of such structural impact and competition-relevance nonetheless play a meaningful role in both enforcement and judicial review (see 'Consideration of structural impacts' section).

[36] Sang-Seung Yi and Youngjin Jung, 'A New Kid on the Block: Korean Competition Law, Policy, and Economics' (2007) 3 Competition Policy International 153, 174.

[37] The Japanese rule on abuse of dependence, namely, the prohibition on abuse of superior bargaining position, was first introduced as a form of unfair trade practice in 1953. At that time, however, it existed as a practice designated by the JFTC through a 'public notice', rather than being directly codified in the AMA. It was not until 2009 that the prohibition became a formal statutory rule directly stipulated in the AMA, accompanied by the possibility of surcharges (administrative fines). See Masako Wakui, *Antimonopoly Law: Competition Law and Policy in Japan* (2nd edn, 2018) 14–17, 41–42.

[38] Yi and Jung (n 36) 158. Korea's competition law, the MRFTA, was first introduced in 1980 (Act No 3320 of 31 December 1980) and entered into force on 1 April 1981. Since the first enactment, the MRFTA has prohibited abuse of a superior bargaining position as an unfair trade practice, although it has been renumbered over time (currently art 45(1)(6)).

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Arguably, the approaches of Australia[39] and New Zealand[40] are comparable, though not identical to those of the East Asian jurisdictions. Their statutory prohibitions on unconscionable conduct cover a broader range of practices than the equitable doctrine of unconscionability, explicitly taking into account bargaining power imbalances. Although these prohibitions may be enforced by competition authorities,[41] it was notable that their bifurcated judicial architecture introduces meaningful differences from the integrated agency model adopted by Japan and Korea.[42] Moreover, at a more substantive level, the former's reliance on equitable unconscionability aligns less closely with the civil-law traditions of the latter.[43]

Across jurisdictions, the analysis indicates that the background and motives of legislation vary, both in cases of introducing new dependence-centred rules and in cases of amending existing ones. In the cases of France, Germany, and Italy, the abuse of dependence provisions have traditionally been used primarily to address concerns arising in retail distribution and subcontracting relationships.[44] Similarly, Japan and Korea adopted their rules against the backdrop of dual economic structures,[45] with frequent application in retail and

[39] In Australia, the statutory unconscionability has existed at the federal level since 1986, initially under the Trade Practices Act 1974 (Cth). The statutory framework was subsequently expanded in 1992 and 1998. See Explanatory Memorandum, *Trade Practices Amendment (Australian Consumer Law) Bill* (No 2) 2010 (Cth) 41. It was later recodified and renumbered in the Australian Consumer Law, contained in Schedule 2 of the Competition and Consumer Act 2010 (Cth), which commenced on 1 January 2011.

[40] New Zealand introduced a statutory prohibition on unconscionable conduct through the Fair Trading Amendment Act 2021, which inserted the prohibition, ss 7–8, into the Fair Trading Act 1986, akin to Australia's statutory prohibition on unconscionable conduct. These changes came into effect on 16 August 2022. (This development was not captured in the author's previous study (n 13), which was drafted prior to the amendment.) For discussion of the new regime, including its legislative background, see Mark Giancaspro, 'Evaluating the Capacity for the Unconscionability Provisions in the Consumer Laws of Australia and New Zealand to Protect Indigenous Consumers' (2023) 30 Competition and Consumer Law Journal 117, ch II (B).

[41] The Australian Competition and Consumer Commission (ACCC) and the New Zealand Commerce Commission (NZCC).

[42] While the ACCC and the NZCC bring formal proceedings before the courts and seek remedies (a 'bifurcated juridical/agency model'; see n 15), the JFTC and the Korea Fair Trade Commission (KFTC) operate as single specialised agencies that undertake investigative and enforcement functions in unfair trade practice cases (see eg, AMA art 20(1) and from art 20-2 to art 20-6; MRFTA arts 49–50) (an 'integrated agency model'). For further explanation of the enforcement models, see Trebilcock and Iacobucci (n 15) 459ff.

[43] Put simply, unconscionability is an equitable doctrine, under which courts may refuse to enforce a contract or a particular term when, at the time of formation, there are elements of procedural and/or substantive unfairness, for example, where a weaker contracting party (including, but not confined to, final consumers) lacked meaningful choice. This doctrine is often invoked where there is an inequality of bargaining power, and a term is unduly one-sided. Although civil-law systems address similar concerns, they do not generally use the term 'unconscionable conduct' (a common-law construct) and instead tend to rely on codified general clauses and statutory unfair-terms regimes. For a comparative overview of common-law unconscionability and civil-law control of abusive clauses, using the example of the USA (for the former) and Colombia (for the latter), see Camilo A Rodriguez-Yong, 'The Doctrines of Unconscionability and Abusive Clauses: a Common Point Between Civil and Common Law Legal Traditions' (2011) Oxford University Comparative Law Forum 1 <https://ouclf.law.ox.ac.uk/the-doctrines-of-unconscionability-and-abusive-clauses-a-common-point-between-civil-and-common-law-legal-traditions/> accessed 25 February 2026.

[44] For France, see eg, Autorité de la concurrence, 'Avis n° 15-A-06 du 31 mars 2015 relatif au rapprochement des centrales d'achat et de référencement dans le secteur de la grande distribution' (31 mars 2015) <https://www.autoritedelaconcurrence.fr/sites/default/files/commitments/15a06.pdf> accessed 25 February 2026; for Germany, see the *Edeka* case, a landmark decision on large retailers' 'wedding rebates' (Hochzeitsrabatte), cited as Bundesgerichtshof, Beschluss vom 23 January 2018, *EDEKA v Bundeskartellamt*, KVR 3/17, DE:BGH:2018:230118BKVR3.17.0; and for Italy, the fact that the provision is codified in the Subcontracting Act is indicative of its origin in subcontracting. Regarding the Italian rule, it is notable that the Supreme Court of Italy has adopted a broad interpretation of art 9, considering it applicable across various sectors beyond traditional subcontracting arrangements. See Falce (n 31) 378.

[45] For Japan, Wakui (n 37) 15–17; for Korea, see Hwang Lee, 'Globalization and the Development of Korean Competition Law' in Changho Yoon, Ji Sang Chang, and Chongmin Kim (eds), *Korean Competition Policy* (Hyungseul 2011) 396–398 (in Korean). For an English-language overview of the development of Korea's competition law, see Hwang Lee, 'Development of Competition Laws in Korea' (2015) ERIA Discussion Paper Series DP-2015-78 <https://www.eria.org/ERIA-DP-2015-78.pdf> accessed 25 February 2026.

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manufacturing contexts.[46] More recently, reforms in Austria,[47] Belgium,[48] Germany,[49] and Italy[50] illustrate a trend towards strengthening these provisions as a means of responding to the challenges associated with the digital platform economy.[51] Meanwhile, in Switzerland, the relative market power was introduced to address the high price issues allegedly resulting from multinational firms' dual pricing practices.[52]

[46] Both jurisdictions maintain sector-specific statutes that regulate abuses in subcontracting more strictly. See Korea's Fair Transactions in Subcontracting Act; Japan's Act Against Delay in Payment of Subcontract Proceeds, etc. to Subcontractors (recently amended and retitled as Act Against Delay in Payment of Fees, etc. to Small and Medium-sized Entrusted Business Operators in Manufacturing and Other Specified Fields, effective from 1 January 2026). They also use dedicated instruments targeting abuse by large retailers, underscoring the prominence of abuse of a superior bargaining position in the retail sector. Whereas the JFTC continues to rely on sector-specific guidelines, Korea codified the KFTC's previous guidelines into a statute in 2011. See the JFTC, 'Guidelines Concerning Designation of Specific Unfair Trade Practices by Large-Scale Retailers Relating to Trade with Suppliers' (2005) <https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/guidelines_large_scale_retailers.pdf> accessed 25 February 2026; Korea's Act on Fair Transactions in Large Retail Business (promulgated 14 November 2011, in force 1 January 2012).

[47] The relative market power concept was originally embedded in s 4(3) ('Market Dominance') of the Austrian Cartel Act 2005, but the 2021 amendment relocated it to a standalone s 4a, as a separate provision on (deemed) dominance in a relative market power setting, and explicitly extending it to multi-sided digital intermediation. As Robertson notes, the move aims to elevate a concept previously treated as an afterthought, enabling more vigorous future enforcement. See Viktoria HSE Robertson, 'The Austrian Competition Law Amendment 2021: A Preview' (*D'Kart Blog*, 28 April 2021) <https://www.d-kart.de/en/blog/2021/04/28/the-austrian-competition-law-amendment-2021-a-preview/> accessed 25 February 2026; Viktoria HSE Robertson, 'Zur kartellrechtlichen Erfassung von Marktmacht im digitalen Zeitalter' (4 November 2021) Graz Law Working Paper No 16-2021, 10 <https://ssrn.com/abstract=3956570> accessed 25 February 2026. The second sentence of s 4a stipulates: 'An undertaking which acts as an intermediary on a multi-sided digital market shall also be deemed to be dominant if the purchasers of its intermediary services depend on establishing business relations with it in order to avoid serious economic disadvantages.' See Federal Cartel Act 2005 (as amended 10 September 2021). The German competition authority's official English translation is available at <https://www.bwb.gv.at/fileadmin/user_upload/PDFs/Cartel_Act_2005_Sep_2021_english.pdf> accessed 25 February 2026.

[48] Belgium introduced the prohibition on abuse of economic dependence in 2019, and it entered into force on 22 August 2020. See Jan Blockx, 'Belgian Prohibition of Abuse of Economic Dependence Enters into Force' (2021) 12 Journal of European Competition Law & Practices 321. It is notable that, when Belgium introduced the abuse of economic dependence, Dr Jacques Steenbergen, then President of the Belgian Competition Authority, reportedly stated that several abuse of economic dependence investigations in other EU Member States against internet platforms had convinced him to pursue the law, so as to address vertical abuses within Belgium's competition law framework. It is unclear which investigations he had in mind, but, given the timing, they may have related to cases concerning price-parity clauses imposed by online travel agencies, such as HRS and Booking.com. Laurent Garzaniti and others, 'Belgian Competition Authority adds another tool to its enforcement toolkit' (*Lexology*, 26 March 2019) <https://www.lexology.com/library/detail.aspx?g=94149b04-2ef9-4779-810e-dedc36ba8df3> accessed 25 February 2026; Kris Van Hove and Argyrios Papaefthymiou, 'Revising the Competition Law Rulebook for Digital Markets in Europe: A Delicate Balancing Act' (*CPI's Europe Column*, October 2020) <https://www.competitionpolicyinternational.com/wp-content/uploads/2020/10/Europe-Column-October-2020.pdf> accessed 25 February 2026.

[49] The 10th amendment to the German GWB in 2021 strengthened s 20 by removing the limitation that confined the scope of s 20(1) to relationships with SMEs, thereby expanding its applicability to all relationships. s 20(1a) on data access dependency was also introduced through the 10th amendment. Under s 20(1a), undertakings controlling access to important data may be regarded as having relative market power, and refusal to grant access may constitute an abuse. For background to these amendments, see Heike Schweitzer and others, 'Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen' (Bundesministerium für Wirtschaft und Energie Projekt Nr. 66/17, August 2018) <https://www.bundeswirtschaftsministerium.de/Redaktion/DE/Publikationen/Wirtschaft/modernisierung-der-missbrauchsaufsicht-fuer-marktmaechtige-unternehmen.pdf> accessed 25 February 2026.

[50] Italy amended art 9 of the Subcontracting Law (Law No 192/1998) in 2022 (Law No 118 of 5 August 2022). The amendment strengthened the rule's effectiveness by introducing a rebuttable presumption of economic dependence where a company uses intermediation services provided by a digital platform (art 9(1)), and by specifying three examples of abuse by intermediaries: first, failing to provide sufficient information about the service offered; second, imposing unilateral obligations that cannot be justified by the nature or content of the activity performed; and third, obstructing the use of alternative providers for the same service by imposing conditions or additional costs (art 9(2)). These provisions became applicable from 31 October 2022. Also see n 159.

[51] For the potential of the abuse of dependence tool in the digital context, see Alice Rinaldi, 'Re-imagining the Abuse of Economic Dependence in a Digital World' (2020) 4 European Competition and Regulatory Law Review 253.

[52] Switzerland introduced the concept of abuse of 'relative market power' in 2021, by inserting art 4(2bis) and amending art 7 of the Cartel Act. The amendments came into effect in January 2022. While dependence-related considerations had been part of the system since 2003, the previous approach proved ineffective. Dissatisfaction with this ineffectiveness prompted the introduction of the 'relative market power' concept in 2021. In shaping the prohibition on relative market power abuse, Switzerland's unique context of high prices played a significant role. This consideration is explicitly reflected in the wording of art 7(2)(g). See Pranvera Këllezi, *Competition Law in Switzerland: Law and Practice in a European Context* (Springer 2023) 165ff.

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While the details of the dependence position, or relative power, differ among jurisdictions, two common elements are frequently central: the absence of feasible alternatives and the importance of the transaction to the weaker party's business.[53] Economically, these elements are broadly consistent with the determinants of bargaining position in sequential bargaining models.[54] In practice, they enable enforcers or a plaintiff to allege abuse even in the absence of substantial market power. This distinctive approach constitutes the shared hallmark of dependence-centred provisions—and also explains much of the controversy surrounding them. Section 3 further examines this controversy by weighing concerns about the rules against their expected benefits, while also considering the role of safeguards in mitigating them.

3. DISCUSSION: CONCERNS, BENEFITS, AND SAFEGUARDS

Concerns: boundary risks and potential regulatory overlaps

While several jurisdictions have adopted dependence-centred rules within their competition law frameworks, as discussed above, non-adoption remains common across the surveyed jurisdictions—roughly 20 of them—including the USA and the EU.[55] Given the concerns and risks associated with the dependence-centred prohibitions, that choice is not unreasonable.

Encroachment into contractual relations

Doctrinal misfit

Among the many concerns, the most fundamental is the risk of encroachment into ordinary contractual relations.[56] That is, once incorporated into competition law, especially given its public enforcement mechanism, the rules may become a basis for intrusive oversight across a wide range of contractual relationships, generating significant inefficiencies.

