

The Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act

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Japan Fair Trade Commission

Introduction

1. Purpose of the Guidelines

Private monopolization, as defined in the provisions of Article 2 (5) of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No.54 of 1947; hereinafter referred to as the “Antimonopoly Act”), is “such business activities, by which any entrepreneur, individually or by combination or conspiracy with other entrepreneurs, or by 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.” Private monopolization is prohibited under the provisions of Article 3 of the Antimonopoly Act.

The Japan Fair Trade Commission (hereinafter referred to as the “JFTC”) can take necessary measures against any private monopolization to eliminate the violation pursuant to the provisions of Article 7 of the Antimonopoly Act. In addition, the JFTC shall order payment of a surcharge pursuant to the provisions of Article 7-2 (2) of the Antimonopoly Act against any private monopolization by controlling the business activities of other entrepreneurs (hereinafter referred to as “Private Monopolization by Control”).

Consequent to the establishment of Act No.51 of 2009 for amending the Antimonopoly Act in June 2009, the Act includes the provision that the JFTC shall order payment of a surcharge pursuant to Article 7-2 (4) of the Antimonopoly Act against any private monopolization by excluding the business activities of other entrepreneurs (hereinafter referred to as “Exclusionary Private Monopolization”) (Note 1).

Exclusionary Private Monopolization refers to excluding the business activities of other entrepreneurs (hereinafter referred to as “Exclusionary Conduct”), thereby causing, contrary to public interest, a substantial restraint of competition in any particular field of trade. There are not so many Exclusionary Private Monopolization cases in Japan, and various types of the alleged conduct fall under such monopolization. Moreover, it could naturally happen in every competition process that as a result of business activities of an entrepreneur, a product—in these

guidelines, a product includes a service such as loan of funds and grant of a license concerning a patent right and grant of a license to use facilities and equipments—of the other entrepreneur is driven out of the market. Therefore, because of the difficulty in distinguishing Exclusionary Conduct from normal business activities leading to exclude the business activities of other entrepreneurs, it has been pointed out that the introduction of a surcharge against Exclusionary Private Monopolization might cause a so-called chilling effect for entrepreneurs and interfere with their fair and free business activities.

In light of these circumstances, the JFTC formulates the “Guidelines for the Exclusionary Private Monopolization under the Antimonopoly Act” (hereinafter referred to as the “Guidelines”). The purpose of the Guidelines is to ensure further transparency of law enforcement and to improve predictability for entrepreneurs by clarifying, to the extent possible, the requirements for Exclusionary Private Monopolization.

2. Outline of the Guidelines

The Guidelines describe the JFTC’s investigation policies about cases concerning Exclusionary Private Monopolization and what conduct may fall under “Exclusionary Conduct” and “substantial restraint of competition in any particular field of trade” as the requirements for Exclusionary Private Monopolization. If it would be deemed that an entrepreneur commits Exclusionary Conduct but not be deemed that the conduct substantially restrains competition in a particular field of trade, the conduct would not fall under Exclusionary Private Monopolization.

Specifically, first, the Guidelines describe general matters that the JFTC is to consider when determining whether to prioritize investigation of a particular case as Exclusionary Private Monopolization (Part I below). The next part of the Guidelines shows types of chief conduct that tends to be deemed problematic as “Exclusionary Conduct” and the framework for deliberations and factors applied for assessing whether or not it falls under Exclusionary Conduct for each type (Part II below). Finally, the Guidelines describe the factors to be considered for defining a particular field of trade and determining the presence or absence of a substantial restraint of competition in a particular field of trade when assessment is made over whether Exclusionary Conduct has substantially restrained competition in the field of trade (Part III below).

The Guidelines clarify the JFTC’s view under the Antimonopoly Act regarding the conceivable Exclusionary Private Monopolization in the present. Business

activities undermining competition in the market will continue to change because of changes in market conditions, technological innovations, and other factors. Therefore, the JFTC will revise the Guidelines, as necessary, while reviewing the specific law enforcements and watching market conditions.

(Note 1) Any entrepreneur who engages in Exclusionary Private Monopolization shall be ordered to pay a surcharge of an amount equivalent to 6% (2% in the case that the entrepreneur engages in retail business or 1% in the case that the entrepreneur engages in wholesale business) of the amount of sales, pursuant to the provisions of Article 7-2 (4) of the Antimonopoly Act.

Any entrepreneur who engages in Private Monopolization affecting consideration of the product's price by controlling and excluding business activities of other entrepreneurs shall be ordered to pay a surcharge of an amount equivalent to 10% (3% in the case that the entrepreneur engages in retail business or 2% in the case that the entrepreneur engages in wholesale business) of the amount of sales concerning the Private Monopolization by Control, pursuant to the provisions of Article 7-2 (2) of the Antimonopoly Act.

Part I. Enforcement Policy of the JFTC

The purpose of the Antimonopoly Act is to promote fair and free competition in the market, stimulate the creative initiative of entrepreneurs, and thereby allow general consumers to choose from a wide variety of high-quality and low-cost products.

In most of the past cases concerning Exclusionary Private Monopolization, entrepreneurs who were subject to the JFTC's investigation had a large share of the markets for the product related to Exclusionary Conduct. Thus, in most cases where an entrepreneur's conduct can be effective in excluding business activities of the other entrepreneurs and foreclosing the market, the share of the product (Note 2) that the said entrepreneur supplies is to some extent large. Moreover, the larger the share of the product that the said entrepreneur supplies is, the more likely it is that the alleged Exclusionary Conduct becomes highly effective in causing a substantial restraint of competition in a particular field of trade.

In light of these, the JFTC, when deciding whether to investigate a case as Exclusionary Private Monopolization, will prioritize the case where the share of the product that the said entrepreneur supplies exceeds approximately 50% after

the commencement of such conduct and where the conduct is deemed to have a serious impact on the lives of the citizenry, comprehensively considering the relevant factors such as market size, scope of business activities of the said entrepreneur, and characteristics of the product. However, even if a case does not meet these criteria, it may be subject to investigation of the case as Exclusionary Private Monopolization depending on the type of conduct, market conditions, positions of the competitors, and other factors.

Needless to say, even where the alleged conduct is found not to fall under Exclusionary Private Monopolization after the JFTC's investigation, it is still likely to be regulated as unfair trade practices, as provided for in Article 2 (9) of the Antimonopoly Act or as the conduct that violates the other provisions of the Antimonopoly Act.

(Note 2) "The share of the product" in the case of "Tying" (in 4 of Part II below) refers to the share of the tying product and "the share of the product" in the case of "Refusal to Supply and Discriminatory Treatment" (in 5 of Part II below) refers to the share of the product in the upstream market.

If multiple entrepreneurs combined or conspired with each other, the share herein refers to the sum of the shares of products supplied by the respective entrepreneurs involved.

Part II. Exclusionary Conduct

1. Basic View

(1) Nature of Exclusionary Conduct

Exclusionary Conduct refers to various conducts that would cause difficulty for other entrepreneurs to continue their business activities or for new market entrants to commence their business activities, thereby would be likely to cause a substantial restraint of competition in a particular field of trade. In the case that an entrepreneur supplies a low-cost and high-quality product by its own efforts such as improving efficiency, and if such conduct would make it difficult for competitors to continue their inefficient business activities, it does not fall under Exclusionary Conduct because it is a result of fair and free competition, which the Antimonopoly Act intends to promote.

To constitute Exclusionary Conduct, conduct of an entrepreneur does not have to result in the actual elimination of business activities of other entrepreneurs from the market or complete block of business activities of new market entrants.

In other words, any conduct falls under Exclusionary Conduct when it is highly likely to cause difficulties in continuing the business activities of other entrepreneurs or commencing the business activities of new market entrants. Even if such conduct was assessed by the entrepreneur to be indispensable for its business management because of the market conditions etc., it does not mean that the said conduct might not fall under Exclusionary Conduct.

It is not essential that for falling under Exclusionary Conduct, the entrepreneur had the exclusionary intent. However, the exclusionary intent as a subjective element can be an important fact leading the presumption that the alleged conduct is Exclusionary Conduct. Moreover, when the entrepreneur has engaged in multiple acts with the exclusionary intent, these acts may be collectively recognized as a series of integrated acts aimed at realizing the exclusionary intent.

In addition, “excluding business activities of other entrepreneurs” include not only direct but also indirect conduct via its trading partner against the said other entrepreneurs. Moreover, such conduct also includes the conduct committed by multiple entrepreneurs in combination or in conspiracy with each other.

