

GUIDELINES CONCERNING ABUSE OF A DOMINANT BARGAINING POSITION IN SERVICE TRANSACTIONS UNDER THE ANTIMONOPOLY ACT

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Fair Trade Commission

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Introduction

With the recent growth of the software and service industries, the service sector has assumed a greater weight within the Japanese economy, and not only transactions involving commodities such as parts and products, but also service transactions are now increasingly common among firms. In particular, with the activation of so-called outsourcing (the contracting-out of internal operations), service transactions, the specifications and other details which are decided based on the instructions of a business (hereinafter referred to as the “contracting party”) entrusting the provision of services (hereinafter referred to as “service transactions”), have become important.

In accordance with the increasing globalization of economic activity and enhancement of Japan’s international status, and under increased need to enrich national life, the Fair Trade Commission has prepared and issued Guidelines Concerning Distribution Systems and Business Practices under the Antimonopoly Act (on July 11, 1991 by the General Secretariat of the Fair Trade Commission, hereinafter referred to as “Guidelines Concerning Distribution Systems and Business Practices”) on practices concerning distribution systems and business transactions of Japan, in a bid to prevent firms and trade associations from violating the Antimonopoly Act by clarifying specifically what acts may impede fair and free competition and conflict with the Antimonopoly Act. This has been done with recognition of the need for further assurance of the interests of consumers and for making Japanese market more internationally open.

The Guidelines Concerning Distributions Systems and Business Practices provide guidance for transactions among firms under the Antimonopoly Act, mainly keeping in mind transactions involving producer goods and capital goods between producers and consumers and transactions in the distribution process in which consumer goods reach their consumers, and provided that the same guidance basically applies to service transactions.

However, service transactions among firms include not only service transactions for transport

and building maintenance, fulfillment of the duty for which is completed when a business contracted with the provision of services (hereinafter referred to as “contracted party”) has provided the services, but also service transactions for software development and the production of television programs, etc., fulfillment of the duty for which is completed when the contracted party has delivered the product derived from the provision of services (hereinafter referred to as “information product”)(NOTE 1). The importance of the latter service transactions has recently risen (NOTE 2). The details of the information product for a transaction are not normally determined at the time of contracting for such transaction and the contracting party may therefore occasionally request the contracted party to “redo” the provided information product. Accordingly, there are cases when the guidance based on the Guidelines Concerning Distribution Systems and Business Practice may not be applied directly.

In accordance with the growth of the software and service industries and the progress in the deregulation of government regulations, meaning that making Japanese market more open and promoting fair and free competition have become important for service transactions among firms. The purpose of these Guidelines is to serve to prevent acts by firms that violate the Antimonopoly Act and proper business activities by clarifying what conducts cause a problem under the Antimonopoly Act. The Guidelines do this chiefly from the viewpoint of controlling the abuse of a dominant bargaining position, in the light of the results of the above investigation and examination and the guidance based on the Guidelines Concerning Distribution Systems and Business Practice (NOTE 3).

The Fair Trade Commission publicized “Guidelines Concerning Abuse of a Dominant Bargaining Position in Service Transactions under the Antimonopoly Act” on March 17, 1998. However, in accordance with the rapid expansion of a society based on information and communication technology, the importance on the transactions over such information activities as computer software and media contents including pictures and music is growing. In these circumstances, because of a special need to publish the interpretation on the principles of the Antimonopoly Act with regard to the unilateral treatment related to the right of these products and of the necessary amendment related to the recent modification of the Act Against Delay in Payment of Subcontract Proceeds, etc. to Subcontractors (hereinafter referred to as “Subcontract Act”) which broadened its scope to include entrustment of service provision and creation of information product, hereby the Fair Trade Commission decided to amend the Guidelines (NOTE 4).