[53] For example, regarding Japan's approach, Wakui and Cheng, after reviewing five enforcement cases handled by the JFTC, emphasise that identifying the 'superior bargaining position' is based mainly on the difficulty of substitution and the degree of dependency. See Wakui and Cheng (n 9) 305–306. And Valeria Falce explains that, in Italy, to establish a status of economic dependence, two cumulative requirements must be met: (i) a position of excessive imbalance in the rights and obligations pertaining to commercial relations with another undertaking (such as sunk costs, company size, or a potential imbalance between the parties), and (ii) the absence of any real possibility for the allegedly abused party to find satisfactory alternatives elsewhere in the market (assessed either under an objective lack of alternatives test or a subjective difficulties test). Falce (n 44) 378–380. Similar factors are considered in France. See Cour de Cassation, Chambre commerciale, du 3 mars 2004, 02-14.529 (An English translation is reproduced in Autorité de la concurrence, Decision 20-D-04 of 16 March 2020, para 961); Autorité de la concurrence (n 44) paras 245–247; Claire-Emeline Auduc, 'Abuse of Economic Dependence in the Decision-Making Practice of the French Competition Authority: Assessment of an Underutilised Provision and Prospects for the Digital Economy' (2021) Competition Forum-Resources, 2021, n° 0005, 10–1 <https://competition-forum.com/masters-thesis-abuse-of-economic-dependence-in-the-decision-making-practice-of-the-french-competition-authority-assessment-of-an-underutilised-provision-and-prospects-for-the-digital-economy/> accessed 25 February 2026. For Germany, see *EDEKA v Bundeskartellamt* (n 44) paras 40–51; Ioannis Lianos and Claudio Lombardi, 'Superior Bargaining Power and the Global Food Value Chain: The Wuthering Heights of Holistic Competition Law?' (2016) 1 Concurrences 22, 28–29. The view of the Spanish competition authority also resonates with that of others: Comisión Nacional de la Competencia, 'Report on the relations between manufacturers and retailers in the food sector' (October 2011) 57–59 <https://www.cnmc.es/sites/default/files/1186012_7.pdf> accessed 25 February 2026.

[54] Aoki draws on cooperative and noncooperative bargaining frameworks (ie, the Nash bargaining model and a sequential bargaining game) in discussing superior bargaining positions, and notes that bargaining positions are determined by various factors, including the disagreement point (ie, the alternative when bargaining fails), patience (ie, a discount factor), and the ability to make counteroffers (ie, the order of play in the game-theoretic sense). She stresses that hold-up problems are often the source of a superior bargaining position and characterises ASBP as opportunistic behaviour. Reiko Aoki, 'Japan's competition policy update: a path-dependent way forward' (Journal of Antitrust Enforcement, published online 6 October 2025) 4 <https://doi.org/10.1093/jaenfo/jnaf024> accessed 25 February 2026.

[55] See fns 20–21.

[56] A note of caution is that, while abuse of dependence is conceptually premised on a relational setting, enforcement of a prohibition on abuse of dependence does not necessarily require a formally constituted contractual relationship. By way of example, in Belgium and Korea, the formation or continuation of a contract is not regarded as a requirement. For further details, see n 105.

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To place this concern in its broader analytical context, it is worth recalling that, as a general rule, private entities are regarded as possessing fundamental freedom to make their own contractual choices about whether, with whom, and on what terms, on the premise that such autonomy improves allocative efficiency.[57] This notion is a common premise in modern market economies. In this sense, limitations on such private autonomy may be justified where the foundations of free contracting are substantially undermined[58] or where the effective functioning of the market mechanism is put at risk or is likely to be adversely affected. As is well recognized, while the former is considered a concern of contract law in a broad sense, competition law has focused on the latter issue.

Following this doctrinal dichotomy, the issue of mere bargaining asymmetry has, in principle, been understood to be better resolved through the market's competitive mechanisms and the autonomy of contractual negotiation. Where intervention is nonetheless needed to remedy such imbalances, it has generally been considered more appropriate to pursue it within private law frameworks, such as contract law, tort law, consumer protection law, or unfair competition regimes, as these areas are better suited to addressing the internal structure of private transactions, including bargaining asymmetries, by providing general protection standards and reciprocity norms, reducing transaction costs, and mitigating information asymmetries. Indeed, it has been recognized that power disparities that do not create externalities may, in general, even be desirable, since they can lead to Pareto improvements.[59] Accordingly, in situations where market dominance is absent, the role of competition law, as an external constraint on contractual freedom aimed at reducing social costs and enhancing allocative efficiency,[60] has been limited.

Such a dichotomous framework and the resulting scepticism toward dependence-centred antitrust intervention are particularly evident in US antitrust law. For example, Albert A Foer observes that, under the Chicago School's hegemony—which interprets consumer welfare through an almost single-minded focus on efficiency—vertical relationships between independent firms have been regarded as a matter of voluntary negotiation, in which contracts (even one-sided ones) should be upheld, and such relations are not considered competitive.[61] On this basis, it has been consistently held that unilateral actions by firms with a superior bargaining position do not raise antitrust concerns, he explains.[62]

[57] See eg, Advocate General Jacob's Opinion delivered on 26 November 1998, *Bronner*, Case C-7/97, EU:C:1998:264, paras 53, 56; *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 US 407–8 (2004); the Supreme Court of Korea Full Bench Decision 2002Du8626 Delivered on 22 November 2007 (*Posco*). The Supreme Court's official English translation of the *Posco* decision is available at <https://eng.scourt.go.kr/eng/supreme/decisions/NewDecisionsView.work?seq=927&pageIndex=1&mode=6&searchWord=2002Du8626> accessed 25 February 2026.

[58] Roughly, contracts are regarded as valid where the contracting parties are sufficiently informed to make an informed choice and voluntarily accept the terms of the contract. Where these conditions are seriously impaired—such as through fraud, deceit, or conflicts with public policy—contractual autonomy may be limited.

[59] See eg, Aaron Nicholas and Birendra Rai, 'Are Efficient Bargaining Power Disparities Unfair? An Experimental Test' (2019) Monash Economics Working Paper 02-19, 2 <https://ideas.repec.org/p/mos/moswps/2019-02.html> accessed 25 February 2026.

[60] See eg, Katalin J Cseres, 'Competition and Contract Law' in Arthur S Hartkamp and others (eds), *Towards a European Civil Code* (4th edn, Wolters Kluwer 2011) 205–208.

[61] Albert A Foer, 'Abuse of Superior Bargaining Position (ASBP): What Can We Learn from Our Trading Partners?' (Competition and Consumer Protection in the 21st Century Hearings, Project Number P181201, 20 August 2018), 4–16.

[62] ibid 16. In his study, recognising the omission of the abuse of superior bargaining position as a "gap" in the US antitrust, he urges the FTC to initiate an information-gathering process and take further steps to address the issue within the antitrust framework, such as under s 5 of the FTC Act.

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This line of reasoning, which underpins the concern over incorporating dependence-centred rules into competition law, was once explicitly articulated by the American Bar Association (ABA) in 2016.[63] At the time, China attempted to introduce a legal provision in the Anti-Unfair Competition Law, to sanction 'unfair trading' by an entity that was 'taking advantage of its comparative advantage position', through engaging in certain types of conduct[64] that overlapped with prohibited conduct under the abuse of dominance law.[65] In response to this attempt, the ABA submitted its comments with critical remarks, stating that 'a law that penalizes the unilateral actions of such a buyer, or other entities, 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 procompetitive conduct'.[66]

In the case of the EU, the absence of dependence-centred competition rules at the Union level may be discussed in light of broader policy considerations beyond antitrust.[67] Nevertheless, it can be observed that the concern over blurred boundaries noted above has also influenced the non-adoption of such rules at the Union level. In a 2009 report, the European Commission expressed scepticism regarding the calls from business and legal communities 'for an extension of the convergence rule to national laws covering unilateral conduct', stating that it was uncertain 'whether competition law is the appropriate instrument to address concerns arising from, for example, disparities in bargaining power'.[68] To this day, the EU has not adopted a dependence-centred competition rule, apart from addressing the related issues through sector-specific unfair trading practices regimes.[69]

[63] American Bar Association, 'Comments of the American Bar Association Sections of Antitrust Law and International Law on the Draft Anti-Unfair Competition Law of the People's Republic of China' (24 March 2016) <https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/v4/at_comments_20160324_china.pdf> accessed 25 February 2026 (ABA Comments).

[64] For example, engaging in restrictive, exclusive dealing, without justifiable reasons, and abusively demanding excessive economic interests and attaching other unreasonable terms. For details, see the English Translation of art 6 of the draft bill, attached to the ABA Comments (n 63).

[65] Then-art 17 of the Anti-Monopoly Law (now art 22, following the 2022 amendments).

[66] In the event, the proposal was not carried over into the 2017 revision. See Adrian Emch, 'China eliminates antitrust overlaps in Anti-Unfair Competition Law' (*Kluwer Competition Law Blog*, 20 November 2017) <https://legalblogs.wolterskluwer.com/competition-blog/china-eliminates-antitrust-overlaps-in-anti-unfair-competition-law/> accessed 25 February 2026. The concept later resurfaced in a consultation draft in November 2022 and again in the December 2024 draft. In the final version, passed on 27 June 2025, a narrower and more focused scope was adopted, mainly targeting payment-related practices by large companies *vis-à-vis* SMEs. See art 15 of the Anti-Unfair Competition Law. Specifically, whereas the 2022 and 2024 draft versions contained prohibitions on exclusive dealing and other practices deemed to disrupt the fair competition order, the final 2025 version dropped these elements during the legislative process. Additionally, it is notable that the 'large companies with a superior position' condition in art 15, enshrined in the 2024 draft, represents a higher threshold than the 2016 and 2022 versions, which referred to 'undertakings with a relatively superior position (or a comparative advantage position)'. The full text of the revised Anti-Unfair Competition Law is available at <https://www.spp.gov.cn/spp/fl/202506/t20250627_699862.shtml>. The 2022 draft is available at <https://www.gov.cn/xinwen/2022-11/27/content_5729081.htm> and the 2024 draft is available at <http://www.npc.gov.cn/npc/c2/c30834/202506/t20250626_446142.html>. All URLs were accessed on 25 February 2026.

[67] These include the appropriate degree of convergence between EU and national rules on unilateral conduct and the need to harmonise fragmented national rules. Recently, the European Commission, in a Staff Working Document, has reported stakeholders' concerns that the proliferation of stricter national rules on unilateral conduct, including rules addressing abuse of economic dependence, risks increased fragmentation (a patchwork of national rules) and legal uncertainty within the internal market, and has stressed the need to safeguard further 'coordination and information exchange' regarding the application of such stricter national rules, in order to 'ensure the coherent, effective and complementary enforcement of available legal instruments, including art 102 TFEU, and to safeguard the integrity of the internal market'. See European Commission, 'Evaluation of Regulations 1/2003 and 773/2004' (Commission Staff Working Document) SWD (2024) 216 final, 236, 238–239.

[68] European Commission, 'Commission Staff Working Paper accompanying the Communication from the Commission to the European Parliament and Council – Report on the functioning of Regulation 1/2003' SEC (2009) 573 final, paras 177–178.

[69] See n 21.

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Operational inefficiency

The concern about competition law's encroachment into private contractual relations may also relate to institutional or operational efficiency. In disputes involving a party's dependence on its counterparty or an asymmetry in bargaining power, it can be argued that overlooking the differences and nuances between contractual and competition issues may enable private parties to strategically instrumentalize competition law to enhance their bargaining leverage, despite having no genuine connection to the market's competitive mechanisms in a broad sense. In the worst-case scenario, this could facilitate an unjust transfer of wealth from consumers to the shareholders of (allegedly) dependent producers and impose unnecessary administrative burdens[70] on enforcement authorities, ultimately increasing costs for taxpayers.[71]

Greece offers an illustrative case. Greek competition law once contained a specific provision on abuse of economic dependence, which was enforced by the Greek competition authority. However, as Truli notes, in this institutional setting, the authority became embroiled in numerous private disputes stemming from mere contractual asymmetries with only a minor impact on competition. To reduce the resulting administrative burden, the legislature later removed this provision from competition law and instead incorporated it into the Greek unfair competition regime (Article 18a of Law 146/1914 on Unfair Competition), which is pursued through private litigation.[72]

Potential overlaps with sectoral regulation

In addition to the blurred-boundaries concern, potential overlaps with other sectoral regulations constitute another key concern regarding dependence-centred competition rules. Put differently, even setting aside the concerns over conceptual congestion and the risk of institutional or operational inefficiency discussed above, the incorporation of a dependence-centred rule into competition law may still be questioned or disfavoured on the ground that competition law's intervention may result in unnecessary regulatory duplication. Where sector-specific regulations and competent regulators are already in place or can be mobilized, the issue of abuse of dependence (even where it extends beyond mere private disputes or consumer protection issues)[73]

[70] One might question the concern about increased administrative burdens, particularly given that competition authorities often have broad discretion to screen cases and steer parties toward private litigation. However, that assumption may not hold across all jurisdictions. In particular, in systems where enforcement is predominantly public and the competition authority's discretion is relatively limited, dependence-centred competition rules are more likely to cause doctrinal and administrative congestion and heighten the risk of unnecessary administrative burdens. This risk is well illustrated by the Korean experience. Under Korea's unfair trade practices regime, including the prohibition on abuse of superior bargaining position, the Korea Fair Trade Commission (KFTC) is reported to devote substantial resources to handling disputes that are, in substance, civil in nature. As Back and others observe, this tendency is exacerbated by the absence of statutory rules on investigative scope or task prioritisation, with the result that the agency is generally understood to investigate, to some extent, almost all complaints it receives. This institutional setting—reinforced by the audit oversight by the Korean Board of Audit and Inspection regarding the appropriateness of the enforcer's case handling—leaves the KFTC with limited practical discretion to screen cases and effectively compels it to engage with matters that might otherwise be resolved through private litigation. See Kwang Hyun Back and others, 'Cartels Laws and Regulations 2025 – Korea' (*Global Legal Insights* 29 April 2025) pt 4 ('Key issues in relation to enforcement policy') <https://www.globallegalinsights.com/practice-areas/cartels-laws-and-regulations/korea/> accessed 25 February 2026.

[71] As pointed out by Hans W Friederiszick and Steffen Reinhold, 'The Economics of Dependence: A Theory of Relativity' (14 October 2021) ESMT Berlin Working Paper No 21-02, ch 4 <https://ssrn.com/abstract=3945672> accessed 25 February 2026.

[72] See Thanassis Liakopoulos, 'New Rules on Competition Law in Greece – Abuse of Economic Dependence and Concentration of Undertakings' (1992) 16 World Competition 17, 18 and 20–23; Emmanuela Truli, 'Relative Dominance and the Protection of the Weaker Party: Enforcing the Economic Dependence Provisions and the Example of Greece' (November 2017) 8 Journal of European Competition Law & Practice 579, 580.

[73] For analyses recognizing that abuse of dependence may generate market-related or structural effects, extending beyond mere private disputes or consumer protection issues, see Green Paper (n 21) 8–9; Mor Bakhoum, 'Abuse Without Dominance in Competition Law: Abuse of Economic Dependence and its Interface with Abuse of Dominance' in Fabiana Di Porto and Rupprecht Podszun (eds), *Abusive Practices in Competition Law* (ASCOLA Competition Law series, Edward Elgar 2018) 161. Friederiszick and Reinhold (n 71) ch 3.5.2; Patrice Bougette and others, 'Exploitative Abuse and Abuse of Economic Dependence: What Can We Learn from an Industrial Organization Approach?' (2019) 129 Revue d'économie Politique 26, 265–267; Thomas K Cheng and Michal S Gal, 'Superior Bargaining Power: Dealing with Aggregate Concentration Concerns'

can arguably be more appropriately addressed within those regulatory frameworks rather than through competition law's general, cross-sectoral application and enforcement.[74]

Indeed, where dependency or asymmetry concerns prevail in particular industries, such as franchises, automobile dealerships, platform intermediation, and agriculture, it is not uncommon to address concerns through more targeted, sectoral regulations, rather than by overly broadening the scope of competition law to encompass a prohibition of abuse in the absence of dominance. For example, as observed in Chin's 2016 study, although the USA has no dependence-centred antitrust rule at the federal level, several state-level regulatory regimes can be found to address comparable asymmetry concerns in targeted sectors—most notably franchising and automobile dealerships—with California and New York offering prominent examples.[75] Similarly, the EU's unfair trading practices rules,[76] not to mention those of the Member States, provide further examples of regulatory 'solutions' to dependence-related concerns 'outside antitrust rules', as Gjendemsjø and Anchustegui have discussed.[77]

This institutional design—namely, addressing dependence-related concerns through sectoral regulation, rather than through incorporating a standalone, dependence-centred abuse prohibition into competition law—may be favoured as more effective, particularly in light of competition authorities' inherent challenges in establishing the 'unfair' or exploitative nature of specific trading conditions, including prices, and in determining an appropriate non-abusive benchmark.[78] It may also be justified on grounds of institutional and operational

in Fabiana Di Porto and Rupprecht Podszun (eds), *Abusive Practices in Competition Law* (ASCOLA Competition Law series, Edward Elgar 2018) 189–191.

