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Guidelines for the Exclusionary Private Monopolization under the Antimonopoly Act (Draft)

Table of Contents

| | |
|--|----|
| Introduction | 1 |
| 1. Purpose of the Guidelines | 1 |
| 2. Outline of the Guidelines | 2 |
| Part I. Enforcement Policy of the JFTC | 3 |
| Part II. Exclusionary Conduct | 4 |
| 1. Basic View | 4 |
| (1) Nature of Exclusionary Conduct..... | 4 |
| (2) Types of Exclusionary Conduct..... | 5 |
| 2. Below-cost Pricing | 8 |
| (1) Conduct that may fall under Exclusionary Conduct..... | 8 |
| (2) Factors for assessment | 9 |
| (3) Reference example..... | 12 |
| 3. Exclusive Dealing | 14 |
| (1) Conduct that may fall under Exclusionary Conduct..... | 14 |
| (2) Factors for assessment | 15 |
| (3) Rebates-giving | 17 |
| (4) Illustrative examples | 18 |
| 4. Tying | 20 |
| (1) Conduct that may fall under Exclusionary Conduct..... | 20 |
| (2) Factors for assessment | 21 |
| (3) Reference examples | 23 |
| 5. Refusal to Supply and Discriminatory Treatment..... | 25 |
| (1) Conduct that may fall under Exclusionary Conduct..... | 25 |
| (2) Factors for assessment | 27 |
| (3) Illustrative examples | 29 |
| Part III Substantial Restraint of Competition in Any Particular Field of Trade | 31 |
| 1. A Particular Field of Trade | 31 |
| (1) Basic view..... | 31 |
| (2) Scope of products..... | 32 |
| (3) Geographical scope..... | 34 |
| 2. Substantial Restraint of Competition | 35 |
| (1) Basic View | 35 |
| (2) Factors for assessment | 35 |

(Draft)

Guidelines for the Exclusionary Private Monopolization under the Antimonopoly Act (Draft)

Introduction

1. Purpose of the Guidelines

“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” is defined as private monopolization in the provisions of paragraph (5), Article 2 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”). Private monopolization is prohibited under the provisions of Article 3 of the Antimonopoly Act.

Against any private monopolization, the Japan Fair Trade Commission (hereinafter referred to as the “JFTC”) can take measures needed 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 paragraph (2), Article 7-2 of the Antimonopoly Act against any private monopolization achieved by controlling the business activities of other entrepreneurs (hereinafter referred to as “Private Monopolization by Control”).

Due to the establishment of the 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 paragraph (4), Article 7-2 of the Antimonopoly Act against any private monopolization achieved 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 cases in which legal measures are taken against Exclusionary Private Monopolization in Japan, and there are various forms of controversial acts that fall under such monopolization. Moreover, in every competition process, a product of an entrepreneur (including lending of money, and granting of a license concerning a patent, etc., granting of a license to use facilities and equipment, and other services; the same shall apply hereinafter) can naturally

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be driven out the market as a result of business activities of other entrepreneurs. Therefore, due to the difficulty in distinguishing Exclusionary Conduct from exclusions of other entrepreneurs resulting from normal business activities, there was an opinion that inclusion of Exclusionary Private Monopolization in violations subject to surcharge might cause a so-called “chilling effect” for entrepreneurs and therefore interfere with a fair and free business activity.

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 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 on 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.

Specifically, the Guidelines first show matters that the JFTC is to generally consider when determining whether to investigate a particular case preferentially as Exclusionary Private Monopolization (Part I). The next part of the Guidelines typifies major conduct that tends to be deemed problematic as “Exclusionary Conduct,” and then describes, for each type, the framework for deliberations and factors applied for assessing whether or not it falls under Exclusionary Conduct (Part II). Finally, the Guidelines describe 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).

The Guidelines clarify the viewpoint of the Antimonopoly Act regarding the currently conceivable Exclusionary Private Monopolization. Business activities undermining competition in the market will continue to change due to changes of market conditions, technological innovations and other factors. Therefore, the JFTC will review the Guidelines as necessary while observing the specific law enforcement, market conditions and so on.

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(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 paragraph (4), Article 7-2 of the Antimonopoly Act.

Any entrepreneur who engages in Private Monopolization 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 paragraph (2), Article 7-2 of the Antimonopoly Act.

Part I. Enforcement Policy of the JFTC

The objective of the Antimonopoly Act is to promote fair and free competition in the market, to stimulate the creative initiative of entrepreneurs, and thereby to allow consumers to choose from a wide variety of high-quality, low-cost products. Therefore, the JFTC will make investigation by focusing on cases that have an extensive influence on lives of the citizenry.

In most of the past cases concerning Exclusionary Private Monopolization, entrepreneurs who were subject to JFTC's investigation had large shares in the markets of the products pertaining to Exclusionary Conduct. As this fact shows, when the share of an entrepreneur is large, its conduct tends to be highly effective in excluding business activities of its competitors and foreclosing the market. Moreover, it can be thought that the larger the share of the entrepreneur is, the more likely it is that the Exclusionary Conduct in question becomes highly effective in causing a substantial restraint of competition in a particular field of trade.

In light of this, the JFTC, when deciding whether to make investigation the case as Exclusionary Private Monopolization, will give priority to cases where the share of the product that the entrepreneur supplied (Note 2) exceeds approximately 50% after the commencement of such conduct and where the conduct is deemed to have an extensive impact on lives of the citizenry, comprehensively considering the market size, scope of business activities of the entrepreneur, characteristics of products, and other factors. However, even if a case does not meet these criteria, it

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may be subject to investigation depending on the type of conduct, market conditions, positions of competitors, and so on.

Needless to say, even when the conduct in question 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 paragraph (9), Article 2 or as conduct that violates the other provisions of the Antimonopoly Act.

(Note 2) The term "share of the product that the entrepreneur supplied" refers to share of the tying product in the case of "Tying" described in paragraph 4 of Part II below. In the case of "Refusal to Supply and Discriminatory Treatment" described in the paragraph 5 of Part II below, the share herein refers to share of products in the upstream market.

If multiple entrepreneurs are the entrepreneurs by combination or conspiracy with each other, the share herein shall refer 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 conduct that make it difficult for other entrepreneurs to continue their business activities or for new market entrants to commence their business activities, thereby be likely to cause the substantial restraint of competition in any particular field of trade. Even if such conduct is assessed by the entrepreneur to be indispensable for its business management due to the market conditions, etc., the said conduct may fall under Exclusionary Conduct for that reason.

On the other hand, if supply of low-cost, high-quality products by an entrepreneur, which was enabled by its own efforts for improving efficiency, has made it difficult for competitors to continue their inefficient business activities, such conduct does not fall under Exclusionary Conduct because it is a result of fair and free competition for which the Antimonopoly Act aims.

To constitute Exclusionary Conduct, conduct of an entrepreneur does not have to result in actual elimination of business activities of other entrepreneurs from the market or complete inhibition of new market entries. In other words, any conduct falls under Exclusionary Conduct when it is highly likely to make it difficult for other entrepreneurs to continue their business activities or for new

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market entrants to commence their business activities.

