

## Specific Consideration on Production Alliances

Production alliances are expected to have the pro-competitive effect through achieving economies of scale in production, specialization in specialty fields, and efficient production through the integration of complementary products and production technologies.

On the other hand, the alliance partners need to keep the following points in mind since in some cases competition among the alliance partners may be restricted mainly in the sales markets.

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### 1. Horizontal production alliances

Examples of horizontal production alliances are cases where production is carried out through competitors sharing the production facilities they respectively own (including cases where one partner has disposed of its own production facilities), cases where the production bases are located in areas far from each other and the competitors supply products to each other in order to reduce the transportation costs or other costs, cases of receiving full or a partial OEM supply from competitors instead of using in-house production, and cases where a variety of products is shared among competitors and supplied to each other through OEM, and so on.

#### **(1) Market for examination**

The sales market for the products, which is the target of the alliance, mainly becomes the market for review.

#### **(2) Evaluation of impact on competition**

The impact on the relationship between the alliance partners<sup>1</sup> is mainly evaluated

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<sup>1</sup> Although this is actually an example of a business combination (the establishment of a joint investment company), there is a case where consideration was given to the impact on competitive behavior by investment companies. Case Example 1: example of the Major Business Combination Case 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) (in this case, the Japan Fair Trade Commission pointed out the problem was competition in a certain field of transaction was substantially restricted, and later, both parties announced that they would withdraw their formation plan).

based on the following points, and the impact on the entire market is also evaluated when competition between the partners is restricted.

- Integration of decision-making on important modes of competition

If the production alliance is implemented after the conditions of the target product specifications, production method, quantity, etc. have been decided among the alliance partners, there is a concern that decision-making regarding important modes of competition such as cost, quantity, quality, etc. will be integrated. In particular, the closer the target product supplied through the alliance is to the finished product, and the closer the supplied amount is to the total supply, the greater the degree of integrated decision-making regarding important modes of competition such as quality and cost.

In addition, when the production and supply capacity of the alliance partners is limited, this volume will be distributed among the alliance partners, which may also adjust the supply volume in the sales market<sup>2</sup>.

- Possibility of coordinated conduct

Since there is a possibility that important information in terms of competition such as the original cost and volume may be exchanged and shared as necessary at the time of implementing a production alliance, it is necessary to take remedy or other methods to stop such information being shared with the sales departments<sup>3</sup>, etc.

Also, in cases where the cost-sharing ratio (“ratio of the shared part to the manufacturing cost per unit of product” multiplied by the “ratio of the product for shared production to the entire production volume”) increases and it becomes easier to predict the behavior between partners, coordinated conduct becomes easier<sup>4</sup>.

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<sup>2</sup> The collection of prior consultation cases on the Antimonopoly Act [Case No. 2 of 2007] [Case No. 7 of 2005] [ Answer to the advance consultation system related to the activities of enterprises, etc., “Concerning a mutual OEM supply by Mitsubishi Fuso Truck and Bus Corporation and Nissan Diesel Industrial Co., Ltd.” (December 15, 2006)].

<sup>3</sup> The collection of prior consultation cases on the Antimonopoly Act: Almost all of the cases related to production alliances refer to this point.

<sup>4</sup> The collection of prior consultation cases on the Antimonopoly Act [Case No. 10 of 2017] [Case No. 5 of 2016] [Case No. 8 of 2014], etc.

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## **2. Vertical and mixed production alliances**

Examples of vertical production alliances are cases where the production facilities are merged between businesses that have a vertical business relationship. Generally, these are envisaged not to be business alliances based solely on a contract but are based on the form of a business transfer or the establishment of a joint investment company, etc. (business combination).

## Specific Consideration on Sales Alliances

Although sales alliances can have the pro-competitive effect due to cost reduction through mutual supplementation of distribution networks and reduced time to enter new markets, etc., the alliance partners need to keep the following points in mind since there are some cases where integrated decision-making regarding important modes of competition such as sales prices corresponds to hardcore cartels, and the likelihood of competition risks is considered greater when compared to other types<sup>5</sup> <sup>6</sup>.

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### **1. Horizontal sales alliances**

Examples of horizontal sales alliances are cases where competitors who have sales bases in faraway areas supplement their sales network by covering for or entrusting sales to each other, cases where competitors share the sales operations such as negotiations with customers, and cases where competitors jointly conduct sales promotion activities such as the advertising and marketing of products and advertisements, and the planning of prizes, etc.

#### **(1) Market for examination**

The sales market for the products, which is the target of the alliance, mainly becomes the market for review.

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<sup>5</sup> In fact, joint sales organizations have often been used as a mechanism to maintain the effectiveness of hardcore cartels. Specific examples include the case of Nippon Yushi and other six (Fair Trade Commission Recommendation Decision of December 11, 1975), etc. (Kanai=Kawahama=Sensui) “AntiMonopoly Act” (Kobundo, 6th edition, page 105).