(2) Types of Exclusionary Conduct

The first example of typical Exclusionary Conduct is a type of conduct similar to the unfair trade practices listed in Article 2 (9) of the Antimonopoly Act. Therefore, a part of unfair trade practices may fall under Exclusionary Conduct. On the other hand, in past cases of Exclusionary Private Monopolization, Exclusionary Conduct has not necessarily been limited to those similar to unfair trade practices, and types of conduct other than these have been also regarded as Exclusionary Conduct.

Thus, there is a wide variety of conduct deemed as Exclusionary Conduct, so it is difficult to characterize all of them. However, factors to be considered for assessing whether the alleged conduct falls under Exclusionary Conduct differ according to the type of the conduct. Therefore, to the extent possible, breaking down Exclusionary Conduct into types and listing factors for assessment for each type of conduct are beneficial from the viewpoint of ensuring transparency of law enforcement and improving predictability of entrepreneurs.

The Guidelines describe four typical Exclusionary Conducts—“Below-cost Pricing,” “Exclusive Dealing,” “Tying,” and “Refusal to Supply and Discriminatory Treatment” in reference to past cases—and for each type of

conduct, consideration factors for assessing whether the alleged conduct falls under Exclusionary Conduct. Of course, Exclusionary Conduct that constitutes Exclusionary Private Monopolization is not limited to the acts that fall under these four typical Exclusionary Conducts. For example, setting a price exclusively either in the sales territory where an entrepreneur competes with others or for customers, for whom an entrepreneur competes with others (Note 3), or interfering with business activities of other entrepreneurs (Note 4) may be regarded as Exclusionary Conduct in some cases. Further, multiple acts may be collectively regarded as a series of integrated Exclusionary Conduct (Note 5).

The illustrative examples given in 2 to 5 of Part II below show conducts deemed as Exclusionary Private Monopolizations in past decisions and judgments for the purpose of helping in understand concretely what conduct falls under Exclusionary Conduct. The reference examples are also given to help understand concretely what conduct falls under Exclusionary Conduct by showing conduct deemed as unfair trade practices in past decisions, judgments, and others. Needless to say, assessment over whether specific conduct, including conduct not referred to in the Guidelines, falls under Exclusionary Conduct is to be made in the context of individual cases pursuant to the provisions of the Antimonopoly Act (Notes 6 and 7).

(Note 3) The following is an illustrative example of setting a price exclusively either in sales territory where an entrepreneur competes with others or for customers, for whom an entrepreneur competes with others:

Company X, a music broadcasting business entrepreneur in Japan, in an attempt to deprive a competitor, Company Y, of a large number of its customers in a short period and to make it difficult for Company Y to manage its music broadcasting business, carried out campaigns only for Company Y's customers, which significantly prolonged free subscription period and significantly lowered minimum subscription fee for the products that competed with Company Y's products. Such conduct was found to exclude the business activities of the said competitor in the music broadcasting business (JFTC recommendation decision, October 13, 2004).

(Note 4) The following are illustrative examples of conducts of interfering with business activities of other entrepreneurs:

1) Company X—a food cans manufacturer—which held approximately

56% (Company X and Companies A, B, C, and D, whose business activities were dominated by Company X, collectively held approximately 74 %) of the market share of all such products supplied in Japan—discontinued its supply of food cans that the canned food manufacturer Company Y could not manufacture on its own, with the intent to make Company Y give up its attempt to independently manufacture food cans to reduce the cost of manufacturing its canned food. Such conduct was found to exclude the business activities of food can manufacturers' producing food cans on their own (JFTC recommendation decision, September 18, 1972).

- 2) Foundation X—a medical food examination institution—restricted registered items etc. of medical food and restricted sales territories and sales destinations of medical food etc. on the basis of the manufacturing plant recognition system and distributor recognition system for medical food, upon the request of medical food distributor Company Y to become the sole distributor of medical food for medical institutions, with the intent to prevent competition among medical food manufacturers and among medical food distributors. Such conduct was found to exclude the business activities of the entrepreneurs that intended to produce or distribute medical food (JFTC recommendation decision, May 8, 1996).

(Note 5) The following is an illustrative example for multiple acts that are collectively regarded as a series of integrated Exclusionary Conduct:

Company X, which published a large percentage of a daily morning and evening newspaper in the Hakodate area, decided to take up measures to make it difficult for Company Y to continue its daily evening newspaper publishing business and to interfere with Company Y entering into the area. On the basis of the decision, a series of the multiple acts that consisted of a) applying for trademark registrations of newspaper mastheads that were expected to be used by Company Y, b) requiring a news agency to refuse Y's offer for providing news service from Company Y, c) setting significantly discounted advertising rates to entrepreneurs that Company Y looked at as advertisers, and d) requesting a TV station to refuse Company Y's offer to broadcast TV commercials as the countermeasures against Company Y was found to exclude the business activities of Company Y

(JFTC consent decision, February 28, 2000).

(Note 6) Regarding whether conduct of restrictions pertaining to the use of technology falls under Exclusionary Conduct, refer to (1) of Part 3 of the Guidelines for the Use of Intellectual Property under the Antimonopoly Act (September 28, 2007, JFTC). Regarding whether joint research and development of technologies that will lead to unification of standards or standardization falls under Exclusionary Conduct, refer to 2 (2) of Part I of the Guidelines Concerning Joint Research and Development under the Antimonopoly Act (April 20, 1993, JFTC) and 2 of Part 2 of the Guidelines on Standardization and Patent Pool Arrangements (June 29, 2005, JFTC).

(Note 7) There are cases where in order to protect secrecy of know-how (meaning any technical knowledge or experience that is not publicly known or any accumulation of them, and thereof the economic value of which is independently protected or controlled by entrepreneurs; the same shall apply hereinafter), such conduct is carried out as imposing restrictions regarding procurement sources of the raw materials or the components of the products or sales destination of the products on the trade partners receiving the said know-how. When assessment is made over whether or not such conduct falls under Exclusionary Conduct, comprehensive consideration is given to factors such as the characteristics of the know-how, technology level in the relevant field, characteristics of the raw materials or the product, and duration of the period until the said know-how loses its value for trading, in addition to factors for assessment described in 2 to 5 of Part II below.

For example, there are cases where a manufacturer outsources the manufacturing of products to another manufacturer by providing its know-how to the latter, or where multiple entrepreneurs manufacture or distribute a product that is manufactured by using the know-how developed in their joint research and development. In such cases, imposing restrictions regarding procurement sources of the raw materials or the components of the products or sales destination of the products on trade partners receiving the said know-how would not be deemed to fall under Exclusionary Conduct as far as such conduct is performed within a scope and period essential for protecting the secrecy of the said know-how.

2. Below-cost Pricing

(1) Conduct that may fall under Exclusionary Conduct

The free competition economy is based on the assumption that supply and demand adjustment is left to market mechanism, and entrepreneurs have the freedom to decide their prices by adapting to the supply and demand relationship in the market. Price-cutting competition based on entrepreneurs' own efforts essentially constitutes the core of competition on the merits—competition by which entrepreneurs win customers by supplying high-quality and low-cost products—that competition policies intend to maintain and promote. Therefore, intervention in price-cutting competition should be kept at a minimum in light of the purpose of the Antimonopoly Act, which promotes fair and free competition.

However, generally, when setting a very low price to allow even recovery of the cost, which would not be generated unless the product was supplied, the amount of loss grows larger as the supply of the product increases, so such conduct lacks economic rationality except in extraordinary circumstances (Note 8). Therefore, depriving competitors' customers by setting such a price would not reflect business efforts or the normal competition process and would cause difficulty in the business activities of an equally or more efficient competitor, thereby possibly undermining the competition. Thus, setting a price below the cost that would not be generated unless the product was supplied (hereinafter referred to as the "Below-cost Pricing") may fall under Exclusionary Conduct (Note 9).

Assessment over what costs are regarded as "the cost that would not be generated unless the product was supplied" is made from the viewpoint of whether the cost will increase or decrease depending on the supply quantity of the product and/or whether the cost is closely related with the supply of the product, in a reasonable period in the context of the actual condition.

From the viewpoint of whether the cost will increase or decrease depending on the supply quantity of the product, for example, variable expense—the cost that proportionally increases or decreases in total amount depending on the rate of capacity utilization—is regarded as "the cost that would not be generated unless the product was supplied." When a cost, due to the nature of the cost, is deemed not to be obviously the variable expense but to be increasing or decreasing to a certain degree depending on the changes in supply quantity, it is presumed to be "the cost that would not be generated unless the product was

supplied.”

