

(Tentative Translation: Only Japanese version is authentic)

**GUIDELINES CONCERNING DISTRIBUTION SYSTEMS AND BUSINESS
PRACTICES UNDER THE ANTIMONOPOLY ACT**

Secretary General, Fair Trade Commission

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INTRODUCTION

1. Distribution systems and business practices have been formed with various historical and social backgrounds, and they differ from one country to another. There is the need to review them from time to time in order to change them for the better. In Japan, distribution systems and business practices are rapidly changing in accordance with the increasing globalization of economic activities, technological innovations, and other factors. Under these circumstances, for the purpose of enabling enterprises to exert their originality and ingenuity and further protecting consumers' interests, it is important to promote fair and free competition and enable the market mechanism to fully perform its functions: more specifically, it is essential to make sure that (a) enterprises are not prevented from freely entering markets, (b) each enterprise can freely and independently select its trading partners, (c) each enterprise can set prices and other transaction terms in its free and independent business discretion, and (d) competition is engaged in by fair means on the basis of prices, quality and services.

These Guidelines are intended to contribute to prevention of enterprises and trade associations from violating the Antimonopoly Act and helping in the pursuit of their appropriate activities, by specifically describing, with respect to Japanese distribution systems and business practices, what types of conduct may impede fair and free competition and violate the Antimonopoly Act.

2. Part I of these Guidelines gives guidance under the Antimonopoly Act concerning enterprises' restrictions on their trading partners' business activities (for example, finished product manufacturers' restrictions on parts manufacturers' business activities or vice versa, and manufacturers' restrictions on wholesalers' and/or retailers' business activities or vice versa). Throughout these Guidelines, the term "trading partners" mean direct and/or indirect trade partners, unless otherwise specifically indicated. Part II contains guidance under the Antimonopoly Act concerning enterprises' selection of their own business partners. Part III provides guidance under the Antimonopoly Act concerning sole distributorship for the entire domestic market.

In addition, although these Guidelines provide guidance mainly with respect to transactions of goods, in principle the same guidance also applies to transactions of services.

3. These Guidelines provide guidance on major types of distribution systems and business practices which may present problems under the Antimonopoly Act. These Guidelines, however, do not cover all types of practices which may present problems. For example, price-fixing cartels, purchasing volume cartels, and bid riggings, which are not covered in the Guidelines, in principle constitute violations of the Antimonopoly Act. Accordingly, it is to be judged on a case-by-case basis whether other types of practices not provided in these Guidelines may present problems under the Antimonopoly Act.

PART I. RESTRICTIONS ON TRADING PARTNERS' BUSINESS ACTIVITIES

1. Scope of These Guidelines

(1) In cases where as a part of marketing activities an enterprise interferes with or influences sales prices of distributors (such as wholesalers and retailers), the kind of products they sell, their sales territories, their customers, etc., it may reduce or eliminate inter-brand or intra-brand competition. For the purpose of these Guidelines, the term “inter-brand competition” means competition among suppliers including manufacturers or among distributors, etc. who deal in different brand products, and the term “intra-brand competition” means competition among distributors, etc. who deal in the same brand products.

This Part I provides guidance on approaches to be followed under the Antimonopoly Act with respect to the following types of conduct, from the view point of regulation of unfair trade practices: enterprises' restrictions on sales prices, handling of products, sales territories, customers, etc. of their trading partners and enterprises' provision of rebates and allowances to their trading partners (Note 1).

With the development and expansion of e-commerce, various business models have been created and enterprises actively use the Internet in their advertising and publicity as well as in their distribution channels. In especial, transactions through the Internet are effective means for enterprises and their customers. For example, in those transactions, enterprises can reach wider areas and more diversified customers than in traditional transactions in brick-and-mortar stores. The basic approaches described in the following sections apply commonly to transactions through the Internet and that in brick-and-mortar stores.

In addition, the basic approaches described below also apply to any platformer's actions toward users of its platform. For the purpose of these Guidelines, the term “platformer” means an enterprise that operates and offers a so-called platform which serves two or more user groups (such as consumers and enterprises offering products to them) and in which a level of its use by one user group influences a level of its use by another user group and vice versa. Such platforms include shopping malls, online marketplaces, online travel booking services and video game consoles.

(2) As seen in a relationship between a large-scale retailer and its supplier, 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. Approaches to regulation of such conduct are specifically described in the Guidelines Concerning Abuse of a Superior Bargaining Position under the Antimonopoly Act published on November 30, 2010.

As to unjust low price sales and related discriminatory pricing, the Japan Fair Trade Commission has given guidance on regulation of those practices in the Guidelines Concerning Unjust Low Price Sales under the Antimonopoly Act published on December 18, 2009 (Note 1).

(Note 1) As to in what cases these practices cause a substantial restraint of competition in markets and are illegal as private monopolization, the Japan Fair Trade Commission has given guidance on this issue in, for example, the Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act published on October 28, 2009 (hereinafter referred to as "Exclusionary Private Monopolization Guidelines").

2. Basic Principles concerning Effects of Vertical Restraints on Competition

The purpose of the Antimonopoly Act is, by prohibiting unfair trade practices and encouraging fair and free competition, to assure the interests of general consumers and promote the democratic and wholesome development of the national economy. Enterprises' business practices which restrain sales prices, handling of products, sales territory, customers, etc. of their trading partners (hereinafter referred to as "vertical restraints") have various effects on

competition depending on their degree, manners and other factors. Vertical restraints include not only restraints imposed under contracts or agreements but also virtual restraints implied by enterprises' direct or indirect requirements or requests (Note 2).

In some cases, vertical restraints may have anti-competitive effects: for example, such restraints may prevent innovative business activities, reduce or eliminate inter-brand or intra-brand competition, raise entry barriers and thereby hold back new market entrants, or limit consumers' choice of products.

In other cases, vertical restraints may have pro-competitive effects: those restraints may promote launch of new products, render market entry easier, or result in improvement of quality of products and services.

Thus, when vertical restraints have effects on competition, such effects may be pro-competitive or anti-competitive.

Promotion of fair and free competition is attained through assuring fair and free competition in each and every level of commercial transactions; it cannot be accomplished simply by securing either inter-brand or intra-brand competition, as long as the other one is eliminated.

(Note 2) In some cases, vertical restraints may be imposed with background of actions, including an enterprise's acquisition or possession of stocks of a trading partner or an enterprise's involvement in management of a trading partner (An enterprise's acquisition or possession of stocks of a trading partner or an enterprise's involvement in management of a trading partner, by itself, is not problematic under the Antimonopoly Act.). Also in such cases, legality of such actions should be determined under the criteria set forth in Section 3 below and in accordance with the guidance given in Chapters 1 and 2 below. (Refer to Appendix (Transactions between Parent and Subsidiary Companies or between Fellow Subsidiaries) attached hereto, with respect to cases where a restraining enterprise is a parent company of its business partner restrained by it.)

3. Criteria for Judging Legality or Illegality of Vertical Restraints

(1) Guidance on the criteria for judging legality or illegality of vertical

restraints

As mentioned in Section 2 above, vertical restraints have various effects on competition. If a vertical restraint tends to impede fair competition, such restraint is prohibited as unfair trade practices. Whether a particular vertical restraint imposed in a commercial transaction tends to impede fair competition or not should be examined by assessing the scope influenced by such transaction depending on factors such as objects, regions and manners of the conduct and transaction and then considering the following factors comprehensively.

In this examination, due consideration should be given to not only anti-competitive effects (such as reduction or elimination of inter-brand or intra-brand competition) but also pro-competitive effects (refer to Sub-Section (3) below) that result from the vertical restraint. Anti-competitive and pro-competitive effects to be so examined should include effects on potential competitors in each and every transaction level.

The factors to be considered are:

- (i) actual conditions of inter-brand competition (such as market concentration, characteristics of products in question, the degree of product differentiation, distribution channels, difficulty of new market entry, etc.);
- (ii) actual conditions of intra-brand competition (such as the degree of dispersion in prices, and business types of distributors, etc. dealing in products in question, etc.);
- (iii) position in the market of an enterprise that imposes the vertical restraint (in terms of a market share, ranking, brand value, etc.);
- (iv) impact of the vertical restriction on business activities carried out by the affected trading partners (such as the degree and manners of the restraint, etc.); and
- (v) the number of trading partners affected by the restraint, and their positions in the market.

The importance of individual factors is different on a case-by-case basis, and therefore each of these factors should be considered depending upon a nature of business carried out by an enterprise which impose a vertical restraint. For example, assessment of effects on competition arising from a vertical restraint imposed by a platformer should take into account actual conditions of competition among the platformer and its competitors and position in the market of the platformer based on a reflection of network effects (Note 3).

(Note 3) Network effects may be direct or indirect. Network effects are direct if, for example, benefits to users arising from a particular platform and usefulness of the platform to its users are improved by increase of the number of users in the same group. On the other hand, network effects are indirect if, for example, two groups of users of a particular platform transact with each other via the platform and benefits to users in one of those groups arising from transactions via the platform and usefulness of such transactions to those users are improved by increase of the number of users in the other group.

(2) “Tend to impede fair competition”

There are 2 types of vertical restraints: resale price maintenance practices (See Chapter 1 below for details.) and vertical non-price restraints. Vertical non-price restraints consist of an enterprise’s restraints on handling products, sales territory, customers, etc. of the enterprise’s trading partners.

Resale price maintenance practices reduce or eliminate price competition among distributors. Therefore, those practices usually have significant anti-competitive effects and, as a general rule, they tend to impede fair competition.

On the other hand, effects of vertical non-price restraints on competition in markets differ depending upon the types of restraints and specifics of each case. Vertical non-price restraints include the following two categories: (i) those which should not be considered illegal merely based on types of the restraints, but should be determined on a case-by-case basis whether or not tend to impede fair competition (i.e., whether or not they have foreclosure effects or price maintenance effects) taking into account, among others, a position in the market of an enterprise which imposes the restraint; and (ii) those each of which usually tends to impede price competition and is considered in principle to tend to impede fair competition, regardless of a position in market of an enterprise which imposes the restraint.

If an enterprise simultaneously imposes a vertical non-price restraint and another vertical non-price restraint or resale price maintenance, assessment as to whether or not the first-mentioned vertical non-price restraint tends to impede fair competition may take into account effects of the other vertical non-price restraint or the resale price maintenance simultaneously imposed by the

enterprise.

a. Cases where vertical non-price restraints have foreclosure effects

“Cases where vertical non-price restraints have foreclosure effects” refer to cases where a vertical non-price restraint tends to cause situation that new entrants to the relevant market and the enterprise’s existing competitors are excluded and/or opportunities available to them are reduced (for example, a situation where such restraint makes difficult for them to easily acquire alternative trading partners, and causes increase of their expenses for conduct of business and/or their discouragement from entering the market or developing new products).

Whether or not a particular vertical non-price restraint has foreclosure effects should be determined in accordance with the guidance on the criteria for judging legality or illegality as set forth in Sub-Section (1) above. For example, if an enterprise which impose a vertical non-price restraint holds a stronger position in a market, the restraint is more likely to have foreclosure effects. Such determination should be made also taking other enterprises’ actions into consideration. For example, if two or more enterprises impose vertical non-price restraints respectively and parallel, those restraints are more likely to have foreclosure effects on the market as a whole than in the case where a single enterprise imposes a vertical non-price restraint.

When determining whether or not a particular vertical non-price restraint has foreclosure effects, the restraint is not required to cause any tangible said situation.

b. Cases where vertical non-price restraints have price maintenance effects

“Cases where vertical non-price restraints have price maintenance effects” refer to cases where a vertical non-price restraint tends to impede competition among a counterparty to the restraint and its competitors and enable the counterparty to reasonably freely control its prices in its own discretion and thus maintain or raise its prices for a product or products in question.