<sup>6</sup> As stated above, with sales alliances, risk in terms of competition is large when compared to other types of alliances, but since acts of certain unions that have as its purpose the mutual aid of small-scale businesses or consumers are basically exempt from application of the Antimonopoly Act (Article 22 of the same Act), the joint sales and joint purchases of these parties are basically exempt from application of the Antimonopoly Act. This is because by jointly selling and purchasing together, substantial economic freedom is guaranteed in their business activities and consumer life, and this is a system which supports participation in the market as an effective competitive unit and trade unit, it is understood that it is a provision to the effect of confirming that it does not violate the Antimonopoly Act (Kanai=Kawahama=Sensui, “Antimonopoly Act” (Kobundo, 6th edition, page 469). However, even in this case, the Antimonopoly Act shall apply if unfair trade practices are used or if the price is unreasonably increased by substantially restricting competition in a particular field of trade (proviso to the same Article).

## **(2) Differentiation from hardcore cartels**

For example, if it is clear that the content of the alliance does not include content such as cost reduction through mutual supplementation of a distribution network or reduced time to enter a new market, etc. and it is clear that there is no other purpose than stabilizing the price or it is clear that no other special effect is expected other than the anti-competitive effects, such as maintaining or raising the price, this has the characteristics of a hardcore cartel.

## **(3) Evaluation of the impact on competition**

The impact on the relationship between the alliance partners is mainly evaluated based on the following points, and the impact on the entire market is also evaluated when competition between the alliance partners is restricted.

- Integrated decision-making on important modes of competition  
When not only decision-making related to joint sales operations and sales promotion activities (holding of sales promotion events, planning of prizes, etc.) but decision-making on important modes of competition such as determination of the sales price is integrated, this has a great impact on competition.
- Possibility of coordinated conduct  
When information that is important in competition, such as the sales volume and customers, is exchanged and shared during the implementation and preparation of a sales alliance, coordinated conduct among the alliance partners is easily facilitated. In addition, there is a need to exercise care so that information that is not necessarily essential in the implementation of the sales alliance, for example, the sales price and cost, is not exchanged and shared.

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## **2. Vertical and mixed sales alliances**

Examples of vertical and mixed sales alliances are cases where sales promotion activities such as the advertising and marketing of products are jointly implemented between a manufacturer and a retail business, or between businesses selling different products in order to quickly and efficiently disseminate new products.

### **(1) Market for examination**

For example, in a vertical sales alliance, the sales market (purchasing market for downstream businesses) of upstream businesses (manufacturers, etc.) pertaining to the target products of the alliance and the sales market of downstream businesses (retail businesses, etc.) become the main consideration.

### **(2) Evaluation of impact on competition**

For example, it is thought that with regard to joint sales promotion activities carried out between manufacturers and retailers, or between businesses that sell different products, the impact on market closure and exclusivity will usually be minimal.

With respect to evaluation of the arrangements between the alliance partners associated with the implementation of a business alliance, unfair restraints on the business activities of alliance partners such as, for example, restraints on the sales prices of retail businesses associated with the implementation of the joint sales promotion activities, may constitute a problem.

## Specific Consideration on Purchasing Alliances

Purchasing alliances<sup>7</sup> are expected to have the pro-competitive effect due to cost reductions taking advantage of the economies of scale through an increase in the purchase unit.

On the other hand, alliance partners need to keep the following points in mind since there are some cases of purchasing cartels<sup>8</sup> and exclusion of competitors when market dominance occurs in the purchasing market, restrictions on competition between alliance partners in the sales market (unreasonable restraint of trade) and input closure are problems that may arise.

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### **1. Horizontal (where there is a competitive relationship in the sales market) purchasing alliances**

Examples of horizontal purchase alliances are cases of the basket purchase on raw materials, etc. among competitors, and cases of jointly negotiating purchasing conditions with the supplier.

#### **(1) Market for examination**

The following markets mainly become the markets for review.

- Purchasing market for products (raw materials, etc.) targeted for joint purchase
- Sales market for products and services provided by using the product

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<sup>7</sup> There are cases to buy raw materials, etc. by establishing a union based on the law for small businesses which have no bargaining power against suppliers to counteract against purchasers, but if the requirements of Article 22 of the Antimonopoly Act are met, these are basically exempt from application of the Antimonopoly Act (see footnote 6).

<sup>8</sup> For example, there is a case of milk price joint negotiation (Japan Fair Trade Commission Recommendation Decision of May 22, 1974).

## **(2) Evaluation of the impact on competition**

### Evaluation of the impact in the purchasing market

The purchasing conditions (purchase price, purchase volume, supplier, etc.) are often determined in an integrated manner by the alliance partners at the time of implementation of the purchasing alliance, and this in itself does not immediately constitute a problem, but if the market share of the alliance partners in the purchasing market increases and market dominance arises in the market, the problem of cartels and the exclusion of other suppliers may occur<sup>9</sup>.

### Evaluation of the impact in the sales market

The impact on the relationship between the alliance partners is mainly evaluated based on the following points, and the impact on the entire market is also evaluated when competition between the alliance partners is restricted.

- Possibility of coordinated conduct

Since important information in terms of competition such as cost and quantity is often exchanged and shared during the implementation and preparation of a purchasing alliance, it is necessary to take information-blocking measures to prevent information being shared with the sales departments<sup>10</sup>.

