GUIDELINES CONCERNING DISTRIBUTION SYSTEMS AND BUSINESS PRACTICES UNDER THE ANTIMONOPOLY ACT

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INTRODUCTION

1. Practices regarding distribution systems and business transactions have been formed with various historical and social backgrounds, and they differ from one country to another. And there is the need to review them from time to time in order to change them for the better. In accordance with the increasing globalization of economic activity and the enhancement of Japan's international status, and under increased need to enrich national life, Japanese distribution systems and business practices, too, are called on to change in the direction of further protecting consumers' interests and making the Japanese market more open internationally. For this purpose, it is essential to promote free and fair competition and enable the market mechanism to fully perform its functions: more specifically, to make sure that a, firms be not prevented from freely entering a market, b, each firm can freely and independently select its customers or suppliers, c, price and other transaction terms can be set via each firm's free and independent business judgment, and composition be engaged in by fair means on the basis of price, quality and service.

This set of the Guidelines is intended to contribute to preventing firms and trade associations from violating the Antimonopoly Act and helping in the pursuit of their appropriate activities, by specifically describing, with respect to Japanese distribution systems and business practices, the types of conduct which may impede free and fair competition and violate the Antimonopoly Act.

2. Part I of these Guidelines sets forth guidance under the Antimonopoly Act concerning the continuity and exclusiveness of transactions among firms, mainly keeping in mind transactions of producer goods and capital goods between producers and users, and Part II states guidance under the said Act concerning transactions in distribution, mainly keeping in mind transactions in distribution process in which consumer goods reach their consumers.

However, there is no difference in guidance under the Antimonopoly Act between transactions of producer goods and capital goods and those of consumer goods. That is, if there are business practices regarding transactions of consumer goods which are not described in Part II but in Part I, the guidance provided in Part I shall apply to them. And if there are business practices regarding transactions of producer goods and capital goods which are not described in Part I but in Part II, the guidance provided in Part II shall apply to them.

Furthermore, Part III provides guidance under the Antimonopoly Act concerning sole distributorship for the entire domestic market, regardless of the nature of goods. If there are business practices which are not described in

Part III but in Part I or II, the guidance provided in Part I or II shall apply to them.

In addition, although these Guidelines provided guidance mainly with respect to goods, the same guidance shall fundamentally apply to service trade.

3. Among the types of conduct described in these Guidelines, "Customer Allocation" and "Boycotts" in Part I, and "Resale Price Maintenance" and so forth in Part II, in principle constitute violations of the Antimonopoly Act. On the other hand, regarding other types of conduct, whether or not each conduct constitutes a violation of the Antimonopoly Act is to be judged on a case-by-case basis, analyzing its effect on competition in a market.

These Guidelines provide guidance on major types of business practices which may present a problem under the Antimonopoly Act, with respect to distribution systems and business practices. The Guidelines, however, do not cover all types of practices which may present a problem. For example, price-fixing cartels, purchasing volume cartels, and bid riggings, which are not covered in the Guidelines, in principle constitute violations of the Antimonopoly Act. Accordingly, it is to be judged on a case-by-case basis whether other types of business practices not provided in these Guidelines may present a problem under the Antimonopoly Act.

There may be cases where it is difficult for firms and others to know whether or not particular practices may present a problem under the Antimonopoly Act in the light of these Guidelines. Accordingly, at the publication of the Guidelines, a prior consultation system concerning distribution systems and business practices shall be established in order to respond to specific consultations (see. Appendix II).

PART I ANTIMONOPOLY ACT GUIDELINES CONCERNING THE CONTINUITY AND EXCLUSIVENESS OF BUSINESS PRACTICES AMONG FIRMS

1. There sometimes could be seen continuous transaction relationships with specific customers or suppliers, mainly in transactions between firms of producer goods and capital goods.

However, if business relationships between firms continue over a long period of time due to each firm's choice of trading partners on its own independent judgment based on price, quality, service, and other transaction terms, there would be no problem from the viewpoint of the Antimonopoly Act.

Furthermore, there may be a case where a firm, in selecting its trading partners, takes account of such overall business capability of suppliers as steady supply, technical resources, and flexibility in response to the firm's requests, in addition to price, quality, service, and other transaction terms in individual transactions. If total evaluation by the firm from the viewpoint mentioned above, or transaction terms of goods or services to be purchased from the suppliers, results in continuous transaction relationships, there would be no problem under the Antimonopoly Act.

If, however, any firm consults with another firm on mutual respect of and priority to the existing business relations to ensure the continuation of such relations, or engages in such conduct as concertedly with another firm excluding competitors, competition to win customers in a market is to be restrained and entries of new competitors hindered, which result in restraining competition in the market. Moreover, if any firm does business with its trading partners on condition that the latter shall not deal with the former's competitors, or the former applies pressure on the latter to prevent it from doing business with the former's competitors, adverse effects on competition in a market is to be produced, including prevention of new entrants from entering the market.

2. There sometimes could be seen cases where firms mutually hold each other's stocks to have stable stockholders, or hold stocks of their trading partners to facilitate their transactions.

Since acquisition or possession by a company of another company's stock may affect competitive order, such acquisition or possession of stocks of another company freely in principle, so long as it does not contravene these regulations.

However, even if acquisition or possession of stocks of another company in itself is not subject to the regulations of the Antimonopoly Act, should a firm, in carrying on transactions with its trading partners whose stocks are owned by it, prevent them from doing business with its competitors, by

making use of the stockholding relationships, or for the same reason, give priority to transactions with them, it would have adverse effects on competition in a market, including prevention of newcomers and others with no stockholding relationship, from entering the market.

Furthermore, so-called corporate groups have been formed by means of holding stocks by a specific firm of many of its trading partners, or mutually holding stocks and dispatching executive among firms belonging to the different industries. Transactions between firms belonging to the same corporate group can be considered in the same light as described above.

3. What follows in Part I, keeping in mind transactions of producer goods and capital goods between producers and users, described guidance under the Antimonopoly Act primarily on business practices undertaken to establish or maintain continuous transaction relationships, or undertaken on the strength of such relationships, which may result in hindrance of new entries of firms into a market or exclusion of existing ones from the market, chiefly from the viewpoint of regulation of unreasonable restraint of trade and unfair trade practices.

Chapter 1 Customer Allocation

1. Viewpoint

Such conduct of a firm in concert with any other firm or firms, or of a trade association as mutually respecting existing business relations without contending for customers or agreeing not to enter a market where another firm has already engaged in business activities, is sometimes employed for the purpose of securing the continuation of existing business relations in a situation where many firms are engaged in continuous transactions. Such conduct is most likely to lead an attempt to exclude new entrants from the market for the purpose of ensuring the effectiveness of that conduct.

Such conduct, which restricts competition for customers, is in principle illegal.

2. Concerned Restrictions by Firms on Competition for Customers

In cases where a firm, concertedly with any other firm or firms, engages in the following types of conduct, for instance, and if competition for customers is thereby restricted and competition in a market becomes substantially restrained, such conduct constitutes unreasonable restraint of trade and violates Article 3 of the Antimonopoly Act (Note 1):

(1) Customer Restrictions

a. Manufactures concerted arrangement mutually not to deal with customers of other firms;

b. Distributors concertedly restrain each other from winning over customers from other firms by offering lower prices;

c. Distributors concertedly arrange to require payment of a rectification charge when one of the distributors deals with any customers of the other firms;

d. Manufacturers concertedly arrange to require each other than those registered; or

e. Distributors concertedly restrict customers which each of distributors deals with

(2) Market Allocation

a. Manufacturers concertedly restrict each other's sales territory:

b. Distributors concertedly arrange not to start sales activities in any area where other firm or firms have already engaged in sales activities;

c. Manufacturers concertedly restrict standards and kinds of products to be manufactured by each firm; or

d. Manufacturers concertedly arrange not to start manufacturing any kind of products already being manufactured by other firm or firms.

(Note1) Even in the absence of an explicit agreement, if a tacit understanding or a common intent is formed among firms regarding customer restrictions or market allocation, thereby substantially retraining competition in a market, this in itself, constitutes a violation of the Antimonopoly Act. The same shall apply in Part I.

3. Restrictions by Trade Associations on Competition for Customers

In case where a trade association, in connection with its member firms' activities, undertakes any of such conduct as described in the forgoing Article 2 (1) a. through e. or (2) a. through d, and if competition for customers among member firms is thereby restricted and competition in a market becomes substantially restricted, such conduct constitutes a violation of Article 8 (i) of the Antimonopoly Act. Even if the conduct does not cause substantial restraint of competition in the market, it in principle constitutes a violation of Article 8 (iv) of the Antimonopoly Act, because it unjustly restricts the functions or activities of member firms.

Chapter 2 Boycotts

1. Viewpoint

Even if free and fair competition results in compelling a firm to exit from a market or to fail to enter the market, it would present no problem under the Antimonopoly Act.

It is, however, in principle illegal for a firm, in concert with its competitors, customers or suppliers, etc., or for a trade association to prevent new entrants from entering a market or exclude existing firms from the market, which is a prerequisite for effective competition.

There are a variety of types in which concerted refusals to deal (boycotts) may take place, and their extent on competition may vary with, among other things, the market structure as well as the degree of probability that such conduct would prevent a firm from entering a market or exclude a firm from the market. A concerned refusal to deal, if it makes it very difficult for a firm to enter a market, or its effect is to exclude a firm from the market, judging from, among other things, the number and position in the market of the firms concerned as well as characteristics of the products or services concerned, thereby resulting in substantial restraint of competition in the market, is illegal as unreasonable restraint of trade. A concerted refusal to deal, even if it does not cause substantial restraint of competition in a market, is, in principle, illegal as unfair trade practices, because it generally tends to impede fair competition. In the case of a trade association arranging for concerned refusal to deal, such conduct is illegal as substantial restraint of competition by trade associations, or obstruction of competition by them (conduct to limit the number of firms in any particular field of business; to unjustly restrict the functions or activities of member firms; or to induce any firm to engage in such acts as constitute unfair trade practices).

2. Refusals to Deal in Concert with Competitors

(1) In cases where competitors concertedly engage in, for instance, the following types of conduct, and, if the conduct makes it very difficult for any firm refused to deal with to enter a market, or its effect is to exclude the refused firm from the market, thereby resulting in substantial restraint of competition in the market (Note 2), such conduct constitutes unreasonable restraint of trade and violate Article 3 of the Antimonopoly Act.

a. Manufacturers concertedly, in an attempt to exclude price-cutting distributors, refuse to supply of products to such distributors;

b. Distributors concertedly, in an attempt to prevent new entries by competitors, refuse to supply products to new entrants as well as cause their suppliers (manufacturers) to refuse supply products to new entrants;

c. Manufacturers concertedly, in an attempt to exclude prevent new entries by competitors, refuse to supply products to new entrants as well as cause their suppliers (manufacturers) to refuse to supply products to new entrants;
d. Finished product manufacturers concertedly, in an attempt to prevent competitors from entering a market, inform material suppliers of their intention to refuse to deal if the suppliers provide the materials to supply to the new entrants.

(Note 2) In cases where a concerted refusal to deal brings about such situations as follows, competition in a market shall be found to be substantially restrained.
a. In case where it is made very difficult for any firm manufacturing or selling products superior in price and quality to enter a market, or in case where such a firm is to be excluded from the market;
b. In case where it is made very difficult for any firm adopting innovative selling method to enter a market, or in case where such firm is to be excluded from the market;
c. In case where it is made very difficult for any firm having superior overall business capabilities to enter a market, or in case where such firm is to be excluded from the market;
d. In case where it is made very difficult for any firm to enter a market where no active competition is taking place; or
e. In case where a concerted refusal to deal is conducted toward any potential entrant to enter a market.