(NOTE 1) Information product is either of the followings:

{1} Computer program (a set of instruction for computer aims to create fixed output),

- e.g.) Video game software, Accounting software, Control program for home appliances,
Consumer management software
- {2} Movies, broadcasting programs and other product contains picture, audio and other
sound effect,
e.g.) Broadcast program, TV advertisement, radio program, radio advertisement, movie,
animation
- {3} Product that consists of character, figure, symbol and these combination and coloring
combined, and
e.g.) plan for buildings, design of posters, products and containers, consultation reports,
magazine advertisement

{4} Otherwise stipulated by the Implementing Ordinance of the Subcontract Act.

(NOTE 2) In these Guidelines, the objects of the service transactions which consist of the
entrustment contract for service provision or creation of information product are
collectively called “services.”

(NOTE 3) Whether an act is problematic as the abuse of a dominant bargaining position is
judged for specific individual transactions, taking into consideration whether there is
superiority or inferiority in the trading position of parties to a transaction, and/or whether
a business with a dominant bargaining position causes unjust disadvantage in the light of
normal business practices by taking advantage of said position, therefore, the guidance
based on these Guidelines will not differ by the type of sectors that firms provide services.

(NOTE 4) According to the amendment of the Subcontract Act in June 2003, entrustment of
service provision become the subject of the revised Act and it applies to the transaction of
service between the parent firms based on the capital criteria and their subcontractors.

With regard to the other transactions of services than above, based on the principles
described these Guidelines, Paragraph 14 (abuse of a dominant bargaining position) of the
“Unfair Trade Practice” (General Designation) (Fair Trade Commission Notification No.
15 of 1982) (hereinafter the Paragraph is referred to as “Unfair Trade Practices” unless
otherwise provided) applies.

I. Basic Approach to the Control of the Abuse of a Dominant Bargaining Position

1. In service transactions among firms in Japan, there are cases in which ongoing
transactions take place among specified firms. When a large number of contracting
parties conduct ongoing transactions, the contracted parties tend to find it difficult to
change their customers in general, and, in some cases, different know-how and facilities
and equipment are required for each contracting party in providing services. Therefore,

the contracted party tends to make every effort to maintain the existing business relationship (NOTE 5).

In service transactions such as these, when continuous transactions are carried out, the contracted party finds it difficult to change its customers and the contracting party is in a dominant bargaining position, there is a possibility that the conduct of acts by the said contracting party, which will cause unjust disadvantage to the contracted party with respect to the conditions and execution of transactions in the light of normal business practice, will prevent transactions based on the free and independent judgment of the contracted party, and parties that wish to be contracted based on proper conditions and competitors with said contracting party will be placed in a disadvantageous competitive position.

Such acts are illegal as unfair trade practice (Article 14(abuse of a dominant bargaining position) of the General Designations)

The control of the abuse of a dominant bargaining position under the Antimonopoly Act is to preclude said acts, if there is a possibility that these acts prevent fair competition between the contracting parties or between the contracted parties to the service transaction.

(NOTE 5) The approach to continuous transactions among firms under the Antimonopoly Act is as stated in I-1 (guidance on continuous transactions of producer goods, etc.) of the Guidelines Concerning Distribution Systems and Business Practice, which similarly applies to service transactions.

The act of abuse of a dominant bargaining position is often conducted against the backdrop of continuous business relations, but is occasionally conducted among firms without continuous business relations.

2. A case in which the contracting party has a dominant bargaining position in service transactions with the contracted party is a case in which the contracted party is forced to accept a request from the contracting party that is significantly disadvantageous to the contracted party, because, if it becomes difficult to continue transactions with the contracting party, it will cause serious trouble for the business of the contracted party. In judging a dominant bargaining position, the degree of dependence by the contracted party on the transactions with the contracting party, the contracting party's position in the market, the possibility of the contracted party to change its customers, a difference in the size of the business of the parties to the transactions, and the supply and demand relationship for the services covered by transactions should be taken into overall account.