Whether or not a particular vertical non-price restraint has price maintenance effects should be determined in accordance with the guidance on the criteria for judging legality or illegality as set forth in Sub-Section (1) above. For example, if a strict territorial restriction (refer to Sub-Section 3 (3) of Chapter 2 below) is imposed by an influential enterprise in the market under

circumstances where inter-brand competition does not work well due to oligopolistic structure of the market and/or due to brand differentiation, then price competition for products included in the enterprise's brand may be impeded, and the restriction may have price maintenance effects. Such determination should be made also taking other enterprises' actions into consideration. For example, if two or more enterprises impose vertical non-price restraints respectively and parallel, those restraints are more likely to have price maintenance effects on the market as a whole than in the case where a single enterprise imposes a vertical non-price restraint.

When determining whether or not a particular vertical non-price restraint has price maintenance effects, the restraint is not required to cause any tangible said situation.

(3) Pro-competitive effects which may result from vertical restraints

In the case where vertical restraints actually promote sales of new products, ease new entrants, improve quality and services and so on, pro-competitive effects can be recognized. The followings are typical and non-exhaustive examples:

a. Distributors may sell any enterprises' product without their own promotional activities if other distributors have already implemented promotional activities for the product as pre-sales efforts, which thus have actually boosted demand for the product. In such a case, no distributors may refrain from actively implementing voluntary promotional activities on their own expenses, resulting in a situation where consumers who would otherwise have purchased the product do not purchase it. This type of situation is called the "free-rider" problem. One situation in which the free-rider problem is likely to occur is when consumers have limited information on the products. For example, in case of relatively new or technically complex products for consumers, consumers tend to have insufficient information so distributors may have to provide enough information or implement through promotional activities. In addition, consumers must have a sufficient cost-saving effect on purchasing products when purchasing the products from a distributor that does not implement such promotional activities instead of purchasing from one which actually does so. Generally, consumers will have a profound effect when the price of products is relatively high. When these conditions are met and therefore the

free-rider problem occurs, making it highly likely that distributors will not provide consumers with sufficient information on a product of the enterprise and that consequently the product will not be sufficiently supplied, then the enterprise's allocation of one sales area to one distributor may be an efficient restriction to avoid such free-riding. However, pro-competitive effects are recognized, for one thing, only if such promotional activities can benefit many new customers who do not yet have enough information and therefore increase of amount of purchase can be expected and so on. Also, such promotional activities may be unique for the product, and the cost of the promotional activities cannot be recouped (so-called "sunk-cost").

b. In some cases, in order to build a reputation for high quality of its new product, it may be vital in an enterprise's marketing strategy to supply the new product to retailers which have established reputation for sale of high-quality products. In such a case, it may be helpful for the enterprise's building-up of reputation for high quality of the new product if the enterprise permits its distributors to sell the enterprise's products only to those retailers.

c. In order to release a new product, an enterprise may request its distributors to make special investments such as installation of special equipment. In such a case, the distributors may not recoup these investments if other distributors are permitted to sell the same product without making such investments. As a result, all distributors may refrain from making such investments. Under said circumstances, the enterprise's allocation of one distribution territory to one distributor may be helpful for the enterprise's encouragement of its distributors to make special investments.

d. In the event that a parts manufacturer has to make special investments (such as installation of special machinery and/or equipment) in order to manufacture parts that satisfy specific requirements of a finished product manufacturer, it may be helpful inducement for the special investment by the parts manufacturer if the parts manufacturer obligates the finished product manufacturer to purchase the specified quantity of the parts from the parts manufacturer, etc.

e. An enterprise may try to create uniform sales services and/or standardize

the quality of sales services in order to build a reputation among its customers (so-called “brand image”) for its products. In such a case, it will be helpful for the enterprise’s building-up of reputation among its customers for the products if the enterprise permits its distributors to sell the products only to those retailers who can meet certain criteria or if the enterprise restricts retailers’ sales methods.

(4) An influential enterprise in a market

Some vertical non-price restraints may be illegal as unfair trade practices if such restraints are imposed by “an influential enterprise in a market.” Examples of such restraints are described in Section 2 (Restriction on Dealings with Competitors, etc.), Sub-Section 3(3) (Strict territorial restriction) and Section 7 (Tie-in Sales) of Chapter 2 below.

Whether or not “an enterprise is influential in a market” is in the first instance judged by a market share of the manufacturer, that is, whether or not it has a share exceeding 20% in the market. (meaning a product market which consists of a group of products with the same or similar functions and utility as the product covered by the conduct, and competing with each other judging from geographical conditions, transactional relations and other factors, and which is determined, in principle, in terms of substitutability for users and also, when necessary, substitutability for suppliers). Nevertheless, even if an enterprise falls under this criterion, a restriction by the enterprise is not always illegal. Such restriction is illegal if it has “foreclosure effects” or “price maintenance effects.”

In cases an enterprise which has a market share of 20% or less or a new entrant commits any said action, it does not usually tend to impede fair competition and therefore is not illegal.

Chapter 1. Resale Price Maintenance

1. Viewpoint

(1) It is one of the most basic matters in an enterprise's business activities that it independently determines its own sales price, in keeping with conditions in a market, and moreover this secures competition among enterprises and consumer choice.

In cases where, as one aspect of marketing activities or upon a distributor's request, an enterprise restricts sales price of distributors, it is in principle illegal as unfair trade practices, because it reduces or eliminates price competition among distributors.

(2) In cases where an enterprise's suggested retail price or quotation is indicated to distributors as a reference price, such conduct itself is not problematic. However, in cases where the enterprise goes beyond notifying a price merely as a reference one and seeks to restrict resale prices of its distributors by, for example, causing them to keep the price indicated by the enterprise, such conduct falls under the conduct described in Sub-Section (1) above, and is in principle illegal (Note 4).

(Note 4) In cases where an enterprise sets a suggested retail price, such conduct is not usually problematic unless it does not constitute restriction of resale prices. (Whether or not a particular price setting constitutes restriction of resale prices should be determined based upon the guidance given in Section 2 below.)

From a viewpoint of prevention of violation of the Antimonopoly Act, it is desirable that, if an enterprise notifies a suggested retail price of its product to its distributors, the enterprise should refrain from using the expression "True Price" (*Seika*), "Set Price" (*Teika*) or merely indicating the value of the price and should use non-binding expressions such as "Reference Price" (*Sanko Kakaku*) or "manufacturer's suggested retail price" and that the enterprise should clearly state in a written notice that the suggested retail price is given solely for reference purposes and that each distributor is free to set its resale price independently.

2. Restriction of Resale Prices

(1) Any enterprise's restrictions of sales prices of its distributors (i.e., resale prices) are in principle illegal as unfair trade practices (Article 2, Paragraph (9), Item (iv) (Resale Price Restriction) of the Antimonopoly Act) (Note 5). That is to say, since resale price maintenance (RPM) reduces or eliminates price competition among distributors, generally RPM has serious anti-competitive effects and so tends to impede fair competition in principle. Therefore, the Antimonopoly Act stipulates that any RPM imposed by an enterprise on distributors without "justifiable grounds" is illegal as unfair trade practices. In other words, RPM is not illegal on an exceptional basis on the condition that it has "justifiable grounds."

(Note 5) Any enterprise's restriction of prices of its distributors for any service falls under Paragraph 12 (Trading on Restrictive Terms) of the General Designation. Basic approach is the same as that which applies to cases which fall under Article 2, Paragraph (9), Item (iv) of the Antimonopoly Act.

(2) "Justifiable grounds" might be granted only within a reasonable scope and only for a reasonable period, in the case where RPM by an enterprise with respect to its product results in actual pro-competitive effects, promotes inter-brand competition, and increases demand for the product thus benefiting consumers, and these pro-competitive effects would not have resulted from less restrictive alternatives other than the RPM.

For example, when an enterprise engages in RPM with respect to a product, such RPM is deemed to have "justifiable grounds" if the RPM actually has pro-competitive effects through avoiding the "free-rider" problem mentioned in Sub-Section 3(3)a of Part 1 above, promotes inter-brand competition, and increases demand of the product, thus benefiting consumers, and pro-competitive effects would not have resulted from less restrictive alternatives other than the RPM.

(3) Whether or not resale prices are restricted by an enterprise is to be determined with reference to whether or not the enterprise has taken artificial means to secure the effectiveness in attaining its distributors' sales at a price

indicated by the enterprise.

In the following cases, it should be determined that the effectiveness in attaining distributors' sales at a price indicated by the enterprise is secured:

- (i) In case where a written or oral agreement between an enterprise and its distributor causes the distributor to sell the enterprise's product at a price indicated by the enterprise, including the cases where:
 - (a) a written or oral contact between an enterprise and its distributor provides that the distributor should sell the enterprise's product at a price indicated by the enterprise;
 - (b) a distributor is required to pledge in writing to sell at a price indicated by an enterprise;
 - (c) an enterprise proposes to a distributor the condition that the distributor should sell the enterprise's product at a price indicated by the enterprise, and the enterprise starts dealing with the distributor only if it accepts such condition; or
 - (d) an enterprise deals with a distributor on the condition that the distributor should sell the enterprise's product at a price indicated by the enterprise and that unsold units of the product should not be sold at any discounted price but repurchased by the enterprise.

(Example)

Company X has established the following sales regulation (hereinafter referred to as the "Sales Regulation") applicable to retailers' sale of Company X's camping equipment products in the next season:

- retailers' sales prices for each of those products should be equal to or higher than the minimum price set by Company X; and
- each retailer will be permitted to sell those products at discounted prices only if the retailer does the discount sale covering all products including other brands or if the retailer does the discount sale for the purpose of selling out its inventory at its brick-and-mortar stores, without issuing advertisement leaflets, and not earlier than the day designated by Company X.

Company X caused retailers to sell its camping equipment products in compliance with the Sales Regulations as follows: Company X by itself or through wholesalers:

- in negotiations for transactions to be done in the next season with each retailer that is Company X's current trading partner, requests the retailer to sell those products in compliance with the Sales Regulations in such a way as to present a quotation in which the minimum price set by Company X is written; and
- at commencement of transactions between Company X and each retailer that is Company X's new trading partner, requests the retailer to sell those products in compliance with the Sales Regulation,

and under the condition that Company X should cause other retailers to sell those products in compliance with the Sales Regulation, obtained from each retailer an agreement to sell those products in compliance with the Sales Regulation.

This action done by Company X was found to fall under Article 2, Paragraph (9), Items (iv) (a) and (iv) (b) of the Antimonopoly Act and therefore to breach the provision of Article 19 of the Act. (Cease and Desist Order of June 15, 2016; JFTC Disposition No. 7 of 2016.)