(2) Any type of conduct described in (1)a, through d, above, undertaken in concert by competitors, even if the conduct does not cause substantial restraint of competition in a market, is in principle illegal as unfair trade practices (Violation of 19 of the Antimonopoly Act), (Article 2(9)(i) of the Antimonopoly Act or Article 1 (Concerted Refusal to Deal) of the General Designation).

3. Refusals to Deal in Concert with Customers, Suppliers, etc.
(1) In case where a firms concertedly with their customers, suppliers, etc., engaged in, for instance, the following types of conduct, and if the conduct makes it very difficult for any firm refused to deal with to enter a market, or its effect is to exclude the refused firm from the market, such conduct constitutes unreasonable restraint of trade (Note 3) and violates Article 3 of

the Antimonopoly Act.

a. Distributors and manufacturers concertedly, in an attempt to exclude price-cutting distributors, undertake such conduct that the latter refuses or restricts the supply of products to such distributors and that the former refuses to deal in the products of those manufacturers which have supplied their products of those manufacturers which have supplied their products to such distributors;
b. A manufacturer and its distributors concertedly, in an attempt to exclude imported products, undertake such conduct that the latter does not deal in the imported products and that the former refuses to supply products to those distributors selling the imported products;
c. Distributors and a manufacturer concertedly, in an attempt to prevent other distributors from entering a market, undertake such conduct that the latter refuses to supply products to new entrants and that the former refuses to deal in the products to such new entrants and that the former refuses to deal in the products of those manufacturers which have supplied their products to such new entrants: or
d. Material manufacturers and a finished product manufacturer concertedly, in an attempt to exclude imported materials, and that the former refuses to supply materials to those finished product manufacturers which have purchased the imported materials.

(Note 3) For any conduct to constitute unreasonable restraint of trade, it is required that any firm in concert with other firms, "mutually restrict their business activities"(Article 2 (6) of the Antimonopoly Act). The content of restrictions of business activities in this context does not need to be identical in all firms (for example, distributors and manufacturers), but is sufficient if the conduct restricts the business activities of each firm and is for the purpose of achieving a common purpose, such as the exclusion of any specific firm. As for example of cases where competition in a market, shall be found to be found to be substantially restrained through refusals to deal in concert with customers, suppliers, etc., see Note 2 above.

(2) Any type of conduct described in (1)a, through d, above, undertaken by any firm concertedly with its customers, suppliers, etc., even if the conduct does not cause substantial restraint of competition in a market, is in principle illegal as unfair trade practices (Article 2(9)(i) of the Antimonopoly Act or Paragraph 1 (Concerted Refusal to Deal) or 2 (Other Refusal to Deal) of the

General Designation).

4. Refusal to Deal Arranged by Trade Associations

In cases where a trade association engages in, for instance, the following types of conduct, and if the conduct makes it very difficult for any firm refused firm from the market, thereby resulting in substantial restrain of competition in a market (Note4), such conduct violates Article 8 (i) of the Antimonopoly Act.

Furthermore, in any case where a trade association engages in the following types of conduct, even if such conduct does not cause substantial restraint of competition in a market such conduct does not cause substantial restraint of competition in a market, such conduct, in principle, violates Article 8 (iii), 8 (iv), or 8 (v) (Article 2(9)(i) of the Antimonopoly Act or Paragraph 1(Concerted Refusal to Deal) or 2(Other Refusal to Deal) of the General Designation) of the Antimonopoly Act.

a. A trade association composed of distributors, in an attempt to exclude imported products, prohibits member firms from dealing in the imported products (Article 8 (i) or 8 (iv) of the Antimonopoly Act)

b. A trade association composed of distributors and manufacturers induces member manufacturers to supply products only to member distributors and not to outsiders (Article 8 (i) or 8 (iv) of the Antimonopoly Act).

c. A trade association composed of distributors, in an attempt to exclude outsiders, applies pressure on manufactures dealing with member firms, by requesting the manufacturers not to supply products to outsides or through other means (Article 8 (i) or 8 (v)) of the Antimonopoly Act);

d. A trade association composed of distributors, in an attempt to prevent competitors of member firms from entering a market, applies pressure on manufacturers dealing with member distributors, by requesting the manufactures not to supply products to those new entrants or though other means(Article 8 (i), or 8 (v) of the Antimonopoly Act);

e. A trade association composed of distributors restricts new membership in the association and causes manufactures dealing with member distributors to refuse to supply products to outsiders (Article 8 (i), 8 (iii), or 8 (v)) of the Antimonopoly Act); or

f. A trade association composed of service providers restricts new membership in the association under the circumstances where it is difficult for the service providers to carry on business without membership Article 8 (iii) of the Antimonopoly Act)

(Note 4) As for examples of cases where competition in a market

shall be found to be substantially restrained through concerted refusals to deal arranged by trade associations, see Note 2 above.

Chapter 3 Primary Refusals to Deal by A Single Firm

1. Viewpoint

Basically peaking, it is a matter of freedom of choice of trading partners for a firm to decide which firm it does business with. Even if a firm, considering such factors as price, quality and service, decides not to deal with a certain firm at its own judgment, there would be fundamentally no problem under the Antimonopoly Act.

However, exceptionally, even a refusal to deal by a single firm is illegal in cases where the firm refuses to deal as a means to secure the effectiveness of its illegal conduct under the Antimonopoly Act. A refusal to deal by a single firm may also present a problem in cases where the firm refuses to deal as a means to achieve to achieve such unjust purposes under the Antimonopoly Act as excluding its competitors from a market.

2. Primary Refusals to Deal by A Single Firm

In cases where a firm engages in such conduct as a, below as a means to secure the effectiveness of its illegal practice under the Antimonopoly Act, such conduct is illegal as unfair trade practices (Paragraph 2 (Other refusal to deal) of the General Designation).

Moreover, in cases where an influential firm in a market engages in such conduct as b, or c, below as a means to achieve such unjust purposes under the Antimonopoly Act as excluding its competitors from a market, and if such conduct may make it difficult for the refused firm to carry on normal business activities, such conduct is illegal as unfair trade practices (Paragraph 2 (Other Refusal to Deal) of the General Designation):

a. A manufacturer influential in a market (Note 5), by causing its distributors not to deal with its competitors, and prevents them from easily finding alternative trading partners, and, with a view to ensuring the effectiveness of such conduct, refuses to deal with distributors not yielding to this request (Paragraph 11 (Dealing on Exclusive Terms) of the General Designation shall also apply to such conduct);

b. A material manufacturer influential in a market, in an attempt to prevent its customers (finished product manufacturer), stops the supply of main materials which have been supplied to finished product manufacturers; or

c. A material manufacturer influential in a market, in an attempt to exclude competitors of its customers (finished product manufacturers) which have close relations with in (Note 6) from the said finished product market, stops the supply of the materials which have been supplied to these competitors.

(Note 5) As to the definition of "a firm influential in a market," see Note 7 below.

(Note 6) A firm "which has close relations" with another firm means one having common interests with the other. Whether or not a firm means one having common interests with another firm is to be judged on a case-by-case basis, taking comprehensively into consideration such factors as stockholding relationship, interlocking or dispatching of directorates, trading and financing relationship, and common membership of so-called corporate groups. The same shall apply in Part I.

Chapter 4 Restrictions on Trading Partners of Dealing with Competitors

1. Viewpoint

If a firm deals with its customers or suppliers on condition that the latter does not deal with the former's competitors, the latter is to be able to deal with other firms, and this may also reduce the business opportunities of the competitors. Moreover, there is the concern that, where firms are doing business with one maintaining the existing business relations, to put pressure on their customers or supplier not to deal with their competitors.

Such conduct infringes on the freedom of choice of trading partners, and at the same time tends to reduce business opportunities of competitors, and, therefore, may pose a problem under the Antimonopoly Act.

2. Restrictions on Trading Partners of Dealing with Competitors

In cases where an influential firm in a market (Note 7), by means of the following manners, engages in transactions with its trading partners on condition that the trading partners shall not deal with competitors of the firm or another firm having close relations with the firm (Note 8), or causes the trading partners to refuse to deal with those above-mentioned competitors, and if such conduct may result in reducing business opportunities of the competitors and making it difficult for them to easily find alternative trading partners (Note 9), such conduct is illegal as unfair trade practices (Paragraph 2 (Other Refusal to Deal), 11 (Dealing on Exclusive Terms), or 12 (Dealing on Restrictive Terms) of the General Designation) (Note 10).

a. An influential material supplier in a market, by notifying or suggesting to its customers (manufacturers) that it intends to discontinue the supply of materials to the customers (manufactures) that it intends to discontinue the supply of materials to the customers if they carry on business with other material suppliers, requests the customers not to carry on business with other material suppliers (Paragraph 11 of the General Designation);

b. A finished product manufacturer influential parts manufactures, and obtains consent from such parts manufacturer to that effect (Paragraph 11 or 12 of the General Designation);

c. An influential financial firm in a market provides finance for an influential distributor on condition that the distributor exclusively deals with manufacturer having close relations with the financial firm; or

d. An influential manufacturer in a market causes its customers (distributors) not to accept an offer of transactions by a specific manufacturer attempting to enter the market (Paragraph 2 of the General Designation).

(Note 7) Whether a firm is "influential in a market" is in the first instance judged by a market share of the firm, that is, whether it has no less than 10% or its position is within the top three in the market (meaning a product market which consists of a group of products with the same or similar function and utility as the product covered by the conduct, and competing with each other judging from geographical conditions, transactional relations and other factors.)

Nonetheless, even if a firm falls under this criterion, the firm's conduct is not always illegal. In cases where the conduct may result in reducing business opportunities of the competitors and making it difficult for them to easily find alternative trading partners, such conduct is illegal.

In case of a low-ranked or newly-entered firm which has a market share of less than 10% and whose position is the fourth or later, the conduct usually would not result in reducing business opportunities of the competitors and making it difficult for them to easily find alternative trading partners, and such conduct is not illegal.

The same shall apply in Chapters 5 through 7 of Part I with regard to whether a firm is "influential in a market."

(Note 8) In addition to cases where a contract or agreement between a firm and its trading partners stipulates that the trading partners shall not and its trading partners stipulates that the trading partners shall not deal with the firm's competitors, if any artificial means is taken by the firm to secure the effectiveness of such restriction, the firm shall be found as dealing with the trading partners on a condition that restricts transactions with the competitors.

(Note 9) Whether or not "such conduct may result in reducing business opportunities of competitors and making it difficult for them to easily find alternative trading partners" is to be determined on a case-by-case basis, taking comprehensively into account the following factors:

a. Structure of the market (market concentration, characteristics of the product, degree of product differentiation, distribution channels, difficulty in the market entry, etc.);

b. Position of the firm in the market (in terms of market share, rank, brand name, etc.);

c. Number of parties affected by the conduct at issue and their positions in the market; and

d. Impact of the conduct on business activities of the affected

parties (extent, manner, etc. of the conduct).

As an element of market structure listed in a, above, other firms' behaviors are also to be considered. For example, in cases where two or more firms respectively and paralleled restrict transactions with their competitors, it is more likely to result in reducing business opportunities of the competitors and making it difficult for them to easily find alternative trading partners, compared to cases where only one firm does.

The same shall apply in Chapter 5 through 7 of Part I with regard to whether such conduct "may result in regarding business opportunities of competitors and making it difficult for them to easily find alternative trading partners."

(Note 10) In case where there is such proper justification under the Antimonopoly Act, in restricting transactions with competitors as follows, such restriction is not illegal:

a. In case where a finished product manufacturer which commissions parts manufacturers to make parts made with the materials exclusively to itself; or

b. In case where a finished product manufacturer which commissions parts manufacturer to make parts, supplying materials and providing know-how (meaning those related to industrial technologies and excluding those that are not secret in nature), requires them to sell parts exclusively to itself, and if such restriction is deemed necessary for keeping the know-how confidential, or preventing from unauthorized diversion of it.