For conduct to fall under Exclusionary Conduct, it is not essential that the entrepreneur has the intention to exclude business activities of other entrepreneurs. However, an intention to exclude such activities as a subjective element can be an important fact enabling to lead presumption that the conduct in question is Exclusionary Conduct. For example, when the entrepreneur has engaged in multiple acts with the intention to exclude business activities, these acts may be collectively recognized, in some cases, as a series of integrated acts aimed at achieving such intent.

“Excluding business activities of other entrepreneurs” includes the conduct not only directly against the said other entrepreneurs but also indirectly via its trading partner. Such conduct also includes the conduct committed by multiple entrepreneurs in combination or conspiracy with each other.

(2) Types of Exclusionary Conduct

The first example of typical Exclusionary Conduct is a type of conduct similar to those listed in the items of paragraph (9), Article 2 of the Antimonopoly Act. In past cases of Exclusionary Private Monopolization, however, Exclusionary Conduct were not necessarily limited to those similar to unfair trade practices, and types of conduct other than these were also regarded as Exclusionary Conduct in the past.

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 conduct falls under Exclusionary Conduct differ according to the type of conduct. Therefore, typifying Exclusionary Conduct to the extent possible and listing factors for judgment for each type of conduct is believed to be beneficial from the viewpoint of ensuring transparency of law applications and improving predictability of entrepreneurs.

Therefore, the Guidelines clarify typical Exclusionary Conduct, mainly those that have been covered in the past, into four categories — “Below-cost Pricing,” “Exclusive Dealing,” “Tying” and “Refusal to Supply and Discriminatory Treatment” — and describe, for each type of conduct, factors for assessing whether 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 categories. For example, setting a price exclusively in a sales territory where an entrepreneur has competitors or

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exclusively for customers for whom an entrepreneur competes with others (Note 3), or interfering with business activities of other entrepreneurs (Note 4), is regarded as Exclusionary Conduct in some cases. Also, multiple acts including these atypical ones may be collectively regarded as a series of integrated Exclusionary Conduct.

The illustrative examples given in paragraphs 2 to 5 of Part II below show conduct deemed as Exclusionary Private Monopolizations in past decisions and judgments, and aim at helping understand concretely what conduct may fall under Exclusionary Conduct. The reference examples are also given to help understand concretely what conduct fall under Exclusionary Conduct by showing acts deemed as unfair trade practices in past decisions, etc. Needless to say, assessment over whether or not specific acts, including those not referred to in the Guidelines, fall under Exclusionary Conduct are all to be made for individual cases pursuant to the provisions of the Antimonopoly Act (Note 5) (Note 6).

(Note 3) An illustrative example of setting a price exclusively in a sales territory where an entrepreneur has competitors or exclusively for customers for whom an entrepreneur competes with others is the following:

Company X, which engaged in music broadcasting business, conspired with Company Y, an agency for business and contracts related to the provision of music broadcasts by Company X, to conduct campaigns, in which an entrepreneur prolonged the free subscription period of a product targeted for customers who also purchased a product of a particular competitor, or significantly lowered the minimum subscription fee for such a product exclusively for customers of the said particular competitor, in an attempt to deprive the said competitor of a large number of its customers in a short period and to made it difficult for the said competitor to manage its music broadcasting business (Usen Corporation case [JFTC recommendation decision, October 13, 2004]).

(Note 4) Illustrative examples of conduct of interfering with business activities of other entrepreneurs include the following:

- 1) Company X — a food cans manufacturer, which held approximately 56% of the market share of all such products supplied in Japan — discontinued its supply to canned food manufacturer Company Y of

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food cans that could not be manufactured by Company Y on its own, with intent to have Company Y give up its attempt to independently manufacture food cans to reduce the cost of manufacturing its canned food, (Toyo Seikan case [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. based on the manufacturing plant recognition system and distributor recognition system for medical food, upon the request of medical food distributor Company Y to be the sole distributor of medical food for medical institutions, with intent to prevent competition among medical food manufacturers and distributors (Japan Medical Foods Association case [JFTC recommendation decision, May 8, 1996]).
- 3) Company X — a publisher of a daily newspaper in the Hakodate district — applied for trademark registrations of newspaper mastheads that were expected to be used by Company Y — a new entrant to the evening newspaper publishing market of the said district — though Company X had no specific plan to use such mastheads, with intent to prevent Company Y from using the said mastheads (The Hokkaido Shimbun case [JFTC consent decision, February 28, 2000]).

(Note 5) Regarding whether conduct of restrictions pertaining to use of technology fall under Exclusionary Conduct, refer to paragraph (1), 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 to standardization falls under Exclusionary Conduct, refer to item (2), paragraph 2, Part 1 of the Guidelines Concerning Joint Research and Development under the Antimonopoly Act (April 20, 1993, JFTC) and paragraph 2, Part 2 of the Guidelines on Standardization and Patent Pool Arrangements (June 29, 2005, JFTC).

(Note 6) There are cases where secrecy of knowhow (meaning any technical knowledge or experience that is not publicly known or any accumulation thereof the economic value of which is independently protected or

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controlled by entrepreneurs; the same shall apply hereinafter) is protected by restricting parties to purchase raw materials or components from, sales destinations of the product, or other factors against the entrepreneur to whom the said knowhow is given. When assessment is made over whether or not such conduct falls under Exclusionary Conduct, comprehensive consideration is given to the characteristics of the said knowhow, technology level in the relevant field, characteristics of the raw materials or the product and duration of period until the said knowhow loses its value for trading, and other factors, in addition to the factors for assessment described in paragraphs 2 to 5 of Part II below.

For example, there are cases in which a manufacturer consigns manufacturing of products to another manufacturer by providing its knowhow to the latter, or a product that uses knowhow is developed in joint research and development by multiple entrepreneurs before it is manufactured and distributed. In such cases, restricting parties to purchase raw materials or components from, sales destinations of the product or other factors against the entrepreneur given the said knowhow is not 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 knowhow.

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 the market mechanism and entrepreneurs have the freedom to decide their prices adapting to the supply and demand relationship in the market. Price-cutting competition based on companies' own efforts essentially constitutes the core of competition on the merits that competition policies intend to maintain and promote. Therefore, intervention in price-cutting competition should be kept at a minimum in light of the objective of the Antimonopoly Act that promotes fair and free competition.

However, depriving competitors' customers by setting price lower than the cost required for supplying the product would not reflect business efforts or the normal competition process and would cause difficulty to the business activities of an equally or more efficient competitor, thereby might undermine the competition (Note 7). Thus, setting a product price lower than the cost required

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for its supply (hereinafter referred to as the “Below-cost Pricing”) may fall under Exclusionary Conduct.

The term “price” herein refers to the real price calculated by taking into account what is substantially equivalent to a discount, not to the nominal price to be paid by the customer to the supplier when the relevant product is provided. The term “cost required for its supply” refers not to the nominal cost, but to the actual amount of the gross cost of sales (Note 8) calculated by taking into account any discount, rebates, physical goods received by the purchaser in connection with the said purchase, and other elements.