From the viewpoint of whether or not the cost is closely related with the supply of the product, for example, production cost (the sum of costs required for producing the product) and purchasing cost (the sum of the actual purchasing cost of the product and miscellaneous expenses pertaining to the purchases, such as the transportation cost) of the expense items for corporate accounting are presumed to be “the cost that would not be generated unless the product was supplied.” From the similar point of view, for example, order execution cost such as delivery cost and storage cost within selling cost and general administration cost are presumed to be “the cost that would not be generated unless the product was supplied.”

Setting a product price below the cost required for supplying the product (Notes 10 and 11) and not less than “the cost that would not be generated unless the product was supplied” is unlikely to be deemed to cause difficulty in the business activities of an equally or more efficient competitor and to fall under Exclusionary Conduct, except in extraordinary circumstances such as a large amount of the products supplied over a long period.

(Note 8) Whether it is economically rational is conceptually assessed from whether a price set by the said entrepreneur can cover average avoidable cost (AAC), which is the average of product-specific fixed costs and variable costs that could have been avoided if the said entrepreneur had not produced extra output. On a practical level, the JFTC will substitute “the cost that would not be generated unless the product was supplied” for the AAC.

(Note 9) Properly setting a low price for a product whose quality is likely to deteriorate rapidly, such as perishable food, for a product whose peak sales periods are over, such as a seasonal good, or for a product with quality defects, such as an inferior product, is not deemed unfair even when the price is lower than “the cost that would not be generated unless the product were supplied” and therefore does not fall under Exclusionary Conduct. The same applies to a case in which a low price is properly set for a product when the prices in the market have been lowered because of the supply–demand relationship.

(Note 10) The cost required for supplying the product refers to the sum of all costs required for supplying a product (average total cost). This corresponds to the gross cost of sales, of the expense items for corporate accounting. Normally, in the manufacturing industry, the gross cost of sales corresponds to the sum of the production cost, selling cost, and general administration cost. In the retail business, the gross cost of sales corresponds to the sum of the purchasing cost, selling cost, and general administration cost.

(Note 11) In terms of common costs in multiple businesses, how to allocate such costs to respective businesses becomes an issue, and it is general in corporate accounting that each entrepreneur allocates common costs to each business depending on the degree of benefit given by the generation of the costs, pursuant to the allocation criteria that were reasonably selected by the entrepreneur in the context of the actual condition. In such a case, if the entrepreneur is deemed to use the allocation criteria that were reasonably selected in the context of the actual condition, the gross cost of sales is usually calculated by allocating the common costs based on the said allocation criteria, although there are various allocation criteria.

(2) Factors for assessment

Where setting a product price below “the cost that would not be generated unless the product was supplied” would cause difficulty in the business activities of an equally or more efficient competitor, the said conduct is regarded as Exclusionary Conduct. The JFTC will comprehensively consider the following factors to assess whether or not such conduct would cause difficulty in the business activities of an equally or more efficient competitor.

A. Conditions of the entire market of the product

Where assessment is made over whether or not Below-cost Pricing falls under Exclusionary Conduct, consideration is given to factors concerning conditions of the entire market of the product, such as the characteristics of the product, economies of scale (the product’s nature that the larger the supply quantity becomes, the lower the per-unit cost of the product becomes; the same shall apply hereinafter), degree of differentiation of the product, distribution channels, dynamics of the market, and difficulty of market entry.

For example, when choosing between the entrepreneur’s and competitors’

products, customers do not consider prices to be important for highly differentiated products as they would when the products are not differentiated. Therefore, such a case would be unlikely to be deemed to cause difficulty in the business activities of an equally or more efficient competitor.

B. Positions of the said entrepreneur and the competitors in the market

Where assessment is made over whether or not Below-cost Pricing falls under Exclusionary Conduct, consideration is given to factors concerning positions of the said entrepreneur and the competitors in the market, such as the share of the product, its ranking, brand value of the product, excess supply capacity, scale of operation (number of places of business, business territory, conditions of diversification, etc.), and proportion of the relevant product in all the businesses of the entrepreneur.

For example, where an entrepreneur with a large scale of operation engages in Below-cost Pricing while compensating for the loss with profits from sales of other products or with other money, excessive Below-cost Pricing can be continued for a much longer period, making it difficult even for an efficient entrepreneur to compete by normal business efforts. Therefore, such a case would be more likely to be deemed to cause difficulty in the business activities of an equally or more efficient competitor.

C. Period of the conduct and turnover and quantity of the product

Where assessment is made over whether or not Below-cost Pricing falls under Exclusionary Conduct, consideration is given to factors such as the period during which Below-cost Pricing is conducted and the turnover and quantity of the product provided at the said price.

For example, a case where a product is provided over a long period at a price below “the cost that would not be generated unless the product was supplied” would be more likely to be deemed to cause difficulty in the business activities of an equally or more efficient competitor.

D. Conditions of the conduct

Where assessment is made over whether or not Below-cost Pricing falls under Exclusionary Conduct, consideration is given to factors concerning conditions of the conduct, such as intent and purpose of an entrepreneur, advertising, and publicity associated with the price-cutting (including the

entrepreneur's reputation for price-cutting).

For example, where the said entrepreneur also carries out Below-cost Pricing in other areas or for other products over long period, other entrepreneurs would be more likely to hesitate to enter the market, being cautious about further Below-cost Pricing by the said entrepreneur. Thus, where Below-cost Pricing by the entrepreneur is deemed to be well known, such a case would be more likely to be deemed to cause difficulty in the business activities of an equally or more efficient competitor.

(3) Reference example

Company X was an entrepreneur selling most of the maps of the residential areas, etc. of Japan and had been the only company that distributed residential maps of City A. When Company Y—an entrepreneur engaging in the distribution of maps of residential areas etc. in the Hokuriku district—began to engage in selling residential maps of City A, Company X intended to cause difficulty in the selling activities of Company Y by a) making Company X's specified agent set a price excessively below the production cost for residential maps of City A ordered via designated competitive bidding etc. by the Gas Bureau and Waterworks Bureau of City A and b) making its wholly owned subsidiary sell a 1998 edition of residential maps at a price excessively below the gross cost of sales (in part at a price lower than the production cost) in the major cities of the Hokuriku area, which was the main distributing territory of Company Y. Such conduct of Company X was deemed to be likely to fall under paragraph (6) of the Designation of Unfair Trade Practices (JFTC Public Notice No.15 of 1982) and to violate the provisions of Article 19 of the Antimonopoly Act (JFTC warning, March 24, 2000).

3. Exclusive Dealing

(1) Conduct that may fall under Exclusionary Conduct

Even if an entrepreneur deals on the condition that the trade partners shall not purchase the products from its competitors, the competitors are able to continue their business activities in the market on the basis of the competition in factors such as prices and product qualities in case that they are able to easily find an alternative trade partner. Therefore, such conduct in itself does not immediately fall under Exclusionary Conduct.

However, where an entrepreneur deals with the trade partners on the

condition of prohibition or restraint of transactions with competitors, and the competitors cannot easily find an alternative supply destination to the said trade partner, such conduct may cause difficulties to the business activities of the competitors and therefore may undermine competition. Thus, dealing with the trade partners on the condition of prohibition or restraint of transactions with the competitors (hereinafter referred to as “Exclusive Dealing”) may fall under Exclusionary Conduct (Note 12).

Exclusive Dealing includes not only an entrepreneur’s obvious conduct of making a contract that the trade partners shall not have dealings with its competitors but also an entrepreneur’s conduct of dealing with its competitors on the substantial condition for prohibition or restraint of the dealings. For example, when achieving a specific quantity of trade is required for dealings, and the said quantity of trade is close to the maximum quantity that the trade partner is capable of dealing (or selling), such conduct can be deemed as prohibiting or restraining dealings with one’s competitor as a virtual requirement for the dealing. Thereby, such conduct falls under Exclusive Dealing. In the same manner, for example, requiring one’s approval before the trade partners’ dealing with one’s competitors falls under Exclusive Dealing when it substantially prevents dealings with one’s competitors by providing economic benefit in return or by attaching economic disadvantage.

(Note 12) For example, where an entrepreneur engages in wholesale business or retail business deals with a manufacturer on the condition of prohibition or restraint of transactions with the competitors, such conduct is included in “Exclusive Dealing.”

(2) Factors for assessment

Where Exclusive Dealing would cause difficulty in the business activities of the competitors who are unable to easily find an alternative trade partner, the said conduct is assessed as Exclusionary Conduct. The JFTC will comprehensively consider the following factors to assess whether or not such conduct would cause difficulty in the business activities of the competitors who are unable to easily find an alternative trade partner.

