

Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act

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Japan Fair Trade Commission

Introduction

Abuse of superior bargaining position is banned by the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of 1947; hereinafter referred to as the "Antimonopoly Act") as a form of unfair trade practices. The provisions on abuse of superior bargaining position were introduced in Article 2, paragraph (9), item (v) of the Antimonopoly Act by the Act for Partial Revision of the Antimonopoly Act (Act No. 51 of 2009; hereinafter referred to as the "Act Amending the Antimonopoly Act") (Note 1).

(Note 1) In addition to Article 2, paragraph (9), item (v) of the Antimonopoly Act, the following provisions, which the Japan Fair Trade Commission designates based on item (vi) of the said paragraph, stipulate matters concerning abuse of superior bargaining position: [1] paragraph (13) (Unjust Interference with appointment of officer in one's transacting party) of the Designation of Unfair Trade Practices applicable to all business types (Fair Trade Commission Notification No. 15 of 1982); and [2] unfair trade practices applicable to specific business types (hereinafter referred to as "special designations").

Special designations that have provisions on abuse of superior bargaining position are as follows:

- Specific Unfair Trade Practices in the Newspaper Business
(Fair Trade Commission Notification No. 9 of 1999)
- Specific Unfair Trade Practices when Specified Shippers Assign the Transport and Custody of Articles
(Fair Trade Commission Notification No. 1 of 2004)
- Specific Unfair Trade Practices by Large-Scale Retailers Relating to Trade with Suppliers
(Fair Trade Commission Notification No. 11 of 2005)

Article 2, paragraph (9), item (v) of the Antimonopoly Act provides as follows:

Taking any act specified in one of the following, unjustly in light of normal business practices by making use of one's superior bargaining position over the other party:

- (a) Causing the said party in regular transactions (including a party with whom one intends to have regular transactions newly; the same shall apply in (b) below) to purchase goods or services other than the one pertaining to the said transactions;
- (b) Causing the said party in regular transactions to provide for oneself money, services or other economic benefits;
- (c) Refusing to receive goods pertaining to transactions from the said party, causing the said party to take back the goods pertaining to the transactions after receiving the said goods from the said party, delaying the payment of the transactions to the said party or reducing the amount of the said payment, or otherwise establishing or changing trade terms or executing transactions in a way disadvantageous to the said party;

With the establishment of the Act Amending the Antimonopoly Act, the Japan Fair Trade Commission has become liable for ordering payment of a surcharge for any abuse of superior bargaining position that falls under Article 2, paragraph (9), item (v) of the Antimonopoly Act and that satisfies certain requirements (Note 2). Thus, the Japan Fair Trade Commission has formulated these "Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act" from the viewpoint of increasing the transparency of law enforcement and predictability for entrepreneurs by clarifying in regard to abuse of superior bargaining position, and with the aim of clarifying the concept under the Antimonopoly Act with regard to the abuse of superior bargaining position that falls under Article 2, paragraph (9), item (v) of the Antimonopoly Act (Note 3) (Note 4).

(Note 2) Since it is sufficient to apply the provisions of Article 2, paragraph (9), item (v) of the Antimonopoly Act to any abuse of superior bargaining position that falls under the said item, the provisions on abuse of superior bargaining position designated pursuant to the provisions of Article 2, paragraph (9), item (vi) of the Antimonopoly Act are never applied to the same abuse.

(Note 3) To date, the Japan Fair Trade Commission has formulated and made public the following guidelines in order to prevent in advance violations of the Antimonopoly Act, such as abuse of superior bargaining position, in regard to specific business types:

<Major guidelines concerning abuse of superior bargaining position>

- Guidelines Concerning Designation of Specific Unfair Trade Practices by Large-Scale Retailers Relating to Trade with Suppliers (Secretary General Notice No. 9 of 2005)

- Guidelines Concerning the Franchise System under the Antimonopoly Act (Fair Trade Commission on April 24, 2002)

- Guidelines Concerning Abuse of Superior Bargaining Position in Service Transactions under the Antimonopoly Act (Fair Trade Commission on March 17, 1998)

(Note 4) In Sections I through IV below, the term "abuse of superior bargaining position" refers to the abuse of superior bargaining position that falls under Article 2, paragraph (9), item (v) of the Antimonopoly Act.

I. Basic Concept of the Regulation of the Abuse of Superior Bargaining Position

1. The trade terms between entrepreneurs are basically left to the independent judgment of the transacting parties. Therefore, as a matter of course, the trade terms of either party could become disadvantageous compared to those of the other party or to those under a previous contract in any transaction, as a result of free negotiations between the transacting parties.

However, if a party who has superior bargaining position against the other transacting party makes use of such position to impose a disadvantage on the transacting party, unjustly in light of normal business practices, such act would impede transactions based on the free and independently select of the said transacting party, and put the said transacting party in a disadvantageous competitive position against its competitors, while putting the party having superior bargaining position in an advantageous competitive position against its competitors. Since such act poses the risk of impeding fair competition, it is regulated under the Antimonopoly Act as "abuse of superior bargaining position," which constitutes a category of unfair trade practices (Note 5).

The risk of impeding fair competition are identified case-by-case, considering factors including the degree of the disadvantage at issue and the extensiveness of the act. For example, the act is likely to be found to impede fair competition [1] when the party having superior bargaining position organizationally imposes a disadvantage on a large number of transacting parties, or [2] when the party having superior bargaining position imposes a disadvantage only on a specific transacting party, but the degree of disadvantage is high or such act, if left unaddressed, is likely to be carried out to other transacting parties.

(Note 5) If the transactions between the parties fall under the category of transactions between main subcontracting entrepreneurs and subcontractors as provided under the Act against Delay in Payment of Subcontract Proceeds, Etc. to Subcontractors (Act No. 120 of 1956; hereinafter referred to as the "Subcontract Act") as well as the category of [1] manufacturing contract, [2] repair contract, [3] information-based product creation contract, or [4] service contract as provided under the Subcontract Act, such transactions are regulated under the Subcontract Act. In respect to the basic approach to the application of the Subcontract Act, the "Guidelines on Application of the Act against Delay in Payment of Subcontract Proceeds, Etc., to Subcontractors" have been formulated and publicized (Secretary General Notice No. 18 of 2003).

2. Acts that are categorized as abuse of superior bargaining position are those committed "unjustly in light of normal business practices by making use of one's superior bargaining position over the other party" and fall under any of the categories of Article 2, paragraph (9), item (v), (a) through (c) of the Antimonopoly Act.

Thus, Sections II and III below describe the concept of "unjustly in light of normal business practices by making use of one's superior bargaining position over the other party," and then Section IV explains the concept of "abuse of superior bargaining position" for each type of acts that falls under the categories of Article 2, paragraph (9), item (v), (a) through (c) of the Antimonopoly Act.

Section II and below also present "case examples" and "supposed examples" in order to help the understanding of what specific acts are deemed to be abuse of superior bargaining position. The "case examples" are examples of acts that were at issue in past decisions or cease and desist orders. Meanwhile, the "supposed examples" are examples of supposed acts that could cause a problem; if those acts fall under Article 2, paragraph (9), item (v) of the Antimonopoly Act, they cause a problem of abuse of superior bargaining position.

As a matter of course, whether or not specific acts, including those that are not exemplified here, would cause a problem as abuse of superior bargaining position is determined case-by-case in light of the provisions of the Antimonopoly Act (Note 6).

(Note 6) Whether or not transactions between a parent and subsidiaries companies are regulated as abuse of superior bargaining position is set forth in the "Guidelines Concerning Distribution Systems and Business Practices under the Antimonopoly Act" (General Secretariat, Fair Trade Commission on July 11, 1991) "Appendix Transactions between a Parent and Subsidiaries Companies."

II. Concept of "by Making Use of One's Superior Bargaining Position Over the Other Party"

1. In order for one party to a transaction (Party A) to have superior bargaining position over the other party (Party B), it is construed that Party A does not need to have a market-dominant position nor an absolutely dominant bargaining position equivalent thereto, but only needs to have a relatively superior bargaining position as compared to the other transacting party. When Party A has superior bargaining position over Party B, who is a transaction counterpart, it means such a case where if Party A makes a request, etc., that is substantially disadvantageous for Party B, Party B would be unable to avoid accepting such a request, etc., on the grounds that Party B has difficulty in continuing the transaction with Party A and thereby Party B's business management would be substantially impeded.

