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Japan Fair Trade Commission
Competition Policy Research Center

Report of the Study Group on Business Alliances

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Study Group on Business Alliances

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Note1: This report summarizes the discussion of nine meetings of the Study Group on Business Alliances, which was held within the Japan Fair Trade Commission (JFTC)'s Competition Policy Research Center. Its objective is to serve as a reference for future policy making and legal enforcement by the JFTC.

The report only expresses the views of the Study Group, and therefore does not represent the official view of the JFTC.

Note2: All page number as reference in this report are the numbers of the original documents.

Part I. Introduction

1. Situation of business alliances

Japan has been recently facing significant changes in the social and economic environment such as the progress of the digital economy and IoT (Internet of Things), rapid population aging, population and labor decline, and market shrink. To respond to these changes, each enterprise is addressing various issues for further business efficiency and innovation. Because of the advantages of promptness in business operation and cost saving, business alliances are widely used as one of business strategy methods to tackle these issues..

Conventionally business alliances have pursued business efficiency such as cost reduction and time reduction through joint implementation of the same business, mutual supplementation in areas where business or technology was lacking and the outsourcing of business in order to streamline management resources, and were concluded mainly by enterprises in the same line of business or between enterprises with a business relationship, but due to the changes in the social and economic environment, such efforts are being further expanded. In addition, business alliances across sectors or industries have also been frequently employed, for pursuing new values such as solving social agendas emerging around cities, traffics and so forth under matured society or economy, and creating new businesses. In this way, business alliances play an important role when enterprises seek more efficiency in their businesses.

2. Purpose of this study

There are various ways for enterprises to strengthen their relationships with other enterprises for the purpose of developing new products and reducing costs such as mergers, partial capital alliances including the establishment of joint ventures, and those based simply on contracts alone.

One such form is business combinations (i.e., mergers and acquisitions), and the systematic consideration to evaluating the impact on competition with this form of partnership is given in the “Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination (Japan Fair Trade Commission, May 31, 2004)” (hereinafter referred to as “Business Combination Guidelines”) published by the Japan Fair Trade Commission. On the other hand, business alliances that are not business combinations are subject to the restrictions on conduct of such provisions as Article 3 of the Antimonopoly Act. The Japan Fair Trade Commission organized the basic concepts under the Antimonopoly Act on business alliances through a fact-finding

survey¹ conducted in 2002, but since then, there have been theoretical developments and an accumulation of case studies in the practices of the Antimonopoly Act. In addition, the basic direction of consideration has been clarified in the evaluation of individual cases in the various guidelines and the collection of prior consultation cases on the Antimonopoly Act², but these ideas are loosely organized divided into situations or issues of respective types of business alliances.

In the first place, business alliances aim at improving the efficiency of the business activities, and in many cases, it is thought that a pro-competitive effect can be expected. On the other hand, since multiple independent enterprises are jointly operating their respective businesses, depending on the mode, a business alliance may have the aspect of having an anti-competitive effect. In order for business efficiency and innovation through a business alliance to be fully realized, in most cases the business alliance is expected to have a pro-competitive effect, and it is very important to confirm that the Antimonopoly Act does not impede stimulation of the creative initiative of enterprise and to clarify that the way of consideration in cases where problems in terms of the Antimonopoly Act may arise.

From this perspective, the Study Group organized the systematic approaches and specific consideration according to individual categories while reflecting the existing way of consideration and recent operational practices in terms of the consideration under the Antimonopoly Act relating to business alliances, and conducted a study on new related issues. The aim of this is to help increase convenience and predictability for enterprises who are considering a business alliance and will also lead to preventing violations of the Antimonopoly Act.

3. Perspectives and methods of the study

The impact of business alliances on competition can, for practical purposes be broadly divided into two problems³: problems caused by integration of the business activities of the alliance partners through the business alliance and problems based on agreements which unilaterally or mutually restrict or restrain the business activities of the enterprises through the implementation of the business alliance. In addition, the

1 Fact-finding report on business alliances and competition between companies (February 2002, Japan Fair Trade Commission; hereinafter referred to as “2002 Fact-Finding Report”).

2 From the perspective of preventing violations of the Antimonopoly Act, the Japan Fair Trade Commission responds to individual consultations on specific actions that businesses, etc. intend to take, and compiles and annually publishes a collection of examples of consultations which may be helpful to parties other than those asking for a consultation in order to further deepen understanding relating to the same Act by enterprises, etc. (<http://www.jftc.go.jp/dk/soudanjirei/index.html>).

3 Only to be used as a conceptual classification to encourage discussion and may be impossible to make clear distinctions in actual practice.

impact on competition may differ depending on the form and type of the alliance relationship (horizontal alliances or vertical and mixed alliances, or which business area is targeted for the alliance). For this reason, this Study Group decided to focus on organizing such categories and details.

In addition, based on the fact that the systematic consideration relating to business alliances has not always been clear, the Study Group focused mainly on discussions on the establishment of a basic evaluation framework⁴ to evaluate the impact of business alliances on competition based on the Antimonopoly Act, and the impact that the various judgment factors considered at the time would have on competition depending on the type of mechanism and process.

In the organization of the consideration, first of all, the consideration that has already been shown individually through case examples of consultations were organized and analyzed in Part II, and based on the similarities with business combinations, such as the business activities of the alliance partners being integrated through the business alliance, the Study Group theoretically examined the differences with the consideration pertaining to business combinations in Part III. In addition, issues that were judgment factors in past cases, such as information exchange and sharing between alliance partners, which were not previously discussed in detail in terms of mechanisms that affect competition were individually examined in Part IV. Based on the above, the impact evaluation framework in terms of the Antimonopoly Act pertaining to business alliances was systematically organized⁵ in Part V. Then the consideration related to cross-industry data-collaboration business alliances that have recently been seen was also examined in Part VI.

4 For this reason, it should be noted that the consideration under the Antimonopoly Act regarding business alliances compiled in this report is not a summary of the relevance and sufficiency of the constituent requirements related to violations of the Antimonopoly Act.

5 Based on such organization, specific ways of consideration have been compiled rather than the more conventional seen types.

**Part III. Examination of differences between business alliances and business combinations
(from the perspective of the integration of business activities)**

1. Similarities between business alliances and business combinations

When business activities are carried out in an integrated manner by enterprises, business combinations (generally, business combinations can take various forms such as partial share acquisition, business transfers, and the establishment of a joint investment company, but to ensure simplicity of discussion, unless otherwise noted, the Business Combination Guidelines generally assume mergers or acquisition of all of the shares), such as cases where the enterprises (or decision-making in terms of the business activities) are completely integrated, the decision-making is unified, and the number of competitive units is reduced, or cases where there is a cooperative relationship only for a specific task.

The consideration relating to business combinations is that, as shown in the Business Combination Guidelines, since the number of competitive units is decreased in the case of horizontal business combinations (that is, the competition that took place between the companies concerned disappears), the effect is said to be the most direct⁶. On the other hand, in the case of a vertical business combination, the number of competitive units is not reduced and so the impact on competition is not as great as that of a horizontal business combination, and unless there is a problem of substantial restraint of competition due to market closure and exclusion or coordinated conduct, it is normally not considered that competition in any particular field of trade may be substantially restrained⁷. In addition, once a business combination is entered into, it is difficult to return it to its original state, and so it is subject to prior regulation due to its irreversibility.

On the other hand, business alliances are often limited to the necessary scope of business, and can be cancelled relatively easily due to the expiration or cancellation of the contract, and therefore the level of the integrated business activities between the enterprises are not thought to be as high as in the case of a business combination. However, even in business alliances, decision-making between enterprises and associated actions are integrated to a certain extent and in the case of a horizontal business alliance, competition between the alliance partners may be lost. For this reason, the impact on the market by acting in an integrated manner can be evaluated by the consideration shown in “Part IV-1(1) and 2” of the Business Combination Guidelines,

⁶ Business Combination Guidelines Part IV -1

⁷ Business Combinations Guidelines Part V-1

and it is considered possible to evaluate the possibility of coordinated conduct in the market (with enterprises other than the alliance partners) based on the consideration indicated in “Part IV-1(2) and 3”⁸⁹.

Similarly, in the case of a vertical business alliance, the closure and exclusion from the market can be evaluated based on the consideration shown in “Part V-1(1) and 2(1)” of the Business Combination Guidelines, and the possibility of coordinated conduct with parties other than the alliance partners can be evaluated based on the consideration shown in “Part V-1(2) and 2(2)”.

The above has been described bearing business combinations in which the company itself is completely integrated and businesses alliances based on a contract in mind, but even with regard to so-called capital business alliances which are neither one nor the other, for example, those involving the acquisition of a small number of shares, the focus is not only an analysis of the impact on the entire market but on the leeway each company has to continue acting independently, and factors to be considered are whether through the acquiring company having an important influence on the decision-making of the acquired company, the acquired company will be restricted from taking competitive action, whether through the acquiring company having a strong stake in the business results of the acquired company, the acquiring company will refrain from taking competitive action, and whether competitive information will be shared between the

8 In this regard, a different view was provided that since it is not necessarily the case that the number of enterprises will be reduced through the business alliance, the same consideration cannot be applied to business combinations with regard to substantial restraint of competition through coordinated conduct.

9 Assuming a horizontal alliance in a homogeneous goods market, the impact of reducing supply is compared by economic theory in cases where a business alliance is entered into without a capital alliance using a parameter that indicates the degree of cooperation between the supplier and the partner company regarding the supply volume, cases where only a partial capital alliance (shareholdings) is involved and cases where a business alliance is entered into involving a partial capital alliance.

As a result, when only a business alliance is entered into without a capital alliance, in a situation where the fluctuations in the supply volume of partner companies could be reliably predicted, and it could be expected that reducing the supply volume itself would help maximize profits, it became clear that the supply volume of the entire market had decreased (when each company took coordinated conduct on supply). Also, in a case of entering only into a partial capital alliance, it became clear that the supply volume of the entire market would decrease through the partial interests of alliance partners via the shareholdings. Furthermore, in the case of a business alliance involving a partial capital alliance, the supply volume of the entire market declined the most due to factors such as coordinated conduct and partial mutual ownership of profits. This indicates the causing of a possible decline in the overall supply of the market through the integration of decision-making and behavior among businesses such as coordinated conduct regarding supply volume and partial mutual ownership of alliance partners' interests, etc. depending on the competitive environment of the market and the competitive relationship between partners in any of the abovementioned three forms, and in this regard suggests that the same effect as a business combination can occur. In this respect, the similarity between business alliances and business combinations is indicated.

acquiring company and the acquired company¹⁰. In addition, even the Business Combination Guidelines considers the point of whether or not a coordinated relationship will be established between investment companies through the sharing of production costs when the investment companies continue to engage in sales in cases where the production department is integrated by the joint investment companies¹¹. Looking at these points, there is a difference in the degree of integration ranging from business combinations where the alliance partners are completely integrated to business alliances that can be cancelled relatively easily through expiration or cancellation of the contract, but the basic consideration in terms on the impact on competition is thought to be the same.

2. Characteristics unique to business alliances differing from business combinations

As problems specific to business alliances: (i) it is not a company integration as in a business combination but is a certain concrete conduct, (does not come under Chapter IV that regulates business combination in the Antimonopoly Act, but comes under the restrictions on conduct under Article 3 that prohibits private monopolization and unreasonable restraint of trade), and (ii) since the businesses are not completely integrated, there is a room for continued independent action among the alliance partners (for example, in the case of a horizontal production alliance, there is still a competitive relationship in sales activities).

(1) Business alliance as a concrete conduct in business activities

As mentioned above, business alliances are subject to the restrictions on conduct under Article 3 etc. of the Antimonopoly Act, and therefore the determination of illegality differs from the business combination regulations which analyze and evaluate the certain extent of anti-competitive effects (and pro-competitive effects) that may occur in the future, and are based on current or past actions, that is, in principle, is based on the facts that have actually occurred up to the time of the judgment¹².

10 For example, in the case of the Major Business Combination Case in FY2015 / Case 3 (Osaka Steel Co., Ltd.'s acquisition of Tokyo Tekko Co., Ltd.), in the examination of the "Evaluation of the combination relations of the company concerned", it is helpful to conduct an examination from the perspective of whether or not coordinated conduct is likely to be taken between companies which have a combination relationship when there is a voting right holding ratio of over 20%, and their shareholder ranking alone is number 1.

11 Business Combination Guidelines Part IV-2 (1) C.

12 For business alliances, in many cases the alliance partners themselves consider the legality in terms of the Antimonopoly Act prior to concluding an alliance or often consult with lawyers or the Japan Fair Trade Commission. Restrictions on acts such as in Article 3 and Article 19 of the same Act are applied

In addition, since business alliances are inevitably joint acts, it is necessary to distinguish them from simple hardcore cartel. For example, seen from the perspective of how the influence the alliance partners have on the market is strengthened and how much efficiency can be expected to improve as a result of the act, business alliances that are not expected to have a special effect other than the effect of restricting competition such as the maintenance or raising of prices and restrictions on sales volumes, usually have the possibility of substantially restricting competition as a simple hardcore cartel. For this reason, it is useful to clarify this point when systematically organizing the consideration under the Antimonopoly Act relating to business alliances. However, it should be noted that even if the intention is not to restrict competition, it may constitute a problem under the Antimonopoly Act if competition is actually restricted by the act.

(2) Existence of room for continued independent action by the alliance partners

A. Necessity of evaluation related to the degree of integration of business activities

Unlike business combinations, in business alliances, it is assumed that the alliance partners will basically continue to act independently after the start of the alliance. For this reason, considering the extent to which the alliance partners have the opportunity to act independently through the implementation of the business alliance, in other words, to what extent the integration of the business activities of the parties of the alliance has developed (for example, how much competition is lost among the alliance partners who have a competitive relationship) is a major point in assessing the impact on competition pertaining to business alliances.

In evaluating the extent to which the business activities of the alliance partners have been integrated, while taking into account the specific details of the business alliance, chiefly the degree of integration of decision-making relating to important modes of competition among the alliance partners and the possibility of coordinated conduct among the alliance partners through the exchange and sharing of information that is important in terms of competition and a common cost-sharing structure are thought to be an important decision factor¹³ (for example, if the production departments are integrated through the

based on the facts after the action has actually been, but in cases where prior consideration is required, in practice, an analysis and evaluation will be conducted of the future anti-competitive effect (or pro-competitive effects). However, even in such case, it goes without saying that the consideration under the Antimonopoly Act in this report can be used.

13 In the 2002 Fact-Finding Report, in terms of the nature of the business alliance, the focus was on the

establishment of a joint investment company and each investment company continues to engage in sales independently (that is, if there is a competitive relationship remaining between the investment companies), there is a concern that the sharing of the production costs creates an incentive for the investment companies to take coordinated conduct¹⁴).

On the other hand, even if there is a horizontal business alliance, it is difficult to envisage that the impact on the overall market will be large if the impact on the competitive relationship between the alliance partners is negligible. Also, in a vertical business alliance, if the independence of decision-making and conduct remains, and the relationship between the alliance partners parties is not significantly affected by the business alliance, it is thought the impact on the market as a whole will not increase¹⁵.

B. Existence of actions of restriction and restraint among the alliance partners

Since the alliance partners will continue to act as independent business entities even after the start of the business alliance, in some cases an incidental agreement may be established to restrict or restrain the business activities of each of the alliance partners either unilaterally or mutually. Therefore, in addition to the perspective of integrating the business activities of the alliance partners, there is also a need to consider the impact such agreements will have on competition among the alliance partners.

For example, if there is a superior or inferior position in the trading power between the alliance partners, cases where one party unfairly imposes unfavorable conditions on the other party, or one party unfairly restrains the other party's business activities may be considered an issue of unfair trade practices, etc. under the Antimonopoly Act. In addition to unilateral acts, there may be an issue of unreasonable restraint of trade when there is an agreement on the sales price, sales area or the sales destination of the products among the alliance partners, and if an alliance partner excludes a party other than an alliance partner, this may cause problems such as private monopolization or concerted refusal to trade.

purpose of the business alliance, the details of the business alliance (the comprehensiveness of the alliance, the room for competition in the essential part in terms of the competition, the incentive towards competition) and the duration of the business alliance, and the effect of the business alliance on competition was evaluated.

14 Business Combination Guidelines Part IV-3 (1) D.

15 However, this does not apply in terms of unfair trade practices which is a regulation that focuses on tendency to impede fair competition.,

Part IV. Examination of individual issues related to business alliances

When systematically organizing the impact evaluation framework in terms of the Antimonopoly Act relating to business alliances below mentioned in Part V, first the issues pertaining to important judgment factors when examining the impact on competition are discussed. In particular, among the following issues, information exchange and sharing may be indispensable for the implementation of a business alliance, and even in such cases, there is a risk that this may lead to restrictions on competition, and in addition, since the sharing of the cost structure has already been repeatedly mentioned as an important judgment factor when examining the degree of integration of the business activities of each alliance partner in past consultation cases, the way of consideration will be clarified below as to how this has an impact on competition through what kind of mechanism.

