公正取引委員会
Japan Fair Trade Commission

Tentative Translation

Guidelines Concerning the Activities of Enterprises, etc. Toward the Realization of a Green Society Under the Antimonopoly Act

<Summary>

March 31, 2023

Japan Fair Trade Commission

1. Background and Purpose

Climate change is a pressing issue for all countries, irrespective of whether they are developed countries or developing countries, threatening the security of human beings across borders. This issue urgently requires the international community to strengthen its concerted efforts.

In Japan, the cabinet decision on **"the Plan for Global Warming Countermeasures"** was made in October 2021. In this decision, Japan declared as **an ambitious target consistent with the target of carbon neutrality by 2050", that it was aiming to reduce its level of greenhouse gas emissions by 46% from the level in FY 2013 by FY 2030 and would continue to take on challenges to reach the ultimate goal of 50% reduction**.

To achieve these reduction targets, it is necessary to create a society that combines the reduction of environmental burdens and the accomplishment of economic growth, i.e., the realization of a "green society."

The realization of a green society needs to be done by the close cooperation of citizens, the national government, local governments, businesses, private bodies, etc., and each of them takes some degree of responsibility.

While environmental policies, etc. play a central role in the realization of a green society by implementing direct actions such as setting down regulations and granting subsidies, the Antimonopoly Act and competition policy can be regarded as **indirect contributors**.

Roles of the Antimonopoly Act and Competition Policy

- Promotion of efficient utilization of resources through competition
- Promotion of innovation including new technologies through competition

- If it is not clear enough how to apply the Antimonopoly Act, it may possibly cause concerns for enterprises and trade associations that their various efforts toward the realization of a green society might pose problems under the Antimonopoly Act.
- Given that the efforts of enterprises, etc. toward the realization of a green society are expected to be even more active and take shapes in years to come, the further promotion of their efforts in terms of competition policy is also required.

The JFTC has formulated the Guidelines for the purposes of preventing anti-competitive conduct that stifles innovation such as the creation of new technologies, and of encouraging the activities of enterprises, etc. toward the realization of a green society by further improving transparency in the application and enforcement of the Antimonopoly Act in relation to the activities of enterprises, etc., and predictability for enterprises, etc.

2. Basic Concept

The activities of enterprises, etc. toward the realization of a green society are basically unlikely to pose problems under the Antimonopoly Act most of the time.

In many cases, the activities of enterprises, etc. toward the realization of a green society are not intended to restrain fair and free competition among them but rather have pro-competitive effects such as promoting the creation of new technologies and excellent products. Such activities are expected to contribute to the interests of general consumers, for example through reduction of greenhouse gas emissions.

On the other hand, if activities of enterprises, etc. **have solely anti-competitive effects to restrain fair and free competition among enterprises, etc.** by imposing restraints on prices/quantities, technologies, etc. of individual enterprises, **such activities pose problems under the Antimonopoly Act** even where those are nominally aimed at contributing to the realization of a green society.

Those activities are problematic as they harm the interests of general consumers, such as by stifling innovation including the creation of new technologies, by increasing the prices of products or services, or by degrading the quality of products or services.

Furthermore, if specific activities of enterprises, etc. are considered to have anti-competitive effects as well as pro-competitive effects, whether those activities pose any problem under the Antimonopoly Act is found by comprehensively considering both types of effects generated by the activities with the rationality of the activity's purpose and the adequacy of the means employed for them taken into account (e.g., whether there are any less restrictive alternatives).

The Guidelines illustrates the framework while presenting supposed cases: "Acts that do not pose problems under the Antimonopoly Act" and "Acts that pose problems under the Antimonopoly Act".

* Whether specific activities of enterprises, etc. violate the Antimonopoly Act is to be found on a case-by-case basis.

* It is highly possible that the analysis framework of the Guidelines can also be applied to the activities toward the achievement of other SDGs.

3. Structure of these Guidelines

Guidelines Concerning the Activities of Enterprises, etc. Toward the Realization of a Green Society Under the Antimonopoly Act

Part I Joint Activities

- Overview
- Acts that do not pose problems
- Acts that pose problems
- Acts that require attention
- Supposed Cases

Part II Restraints on Business Activities of Trading Partners and Selection of Trading Partners

- Overview
- Acts that do not pose problems
- Acts that pose problems
- Supposed Cases

Part III Abuse of a Superior Bargaining Position

- Overview
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Part IV Business Combinations

- Overview
- Acts that do not pose problems
- Acts that pose problems
- Supposed Cases

Part V Consultation with the JFTC

- Introduction of Consultation Process
- Desirable preparation by enterprises, etc. for prompt and smooth consultation
- Contact points

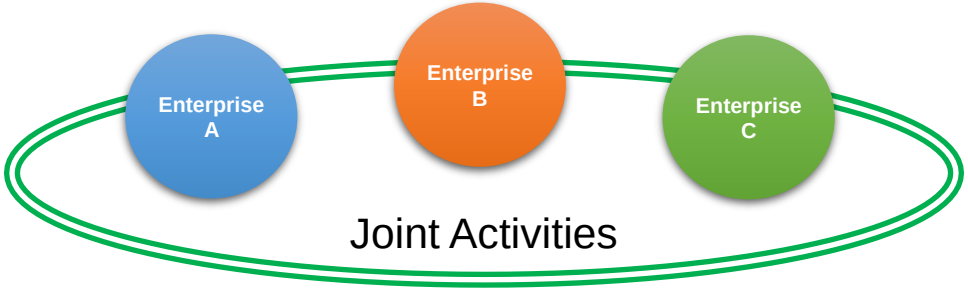
Continuously consider Adding supposed Cases

Continuously consider refining the Guidelines

Part I Joint Activities (1)

There are cases in which enterprises, etc. establish voluntary standards or implement joint activities such as joint R&D, as steps toward the realization of a green society.

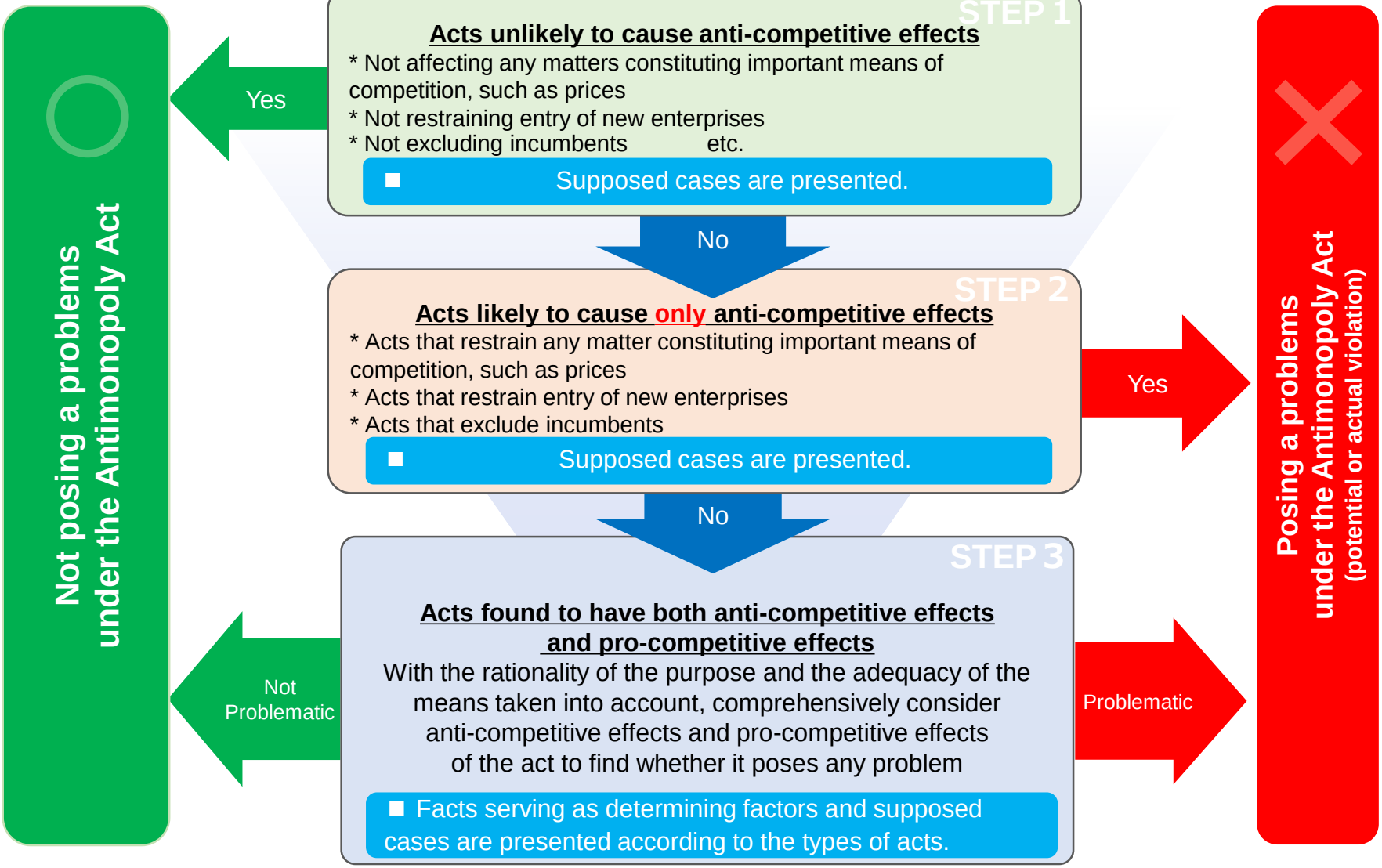
These activities seek to streamline business activities, for example, by enabling prompt business execution, cost reduction, or mutual complementation to address insufficiency related to work, technologies, etc., and are aimed at achieving the early realization of a green society. In many cases, joint activities can be implemented without causing problems under the Antimonopoly Act, and enterprises, etc. will not necessarily be held to be in violation of the Antimonopoly Act merely because of the fact they have conducted such activities.