2. In determining the presence or absence of superior bargaining position, the degree of dependence by Party B on the transactions with Party A, position of Party A in the market, the possibility of Party B changing its business counterpart, and other concrete facts indicating the need for Party B to carry out transactions with Party A are comprehensively considered (Note 7).

(Note 7) Whether or not Party A has superior bargaining position in transactions with Party B is determined by comprehensively considering the specific facts set forth in the following (1) through (4). Accordingly, it should be noted that, not only in transactions between large enterprises and SMEs but also in transactions between large enterprises, as well as transactions between SMEs, there are some cases where either transacting party is deemed to have superior bargaining position in transactions with other parties.

(1) Degree of dependence by Party B on the transactions with Party A

The degree of dependence by Party B on the transactions with Party A is, in the case where Party B supplies goods or services to Party A in the transactions, generally calculated by dividing Party B's amount of sales to Party A by Party B's total amount of sales. If the degree of dependency by Party B on the transactions with Party A is high, it would be highly necessary for Party B to carry out transactions with Party A. Therefore, should there be any difficulty in continuing the transactions with Party A, Party B's business management would likely be substantially impeded.

(2) Position of Party A in the market

The position of Party A in the market is determined by considering Party A's market share and its ranking, among other factors. If Party A's market share is large or has a high ranking, Party B can expect to increase its transaction volume or amount through transactions with Party A, and it would be highly necessary for Party B to carry out transactions with Party A. Therefore, should there be any difficulty in continuing the transactions with Party A, Party B's business management would likely be substantially impeded.

(3) Possibility of Party B changing its business counterpart

The possibility of Party B changing its business counterpart is determined by considering the possibility of Party B starting transactions with or increasing its transactions with the entrepreneur other than Party A, and investments made by Party B in association with the transactions with Party A, among other factors. If it is difficult for Party B to start or increase transactions with the other entrepreneurs, or if Party B has made a large investment in association with the transactions with Party A, it would be highly necessary for Party B to carry out transactions with Party A. Therefore, should there be any difficulty in continuing the transactions with Party A, Party B's business management would likely be substantially impeded.

(4) Other concrete facts indicating the need for Party B to carry out transactions with Party A

The other concrete facts indicating the need for Party B to carry out transactions with Party A is determined by considering the amount of transactions with Party A, the future growth potential of Party A, the importance for Party B of handling the goods or services subject to the transactions, the securing of confidence in Party B through its transactions with Party A, and the difference in business size between Party A and Party B, among other factors. If the amount of transactions with Party A is high, if Party A's business size is expanding, if, in the case where Party A supplies goods or services to Party B, the said goods or services have a strong brand power, if the confidence in the goods or services handled by Party B increases through the transactions with Party A, or if Party A's business size is substantially larger than that of Party B, it would be highly necessary for Party B to carry out transactions with Party A. Therefore, should there be any difficulty in continuing the transactions with Party A, Party B's business management would likely be substantially impeded.

<Case examples>

[1] Company X ranks second in the Japanese convenience store chain industry in terms of the number of stores, operating 6,649 chain stores nationwide. The total annual sales of the chain stores operated by Company X amount to about 1.1 trillion yen, which is the second highest in the convenience store chain industry, and the fifth highest in the whole retail industry. Company X is increasing the number of its stores and amount of sales every year. Also, Company X's chain stores have gained a high level of consumer confidence for providing lines of goods in high demand.

Since Company X operates chain stores nationwide and sales of those stores are large, Company X is an extremely influential business partner for manufacturers, sellers, and wholesalers of daily goods handled by Company X's chain stores.(hereinafter referred to as "daily goods suppliers"). At the same time, daily goods suppliers have a strong desire to continue their supply transactions with Company X, because consumer confidence in their goods increases as a result of their goods being handled by Company X's chain stores, amongst other reasons. Accordingly, most of the daily goods suppliers that engage in continuous transactions with Company X are in a position where they are unable to avoid accepting various requests from Company X, apart from trade terms such as the quality and supply price of the supplied goods, in continuing their supply transactions with Company X. (JFTC recommendation decision, July 30, 1998)

[2] Bank X ranks the highest in Japan's banking industry in terms of the amount of total assets, with its total assets amounting to about 91 trillion yen as of the end of the fiscal year in question.

Some entrepreneurs, particularly small- and medium-sized enterprises (SMEs), engaged in financial transactions with Bank X (hereinafter referred to as the "borrower entrepreneurs"), would have difficulty raising funds through loans, etc. from financial institutions other than Bank X in the immediate future if they were to lose access to the loans from Bank X for the following reasons:

- The borrower entrepreneurs' demand for funds, to be provided by loans from financial institutions, is satisfied mainly by the loans from Bank X..
- It is difficult for the borrower entrepreneurs to refinance the loans from Bank X immediately by using loans from other financial institutions.
- Since the borrower entrepreneurs, when purchasing land or equipment for their business activities, proceeded with the contract to purchase the land or equipment after it has been suggested that the entrepreneurs will be granted a loan from Bank X, it is

difficult for the entrepreneurs to procure funds by another method if the entrepreneurs are not granted the said loan.

Because the business activities of the borrower entrepreneurs would be impeded if the entrepreneurs are not granted loans from Bank X, they are in a position where they are unable to avoid accepting various requests from Bank X that are not covered under the trade terms of the loans, in continuing their financial transactions with Bank X, and they are in a weaker position than Bank X in the transactions. (JFTC recommendation decision December 26, 2005)

[3] Company X's directly operated convenience stores (hereinafter referred to as "directly-operated stores") and convenience stores operated by entrepreneurs who are members of Company X's franchise chain (such entrepreneurs are hereinafter referred to as "franchise members" and such stores are hereinafter referred to as "franchise stores") are located nationwide except in some areas. The total number of stores is about 12,000, with about 800 directly-operated stores and about 11,200 franchise stores, and the total annual amount of sales is about 2.57 trillion yen, with approximately 150 billion yen sold by directly-operated stores and approximately 2.42 trillion yen sold by franchise stores. Company X is the largest entrepreneur among the entrepreneurs engaged in the convenience-store franchise business in Japan in terms of both the number of stores and the amount of sales. In contrast, almost all franchise members are small- and medium-sized retailers.

Where Company X concludes a franchise store basic contract with the franchise members, the contract forbids the franchise members from becoming members of a franchise chain of an entrepreneur engaged in a convenience-store franchise business other than Company X for at least one year after the termination of the said contract.

Under the franchise-store basic contract, Company X presents the goods recommended to be sold at the franchise stores (hereinafter referred to as the "recommended goods") and their suppliers to the franchise members. Since franchise members can use Company X's system as a simple way of placing orders, purchasing goods, settling payments, and processing other procedures when purchasing the recommended goods from the said suppliers, almost all goods sold at the franchise stores are the recommended goods.

Company X allocates management advisors to districts where the franchise stores are located, and, under the franchise-store basic contract, provides guidance and assistance concerning the management of the franchise stores to franchise members through the management advisors, and franchise members manage their franchise stores in

accordance with the contents of such guidance, etc.

Due to these circumstances, should there be any difficulty in continuing the transactions with Company X, the franchise members' business management would be substantially impeded. Therefore, the franchise members are in a position where they are unable to avoid accepting various requests from Company X. Accordingly, Company X has superior bargaining position in transactions with the franchise members (Cease and Desist Order No. 8 of 2009; June 22, 2009).

3. Also, when a party who has superior bargaining position carries out transactions by unjustly imposing a disadvantage on the other party, such act is generally recognized as an act "making use" of superior bargaining position.

III. Concept of "Unjustly in Light of Normal Business Practices"

The requirement, "unjustly in light of normal business practices," indicates that the presence or absence of abuse of superior bargaining position is determined case-by-case from the viewpoint of maintaining/promoting fair competition where entrepreneurs compete to provide better quality or lower prices.