[74] See eg, Victoria Daskalova, 'Regulating Unfair Trading Practices in the EU Agri-food Supply Chain: a Case of Counterproductive Regulation?' (2020) 13 Yearbook of Antitrust and Regulatory Studies 7, 44–45 (pointing out the European Commission's approach of relegating unfair trading practices to other legal frameworks, and explaining that it stems from the perception that such problems should not fall under competition law; Daskalova nevertheless criticizes this approach as counterproductive, for overlooking the interwoven nature of policy problems and creating risks of regulatory 'smorgasbordism').

[75] Yee Wah Chin, 'What Role for Abuse of Superior Bargaining Position Laws' (2016) 256 New York Law Journal 1, 2.

[76] See eg, the UTPs Directive and the P2B Regulation (n 21).

[77] See Ronny Gjendemsjø and Ignacio Herrera Anchustegui, 'The Scope for National Regulation of Unfair Trading Practices' in Johan Giertsen and others (eds), *Rett i vest: festskrift til 50-årsjubileet for jurist-utdanningen ved Universitetet i Bergen* (Fagbokforlaget 2019), particularly at 303 and related discussions.

[78] At this point, it is worth recalling the conceptual closeness between abuse of dependence and exploitative abuses (see eg Bougette and others (n 73)). Given that dominant firms' exploitative abuses, such as the imposition of unfair terms including excessive pricing, typically arise where affected parties have few options other than to accept such conditions, the objections to sanctioning exploitative abuse of dominance may apply with equal or even greater force to the issue of addressing abuse of dependence, in the absence of dominance, within the framework of competition law. The well-known objections to treating excessive pricing as an antitrust violation include: (i) the market's self-correction; (ii) the risk that intervention against high prices may weaken incentives to compete and innovate; (iii) the institutional difficulty for competition authorities and courts, given their limited competence, in identifying an appropriate non-abusive benchmark (including a 'fair' price); and (iv) concerns over legal certainty/predictability. See OECD Competition Committee, 'Excessive Prices' (DAF/COMP(2011)18, 2012) ch 'United States', 299–301 <https://www.oecd.org/content/dam/oecd/en/publications/reports/2012/02/excessive-prices_372e092c/8e1fd82e-en.pdf> accessed 25 February 2026; Opinion of Advocate General Wahl, delivered on 6 April 2017, *Biedrība 'Autortiesību un komunicēšanās konsultāciju aģentūra – Latvijas Autoru apvienība' (AKKA/LAA)*, C-177/16, EU:C:2017:286 (In *AKKA/LAA*, Wahl argued excessive pricing should apply only in exceptional cases, such as regulated markets, particularly where sectoral regulators fail to act, and where the price-benchmark gap is 'significantly and persistently' large). Additionally, with respect to non-price exploitative abuses, O'Donoghue and Padilla offer a helpful explanation for the rarity of competition cases in the EU. They explain that the extremely low number of competition cases concerning unfair conditions under art 102(a) TFEU may be attributable, among other things, to the availability of national contract and tort law doctrines on unfair terms, which seek to protect weaker contracting parties (including consumers) from unconscionable terms, together with EU sectoral rules preventing unfair terms; these regimes reduce the need to rely on competition law. They also note that unfair terms do not necessarily have a required connection to harm to competition. Robert O'Donoghue and Jorge Padilla, *The Law and Economics of Article 102 TFEU* (3rd edn, Bloomsbury Publishing 2020) 1031–1033. To be sure, the enforcement landscape in the EU may be shifting, as illustrated by recent Commission decisions such as the *Apple App Store Practices (music streaming)* case and *Facebook Marketplace* case (n 4). However, these decisions have not yet been tested before the EU Courts, and it therefore remains to be seen whether this line of enforcement will take root. For further discussion, see Baskaran Balasingham and Alessia S D'Amico, 'Beyond Exclusion: Revisiting Exploitative Abuses in Digital Platform Markets' (2025) 13 Journal of Antitrust Enforcement 265, and Anne C Witt, 'Unfair Trading Conditions—the Revival of a Dormant Concept of EU Competition Law' (Journal of Competition Law & Economics, published online 15 October 2025) <https://doi.org/10.1093/joclec/nhaf025> accessed 25 February 2026.

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efficiency. Arguably, substantive overlaps between dependence-centred rules incorporated into competition law and other sectoral regulations risk generating regulatory confusion, institutional inefficiencies, and duplicative proceedings, including the risk of double jeopardy, as well as the wasteful allocation of enforcement and regulation resources. Businesses may face disproportionate burdens, as they are required to navigate a complex legislative landscape that may unduly constrain legitimate contractual autonomy and deter innovation.

Benefits: augmenting the conception of anticompetitive power

The concerns discussed above, and the resulting legislative choice of non-adoption, can be regarded as reasonable. At the same time, however, such caution may place disproportionate weight on the downsides, while undervaluing the complementary benefits that a dependence-centred abuse prohibition could bring to competition enforcement. This section highlights the benefits that merit closer recognition.

Incorporating the vertical power-over dimension into the power assessment

Identifying the gap

It is first notable that incorporating the concept of dependence into the existing framework may strengthen competition law's control of abusive conduct, which, as currently framed, may not fully capture relative and relational (as opposed to objective and absolute) market power.

This lacuna has been noted in a range of policy documents, including outside the competition law literature. Renda and others' 2014 study[79] observes that EU competition law has had difficulty in addressing unfair trading practices (including abuse of dependence)[80] in retail chains, partly because the market share of large retailers is generally below the 'dominance' threshold under Article 102 TFEU.[81] Similarly, the Commission Staff Working Document accompanying the P2B Regulation proposal notes that the abuse of dominance framework has limited capacity to address the significant influence that non-dominant platforms may exert over dependent business users in competitive bottlenecks.[82]

Also noteworthy is the US House Antitrust Subcommittee's 2020 recommendation that Congress should consider prohibiting abuse of a superior bargaining position. This recommendation is based on the finding that in the USA, dominant platforms' bargaining leverage over dependent third parties, and their exploitative practices, fall outside the reach of antitrust law because courts interpret it as focusing on the formation or entrenchment of market power, not on its exploitation or exercise.[83]

[79] Renda and others (n 33) 38–39. This study followed the 2013 Green Paper (n 21).

[80] In the EU, unfair trading practices refer to conduct that grossly deviates from good commercial standards and is contrary to good faith and fair dealing, typically shifting costs and entrepreneurial risk to the weaker party in an asymmetric relationship (see n 21).

[81] See Chin (n 75).

[82] SWD (2018) 138 final (n 21) 11, 25, and 42. At 11, the document notes that even relatively small online platforms, which provide business users with access to very large consumer groups, can exhibit an imbalance in bargaining power, enabling them to engage in potentially harmful unilateral trading practices. Further reasoning is set out at 25, which cites the concept of 'competitive bottlenecks'. Roughly, the concept in the present context indicates that, in the case of intermediary platforms, such as e-commerce or food delivery services, business users typically multi-home across several major platforms to reach the widest possible consumer base, most of whom single-home. For instance, where there are three influential platforms in the market, business users need to use all three platforms because foregoing one of them would mean foregoing a substantial share of sales, making such a choice infeasible. The document points out that this setting gives a small number of platforms an imbalance in bargaining power over their dependent business users, which in turn allows them to engage in potentially harmful practices. Despite their overlaps with anticompetitive conduct, they are not effectively addressed under competition rules alone, given the absence of an identifiable object or effect and the absence of a dominant position, within the meaning of competition law.

[83] US House of Representatives, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, 'Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations' (October 2020) ch VI A 6 (Prohibited Abuse of Superior Bargaining Power and Require Due Process) <https://www.govinfo.gov/content/pkg/GOVPUB-Y4_J89_1-PURL-gpo145949/pdf/GOVPUB-Y4_J89_1-PURL-gpo145949.pdf> accessed 25 February 2026.

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Meanwhile, in her OECD report, Masako Wakui points out several issues regarding the concept of market power, defined as the power to raise prices above the competitive level. She exemplifies Japan's online marketplace and online news distribution markets as instances where one or two platforms (such as Amazon and Rakuten, and Yahoo! News, with Google often cited as a competitive constraint) hold a strong position and engage in profit-extracting practices against business users or local news publishers. Yet, such conduct is not effectively addressed under the monopolization framework, since the existence of horizontal competition among them provides a counter-argument against a finding of market power.[84]

These observations suggest a gap that may be narrowed by recognizing the current dominance framework's constraints, if not limits, in capturing the full spectrum of power.

Constraints of the existing dominance assessment

The question, then, is which features give rise to the gap. To address this question, first consider the defining features of the dominance approach.

In contemporary practice, the dominant position, or monopoly power, is approximated by the concept of substantial market power.[85] This power refers, roughly, to a substantial degree of a firm's ability (from the supply side perspective, for example) to raise product prices and sustain them above competitive levels, reduce output, or lower the quality of its products or services below competitive levels.[86] On the buyer side, commonly termed 'monopsony', the power can be described in reverse, such as the ability to depress prices paid to suppliers below the competitive level.[87] Be it on the seller side or the buyer side, such power has drawn close scrutiny from competition authorities across jurisdictions.[88] It is because such power may be used to exclude efficient competitors from the market and exploit[89] the resulting situation,[90] by, for example, raising prices or limiting output. In assessing

[84] Masako Wakui, 'On Market Power and Economic Dependence – Note by Masako Wakui' (DAF/COMP/WD(2022) 61, OECD 10 May 2022) 5 <https://one.oecd.org/document/DAF/COMP/WD(2022)61/en/pdf> accessed 25 February 2026.

[85] See ICN Recommended Practices (n 16).

[86] For a textbook explanation of market power, see Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* (6th edn, West Academic Publishing 2021) 103ff; or Richard Whish and David Bailey, *Competition Law* (11th edn, OUP 2024) 37ff.

[87] This study does not sharply differentiate between monopoly power and monopsony power, as monopsony power mainly originates from the absence of horizontal competition among buyers in the same market, just as monopoly power is created by the absence of horizontal competition among suppliers. Although supplier dependence on the buyer's purchases can enhance the power of the monopsonist, it is not essential to the creation of monopsony power. This study posits that, like monopoly power, monopsony power has an inherent bias, with a greater focus on the horizontal aspect of power and competition. As exemplified above, monopsony power fails to capture the power of non-dominant large retailers with relatively small market shares. Renda and others (n 33) 38–40.

[88] International Competition Network, Unilateral Conduct Working Group, 'Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies' (6th Annual Conference of the ICN, Moscow, May 2007) 39ff <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/UCWG_SR_Objectives.pdf> accessed 25 February 2026 (2007 ICN Report).

[89] In this article, a conceptual distinction is drawn between exploitation following exclusion and direct exploitation. The former aligns with the harm in cartels and, in the context of unilateral conduct, with the Chicago School's understanding of harm—namely, harm to final consumers, such as limiting output and raising prices, which is required to establish abuse while rejecting the notion of a violation based on mere exclusion. The latter refers to exploitation directed at customers, not necessarily accompanied by exclusionary effects, such as direct excessive pricing or the imposition of unfair terms, as outlined in art 102(a) TFEU. See Eleanor M Fox, 'What is Harm to Competition? - Exclusionary Practices and Anticompetitive Effect' (2002) 70 Antitrust Law Journal 371.

[90] The term 'exploit the resulting situation' here may correspond closely to the Chicago School's understanding of harm (see n 89). Yet, this conceptual explanation does not imply that competition law intervention must await such exploitation following successful exclusion to occur. The proper timing of intervention depends on the theoretical perspective or policy proposition advanced. At the risk of oversimplification, the Chicago-school view would justify enforcement only after exclusion produces consumer harm, whereas post-Chicago approaches and EU jurisprudence support earlier intervention to protect the competitive process. See eg, Timothy Muris' viewpoint on single firms' antitrust violations described in Fox (n 89) 380–384; Jonathan B Baker, *Antitrust Paradigm: Restoring A Competitive Economy* (Harvard University Press 2019) chs 4 and 5. For the EU's approach, see Fox (n 89) 392ff; Baker (n 90) 79.

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the degree of market power, one of the most salient factors,[91] particularly in the absence of direct evidence,[92] has been the firm's market share, measured by objective indicators such as the firm's proportion of the total revenue or sales in a relevant market. As is well known, the relevant market is an analytical construct comprising substitutable products or services.[93] A notably large market share is taken as indicative of a lack of competitive pressure from substitutes,[94] on the premise that competition is a horizontal process.[95]

This approach is grounded in sound economics and well-established as a legal concept in competition law. However, upon deeper reflection, one may discern that it places an uneven emphasis, tilted toward objective aspects of power. Substantial market power is an objective, absolute capacity to bring about desired effects—such as creating barriers, raising prices, or lowering quality. It is, basically, assumed to exist exogenously, prior to specific relationships with trading partners, and premised on reduced horizontal competition from substitutes. Such a conception, by its nature, tends to underemphasize subjective, relative dimensions of power, endogenous to specific contexts or enduring relationships with customers and attributable to diminished vertical competition in complementary relationships.

From a sociological standpoint, the above-described understanding of market power closely aligns with Peter Morriss's perspective. According to him, power is a dispositional concept that refers to the capacity to achieve outcomes rather than the ability to influence others or alter their behaviour in some way.[96] His view is well taken, and the alignment of his conception with anticompetitive power poses no serious problem, particularly from the perspective of economics.

On the flip side, however, it is important to note that power is not necessarily absolute or objective, and that, in various sociological fields, power has been understood as 'the influence or control over other actors and their actions', rather than 'the capacity to achieve outcomes as intended'. If the former may be denoted as 'power-over', the latter as 'power-to'.[97]

[91] Another important consideration is the presence of substantial economic or legal barriers that limit the expansion of current competitors or obstruct the entry of potential new competitors into the market. See Lawrence A Sullivan and others, *The Law of Antitrust: An Integrated Handbook* (4th edn, West Academic Publishing 2023) 86–88.

[92] For US cases illustrating the meaning of direct evidence and adopting this approach, see Shin-Ru Cheng, 'Approaches to Assess Market Power in the Online Networking Market' (2021) 22 The Columbia Science & Technology Law Review 231, 236.