Calculation of the gross cost of sales takes into account the amount of cost generated in a period that is deemed reasonable in the context of the actual condition. In the said calculation, it becomes an issue how the JFTC takes into account the external support and common costs in multiple businesses. Regarding external support, there was a judicial precedent: In the particular circumstances where a local newspaper publisher had business ties with a nationwide newspaper publisher and received massive support that the said national newspaper publisher provided large part of articles and advertisements, the cost generated for the said local newspaper publisher should be calculated not by taking the said circumstances into account but based on expense items that independent entrepreneurs in general without external support would normally require (Chubu Yomiuri Shimbun case [Tokyo High Court decision, April 30, 1975]). In terms of common costs in multiple businesses, how to allocate the amount to respective businesses becomes an issue, and it is general in the accounting of business enterprise that each entrepreneur allocates the cost to each business pursuant to the allocation bases that were reasonably selected by the entrepreneur in the context of the actual condition, according to the degree of benefit given by the generating costs. In such a case, if the entrepreneur selects the allocation bases that were reasonably selected in the context of the actual condition, the gross cost of sales is usually calculated by allocating the common cost based on the said allocation bases.

(2) Factors for assessment

Where Below-cost Pricing would cause difficulty to 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 to the

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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 such factors as the characteristics of the product, economies of scale (meaning the fact 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, market trend, current status of competitive relationships, and difficulty of market entry.

For example, where the product is highly differentiated, customers do not place more importance on prices than when the product is not differentiated, when choosing between a product from the entrepreneur and another product from competitors. Therefore, such a case would unlikely to be deemed to cause difficulty to 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 such factors as the brand value, 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 more likely to be deemed to cause difficulty to the business activities of an equally or more efficient competitor.

C. Relationship between price and cost required for the supply

Generally, when a price is too low to allow even recovery of the costs which would not be generated unless the products were supplied, the amount of loss grows larger as more products are supplied. Therefore, setting such a low price lacks economic rationality except for exceptional circumstances,

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and it is more likely to be deemed to cause difficulty to the business activities of an equally or more efficient competitor..

Therefore, the criteria with regard to the relationship between price and cost required for the supply is whether or not the price is below the costs which would not be generated unless the products were supplied. Assessment over what costs are regarded as the costs which would not be generated unless the products were supplied is made from the viewpoint of whether the cost is closely related with the supply of the product (Note 9), whether the cost will increase or decrease depending on the supply quantity of the product (Note 10), and whether the cost is inevitably generated for commencing or continuing the supply of the product (Note 11).

On the other hand, setting a price of a product below the gross cost of sales and not less than the costs which would not be generated unless the products were supplied is unlikely to be regarded as a case in which even a hypothetical competitor equally efficient would more likely to be deemed to cause difficulty to the business activities of an equally or more efficient competitor.

D. 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 the period during which Below-cost Pricing is conducted and to the turnover and quantity of the product in question

For example, a case where a product is provided over a long period at a price below the cost required for its supply would more likely to be deemed to cause difficulty to the business activities of an equally or more efficient competitor.

E. Conditions of the conduct

Where assessment is made over whether or not Below-cost Pricing falls under Exclusionary Conduct, consideration is given to intent and purpose of an entrepreneur, advertising and publicity associated with the price-cutting (including the reputation of the entrepreneur, etc) and other factors.

For example, where the said entrepreneurs also performs Below-cost Pricing in other areas or for other products, other entrepreneurs will more likely hesitate to enter the market, being cautious about further Below-cost Pricing by the said entrepreneur. Thus, where Below-cost Pricing by the

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entrepreneur is deemed to be reputed, the relevant market would more likely be foreclosed, even if the price is not less than the costs which would not incur unless the products were supplied or even if the price-cutting was made for a short period. Consequently, such a case would more likely to be deemed to cause difficulty to the business activities of an equally or more efficient competitor.

(3) Reference example

Company X was an entrepreneur selling most of maps of the residential areas, etc. of Japan, and had been the only company that distributed maps of residential areas, etc. of Sendai city. When Company Y, engaging in distribution of maps of residential areas, etc. in the Hokuriku district, began to sell maps of residential areas, etc. of Sendai City, Company X intended to complicate business activities of Company Y by: a) having Company X's specified agent receive order for maps of residential areas of Sendai City from the Gas Bureau of Sendai City and others made via designated competitive bidding, etc., by offering a price excessively below the production cost and; b) having its wholly owned subsidiary sell a 1998 edition of residential area maps, etc. at prices excessively below the gross cost of sales (including prices lower than the production cost in part) in major cities of the Hokuriku district, which was the main distributing territory of Company Y. Such conduct of Company X fell under paragraph (6) of the Designation of Unfair Trade Practices (JFTC Public Notice No.15 of 1982) and was deemed likely to violate the provisions of Article 19 of the Antimonopoly Act (Zenrin case [JFTC warning, March 24, 2000]).

(Note 7) Setting accordingly low prices for products whose quality is likely to deteriorate rapidly, such as perishable food, for products whose peak sales periods are over, such as seasonal goods, or for products with quality defects, such as inferior products, is not deemed unfair even when the price is lower than the cost required for the supply, and therefore does not fall under Exclusionary Conduct. The same applies to a case in which an accordingly low price is set for a product when the prices in the market have been lowered due to the supply-demand relationship.

(Note 8) The gross cost of sales refers to the sum of all costs required for

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supplying a particular product. Normally, in the manufacturing industry, it corresponds to the sum of the production cost, selling cost and general administration cost. In the retail business, the gross cost of sales refers to the sum of the purchasing cost, selling cost and general administration cost.

(Note 9) Of the expense items for corporate accounting, production cost (meaning the total amount of cost required for producing the product) and purchasing cost (meaning the sum of the actual purchasing cost and miscellaneous expenses pertaining to the purchases, such as the transportation cost), for example, are presumed to be the costs which would not be generated unless the products were supplied, from the viewpoint of whether or not the expense item is closely related with the supply of the product. From the similar point of view, of selling cost and general administration cost, for example, cost for executing order, such as delivery cost and storage cost, are presumed to be the costs which would not be generated unless the products were supplied.

(Note 10) From the viewpoint of whether the cost will increase or decrease depending on the supply quantity of the product, variable cost (meaning a cost that increases or decreases in total amount in proportion to the rate of capacity utilization), for example, is regarded as the cost which would not be generated unless the products were supplied. In addition, any cost that increases or decreases to a certain degree in accordance with the changes of supply quantity is presumed to be the costs which would not be generated unless the products were supplied, even if it is not expressly deemed to be a variable cost.

(Note 11) From the viewpoint of whether the cost was inevitably generated for commencing or continuing the supply of the product, advertising cost allocated prior to the release date of the relevant product to create demand for the product, for example, is regarded as the cost which would not be generated unless the products were supplied where it is recognized that supply of the product itself would not have been implemented without expending such a cost.