The term "normal business practices" means business practices that are endorsed from the viewpoint of the maintenance/promotion of the said fair competition. Therefore, an act is not immediately justified merely because it complies with the currently existing business practices.

IV. Categories of Acts That Constitute Abuse of Superior Bargaining Position

This section clarifies the concept of "abuse of superior bargaining position" for each category of acts, mainly those acts that clearly constitute abuse of superior bargaining position in light of the provisions of Article 2, paragraph (9), item (v), (a) through (c) of the Antimonopoly Act.

Acts that could become a problem in terms of the abuse of superior bargaining position are not restricted to the categories of acts shown below. In order to prevent various acts that could become a problem as abuse of superior bargaining position in advance, it is desirable for the transacting parties to make clear and confirm in writing in advance matters including the specific contents of and the quality evaluation standards for the goods or services subject to the transactions, the time of delivery, the amount of payment therefor, the due date for payment, and the payment method.

1. Article 2, paragraph (9), item (v), (a) of the Antimonopoly Act (forced purchase/use)

The provisions of Article 2, paragraph (9), item (v), (a) of the Antimonopoly Act are as follows:

(a) Causing the said party in regular transactions (including a party with whom one intends to have regular transactions newly; the same shall apply in (b) below) to purchase goods or services other than the one pertaining to the said transactions;

The phrase "goods or services other than those pertaining to the said transaction" in these provisions includes not only the goods or services supplied directly by a party, but also goods or services supplied by entrepreneurs designated by that party.

Meanwhile, "causing...to purchase" includes not only the case of specifying such purchase in the trade terms or the case of imposing a disadvantage against a failure to make such purchase, but also the case where the purchase is found in effect to be unavoidable (Note 8).

(Note 8) The same applies to the concept of "causing...to provide" in Article 2, paragraph (9), item (v), (b) of the Antimonopoly Act.

(1) In the case where an entrepreneur who has superior bargaining position over a transacting party requests the transacting party to purchase goods or services other than those pertaining to the transactions in question, and if it is unavoidable for the transacting party to accept such request from concerns about the possible effects on future transactions even where the transacting party does not require the said goods or services in performing its business and does not wish to purchase them, such act would unjustly impose a disadvantage on the transacting party in light of normal business practices, and cause a problem as abuse of superior bargaining position.

(2) On the other hand, in the case where an entrepreneur who has superior bargaining position over a transacting party, upon placing an order for the manufacture of goods or the provision of services by designating certain specifications, causes the transacting party to purchase the raw materials required for manufacturing the said goods or the equipment required for providing the said services based on a reasonable need, such as a need to standardize or improve the quality of the said goods or services, such act would not unjustly impose a disadvantage on the transacting party in light of normal business

practices, and therefore does not cause the problem of abuse of superior bargaining position.

<Supposed examples>

[1] An entrepreneur causes a transacting party to purchase goods or services by making a request that could be taken to mean that the purchase would have an influence on future transactions, such as suggesting the termination of transactions with the transacting party or a reduction of the transaction volume in the event of a failure to make the purchase.

[2] An entrepreneur causes a transacting party, to purchase goods or services by having a person, such as a staff member in charge of purchasing, who could have an influence on the transactional relationship with the transacting party request the purchase.

[3] An entrepreneur causes a transacting party to purchase goods or services by organizationally or systematically requesting the purchase.

[4] An entrepreneur causes a transacting party to purchase goods or services in the case where the transacting party has expressed its intention not to make a purchase or where the transacting party is clearly found to have no intention of making a purchase even in the absence of such expression, by repeatedly requesting that the purchase be made or by one-sidedly sending goods to the transacting party.

[5] An entrepreneur requests a transacting party with whom the entrepreneur places an order for the processing of components to recommend a purchaser of the goods produced by a manufacturer, a transaction partner of the entrepreneur, and causes the transacting party to purchase the said goods should the transacting party fail to recommend a purchaser.

[6] In computerizing receipts/placement of orders, an entrepreneur, despite the fact that a transacting party has already signed a contract with another entrepreneur on Internet services that can respond to the said computerization, and therefore has been receiving such services, requests the transacting party to designate and use an Internet service provider that provides more expensive Internet services, and causes the transacting party to use the said provider, suggesting that the entrepreneur would not continue transactions with the transacting party.

<Case examples>

[1] Company X, with the aim of increasing the operating rate and securing profits in the off-season at its six hotels located within Hokkaido, prepares hotel vouchers that can be used at those hotels within a limited period, and determines in advance the number of

hotel vouchers which Company X is to request each supplier, etc. to purchase.

- Company X requests the purchase of the hotel vouchers in writing, and if there is no offer to purchase, Company X has a person, such as a divisional manager, who could have an influence on the supply transactions, repeatedly request the suppliers, etc. to make such purchase.

- Company X requests the suppliers, etc. to purchase the hotel vouchers by having a person who could have an influence on the supply transactions hand over directly the number of hotel vouchers for which a purchase is requested, along with a document requesting the purchase of the hotel vouchers.

Many of the suppliers, etc. who receive such a request are unable to avoid accepting the request in order to continue the supply transactions with Company X. (JFTC recommendation decision , November 18, 2004)

[2] In the case of receiving an application for a new loan or for the renewal of an existing loan from a borrower entrepreneur, Bank X proposes the purchase of interest-rate swaps to the borrower entrepreneur in the process of advancing the procedure related to the loan. If the borrower entrepreneur does not accept the proposal, Bank X makes it unavoidable for the borrower entrepreneur to purchase the interest-rate swaps by the following methods:

- Bank X clearly indicates that the purchase of the interest-rate swaps is a requirement for providing the loan, or that more disadvantageous conditions than usual would be set for the loan if the borrower entrepreneur fails to purchase the interest-rate swaps.

- By having the staff member in charge visit the borrower entrepreneur together with its superior who is in a managerial position to make repeated requests that the borrower entrepreneur make the purchase, Bank X requests the purchase of interest-rate swaps, hinting that the purchase of the interest-rate swaps is a requirement for providing the loan, or that more disadvantageous conditions than usual would be set for the loan if the borrower entrepreneur fails to purchase the interest-rate swap. (JFTC recommendation decision ,December 26, 2005)

[3] When implementing an annual sales promotion campaign for a period of about one month at Store Y and Store Z, with the aim of attaining the sales target amount predetermined for each store, Company X has had the buyers at Store Y and Store Z request the suppliers of the goods sold at Store Y and Store Z and the employees of the said suppliers to purchase electric products, clothing, and other goods. Many of the suppliers and the employees of the said suppliers who received such a request were in a

position where they were unable to avoid accepting the request in order for the suppliers to continue their transactions with Company X, and had purchased the above-mentioned goods. (Cease and Desist Order No. 3 of 2009; March 5, 2009)

2. Article 2, paragraph (9), item (v), (b) of the Antimonopoly Act

The provisions of Article 2, paragraph (9), item (v), (b) of the Antimonopoly Act are as follows:

(b) Causing the said party in regular transactions to provide for itself money, services or other economic benefits;

The term "economic benefits" in these provisions refers to the provision of money as a monetary contribution, financial assistance, or under any other title, the provision of labor services, and the like.

(1) Request for payment of monetary contribution, etc.

A. In the case where an entrepreneur who has superior bargaining position in transactions over a transacting party requests the transacting party to pay money under the title of monetary contribution, etc., and if the amount of such monetary contribution, to be paid, the basis for the calculation of such amount, and the use of such money have not been made clear between the entrepreneur and the said transacting party, thereby imposing a disadvantage on the said transacting party the cost of which the said transacting party cannot calculate in advance, or if the payment turns out to be a burden which exceeds the scope as deemed reasonable considering the direct benefit (Note 9), etc., to be acquired by the transacting party, thereby imposing a disadvantage on the transacting party (Note 10), such an act would unjustly impose a disadvantage on the transacting party in light of normal business practices, and would cause a problem as abuse of superior bargaining position.

(Note 9) The term "direct benefit" refers to a benefit that actually arises, such as that in the case where an entrepreneur causes a transacting party to pay a portion of expenses required for preparing or distributing advertisements as monetary contribution in order to advertise the goods supplied by a transacting party, but such an act leads to a sales promotion of the goods supplied by the transacting party. It does not include an indirect benefit such as the case where the payment of a monetary contribution, etc. has an advantage for future transactions.