(ii) In case where an enterprise, through any artificial means (such as an enterprise's imposing or suggesting to impose economic disadvantage on its distributors if the distributors do not sell the enterprise's product at a price indicated by the enterprise), causes the distributors to sell at the indicated price, including the cases where:

- (a) curtailment of shipments or any other economic disadvantage (including reduction of quantities shipped, raising of a shipment price, reduction of rebates, and refusal to supply other products; hereinafter the same) is imposed by an enterprise on its distributor if the distributor does not sell the enterprise's product at a price indicated by the enterprise, or an enterprise's intention to do so is notified or suggested by the enterprise to its distributor;
- (b) rebates or other economic rewards (including lowering of a shipment price and supply of other products; hereinafter the same) are provided by an enterprise to its distributor if the distributor sells the enterprise's product at a price indicated by the enterprise, or an enterprise's intention to do so is notified or suggested by the enterprise to its distributor;
- (c) an enterprise compels its distributor to sell the enterprise's product at a price indicated by the enterprise, by collecting sales price reports,

patrolling the distributor's retail establishments, conducting price supervision by salespersons dispatched to the distributor's shops, examining the distributor's ledgers or records and/or taking similar measures in order to ascertain whether or not the distributor sells the product at the indicated price;

- (d) an enterprise compels its distributors to sell the enterprise's product at a price indicated by the enterprise, by detecting distribution channels through which the product is supplied to price-cutting distributors (through, for example making use of secret marks) and requesting distributors who make supply to such price-cutting distributors not to sell the product to them;
- (e) an enterprise compels its distributors to sell the enterprise's product at a price indicated by the enterprise, by buying the product from a price-cutting distributor and causing such price-cutting distributor or a distributor who supplied the product to the distributor to buy the product from the enterprise or pay the enterprise's cost of purchase of the product; or
- (f) an enterprise compels its distributors to sell the enterprise's product at a price indicated by the enterprise, by transmitting complaints to a price cutting distributor which the enterprise receives from other distributors with regard to the price-cutting distributor's low-price sales, and requesting the price-cutting distributors to end such sales.

(4) In cases where discriminatory treatment in the form of refusals to deal or provision of rebates, and so on, has been used to secure the effectiveness of restrictions on resale price, such conduct itself is illegal as unfair trade practices (Paragraph 2 (Other Refusal to Deal) or 4 (Discriminatory Treatment on Trade Terms, etc.) of the General Designation).

- (5) For the purpose of Sub-Section (3) above, prices indicated by enterprises to distributors include both specific prices and any of the following types of prices:
- a. a price within x% discount from the enterprise's suggested retail price;
 - b. a price within a specific range (i.e., not less than JPY Y and not more than JPY Z);
 - c. a price approved in advance by the enterprise;
 - d. a price not less than that charged by nearby stores; or

e. a price suggested by the enterprise to distributors as the lowest limit by, for example, warning the distributors if they sell the product in question at any price lower than such suggested price.

(6) The guidance given in Sub-Sections (3), (4) and (5) above applies not only to an enterprise's restriction on its direct trading partners (for example, a manufacturer's restriction on wholesalers) but also to an enterprise's restriction imposed on its indirect trading partners (for example, a manufacturer's restriction on retailers or secondary wholesalers) either directly or indirectly via the enterprise's direct trading partners (Article 2, Paragraph (9), Item (iv) of the Antimonopoly Act; Paragraph 2 or 4 of the General Designation).

(7) In cases where, in the following kinds of transactions, an enterprise's direct trading partner only functions as a commission agent and it is deemed that in substance a sale is done by the enterprise, then the sale is usually not illegal even if the enterprise instructs a resale price to the direct trading partner, :

- (i) in the case of consignment sales, and if the transaction is made with a consignor on its own risks and account so that a consignee bears no risk beyond that associated with its obligation to exercise the care of a good manager in storage of products, collection of payments, and so on, i.e., is not liable for loss of products, damage to them, or for unsold products; or
- (ii) in the case of transactions where a supply price is negotiated and decided directly between a manufacturer and a retailer (or user), and the manufacturer instructs a wholesaler to deliver products to the retailer (or the user), and if the manufacturer is deemed, in substance, to sell the products to the retailers (or the user), under such circumstances that the wholesaler is charged only with responsibility for physical delivery of the products and collection of payment, and a fee is paid for such work.

(Examples)

(i) Content Provider A engages in an online music distribution business. Content Provider A is planning to execute a consignment sales contract with Platformer B (an enterprise which runs a portal site), and the contract provides that Platformer B should provide online music distribution services at prices indicated by Content Provider A. Under the contract, Content Provider A engages Platformer B merely to upload music contents provided

by Content Provider A to Platformer B's servers and to collect prices of such music contents on behalf of Content Provider A, so providing music contents held by Content Provider A is deemed to in substance be done by Content Provider A directly to its users. Therefore, execution of the contract does not immediately constitute a problem under the Antimonopoly Act. ("3. Content provider's designation of prices for music content services," 2004 Consultation Cases)

(ii) Company X is a manufacturer of Industrial Component A. Company X set its selling price of Industrial Component A charged to Customer Z through negotiations with Customer Z. Company X is planning to instruct its Agent Y to supply Industrial Component A to Customer Z at such price. (More specifically, Agent Y is responsible for physical delivery of Industrial Component A to Customer Z, collection of the payment from Customer Z and storage of Industrial Component A. A commission payable by Company X to Agent Y is the difference between Agent Y's sales price of Industrial Component A to Customer Z and Agent Y's purchase price of Industrial Component A from Company X.) Company X is deemed to in substance sell Industrial Component A directly to Customer Z because Agent Y is considered to bear minimal risks arising from its storage of Industrial Component A although, as stated above, Agent Y is responsible for delivery of Industrial Component A, collection of the payment and storage. In addition, Company X is deemed to exert few influence on price competition for Industrial Component A because Company X instructs only a price for Agent Y's supply of Industrial Component A to Customer Z and does not instruct prices applicable to Agent Y's sale of Industrial Component A to any customers other than Company Z or sale of Industrial Component A by any other agents other than Agent Y. Therefore, the said instruction by Company X to Agent Y does not immediately constitute a problem under the Antimonopoly Act. ("2. Restriction on an agent's resale price," 2009 Consultation Cases)

3. Distribution Research

When an enterprise carries out a research on actual sales prices, customers, etc. of distributors handling the enterprise's products ("distribution research"), such research itself is generally not illegal, unless the research is accompanied by

(Tentative Translation: Only Japanese version is authentic)

restrictions of sales prices of distributors such as imposing, notifying or suggesting imposition of curtailment of shipments or other economic disadvantage (including reduction of quantity shipped, raising of shipment price, reduction of rebate, refusal to supply other products) in the event that sales are not made at the enterprise's indicated price.

Chapter 2. Vertical Non-Price Restraints

1. Viewpoint

(1) As mentioned in Section 3 of Part I above, whether or not an enterprise's vertical non-price restraint constitutes a violation of the Antimonopoly Act should be determined with reference to a type of such restraint on a case-by-case basis, analyzing its effect on competition in a market. Principles underlying the criteria for judging legality or illegality of major types of vertical non-price restraints are described in the following sections.

(2) As to whether or not a vertical non-price restraint is imposed by an enterprise, as is the case with restrictions on resale prices described in Section 2 of Chapter 1 above, it should be found that the enterprise imposes a vertical non-price restraint not only in cases where the enterprise imposes such restraint on its trading partners under a contract or by other means, but also in cases where the enterprise has taken any artificial means (such as imposing economic disadvantage on trading partners who do not comply with the enterprises' requests) to secure the effectiveness of the restraint.

2. Restrictions on Dealings with Competitors, etc.

(1) Restriction on trading partners' dealing with competitors and/or trading partners' handling of competing products

a. In cases where as a part of marketing activities, an enterprise may restrict its trading partners from dealing with its competitors. It is said that such restriction has managerial benefits. However, any such restriction may possibly impede current competitors' business activities and/or raise entry barriers, depending upon the enterprise's position in the market.

b. In cases where any below-listed conduct done by an influential enterprise in a market has foreclosure effects, such conduct is illegal as unfair trade practices (Paragraph 2 (Other Refusal to Trade), 11 (Trading on Exclusive Terms) or 12 (Trading on Restrictive Terms) of the General Designation): the

enterprise's engaging in transactions with its trading partners on the condition that the trading partners should not deal with competitors of the enterprise or another enterprise having close relations with the enterprise (Note 6); the enterprise's causing its trading partners to refuse to deal with competitors of the enterprise or another enterprise having close relations with the enterprise; or the enterprise's engaging in transactions with its trading partners on the condition that the trading partners should limit their handling of products that compete with products of the enterprise or another enterprise having close relations with the enterprise (hereinafter referred to as "competing products").

Whether or not a particular vertical non-price restraint has foreclosure effects should be determined in accordance with the guidance given in Part I, Sub-Section 3(1) above and Part I, Sub-Section 3(2)a above. For example, if products of an enterprise which imposes a vertical non-price restraint have a stronger brand value or the excess supply capacity of such enterprise's competitors is smaller as a whole, the vertical non-price restraint is more likely to have foreclosure effects, because availability of the enterprise's products is more important to its competitors and effectiveness of the restriction is greater. In addition, if a vertical non-price restraint is imposed for a longer period or on a larger number of competitors or if commercial transactions between an enterprise and its trading partner on which the enterprise imposes a vertical non-price restraint is more important to such trading partner, the vertical non-price restraint is more likely to have foreclosure effects. If two or more enterprises impose vertical non-price restraints respectively and parallel, those restraints are more likely to have foreclosure effects on the market as a whole than in the case where a single enterprise imposes a vertical non-price restraint.

- (i) An influential material manufacturer in a market, by notifying or suggesting to a customer (which is a finished product manufacturer) that it intends to discontinue supply of its materials to the customer if the customer purchases corresponding parts from other parts manufacturers, requests the customer not to do so (Paragraph 11 of the General Designation);
- (ii) an influential finished product manufacturer in a market requests an influential parts manufacturer in a market to refrain from selling its parts to the finished product manufacturer's competitors or to restrict such supply, and obtains the supplier's consent to do (Paragraph 11 or 12 of the

General Designation);

- (iii) an influential manufacturer deals with a distributor on the condition that the manufacturer makes it mandatory for the distributor to handle only the manufacturer's products (Paragraph 11 of the General Designation);
- (iv) an influential manufacturer in a market does business with a distributor under any condition which restricts the distributor from handling specific products (such as competing imported products) or from handling a specific enterprise's products (Paragraph 12 of the General Designation);
- (v) an influential manufacturer deals with a distributor on the condition that the manufacturer restricts the distributor's handling of competing products by means of requiring the distributor to sell such a large volume of the manufacturer's products as is close to the distributor's selling capacity (Paragraph 12 of the General Designation); or
- (vi) an influential manufacturer in a market causes distributors not to accept any offers of transactions from a specific manufacturer attempting to enter the market (Paragraph 2 of the General Designation).

(Note 6) A enterprise "having close relations with the enterprise" means one having common interests with the other. Whether or not an enterprise means one having common interests with another enterprise is to be judged on a case-by-case basis, taking comprehensively into consideration such factors as stockholding relationship, interlocking or dispatching of directorates, trading and financing relationship, and common membership of so-called corporate groups. The same applies throughout in these Guidelines.

c. In case where there is proper justification under the Antimonopoly Act for any enterprise's restriction on its trading partner's transactions with the enterprise's competitors or its trading partner's handling of competing products, the restriction is not illegal. For example;

- (i) the case where a finished product manufacturer engages a parts manufacturer to manufacture parts for the former's product by making use of materials supplied by the former to the latter and the former requires the latter to sell those products exclusively to the former

(ii) the case where a finished product manufacturer engages a parts manufacturer to manufacture parts for the former's product, the former provides know-how (meaning and limited to know-how related to industrial technologies, and excluding any know-how that is not secret in nature) to the latter for the purpose of such manufacture, and the former requires the latter to sell those parts exclusively to the former, to the extent that such restriction is deemed necessary for keeping the know-how confidential or for preventing its unauthorized diversion.

d. The guidance given in Sub-Sections a, b and c above also applies to cases where an enterprise causes its direct trading partners to restrict their counterparties' (e.g., a manufacturer causes wholesalers to restrict retailers') dealing with the enterprise's competitors and/or handling of competing products (Paragraph 2 or 12 of the General Designation).