[93] See Ulrich Schwalbe and Frank Maier-Rigaud, 'Market Definition' (OECD Competition Committee, DAF/COMP (2012)13/REV1, 21 September 2012) <https://ssrn.com/abstract=2084658> accessed 25 February 2026.

[94] For instance, in the USA, the monopoly requirement is considered satisfied when a company's market share surpasses 60–70 per cent, while in the EU, the dominance threshold is presumed to be met if a company's market share is 50 per cent or more. James Keyte, 'Why the Atlantic Divide on Monopoly, Dominance Law and Enforcement Is So Difficult to Bridge' (2018) 33 Antitrust 113, 116; Judgment of 3 July 1991, *AKZO v Commission*, C-62/86, EU:C:1991:286, paras 59–60. Similarly, in Korea, a 50 per cent market share serves as a statutory presumption of dominance. See art 6 of the MRFTA (as amended in its entirety by Act No 17799 on 29 December 2020, with subsequent amendments not affecting this provision). The JFTC suggests prioritising monopolisation cases where a company's market share exceeds 50 per cent, while in practice, a monopoly tends to be found only when a company's market share exceeds 80 per cent. Masako Wakui, 'Assessment of Dominance or Substantial Market Power' (JAIF Virtual Training Course on Unilateral Conduct and Abuse of Dominance, 3 August 2021) slide 2 <https://researchmap.jp/mwakui/presentations/33257033> accessed 25 February 2026.

[95] See eg, *Business Electronics Corp v Sharp Electronics Corp*, 485 US 717, 730 n 4 (1988) ('All anticompetitive effects are, by definition, horizontal effects.'). Also see Bougette and others (n 73) 264–265.

[96] Peter Morriss, *Power: A Philosophical Analysis* (2nd edn, Manchester University Press 2002) 29–35, as cited in Ioannis Lianos and others, 'Superior Bargaining Power and Boundaries of Competition Law' in Ioannis Lianos (ed), *Global Food Value Chains and Competition Law BRICS Draft Report* (2017–2018) 378. See also, Keith Dowding, *Rational Choice and Political Power* (Edward Elgar 1991), as cited in Pamela Pansardi, 'Power to and power over: two distinct concepts of power?' (2012) 5 Journal of Political Power 73, 75–76 (Dowding defined power-to as outcome power, as opposed to the concept of power-over labelled as social power. He argued that the latter is a specific subset of the former in that power-over always presupposes some kind of power-to. According to him, social power is defined as the ability of an actor deliberately to change the incentive structure of another actor(s) to bring about certain outcomes and so constitutes a subset of outcome power, which is described as the ability of an actor to (help to) bring about outcomes in a broader sense.

[97] This study sets aside the question of which accounts, perspectives, definitions, or theories most accurately capture the essence of power. While some may interpret the concepts of power-to and power-over as conflicting, others may consider them complementary dimensions of power. For further discussion, see the perspectives of Felix Oppenheim, Thomas E Wartenberg, and Keith Dowding, which are explained and cited in Pansardi (n 96) 75–77. That said, this study's approach, it

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To be sure, competition law need not cover every dimension of power. That said, it is worth noting that the substantial market power approach sidelines the power-over dimension, and recognizing this bias helps explain the conceptual benefit of incorporating the dependence concept into competition law.

Complementing power-to with power-over

As Lianos and others have articulated,[98] contemporary literature on power identifies its presence not only through the capacity to achieve intended outcomes but also as a relational dynamic in which one actor can influence the behaviour of another.[99] The political scientist Robert A Dahl, viewing power as a relation among people, suggested that A has power over B to the extent that he can get B to do something that B would not otherwise do.[100] Similarly, the social theorist Steven Lukes, expanding the focus to include less visible dimensions of power as well, defined the concept of power as 'A exercises power over B when A affects B in a manner contrary to B's interests.'[101] Michel Foucault, often described as a post-structuralist, even asserted that 'power as such does not exist' and said, 'if we speak of the structures or the mechanisms of power, it is only insofar as we suppose that certain persons exercise power over others'.[102] Among discussions on power,[103] the most pertinent may be that of social exchange theorist Richard M Emerson. He observed that '[s]ocial relations commonly entail ties of mutual dependence between the parties' and noted that to say that X has power is vacant unless we specify 'over whom'. He held that 'power resides implicitly in the other's dependency', and hence that 'the power of A over B is equal to, and based upon, the dependence of B upon A'.[104]

Arguably, the power-over dimension may find partial reflection in competition law through the inclusion of the dependence concept, thereby complementing the dominance-based abuse control. It broadens the law's recognition of anticompetitive power to cover not only an objective, dispositional capacity existing independently of specific relations but also a more subjective, relative, and endogenous dimension embedded in enduring relationships,[105] thereby enabling a more holistic, integrated approach.

aligns more closely with the latter view of 'different dimensions', because this study postulates a situation in which the concept of dominance, fundamentally rooted in power-to, already exists, and dependence, based on power-over, is subsequently added.

[98] Lianos and others (n 96), particularly at 378–379 and 384.

[99] Pansardi (n 96) 74.

[100] Robert A Dahl, 'The Concept of Power' (1957) 2 Behavioral Science 201, 202–203.

[101] Steven Lukes, *Power: A Radical View* (2nd edn, Palgrave Macmillan 2005) 37. For Lukes' critiques of Dahl's concept of power, see Steven Lukes, 'Robert Dahl on Power' (2015) 8 Journal of Political Power 261.

[102] Michel Foucault, 'The Subject and Power' in Hubert L Dreyfus and Paul Rabinow (eds), *Michel Foucault: Beyond Structuralism and Hermeneutics* (The University of Chicago 1983) <https://foucault.info/documents/foucault.power/> accessed 25 February 2026. See also Lianos and others (n 96) 378.

[103] See Keith Dowding (ed), *Encyclopedia of Power* (SAGE 2011) 92–96 ('Causal Theories of Power'), 108–111 ('Coercion, Analytic'), 111–116 ('Coercion and Power'), 133–137 ('Consensual Power, Theories of'), 141–142 ('Control'), 203–206 ('Domination'), 223–224 ('Exchange Theory'), 251–257 ('Feminist Theories of Power'), 276–279 ('Gender, Role of Power In'), 424–425 ('Monopoly Power'), 500–504 ('Power, Cognition, and Behavior'), 504–507 ('Power as Control Theory'), 521–524 ('Power To and Power Over'), 613–616 ('Social Dominance Theory'), 616–619 ('Social Power'), 636–640 ('Structural Power'), 646 ('Subordination'), and 544–547 ('Queer Theories of Power'). For the sake of theoretical parsimony, this research adopts a simple dichotomous approach to power, examining it from both absolute and relational perspectives. However, other approaches may emphasize different values, such as greater explanatory depth. See eg, Ioannis Lianos and Bruno Carballa-Smichowski, 'A Coat of Many Colours—New Concepts and Metrics of Economic Power in Competition Law and Economics' (2022) 18 Journal of Competition Law & Economics 795.

[104] Richard M Emerson, 'Power-Dependence Relations' (1962) 27 American Sociological Review 31, 32–3.

[105] While abuse of dependence is conceptually a relationship-based notion and is therefore discussed in a contractual context, this does not mean that, in practice, the legal assessment necessarily requires the existence of a long-lasting, formal contractual relationship to establish a dependence-centred position. For example, in *Tunstall*, the Supreme Court of Belgium (Hof van Cassatie van België; Cour de Cassation de Belgique) ruled that no pre-existing formal contractual relationship is required to establish a position of 'economic dependence'. At the risk of oversimplification, the dispute concerned an IP holder (Tunstall) refusing to license its patented technology to a competitor (Victrix), allegedly impeding the latter's market access.

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Vertical competition and dependence

Additionally, the inclusion of the dependence concept may be commended for adopting a more integrated approach to competition. As noted above, within the dominance framework, competition is basically conceived as a horizontal process among substitutes, and substantial market power is understood as a state where horizontal competitive pressure is either reduced or insufficient. However, competitive pressure may emerge from vertically linked economic actors as well. For instance, Robert L Steiner, while keeping his focus away from substitutability, argued that firms should be deemed competitors when they capture surplus value at each other's expense or take sales or margins from each other, whether they are in horizontal or vertical relations.[106]

Take Apple, drawing on Steiner's work and the French *Apple* case.[107] Apple products are distributed through various retail outlets. Yet, from the consumer's perspective, they are essentially identical, and they can easily switch between stores, which intensifies horizontal intra-brand competition between retailers. If Apple and retailers are mutually dependent, their relationship would remain complementary, allowing both to gain from the value created along the supply chain. However, this reciprocal relationship becomes less likely to continue once one side acquires significantly greater bargaining power over the other side. Assume that consumers are strongly attached to Apple brands. This strong brand can

Tunstall, which managed the hardware, the software, and the underlying IP linking them, reacted negatively when one of its customers (Télé-Secours) sought to move to an alternative software provider (Victrix). In response, Tunstall denied the licence and initiated infringement proceedings. Télé-Secours (the customer) and Victrix (the competitor) alleged that this amounted to an abuse of economic dependence. On the question whether Victrix—despite having no contractual relationship with Tunstall—could still be regarded as economically dependent on it, the Supreme Court clarified that economic dependence does not necessarily require formal contractual ties. Cour de cassation's judgment of 20 February 2025, *VICTRIX SOCSAN S.L. v. TUNSTALL GROUP H*, C.23.0375.F-C.24.0002.F, BE:CASS:2025:ARR.20250220.1F.4. From a comparative perspective, a recent development in Korea is also noteworthy. On 28 September 2022, the Seoul High Court (2021Nu60719) ruled that while an ongoing transactional relationship can be a factor in assessing a superior bargaining position (an equivalent of economic dependence), it is not a standalone criterion. The court emphasised that the key consideration is not the 'continuity' of transactions but rather the 'relative dominant power' or the 'degree of transactional dependence' of one party over another. The appeal to this ruling was dismissed by the Supreme Court of Korea without a hearing on 2 February 2023 (Decision 2022Du61182). Following the court's decision, the KFTC revised its guidelines in 2024 to reflect that a continuous transactional relationship is not a mandatory requirement. See Seoul High Court Decision 2021Nu60719 Decided 28 September 2022 (*Korea Land & Housing Corporation*).

[106] Steiner, a former Senior Staff Economist at the US FTC, published a series of papers on vertical competition. See eg, Robert L Steiner, 'Intrabrand Competition-Stepchild of Antitrust' (1991) 36 Antitrust Bulletin 155; Robert L Steiner, 'Vertical Competition, Horizontal Competition, and Market Power' (2008) 53 The Antitrust Bulletin 251; Robert L Steiner, 'How Interactions Between Vertical and Horizontal Competition Determine Welfare Outcomes in Consumer Goods Industries' (2018) University of Oxford Centre for Competition Law and Policy Working Paper CCLP (L) 31 <https://www.law.ox.ac.uk/sites/default/files/migrated/how_interactions_between_vertical_and_horizontal_competition_determine_welfare_outcomes_in_consumer_goods_industries.pdf> accessed 25 February 2026. See also Ioannis Lianos, 'Competition Law for the Digital Era: A Complex Systems' Perspective' (August 2019) CLES Research Paper Series 6/2019, eg 59–71 <https://www.ucl.ac.uk/laws/sites/laws/files/cles_6-2019_final.pdf> accessed 25 February 2026. In analysing intra-platform/ecosystem competition dynamics, Lianos calls for further consideration of vertical competition, which he defines as competition for a higher portion of the surplus value generated by innovation, and competition from complementary technologies that may challenge incumbent positions in value chains.

[107] In Steiner's work, no specific brands are mentioned; only the term 'consumer goods' is used instead. The above example is an application of his explanation to the French *Apple* case. Steiner, 'How Interactions between Vertical and Horizontal Competition Determine Welfare Outcomes in Consumer Goods Industries' (n 106) pt 'Market Power Effects from the Intertwining of Horizontal and Vertical Competition'. For the French *Apple* case, see Autorité de la concurrence, Décision No 20-D-04 of 16 March 2020 on practices implemented in the Apple products distribution sector <https://www.autoritedelaconcurrence.fr/en/decision/regarding-practices-implemented-apple-products-distribution-sector> accessed 25 February 2026. To be more specific, in this case, three types of practices were challenged: product and customer allocation, resale price maintenance, and abuse of economic dependence. Regarding the abuse of economic dependence, the authority raised issues with several unilateral practices by Apple against its independent specialised dealers, known as 'Apple Premium Resellers' (APRs), who were selected based on specific criteria. These practices included delays or refusals in supply, discriminatory treatment, and the unpredictable operation of the discount/rebate policy. In its judgment of 6 October 2022, the Paris Appeal Court upheld the authority's finding of abuse of economic dependence in part, while setting aside the infringement finding relating to the discount/rebate scheme. Cour d'appel de Paris, 6 octobre 2022, n° 20/08582, Pôle 5 – Chambre 7. A pourvoi en cassation (an appeal on points of law before the Cour de cassation) has been lodged and remains pending. See also Olivia Rafferty, 'French court cuts record €1.1 billion Apple fine' (*Global Competition Review*, 7 October 2022) <https://globalcompetitionreview.com/article/french-court-cuts-record-eu11-billion-apple-fine> accessed 25 February 2026.

weaken retailers' upstream bargaining power and reduce their substitution elasticity, outside options, in negotiating with Apple. As a result, Apple may be able to increase its margins at the cost of the retailers' margins. In this case, the parties may also be considered to be in competition.

Steiner's suggestion is not novel; it is in line with the understanding of bargaining theory. As Abhinay Muthoo notes, in general terms, a bargaining situation can be defined as 'a situation in which two or more players have a common interest to co-operate, but have conflicting interests over exactly how to co-operate'.[108] And, applying his definition to the issue of dependence, Friederiszick and Reinhold describe the vertical dependency relationship as a status in which multiple firms at different levels of a value chain not only cooperate to create a surplus but also disagree on a few features of their cooperation, often including ways to share the surplus between them, namely, the prize.[109]

If one accepts the view that competition may more broadly involve a contest in which parties strive to gain or secure advantages, then competitive pressure can be said to arise from vertically related bargaining parties as well. A reduction in such vertical competitive pressure could, in turn, be seen as strengthening an incumbent's anticompetitive market power by amplifying its power over others, much like a reduction in horizontal competitive pressure fosters its power to achieve intended outcomes. From an economic perspective, the reduction of vertical competitive pressure may be described as arising when the weaker party's outside options are limited and switching is costly.[110] Specifically, this may occur where the market shares of the incumbent's rivals are limited, where the incumbent controls valuable technology or know-how, or it enjoys strong brand advantages, or where product characteristics (eg, scarcity, perishability, high consumer loyalty, or essentiality) constrain substitutability. This can be further reinforced when a large share of the weaker party's transactions depends on the incumbent, and termination would impose substantial economic losses on the weaker party. The incumbent's regular granting of special conditions, such as discounts or rebates, to the weaker party, may also contribute.[111]

Incorporating the concept of dependence enables competition law to better capture such power arising from reduced vertical competition, which the dominance threshold may not fully address.[112]

Dependence and countervailing power

Admittedly, such a relative, relational, and vertical perspective is not entirely foreign to the dominance framework—indeed, it finds partial recognition of vertically competitive

[108] Abhinay Muthoo, 'A Non-Technical Introduction to Bargaining Theory' (2000) 1 World Economics 145, 146.