Moreover, in cases where the cost-sharing ratio (“ratio of the cost pertaining to the raw materials, etc. jointly purchased to the sales price (or original manufacturing cost) of the products to be sold” multiplied by the “ratio of the product using the raw materials, etc. jointly purchased to the entire sales volume”) increases (for example, cases of reselling purchased products as they are) and it becomes easier to predict the behavior between partners, coordinated conduct is facilitated<sup>11</sup>.

In addition, in cases where the market share of the alliance partners in the purchasing market of the abovementioned “evaluation of the impact on the purchasing market” becomes high, it is possible that competitors will not be able to obtain a sufficient supply of its raw materials, etc. in the purchasing market and will be excluded from the sales market.

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<sup>9</sup> The collection of prior consultation cases on the Antimonopoly Act [Case No. 9 of 2005] [Case No. 7, 6 of 2002 and 2003] [Case No. 9 of 2001] and others.

<sup>10</sup> The collection of prior consultation cases on the Antimonopoly Act [Case No. 9 of 2017] [Case No. 3 of 2012] [Case No. 9 of 2011] and others.

<sup>11</sup> The collection of prior consultation cases on the Antimonopoly Act [Case No. 9 of 2017] [Case No. 3 of 2012] [Case Nos. 6, 7 and 10 of 2012 and 2013] and others.



Evaluation of the arrangements between alliance partners associated with implementation of the business alliance

For example, the following actions may constitute a problem:

- An act that unfairly restrains the business activities of another party, such as unduly obligating the other party to use joint purchasing or restricting purchases through other routes.
- An act that unfairly restrains the business activities of suppliers, such as restricting the supply of products to enterprises other than the alliance partners.
- In cases where the purchase of raw materials, etc. using a joint procurement organization<sup>12</sup> pertaining to the business alliance is the norm, and the use of such organization is an important mode of competition in terms of conducting business activities, an act of excluding a specific enterprise from use of the organization without any justifiable reason.

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## **2. Vertical and mixed purchasing alliances (where there is no competitive relationship in the purchasing market)**

Examples of vertical and mixed purchasing alliances are cases of, for example, joint procurement of energy and highly versatile materials and products by enterprises manufacturing different products.

### **(1) Market for examination**

The following markets mainly become the markets for review.

- Purchasing market of products targeted for joint purchase
- For example, in the case of a mixed purchasing alliance, the sales market of each product or service provided by using the product

### **(2) Evaluation of the impact on competition**

If the alliance partners have a competitive relationship in the purchasing market, the product in this case is generally considered to be highly versatile, but if the market share of the alliance partners in the purchasing market is not high, the impact on the purchasing market is considered to be small.

Even with regard to the sales market, since the products to be sold differ among the alliance partners, the impact on market closure and exclusivity is usually

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<sup>12</sup> Includes the establishment of an online joint procurement operation site.

considered to be minimal.

## Specific Consideration on Logistics Alliances

Logistics alliances are expected to have the pro-competitive effect through cost reductions due to the elimination of intermodal transportation and the sharing of logistics networks, etc.

On the other hand, the alliance partners need to keep the following points in mind since competition between the alliance partners may be restricted mainly in the sales markets.

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### **1. Horizontal logistics alliances**

Examples of horizontal logistics alliances are cases where a joint delivery network is constructed among the competitors and deliveries are made, and cases where the logistics facilities owned by each competitor are shared and used, etc.

#### **(1) Market for examination**

The following market mainly become the markets for review.

- Logistics operations procurement market
- Sales market for products provided through use of joint deliveries

#### **(2) Evaluation of impact on competition**

##### Evaluation of the impact on the procurement market of logistics

The logistics business procurement conditions (delivery fee, delivery volume, delivery site, etc.) are often determined by the alliance partners in an integrated manner at the time of implementation of the logistics alliance, and this in itself does not immediately constitute a problem but if the market share of the alliance partners in the procurement market of the logistics business increases and market dominance arises in the market, the problem of procurement cartels and the exclusion of other suppliers may occur. At that time, if the market share of the alliance partners is not high, such as when the relevant logistics business is used widely by other parties other than the alliance partners, the impact on the procurement market of the logistics business is

considered to be minimal<sup>13</sup>.

#### Evaluation of the impact on the sales market

Moreover, with regard to alliances that take the form of sharing and mutual use of logistics facilities already owned by the alliance partners, it is not usually assumed that any changes will be made to the logistics business procurement market.

The impact on the relationship between the alliance partners is mainly evaluated based on the following points, and the impact on the entire market is also evaluated when competition between the alliance partners is restricted.

Logistics alliances are jointly carried out with respect to the logistics operations accompanying the main business of the enterprises, and as such, do not normally affect the price, quantity, or customers of the target product itself, and is not likely to be a problem<sup>14</sup>.

#### - Possibility of coordinated conduct

Information that is important in terms of competition, such as the delivery site (equivalent to the sales destination) and the delivery amount (equivalent to the sales volume) is often exchanged and shared during the implementation and preparation of the logistics alliance and so it is necessary to take information-blocking measures to prevent information being shared with the sales departments<sup>15</sup>.