1. Information exchange and sharing associated with business alliances

(1) Significance of information exchange and sharing in business alliances

Generally, when preparing or implementing a business alliance, a certain degree of information exchange and sharing necessary for the business alliance takes place among the alliance partners. For example, in joint R&D, it is expected that each alliance partner will develop new technologies and products by bringing together information on the technologies and know-how that they each possess. Moreover, in joint purchasing, it is expected that volume discounts will be provided through the placing of an order following the collection of information such as the purchasing quantity needed by each alliance partner. Furthermore, in a business alliance where competitors supply each other's OEM, it is expected that manufacturing costs will be reduced, but in this case as well, a certain amount of information exchange and sharing will take place regarding supply volume and manufacturing costs.

In this way, the alliance partners are able to exchange and share certain information which is necessary for the business activities to be carried out through the business alliance, and a pro-competitive effect is expected through the achievement of efficient business activities that cannot be achieved by one enterprise alone.

(2) Problems of information exchange and sharing in business alliances

On the other hand, one aspect of business alliances is that coordinated conduct is likely to be facilitated due to an increase in market transparency

associated with the exchange and sharing of information, making it easier for the parties to predict each other's behavior¹⁶.

In other words, if market transparency increases through the exchange and sharing of information and it becomes easier for the alliance partners to predict each other's behavior, first, there is a possibility that a common understanding will be reached about the conditions under which coordinated conduct can be taken (what kind of trade conditions, for example, price setting, are needed on both sides in order to take coordinated conduct). In addition, it becomes possible for the alliance partners to monitor whether there has been a deviation from the coordinated conduct, and if there is an act of deviation, it is easier to retaliate against it in a timely manner. Under these circumstances, when the alliance partners seek to secure profits in the long-term, they usually collaborate by acting in concert with one another since larger profits can be obtained through maximizing common profits through acting in collaboration and sharing the profits rather than an enterprise attempting to maximize its profits alone¹⁷¹⁸. In general, the more valuable the information in terms of competition that is exchanged or shared such as the price, quantity, cost and demand, the easier it becomes for enterprises to mutually predict each other's behavior¹⁹, and moreover, the higher the frequency of information exchange or sharing as an aspect of information exchange and sharing, the easier it becomes to mutually predict behavior among the enterprises.

In general, a market structure that facilitates coordinated conduct is, for

16 In addition, it has been pointed out that in vertical and mixed business alliances, competitors can be excluded through information exchange and sharing between alliance partners (see V-3 (2) A below).

17 See Business Combination Guidelines Part IV-1 (2), Part V-1 (2), Tanabe = Fukamachi, "Business Combination Guidelines" (Shoji homu), pp. 108-110, pp. 198-201 pages and Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements of the European Commission paragraphs 66 and 67.

18 See Hiroyuki Odagiri, "Competition Policy Theory (2nd Edition)" (Nihon Ronbunsha), Chapter 3, "Conspiracy and Cooperation".

19 In response to the prior consultation of the Japan Fair Trade Commission "Information Sharing by Eight Star Alliance Member Airlines" (October 21, 2011), eight of the airlines that are members of a federation of airlines called Star Alliance engaged in information exchange and sharing with regard to certain sales performance data, where they voluntarily reported the total sales for six months to a service company, and the service company provided the eight companies with only the total adding up the sales figures for each of the eight companies, a number of companies out of the eight companies sent their employees to the service company, confidentiality obligations were stipulated in the contract between each airline and the service company, and confidentiality obligations were also stipulated between the service company and the seconded employees, and the information on each of the eight companies collected by the service company was returned to the companies, and therefore, from these facts the answer was that there was no problem under the Antimonopoly Act.

example, a market that exhibits such traits as a high level of transparency, a high degree of concentration (oligopoly), stability (less fluctuation in supply and demand) and symmetry (cost structure, market share, products manufactured, etc. are homogeneous). In such cases, information exchange and sharing will increase the transparency of the market and increase the likelihood of coordinated conduct being facilitated.²⁰

In business alliances, since the exchange and sharing of a certain amount of information is usually considered normal in order to ensure smooth implementation of the business alliance, as described above, it is necessary to take into account the contents of information exchanged or shared, the form of the exchange or sharing and the structure of the market, and to consider whether coordinated conduct among the alliance partners may be facilitated. In addition, regarding the impact information exchange and sharing will have on competition, it is also useful to examine what kind of competition there was when there was no information being exchanged or shared.

(3) Previous consideration in terms of the practices of information exchange

The previous consideration of the practices relating to information exchange is as given below.

A. Guidelines

According to the guidelines²¹ of the Japan Fair Trade Commission (JFTC), there is a broad range with regard to the information activities of the trade associations where there are no particular problems under the Antimonopoly Act such as activities to provide information on product knowledge, technology trends and management knowledge to its enterprise members, consumers or others, but there is a possibility of a violation of the Antimonopoly Act when there is an effect that enables prediction between the partners regarding the specific contents of important competitive channels such as prices relating to current or future business activities among competing enterprises²².

20 See Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements of the European Commission paragraph 77.

21 Guidelines Concerning the Activities of Trade Associations under the Antimonopoly Act (Japan Fair Trade Commission, October 30, 1995) Trade Association Guidelines Part II-9.

22 Examples of such information exchanges include, “Collecting or offering information from or to constituent firms, or promoting the exchange of information among the constituent firms, where such information specifically relates to important competition-related factors, concerning the present or

Moreover, if an implicit understanding or common intention pertaining to restrictions on competition is formed among the enterprise members through such information-related activities, or if such information-related activities are used as a means or method to engage in an act of restriction of competition, as a general rule, this will constitute a violation²³.

These are guidelines for the activities of trade associations, but they can also be referred to when considering problems in terms of competition in the exchange and sharing of information by business alliances.

B. Prior consultations

In one case in the prior consultations provided by the JFTC where two companies, which held a 90% share in an oligopolistic market supplied each other's OEM, since it was possible to find out important information in terms of conducting the business activities such as manufacturing costs, there was a significant impact on competition, and this became one of the reasons why the case was a problem under the Antimonopoly Act²⁴.

In addition, in relation to trade associations, in a case where a trade association intended to show its members an annual outlook relating to demand that it had created for products manufactured by only two of its members and to inform its members of the total production and shipment results per month calculated by asking the two members for a report, the JFTC determined that there was a risk of a problem under the Antimonopoly Act on the grounds that with regard to the products, the association was making the production and shipment volumes of the two companies known to each other by disclosing to its members the total production and shipment performance of the products, and was potentially making it easier for the two companies to predict each other's future production and shipment volume through providing an outlook relating to demand²⁵.

C. Legal measures

In the past, legal measures against unreasonable restraint of trade were

future business activities of the constituent firms, such as the following: specific plans or prospects regarding the prices or quantities of goods or services supplied or received by the constituent firms; the specific contents of the constituent firms' transactions with or inquiries from customers; the limits of anticipated plant investment" (Trade Association Guidelines, Part II-9-(2)).

23 Trade Association Guidelines Part II- 9 (2).

24 2001 The collection of prior consultation cases on the Antimonopoly Act / Case 8.

25 Major consultation cases concerning the activities of trade associations (1999) / Case 21.

taken by the JFTC in such instances as when it could be seen that the fact of violation had been recognized due to mutual restraint of business activities based on an agreement which focused on the process²⁶ of consensus-building on price increases or the existence of information exchange and sharing as a means of ensuring the effectiveness of the consensus²⁷.

D. Examples in Europe and the United States

In Europe and the United States, information exchange activities are not only treated as tools to form a cartel and as circumstantial evidence, but are also considered to be a type of illegal act²⁸²⁹.

(4) Consideration relating to the exchange and sharing of information in business alliances based on the above

As described in (1) and (2) above, the exchange and sharing of information in business alliances used as a means of smooth implementation of business alliances contributes to enhancing effectiveness and also increasing transparency, and there is also an aspect of generally making it easier for the alliance partners to predict each other's behavior and to facilitate coordinated conduct.

On the other hand, as described in (3) above, when applying the

26 For example, in the Toshiba Chemical Case (Tokyo High Court decision of September 25, 1995), information and opinions were exchanged regarding the increase in the sales price of copper-clad laminates, resulting in an increase in the sales price for consumers. As a result of the consistent action, it was deemed that there was a joint act of "communication of intention" for the coordinated increase in product prices, and it was a violation of Article 3 (Unreasonable restraint of trade) of the Antimonopoly Act.

In addition, in the Seed Cartel Case (Tokyo High Court decision of April 4, 2008), an agreement was recognized regarding the content of setting the "price list price" of each company according to the standard price determined by the trade association for the originally packed seeds, and on this premise, the exchange of information such as the pattern situation, market conditions, etc., and the standard price was determined for each category established according to the grade and transaction form from the previous year's standard price, a questionnaire was conducted on whether to raise, lower, or leave the price as it was, and the exchange of opinions were recognized.

27 For example, in the Polypropylene Cartel Case (Japan Fair Trade Commission decision of February 24, 2010) and the Isomerized Sugar Cartel Case (Japan Fair Trade Commission decision of April 15, 2016), information exchange to confirm the status of price increases was recognized.

28 See Takahiro Saito, "Illegality criteria in information exchange activities regulation –focusing on the developments in EU competition law" ("New Challenges of Company Merger Regulation", The annual of the Japan Association of Economic Law No. 33), p. 136.

29 EU example: UK Tractor Case (Case C-7 / 95P, John Deere Ltd V Commission), example in the United States: Container Case (US v. Container Co. Of America, 393 US 333). Regarding the UK Tractor Case, Takahiro Saito "Regulation of information exchange activities in EU competition law (2)" (Hogaku Shinpo Vol. 117, Nos. 9 and 10), p. 185 and later, Takahiro Saito, "Regulations on Information Exchange Activities in Antitrust Law" (Comparative law review Vol. 37, No. 1), p. 172.

Antimonopoly Act in the past, establishing a cartel (unreasonable restraint of trade) required the existence of an agreement (or communication of intention³⁰) concerning price increases, etc., and therefore, information exchange or sharing itself was not an illegal act³¹ and was treated as one of the indirect facts to indicate the existence of an agreement on price increases, etc.

In this respect, even if there is no agreement (or communication of intent) regarding price increases, etc., in a case where the enterprises exchange and share information and the exchange or sharing of information is not itself a problem under the Antimonopoly Act, depending on the content of the information exchanged or shared, the mode of exchange or sharing and the market structure, an environment that facilitates coordinated conduct among competitors and is likely to lead to consensus building regarding restrictions on competition may be fostered, and therefore, enterprises need to be careful about the content and handling of information exchanged and shared during the preparation and implementation of a business alliance.

As described above, when a business alliance is being implemented, it is normal for a certain amount of information to be exchanged and shared between the alliance partners and while such information exchange and sharing is expected to aid in smooth implementation of the business alliance and to give rise to a pro-competitive effect, on the flip side, there is also the aspect of

30 In the above-mentioned Toshiba Chemical Case, since it falls under “in concert with” as described in (Article 2-6 of the Act), it is interpreted that it is necessary to recognize that there was a mutual “communication of intent” when multiple companies raised the price. However, the “communication of intent” here refers to recognizing or predicting that multiple businesses will implement the same content or raise the same type of price and willingness to align this at the same pace, but it is not enough for the other party to simply recognize and accept the increase in value, and while it is not necessary to explicitly agree that the enterprises will be bound to each other, it is sufficient to recognize the act of raising the price of other enterprises and to accept it implicitly.

31 However, even when the information is exchanged or shared externally, if the information exchanged or shared is important in terms of competition, such as raising the sales price, it will be evaluated in light of the judgment of the Toshiba Chemical Case as an anti-competitive agreement (or communication of intent) that violates the Antimonopoly Act.

For example, in response to the plaintiff’s assertion that “they were merely exchanging information about price increases and it was not an agreement of a cartel” regarding the notification of the price increase and the date of the price increase to other companies before the announcement of the price increase, the price increase, price increase date and price increase announcement date are important business strategy secrets, and therefore it is difficult to think that sharing these details with other rival companies was for a normal purpose other than keeping pace with the price increase, and in fact, the plaintiff’s claim cannot be accepted in light of the fact that prices were almost the same at the same timing without any delay from the provision of the information” (Vinyl Chloride Pipe and Fitting Price Cartel Case ([Tokyo High Court decision of June 30 , 2017])).

Moreover, it has been pointed out that if there is an agreement (or communication of intent) to exchange and share information, it can be said that it is causing substantial restraint of competition, so there is the possibility of a problem under the current Antimonopoly Act.

increasing the risk of coordinated conduct being taken. Therefore, enterprises need to consider whether the information exchanged and shared in the business alliance is within the range necessary for the implementation of the business alliance (to ensure information on the sales price is not shared in the production alliance) and if there is a need to exchange and share information that is vital in terms of competition, it is also necessary to consider methods of handling the information including the use of information blocking measures (see (5) below).

Even if information exchange and sharing is indispensable for the implementation of a business alliance (and even if information blocking measures are taken to the greatest extent possible), bearing in mind the content and mode of the information exchanged or shared and the market structure, it may not be possible to eliminate problems under the Antimonopoly Act if coordinated conduct is facilitated among the alliance partners.

(5) Specific countermeasures

For example, in cases where competitors supply each other with an OEM, if information on manufacturing costs is shared with the sales department, it may become easier for an enterprise to guess the sales price of another party of the business alliance, and there may be cases where coordinated conduct is facilitated between the sale representatives of both alliance partners. In this way, when information is exchanged and shared in a business alliance, it is considered that anti-competitive actions can be easily performed using the information.

For this reason, it is important for the alliance partners to take appropriate measures to manage the information (information blocking measures, etc.) so as not to induce problems such as cartels when exchanging and sharing information. Past consultation cases where there were information blocking measures in a business alliance have included the establishment of firewalls³² between

32 The collection of prior consultation cases on the Antimonopoly Act(FY 2016) / Case 7 (case where two food manufacturers at the time of joint delivery operations, did not give any information related to the sales prices of the products to each of their logistics subsidiaries which were carrying out the deliveries, limited the information required for delivery, such as delivery destination and quantity to exchanges between the relevant logistics subsidiaries, and took measures to block the information from being transmitted to the two manufacturers was not deemed to be a problem under the Antimonopoly Act).

In addition, the collection of prior consultation cases on the Antimonopoly Act (FY2017) / Case 8 (case where six home appliance manufacturers at the time of considering joint logistics operations, took information blocking measures where such consideration would only be conducted with a limited number of departments and personnel, and the information would only be shared within the relevant departments and personnel was not deemed to be a problem under the Antimonopoly Act).

departments, entering into confidentiality agreements³³ with persons with an involvement in the business alliance, and restricting access to information³⁴ of those engaging in the business alliance and it is also possible to take practical measures such as allocating information managers and assigning personnel who are engaged in the business alliance to an unrelated department for a certain period of time. In addition, regarding business combinations, in cases where competition in any particular field of trade is to be substantially restricted, the relevant company may resolve the problem by taking certain appropriate measures (remedies). The Business Combination Guidelines give an example of the blocking of information exchange or sharing as one type of problem-solving measure³⁵, and there are also examples of decisions being made in terms of the Antimonopoly Act based on the assumption that information blocking measures will actually be taken³⁶.

2. Sharing a common cost structure

(1) Problems with sharing a common cost structure

In the case of an alliance in production, purchasing or logistics, efficiency is expected to increase since economies of scale will occur through the alliance. Usually, it is thought that these business alliances are implemented between enterprises in order to pursue such efficiency³⁷. Meanwhile, the structure of the product manufacturing costs can be shared to a certain extent between the alliance partners through the business alliance.

33 The collection of prior consultation cases on the Antimonopoly Act 2001 / Case 6 (case where Food Manufacturer A established a joint distribution center as a 100% subsidiary and by using the center in the case of a joint delivery with other food manufacturers, signed a contract between a food manufacturer, including Company A, and the center not to leak or exchange information related to transactions (price, quantity, etc.), and took measures to have a system where the employees of the center could not obtain information about the transactions, was deemed not to be a problem under the Antimonopoly Act).

34 Same as footnote 34.

35 “when in a business combination goods are produced by the joint investment company but are sold by the respective investing companies, the problems of the substantial restraint of competition in a particular field of trade are solved by measures that make it possible to block the exchange of information on sales of the goods between the investing companies and between each investing company and the joint investment company” (Business Combination Guidelines Part VI-2 (2) B).

36 Example of a Major Business Combination Case in FY2017 / Case 2 (Hitachi Metals, Ltd.’s acquisition of the shares of Santoku Corporation). Also, an example of a Major Business Combination Case in FY2017 / Case 4 (merger of Broadcom Ltd. and Brocade Communications Systems).

37 Even if efficiency is achieved, it is only when it is in the interests of the consumer that it will be taken into account when determining the impact on competition under the Antimonopoly Act (Business Combination Guidelines Part IV-2 (7)).

If a common cost structure is shared between the alliance partners, cost information will be shared between the alliance partners, and accordingly, as outlined in (2) above, it may become possible for the enterprises to monitor whether there has been a deviation from the coordinated conduct, and if there is an act of deviation, it will be easy to retaliate against such act in a timely manner³⁸. For this reason, there is usually a problem that coordinated conduct is likely to be facilitated among the alliance partners caused by the sharing of a common cost structure³⁹.

In addition, the sharing of a common cost structure means that part of the cost is the same for some of the alliance partners, and therefore the decision-making pertaining to important competitive methods to reduce the costs of both parties will also be integrated.

(2) View based on the above

As described above, there may be cases where a problem may arise in terms of the Antimonopoly Act due to the sharing of a common cost structure, but in business alliances, the form of the business alliance will vary depending on the case. For example, in the case of joint production, both the ratio of the common part of the manufacturing cost per unit of the product and the ratio of the jointly produced product of the total production volume will vary, and the total cost commonality ratio that combines the two will vary from high to low depending on the case.