- Establishment of voluntary standards
- Joint R&D
- Technology collaboration
- Standardization activities
- Joint purchasing
- Joint logistics
- Joint production and OEM
- Sales cooperation
- Data sharing

Whether joint activities pose problems under the Antimonopoly Act is found following the analysis framework below.

Joint Activities: Analysis Flowchart



Acts that do not pose problems under the Antimonopoly Act

STEP1

Among joint activities of enterprises, etc., those acts that are not expected to have any anti-competitive effects do not pose problems under the Antimonopoly Act.

Most of the joint activities of enterprises, etc. that satisfy the following factors are considered to fall under the category of acts without anti-competitive effects: not affecting matters that constitute important means of competition including prices, not restraining entry of enterprises, and not excluding incumbents from markets.

Supposed case 1: Industry-wide awareness-raising campaign

Trade Association X has decided to organize an awareness-raising campaign to promote the activities of individual enterprises in the industry toward the realization of a green society. In the implementation of the campaign, X has ensured the following matters: it is to be implemented to an extent that it will not affect any matters constituting important means of competition; entry of new enterprises will not be restrained; incumbents will not be excluded from the market; and it will not restrict the business activities of individual enterprises.

Supposed case 2: Compliance with statutory obligations

Trade Association X, which consists of manufacturers of Product A, has set the target recycling ratio for its member enterprises to comply with; the target ratio is same as the obligatory recycling ratio with which each individual enterprise is statutorily required to comply. Then, in an attempt to ensure the achievement of that recycling ratio, X has decided to encourage its members to publish on their websites that they are making efforts to achieve the goals, and has decided to publish the accomplishment rate of each member enterprise on X's website, with the consent of the member enterprise

Supposed case 6: Information exchange irrelevant to important means of competition

Enterprises X, Y, and Z, which are manufacturers of Product A, exchanged among them information on their respective activities for reducing greenhouse gas emissions, such as how to calculate the emissions, measures for energy saving, experiences of greenhouse gas emissions reduction leading to new transaction opportunities, and used that information as a reference for their respective activities. The matters constituting their important means of competition, such as their respective prices of Product A, were not subject to the information exchange.

Acts that pose problems under the Antimonopoly Act

STEP 2

If a joint activity of an enterprise, etc. causes **only** anti-competitive effects, in principle, it poses problems under the Antimonopoly Act.

Specifically, if a joint activity falls under (i) act that restrains any matter constituting important means of competition such as prices, (ii) act that restrains entry of enterprises, or (iii) act that excludes any incumbents from markets then even if the purpose of this joint activity is to realize a green society, it will, in principle, pose problems under the Antimonopoly Act without being justified by its purpose alone.

Supposed case 10: Joint disposal of production facilities

In order to reduce the amount of greenhouse gas emissions generated in the manufacturing processes of Product A, Enterprises X, Y, and Z, which are manufacturers of Product A, individually considered switching their existing production equipment to new equipment featuring a new technology for less greenhouse gas emissions. Under such circumstances, X, Y, and Z communicated with each other, without each of own decisions, to set their pace in the industry and decided the time of disposal of their existing production equipment and which pieces of their existing production equipment to dispose of.

[Commentary] It is because the enterprises jointly decided the time of disposal of their existing production equipment, etc. which is important means of competition that this activity poses problems under the Antimonopoly Act.

As long as the enterprises independently decide, considering the needs of the users, etc., each of their time of disposal of the production equipment, etc. and the contents of the decision get similar without forming tacit agreement and common intention, that will not pose problems under the Antimonopoly Act.

Supposed case 11: Restraints on technological development

Enterprises X, Y, and Z, which are manufacturers of Product A, were strongly required by Product A users to develop technologies to reduce greenhouse gas emissions. However, X, Y, and Z exchanged information on their respective R&D statuses among them so as to avoid the escalation of competition in the development of new technologies, and also restrained the new technologies adopted for the product to be offered to users in the future.

Acts that require attention in order not to pose problems under the Antimonopoly Act

STEP 3

When a joint activities is considered to have both anti-competitive effects and pro-competitive effects, whether such an activity poses any problem under the Antimonopoly Act needs to be assessed **by comprehensively considering both the anti-competitive effects and pro-competitive effects generated by the activity with the rationality of the activity's purpose and the adequacy of the means employed for it (e.g., whether there is any other less restrictive alternative means) taken into account.**

Types of conduct

Establishment of voluntary standards

- There are cases in which enterprises, etc. choose to establish voluntary standards for their business activities including the supply of products or services; for example, they possibly choose to formulate recommended standards concerning the types, quality, specifications, etc. of their products or services.

Business alliances

- An enterprise may possibly arrange a business alliance to reinforce its relationship with another enterprise and jointly implement operations.
- Business alliances include **Joint R&D, Technology collaboration, Standardization activities, Joint purchasing, Joint logistics, Joint production and OEM, Sales cooperation, Data sharing.**

Views on Establishment of voluntary standards

- In many cases, voluntary standards can be established without posing any problem under the Antimonopoly Act since they may potentially lead to pro-competitive effects; for example, the unification of specifications can potentially lead to such pro-competitive effects as the prompt launch of a market for products adopting the unified specifications or an expansion of the demands.

- However, since the establishment of voluntary standards may cause anti-competitive effects, for example, in the case where it restrains means of competition and unjustly harms the interests of users, or where it is unjustly discriminatory among enterprises, such establishment may pose problems under the Antimonopoly Act, depending on the contents or implementation methods of voluntary standards. For example, if the establishment of voluntary standards restrains the development or supply of specific products and restrains means of competition, thereby unjustly harms the interests of users, it may pose problems under the Antimonopoly Act. Furthermore, the establishment of voluntary standards containing discriminatory contents, or the restraining of the use of voluntary standards, amounts to discriminatory treatment, etc. in a trade association and may, if it impedes competition in connection with the development, supply, etc. of diverse products or services, pose problems under the Antimonopoly Act. In addition, the use and compliance of voluntary standards should be left to the discretion of each member enterprise; forcing member enterprises to use or comply with voluntary standards may pose problems under the Antimonopoly Act.

- Also, problems under the Antimonopoly Act arise if any act that restrains any matter constituting important means of competition, such as prices, is conducted in association with the establishment of voluntary standards.

Acts that do not pose problems under the Antimonopoly Act

Supposed case 12: Establishment of general activity guidelines concerning business activities aimed at reducing greenhouse gas emissions

In relation to the provision of Service A, the competent authority has not imposed on enterprises any statutory obligation concerning the reduction of greenhouse gas emissions. For the purpose of reducing the greenhouse gas emissions generated in the provision of Service A, Trade Association X, which consists of enterprises providing Service A, has decided to set voluntary standards indicating the desirable manner of conducting business activities in the decarbonization of Service A and to recommend its member enterprises to put those standards into practice to the extent possible for each enterprise. Those standards do not include any contents concerning matters constituting important means of competition, such as prices.

Supposed case 13: Establishment of specifications for products/services toward the reduction of greenhouse gas emissions (i)

The use of Raw Material B in the manufacturing processes of Product A emits a large amount of greenhouse gas emissions, and it has been found preferable to use Raw Material C in place of Raw Material B to reduce the greenhouse gas emissions. In order to reduce the greenhouse gas emissions generated in the manufacturing processes of Product A on an industry-wide basis, Enterprises X, Y, and Z, which are manufacturers of Product A, have decided to establish specifications for Product A whereby to replace Raw Material B with Raw Material C, and decided to arrange that each company can sell Product A compliant with those specifications with a certification label attached thereto and certifying Product A as a decarbonized product.

Although the use of Raw Material C is expected to increase the cost of Product A to a certain extent, Product A made from Raw Material C is found to have a clearly improved quality such as better durability, a lighter weight, etc., compared to the previous version of Product A. Furthermore, aside from Raw Material C, there is no substitute for Raw Material B that can be used for the purpose of reducing the greenhouse gas emissions.

[Commentary] Concerning this act, the rationality of the purpose is found within social and public purposes of greenhouse gas emissions reduction. Also, establishment of products standards is a pro-competitive method and the adequacy of the means is found since there is no substitute for raw material which can be used for decarbonization specification, aside from Raw Material C. Much as there is a concern that the price of Product A will increase because of expected cost increase owning to Raw Material C use, this act can be conducted, under overall consideration, if clearly improved quality is achieved and it does not unjustly harm the interests of users.

Supposed case 14: Establishment of specifications for products/services toward the reduction of greenhouse gas emissions (ii)

Normally, Consumable C placed inside a container made with Raw Material B is frequently used in the provision of Service A. However, it has been found that the use of a container made with Raw Material D in place of Raw Material B can lead to some reductions in greenhouse gas emissions. For the purpose of reducing the greenhouse gas emissions generated in the use of Consumable C, Enterprises X, Y, and Z, which provide Service A, have decided to set voluntary standards specifying that the use of a container made with Raw Material D is preferable for Consumable C in the provision of Service A, and has decided that each of the companies is to switch as much as possible to Consumable C placed inside containers made with Raw Material D.

Although the switch to containers made with Raw Material D is expected to increase the cost of containers to a certain extent, the ratio of the cost of Consumable C to the cost of provision of Service A is extremely small.

Acts that pose problems under the Antimonopoly Act

Supposed case 16: Restraints on prices, etc. in connection with the establishment of voluntary standards

For the purpose of reducing the greenhouse gas emissions generated through the manufacturing of Product A, Enterprises X, Y, and Z, which are manufacturers of Product A, set down voluntary standards specifying the desirable manner of conducting business activities for decarbonization of the manufacturing of Product A. Receiving requests for a certain amount of price reduction from users each year alongside their requests for decarbonization, the three companies set, in the voluntary standards, a rough indication of how much cost should be passed on to the price of Product A in an attempt to make improvements in the situation surrounding tough price negotiations with users.