In addition, if the cost sharing ratio (“the ratio of the logistics cost to the sale price (or original manufacturing cost) of the product which is the target of the logistics alliance multiplied by the “ratio of the product which is the target of the logistics alliance to the entire sales amount”) increases and it becomes easier to predict the behavior of the alliance partners, coordinated conduct is facilitated but the ratio to the cost pertaining to the logistics is usually not large<sup>16</sup>.

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<sup>13</sup> It can be a problem if the logistics enterprise’s business activities are unduly restrained or if it is subject to an unfairly disadvantage.

In addition, regarding the point that certain acts related to service consignment to a logistics enterprise of a specific shipper are unfair methods of transaction, refer to “specific unfair methods of transaction when a specific shipper entrusts transportation or storage of goods” (Fair Trade Commission Notification No.1 of 2004).

<sup>14</sup> Guidelines Concerning the Activities of Trade Associations under the Antimonopoly Act Part II-11(2)A

<sup>15</sup> The collection of prior consultation cases on the Antimonopoly Act: All of the cases related to logistics alliances mention this point.

<sup>16</sup> The collection of prior consultation cases on the Antimonopoly Act: All cases related to logistics alliances refer to this point.

Evaluation of the arrangements between the alliance partners associated with implementation of the business alliance

If it is the norm to use a joint delivery network etc. pertaining to the business alliance to deliver products, and where use of the network is an important mode of competition in terms of the business activities, an act of excluding a specific enterprise from use of the network without any justifiable reason may constitute a problem.

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## **2. Vertical and mixed logistics alliances**

Examples of vertical and mixed purchasing alliances are cases where a joint distribution network is built which crosses the boundaries of business types or industries and cases of sharing or mutual use of logistics facilities<sup>17</sup>, etc.

### **(1) Market for examination**

The following markets mainly become the markets for review.

- The procurement market of logistics operations
- Each sales market of the products provided through joint delivery, etc.

### **(2) Evaluation of impact on competition**

In the logistics business procurement market, when the alliance partners have a competitive relationship, but as given in the abovementioned 1(2), Evaluation of the impact on the procurement market of the logistics business, if the market share of the alliance partners in the market is not high, the impact on the market is considered to be minimal.

Also, in terms of the sales market as well, with regard to logistics alliances between manufacturers and retail businesses, or between businesses that sell different products, the products that are being sold usually differ between the alliance partners and therefore the impact on market closure and exclusivity, etc. is considered to be minimal.

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<sup>17</sup> In recent years, such logistics alliances have been proactively implemented against the background of increasing labor shortages in the logistics industry, etc.

## Specific Consideration on Research and Development Alliances

Research and development (R&D) is expected to have the pro-competitive effect through cost reductions in R&D, risk diversification or shortening of the period and mutual supplementation of technology, etc. between enterprises in different fields<sup>18</sup>.

On the other hand, alliance partners need to keep the following points in mind since there are cases substantial restraint of competition due to improvement of products exceeding the required range and the development of substitute products, exclusion of enterprises from the market due to restrictions on participation in joint R&D, and arrangements which impose unfair restraints on business activities associated with the implementation of joint R&D, etc. may constitute a problem.

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### **1. Horizontal (where there is a competitive relationship in the product market) R&D alliances**

Examples of horizontal R&D alliances are cases where businesses that have a competitive relationship in the product market jointly form an organization to conduct R&D activities with regard to the improvement of products or development of substitute products and R&D of technology using the product, cases of sharing the R&D among the alliance partners, and cases where one partner provides funds and another partner does the R&D, etc.

#### **(1) Market for examination**

The following markets mainly become the market for review<sup>19</sup>.

- Market providing technology as the outcome of R&D
- Sales market for products manufactured using this technology

#### **(2) Evaluation of the impact on competition**

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<sup>18</sup> Guidelines Concerning Joint Research and Development under the Antimonopoly Act "Introduction" 1

<sup>19</sup> Guidelines for the Use of Intellectual Property under the Antimonopoly Act Section 2-2(3). It should be noted that transactions and markets cannot be envisaged for the R&D activities themselves.

Evaluation of the impact on the markets providing the technology

Evaluation of the impact on the relationship between the alliance partners

- Integrated decision-making on important modes of competition  
Since the R&D alliance itself shares some of the R&D activities of products and technology which are an important mode of competition, from the perspective of the need for R&D collaboration, whether or not the alliance enterprise is able to conduct the R&D by itself needs to be considered. Cases where the risk or cost related to the R&D is enormous and it is difficult to assume the costs alone, or cases where there is a great need for joint R&D in view of the technological accumulation or technological development capability of the enterprise alone, etc. are less likely to be problematic<sup>20 21</sup>.
- Expansion of the target scope, period, etc.  
The larger the amount of R&D to be conducted jointly and the longer the period, the smaller the room for competition between alliance partners. Also, when the target range, period, etc. are well defined, compared to cases where it is broadly defined beyond the necessary extent, the smaller the impact on competition<sup>22 23</sup>.