There are also some markets where it is easy to predict the behavior of enterprises such as a market situation which is highly transparent, highly concentrated (oligopolistic), stable (less fluctuation in supply and demand), and highly symmetric (cost structure, market share, manufactured products, etc. are homogeneous), and other markets where it is less easy to predict. Therefore, even if the cost commonality ratio⁴⁰ is low, it can be assumed that monitoring and retaliation will be easier due to such market conditions and the active exchange and sharing of other information.

In addition, the extent to which the cost structure problem relates to the competitive

38 For example, if some of the partners in an alliance partners where the cost structure is shared, engage in competitive behavior such as reducing the price, since the other enterprises know that this action does not reflect the cost structure (monitoring possible), it is thought that retaliation becomes possible.

39 Incidentally, cost information is strategic competitive information that is just as important as price and production (or close to it) and with regard to the risk that sharing such information could produce competition concerns, see the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements of the European Commission paragraphs 78 and 86 and the Federal Trade Commission / US Department of Justice Antitrust Guidelines for Collaborations Among Competitors Antitrust Guidelines for Collaborations Among Competitors 3.31 (b).

40 For production alliances, it is the product of “the ratio of the shared part of the manufacturing cost per product unit” and “the ratio of the jointly-produced product in the total production volume”.

means may vary depending on the specific individual case. In general, cost is a specific element of an important means of competition. For example, when a means of competition which is not the price such as quality, design or brand are emphasized, or where the degree of product differentiation is high and it is difficult for consumers to grasp the price difference, the importance of the cost itself in terms of competition will be proportionally reduced.

For this reason, it can be said that the cost commonality ratio, as described above, is one of the factors that may facilitate coordinated conduct and one of the factors that may integrate decision-making pertaining to important means of competition, but it is not appropriate to judge whether there is a problem with the business alliance in terms of the Antimonopoly Act simply from whether the ratio is high or low, and should be considered overall in addition to other factors (market conditions, form of information exchange and sharing such as the frequency of information exchange, etc.).

3. Impact on innovation

Japan's economy has experienced high growth and recessions and has since matured, but now there is a need to constantly come up with innovations in order to solve such problems as the rapidly ageing population and decline in the overall population, market shrink and low productivity in order to further develop the economy and enrich people's lives in the current environment surrounding Japan, such as the globalization of the economy, the digital economy, and the development of IoT⁴¹. For example, in recent years, an innovation known as the Fourth Industrial Revolution has occurred, and innovation has also become more energized in the form of the actualization of new products and services through the analysis of large amounts of data due to the advancement of artificial intelligence-related technologies (AI).

In the formation of such innovations, business alliances are being used as one of the methods in business strategies from the perspective of achieving prompt business execution, cost reduction and risk distribution, and when organizing the consideration under the Antimonopoly Act relating to business alliances, it is also important to consider the impact business alliances will have on innovation. In this respect, joint research and development (R&D) is generally considered to make R&D activities more active and efficient through alliances and to promote technological innovation⁴², but depending on the specific circumstances, it may prove to hinder the innovation of other

41 See Kazuyuki Sugimoto, Chairman of the Japan Fair Trade Commission, "Discussion on the 70th Anniversary of the Antimonopoly Act" (July 20, 2017).

42 Guidelines Concerning Joint Research and Development under the Antimonopoly Act "Introduction" 1.

alliance partners or other enterprises⁴³. In other words, in general, business alliances related to research and development are considered to contribute to the achievement of innovation and efficiency, and in many cases are not considered to cause problems in terms of the Antimonopoly Act. On the other hand, restricting research and development, for example, in terms of a subject other than that of the joint R&D without a justifiable cause between alliance partners, or restricting other research and development, which uses the outcomes (technology) of the joint R&D, in some cases, will unreasonably constrain the research and development activities and adversely affect innovation.

The Antimonopoly Act recognizes the value of “stimulating the creative initiative of enterprises”⁴⁴ through the promotion of fair and free competition, and in cases where research and development activities, which are an important component of the business activities, and innovation are hindered, this may constitute a problem under the Antimonopoly Act. In fact, in the case of a business combination in Japan, there was a fear that a company which had obtained the information of another enterprise related to research and development would use this information in the development of their own products and would be able to gain an unfair advantage through the relevant company manufacturing and selling the products, and through other enterprises sharing the same concerns, it was thought that these other enterprises would be reluctant to collaborate on research and development⁴⁵. In recent years, the focus overseas has been on whether business combinations will hinder innovation, and there have been a number of cases where remedies were taken when there were such concerns⁴⁶. In addition, there is also description⁴⁷ in the Japan Fair Trade Commission’s Guidelines stating that imposing the obligation of non-compete on a license hinders the willingness of the licensee to conduct research and development and impedes the development of new technologies,

43 For reference purposes, there was a case in Europe where several automobile manufacturers colluded to limit the development of technology to reduce the harmful substances in the exhaust gases and a statement of objections was sent to the automobile manufacturers (European Commission, April 5, 2019).

44 Article 1 of the Antimonopoly Act stipulates, “The purpose of this Act is to promote fair and free competition, stimulate the creative initiative of enterprise, encourage business activity (omitted) and thereby promote the democratic and wholesome development of the national economy as well as secure the interests of general consumers (omitted).”

45 Example of a Major Business Combination Case in 2016 / Case 8 (combination of Lam Research Corporation and KLA Tencor Corporation). After the Japan Fair Trade Commission conveyed its concerns about the impact on competition to the parties, the companies concerned withdraw this combination plan.

46 Dow Chemical Company and E.I. du Pont de Nemours & Company merger plan (European Commission on March 27, 2017), Takeda Pharmaceutical Co., Ltd. plans to acquire Shire plc (European Commission on November 20, 2018), and Bayer AG plans to acquire Monsanto Company (European Commission of March 21, 2018).

47 Guidelines for the Use of Intellectual Property under the Antimonopoly Act Part 4(5) (vi).

and therefore should be considered in the judgment on whether fair competition is being inhibited and a description⁴⁸ stating that imposing the obligation to transfer improved inventions, etc., resulting from joint R&D to other participants, reduces the incentive to conduct research and development in order to improve the results, and strongly inhibits fair competition.

Since the application of the Antimonopoly Act to business alliances is a question of whether or not there has been a violation of Article 3 or Article 19 of the same Act in the conduct of a business alliance, if the effect on competition is a violation of Article 3, the existence of substantial restraint of competition in any particular field of trade becomes the issue, and if it is a violation of Article 19, the existence of inhibition of fair competition becomes the issue. In order to examine whether there have been substantial restraint of competition in any particular field of trade or the existence of inhibition of fair competition, it is necessary to consider which markets will be affected by the business alliance⁴⁹, and in this respect, the Intellectual Property Guidelines state, “Restrictions pertaining to the use of technology can affect competition in developing technologies. No market or trade, however, can be defined for research and development activities by themselves. Therefore the effect on competition in developing technologies should be evaluated by the effect on competition in the trade of future technologies resulting from such activities or products incorporating the technology.”⁵⁰⁵¹⁵².

48 Guidelines Concerning Joint Research and Development under the Antimonopoly Act Part II -2(2) (b) (2).

49 When considering whether substantial restraint of competition in private monopolization or unreasonable restraint of trade, it is necessary to define a the “any particular field of trade” as a requirement in terms of the Antimonopoly Act (see Article 2, paragraphs 5 and 6), but there is no such requirement per se when considering the existence of tendency to impede fair competition in unfair trade practices.

50 Guidelines for the Use of Intellectual Property under the Antimonopoly Act Part 2(2) (iii).

51 In the United States, in cases where an agreement between competitors may have an impact on innovation and it is not possible to respond appropriately in the analysis of the products and services market, in some cases, an innovation market may be defined and analyzed (Federal Trade Commission / US Department of Justice / Antitrust Guidelines Relating to Collaborative Action between Competitors 3.32 (c)). In Europe, when the impact of R&D agreements on innovation cannot be fully evaluated by analyzing actual or potential competition in existing product and technology markets: (i) if the R&D poles (R&D activities directed at new products and development of technology) can be identified, an evaluation will be conducted depending on whether a sufficient number of R&D poles remain after the agreement and (ii) if the R&D poles cannot be identified, rather than the impact on innovation, the evaluation will be limited to the real products and technologies market related to the agreement (Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements of the European Commission paragraphs 119 - 122).

52 Regarding “any particular field of trade”, in the case of Asahi Kohmatsu Document Case, where if there were multiple uses for the product in question, even with regard to the part of the use where there were no actual consumers and the transaction was not conducted, the possibility of the new entry of customers could be denied and etc., any particular field of trade including this (potential supply) was

In cases where innovation is inhibited by a business alliance (or action), if it is not clear what kind of product or technology will be affected by such inhibition, it can be assumed that there are a variety of patterns such as where it can be presumed to have been generated from the previous R&D activities of the alliance partners, technology that is already possessed or products which are being manufactured, or where it can be regarded that the products were marketed due to there being a high degree of certainty that the products would be launched in the market. Based on the situation of past and present R&D activities carried out by the alliance partners, the technology already possessed and the products that have been manufactured, and the R&D activities of other enterprises currently active in the market, in cases where the motivation of the alliance partners or other enterprises to conduct R&D activities suffers a decline due to the alliance, if it is possible to specifically predict to a considerable extent what kind of technology or product will be adversely affected and how, these factors may be taken into account in the evaluation of the impact on competition.

For example, as seen in examples overseas⁵³, there are huge barriers to entry and many high costs and years of research and development involved in creating one technology or product as well as a limited number of players, and while there are cases where it is possible to predict to a considerable extent what kind of new technology or new product⁵⁴ will be launched in the world making it possible to demarcate the market⁵⁵ with such new technology or new product, there are other cases where while considering the predicted pro-competitive effect caused by the business alliance, it can be evaluated that competition in the market is being restricted due to a decline in motivation towards research and development and a negative impact on innovation. In such cases, as well as such circumstances as the huge barriers to entry into the market and the number of competitors, whether there was vigorous competition between the alliance partners in the past, and in addition, the ability to stir innovation among competitors in the entire market may also be factors to judge the impact on competition.

On the other hand, there are cases where vigorous research and development activities are being carried out among the enterprises even if the products or services that will be produced in the future cannot be specifically predicted. In such a situation, cases where the contents of the business alliance are such that the motivation for R&D is reduced and innovation is adversely affected may constitute a problem under the

recognized (see Tokyo High Court decision of June 13, 1986).

53 Same as footnote 47.

54 Sometimes called “pipeline products”.

55 This kind of operation has been observed recently in Japanese business combination cases as well (Major Business Combination Case in FY2018 / Case 3 [acquisition of shares of Shire plc by Takeda Pharmaceutical Co., Ltd.]).

Antimonopoly Act (in such case, it is necessary to organize these cases using the conventional Antimonopoly Act interpretation of evaluating the impact on the current transactions and competition in the market). Specific judgments are rendered on the basis of the facts of each case. For example, in cases where, through the business alliance, inputs (funds, data, technology, human resources, etc.) required for innovation in the development of new products and services and fundamental improvements are accumulated by the alliance partners and innovation is inhibited due to the difficulty other enterprises face in obtaining such inputs, while considering the pro-competitive effect expected from the business alliance, it is considered that such an alliance may be evaluated as having the effect of restricting R&D competition. In such cases, the extent to which funding, data, technology, human resources, etc. are required for the innovation, the status of the accumulation by the alliance partners, and the availability of the inputs to other enterprises are thought to constitute factors that determine the impact on competition.

Part V. Consideration in terms of the Antimonopoly Act relating to business alliances

Based on the above, the general consideration in terms of the Antimonopoly Act regarding business alliances is based on the consideration of the Business Combination Guidelines as a large framework from the perspective of a business combination that integrates the business activities of the alliance partners, but it is also considered appropriate to consider the characteristics unique to business alliances such as the extent to which the business activities of the alliance partners will be integrated.

In other words, in a horizontal business alliance, first, the degree of integration of the business activities of the alliance partners through the business alliance is evaluated from

the perspective of the extent to which competition between the alliance partners is being restricted. In cases where competition between the alliance partners is restricted, the impact of this restriction on the overall market will be evaluated from the perspective of the effect of the alliance partners acting in unison and the possibility of the alliance partners taking coordinated conduct with their competitors.

Meanwhile, in vertical and conglomerate business alliances, the degree of integration of the business activities of the alliance partners through the business alliance is first evaluated from the perspective of whether closure or exclusion occurs. In the event that closure or exclusion occurs among the alliance partners, the impact of such closure or exclusion on the market as a whole will be evaluated from the perspective of the possibility of the closure and exclusion of the market and the possibility that the alliance partners will take coordinated conduct with their competitors.

In addition, unlike business combinations, in the case of both horizontal business alliances and vertical and mixed business alliances, since the alliance partners will continue to act independently even after the start of the business alliance, consideration will also be given to whether an agreement is reached that restricts or restrains the business activities of each alliance partner unilaterally or mutually in association with the implementation of the business alliance.

A summary of the systematic organization of the impact evaluation framework under the Antimonopoly Act in relation to these kinds of business alliances, including the judgment factors, is as follows.

1. Markets for examination

In business alliances, since there may be an impact on various markets (for example, sales market, purchasing market, technology market) in connection with the business of the alliance, the target markets to be considered as markets that should be examined for impacts on competition will be determined by looking at the specific forms of business alliances.

See Part IV-3 above for the concepts of the target markets when evaluating the impact on innovation.

2. Differentiation from hardcore cartels

In business alliances, each alliance partner will continue to engage in business activities independently, and a pro-competitive effect is expected through such efficiency as cost reduction achieved through the business alliance. However, given that business alliances invariably involve a certain level of commonality of business activities among multiple enterprises, those where special effects which cannot be foreseen other than the effect of restricting competition, such as maintaining and raising

prices and limiting sales volume are usually regarded as simple hardcore cartels.

3. Evaluation of the impact on competition

Business alliances are conducted for the purpose of improving the efficiency of the business activities, and in many cases are expected to have a pro-competitive effect. On the other hand, depending on the mode, there may be an anti-competitive effect and therefore the impact on competition will be evaluated as follows.

(1) Horizontal business alliances

After evaluating the impact on competition from the perspective of integrating the business activities of each alliance partner as shown in A and B below, further evaluation is to be conducted on the impact on competition of the agreement among the alliance partners associated with the business alliance as given in C, and if there is a risk of substantially restricting competition or inhibiting fair competition, this may constitute a problem under the Antimonopoly Act.

A. Evaluation of the impact on the relationship among the alliance partners

When evaluating the impact of the business alliance on competition, first consideration should be given to the extent to which business activities are integrated between the alliance partners. Specifically, since the alliance partners in a horizontal business alliance are in a competitive relationship, the extent to which the competition among the alliance partners is restricted through the business alliance should be examined.

In general, if the impact on the competitive relationship among the alliance partners is negligible, in many cases the impact on the overall market is not significant.

Based on the above, when evaluating the extent of integration of the business activities of the alliance partners, the following judgment factors should chiefly be taken into account.

- Integrated decision-making for important means of competition

If decision-making on important means of competition such as the production volume or price are supposed to be integrated in the contents of a business alliance including comprehensive alliance in multiple stages of production or sales, etc., there is a possibility that the leeway for competition among the alliance partners will be diminished.

In addition, when a common cost structure of the two alliance partners is shared through a business alliance, the decision-making pertaining to important means of competition may be integrated between the alliance partners with respect to reducing the costs (see Part IV-2 above for the

mechanism by which decision-making on important means of competition may be integrated through sharing of a common cost structure).

- Possibility of facilitating coordinated conduct

When information is exchanged and shared between the alliance partners, it is usually easier for coordinated conduct to be facilitated (see Part IV-1 above for a mechanism that makes it easier for coordinated conduct to be facilitated through information exchange and sharing).

Also, in a market where it is easy to predict the behavior of competitors, if a common cost structure of each alliance partner is shared, it is usually easier for coordinated conduct to be facilitated (see Part IV-2 above for a mechanism that makes it easier for coordinated conduct to be facilitated through a common cost structure).

- Expansion of the business alliance such as the implementation period

With respect to whether the length of the business alliance or the period of imposing restrictions on the alliance partners is long or short and the ratio of target products that are to actually be subject to the business alliance (for example, whether it applies to the total volume of the OEM supply or is limited to part of the OEM supply) and the geographical range that is the target of the alliance (for example, whether the alliance is limited to only a part of the region for products that have a national market) should be considered. In general, if the expansion of the business alliance is large, there will be a significant impact on competition.

B. Evaluation of the impact on the entire market (in cases where competition between the alliance partners is restricted)

(A) Potential impact on the market due to loss of competition among the alliance partners and concerted action⁵⁶

The typical consideration about the impact on the market through competition being lost between the alliance partners due to a horizontal business alliance, and concerted action being taken is as follows based on whether the product is homogeneous or differentiated.

In cases where the products sold in the market under review are homogenous, if the competition on sales between the alliance partners is reduced and the alliance partners raise the price of the products through the business alliance, unless other enterprises aside from the alliance partners raise the price of the product, the consumer will shift to another

⁵⁶ Business Combination Guidelines Part IV-1(1), 2.

enterprise for their purchase and so it is usually difficult for the alliance partners to form, maintain or strengthen market power. However, when the excess capacity of the alliance partners is large while the excess capacity of the other enterprises is small, it may be difficult for the consumer to shift to another enterprise for their purchase, and in such case, it can be evaluated that the partners have formed, maintained or strengthened market power.