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3. Exclusive Dealing

(1) Conduct that may fall under Exclusionary Conduct

Even if an entrepreneur engages in a dealing on the condition that its trade partner will not purchase the products from its competitor, the competitor is able to continue its business activities in the market based on the competition in prices, product quality or other factors if it is capable of easily finding a supply destination as an alternative to the said trade partner. Therefore, such conduct in itself does not necessarily fall under Exclusionary Conduct.

However, when an entrepreneur engages in trade on the condition that trade of the trade partner with competitors be prohibited or restrained, such conduct may cause difficulties to the business activities of a competitor that cannot easily find a supply destination as an alternative to the said trade partner, and therefore may undermine competition. Trading on condition for prohibiting or restraining the trade's trade with the said entrepreneurs' competitor as described above (hereinafter referred to as "Exclusive Dealing") may fall under Exclusionary Conduct (Note 12).

Exclusive Dealing includes not only the conduct of making it clear in the contract that the trade partner shall not have dealings with one's competitor, but also conduct of prohibiting or restraining dealings with one's competitor as a substantial condition for the dealing. For example, when achievement of 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 way, for example, requiring one's approval before the trade partner deals with one's competitors or conduct of giving rebates falls under Exclusive Dealing when it is substantially preventing dealings with one's competitor by providing economic benefit in return or by attaching economic disadvantage.

Giving rebates to trade partner on condition for the quantity of dealing with one's products etc. (hereinafter referred to as "Rebates-giving") functions the same as Exclusive Dealing when it is effective in restraining trade of competitor's products (Note 13). With regard to Rebates-giving, comprehensive consideration is given to the matters described in (3) below in addition to the factors for assessment in (2) below.

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(2) Factors for assessment

Where Exclusive Dealing would cause difficulty to the business activities of a competitor incapable of easily finding 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 to the business activities of a competitor incapable of easily finding 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 such factors as degree of market concentration, characteristics of the product, economies of scale, degree of differentiation of the product, distribution channels, market trend and difficulty of market entry.

For example, when network effects (Note 14) are recognized as a feature of the product, a decline in the number of entrepreneurs dealing with competitors' products is 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, compared with cases without the network effects. Therefore, in such a case Exclusive Dealing would more likely to be deemed to cause difficulty to the business activities of a competitor incapable of easily finds 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 such factors as the share of the entrepreneur's product, its ranking, brand value, excess supply capacity and scale of operation.

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

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C. Position of the competitors in the market

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

For example, when the number of competitors is small and the excess supply capacity is small as a whole, it is impossible to make up entirely for the whole supply of products which would be provided from the entrepreneur, by purchasing the products from 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 competitors is not small and the excess supply capacity is large as a whole. Consequently, in such a case Exclusive Dealing would more likely to be deemed to cause difficulty to the business activities of a competitor incapable of easily finding 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 such factors 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 more likely to be deemed to cause difficulty to the business activities of a competitor incapable of easily finding 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 such factors as the conditions and contents of dealing and the intent and purpose of the entrepreneur.

For example, when a trade partner is subject to additional charge or a large amount of penalty for its trading with competitors, due to the conditions and content of the dealing, they become the greater obstacle for the trade partner to trading with competitors. Therefore, in such a case Exclusive Dealing would more likely to be deemed to cause difficulty to the business activities of a competitor incapable of easily finding an alternative trade partner.

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(3) Rebates-giving

Rebates given by entrepreneurs to their trade partners are actually used for a variety of purposes, such as sales promotions and adjustment of purchase prices. In fact, rebates have the aspect to stimulate the demand or, as an element of prices, promote formation of prices that reflects the actual market situation. Therefore, Rebates-giving in itself does not necessarily fall under an Exclusionary Conduct.

However, when rebates are given to a trade partner 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, reach a particular threshold over a specified period, such conduct may function the same as Exclusive Dealing (Note 15). Thus, Rebates-giving may fall under Exclusionary Conduct.

When assessment is made over whether Rebates-giving causes difficulty to the business activities of a competitor incapable of easily finding an alternative trade partner, comprehensive consideration is given to the following factors, in addition to the factors for judgment described in (2) above:

A. Level of rebates

When a level of rebates is set higher, the trade partner is more likely to purchase more products from the entrepreneur. Thereby, such a Rebates-giving is highly effective in restraining the dealings of competitor's products.

B. Threshold of giving rebates

Where threshold for giving rebates is set at the higher level within the achievable range for the trade partner, the rebates function more effectively to have the trade partner deal with products from the entrepreneur more preferentially than competitor's products, and therefore have the trade partner be more likely to purchase more products from the entrepreneur.

When an individual threshold in giving rebates are is for each trade partner, the trade partners are more likely to purchase more products from the entrepreneur than when the same criteria are set for all the trade partners, because the entrepreneur is able to set the criteria in accordance with the individual circumstances of each trade partner so that the rebates function

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more effectively to have the trade partner deal with the entrepreneur's products with greater preference than competitor's products. Consequently, Rebates-giving is highly effective in restraining the dealings of competitive products in such a case.

C. Progressiveness of rebates

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

D. Retro-activeness of rebates

If rebates are given for the entire quantity of trade made so far when the quantity of trade has exceeded a certain threshold, the rebates function more effectively in having the trade partner deal with products from the entrepreneur with greater preference than competitive products, and therefore have it 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 exceeded the threshold required for Rebates-giving. Such Rebates-giving is highly effective in restraining the dealings of competitive products.

(4) Illustrative examples

A. Company X produced more than half of all the globally produced molybdenum-99, a radiopharmaceutical raw material, and distributed the majority of molybdenum-99 worldwide. The said radiopharmaceutical cannot be produced from any raw material other than molybdenum-99. In Japan, there were two entrepreneurs purchasing molybdenum-99 and producing this radiopharmaceutical. Company X prevented other producers and distributors of molybdenum-99 from having deals with the said two companies by concluding agreements with them under which the two companies purchased all the molybdenum-99 only from Company X for 10 years. Such conduct by Company X was deemed to exclude business activities of other producers of molybdenum-99 (MDS Nordion case, [JFTC recommendation decision,

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September 3, 1998]).

B. Company A was the only entrepreneur in Japan producing glass pipes as raw materials for ampoules. Companies manufacturing ampoules by processing the glass pipes and distributing the ampoules (ampoule processors) needed to use Company A's glass pipes as these pipes were in high demand from pharmaceutical companies, etc. Under such circumstances, Company X, the only company supplied with Company A's products in Western Japan, intended to halt continuation or expansion of trade of imported glass pipes by Company Group Y, which purchased imported glass pipes 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 pipes 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 extremely likely to exclude the business activities of company group Y in dealing with imported glass pipes, to shrink other ampoule processors from dealing with imported glass pipes and, consequently, to exclude the business activities of Company X's competitors (Nipro case [JFTC hearing decision, June 5, 2006]).