In addition, the “normal business practice,” which is applied when judging the impropriety of the act of the contracting party, denotes business practice that is endorsed from the standpoint of the maintenance and promotion of public order in the form of fair competition. Therefore, even if the act of the contracting party corresponds with existing business practice, said act cannot be immediately justified for that reason alone.

3. Whether the contracting party and the contracted party enter into transactions on what conditions in the service transactions is basically left to their independent judgment. However, when the contracting party has a dominant bargaining position in transactions over the contracted party, and requests, by taking advantage of its position, that the contracted party accept a postponement of the payment of considerations, a reduction of the amount of proceeds, trade for an extremely low proceeds, a redo, a monetary contributions, .etc., the purchase of commodities, etc., or unilateral treatment of the rights related to the information product, it will likely cause a problem as the abuse of a dominant bargaining position (NOTE 6).

We will show below how to consider these acts from the viewpoint of the control of the abuse of a dominant bargaining position. However, acts that will become a problem as the abuse of a dominant bargaining position are not limited to these acts.

Also, problems with service transactions under the Antimonopoly Act are not limited to problems with the abuse of a dominant bargaining position.

Accordingly, whether any act not included in these Guidelines will pose a problem in view of the Antimonopoly Act, it should be judged individually and specifically in the light of the provisions of the Antimonopoly Act.

(NOTE 6) When details of services, criteria for the evaluation of qualities, or the treatment of rights, etc. related to the information product are not made clear in advance for transactions between the contracting party and the contracted party, it can be easily recognized that these acts are conducted improperly for the contracted party. It is therefore desirable that these matters be made clear in advance, and that a document thereof is delivered to the contracted party at the time of contracting.

4. We show below how firms, which are users of services for transactions with the contracting party, should be considered on the basis of the Antimonopoly Act. When agents or competitor companies (hereinafter referred to “parties engaged in providing the same services as the contracted party”),, by taking advantage of their position as the

contracting party, conducts similar acts against the contracted party, it will essentially be judged to be illegal, based on the same approach as that described above.

With respect to such service transactions at multiple levels, the primary contracted party may shift disadvantage suffered by the contracting party to the secondary contracted party, etc. However, this should not be interpreted such that the act of the contracting party and the primary contracted party will not become a problem as abuse of a dominant bargaining position (NOTE 7).

(NOTE 7) When the primary contracted party is a subsidiary of the contracting party, the approach to considering whether transactions between the contracting party and the primary contracted party are subject to regulate on the basis of unfair trade practices is as stated in Attachment 1 (Transactions Between Parent Company and Subsidiaries) of the Guidelines Concerning Distribution Systems and Business Practice.

II. Acts of Abuse of a Dominant Bargaining Position by the Contracting Party

1. Postponement of payment of consideration

(1) Viewpoint

The contracting party in some cases may pay all or part of the proceeds for services provided after the date of payment set out in an agreement, without a reason for which the contracted party is responsible. Mostly, this delayed payment for proceeds reflects a worsening of the financial situation or a delay in the internal procedures of the contracting party. When the contracting party with a dominant bargaining position does not pay proceeds at the date of payment set out in an agreement without due cause, it will cause the contracted party to suffer unjust disadvantage, and will become a problem as the abuse of a dominant bargaining position.

In addition, not only when proceeds is paid after the date of payment set out in an agreement, but also when a contracting party with a dominant bargaining position unilaterally sets the date of payment for proceeds at the date of payment that is unreasonably late in the light of normal business practice, or arbitrarily defers the arrival of the date of payment, it will cause to the contracted party to suffer unjust disadvantage, and a problem as the abuse of a dominant bargaining position is likely to arise. However, when the date of payment is set at a late date, but unjust disadvantage is not acknowledged as being suffered by the contracted

party because negotiations for the amount of proceeds were carried out taking into consideration the financing cost of the contracted party to be incurred up to the date of payment, it will not be illegal as the abuse of a dominant bargaining position.