Chapter 5 Unjust Reciprocal Dealings

1. Viewpoint

(1) In cases where transactions are continuously taking place between firms, the parties to the transactions, mutually selling products required by each other, may engage in reciprocal dealings (meaning transactions in which the purchases by one party of the other party's products are linked with the sales of the one party's products to the other party) in order to keep the existing business relationship as long as possible, and maintain mutual trust between the transacting parties. Such dealing may take place not only between directly transacting parties, but also between one party and another firm having close relations with the other.

(2) If each firm reciprocally deals with another as a result of its free choice of suppliers of products with better price, quality, service, and so forth, it does not present any problem under the Antimonopoly Act.

However, if one firm, by making use of its buying power, makes conditions on or compels the other to deal reciprocally, the conduct may infringe the latter's free choice of trading partners, or create the effect of reducing business opportunities of the former's competitors or of firms that are unable to accept reciprocal dealings, and may present a problem as unjust reciprocal dealing.

(3) In cases where a firm establishes a department or appoint personnel to supervise both purchases and sales, and has the department or personnel compare and check data on such purchases and sales, and systematically maintain lists of the volumes of purchases from and sales to each specific firm, or exchanges lists of customers and suppliers and between the purchases and sales departments, and if such conduct is carried out in order not to ensure recovery of credits but to have its purchases records from specific firms reflect on the sales of its products to those firms, such conduct is most likely to invite unjust reciprocal dealings.

2. Reciprocal Dealings by Making Use of Buying Power

(1) In cases where an influential firm in a purchasing market deals with the other party (supplier) on a continuous basis by means of the following manners on condition that the other party purchases the firm's products, and if such conduct may result in reducing business opportunities of firms not buying or unable to buy products from the influential firm, or of competitors of the influential firm and making it difficult for those firms to easily find alternative trading partners, such conduct is illegal as unfair trade practices (Paragraph 12 (Dealing on Restrictive Terms) of the General

Designation)(Note 11)

a. The influential firm, indicating that it would terminate or reduce purchases from the other party unless the other party purchases the firm's products, requests the other party to purchasing the firm's products.
b. The procurement personnel in the influential firm, suggesting that the influential firm's purchases would be affected, requests the other party to purchase the firm's products;
c. The influential firm, setting a sales target of its products for each transacting party on the basis of the amount of purchases from the latter, and indicating that the latter's failure to attain this target would result in a reduction in the volume of purchases by the firm from the latter, requests the latter to purchases a large enough amount to meet the a sales target;
d. The influential firm, revealing the comparative list of each transacting party's purchases from and sales to the firm and suggesting that it would otherwise purchase only a corresponding volume, requests additional purchases by each party; or
e. In response to the other party's offer to sell, the influential firm, indicating that it would purchase the other party's products if the other party purchases services supplied by the firm or its designated firm, requests the other party to purchase the services.

(Note 11) If there is such proper justification under the Antimonopoly Act, that for one party to a transaction to ensure the quality of the products to be supplied by the other party, the former's supply of materials for the particular products to the latter is considered necessary, such conduct is not illegal (the same applies in 3 below).

(2) Furthermore, in cases where a firm, by making use of its buying power Note 12, engage in any type of the conduct described in (1)a, through e. above, or any of following types of conduct to the other party, and if the other party, under the circumstances in which the conduct takes place (including the firm's position in a market, relationship between the firm and the other party, market structure, and the extent and manner of the request or proposal), is to be compelled to purchase products from the firm, such conduct is illegal as unfair trade practices (Paragraph 10 (Tie-in Sales, etc.) of the General Designation):

a. Though the other party has expressed its intention not to purchase, the firm, saying that it has purchased services from that party, makes a request to the party and induces it to purchase the firm's products; or

b. In spite of the absence of proposal by the other party to purchase, the firm unilaterally sends its products to that party, and offsets the products' total value against the unpaid balance due the latter.

(Note 12) In cases where a firm makes use of buying power of another firm having close relationships with it, as well as buying power of its own, consideration is to be given to such use of buying power (the same shall apply in (3) below).

(3) In cases where, between firms having continuous business relations, the one party which is relatively in a dominant bargaining position over the other party (Note 13) by making use of that position, unjustly in the light of normal business practices, induces the latter which sells its products to the former, to buy products sold by the former or its designated firm, such conduct impairs transactions based on free and independent judgment by a counterparty and may put the counterparty in the disadvantageous position on the one hand, and the one party the advantageous position to compete their respective rivals on the other. Therefore, in case where a firm in a dominant bargaining position induces the other party which sells its products to the firm, to buy products to the sold by the firm or its designated firm, by resorting to such conduct as described in (1)a, through e., or (2) a, or b, above the conduct is illegal as unfair trade practices (Article 2 (9)(v) (Abuse of Dominant Bargaining Position) of the Antimonopoly Act).

(Note 13) One party in transaction shall be found to be "in a dominant bargaining position over the other party" in such case where the latter is obliged to accept the former's requests even if they are excessively disadvantageous to the latter, since discontinuance of transaction with the former would significantly damage the latter's business. In making this finding, consideration is to be given to such factors as degree of dependence on the former, position of the former in a market, changeability of customers, and other specific fact that shows the necessity of the latter to do a business with the one party (supply and demand forces of the product).

3. Reciprocal Dealings Based on Voluntary Consent between Firms

In cases where firms having continuous business relations engaged in reciprocal dealings based on voluntary mutual arrangements such that each party should purchase products from the other on condition of reciprocity, such reciprocal dealing are different from the cases in 2 above, in which one party unilaterally induces the other party to buy its products, and they

present no problem except where a market is significantly to be foreclosed. One party to such dealings may give priority to transactions with the other party purchasing the one party's products, and the one party would respond only reluctantly to offers from competitors of the other party. As a result, these competitors would lose business opportunities to deal with the one party. Therefore, reciprocal dealings, even if based on voluntary consent, are illegal in the following cases.

(1) In case where an influential firm in a market based on voluntary consent with the other party to a continuous transaction, engages in reciprocal dealings, in which both parties purchase products on condition that each party mutually purchase the other's products, and if such conduct may result in reducing business opportunities of other firms selling the products which are the object of said reciprocal dealings and making it difficult for such other firms to easily find alternative trading partners, such conduct is illegal as an unfair trade practice (Article 12 (Dealing on Restrictive Terms) of the General Designation); or

(2) In case where a firm, based on voluntary consent, purchase products from another firm having close relations with the former, such conduct is to be assessed in accordance with the thinking described in (1) above. The same shall apply to reciprocal dealings, based on voluntary consent, among firms belonging to the same so-called corporate group.

Chapter 6 Other Anticompetitive Practices on the Strength of Continuous Transaction Relationships

In addition to the conduct described above up to Chapter 5, the following types of conduct, for instance on the strength of continuous transaction relationships, may present a problem under the Antimonopoly Act.

1. Restriction on Dealing with Competitors by Price Meeting

(1) Reducing prices by a firm of its products in accordance with market conditions is indeed a manifestation of competition policy. However, in cases where the firm does business with its customers on condition that the customers continue business with its customers on condition that the customers continue business with the firm if the firm reduces its price in response to lower prices offered by its competitors, such conduct may reduce business opportunities of its competitors, and may present a problem under the Antimonopoly Act if a market is significantly to be foreclosed.

(2) In cases where an influential firm in a market, as a means to maintain continuous transaction relationships with its customers, continues business with such customers on conditions that the terms of any proposal made by the former's competitors be made known to the former, and that if the former reduces its sales price to the same level as or to a more attractive level than the price quoted by the competitors, the latter will not deal with the competitors or will maintain the volume of transaction with the former at the same level as before, and if such conduct may result in reducing the competitors' business opportunities and making it difficult for the competitors to easily find alternative trading partners, such conduct is illegal as unfair trade practices (Paragraph 11 (Dealing on Exclusive Terms) or 12 (Dealing on Restrictive) of the General Designation).

2. Abuse of Dominant Bargaining Position on the Strength of Continuous Transaction Relationships

In cases where a firm in a dominant bargaining position on the strength of continuous transaction relationships, by using its position, establishes or charges trade terms or execute transactions in a way unjustly disadvantageous to its counterparty in the light of normal business practices to its counterparty, such conduct may impede the customers' transaction based on their free and independent judgment and may put the counterparty in the disadvantageous position on the one hand, and the one party the advantageous position to compete their respective rivals on the other. . Such conduct is illegal as unfair trade practice (Article 2 (9)(v)(Abuse of Dominant Bargaining Position) of the Antimonopoly Act).

Whereas abuse of dominant bargaining position on the strength of continuous transaction relationships is apt to occur in transactions between a parental firm and its subcontractors (subcontract transactions), such conduct in subcontract transactions violates Article 4 of the Act against Delay in Payment of Subcontract Proceeds, etc. to Subcontractors.

(For supplementary reference)

Act against Delay in Payment of Subcontract Proceeds, etc. to Subcontractors (Law No.120 of 1956) (excerpt)

Article 4 (Prohibited Conduct of Parental Firms)

(1) No parental entrepreneur shall, in case he gives a manufacturing commission etc. to a subcontractor, effect any one of the following types of conduct (in case of service contract, (i) and (iv) shall be excluded.):

(i) Refusing to receive the work from a subcontractor without reason for which the subcontractor is responsible;

(ii) Failing to make payment of subcontract proceeds after the lapse of the date of payment;

(iii) Reducing the amount of subcontract proceeds without reason for which the subcontractor is responsible;

(iv) Causing a subcontractor to take back the things relating to its work after receiving the work from the said subcontractor is responsible;

(v) Unjustly fixing a conspicuously lower amount of subcontract proceeds than the price ordinarily paid for the same or similar contents of work.

Chapter 7 Acquisition or Possession of Stocks of Trading Partners and Anticompetitive Effect

1. Viewpoint

(1) Since the acquisition by a company of stocks of another company may have effect on competitive order, the Antimonopoly Act prohibits the acquisition or possession of such stocks where its effect may be substantially to restrain competition in any particular field of trade. In addition, from the viewpoint of preventing excessive concentration of economic power, there also are provisions which prohibit establishing corporations which may be to cause excessive concentration of economic power and restrict the acquisition or the holding of voting rights of banks or insurance companies (Note 14). However, a company may acquire or possess stocks of another company freely so long as it does not contravene these regulations.

(2) Even where the acquisition or possession of stocks by a company is not in itself subject to regulation, if a firm uses its holding of stocks of its trading partners as a means to restrict transactions by the said partners with the firm's competitors or unreasonably refuses to deal with any other firm of which it holds no stocks, such conduct may reduce business opportunities of new entrants and other firms with no stockholding relationship, and accordingly may present a problem under the Antimonopoly Act.

Whereas a firm may enter into a stockholding relationship with its trading partners with a view to facilitating transactions between them, if the former, by making use of its dominant bargaining position, acquires stocks of the latter, such conduct may present a problem under the Antimonopoly Act.

(3) When such conduct as constituting unfair trade practices has been committed, the Fair Trade Commission may order, besides a cease and desist order, any necessary measure to eliminate the conduct (Article 20 of the Antimonopoly Act).

Therefore, in cases where such conduct as continuing unfair trade practices has been committed by a firm by means or by reason of the holding of stocks of its trading partners, the Commission will order the firm to cease and desist the conduct, and furthermore, if it is considered necessary, in order to eliminate the violation, to have the firm dispose of the stocks, because the violation is repeated or highly likely to be repeated, despite the cease and desist order, so long as the stockholding relationship continues to exist, the Commission will order the firm to dispose of the stocks in question.