Supposed case 19: Restraints on the use of equipment, etc. in connection with the establishment of targets for greenhouse gas reduction

For the purpose of reducing the greenhouse gas emissions generated in the provision of Service A, Trade Association X, which consists of enterprises providing Service A, has set a uniform annual target for member enterprises' reduction of the greenhouse gas emissions and has arranged that any member enterprise that has failed to achieve the target will not be allowed any longer to use the facility managed by X and required for the provision of Service A.

[Commentary] Concerning this act, social and public purposes of greenhouse gas emissions reduction are found to have the rationality. Nonetheless, considering that there are possible alternatives with smaller impact on member enterprises' business activities, trade association's imposition of disadvantage which is ban on member enterprise's use of facility necessary for their business activities, goes beyond establishment of the voluntary standards for greenhouse gas emissions reduction, and gets outside the reach of necessary and rational act for simply prompting member enterprises to achieve the target. For that reason, the adequacy of the means is not found. Therefore, this act poses problems under the Antimonopoly Act.

Business alliances：Views on Joint R&D

- There are cases in which enterprises jointly conduct basic, applied, or developmental research with other enterprises in competition and develop products with the technologies developed through such research in order to create technologies for the realization of a green society.
- In many cases, such joint R&D is implemented among such a small number of enterprises which do not affect competition in a market and thus can be conducted without causing problems under the Antimonopoly Act.
- On the other hand, problems under the Antimonopoly Act arise, for example, in the case where the majority of enterprises in competition in a product market conduct joint research despite the fact each of those enterprises can conduct research by itself, and thereby restrain their respective R&D activities, resulting in substantially restraining competition in the relevant technology market or product market.

Therefore, in the assessment of whether joint R&D poses any problem under the Antimonopoly Act in connection with joint R&D, the presence and degree of any anti-competitive effects are assessed first of all with consideration given to the following points:

(i) the number and market shares of participants in the joint R&D (with respect to joint R&D for modification of a product or for development of a substitute conducted by enterprises in competition with each other in the relevant product market, it will not normally pose problems under the Antimonopoly Act if the total market share of the relevant product held by its participants is 20% or less), etc.;

(ii) the characteristics of the joint R&D (e.g., whether it is basic, applied, or developmental research)

R&D projects can be classified into basic, applied and development researches as different stages of a comprehensive research work. And these differences in character are an important criterion in deciding whether the impact of a given joint R&D project on competition in the product market is direct or indirect. If a joint R&D project is conducted for basic research, which is not intended to develop a specific product, it usually would have little effect on competition in the product market, and is less likely to pose a problem under the Antimonopoly Act. On the other hand, if it is a developmental research, since its fruits would have a more direct impact on the product market, it would more likely pose a problem under the Antimonopoly Act;

(iii) the need for the joint R&D (e.g., cost apportionment); and

(iv) the scope of subject matters of the joint R&D, its period, etc. (e.g., whether the designated scope of subject matters and participating organizations is unnecessarily extensive)

Part I Joint Activities (10): Joint R&D (ii)

Acts that do not pose problems under the Antimonopoly Act

Supposed case 20: Joint R&D for a technology to reduce greenhouse gas emissions, for which it is difficult for an enterprise to conduct R&D alone

Although there has been an increased need for creating a new manufacturing method to significantly reduce the greenhouse gas emissions generated in the manufacturing processes of Product A, it is difficult for an enterprise to conduct the necessary R&D alone due to its enormous cost. For that reason, Enterprises X, Y, and Z, which are manufacturers of Product A, have decided to jointly conduct the R&D. In the implementation of the joint R&D, X, Y, and Z are to take the measures necessary for preventing the exchange of information on any matters constituting their important means of competition, such as their prices of Product A, and are to impose no restraint on their manufacturing and sales business based on the results of their joint R&D or on their respective R&D activities. Furthermore, although the total market share of X, Y, and Z in the manufacturing and sales market of Product A exceeds 70%, they will license other competitors to access the results of their joint R&D on the condition that those competitors bear reasonable costs.

Acts that pose problems under the Antimonopoly Act

Supposed case 21: Joint R&D that excludes alternative technologies

For the purpose of reducing the greenhouse gas emissions generated in the provision of Service A, Trade Association X, which consists of enterprises providing Service A, has decided to develop technology to improve Equipment B that is required for the provision of Service A in cooperation with its member enterprises. In order for its member enterprises to concentrate on the joint R&D for the improvement technology to be applied to Equipment B, X has prohibited its member enterprises from developing alternative technologies on their own.

Supposed case 22: Joint R&D involving restraints on prices, etc.

For the purpose of reducing the greenhouse gas emissions generated in the manufacturing processes of Product A, Enterprises X, Y, and Z, which are manufacturers of Product A, jointly developed a new manufacturing method which can significantly reduce the greenhouse gas emissions. In order to efficiently recover the cost of their joint R&D, X, Y, and Z has jointly decided to raise their selling prices of Product A.

Business alliances: Views on Joint purchasing

- There are cases in which an enterprise procures raw materials, components, and equipment jointly with its competitors similarly in need of such raw materials, etc. (joint purchasing).
- Joint purchasing is conducted for the purposes of enhancing bargaining power and establishing a stable and efficient procurement system. In the manufacturing of products that can contribute to the realization of a green society, globally rare materials or those raw materials whose procurement is unstable are often used, and, in such cases, the establishment of a stable and efficient procurement system is an issue. Accordingly, it is considered that a significant contribution to the realization of a green society can be made when such a stable and efficient procurement system is achieved through joint purchasing.
- Joint purchasing can generate pro-competitive effects by enabling stable and efficient procurement of raw materials, components, and equipment and can be implemented without causing problems under the Antimonopoly Act in many cases. However, problems may arise in the case where competition is substantially restrained in the purchase market of products subject to joint purchasing or in the selling markets of those products/services whose supply is based on products subject to joint purchasing.

When, for instance, the joint purchasing participants market shares of the products subject to the joint purchasing are high, and competitive pressure from the competitors is weak, the participants can control the purchase price at their own discretion, freely to some extent, resulting in substantially restraints on competition in the relevant purchase market of the products. Furthermore, when, for instance, the joint purchasing participants market shares of selling some products/services are high, and the ratio of purchased amount of the products subject to the joint purchasing to the cost required for the supply of the products/services is high, competition in the relevant sales market of the products/services can be substantially restrained through the integration of decision-making among the joint purchase participants concerning the matters constituting important means of competition such as sales price of the products /services or through the facilitation of concerted practices.

Therefore, in the assessment of whether joint purchasing poses any problem under the Antimonopoly Act, the presence of any anti-competitive effects is assessed first of all with consideration given to the following points:

(i) concerning purchase market, the market shares of the joint purchasing participants in the purchase market, the presence of competitors in such market, etc.
(ii) concerning sales market, where the market shares of the joint purchasing participants in the sales market are high,
- the ratio of the purchased amount of the raw materials, etc. subject to the joint purchasing to the cost required for the supply of the relevant products/services, and
- the possibility of exchanging or sharing information on the selling prices, etc.; and
(iii) whether participation in the joint purchasing is voluntary and no restraint is imposed

Acts that do not pose problems under the Antimonopoly Act

Supposed case 28: Joint purchasing toward greenhouse gas reduction

It has been found that the use of Fuel B refined with a new technology is desirable in order to significantly reduce the greenhouse gas emissions generated through the provision of Service A. However, it is difficult for an enterprise alone to procure Fuel B in a stable manner since there are not many enterprises that supply or procure it and consequently its market has not really been formed yet. Enterprises X and Y, which provide Service A and together hold a total share of over 80% in the market for the service, have decided to jointly procure Fuel B until its market is formed so that its stable procurement is made possible.

In the implementation of joint procurement, X and Y have decided to share only the reasonably necessary information, such as on the necessary volume of Fuel B, between them and to take the measures necessary to prevent the exchange of information on any other matter constituting their important means of competition.

In addition, although the fuel costs account for a certain proportion of the cost for the provision of Service A, the ratio of the cost of Fuel B to the entire fuel costs is low. Considering that other types of fuel are to be concurrently procured by each of the companies in its own right, the impact of the joint procurement of Fuel B on competition for the provision of Service A is, at the moment, extremely limited.

Acts that pose problems under the Antimonopoly Act

Supposed case 29: Joint purchasing restraining competition in manufacturing and sales market of the products made from the raw materials subject to the joint purchasing

Product A is a general consumer product manufactured by processing Raw Material B, and Enterprises X, Y, and Z, which are manufacturers of Product A, together hold a total share of 80% in the manufacturing and sales market of Product A. From the perspective of streamlining procurement operations, Enterprises X, Y, and Z have decided to jointly procure Raw Material C that can be used to significantly reduce the greenhouse gas emissions generated through the manufacturing of Product A. The ratio of purchased amount of Raw Material C to the costs for the manufacturing of Product A is considerably high, and thus the manufacturing costs of Product A incurred by X, Y, and Z, so-called shared costs, are expected to bet higher, resulting in the integration of the decision-making concerning cost reduction, which is supposed to be one of the matters constituting important means of competition, and in the facilitation of concerted practices.

Business alliances: Views on Data sharing

- There are cases in which enterprises, etc. conduct activities to collect and share data on the greenhouse gas emissions generated through the manufacturing of specific products on an industry-wide scale, or jointly conduct activities with a number of competitors to collect and share data on the greenhouse gas emissions generated through the supply of specific services in order for those enterprises, etc. to develop new greenhouse gas reduction technologies on their own (hereinafter referred to as “data sharing”). Data sharing enables enterprises, etc. to collect a wide range of data and thus can be regarded as an important element in the assessment of specific activities toward the realization of a green society. In cases where, as a result of the assessment, such achievements facilitates as the development or new products/services that involve less greenhouse gas emissions, reductions in the greenhouse gas emissions generated through the supply of existing products/services, the improvement of safety, or the dissemination of technology through improvement of data interoperability or data integrity by standardization, data sharing can be considered to contribute to the realization of a green society.
- However, if data sharing facilitates concerted practices through mutual understanding of the matters constituting the important means of competition of the participants of the data sharing, such as the prices, quantities, etc. of the products/services sold by those participants, or limits data collection, which is normally implemented by each individual enterprise under ordinary circumstances, and thereby substantially restrains competition in the selling market of the products/services subject to the data sharing, problems under the Antimonopoly Act may arise.