(Note 10) In this case, even if the conditions for the payment of a monetary contribution, etc. has been made clear between the entrepreneur and the transacting party, such act would cause a problem as an abuse of superior bargaining position.

B. In some cases, when holding an event or placing an advertisement, an entrepreneur requests a transacting party to pay a monetary contribution, etc. as part of the required expenses. While such request is often made by distributors, in the case where a distributor requests a supplier to pay a monetary contribution, etc., the payment of such expenses could, at times, give the supplier a direct benefit, such as the payment leading to a sales promotion for the supplied goods. When a monetary contribution, etc. is paid by the transacting party on its free will, considering that the contribution is within the scope of the direct benefit to be acquired by such payment, the request for such payment would not unjustly impose a disadvantage on the transacting party in light of normal business practices, and therefore does not cause a problem as abuse of superior bargaining position.

<Supposed examples>

[1] An entrepreneur requests, and causes a transacting party to pay a monetary contribution, etc. for holding an event, refurbishing the selling space, or placing an advertisement that does not directly contribute to the sales promotion of the transacting party's goods or services.

[2] An entrepreneur requests, and causes a transacting party to pay a monetary contribution as a measure for improving the settling accounts of the entrepreneur.

[3] An entrepreneur causes a transacting party to pay, at the time of opening its new store or refurbished store, an amount equivalent to a certain percentage of the transacting party's amount of supply to the said store as a monetary contribution over a fixed period, without clarifying the amount of the payment, the basis for the calculation of the amount, and the purpose of the payment in advance, in order to secure the said store's gross profits.

[4] In the case where it had been decided in advance that an entrepreneur receives a rebate on attaining a certain sales volume during a fixed period, the entrepreneur requests, and causes a transacting party to pay, the said rebate in spite of the fact that it has not attained the sales volume.

[5] When placing an advertisement for a discount sale upon opening its new store or refurbished store, an entrepreneur requests, and causes a transacting party to pay, an amount of monetary contribution that exceeds the expenses actually required for placing

the said advertisement.

[6] An entrepreneur unilaterally requests a supplier to pay a fee for using a facility (“center fee”) for its distribution operation, such as a logistics center, without sufficiently discussing the amount of the fee and the basis for the calculation of the amount with the supplier, and causes the supplier to pay an amount that exceeds a reasonable amount of fee for the level of use of the said facility.

[7] An entrepreneur suspends the acceptance of the supply of goods in respect to transactions, which have been continued in order to gain money under the pretext of a “newly-introduced monetary contribution,” and thereafter causes the transacting party to resume supply of the same goods. Through these measures, the entrepreneur requests the transacting party to provide money and causes the transacting party to pay the money.

<Case examples>

Company X, when opening its own and its three subsidiaries' stores, requested the suppliers who supplies goods to each division of purchasing prepared foods or other goods, etc., to make the supply prices of specific goods to be supplied by the said suppliers upon the store-opening lower than the usual supply prices, obtained for example by multiplying the usual supply prices by a certain percentage, under the title of "instant discount," thereby causing the suppliers to provide economic benefits equivalent to the difference between the said price and the usual supply price, without clarifying the basis for the calculation of the amount, and the purpose of the payment in advance, in order to secure the said stores' gross profits. Many of the suppliers, etc. who have received such request were in a position where they were unable to avoid meeting the request in order to continue the supply transactions with Company X, and have provided the economic benefits. (Cease and Desist Order No. 15 of 2008; June 23, 2008)

(2) Request for dispatch of employees, etc.

A. In the case where an entrepreneur who has superior bargaining position in transactions over a transacting party requests the transacting party to dispatch, employees, or the like (Note 11), and if the cases in which they are to be dispatched and the conditions for the dispatch have not been made clear between the entrepreneur and the transacting party, thereby imposing a disadvantage on the said transacting party the cost of which the transacting party cannot calculate in advance, or if the burden to be borne by the transacting party exceeds the scope as deemed reasonable considering the

direct benefit (Note 12), etc., to be acquired by the transacting party through the dispatch of, employees, etc., thereby imposing a disadvantage on the transacting party (Note 13), such act would unjustly impose a disadvantage on the transacting party in light of normal business practices, and would cause a problem as abuse of superior bargaining position.

The same applies in the case where an entrepreneur causes a transacting party to pay equivalent personnel costs in place of dispatching employees, etc.

(Note 11) The term "employee, etc." includes a part-time worker, a dispatched worker, etc. whom the said transacting party employs in order accept such request.

(Note 12) The term "direct benefit" refers to a benefit that actually arises, such as that in the case where if an entrepreneur causes a transacting party to dispatch employee, etc., of a transacting party to retail stores of the entrepreneur and sell goods to consumers, such act leads to an increase in sales of the goods supplied by the transacting party or a direct understanding of a trend in consumer needs by the transacting party. It does not include such an indirect benefit that makes future transactions advantageous through the dispatch of employee, etc.

(Note 13) In this case, even if the conditions for the dispatch of, employees, etc. have been made clear between the entrepreneur and the transacting party, the act would cause a problem as abuse of superior bargaining position.

B. In some cases, a manufacturer or a wholesaler, upon the request of a retailer such as a department store or a supermarket, dispatches employees, etc. for selling, etc. goods manufactured or supplied by the said manufacturer or wholesaler. Such dispatch of employees, etc. could be advantageous at times, such as allowing the manufacturer or wholesaler to directly ascertain the trend of consumer needs, or allowing the retailer to supplement a lack of knowledge about the goods. When employees, etc. are dispatched by the free will of the transacting party within the scope of the direct benefit to be acquired by such dispatch, the request for such dispatch would not unjustly impose a disadvantage on the transacting party in light of normal business practices, and therefore does not cause a problem as abuse of superior bargaining position. The same applies when a entrepreneur has made an agreement (Note 14) regarding the conditions for the dispatch of employees, etc. in advance with the transacting party, and pays the expenses normally required for such dispatch.

(Note 14) The term "agreement" means that the substantial intentions of both parties

coincide, and that the transacting party has satisfactorily agreed on the terms and conditions after sufficient discussions between the parties. The same applies to the concept of an "agreement" in regard to "return of goods" (IV. 3(2)).

<Supposed examples>

[1] An entrepreneur requests, and causes a transacting party to dispatch employees, etc., of the transacting party to engage in operations that only benefit the entrepreneur without paying the expenses for the dispatch.

[2] An entrepreneur causes a supplier to dispatch employees, at the time of a discount sale upon opening its new store or refurbished store, in order to have them engage in sales operations, and has those employees engage in the sales operations of not only the goods supplied by the said supplier, but also the goods of other suppliers, thereby causing the supplier that has dispatched the employees to bear a burden that exceeds the scope as deemed reasonable considering direct benefit, etc.

[3] While offering to bear the expenses for the dispatch of employees, etc. by transacting parties, an entrepreneur merely decides a uniform amount of daily allowance as dispatch expenses, and although expenses such as transportation expenses and accommodation expectations occur depending on an individual transacting party's circumstances, the entrepreneur causes the transacting parties to dispatch employees, etc. without paying such expenses.

[4] In the case where an entrepreneur bears the expenses for the dispatch of employees, etc. by transacting parties, and such expenses to be borne include daily allowances, transportation expenses, and accommodation expenses, an entrepreneur uniformly decides that the daily allowance should be set at an amount lower than an appropriate amount corresponding to the salary of the said employee, etc. or the contents of the operations pertaining to the dispatch.

[5] An entrepreneur causes a transacting party to pay the wage for a part-time worker whom it has employed for its inventory operations.

[6] In the case where a contract only stipulates that a transacting party transports goods to a warehouse of an entrepreneur, the entrepreneur causes the transacting party to engage free of charge in loading and unloading work, etc., in the warehouse of the entrepreneur, which has not been set forth in the contract in advance.