If the acquisition or possession of stocks of the other party is achieved by means of unfair trade practices, the Fair Trade Commission may order any necessary measure, including the disposal of the stocks in question, to

eliminate the violation (Article 17-2 of the Antimonopoly Act).

(Note 14) Regulations acquisition or possession of stocks by a company under the Antimonopoly Act

a. Prohibition of stockholding, etc. which would result in substantial restraint competition (Article 10 of the Antimonopoly Act):

In cases where the effect of acquisition or possession of a domestic company's stocks may be substantially to restrain competition in any particular field of trade, such acquisition or possession is prohibited.

b. Prohibition of corporations which may be to cause excessive concentration of economic power (Article 10 of the Antimonopoly Act):

The formation of a company which may be to cause excessive concentration of economic power by means of stockholding other domestic company and the transformation of a company to become such a company in Japan are prohibited.

c. Restriction on the holding of voting rights by banks or insurance companies (Article 11 of the Antimonopoly Act)

Banks or insurance companies are prohibited from acquiring or holding more than 5% (10 % in the case of insurance companies) of the voting rights of any domestic company.

2. Formation of Stockholding Relationship by Unfair trade Practices

Whereas a firm, with a view to facilitating transactions or for other purpose, sometimes acquire or holds stock of any of its trading partners, or has any of them acquire or hold its own stocks, the following types of conduct undertaken as a mean to do so, is illegal.

(1) Acquisition of stocks o trading partners by unfair trade practices

A company is prohibited from acquiring or holding stocks of any domestic company by means of unfair trade practices (Article 10 of the Antimonopoly Act). Acquisition of stocks of trading partners is illegal when it is achieved by a method which itself constitutes unfair trade practices as well as by making the normal business activities of the trading partners difficult by means of unfair trade practices.

Acquisition of stocks by a firm of its trading partner by any of the following means, for instance, constitutes unfair trade practices and violates Article 10 of the Antimonopoly Act:

a. A finished product manufacturer in a dominant bargaining position, by requesting its parts supplier to let it acquire stocks of the latter, or suggesting that the latter's failure to comply with the request would invite the former's refusal to deal with the latter, or imposition of unjustly disadvantageous terms on the latter, forces the latter to issue new stocks for allocation to third parties or take some other step which enable the former to acquire stocks of the latter (Article 2 (9)(v) (Abuse of Dominant Bargaining Position) of the Antimonopoly Act); or

b. An influential finished product manufacturer in a market, by inducing a material producer which supplies materials to a parts manufacturer, with whom the finished product manufacturer has no stockholding relationship, to refuse further supply of the materials to the parts manufacturer, makes the normal business activities of the parts manufacturer difficult and as a result the finished product manufacturer acquires stocks from stockholders of the parts manufacturer (Paragraph 2 (Other refusal to deal) of the General Designation).

(2) Causing Trading Partners to Hold Stocks by Using Dominant Bargaining Position

In cases where a firm in a dominant bargaining position, by making use of that position, undertakes the following types of conduct, for instance, and thereby unjustly in the light of normal business practices, induces its trading partners to offer economic benefits or renders a disadvantage to them regarding transaction terms, such conduct is illegal as unfair trade practices (Article 2 (9)(v) (Abuse of Dominant Bargaining Position) of the Antimonopoly Act):

a. A finished product manufacturer in a dominant bargaining position, by making use of that position, suggests to its parts supplier that the latter's failure to subscribe to stocks to be issued by the former would result in the former's suspension of dealings with the latter, and thereby obliges the parts supplier to subscribe to the stocks to be issued; or

b. A manufacturer in a dominant bargaining position, by making use of that position, supplies its products to its distributor which owns stocks of the manufacturer on condition that the distributor does not dispose of the stocks.

3. Exclusionary Conduct by Means or by Reason of Holding of Stocks of Trading Partners

In cases where a firm holds stocks of or is in a cross stockholding relationship with any of its trading partners, even if the proportion of

stockholding is not particularly high, the former can use its position as a stockholder to influence decision-making processes by the latter, and may thereby engage in such conduct as impairing the latter's independent judgment in selecting trading partners, etc. Furthermore, in cases where a firm has a relationship of either unilateral or cross stockholdings with its trading partners, the firm may refuse to deal with other firms having no stockholding relationship with it, with, with intent of excluding them from a market. Such conduct may impair the choice of trading partners through their own independent judgment based on price, quality, service, and other transaction terms. It may also reduce business opportunities of new entrants or other firms having no stockholding relationship, and may present a problem under the Antimonopoly Act.

(For cases where a firm and its trading partners are in a parent-subsidiary relationship, see, Appendix I "Transactions between Parent and Subsidiary Companies.")

(1) Restrictions on trading partner' dealings with competitors by means of stockholding

In cases where an influential firm in a market, holding stocks of any of its trading partners, engages in the following types of conduct, for instance, and if such conduct may result in reducing business opportunities of competitors and making it difficult for them to easily find alternative trading partners, such conduct is illegal as unfair trade practices:

a. An influential finished product manufacturer in m market notifies its parts supplier, whose stocks it holds, o its intention to dispose of the stocks and suspend business with the said supplier if the latter sells parts to the former's competitors who are attempting to enter the market, or makes suggestions to that effect, and thereby discourages the latter from dealing with the said competitors (Paragraph 2 (Other Refusal to deal) of the General Designation); or

b. An influential manufacturer in a market, by making use of its position as a stockholder, induces its distributor, whose stocks it holds, to give consent (Paragraph 11(Dealing on Exclusive Terms) of the General Designation).

(2) Refusal to deal by reason of presence or absence of stockholding relationship

It is basically a matter of freedom of choice of trading partners for a film to decide which film it does business with.

However, in cases where an influential firm in a market, in any of following manners, for instance, refuses to deal with other firms having no

stockholding relationship with it, with a view to excluding them from the market, and if such conduct may make it difficult for the refused firm to engage in normal business activities, such conduct is illegal as unfair trade practices (Paragraph 2 (Other Refusal to Deal) of the General Designation):

a. An influential finished product manufacturer in a market stops purchasing from a parts manufacturer which has no stockholding relationship with it, with a view to excluding the competitors of a parts manufacturer which does have a stockholding relationship with it; or
b. An influential parts manufacturer having a stockholding relationship with a finished product manufacturer rejects a proposal for purchases of parts by a firm attempting to enter to finished product market, by reason of the absence of stockholding relationship with the parts manufacturer.

PART II ANTIMONOPOLY ACT GUIDELINES CONCERNING TRANSACTIONS IN DISTRIBUTION

1. Scope of the Guidelines

In order to sell its products, a manufacturer tends to conduct a variety of marketing activities, not only in a connection with direct transactions with customers but also extending to the level of retailers and consumers. In cases where as a part of those marketing activities a manufacturer interferes in, or influences in, or influences, sales prices of distributors, kind of products they sell, their sales territories, their customers, etc., it may impede competition among distributors and among manufacturers.

On the other hand, it is most likely to have anticompetitive effect if a large scale retailer seeks to utilize its dominant bargaining positions over its suppliers, on the strength buying power.

This part, mainly keeping in mind transactions in the distribution process in which consumer goods reach their consumers, provides guidance under the Antimonopoly Act on the following types of conduct, from the view point of regulation of unfair trade practices: conduct by manufacturers (Note 1) vis-à-vis their distributors regarding restrictions of sales price, products handled, sales territories, customers, etc., provision of rebates and allowances, and interference in management and interference in management.

(Note 1) The term "manufacturer" shall include a sole distributor, wholesaler or the like which conducts marketing activities as a principal.

2. Basic principles concerning the criteria for judging the legality and illegality with respect to effects of vertical restraints on competition

The purpose of the AMA is, by prohibiting unfair trade practices, to promote fair and free competition, and thereby to promote the democratic and wholesome development of the national economy as well as to assure the interests of general consumers.

Promoting free and fair competition in the distribution sector will be attained through assuring free and fair competition in each level of distribution; it cannot be accomplished simply by securing either competition among distributors or manufacturers as long as the other one is eliminated.

Manufacturer's business activities which restrain sales price, sales territory, customers, etc. of distributors such as wholesalers and retailers dealing in the manufacture's products (hereinafter, referred to as "vertical restraints") have various effects on competition depending on their degree, shapes and forms etc. Also, even if vertical restraints give effects to competition, such effects may include pro-competitive effects as well as anti-

competitive effects.

3. Criteria for judging the legality and illegality of vertical restraints

(1) Viewpoint on the criteria for judging the legality and illegality for vertical restraints

The AMA prohibits business activities which are likely to impede competition as unfair trade practices.

Whether vertical restraints are likely to impede fair competition or not will be examined by considering the following factors comprehensively. In this examination, not only anticompetitive effects but also procompetitive effects that would be resulted from the vertical restraints will be taken into consideration.

Also, the effects on potential competitors in each distribution level will be taken into consideration as well.

a. Actual conditions of so-called inter-brand competition (competition among manufacturers and competition among distributors carrying the different brand of products) (market concentration, characteristics of the product, degree of product differentiation, distribution channels, difficulty of new market entry, etc.);
b. Actual conditions of so-called intra-brand competition (competition among distributors carrying the same brand of products) (degree of dispersion in price, business types of distributors dealing in the product, etc.);
c. Position in the market of the manufacturer that imposes the restrictions (in terms of market share, rank of brand name, etc.);
d. Impact of the restrictions on the business activities of the distributors (degree, shapes and forms of the restriction etc.);
e. Numbers of distributors affected by the restrictions, and their position in the market.

(2) Pro-competitive effects which may result from vertical restraints

In the case where vertical restraints actually promote sales of new products, ease new entrants, improve quality and services and so on, pro-competitive effects can be recognized. The followings are typical and non-exhaustive examples:

a. Distributors may sell manufacturer's products without their own promotional activities when other distributors implement such promotional activities as pre-sales services to consumers, which thus actually boost demand for the products.

In such a case, either distributor may eventually refrain from actively

implementing voluntary promotional activities, and such situations may come where consumers who would have purchased the products, may not purchase them.

This type of situation is called the "free-rider" problem. One situation in which the free-rider problem is likely to occur is when consumers have limited information on the products. For example, in case of relatively new or technically complex products for consumers, consumers tend to have insufficient information so distributors may have to provide enough information or implement through promotional activities.

In addition, consumers must have a sufficient cost-saving effect on purchasing products when purchasing the products from a distributor that does not implement such promotional activities instead of purchasing from one which actually does so. Generally, consumers will have a profound effect when the price of products is relatively high.

When these conditions are met and therefore the free-rider problem occurs, making it highly likely that distributors will not provide consumers with sufficient information of the product hereby the product will not be supplied, allocating one sales area to one distributor may be one of efficient restrictions to avoid such free-riding.

Provided, however, that pro-competitive effects are recognized, for one thing, only if such promotional activities can benefit many new customers who do not yet have enough information and therefore increase of amount of purchase can be expected and so on. Also, such promotional activities may be unique for the product, and the cost of the promotional activities cannot be recouped (so-called "sunk-cost").

b. In some cases, it may be vital for manufacturer's marketing strategy to sell its products through retailers which establish a reputation for stocking high-quality products, in order to build a reputation for high quality of their new products.

In such a case, limiting retailers to whom dealers selling their products to such exclusive retailers may be one of helpful restriction for such manufacturers in order to acquire reputation for high quality of their new products.

c. Where a manufacturer sells a new product, the manufacturer may ask its distributors to make special investments such as establishing special facilities. In such a case, the distributors may not recoup these investments if other distributors which do not make such investments sell the same product. As a result, all distributors may refrain from making such investments.