C. Company X was the Japanese subsidiary of Company A engaging in manufacturing and distributing of CPUs, and distributed CPUs manufactured by Company A. The share of Company A's CPUs among all CPUs distributed in Japan was approximately 89%. Under these circumstances, Company X promised to finance five companies in Japan (which held on approximately 77% share of CPUs distributed in Japan in total) that purchased CPUs for the manufacturing and distribution of PCs, on the condition that: a) the proportion of Company A's CPUs used for PCs manufactured and distributed by the said companies be 100% and they not use competitors' CPUs; b) the said proportion be kept at 90%, with competitors' CPUs at 10% or; c) the said companies refrain from incorporating competitors' CPUs into PCs in more

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than one series with a large amount of production volume relative to others. Such conduct by Company X was deemed to decrease the proportion of competitors' CPUs among all the CPUs distributed in Japan and to exclude the business activities of competitors in distribution of CPUs (Intel Corporation case [JFTC recommendation decision, April 13, 2005]).

(Note 12) For example, where an entrepreneur engaging in wholesale business or retail business trades with a manufacturer on the condition for prohibiting or restraining the trade partner's trade with the said entrepreneur's competitor, whether or not such conduct falls under Exclusionary Conduct is assessed from the same standpoint as that applied for assessment over "Exclusive Dealing."

(Note 13) Rebates given with no special conditions are treated in the same way as mere discounts. Therefore, giving unconditional rebates does not fall under "Rebate Giving."

(Note 14) 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 of their users.

(Note 15) In addition to cases in which Rebates-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 trade of competitive products.

4. Tying

(1) Conduct that may fall under Exclusionary Conduct

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

However, supplying one product (tying product) only on the condition that trade partners also purchase another product (tied product) may cause difficulty to a competitor incapable of easily finding alternative trade partners in the market of the tied product, and therefore may undermine competition in the

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market of the tied product. Supplying (or purchasing) only on the condition that trade partners also purchase (or supply) another product (hereinafter referred to as “Tying”) is likely to fall under Exclusionary Conduct (Note 16).

Assessment over whether or not a product that is required to purchase under a trade condition is deemed to be “another product” is made from the viewpoint of whether or not each of the combined products has distinctiveness and is traded independently. Specifically, comprehensive consideration is given to respective products in terms of such factors 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 the tying), and whether users can purchase each of them separately (including whether each of the combined products is normally sold or used as a single unit). For example, in a case where a cellular phone is tied with a digital camera and sold as a cellular phone with a digital camera, contents and functions of the cellular phone with a digital camera will be substantially changed compared with those of the cellular phone or the digital camera are sold separately, and therefore the cellular phone with a digital camera is regarded as a single product with distinct functions. Consequently, the product that the trade partner is required to purchase under the condition for the trade, digital camera, is not deemed to be “another product.”

With regard to whether or not purchase of another product is regarded as the “only on the condition,” even if the tying product and tied product supplied by an entrepreneur conducting tying are also available for separate purchase, if the quantity of the tying products offered separately from the tied products is small and many users consequently purchase the tied products as well as the tying products, it is deemed that purchase of the tied product is substantially the “only on the condition.” In the same way, when the price of the products as tied together is lower than the sum of the prices of the same products purchased separately, thereby attracting users more strongly, it is also deemed that purchase of the tied product is virtually the “only on the condition” (Note 17).

(2) Factors for assessment

Where Tying causes difficulty to the business activities of a competitor not capable of easily finding 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 such conduct

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would cause difficulty to the business activities of a competitor not capable of easily finding alternative trade partners in the market of the tied product:

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

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

For example, where the tied product is not differentiated in the market, it is more likely that purchases of tied products from the entrepreneur conducting tying may prevent competitors' tied products from being purchased. Therefore, such a case is likely to be deemed to cause difficulty to the business activities of a competitor incapable of easily finding 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 such factors as the share of the entrepreneur in the market of the tying product, its ranking, brand value, excess supply capacity and the scale of the entrepreneur's operations.

For example, where the entrepreneur has a large share of the tying product, more tied products from the entrepreneur tend to be supplied through tying than when the entrepreneur's share is not large. Therefore, such a case tends to be deemed to cause difficulty to the business activities of a competitor incapable of easily finding 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 such factors as the share of the entrepreneur and its competitors in the market of the tied product, their ranking, brand value, excess supply capacity and the scale of their operations.

For example, where the entrepreneur is deemed to have large excess

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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 tends to be deemed to cause difficulty to the business activities of a competitor incapable of easily finding alternative trade partners in the market of the tied product.

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

When assessment is made over whether or not Tying falls under Exclusionary Conduct, consideration is given to such factors 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, Tying is more likely to be deemed to cause difficulty to the business activities of a competitor incapable of easily finding alternative trade partners in the market of the tied product if Tying has been implemented over a long period or if the number of counterparties on which the tying is targeted is large.

E. Conditions of the conduct

When assessment is made over whether or not Tying falls under Exclusionary Conduct, consideration is given to such factors 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 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 tends to be deemed to cause difficulty to the business activities of a competitor incapable of easily finding 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. Spreadsheet software of Company X (tying product) 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,

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Company Y, would seriously interfere with Company X's activities for increasing the market share of its word processing software (tied product), and had entrepreneurs engaging in manufacturing and distribution of PCs accept a contract under which both the spreadsheet and word processing software of Company X be installed in their PCs before shipment. Due to this contract, the said entrepreneurs sold PCs incorporating both the spreadsheet 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 paragraph (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. (Microsoft Japan case [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 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 a company other than Company X, or Company Y. When Company B found it necessary to replace components of the said elevators and ordered components from Company X, Company X: a) responded that it would not sell components (tied products) only, would not accept the order unless Company Y also makes an order for replacement, repair and adjustment work related to the components (tying products) to Company X, and would deliver the components three months later, and; b) did not supply the said components to Company B although the order was again made later. Such conduct by Company X was deemed to fall under paragraph (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 (Toshiba Elevator Service case [Osaka High Court Judgment, July 30, 1993]).

(Note 16) Tying includes supplying one product only on the condition that the trade partner also supplies another product. It also includes trading only on the condition that the trade partners purchase another product.

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In addition, Tying includes dealing only on the condition that the trade partner purchases particular products in the market of supplementary products that will be needed after the product is purchased, so-called “aftermarket”.

(Note 17) With respect to offering a discount for a tying product and tied product supplied in combination, there are cases in which such conduct leads to competition regarding bundled (packages of tying products and tied products) between the entrepreneur and its competitor 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 is capable of supplying without a particular additional cost, a product that is equal in quality and brand value to the tying product of the entrepreneur. In such a case, assessment over whether or not the competition against the said competitor falls under Exclusionary Conduct is made from the viewpoint of “Below-cost Pricing” in paragraph 2 above.