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

- When the alliance partners include multiple businesses in an oligopolistic industry or when the R&D entity is restricted to a large degree<sup>24</sup>, this may substantially limit competition in the technology market (unreasonable restraint of trade)<sup>25 26</sup>.
- In addition, in cases where the R&D entity is restricted to a large degree, and the R&D is conducted for the purpose of developing technology essential in the business activities such as consistency in the specifications or standardization, this may become a problem if by restricting the participation of a specific enterprise in the R&D, such enterprise is excluded from the market providing the technology (private monopolization etc.)<sup>27</sup>. However, it is not a problem if the restricted enterprise is guaranteed access to the

<sup>20</sup> Guidelines Concerning Joint Research and Development under the Antimonopoly Act Part 1-2(1) (3)

<sup>21</sup> The collection of prior consultation cases on the Antimonopoly Act [Case No. 2 of 2016] [Case No. 8 of 2005] [Case No. 6 of 2004] and others.

<sup>22</sup> Guidelines Concerning Joint Research and Development under the Antimonopoly Act Part 1-2(1)(4)

<sup>23</sup> As an example of when the “target scope, the expansion of the period” became decision elements, The collection of prior consultation cases on the Antimonopoly Act [Case No. 8 of 2013] [Case No. 6 of 2004] [Case No. 8 of 2000]

<sup>24</sup> In many cases, joint R&D is carried out between a small number of enterprises, and in such case, there are not many problems in terms of the Antimonopoly Act (Guidelines Concerning Joint Research and Development under the Antimonopoly Act Part 1-1).

<sup>25</sup> Guidelines Concerning Joint Research and Development under the Antimonopoly Act Part 1-1

<sup>26</sup> The collection of prior consultation cases on the Antimonopoly Act [Case No. 7 of 2000]

<sup>27</sup> Guidelines Concerning Joint Research and Development under the Antimonopoly Act Part 1-2(2)

outcomes of the R&D and there is no risk that it will become difficult for the enterprise to engage in business activities.

Evaluation of the impact on the sales market of the product

Evaluation of the impact on the relationship between the alliance partners

- Evaluated in the same manner as “Evaluation of the impact on the relationship between the alliance partners” of the abovementioned “Evaluation of the impact on the markets providing the technology”

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

- Cases where the alliance partners include multiple enterprises in an oligopolistic industry, cases where the total market share of the alliance partners in the sales market of the products is high<sup>28</sup> or cases where there is a possibility that the nature of the research will affect the sales market of the products more directly<sup>29</sup> may substantially restrict competition in the sales market of the products (unreasonable restraint of trade)<sup>30</sup>.
- In addition, in cases where the market share of the alliance partners is considerably high, and the joint R&D is for the purpose of developing technologies essential for the business activities, such as consistency in specifications or standardization, this may become a problem if by restricting the participation of a specific enterprise in the R&D, such enterprise is excluded from the market providing the product (private monopolization, etc.)<sup>31</sup>. However, it is not a problem if the restricted enterprise is guaranteed access to the outcomes of the R&D and there is no risk that it will become difficult for the enterprise to engage in business activities.

Safe Harbor

- In joint R&D for product improvement and substitute product development, if the total market share of the products of the alliance partners is 20% or less, this is normally not considered to be problem<sup>32 33</sup>.

<sup>28</sup> The collection of prior consultation cases on the Antimonopoly Act [Case No. 2 of 2016] [Case No. 8 of 2013] [Case No. 6 of 2004] and others.

<sup>29</sup> Although R&D can be categorized into the stages of basic research, applied research, and development research, even if basic research that does not target specific product development is conducted, it usually does not have much of an impact on competition in the product market. On the other hand, the results of development research are said to have a direct impact on the product market (Guidelines Concerning Joint Research and Development under the Antimonopoly Act Part 1-2(1)(2)).

<sup>30</sup> Guidelines Concerning Joint Research and Development under the Antimonopoly Act Part 1-2(1)

<sup>31</sup> Guidelines Concerning Joint Research and Development under the Antimonopoly Act Part 1-2(2)

<sup>32</sup> Guidelines Concerning Joint Research and Development under the Antimonopoly Act Part 1-2(1)(1)



Evaluation of arrangements between alliance partners accompanying implementation of the business alliance

For example, the following actions may constitute a problem<sup>34</sup>.

- An act where one partner improperly restrains another partner's business activities, such as by imposing an obligation to transfer the improved invention, etc. which is the outcome of the R&D, to another alliance partner, or imposing an obligation of exclusive licensing on another partner.
- An act of arranging the price, quantity, customer, etc. of a product that uses the resulting technology

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## **2. Vertical and mixed R&D alliances (that do not have a competitive relationship in the product market)**

Examples of vertical and mixed R&D alliances are cases where the manufacturer of a certain product and the manufacturer of a part incorporated in the product engage in joint R&D on improvements to such part or substitute goods, and cases where enterprises that manufacture different products jointly engage in the R&D of technology for use of a part in common, etc.

### **(1) Market for examination**

The following markets mainly become the markets for review<sup>35</sup>.