(2) Restrictions on Dealing with Competitors by Price Matching

a. Any enterprise's reducing prices of its products in accordance with market conditions is indeed a manifestation of competition, and should be positively evaluated from a viewpoint of competition policies. However, in cases where the enterprise causes its customer to agree to continue business with the enterprise if it reduces its price to the extent that, as mentioned in Sub-Section b below, such price reduction is in response to lower prices offered by the enterprise's competitors, then such conduct may reduce business opportunities available to the enterprise's competitors.

b. In cases where an influential enterprise in a market causes its trading partner to agree to continue business with the enterprise on the condition that terms of any proposal, if any, made by the enterprise's competitors to the trading partner should be made known to the enterprise, and that if the enterprise reduces its sales price to the same level as or to a more attractive level than prices quoted by the competitors, the trading partner should not deal with the competitors or should maintain the volume of transaction with the enterprise at the same level as before, and if such conduct has foreclosure effects, then such conduct is illegal as unfair trade practices (Paragraph 11 or 12 of the General Designation).

The guidance given in Sub-Section (1) (Enterprises' restriction on trading partners' dealing with competitors and/or trading partners' handling of competing products) of this Section 2 applies to determination of whether or not a particular restriction has foreclosure effects.

3. Restrictions on Sales Territories

(1) In cases where as a part of marketing activities, enterprises may impose restrictions on distributors in terms of their sales territories. Such restrictions include the followings:

- (i) an enterprise's assigns a specific territory to each distributor as the area of the distributor's primary responsibility, and imposes on the distributor the requirement that the distributor should carry out active marketing and sales activities within its own territory (i.e., establishment of an area of the distributor's primary responsibility, not involving restrictions mentioned in (iii) or (iv) below; hereinafter referred to as "area-of-responsibility system");
- (ii) an enterprise limits areas where a distributor may establish outlets such as stores, or an enterprise designates a place where such outlets are to be established (i.e., restriction of locations of distributors' outlets, not involving restrictions mentioned in Clause (iii) or (iv) below; hereinafter referred to as "location system");
- (iii) an enterprise assigns a specific area to each distributor and restricts the distributor's sale of the enterprise's products outside the assigned area (hereinafter referred to as "strict territorial restriction"); and
- (iv) an enterprise assigns a specific area to each distributor and restricts the distributor's sale of the enterprise's products to customers outside the assigned area upon such customers' request (hereinafter referred to as "restriction on passive sales to outside customers"); and

(2) Area-of-responsibility system and location system

It is not illegal for an enterprise to adopt an area-of-responsibility system or a location system for the purpose of developing effective outlets for the products or securing a better system for provision of after-sales services for the products, unless such restriction falls under the category "strict territorial restriction" or "restriction on passive sales to outside customers". The said restriction is not

illegal because it does not usually have price maintenance effects.

For example in sales through the Internet, it is usually not illegal for an enterprise to obligate distributors to engage in active marketing activities in specific areas and/or toward specific customer groups, such as publication of advertisements on websites of the distributors or third parties (including platformers) and issuance of mail magazines. However, if an enterprise's restriction falls under the category "strict territorial restriction" or "restriction on passive sales to outside customers" (including the case where an enterprise restricts distributors' sales to any areas or customers other than the specific ones), illegality of such restriction should be determined in accordance with the guidance given in Sub-Section (3) or (4) below.

(3) Strict territorial restriction

In cases where an influential enterprise in a market imposes a strict territorial restriction on distributors and such restriction has price maintenance effects, the restriction is illegal as unfair trade practices (Paragraph 12 (Trading on Restrictive Terms) of the General Designation) (Note 7).

Whether or not a particular strict territorial restriction imposed by an enterprise has price maintenance effects should be determined in accordance with the guidance given in Part I, Sub-Section 3(1) above and Part I, Sub-Section 3(2)b above. For example, if a strict territorial restriction is imposed by an influential enterprise in the market under circumstances where inter-brand competition does not work well due to oligopolistic structure of the market and/or due to brand differentiation, then price competition for products included in the enterprise's brand may be impeded, and the restriction may have price maintenance effects. If two or more enterprises impose strict territorial restrictions respectively and parallel, those restrictions are more likely to have price maintenance effects on the market as a whole than in the case where a single enterprise imposes a strict territorial restriction.

(Note 7) If, in test marketing of a new product or in sale of local souvenirs, distribution areas of such products or souvenirs are restricted, such restriction usually does not have price maintenance effects and is not illegal.

(4) Restriction on passive sales to outside customers

In cases where an enterprise imposes a restriction on a distributor's passive sales to outside customers and such restriction has price maintenance effects, the restriction is illegal as unfair trade practices (Paragraph 12 of the General Designation).

Because restrictions on passive sales to outside customers even make it impossible for distributors to sell the products in response to outside customers' request, such restrictions have more effect of restricting intra-brand competition than strict territorial restrictions.

For example, in sales through the Internet, if a customer visits a website of a distributor and contacts the distributor and if such contact leads to a sale, then that is considered passive sales. The same is true if a customer chooses to continuously receive information such as mail magazines from the distributor, the customer places a purchase order with the distributor based upon the information and the purchase order leads to a sale. Under such circumstances, in the event that an enterprise assigns a specific area to the distributor and the customer's shipping address or another similar information reveal the address that is not within the distributor's territory, it constitutes a restriction on passive sales to an outside customer for the enterprise to cause the distributor to discontinue its dealings through the Internet with the customer. If such conduct has price maintenance effects, it is illegal as unfair trade practices.

(5) The guidance given in Sub-Sections (2), (3) and (4) above of this Section 3 also applies to cases where an enterprise causes its direct trading partners to restrict sales territories of their counterparties (for example, the case where a manufacturer causes wholesalers to restrict sales territories of retailers) (Paragraph 12 of the General Designation).

4. Restrictions on Distributors' Trading Partners

(1) An enterprise may require and cause distributors to do business only with specified trading partners and to distribute the enterprise's products only to those partners. Examples of such restriction include the following cases:

- (i) an enterprise's requiring each wholesaler to identify retailers that are the wholesaler's customers, so that each of the retailers can buy the enterprise's products only from that wholesaler (hereinafter referred to as "requirement of designated accounts");

- (ii) an enterprise's prohibition of distributors from buying and selling the enterprise's products among themselves (hereinafter referred to as "prohibition of sales among distributors"); and
- (iii) an enterprise's prohibition of wholesalers' sale of the enterprise's products to price-cutting retailers.

(2) Requirement of designated accounts

If an enterprise imposes requirement of designated accounts on distributors and such requirement has price maintenance effects, the restriction is illegal as unfair trade practices (Paragraph 12 (Trading on Restrictive Terms) of the General Designation).

Under a scenario of requirement of designated accounts, an enterprise assigns particular retailers to each wholesaler as the wholesaler's trading partners and prohibits the wholesaler from accepting any offer, if any, made to the wholesaler by any retailer that has been assigned by the enterprise to any other wholesaler. This conduct by the enterprise is same as that the enterprise assigns a specific area to each distributor and restricts the distributor's sale of the enterprise's products to customers outside the assigned area upon such customers' request. Therefore, the guidance given in Part I, Chapter 2, Sub-Section 3(4) above "Restriction on passive sales to outside customers" applies to determination of whether or not a particular requirement of designated accounts has price maintenance effects.

(3) Prohibition of sales among distributors

Because prohibition of sales among distributors imposes restrictions on selection of trading partners which is an essential element of transactions, the prohibition may lead to restrictions on distribution competition, depending upon a manner of the restrictions. If it has price maintenance effects, it is illegal as unfair trade practices (Paragraph 12 of the General Designation).

In cases where an enterprise prohibits sales among distributors for the purpose of prohibition of wholesalers' sale of the enterprise's products to price-cutting retailers described in Sub-Section (4) below, such prohibition of sales among distributors usually tends to impede price competition, and therefore, in principle, such prohibition is illegal as unfair trade practices (Paragraph 12 of the General Designation).

(4) Prohibition of sales to price-cutting retailers

When an enterprise prohibits wholesalers from selling the enterprise's products to a retailer on account of the retailer's price-cutting (Note 8), such prohibition is an action involved in one of the most basic matters in an enterprise's business activities that it independently determines its own sales price, in keeping with conditions in a market. Therefore, in light of the guidance given in Chapter I "Resale Price Maintenance" of this Part I, such prohibition usually tends to impede price competition, and is in principle illegal as unfair trade practices (Paragraph 2 (Other Refusal to Trade) or 12 of the General Designation).

An enterprise's discontinuance of shipments to a distributor that is its current direct customer, on account of the distributor's price-cutting (Note 8), also usually tends to impede price competition, and such conduct is in principle illegal as unfair trade practices (Paragraph 2 of the General Designation).

(Note 8) Whether or not such restriction is "on account of the distributor's price-cutting" is to be objectively judged based on actual conditions of the transactions (including the enterprise's response to other distributors, and related circumstances).

5. Selective Distribution

An enterprise may set up certain criteria to limit distributors that handle its products to those who meet the criteria. In such a case, the enterprise may prohibit distributors from reselling its product to other distributors who do not meet the criteria. This is called "selective distribution" and may result in such pro-competitive effects as described in Sub-Section 3(3) of Chapter 1 above. It is generally not problematic in itself even if, as a result of any enterprise's adoption of the selective distribution, certain price-cutters (and/or other distributors) that do not satisfy the enterprise's criteria are prevented from handling the enterprise's product, to the extent that such criteria are deemed to have plausibly rational reasons from the viewpoint of the consumers' interests such as preservation of quality of the product and/or assurance of appropriate use of the product and that such criteria are equally applied to other distributors who want to deal in the product.

6. Restrictions on Retailers' Sales Methods

(1) Restrictions on retailers' sales methods include the following types of restrictions:

- (i) an enterprise's instruction that a retailer should give demonstration sales of the enterprise's products to customers;
- (ii) an enterprise's instruction that a retailer should provide customer delivery services for the enterprise's products;
- (iii) an enterprise's specification of conditions for a retailer's quality control of the enterprise's products; and
- (iv) an enterprise's instruction that a retailer should establish a shelf space or a display area exclusively for the enterprise's products.

(2) In cases where an enterprise's restrictions on a retailer's sales methods (excluding those on sales prices, sales territories and customers) are deemed to have plausibly rational reasons for the purpose of ensuring proper sales of the enterprise's product, such as assurance of the safety of the product, preservation of its quality and maintenance of credit of its trademark, and if equivalent restrictions are applied to other retailers, such restrictions in themselves do not present problems under the Antimonopoly Act.

(Examples)

- (i) Company X, a manufacturer of Medical Device A, is planning to prohibit its trading partners from selling Medical Device A to mail-order customers and also from selling it to any enterprises that conduct mail-order businesses. (More specifically, if Company X obtains information that its trading partner sold Medical Device A to mail-order customers or to an enterprise that conducted a mail-order business, Company X requires the trading partner to discontinue such sale. If the trading partner fails to do so, Company X suspends its shipment of Medical Device A to the trading partner.) This business practice by Company X does not unreasonably restrict its trading partners' business activities and therefore does not constitute a problem under the Antimonopoly Act for the following reasons:
 - a. there are rational reasons for said business practice in light of the following observations:
 - (a) if Medical Device A is sold without adjustment, the device would be

- significantly prevented from exerting its functions and such prevention would be highly likely to be disadvantageous to consumers;
- (b) adjustment of Medical Device A cannot be done in the case of mail-orders; and
 - (c) the said business practice of Company A imposes a minimum required restriction as it does not prohibit any of its business partners from selling to mail-order customers any devices that are not required by purchasing customers to be adjusted at the time of its sale to the customers;
- b. equivalent restrictions are applied to all of Company A's trading partners; and
- c. some of Company A's trading partners engaging in brick-and-mortar store sales are selling Medical Device A at prices significantly lower than Company A's suggested retail price and accordingly this business practice of Company A is not deemed to impose a restriction on its business partners' selling prices.