5. Refusal to Supply and Discriminatory Treatment

(1) Conduct that may fall under Exclusionary Conduct

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

However, if an entrepreneur refuses to supply, imposes restriction on the quantity or contents of products to be supplied, or applies discriminatory treatment to the condition or implementation of supply, beyond reasonable degree, in the upstream market which provides products necessary for other entrepreneurs to engage in their business activities in the downstream market, the conduct (hereinafter referred to as “refusal to supply, etc.”) may cause difficulty to the business activities in the downstream market of the entrepreneurs incapable of easily finding an alternative supplier in the upstream market (hereinafter referred to as “entrepreneurs subject to refusal to supply”), and may undermine competition in the downstream market. Thus, refusal to

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supply, etc. conducted by an entrepreneur beyond reasonable degree (hereinafter referred to as “Refusal to Supply and Discriminatory Treatment”) may therefore fall under Exclusionary Conduct (Note 18) (Note 19).

Whether or not a product to be supplied can be considered to be a product necessary for trading customers to carry out business activities in the market (downstream market) will be assessed from the viewpoint of whether or not the product is an unsubstitutable and indispensable product for the trading customer to carry out business activities in the downstream market, and the production of a similar product through the trading customer’s own investment, technology development, etc. is difficult in reality. For example, natural resources such as iron ore and coal are unsubstitutable and indispensable products for a steel manufacturing company (trading customer) to manufacture products. In addition, it would be extremely difficult for the steel manufacturing company to produce natural resource, due to their nature. They can therefore be considered to be “products necessary for the trading customer to carry out business activities in the market (downstream market)”. In an area of business where the economies of scale or network effects work strongly, there are many cases where an organization with facilities, the right of use of which was exclusively assigned by the nation or other public entities, is privatized and conducts business. In such a case, if entrepreneurs cannot use the facilities, it would be likely to be difficult for them to carry out business activities in downstream markets. As a result, there are many cases where permission for the use of those facilities falls under “products necessary for a trading customer to carry out business activities in the market (downstream market)”

When assessing whether or not the refusal to supply, etc. goes beyond reasonable degree, the JFTC will concretely consider 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 low, significantly exceeding the difference in cost appropriate for the difference in trading volume compared with other purchasing entrepreneurs, it can be said that this price difference goes beyond reasonable degree. Meanwhile, for example, if the settlement conditions, delivery conditions and other supply conditions for an entrepreneur to whom an entrepreneur has supplied products in the upstream market for a long period of time are different from the conditions for an entrepreneur who is going to be newly supplied, but they are appropriate

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based on differences in past results, it cannot be said that such difference in treatment goes 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 falls under Exclusionary Conduct should be assessed especially prudently.

(2) Factors for assessment

Where Refusal to Supply and Discriminatory Treatment would cause difficulty to the business activities of the trading customer subject to refusal, etc. in the downstream 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 to the business activities of a trading customer subject to refusal, etc. in the downstream 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, the degree of market concentration, consideration is given to such factors as the characteristics of the products, the economies of scale, the degree of differentiation of products, distribution channels, market trends, difficulties in entry, etc. in the upstream market and downstream market will be taken into account.

For example, where the upstream market is an oligopolistic market with a high degree of market concentration, a trading customer will not easily find another supplier who can take the place of an entrepreneur 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 purchasing entrepreneur. Accordingly, such a case tends to be deemed to cause difficulty to the business activities of the trading customer in the downstream market of the purchasing entrepreneur subject to refusal, etc.

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, the market share

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of products, the rankings, brand value, excess supply capacity, and scale of operation of a trading customer and its competitors in the upstream market will be taken into account.

For example, where the products of an entrepreneur have strong brand power in the upstream market, a trading customer will not easily find another supplier who can take the place of the entrepreneur in the upstream market. The supply of products by the entrepreneur in the upstream market will therefore be more critical for the trading customer. In this case, if the business size of the entrepreneur's competitor is small and its excess supply capacity of the products is limited, the importance of the entrepreneur will increase further. Accordingly, such a case tends to be deemed to cause difficulty to the business activities of the trading customer in the downstream market subject to refusal, etc.

C. Positions of the trading customers and its competitors in the downstream market

When assessment is made over whether or not Refusal to Supply and Discriminatory Treatment fall under Exclusionary Conduct, the market share of products, the rankings, brand power, excess supply capacity and business size of a trading customer and its competitors in the downstream market will be taken into account.

For example, if the products of a trading customer do not have so strong brand value in the downstream market and the products of its competitor do have strong brand power, the trading customer will not easily find another supplier who can take the place of an entrepreneur in the upstream market. The supply of products by the entrepreneur in the upstream market will therefore be more critical to the business activities of the purchasing entrepreneur. Accordingly, such a case tends to be deemed to cause difficulty to the business activities of the trading customer in the downstream market subject to refusal, etc.

D. Period of the conduct

When assessment is made over whether or not Refusal to Supply and Discriminatory Treatment fall under Exclusionary Conduct, the period of Refusal to Supply and Discriminatory Treatment will be taken into account.

For example, if Refusal to Supply and Discriminatory Treatment occur over

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a long period of time, such a case tends to be deemed to cause difficulty to the business activities of the trading customer in the downstream market subject to refusal, etc.

E. Conditions of the conduct

When assessment is made over whether or not Refusal to Supply and Discriminatory Treatment fall under Exclusionary Conduct, the prices of the products of an entrepreneur in the upstream market, the conditions and details of transactions with a purchasing entrepreneur and the intention and purpose of the entrepreneur will be taken into account.

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 the prices for other trading customers, going beyond reasonable degree based on differences in the details of supply and other conditions, those trading customers will have to raise the prices of their products in the downstream market because the purchasing cost will be higher for them. In this case, particularly when the purchasing cost for those trading customers is higher than the selling price of the products sold by other trading customers in the downstream market (the said selling price includes the sales price of the said entrepreneur's product 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 said entrepreneur) through economically reasonable business activities. Accordingly, such a case tends to be deemed to cause difficulty to the business activities of the trading customer in the downstream market subject to refusal, etc.

(3) Illustrative examples

A. Ten companies including Company X owned numerous patent rights, etc. for the manufacture of pachinko machines and, at the same time, supplied almost all of the pachinko machines sold in Japan. Company Y was a joint stock company that was established by the members of the Japan Pachinko Pachislot Manufacturers Association, who were pachinko and pachislot manufacturers, with the aim of conducting business regarding granting a license of patented inventions for pachinko and pachislot. The ten companies including Company X outsourced the management of their owned patent rights, etc. to Company Y, and participated in the decision-making of

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Company Y through direct or indirect shareholdings in Company Y. Patented inventions, etc. owned or managed by the ten companies, including Company X, and Company Y were important technologies 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. Based on a policy of preventing the entry of parties or individuals who were not members of the Japan Pachinko Pachislot Manufacturers Association, the ten companies, including Company X, and Company Y have made it impossible for non-members to begin manufacturing pachinko machines in the pachinko machine manufacturing market (downstream market) by not granting a license of the patented inventions to them in the market (upstream market) pertaining to licensing the patents and inventions. As a result, the said conduct of the ten companies, including Company X, and Company Y was deemed to exclude the business activities of persons who intended to manufacture pachinko machines (pachinko machine manufacturing patent pool case ([JFTC recommendation decision, August 6, 1997])).