In such a case, providing a certain territorial protection to the distributor

may be one of helpful restrictions for a manufacture to encourage them to make special investments.

d. A manufacturer may try to create uniform sales services and standardize the quality of sales services to build a reputation among customers (so-called "brand image") for its products. In such a case, limiting the distributor's customers to those who can meet certain criteria or restraining retailers' sales methods might be helpful for a manufacturer in order to build a reputation among consumers.

(3) The marketing activities which involve restrictions of products handled by distributor, distributors' sales territories or customers, etc. (hereinafter referred to as "vertical non-price restraints"), one of vertical restraints, are generally not illegal unless such restrictions "result in making it difficult for new entrants or competitors to easily ensure alternative distribution channels" (Note 2) or "the price level of the product covered by the restriction is likely to be maintained" (Note 3). On the other hand, price restrictions generally have significant anticompetitive effects and are likely to impede fair and free competition in principle.

(Note 2) Whether or not a restriction "may result in making it difficult for new entrants or competitors to easily secure alternative distribution channels" is to be determined, taking comprehensively into account the judging criteria for the legality and illegality in (1) above. When applying the judging criteria, other manufacturers' behaviors are also to be considered. For example, in cases where two or more manufacturers respectively and parallel restrict handling of competing products (see, 2 (1) of the Chapter 2 below), it is more likely to result in making it difficult for new entrants or competitors to easily secure alternative distribution channels, compared to cases where only one manufacture does.

The same shall apply in the remainder of Part II with regard to whether a restriction "may result in making it difficult for new entrants or competitors to easily secure alternative distribution channels"

(Note 3) "Cases where the price level of the product covered by the restriction is likely to be maintained" refers to cases where vertical restraints would be likely to bring such circumstances as where the said vertical restraint would impede competition among distributors and thereby enable a

distributor to reasonably freely control its price by its own volition and thus maintain or raise its price of the product.

A Restriction which does not result in such circumstances would not be generally deemed as "cases where the price level of the product covered by the restriction is likely to be maintained."

When examining whether a vertical restriction would fall under such a case, for example, in case of a restriction on sales territory of distributors, the degree of competitive pressures from available mail order shopping or available cross-border purchases from distributors located in other areas, may be taken into account.

Whether or not "cases where the price level of the product covered by the restriction is likely to be maintained" is to be determined, taking comprehensively into account the judging criteria for the legality and illegality in (1) above. For example, in cases where exclusive territory (see, 3 (1) of the Chapter 2 below) is assigned to distributors by an influential manufacturer in a market (Note 4) under the circumstances where inter-brand competition does not work well due to oligopolistic structure of the market and product differentiation, price competition for the product of the manufacture's brand may be imposed, and the price level of the product is likely to be maintained.

The same shall apply in the remainder of Part II with regard to whether "price level of the product is likely to be maintained."

(Note 4) Whether "a manufacturer is influential in a market" is in the first instance judged by a market share of the manufacturer, that is, whether it has no less than 10% or its position is within the top three in the market (meaning a product market which consists of a group of products with the same or similar function and utility as the product covered by restriction, and competing each other judging from geographical conditions, relations to customers, and other factors).

Nevertheless, even if a firm falls under this criterion, the restriction by the manufacturer is not always illegal. In cases, where the price level of the product covered by the restriction is likely to be maintained," such restriction is illegal.

In cases where an exclusive territory is imposed by a low-

ranked or newly-entered firm which has a market share of less than 10% and whose position is the fourth or later, the price level of the product covered by the restriction is not usually likely to be maintained, and such restriction is not illegal.

4. Unjust Low-price Sales and Discriminatory Pricing

As an issue under the Antimonopoly Act in relation to distribution, in addition to this type of conduct, there is the matter of unjust low-price sales and discriminatory pricing.

Unjust low-price sales and discriminatory pricing as defined below are prohibited under the Antimonopoly Act as unfair trade practices:

(1) Unjust low price sales

a. Without justifiable grounds, continuously supplying goods or services at a price far below the cost incurred to supply them, thereby tending to cause difficulties to the business activities of other enterprises. (Article 2(9)(iii) of the Antimonopoly Act)

b. In addition to any conduct that falls under the provisions of Article 2, paragraph (9), item (iii) of the Act, unjustly supplying goods or services at a low price, thereby tending to cause difficulties in the business activities of other enterprises. (Article 6 (Unjust Low-price Sales) of the General Designation)

(2) Discriminatory pricing

a. Unjustly and continually supplying goods or services at a price applied differentially between regions or between parties, thereby tending to cause difficulties to the business activities of other enterprises. (Article 2(9)(ii) of the Antimonopoly Act)

b. In addition to any conduct that falls under the provisions of Article 2, paragraph (9), item (ii) of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of 1947; hereinafter referred to as "the Act"), unjustly supplying or accepting goods or services whose prices are differentiated by region or by counterparty. (Article 3 (Discriminatory pricing) of the General Designation)

As to unjust low-price sales and discriminatory pricing relating to them, the Fair Trade Commission has already provided guidance on them in the Guideline Concerning Unjust low-price Sales under the Antimonopoly Act Published in December 18, 2009, and will address these practices properly in

accordance with these Guidelines.

Chapter 1　Resale Price Maintenance

1. Viewpoint

(1) It is one of the most basic matters in a firm's business activities that it independently determines its own sales price, in keeping with conditions in a market, and moreover this secures competition among firms and consumer choice.

In cases where, as one aspect of marketing activities, or as requested by distributors, a manufacture restricts sales price of distributors, it is in principle illegal as unfair trade practices, because it reduces or eliminates price competition among distributors.

(2) In cases where a manufacturer's suggested retail price or quotation is indicated to distributors as a reference price, such conduct itself is not a problem (Note 5). In cases where the price, such conduct itself is not merely given as a reference price, however, and the manufacturer seeks to restrict resale price of the distributors by causing them to keep the reference price, such conduct falls under the conduct described (1) above, and is in principle illegal.

> (Note 5) In cases where a manufacturer sets a suggested retail price, it is as "True Price" (Seika), "Set Price" (Teika), or the number of the price alone, but non-binding expressions such as "Reference Price" (Sanko Kakaku) or "manufacturer's suggested retail price" and that in case of announcing the suggested price to distributors and consumers, the manufacturers clearly states that the suggested retail price is given solely for reference and that each distributor should determine its resale price independently.

2. Restriction of Resale Price

(1) Restrictions by a manufacture of sales price of distributors (resale price) are in principle illegal as unfair trade practices (Article 12 (Resale Price Restriction) of the General Designation). That is to say, since resale price maintenance (RPM) reduces or eliminates price competition among distributors on the products, generally RPM will have a serious anti-competitive effect and so is likely to impede fair and free competition in principle. Therefore, the Antimonopoly Act stipulates that RPM without "justifiable grounds" is illegal as unfair trade practice. In other words, RPM is not illegal as an exception on the condition that it has "justifiable grounds."

(2) "Justifiable grounds" might be granted within reasonable scope and reasonable term, in the case where such RPM by a manufacturer will result

in actual pro-competitive effects and will promote inter-brand competition, will get demand for the product increased thus benefiting consumers, and pro-competitive effects will not result from less restrictive alternatives other than the RPM.

For example, when a manufacturer performs RPM, such RPM will be granted to have "justifiable grounds" in the case where such RPM actually results in pro-competitive effects through avoiding the "free-rider" problem mentioned in Part 2, 3(2) a., will promote inter-brand competition, will get the demand of the product increased, thus benefiting consumers, and pro-competitive effects will not result from less restrictive alternatives other than the RPM.

(3) Whether resale prices have been restricted is to be judged based on the determination of whether any artificial means is taken to secure the effectiveness in attaining sales at the price indicated by the manufacturer.

In the following cases, it shall be judged that the effectiveness in attaining sales at the price indicated by the manufacturer is secured:

a. In case where a written or oral agreement between a manufacturer and its distributors causes the distributors to sell at the price indicated by the manufacturer, examples are as follows:

(a) In case whether a written or oral contact provides that sales are made at the price indicated by a manufacturer;

(b) In case where distributors are required to pledge in writing to sell at the indicted by manufacturer:

(c) In case where a manufacturer only starts dealing with such distributors that accept such condition that they sell at the price indicted by the manufacturer; and

(d) In case where a manufacturer deals with distributors on conditions that the distributors sell at the price indicated by the manufacturer and that unsold goods are not to be discounted but to be repurchased by the manufacturer.

b. In case where any artificial means, such as imposing or suggesting to impose economic disadvantage if sales are not made at a manufacturer's indicated price, causes distributors to sell at the indicated price. Examples are as follows:

(a) In case where curtailment of shipments or any other economic disadvantage (including reduction of quantities shipped, raising of shipment price, reduction of rebates, refusal to supply other products: hereinafter the same) is imposed in the event that sales are not made at a manufacturer's indicated price or in case where a notification or suggestion to that effect is made to distributors;

(b) In case where rebates or other economic rewards (including lowering of shipment price, supplying of the products; hereinafter the same) are provided in the event that sales are made at a manufacturer's indicated price, or in case where a notification or suggestion to that effect is made to distributors; and

(c) In case where a manufacturer cases distributors to sell at the manufacturer's indicated price by the following means:

i. Collecting sales price reports, patrolling retail establishments, conducting price, supervision by salespersons dispatched to shops, examining ledgers or records of retailers, and so forth in order to ascertain whether sales are being made at the manufacturer's indicated price;

ii. Identifying price-cutting distributors by making use of secret marks and requesting wholesalers who supplied them to buy the goods to such distributors not to sell to them;

iii. Buying goods from price-cutting distributors and requesting such distributors or wholesalers who supplied them to buy the goods or pay the cost of their purchases; and

iv. Transmitting complaints to price cutting distributors from nearby distributors with regard to low-price sales, and requesting the price-cutting distributors to end such sales.

(4) In cases where discriminatory treatment in the form of refusals to deal or provision of rebates, and so on, has been used to secure the effectiveness of restrictions on resale price, such conduct itself is illegal as unfair trade practices (Article 2 (Other Refusal to Deal) or 4 (Discriminatory Treatment on Transaction Terms, etc.) of the General Designation).

(5) In (3) above, the price indicated by a manufacturer to distributors includes both a specific price and any of the following types of price level:

a. Price to be within x% discount from the manufacturer's suggested retail price;

b. Price to be in a specific range (no less than Y JPY and no more than Z JPY);

c. Price to be approved in advance by the manufacturer;

d. Price to be not less than that charged by nearby stores; or

e. Price to be suggested by the manufacturer to the distributors as the lowest limit by such means as warning the distributors against discount.

(6) The guidance regarding restrictions on resale price described in (3), (4) and (5) above shall apply not only to conduct by a manufacturer vis-à-vis direct customers but also to conduct vis-à-vis secondary wholesalers or

retailers which are indirect customers, either directly or indirectly via wholesalers (Article 12, 2, or 4 of the General Designation).

(7) In cases where in the following kinds of transactions, a direct purchaser from a manufacturer only functions as a commission agent, and if it is recognized that in substance the sale is being done between the manufacturer and its ultimate purchasers, even if the manufacturer instructs resale price to the direct purchaser, it is usually not illegal:

a. In case of consignment sales, and if the transaction is made with a consignor on its own risks and account so that a consignee bears no risk beyond that associated with its obligation to exercise the care of a good manager in shortage and handling of goods, collection of payments, and so on, i.e., is not liable for loss of goods, damage to them, or for unsold goods; or

b. In case of transactions where a supply price is negotiated and decided directly between a manufacturer and a retailer (or user), and the manufacturer instructs a wholesaler to deliver goods to the retailer (or the user), and if the manufacturer is deemed, in substance, to sell the goods to the retailers (or the user), under such circumstances that the wholesaler is charged only with responsibility for physical delivery of the goods and collection of payment, and a fee is paid for such work.