A. Conditions of the entire market of the product

Where assessment is made over whether Exclusive Dealing falls under

Exclusionary Conduct, consideration is given to factors concerning conditions of the entire market of the product, such as the degree of market concentration, characteristics of the product, economies of scale, degree of differentiation of the product, distribution channels, dynamics of the market, and difficulty of market entry.

For example, where network effects (Note 13) are recognized as characteristics of the product, a decline in the number of entrepreneurs dealing with the competitors' products would be more likely to lower the utility value of the competitors' products and more likely to lead to further decline in the number of its users, as compared to cases without the network effects. Therefore, in such a case, Exclusive Dealing would be more likely to be deemed to cause difficulty in the business activities of the competitors who are unable to easily find an alternative trade partner.

B. Position of the said entrepreneur in the market

Where assessment is made over whether Exclusive Dealing falls under Exclusionary Conduct, consideration is given to factors concerning position of the said entrepreneur in the market, such as the share of the entrepreneur's product, its ranking, brand value of the product, excess supply capacity, and the scale of operation.

For example, where the said entrepreneur's product has a strong brand value, demand for it would be more likely to increase, and it becomes more important for its trade partners to be supplied with the products from the said entrepreneur. Therefore, in such a case, Exclusive Dealing would be more likely to be deemed to cause difficulty in the business activities of the competitors who are unable to easily find an alternative trade partner.

C. Position of the competitors in the market

Where assessment is made over whether Exclusive Dealing falls under Exclusionary Conduct, consideration is given to factors concerning position of the competitors in the market, such as the share of the products, their rankings, brand value of the product, excess supply capacity, and scale of operation.

For example, when the excess supply capacity of the competitors is small as a whole, it is impossible to completely make up for the whole supply of products that would be provided from the said entrepreneur by purchasing the products from the competitors. Therefore, it is more important for a trade

partner to be supplied with the products from the said entrepreneur than when the number of the competitors is not small and the excess supply capacity is large as a whole. Consequently, in such a case, Exclusive Dealing would be more likely to be deemed to cause difficulty in the business activities of the competitors who are unable to easily find an alternative trade partner.

D. Period of the conduct, number of trade partners, and their share

When assessment is made over whether Exclusive Dealing falls under Exclusionary Conduct, consideration is given to factors such as the period of implementation of the Exclusive Dealing, the number, and the share of the counterparties concerned.

For example, where Exclusive Dealing has been implemented over a long period or is implemented with a large number of counterparties, the Exclusive Dealing would be more likely to be deemed to cause difficulty in the business activities of the competitors who are unable to easily find an alternative trade partner.

E. Conditions of the conduct

Where assessment is made over whether Exclusive Dealing falls under Exclusionary Conduct, consideration is given to factors concerning conditions of the conduct, such as the conditions and contents of dealing and the intent and purpose of the entrepreneur.

For example, when trade partners are subject to additional charge or a large amount of penalty for their dealing with the said entrepreneur's competitors, because of the conditions and contents of the dealing, they become the greater obstacle for the trade partners to trade with the competitors. Therefore, in such a case, Exclusive Dealing would be more likely to be deemed to cause difficulty in the business activities of the competitors who are unable to easily find an alternative trade partner.

(Note 13) The network effects refer to effects in which an increase in the number of users of particular technologies or specifications improves the utility value of the technologies or specifications, thereby allowing a further increase in their users.

(3) Exclusive Rebate-giving

Rebates are actually used for a variety of purposes such as sales promotions and adjustment of purchase prices. In fact, rebates have the procompetitive effect to stimulate the demand or, as an element of prices, promote formation of prices that reflect the actual market situation. Therefore, Rebate-giving in itself does not immediately fall under an Exclusionary Conduct.

However, when an entrepreneur gives rebates to trade partners on the condition that the amount or volume of purchase from the entrepreneur or the proportion of amount (volume) of purchase from the entrepreneur to the total amount (volume) of its purchase reaches a particular threshold or more during a specified period, such conduct may have effects in restraining the trade partners' dealings of competitors' products. Thus, where Rebates-giving to the trade partners on the condition for certain amount of purchase from the alleged entrepreneur etc. has effects in restraining the trade partners' dealings of the competitors' products (Note 14), such conduct (hereinafter referred to as "Exclusive Rebate-giving") may have the same effect as Exclusive Dealing. Therefore, whether such conduct falls under Exclusionary Conduct will be determined on the basis of the factors for assessment described in (2) above.

The JFTC will comprehensively consider the following factors to assess whether or not Rebates-giving has an effect in restraining the dealings of competitors' products and have the same effect as Exclusive Dealing.

A. Level of rebates

Where the amount or rate of rebates is set at a higher level, the trade partners would be more likely to purchase more products from the entrepreneur. Such Rebate-giving is highly effective in restraining the dealings of competitors' products.

B. Threshold of giving rebates

Where threshold for Rebates-giving is set at the higher level within the achievable range for the trade partners, the rebates function more effectively to have the trade partners deal with products from the entrepreneur with greater preference than with those from the competitors, and the trade partners would be more likely to purchase more products from the entrepreneur.

Where rebate-giving is set an individual threshold for each trade partner, the trade partners would be more likely to purchase more products from the entrepreneur than when the same criteria are set for all the trade partners,

because the entrepreneur can set the criteria in accordance with the individual circumstances of each trade partner so that the rebates function more effectively to have the trade partners deal with the entrepreneur's products with greater preference than with the competitors' products. Such Rebates-giving is highly effective in restraining the dealings of competitors' products in such a case.

C. Progressiveness of rebates

When the level of rebates is progressively set in accordance with the quantity of trade etc. in a specified period, the rebates function more effectively to have the trade partners to deal with products from the entrepreneur with greater preference than with those from the competitors, and the trade partners would be more likely to purchase more products from the entrepreneur. Such Rebates-giving is highly effective in restraining the dealings of the competitors' products.

D. Retro-activeness of rebates

If rebates are given for the entire quantity of trade made thus far in case that the quantity of trade has exceeded a certain threshold, the rebates function more effectively in having the trade partners deal with products from the entrepreneur with greater preference than with those from the competitors, and the trade partners would be more likely to purchase more products from the entrepreneur than when rebates are given only for the portion of the quantity of trade etc., which exceed the threshold required for Rebates-giving. Such Rebate-giving is highly effective in restraining the dealings of competitors' products.

(Note 14) In addition to cases in which Exclusive Rebate-giving in itself functions in the same way as Exclusive Dealing, there are cases where rebates are used to ensure the effectiveness of Exclusive Dealing in restraining the dealings of competitive products.

(4) Illustrative examples

A. Company X manufactured more than half of all the globally produced molybdenum-99—a raw material for a particular radiopharmaceutical—and distributed the majority of molybdenum-99 worldwide. The said

radiopharmaceutical cannot be produced from any other raw material but molybdenum-99. In Japan, there were two companies that had purchased molybdenum-99 and produced the said radiopharmaceutical, and the two companies had bought molybdenum-99 only from Company X. Company X prevented other producers and distributors of molybdenum-99 from dealing with the two companies through concluding agreements with them for 10 years, including the provision under which the two companies purchased all the molybdenum-99 that they acquire, use, consume, or process only from Company X. Such conduct by Company X was deemed to exclude the business activities of other producers of molybdenum-99 (JFTC recommendation decision, September 3, 1998).

B. Company A was the only entrepreneur in Japan producing glass tubes as raw materials for ampoules, which is used as a container of injection solution. It is essential for companies manufacturing ampoules by processing the glass tubes for ampoules and distributing the ampoules (ampoule processors) to use Company A's glass tubes as the users of ampoules; pharmaceutical companies preferred ampoules made using Company A's glass tubes. Under such circumstances, Company X, the only company supplied with Company A's products in Western Japan, intended to halt the continuation or expansion of trade of imported glass tubes by Company Group Y, which purchased imported glass tubes along with those from Company A for processing them into ampoules and selling them to pharmaceutical companies etc. and to enforce sanctions against Company Group Y for such conduct, by a) calling for a shortened term of promissory notes, price increase, and total abolition of the special price discount only to Company Group Y; b) refusing to supply to Company Group Y the same type of glass tubes as those imported by Company Group Y; and c) expressing its intention to terminate transactions with Company Group Y, unless Company Group Y accepted cash settlement or furnished security for its debts to Company X generated from purchases. Such conduct by Company X was deemed to exclude the business activities of company group Y in dealing with imported glass tubes and to exclude the business activities of the foreign glass tube manufacturers, which competed with Company X (JFTC hearing decision, June 5, 2006).