(“1. Medical device manufacturer's prohibition of its business partners' sale to mail-order customers,” 2011 Consultation Cases)

(ii) Company X, a manufacturer of Machine Product A, is planning to obligate retailers to give descriptions of functions of Company A's new product to general consumers. (More specifically, Company X requires retailers to cause the retailers' shop staff to give oral descriptions to general consumers or to post on the retailers' web-based shopping sites video clips created by Company A.) This business practice by Company X does not constitute a problem under the Antimonopoly Act for the following reasons:

- a. the requirement of Company A is not excessive and Company A is deemed to have a rational reason for the purpose of ensuring proper sales of its new product; and
- b. substantially equivalent restrictions are applied to all retailers dealing with Company A.

(“6. Machine manufacturer's demand for descriptions of functions of its new product,” 2014 Consultation Cases)

However, in cases where restrictions on retailers' sales methods are used by an enterprise as a means to restrict the retailers' sales prices, handling of

competing products, sales territories, customers, etc. (Note 9), their illegality should be determined in accordance with the guidance given in Chapter 1 above and in Chapter 2, Sections 2 through 4 above (Article 2, Paragraph (9), Item (iv) of the Antimonopoly Act (Resale Price Restriction) and paragraph 11 (Dealing on Exclusive Terms) or 12 (Trading on Restrictive Terms) of the General Designation).

(Note 9) For example, in cases where a manufacturer stops shipments only to price-cutting retailers among those which do not observe the restrictions on sales methods on account of their nonobservance of the restrictions, the manufacturer is usually found to restrict sales price by means of the restrictions on sales methods.

(3) Furthermore, in cases where an enterprise imposes the following types of restrictions on ways of advertisements and representations (one category of marketing efforts), such practices are actions involved in one of the most basic matters in an enterprise's business activities that it independently determines its own sales price, in keeping with conditions in a market. Therefore, in light of the guidance given in Chapter 1 above (Resale Price Maintenance), these practices usually tend to impede price competition, and are in principle illegal as unfair trade practices (Paragraph 12 of the General Designation):

- a. an enterprise's restriction on prices shown by retailers at their stores, in their handbills or otherwise, or an enterprise's prohibition of retailers' advertisements which expressly indicates specific prices of the enterprise's products; and
- b. an enterprise's causing its trading partners which operate magazines, newspapers or other advertising media to reject retailers' advertisements which indicate the enterprise's cut-price products or which expressly indicates specific prices of the enterprise's products.

(4) The guidance given in Sub-Sections (2) and (3) above also applies to a case where an enterprise causes its direct trading partners to restrict sales methods of their counterparties (e.g., a manufacturer causes wholesalers to restrict sales methods of retailers) (Paragraph 12 of the General Designation).

7. Tie-in Sales

(1) Viewpoint

Adding new values by offering multiple products tied or integrated together to trading partners is a method of technological innovation and sales promotion. Therefore, such conduct in itself does not immediately constitute a problem under the Antimonopoly Act.

However, in case where an enterprise compels its trading partner, in conjunction with the supply of a product (“tying product”) to the trading partner, to purchase another product (“tied product”) may possibly, for example, impede current competitors’ business activities and/or raise entry barriers in the market for tied product, depending upon the enterprise’s position in the market for tying product.

(2) Cases where there are problems under the Antimonopoly Act

If an influential enterprise in a market for a product (“tying product”) compels its trading partner to purchase another product (“tied product”) in conjunction with the influential enterprise’s supply of the tying product to the trading partner and such conduct has foreclosure effects in a market for the tied product (Note 10), then the conduct is illegal as unfair trade practices (Paragraph 10 (Tie-in Sales, etc.) of the General Designation).

Whether or not a particular tie-in sales has foreclosure effects should be determined in accordance with the guidance given in Sub-Sections 3(1) and 3(2)a of Chapter 1 above. For example, if a tying product of an enterprise which engages in a tie-in sales has a larger market share or a tie-in sales has been implemented over a longer period or the number of counterparties, which a tying practice is related to, is larger, the tie-in sales is more likely to have foreclosure effects. Where the tied product is not differentiated in the market, it would be more likely that purchases of the tied product from the alleged enterprise may prevent competitors’ tied products from being purchased, and therefore the tie-in sales is more likely to have foreclosure effects.

(Example)

Each of Company X and Company Y engages in a software development and licensing business. Company X’s spreadsheet software product and Company Y’s word processing software had the largest shares in their respective

markets.

Company X feared that distribution of PCs equipped with only word processing software of Company Y (i.e., Company X's competitor) would seriously interfere with Company X's activities for increasing a market share of its own word processing software, and Company X caused enterprises engaging in manufacturing and distribution of PCs to accept contracts under which both the spreadsheet software the word processing software of Company X were to be installed on their PCs. Because of these contracts, the enterprises sold PCs incorporating Company X's spreadsheet software and word processing software, and consequently the share of Company X's word processing software increased and became the largest in the market.

This conduct by Company X was found to fall under Paragraph 10 of the General Designation and to violate the provisions of Article 19 of the Antimonopoly Act. (JFTC recommendation decision dated December 14, 1998; JFTC recommendation No. 21 of 1998)

(Note 10) Tie-in sales is illegal as unfair trade practices also if it tends to impede freedom of choice of customers and is an unjustifiable as competition means from a viewpoint of competition on the merits focusing on prices, quality and services. Whether or not a particular tie-in sales by an enterprise is an unjustifiable as competition means should be determined comprehensively taking into account a tying product's attractiveness, a tied product's characteristics, a manner of the tie-in sales, and spread of such an action in terms of the number of the enterprise's trading partner involved in the tie-in sales, repetitiveness and continuity of such an action, and propagation of such an action, etc.

(3) Assessment over whether or not the product required to purchase on condition for the supply of a product is deemed to be "another product" is made from the viewpoint of whether or not each of the combined product has a distinctive character and is traded independently. Specifically, comprehensive consideration is given to the respective products in terms of factors such as whether the users are different from each other, whether the contents and functions are different from each other (including whether the contents and functions of the combined products differ substantially from those of each product

before combination), and whether the users can separately purchase each of them (including whether each of the combined products is normally sold or used as a single unit).

Assessment as to whether or not an enterprise “compels to purchase” in conjunction with supply of another product should depend upon whether or not, upon supply of the other product to them, objectively many customers are compelled to purchase the other product.

In addition, tie-in sales includes such conduct that an enterprise supplies a product only on the condition that the trade partners purchase a particular product in the market of supplementary products (so-called “aftermarket”) that will be needed after the product is purchased.

Chapter 3. Provision of Rebates and Allowances

1. Viewpoint

(1) The nature of rebates and allowances provided by an enterprise to its trading partners (in general, meaning money paid on a systematic or case-by-case basis, separately from the billing price for products; hereinafter referred to as “rebates”) is diverse, including those that have the nature of adjusting the nature of adjusting the billing price, and those that have the purpose of promoting sales. Thus, rebates are paid for a variety of purposes, and rebates as one element of price also have the aspect of promoting price formation in keeping with actual conditions in a market. Accordingly, the provision of rebates in itself does not necessarily present a problem under the Antimonopoly Act.

(Example)

Company X is an influential welfare equipment manufacturer in a market. In connection with sale of its Welfare Equipment A, Company X is planning to adopt a new rebate program available only to dealers engaging in brick-and-mortar store sales but not to dealers engaging in sales through the Internet. (More specifically, Company X imposes the following requirements: (i) a trading partner should train its sales personnel to appropriately describe Company X's products directly to general consumers visiting the trading partner's brick-and-mortar stores, and (ii) a trading partner should always keep inventory of each type of Welfare Equipment A at a specified level. If a trading partner meets both of these requirements, Company X provides the trading partner a rebate designed for supporting the partner in sales in the said manner. The amount of the rebate is fixed and does not fluctuate depending upon the trading partner's sales volume of Welfare Equipment A.) Although the rebate program is not available to dealers engaging in sales through the Internet, the rebate program is offered in order to cover cost of brick-and-mortar store sales and does not involve increase in Company X's wholesale prices charged to dealers engaging in sales through the Internet or otherwise restrict business activities of them. Therefore, the rebate program does not constitute a problem under the Antimonopoly Act. (“4. Welfare Equipment Manufacturer's Offering of Rebate Program Only to Trading Partners Engaging in Brick-and-mortar Store Sales,” 2013

Consultation Cases)

(2) However, depending on the ways in which rebates are provided by an enterprise, they may restrict business activities of the enterprise's trading partners and present problems under the Antimonopoly Act. In cases where an enterprise discretionally provides rebates to its trading partner without clear basis, and particularly if such opaque rebates account for a large percentage of the trading partner's margin, they can have the effect of making it easy for the enterprise to conform the trading partner to the enterprise's sales policy, and are most likely to restrict business activities of the trading partner. For this reason, it is desirable for enterprises to make clear the basis for payment of rebates, and inform the basis to their trading partners.

2. Cases Where There are Problems under the Antimonopoly Act

(1) Rebates used as a means of restrictions on trading partners' business activities

In the event that, by means of rebates, an enterprise restricts its trading partner's sales prices, handling of competing products, sales territory, customers, etc. (including the case where a rebate provided by an enterprise to its trading partner is reduced if the trading partner does not sell the enterprise's product at a price indicated by the enterprise), illegality of such restriction should be determined in accordance with the guidance given in Chapters 1 and 2 above (Article 2, Paragraph (9), Item (iv) of the Antimonopoly Act (Resale Price Restriction), and Paragraph 11(Trading on Exclusive Terms) or 12 (Trading on Restrictive Terms) of the General Designation).

Furthermore, an enterprise's discriminatory provision of rebates to its trading partner depending on, for example, the trading partner's selling prices of the enterprise's products and/or its handling of competing products is illegal in itself as unfair trade practices, if such conduct has the same or similar function as or to the imposition of illegal restrictions on trading partners (Paragraph 4 (Discriminatory Treatment on Trade Terms, etc.) of the General Designation; the same also applies to (2), and (3) below).

The above assessment applies to cases where a so-called "repayment system" (i.e., a system under which an enterprise collects all or a part of a margin from its trading partner and pays it back after retaining the same for a certain period)

is used as a means of an illegal restriction on the trading partner, or has the same or similar function as or to the imposition of such restriction.

(2) Rebates which have the function of restricting trading partners' handling of competing products

An enterprise sometimes provides rebates to its trading partner according to a percentage of the trading partner's total sales during a specific period occupied by its sales of the enterprise's products, or according to a share that the enterprise's products have in the display of all products at the trading partner's store (hereinafter referred to as "coverage rebates"). In addition, an enterprise, in providing a volume rebate, may set progressive rebate rates according to ranking of its trading partners based on the quantity of products purchased by each trading partner from the enterprise during a certain period. In such a case, an enterprise's provision of rebates to its trading partner may have the function of restricting the trading partner's handling of competing products.

Whether an enterprise's provision of rebates of these kinds has the function of restricting the trading partner's handling of competing products or not should be examined by assessing level of rebates, threshold of giving rebates, progressiveness of rebates, retro-activeness of rebates, etc. comprehensively (Note 11).

a. Coverage rebates

In cases where an enterprise's provision of coverage rebates to its trading partner has the function of restricting the trading partner's handling of competing products, its illegality should be determined in accordance with the guidance given in Sub-Section 2(1) (Enterprises' restriction on trading partners' dealing with competitors and/or trading partners' handling of competing products) of Chapter 2 above.