Therefore, in the assessment of whether data sharing poses any problem under the Antimonopoly Act, the presence of any anti-competitive effects is assessed first of all with consideration given to the following points:

(i) the number of the participants, their market shares, etc.;

(ii) the characteristics of the data to be collected (the importance of the data in R&D using the data, the importance of the data as an input resource to the products/services using the data, etc.);

(iii) the necessity for data sharing;

(iv) the scope, period, etc. of the data sharing; and

(v) the independent activities in the selling field of the products/services concerned (information on the prices, quantities, etc. is not to be exchanged or shared)

Acts that do not pose problems under the Antimonopoly Act

Supposed case 38: Joint collection/use of the data necessary for activities toward greenhouse gas reduction

Enterprises X, Y, and Z, which are manufacturers of Product A and together hold a total share of over 60% in the manufacturing and sales market of Product A, have individually been conducting R&D on technology to reduce the greenhouse gas emissions generated through the use of Product A. In this R&D, it is essential to collect data on the amount of greenhouse gas emissions generated through the use of Product A from as many users as possible in order to make progress in the research. For that reason, X, Y, and Z have decided to collect data on the greenhouse gas emissions generated through users' use of Product A that those enterprises have sold, and to mutually share such data to make use of it for their respective R&D activities.

The data to be collected and shared will be anonymized and abstracted, and limited to the amount of greenhouse gas emissions associated with the use of Product A, and the matters constituting the enterprises' important means of competition, such as their prices of Product A, will not be shared. In addition, those enterprises will continuously and independently implement their R&D on technology to reduce the greenhouse gas emissions generated by Product A.

Acts that pose problems under the Antimonopoly Act

Supposed case 40: Joint collection/use of the data necessary for activities toward greenhouse gas reduction which involves the sharing of prices, etc.

Trade Association X consisting of enterprises providing Service A decided to collect data on the amount of greenhouse gas emissions generated through the provision of Service A by each of its member enterprises and to analyze relevant trends, in order to utilize such data and trends for consideration of possible service improvements toward greenhouse gas reduction in the provision of Service A. In the collection of such data, X also collected information on the trade conditions that each member enterprise presented to their individual customers, such as their prices and volumes, and shared such information with the member enterprises.

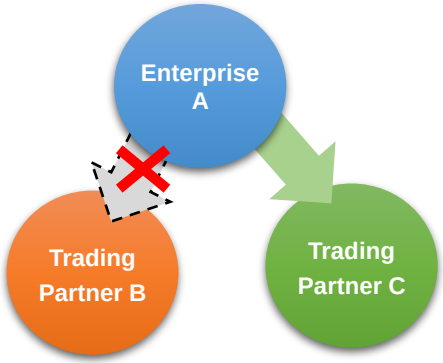
Part II Restraints on Business Activities of Trading Partners and Selection of Trading Partners (1)

There are cases in which an enterprise, etc., for the purpose of reducing greenhouse gas emissions, conducts any acts that restrain trading partners' products for sale, sales territories, purchasers, sales methods, etc. or acts that break off dealings with trading partners.

Such activities of enterprises, etc. mainly observed in vertical trade relationships do not generate anti-competitive effects in many cases if they are carried out for the purpose of reducing greenhouse gas emissions. Furthermore, restraints on business activities of trading partners may result in generating pro-competitive effects such as the enhancement of consumers' convenience with the selling methods of the products they purchase being unified, the expansion of a market with the necessary investment made by trading partners, or an increase in the number of trading partners that actively engage in greenhouse gas reduction. For that reason, problems under the Antimonopoly Act may not arise in many cases where the imposition of restraints on business activities of trading partners or selection of trading partners is carried out as an activity toward the realization of a green society.

- Restraints on trading partners' dealings with competitors and on trading partners' handling of competing products
- Restraints on sales territories
- Selective distribution
- Restraints on retailer's sales method

Restraints on Business Activities of Trading Partners



Selection of Trading Partners

- Individual refusal to deal
- Boycotts

Whether “Restraints on Business Activities of Trading Partners and Selection of Trading Partners” pose problems under the Antimonopoly Act is found following the analysis framework below.

Restraints on Business Activities of Trading Partners and Selection of Trading Partners: Analysis Flowchart

STEP 1

The type of the act falls under the category of “Acts that do not pose problems”

* Market foreclosure effects/price maintenance effects are unlikely to be generated.
* There is legitimate justification under the Antimonopoly Act.

etc.

■ Facts serving as determining factors and supposed cases are presented according to the types of acts

Yes → **Not posing problems under the Antimonopoly Act**

No

STEP 2

Act found to have both anti-competitive effects and pro-competitive effects

With the rationality of the purpose and the adequacy of the means taken into account, comprehensively consider anti-competitive effects and pro-competitive effects of the act to find whether it poses any problem

■ Facts serving as determining factors and supposed cases are presented according to the types of acts

Not Problematic → **Not posing problems under the Antimonopoly Act**

Problematic → **Posing problems under the Antimonopoly Act** (potential or actual violation)

Acts that do not pose problems under the Antimonopoly Act

Restraints on dealings with competitors and on the handling of competing products do not pose problems under the Antimonopoly Act in the following cases.

- Case where, on the basis of the substance and form of the activity concerned and the market condition, it is unlikely that market foreclosure effects will be generated by the restraint

For example, case where an enterprise with market a share of no more than 20% or a new entrant restraints its trading partners' dealing with competitors and handling of competing products generally does not tend to impede fair competition, does not become violate the Antimonopoly Act.

- Case where there is legitimate justification under the Antimonopoly Act for the restraint, such as the following:

(i) case where a finished product manufacturer engages a parts manufacturer to manufacture parts for the former by making use of materials supplied by the former, and the former requires the latter to sell those parts exclusively to the former; or

(ii) case where a finished product manufacturer engages a parts manufacturer to manufacture parts for the former by making use of the know-how (meaning know-how related to industrial technologies, and excluding any know-how that is not secret in nature) provided by the former, and the former requires the latter to sell those parts exclusively to the former when such restriction is deemed necessary for maintaining the confidentiality of the know-how or for preventing its unauthorized diversion.

Supposed case 41: Making continuous purchase, etc. obligatory as a condition for the supply of products that require further investment in equipment

Enterprise X, which is a manufacturer, developed a new version of Component A, which emits significantly less greenhouse gases in its manufacturing processes compared with conventional products. X has a share of 25% in the market of manufacturing of the previous version of Component A, Enterprise Y with a share of 20%, Enterprise Z with a share of 15%, etc. in the market.

Component A is used for the manufacturing of Finished Product B, and multiple manufacturers of Finished Product B have indicated their intention to purchase a large volume of Component A on a continuous basis into the future. In order for X to produce Component A in large volume, it is necessary to make certain investment to reinforce its production equipment. In order to ensure the recovery of its investment cost, X has obliged those trading partners which wish to purchase its Component A to continuously purchase its Component A in a certain amount for the next three years, which is necessary to recover its investment cost. Y and Z have also started selling a new version of Component A whose manufacturing processes emit significantly less greenhouse gases compared with its previous version. It is possible for enterprises intending to procure the new version of Component A continuously to find trading opportunity.

Acts that pose problems under the Antimonopoly Act

In the case where market foreclosure effects are generated, for example, by an influential enterprise in a market imposing restraints on its trading partners in terms of their dealings with the enterprise's competitors or their handling of competing products, problems under the Antimonopoly Act arise.

In such case, whether it is problematic under the Antimonopoly Act is found by comprehensively considering the anti-competitive effects and pro-competitive effects generated by, among other factors, the restraints on business activities of the trading partners, with the rationality of the purpose of the act concerned and the adequacy of the means employed for it taken into account. Specifically, each of the following factors is comprehensively considered in addition to the type of the act concerned; furthermore, when anti-competitive effects and pro-competitive effects are considered, it is necessary to take account of their impact on potential competitors at each trading stage:

(i) the actual conditions of interbrand competition (such as the degree of market concentration, the characteristics of the relevant products, the degree of product differentiation, distribution channels, and the difficulty in newly entering the market);
(ii) the actual conditions of intrabrand competition (such as the degree of dispersion in prices and the business types of distributors, etc. handling the relevant products);
(iii) the position in the market of the enterprise that conducts the act concerned (in terms of the market share, rank, brand value, etc.);
(iv) the impact on the business activities of the trading partners subject to the act concerned (such as the degree and form of the restraints); and
(v) the number of the trading partners subject to the restraints and their positions in the market.

The importance of each individual factor is different on a case-by-case basis, and therefore the substance of each factor should also be considered according to the business carried out by the enterprise conducting an act that poses vertical restraints.

Supposed case 42: Prohibiting retailers from handling competing products

Product A sold by Enterprise X, which is a manufacturer of Product A, is differentiated from other products of the same type and is highly regarded by general consumers.

In commencing the sale of a new version of Product A with a lower environmental burden compared with the previous one, X has decided to make it obligatory for retailers intending to sell its new version of Product A not to handle competing products in the future, in order to ensure demand for the new version of Product A. X is an influential enterprise in the market. By making it obligatory for its retailers to sell only the new version supplied by X when selling Product A, a certain number of retailers will be unable to handle competing products so that other manufacturers of Product A will be unable to find alternative buyers.

Selective distribution

When an enterprise sets up certain criteria for distributors handling its products and thereby limits distributors that can handle its products to those which meet the criteria, there are cases in which the enterprise prohibits those distributors from reselling its products to any distributor other than those authorized to handle its products. An act of this type is called selective distribution.

Acts that do not pose problems under the Antimonopoly Act

Selective distribution does not normally pose problems under the Antimonopoly Act in the case where the criteria set for distributors that handle the products concerned are found to be based on reasonably rational grounds in terms of the interests of consumers, such as for maintaining the quality of the products or for ensuring proper use of the products, and also where criteria equivalent to those mentioned above are applicable to other distributors which wish to handle the products.