B. Company X was engaged in the regional telecommunications business and had a 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. In addition, Company X also had an overwhelmingly large market share in almost all areas of eastern Japan in terms of the number of optical fiber telecommunications to the home (FTTH services). Other telecommunications carriers who had no subscriber optical fiber equipment needed to connect with the subscriber optical fiber equipment owned by Company X by paying a connection fee in the subscriber optical fiber equipment connection market (upstream market) to provide users with services in the FTTH service market (downstream market). When Company X provided FTTH services, it established a user's fee which was lower than the connection fee paid to Company X by other telecommunications carriers. Therefore, if other telecommunications carriers set a user's fee that was able to compete with the user's fee of Company X, while paying Company X the connection fee, the other telecommunications carriers would be forced to suffer a large deficit. It has therefore become difficult for other telecommunications carriers to enter the FTTH service business by connecting with the subscriber optical fiber

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equipment of Company X. Such conduct was deemed to exclude the business activities of other telecommunications carriers who had no subscriber optical fiber equipment (NTT East case [Tokyo High Court Judgment May 29, 2009]).

(Note 18) 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, operates in the downstream market. In this case, whether or not conduct of setting the prices of its products in the upstream market at a level higher than the prices of its products in the downstream market or setting prices that are so close as to interfere trading customers from responding 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 19) 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, beyond reasonable degree refuses supply, from a manufacturer, etc. in the upstream market ,who has difficulty in establishing a new distribution channel in the downstream market actually, whether or not it falls under Exclusionary Conduct will be determined from the same viewpoint as Refusal to Supply and Discriminatory Treatment.

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 mentioned in Part II above falls under Exclusionary Private Monopolization is determined from the viewpoint of the influence that the conduct concerned has on 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 decided on a relative basis according to the objects, regions and conditions of the specific conduct and trade. Accordingly, it is in principle, like the

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unreasonable restraint of trade, that a particular field of trade is decided after assessing the said conduct and the scope influenced by the trade related to the said conduct according to the objects, regions and conditions of the specific conduct and trade, and determining the scope where competition is substantially restrained.

In many cases, Exclusionary Private Monopolization is 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 examining trade pertaining to Exclusionary Conduct and the scope of its influence, the scope of products (as mentioned in (2) below) which substitute for the traded products (Note 20) or the geographical scope (as mentioned in (3) below) for users (or suppliers) could be taken into account as necessary.

A particular field of trade could be determined for the scope of a certain product (or geographical scope) according to the actual conditions of trade, while other particular field of trade could be also determined in a superposed manner for a wider (or narrower) scope of products (or geographical scope).

(2) Scope of products

The scope of products is determined mainly from the viewpoint of the substitutability of products for users. In many cases, the degree of the substitutability of products for users corresponds to the degree of similarity of utility of the products, and the scope of products is 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, consideration would also be given to whether suppliers are able to switch the manufacture and sale of one product to another within a short period of time without substantially added cost and risk.

When assessing the degree of similarity of a product's utility for users, the JFTC takes into account the following factors.

A. Usage

Consideration is given to whether or not a product is, or has the potential to be, used for the same usage of the product traded.

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To determine whether both products are used for the same usage, 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, there could be a case where, even if these characteristics differ to a certain extent, both products are considered to be for the same usage.)

Where the traded product is used for several usages, each usage is examined to determine whether any other products are, or has the potential to be, used for the same usage.

B. Changes in price, quantity, etc.

There are instances where differences in the level of prices or changes in price and quantity are taken into account.

For example, there are cases where it is not deemed that the traded product (Product X) and another product (Product Y) cannot be considered to provide similar utility, etc. This is because product Y is rarely used as a substitute for product X, since there is a significant price difference between product X and Y, or costs are involved in substituting product Y for X to change the facilities or train employees despite no price difference between product X and Y.

In addition, it is deemed that product X and Y provide similar utility, 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

There are cases where the recognition and behavior of users are taken into account.

For example, there are cases where, even though the specific material characteristics of product X (the traded product) and Y are different, products X and Y are deemed to provide similar utility, etc. 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 a traded product was raised in the past, it could be taken into account whether users used another product as a substitute for the traded product.

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(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 very often be determined by the behavior of users and suppliers, and the existence of issues in the transportation of the product.

To assess the behavior of users and suppliers and the existence of problems regarding the transportation of the product, the following factors are considered.

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

In the assessment of the range of the region in which users can usually purchase the product, 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 are considered.

Consideration could be also given to which region's suppliers the users purchased the product from when the price of the product in a certain region was increased in the past.

B. Characteristics of products

Feature of products such as perish ability, heaviness and fragility affect the scope of transportation or the degree of difficulty in transporting the products.

C. Means and cost of transport

The 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 are considered.

(Note 20) The traded products refer to tied product when the Exclusionary Conduct falls under "Tying" as mentioned in paragraph 4 of Part II above, and refer to products in the downstream market when the Exclusionary Conduct falls under the discriminatory treatment and refusal to supply mentioned in paragraph 5 of Part II above.

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2. Substantial Restraint of Competition

(1) Basic View

With respect to the meaning of “substantially to restrain competition in any particular field of trade,” which is provided for in Paragraph (5) of Article 2 of the Antimonopoly Act, a court held that this is interpreted to mean establishing, maintaining and strengthening a situation in which competition itself has decreased, and a certain entrepreneur or a certain group of entrepreneurs can control the market by to some extent manipulating price, quality, quantity and other various conditions (NTT East Case [Tokyo High Court Judgment May 29, 2009]).

If the state of market control for this purpose is established, maintained or strengthened, it is deemed that competition is substantially restrained, even though prices are not raised in reality.

(2) Factors for assessment

When the JFTC assesses the existence or non-existence of a substantial restraint of competition, it will not rely on a certain specific standard, but comprehensively consider the following factors in accordance with each case (Note 21).

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

(A) Market share (Note 22) and its ranking of the said entrepreneur

As an entrepreneur engaging in Exclusionary Conduct has a larger market share and higher share ranking, it is less easy for its competitors to maintain sufficiently supply in place of the entrepreneur in response to an attempt by the entrepreneur to raise the price of the traded product. Thus, in such a case that the said entrepreneur has a top ranking with a large market share, it could be more likely concluded that the Exclusionary Conduct causes a substantial restraint of competition since it is thought that the ability of the competitors to constrain by the said entrepreneur’s price rise is weaker.

In particular, if these conditions have continued from the past and are not expected to easily change in the future, it could be more likely concluded that the Exclusionary Conduct causes a substantial restraint of competition.

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(B) Conditions of competition in the market

In such a case that robust competition has so far been made between an entrepreneur conducting Exclusionary Conduct and an excluded entrepreneur or that an entrant has so far intensified market competition, it could be more likely concluded that the Exclusionary Conduct causes a substantial restraint of competition.

