

Effect on Non-Assertion of Patents Provisions

--A Study on Research and Development Incentives in Vertical Relationship --

This paper studies on Research and Development (R&D) incentives in vertical relationship, in terms of the case of the Microsoft Corporation (MS), which is involved to the hearing decision based on the Article 54 (1) Antimonopoly Act (Law Number 35, 2005: AMA) at September 16, 2008 (hearing from September 1, 2004). In the hearing decision by the Japan Fair Trade Commission, the conduct that the MS forced to contract including Non-Assertion of Patents Provisions (NAP provisions) that prescribed licensed Original Equipment Manufacturers (OEMs) pledged not to bring a suit to MS or other licensors, from January 1, 2001 to July 31, 2004, through direct negotiation between MS and PC manufacturers in the step of licensing MS Windows (OS), was identified as violation of the AMA.

This paper builds simple theoretical models for several discussion points and obtains following results: (i) In the case where incorporating an OEM's advanced technologies into MS improves the product quality of the other OEM's, if the *ex ante* quality difference between the OEMs' products is small, it is optimal for MS to use both technologies of the OEMs, and the MS's conduct is also beneficial for the OEMs. However, if the *ex ante* quality difference is large, the MS's conduct harms the OEM with more advanced technologies. (ii) In the case where incorporating an OEM's advanced technologies into MS decreases the marginal cost of MS, it is optimal for MS to use both technologies of the OEMs, and the MS's conduct is also beneficial for the OEMs. (iii) In the case where incorporating an OEM's advanced technologies into MS decreases the marginal cost of the other OEM, if the MS's capability of absorbing technologies is low (the level of technology spillover is low), then it is optimal for MS to use both technology of the OEMs. If the MS's capability is high, then it is optimal for MS not to introduce NAP provisions. When if the *ex ante* quality difference is large, the MS's conduct tends to harm the OEM with more advanced technologies.

The implication of this study is as follows. It is pointed out that NAP provisions have various effects on OEMs in downstream markets, and also it is important that analysis of the incentive mechanism in the process of investigation and proof at the litigation. For example, in case of large distinction among OEMs, it is considered that clarifying damages related to competition policy including the probability of damaging efficient OEMs, or the probability of disturbing investment incentive is beneficial effect on the sound competition policy. On the other hand, it is needed to deliberate consideration to capture the effect quantitatively.