<Case examples>

Company X, at the time of opening its new store or refurbished store, causes suppliers to engage in work such as displaying goods, replenishing stock, and providing

customer services (hereinafter referred to as "open work") at the store, irrespective of whether the goods are those supplied by the said suppliers, and without making an agreement with the said suppliers about the conditions for the dispatch of employees, etc. in advance, requests the suppliers to dispatch employees, etc. by informing the suppliers of the store, date, and time where and when Company X needs the suppliers' employees to be dispatched to engage in open work. Many of the suppliers who received such a request were in a position where they were unable to avoid accepting the request in order to continue the transactions with Company X, and have dispatched their employees, etc., while Company X has not paid the expenses normally required for such dispatch. (Cease and Desist Order No. 16 of 2008; June 30, 2008)

(3) Request for other economic benefits

A. Even if the request is other than that for the payment of monetary contribution, etc., or the dispatch of employee, etc., if an entrepreneur has a superior bargaining position over a transacting party, without a just reason, requests a transacting party to provide free of charge a design drawing or an intellectual property right such as a patent right on a die (including a wooden die and other types similar to a metal die; the same shall apply hereunder) or the like not contained in the order, as well as the provision of services other than the dispatch of employee, etc., or other economic benefits, and if the transacting party would be unable to avoid accepting the said requests from concerns about the possible effects on future transactions, such act would unjustly impose a disadvantage on the transacting party in light of normal business practices and therefore cause a problem as abuse of superior bargaining position (Note 15).

(Note 15) In the case where not only the case of the free-of-charge provision, but also an entrepreneur who has superior bargaining position over a transacting party causes a transacting party to provide at an unjustly lower price in light of normal business practices, such act would cause a problem as abuse of superior bargaining position. In determining that whether such acts constitute abuse of superior bargaining position, the concept described in "unilateral decision on a consideration for transactions" (IV. 3 (5) A) is applied.

B. On the other hand, even if the economic benefits described in A. above are provided free of charge, when it is a matter of course for the economic benefits to be provided accompanying the sale of certain goods and the economic benefits have originally been reflected in the prices of the said goods, such economic benefits would not unjustly

impose a disadvantage on the transacting party in light of normal business practices, and therefore does not cause a problem as abuse of superior bargaining position.

<Supposed examples>

[1] In the case where rights such as a copyright or a patent right, etc., are created or belong to a transacting party in transactions, an entrepreneur, on the grounds that those rights are acquired in the course of transactions with the entrepreneur, unilaterally causes the transacting party to transfer those rights to the entrepreneur exceeding the scope of use, which is a purpose of preparation of drawings.

[2] In spite of the fact that the provision of design drawings is not contained in the order, an entrepreneur causes a transacting party to provide design drawings of dies free of charge.

[3] An entrepreneur causes, due to reasons specific to the entrepreneur, a transacting party to free of charge retain components for repairs, dies, etc., to be kept by the entrepreneur, or provide maintenance, etc., for retention.

[4] In spite of the fact that an entrepreneur is responsible because of defects, of components or raw materials supplied by an entrepreneur or defects in designs made by the entrepreneur, etc., when an end user raises a complaint, the entrepreneur does not assume any responsibility and causes a transacting party to free of charge take measures to settle all complaints, including payment of compensation for damages to the end user.

[5] In supplying goods, an entrepreneur unilaterally causes a transacting party, without sufficient discussion with the transacting party, to free of charge collect industrial waste or transportation equipment, etc., of other entrepreneurs, which the transacting party is not obligated to collect.

3. Article 2, paragraph (9), item (v), (c) of the Antimonopoly Act

The provisions of Article 2, paragraph (9), item (v), (c) of the Antimonopoly Act are as follows:

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

Article 2, paragraph (9), item (v), (c) of the Antimonopoly Act indicates a "refusal to

receive goods," " return of goods," "delay in payment," and "price reduction" as examples of acts that could lead to abuse of superior bargaining position, but it also includes various other acts that impose a disadvantage on a transacting party.

(1) Refusal to receive goods

A. In the case where an entrepreneur who has superior bargaining position in transactions over a transacting party, after concluding a contract to purchase goods from the transacting party, refuses to receive (Note 16) all or part of the said goods without justifiable grounds, and if it is unavoidable for the transacting party to accept such refusal from concerns about the possible effects on future transactions, such act would unjustly impose a disadvantage on the transacting party in light of normal business practices, and cause a problem as abuse of superior bargaining position (Note 17).

(Note 16) The phrase "refuse to receive" means not receiving goods on the delivery date. It also includes the case where the entrepreneur does not receive all or part of the goods on the delivery date by unilaterally postponing the delivery date or by unilaterally canceling the order.

(Note 17) After concluding a contract on receiving the provision of supply of services from a transacting party, if an entrepreneur refuses the receipt of all or part of the supply of the said services, such refusal falls under "changing trade terms or excuting transactions in a way disadvantageous to the said party" set forth in Article 2, paragraph (9), item (v), (c) of the Antimonopoly Act and may cause a problem as abuse of superior bargaining position (refer to IV. 3 (5) C).

B. On the other hand, [1] in the case where there are grounds attributable to the transacting party's side, such as where the goods purchased from the transacting party were defective, where the goods delivered differed from the goods ordered, or where the aim of the sales could not be achieved since the goods were not delivered in time for the delivery date, or [2] in the case where the entrepreneur decides conditions for return of goods based on an agreement with the transacting party when purchasing the goods and does not receive the goods according to those conditions (Note 18), or [3] in the case where the entrepreneur obtains the consent of (Note 19) the transacting party in advance and bears the loss that should normally occur (Note 20) on the transacting party as a result of the refusal to receive the goods, such act would not unjustly impose a disadvantage on the transacting party in light of normal business practices, and therefore does not cause a problem as abuse of superior bargaining position.

(Note 18) This is limited to the case where the conditions for the refusal to receive the said goods are decided within the scope of normal business practices.

(Note 19) The phrase "obtain the consent of" means to obtain the transacting party's manifestation of an intention of acceptance and that the transacting party has satisfactorily given its consent. The same applies to the concept of "obtain the consent of" in regard to "return of goods" (IV. 3(2)), "delay in payment" (IV. 3(3)), and "request for redoing" (IV. 3(5) B).

(Note 20) The phrase "loss that should normally occur" means a loss within the scope of reasonable consequence, which arises as a result of a refusal to receive goods. For example, it includes [1] expenses equivalent to a decrease in value due to a drop in the market for the goods or the shortening of the use-by date due to the lapse of time, [2] expenses required for physical distribution, and [3] expenses for the disposal of the goods. The same applies to the concept of a "loss that should normally occur" in "return of goods" (IV. 3(2)), "delay in payment" (IV. 3(3)), and "request for redoing" (IV. 3(5) B).

<Supposed examples>

[1] In the case where a transacting party has manufactured goods based on an order from an entrepreneur, and tried to deliver the said goods, the entrepreneur refuses to receive the said goods on the grounds that the goods are no longer required due to slack sales or due to a refurbishment of the selling space or a change in the shelf arrangement.

[2] An entrepreneur arbitrarily makes the predetermined inspection standard stricter, and refuses to receive the said goods on the grounds that the goods differ from those ordered or that the goods are defective.

[3] In spite of the fact that an entrepreneur has ordered goods to be manufactured by designating certain specifications, the entrepreneur refuses to receive the said goods on the grounds that its customer has cancelled the order for the said goods, or changes its sales projection.

[4] In spite of the fact that a transacting party asked an entrepreneur to clarify the specifications, an entrepreneur has not clarified the specifications without justifiable grounds and causes the transacting party to continue engaging in work. Thereafter when the transacting party tries to deliver the goods, the entrepreneur refuses to receive the said goods on the grounds that the goods differ from those ordered.

[5] After placing the order, an entrepreneur unilaterally shortens the delivery date agreed on in advance, without considering the transacting party's circumstances, and refuses to

receive goods on the grounds that the delivery was not made in time for the shortened delivery date.

[6] Although a contract provides that an entrepreneur is to inspect goods by each lot, and is to refuse to receive only a lot with defective goods included, the entrepreneur refuses to receive all lots when defective goods are found in one lot, without inspecting the other lots.