- Markets providing technology which is the outcome of the joint R&D
- Each sales market of each product manufactured using this technology

### **(2) Evaluation of the impact on competition**

R&D collaboration mainly becomes a problem when enterprises which have a competitive relationship (including potential competitive relationships) share R&D, and it is usually less of a problem when the R&D collaboration is between business partners which do not have a competitive relationship<sup>36</sup>. However, for example, when the technology to be developed is highly versatile, there may be cases where a competitive relationship is recognized between the alliance partners in the market

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<sup>33</sup> The collection of prior consultation cases on the Antimonopoly Act [Case No. 5 of 2002 and 2003] [Case No. 7 of 2000]

<sup>34</sup> Refer to Guidelines Concerning Joint Research and Development under the Antimonopoly Act Part 2 for details of specific action types and ideas.

<sup>35</sup> See footnote 19.

<sup>36</sup> Guidelines Concerning Joint Research and Development under the Antimonopoly Act Part 1-1

providing the technology, and in that case, the impact on competition is evaluated as being due to a horizontal alliance.

## Specific Consideration on Technological Alliances

Technological alliances are expected to have the pro-competitive effect where the technology will be effectively utilized and a new market for products using this technology will be formed, etc.

On the other hand, alliance partners need to bear the following points in mind since arrangements that impose unfair restraints on business activities associated with the implementation of the business alliance, restrictions on competition between alternative technologies in the patent pool and restrictions on use exceeding the necessary range may constitute a problem.

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### **1. Horizontal (where there is a competitive relationship in the product market) technological alliances**

Examples of horizontal technological alliances are cases where the enterprises that have a competitive relationship in the product market grant a license to one another through the method of cross-licensing and cases where alliance partners are granted a license through a patent pool.

#### **(1) Market for examination**

The following markets mainly become the markets for review<sup>37</sup>.

- Markets providing technology which is the target of the business alliance
- Sales market for products manufactured using this technology

#### **(2) Evaluation of the impact on competition**

##### Cross-licensing

Article 21 of the Antimonopoly Act stipulates the provisions of the Act do not apply to acts found to constitute an exercise of intellectual property rights. Of the acts of restriction relating to the use of technology, the Antimonopoly Act is applied to acts that firstly are not seen to be the exercise of rights, and in addition, even if an act is appearance-wise recognized to be the exercise of rights, in cases where it deviates from the purpose of the intellectual property system or is contrary to the purpose of the system, which is that the

<sup>37</sup> Guidelines for the Use of Intellectual Property under the Antimonopoly Act 2-2(2)

ingenuity of the enterprise is demonstrated and the technology is utilized taking into consideration the purpose of the act, the form and the magnitude of the impact on competition, it cannot be evaluated as an “act found to constitute the exercise of rights” and therefore the Antimonopoly Act applies<sup>38</sup> (this concept also applies to the act of licensing technology using a patent pool in the “patent pool” below<sup>39</sup>).

Cross-licensing is a relationship in which technology is mutually licensed between the alliance partners, but since it does not immediately integrate the business activities of the alliance partners, and evaluation is conducted of the arrangements between the alliance partners accompanying implementation of the cross-licensing. For example, the following actions may be problematic<sup>40</sup>.

- An act between the alliance partners of arranging the sales price, volume and customers, etc. of products manufactured using the technology in accordance with the cross-licensing and an act of arranging not to grant a license for the technology to enterprises other than the alliance partners<sup>41</sup>.
- An act where one partner imposes unfair restraints on another partner’s business activities such as an act where one party restricts the scope of use of technology or imposes disadvantageous conditions on the use of technology on another party<sup>42</sup>.

Patent pool

[Evaluation of the impact on the technology supply market or product sales market]

The impact on the relationship between the alliance partners is mainly evaluated based on the following points, and if competition between the alliance partners is restricted, the impact on the technology supply market or the entire product sales market is also evaluated. It may be problematic if competition in the technology supply market or product sales market is substantially restricted (unreasonable restraint of trade, private monopolization, etc.).

- Integrated decision-making on important modes of competition

In cases where the patent pool contains technologies that have a substitutable relationship with each other where the rights-holders differ<sup>43</sup>, the decision-making for each licensing condition related to the substitutable technology will be integrated through the operation of the patent pool<sup>44</sup>. In addition, when jointly deciding on restrictions on technology usage beyond the scope necessary for smooth operation of the patent pool, such as

<sup>38</sup> Guidelines for the Use of Intellectual Property under the Antimonopoly Act 2-1

<sup>39</sup> Guidelines on Standardization and Patent Pool Arrangements Part 1

<sup>40</sup> See Guidelines for the Use of Intellectual Property under the Antimonopoly Act 4 for details of specific action types and ideas.

<sup>41</sup> Guidelines for the Use of Intellectual Property under the Antimonopoly Act 3-2(3)

<sup>42</sup> Guidelines for the Use of Intellectual Property under the Antimonopoly Act 3-1(2),(3), 4-3 to 5

<sup>43</sup> If the patent pool is composed only of essential technologies (essential patents), there is no risk that competition between these technologies will be restricted even if the licensing conditions are fixed between the alliance partners (Guidelines on Standardization and Patent Pool Arrangements Part 3-2)).

<sup>44</sup> Guidelines on Standardization and Patent Pool Arrangements Part 3-2(1)b(1)

not permitting licenses other than through the patent pool, the impact on competition is considered to be significant<sup>45</sup>.