3. "Distribution Research"

When a manufacturer research actual sales prices, actual customers, etc. of distributors handling the manufacturer's products ("distribution research"), such research itself is generally not illegal, unless the research is accompanied by restrictions of sales prices of distributors such as imposing, notifying or suggesting imposition of curtailment of shipments or other economic disadvantage (including reduction of quantity shipped, raising of shipment price, reduction of rebate, refusal to supply other products) in the event that sales are not made at the manufacturer's indicated price.

Chapter 2 Vertical Non-Price Restraints

1. Viewpoint

(1) A manufacturer tends to conduct a variety of marketing activities directed to distributors handling the manufacturer's products, not only at direct consumers but extending as far as the retail stage. A number of managerial advantages are identified with such marketing activities to distributor, but in cases of vertical non-price restraints, the following problems may arise (Note 6).

a. Interference in business activities conducted by distributors through creative efforts;
b. Maintenance of final sales prices as a result of dependence of distributors on a manufacturer, and cooperative behavior by the manufacturer and the distributors together;
c. Restriction or elimination of inter-brand competition or intra-brand competition;
d. Higher barriers to entry by other manufacturers and distributors; and
e. Reduced consumer choice.

(Note 6) Since the above problems are most likely to arise particularly in the case of restrictions on products handled by distributors, it is desirable that distributors be capable of handling those products that match the needs of consumers on their independent judgement.

(2) Generally speaking, the effect of vertical non-price restraints on competition in a market differs according to the types of restrictions and specifics of each case. Vertical non-price restraints include the following two categories: a, those which shall not be considered illegal based on types of restraint, but examined on a case-by-case basis, to analyze their effects on competition in a market, from such viewpoints of whether competitors such as new entrants would be excluded and whether price competition of the product covered by the restriction would be impeded, taking account of various factors, including the position of a manufacturer in a market; and b, those which usually tend to impede price competition and are considered in principle illegal, regardless of the position of a manufacturer in market.

(3) As to whether or not vertical non-price restraints have been imposed by a manufacturer, as is the case of restrictions on resale price described in 2 of Chapter 1 above, it shall be found that restrictions have been imposed not only in cases where a contract or other means of arrangement between the

manufacturer and distributors can be found, but also in cases where any artificial means, such as imposing economic disadvantage on distributors who do not comply with the request of the manufacturer, is taken to secure the effectiveness of the restrictions.

2. Restriction on Distributors' Handling of Competing Products

(1) Restrictions on distributors' handling of competing products include the following types of restraint imposed by a manufacturer:

a. Making it mandatory for distributors to handle only the manufacturer's products;
b. Restricting distributors from handling competitors' products;
c. Prohibiting or restricting distributors from handling specific products, or f from handling products from a specific firm; and
d. Restricting distributors from handling competing products by means of requiring the distributors to sell such a large volume of its products as is close to their capacity.

(2) In cases where a restriction on handling of competing products is imposed by an influential manufacturer in a market (Note 7), and if the restriction may result in making it difficult for new entrants or competitors to easily secure alternative distribution channels, such restriction is illegal as unfair trade practices (Article 11 (Dealing on Exclusive Terms) or 12 (Dealing on Restrictive Terms) of the General Designation).

(Note 7) Whether "a manufacturer is influential in a market" is in the first instance judged by a market share of the manufacturer, that is, whether it has no less than 10% or its position is within the top three in the market (meaning a product market which consists of a group of products with the same or similar function and utility as the product covered by restriction, and competing each other judging from geographical conditions, relations to customers, and other factors).

Nevertheless, even if a firm falls under this criterion, the restriction by the manufacturer is not always illegal. In cases, where the restriction "may result in making it difficult for new entrants or competitors to easily secure alternative distribution channels," such restriction is illegal.

In cases where a restriction on handling of competing products is imposed by a low-ranked or newly-entered firm which has a market share of less than 10% and whose position

is the fourth or later, the restriction usually would not result in making it difficult for new entrants or competitors to easily secure alternative distribution channels, and such restriction is not illegal.

The same shall apply in the remainder of Part II with regard to whether a firm is "influential in a market."

(3) The guidance given in (2) immediately above shall also apply to cases where a manufacturer causes wholesalers to restrict retailers' handling of competing products (Article 12 (Dealing on Restrictive Terms) of the General Designation).

3. Restrictions on Distributors' Sales Territory

(1) Restrictions on distributors' sales territory include the following types of restraint imposed by a manufacturer:

a. Assigning a specific territory to each distributor as the area of primary responsibility and requiring the distributor to carry out active sales activities within each territory (establishing the area of primary responsibility, without restriction on sales outside the area and not falling under c, or d, below; hereinafter referred to as " area of responsibility system");

b. Restricting the area where a distributor may establish business premises such as stores, or designating the plane where such premises are to be established (restricting the location of business premises, and not falling under c, or d, below; hereinafter referred to as "location system");

c. Assigning a specific area to each distributor and restricting the distributor from selling outside each area (hereinafter referred to as "exclusive territory");

d. Assigning a specific area to each distributor and restricting the distributor from selling to customers outside each area upon request (hereinafter referred to as "restriction of sales to outside customers"); and

(2) Area of responsibility system and location system

It is not illegal for a manufacturer to adopt the area of responsibility system or location system, for the purpose of developing an effective network for sales or securing a better system for after-sales service, except where such restriction falls under exclusive territory or restriction on sales to outside customers.

(3) Exclusive territory

In cases where an influential manufacturer in market assigns exclusive

territory to distributors and if price level of the product covered by the restriction is likely to be maintained, such restriction is illegal (Note 8) as unfair trade practices (Article 12 (Dealing on Restrictive Terms) of the General Designation).

(Note 8) In case of test marketing of a new product or sale of local souvenirs, price level of the product usually would not be maintained by territorial restriction and such restriction is not illegal.

(4) Restriction of sales to customers

In cases where a manufacturer imposes restriction of sales to outside customers, and if price level of the product is likely to be maintained, such restriction is illegal as unfair trade practices (Article 12 of the General Designation).

(5) The guidance given in (2), (3), and (4) immediately above shall also apply to cases where a manufacturer causes wholesales to restrict retailers' sales territory (Article 12 of the General Designation).

4. Restrictions on Distributors' Customers

(1) Restrictions on distributors' customers include the following types of restraint imposed by a manufacturer.

a. Requiring each wholesaler to supply only to certain retailers, so that the retailers may buy only to certain retailers, so that the retailers may buy only from that wholesaler (hereinafter referred to as "requirement of designated accounts");
b. Preventing distributors from buying and selling products among themselves (hereinafter referred to as "prohibition of sales among distributors"); and
c. Prohibiting wholesalers to sell to price-cutting retailers.

(2) Requirement of designated accounts on wholesalers, and if price level of the product covered by the restriction is illegal as unfair trade practices (Article 12 (Dealing on Restrictive Terms) of the General Designation).

(3) Prohibition of sales among distributors

In cases where a manufacturer prohibits sales among distributors for the purpose of preventing its products from being sold to price-cutting distributors, and if price level of the product is likely to be maintained, such restriction is illegal as unfair trade practices (Article 12 of the General

Designation).

(4) Prohibition of sales to price-cutters

In cases where a manufacturer causes wholesalers not to sell to a retailer on account of the retailer's price-cutting(Note9), price level of the product is likely to be maintained, and such restriction is in principle illegal as unfair trade practices (Article 2 (Other Refusal to Deal) or 12 of the General Designation).

Moreover, in cases where a manufacturer stops shipments to a distributor that has been its direct customer, on account of the distributor's price-cutting (Note 9), price level of the product is likely to be maintained, and such conduct is in principle illegal as unfair trade practices (Article 2 of the General Designation).

(Note 9) Whether or not such restriction is "on account of the retailer's (the distributor's) price-cutting" is to be objectively judged based on actual conditions of the transactions, including the manufacturer's response to other distributors, and related circumstances.

5. So-called "selective distribution"

A manufacturer may set up a certain criteria to limit the distributors handle its product to ones who meet the criteria.

In such a case, such a manufacturer may prohibit distributors from reselling its product to other distributors who do not meet the criteria.

This is called "selective distribution" and may result in such pro-competitive effects as mentioned in 2(3).

It is generally not illegal in itself, even if such criteria of the selective distribution were to result in preventing certain incompetent price-cutters etc., from handling the product, provided that such criteria are recognized to have plausibly rational reasons from the viewpoint of the consumers' interests such as related to preservation of its qualities, assuring appropriate use, etc., and, that such criteria are equally applied to other distributors who want to deal in the product.

6. Restrictions on Retailers' Sales Methods

(1) Restrictions on Retailers' sales methods include the following types of restraint imposed by a manufacturer:

a. Calling for demonstration –sales of the product;
b. Calling for customer delivery service for the product;
c. Instructing conditions for quality control of the product; and

d. Calling for shelf space or a display area exclusively for the product.

(2) In cases where restrictions on the retailers' sales methods (excluding those on sales price, sales territory and customers) are recognized to have plausibly rational reasons for the purpose of ensuring proper sales of the product, such as related to assuring the safety of the product, preservation of its qualities, maintenance of credit of its trademark, and so on, and if the same restrictions are applied to other retailers-customers on equal terms, such restrictions in themselves do not present a problem under the Antimonopoly Act.

However, in cases where restrictions on retailers' sales methods are used as a means to restrict sales price, handling of competing products, sales territory or customers (Note10), their illegality is to be judged on the basis of the guidance set forth for each types of conduct described in Chapter 1 and 2 through 4 of Chapter 2 (Article 2(9)(iv) of the Antimonopoly Act (Resale Price Restriction), Article 11 (Dealing on Exclusive Terms) or 12 (Dealing on Restrictive Terms) of the General Designation).

(Note 10) For example, in cases where a manufacturer stops shipments only to price-cutting retailers among those which do not observe the restrictions on sales methods on account of their nonobservance of the restrictions, the manufacturer usually shall be found to restrict sales price by means of the restrictions on sales methods.

(3) Furthermore, in cases where a manufacturer imposes the following types of restriction on advertisements and representations as one kind of sales methods, price level of the product is likely to be maintained, and such restriction is in principle illegal as unfair trade practices (Article 12 of the General Designation):

a. In case where a manufacturer restricts the price shown at stores or in handbill etc. or prohibits price advertising: or
b. In case where a manufacturer causes magazines, newspapers or other advertising media in which the manufacturer put advertisements, to reject such advertisements that give price or announcements that give prices or announce price-cutting.

(4) The guidance described in (2) and (3) immediately above shall also apply to cases where a manufacturer causes wholesalers to restrict retailers' sales methods(Article 12 of the General Designation).

Chapter 3 Provision of Rebates and Allowances

1. Viewpoint

The nature of rebates and allowances provided by a manufacturer to its distributors (in general, meaning money paid on a systematic or case-by-case basis, separately from the billing price for goods; hereinafter referred to as "rebates") is diverse, including those that that have the nature of adjusting the nature of adjusting the billing price, and those that have the purpose of promoting sales Thus, rebates are paid for a variety of purposes, and rebates as one element of price also have the aspect of promoting price formation in keeping with actual conditions in a market. Accordingly, the provision of rebates in itself does not necessarily present a problem under the Antimonopoly Act.

There are cases, however, where depending on the ways that rebates are provided, they may restrict business activities of distributors and present a problem under the Antimonopoly Act (Note 11)

(Note 11) In cases where a manufacturer discretionally provides rebates without clear basis, and particularly if such opaque rebates account for a large percentage of distributors' margin, they can give rise to the effect of making it easy for the manufacturer to conform the distributors to its sales policy, and are most likely to restrict business activities of the distributors. For this reason, it is desirable for manufacturers to make clear the basis for payment of rebates, and inform their distributors of it.