If the product has distinct qualities, the consumer will not uniformly consider purchasing other alternative brands even if the price of a brand product is increased but will have to think about purchasing the next preferred (highly substituting) brand product. Therefore, when an alliance partner increases the price of a product of a certain brand and sells another brand that is highly substitutable, the decline in sales of the brand whose price was increased can be compensated by an increase in sales of the other brand, and therefore the alliance partners are able to raise the price of the product without significantly reducing the sales of the overall alliance partners. In such cases, it may be evaluated that the partners have formed, maintained or enhanced market power.

Based on the above, when evaluating the impact on the market through the alliance partners taking concerted action, the following judgment factors should chiefly be taken into account.

- Market share and ranking

If the market share of the alliance partners is large, the competitiveness of the competitors will be weakened. In addition, if the market share ranking of the alliance partners is high, the impact on competition will be significant.

- Situation of conventional competition between alliance partners

In cases where vigorous competition has been taken place between the alliance partners, if such competition ceases through the business alliance, competition in the market would be affected. See A above for an evaluation of the impact on the competitive relationship between the alliance partners.

- Disparity with the market share of the competitors (presence of powerful competitors)

If there is a large disparity in the market share between the alliance partners and their competitors, the competitiveness of the competitors is weakened and the impact on competition will be significant.

- Excess capacity of the competitors and degree of product differentiation

If the excess capacity of the competitors is insufficient, the capability of the competitors to restrain potential price increases by the alliance partners will not work and there will be a significant impact on competition. In addition, if the substitutability of the products of the alliance partners and the competitors is low, the impact on competition will be significant.

- Import pressure, entry pressure and competitive pressure from neighboring markets

If these pressures are working sufficiently, the impact on competition will be small.

- Competitive pressure from consumers

If the customer has countervailing bargaining power, the impact on competition will be small.

- Comprehensive business capacity

If the overall business capacities of the alliance partners are increased due to the business alliance and it is foreseen that it will be difficult for competitors to take competitive action due to a significant increase in the competitive power of the alliance partners, such point must also be taken into consideration.

- Efficiency

In cases where it is foreseen that the alliance partners will take competitive action due to the increased efficiency of the alliance partners through the business alliance, this point should also be taken into consideration. Increased efficiency in this case should be judged from three perspectives: whether increased efficiency cannot be achieved by other methods that are less restrictive on competition⁵⁷, whether it is feasible, and whether it increases the welfare of consumers⁵⁸.

(B) Possibility of coordinated conduct with competitors other than the alliance partners⁵⁹

When coordinated conduct is facilitated among the alliance partners through a horizontal business alliance, this may also further facilitate

⁵⁷ Examples of business combinations that examined these factors include the Major Business Combination Case example in FY2010 (example of the establishment of an iron ore production joint venture by BHP Billiton plc and BHT Billiton Limited, Rio Tinto plc and Rio Tinto Limited).

⁵⁸ Business Combination Guidelines Part IV-2(7).

⁵⁹ Business Combination Guidelines Part IV-1(2), 3.

coordinated conduct between the alliance partners and other competitors⁶⁰.

In such case, when evaluating the impact on the market by the alliance partners taking coordinated conduct with their competitors, the following judgment factors should chiefly be taken into account.

- Number of competitors, etc.

When there are a small number of competitors, it becomes easier to predict the behavior of the competitors and for coordinated conducts to be facilitated.

In addition, in cases where the cost structure is similar among the competitors, it also becomes easier for coordinated conduct among the competitors to be facilitated (see Part IV-2 above).

- Situation of conventional competition between the alliance partners

Conventionally, in cases where competition has been promoted through vigorous competition taking place between the alliance partners, the impact on competition would be significant through such competition ceasing⁶¹.

- Excess capacity of the alliance partners and competitors

In cases where the excess capacity of the alliance partners is not large, there is limited opportunity for them to be able to capture the market share even if they lower the prices and therefore it becomes easier to take coordinated conduct with competitors. On the other hand, if the excess capacity of the alliance partners is large and the excess capacity of the competitors is small, even if the price is lowered and sales are expanded, there is a limit to the sales that the competitor is able to take away by reducing the price, and therefore the incentive to take coordinated conduct with a competitor becomes smaller.

- Ease of obtaining information such as trading conditions

If information on the transactions of competitors can be easily obtained through a trade association or others, it becomes easier to predict the behavior of competitors and for coordinated conduct to be facilitated.

- Situation of past competition

If the market share and price fluctuate sharply, it becomes difficult to predict the behavior of competitors and for coordinated conduct to be

60 As an example of a business combination that considered the possibility of coordinated conduct with competitors the same as in footnote 59.

61 It should be noted that there has been criticism that between parties in an alliance there is a shared sense of camaraderie, and therefore there is the possibility that competitive action will not be taken.

facilitated.

- Import pressure, entry pressure, and competitive pressure from neighboring markets

If these pressures are working sufficiently, it is difficult for coordinated conduct to be facilitated.

- Efficiency (same as (A))

C. Evaluation of agreements that unilaterally or mutually restrict or restrain the business activities of each alliance partner associated with implementation of the business alliance

As mentioned in Part III-2 above, it is assumed that there will be agreements on unilateral or mutual restrictions or restraints between the alliance partners associated with implementation of the business alliances, and since these may also constitute a problem under the Antimonopoly Act, it is necessary to consider them while considering the results of the examinations in A and B above.

In such case, if an agreement restricts competition, the pro-competitive effect of the agreement should also be examined from the perspective of the rationality of the purpose of the agreement and whether there are other alternatives that are less restrictive should be kept in mind and considered as well⁶².

For example, the following actions are conceivable as agreements which unilaterally or mutually restrict or restrain the business activities of the alliance partners.

- (A) An act in which one party unfairly imposes unfavorable conditions on another party (abuse of superior bargaining position, etc.)

An act⁶³ where only some of the participants out of the partners in an alliance on joint R&D are required to disclose information on technology, etc., and the contents of such information ensures that there is significant inequality among the alliance partners, and where through this, the alliance partners that are required to disclose information will be subject to

62 Kanai = Kawahama = Sensui “Antimonopoly Act (6th edition), p. 102. In addition, Sony Computer Entertainment (SCE) Case (Japan Fair Trade Commission decision of August 1, 2001) (case where this is an unfair trade practice, but with regard to the restrictive act of prohibiting the distribution of products to business partners, illegality was judged based on the rationality of the purpose of the restricted act, and whether there was an alternative means that was less restrictive in terms of competition that could have been taken to achieve the purpose).

63 Guidelines Concerning Joint Research and Development under the Antimonopoly Act Part II-2 preface and (1)(a)(2).

an unfair disadvantage.

- (B) An act in which one party unfairly restrains the business activities of another party (trading on restrictive terms, etc.)

An act⁶⁴ of imposing an obligation to transfer an improved invention of an achievement to another party or an obligation to exclusively license the invention to another party among the partners in an alliance on joint R&D.

- (C) An act⁶⁵ of negotiating the sales price, sales area, sales destination, etc. of a product among the alliance partners (unreasonable restraint of trade)

An act of mutually restricting the price, quantity, etc. of a product in joint R&D conducted between enterprises that have a competitive relationship in the product market.

- (D) An act⁶⁶ in which an alliance partner excludes a party other than the alliance partners (private monopolization, concerted refusal to trade)

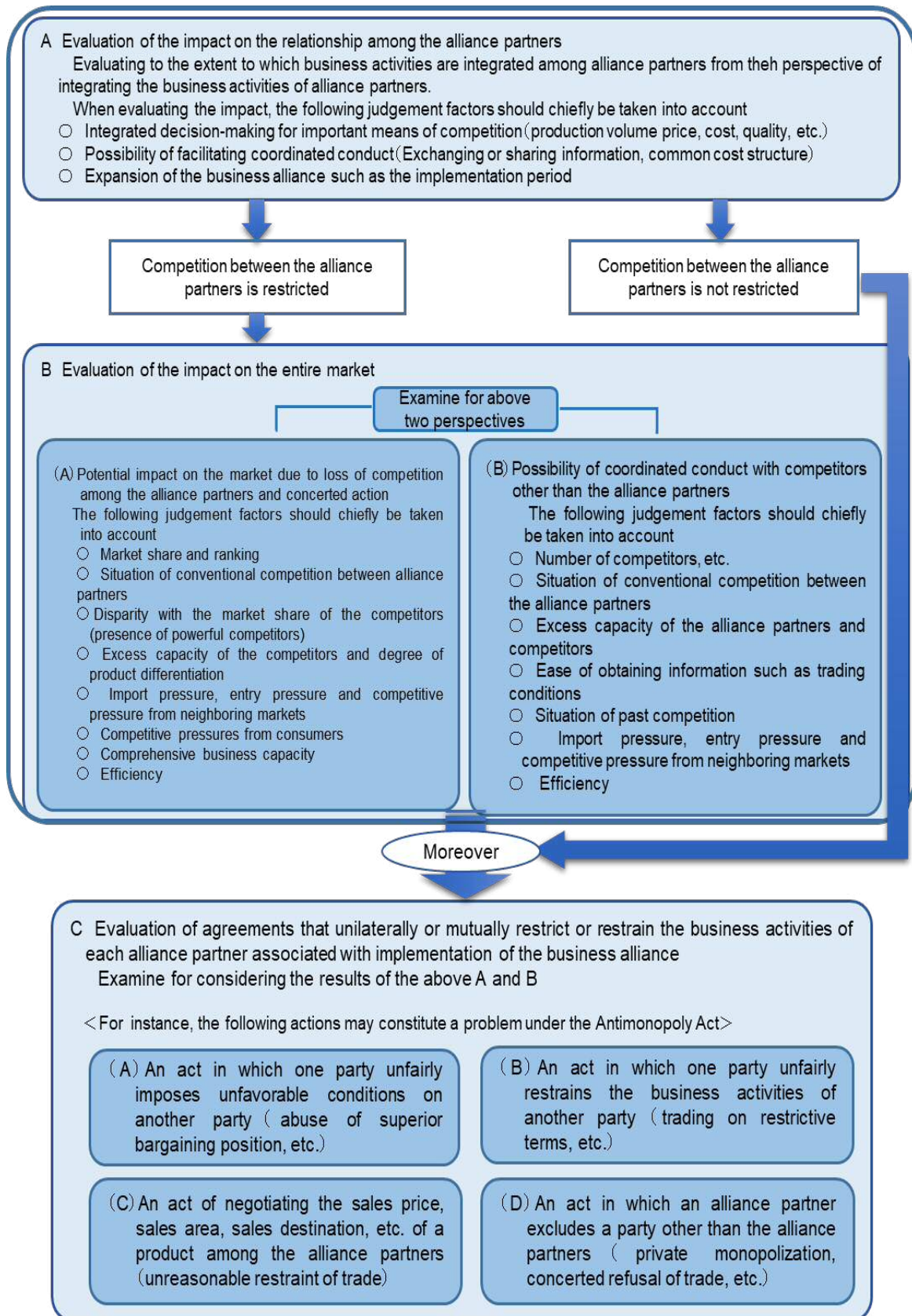
An act that restricts the participation of a specific enterprise without a justifiable reason in cases where without participating in the standardization activities, it would be difficult to develop and produce products that adopt the established specifications, and there would be a risk of being excluded from the product market.

A conceptual diagram of the evaluation of the impact on competition as given in A to C in the above horizontal business alliance is as follows.

64 Guidelines Concerning Joint Research and Development under the Antimonopoly Act Part II-2(2)(b).

65 Guidelines Concerning Joint Research and Development under the Antimonopoly Act Part II-1.

66 Guidelines on Standardization and Patent Pool Arrangements Part 2-2 (5).



(2) Vertical and conglomerate business alliances

After evaluating the impact on competition from the perspective of integrating the business activities of each alliance partner as shown in A and B below, further evaluation is to be conducted on the impact on competition of the agreement among the alliance partners associated with the business alliance as given in C, and if there is a risk of substantially restraining competition or inhibiting fair competition, this may constitute a problem under the Antimonopoly Act.

A. Evaluation of the impact on the relationship between the alliance partners

In the case of a vertical or mixed business alliance, since the alliance partners are not in a competitive relationship, there are no problems with the competitive relationship between the alliance partners unlike with the horizontal business alliance. However, if the actions of the alliance partners are integrated through the vertical or conglomerate business alliance, problems such as customer closure and input closure may occur, and therefore the extent of the integration of the business activities needs to be examined.

For example, when decision-making regarding important means of competition is integrated between the alliance partners, or is unilaterally or mutually restricted, there is increased closure among the alliance partners regarding the selection of trade connections, etc. and it is possible that trading opportunities may be taken away from other enterprises. In addition, when important information in terms of competition is exchanged and shared between the alliance partners, one partner may be in a more competitive position compared to its competitors, and the trading opportunities of the competitors may be eliminated.

Based on the above, when evaluating the extent of integration of the business activities of the alliance partners, the following judgment factors should chiefly be taken into account.

- Degree of closure within the alliance partners

If there is a lot of room for the alliance partners to freely engage in trading with parties other than the alliance partners such as when trading with parties other than the alliance partners is not restricted between partners in a vertical or mixed alliance, the problem of customer closure or input closure is unlikely to occur.

- Extent of closure through information exchange or sharing

For example, if an enterprise that conducts business activities in an upstream market shares information with an enterprise in a downstream market with which it shares a vertical alliance relationship about an enterprise which is a competitor of such enterprise in the downstream market and is its customer, there is a possibility that the enterprise that is its alliance partner will gain an advantage in

the downstream market and the competitor will be excluded.

- Expansion of the business alliance such as the implementation period

With respect to whether the length of the business alliance or the period of imposing restrictions on the alliance partners is long or short and the ratio of target products that are to actually be subject to the business alliance and the geographical range that is the target of the alliance should be considered. In general, if the expansion of the business alliance is large, there will be a significant impact on competition.

In addition, if important information pertaining to the competitor of one partner is exchanged and shared between the alliance partners, it becomes easier for such partner to predict the behavior of the competitor and for coordinated conduct with the competitor to be facilitated.

B. Evaluation of the impact on the entire market (in cases where competition between the alliance partners is restricted)

(A) Potential for market closure and exclusion⁶⁷

Vertical and mixed business alliances do not reduce competitive units in the market and so it is usually difficult for problems in terms of competition to occur but since trading is conducted only between the alliance partners and trading with other enterprises do not generally take place, there is the possibility that problems with market closure and exclusion may arise.

For example, if a finished product manufacturer with a large market share that procures parts from multiple parts manufacturers concludes a business alliance with a specific parts manufacturer, it will procure parts only from that parts manufacturer, and other parts manufacturers will lose business with a large customer, which may cause customer closure problems. In addition, if a parts manufacturer that has a large market share supplies parts to multiple finished product manufacturers, but as a result of entering into a business alliance with a specific finished products manufacturer, stops supplying parts to other finished product manufacturers, there is a possibility of an input closure problem (note that even if customer closure or input closure does not occur, competition issues may similarly arise if discriminatory conditions on trading are set for parties other than the alliance partners. In addition, alliances between enterprises in different industries increase the overall business capabilities of the partners, and this would make it difficult for competitors to

⁶⁷ Business Combination Guidelines Part V-1(1) and 2(1).

take competitive action due to the competitive power of the alliance partners increasing significantly, there may be problems with market closure and exclusion).

In vertical and conglomerate business alliances, it may be necessary to consider market closure and exclusion as described above, in that case, the following judgment factors should chiefly be taken into account.

- Status of the alliance partners and situation of the competitors

If the market share of the alliance partners is high and the disparity with the market share of the competitors is large, the competitors may not be able to secure an alternative trade connection and there may be problems of market closure and exclusion.

- Import pressure, entry pressure, competitive pressure from neighboring markets (same as (1) B (A))
- Competitive pressure from consumers (same as (1) B (A))
- Comprehensive business capacity (same as (1) B (A))
- Efficiency (same as (1) B (A))

(B) Possibility of coordinated conduct with competitors other than the alliance partners⁶⁸

In a vertical or conglomerate business alliance, for example, when a manufacturer and distributor have an alliance relationship through sales, etc., if the manufacturer is able to obtain information such as the sales prices of other manufacturers from the distributor, it will be easier for the manufacturer to predict the behavior of other manufacturers, and since it is also easier for other manufacturers to predict that the manufacturer has set prices, etc. on the basis of the information (information such as the sales prices of other manufacturers), it will be easier for coordinated conduct among the manufacturers to be facilitated.

In such a case, when evaluating the impact on the market through the alliance partners taking coordinated conducts with a competitor, the following judgment factors should chiefly be taken into account.

- Number of competitors, etc. (same as (1) B (B))
- Excess capacity of the alliance partners and competitors (same as (1) B (B))
- Ease of obtaining information such as on trading conditions

As in the manufacturer and distributor example given above, if an upstream market enterprise is able to obtain information about its

⁶⁸ Business Combination Guidelines Part V-1(2) and 2(2).

competitors' transactions through a downstream market enterprise in the alliance, it will become easier for the upstream market enterprise to predict the behavior of its competitors and for coordinated conduct to be facilitated.