- Possibility of coordinated conduct

For example, when information that is important in terms of competition in the product sales market, such as product production, sales volume and sales price, etc. is concentrated in one patent pool operator at the time of the operation of the patent pool, it is necessary to take information-blocking measures or other methods so that this information is not exchanged or shared between the alliance partners<sup>46</sup>.

Also, even in cases where the technology included in the patent pool is not in a substitutable relationship, it may also be a problem if a technology included in the patent pool is in a substitutable relationship with technology outside of the patent pool, and through being licensed bundled together with essential technology, the substitutable technology outside the patent pool cannot be easily licensed and is excluded from the technology market (private monopolization, etc.)<sup>47</sup>.

[Evaluation of arrangements between alliance partners in accordance with the implementation of the business alliance]

For example, the following actions may constitute a problem<sup>48</sup>.

- An act of arranging the sales price, volume, customers, etc. of products manufactured using the technology included in the patent pool<sup>49</sup>.
- An act of imposing unfair restraints on the business activities of other enterprises such as an act of restricting R&D of competing specifications on a licensee without any justifiable reason in cases of granting a license through a patent pool pertaining to the specifications<sup>50</sup>.

Safe harbor

With regard to acts of restriction relating to the use of technology, cases where the total market share of the product market of enterprises engaging in business activities using the technology which is the target of the restrictive act is 20% or less, the competition-lessening effect is generally considered to be minimal except in cases where the contents of the act impose restrictions pertaining to the sales prices of the products using the technology, sales volume, market share, sales region or customers, restrictions on R&D activities, the obligation

<sup>45</sup> Guidelines on Standardization and Patent Pool Arrangements Part 3-2(2)b

<sup>46</sup> Guidelines on Standardization and Patent Pool Arrangements Part 3-2(3)

<sup>47</sup> Guidelines on Standardization and Patent Pool Arrangements Part 3-2(1)b(2)

<sup>48</sup> Refer to Guidelines on Standardization and Patent Pool Arrangements Part 3-3 for details of specific action types and concepts.

<sup>49</sup> Guidelines for the Use of Intellectual Property under the Antimonopoly Act 3-2(1)C

<sup>50</sup> Guidelines for the Use of Intellectual Property under the Antimonopoly Act 3-2(1)B, Guidelines on Standardization and Patent Pool Arrangements Part 3- 3(2)a

of transferring the improved technology or the obligation of exclusive licensing<sup>51</sup>.

## **2. Vertical and mixed technological alliances (which do not have a competitive relationship in the product market)**

Examples of vertical and mixed technological alliances are cases of granting mutual licenses between enterprises that manufacture different products through the method of cross-licensing of the technology which is used in common in these products or granting a license to alliance partners, etc. through a patent pool, and cases where a manufacturer of a certain product and a manufacturer of a part incorporated in the product grants a license for the technology used in the product and the parts to enterprises through a patent pool, etc.

### **(1) Market for examination**

The following markets mainly become the markets for review<sup>52</sup>.

- Markets providing technology which is the target of the alliance
- Each sales market of each product manufactured using this technology

### **(2) Evaluation of the impact on competition**

Cross-licensing

\* Same as the abovementioned 1 (2) "Cross-licensing".

Patent pool

Even if a patent pool is implemented between enterprises that do not have a competitive relationship in either the product sales market or the technology supply market, through the granting of a bundled license, or where a license outside the patent pool is not permitted, this may cause problems of closure and exclusivity in the technology supply market or the product sales market.

Also, for example, when technology licensed through a patent pool has substitutability, a competitive

<sup>51</sup> Guidelines for the Use of Intellectual Property under the Antimonopoly Act 2-5. Incidentally, when considering the impact on competition in the technology market, this in principle will depend on the standard, but when it is not possible to calculate the product share or it is not deemed appropriate to determine the impact on the technology market based on the product share, it is thought that in addition to this technology, if there are four or more persons who have the right to a substitutable technology that can be used without causing any significant hindrance to the business activities, the anti-competitive effect is considered to be negligible.

<sup>52</sup> See footnote 37.

relationship is recognized between the alliance partners in the technology provision market, and in this case, the impact on competition is evaluated in terms of being a horizontal alliance.

In addition, the problem of arrangements between alliance partners associated with the operation of the patent pool may be considered. (See the abovementioned 1 “Evaluation of the arrangements between the alliances partners associated with implementation of the business alliance of the Patent pool”).

### Specific Consideration on Standardization Alliances

Standardization alliances<sup>53</sup> are expected to have the pro-competitive effect through a rapid start-up of the market for the products that adopt the standardized specifications and expansion of demand and so on.

On the other hand, alliance partners need to bear in mind the following points since there are cases of substantial restraint of competition through standardization exceeding the necessary range, exclusion of enterprises from the market due to restrictions on participation in standardization activities, and arrangements imposing unfair restraints on business activities associated with implementation of the standardization alliance.

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#### **1. Horizontal (where there is a competitive relationship in the product market) standardization alliances**

Examples of horizontal standardization alliances are cases where specifications are established for the type, quality, etc. of products, parts, technologies to be used, etc., among enterprises that have a competitive relationship in the product market<sup>54</sup>.