(2) Cases in which a problem is caused under the Antimonopoly Act

The postponement of payment of proceeds by the contracting party with a dominant bargaining position will cause the contracted party to suffer unjust disadvantage in the light of normal business practice, it will be illegal as unfair trade practice in the following cases:

- (i) When proceeds is not paid at the date of payment set out in an agreement because of a unilateral decision by the contracting party, such as a delay in internal payment procedures,
- (ii) When proceeds for transactions for the information product is not paid at the date of payment set out in an agreement despite the completion of the provision of the information product by arbitrarily delaying inspection of this product, and
- (iii) When the payment of proceeds for a transaction for the information product, which the contracting party agreed to pay after the actual use of the product, is delayed because the time of use of the product is postponed significantly from the original schedule because of a unilateral decision by the contracting party.

2. Request to reduce the amount of proceeds

(1) Viewpoint

The contracting party in some cases requests the contracted party to reduce the amount of proceeds set out in an agreement. The contracting party may request the contracted party to reduce the amount of proceeds based on the reason that the details of services provided by the contracted party do not satisfy the conditions agreed at the time of contracting. When, however, the contracting party with a dominant bargaining position requests the contracted party to reduce the amount of proceeds without proper justification, a disadvantage, which cannot be calculated in advance, is likely to be suffered by the contracted party, thereby readily causing a problem as the abuse of a dominant bargaining position (NOTE 8).

In addition, in some cases the contracting party changes the specifications of services or requests the contracted party to provide non-agreed services without changing the proceeds set out in the agreement. The approach to such a substantial reduction of the amount of

proceeds is the same as described above.

When a request for the reduction of the amount of proceeds is made as part of the negotiations for proceeds and the amount of reduction is acknowledged as reflecting a supply-demand relationship, a problem as the abuse of a dominant bargaining position will not arise.

(NOTE 8) There is a case in which the contracted party is requested to bear costs on the pretext of a “monetary contribution” or “financial assistance,” in place of a reduction of the amount of proceeds in continuous transactions with the contracted party. The approach to this case is the same as that in the case of a request for a reduction of the amount of proceeds.

There is also a case in which the contracted party is requested to pay a monetary contribution, etc. which is appropriated for part of the costs of an event, etc. held by the contracting party. The approach to this case is as shown in 5 below.

(2) Cases where a problem is caused under the Antimonopoly Act

The reduction of the amount of proceeds by the contracting party with a dominant bargaining position will cause the contracted party to suffer unjust disadvantage in the light of normal business practice, it will be illegal as unfair trade practice in the following cases:

- (i) When the amount of proceeds set out in an agreement is reduced after the provision of services because of a unilateral decision by the contracting party, such as a lack of budget, without reason for which the contracted party is responsible,
- (ii) When the amount of proceeds set out in an agreement is reduced because of a deviation from the description of contracting or the existence of a defect by arbitrarily setting pre-determined criteria for a stricter inspection on the provided services,
- (iii) When the workload of the contracted party greatly increases as a result of a request for a change in the specification of services for a transaction, redoing the services or providing additional services because of a unilateral decision by the contracting party and contracting party therefore acknowledges paying extra amount of proceeds for the said incremental workload of the contracted party, but pay only the amount of proceeds initially set out in an agreement, and
- (iv) When, even though the contracted party is forced to bear the costs of the preparation for the provision of services to the contracting party, including outlays for capital expenditure and personnel arrangements as requested by the contracting party, a part of the contract for said services was cancelled because of a unilateral decision by the

contracting party and the amount of proceeds for said part of the services is reduced from the amount of proceeds set out in an agreement.

3. Request of a transaction for an extremely low proceeds

(1) Viewpoint

In some cases the contracting party requests the contracted party to provide services for far lower proceeds than that ordinarily paid for same or similar contents of work.