That is, in cases where an influential enterprise in a market provides a coverage rebate to its trading partner, and if the provision has the function of restricting the trading partner's handling of competing products and as a result has foreclosure effects, such provision of the coverage rebate is illegal as unfair trade practices (Paragraph 4, 11, or 12 of the General Designation).

b. Remarkably progressive rebates

While progressive rebates have the aspect of promoting price formation in

keeping with actual conditions in a market, if an enterprise apply remarkably progressive rates for a particular rebate, the rebate has the function of encouraging trading partners' preferential handling of the enterprise's products over those of others.

In cases where an enterprise's provision of a remarkably progressive rebate to its trading partners has the function of restricting those trading partners' handling of competing products, illegality of the rebate should be determined in accordance with the guidance given in Sub-Section 2(1) (Enterprises' restriction on trading partners' dealing with competitors and/or trading partners' handling of competing products) of Chapter 2 above.

That is, in cases where an influential enterprise in a market provides such a rebate to its trading partners, and if the provision has the function of restricting the trading partners' handling of competing products and as a result has foreclosure effects, the provision of the rebate is illegal as unfair trade practices (Paragraph 4, 11 or 12 of the General Designation).

(Note 11) More specific guidance on each factor is given in Sub-Section 3 (3) A-D of Part II of Exclusionary Private Monopolization Guidelines.

(3) Rebates that have the function of requiring designated accounts

At times an enterprise may provide a rebate directly or through wholesalers even to retailers who are indirect trading partners of the enterprise, in accordance with each retailer's purchase amount of the enterprise's products. In cases where an enterprise provides such a rebate to retailers, and if the amount of the rebate to each retailer is calculated solely on the basis of the amount of the retailer's purchase of the enterprise's products from a specific wholesaler, it is most likely to have the function of requiring designated accounts.

In cases where provision of such a rebate has the function of requiring designated accounts, its illegality should be determined in accordance with the guidance given in Sub-Section 4(2) (Requiring of designated accounts) of Chapter 2 above.

That is, in cases where price maintenance effects arise from provision of any rebate that has the said function, the provision of the rebate is illegal as unfair trade practices (Paragraph 4 or 12 of the General Designation).

(Tentative Translation: Only Japanese version is authentic)

PART II. SELECTION OF TRADING PARTNERS

1. Through fair and free competition, each enterprise selects its trading partners on its own independent judgment based on their superiority in prices, quality, services and other transaction terms. Furthermore, there may be a case where an enterprise, in selecting its trading partners, takes account of overall business capability of suppliers in terms of, such as steady supply, technological development capability and flexibility in response to the enterprise's requests, in addition to prices, quality, services and other terms of individual transactions. If an enterprise selects its trading partner from the viewpoint mentioned above and such selection results in continuous a transaction relationship between the enterprise and the trading partner, there are no problems under the Antimonopoly Act.

If, however, for example, any enterprise consults with another enterprise on mutual respect of and priority to the existing business relations to maintain such relations, or engages in such conduct as concertedly with another enterprise excluding competitors, competition to win customers in a market is to be restrained and entries of new competitors hindered, which result in restraining competition in the market.

2. This Part II gives guidance on principles applicable under the Antimonopoly Act primarily to enterprises' actions such as the enterprises, in concert with other enterprises, discourage new competitors from entering the market or exclude existing competitors in selection of trading partners which should be done in a free and independent manner.

Chapter 1. Customer Allocation

1. Viewpoint

Such conduct of an enterprise in concert with any other enterprise or enterprises, or of a trade association as mutually respecting existing business relations without contending for customers or agreeing not to enter a market where another enterprise has already engaged in business activities, is sometimes employed. Such conduct is most likely to lead to an attempt to exclude new entrants from the market for the purpose of ensuring the effectiveness of that conduct.

Such conduct, which restricts competition for customers, is in principle illegal.

2. Concerted Restrictions by Enterprises on Competition for Customers

In cases where an enterprise, concertedly with any other enterprise or enterprises, engages in the following types of conduct, for instance, and if competition for customers is thereby restricted and competition in a market becomes substantially restrained, such conduct constitutes unreasonable restraint of trade and violates Article 3 of the Antimonopoly Act (Note 1):

(1) Customer Restrictions

- (i) Manufacturers enter into a mutual agreement that they should not deal with each other's customers;
- (ii) distributors concertedly refrain from soliciting each other's customers by offering lower prices;
- (iii) distributors enter into a mutual agreement that any of them should pay a rectification charge if it deals with a customer of any other of the distributors;
- (iv) manufacturers enter into a mutual agreement that each of them should register its own customers and should not deal with any persons other than the registered customers; or
- (v) distributors concertedly limit customers with whom each of the distributors can deal.

(2) Market Allocation

- (i) Manufacturers concertedly limit a sales territory of each of them;
- (ii) distributors enter into a mutual agreement that any of them should not

commence marketing activities in an area where any other of the distributors have already engaged in marketing activities;

- (iii) manufacturers concertedly limit specifications and kinds of products which each of the manufacturers can manufacture; or
- (iv) manufacturers enter into a mutual agreement that any of them should not commence manufacturing any products of any kind which any other of the distributors have already manufactured.

(Note 1) Even in the absence of an explicit agreement, if a tacit understanding or a common intent is formed among enterprises regarding customer restrictions or market allocation, thereby substantially restraining competition in a market, the tacit understanding or the common intent constitutes a violation of the Antimonopoly Act. The same applies in Part II.

3. Restrictions by Trade Associations on Competition for Customers

In case where a trade association, in connection with its member enterprises' activities, undertakes any of such conduct as described in the Sub-Section 2(1)(i) through 2(1)(v) or Sub-Section 2(2)(i) through 2(2)(iv) above, and if competition for customers among member enterprises is thereby restricted and competition in a market becomes substantially restricted, such conduct constitutes a violation of Article 8, Item (i) of the Antimonopoly Act. Even if the conduct does not cause substantial restraint of competition in the market, it in principle constitutes a violation of Article 8, Item (iv) of the Antimonopoly Act, because it unjustly restricts the functions or activities of member enterprises.

Chapter 2. Boycotts

1. Viewpoint

Even if free and fair competition results in compelling an enterprise to exit from a market or to fail to enter the market, it would present no problem under the Antimonopoly Act.

It is, however, in principle illegal for an enterprise, in concert with its competitors, customers or suppliers, etc., or for a trade association to prevent new entrants from entering a market or exclude existing enterprises from the market, which is a prerequisite for effective competition.

There are a variety of types in which concerted refusals to deal (boycotts) may take place, and their extent on competition may vary with, among other things, the market structure as well as the degree of probability that such conduct would prevent an enterprise from entering a market or exclude an enterprise from the market. If a concerted refusal to deal makes it very difficult for an enterprise to enter a market, or has the effect of excluding a enterprise from the market, judging from, among other things, the number and position in the market of the enterprises concerned as well as characteristics of the products or services concerned, thereby resulting in substantial restraint of competition in the market, then the concerted refusal is illegal as private monopolization or unreasonable restraint of trade. A concerted refusal to deal, even if it does not cause substantial restraint of competition in a market, is, in principle, illegal as unfair trade practices, because it generally tends to impede fair competition. In the case of a trade association arranging for concerted refusal to deal, such conduct is illegal as substantial restraint of competition by trade associations, or obstruction of competition by them (conduct to limit the number of enterprises in any particular field of business; to unjustly restrict the functions or activities of member enterprises; or to induce any enterprise to engage in such acts as constitute unfair trade practices).

2. Refusals to Deal in Concert with Competitors

(1) In cases where competitors concertedly engage in, for instance, the following types of conduct, and, if the conduct makes it very difficult for any enterprise refused to deal with to enter a market or the conduct has the effect of excluding the refused enterprise from the market, thereby resulting in substantial

restraint of competition in the market, such conduct constitutes private monopolization or unreasonable restraint of trade and violates Article 3 of the Antimonopoly Act:

- (i) manufacturers concerted, in an attempt to exclude price-cutting distributors, refuse to supply products to such distributors or limit such supply;
- (ii) distributors concerted, in an attempt to prevent new entries by competitors, refuse to supply products to new entrants and cause their suppliers (manufacturers) to refuse to supply products to the new entrants;
- (iii) manufacturers concerted, in an attempt to exclude imported products, cause distributors not to distribute the imported products, by informing the distributors of the manufacturers' intention to refuse to supply products to the distributors if they distribute the imported products; and
- (iv) finished product manufacturers concerted, in an attempt to prevent competitors from entering a market, cause material manufacturers to refuse to supply products to new entrants by informing the material manufacturers of the finished product manufacturer's intention to refuse to deal with the material manufacturers if they provide their products (i.e., materials for finished products) to the new entrants.

(2) In cases where a concerted refusal to deal brings about, for example, the following situations, competition in a market shall be found to be substantially restrained:

- (i) it is made very difficult for any enterprise manufacturing or selling products superior in price and quality to enter a market, or in case where such an enterprise is to be excluded from the market;
- (ii) it is made very difficult for any enterprise adopting innovative selling method to enter a market, or in case where such enterprise is to be excluded from the market;
- (iii) it is made very difficult for any enterprise having superior overall business capabilities to enter a market, or in case where such enterprise is to be excluded from the market;
- (iv) it is made very difficult for any enterprise to enter a market where no active competition is taking place; or
- (v) a concerted refusal to deal is conducted toward any potential entrant to

enter a market.

(3) Any of the types of conduct listed in (1) (i) through (iv) above, undertaken in concert by competitors, is in principle illegal as unfair trade practices, even if the conduct does not cause substantial restraint of competition in a market (Violation of Article 19 of the Antimonopoly Act) (Article 2, Paragraph (9), Item (i) of the Antimonopoly Act or Paragraph 1 (Concerted Refusal to Trade) of the General Designation).

(Examples)

(i) Company X and other 4 companies are record producers or subsidiaries of record producers, and engage in “Chaku-uta” services (services that provide part of singing voice recorded on the original master, produced for the release of music CDs, to a cellular phone for use as a ring tone). They entrust Chaku-uta services to Company A.

These 5 companies entered into an agreement that they would not grant licenses for their original master records to any enterprises which provided Chaku-uta services or wished to do so other than those which entrusted Chaku-uta services to Company A, and the 5 companies actually refused to grant such licenses.

This conduct was found to fall under Paragraph 1, Sub-Paragraph 1 of the General Designation and to violate the provisions of Article 19 of the Antimonopoly Act. (JFTC recommendation decision dated July 24, 2008; JFTC Decision No. 11 of 2005) (Tokyo High Court Judgement of January 29, 2010; (Gyo Ke) Nos. 19, 20, 35 and 36 of 2008)

(ii) Ten companies including Company X owned numerous patent rights for the manufacture of pachinko machine (pachinko is a popular Japanese pinball game) and, at the same time, distributed almost all of the pachinko machines in Japan. The ten companies including Company X outsourced the management of their owned patent rights to Company Y and substantially participated in the decision making on granting a license of patented inventions for pachinko and pachislot. The patented inventions owned or managed by Company Y were important rights for the manufacture of pachinko machines. Under the circumstances, it was difficult to manufacture pachinko machines without being granted a license of the patented

inventions.

On the basis of a policy of preventing new entry into the pachinko machine manufacturing market (downstream market), the ten companies including Company X and Company Y attempted to accumulate patented inventions owned or managed by Company Y and made it impossible for persons who intended to enter the market to commence the manufacture of pachinko machines by refusing to grant a license of the patented inventions to anyone other than the existing pachinko manufacturers in the market, pertaining to licensing the patented inventions (upstream market).