- Situation of past competition (same as (1) B (B))
- Import pressure, entry pressure, competitive pressure from neighboring markets (same as (1) B(B))
- Efficiency (same as (1) B(B))

C. Evaluation of agreements that unilaterally or mutually restrict or restrain the business activities of each alliance partner associated with the implementation of the business alliance

Even in vertical and conglomerate business alliances, it is assumed that along with the implementation of a business alliance, there will be an agreement that unilaterally or mutually imposes restrictions or restraints among the alliance partners and since this may become a problem under the Antimonopoly Act, it is necessary to consider the results of the examinations in A and B above.

In such case, if the agreement restricts competition, the pro-competitive effect of the agreement should also be examined from the perspective of the rationality of the purpose of the agreement and consideration should also be given to whether there are other alternatives that are less restrictive.

As an agreement to restrict or restrain the business activities of the alliance partners unilaterally or mutually, (A), (B), (D), etc. of the actions listed in (1) C above may also occur in vertical alliances. For example, the following actions may be considered.

- (A) An act⁶⁹ in which one party unfairly imposes unfavorable conditions on another party (abuse of superior bargaining position, etc.)

An act where in joint R&D between the alliance partners who have a trading relationship, one party unilaterally attributes the results of the joint R&D to itself, and there is significant inequality in its contents between the alliance partners, and through this, an unfair disadvantage is imposed on the other alliance partner.

- (B) An act⁷⁰ in which one party unfairly restrains the business activities of another party (trading on restrictive terms, etc.)

69 Guidelines Concerning Joint Research and Development under the Antimonopoly Act Part II-2 preface and (2)(a)(1).

70 Guidelines Concerning Joint Research and Development under the Antimonopoly Act Part II-2(3) ©.

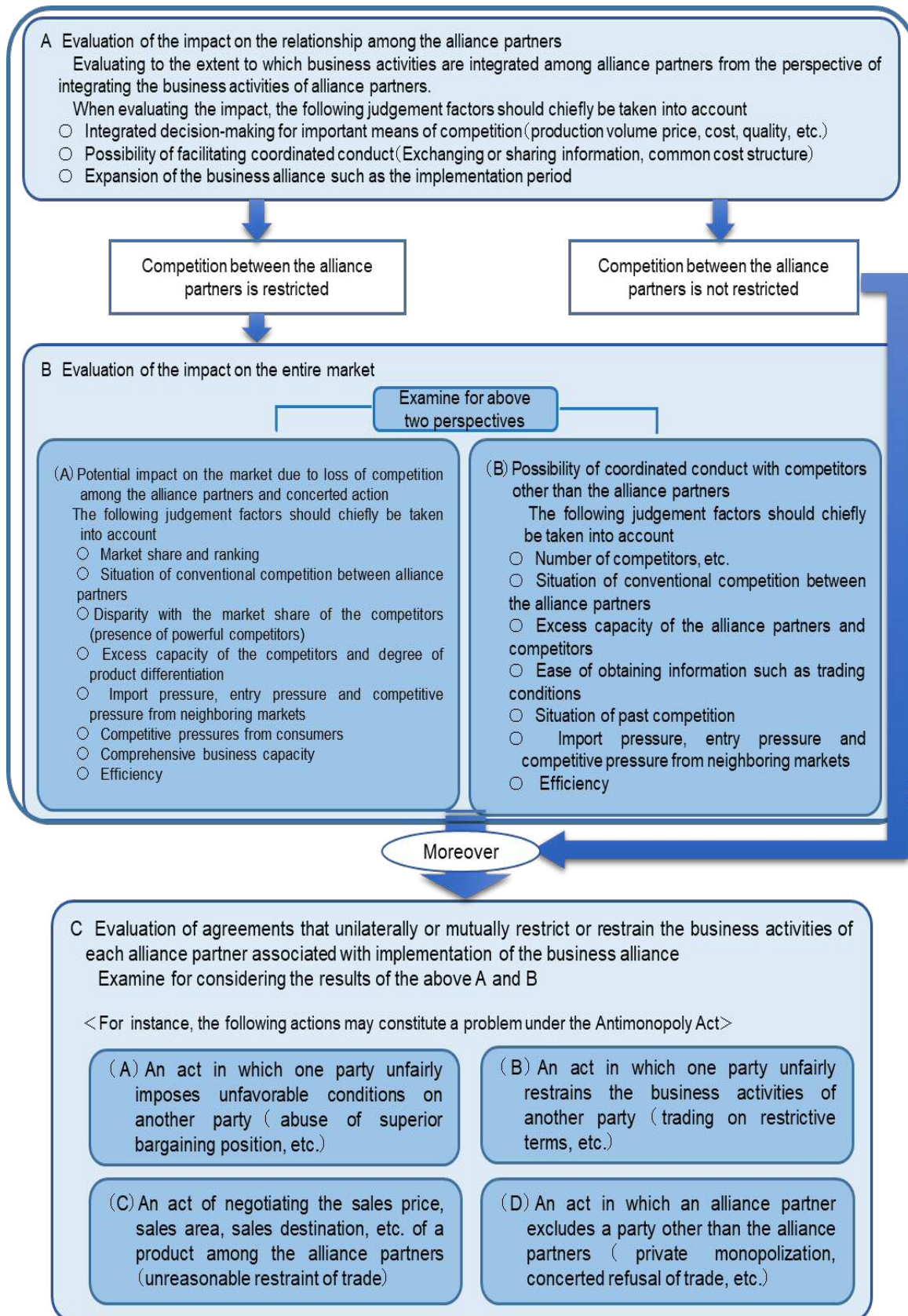
An act of imposing restrictions towards the parts manufacturer of a finished product on the sales price for parts when selling to a third party with regard to a part that is based on the results of joint R&D on parts, which was conducted by the parts manufacturer and a finished product manufacturer that uses the parts.

- (C) An act⁷¹ in which an alliance partner excludes a party other than the alliance partners (private monopolization, concerted refusal to trade, etc.)

An act in which a manufacturer and a distributor, which have a business alliance relationship, cooperate with each other to refuse the supply of products in order to exclude other distributors.

A conceptual diagram of the evaluation of the impact on competition as given in A to C in the above vertical or mixed business alliance is as follows.

71 Guidelines Concerning Distribution Systems and Business Practices (Japan Fair Trade Commission on July 11, 1991) Part II, chapter 2-3.



4. Specific consideration for each type of business alliance

Based on the above general consideration and norms, business alliances are broadly divided into the seven types described above (and horizontal business alliances and vertical or mixed business alliances), and while taking into account the characteristics and trends organized and analyzed in 2 above, more specific consideration and points that enterprises should pay particular attention to for each of these types are summarized in Attachments.

The matters shown in the Attachments are only special features for each type, and for specific evaluations on impact on competition, an evaluation should be conducted based on the above general consideration and norms, taking these features into account.

In addition, actual business alliances may mix some of these types in a complex manner and in such case, what kind of competitive effect will occur as a whole should be evaluated based on the consideration of each of the included types.

Part VI Consideration in terms of the Antimonopoly Act relating to cross-industry data-collaboration business alliances

1. Defining the problem

In Japan, business alliances are increasingly being used as one of the methods for dealing with the great changes in the social and economic environment and various social problems described in Part I-1 above. In addition, as represented by so-called social problem-solving businesses⁷², in order to provide services that combine various products and service elements, collaboration across industries and industry boundaries has also become active. Furthermore, in recent years, against the backdrop of the digital economy, the development of IoT and the advancement of data analysis technology such as AI, business forms that are useful for comprehensive analysis of data, to create new businesses, develop new products or services, quality improvement, and strengthened marketing (hereinafter referred to as “data-driven businesses”) are attracting attention, and with these businesses, in many cases various enterprises are involved in jointly collecting and utilizing various data.

For example, in order to develop an automated driving system for a car, map data that can display information on the position of the vehicle and traffic jams in real time on a high-precision map that takes into account height differences is indispensable. For this reason, enterprises involved in various fields such as maps, surveying, equipment, and automobiles share necessary data for development and creation. In addition, businesses that provide so-called common point services⁷³ form an alliance with retailers and collect, accumulate and analyze the various purchase history data of customers obtained from them and are useful in the marketing support businesses for partner retailers.

Data collection and utilization itself has been widely carried out in general business activities, including business alliances, and is not at all new, but recent features include

72 For example, the following social problem-solving businesses have been seen recently.

(i) Smart City: while utilizing new technology such as ICT (Information and Communication Technology) for the challenges faced by the city, planning, development, management and operation are carried out and optimal sustainable cities or districts are created (Urban Bureau, Ministry of Land, Infrastructure, Transport and Tourism, August 2018, “Towards the realization of smart cities [interim summary]”).

(ii) MaaS (Mobility as a Service): Cloud transportation using ICT, mobility (movement) by all means of transportation other than private cars integrated to become one mobile service regardless of whether it is public transportation or not or the type of operating entity (Policy Research Institute for Ministry of Land, Infrastructure and Transport Report No. 69, summer of 2018).

73 Services were when a member (consumer) presents a membership card (point card, etc.) at the time of purchasing a product at a points service partner (member store), points are awarded by the point service provider, and these points can be used to pay for the purchase of goods at the member store or other member stores.

improvements in sensor technology and communication technology making it possible to collect and accumulate a large amount of data in real time, and with the improvement of AI-related technology, etc., data (unstructured data) of images, sounds, large amounts of text data, etc. that were previously considered unsuitable for management and analysis can be analyzed in large quantities and at great speed. As a result, data becomes a valuable resource that brings new knowledge and ideas to business activities, such as new product development, quality improvement, and efficiency promotion, and its importance is increasing more than ever⁷⁴. From this perspective, business alliances pertaining to data collection and utilization can often be expected to have a pro-competitive effect.

On the other hand, with regard to data collection and utilization, concerns over competition laws and competition policies are currently being discussed around the world⁷⁵, and Data Study Report also points out problems in terms of the Antimonopoly Act such as, for example, unauthorized data collection and improper enclosure. For this reason, in the following, the issues under the Antimonopoly Act regarding the collection and utilization of data through business alliances between businesses across industry sectors and industry boundaries will be examined.

2. Outlook of the issues under the Antimonopoly Act in cross-industry data-collaboration business alliances

(1) Examination based on the nature of a business alliance

As mentioned above, in recent years, cross-industry business alliances that are carried out for the purpose of jointly collecting and utilizing data or as the basis of business activities (hereinafter referred to as “cross-industry data-collaboration business alliances”) are being proactively pursued. Focusing on the fact that cross-industry data-collaboration business alliances are mainly aimed at the development and creation of new businesses through the joint collection and utilization of data, these business alliances have characteristics similar to joint R&D. For this reason, it is considered that the consideration in Guidelines Concerning Joint Research and Development under the Antimonopoly Act etc. can be referred to when examining the issues under the Antimonopoly Act relating to cross-industry data-collaboration business alliances⁷⁶. Based on the consideration presented in Guidelines

74 Study Group on Data and Competition Policy (Japan Fair Trade Commission Competition Policy Research Center, June 6, 2017; hereinafter referred to as “Data Study Report”) pp. 2-6.

75 For example, OECD (2016) “Big Data: Bringing Competition Policy to the Digital Era”, European Commission (2019) “Competition Policy for the Digital Era”.

76 Even page 41 of the Data Study Report indicates the Guidelines Concerning Joint Research and Development under the Antimonopoly Act are useful.

Concerning Joint Research and Development under the Antimonopoly Act, the following two situations can be envisaged as cases of Antimonopoly Act issues related to cross-industry data-collaboration business alliances.

- Cases where the business activities between the alliance partners are unfairly restricted and competition is substantially restricted in the related markets through the joint collection and utilization of data based on a business alliance in light of the necessity of the joint collaboration, the number of participants and the market share, etc. (unreasonable restraint of trade)⁷⁷
- Cases in which the business activities of specific enterprises become difficult due to restrictions on participation in the business alliances and access to the results, and such enterprises are excluded from the market (private monopolization, etc.⁷⁸)⁷⁹

If the business activities of the alliance partners are unfairly restricted through an agreement associated with the implementation of the business alliance, competition in the market may be affected (unfair trade practice, etc.)⁸⁰

For cross-industry data-collaboration business alliances, it is usually difficult to envisage changes that would have a substantial impact on the existing competitive environment as soon as the alliance is initiated. For this reason, the abovementioned situation occurs after the status of the alliance partners in the market gradually increases and market power is formed based on the results obtained from the business alliance in some shape or form (created data or new technologies or new products and services using it) being introduced to the market, or in other cases where there was a dominant party in the market from the beginning among the alliance partners or the total market share of the alliance partners is high. In other words, even if the business alliance is implemented, it is unlikely that an Antimonopoly Act problem will occur immediately as long as the alliance partners are one of a number of competitive units, and the alliance will only become a problem if the alliance partners have market power⁸¹ (or if there is a dominant enterprise in the market).⁸²

77 Guidelines Concerning Joint Research and Development under the Antimonopoly Act Part I, Guidelines on Standardization and Patent Pool Arrangements Part 2-2.

78 Regarding the applicable laws and regulations for exclusion by multiple enterprises, various related guidelines clearly state that it falls under private monopolization, but also include unreasonable restraint of trade in some places.

79 Guidelines Concerning Joint Research and Development under the Antimonopoly Act Part I -2(2).

80 Guidelines Concerning Joint Research and Development under the Antimonopoly Act Part 2.

81 In addition, even if the impact on competition is small, if there is significant inequality in the contents among the alliance partners, and this results in an unfair disadvantage for a particular alliance

(2) Examination based on the nature of a data-driven business

A. Characteristics of a data-driven business

As mentioned above, the main purpose of a cross-industry data-collaboration business alliance is to develop and create new businesses through joint collection and utilization of data. Therefore, it can be said that the business carried out by the alliance partners has more or less data-driven business characteristics. Such data-driven businesses are generally said to have the following characteristics⁸³.

- (i) Through an analysis of the collected data, the quality of the products and services (including related products and services) will be improved, thereby creating new users, and since the direct network effect will work more strongly, a greater number of users may be acquired, and more data can be accumulated (feedback loop). Especially in the case of a platform-type business, the indirect network effect between markets works strongly, so this action may be further strengthened.
- (ii) When collecting and using data, the larger the amount and the wider the range, the greater the possibility the average cost required will be significantly reduced (economy of scale or economy of range).
- (iii) As for the data, since it has the nature of first generating value of use after the amount of accumulated data exceeds a certain threshold (critical mass), it becomes necessary to accumulate data of a certain scale in order to put it on a business base. However, after the threshold is exceeded, there is a possibility that data accumulation will be improved continuously and in an amplifying manner due to the network effect and economies of scale or

partner, problems such as abuse of superior bargaining position may arise.

82 See 3 (4) below for market superposition.

83 Major examples are the previously mentioned OECD (2016), OECD (2014) “Data-driven Innovation for Growth and Well-being”, previously mentioned European Commission (2019), Data Study Report, Study Group on Improvement of Trading Environment surrounding Digital Platforms, Working Group for Securing Transparency and Fairness in Trading Environments. “Options for Ideal Approaches to Rulemaking for Securing Transparency and Fairness in Trading Environments” (May 2019), Working Group for Ideal Approaches to Data Transfer and Disclosure “Options for Ideal Approaches to Data Transfer and Disclosure” (May 2019). For example, in the previously mentioned OECD (2016), the characteristics of data-driven network effects are as follows: (i) a user feedback loop (a company with many user bases collects data from users and improves the quality of services [improved algorithms, etc.], and attracts new users), (ii) monetization feedback loop (a company with many user bases collects data from users, improves the precision of targeted advertising [monetization of the services], uses the obtained funds for further investment, and thereby acquires more users), and then it is possible that these loops will make it difficult for newcomers to compete against companies with many user bases.

scope.

Since data-driven businesses have these characteristics, a monopoly or oligopoly easily develops and the user switching cost may increase, and it may be difficult for new entrants to collect and accumulate information compared to incumbents making it difficult for these enterprises to newly enter the market and easier for a monopoly or oligopoly to be maintained⁸⁴.

B. Focus on data collection and accumulation processes

In light of the characteristics of A, with regard to cross-industry data-collaboration business alliances, as well as the abovementioned problems (see (1) above) in cases when the alliance partners actually have market power, another important point under the Antimonopoly Act is to focus on the process leading to market power through data collection and accumulation based on the business alliance, and to ensure that a proper process is being followed.

In principle, market power caused by these characteristics pertaining to data collection and aggregation is in itself not a problem under the Antimonopoly Act. However, when collecting and aggregating data, seen from the perspective of the formation, maintenance and strengthening of market power regarding the occurrence and mechanism of the above-mentioned effects, a problem under the Antimonopoly Act may arise with regard to the formation of market power⁸⁵ based on improper operation and amplification through an act that is an “artificial act that deviates from the scope of normal competitive means”⁸⁶ (private monopolization⁸⁷).⁸⁸⁸⁹

84 In particular, if the services provided through the business alliance are of a social problem-solving type or are provided with a vertically integrated conglomerate of multiple services with similar characteristics, it is considered these trends will further intensify.

85 These actions are thought to be more powerful in the platform-type but are not necessarily unique to the platform type.