When, with respect to the proceeds for services for a transaction, the contracting party with a dominant bargaining position requests the contracted party to carry out the transaction for extremely low proceeds, an unjust disadvantage is likely to be suffered by the contracted party, and a problem as the abuse of a dominant bargaining position is likely to arise (NOTE 9).

However, when the proceeds requested by the contracting party is far lower than the proceeds estimated by the contracted party, although the contracted party may recognize that the contracting party acted to cut the proceeds, and there is a competitor company that is willing to be contracted for the proceeds requested by the contracting party, so that the request for a reduction of the proceeds was made as part of the negotiations for the proceeds and the amount of the requested reduction reflects the supply-demand relationship, a problem as the abuse of a dominant bargaining position will not arise (NOTE 10).

Whether a request for a service transaction for an extremely low proceeds constitutes an act of abuse of a dominant bargaining position or not should be judged on a comprehensive basis after considering the method for determining proceeds: namely, whether full consultation with the contracted party is made when determining the proceeds or not, etc., the details of determination: namely, whether the amount of proceeds is discriminatory compared with considerations of other contracted parties or not, etc., and the conditions of the determination of the proceeds: namely, whether the proceeds reflects the supply-demand relationship of services for a transaction or not, etc.

(NOTE 9) In this event, when the contracting party and the contracted party do not negotiate the amount of proceeds fully, the contracted party readily recognizes it as an act by the contracting party to request a discount on the proceeds. It is therefore desirable that the contracting party makes the request after fully explaining to the contracted party that the proceeds in question reflect the supply-demand relationship.

(NOTE 10) When a competitor company conducts an act that constitutes unjustly low price sales as provided in Article 6 of the general designation, the proceeds proposed by the said

competitor company is not acknowledged as reflecting the supply and demand relationship.

(2) Cases where a problem is caused under the Antimonopoly Act

The determination by the contracting party with a dominant bargaining position of the extremely low proceeds for a service transaction with the contracted party will cause the contracted party to suffer unjust disadvantage in the light of normal business practice, it will be illegal as unfair trade practice in the following cases:

- (i) When, although the contracted party requested a rise in the amount of proceeds because the cost required to provide the services will significantly increase because of the need for new capital expenditures and personnel arrangements for the contracted party to conduct the service transaction, an extremely low consideration is determined without taking into account the increase in cost fully,
- (ii) When, although a short period before delivery by the contracted party is set, thereby greatly increasing the cost, etc. required to provide the concerned services and the contracted party is therefore requested to increase the proceeds, an extremely low proceeds is determined without taking into account the said increase in cost fully,
- (iii) When the contracted party is requested to provide an estimate on the premise of the service transactions on the condition of a large volume over a long period, and the proceeds included in the said estimate is determined as the proceeds for service transactions of a small volume over a short period, and
- (iv) When the amount of proceeds, which is discriminately lower than the amount of proceeds for other contracted parties, is set for a specified contracted party without due cause.

4. Request for redoing

(1) Viewpoint

The contracting party in some case requests the contracted party to redo the provided services without bearing the cost required for the same service.

When the details of the provided services do not satisfy the conditions agreed at the time of their contracting, the contracting party's request for redoing will pose no problems. However, where the contracting party with a dominant bargaining position requests the contracted

party to redo on the basis of a unilateral decision by the contracting party, unjust disadvantage is likely to be suffered by the contracted party, and a problem as the abuse of a dominant bargaining position is likely to arise (NOTE 11).

When it is acknowledged that no disadvantage will be suffered by the contracted party if the contracting party bears the cost normally required for redoing, etc., a problem as the abuse of a dominant bargaining position will not arise.

(NOTE 11) There are cases in which, with respect to a transaction for the information product, a detailed specification can be set only after the contracted party has manufactured trial of the product, and the contracting party therefore requests the contracted party to redo the said product. In this event, if it is acknowledged that the cost required for the said redoing is included in the initial consideration, a problem as the abuse of a dominant bargaining position will not arise.