##### **(1) Market for examination**

The following markets mainly become the market for review.

- Markets providing technology incorporated in the specifications

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<sup>53</sup> Standardization activities impose certain restrictions on the business activities of participants by, for example, standardizing product specifications and performance, but on the other hand, they also contribute to the rapid launch of the market, and the activities themselves are not an immediate problem under the Antimonopoly Act (Guidelines on Standardization and Patent Pool Arrangements Part 2-2).

<sup>54</sup> As more specific aspects, (i) a small number of competitors jointly develop a new product, and gain an overwhelming share through market competition with competing products to widely disseminate the specifications of the product, (ii) by accepting a large number of participants through disclosing the activities and formulating specifications based on technological proposals from the participants, the specifications are widely disseminated, (iii) after the core technology of the specifications was developed by a small number of persons in private, by making the activities public at the stage of determining additional parts, and formulating specifications through incorporating technological proposals from the participants, the specifications are widely disseminated, etc. (Guidelines on Standardization and Patent Pool Arrangements Part 2-1).



- Sales market for products that adopt the specifications

## **(2) Evaluation of the impact on competition**

[Evaluation of the impact on the relationship between alliance partners]

Integrated decision-making on important modes of competition

- Since the standardization alliance itself partially shares the specifications and functions of the products, etc. which are an important mode of competition, in cases of formulating specifications which exceed the scope necessary to realize the benefits of standardization such as ensuring compatibility (standardization of specifications and performance, etc.), the impact on the competition is large<sup>55</sup>. The same applies when jointly deciding not to revise the contents of specifications based on the non-adoption of the technological proposals of a specific enterprise or the outcomes of technological improvements<sup>56</sup>.

[Evaluation of the impact on the technology provision market or entire sales market of the product (when competition between the alliance partners is restricted)]

For example, in cases where a large number of competing enterprises are participating as alliance partners, and the established specifications become a de facto standard, competition in the technology supply market or product sales market may be substantially restricted (unreasonable restraint of trade, private monopolization, etc.).

In addition, in cases where it is difficult to develop and produce a product that adopts the established specifications without participating in the standardization activities pertaining to the standardization alliance, exclusion from the product sales market by restricting a specific enterprise from participating in the standardization activities without any justifiable reason may constitute a problem (private monopolization, etc.)<sup>57</sup>.

[Evaluation of arrangements between alliance partners associated with implementation of the business alliance]

For example, the following actions may constitute a problem.

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<sup>55</sup> Guidelines on Standardization and Patent Pool Arrangements Part 2-2(3)

<sup>56</sup> Guidelines on Standardization and Patent Pool Arrangements Part 2-2(4)

<sup>57</sup> Guidelines on Standardization and Patent Pool Arrangements Part 2-2(5)

An act to jointly arrange the sales price, production volume, timing of commercialization, etc. of products that adopt the established specifications<sup>58</sup>.

An act that restricts or prohibits the development of competing specifications without any justifiable reason and the development and production of products that adopt competing specifications<sup>59</sup>.

An act where a specific alliance partner who is participating in the specification activities proactively urges that its own technology be incorporated into the specifications, and after the specifications have been formulated and widely spread, refuses to grant a license for the technology to other alliance partners who intend to adopt the specifications without any justifiable reason (including cases of requesting a license fee so high that it can be equated with refusal)<sup>60</sup>.

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## **2. Vertical and mixed standardization (where there is no competitive relationship in the product market) alliances**

Examples of vertical and mixed standardization alliances are cases where, as well as the multiple manufacturers who are in a competitive relationship, multiple secondary manufacturers that manufacture products that incorporate the products of the manufacturer participate, and specifications are formulated with regard to the products, parts, type and quality of technologies to be used, and cases where enterprises manufacturing different products formulate specifications with regard to the type and quality of technology to be used in common with these products.

### (1) Market for examination

The following markets mainly become the market for review.

- Markets providing technology incorporated in the specifications
- Each sales market of each product adopting the specifications

### (2) Evaluation of the impact on competition

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<sup>58</sup> Guidelines on Standardization and Patent Pool Arrangements Part 2-2(1)

<sup>59</sup> Guidelines on Standardization and Patent Pool Arrangements Part 2-2(2)

<sup>60</sup> Guidelines on Standardization and Patent Pool Arrangements Part 2-3. In addition, in cases of license refusal after the FRAND declaration in the standardization activities through the standardization organizations, etc. (hold-up problem), see Guidelines for the Use of Intellectual Property under the Antimonopoly Act Part 3-(1) (i)(e) and Part 4-(2) (iv).

In the standardization alliances, as stated above, it is thought that multiple enterprises who are in a competitive relationship participate even in vertical and mixed alliances. For this reason, in evaluating the impact on competition, first, the points relating to the alliance relationship between the competitors are evaluated in light of 1 above, and based on this, the impact on competition related to the overall alliance relationship is also evaluated.

In addition, for example, when the technology incorporated in the specifications to be developed is highly versatile, there may be cases where a competitive relationship of the alliance partners is recognized in the technology provision market, and in that case, the impact on competition is evaluated as a horizontal alliance.