As a result, such conduct by the ten companies including Company X and Company Y was deemed to exclude the business activities of any persons who intended to manufacture pachinko machines and therefore to constitute private monopoly set forth in Article 2, Paragraph (5) of the Antimonopoly Act and violate Article 3 of the Act. (JFTC recommendation decision dated August 6, 1997; JFTC recommendation No. 5 of 1997)

3. Refusals to Deal in Concert with Trading Partners, etc.

(1) In case where an enterprises concertedly with their trading partners, etc., engage in, for instance, the following types of conduct, and if the conduct makes it very difficult for any enterprise refused to deal with to enter a market or the conduct has the effect of excluding the refused enterprise from the market, thereby resulting in substantial restraint of competition in the market, then such conduct constitutes private monopolization or unreasonable restraint of trade (Note 2) and violates Article 3 of the Antimonopoly Act:

- (i) two or more distributors and two or more manufacturers concertedly, in an attempt to exclude price-cutting distributors, undertake such conduct that the latter refuses or restricts the supply of products to such distributors and that the former refuses to deal in the products of those manufacturers which have supplied their products to such distributors;
- (ii) a manufacturer and two or more distributors concertedly, in an attempt to exclude imported products, undertake such conduct that the latter does not deal in the imported products and that the former refuses to supply products to those distributors selling the imported products;
- (iii) two or more distributors and a manufacturer concertedly, in an attempt

to prevent other distributors from entering a market, undertake such conduct that the latter refuses to supply products to new entrants and that the former refuses to deal in the products of those manufacturers which have supplied their products to such new entrants: or

(iv) two or more material manufacturers and a finished product manufacturer concertedly, in an attempt to exclude imported materials, the latter does not purchase the imported materials and that the former refuses to supply materials to those finished product manufacturers which have purchased the imported materials.

(Note 2) In order for any conduct to constitute unreasonable restraints of trade, it is required that an enterprise “in concert with other enterprises, mutually restrict...their business activities” (Article 2, Paragraph (6) of the Antimonopoly Act). The content of a restriction of business activities in this context does not need to be identical in all of the enterprises engaging in the concerted action (for example, manufacturers and distributors), but it is sufficient if the action restricts business activities of each of those enterprises and is done for the purpose of achieving a common purpose, such as exclusion of a specific enterprise.

See Sub-Section 2(2) above for examples of cases where competition in a market should be found to be substantially restrained through refusals to deal enterprise in concert with its trading partner, etc.

(2) Any type of conduct described in (1)(i) through (iv) above, undertaken by any enterprise concertedly with its customers, suppliers, etc., even if the conduct does not cause substantial restraint of competition in a market, is in principle illegal as unfair trade practices (Article 2, Paragraph (9), Item (i) of the Antimonopoly Act or Paragraph 1 (Concerted Refusal to Deal) or 2 (Other Refusal to Trade) of the General Designation).

4. Refusal to Deal Arranged by Trade Associations

In cases where a trade association engages in, for instance, the following types of conduct, and if the conduct makes it very difficult for any enterprise refused to deal with to enter a market, or its effect is to likely exclude the

enterprise refused from the market, thereby resulting in substantial restraint of competition in a market (Note 3), such conduct violates Article 8, Item (i) of the Antimonopoly Act. Furthermore, in any case where a trade association engages in the following types of conduct, even if such conduct does not cause substantial restraint of competition in a market, the conduct, in principle, violates Article 8, Item (iii), (iv) or (v) of the Antimonopoly Act (Article 2, Paragraph (9), Item (i) of the Antimonopoly Act or Paragraph 1 or 2 of the General Designation).

- (i) a trade association composed of distributors, in an attempt to exclude imported products, prohibits its member enterprises from dealing in the imported products (Article 8, Item (i) or Article 8, Item (iv) of the Antimonopoly Act);
- (ii) a trade association composed of distributors and manufacturers induces member manufacturers to supply their products only to member distributors and not to outsiders (Article 8, Item (i) or Article 8, Item (iv) of the Antimonopoly Act);
- (iii) a trade association composed of distributors, in an attempt to exclude outsiders, applies pressure on manufacturers dealing with its member enterprises, by requesting the manufacturers not to supply their products to outsiders or through other means (Article 8, Item (i) or Article 8, Item (v) of the Antimonopoly Act);
- (iv) a trade association composed of distributors, in an attempt to prevent competitors of its member enterprises from entering a market, applies pressure on manufacturers dealing with member distributors, by requesting the manufacturers not to supply their products to those new entrants or through other means (Article 8, Item (i) or Article 8, Item (v) of the Antimonopoly Act);
- (v) a trade association composed of distributors restricts new membership in the association and causes manufacturers dealing with member distributors to refuse to supply their products to outsiders (Article 8, Item (i); Article 8, Item (iii) or Article 8, Item (v) of the Antimonopoly Act); or
- (vi) a trade association composed of service providers restricts new membership in the association under the circumstances where it is difficult for any service providers to carry on business without membership in the association (Article 8, Item (i) or Article 8, Item (iii) of the Antimonopoly Act).

(Tentative Translation: Only Japanese version is authentic)

(Note 3) See Sub-Section 2(2) above for examples of cases where competition in a market should be found to be substantially restrained through concerted refusals to deal arranged by trade associations.

Chapter 3. Primary Refusals to Deal by a Single Enterprise

1. Viewpoint

Basically speaking, it is a matter of freedom of choice of trading partners for an enterprise to decide which enterprise it does business with. Even if an enterprise, considering such factors as price, quality and service, decides not to deal with a certain enterprise at its own judgment, there would be fundamentally no problem under the Antimonopoly Act.

However, exceptionally, even a refusal to deal by a single enterprise is illegal in cases where the enterprise refuses to deal as a means to secure the effectiveness of its illegal conduct under the Antimonopoly Act. A refusal to deal by a single enterprise may also present a problem in cases where the enterprise refuses to deal as a means to achieve such unjust purposes under the Antimonopoly Act as excluding its competitors from a market (Note 4).

(Note 4) As to in what cases these practices substantially restrict competition in markets and are illegal as private monopolization, the Japan Fair Trade Commission has given guidance on this issue in Exclusionary Private Monopolization Guidelines.

2. Cases Where There are Problems under the Antimonopoly Act

In cases where an enterprise engages in, for example, the conduct mentioned in Sub-Section (i) below as a means to secure the effectiveness of its illegal practice under the Antimonopoly Act, such conduct is illegal as unfair trade practices (Paragraph 2 (Other Refusal to Trade) of the General Designation).

Moreover, in cases where an influential enterprise in a market (Note 5) engages in, for example, the conduct mentioned in Sub-Section (ii) or (iii) below as a means to achieve unjust purposes under the Antimonopoly Act (such as exclusion of its competitor from a market), and if such conduct tends to make it difficult for the refused competitor to carry on normal business activities, such conduct is illegal as unfair trade practices (Paragraph 2 of the General Designation):

- (i) an influential manufacturer in a market, by causing distributors not to

deal with its competitor, reduces the competitor's business opportunities and prevents the competitor from easily finding alternative trading partners, and, with a view to ensure the effectiveness of such conduct, refuses to deal with distributors not complying with this request (this conduct also falls under Paragraph 11 (Trading on Exclusive Terms) of the General Designation);

(ii) an influential material manufacturer in a market, in an attempt to prevent a finished product manufacturer from manufacturing by itself some of materials supplied by the material manufacturer to it, stops its supply to the finished product manufacturer of main materials which have been being supplied by the material manufacturer to the finished product manufacturers;

or

(iii) an influential material manufacturer in a market, in an attempt to exclude competitors of its customer (more specifically, an enterprise which has a close relation with the material manufacturer and which manufactures a finished product by making use of materials supplied by the manufacturer) from a market for the said finished product, stops its supply to those competitors of materials which have been being supplied by the material manufacturer to them.

(Note 5) The guidance given in Sub-Section 3 (4) of Part I above applies to a definition of "an influential enterprise in a market."

PART III. SOLE DISTRIBUTORSHIP

1. There are cases where an enterprise, whether domestic or foreign, for the purpose of supplying products, grants to another enterprise an exclusive distributorship for the products covering the entire domestic market. Such enterprise given an exclusive distributorship is called a “general sales agent” or a “sole import distributor” (hereinafter referred to as “sole distributor”; and an enterprise granting an exclusive distributorship is hereinafter referred to as “supplier”; and a contract concluded between them as “sole distributorship contract”). Sole distributorship contracts are sometimes used as a means for foreign enterprises’ entry into Japanese markets, because such contracts can reduce suppliers’ cost and risks of entry into markets and sole distributors’ organized marketing activities can be expected.

2. As stated above, sole distributorship contracts can generally contribute to promote competition. However, depending on the market status of the product covered by such contracts as well as the contracting parties, or their behaviors in markets, such contracts may function to impede competition in the markets. This Part, focusing on sole distributorship contracts, provides guidance under the Antimonopoly Act from the viewpoint of regulation of unfair trade practices.

3. Chapter 1 of this Part III deals with restrictions imposed by one party to a sole distributorship contract on the other. Resale price maintenance practices, vertical non-price restraints, and other restrictions imposed or done by sole distributors, in their capacities as marketing entities, on or against distributors are covered by Part I above.

Chapter 2 of this Part III deals with unreasonable obstruction of parallel imports, regardless of whether they are stipulated in sole distributorship contracts, or committed by suppliers or sole distributors. Chapter 2 also applies to such obstruction that is committed toward distributors by a sole distributor at its own discretion.

Chapter 1. Major Restrictive Provisions in Sole Distributorship Contracts

1. Case Where There are Problems under the Antimonopoly Act

(1) Resale price maintenance

The guidance given in Part I, Chapter 1 (Resale Price Maintenance) applies to any conduct by a supplier to restrict its sole distributor's sales price of a product covered by a sole agency contract between the supplier and the sole distributor or to cause the sole distributor to restrict sales prices of enterprises which purchase the product from the sole distributor for resale (including other enterprises that purchase the product from the said enterprise for resale; hereinafter referred to as "dealers").

(2) Restrictions on handling of competing products

(i) Restrictions on handling of competing products during term of sole distributorship contracts

The guidance given in Part I, Chapter 2, Sub-Section 2(1) (Restriction on trading partners' dealing with competitors and/or trading partners' handling of competing products) applies to a supplier's restricting its sole distributor's handling of competing products or causing the sole distributor to restrict dealers' handling of competing products in either case during the term of a sole distributorship contract between the supplier and the sole distributor ; provided, however, that, during the term of the contract, if the supplier's restriction does not cover handling of any competing products-which have already been handled by the sole distributor, the restriction presents, in principle, no problems under the Antimonopoly Act.

(ii) Restrictions on handling of competing products after termination of sole distributorship contract

In case where a supplier restricts its sole distributor from handling competing products after termination of a sole distributorship contract between the supplier and the sole distributor, such restriction constitutes binding on business activities of the sole distributor, obstructs entry into the market, and, in principle, presents problems under the Antimonopoly Act. However, in cases where such restriction is imposed with such proper

justification as the necessity for preventing confidential information (including marketing know-how) from being diverted and only the maximum extent necessary, it presents, in principle, no problems under the Antimonopoly Act.

(3) Restrictions on sales territories

(i) The guidance given in Part I, Chapter 2, Section 3 (Restrictions on Sales Territories) applies to any conduct to a supplier cause its sole distributor to restrict dealers' sales territories in the domestic market with respect to products covered by a sole distributorship contract between the supplier and the sole distributor.

(ii) In cases where a supplier requires its sole distributor not to actively market the product covered by the contract in area outside the territory for which the sole distributor is granted the exclusive distributorship for the product (hereinafter referred to as "approved territory"), or the sole distributor causes the supplier to discourage its direct customers located outside the approved territory from actively marketing the product in the sole distributor's approved territory, it presents, in principle, no problem under the Antimonopoly Act.