(2) Cases where a problem is caused under the Antimonopoly Act

If the contracting party with a dominant bargaining position requests the contracted party to redo provided services, it will cause the contracted party to suffer unjust disadvantage in the light of normal business practice, it will be illegal as unfair trade practice in the following cases:

- (i) When, although a specification for services for a transaction was changed because of a unilateral decision by the contracting party, the contracting party forces the contracted party to redo because the specification is not met,
- (ii) When, although the contracting party agreed on the details of services in the course of the provision of the services, the contracting party forces the contracted party to redo after the provision of the services,
- (iii) When the contracting party forces the contracted party to redo because of a deviation from the description of contracting or the existence of a defect by arbitrarily setting pre-determined criteria for a stricter inspection for the provided services, and
- (iv) When, although the contracted party requested the contracting party to clarify a specification and criteria for inspection, the contracting party forces the contracted party to redo because of a deviation from the specification, etc. or the existence of a defect without clarifying the specification and the criteria for inspection.

5. Request for payment of monetary contribution, etc.

(1) Viewpoint

The contracting party in some cases requests the contracted party to pay monetary contribution, etc. as part of cost for an event or advertisement, etc. (NOTE 12).

This kind of request is often made if the requesting party is a distribution company. When a distribution company requests a company delivering commodities to pay monetary contribution, etc., in some cases it will give the contracted party a direct advantage because the payment of the monetary contribution, etc. leads to sales promotion for the delivered commodities. However, it is rare in service transactions that the contracted party can enjoy a direct advantage, such as sales promotion activities, commensurate with the amount of the monetary contribution, etc. paid by the contracted party. Therefore, when a contracting party with a dominant bargaining position requests a contracted party to pay monetary contribution, etc. based on a unilateral decision made by the contracting party, unjust disadvantage is likely to be suffered by the contracted party, and a problem as the abuse of a dominant bargaining position is likely to arise.

(NOTE 12) There is a case in which the payment of monetary contribution, etc. is requested instead of a reduction in consideration. The approach to this case is the same as that described in item 2 above.

(2) Cases where a problem is caused under the Antimonopoly Act

If the contracting party with a dominant bargaining position forces the contracted party to pay monetary contribution, etc., it will cause the contracted party to suffer unjust disadvantage in the light of normal business practice, it will be illegal as unfair trade practice in the following cases:

- (i) When the amount of monetary contribution, etc., the basis for calculation and the purpose for expenditure have not been made clear between the contracting party and the contracted party, and thereby causing unforeseeable disadvantage to the contracted party
- (ii) When the contracted party is forced to pay monetary contribution, etc. through the following methods and suffers a disadvantage (NOTE 13):
 - a. When the contracting party requests the contracted party to pay monetary contribution, etc. as a financial measure because of a deterioration in financial results,

- b. When the contracting party requests the contracted party to pay monetary contribution, etc. exceeding a direct benefit enjoyed by the contracted party for reasons that the contracting party requested other companies including delivery companies to pay monetary contribution, etc., and
- c. When it was determined in advance that monetary contribution, etc. will be collected from the contracted party if service transactions of more than a certain volume were carried out within a certain period, and the contracting party requests the contracted party to pay monetary contribution, etc, even if said volume of transactions is not attained.

(NOTE 13) In the event of (ii), some cases may be judged as illegal even if the contracting party and the contracted party clearly agreed on the conditions for the payment of monetary contribution, etc.

6. Request for purchase of commodities

(1) Viewpoint

The contracting party in some cases requests, by taking advantage of the service transaction relation, the contracted party to purchase commodities and services sold by affiliated companies or customers of the contracting party, in addition to the commodities and services sold by the contracting party.