[7] When an entrepreneur instructs a transacting party to adopt certain specifications and continues placing orders for manufacturing components, the entrepreneur, as it no longer needs to use the components due to a reason specific to the entrepreneur, rejects to receive the said components with the same level as those which the entrepreneur deemed to meet the specifications and passed on the inspection at the time of supply in the past on the grounds that the said components have a minor damage, dent, etc., which would not bear any influence on the performance of the components, such as durability and toughness.

(2) Return of goods

A. In the case where an entrepreneur who has superior bargaining position in transactions over a transacting party returns goods which the entrepreneur has received from the transacting party, and the circumstances and conditions under which goods are to be returned have not been made clear between the entrepreneur and the transacting party, thereby imposing a disadvantage on the transacting party the cost of which the said transacting party cannot in advance, or in other cases where the entrepreneur, without justifiable grounds, returns goods which it has received from the transacting party and if it is unavoidable for the said transacting party to accept such return from concerns about the possible effects on future transactions, such act would unjustly impose a disadvantage on the transacting party in light of normal business practices, and would cause a problem as abuse of superior bargaining position.

B. On the other hand, [1] in the case where there are grounds attributable to the transacting party's side, such as where the goods purchased from the transacting party were defective, where the goods delivered differed from the goods ordered, or where the aim of the sales could not be achieved since the goods were not delivered in time for the delivery date, goods are returned within the scope of a quantity that is found to be reasonable in light of the said grounds, within a reasonable period of time from the day of the receipt of the goods (Note 21), [2] in the case where conditions for return of goods are decided on based on an agreement with the transacting party when purchasing

the goods, and the goods are returned according to those conditions (Note 22), [3] in the case where the entrepreneur obtains the consent of the transacting party in advance and bears the loss should that normally occur in regard to the transacting party from the return of the goods, or [4] in the case where the transacting party offers to accept the return of goods, and the disposal of the goods by the transacting party is of direct benefit to the transacting party (Note 23), such act would not unjustly impose a disadvantage on the transacting party in light of normal business practices, and therefore does not cause a problem as abuse of superior bargaining position.

(Note 21) While a "reasonable period of time" should be determined based on the circumstances of each case, if there is a defect that could be discovered immediately or if the goods differ from those ordered, the goods need to be returned promptly within an average period required for inspection after receiving the goods. The same applies to the concept of a "reasonable period of time" in "price reduction" (IV. 3(4)).

Meanwhile, even in the case of returning goods within a reasonable period of time, goods are not allowed to be returned without a limit. For example, defective goods or goods that differ from those ordered are allowed to be returned, but returning other goods (excluding goods that can only be sold with such goods as a set) together with such goods is not recognized as the return of goods "within the scope of a quantity that is found to be reasonable."

(Note 22) This is limited to the case where the return of goods within the scope of a specific quantity within a specific period from the day of the receipt of the goods or the return of the goods within the scope of a specific quantity against the total quantity of the goods received follows normal business practices, and the conditions for the return of the goods are decided within the scope of such trade practices.

(Note 23) The term "direct benefit" refers to a benefit that actually arises, for example, in the case where a supplier collects the goods it has delivered, which remain unsold at a store of the transacting party, and delivers new goods, thereby leading to an increase in sales of the supplier. It does not include an indirect benefit such as that in the case where the return of goods has an advantage to the transacting party for future transactions.

<Supposed examples>

[1] An entrepreneur returns goods that have been damaged due to being used for display.

[2] An entrepreneur returns goods with retail price stickers attached thereto which are difficult to remove without damaging the goods.

[3] An entrepreneur unilaterally and independently decides on a sell-by date which is shorter than the freshness date decided on by a manufacturer, and returns goods on the grounds that the said sell-by date has expired.

[4] An entrepreneur returns goods under its private brand.

[5] An entrepreneur returns goods for the purpose of a month-end or term-end inventory adjustment.

[6] An entrepreneur returns goods on the grounds of the refurbishment of the store or selling space or a change in the shelf arrangement conducted at its own discretion.

[7] An entrepreneur returns goods on the grounds that the goods remained unsold after a discount sales period.

[8] An entrepreneur returns goods merely on the grounds that the goods were returned from a customer who purchased the goods.

[9] In spite of the defect, which can be discovered immediately, an entrepreneur returns goods to a transacting party on the grounds that a defect was found long after the average period of time required for inspection has passed.

<Case examples>

At the time of closing or refurbishing its store, Company X requests the suppliers of those goods sold at the store which Company X has decided no longer to sell at that store and other stores to accept the return of such goods, in spite of the fact that there are no grounds attributable to those suppliers, no conditions have been decided on regarding the return of goods based on an agreement with those suppliers in advance, and the acceptance of the return of the said goods is of no direct benefit to those suppliers. Many of the suppliers who have received such a request were in a position where they were unable to avoid meeting the request in order to continue the transactions with Company X, and have accepted the return of the goods, while Company X has not borne the loss that should normally occur in regard to those suppliers as a result of the return of the said goods. (Cease and Desist Order No. 7 of 2009; June 19, 2009)

(3) Delay in payment

A. In the case where an entrepreneur who has superior bargaining position in transactions over a transacting party fails to pay the consideration on the due date for the payment decided under a contract, without justifiable grounds, and if it is unavoidable for the transacting party to accept such failure of payment from concerns about the possible effects on future transactions, such act would unjustly impose a

disadvantage on the transacting party in light of normal business practices, and would cause a problem as abuse of superior bargaining position.

Not only in the case where an entrepreneur pays a consideration after the due date for payment decided under a contract, but also in the case where an entrepreneur who has superior bargaining position in transactions unilaterally sets the due date for payment on a later date or arbitrarily defer the arrival of the due date for payment, such act is likely to unjustly impose a disadvantage on the transacting party in light of normal business practices, and cause a problem as abuse of superior bargaining position.

B. On the other hand, in the case where an entrepreneur obtains the consent of the transacting party in advance, and bears the loss that should normally occur in regard to the transacting party as a result of delay in payment of a consideration, such act would not unjustly impose a disadvantage on the transacting party in light of normal business practices, and therefore does not cause a problem as abuse of superior bargaining position.

<Supposed examples>

[1] An entrepreneur fails to pay a consideration by the due date for payment decided under a contract due to reasons specific to the entrepreneur such as a delay in in-house payment procedures or changes in designs and specifications of goods.

[2] In transactions where goods are delivered in installments, in spite of the fact that a consideration is to be paid after the delivery of the first installment, the entrepreneur unilaterally changes the payment conditions, and delays the payment of the consideration on the grounds that the delivery of all installments has not been completed.

[3] In spite of the fact that provision of goods has been completed, an entrepreneur fails to pay a consideration by the due date decided on under a contract by arbitrarily delaying the receiving inspection of those goods.

[4] In the case where a consideration is to be paid after an entrepreneur actually uses the goods or services pertaining to a transaction, the entrepreneur substantially delays the period for using those goods from the originally planned period, due to reasons specific to the entrepreneur.

[5] In the case where an entrepreneur has received highly expensive goods/components, etc., in spite of the fact that it concluded a contract incorporating a lump-sum payment, the entrepreneur changes the lump-sum payment to an installment payment made over the years due to reasons specific to the entrepreneur, and refuses the lump-sum payment.

(4) Price reduction

A. In the case where an entrepreneur who has superior bargaining position in transactions against a transacting party reduces the price decided on under a contract, without justifiable grounds, after purchasing goods or services, and if it is unavoidable for the transacting party to accept such reduction from concerns about the possible effects on future transactions, such act would unjustly impose a disadvantage on the transacting party in light of normal business practices, and would cause a problem as abuse of superior bargaining position.

The same applies in the case of price reduction in effect without changing the price decided on under a contract, by changing the specifications of the goods.

B. On the other hand, [1] in the case where there are grounds attributable to the transacting party's side, such as where the goods purchased from the transacting party or the services provided by the transacting party were defective, where the goods delivered or the services provided differed from the details of goods or services ordered, or where the aim of the sales could not be achieved since the goods were not delivered in time for the delivery date, the price is reduced within the scope of an amount that is found to be reasonable in light of the said grounds, within a reasonable period of time from the day of the delivery of the goods or the provision of the services (Note 24), or [2] in the case where a request for price reduction has been made as part of the negotiations on the consideration, and the amount is found to reflect the supply-and-demand relationship, such act would not unjustly impose a disadvantage on the transacting party in light of normal business practices, and therefore does not cause a problem as abuse of superior bargaining position.

