



**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

ROUNDTABLE ON BUNDLED AND LOYALTY DISCOUNTS AND REBATES

-- Japan --

10 June 2008

The attached document is submitted by Japan to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 10 June 2008.

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1. Introduction

1. This paper describes single product loyalty discounts and rebates, not bundled discounts and rebates.

2. In Japan, the provision of rebates by manufacturers to distributors has been conventional, especially in the distribution of various consumption goods.

3. The nature of rebates provided by manufacturers to distributors is diverse, including those that adjust billing prices, and those that promote 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 the actual conditions in a market. Accordingly, the provision of rebates in itself does not necessarily present a problem under the Antimonopoly Act (“AMA”). However, business operators might be involved in anti-competitive conduct with the provision of rebates, and this conduct might be considered a problem as an “unfair trade practice” or “private monopolization” prohibited by the AMA.

4. In the following sections, we would like to introduce the viewpoint of the AMA on the provision of rebates by manufacturers to distributors, which is related to the theme of this roundtable, based on the Guidelines published by the JFTC in 1991. We would also like to introduce a recent JFTC case (against Intel Japan), which is closely relevant to it.

2. Viewpoint on the provision of rebates in the Distribution Systems and Business Practices Guidelines¹

5. The Guidelines, mainly keeping in mind transactions in the distribution process in which consumer goods reach their consumers, shows the viewpoint of the AMA on the provision of rebates by manufacturers to distributors, in light of the regulation of unfair trade practices. The viewpoint is as follows.

2.1 Viewpoint

6. The nature of rebates provided by manufacturers to distributors is diverse, including those that adjust billing prices, and those that promote 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 the actual conditions in a market. Accordingly, the provision of rebates in itself does not necessarily present a problem under the AMA.

7. There are cases, however, where depending on the ways that rebates are provided, they may restrict the business activities of distributors and present a problem under the AMA.²

¹ JFTC “Guidelines Concerning Distribution Systems and Business Practices” (1991).

² The Guidelines state that “In cases where a manufacturer discretionally provides rebates without a clear basis, and particularly if such opaque rebates account for a large percentage of a distributor’s margin, they can give rise to the effect of making it easy for the manufacturer to conform the distributor to its sales policy, and are most likely to restrict the business activities of the distributor. For this reason, it is desirable for manufacturers to make clear the basis for the provision of rebates, and inform their distributors of it.”

2.2 *Cases where there is a problem under the AMA*

2.2.1 *Rebates provided as a means of restricting a distributor's business activities*

8. Rebates might be provided as a means of restricting a distributor's sales price, handling of competing products, sales territory, customers, etc. For example, rebates might be reduced if the distributor does not sell products at the price indicated by the manufacturer. It is to be judged whether such restrictions fall under unfair trade practices, including Dealing on Exclusive Terms (unjustly trading with another party on condition that the said party shall not trade with a competitor, thereby tending to reduce trading opportunities for the said competitor) and Resale Price Restriction.

9. Furthermore, the conduct of discriminating against the provision of rebates depending on the price, handling of competing products, or the like, is illegal as an unfair trade practice (Discriminatory Treatment on Transaction Terms, etc.) if it has the same or similar function as the imposition of illegal restrictions on distributors.

10. Also, the same shall apply to cases where a "repayment system" (under which a manufacturer collects all or a part of the margin from the distributors and pays it back after a certain period) is used as a way of illegal restriction, or has the same and similar functions as the imposition of illegal restriction on the distributors.

2.2.2 *Share rebates*

11. A manufacturer sometimes provides rebates to its distributors according to the percentage of sales of the manufacturer's products in the total business of each distributor during a specific period, or according to the share that the manufacturer's products have in the display of all goods at the distributor's store.

12. The provision of such rebates by an influential manufacturer³, if it has the function of restricting a distributor's handling of competing products and may result in making it difficult for new entrants or competitors to easily secure alternative distribution channels, is illegal as an unfair trade practice (Trading on Exclusive Terms, etc.).

2.2.3 *Remarkably progressive rebates*

13. At times a manufacturer in providing volume rebates may set a rebate rate progressively, according to a ranking of distributors based on criteria such as quantity of products supplied to each distributor during a certain period. While progressive rebates have the aspect of promoting price formation in keeping with actual conditions in a market, if the rate is remarkably progressive, they have the function of encouraging the preferential handling of that manufacturer's products over those of others.

14. The provision of such rebates by an influential manufacturer, if it has the function of restricting a distributor's handling of competing products and may result in making it difficult for new entrants or competitors to easily secure alternative distribution channels, is illegal as an unfair trade practice (Trading on Exclusive Terms, etc.).

³ The Guidelines stipulate that "Whether a firm is 'influential in a market' is judged by the market share of the firm, that is, whether it has no less than 10% or its position is within the top three in the market (meaning a product market that consists of a group of products with the same or similar function and utility as the product covered by the conduct, and competing with each other judging from geographical conditions, transactional relations and other factors) . Nevertheless, even if a firm falls under this criterion, the firm's conduct is not always illegal."

3. Private Monopolization

15. The Guidelines stated above aim to clarify cases where anticompetitive conduct with the provision of rebates by manufactures falls under unfair trade practices. Such anticompetitive conduct might pose a problem as private monopolization prohibited by the AMA, as well.