When the contracting party with a dominant bargaining position requests the contracted party to purchase commodities and services, the contracted party is forced to accommodate to the request because of a concern about the effect on future service transactions, even though the contracted party does not desire to purchase the said commodities and services. It will therefore cause a problem as the abuse of a dominant bargaining position.

There are cases in which such a request for the purchase of commodities, etc. will be made as a proposal for reciprocal dealings (denoting transactions in which the purchase of commodities and services from the other party to a transaction is tied to the sale of the commodities and services by the first party to said other party when both parties sell commodities and services necessary for the conduct of the other party's business). The approach to such reciprocal dealings is as set out in I-5 (unjust reciprocal dealings) of the Guidelines Concerning Distribution Systems and Business Practices.

(2) Cases where a problem is caused under the Antimonopoly Act

If the contracting party with a dominant bargaining position requests the contracted party to purchase commodities and services unnecessary for the business of the contracted party from the contracting party or parties designated by the contracting party through the following methods, it will cause the contracted party to suffer unjust disadvantage in the light of normal business practice, it will be illegal as unfair trade practice in following cases:

- (i) When a person such as a staff member in charge of the service transaction who may influence the service transaction requests the contracted party to make a purchase,
- (ii) When the contracting party requests organizationally and systematically the contracted party to make a purchase, and
- (iii) When the contracting party makes a request to purchase repeatedly or shipping product unilaterally, when the contracted party has expressed no intention purchase, or when even in the absence of such an expression it is clearly recognized that the contracted party has no intention to purchase When the contracting party makes a request to purchase in such ways as to indicate that failure to do so would influence future service transactions, or using such selling methods as to indicate that effect.

7. Unilateral treatment of rights, etc. to the information product

(1) Viewpoint

With respect to service transactions for the information product, the product produced by the contracted party may become the object of its rights including copyright, patent rights and design rights, etc. In addition, products and technologies that can be used for other purposes may be obtained in the course of the production of the concerned product by the contracted party, and said products and technologies in some cases have an asset value that is different from that of the product for the transaction.

In this kind of service transaction, if the contracting party with a dominant bargaining position unilaterally forces the contracted party to transfer the said rights to the contracting party (or consent the contracting party's use of the rights) (hereinafter the same applies) or restricts the use by the contracted party of the product and technologies, etc. (secondary use) (NOTE 14) for other purposes to an extent that does not conflict with the purpose of the service transaction for the reason that the product was obtained in the course of the service transaction with the contracting party or was produced with the contracting party bearing the cost, an unjust disadvantage is likely to be suffered by the contracted party, and a problem as

the abuse of a dominant bargaining position is likely to arise (NOTE 15).

In this event, however, if it is acknowledged that the contracting party separately paid proceeds for transferring the right to products to contracting party and the restriction on the secondary use, or a negotiation for proceeds including said proceeds was made, a problem as the abuse of a dominant bargaining position will not arise (NOTE 16).

However, even if the cases above, when the payment for transfer of the rights and others is extremely low or the contracting party is unjustifiably inflicting a loss of the contracted party including the case that it substantially forces to transfer of the said rights and others, a problem as the abuse of a dominant bargaining position will arise.

(NOTE 14) The secondary use includes the followings:

- {1} Selling videotapes made from the TV programs entrusted by the contracting party for ground broadcasting,
- {2} Distributing animation programs which are made for movie shows entrusted by the contracting party through the internet,
- {3} Providing computer programs which are made for the internal use of the contracting party for other firms, and
- {4} Using the characters which are made for specific product based on the entrustment by the contracting party for other products.

(NOTE 15) The views provided for in (1) Viewpoint and (2) Cases where a problem is caused under the Antimonopoly Act stated below are based on that the contracted party obtain or receive rights during the creation of information product.

However, there are cases in which, at the time of the production of the information product by the contracted party, the contracted party produces the product using not only its own technologies and personnel based on the service transaction but also technologies and personnel provided by the contracting party.