Supposed case 45: Supply of products only to distributors that meet certain criteria associated with greenhouse gas reduction

Product A is manufactured by Enterprises X, Y and Z. X has successfully developed a new version of Product A that generates significantly less greenhouse gas emissions in its manufacturing processes compared with the previous version. In commencing the sale of the new version of Product A, X has decided to impose an obligation on those distributors (wholesalers and retailers) that are to handle the new version of Product A to reduce their greenhouse gas emissions to a certain extent, for the purpose of also reducing the greenhouse gas emissions generated at the sales stage of the product, in which Enterprise X is not directly involved.

X is to supply its new version of Product A only to those wholesalers which can be recognized as engaged in greenhouse gas reduction, and has obliged such wholesalers to sell the product only to those retailers which can similarly be recognized as engaged in greenhouse gas reduction. Equivalent criteria are applicable to all the distributors that wish to handle the new version of Product A.

Acts that pose problems under the Antimonopoly Act

An influential enterprise in a market may sets up certain criteria for distributors handling its products and thereby limits distributors that can handle its products to those which meet the criteria, and also where the enterprise prohibits those distributors from reselling its products to any distributor other than those authorized to handle its products.

In such case, whether it is problematic under the Antimonopoly Act is found by comprehensively considering the anti-competitive effects and pro-competitive effects produced by selective distribution, with the rationality of the purpose of the act concerned and the adequacy of the means employed for it taken into account. Specifically, each of the factors set forth in (i) through (v) of 2 (1) B above is comprehensively considered in addition to the type of the act concerned. Furthermore, when anti-competitive effects and pro-competitive effects are considered, it is necessary to take account of their impact on potential competitors at each trading stage.

The importance of each individual factor is different on a case-by-case basis, and therefore the substance of each factor should also be considered according to the business carried out by the enterprise conducting an act that poses vertical restraints.

Supposed case 46: Selective distribution aimed at prohibiting sale to price-cutting retailers

In commencing the sale of a new version of Product A with a high ratio of recyclable materials compared with the previous version, Enterprise X, which is a manufacturer of Product A, has decided to adopt a sales strategy under which the product is rolled out only to those distributors (wholesalers and retailers) which specialize in products with low environmental burdens, such as organic products, in order to strengthen the enterprise's sale particularly to those general consumers who are conscious of environmental problems and also raise the brand value of the product. X is to supply its new version of Product A only to those wholesalers which can be recognized as meeting certain criteria and specializing in organic products, etc., and has obliged such wholesalers to sell the new version of Product A only to those retailers which can similarly be recognized as specializing in organic products, etc. However, in order to prevent its price collapse, X has actually, in the selection of distributors to which X is to sell Product A, set down a transactional condition that distributors are required to agree to sell Product A at or above a certain wholesale price or retail price, whichever is applicable.

Individual refusal to deal

When an enterprise determines which enterprise it conducts business with, it is basically a matter of its freedom of choice of trading partners. Even if an enterprise decides not to deal with another enterprise at its own judgment, considering such factors as prices, quality, and services, it basically poses no problem under the Antimonopoly Act.

Acts that do not pose problems under the Antimonopoly Act

An individual refusal to deal to a reasonable extent toward the realization of a green society does not pose problems under the Antimonopoly Act; for example, an enterprise may, at its own discretion, decide not to conduct business with other enterprises that are not capable of achieving certain targets for greenhouse gas reduction set by the enterprise for the purpose of reducing greenhouse gas emissions in its entire supply chain.

Supposed case 49: Termination of dealings with a trading partner that does not meet certain standards associated with greenhouse gas reduction

The competent authority for Service A has prescribed, in its guidelines, that enterprises providing Service A assume the duty to strive to reduce greenhouse gas emissions by 3% each year. Enterprise X that provides Service A has not fulfilled the duty to strive on the basis of its management decision. Enterprise Y, which is a manufacturer of Product B used for Service A, has independently found that, in light of its own social responsibility, it is not desirable to conduct business with X due to its failure to fulfill the duty to strive prescribed by the competent authority, and has decided to terminate its supply of Product B, which Y has so far sold to X.

[Commentary] This act is an individual refusal to deal with an enterprise which has not fulfilled the goal of reducing greenhouse gas prescribed by the competent authority. The act has been implemented following its social public purpose. It has not been executed as a means to ensure the effectiveness of a violation of the Antimonopoly Act or as a means to achieve an unjust purpose under the same Act. A decision of an enterprise to have dealings with which enterprise is basically fallen into the enterprise's freedom on choice of trading partners. Therefore, the act can be implemented without posing problems under the Antimonopoly Act.

Acts that pose problems under the Antimonopoly Act

Even in the case of a refusal to deal unilaterally implemented by an enterprise, if, as an exceptional case, such refusal is executed as a means to ensure the effectiveness of a violation of the Antimonopoly Act or as a means to achieve an unjust purpose under the same Act, such as for excluding a competitor from the market, problems under the Antimonopoly Act may arise.

In the judgment of whether it is problematic under the Antimonopoly Act in such a case, the following factors, among others, are comprehensively considered: whether it would be difficult for the enterprise whose dealings are refused to conduct its business activities; any adverse impact on competition in the market; the market position of the party carrying out the act concerned and those of competitors; and the duration and type of the act concerned.

Supposed case 51: Termination of dealings with distributors for the purpose of securing viability of trade with exclusive term

Enterprise X is a manufacturer of Product B used for the provision of Service A and holds a share of 50% in the manufacturing market of Product B. X has previously requested its trading partners not to deal with other manufacturers of Product B, which are competitors to the enterprise. In order to reduce the business opportunities of other competing manufacturers of Product B, make it difficult to find alternative trading partners, and also ensure the viability of these efforts, X has decided to terminate its dealings with those trading partners that do not honor its request on the pretext that X will not conduct business with other enterprises that have not specifically set out their greenhouse gas reduction targets.

Supposed case 52: Termination of dealings with competing enterprises as means to achieve to exclude them

Enterprise X, which is a manufacturer of Product A, also manufactures Component B that is indispensable for the manufacturing of Product A, and there is no other manufacturer of this component. Last year, X commenced the sale of a new version of Component B, which can significantly reduce the greenhouse gas emissions generated in its manufacturing processes, compared with the previous version. Considering that the demand of general consumers for Product A with significantly reduced greenhouse gas emissions in its manufacturing processes is growing, X has decided to terminate its existing dealings with Enterprises Y and Z, which are manufacturers of Product A, and not to supply the previous version and the new version of Component B to them for the purpose of excluding them from the market.

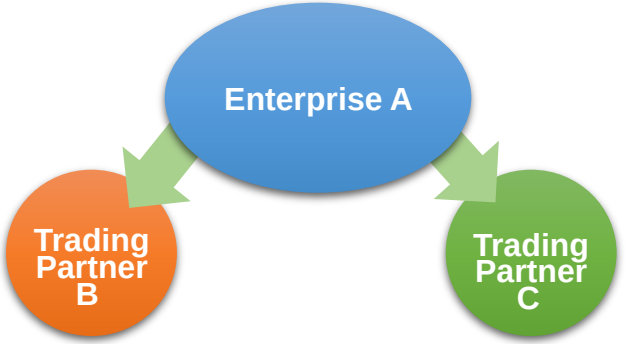
Supposed case 53: Refusal of competitors' access to the data indispensable for their business activities

Enterprise X, which provides Transportation Operation A, offers a service in which X collects, in real time, the location information, etc. of the transportation vehicles of plural enterprises similarly providing Transportation Operation A, and provides such information, etc. in the form of a database. There is no other enterprise that provides a substituting database. By referring to the database, enterprises providing Transportation Operation A can select optimal transportation routes and thereby reduce the greenhouse gas emissions generated through their provision of the operation. With an increase in customers' awareness of the issue of climate change in recent years, access to the database is indispensable to enterprises providing Transportation Operation A for their business activities. X has refused access to the database by Enterprise Y whose share in the market of transportation operation provision is growing, as means to make it difficult for Y to conduct its business activities.

Part III Abuse of a Superior Bargaining Position (1)

- There are cases in which an enterprise, for the purpose of reducing greenhouse gas emissions, imposes, on the counterparty to certain transactions, some conditions that pertain to the quality, etc. of the product or service being the subject matter of the transactions, and that differ from the existing conditions. For instance, in cases where an order has been placed with a transacting party for the continuous manufacturing of parts based on the certain specifications designated by the ordering enterprise, the requirement of a certain level of reduction in the greenhouse gas emissions generated in the manufacturing processes of the parts may be incorporated into the specifications. The trade terms between enterprises are basically left to the independent judgment of the transacting parties. Accordingly, the performance of such an act as that mentioned above does not necessarily pose problems under the Antimonopoly Act.
- Furthermore, there are cases in which an enterprise considers it necessary to work on the reduction of greenhouse gas emissions in its entire supply chain and makes a general request to the counterparty to its transaction, which is, its outsource entrusted with the manufacturing of parts, for considering implementing activities toward greenhouse gas reduction to a possible extent. Such an act will not pose problems under the Antimonopoly Act in the case where the enterprise discusses with each relevant party, on the basis of the results of its counterparty's consideration, the implementation of activities for greenhouse gas reduction in the manufacturing processes, etc. of parts and the changing of the trade terms and, in renegotiations for a new transaction price, sets a transactional price acceptable to both sides with due consideration given to the cost increment generated to the counterparty.
- However, if an enterprise takes advantage of its superior bargaining position over the other party to a transaction to, for example, perform the act of making a request to the counterparty for greenhouse gas reduction and unilaterally setting a price without considering the counterparty's cost necessary to fulfill the request, or the act of requesting the provision of economic benefits without any compensation on the grounds of greenhouse gas reduction, the performance of such act will give rise to problems under the Antimonopoly Act (Article 19 of the Antimonopoly Act) as Abuse of a Superior Bargaining Position, one of the conduct types of Unfair Trade Practices, in the case where the act concerned is found unjust in light of normal business practices, even if where the act concerned is for the social and public purpose of reducing greenhouse gas emissions.