In such a case that a market share concentrated on a few leading entrepreneurs as a result of Exclusionary Conduct, it could be more likely concluded that the Exclusionary Conduct causes a substantial restraint of competition since they tend to take coordinated conduct as they share common interests

(C) Conditions of the competitors

In such a case that Exclusionary Conduct makes it difficult for a competitor selling superior products in terms of price and quality or a competitor with high overall business capability including its ability to procure raw materials, technical capabilities, marketing capabilities, creditworthiness, brand value, advertising capabilities, to take competitive actions in the market, it could be more likely concluded that the Exclusionary Conduct causes a substantial restraint of competition.

In such a case that the excess supply capacity of a competitor is not sufficient, the ability of the competitors to constraint the said entrepreneurs' price rise may not work better than otherwise. Therefore, it could be more likely concluded that the Exclusive Conduct causes a substantial restraint of competition.

B. Potential Competitive Pressure

Generally, where market entry is not easy and there is little possibility that a new entrepreneur enters the market within a certain period, even if the entrepreneur raises the price of the traded product, the said entrepreneur acquires some ability to control price and other factors. Therefore, it could be more likely concluded that the Exclusionary Conduct causes a substantial restraint of competition.

As to whether or not potential competitive pressure works sufficiently, the JFTC will comprehensively consider the following factors, and assesses whether or not the possibility of entry by other entrepreneurs within a certain

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period can be a factor preventing the said entrepreneur from acquiring some ability to control the prices of the traded product (Note 23).

(A) Degree of institutional entry barriers

Where regulations based on legislations become an entry barrier, potential competitive pressure is unlikely to work, because the entry will not be possible even if an entrepreneur raises the prices of traded products.

(B) Degree of entry barriers in practice

When the amount of capital required for entry is large and an entrant is subject to conditions that are more disadvantageous than those for existing entrepreneurs in terms of location, technical issues, purchasing conditions for raw materials or sales conditions, potential competitive pressure is unlikely to work.

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

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

Meanwhile, where it is difficult for the entrants to produce and sell products with a quality and range equivalent to those of the entrepreneur's products, or if the entrant's products confront familiarity issues, potential competitive pressure is unlikely to work.

C. Users' countervailing bargaining power

Where users do not have the countervailing bargaining power against an entrepreneur for such circumstance that users have difficulty to switch the suppliers, it could be more likely concluded that the Exclusionary Conduct causes a substantial restraint of competition since the entrepreneur acquires some ability to control price and other factors.

On the other hand, where users' price bargaining powers are strong in terms of the ways of their procuring the product, the dispersion of suppliers, and ease of switching, such as situations where users easily switch the suppliers or

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where users acquire price bargaining powers by indicating the possibility of switching the suppliers, this power becomes the factor to interfere the entrepreneur from acquiring some ability to control price and other factors.

D. Efficiency

When an entrepreneur is expected to take competitive actions owing to the improvement of productivity, technological innovation and the improvement of the efficiency of business activities that are attributable to the economies of scale, the integration of production facilities, the specialization of facilities, the reduction of transportation costs and the improvement of the efficiency of research and development systems that are incidental to Exclusionary Conduct of the entrepreneur, such circumstances may be taken into account in the assessment regarding substantial restraint of competition.

In such a situation, 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 the results of a decline in the prices of products, an improvement of quality, a supply of new products, etc. are passed on 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 economies of scale are acknowledged in tied products, and the demand for tied products cannot be increased by means other than selling tied products together with tying products. In this situation, when it is acknowledged that the supply of tied products has increased, resulting in supplying the products to users at the lower price, and improving users' welfare according to the promotion of competition in the market, whether or not competition is substantially restrained will be assessed in consideration of such circumstances.

However, when the Exclusionary Conduct achieves a monopolistic situation or an almost monopolistic situation, it is hardly concluded that competition is not substantially restrained, even if the circumstances mentioned in (i) and (ii) above are acknowledged.

E. Exceptional circumstances to assure consumer interests

Where Exclusionary Conduct assures the interests of general consumers

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based on safety, health and other justifiable reasons, and promotes the democratic and wholesome development of the national economy, such circumstances may be taken into account exceptionally in the assessment regarding substantial restraint of competition. Namely, if there are special 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 in general as provided in Article 1 of the Antimonopoly Act, the conduct in question may not fall under “substantial restraint of competition” (Note 24).

For example, a case is conceivable where a gas equipment sales company with approximately 50% share in a region sells its gas equipment with an imperfect combustion prevention device to someone who uses gas equipment without the device at a price lower than the cost required for its supply to stimulate replacement demand for gas equipment with the device from a viewpoint of the prevention of serious accidents caused by carbon monoxide poisoning, and the company bears the full cost of the installation even if other companies' gas equipment with the device is purchased. In such a case, it is considered that the conduct is based on the purpose of preventing serious accidents from happening, and that it serves the interests of general consumers, and that its influence on competition is limited. Therefore, the JFTC assesses whether or not competition is substantially restrained in consideration of such circumstances.

However, when the Exclusionary Conduct achieves a monopolistic situation or an almost monopolistic situation, it is hardly concluded that competition is not substantially restrained, even if the Exclusionary Conduct assures the interests of general consumers based on safety, health and other justifiable reasons, and promotes the democratic and wholesome development of the national economy.

(Note 21) When the Exclusionary Conduct falls under “Refusal to Supply and Discriminatory Treatment” as mentioned in paragraph 5 of Part II above, the existence or non-existence 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, the JFTC assesses each factor will therefore be assessed according to the condition of the trading customers and their competitors in

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the downstream market.

(Note 22) Market shares are based on the percentage of the quantity of the traded products of each entrepreneur to the quantity of traded products in any particular field of trade. However, in such a case that it is acknowledged that there is a large difference in the price of the said products and the practice of calculating the results of supply using prices has been adopted, or that the use of trading volume of product is not appropriate, market shares will be calculated based on transaction value.

If multiple entrepreneurs are the entrepreneurs by combination or conspiracy with each other, the market share herein shall refer to the sum of the market shares of products supplied by the respective entrepreneurs involved.

(Note 23) When the Exclusionary Conduct falls under the “Below-cost Pricing” mentioned in paragraph 2 of Part II above, there is almost no entry barriers due to conditions such as control based on regulations, etc., in terms of technical issues, purchasing conditions for raw materials, etc. In such a case, if an entrepreneur raises the price of the traded products, the entry of an entrepreneur with a competitive restraint can be realistically expected within a short period of time. Therefore, such a case will not be considered to substantially restrain competition.

(Note 24) 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 interests” stipulated in Paragraph (6) of Article 2 of the Act as follows:

In principle, “contrary to the public interests” 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 objective of the Act “to promote the democratic and wholesome development of the national economy as well as to assure the interests of general consumers,” after the interest protected by the said conduct were weighed against the interest

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protected by the Act. It should be interpreted that the provision, “contrary to the public interest”, has meaning of excluding this exceptional situation from the conduct of “unreasonable restraint of trade” stipulated in Paragraph (6) of Article 2 (petroleum cartel criminal case [Supreme Court judgment February 24, 1984]).