When the contracting party provides the contracted party with technologies held by the contracting party when carrying out a service transaction, it may be deemed that the service transaction was conducted concurrently with a technological transaction. Therefore, the treatment of rights to the information product will be judged in consideration of the relationship to the technologies provided by the contracting party. When said technologies are a patent or know-how, the approach based on the Antimonopoly Act is as stated in the "Guidelines for Patent and Know-how Licensing Agreements under the Antimonopoly Act" (issued by the Fair Trade Commission on July 31, 1999).

When it may be deemed that the information product was produced jointly by the contracting party and the contracted party through the contracting party's provision of technologies and personnel, etc., and, with respect to the transferring of rights to the said product, the secondary use or the details of an agreement on labor and cost for the production of the said product, the balance between the contracting party and the contracted party is lost, thereby causing the contracted party to suffer an unjust disadvantage, a problem as the abuse of a dominant bargaining position or discriminatory treatment in a trade association, etc. (Paragraph 5 of the general designation) will arise.

(NOTE 16) The payments for the restriction on the secondary use include those paid according to the agreed condition on profit sharing.

(NOTE 17) It is necessary to be acknowledged that the negotiation for proceeds including the said proceeds is being made to clarify the terms of transaction including clear indication that the contracting party presents the payment estimate containing the said proceeds for the transferring the rights or others of the contracted party based on the mutual recognition that the transfer of the rights or others is essential to the transaction.

(NOTE 18) Upon the judgement for the case that the payment is extremely low, the views provided herein 3. Request where a problem is caused under the Antimonopoly Act of Part2 apply.

The example of the case that the contracting party substantially forces the contracted party to transfer its rights or others is follows: Even though where the contracted party denies to conclude an agreement with transfer clause of its rights, the contracting party forces the contracted party to contract without help to transfer by hinting that it breaks of its business connections with the contracted party in case of denial.

(2) Cases where a problem is caused under the Antimonopoly Act

If, in a service transaction for the information product, a contracting party with a dominant bargaining position commits the following acts against the contracted party who produced the said product, it will cause the contracted party to suffer unjust disadvantage in the light of normal business practice, it will be illegal as unfair trade practice in the following case: and be illegal:

(i) Transfer of information product rights,

{i} When the contracting party unilaterally transfers the rights to the contracting party for the reason that said product is obtained in the course of the service transaction with the contracting party, or produced at the cost of the contracting party, even

- though the contracted party receives rights including copyright and patent right related to the product concerned,
- {ii} When the contracting party managing the secondary use fails to respond to the request or proposal on the secondary use from the contracted party without reasonable reason, where the contracted party receives the rights related to the product concerned, even though the contracted party transferred the rights to the contracting party under the condition of profit sharing agreement in the secondary use of the product
 - (ii) Restriction on the secondary use of information product, and
 - {i} When the contracting party insists that it deserves to obtain or receive the rights and based on that ground sets unilaterally the terms of transaction with the contracting party including the profit sharing of the secondary use of the product concerned even though the contracted party receives the rights related to the product concerned while the contracting party does not
 - {ii} When the contracting party unilaterally sets the terms of transaction with the contracting party including the profit sharing of the secondary use of the product concerned or restricts the secondary use for the reason that said product is obtained in the course of the service transaction with the contracting party, or is produced at the cost of the contracting party
 - {iii} When the contracting party managing the secondary use of the product concerned fails to respond to the request or proposal on the secondary use from the contracted party without reasonable reason, where the contracted party receives the rights related to the said product, even though the contracted party is entrusted the production of the said product with the condition of profit sharing of the secondary use of the said product in addition to the proceeds of production the contracting party presented
 - (iii) Transfer of the rights obtained in the course of the service transaction but not subject to the transaction itself and restriction of the secondary use of them.
 - {i} When the contracting party conducts similar activities described (i) and (ii) above, where the contracted party receives the rights obtained in the course of the service transaction but not subject to the transaction itself