C. Company X was the Japanese subsidiary of Company A, which engaged in

manufacturing and distributing CPUs, and distributed CPUs manufactured by Company A in Japan. Company A's CPUs, which Company X had sold, made up a substantial percentage (approximately 89%) of all CPUs distributed in Japan and had a strong brand value. Under these circumstances, Company X promised to offer rebates or financial support to the five PC manufactures in Japan (which held approximately 77% share of the total CPUs distributed in Japan) that purchased CPUs for the manufacturing and distribution of PCs, on the following conditions: a) The proportion of Company A's CPUs used in the PCs manufactured and distributed would approach 100%, and the five PC manufactures would not use competitors' CPUs; b) the said proportion would be maintained at 90%, with competitors' CPUs at 10%; or c) they would refrain from incorporating the CPUs of Company Y's competitors into PCs in more than one series with a large amount of production volume relative to others. Such conduct by Company X was deemed to induce the five PC manufactures to refrain from incorporating the competitors' CPUs and to exclude the business activities of the competitors in distributing CPUs to them (JFTC recommendation decision, April 13, 2005).

4. Tying

(1) Conduct that may fall under Exclusionary Conduct

Adding new value by offering multiple products tied or integrated together to the trade partners is a method of technological innovation and sales promotion. Therefore, such conduct in itself does not immediately fall under Exclusionary Conduct.

However, where an entrepreneur supplies one product (tying product) only on the condition that the trade partners also purchase another product (tied product) may cause difficulty in the business activities of competitors who are unable to easily find alternative trade partners in the market of the tied product, and therefore may undermine competition in the market of the tied product. Thus, supplying (or purchasing) only on the condition that the trade partners also purchase (or supply) another product (hereinafter referred to as "Tying") may fall under Exclusionary Conduct (Note 15).

Assessment over whether or not the product required to purchase on condition for the supply of a product is deemed to be "another product" is made from the viewpoint of whether or not each of the combined product has a distinctive character and is traded independently. Specifically, comprehensive consideration

is given to the respective products in terms of factors such as whether the users are different from each other, whether the contents and functions are different from each other (including whether the contents and functions of the combined products differ substantially from those of each product before combination), and whether the users can separately purchase each of them (including whether each of the combined products is normally sold or used as a single unit). For example, in case that a cellular phone integrates a digital camera into itself, the contents and functions of the cellular phone with a digital camera will be substantially changed when compared to those of a cellular phone or a digital camera that are sold separately, and therefore, the cellular phone with a digital camera can be regarded as a single product with distinct functions. In this case, the product—digital camera—that the trade partners are required to purchase under the condition for the trade is not deemed to be “another product.”

Even if the tying and the tied products supplied by the alleged entrepreneur can be purchased separately, or if the quantity of the tying product offered separately from the tied product is small, and many users consequently will purchase the tied and the tying products together, it is deemed to substantially make the trade partners purchase another product. In addition, when the price of the product combined together is lower than the sum of the prices of the tying product and tied product, thereby attracting more users, it is also deemed to substantially make the trade partners purchase another product. (Note 16)

(Note 15) Tying includes such conduct that an entrepreneur supplies one product only on the condition that the trade partners also supply another product and that an entrepreneur purchases a product only on the condition that the trade partners purchase another product.

In addition, Tying includes such conduct that an entrepreneur supplies a product only on the condition that the trade partners purchase a particular product in the market of supplementary products—so-called aftermarket—that will be needed after the product is purchased.

(Note 16) With respect to offering a discount for the tying and the tied products supplied in combination, there are cases where such conduct leads to competition regarding the combined product (a package of the tying and the tied products) between the alleged entrepreneur and its competitors in the market of the tied product. For example, this includes the case where a

competitor in the market of the tied product has actually been supplying, or it can supply without particular additional costs, a product that is equal in quality and brand value to that of the tying product of the alleged entrepreneur. In such a case, assessment over whether or not such conduct against the said competitor falls under Exclusionary Conduct is made from the viewpoint of “Below-cost Pricing” (in 2 above).

(2) Factors for assessment

Where Tying causes difficulty in the business activities of competitors who are unable to easily find alternative trade partners in the market of the tied product, the said conduct is regarded as Exclusionary Conduct. The JFTC will comprehensively consider the following factors to assess whether or not such conduct would cause difficulty in the business activities of competitors who are unable to easily find alternative trade partners in the market of the tied product.

A. Conditions of the entire market of the tying and the tied products

When assessment is made over whether or not Tying falls under Exclusionary Conduct, consideration is given to factors concerning conditions of the entire market of the tying and the tied products, such as degree of market concentration, characteristics of the products, economies of scale, degree of differentiation of the products, distribution channels, dynamics of the market, and difficulty of market entry.

For example, where the tied product is not differentiated in the market, it would be more likely that purchases of tied product from the alleged entrepreneur may prevent competitors’ tied products from being purchased. Therefore, such a case would be more likely to be deemed to cause difficulty in the business activities of competitors who are unable to easily find alternative trade partners in the market of the tied product.

B. Position of the said entrepreneur in the market of the tying product

When assessment is made over whether or not Tying falls under Exclusionary Conduct, consideration is given to factors concerning position of the said entrepreneur in the market of the tying product, such as the share of the tying product, its ranking, brand value of the tying product, excess supply capacity, and scale of operation.

For example, where the entrepreneur has a large share of the tying product,

more tied products from the entrepreneur would be more likely to be supplied through tying than when the entrepreneur's share is not large. Therefore, such a case would be more likely to be deemed to cause difficulty in the business activities of competitors who are unable to easily find alternative trade partners in the market of the tied product.

C. Positions of the said entrepreneur and its competitors in the market of the tied product

When assessment is made over whether or not Tying falls under Exclusionary Conduct, consideration is given to factors concerning positions of the said entrepreneur and its competitors in the market of the tied product, such as the share of the tied product, their ranking, brand value of the tied product, excess supply capacity, and scale of operations.

For example, where the entrepreneur is deemed to have large excess supply capacity for the tied product, the quantity of trade of the tied products supplied through tying is less likely to be limited. Therefore, such a case would be more likely to be deemed to cause difficulty in the business activities of competitors who are unable to easily find alternative trade partners in the market of the tied product.

D. Period of the conduct, number of the trade partners, and quantity of transaction

When assessment is made over whether or not Tying falls under Exclusionary Conduct, consideration is given to factors such as the length of period during which tying has been implemented, the number of counterparties for whom the tying is intended, and the quantity of trade.

For example, where Tying has been implemented over a long period or where the number of counterparties, which the tying is related to, is large, such a case would be more likely to be deemed to cause difficulty in the business activities of competitors who are unable to easily find alternative trade partners in the market of the tied product.

E. Conditions of the conduct

When assessment is made over whether or not Tying falls under Exclusionary Conduct, consideration is given to factors concerning conditions of the conduct, such as the price of the products tied together, condition for the

tying, and the degree of forcing by the condition for Tying, and intent and purpose of the entrepreneur.

For example, even when products combined through tying permit the removal or reverse of the tied product without damaging the functions of the tying product, if the said removal or disabling requires a large cost or time, more users are expected to use the tied product as is. Therefore, such a case would be more likely to be deemed to cause difficulty in the business activities of competitors who are unable to easily find alternative trade partners in the market of the tied product.

(3) Reference examples

- A. Company X was an entrepreneur engaging in business related to development and licensing of PC software. The spreadsheet software of Company X and word processing software of Company Y had the largest shares in their respective markets. Company X feared that distribution of PCs equipped with only the word processing software of its competitor, Company Y, would seriously interfere with Company X's activities for increasing the market share of its word processing software, and it made entrepreneurs engaging in manufacturing and distribution of PCs accept contracts under which both the spreadsheet software and word processing software of Company X were to be installed in their PCs. Because of this contract, the said entrepreneurs sold PCs incorporating both the spreadsheet software and word processing software of Company X and, consequently, the share of Company X's word-processing software increased and became the largest in the market. Such conduct by Company X was deemed to fall under (10) of the Designation of Unfair Trade Practices (JFTC Public Notice No. 15 of 1982) and to violate the provisions of Article 19 of the Antimonopoly Act (JFTC recommendation decision, December 14, 1998).
- B. Company X was a subsidiary of Company A, which manufactured and distributed elevators. Company X engaged mainly in the maintenance of elevators manufactured by Company A and was the sole distributor of components of elevators manufactured by Company A. Company B owned buildings equipped with elevators manufactured by Company A and concluded a maintenance contract with regard to the said elevators with an independent maintenance Company Y. Company B ordered particular

components of elevators manufactured by Company A from Company X because it was necessary to replace the components in order to repair the elevators. Company X a) responded that it would not sell only the components; would not accept the order unless Company B also would order Company X a service for replacement, repair, and adjustment related to the components; and would deliver the components three months later and b) did not supply the components to Company B although the order for the components was made again later. Such conduct by Company X was deemed to fall under (10) of the Designation of Unfair Trade Practices (JFTC Public Notice No.15 of 1982) and to violate the provisions of Article 19 of the Antimonopoly Act (Osaka High Court Judgment, July 30, 1993).