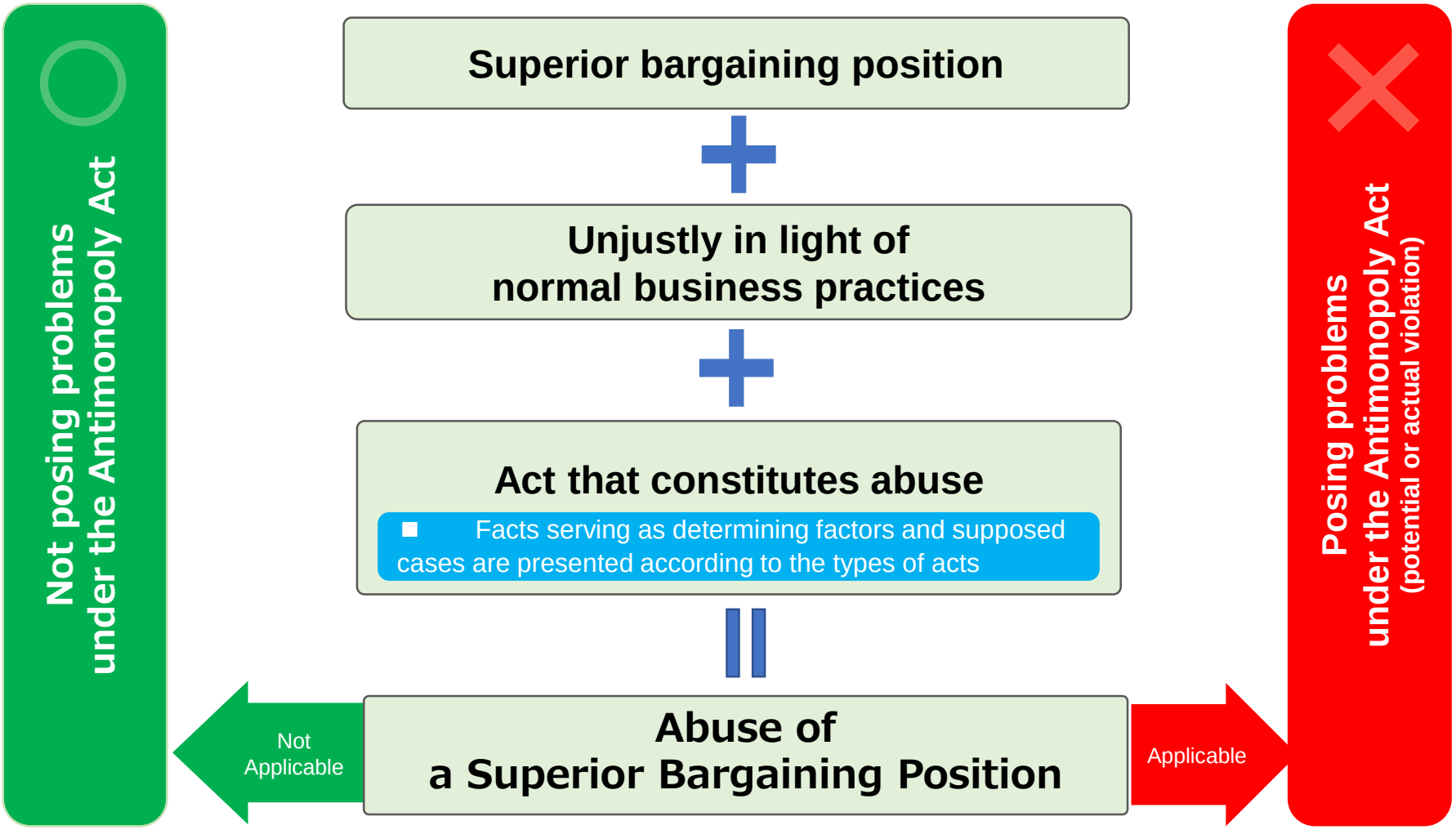
- Forced purchase/use
- Request for provision of economic benefits
- Unilateral decision on the consideration for a transaction
- Establishments of other trade terms, etc.



Abuse of a superior bargaining position

Outline of Abuse of a Superior Bargaining Position
With respect to whether an act poses problems under the Antimonopoly Act in this context, the following is assessed on a case-by-case basis: (i) by making use of one's superior bargaining position over the other party, (ii) unjustly in light of normal business practices, (iii) performs categories of acts that constitute Abuse of a Superior Bargaining Position.

Outline of Abuse of a Superior Bargaining Position



- **With respect to (i) "superior bargaining position over the other party,"** an enterprise which engages in the act does not need to have a dominant market position nor an absolutely dominant position equivalent thereto, but only needs to have a relatively superior bargaining position as compared to the counterparty. In determining the presence of a superior bargaining position, the following factors are comprehensively considered: the degree of dependence by the counterparty on the transaction with the enterprise; the position of the enterprise in the market; the possibility of the other transaction party changing its business counterpart; and other specific facts indicating the need for the other transaction party to deal with the enterprise. Also, when a party who has a superior bargaining position carries out transactions by unjustly imposing a disadvantage on the other party, such act is generally recognized as an act "making use" of the superior bargaining position.

- **With respect to (ii) "unjustly in light of normal business practices,"** it is found by considering such factors as the degree of the disadvantage at issue and the extensiveness of the act concerned, from the perspective of maintenance and promotion of fair competition and order. For that reason, it is necessary to note that the conformity of the act concerned with actually existing business practices does not necessarily justify the act.

- **With respect to (iii) "act that constitutes abuse,"** it is necessary to consider whether the act concerned falls under any of subitems (a) through (c) of Article 2, paragraph (9), item (v) of the Antimonopoly Act.

Part III Abuse of a Superior Bargaining Position (4): Request for provision of economic benefits (i)

Request for provision of economic benefits

There are cases in which an enterprise requests the counterparty to its transaction to provide economic benefits for purposes such as for reducing greenhouse gas emissions.

Acts that do not pose problems under the Antimonopoly Act

In the case where an enterprise requests the counterparty to its transaction to provide economic benefits for a purpose such as for reducing greenhouse gas emissions, and if the provision of economic benefits is carried out by the counterparty on its own free will, considering that the provision is within the scope of the direct benefit to be obtained through the provision, such act of requesting the provision of economic benefits would not unjustly impose a disadvantage on the counterparty in light of normal business practices and therefore would not cause problems under the Antimonopoly Act.

Supposed case 59: Provision of a monetary contribution by the counterparty to a transaction

Enterprise X, which is a manufacturer of consumer electronics, etc., actively engages in the development, manufacturing, and sale of energy-saving products for greenhouse gas reduction and operates a consortium among its competitors and enterprises from different industries, which conducts activities to raise consumers' awareness of lifestyle reforms toward the achievement of decarbonization. Enterprise participating in such consortiums are requested to pay a certain sponsorship fee.

X received an application from the counterparty to the transaction that it would like to participate in the consortium. X explained in advance the amount and use of the monetary contribution requested of the participants so that the counterparty could decide whether to provide it as a reasonable burden, and after consideration by the counterparty, X decided to have the counterparty pay the money as a monetary contribution and join the consortium.

Supposed case 60: Data sharing that constitutes a direct benefit for the counterparties to transactions

As a step toward the reduction of the greenhouse gas emissions generated in its entire supply chain, Enterprise X, which is a manufacturer of Product A, decided to visualize the amount of such emissions. Then, Enterprise X developed a platform to aggregate emission amount data at each trading stage within the supply chain and requested the counterparties to its transactions to provide their emission amount data to the platform in real time, including the emission amount data of their trading partners.

Since such data is extremely useful for each company in considering their activities for greenhouse gas reduction, X has arranged that each data-providing company can freely access the emission amount data aggregated on the platform, except for the data that each company is not willing to share with others due to its connection with business secrets, etc. Since X is supposed to provide those counterparties with the program required for provision of emission amount data to X, no extra cost will be incurred by those counterparties.

Part III Abuse of a Superior Bargaining Position (5): Request for provision of economic benefits (ii)

Acts that pose problems under the Antimonopoly Act

In the case where an enterprise in a superior bargaining position over the counterparty to its specific transaction conducts the act of requesting the counterparty to provide economic benefits for a purpose such as for reducing greenhouse gas emissions, such act would unjustly impose a disadvantage on the counterparty in light of normal business practices and cause a problem under the Antimonopoly Act, if such act is to impose on the counterparty a disadvantage of not being able to calculate in advance the amount that the counterparty is supposed to bear through its provision of economic benefits since the details, basis, or other matters of its burden of such provision have not been made clear between the enterprise and the counterparty, or if such act is to impose on the counterparty a disadvantage since such provision turns out to be a burden exceeding what is deemed as a reasonable scope considering the direct benefit, etc. to be obtained by the counterparty.

Supposed case 61: Request for bearing a financial burden in the name of greenhouse gas reduction, etc.

In order to ensure its profit, Enterprise X, which provides Transportation Operation A, decided that the counterparty to the outsourcing transaction whereby Enterprise X had outsourced part of its Transportation Operation A was to pay to X a certain amount according to the transaction amount of the counterparty as a "fee for greenhouse gas reduction measures," nominally for the purpose of reducing greenhouse gas emissions in X's value chain. X did not make clear the basis for calculation of the fee or the specific usage of the fee, and actually X did not use the collected fee for activities that could lead to any direct benefit for the counterparty.

Supposed case 63: Unilateral possession of data collected from the counterparties to transactions

As a step toward the reduction of the greenhouse gas emissions generated in its entire supply chain, Enterprise X, which is a manufacturer of Product A, decided to visualize the amount of such emissions. Then, Enterprise X developed a platform to aggregate emission amount data at each trading stage within the supply chain and requested the counterparties to its transactions to provide their emission amount data to the platform in real time, either free of charge or at a price lower than a reasonable amount commensurate with the costs incurred by the counterparty to the transaction in providing such data. Although such data is extremely useful for each company in considering their activities for greenhouse gas reduction, X has refused to grant the counterparties access to any data on the platform and has used such data only for considering its own activities.