[109] Friederiszick and Reinhold (n 71) ch 3.1. Also see Lianos and Carballa-Smichowski (n 103) 798–799.

[110] See n 54.

[111] See n 53; and Lee (n 13) 155.

[112] In a similar vein, Andy Chen, Vice Chair of the Taiwan Fair Trade Commission (TFTC), once commented as follows:

> Under the [abuse of superior bargaining power] theory, dominance and market power are not concepts that can be defined solely by comparing horizontally the economic power held by individual competitors in the market. Rather, market power can arise in the form of reliance between parties in a vertical transaction relationship, in the sense that one of the parties is unlikely or unable to deviate from the business relationship.

Andy C M Chen, 'Investigating Competition Cases in Taiwan: The Inquisitorial Principle and the Abuse of Superior Bargaining Position' (April 2017) 1 CPI Antitrust Chronicle 35, 37–38. Taiwan's Fair Trade Act does not contain a specific provision on the abuse of a superior bargaining position. art 9 addresses abuse of dominance. Nevertheless, the issue of superior bargaining position is generally regarded as falling under art 20 (competition-restrictive practices) and art 25 (unfair conduct). See Taiwan Fair Trade Commission, 'White Paper on Competition Policy in the Digital Economy (Summary)' (December 2023) 52–53 <https://www.ftc.gov.tw/upload/c1697761-9974-412f-b6cb-28befbc9e8d3.pdf> accessed 25 February 2026. See also Matt Liu, 'How Abuse of Superior Bargaining Position is Regulated in Taiwan?' (presentation, ICN Unilateral Conduct Workshop – Tokyo 2023, 7 March 2023) <https://www.jftc.go.jp/en/int_relations/icnucws_files/BOS1_Matt%20J.C.%20LIU.pdf> accessed 25 February 2026.

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relationships through the concept of countervailing power.[113] Yet, the significance of vertical dynamics has been undervalued within the dominance framework.[114] For instance, the US enforcers have downplayed the significance of countervailing leverage by powerful buyers in the context of the supply-side concentration.[115] In the EU, as shown in *Irish Sugar v Commission*, countervailing buyer power has been treated as an exceptional or, at most, marginal consideration.[116]

More importantly, it is emphasized that the countervailing power concept is supposed to function as a defence or a constraint on substantial market power, serving to demonstrate that vertical competition mitigates the formation or exercise of anticompetitive market power. In contrast, in the assessment of dependence, relative power operates as a more affirmative tool—a sword rather than a shield—to establish that vertical competition has been restricted and anticompetitive power thereby created.

In this sense, the inclusion of the concept of dependence differs from the limited defensive role of countervailing power under the dominance framework. This further indicates that, while closely related, discussions of abuse of dependence and buyer power should be kept distinct.[117]

Flexibilizing abuse and competitive harm assessment

Incorporating a standalone prohibition on abuse of dependence into competition law may not only facilitate a more holistic assessment of power and its anticompetitive manifestations, as discussed above, but also introduce greater flexibility into the analysis of abuse and competitive harm. This, in turn, enables competition law to capture concerns related to exploitative practices more effectively—whether they involve direct harm to customers (typically termed 'exploitative abuse') or even generate exclusionary effects (ie, exclusion through exploitation).

First, direct exploitation

As is well known, addressing direct exploitation within competition law raises various concerns.[118] How to respond to them is a matter of policy choice. One option may be (i) to focus on foreclosure and exclusionary conduct (or more narrowly on exploitation following

[113] As for the term 'countervailing power', John Kenneth Galbraith is widely credited with its early formulation. His argument, however, attracted substantial criticism from economists, most notably Stigler and Hunter. See John Kenneth Galbraith, *American Capitalism: The Concept of Countervailing Power* (Houghton-Mifflin 1952); George J Stigler, 'The Economist Plays with Blocs' (1954) 44 The American Economic Review 7; Alex Hunter, 'Notes on Countervailing Power' (1958) 68 The Economic Journal 89.

[114] See eg, Hwang Lee, 'Concept and Criteria of 'Superior Bargaining Position' in Korean Competition Laws' (2016) 51 Journal of Legislation Research 39, 59–60 (in Korean) (noting the limits and longstanding criticisms of relying on countervailing (buyer) power as a constraint in dominance assessments, while arguing that it may have a greater analytical significance in the assessment of dependence (ie, superior bargaining position in Korea)).

[115] For example, the 2010 Horizontal Merger Guidelines discussed 'powerful buyers' only as a limited constraint, and the 2023 Merger Guidelines omit the concept. See US Department of Justice & Federal Trade Commission, 'Horizontal Merger Guidelines' (19 August 2010) 27; US Department of Justice & Federal Trade Commission, 'Merger Guidelines' (18 December 2023). See also Jay B Sykes, 'The 2023 Merger Guidelines: Analysis and Issues for Congress' (CRS Legal Sidebar LSB11138, Congressional Research Service, 28 March 2024) 6.

[116] See eg Judgment of 7 October 1999, *Irish Sugar v Commission*, T-228/97, EU:T:1999:246, paras 70–72, 97–98, 104 (appeal dismissed by Order of 10 July 2001, *Irish Sugar v Commission*, Case C-497/99 P, EU:C:2001:393).

[117] The term 'buyer power' encompasses both a defensive, pro-competitive constraint on seller power (ie, countervailing buyer power) and buyer-side, anticompetitive market power (ie, monopsony). In the present context, however, not only the former but also the latter should be distinguished from the discussion of dependence without dominance. As explained at n 87, both monopsony and monopoly are power-to constructs, arising from reduced horizontal competition, and thus share the same fundamental limitation for present purposes. In contrast, the analysis of dependence position focuses more on power-over in vertical relations, giving less weight to power-to in horizontal rivalry. For a detailed discussion of the three concepts, see John B Kirkwood, 'Powerful Buyers and Merger Enforcement' (2012) 92 Boston University Law Review 1485, 1493–1512; Ignacio Herrera Anchustegui, 'Buyer power' (Competition Law Dictionary, Concurrences, Art. N° 12328) <https://www.concurrences.com/en/dictionary/buyer-power> accessed 25 February 2026.

[118] See n 78.

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exclusion), while tolerating direct exploitation in the belief that market mechanisms may correct it (for example, through entry by rivals offering better terms). An alternative may be (ii) to treat concerns as challenges to be overcome, notwithstanding the risk that intervention may chill innovation incentives and fail to deliver consumer benefits—particularly where exploitation against small businesses is sanctioned. The rationality of either choice may be assessed differently depending, for instance, on the level of economic development, market maturity, institutional capacity, and regional and cultural specificities.

That said, if the latter course is adopted (eg, for economic reasons, as noted by Bougette and others),[119] incorporating a prohibition on abuse of dependence would offer an effective, complementary tool for implementing that policy choice.

As discussed above, the abuse of dominance framework sits uneasily with vertical abuses.[120] Rooted in horizontal rivalry, it treats substantial market power as the primary concern, with heightened vigilance directed at horizontal abuse through market foreclosure and exclusion of efficient competitors. In this setting, vertical exploitation occurring prior to, or irrespective of, horizontal exclusion becomes difficult to address. In contrast, abuse of dependence, centring on vertical aspects from the outset, allows competition law to treat vertical abuses as central issues, not merely as subsidiary concerns.

This benefit is well illustrated by certain national practices. As Lina M Khan once noted when stressing the FTC's mandate for fairness,[121] it is particularly evident in jurisdictions such as Korea and Japan, where the prohibition on unfair trade practices is incorporated into the competition law framework.

In Japan, although the scope of private monopolization under Articles 2(5) and 3 of the AMA is confined to exclusionary conduct,[122] the JFTC has effectively addressed exploitative practices outside the scope of monopolization through the prohibition on abuse of superior bargaining position under Articles 2(9)(v) and 19, as an unfair trade practice. Although the term 'unfairness' may confuse readers unfamiliar with Japan's law,[123] putting details aside, what the concept covers in this context is comparable to exploitative abuse under EU competition law, as Simon Vande Walle notes.[124] A notable difference is that the Japanese concept does not require a market-dominant power to establish abuse.

[119] Bougette and others identify six economic reasons for reinvigorating competition policy on exploitative and economic dependence abuses as follows: (i) direct harm to consumer welfare resulting from increased prices, reduced choices, and limited innovation incentives; (ii) harm to the competition process by impairing firms' capacities to access the market; (iii) distributional wealth transfer by superior economic power, which negatively affects economic efficiency; (iv) welfare concerns arising from the accumulation of economic power, such as lobbying and regulatory biases; (v) macroeconomic imbalances resulting from the concentration of economic power; and (vi) as a long-term effect, an erosion of the 'moral of the market' and a loss of faith in the competitive market as a coordination mechanism. See Bougette and others (n 73).

[120] In Erhard Kantzenbach's formulation, abuse can be classified into two types: horizontal and vertical. Horizontal abuse captures practices targeting competitors and resulting in market foreclosure, whereas vertical abuse concerns practices against customers, especially by raising prices above the competitive level. Erhard Kantzenbach, 'Competition Policy in West Germany: A Comparison with the Antitrust Policy of the United States' in George W Comanor and others (eds), *Competition Policy in Europe and North America: Economic Issues and Institutions* (Routledge 2014) 193–195.

[121] She stated at the 2022 OECD Global Forum on Competition (Session 1) that '… in recognizing fairness … the prohibition on unfair methods of competition is a core part of the FTC's mission, and we are not alone. Internationally we've looked to counterparts, including in Japan and Korea, that have already led the way in thinking about issues relating to superior bargaining power and fairness and centering those in their regimes and so that's also an area where we continue to look and learn as we develop this unique aspect of the FTC's mission in particular'. OECD Competition Law and Policy, '2022 OECD Global Forum on Competition – Session 1: The Goals of Competition Policy' (conference recording, 1 December 2022) (her remarks begin at 1:23:52) <https://youtu.be/SvY_UBOf58Y?t=5033> accessed 25 February 2026.

[122] To be more precise, private monopolization is classified into two types: exclusionary conduct and control-type conduct. The latter refers to cases where a large company (eg, a majority shareholder) causes another company to act in accordance with its will. Given its scarce application and limited relevance, this study focuses solely on exclusionary conduct. See Simon Vande Walle, 'Japanese Competition Law in a Nutshell' (June 2025) 11 <https://ssrn.com/abstract=5072330> accessed 25 February 2026.

[123] For a detailed overview of the meaning of unfairness in Japan's competition law, see Wakui (n 37) 138ff.

[124] See Vande Walle (n 122) 13–16.

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Similarly,[125] Korea has vigorously tackled exploitative practices arising from asymmetric situations, without dominance, by relying on Article 45(1)(6) of the MRFTA. Like in Japan, the provision addresses abuse of a superior bargaining position as one of the types of unfair trade practices. Although, unlike Japan, Korea's MRFTA contains some separate provisions addressing exploitative abuse of dominance,[126] the abuse of superior bargaining position has been invoked more frequently and broadly in practice to curb exploitative conduct. According to the KFTC,[127] from 2020 to 2024, the enforcer recorded no remedial cases[128] concerning exploitative abuse of a dominant position. In contrast, during the same period, there were 56 remedial cases concerning abuse of a superior bargaining position.

These instances suggest that the prohibition on abuse of dependence enables competition law to address vertical abuse more effectively, without being constrained by concepts designed primarily for horizontal rivalry.

Second, exclusion through exploitation

The benefit of incorporating a prohibition on abuse of dependence extends beyond addressing purely exploitative practices. It may also enable competition law to identify and assess exclusionary exploitation within broader systemic dynamics more effectively. While the 'exclusion through exploitation' mechanism may not be easily articulated within the dominance framework, the dependence-centred framework may facilitate its recognition and allow a more flexible assessment of competitive harm in unilateral conduct cases.

Under the dominance-based approach, competitive harm is, conceptually, understood in a linear sequence: reduced substitutes confer market power on the incumbent, enabling it to drive efficient competitors out, lock up the market, and subsequently exploit locked-in customers within the foreclosed market, as depicted in Figure 1. Arguably, the Chicago School account of competitive harm provides a prominent illustration of this linear mindset.[129] This linear understanding leaves little room to recognize exclusion through exploitation.

The dependence-centred framework offers an alternative lens. By emphasizing the relational and vertical aspects of power and competition, it allows competition law to view competitive harm from a different angle—one that facilitates a more circular, systemic, and dynamic understanding.

Suppose a relatively stronger firm exploits its significant influence over trading relationships to extract disproportionately high profits. These profits may then be reinvested to

Figure 1. Linear understanding of competitive harm.
Source: Author.

[125] For a comparison between Korea and Japan's rules, see Sangyun Lee, 'Japan and Korea's Competition Law - Digital Platform Cases' (Kyushu University, June 2025) <https://www.slideshare.net/slideshow/japan-and-korea-s-competition-law-kyushu-university-jun-2025/281352805> accessed 25 February 2026.

[126] Such as art 5(1) items 1 (on unfair pricing), 2 (on limiting outputs), and the second part of item 5 (on conduct harmful to consumer interests).

[127] See Korea Fair Trade Commission, *Statistical Yearbook of 2024* (2025) 43 and 61.

[128] In the table at 43 of the *Statistical Yearbook of 2024*, one case is listed in 2023 under art 5(1) item 5 (formerly art 3-2(1)). It does not concern exploitative abuse. Rather, it is an exclusionary abuse case—against Google's practice of preventing game developers from launching their mobile games on rival app stores—handled under the first part of art 5(1) item 5 (exclusionary dealing), not the second part (conduct harmful to consumer interests). art 5(1), item 5 stipulates as follows: (No market-dominant business entity shall engage in any of the following practices) '5. Making an unfair transaction to exclude a competitor or substantially undermining consumer interests.'

[129] See the discussions at fns 89–90.

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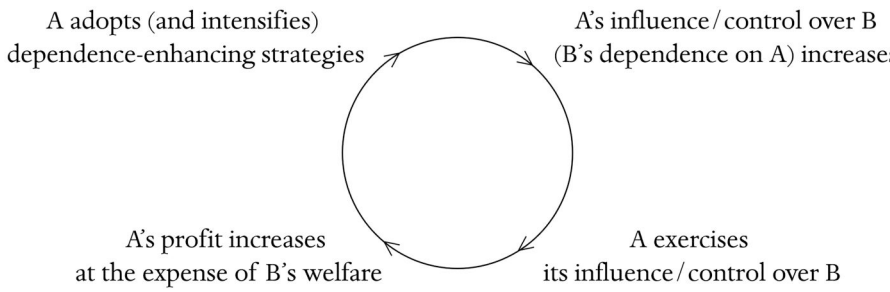

Figure 2. Complementary circular understanding of competitive harm.
Note: A refers to an incumbent, and B to its trading partner(s).
Source: Author.

further entrench its asymmetric power over trading partners through strategies such as raising entry barriers or expanding a captive business model. The resulting amplification of power over its counterparts enables the firm to intensify and refine its extractive practices, thereby consolidating its market power through a self-reinforcing loop. As aptly described by the JFTC's 2010 Guidelines,[130] and later affirmed by the Tokyo High Court in the *Ralse* case,[131] such reinforced power also provides a competitive advantage against rivals—particularly those that refrain from exploitative practices and instead engage in fair dealings even with weaker partners—thereby strengthening its horizontal competitive position.