(Note 24) Meanwhile, even in the case of price reduction within a reasonable period of time, the price is not allowed to be reduced without a limit. For example, if goods are defective, the price needs to be reduced within the scope of a justly evaluated amount according to the degree of the defect. However, price reduction above this level is not recognized as a price reduction "within the scope of amount that is found to be reasonable."

<Supposed examples>

[1] In spite of having received the provision of goods or services, an entrepreneur reduces the price decided on under a contract, due to reasons specific to the entrepreneur,

such as a business downturn, budget shortfall, or cancellation by a customer.

[2] An entrepreneur arbitrarily makes the predetermined inspection standards stricter, and causes a transacting partner to give a discount on the supply price on the grounds that the goods differ from those ordered or that the goods are defective.

[3] As a result of having requested, due to reasons specific to the entrepreneur, a change of specifications, or the redoing or additional provision of the goods or services subject to the transactions, the entrepreneur promised to pay a consideration for the substantially increased workload of the transacting party, but the entrepreneur only pays the consideration decided on under the initial contract.

[4] An entrepreneur causes a transacting party to give an amount of discount equivalent to the amount of the discount by the entrepreneur, on the grounds that the entrepreneur has sold at a discount during a discount sales period or in order that it covers the decrease in profit in line with the discount sales.

[5] Every month, in order to secure a certain level of profitability, an entrepreneur calculates the amount necessary for securing profitability, and causes a transacting party to give an amount of discount equivalent thereto.

[6] In spite of having placed an order for the manufacture of goods, an entrepreneur calculates the amount necessary for attaining the cost reduction target decided on in-house, and causes a transacting party to give an amount of discount equivalent thereto.

[7] In spite of the fact that a transacting party bears the expenses for preparing the provision of goods or services to an entrepreneur, such as making a capital investment or arranging personnel based on a request from the entrepreneur, the entrepreneur cancels, due to the entrepreneur, a part of the transaction of the said goods or services, and reduces the amount of the consideration pertaining to such reduced portion of the transactions from the consideration decided on under a contract.

[8] An entrepreneur, without discussions with a supplier, pays only a consideration obtained by deducting differences of sales prices between own store and other stores on the grounds that the same goods are sold at a lower price at other stores.

[9] An entrepreneur reduces a consideration set forth in a contract without payment of the amount equivalent to consumption tax or local consumption tax, or by rounding down of fractions at the time of payment.

[10] In spite of the fact that an entrepreneur has changed designs or delayed the provision of drawings, etc., due to a the entrepreneur, it does not agree to the extension of the delivery date, and pays only a consideration obtained by deducting a penalty imposed for late delivery.

<Case examples>

With regard to goods handled by each division for purchasing food, confectionary, and sundries, Company X has decided to conduct discount sales of the goods, on the grounds that the turnover of the goods is low, the store is to be closed, the sales period for seasonal goods has ended, or the goods have been damaged as a result of falling from the display shelf, or for other reasons, and has requested the suppliers of the goods subject to the said discount sales to reduce, from the supply prices, an amount calculated by such method as multiplying the price before the discount by 50 percent. Many of the suppliers who have received such a request were in a position where they were unable to avoid accepting the request in order to continue the supply transactions with Company X, and have given a discount. (Cease and Desist Order No. 11 of 2008; May 23, 2008)

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

Even when an act does not fall under any of the categories of acts listed up to IV. 1, IV. 2 and IV. 3 (1) through (4) above, if an entrepreneur who has superior bargaining position in transactions over a transacting party determines or changes the trade terms or implements transactions in such a manner that would unjustly impose a disadvantage on the transacting party in light of normal business practices, such act causes a problem as abuse of superior bargaining position.

Generally, when negotiations on trade terms are not sufficient, the transacting party tends to believe that the trade terms, etc., have been decided unilaterally. Therefore, when presenting the trade terms, etc., to a transacting party, it is desirable for an entrepreneur who has superior bargaining position in transactions to sufficiently explain to the transacting party a reason for presenting the said trade terms, etc.

A. Unilateral decision on a consideration for transactions

(a) In the case where an entrepreneur who has superior bargaining position in transactions against a transacting party unilaterally requests a transacting party to carry out transactions for either an extremely low or extremely high consideration, and if it is unavoidable for the transacting party to accept the request from concerns about the possible effects on future transactions, such act would unjustly impose a disadvantage on the transacting party in light of normal business practices, and would cause a problem as abuse of superior bargaining position (Note 25).

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

(Note 25) A unilateral decision on a consideration for transactions falls under “establishing trade terms... in a way disadvantageous to the said party” set forth in Article 2, paragraph (9), item (v), (c) of the Antimonopoly Act.

(b) On the other hand, [1] in the case where a request to carry out transactions at a lower consideration or a higher consideration on the grounds that there is a competitor intending to carry out such transactions at the requested amount of consideration, or for other reasons, is made as part of the negotiations on the consideration, and where the said amount is found to reflect the supply-and-demand relationship, or [2] in the case where the request is found to be a just reflection on a difference in the trade terms, such as when goods are purchased at a lower price than usual for the purpose of purchasing a larger volume than usual (i.e., a volume discount) for conducting discount sales, etc., such act would not unjustly impose a disadvantage on the transacting party in light of normal business practices, and therefore does not cause a problem as abuse of superior bargaining position.

<Supposed examples>

[1] An entrepreneur unilaterally sets a unit price that has been presented by a transacting party for large-lot orders as the unit price for small-lot orders.

[2] In spite of the fact that a transacting party's personnel expenses and other costs substantially increased as a result of an entrepreneur having placed an order with a short delivery date, the entrepreneur unilaterally decides on the same unit price as when placing an order with a usual delivery date.

[3] In spite of the fact that a transacting party's workload has increased and the transacting party's personnel expenses and other costs have substantially increased as a result of an entrepreneur designating special specifications that are not designated in usual orders, or instructing a change in the delivery frequency, the entrepreneur

unilaterally decides on the same unit price as when placing an order with a usual delivery date.

[4] An entrepreneur unilaterally decides on a unit price which is substantially lower or substantially higher than the usual price, based solely on its budget unit price.

[5] An entrepreneur unilaterally decides on a unit price substantially lower or substantially higher than the usual price through uniformly lowering or raising the unit price by a certain percentage, by using a unit price that has been decided on through discussions with some transacting parties or a unit price calculated based on an unreasonable criteria to revise the unit price for another transacting party, or by the periodical revision of the unit price which is not based on transacting parties' decline in costs.

[6] In spite of the fact that there are no reasonable grounds in light of the trade terms, such as the volume of orders, the delivery method, the settlement method, and whether or not the return of goods is possible, an entrepreneur treats specific transacting parties in a discriminatory manner, and unilaterally decides on an amount of consideration substantially lower or substantially higher than those of other transacting parties.

[7] An entrepreneur, without discussion with a supplier, decides on a supply price that is lower than the supplier's purchase price with regard to the goods which the entrepreneur sells at a discount sale, and by unilaterally instructing the supplier to deliver the goods at such price, the entrepreneur causes the supplier to deliver goods at a price substantially lower than the supplier's usual supply price.

[8] In spite of the fact that a transacting party's costs have substantially increased due to a price hike in raw materials, etc., an increase in research and development expenses in line with an improvement in the quality of parts and components, and in response to environmental control, an entrepreneur unilaterally decides on the same unit price as the conventional unit price.

[9] An entrepreneur, at the time of a discount sale upon opening its new store, unilaterally decides a substantially lower price not only for supply of goods to the new store but also for supply of goods to nationwide stores of the entrepreneur.

[10] An entrepreneur causes a transacting party to submit transacting party's confidential materials for the calculation of manufacturing costs, labor management-related materials, etc., analyzes such materials, and unilaterally decides a substantially lower supply price, for example, insisting that the transacting party "can agree to price reduction because the profit margin is high."