16. The AMA prohibits as private monopolization “such business activities, by which any entrepreneur, individually or by combination or conspiracy with other entrepreneurs, or in any other manner, excludes or controls the business activities of other entrepreneurs, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.”

17. “Exclusion” in this definition is interpreted as making it difficult for other companies to continue their business activities or to enter the market. “Control” is construed as depriving other companies of their freedom to make decisions concerning their business activities and forcing them to obey the controller’s intent.

18. Acts that correspond to unfair trade practices are more specifically designated by the JFTC as activities stipulated by each Item of Paragraph 9 of Article 2 of the AMA. On the other hand, any act, if it causes “substantial restraint of competition” by “exclusion” or “control”, is prohibited as private monopolization.

19. As to “substantial restraint of competition in any particular field of trade”, the case laws⁴ state that “restraining competition in any particular field of trade substantially means causing or at least being about to cause a situation in which competition itself has significantly lessened in a market and thereby a specific company or companies can control the market by determining freely, to some extent, prices, qualities, volumes, and various other terms on its or their own volition”. Thus, “substantial restraint of competition in any particular field of trade” can be interpreted as the formation, maintenance and enhancement of a market dominance situation in the context of those case laws.

20. Anti-competitive conduct with the provision of rebates can be regulated as private monopolization prohibited by the AMA if it causes a substantial restraint of competition by excluding the business activities of other companies.

4. Recent relevant case: Case against Intel Kabushiki Kaisha (recommendation decision on 13 April 2005)

21. In this case, Intel Kabushiki Kaisha (IJKK) made domestic PC manufacturers refrain from making transactions with IJKK’s competitors by offering special discount prices to the manufacturers in the market of central processing units (CPUs) sold to PC manufacturers in Japan on condition that the manufacturers would increase their market segment shares (MSSs) of Intel’s CPUs to 100%, and other conditions. In this case, the JFTC found that a series of IJKK’s acts under its policy to raise MSSs and other policies constituted a single act of violation. In other words, the JFTC didn’t consider the provision of special discount prices in itself as a problem, but it focused on and applied the AMA to IJKK’s exclusion of its competitors’ business activities from the market by linking its targeted MSS figures and other goals to the rebates offered to domestic PC manufacturers.

22. This is a private monopolization case. IJKK held an 80-90% share of the market of CPUs sold to PC manufacturers in Japan. In addition, IJKK was capable of setting conditions for transactions with domestic PC manufacturers, based on the strong financial resources, brand power, technology, production

⁴ See decisions by Tokyo High Court on September 19, 1951 and December 7, 1953.

capacity, etc. of Intel Corporation in the United States. Accordingly, IJKK was regarded as a company with a market dominant power. And, as a result of the fact that the business activities of IJKK's competitors were excluded by its conduct, its market dominant power was further strengthened. Thus, it was found that IJKK substantially restrained competition in the market. Consequently, it was judged that IJKK's conduct fell under private monopolization.

23. In this case, it was not found that IJKK set predatory prices or sold CPUs to domestic PC manufactures at unjustly discriminatory prices.

4.1 Outline of the Violations

24. IJKK was the Japanese subsidiary of Intel Corporation in the United States, and was engaged in imports and sales of CPUs manufactured by Intel Corporation.

25. In addition to IJKK, the Japanese subsidiary of AMD in the United States (AMD Japan) and Transmeta from the United States were also selling CPUs to PC manufacturers in Japan.

26. Around 2000, AMD Japan started to sell its CPUs in competition with Intel's CPUs at lower prices. This and other surroundings led domestic PC manufacturers to incorporate AMD's CPUs into their PCs. Consequently, a percentage of AMD's CPU sales volume to the total domestic CPU sales volume increased from approximately 17% in 2000 to approximately 22% in 2002.

27. Based on such facts, IJKK felt apprehensive about a continuing increase in the sales volumes of AMD's CPUs. Since May 2002, in order to maximize the share of Intel's CPU volume incorporated into PCs manufactured by domestic PC manufacturers, IJKK had made five major domestic PC manufacturers refrain from adopting competitors' CPUs for all or most of the PCs manufactured and sold by them or all of the PCs that belonged to specific categories, by making commitments to provide the five PC manufactures with rebates and/or sales promotion funds on condition that

1. They have the share of Intel's CPU at 100% and refrain from adopting competitors' CPUs;
2. They have the share of Intel's CPU at 90% and the share of other CPU's at 10%; or
3. They refrain from adopting competitors' CPUs to be incorporated into all PCs that belonged to specific categories with relatively large production volume.

28. Such conduct by IJKK decreased the percentage of AMD's and Transmeta's CPU sales volume in the total domestic CPU sales volume from approximately 24% in 2002 to approximately 11% in 2003. In contrast, the percentage of Intel's sales volume was approximately 89% in 2003.

29. On March 8, 2005, the JFTC found that IJKK substantially restrained competition in the market for CPUs sold to domestic PC manufacturers by excluding its competitors' business activities concerning the sales of CPUs to the five domestic PC manufacturers, contrary to the public interest. The JFTC issued a recommendation to IJKK to implement the necessary measures to eliminate the violation. In response, the IJKK accepted this recommendation. On April 13, 2005, the JFTC made a decision with the same contents as the recommendation.