In this circular and dynamic framework, unlike the classical linear one, exclusion need not precede exploitation for competition concerns to arise. Within the reinforcing loop, vertically abusive practices strengthen a firm's market power, enabling it to expand captive value chains and extract supra-competitive profits more effectively and with increasing efficiency, even without directly targeting horizontal rivals through exclusionary conduct. This flywheel-like dynamic is illustrated, in highly simplified form, in Figure 2. The diagram condenses the more elaborate causal-loop diagrams used by Lianos and others to illustrate competitive dynamics in which growth cycles and accelerators generate positive and self-reinforcing feedback loops that allow leading firms to acquire and consolidate market power.[132]

[130] In its 2010 Guidelines, the JFTC explains that abuse of a superior bargaining position impedes the dependent counterparty's independent decision-making 'and' puts the superior firm 'in an advantageous position against its competitors', while putting the dependent party in a disadvantageous position *vis-à-vis* its competitors, thereby posing a risk of impeding fair competition. Japan Fair Trade Commission, 'Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act' (30 November 2010) 3 <https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/101130GL.pdf> accessed 25 February 2026 (JFTC Guidelines).

[131] In the *Ralse* case, the JFTC issued a cease-and-desist order and a surcharge payment order (¥1,287.13 million) to Ralse, a regional supermarket chain in Hokkaido, for (i) forcing suppliers to dispatch employees without prior agreement or proper compensation, (ii) demanding monetary contributions that were unilaterally set without a clear basis or any advance explanation of their calculation and use, and (iii) compelling purchases of suits and business attire at Ralse's request. The Tokyo High Court dismissed Ralse's appeal. In articulating the rationale for the prohibition, the Tokyo High Court held that where a party whose trading position is superior to its counterparty uses that position to cause disadvantage to the counterparty, unjustly in light of normal business practices, such conduct hinders transactions based on the counterparty's free and independent judgment; it places the counterparty at a competitive disadvantage *vis-à-vis* its competitors and, conversely, may place the actor at a competitive advantage *vis-à-vis* its own competitors; because such conduct poses a risk of impeding fair competition, it is prohibited as one form of unfair trade practice. *Ralse* (n 8). On 18 May 2022, the Supreme Court of Japan denied the petition for acceptance of appeal (leave to appeal), so the Tokyo High Court's judgment became final; this is confirmed in the JFTC Regular Press Conference of 25 May 2022, available at <https://www.jftc.go.jp/houdou/teirei/2022/apr_jun/220525.html> accessed 25 February 2026.

[132] Their research focuses on the global seed industry, in which a small number of leading firms hold substantial market positions. They analyse growth cycles and accelerators, using a system dynamics methodology. Their findings highlight the presence and operation of several positive and self-reinforcing feedback loops arising from interactions between advanced technologies, heavy investment in marketing and distribution, and increases in product attractiveness, customer base, sales, and

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To be sure, this diagram is a radically simplified illustration, designed for conceptual exposition. To illustrate its practical implications, this circular understanding of harm may be applied to a real-world context, such as app distribution markets.

Illustration: App distribution markets

Suppose that two or three leading app stores operate. One might think of Apple's App Store and Google's Play Store when considering the entire app distribution market, or if looking only at Android devices, of Google's Play Store and local alternatives.[133]

First, end-users' reliance on a single app store tends to increase through path dependence: they rarely deviate from repeated choices because of learning effects, emotional attachment, habits, and sunk or switching costs.[134] App developers, in turn, become heavily dependent on the main distribution channels as they seek to reach the largest possible number of end-users, who tend to single-home on an app store platform.[135] In these settings, the mere presence of substitute app stores is of limited significance—not entirely irrelevant, of course, but insufficient to counteract the fact that key app stores hold considerable structural influence over both dependent app developers and end-users.

In the next stage, this structural dependence enables app store operators to exploit their decisive positions over users. Consider a scenario in which a leading app store engages in exploitative practices. Leveraging its power over app developers, the firm may impose one-sided unfair terms, extract monetary or data rents, or degrade service quality, while still maintaining its substantial user base. The profits from these practices can then be reinvested in the platform or its broader ecosystem, thereby improving quality and further reinforcing user dependence. As this process repeats, this dynamic creates a strong self-reinforcing feedback loop: exploitation strengthens market power, which in turn expands the captive value chain and enables further extraction.

While the extracting practices may themselves be a concern of direct exploitation, it becomes even more acute because a leading player may consolidate its position through repeated exploitative practices *vis-à-vis* vertically dependent users alone, thereby attaining a horizontal competitive advantage and progressively tightening its grip on the market—even without directly targeting rivals for exclusion. Figure 3 below visualizes the competitive dynamics in the app distribution market discussed above.

revenues. They find that, through these loops, leading seed companies were able to acquire and entrench their market power. Ioannis Lianos and others, 'The Global Seed Market, Competition Law and Intellectual Property Rights: Untying the Gordian Knot' (February 2016) CLES Research Paper Series 2/2016, chs IV.B and V <https://discovery.ucl.ac.uk/id/eprint/10045042/> accessed 25 February 2026.

[133] It is rare, but local alternatives competing with Google's Play Store can be found, for example, in Korea. In Korea's overall mobile app distribution market, Galaxy Store (preinstalled on Galaxy phones by Samsung Electronics) and One Store (preinstalled on Android phones by telecommunications companies) do serve as alternatives. See Hwa Ryung Lee, 'Abuse of Dominance in Digital Markets: The Korea Fair Trade Commission's Google Play Store Decision' (2024) 37 Seoul Journal of Economics 38, 40 (Table 1 App Stores by Operating Entity).

[134] Path dependence refers to a situation in which an actor's apparently free and rational decision is constrained to a path by the actor's prior choices and is influenced by the choice history of others (Schulte 2015). This concept was first developed in the context of technological path dependence, such as the QWERTY keyboard layout and the VHS–Betamax format contest (David 1985; Arthur 1989). Early work emphasised increasing returns, sunk costs, and other self-reinforcing mechanisms that can keep suboptimal technologies in place even when more desirable alternatives exist (Cotter, Hovenkamp, and Siebrasse 2019). The concept has subsequently been employed across the social sciences, including political science, sociology, and consumer behaviour. In that vein, 'consumption path dependence' has been described as 'a form of repeat consumption that a consumer may be locked into through the effects of self-reinforcing mechanisms on either a cognitive, emotional, habitual, or calculative level, or on a combination of those four' (Siray 2016). Benjamin Krischan Schulte, *Staying the Consumption Course: Exploring the Individual Lock-in Process in Service Relationships* (Springer 2015) 9; Paul A David 'Clio and the Economics of QWERTY' (1985) 75 American Economic Review 332; W Brian Arthur 'Competing Technologies, Increasing Returns, and Lock-in by Historical Events' (1989) 99 The Economic Journal 116; Thomas F Cotter, Erik Hovenkamp and Norman Siebrasse 'Demystifying Patent Holdup' (2019) 76 Washington & Lee Law Review 1501, 1509–1510; Sibel Siray 'Combining Marketing Theory and Path Dependence' (PhD thesis, Freie Universität Berlin 2016) 10, 27.

[135] As explained above, this creates what economists describe as a competitive bottleneck. See n 82.

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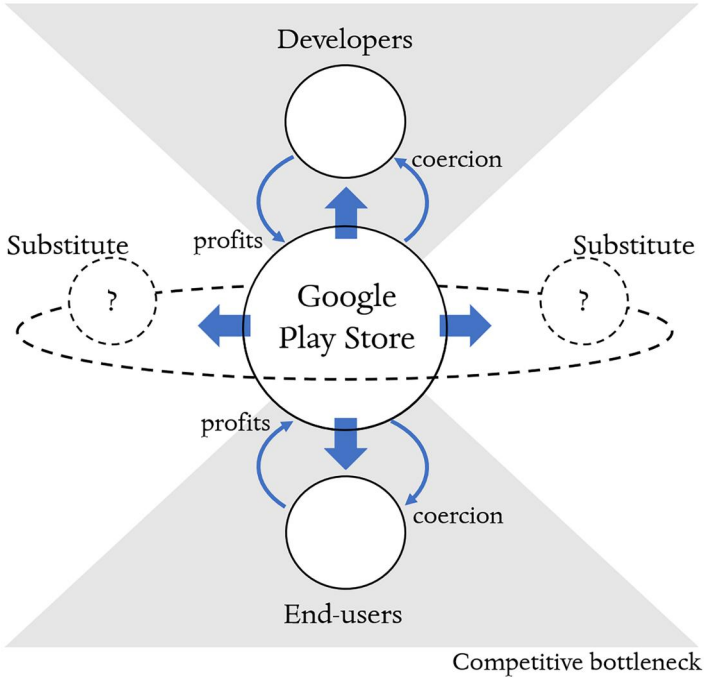

Figure 3. Competitive dynamics in the app distribution market.
Source: Author.

So far as can be observed, enforcement actions concerning app store-related practices have rarely, if ever, proceeded explicitly on such a theory of exclusionary exploitation, beyond the exploitative abuse of dominance (EU),[136] misuse of market power (Australia),[137] or the illegal monopolization framework (Japan[138] and the USA).[139] Yet, had the abuse of dependence been applied to problematic practices such as the imposition of anti-steering provisions, it would likely have provided a timelier solution than is possible under the dominance framework, which often becomes entangled in counterintuitive debates over the proper definition of the relevant market and the existence of substantial market power. It is

[136] *Apple App Store Practices (music streaming)* case (n 4) (where the European Commission found Apple's anti-steering provisions to be unfair trading conditions in breach of art 102(a) TFEU, as noted at fns 4 and 78).

[137] *Epic Games Inc and another v Apple Inc and another* (Federal Court of Australia, NSD 1236/2020, 12 August 2025, Beach J); *Epic Games Inc and another v Google LLC and others* (Federal Court of Australia, NSD 190/2021, 12 August 2025, Beach J) (where the Federal Court found in part for Epic and held that Apple and Google misused market power contrary to s 46 of the Competition and Consumer Act 2010, by engaging in practices in app distribution and in-app payment markets, while the statutory unconscionable conduct claim under s 21 of the Australian Consumer Law—broadly comparable to abuse of superior bargaining position, though not exactly coextensive—was rejected). For a brief case overview, see Anna Moskal, 'Main Developments in Competition Law and Policy 2025 – Australia' (*Kluwer Competition Law Blog* 24 December 2025) (see pt 'Federal Court rulings against Apple and Google in Epic Games and class action cases') <https://legalblogs.wolterskluwer.com/competition-blog/main-developments-in-competition-law-and-policy-2025-australia/> accessed 25 February 2026.

[138] Japan Fair Trade Commission, 'Closing the Investigation on the Suspected Violation of the Antimonopoly Act by Apple Inc.' (Press Release, 2 September 2021) <https://www.jftc.go.jp/en/pressreleases/yearly-2021/September/210902.html> accessed 25 February 2026. Then, the JFTC considered applying art 3 (private monopolization) and art 19 (unfair trade practices, particularly the trading on restrictive terms provision) of the AMA.

[139] See *Epic Games Inc v Apple Inc*, 67 F 4th 946 (9th Cir 2023) (Sherman Act claims rejected; injunction under California's Unfair Competition Law against anti-steering upheld nationwide; certiorari denied 16 January 2024). Also see *Epic Games Inc v Google LLC* No 24-6256 (9th Cir 31 July 2025) (Sherman Act ss 1 and 2 liability sustained; permanent injunction on a broader extent of exclusionary practices largely affirmed).

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also notable that concerns about dependence and its abuse through unfair practices have been a major driver of legislative initiatives, notably the EU's Digital Markets Act (DMA)[140] and Japan's Mobile Software Competition Act (MSCA).[141]

To be sure, even when understood as a matter of policy choice, competition enforcement against exploitative practices—whether they directly harm customers or generate exclusionary effects—remains vulnerable to the criticism that it protects competitors rather than competition. Yet, as Masako Wakui rightly points out,[142] it is worth asking whether a competitive advantage obtained by exploiting transactional counterparts should truly be regarded as legitimate competition on the merits.

Safeguards: internal safeguards mitigating concerns

While the abuse of dependence may offer certain benefits, it does not follow that those benefits should necessarily be realized through a standalone, dependence-centred prohibition within competition law. As discussed earlier, incorporating such rules into competition law raises concerns about blurred boundaries, over-enforcement, and institutional inefficiencies. These concerns may be argued to outweigh the potential benefits of dependence-centred competition rules.

However, actual experience in implementing jurisdictions suggests that, in practice, some legislative and interpretative safeguards effectively mitigate these concerns and shift the balance in favour of the benefits, reducing the risk that competition law drifts into ordinary contractual disputes without competitive implications. This section examines those safeguards and discusses how the implementing jurisdictions seek to recalibrate the weighting between concerns and benefits toward the latter.

Emphasis on structural power

First, while abuse of dependence is conceptually associated with bargaining asymmetries, it is notable that jurisdictions with dependence rules in practice apply the rules mainly where the stronger firm holds structural power, rather than mere situational power.

Structural—not situational—relative power

As Trebilcock explains in a straightforward manner,[143] market power (which he terms 'monopoly') can be separated into a situational one and a structural one. Only the latter falls squarely within the scope of antitrust law, while the former is better regulated in contract law. The structural power ('structural monopoly') refers to power that is 'non-transitory, obtain[ed] against all parties in the relevant market, and is exogenous to and precedes the particular circumstances of the interaction between parties to a given exchange'. He argues that this form of power results in broader welfare effects as contractual externalities and has allocative and distributive implications. The structural power is conceived as existing prior to the negotiation of a specific bargain.[144]

[140] DMA (n 5). See Recitals 2–5, 39–40, and arts 5(4) and 5(7).

[141] See Japan Fair Trade Commission, 'Market Study Report on Mobile OS and Mobile App Distribution' (February 2023) 94–95, 129–135. Following this report, Japan enacted the MSCA in 2024. Provisions corresponding to arts 5(4) and 5(7) of the DMA can be found in arts 8(1) and 8(2) of the MSCA. For a detailed analysis of the MSCA, see Masako Wakui, 'The Smartphone Act: Japan's New Legislation that Regulates Google and Apple' (2025) 16 Journal of European Competition Law & Practice 254; Simon Vande Walle, 'Big in Japan: The Design and Limits of Japan's Mobile Software Competition Act' (17 December 2025) <https://ssrn.com/abstract=5935774>. For a comparison between the two rules, see Alba Ribera Martínez and Sangyun Lee, 'The Japanese Smartphone Act: Teaching Competition Law New Tricks' (*Kluwer Competition Law Blog*, 2 July 2024) <https://legalblogs.wolterskluwer.com/competition-blog/the-japanese-smartphone-act-teaching-competition-law-new-tricks/>. All URLs were accessed on 25 February 2026.

[142] Wakui (n 84) 7.