2. Cases Where There Is a Problem under the Act

(1) Rebates used as a means of restrictions on distributors' sales price, handling of competing products, sales territory, or customers, etc. (for example, in such cases that rebates are reduced if the distributors do not sell products at the price indicated by the manufacturer), their illegality is to be judged in accordance with the guidance described in Chapter 1 and 2 above (Article 2(9)(iv) of the Antimonopoly Act (Resale Price Restriction), Article 11(Dealing on Exclusive Terms) or 12 (Dealing on Restrictive Terms) of the General Designation).

Furthermore, the conduct of discriminating the provision of rebates depending on the price, handling of competing products, or the like, if it has the same or similar function as the imposition of illegal restrictions on distributors, such conduct itself is illegal as unfair trade practices (Article 4 (Discriminatory Treatment on Transaction Terms, etc.) of the General Designation). The same shall also apply to (2), (3), and (4) below.

Also, the same shall apply to cases where a "repayment system" (under

which a manufacturer collects all or a part of the margin from the distributors and pays it back after a certain period is used as has the same and similar function as the imposition illegal restriction on the distributors.

(2) Coverage rebates

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

In cases where the provision of rebates of these kinds (coverage rebates) has the function of restricting the handling of competing products, its illegality is to be judged in accordance with the guidance described in 2 (2) of Chapter 2 (Restriction on Distributors' Handling of Competing Products) above.

That is, in cases where an influential manufacturer provides coverage rebates, and if the provision has the function of restricting distributors' handling of competing products and may result in making it difficult for new entrants or competitors to easily secure alternative distribution channels, such provision is illegal as unfair trade practices (Article 4, 11, or 12 of the General Designation).

(3) Remarkably progressive rebates

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

In cases where the provision of remarkably progressive rebates has the function of restricting the handling of competing products, its illegality is to be judged in accordance with the guidance described in 2 (2) of Chapter 2 (Restrictions on Distributors' Handling of Competing Products) above.

That is, in cases where an influential manufacturer provides such rebates, and if the provision has the function of restricting distributors' handling of competing products and may result in making it difficult for new entrants or competitors to easily secure alternative distribution channels, such provision is illegal as b unfair trade practices (Article 4, 11, or 12 of the General Designation).

(4) Rebates that have the function of requiring designated accounts

At times a manufacturer may provide rebates directly or through wholesalers even to retailers who are indirect customers of the manufacturer, in accordance with the purchases by each retailer of the manufacturer's products. In cases where the manufacturer provides such rebates, and if the amount of rebates to each retailer is calculated solely on the purchase amount of the manufacturer's products purchased from a specific wholesaler by each retailer, it is most likely to have the function of requiring designated accounts.

In cases where the provision of such rebates has the function of requiring designated accounts, its illegality is to be judged in accordance with the guidance described in 4 (2) of Chapter 2 (Requiring of designated accounts) above.

That is, in cases where price level of the product is likely to be maintained by the provision of rebates that have such function, such provision of the rebates is illegal as unfair trade practices (Article 4 or 12 of the General Designation).

Chapter 4 Interference in Distributors' Management

1. Viewpoint

At times a manufacturer provides in transaction contracts with its distributors, the interference in the management of the distributors as the distributors as a condition for doing business with it. The concrete obligations in each contract may vary, but there are cases where it is made obligatory for the distributors to obtain advance permission form, or to consult with, the manufacturer before making changes in their articles of incorporation, business lines, amount of capital, officers, major stockholders, products to deal in, and sales methods, or cases where the distributors are required to submit ledgers and other documents for inspection. Such interference in the management of distributors is undertaken in order to diffuse the sales policy of the manufacturer, or for various reasons including provision of managerial guidance, securing recovery of credits, collection of marketing information, and so on, and the interference in itself does not necessarily present a problem under the Antimonopoly Act.

However, depending on the methods and extent of interference in the management of distributors, business activities of the distributors may be restricted, or unjust disadvantages may be imposed on the distributors; in such cases there is a problem under the Antimonopoly Act.

2. Cases Where There Is a Problem under the Act

(1) In cases where interference in the management of distributors is used as a means of restricting the distributors' sales price, handling of competing products, sales territory, or customers, its illegality is to be judged in accordance with the guidance described in Chapters 1 and 2 above (Article 2(9)(iv) of the Antimonopoly Act (Resale Price Restriction), Article 11 (Dealing on Exclusive Terms) or 12 (Dealing on Restrictive Terms) of the General Designation).

(2) In cases where a manufacturer's interference in the management of distributors, is regarded as, by making use of its dominant bargaining position over the distributors, imposing unjust disadvantage on the distributors in the light of normal business practices, such as onerous restrictions or obligations regarding other lines of business, sales quantities, etc., it is illegal as unfair trade practices (Article 2(9)(v) of the Antimonopoly Act (Abuse of Dominant Bargaining Position)).

(3) In franchise system, regarding interference of franchisees, reference should be made to the Guideline Concerning Franchise System under the Antimonopoly Act (published on April 24, 2002).

Chapter 5 Abuse of Dominant Bargaining Position by Retailers

1. While transaction terms or conditions are basically to be negotiated and determined between the parties to transactions based on their independent business judgement, in cases where a retailer in a dominant bargaining position over its suppliers, by making use of that position, engages in coercion to purchase return of unsold goods, request for dispatch of sales persons to shops, coercive collection of contributions, request for frequent delivery in small lots, such conduct is most likely to present a problem under the Antimonopoly Act as abuse of dominant bargaining position.

The regulation of abuse of dominant bargaining position under the Antimonopoly Act aims at eliminating these types of conduct if they are likely to impede fair competition among retailers or among suppliers.

2. A retailer shall be found to be "in a dominant bargaining position over its suppliers" in such cases where the suppliers are obliged to accept the retailer's requests even if they are excessively disadvantageous to the suppliers, since discontinuance of transaction with the retailer would significantly damage the suppliers' business. In making this finding, comprehensive consideration is to be given to such factors as degree of dependence on the retailer, position of the retailer in a market, changeability of customer, and other specific fact that shows the necessity of the latter to do a business with the one party (supply and demand forces of the product).

3. Abuse of dominant bargaining position of retailers vis-à-vis their suppliers is regulated under Article 2(9)(v) of the Antimonopoly Act and under "Designation of Specific Unfair Trade Practices by Large-Scale Retailers Relating to Trade with Suppliers" (Fair Trade Commission Notification No.11 of 2005), which Fair Trade Commission designates in line with the provision of Article 2(9)(vi) regulating retailers that engage in the retail sale of goods that are used by general consumers on a daily basis with (a) sales of 10 billion yen or more in its last completed fiscal year or (b) having a store with an certain floor space.

In cases where a business relation between a retailer and its supplier falls under contractor-subcontractor transaction under the Act Against Delay in Payment of Subcontract Proceeds, etc. to Subcontractors, and if it also comes under manufacturing commission of products, such as manufacturing and supplying of goods bearing the brand of the retailers (so-called "private brand" goods), this Act shall apply to it. As for the Act Against Delay in Payment of Subcontract Proceeds, etc. to Subcontractors, please refer "Implementation Standards for the Act Against Delay in Payment of Subcontract Proceeds, etc. to Subcontractors" (Secretary General

Implementation Standards No. 18 of 2003), which stipulates basic principles for implementation of the Act.

PART III ANTIMONOPOLY ACT GUIDELINES CONCERNING SOLE DISTRIBUTORSHIP

1. There are cases where a firm, domestic or foreign, supplying the products it handles, grants to another firm an exclusive distributorship covering the entire domestic market. Such firm given an exclusive distributorship is called a sole agent or a sole import distributor (hereinafter referred to as "sole distributor"; and a firm granting an exclusive distributorship is hereinafter referred to as "supplier"; and a contract concluded between them as "sole distributorship contract"). Sole distributorship contracts can reduce the cost and risks of suppliers for new entry into markets.

2. As stated above, sole distributorship contracts can generally contribute to promote competition. However, depending on the market status of the product covered by such contracts as well as the contracting parties, or their behaviors in markets, such contracts may function to impede competition in the markets. This Part, focusing on sole distributorship contracts, provides guidance under the Antimonopoly Act from the viewpoint of regulation of unfair trade practices.

With the promulgation of these Guidelines, the Examination Guidelines on Unfair Trade Practices in Sole Import Distributorship Contracts, Etc. (published on November 21, 1972) and the Guidelines concerning Unreasonable Obstruction of Parallel Imports under the Antimonopoly Act (published on April 17, 1987) are repealed.

3. Chapter 2 of Part III deals with restrictions imposed by one party to a sole distributorship contract on the other. Part II shall be referred to with regard to resale price maintenance, vertical non-price restraints, and other restrictions which a sole distributors.

Chapter 3 of Part III deals with unreasonable obstruction of parallel imports, regardless of whether they are stipulated in sole distributorship contract, or carried out by a supplier or a sole distributor. It shall also apply to such obstruction that are carried out toward distributors by a sole distributor at its own discretion.

Chapter 1　Sole Distributorship Contracts Between Competitors

1. Viewpoint

There are cases in which a sole distributorship contract is concluded between competitors. The conclusion of a sole distributorship contract between a supplier and its competitor, while it is expected that entry into a market by the supplier itself or though another firm would enable the supplier to function as an effective competitive entity and help promote competition in the market, could either eliminate competition between the two parties or help reinforce and expand the market status of the firm that serve as a sole distributor. This may result in impeding competition in the market.

2. Case Where There Is a Problem under the Act

(1) In cases where a firm to serve as a sole distributor either manufacturers or markets the same kind of products as the one covered by the contract (meaning a group of products with the same or similar function and utility as those of the product covered by the contract and in competition with each other; hereinafter the same in Chapter 1), and if the firm has a market share of no less than 10% and is ranked within the top three in the domestic market of the products, the conclusion of a sole distributorship contract with the supplier of the product may have an anticompetitive effect. To determine whether the conclusion of the contract has an anticompetitive effect, how much effect it would have on competition in the market is to be examined on a case-by-case basis, taking comprehensively into account the following factors. If it is recognized that the conclusion of the contract has an anticompetitive effect, it is illegal as unfair trade practices (Article 12 (Dealing on Restrictive Terms) of the General Designation).

a. The market share and rank of a firm to serve as a sole distributor, the extent of their changes caused by the conclusion of the contract;
b. Overall business capability of a supplier (sales amount, brand value, market position in other markets, etc.);
c. The market share and rank of the product covered by the contract in the domestic market;
d. Actual situation of competition in the market (number of competitors, fluctuations in market shares, difficulty in new market entry, etc.);
e. Characteristics of the product covered by the contract, the degree of competition between products between products produced or marketed by a sole distributor and the product covered by the contract; the presence or absence of closely comparable substitute, and the sales price of the product covered by the contract; and

f. Actual situation of distribution for the product covered by the contract (difficulty in new entry into distribution, etc.).

(2) In case where a firm to serve as a sole distributor has a market share of no less than 25% and is ranked top, whether or not the conclusion of the contract has an anticompetitive effect is to be judged on a case-by-case basis, as in the case of (1) above. In general, however conclusion of a sole distributorship contract between a firm in such a strong position and a supplier in competition with the firm is highly likely to have an anticompetitive effect. Therefore, each contract is to be carefully examined, paying special attention to the following factors:

a. Whether the overall business capability of the supplier is not large; and
b. Whether the product covered by the contract has already held a not insubstantial market share in the domestic market.