5. Refusal to Supply and Discriminatory Treatment

(1) Conduct that may fall under Exclusionary Conduct

An entrepreneur basically has the discretion to select to whom and on what conditions it supplies products. Accordingly, if an entrepreneur independently selects a party to whom the product is supplied and determines the conditions for supply in consideration of the details and results of transactions for supply to the trading customers (including entrants intending to be supplied with the products; the same shall apply hereinafter), it does not fall under Exclusionary Conduct in principle.

However, if an entrepreneur carries out, beyond reasonable degree, refusal to supply, imposing restriction on the quantity or contents, or applies discriminatory treatment to the condition or implementation of supply in the upstream market (hereinafter referred to as “Refusals”) concerning a product necessary for the trading customers to carry out business activities in the downstream market, such conduct may cause difficulty in the business activities in the downstream market of the trading customers who are unable to easily find an alternative supplier in the upstream market, and may undermine competition in the downstream market. Thus, carrying out Refusals, beyond reasonable degree, concerning a product necessary for the trading customers to carry out business activities in the downstream market (hereinafter referred to as “Refusal to Supply and Discriminatory Treatment”) may fall under Exclusionary Conduct (Notes 17 and 18).

Whether or not a product in the upstream market can be considered to be “a product necessary for the trading customers to carry out business activities in the

downstream market” will be assessed from the viewpoint of whether or not a) the product is an unsubstitutable and indispensable product for the trading customers to carry out business activities in the downstream market and b) it is impossible in reality for the trading customers to produce the product through the trading customer’s own effort, such as investment and technological development. In an area of business where the economies of scale or network effects work strongly, there are some cases where organizations with facilities, the right of use of which was exclusively assigned by the nation or other public entities, were privatized. In such a case, if other entrepreneurs cannot use the organizations’ facilities, it may be often difficult for them to carry out the business activities in the downstream market. As a result, it is considered that services for the use of those facilities may often fall under “a product necessary for the trading customers to carry out business activities in the downstream market.”

Whether or not the Refusals goes “beyond reasonable degree” will be concretely assessed from the viewpoint of the details and results of transactions for supply and any differences in the relationship between supply and demand according to region. For example, if the price of products that an entrepreneur supplies to some trading customers in the upstream market is significantly low, exceeding the appropriate differences in the costs depending on the difference in trading volume between purchasing entrepreneurs, such price difference will be deemed to go beyond reasonable degree. Meanwhile, for example, if the settlement conditions, delivery conditions, and other supply conditions for an entrepreneur who has supplied products in the upstream market for a long time are different from those for another entrepreneur who is going to be newly supplied, although they are appropriately based on differences in past results, such difference in conditions in treatment would not be deemed to go beyond reasonable degree.

In principle, the selection of purchasers and the establishment of supply conditions independently made by an entrepreneur should be respected as discretion of the entrepreneur. Accordingly, whether or not Refusal to Supply and Discriminatory Treatment by a single entrepreneur falls under Exclusionary Conduct should be assessed especially prudently.

(Note 17) There are cases where an entrepreneur in the upstream market who supplies products that are necessary for carrying out business activities in

the downstream market and also carries out business activities in the downstream market. In this case, whether or not the conduct of setting a price of its product in the upstream market at a level higher than that in the downstream market or setting a price that are so close as to interfere with the trading customers from countering by economically reasonable business activities (so-called margin squeeze) falls under Exclusionary Conduct will be determined from the same viewpoint as Refusal to Supply and Discriminatory Treatment.

(Note 18) For example, if an entrepreneur, who engages in wholesale business or retail business in the downstream market and has distribution channels such as a sales network, which is indispensable for selling products in the downstream market, refuses to purchase from a manufacturer or treats a manufacturer discriminately beyond reasonable degree in the upstream market, there are cases that the manufacturer has difficulty in establishing a new distribution channel in the downstream market in reality. In such cases, whether or not the entrepreneur's conduct in the downstream market falls under Exclusionary Conduct will be determined from the same viewpoint as Refusal to Supply and Discriminatory Treatment.

(2) Factors for assessment

Where Refusal to Supply and Discriminatory Treatment would cause difficulty in the business activities of the trading customers who are unable to easily find an alternative supplier in the upstream market, the said conduct is regarded as Exclusionary Conduct. The JFTC will comprehensively consider the following factors to assess whether or not such conduct would cause difficulty in the business activities of the trading customers who are unable to easily find an alternative supplier in the upstream market.

A. Entire conditions of the upstream market and the downstream market

When assessment is made over whether or not Refusal to Supply and Discriminatory Treatment fall under Exclusionary Conduct, consideration is given to factors concerning entire conditions of the upstream market and the downstream market, such as degree of market concentration, the characteristics of the products, economies of scale, the degree of differentiation of products, distribution channels, dynamics of the market, and

difficulty in entry into the upstream and downstream markets.

For example, where the upstream market is a highly oligopolistic market with a high degree of market concentration, the trading customers will not easily find an alternative supplier in the upstream market. The supply of products by the entrepreneur in the upstream market will, therefore, be more critical for the business activities of the trading customers. Accordingly, such a case would be more likely to be deemed to cause difficulty in the business activities of the trading customers who are unable to easily find an alternative supplier in the upstream market.

B. Positions of the said entrepreneur and its competitors in the upstream market

When assessment is made over whether or not Refusal to Supply and Discriminatory Treatment fall under Exclusionary Conduct, consideration is given to factors concerning positions of the said entrepreneur and its competitors in the upstream market, such as the market share of products, the rankings, brand value of the product, excess supply capacity, and business sizes of the trading customers and its competitors in the upstream market.

For example, where the products of an entrepreneur have strong brand value in the upstream market, the trading customers will not easily find an alternative supplier in the upstream market. The supply of products by the entrepreneur in the upstream market will, therefore, be more critical for the trading customers. In this case, if the business sizes of the entrepreneur's competitors are small and their excess supply capacities of the product are limited, the importance of the entrepreneur will increase further. Accordingly, such a case would be more likely to be deemed to cause difficulty in the business activities of the trading customers who are unable to easily find an alternative supplier in the upstream market.

C. Positions of the trading customers in the downstream market

When assessment is made over whether or not Refusal to Supply and Discriminatory Treatment falls under Exclusionary Conduct, consideration is given to factors concerning positions of the trading customers in the downstream market, such as the market share of products, the rankings, brand value of the product, excess supply capacity, and business sizes of the trading customers in the downstream market.

For example, if the product of the trading customers has a large share and a

very strong brand value in the downstream market, the trading customers will not easily find an alternative supplier in the upstream market. In this case, the supply of products by the entrepreneur in the upstream market will be less critical to the business activities of the trading customers. Accordingly, such a case would be more unlikely to be deemed to cause difficulty in the business activities of the trading customers who are unable to easily find an alternative supplier in the upstream market.

D. Period of the conduct

When assessment is made over whether or not Refusal to Supply and Discriminatory Treatment falls under Exclusionary Conduct, consideration is given to factors such as the period of Refusal to Supply and Discriminatory Treatment.

For example, if the Refusal to Supply and Discriminatory Treatment occurs over a long period, such a case would be more likely to be deemed to cause difficulty in the business activities of the trading customers who are unable to easily find an alternative supplier in the upstream market.

E. Conditions of the conduct

When assessment is made over whether or not Refusal to Supply and Discriminatory Treatment fall under Exclusionary Conduct, consideration is given to factors concerning conditions of the conduct, such as the prices of the products of an entrepreneur in the upstream market, the conditions and details of transactions with a trading customer, and the intention and purpose of the entrepreneur.