[143] Michael J Trebilcock, *The Limits of Freedom of Contract* (Harvard University Press 1997) 93–96. See also Lianos and others (n 96) 383.

[144] See the previous discussion of power-to and power-over in 'Incorporating the vertical power-over dimension into the power assessment' section.

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If one adheres to this textbook definition of structural power, abuse of dependence (without dominance) should not be placed within the competition law framework, as otherwise it would extend enforcement to all bargaining processes where situational power prevails. As discussed above, introducing the dependence concept into competition law, alongside dominance, may undermine the advantages of the market power threshold, including enhancing legal predictability by enabling businesses to self-assess the illegality of their unilateral conduct and reducing enforcement costs by excluding meritless or baseless cases from the scope of competition law.[145]

However, as discussed in 'Incorporating the vertical power-over dimension into the power assessment' section, there is also a relative aspect of power that is premised on and endogenous to a bundle of dependent transactions. Accepting that this power-over dimension may fall within the remit of competition law can open the way to recognizing structural, relative power—rooted in asymmetry, yet non-transitory and economy-wide in character, with allocative or distributive implications.[146] By focusing on structural characteristics, concerns about blurring the line between abuse of dependence and mere private disputes arising from bargaining asymmetry can be mitigated. Indeed, in practice, several implementing jurisdictions have applied additional elements to reflect the structural aspect of relative power in the concept of dependence, beyond the core factors of the absence of feasible alternatives and the significance of the transaction at issue.[147]

Structural indicators in practice

For instance, as illustrated by the French *Apple* case or the Korean *Delivery Hero* case, a certain level of market share—though not reaching the level typically required to establish dominance,[148] yet significantly influential (for instance, around 20–30 per cent)—is taken into account as an important factor in applying dependence rules. In *Apple*, the French competition authority, Autorité de la concurrence, regarded Apple's market share of 24.7–28 percent in the mass retail sale of electronic equipment as a positive element in establishing Apple's relative market power, that is, a state of economic dependence.[149] Similarly, in *Delivery Hero* (also known as the *Yogiyo* case), the KFTC took into account the second-largest food delivery platform Delivery Hero's market share, which was approximately 20–30 per cent, as part of its assessment, and sanctioned its lowest-price-guarantee system as an abuse of superior bargaining position *vis-à-vis* the restaurants using the platform.[150] Likewise, the JFTC's 2010 Guidelines stipulate that a firm's large market share and high ranking, among other factors, are key considerations, as they may render transactions with the stronger party 'highly necessary' and may cause substantial consequences for the trading party if the relationship is discontinued.[151]

[145] See US Department of Justice, 'Competition And Monopoly: Single-Firm Conduct Under Section 2 Of The Sherman Act' (September 2008) ch 2. This report was withdrawn in 2009 to lower the 'hurdles' to antitrust enforcement. However, the content about the role of market power referenced in this report has not been altered and is still valid. As of the time of writing this article, the report is archived and available at <https://www.justice.gov/archives/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-2> accessed 25 February 2026.

[146] See, in the same vein, Cheng and Gal (n 73) 189–190.

[147] See discussions at n 53.

[148] See presumptions at n 94.

[149] See Autorité de la concurrence (n 107) paras 990–995.

[150] Korea Fair Trade Commission, Decision of 24 August 2020, No 2020-251, para 47 (KFTC's *Delivery Hero* decision). While the market share figure is redacted in the publicly disclosed decision, the agency's press release states that the platform market share by turnover was approximately 26 per cent. The press release, dated 2 June 2020, is available at <https://repokr.github.io/doc/press20200603.pdf> accessed 25 February 2026.

[151] See JFTC Guidelines (n 130) 6. This factor is set out as one of four categories of factors: (i) Degree of dependence by Party B on the transactions with Party A; (ii) Position of Party A in the market; (iii) Possibility of Party B changing its business counterpart; (iv) Other concrete facts indicating the need for Party B to carry out transactions with Party A.

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Here, it bears emphasis that market share serves only a supplementary function in the dependence framework, illustrating the structural and systemic nature of relational power, while it plays a quasi-decisive role in the dominance framework.[152] In the dependence context, the precise definition of the relevant market is less crucial; it is sufficient to demonstrate, through a variety of indicators, that a firm's relational power exerts a significant influence over other market participants. For example, in the Korean *Coupang* case,[153] the KFTC emphasized Coupang, a local e-commerce retailer's, consistently high rankings across different measures—although it was not first in overall sales (combined offline–online) and trailed on PC unique visitors, it ranked second by online payment volume, led the mobile segment (first by unique visitors and by the primary usage share), and recorded the highest monthly active users across age groups.[154]

Also, competitive bottlenecks—where consumers on one side tend to single-home, while businesses on the other side multi-home to reach those single-homing consumers and maximize profits—can be of particular relevance to the power consideration.[155] Such a structure is especially prevalent in digital intermediary platforms. Indeed, practice offers several instances where the competitive bottleneck structure has been relied upon in establishing the dependence position of intermediary platforms.

Italy's recent amendments provide a pertinent illustration. As seen above,[156] Italy introduced a rebuttable presumption of economic dependence in 2022 at the end of Article 9(1), stating that it applies 'where a company uses the intermediation services provided by a digital platform that plays a decisive role in reaching end users or suppliers, including in terms of network effects or data availability'.[157] While this presumption may appear to carry a risk of over-enforcement, it is notable, first, that the presumption is not absolute but rebuttable, and second, that the requirement of 'intermediation by a digital platform playing a decisive role' functions like a scalpel, carving out cases of mere imbalances from forms of structural dependence that more clearly raise competition concerns, as shown in the 2024 *Meta-SIAE* decision.[158] In this case, the Consiglio di Stato set aside the AGCM's reliance on Article 9(1), holding that the applicability of the legal presumption had not been established absent the requirement. The court found that, on the facts, Meta's Audio Library—a built-in audio-clip library rather than a music-streaming service—did not amount to such intermediation, and the unavailability of alternative channels for a collecting society for artists' rights (SIAE) was not adequately substantiated. In this study, the court's point may be understood as reflecting the absence of a competitive bottleneck structure.[159]

[152] See presumptions at n 94.

[153] Korea Fair Trade Commission, Decision of 23 September 2021, No 2021-237 (where the local e-commerce retailer Coupang's 'lowest price matching system' was found to constitute an abuse of superior bargaining position under the MRFTA; other coercive and exploitative practices against suppliers were addressed under the Act on Fair Transactions in Large Retail Business) (KFTC's *Coupang* decision). See also, Seoul High Court Decision 2022Nu36102 Decided 1 February 2024 (where the appellate court overturned the enforcer's decision, holding that Coupang's superior bargaining position could not be established with respect to the eight monopolistic suppliers among the more than one hundred concerned, and that even for the remaining suppliers, coercion beyond ordinary negotiation was not proven). This case is currently pending on appeal before the Supreme Court of Korea.

[154] KFTC's *Coupang* decision (n 153) paras 7–16.

[155] See 'Incorporating the vertical power-over dimension into the power assessment' section and fns 82 and 135.

[156] See n 50.

[157] See art 9(1) of the Italian Subcontracting Act (LEGGE 18 giugno 1998, n. 192, amended by LEGGE 5 agosto 2022, n. 118).

[158] Consiglio di Stato (Sez VI), 2 luglio 2024, no 5827/2024.

[159] On 20 April 2023, the AGCM adopted interim measures, relying on the presumption under art 9, ordering Meta to resume negotiations, in good faith, with SIAE, the largest Italian copyright collecting society, for the licensing of musical works on Meta's platforms (see Consiglio di Stato (n 158) pt 1, a)–d)). Prior to this, following a breakdown in negotiations in March 2023, Meta had suspended licensing talks with SIAE and removed protected content repertoire from its social platforms. While the AGCM and the TAR Lazio (first instance) considered that the conditions for the presumption were satisfied, the Consiglio di Stato (on appeal) set aside and annulled the order. The Consiglio di Stato first emphasised that the

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Also, in the Korean *Delivery Hero* case, the KFTC invoked this structure, together with other evidence, to find that the second-largest platform held a superior bargaining position over restaurants.[160]

In addition to these considerations, the 'difference in scale of business between the parties' may also be taken into account to clarify the structural features of the relationship(s) concerned. As illustrated by the International Competition Network in 2008, several jurisdictions with specific provisions on abuse of dependence—including France, Germany, Italy, Japan, and Korea—indicated that this factor is used to identify whether one party holds a position of dependence, or superior bargaining position.[161]

In practice, this factor is often absorbed into other elements of the assessment and thus may seem marginal in isolation. However, under particular growth paths and prevailing economic structures, it may carry distinctive weight. For example, it is worth noting that, in Japan—and similarly in Korea—the abuse of superior bargaining position prohibition was introduced in 1953 (1980 in Korea), together with dedicated rules on subcontracting relationships in 1956 (1984 in Korea), to address problems rooted in the dual structure of the economy, polarized between a small number of large firms and a multitude of small and medium-sized enterprises (SMEs).[162] In this setting, the abuse of a superior bargaining position may have been expected to operate as a protective framework for SMEs in their dealings with large enterprises, even where case-specific structural power is difficult to establish. In this context, business scale may be seen as carrying *de facto* decisive weight, easing a finding of superior bargaining position.

Consideration of structural impacts

Beyond the emphasis on structural power, it is also important to note that, to minimize the risk of blurred boundaries and over-enforcement, jurisdictions with abuse of dependence rules assess the broader ramifications of abusive conduct, going beyond mere private disputes. By focusing on systemic problems—market failures or functional equivalents, such as the concentration of economic power—they seek to justify another parallel abuse prohibition within competition law.

Safeguard against blurred boundaries and over-enforcement

Admittedly, the existence of structural power, whether conceptually absolute or relative, already signals some distortion of the market system, and conduct that leverages such power is likely to have broader effects beyond purely private disputes. However, this does not mean that such outcomes are inevitable. As is well known, modern competition law has generally[163] taken the view that the mere possession of market power is not

presumption is rebuttable and, even allowing for the preliminary nature of the proceedings, found that the AGCM had insufficiently examined Meta's submission that the service at issue could not be classified as 'intermediation' within the meaning of the statute. In particular, it clarified that the object of the negotiations was the Audio Library, a mere archive from which users can draw music content to enrich videos or reels. This is distinct from music streaming or listening services (such as Spotify). The Consiglio di Stato found that any restrictions on this functionality did not prevent the distribution or sharing of music content via other channels, and further noted that the AGCM had presented no evidence that satisfactory alternatives were unavailable. See Consiglio di Stato (n 158) pts 8–9. For a brief case overview, see Giovanni Maria Riccio, 'The Italian Antitrust Authority investigates Meta for abuse of economic dependence' (*Kluwer Competition Law Blog* 30 May 2023) <https://legalblogs.wolterskluwer.com/copyright-blog/the-italian-antitrust-authority-investigates-meta-for-abuse-of-economic-dependence/> accessed 25 February 2026.

[160] KFTC's *Delivery Hero* decision (n 150) paras 19–23, 46–48.

[161] 2008 ICN Report (n 9) 19–20.

[162] Wakui (n 37) 15–17.

[163] Of course, economic and policy perspectives may vary. See eg, Bo Cowgill and others, 'Political Power and Market Power' (2024) NBER Working Paper No 33255 <https://www.nber.org/system/files/working_papers/w33255/w33255.pdf> accessed 25 February 2026; Stefan Kolev, '"Power Is Evil in Itself": The Ordoliberal Quest for a Privilege-Free Order' (*ProMarket* 28 March 2021) <https://www.promarket.org/2021/03/28/ordoliberal-privilege-free-order-walter-eucken-franz-bohm-germany/> accessed 25 February 2026.

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unlawful.[164] Reflecting this, and in the interest of coherence, the implementing jurisdictions require a broader impact of conduct as a condition for establishing abuse in dependence cases as well, thereby mitigating the boundary-related concerns.

The nature of the impact required to establish abuse differs across jurisdictions. Broadly speaking, the jurisdictions can be divided into two groups. One group requires effects on competition, consistent with (though not identical to) the standard applied in cases of abuse of dominance; the other applies a different standard, centred on fairness. This distinction tends to arise largely from differences in the legislative format of the rules, as seen in 'Legislative and institutional landscape' section.

In broad terms, European jurisdictions, including Austria, Belgium, France, Portugal, and Switzerland, tend to fall into the first group. They align dependence rules with dominance rules within the same legal framework and require a comparable standard of effects on competition.

French law, for example, places the prohibition on abuse of dependence alongside that of abuse of dominance in Article L. 420-2 of the Commercial Code, and makes the former contingent on the conduct being 'capable of affecting the operation or structure of competition'. In *Apple*, the potential effects[165] of Apple's conduct, exploiting the state of economic dependence, were established on the basis that it impacted intra-brand competition between Apple Premium Resellers (APRs), which were independent retailers subject to Apple's abuse, and other distribution channels, including Apple Stores owned by itself, by placing the former at a competitive disadvantage relative to the latter.[166] The Court further noted that Apple's conduct also impacted inter-brand competition by using APRs to maintain a nationwide distribution presence while reserving the most profitable areas for its own Apple Stores.[167]

Meanwhile, East Asian jurisdictions, such as Korea and Japan, fall into the second group. In these jurisdictions, abuse of a superior bargaining position is treated as an unfair trade practice rather than as a classic antitrust infringement, such as abuse of dominance, cartels, or anticompetitive mergers. The question is how unfairness, a concept that is inherently vague and thus liable to give rise to the boundary-related concerns, should be construed so as to justify placing the prohibition on abuse of superior bargaining position within the same framework as these classic antitrust infringements.

Korea provides an instructive example of the effort to align the notion of unfairness with the requirement of anticompetitive effects, thereby justifying its placement within that framework.

Historically, in Korea, the abuse of a superior bargaining position was actively enforced to address distributive concerns arising from the country's dual economic structure.[168] In the author's view, during this earlier period, the provision was applied in a manner that allowed almost any conduct that disadvantaged a weaker party in a vertical relationship to be characterized as 'unfair'. However, as the economy matured and a liberal market order began to take hold following the 1997 Asian financial crisis, such intervention came under increasing

[164] See eg, *Verizon Commc'ns Inc. v. Trinko, LLP*, 540 US 398, 407 (2004); Judgment of 27 March 2012, *Post Danmark A/S v Konkurrencerådet*, C-209/10, ECLI:EU:C:2012:172, para 21. Most jurisdictions adopt similar approaches. See 2007 ICN Report (n 88) 40.

[165] Cour d'appel de Paris (n 107) para 646. The court held that, to establish abuse of the state of economic dependence, it is not required to prove an actual effect on competition, and that it is sufficient to establish a potential effect on the functioning or the structure of competition in the relevant market.

[166] Cour d'appel de Paris (n 107) paras 649–650.

[167] Cour d'appel de Paris (n 107) para 652.

[168] See n 9; Lee (n 45).