86 Whether or not the act in the case comes under the act of “excludes (omitted) the business activities of other enterprises” (hereinafter referred to as “exclusionary conduct”) referred to in Article 2, paragraph (5) of the Antimonopoly Act is decided depending on whether the single and unilateral refusal or low-price aspect of the artificial act that deviates from the scope of normal competitive means in terms of the formation, maintenance or enhancement of its own market power, and whether it can be said to have such an effect as making it extremely difficult for competitors to enter the FTTH service market. Specifically, this point refers to an interpretation where a judgment should be made having taken into consideration overall factors such as the difficulty with which the competitor (competitors in the FTTH service market includes potential competitors; hereinafter the same shall apply below) can secure a connection site to replace the appellant in the subscriber optical fiber equipment connection market, differences in FTTH service characteristics, mode of conduct, appellant and competitor positions in the FTTH service market and competitive conditions, duration of this action” (NTT East Case [Supreme Court decision of December 17, 2010]).

87 To constitute a private monopolization, the act requires “excludes or controls the business activities

In addition, it should also be noted that after the formation of market power, other enterprises may be excluded from the market through use of this market power and through inputting the acquired data and other goods and revenues, there may be a cycle in which market power is further strengthened.

(3) Summary

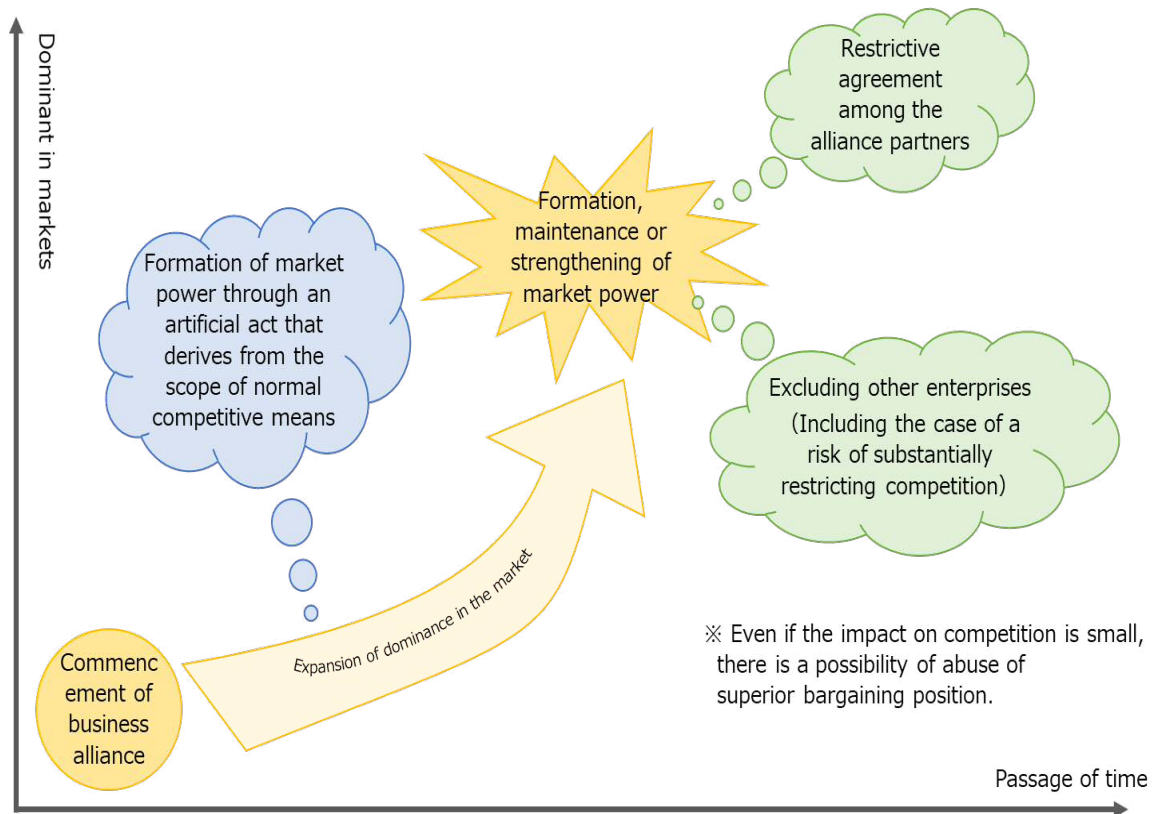
Based on the above, the following situations are chiefly envisaged as situations where cross-industry data-collaboration business alliances can become a problem under the Antimonopoly Act.

- (i) In cases where the alliance partner actually has market power (or at least there is a dominant enterprise in the market), such partner uses that power to conduct other activities such as excluding the business activities of other enterprises, or when a restrictive agreement is reached between the alliance partners.
- (ii) Cases where in the process of collecting and aggregating data, market power is formed through an artificial act that deviates from the scope of normal competitive means

of other enterprises”, it is deemed to be an act of “exclusion”, which takes away customers or data that is indispensable in the business activities from other enterprises.

88 It is understood that the substantial restraint of competition in the market pertaining to Article 3 (private monopolization) of the Antimonopoly Act include the formation, maintenance and strengthening of market power based on the leading cases.

89 Note when judging the illegality of whether this action excludes other enterprises based on the formed market power (for example, refusal of access to data), this may also become grounds to consider the background and process of forming the market power (Guidelines on Standardization and Patent Pool Arrangements Part II-3, Guidelines for the Use of Intellectual Property under the Antimonopoly Act) (See 4 (3) B (B)).



3. Specific issues for an evaluation in terms of the Antimonopoly Act

In the following, respective considerations underlying the individual issues that may be necessary when evaluating cross-industry data-collaboration business alliances under the Antimonopoly Act will be compiled.

(1) Rights and obligations related to data

Goods that are targeted for specific acts conducted through cross-industry data-collaboration business alliances are broadly classified into data, technology, and manufactured goods (products and services). Of these, the consideration regarding acts related to technology or products has already been basically organized through the various guidelines. On the other hand, when considering the applicability of the Antimonopoly Act for data-related activities, it is first necessary to organize how data rights and obligations will be treated.

Since data is intangible and it is not possible⁹⁰ to envisage real rights of the Civil Code (ownership, proprietary rights, etc.), the situation is such that the way of consideration about data attribution and ownership (so-called data ownership) has

⁹⁰ Similarly, various intellectual property rights that are intangibles are organized by individual legal provisions such as laws related to intellectual property rights and the Unfair Competition Prevention Act.

not yet been established. At present, the data is:

- (i) Cases when legally protected as an intellectual property right,
- (ii) Cases when rights and obligations related to use between parties are agreed through a contract, etc.,
- (iii) Cases, practically speaking, of being in a position of being able to control access to and use of data (through ownership, etc. related to data storage facilities).

Other than the above cases, it is thought that it is not possible to prevent others from accessing and using the data.

For this reason, until some form of consideration about the data ownership problem is established, it is considered the present situation is the norm and that judgments under the Antimonopoly Act should be rendered based on the following kind of treatment.

- (i) Data that is legally protected for exclusive use, etc. such as intellectual property rights should be handled based on the consideration⁹¹⁹² of the Antimonopoly Act and intellectual property acts described in the Guidelines for the Use of Intellectual Property under the Antimonopoly Act.
- (ii) Regarding the use of data between the parties, if there is a rights and obligations relationship based on a contract, etc., as in a normal case, if the act or restriction based on the contract, etc. inhibits competition, the contract would be cancelled through the intervention of the Antimonopoly Act as a compulsory provision.
- (iii) Restraints derived from a de facto status are basically considered not to require special consideration in the examination under the Antimonopoly Act, and the handling of data is evaluated as there being no effect based on

91 “Article 21 of the Antimonopoly Act prescribes: “The provisions of this Act shall not apply to such acts recognizable as the exercise of rights under the Copyright Act, the Patent Act, the Utility Model Act, the Design Act, or the Trademark Act”. This means that the Antimonopoly Act is applicable to restrictions pertaining to the use of technology that is essentially not considered to be the exercise of rights. An act by the right-holder to a technology to block other parties from using its technology or to limit the scope of use may seem, on its face, to be an exercise of rights. The provisions of the Antimonopoly Act apply even to this case if it cannot be recognized substantially as an exercise of a right. In other words, any act that may seem to be an exercise of a right cannot be “recognizable as the exercise of the rights” provided for in the aforesaid Article 21, provided that it is found to deviate from or run counter to the intent and objectives of the intellectual property systems, which are, namely, to motivate entrepreneurs to actualize their creative efforts and make use of technology, in view of the intent and manner of the act and its degree of impact on competition. The Antimonopoly Act is applicable to this kind of act” (Guidelines for the Use of Intellectual Property under the Antimonopoly Act Part 2-(1)).

92 Data that represents know-how does not fall under intellectual property rights and is not subject to legal protection but should be treated in the same manner as application of the Antimonopoly Act based on Guidelines for the Use of Intellectual Property under the Antimonopoly Act Part 2-(1) Note 5.

restraints, etc.⁹³

(2) Characteristics and considerations of data as goods

When examining the impact of cross-industry data-collaboration business alliances on competition, it is necessary to understand the characteristics of the data as a resource as well as to organize how such characteristics should be taken into account in an evaluation.

For example, in the Data Study Report, the characteristics of data as goods are mentioned in detail, and the fact of the extent of the possibility of separately obtaining the same or similar data varying in accordance with the attributes of the data, the fact of the characteristics and usefulness of the data varying depending on the content and purpose of the data, the amount of data collected and combinations, the fact the extent of the usefulness and versatility also depending on the technology and equipment used for the data collection and analysis, and the fact that there are many cases where the use of certain elemental technologies is a prerequisite for data collection and analysis are all indicated.

Therefore, while paying attention to these points, it is necessary to judge the characteristics of the data as goods on a case-by-case basis according to the specific mode of the data to be examined. In addition, when evaluating the impact on competition, based on the abovementioned characteristics of the data as a resource, for example, based on the perspective of the effect when different types of data can be used in combination⁹⁴, the extent of the increase in value of use due to the accumulation of large amounts of similar data and the limitation of the sources of the data, it is considered that whether it is technically or economically possible for new entrants to achieve data accumulation with the same value of use will have to be taken into account. Consideration may also be given as to whether the data is an important input for the provision of products and services, and whether the cycle of data collection and accumulation and function improvement is being strengthened by the network effect⁹⁵.

93 However, when implementing competition recovery measures based on the Antimonopoly Act, for example, it may be possible to argue whether the ownership of facilities that produce such a de facto status is separable from the data.

94 For example, it has been pointed out that it is possible to obtain new data which can be used in detailed marketing targeting certain persons by combining the purchase history data such as what was purchased with the attribute data of the purchaser (age, sex, occupation, residence, etc.) and it is possible to obtain new data that can be used in credit management by combining the financial transaction data of settlements.

95 Data Study Report pp. 32 to 34.

(3) Examination of specific artificial acts that deviate from the scope of normal competitive means

It is difficult to qualitatively organize what kind of act is an “artificial act that deviates from the scope of normal competitive means” seen from the perspective of the formation, maintenance and strengthening of market power as described in 2 (2) B above, and basically, the act should be judged individually depending on the specific case.

However, at least in past cases, if the method itself is unreasonable and cannot be approved under the Antimonopoly Act, it can be said at the very least that the act is an artificial act that deviates from the scope of normal competitive means. For example, the following may be applicable.

Note the act itself may also constitute a problem under the Antimonopoly Act (unfair trade practices, etc.).

A. An act that artificially or intentionally amplifies the network effect, etc. through the following unfair techniques is envisaged.

- The method of aggregating data collection sources to oneself due to an unfair leverage effect using market power in related and neighboring markets

Envisaged example⁹⁶

Acquiring trade connections who are the source of data collection by using unfair tie-ins, unfair rebates, etc.

- In platform-type businesses, in relation to the conditions for cost distribution among customer groups on the platforms (costs, usage, rights and obligations,

⁹⁶ The following is given as a reference example for a specific aspect of the techniques. It does not mean that the individual specific action in the case immediately falls under these techniques (the same applies to footnotes 101 and 103).

(i) Google Android Case (European Commission on July 18, 2018): Google, which has a dominant position in the Internet search service market, mobile OS market, and Android OS app store market, in order to maintain and strengthen the company's dominant position in the Internet search service market, (i) engaged in an unfair tie-in of the company's browser applications (Google Search and Google Chrome) with Google's content distribution application (Google Play Store), and (ii) provided unreasonable rebates subject to exclusive pre-installation of Google Search, and (iii) and engaged in unfair interference with the development and distribution of competing Android OS (Android Fork), and these actions were deemed the abuse of a dominant position .

(ii) Google Search (AdSense) Case (European Commission on March 20, 2019): Google which has a dominant position in the online search-linked advertising intermediary market, in a contract with the owner (publisher) of a website where search-linked ads are posted, (i) in addition to prohibiting competitors from placing search-linked advertisements on search results pages (exclusionary clause), later (ii) secured the most profitable space on the search results page for the company's advertising and used the minimum amount of the company's advertising (premium placement clause), and (iii) required written approval from the company before changing how competitors' ads were displayed, and is deemed to have abused its dominant position in the online search-linked advertising intermediary market and prevented competitors from entering the market.

etc.), the method of preferentially attracting or inviting other customer groups that are the starting point of amplification routes such as employing an indirect network effect using profits gained by abuse of one's superior bargaining position towards one customer group.

Envisaged example

In transactions through a matching-type platform, terms of service where the intellectual property rights, etc. that arise for one party during the transaction execution process are unilaterally given to the other party.

- The method of collecting data that is not normally provided by the customer in an unfair manner in light of the Personal Information Protection Act⁹⁷, etc., or by exploiting the limitations of customer perception or behavioral bias and literacy⁹⁸.

Envisaged example⁹⁹

Creating a state where customers will agree to the policy without reading or understanding the privacy policy, and to collect personal information and action history data that cannot normally be acquired.

- A deceptive technique that attracts customers by causing them to misunderstand the extent of the convenience based on network externalities

Envisaged example

Inflated information such as the number of service users

- B. An act is envisaged where the customers and alliance partners will be locked in¹⁰⁰ and the data collection source will be polarized through the following unfair

99 There are provisions in the Act on the Protection of Personal Information, for example, which prohibit the acquisition of personal information by false or other illegal means (Article 17, paragraph (1) and the prohibition of acquisition of sensitive personal information without the consent of the person (paragraph 2 of the same Article).

98 Knowledge about a certain field and ability to use it.

99 The following is given as an example regarding a specific aspect of the techniques.

Facebook Case (German Federal Cartel Office on February 7, 2019): Facebook, which has a dominant position in the social network market, collected user data from a third-party source (not just Instagram, WhatsApp, etc. which it owns, but including third-party websites), and the data was used by being linked to a Facebook account. However, many users were not aware of the conditions, and since the consent to the terms and conditions by the user who could not in essence switch to another social network was "mandatory", the company's action was performed in a manner that violated the General Data Protection Regulation (GDPR) without obtaining voluntary consent from the user, caused damage to the user and also hindered the competitors who could not collect large amounts of data, and was deemed to be an act of exploitative abuse.

100 Regarding something such as the possibility that the lock-in of users to specific services may damage the fair competitive environment, and the necessity of appropriately ensuring the transfer and release of data, also see the Study Group on Improvement of Trading Environment surrounding Digital Platforms, Working Group for Ideal Approaches to Data Transfer and Disclosure "Options for Ideal Approaches to Data Transfer and Disclosure" (May 2019).

methods.

- Techniques that improperly restrict the use of competing services (including indirect ones that, practically speaking, restrict use)

Envisaged example¹⁰¹

Imposing the unreasonable obligation of single homing¹⁰², imposing unfair restrictions on API¹⁰³ opening and connections, and setting unnecessary standards and technologies to hinder data interoperability

- The method of intentionally creating an unreasonable sunk cost and significantly increasing the switching costs

Envisaged example

Requirement of unreasonable large-scale investment in facilities used in joint R&D, etc. (things that are difficult to divert to other uses).

(4) Cumulativeness of the market where there is competition

In a cross-industry data-collaboration business alliance, in many cases, not only businesses that have a competitive relationship, but also enterprises that have a vertical business relationship or enterprises that belong to completely different industries participate. Even in horizontal business alliances and vertical or conglomerate business alliances (cross-industry data-collaboration business alliances belong to this category), as with, for example, technology markets and

101 The following is given as a reference example regarding a specific aspect of the techniques.

(i) Suspected violation of the Antimonopoly Act against Minna no Pet Online co, Ltd. (Japan Fair Trade Commission on May 23, 2018): The same company, which is a leading operator in the field of website operations that mediate dog or cat trading between breeders and consumers, was investigated based on the provisions of the Antimonopoly Act for its act of prohibiting the posting of information on dogs or cats on other brokerage sites without limiting the scope or time period to a large number of breeders who used the brokerage site operated by it was at risk of hindering fair competition (trading on exclusive terms) with other brokerage site operators (and then later the investigation was closed based on a voluntary proposal for improvement measures from the company).

(ii) Case of suspected violation of the Antimonopoly Act by Airbnb Ireland UC and Airbnb Japan K.K. (Japan Fair Trade Commission on October 10, 2018): When Airbnb Ireland UC's business partner posted information on private accommodation serviced using API on the website introducing private accommodation services operated by Airbnb Ireland UC, since there was the risk that the companies establishing contractual provisions that restricted the posting of information on private accommodation services using API on other private accommodation service brokerage sites would restrict the business activities of the business partners concerned and could lead to the exclusion of operators of other private accommodation service brokerage sites, an investigation was conducted based on the provisions of the Antimonopoly Act (and then later the investigation was closed based on a voluntary proposal for improvement measures from the companies).