For example, if the prices of products in the upstream market that an entrepreneur supplies to some trading customers are set at a higher level than those for other trading customers, going beyond reasonable degree, on the basis of differences in the details of supply and other conditions, those trading customers will have to increase the price of their products in the downstream market because the purchasing costs will be higher for them. In this case, particularly when the purchasing costs for those trading customers is higher than the selling price of the products sold by other trading customers in the downstream market or the selling price of the product sold by the alleged entrepreneur in the downstream market, if the entrepreneur itself sell it there, it is considered that those trading customers cannot compete with other trading

customers (or the alleged entrepreneur) through economically reasonable business activities. Accordingly, such a case would be more likely to be deemed to cause difficulty in the business activities of the trading customers who are unable to easily find an alternative supplier in the upstream market.

(3) Illustrative examples

A. Ten companies including Company X owned numerous patent rights for the manufacture of pachinko machine (pachinko is a popular Japanese pinball game) and, at the same time, distributed almost all of the pachinko machines in Japan. The ten companies including Company X outsourced the management of their owned patent rights to Company Y and substantially participated in the decision making on granting a license of patented inventions for pachinko and pachislot. The patented inventions owned or managed by Company Y were important rights for the manufacture of pachinko machines. Under the circumstances, it was difficult to manufacture pachinko machines without being granted a license of the patented inventions. On the basis of a policy of preventing new entry into the pachinko machine manufacturing market (downstream market), the ten companies including Company X and Company Y attempted to accumulate patented inventions owned or managed by Company Y and made it impossible for persons who intended to enter the market to commence the manufacture of pachinko machines by refusing to grant a license of the patented inventions to anyone other than the existing pachinko manufacturers in the market, pertaining to licensing the patented inventions (upstream market). As a result, such conduct by the ten companies including Company X and Company Y was deemed to exclude the business activities of entrepreneurs who intended to manufacture pachinko machines (JFTC recommendation decision, August 6, 1997).

B. Company X was engaged in the regional telecommunications business in eastern Japan and had an extremely large market share in almost all areas of eastern Japan in terms of the volume of holdings of subscriber optical fiber facilities, which was indispensable for providing optical fiber telecommunications services, and in terms of the number of optical fiber telecommunications to the home (FTTH services). Therefore, it was extremely important for those who had no subscriber optical fiber equipment to connect with the subscriber optical fiber equipment owned by Company X

in the subscriber optical fiber equipment connection market (upstream market) to provide services in the FTTH service market (downstream market). Under the circumstances, Company X provided FTTH services at a price of the user fee, which was lower than the connection fee paid to Company X by other telecommunications carriers. Therefore, in order to win users, other telecommunications carriers had to set a user fee that could counter against the user fee of Company X while paying Company X the connection fee; further, the other telecommunications carriers would be forced to suffer a large deficit, because it would generate negative margins. It has virtually become extremely difficult for other telecommunications carriers to enter the FTTH service business. Such conduct by Company X was deemed to exclude the business activities of other telecommunications carriers who intended to connect the subscriber optical fiber equipment owned by Company X and provide FTTH services (Tokyo High Court Judgment May 29, 2009).

Part III Substantial Restraint of Competition in Any Particular Field of Trade

1. A Particular Field of Trade

(1) Basic view

Whether or not the Exclusionary Conduct described in Part II above falls under Exclusionary Private Monopolization is assessed from the viewpoint of the influence that the alleged conduct has on the competition in a particular field of trade.

In this case, a particular field of trade means the scope where the Exclusionary Conduct causes a substantial restraint of competition. The scope is relatively decided depending on factors such as the objects, regions, and conditions of the conduct and trade. Accordingly, it is in principle, like the unreasonable restraint of trade, that the JFTC will assess the scope influenced by the related trade depending on factors such as the objects, regions, and conditions of the conduct and trade and determine the scope where competition is substantially restrained.

Exclusionary Private Monopolization is often committed by a single entrepreneur. In addition, there are various types of Exclusionary Conduct. There are cases where multiple acts could be committed as Exclusionary Conduct. Therefore, to determine a particular field of trade pertaining to Exclusionary Private Monopolization, at the time of assessing the scope influenced by the trade pertaining to Exclusionary Conduct, the JFTC will consider the scope of products (in (2) below) that substitute for the traded products (Note 19) or the geographical

scope (in (3) below) for users (or suppliers), as necessary.

(Note 19) The traded products refer to the tied products when the Exclusionary Conduct falls under “Tying” (in 4 of Part II above), and refer to the products in the downstream market when the Exclusionary Conduct falls under “Refusal to Supply and Discriminatory Treatment” (in 5 of Part II above).

(2) Scope of products

The scope of products is determined mainly from the viewpoint of the substitutability of products for users. The degree of the substitutability of products for users often corresponds to the degree of similarity of utility of the products, and the scope of products is often determined from the degree of similarity of utility of the products.

In addition, when the scope of products is determined, besides the degree of the substitutability of products for users, if necessary, the JFTC would consider whether suppliers are able to switch the manufacture and sale of one product to another within a short period of time without substantial added cost and risk.

Assessing the degree of similarity of a product’s utility for users, the JFTC will consider the following factors.

A. Usage

Consideration is given to whether or not a product is, or has the potential to be, used in the same manner as the traded product.

To determine whether both, a product and the traded product, are used in the same manner, the following factors are considered: external features such as size and form; specific material characteristics such as strength, plasticity, heat resistance, and insulation; quality such as purity; and technological characteristics such as standards and systems. (However, even if these characteristics differ to a certain extent, both products might be considered to have the same usage.)

Where the traded product is used in several ways, each usage is examined to determine whether any other products are, or have the potential to be, used in the same manner.

B. Changes in price, quantity, etc.

Differences in the level of prices or changes in price and quantity may be considered.

For example, there are cases where the traded product (Product X) is not deemed to have similar utility as that of another product (Product Y), because Product Y is rarely used as a substitute for Product X owing to a significant price difference between Products X and Y or costs that are involved in substituting Product Y for Product X to change the facilities or train employees despite no price difference between Products X and Y.

In addition, it is deemed that Product X has similar utility as that of product Y, in such a case that the sales volume of Product Y increases or the price of Product Y rises as a result of users' purchasing Product Y as a substitute for Product X, if the price of Product X rises.

C. Recognition and behavior of users

The recognition and behavior of users may be considered.

For example, there are cases where, even though the specific material characteristics of Product X (the traded product) and Product Y are different, Products X and Y are deemed to provide similar utility since there could be a case in which users use either of them as raw materials to produce Product Z.

In addition, there are instances where, when the price of the traded product was increased in the past, it could be taken into account whether users used another product as a substitute for the traded product.

(3) Geographical scope

The geographical scope, the same as the scope of products, is determined mainly from the viewpoint of the substitutability of products for users in each area. The substitutability of products can often be determined depending on the behavior of users and suppliers and the presence of problems regarding the transportation of the product.

The JFTC will consider the following factors to assess the behavior of users and suppliers and the presence of problems regarding the transportation of the product.

A. Business area of suppliers and area for the users to purchase

With regard to the range of the region in which users can normally purchase the product, consideration is given to factors such as the area around which users purchase the product (such as the purchasing behavior of consumers), the

business area such as the distribution network of suppliers, and their supply capacity.

Consideration may be also given to the region in which the users purchased the product when the price of the product in a certain region was increased in the past.

B. Characteristics of products

Features of products, such as perishability, heaviness, and fragility, affect the scope of transportation or the degree of difficulty in transporting the products.

C. Means and cost of transport

Consideration is given to factors such as the modes of transportation, the ratio of the transportation cost to the price of products, and whether the transportation cost is larger than the regional price difference in order to assess the range of region in which users can normally purchase the product.

2. Substantial Restraint of Competition

(1) Basic view

With regard to the definition of “substantially to restrain competition in any particular field of trade,” which is provided for in Article 2 (5) of the Antimonopoly Act, the appealed court held that this is interpreted to mean establishing, maintaining, or strengthening the state in which a certain entrepreneur or a certain group of entrepreneurs can control the market at will by being, to some extent, free to influence price, quality, quantity, and other various conditions after competition itself has lessened (Tokyo High Court Judgment May 29, 2009).

If the state of market control by such means is established, maintained, or strengthened, it is deemed that competition is substantially restrained, even in the case where the prices are not increased in reality.

(2) Factors for assessment

The JFTC will not rely on a certain specific criteria but comprehensively consider the following factors on a case-by-case basis to assess whether or not competition is substantially restrained (Note 20).