[Commentary] This act is that Enterprise X requested its counterparty of the trading to provide data on greenhouse gas emissions with no compensation or under other conditions, but it did not allow the counterparty to have access to the collected data. Requests to provide various economic benefits to reduce greenhouse gas emissions are not in themselves problematic under the Antimonopoly Act. However, this act is problematic under the Antimonopoly Act since X did not pay appropriate compensation that takes costs into account, and did not allow the counterparty to have access to the collected data, despite that the counterparty incurs substantial costs in providing data, thereby unjustly impose a disadvantage to the counterparty.

Part III Abuse of a Superior Bargaining Position (6): Unilateral decision on the consideration for a transaction (i)

Unilateral decision on the consideration for a transaction

There are cases in which an enterprise, for purposes such as for reducing greenhouse gas emissions, requests the counterparty to its transaction to conduct an activity to accomplish the above purpose or make improvements, etc. to certain products or services. Such counterparty may incur additional costs in its implementation of such improvements, etc.

Acts that do not pose problems under the Antimonopoly Act

In the case where, an enterprise, in making a request to the counterparty to its transaction for improvement, etc. of the relevant products or services for a purpose such as for greenhouse gas reduction, proposes a revision of the transaction price in light of the additional costs that the counterparty is to incur due to such implementation, etc. and, in renegotiations for a new transaction price, sets a transaction price acceptable to both sides with due consideration given to the cost increment generated to the counterparty, such act of the enterprise would not pose problems under the Antimonopoly Act.

Supposed cases 64: Setting a price with consideration given to the increased cost of the counterparty

Enterprise X, which is a manufacturer of Product A, consulted with Enterprise Y, to which X had outsourced the manufacturing of Component B used in the manufacturing of Product A, about whether it was possible for Y to use environmentally-friendly Material D in place of Material C used at the time, and about the unit price of Component B for the case where the use of Material D became possible. As a result of this consultation, it was revealed that the procurement price of Material D was higher than that of Material C, and therefore the amount obtained by adding the difference in the procurement prices to the original unit price was set as a new unit price of Component B after change of the material.

Part III Abuse of a Superior Bargaining Position (7): Unilateral decision on the consideration for a transaction (ii)

Acts that pose problems under the Antimonopoly Act

In the case where an enterprise whose bargaining position is superior to that of the counterparty to its transaction unilaterally requests this counterparty to carry out the transaction for a considerably low consideration for a purpose such as for greenhouse gas reduction without regard to the cost increment to be generated to the counterparty, and if it is unavoidable for the counterparty to accept such request out of concern about any possible impact on future transactions or other relevant matters, such act of the enterprise would unjustly impose a disadvantage on the counterparty in light of normal business practices and therefore cause problems under the Antimonopoly Act.

Whether or not such act constitutes Abuse of a Superior Bargaining Position is determined after comprehensively considering the method for deciding on the consideration, such as whether or not the enterprise conducted sufficient discussions with the counterparty when deciding on the consideration, as well as whether or not the consideration is discriminatory in comparison to the consideration for other counterparties, whether or not the consideration is lower than the counterparty's purchase price, the difference between the normal purchase price or selling price, and the supply-and-demand relationship of the products or services subject to the transactions.

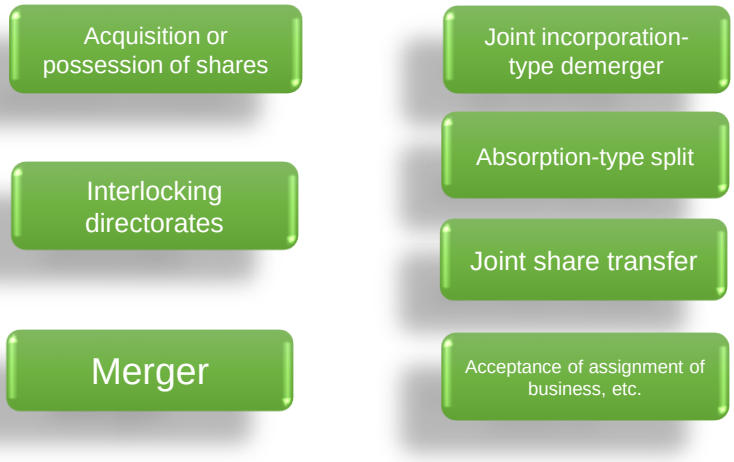
Supposed case 65: Unilateral decision on the consideration of an order based on specifications for less greenhouse gas emissions compared with conventional products

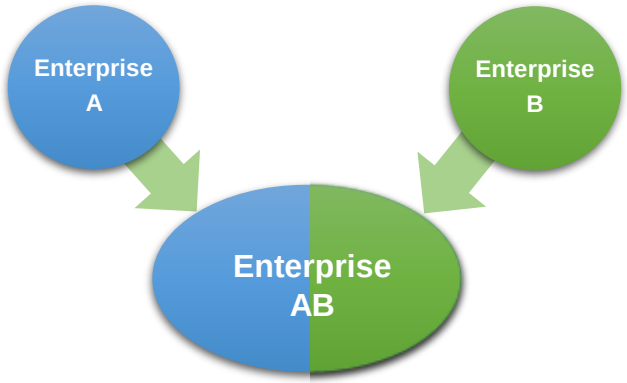
Enterprise X, which is a manufacturer of Product A, has placed orders with Enterprises Y and Z, to which X has outsourced the manufacturing of Component B used in the manufacturing of Product A, to the effect that, for all future deliveries of Component B, Component B needs to be based on the new specifications that incorporate the reduction of the greenhouse gas emissions generated in the manufacturing processes of Component B. In order to fulfill the specifications, Y and Z are to incur an increase in R&D costs and new costs for the procurement of different raw materials, etc. compared with those for the previous specifications. X has kept the transaction price of Component B at the same level as that for Component B based on the previous specifications without explicitly consulting with either of Y or Z on the additionally generated costs in price negotiations with those enterprises.

[Commentary] This act involves the failure to explicitly consult with the counterparty to the transaction in determining the transaction price, even though costs are incurred in placing the order to the counterparty based on the new specifications. Changing specifications for the purpose of reducing greenhouse gas emissions is not in itself a problem. However, unilateral price fixing without explicit consultation is problematic under the Antimonopoly Act.

- Enterprises may implement business combinations, for the purposes of strengthening their R&D capabilities and streamlining their business activities, among other purposes, in their efforts toward the realization of a green society. Such business combinations often have pro-competitive effects, such as the facilitation of active R&D activities leading to innovations including the development of new technologies, and the realization of efficient production and distribution contributing to reduction of greenhouse gas. Thus, such business combination causes no problem under the Antimonopoly Act in many cases.
- However, if a business combination is to substantially restrain competition in a market even despite its purpose being the strengthening of R&D capabilities associated with technologies that can contribute to reduction of greenhouse gas, (i) it may not only reduce users' choices and thereby impose a disadvantage on them, such as price increase, (ii) but also cause the parties to the business combination to lose their incentives to appropriately deal with demand and consequently to lose opportunities to grow further. Such business combination may eventually obstruct the stimulation of economic activities and rather impede the development or implementation of new technologies for reducing greenhouse gas emissions.
- From these perspectives, the Antimonopoly Act prohibits any business combination that may be substantially to restrain competition in a market. The JFTC reviews business combination cases in accordance with the provisions of the Antimonopoly Act.

* The term "business combination" means the acquisition or possession (hereinafter collectively referred to as "holding") of shares of another company (including equity interest; the same applies hereinafter) (Article 10 of the Antimonopoly Act), interlocking directorates (Article 13 of the same Act), shareholding by any person other than a company (Article 14 of the same Act), a company merger (Article 15 of the same Act), a joint incorporation-type split or absorption-type split (Article 15-2 of the same Act), joint share transfer (Article 15-3 of the same Act), or the acceptance of assignment of business, etc. (Article 16 of the same Act).





Business combinations

Particular field of trade

- In business combination review, first of all, the scope of a particular field of trade (market) is defined in terms of the scope of suppliers from which users can procure relevant products/services (hereinafter collectively referred to as a "product"), and then whether the planed business combination would pose any problem under the Antimonopoly Act is assessed by considering whether it may be substantially to restrain competition, i.e., whether the planed business combination would give rise to a situation where users cannot secure sufficient options.
- A particular field of trade denotes the scope for determining whether a business combination may restrain competition or not ("product range" and "geographic range").
- In some forms of trade, a particular field of trade can be constituted by a product range (or geographic range, etc.) while another particular field of trade might also be constituted by a wider (or narrower) product range (or geographic range, etc.), which means that both fields of trade may be constituted in an overlapping manner.

Supposed case 67: Market definition for products with different power sources

There are two types of Product A: **Product A1 that uses fossil fuels as its power source and Product A2 that uses electricity as its power source**. Product A2 whose power source is electricity can keep its total cost down when used for a long term and poses a low environmental burden, while also fossil fuels can be used for some Product A2 types. Under such circumstances, although the existence of any users who substitute Product A1 for Product A2 or vice versa cannot be negated, it is considered that there are certain number of users who do not recognize Product A1 and Product A2 as mutually substitutable due to their increased environmental awareness today. Therefore, it is found that the demand substitutability between Product A1 and Product A2 is limited. Furthermore, since the technology, know-how, etc. required for the manufacturing of Product A1 and Product A2 differ between them, the manufacturing of one of them is not found to be readily switchable to the manufacturing of the other. Accordingly, there is no supply substitutability found between Product A1 and Product A2. Based on such circumstances, **the product ranges of "Product A1" and "Product A2" have been separately defined**.