(iii) Google Search (AdSense) Case: See footnote 98.

102 The user can use only one service. On the other hand, a state in which a user can use a plurality of services of the same type in parallel is called "multihoming".

103 Abbreviation for Application Programming Interface. A system for making program functions available to other programs.

product markets, input resource purchase markets, and product sales markets, the market exists in multiple stages from the stages of research and development to procurement, manufacturing and sales. However, in a cross-industry data-collaboration business alliance, for example, even when looking at the product sales and marketing stage, there is a tendency for multiple sales markets (in some cases, the same enterprise is the main sales body) to coexist.

In other words, since the partners of the cross-industry data-collaboration business alliance conduct their own business activities using the results obtained through the business alliance, a market can be established for each business they engage in. In addition, some business alliances form a consortium or project that develops new products or technologies, etc., under the framework of the business alliance, and various products and service elements possessed by each alliance partner are combined to provide integrated services (social problem-solving services, etc.), while others build and provide platforms with multiple markets (infrastructure), and in such cases, in addition to the markets unique to each partner, there will also be a market where these consortiums compete¹⁰⁴ with those that compete with them¹⁰⁵.

For this reason, when examining the impact of cross-industry data-collaboration business alliances on competition, it is very important to identify and analyze where and in what manner an overlapping competitive relationship is occurring with which enterprise, and to clarify the effects and acquired markets.

4. Consideration under the Antimonopoly Act related to cross-industry data-collaboration business alliances (general overview)

Here, based on the organization of Part V above, consideration will be given to the consideration under the Antimonopoly Act related to cross-industry data-collaboration business alliances focusing mainly on data handling.

The specific business activities of the alliance partners pertaining to the business alliance can typically be divided into three stages: (i) standardization activities for data collaboration, (ii) activities related to accumulation and analysis, and the creation of

104 Sometimes called “competition between business ecosystems”.

105 The following can be considered as typical examples.

Business alliance related to common point service provision business

Markets related to the service user’s unique business, markets related to the service (data collection market, service provision market, etc.)

Business alliance related to social problem-solving business

Markets related to a business that individually supplies each product that constitutes the service or service element, markets related to the service (acquisition market of each business that supplies component products, service provision market, etc.)

new data through data sharing (including joint collection of data), and (iii) activities¹⁰⁸ related to technologies and products or services using¹⁰⁶ the obtained created data, and the consideration according to these stages is organized as given below.

(1) Standardization activities for data linkage

When engaging in data linkage not only within the business alliance but also between enterprises, since there are many cases where the data format pertaining to data acquisition, analysis and management, and the technologies and equipment required for data sharing and analysis adopted by each enterprise generally differ, the standardization activities such as unification and specification to ensure the implementation of data linkage and interoperability often take place at the stage prior to the data linkage.

The subject of such standardization activities is standardization relating to the handling of data, etc., but basically the consideration of Guidelines on Standardization and Patent Pool Arrangements (and Attachment 7) may be helpful.

A. These standardization activities impose certain restrictions on the business activities of the alliance partners, but since there is an aspect of an expectation of a pro-competitive effect through rapid market launches of newly created services through the data linkage, increased demand and greater consumer convenience, they do not immediately pose a problem under the Antimonopoly Act.

B. On the other hand, for example, the following actions may constitute a problem under the Antimonopoly Act.

(A) Unfair extension of the scope of standardization

Unification or specification among the alliance partners beyond the scope necessary to realize the benefits of standardization, such as ensuring implementation of the data-linkage and interoperability pertaining to the business alliance in cases where some of the alliance partners have a competitive relationship in the technology or products and services market that uses the data created through the business alliance as an important input, and where the total market share of the alliance partners in the competitive relationship is high, may substantially restrict competition in the technology or products and services market (unreasonable restraint of

¹⁰⁶ There are also business activities in which the created data itself is traded with other businesses.

trade)¹⁰⁷.

Moreover, with regard to the “technology or product and services market”, as given in 3(4) above, as well as each of the markets pertaining to the unique business activities conducted by each enterprise, cumulative markets comprising multiple markets are envisaged such as a market pertaining to products and services provided through the framework of the business alliance (for example, common point services, social problem-solving services) (the same applies below).

Also, in terms of using the created data as an input resource for each business activity, it is considered that the alliance partners generally have a competitive relationship. For this reason, the unfair extension of the scope of standardization by the alliance partners, as described above, cases where there is a secondary market¹⁰⁸ for the created data itself and the total share of the alliance partners in that market is high may substantially restrict competition in that market (unreasonable restraint of trade).

(B) Unfair exclusion of technical proposals, etc.

Unfairly preventing the adoption of a technical proposal related to standardization made by a specific alliance partner or preventing revisions to the standardization contents based on the results of technological improvements among the alliance partners may constitute a problem under the Antimonopoly Act (private monopolization, discriminatory treatment)¹⁰⁹.

(C) Restrictions on participation in standardization activities

Restricting a specific enterprise from participating without a justifiable reason in cases where an enterprise does not participate in standardization activities, and therefore is not able to ensure the implementation of data-linkage and interoperability based on unification and specification, and where it becomes difficult¹¹⁰ to

107 Guidelines on Standardization and Patent Pool Arrangements Part 2-2 (3).

108 For example, created data can not only be used as the input resource of the alliance partners, but when used in transactions with other enterprises, there is the concern of a data distribution market (for example, see 5 (4) below).

109 Guidelines on Standardization and Patent Pool Arrangements Part 2-2 (4).

110 Although it is technically possible to create the data separately through original data collection, aggregation and analysis, it includes cases where it cannot be practically performed from the viewpoint of costs. The same applies below.

conduct business activities in the technology or product and service market¹¹¹ that uses the data created by the business alliance as an important input resource, and there is a risk of being excluded from the technology or products and services market, may constitute a problem under the Antimonopoly Act (private monopolization, etc.)¹¹²

(D) Joint action through standardization activities (spillover problems)

Cases where important information in terms of competition is exchanged or shared such as the contents, price, quantity, etc. pertaining to technology, or a product or service that will be introduced into the market in the future among alliance partners which have a competitive relationship in the technology or products and services market¹¹³ that uses the data created by the business alliance based on unification and specification as an important input resource may lead to an anti-competitive agreement being reached (unreasonable restraint of trade).¹¹⁴

(E) Other acts associated with standardization activities

Restricting the development of competition standards required for the data-linkage among the alliance partners without a justifiable reason or prohibiting business activities such as data-linkage based on the competition standards may constitute a problem under the Antimonopoly Act (unreasonable restraint of trade, trading on restrictive terms, etc.).¹¹⁵

In addition, cases where specific alliance partners participating in standardization activities actively encourage their own technologies be incorporated into the specifications, and after the specifications have been formulated and widely publicized, reject the granting of the license of the technology to other alliance partners that try to adopt the specifications without a justifiable reason (including cases of requesting a license fee that is so high that it can be equated with rejection) make it difficult for business activities to be conducted in the

111 If there is a secondary market related to the created data, this is also included.

112 Guidelines on Standardization and Patent Pool Arrangements Part 2-2 (5).

113 If there is a secondary market related to created data, this is also included.

114 Guidelines on Standardization and Patent Pool Arrangements Part 2-2 (1).

115 Guidelines on Standardization and Patent Pool Arrangements Part 2-2 (2).

technology or products and services market¹¹⁶ that uses the data created by the business alliance based on the unification and specification of the alliance partners as an important input resource, and cases where there is exclusion from the technology or products and services market may constitute a problem under the Antimonopoly Act (private monopolization, individual refusal to trade, etc.)¹¹⁷.

- (2) Activities pertaining to collection, analysis, and new data creation through the sharing of data, etc.

The sharing of data either mutually or unilaterally or through the joint collection of data by an alliance partner and analysis of the accumulated data jointly or through analysis by a specific alliance partner is positioned as a core activity of cross-industry data-collaboration business alliances. The alliance partners will create new data that can be used in the development and improvement of technologies, products and services through joint analysis or analysis by a specific alliance partner of the data that has been shared or jointly collected.

In light of the fact that this activity involves the development and creation of new value through collaboration such as data sharing, the consideration of Guidelines Concerning Joint Research and Development under the Antimonopoly Act (and Attachment 5) may basically be referred to with regard to the evaluation. In addition, the consideration¹¹⁸ of the Data Study Report may also be used as reference from the perspective of data handling.

- A. Creating data with new added value through each alliance partner sharing and jointly collecting data, and aggregating and analyzing the data is expected to have a pro-competitive effect through the vigorous and efficient creation of new technology and products and promotion of technological reform brought about through cost reduction related to the data collection, risk diversification or shortening of the period and mutual complementation of data, and does not immediately constitute a problem under the Antimonopoly Act.

116 If there is a secondary market related to the created data, this is also included.

117 Guidelines on Standardization and Patent Pool Arrangements Part 2-3. For cases of license refusal after the FRAND declaration in the standardization activities through the standardization organizations (hold-up problem), see Guidelines for the Use of Intellectual Property under the Antimonopoly Act Part 3-(1) (i) and Part 4-(2) (iv).

118 Data Study Report pp. 35-42.

B. On the other hand, the following actions, for example, may constitute a problem under the Antimonopoly Act.

(A) Collaboration of accumulation, analysis, and new data creation through data sharing beyond the necessary scope

The joint creation of new data through the sharing or joint collection of data, accumulation and analysis notwithstanding the fact that each partner is able to achieve its own business aims without collaborating in cases where some the alliance partners are a competitive relationship with each other in the technology or products and services market¹¹⁹ which uses the data as an input resource, and where the total share of the market of the partners in the competitive relationship is high, may substantially restrict competition in the technology or products and services market (unreasonable restraint of trade)¹²⁰¹²¹.

(B) Formation of market power through data collection involving an artificial act that deviates from the scope of normal competitive means

Even if there is a reasonable need for joint accumulation, analysis and new data creation through data sharing, by using an artificial method that deviates from the scope of normal competitive means as given in 3(3) above in the process of the joint data collection among the alliance partners, if a strong network effect relating to data collection and accumulation is unfairly manipulated and amplified, and as a result, a specific alliance partner forms market power in a technology or products and services market¹²² which uses the created data obtained through the alliance as an important input resource, this may constitute a problem under the Antimonopoly Act (private monopolization).

Also, the act of using an artificial method that deviates from the scope of normal competitive means itself may constitute a problem (trading on restrictive terms, trading on exclusive terms, tie-in sales, abuse of a superior bargaining position, customer inducement by unjust benefits, deceptive customer inducement, etc.).

119 If there is a secondary market related to created data, this is also included.

120 Guidelines Concerning Joint Research and Development under the Antimonopoly Act Part I-1.

121 Data Study Report p. 40.

122 If there is a secondary market related to created data, this is also included.

(C) Restrictions on participation in accumulation, analysis and new data creation activities through data sharing

In cross-industry data-collaboration business alliances, through the alliance partners restricting the participation of a specific enterprise in the business alliance (where participation is restricted in practice, such as restrictions on the use of some of the data, restrictions on the use of technologies and equipment required for analysis, unreasonable participation conditions), cases where accumulation and analysis are conducted through data-sharing in order to create data indispensable in conducting business activities relating to specific technologies or products and services, may make it difficult for the specific enterprise to engage in business activities and result in exclusion from the technology or products and services market, which may constitute a problem under the Antimonopoly Act (private monopolization, etc.)¹²³¹²⁴. However, this is not a problem if the enterprise who has been restricted from participation is guaranteed¹²⁵ access to the data created as a result of the business alliance and there is no risk of it being difficult to engage in the business activities (see also (3) B (A) below).

(D) Restrictions on unilateral attribution and use of shared or jointly collected data

An act¹²⁶¹²⁷ of one partner unilaterally attributing the data shared or jointly collected by the alliance partners to another partner, or restricting the use of the data provided by the other party in the business activities of parties other than those in the business alliance beyond the necessary scope may result in the scarcity of the data, leading to the strengthening of the partner's dominant position in the technology or products and services market, or impairing the willingness of the other party to conduct research and development using the data and hindering the development of new technologies and products, may constitute a

123 Guidelines Concerning Joint Research and Development under the Antimonopoly Act Part I-2 (2).

124 Data Study Report p. 48.

125 If there is a secondary market related to the created data, this is also included.

126 Guidelines Concerning Joint Research and Development under the Antimonopoly Act Part II-2(1) (b) (1).

127 For the typology of other acts to be envisaged, see Guidelines Concerning Joint Research and Development under the Antimonopoly Act Part II-2(1).

problem under the Antimonopoly Act (trading on restrictive terms)¹²⁸¹²⁹.

Even in cases where the above does not apply, if there is significant inequality in the unilateral attribution etc. among the alliance partners in its contents, and due to this, the other partner is subject to an unfair disadvantage, this may constitute a problem under the Antimonopoly Act (abuse of superior bargaining position, etc.)¹³⁰¹³¹.

(E) Joint acts through data sharing, etc. (spillover problem)

Cases where important information in terms of competition is exchanged or shared such as the contents, price, quantity, etc. pertaining to technology, a product or service that will be introduced into the market in the future among alliance partners which have a competitive relationship in the technology or products and services market¹³² which uses the data created by the business alliance based on the sharing or joint collection of data as an important input resource may lead to an anti-competitive agreement being reached (unreasonable restraint of trade)¹³³¹³⁴.

(3) Business activities related to technologies, products, and services using the created data

Alliance partners will use the newly created data to develop, provide, and sell new technologies, products and services in their business activities.

The business activities may be carried out independently by each alliance partner or may continue to be carried out through collaboration in the framework of the business alliance, and the scope of collaboration will vary depending on the specific business alliance framework. In addition, it may be possible to provide the created data itself to other enterprises as a trade resource.

These activities are positioned as use of the outcomes of the business alliance but, in principle, the consideration of Guidelines Concerning Joint

128 Guidelines for the Use of Intellectual Property under the Antimonopoly Act Part 4-(5) (vi).

129 Data Study Report p. 36.

130 Guidelines Concerning Joint Research and Development under the Antimonopoly Act 2-2.

131 Data Study Report p. 37.

132 If there is a secondary market related to created data, this is also included.

133 Guidelines Concerning Joint Research and Development under the Antimonopoly Act 2-1.

134 Data Study Report p. 40.

Research and Development under the Antimonopoly Act (and Attachment V-5) can be used as reference¹³⁵. It is also appropriate from the perspective of handling of the data to consider the consideration¹³⁶ of the Data Study Report.

Issues in terms of the Antimonopoly Act relating to the use of created data are mainly envisaged to be the problem of the access of other enterprises to the created data and the problem of constraints on the attribution and use of the created data among the alliance partners.

- A. The decision on whether to grant access to the created data to other enterprises, and what conditions to set when it is granted, is basically a matter of free choice in selecting trade connections and even when it is not granted, this does not immediately constitute a problem under the Antimonopoly Act. In addition, attaching some form of restriction on the handling of created data among the alliance partners does not immediately constitute a problem under the Antimonopoly Act.
- B. On the other hand, the following actions may constitute a problem under the Antimonopoly Act.

(A) Concerted refusal of access to created data¹³⁷

With respect to created data indispensable in conducting business activities related to specific technologies or products and services, if refusing or restricting access by a specific enterprise among the alliance partners (including refusing or restricting access of part of the data, refusing or restricting access to the technology or equipment¹³⁸ required for the use of the data, de facto refusal or restricting of access through imposing unreasonable access conditions¹³⁹, etc., hereinafter the same applies below) makes it difficult for the specific enterprise to

135 If business activities related to technologies, products, and services that use the created data are continued through collaboration, the business activities will also be evaluated based on the consideration of the Guidelines Concerning Joint Research and Development under the Antimonopoly Act.

136 Data Study Report pp. 42-50.

137 When created data is to be accessed by other enterprises, a method of pooling the data among the alliance partners and using them all together (data pool) can be considered. In that case, see the consideration in Guidelines on Standardization and Patent Pool Arrangements Part III (as well as Attachment V-6 and pp. 48-50 of the Data Study Report).

138 For example, there may be technical factors related to the API connection.

139 For example, it is conceivable to provide other services, etc., together with the created data, or to require transactions only with oneself (Data Study Report p. 50).

engage in business activities and the enterprise is excluded from the technology or products and services market, this may constitute a problem under the Antimonopoly Act (private monopolization, etc.)¹⁴⁰¹⁴¹ (See also (2)B(C) above).

(B) Individual refusal of access to created data

If a specific alliance partner which has market power in a specific technology or products and services market, under such circumstances as (i) or (ii), rejects or restricts access to created data that is indispensable in terms of conducting business activities in that market or other markets by a specific enterprise operating in that market or other market without a justifiable reason, and it becomes difficult for the specific enterprise to engage in business activities and the enterprise is excluded from the market or other market, this may constitute a problem under the Antimonopoly Act (private monopolization, individual refusal to trade)¹⁴²¹⁴³.

- (i) Cases of refusing or restricting access to created data which is generally available without a justifiable reason despite the fact that a rational purpose cannot be envisaged other than the purpose of attempting to exclude a specific enterprise.
- (ii) Cases of refusing or restricting access to the created data by a specific enterprise (or its customer) without a justifiable reason despite the fact that this means the specific enterprise will be excluded when it is recognized that there is an obligation to give the specific enterprise (or its customer) access to the created data.