3. Cases Where There Is no Problem under the Act

(1) In case of either 2 (1) or 2 (2) above, if a sole distributorship contract is concluded for the purpose of newly selling the product in the domestic market for a short term (while the meaning of " a short term" depends on the types of the product covered by the contract, three (3) to five (5) years is considered as a standard), or if the product covered by the contract is produced in accordance with the technology provided by the firm to serve as a sole distributor or under consignment by the firm, the conclusion of the contract presents, in principle, no problem under the Antimonopoly Act.

(2) In cases where a firm to serve as a sole distributor, manufacturers or markets the same kind of products as the one covered by the contract, and if the firm has a market share of less than 10% or is ranked the fourth or later in the domestic market, the conclusion of a sole distributorship contract with the supplier of the same kind of products presents, in principle, no problem under the Antimonopoly Act.

Chapter 2 Major Restrictive Provisions in Sole Distributorship Contracts

1. Case Where There Is a Problem under the Act

(1) Resale price maintenance

The guidance provided in Chapter 1 of Part II (Resale Price Maintenance) shall apply to any conduct by a supplier to restrict its sole distributor's sales price or to cause the sole distributor to restrict sales price of firms which purchase the product covered by the contract from the sole distributor for sales (including other firms that purchase the product from the said firm for sales; hereinafter referred to as "distributors")

(2) Restrictions on handling of competing products

a. Restrictions on handling of competing products during the term of the contract

The provided in 2 of Chapter 2, Part II(Restriction on Distributors' Handling of Competing Products) shall apply to cases where a supplier restricts its sole distributor from handling competing products or causes the sole distributors from handling competing products during the term of the contract, provided, however, that during the term of the contract, if the supplier does not restrict handling of competing products-which have already been handled by the sole distributor, it presents, in principle, no problem under the Antimonopoly Act.

b. Restrictions on handling competing products after the termination of the contract

In case where a supplier restricts its sole distributor from handling competing products after the termination of the conduct would restrict business activities of the sole distributor and obstruct entry into the market, and it presents, in principle, a problem under the Antimonopoly Act. Provided, however, that in cases where such restriction is imposed with such proper justification as the necessity for preventing confidential information (including marketing know-how) from being diverted and only the maximum extent necessary, it presents, in principle, no problem under the Antimonopoly Act.

(3) Restrictions on sales territory

a. The guidance provided in 3 of Chapter 2, Part II (Restrictions on Distributors' Sales Territory) shall apply to any conduct by a supplier to cause its sole distributor to restrict distributors' sales territories in the domestic market.

b. In cases where a supplier requires its sole distributor not to actively market the product covered by the contract in area outside the territory for which the sole distributor is granted the exclusive distributorship for the

product (hereinafter referred to as "approved territory"), or the sole distributor causes the supplier to discourage its direct customers located outside the approved territory from actively marketing the product in the sole distributor's approved territory, it presents, in principle, no problem under the Antimonopoly Act.

(4) Restrictions on customers or suppliers

a. The guidance provided in 4 of Chapter 2, Part II (Restrictions on Distributors' Customers) shall apply to any conduct by a supplier to restrict its sole distributor's customers or to cause the sole distributor to restrict distributors' customers

b. In case where a supplier requires its sole distributor to buy the product covered by the contract exclusively from the supplier or from the parties it designates, it presents, in principle, no problem under the Antimonopoly Act.

(5) Restrictions on sales methods

The guidance provided in 6 of Chapter 2, Part II (Restriction on Retailers' Sales Methods) shall apply to any conduct by a supplier to restrict its sole distributor's sales method for the product covered by the covered by a supplier to restrict its sole distributor's sales method for the product covered by the contract or to cause the sole distributor to restrict distributors' sales methods.

2. Cases Where There is no Problem under the Act

While a supplier, in exchange for granting an exclusive distributorship of the product covered by the contract, sometimes imposes on its sole distributor the following restriction or obligation, it presents, in principle, no problem under the Antimonopoly Act.

a. Setting a minimum volume or value of the product covered by the contract to be purchased or sold; or

b. To make the best efforts to sell the product covered by the contract.

Chapter 3 Unreasonable Obstruction of Parallel Imports

1. Viewpoint

(1) In case of a sole import distributorship contract, a product covered by the contract can be imported by way of channels other than that arranged between the contracting parties (such importation of the product is hereinafter referred to as "parallel import"; it assumes the importation of genuine products, which does not infringe any trademark right).

Parallel imports are considered to promote price competition in a market, and accordingly, obstruction of parallel imports presents a problem under the Antimonopoly Act, if it is conducted to maintain price level of the product covered by the contract.

(2) In cases where products being sold as parallel imports goods are not genuine products but counterfeit products, owner of trademarks may request to cease and desist from selling such products, on the ground of trademark infringements. In addition, necessary measures to maintain credit of trademarks under the following situations present, in principle, no problem:

a. In case where consumers may misunderstand parallel import goods with different specification or quality are identical to the product handled by a sole distributor, because of false representation of origin or other reasons; or

b. In case of parallel import of trademarked goods which were legitimately sold in foreign markets, if credit of the product handled by a sole distributor may be damaged because of such reasons as threats to consumers' health or safety caused by deterioration of the parallel import goods.

(3) In case of domestic products, if the same or similar conduct as in case of parallel import goods is carried out, viewpoint on it is basically the same as stated above, and the guidance described below in this Chapter shall apply.

2. Cases Where There Is a Problem under the Act

(1) Preventing any parallel importer from purchasing genuine products in overseas markets

There are cases where parallel importers are prevented from buying genuine products through overseas distribution channels, in order to maintain price level of the product covered by the contract. Such conduct curtails or eliminates price competition between the product handled by the sole distributor and the parallel imports goods and deviates the extent necessary for the sole import distributorship system to function properly.

Accordingly, such conduct is illegal as unfair trade practices, in cases

where the following types of conduct are employed by a sole distributor or supplier to maintain price level of the product covered by the contract (Article 12 (Dealing on Restrictive Terms) or 14 (Interference With A Competitor's Transaction)of the General Designation).

a. In case where a parallel importer makes an offer of purchase to the supplier's overseas customer, the sole distributor or supplier's overseas customer not to sell to the parallel importer; or
b. The sole distributor or supplier induces the supplier's overseas customer, to stop selling to the parallel importer by such means of tracing the supply channel of parallel import goods by checking their serial number s or the like, and providing the information to the supplier or its overseas customer.

(2) Restriction on distributors' handling of parallel imports goods

Distributors should be free to choose whether or not to handle parallel import goods. In cases where a sole distributor transacts business with its distributors on condition that they shall not handle parallel import goods, or in any manner induces the distributors not to handle parallel imports goods, and if such conduct is employed to maintain price level of the product covered by the contract, it is illegal as unfair trade practices (Article 12 or 14 of the General Designation).

(3) Restriction on wholesalers of selling the product covered by the contract to retailers handling parallel import goods

Distributor (wholesaler) should be free to sell the product purchased from a sole distributor, to any retailer of its own choice. In cases where a sole distributor induces its distributors not to sell the product covered by the contract to a retailer that is handling parallel import goods, and if such conduct is employed to maintain price level of the product covered by the contract, it is illegal as unfair trade practices (Article 12 or 14 of the General Designation).

(4) Interference with marketing of parallel import goods by alleging them as counterfeit

Owners of trademarks may request to cease and desist from marketing any counterfeit of their products on the ground of trademark infringements.

However, in cases where a trademark owner requests a firm handling parallel import goods to cease and desist from selling them, alleging, without adequate reasons, that they are counterfeit and infringes the trademark (Note 1), and if such conduct is employed to maintain price level of the product covered by the contract, it is illegal as unfair trade practices (Article 14 of the

General Designation).

(Note 1) If such conduct is carried out, a retailer may refrain from handling parallel import goods out of fear that such allegation in itself might be detrimental to the retailer's reputation, even if the parallel import goods are genuine and the parallel importer can prove them as such.

(5) Concerning parallel import goods

When a retailer attempts to sell parallel import goods, there may be cases where a sole distributor may come to the store and corner the goods, thereby obstructing transaction of parallel import goods (Note 2). If such conduct is employed to maintain price level of the product covered by the contract, it is illegal as unfair trade practices (Article 14 of the General Designation)

(Note 2) If parallel import goods advertised to consumers, are cornered by a sole distributor, consumers, who come to by the goods may allege as "bait and switch advertising" and the retailer's credit may be injured. Cornering of the parallel import goods may also place psychological pressure on the retailer to stop selling parallel import goods and deter it from handling them.

(6) Refusal to conduct repairs or the like on parallel import goods

It is common for a sole distributor to set up repair service and keep in stock of repair parts, commensurate with its volume of supply of the product. Consequently, there may be cases where it is not available for sole distributor to comply with requests for repair of parallel import goods or to provide the required repair parts. Accordingly, even if the sole distributor refuses to repair parallel import goods under the objective circumstances which make the sole distributor unable to comply with the requests for repair or make differences in terms and conditions of repair or the between the goods handled by it and the parallel import goods, such conduct in itself presents no problem under the Antimonopoly Act.

However, in cases where it is extremely difficult for any party other than a sole distributor or its distributors to repair parallel import goods or to obtain necessary repair parts, and if the sole distributor refuses repair work or supply of repair parts or induces the distributors to refuge such repair work or supply of repair parts, solely on the ground of parallel imports goods, such conduct is illegal as unfair trade practices, if it is employed to maintain price level of the product covered by the contract (Article 14 of the General Designation).

(7) Obstruction of advertising activities for parallel import goods

Depending on ways and means, advertising activities for parallel import goods might constitute infringement of trademark rights, or cause confusion with the business operations of the a sole import distributor, due to similarities of advertising and the like, and may constitute violations of the Unfair Competition Prevention Law. In such cases, discontinuation of such advertising activities may be requested.

However, in cases where a sole distributor induces publishers of magazines, newspapers, and other media not to carry advertisements on parallel import goods or in any manner obstructs the advertising activities of parallel import goods without proper justification, and if it is employed to maintain price level of the product covered by the contract, such conduct is illegal as unfair trade practices (Article 12 or 14 of the General Designation).

Appendix　Transactions between a Parent and Subsidiaries Companies

In cases where a firm (parent company) owns stocks of another (subsidiary company), whether or not transactions between the two companies are subject to the regulation of unfair trade practices depends on the following:

1. In cases where a parent company owns 100% of a subsidiary, it is usually recognized that transactions between them are in substance equivalent to intra-company transactions, and the transactions, and the transactions in principle are not subject to the regulation of unfair trade practices.

2. Even in cases where a parent company owns less than 100% (in principle, more than 50%) of stocks of a subsidiary, and if it is recognized that transactions between them are in substance equivalent to intra-company transactions, the transactions in principle are not subject to the regulation of unfair trade practices.

3. In cases where transactions between a parent company and a subsidiary company are recognized to be in substance equivalent to intra-company transactions, and if the parent company restricts business activities of a third party that deals with the subsidiary, for example, in such cases where either a contract between the parent and subsidiary or instructions given by the parent causes the subsidiary to restrict sales price of the third party, such conduct of the parent company is subject to the regulation of unfair trade practices.

4. In 2 and 3 above, whether or not transactions between a parent company and a subsidiary company are in substance equivalent to intra-company transactions is to be determined on a case-by-case basis by means of comprehensive examination of various factors, including:

a. Ratio of stocks of the subsidiary held by the parent;
b. Situation regarding dispatch of directors from the parent to the subsidiary;
c. Situation regarding interference of the parent in financial matters and business policy of the subsidiary; and
d. Business relationship between the parent and subsidiary (ratio of the subsidiary's transaction with the parent in the total volume of transaction, etc.).

In cases where a parent imposes the same or similar restrictions on other firms as on a subsidiary, it is usually recognized that the restriction is

imposed on the subsidiary as one of the other parties to transactions and the transactions between the parent and the subsidiary are in principle subject to the regulation of unfair trade practices.