(4) Restrictions on trading partners

(i) The guidance given in Part I, Chapter 2, Section 4 (Restrictions on Distributors' Trading Partners) applies to any conduct by a supplier to restrict its sole distributor's customers or to cause the sole distributor to restrict distributors' customers.

(ii) In case where a supplier requires its sole distributor to buy the product covered by the contract exclusively from the supplier or from the parties it designates, it presents, in principle, no problem under the Antimonopoly Act.

(5) Restrictions on sales methods

The guidance given in Part I, Chapter 2, Section 6 (Restrictions on Retailers' Sales Methods) applies to any conduct by a supplier to restrict its sole distributor's sales method for the product covered by the covered by a supplier to restrict its sole distributor's sales method for the product covered by the contract or to cause the sole distributor to restrict distributors' sales methods.

2. Cases Where There are no Problems under the Antimonopoly Act

While a supplier, in exchange for granting an exclusive distributorship of the product covered by the contract, sometimes imposes on its sole distributor the following restriction or obligation, it presents, in principle, no problem under the Antimonopoly Act.

- (i) Setting a minimum volume or value of the product covered by the contract to be purchased or sold; or
- (ii) To make the best efforts to sell the product covered by the contract.

Chapter 2. Unreasonable Obstruction of Parallel Imports

1. Viewpoint

(1) In case of a sole import distributorship contract, a product covered by the contract can be imported by way of channels other than that arranged between the contracting parties (such importation of the product is hereinafter referred to as “parallel import”; it assumes the importation of genuine products, which does not infringe any trademark right).

Parallel imports are considered to promote price competition in a market, and accordingly, obstruction of parallel imports presents a problem under the Antimonopoly Act, if it is conducted to maintain price level of the product covered by the contract.

(2) In cases where products being sold as parallel import goods are not genuine products but counterfeit products, owner of trademarks may request to cease and desist from selling such products, on the ground of trademark infringements. In addition, necessary measures to maintain credit of trademarks under the following situations present, in principle, no problem:

(i) In case where consumers may misunderstand parallel import goods with different specification or quality are identical to the product handled by a sole distributor, because of false representation of origin or other reasons; or

(ii) In case of parallel import of trademarked goods which were legitimately sold in foreign markets, if credit of the product handled by a sole distributor may be damaged because of such reasons as threats to consumers’ health or safety caused by deterioration of the parallel import goods.

(3) In the case of domestic products, if the same or similar conduct as or to unreasonable obstruction of parallel import goods is carried out, an approach to illegality of such conduct is basically the same. Therefore the guidance given in Section 2 below also applies to domestic products.

2. Cases Where There are Problems under the Antimonopoly Act

(1) Preventing any parallel importer from purchasing genuine products in overseas markets

There are cases where parallel importers are prevented from buying genuine

products through overseas distribution channels, in order to maintain price level of the product covered by the contract. Such conduct curtails or eliminates price competition between the product handled by the sole distributor and the parallel import goods and deviates the extent necessary for the sole import distributorship system to function properly.

Accordingly, such conduct is illegal as unfair trade practices, in cases where the following types of conduct are employed by a sole distributor or supplier to maintain price level of the product covered by the contract (Article 12 (Trading on Restrictive Terms) or 14 (Interference With A Competitor's Transaction) of the General Designation).

(i) In case where a parallel importer makes an offer of purchase to the supplier's overseas customer, the sole distributor or supplier's overseas customer not to sell to the parallel importer; or

(ii) The sole distributor or supplier induces the supplier's overseas customer, to stop selling to the parallel importer by such means of tracing the supply channel of parallel import goods by checking their serial numbers or the like, and providing the information to the supplier or its overseas customer.

(2) Restriction on distributors' handling of parallel import goods

Distributors should be free to choose whether or not to handle parallel import goods. In cases where a sole distributor transacts business with its distributors on condition that they shall not handle parallel import goods, or in any manner induces the distributors not to handle parallel import goods, and if such conduct is employed to maintain price level of the product covered by the contract, it is illegal as unfair trade practices (Article 12 or 14 of the General Designation).

(3) Restriction on wholesalers of selling the product covered by the contract to retailers handling parallel import goods

Distributor (wholesaler) should be free to sell the product purchased from a sole distributor, to any retailer of its own choice. In cases where a sole distributor induces its distributors not to sell the product covered by the contract to a retailer that is handling parallel import goods, and if such conduct is employed to maintain price level of the product covered by the contract, it is illegal as unfair trade practices (Article 12 or 14 of the General Designation).

(4) Interference with marketing of parallel import goods by alleging them as counterfeits

Owners of trademarks may request to cease and desist from marketing any counterfeit of their products on the ground of trademark infringements.

However, in cases where a trademark owner requests an enterprise handling parallel import goods to cease and desist from selling them, alleging, without adequate reasons, that they are counterfeit and infringes the trademark (Note 1), and if such conduct is employed to maintain price level of the product covered by the contract, it is illegal as unfair trade practices (Article 14 of the General Designation).

(Note 1) If such conduct is carried out, a retailer may refrain from handling parallel import goods out of fear that such allegation in itself might be detrimental to the retailer's reputation, even if the parallel import goods are genuine and the parallel importer can prove them as such.

In addition to alleging parallel import goods as counterfeit, the following conduct was pointed out constituting a problem under the Antimonopoly Act as interfering with marketing of parallel import goods.

(Examples)

Company X is a sole import distributor of medical devices and consumables to be used for those medical devices which made by Company Y located in Country A. To those consumables sold by it, Company X is planning to apply stickers bearing the words "Inspected by Company X" or the statements "Company X certifies that the product in this bottle was accepted in Company X's quality control tests. Please note that Company X will not be liable for any defects in data or devices which may arise from any products that have not gone through Company X's quality control tests." in order to distinguish the product handled by Company X from parallel import goods, with the requests of the users who is doubting quality of parallel import goods. The application of those stickers is not alleging parallel import goods as counterfeits but finds to have marketing interference effects just like alleging parallel import goods as counterfeits, because:

- (i) Company Y, the manufacturer of consumables, is conducting quality inspection and quality control tests of the consumables; if Company X's inspection is no more than sampling inspection for effects of the consumables, Company X's representation which may give the impression as if Company X is engaging in independent quality control may lead consumers to erroneously believe that quality of any parallel import goods are not assured; and
- (ii) Company X is not liable for any malfunction, if any, of the said medical devices which may arise from defects in genuine parallel import goods controlled their quality by Company Y and therefore Company X's application of the stickers has no justifiable grounds; rather the possibility cannot be denied that the application is possibly used as a means to interfere with marketing of parallel import goods.

The application of the stickers may be possibly used by Company X as a means to interfere with marketing of parallel import goods and accordingly it would possibly constitute a problem under the Antimonopoly Act. ("11. Preparation of documents to the effect that a sole distributor of a device will not warrant performance of the device if parallel imported consumables are used for the device," Consultation Cases Relating to Unfair Trade Practices (July, 1991 – March, 1995))

(5) Buying-up of parallel import goods

When a retailer attempts to sell parallel import goods, there may be cases where a sole distributor may come to the store and corner the products, thereby obstructing transaction of parallel import goods (Note 2). If such conduct is employed to maintain price level of the product covered by the contract, it is illegal as unfair trade practices (Article 14 of the General Designation)

(Note 2) If parallel import goods advertised to consumers, are cornered by a sole distributor, consumers, who come to by the products may allege as "bait and switch advertising" and the retailer's credit may be injured. Cornering of the parallel import goods may also place psychological pressure on the retailer to stop selling parallel import goods and deter it from handling them.

(6) Refusal to conduct repairs or the like on parallel import goods

It is common for a sole distributor to set up repair service and keep in stock of repair parts, commensurate with its volume of supply of the product. Consequently, there may be cases where it is not available for sole distributor to comply with requests for repair of parallel import goods or to provide the required repair parts. Accordingly, even if the sole distributor refuses to repair parallel import goods under the objective circumstances which make the sole distributor unable to comply with the requests for repair or make differences in terms and conditions of repair or the between the product handled by it and the parallel import goods, such conduct in itself presents no problem under the Antimonopoly Act.

However, in cases where it is extremely difficult for any party other than a sole distributor or its distributors to repair parallel import goods or to obtain necessary repair parts, and if the sole distributor refuses repair work or supply of repair parts or induces the distributors to refuse such repair work or supply of repair parts, solely on the ground of parallel import goods, such conduct is illegal as unfair trade practices, if it is employed to maintain price level of the product covered by the contract (Article 14 of the General Designation).

(7) Obstruction of advertising activities for parallel import goods

Depending on ways and means, advertising activities for parallel import goods might constitute infringement of trademark rights, or cause confusion with the business operations of the a sole import distributor, due to similarities of advertising and the like, and may constitute violations of the Unfair Competition Prevention Law. In such cases, discontinuation of such advertising activities may be requested.

However, in cases where a sole distributor induces publishers of magazines, newspapers, and other media not to carry advertisements on parallel import goods or in any manner obstructs the advertising activities of parallel import goods without proper justification, and if it is employed to maintain price level of the product covered by the contract, such conduct is illegal as unfair trade practices (Article 12 or 14 of the General Designation).

Appendix: Transactions between Parent and Subsidiary Companies or between Fellow Subsidiaries

In cases where an enterprise (parent company) owns shares in another enterprise (subsidiary company), the following rules apply as to whether or not transactions between the two companies or between subsidiary companies (hereinafter referred to as “fellow subsidiaries”) shares in which are owned by the same parent company are subject to the regulation of unfair trade practices:

1. In cases where a parent company owns 100% of shares in a subsidiary or in each of two subsidiary companies, it is usually deemed that transactions between the parent company and the subsidiary company or between the fellow subsidiaries are in substance equivalent to intra-company transactions, and the transactions in principle are not subject to the regulation of unfair trade practices.
2. Even in cases where a parent company owns less than 100% (but, in principle, more than 50%) of shares in a subsidiary or in each of two subsidiaries, and if it is deemed that transactions between the parent company and the subsidiary company or between the fellow subsidiaries are in substance equivalent to intra-company transactions, the transactions in principle are not subject to the regulation of unfair trade practices.
3. In cases where transactions between a parent company and a subsidiary company or between fellow subsidiaries are deemed to be in substance equivalent to intra-company transactions, and if the parent company restricts business activities of a third party that is the subsidiary’s trading partner (for example, if either a contract between the parent company and the subsidiary company or instructions given by the parent company to the subsidiary company causes the subsidiary company to restrict sales price of the third party), such conduct of the parent company is subject to the regulation of unfair trade practices.
4. For the purpose of Paragraphs 2 and 3 above, whether or not transactions between a parent company and a subsidiary company or between fellow subsidiaries are in substance equivalent to intra-company transactions is to be determined on a case-by-case basis by means of comprehensive examination of

various factors, including:

- (i) percentage of the parent company's shareholding in the subsidiary company;
- (ii) situation regarding dispatch of directors from the parent company to the subsidiary company;
- (iii) situation regarding the parent company's interference in financial affairs and business policies of the subsidiary company; and
- (iv) business relationship between the parent and subsidiary companies or between the fellow subsidiaries (including a percentage of the subsidiary's transaction with the parent company or with the fellow subsidiary in the total volume of transaction of the subsidiary).

In cases where a parent company imposes the same or similar restrictions on other enterprises as or to those imposed on a subsidiary company (or a subsidiary company imposes the same or similar restrictions on other enterprises as or to those imposed on a fellow subsidiary), it is usually deemed that the restrictions are imposed on the subsidiary (or the fellow subsidiary) as one of trading partners and the transactions between the parent and the subsidiary or between the fellow subsidiaries are in principle subject to the regulation of unfair trade practices.