In addition, the same applies if a specific enterprise which has formed market power in a specific technology or products and services market through data collection associated with an artificial act that deviates from the scope of normal competitive means described in (2) B (B), refuses or restricts access without justifiable reason to created data that is indispensable in conducting business activities in the relevant market or other markets to a specific enterprise conducting business activities in the market or other

140 Guidelines Concerning Joint Research and Development under the Antimonopoly Act Part I-2 (2).

141 Data Study Report p. 48.

142 Guidelines Concerning Distribution Systems and Business Practices Part II, Chapter 3.

143 Data Study Report pp. 45-47.

markets, and it becomes difficult to the specific enterprise to engage in business activities and the enterprise is excluded from the market or other markets¹⁴⁴.

(C) Restrictions on unilateral attribution and use of the created data

An act of one partner unilaterally attributing the created data to another partner, or restricting¹⁴⁵¹⁴⁶ use by the other partner of the created data in the business activities of parties other than those in the business alliance beyond the necessary scope may result in the scarcity of the data, leading to the strengthening of the partner's dominant position in the technology or products and services market, or impairing the willingness of the other party to conduct research and development using the created data and hindering the development of new technologies and products, may constitute a problem under the Antimonopoly Act (trading on restrictive terms)¹⁴⁷.

Even in cases where the above does not apply, if there is significant inequality in the unilateral attribution etc. among the alliance partners in its contents, and due to this, the other partner is subject to an unfair disadvantage, this may constitute a problem under the Antimonopoly Act (abuse of superior bargaining position, etc.)¹⁴⁸.

(D) Concerted conducts in the use of created data (spillover problem)

Cases where important information in terms of competition is exchanged or shared such as the contents, price, quantity, etc. pertaining to technology, a product or service that will be introduced into the market in the future among alliance partners which have a competitive relationship in the technology or products and services

144 Data Study Report pp. 47-48

145 Guidelines Concerning Joint Research and Development under the Antimonopoly Act Part II-2(2) (b) (1). Regarding this restriction, when the created data is used for the research and development of the other party, the research and development activities are unreasonably restricted and tendency to impede fair competition is considered strong.

146 See Guidelines Concerning Joint Research and Development under the Antimonopoly Act Part II-2(2) and (3) for types of other actions that can be envisaged.

147 Guidelines for the Use of Intellectual Property under the Antimonopoly Act Part 4-(5) (vi).

148 Guidelines Concerning Joint Research and Development under the Antimonopoly Act Part II-2.

market¹⁴⁹ which uses the created data as an important input resource may lead to an anti-competitive agreement being reached (unreasonable restraint of trade)¹⁵⁰¹⁵¹.

5. Major issues in specific forms of cross-industry data-collaboration business alliances

Some of the major forms¹⁵² of cross-industry data-collaboration business alliances that have been widely used in recent years are described below, and in light of the consideration in 4 above, the actions that can be considered as problems that are particularly likely to occur in each form and points to be note have been compiled.

(1) Intention to create new products and services through data sharing, etc.

This form is where multiple enterprises across industries and industry boundaries form a consortium or some other group and intend to accumulate and analyze data and create new data by sharing the data held by each enterprise. The development of new technologies, products and services using the created data may be carried out independently by each alliance partner in their business activities, or various development activities may continue to be carried out in collaboration among the alliance partners. In addition, even with regard to the provision of developed products and services, etc., if they are provided through collaboration among the alliance partners in order to further enhance the value of each product and service, or where the developed products or services combine or integrate various product or service elements, it is assumed that the alliance partners will provide the services in an integrated manner¹⁵³.

For example, social problem-solving businesses such as smart cities and MaaS, and cross-industry collaboration for the development of automated driving systems, etc. (for example, automobile manufacturers and IT technology companies) are considered to be applicable to such forms.

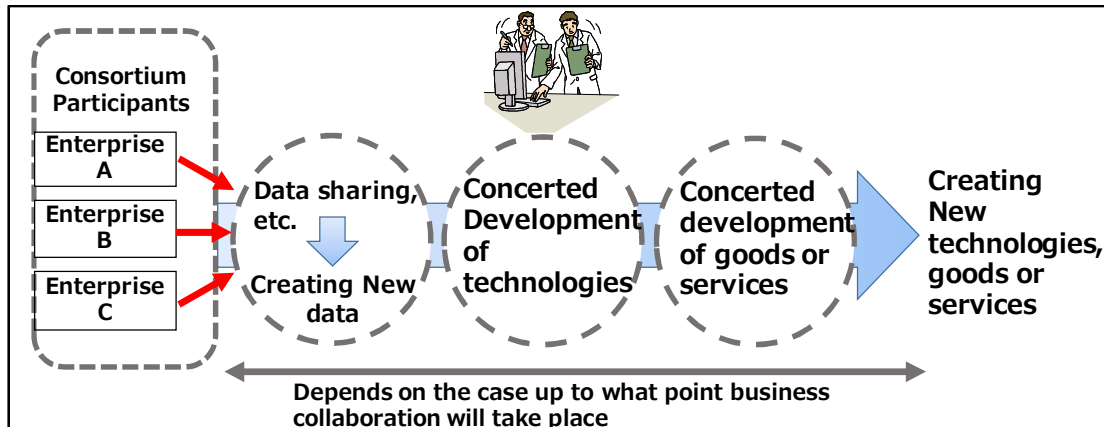
149 If there is a secondary market related to the created data, this is also included.

150 Guidelines Concerning Joint Research and Development under the Antimonopoly Act Part II-1.

151 Data Study Report p. 40.

152 These forms were conveniently classified for simplicity of organization and cannot necessarily be clearly distinguished in practice.

153 In that case, it is not just a form of business alliance, but for example, it may be possible to establish a joint investment company that conducts the provision business.



For example, the following actions can be considered as problems that can be particularly envisaged in this form.

- Collaboration such as data sharing beyond the necessary scope
- Concerted or individual refusal¹⁵⁴ of access to created data (in this respect, as a result of competition among the consortiums, there is a tendency for certain things to establish de facto standards)
- Concerted conducts for utilization of the created data
- Restrictions on unilateral attribution and use of shared data and created data

(2) Improving efficiency through data sharing between supply chains

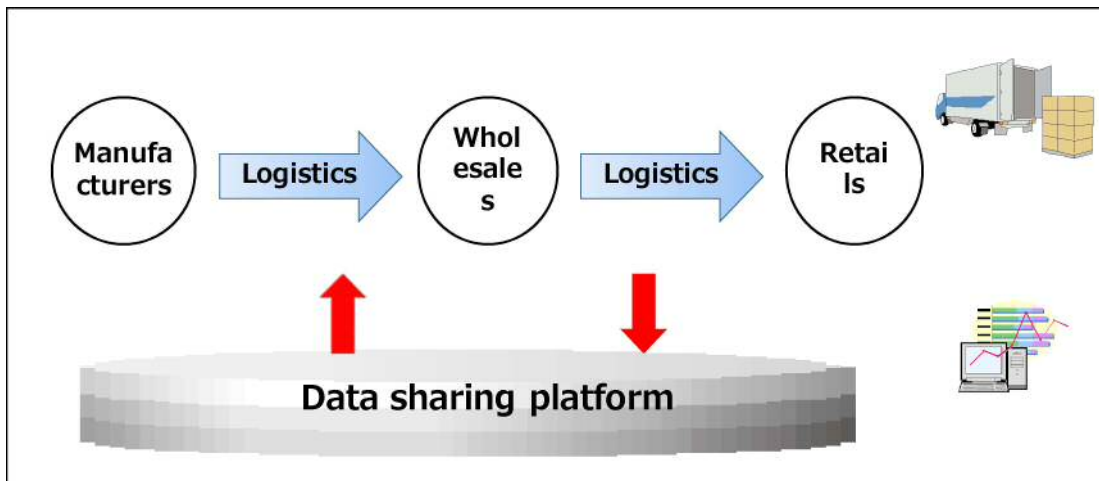
This form aims to share various kinds of information pertaining to transactions in real time and to improve business efficiency in the supply chain among multiple enterprises in a vertical business relationship that belong to the supply chain of goods, etc. (multiple competitors exist for each transaction stage). At such time, it is often the case that a platform for sharing and using the various kinds of data is constructed and operated.

This form of approach is particularly notable in the distribution field. For example, production data, transportation-related specification data¹⁵⁵, truck dynamics data, inventory data and purchase data are shared through a data-sharing platform with the participation of the manufacturers, logistics (wholesale) enterprises, and sales and marketing enterprises with the aim of improving the efficiency of the entire supply chain and contributing to traceability and food loss countermeasures¹⁵⁶.

¹⁵⁴ In addition, problems such as rejection of licenses for new technologies and connection to new services are also assumed.

¹⁵⁵ For example, data on transportation pallet standards, packing standards, truck loading rates, etc.

¹⁵⁶ In addition, for example, trial experiments related to smart supply chains using electronic tags are



For example, the following actions can be considered as problems that can be particularly envisaged in this form.

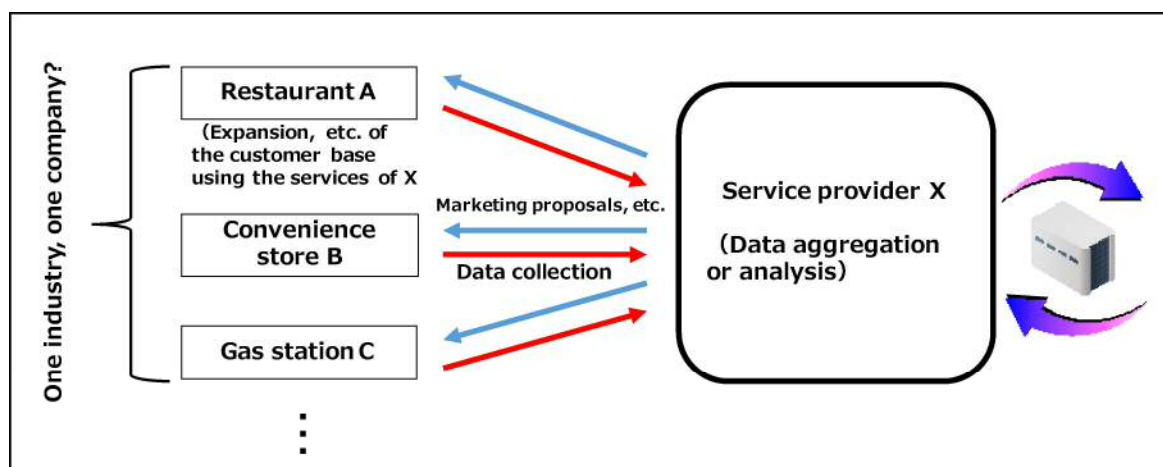
- (Rather than handling data) restrictions on participation in the business alliance itself (or refusal to allow a connection to the data sharing platform)
- Concerted action through data sharing (since multiple competitors participate at each stage of the transaction, there is a high risk that the sharing of important information in terms of competition such as quantity and trade connections will facilitate coordinated conduct)
- Restrictions on unilateral attribution and use of shared data

(3) Those seeking to create or improve services, etc. based on created data obtained through concentrated collection of data

In this form, a specific alliance partner (such as a service provider) collects data generated in each business activity conducted by another alliance partner (such as a service user) in a concentrated manner, and by aggregating and analyzing it, creates new data. Then as an operator of the services, uses the created data to improve services and provide new services to users of the services.

For example, such forms as a common point service and a maintenance and management service by a manufacturer of industrial machinery and equipment are considered to apply.

Cases of a common point service



For example, the following actions can be considered as problems that can be particularly envisaged in this form.

- Collaboration of data collection beyond the necessary scope
- Formation of market power through data collection associated with an artificial act that deviates from the scope of normal competitive means (specifically, collection of customer behavior history data that exploits customer perceptions and behavioral biases, exploitation of an unfair leverage effect and the imposition of an unfair obligation of single homing¹⁵⁷ are envisaged. See 3 (3) above).
- Exclusion of competing service operators through the above method
- Single refusal of access to created data¹⁵⁸¹⁵⁹
- Obligation of the provision or disclosure of data¹⁶⁰ separately acquired or possessed by users of the services, etc.
- When providing services, etc., imposing the condition that users of the services, etc. do not use competing services or the condition that it does not provide services etc. to service user competitors (trading on exclusive terms , etc.)¹⁶¹

157 It has been pointed out that in order to ensure the accuracy of the created data, etc., the distribution to other data collection destinations must be suppressed.

158 In particular, if there are rules and practices that make service users choose one company in one industry, the need for access to the created data will increase.

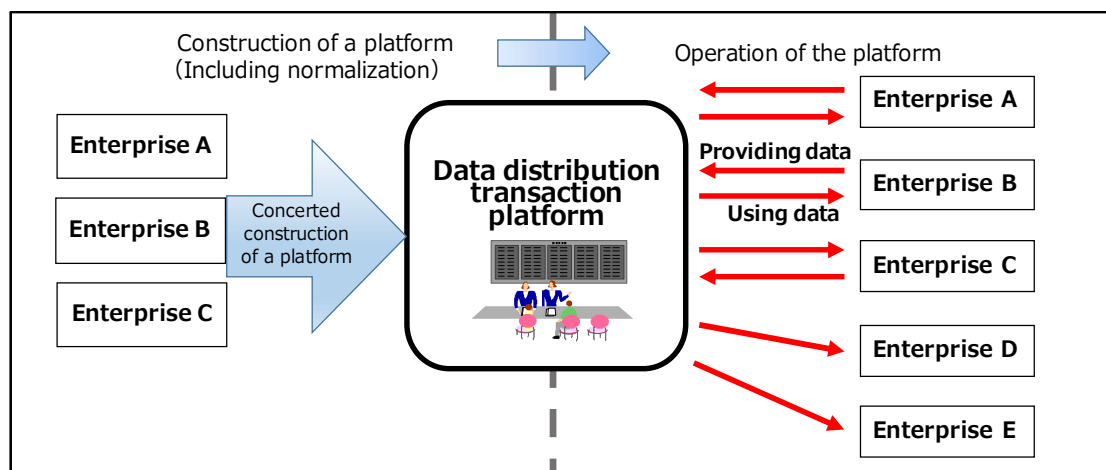
159 At the same time, problems such as restricting participation in the service itself are also assumed.

160 For example, in the case of a common point service, POS data obtained at the stores of the service users are envisaged.

161 It has been pointed out that since the interests of these parties might be the same, as a result of the negotiations, there may be an actual situation that results in a bilateral exclusionary relationship.

(4) Constructing a data distribution transaction platform and attempting to trade necessary data among enterprises

This form is when after the alliance partners have jointly built a data distribution transaction platform, the alliance partners and parties other than the alliance partners mutually provided the data¹⁶² that they possess on the platform. In addition, standardization activities related to the data format, etc. may also be conducted prior to the construction of the platform.



Such forms are typically considered to be the construction and operation of so-called data transaction exchanges similar to financial transactions.

For example, the following actions can be considered as problems that can be particularly envisaged in this form.

- Restrictions on participation in the standardization activities
- Formation of market power through data collection associated with an artificial act that deviates from the scope of normal competitive means (specifically, unreasonable obligations such as single homing are envisaged. See 3 (3) above)
- Exclusion of competing platform operators through the above method
- Unreasonable discriminatory treatment of platform use between the alliance partners and other parties

¹⁶² By processing or combining each provided data, this may also contain more value-added created data.

Part VII. Conclusion

As stated at the beginning, business alliances, such as business alliances which aim at improving business efficiency that were traditionally conducted among enterprises in the same industry and cross-industry data-collaboration business alliances, are one of the important methods in terms of the business strategies of enterprises, and it is thought that there will be increased use of business alliances in the future.

This report systematically organizes the consideration in terms of the Antimonopoly Act on business alliances in general, reflecting the recent operational practices based on the discussions of the Study Group, and examines and compiles specific consideration for each type of business alliance.

There are a wide variety of business alliances, and until now there has been no opportunity to systematically present the consideration in terms of the Antimonopoly Act, but in conducting this study, the basic evaluation framework, etc. was organized with a focus on identifying the overall picture of the impact of business alliances on competition and its mechanism. In addition, this study theoretically confirms the similarities in the impact of business alliances and business combinations on competition and clarifies the differences in terms of evaluating competition between the conduct regulations and business combination regulations.

On the other hand, this report, for example, points out in relation to cross-industry data-collaboration business alliances, cases where the formation of market power through an artificial act that deviates from the scope of normal competitive means in the data collection or aggregation process based on the characteristics of the business model may constitute a problem under the Antimonopoly Act and identifies some specific methods of the action, but these are listed as the least problematic and methods that do not apply to this are also envisaged. For this reason, it is hoped that theoretical and practical accumulation toward the clarification of the extension that may be a problem under the Antimonopoly Act, including other types of actions, will be promoted in the future.

In addition, although it is not necessarily an issue unique to business alliances, in view of the importance of vigorous innovation in present-day economic activities, it is important to have deeper discussions on how to address the issue of the impact on innovation in terms of the Antimonopoly Act while paying attention to consistency with conventional interpretations under the Antimonopoly Act.

The aim of this report is to contribute to preventing acts of violation through the provision of greater convenience and predictability for enterprises who wish to use a business alliance, and it is anticipated that further use of pro-competitive business alliances will help further Japan's economic development and resolve its social problems.

End