A. Position of the alleged entrepreneur and the conditions of the competitors

(A) Market share (Note 21) and its ranking of the said entrepreneur

Where the alleged supplier has a larger market share and its ranking is higher, it is less easy for its competitors to supply products sufficiently in place of the supplier when the supplier increases price of the traded products. Thus, in such a case that the supplier has the top ranking with a large market share or a case that the gap between the market shares of the supplier and its competitor is wide, it would be more likely to conclude that competition is substantially restrained since the ability of the competitors to constrain the supplier's price increase deems to be weaker.

In particular, if these circumstances have continued from the past and are not expected to easily change in the future, it would be more likely to be deemed to cause a substantial restraint of competition.

(B) Conditions of competition in the market

Where the circumstances that robust competition has so far been made between the alleged entrepreneur and an excluded entrepreneur are deemed to cause price decrease or the improvement of product quality or variety in the entire market, it would be more likely to be deemed to cause a substantial restraint of competition.

Where a market share concentrates on a few leading entrepreneurs as a result of Exclusionary Conduct, it would be more likely to be deemed to cause a substantial restraint of competition, because they tend to take coordinated conduct as they would mostly come to share common interests.

(C) Conditions of the competitors

Where Exclusionary Conduct makes it difficult for competitors to sell products superior in price and quality or competitors with high business capability to take competitive actions in the market, such as abilities to procure raw materials, technical capabilities, marketing capabilities, creditworthiness, brand value, and advertising capabilities, it would be more likely to be deemed to cause a substantial restraint of competition.

Where the excess supply capacities of competitors are not sufficient, the abilities of the competitors to constraint the said entrepreneurs' price increase may not work better than otherwise. Therefore, it would be more likely to be deemed to cause a substantial restraint of competition.

B. Potential competitive pressure

Generally, where market entry is not easy, and it is less likely that a new competitor enters the market within a certain period in case that the alleged entrepreneur increases the price of the traded product, the said entrepreneur could be, to some extent, free to influence price and other conditions. Therefore, it would be more likely to be deemed to cause a substantial restraint of competition.

With regard to whether or not potential competitive pressure works sufficiently, the JFTC will comprehensively consider the following factors to assess whether or not the possibility of entry by another competitor within a certain period can be a factor preventing the said entrepreneur from becoming, to some extent, free to influence price and other conditions of the traded products (Note 22).

(A) Degree of institutional entry barriers

Where regulations based on legislations serve as an entry barrier, potential competitive pressure is unlikely to work, because the entry will not be possible even if the said entrepreneur increases the price of the traded products.

(B) Degree of entry barriers in practice

When the scale of capital necessary for entry is large, and an entrant is under less advantageous conditions than those for existing entrepreneurs in terms of location, technical issues, conditions of purchasing raw materials, or sales conditions, potential competitive pressure is unlikely to work.

(C) Degree of substitutability between the entrant's and the entrepreneur's products

Where substitutability between the entrant's product and the entrepreneur's product is high because it is not considered that users can purchase and use the entrant's product without hesitation, potential competitive pressure is likely to work.

Meanwhile, where it is difficult for the entrant to produce and distribute product with a quality and variety equivalent to those of the entrepreneur's product, or where users do not purchase the entrant's product, potential

competitive pressure would be unlikely to work because they are familiar with the product that is usually used.

C. Users' countervailing bargaining power

Where users do not have the countervailing bargaining power against the alleged entrepreneur for such circumstances that it is difficult for users to switch the suppliers, it would be more likely to be deemed to cause a substantial restraint of competition, because the said entrepreneur becomes, to some extent, free to influence price and other conditions.

Meanwhile, where users' price bargaining powers are strong in terms of the means of their procuring the product, the dispersion of suppliers, and ease of switching, such circumstances where users easily switch the suppliers or where users acquire price bargaining powers by indicating the possibility of switching the suppliers, this power becomes the factor to interfere the entrepreneur from becoming, to some extent, free to influence price and other conditions. Thus, it would more unlikely to be deemed to cause a substantial restraint of competition.

D. Efficiency

Where the alleged entrepreneur is expected to take competitive actions owing to the improvement of productivity, technological innovation, and the improvement of the efficiency of business activities—which are caused by the economics of scale, integration of production facilities, specialization of facilities, reduction of transportation costs, and improvement of the efficiency of research and development systems that are incidental to Exclusionary Conduct of the said entrepreneur, such circumstances may be taken into account to assess whether or not competition is substantially restrained.

In such a case, the efficiency improvements will be taken into account when (i) it is deemed that efficiency improves as effects specific to the conduct, and it cannot be achieved by other means that are less restrictive on competition and (ii) it is deemed that outcomes such as a decline in the prices of products, an improvement of product's quality, and a supply of new products are returned to users due to the said improvement of efficiency, and the welfare of users is improved.

For example, a situation is conceivable where, in the case of Tying, the economics of scale works in the tied products, and the demand for the tied

products cannot be increased by means other than selling the tied products together with the tying products. In this situation, where the supply of the tied products deems to be increased, resulting in supplying the products to users at the lower price, and improving users' welfare according to promoting competition in the market, the JFTC will consider such circumstances to assess whether or not competition is substantially restrained.

However, where Exclusionary Conduct causes monopoly or monopolistic situation, it would be normally concluded that competition is substantially restrained.

E. Extraordinary circumstances to assure consumer interests

Where Exclusionary Conduct with justifiable reasons such as safety and health assures the interests of general consumers and promotes the democratic and wholesome development of the national economy, such circumstances may be exceptionally taken into account to assess whether or not competition is substantially restrained. Namely, if there are extraordinary circumstances that can be supported in view of the purpose of promoting fair and free trade to support the democratic and wholesome development of the national economy as well as to assure the interests of general consumer, as provided in Article 1 of the Antimonopoly Act, the said conduct may not fulfill the requirement of "substantial restraint of competition" (Note 23).

For example, in such a case that a gas equipment sales company with approximately 50% market share in a region sells its gas equipment with an imperfect combustion prevention device to someone who uses gas equipments without the device at a price lower than the cost required for its supply in order to stimulate replacement demands for gas equipments with the devices from a viewpoint of the prevention of serious accidents caused by carbon monoxide poisoning, it is considered that the conduct is based on the purpose of preventing serious accidents before happens; further, it is considered that it serves the interests of general consumers and that its influence on competition would be more likely to be limited. Therefore, the JFTC will consider such circumstances to assess whether or not competition is substantially restrained.

However, where Exclusionary Conduct causes monopoly or monopolistic situation, it would be normally concluded that competition is substantially restrained.

(Note 20) When the Exclusionary Conduct falls under “Refusal to Supply and Discriminatory Treatment” (in 5 of Part II above), the existence or nonexistence of a substantial restraint of competition will be assessed based on whether or not the state of market control are established, maintained, or strengthened in the downstream market. Therefore, each factor will be assessed mainly in terms of the trading customers and their competitors in the downstream market.

(Note 21) “Market shares” are based on the percentage of the quantity of the products of each entrepreneur to the quantity of traded products in any particular field of trade. However, in the case where the use of the quantity of the products in calculation of the market share is not appropriate, such as the case where it is deemed that there is a large difference in the price of the products and the practice that the price of the products is used to calculate the outcomes of supply takes root, market shares will be calculated based on turnover.

If multiple entrepreneurs combined or conspired with each other, the market share herein refers to the sum of the market shares of products supplied by the respective entrepreneurs involved.

(Note 22) With regard to Exclusionary Conduct by “Below-cost Pricing” (in 2 of Part II above), there is a case where even if the alleged entrepreneur increases price of the traded products, the entry of a competitor who has the ability to constrain against it could be realistically expected within a short period of time, because there are almost no entry barriers due to regulations based on legislations, or conditions such as locations, technical issues, and conditions of purchasing raw materials. In such a case, it would not be concluded that competition is substantially restrained.

(Note 23) With respect to the position of the purpose provision stipulated in Article 1 of the Antimonopoly Act, the Supreme Court provided the interpretation of “contrary to the public interest” stipulated in Article 2 (6) of the Antimonopoly Act as follows:

In principle, “contrary to the public interest” refers to infringement of free competitive economic order, which is the interest directly provided by the Antimonopoly Act. Nevertheless, there could be an exceptional situation

where it is deemed that, even though a certain entrepreneur's conduct might be superficially contrary to the free competitive economic order, they could not substantially infringe ultimate purpose of the Act as "to promote the democratic and wholesome development of the national economy as well as to assure the interest of general consumers," after the interest protected by the said conduct were weighed against the interest protected by the Act. It should be interpreted that the provision, "contrary to the public interest," means to exclude this exceptional situation from the conduct of "unreasonable restraint of trade" stipulated in Article 2 (6) (Supreme Court judgment, February 24, 1984).