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criticism and could not be sustained.[169] Against this background, the courts gradually narrowed the scope of the provision by interpreting the meaning of unfairness in a more systemic and structural way.[170] The recent instance is the 2015 *Geumbo Development* decision.[171]

The *Geumbo Development* case concerned a golf club operator that unilaterally revised membership terms in ways disadvantageous to members. Seeing the conduct as an abuse of a superior bargaining position, the KFTC sanctioned this company in 2011,[172] and the decision was upheld by the Seoul High Court in 2012.[173] But the Supreme Court of Korea reversed that decision in 2015. The Court clarified that the aim of the prohibition is to prevent unfair trade practices 'from a public regulatory standpoint in order to establish fair trade or competition order', not merely to rectify unfair contractual terms or coordinate private-law rights and obligations. Then, it ruled that (particularly in cases where general consumers were subject to such practices, as in this case)[174] it was required for the plaintiff to prove that the practices at hand, 'from a more wider perspective (*i.e.*, impact on trade order)', 'may likely damage unspecified number of consumers' and to demonstrate that the practices are 'continuous and repetitive', thereby undermining the 'fair trade order'. On that basis, the Court found that the golf club operator's conduct failed to meet this standard on the evidence. It noted that the factors reflected only private contractual faults affecting identified members, with no broader nexus to the trade order (ie, no broader impact on unspecified consumers, no continuity/repetition), and no showing that civil remedies were insufficient. By setting such a demanding threshold, the Court effectively raised the hurdle for competition enforcement of the abuse of dependence prohibition.

Japan, too, sets a comparably high standard, which makes the concern about blurred boundaries less likely. The JFTC's 2010 Guidelines suggest that, when assessing abuse of a superior bargaining position, the conduct's gravity, prevalence, and the consequence of giving a competitive advantage to the perpetrator are considered.[175] Such factors were affirmed by the Tokyo High Court in the 2021 *Ralse* case (although the last element concerning competitive advantage

[169] For criticism of the Korean approach, see Yong Lim and Soojin Nam, 'Bringing Abuse of Superior Bargaining Position into the Digital Era' (ASCOLA Asia Online Seminar, 30 May 2022) <https://www.ascola-asia.com/events> accessed 25 February 2026. The recording of the presentation is archived at the provided link.

[170] For precedents Lee (n 13) 139–140.

[171] Supreme Court Decision 2012Du18325 Decided on 10 September 2015 (*Geumbo Development*). An English translation offered by the Supreme Court of Korea is available at <https://library.scourt.go.kr/SCLIB_data/decision/08-2012Du18325.htm> accessed 25 February 2026.

[172] Korea Fair Trade Commission, Decision of 4 July 2011, No 2011-091.

[173] Seoul High Court Decision 2011Nu26505 Decided on 12 July 2012.

[174] This case specifically concerned business-to-consumer relations rather than business-to-business relations, and it remains uncertain whether the standard will also be required in business-to-business contexts in the future. However, given that the Court has consistently narrowed the scope of the prohibition, the standard may also be applied to business-to-business relations as well. For a similar argument, see Jae-Hun Jeong, 'A Study on the Revision of Unfair Practice Based on the Korean Competition Law' (2019) 23 Ewha Law Journal 1, 22 (in Korean); in the same spirit, see Hwang Lee, 'Requirements for Regulation by Competition Laws over Hold-up by Breach of FRAND Commitment' (2012) 129 The Justice 193, 237 (in Korean).

[175] The JFTC Guidelines state as follows:

> However, if a party who has superior bargaining position against the other transacting party makes use of such position to impose a disadvantage on the transacting party, unjustly in light of normal business practices, such act would impede transactions based on the free and independently select of the said transacting party, and *put the said transacting party in a disadvantageous competitive position against its competitors*, while *putting the party having superior bargaining position in an advantageous competitive position against its competitors*. Since such act poses the risk of impeding fair competition, it is regulated under the Antimonopoly Act as "abuse of superior bargaining position," which constitutes a category of unfair trade practices. (*emphasis* added) JFTC Guidelines (n 130) 3.

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seems to remain somewhat declaratory in nature).[176] In *Ralse*, the Tokyo High Court ruled that the retailer Ralse's conduct against suppliers was likely to impede fair competition, noting that the conduct was carried out over a certain period, on a wide scale, and continuously, and as a result, suppliers' transactions based on free and independent judgment were impeded, thereby placing them at a disadvantage *vis-à-vis* their competitors, while finding that there was a concern that Ralse would gain an advantage over its competitors.[177]

To be sure, the contrast between the two groups is only a rough comparison rather than a precise taxonomy.[178] What is noteworthy is that, across jurisdictions (albeit not uniformly), there exists a common reliance on certain safeguards, ensuring that the abuse of dependence within competition law does not overstretch into a device for resolving ordinary contractual disputes. In this sense, the commonly raised concerns discussed above arguably carry less weight in practice, in light of these safeguards.

Justification for overlaps with sectoral regulations

As noted in 'Potential overlaps with sectoral regulation' section, even if enforcement is directed at broader structural and systemic concerns, the presence of targeted regulatory tools and competent regulators still makes extending competition law to abuse of dependence superfluous and excessive. This is even more true given the scarcity of government resources, the possibility of conflicts arising from overlaps, increased coordination costs, and the complexity resulting in confusion and uncertainty.[179] These problems do not vanish even if one circumvents double jeopardy risks through legislation or interpretive measures.[180]

However, while such a view may hold from an efficiency-oriented perspective, it does not necessarily follow when the value of beneficial overlaps in enhancing reliability is also considered. According to the theory of redundancy, introduced into public administration by Martin Landau, overlaps or duplications can be more beneficial than a strict division of labour (ie, zero redundancy) under certain circumstances. Specifically, where an overlapping component, while operating independently of another overlapping part and at a reasonable cost, prevents the whole system from failing—like an automobile's dual braking setup—such redundancy can serve as a fail-safe that improves system reliability rather than constituting waste, thereby making the entire system more trustworthy.[181] In short, provided that some

[176] While the first two elements are concretely substantiated in the decision, the last is not. The same point is made by Masako Wakui, 'Ralse case' in Noboru Kawahama, Kuninobu Takeda and Masako Wakui (eds), *Economic Law Cases and Decisions 100 Selected Cases* (3rd edn, Jurist Extra Issue No 268, Yuhikaku 2024) 164–165 (in Japanese).

[177] *Ralse* (n 8).

[178] As seen above, Italy, Spain, and Romania, for instance, place the prohibition on abuse of dependence within unfair practices or unfair competition frameworks, yet still require proof of an effect on competition rather than on fairness alone. Australia, meanwhile, addresses bargaining asymmetries through the doctrine of unconscionable conduct—an approach that resembles Korea and Japan in form but, in practice, remains closer to contract law, requiring a finding of unconscionability.

[179] See Michael Doran, 'Legislative Organization and Administrative Redundancy' (2011) 91 Boston University Law Review 1815, 1835–1836 (in these parts, before reviewing Martin Landau's theory of redundancy, the author examines Milton Friedman and others' critiques of redundant administrative programs); Todd S Aagaard, 'Regulatory Overlap, Overlapping Legal Fields, and Statutory Discontinuities' (2011) 29 Virginia Environmental Law Journal 237, 286–288 (here, Aagaard discusses the disadvantages of regulatory overlap before addressing its advantages at 292ff).

[180] For example, while the DMA overlaps with conventional competition rules (particularly the prohibition on abuse) to some extent, the former is viewed as pursuing distinct objectives—specifically 'fairness' and 'contestability'—which allows the sectoral regulation to maintain a complementary relationship with competition law. See Recital 11 of the DMA, and Judgment of 22 March 2022, *bpost*, C-117/20, EU:C:2022:202, para 49. Even if concerns regarding *ne bis in idem* could be addressed through such legislative techniques and affirmative interpretation, other practical issues discussed in the main text above remain unresolved.

[181] In the field of social sciences, the concept of redundancy began to be explored with Martin Landau's 1969 study: Martin Landau, 'Redundancy, Rationality, and the Problem of Duplication and Overlap' (1969) 29 Public Administration Review 346. For further details and discussions of the redundancy theory and its application to the competition law enforcement, see my previous research, Sangyun Lee, 'Duplicate Powers in the Criminal Referral Process and the Overlapping Enforcement of the Competition and Criminal Authorities in Korea: An Analysis Through the Lens of the Redundancy Theory' (ASCOLA Asia Annual Regional Workshop 2024, Tokyo, 25–26 October 2024) 6ff <https://ssrn.com/abstract=5004296> accessed 25 February 2026.

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conditions are met,[182] 'arithmetic increases in redundancy' could 'yield geometric increases in reliability'.[183]

When viewed through the lens of this constructive redundancy,[184] the institutional overlaps between the prohibition on abuse of dependence and sectoral regulations may be justified[185] where competition law focuses on structural and systemic concerns. In such cases, the overlaps may operate as a fail-safe, a system-reliability-enhancing institutional arrangement, ultimately strengthening trust in the whole market system by guarding against the risk that regulatory oversight failures by sectoral regulators could lead to system-wide failures—whether outright market failures or equivalent systemic problems.

In sum, the structural impact requirements—whether understood as anticompetitive effects or as comparable negative impacts on the fair-trade order—have in practice operated both as safeguards against concerns about blurred boundaries and over-enforcement and as justifications for institutional overlaps with sectoral regulations addressing sector-specific asymmetry concerns.

4. CONCLUSION

The analysis suggests that incorporating a prohibition on abuse of dependence into competition law—such as abuse of superior bargaining position or economic dependence—can serve as a complement to the dominance-based approach, easing the conceptual and practical constraints of that framework.

Admittedly, as discussed in 'Concerns: boundary risks and potential regulatory overlaps' section, reasonable concerns and risks have been raised about such standalone, dependence-centred abuse rules, and these provide a justifiable rationale for their non-adoption in many jurisdictions. Still, as examined in 'Benefits: augmenting the conception of anticompetitive power' section, adding a dependence lens to competition law can yield complementary benefits for the existing dominance-based framework, notably by bringing the vertical power-over dimension to the centre of the analysis of anticompetitive power and enabling a more flexible, dynamic assessment of competitive harm. Of course, there may still be a valid objection that these benefits are outweighed by the concerns and risks. Yet, as 'Safeguards: Internal safeguards mitigating concerns' section suggests, actual experience in implementing jurisdictions (notably those in 'Legislative and institutional landscape' section) indicates that, with appropriate legislative and interpretative safeguards, the concerns can be mitigated in practice, thereby shifting the balance between concerns and benefits toward the latter. Taken together, these findings answer the research question raised at the outset: why several jurisdictions have adopted abuse of dependence rules in competition law, and how they have sought to make such rules workable, while mitigating inherent risks.

To be sure, competition enforcement against abuse of dependence may carry an elevated risk of over-enforcement. It is worth bearing in mind that, at a fundamental level, even

[182] Here, 'some conditions' refer to the following: (i) the potential for partial failures to lead to systemic failures, (ii) the reliability benefits outweighing the costs of adding redundancy, (iii) the independence of redundant parts, and (iv) equipotentiality. As I discussed in my previous research, these are key elements of constructive redundancy. While these do not necessarily constitute formal requirements for beneficial overlaps, I use the term 'conditions' here for the sake of clarity and readability. See Lee (n 181) 7–8.

[183] Landau (n 181) 350.

[184] Landau (n 181) 356.

[185] Of course, the conceptual justification of overlaps should be distinguished from the question of how individual cases of abuse of dependence are handled in practice. Approaches of jurisdictions may differ in whether they rely primarily on competition authorities (with sectoral regulatory interventions confined to a complementary, secondary role), on sectoral regulators (with competition law's enforcement serving a residual or fail-safe role), or on a more fully parallel approach. These choices are likely to reflect jurisdiction-specific economic, institutional, and organisational conditions. This issue, which would require further analysis, is not examined in this article.

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practices that appear unfair or unduly aggressive may reduce transaction costs, enhance allocative efficiency, and, in some circumstances, even benefit final consumers. Moreover, it is noteworthy that competition law is not the sole instrument capable of redressing problems that arise in market systems. Even where a problem appears to warrant public intervention, other frameworks—at different layers, including sectoral regulation, unfair competition law, or private remedies—may offer a better institutional fit. Pursuing a general expansion of competition law while disregarding those alternatives risks generating, beyond over-enforcement, significant institutional and organizational inefficiencies.

Nevertheless, how a legal system responds to abuse of dependence remains, to a considerable degree, a matter of policy choice. A jurisdiction may choose to focus on exclusionary abuse of dominance, while tolerating exploitative abuse and abuse of dependence, on the view that market mechanisms or adjacent legal regimes can address the concerns. Alternatively, a jurisdiction may opt for a more interventionist, proactive stance, accepting some risk of over-enforcement to respond more flexibly and efficiently to pressing problems, particularly where dependency, bargaining asymmetries, and exploitative practices are pervasive and deeply rooted. As noted above, franchise relationships, automobile dealerships, platform intermediation, and agricultural supply chains provide illustrative examples. Which choice is rational depends not merely on the internal logic of competition law, but also (and often more) on the broader context in which the choice is made—such as the level of economic development, market maturity, institutional capacity, and relevant regional and cultural specificities.

In the absence of a one-size-fits-all approach, the central question is not how risky abuse of dependence intervention is as such, but how to design a more balanced response that is sensitive to context while maintaining principled limits. In this sense, the comparative experience examined in this study suggests a cautious hint as to what a standalone, dependence-centred abuse prohibition within competition law should be designed to cover and to avoid. On the basis of the analysis above, such a prohibition is most defensible when (i) it targets structural forms of relative power that are rooted in relational asymmetry yet non-transitory and economy-wide in character, with allocative and/or significant distributive implications; and (ii) it incorporates a structural-impact screen that mitigates the risk of competition law's encroachment into private contractual relations. It is likely to be more robust where overlaps with other sectoral rules serve, by focusing on systemic concerns, as a system-reliability-enhancing arrangement. Although not discussed in detail above, such a design can also be coupled with enforcement prioritization mechanisms, evidentiary discipline, and appropriate governance arrangements that coordinate the roles of the competition authority and sectoral regulators.

This study contributes to the global discourse and the existing body of literature on unilateral conduct by shedding further light on the abuse of the dependence rule, beyond region- or issue-specific focuses.

At the same time, this study has limitations. Among others, it may overly narrow its research focus to abuse control, even though market power is a central concept across other areas of competition law. For example, incorporating a standalone dependence prohibition may broaden the potential for intervention in merger control, particularly where the relevant transactions are likely to reinforce dependence and relative power. Also, it does not properly address societal and cultural nuances. Arguably, hierarchical societies with a high power distance may need and allow bolder governmental actions against abuse of dependence in business fields, justifying competition interventions even in non-structural cases. In contrast, more individualistic societies might find the dependence tool, whether equipped with appropriate safeguards or not, excessive or unwarranted. Additionally, the relationship between

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the level of economic development and market maturity, on the one hand, and the justification for and effectiveness of dependence-centred competition rules, on the other, would merit more detailed treatment than is offered here.

These limitations, in turn, suggest a clear agenda for future work. This may include examining how dependence-centred intervention interacts with merger review, and how its justification and effectiveness vary across socio-economic contexts. In addition, building on the present analysis, future research could also explore how dependence-centred doctrines might apply to specific settings—such as the exploitation of data or copyrighted content in the context of the provision of AI services. These reflections point to promising directions for further research on abuse of dependence in competition law.

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