Supposed case 68: Market definition for the entire electricity generation business and the business of renewable energy-based electricity generation in an overlapping manner

In order to enhance its business of renewable energy-based electricity generation, Company X engaged in the business of electricity generation decided to acquire shares of Company Y with a proven track record in the same business field. Although there is no difference made in the quality, etc. of generated electricity depending on the method of electricity generation, there have been certain end users who specifically demand electricity generated by using renewable energy. Also, among electricity retailers which are direct users for the business of electricity generation, there have emerged those retailing enterprises which target such end users in their sale of electricity generated by using renewable energy. Such enterprises specifically select electricity based on renewable energy in their procurement. It is considered that, for those electricity retailers whose electricity supply targets such end users, electricity generated by using fossil fuels, centrally that by thermal power generation, cannot be a substitute for electricity generated by using renewable energy. In light of such changes in how users perceive renewable energy, among other matters, the demand substitutability between the business of electricity generation and the business of renewable energy-based electricity generation is becoming rather limited for users. By particularly separating out the business of renewable energy-based electricity generation among electricity generation businesses, **the service ranges of "the entire electricity generation business" and "the business of renewable energy-based electricity generation" have been defined in an overlapping manner**.

Acts that do not pose problems under the Antimonopoly Act

Supposed case 69: Horizontal business combination in a market where there are influential competitors

Because it is necessary for Company X engaged in the manufacturing and sale of Product A to invest an enormous amount in R&D to advance its activities for reduction of greenhouse gas, X has decided to acquire all the shares of, and thereby purchase, Company Y, which is a competitor manufacturing and selling the same Product A, in order to enhance X's investment capabilities and technical capabilities for R&D. There is no other product similar to Product A, and thus it constitutes a particular field of trade in terms of demand substitutability and supply substitutability. The market shares of X and Y in the market for Product A are 25% and 15%, respectively, and accordingly the business combination in this case does not meet the safe-harbor criteria for horizontal business combinations. With respect to companies manufacturing and selling Product A aside from X and Y, there are a number of competitors, each of which holds the larger level of market share compared to those of X and Y and has a sufficient excess capacity with ample manufacturing equipment and raw materials for Product A. Since Product A is sold with customizations made according to the needs of users, it is difficult to predict the behavior of the competitors, such as their pricing.

[Commentary] Although this business combination does not meet the safe-harbor criteria, it is regarded that the business combination may not be substantially to restrain competition through unilateral conduct since there are multiple competitors with greater market shares than those of the parties to the business combination and with sufficient excess capacities. Furthermore, given the market conditions under which it is difficult to predict the behavior of such competitors, it is considered that the business combination may not be substantially to restrain competition through coordinated conduct.

Supposed case: Horizontal business combination by establishing a joint investment company that is to conduct R&D activities

Companies X and Y, which are engaged in the manufacturing and sale of Product A, have actively conducted their respective R&D activities toward reduction of greenhouse gas emissions generated in their manufacturing processes of Product A. While it is essential for these companies to continue their R&D activities into the future to achieve technological innovations in order to accomplish their carbon neutrality, their costs for R&D activities and risks associated with their business activities have increased. On this basis, X and Y have decided to invest together in the establishment of a joint investment company that is to specialize in R&D for technologies to reduce greenhouse gas emissions generated in the manufacturing processes of Product A. However, X and Y will not be collaboratively engaged in the manufacturing and sale of Product A. Furthermore, the market shares of X and Y in the market for Product A are 30% and 20%, respectively, and accordingly the business combination in this case does not meet the safe-harbor criteria. Nonetheless, aside from X and Y, there are some influential competitors manufacturing and selling Product A, each of which actively engages in R&D and competes hard against the others in the stage of manufacturing and sale.

[Commentary] Since the establishment of a joint investment company, as seen in this case, may potentially create an indirect business combination relationship between its investing companies, whether the business combination concerned is subject to business combination review is found with the trade relationship between the parties to the combination and their business alliances, contractual relationships, and other relevant relationships taken into consideration. With respect to the case concerned, if there is a joint relationship between X and Y and the joint investment company, and a cooperative relationship is created between the investing companies (between X and Y) through the joint investment company in connection with the manufacturing and sale of Product A, it is considered that the horizontal business combination concerned may not be substantially to restrain competition through unilateral conduct despite the fact that it does not meet the safe-harbor criteria, because there are multiple influential competitors, each of which actively conducts R&D. Furthermore, given the market conditions under which there is fierce competition in the manufacturing and sale of Product A, it is considered that the business combination concerned may not be substantially to restrain competition through coordinated conduct.

Acts that pose problems under the Antimonopoly Act

Supposed case 71: Horizontal business combination that creates a situation similar to monopolization in a specific product market

Companies X and Y, which are engaged in the manufacturing and sale of Product A, have actively conducted their respective R&D activities with the aim of further reducing greenhouse gas emissions generated in their manufacturing processes of a new version of Product A that is compatible with new environmental regulations. With the demand for Product A forecast to expand in the future, X and Y have decided to merge with each other in order to avoid their competition in the manufacturing and sale of Product A becoming fierce and control increases in their costs for R&D activities.

This merger will lead to the situation where, aside from the parties to the merger, there is only one company engaged in the manufacturing and sale of Product A, and the business scale of this company is significantly smaller than those of X and Y. In addition, since high technical capabilities are required to commence the manufacturing and sale of Product A, it is difficult for others to newly enter the market. Furthermore, there is no other product that can be substituted for Product A, and it is not manufactured or sold overseas. For that reason, any competitive pressure from adjacent markets, import, etc. is not expected to arise.

[Commentary] The business combination concerned will raise the positions of Companies X and Y in the market of Product A, generating a situation close to monopolization. As there is only one competitor with a significantly small business scale, compared with those of Companies X and Y, no competitive pressure from competitors can be expected. Since no competitive pressure from adjacent markets, import, etc. can be expected as well, the business combination may be substantially to restrain competition by unilateral conduct or coordinated conduct.

Part V Consultation with the JFTC (1)

In the implementation of activities toward the realization of a green society, an enterprise, etc. may choose to consult with the JFTC on whether the specific act that it intends to carry out may pose any problems under the Antimonopoly Act, in addition to making its own judgment in this regard by reference to the Guidelines. To encourage the activities of enterprises, etc. toward the realization of a green society, the JFTC actively responds to their requests for advice in light of the Guidelines while maintaining close communication with an enterprise.

Consultation through the Prior Consultation System

- For the purposes of increasing transparency in the operation of laws and enriching consultation systems, the JFTC has been implementing the Prior Consultation System to provide consultation and written responses concerning whether the specific acts that enterprises, etc. intend to conduct pose any problem under the Antimonopoly Act.
- For consultation under the Prior Consultation System, a written response is given, in principle, within 30 days of receipt of an application form for prior consultation. However, where the submission of additional materials, etc. is regarded as necessary for giving a response and is requested after an application form for prior consultation has been received, a response is given within 30 days of receipt of all the materials, etc.
- When a response is given to the effect that there is no conflict with the provisions of the Antimonopoly Act, no legal measure will be taken against the act that is the subject matter of the consultation on the grounds of a conflict with the provisions of the same Act, unless the application form for prior consultation or submitted materials, etc. include any description that is not based on the facts, any act different from the one covered in the application is carried out, or any act is carried out either after the time limit shown in the response or in breach of the conditions shown in the response. Furthermore, the name of the applicant and the details of the consultation and response are published, in principle, within 30 days of the response.

Consultation NOT through the Prior Consultation System

- The JFTC also offers consultation NOT based on the Prior Consultation System (hereinafter referred to as “General Consultation”) with the aim of easing the burdens of parties seeking consultation and with consideration given to the maintenance of their confidentiality.
- In General Consultation, the explanation of each party seeking consultation is received by phone or in person at the JFTC, and its response is given, in principle, orally. It aims to promptly respond to each case, and the details of each consultation case are not published.

Part V Consultation with the JFTC (2)

To ensure prompt and smooth completion of the procedure for consultation with the JFTC, enterprises, etc. are requested to make preparations in relation to the following matters.

In the case of making an application form for consultation under the Prior Consultation System, it is necessary to submit an application form for prior consultation in the form designated according to the type of the case concerned, among the forms designated according to acts subject to consultation.

(i) Matters concerning the party to implement the act

- The name, address, capital amount, annual sales, and number of employees
- Outline of the business(es) currently managed

(ii) Matters concerning publication

- Whether publication is possible
- The time when publication becomes possible (if deferment is requested) and the reason for choosing such time

(iii) Matters concerning the act to be conducted

- The purpose of the act
- Details on the act
- The function, utility, usage, and characteristics of the targeted product/service
- The market shares of main enterprises associated with the above product/service (during the past three years), their ranks and other market conditions, and distribution channels
- The necessity for the act
- Other matters as references (e.g., the impact of the act on the realization of a green society)
- In the case of consultation on joint research and development, the product/service related to the joint research and development, its scope and period, and any restrictions on third-party access to its results
- In the case of consultation on the joint construction of a recycle system, the ratio of costs required for recycling to the selling price of each product associated with recycling, and the recycling market conditions

(iv) The opinion of the party seeking consultation with regard to the relationship between the act concerned and the provisions of the Antimonopoly Act

Contact points

Details of covered consultation	Headquarters 03-3581-5471 (Main phone number)	Local Offices
[Re: Parts I to III] Consultation on the specific and individual business activity that the enterprise/trade association intends to implement in connection with its transactions for products/services, its use of intellectual property, its voluntary standards/self-restraints, its joint activities, etc.	[Re: Parts I and II] Consultation and Guidance Office <Contact point for green related case consultation> [Re: Part III] Inter-Enterprise Trade Division	[Re: Parts I and II] Director of Economic Affairs, General Affairs Division, or General Affairs Section [Re: Part III] Trade Division or General Affairs Section
[Re: Part IV] Notification/Consultation concerning business combinations including the acquisition of shares and mergers	Mergers and Acquisitions Division	Director of Economic Affairs, General Affairs Division, or Economic Affairs Section

* Inquiries about the descriptions of the Guidelines (other than those on individual and specific acts in the future) should be directed to: Coordination Division.