<Case example>

At the time of a special thank-you sale conducted twice a year and the Tuesday bargain sales conducted about 50 times a year, Company X, with the aim of increasing sales, has the staff members in charge of purchasing at some stores request intermediate wholesalers to supply a larger amount of goods than usual at a substantially lower price than the general wholesale price for the same type of goods as the fruits and vegetables to be used for any of the sales above, in light of the grade or the production area, etc., without discussing the supply price with the intermediate wholesalers in advance. Such request is made, for example, by informing the intermediate wholesalers about the featured goods to be shown on the sales flier, such as Japanese radish, cucumbers, and tomatoes, on the day immediately before a Tuesday bargain sale, and unilaterally instructing them to supply the said goods at a price lower than their purchase price. Many of the intermediate wholesalers who have received such requests are in a position where they are unable to avoid accepting the request in order to continue the supply transactions with Company X. (JFTC recommendation decision, January 7, 2005)

B. Request for redoing

In the case where an entrepreneur who has superior bargaining position over a transacting party, without justifiable grounds, requests the transacting party for redoing after the entrepreneur has received the goods or services from the transacting party, and where the transacting party to unavoidably accept such request from concerns about the possible effects on future transactions, such act would unjustly impose a disadvantage on the transacting party in light of normal business practices, and therefore causes a problem as abuse of superior bargaining position (Note 26) (Note 27).

(Note 26) “Redoing” falls under “changing trade terms or excuting transactions in a disadvantageous to the transacting party” set forth in Article 2, paragraph (9), item (v), (c) of the Antimonopoly Act.

(Note 27) Before receiving goods or receiving the provision of services from the transacting party, in the case where an entrepreneur changes the details of the provision and causes a transacting party to conduct work different from that initially decided on, such act falls under “price reduction” (refer to IV. 3 (4)) or “other establishments, etc. of trade terms in a way disadvantageous to the transacting party” (refer to IV. 3 (5) C) and may cause a problem as abuse of superior bargaining position.

(b) On the other hand, [1] in the case where goods or services do not meet the conditions decided on at the time of placing orders, or [2] in the case where an

entrepreneur bears the loss that should normally occur for redoing, based on the prior consent of the transaction party, or [3] in the case where the entrepreneur requests the transacting party for redoing concerning a prototype in transactions that include the creation of the prototype, in order to determine a specific specification, and expenses for the said redoing are found to be included in the initial consideration, such act would not unjustly impose a disadvantage on the transacting party in light of normal business practices, and therefore does not cause a problem as abuse of superior bargaining position.

<Supposed examples>

[1] Before receiving goods or services, in spite of the fact that an entrepreneur has changed specifications of goods or services decided on in advance due to a reason specific to the entrepreneur, the entrepreneur causes a transacting party to continue working without notifying the transacting party of the change and to redo on the grounds that such goods or services have not met the specifications at the time of delivery.

[2] In spite of the fact that an entrepreneur was requested by a transacting party to confirm the details of entrustment and has agreed to them, and therefore the transacting party has manufactured goods or engaged in other work based on such entrustment, the entrepreneur causes the transacting party to redo, on the grounds that the goods, etc., provided by the transacting party differ from those of entrustment.

[3] An entrepreneur arbitrarily makes the predetermined inspection standards stricter, and causes a transacting partner to re-provide goods, etc., on the grounds that the provided goods, etc., differ from those ordered or they are defective.

[4] In spite of the fact that a transacting party requested an entrepreneur to clarify the specifications, the entrepreneur does not clarify the specifications without justifiable grounds and causes a transacting party to continue engaging in work. Thereafter when the transacting part delivered the goods, the entrepreneur causes the transacting party to redo on the grounds that the goods differ from those ordered.

(C) Other

(a) Even when an act does not fall under any of the categories of acts listed from IV. 3 (1) through (4), as well as IV. 3 (5) A and B above, if an entrepreneur who has superior bargaining position in transactions over a transacting party unilaterally determines or changes the trade terms or implements transactions and when such act unjustly imposes a disadvantage on the transacting party in light of normal business practices, the said act

causes a problem as abuse of superior bargaining position.

(b) The following supposed examples could not generally fall under any of the categories of acts described earlier. However, if they fall under the provisions of Article 2, paragraph (9), item (v), (c) of the Antimonopoly Act, such act causes a problem as abuse of superior bargaining position.

<Supposed examples>

[1] In the case where consideration is to be paid after a transacting party actually uses the goods or actually receives the provision of services pertaining to a transaction, in spite of the fact that the transacting party has yet to actually use the goods or has yet to actually receive the provision of the services, an entrepreneur causes the transacting party to advance the payment of a consideration due to reasons specific to the entrepreneur.

[2] In spite of the fact that an entrepreneur has ordered goods to be manufactured by designating certain specifications and a transacting party has procured raw materials, etc., based on such an order, the entrepreneur cancels an order for components due to reasons specific to the entrepreneur, without paying the transacting party's expenses required for the said procurement.

[3] In spite of the fact that an entrepreneur has directed a transacting party to introduce new machinery and equipment, has explained to and committed the transacting party that the entrepreneur places an order for a certain volume immediately after the introduction of the said machinery and equipment, and has given implicit approval to the fact that the transacting party is taking such actions as the introduction of machinery and equipment for the transaction with the entrepreneur, the entrepreneur substantially reduces the volume of the order or cancels the order due to reasons specific to the entrepreneur.

[4] An entrepreneur delivers a bill that is difficult for a general financial institution to discount until due date such as a bill drawn by a company with poor performance, including a negative net worth, or a bill with a sight being substantially long, and causes a transacting party to bear discount fees higher than usual.

[5] An entrepreneur unilaterally decides a substantially high amount of a guarantee deposit, which exceeds the necessary amount to preserve entrepreneur's receivables arising from sales on credit, and causes a transacting party to make a guarantee deposit.

[6] In the case where a transacting party fails to deliver goods by the delivery date or the goods delivered are defective, an entrepreneur unilaterally decides a penalty to be

imposed on a transacting party, without sufficiently discussing the penalty amount and the basis for the calculation of the amount, etc., with the transacting party, and causes the transacting party to pay an amount exceeding an amount equivalent to the profit that would have been gained if the goods had been delivered and sold or if the goods had not been defective.

(c) As described below, in the case where the headquarters of a franchise chain makes it unavoidable for a franchise member to stop selling goods at a close-out price, thereby depriving a franchise member of the opportunity of reducing its burden based on its own reasonable management decisions, such act has imposed a disadvantage on the transacting party, and therefore has caused a problem as abuse of superior bargaining position (Note 28).

(Note 28) Such act also falls under Article 2, paragraph 9, item(v),(c) of the Antimonopoly Act. Regarding the details of the concept for abuse of superior bargaining position in franchise transactions, refer to “Guidelines Concerning the Franchise System under the Antimonopoly Act.” (Fair Trade Commission on April 24, 2002)

<Case example>

Company X has a system in which the franchise members of its franchise chain are to bear the entire amount equivalent to the cost of the goods discarded at the convenience stores managed by the franchise members. Company X has taken the following measures under this system.

A. If a management consultant finds out that a franchise member is intending to sell daily goods (foods and beverages of which quality is easy to deteriorate and also those which are delivered to stores daily. The same shall apply hereunder.) at a close-out price, it causes the franchise member not to sell the goods at a close-out price.

B. If a management consultant finds out that a franchise member has sold goods at a close-out price, it causes the franchise members never to sell goods at a close-out price again.

C. If a franchise member does not stop selling goods at a close-out price in spite of the measures set forth in (a) or (b) above, superior of the management consultant causes the franchise member not to sell goods at a close-out price or never to sell goods at a close-out price again by suggesting that the franchise member would receive disadvantageous treatment, such as the cancellation of the franchise-store basic contract.

In this manner, Company X makes it unavoidable for a franchise member who intends to sell or is selling goods at a close-out price to stop selling goods at a close-out price, thereby depriving franchise members of the opportunity of reducing their burden regarding the amount equivalent to the cost of daily goods discarded, based on their own reasonable management decisions. (Cease and Desist Order No. 8 of 2009; June 22, 2009)