

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

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Japan Fair Trade Commission

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## Introduction

### 1. Background and purpose of formulating the Guidelines

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.

Against this background, in Japan, as a “comprehensive and systematic global warming countermeasure” based on the Article 2-2 of the “Act on Promotion of Global Warming Countermeasures” (Act No. 117 of 1998), 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<sup>1</sup>, that it was aiming to reduce its level of greenhouse gas emissions by 46% from the level in fiscal 2013 by fiscal 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.<sup>2</sup> play a central role in the realization of a green society by implementing direct actions such as setting down regulations and granting subsidies, the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of 1947; hereinafter referred to as “the Antimonopoly Act”) and competition policy can be regarded as indirect contributors to realization of a green society through promotion of competition among enterprises and facilitation of the efficient utilization of resources, thereby leading to innovations including new technologies. Thus, the said Act and competition policy can be recognized as complementing environmental policies, etc.

At the same time, if it is not clear enough how to apply and enforce the Antimonopoly Act, it may possibly cause concerns for enterprises and trade associations (hereinafter referred to as an “enterprise, etc.” or “enterprises, etc.” as appropriate) that their various efforts toward the realization of a green society might pose problems under the Antimonopoly Act. In this regard, over a period of time, the Japan Fair Trade Commission (“JFTC”) has been, through publication of various guidelines and consultation cases, presenting viewpoints based on the Antimonopoly Act concerning the acts of enterprises, etc. conducted for social and public objectives, and thereby ensuring transparency in the application and enforcement of the Act, and predictability for enterprises, etc.<sup>3</sup> However, 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.

On this basis, 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

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

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<sup>1</sup> This means “the maintenance of equilibrium between the amount of greenhouse gas emissions generated from human activities and the amount of greenhouse gas emissions absorbed through the maintenance and intensification of greenhouse gas absorption.” (Article 2-2 of the Act on Promotion of Global Warming Countermeasures)

<sup>2</sup> Preferably, the formulation of environment policies, etc. should be considered in terms of any possibility that such policies, etc. may obstruct the economic activities of enterprises based on their free and voluntary decisions or pose any risk of impeding fair and free competition among enterprises.

<sup>3</sup> For example, this includes the publication of the Guidelines Concerning Joint Activities for Recycling under the Antimonopoly Act (June 26, 2001; hereinafter referred to as “the Recycle Guidelines”).

effects<sup>4</sup> 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. Therefore, those activities are basically unlikely to pose problems under the Antimonopoly Act most of the time.<sup>5</sup>

On the other hand, if activities of enterprises, etc. have solely anti-competitive effects to restrain fair and free competition among enterprises, etc.<sup>6</sup> by imposing restraints on prices/quantities, customers/distributions, technologies/facilities, etc. of individual enterprises, those activities are likely to 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. Such activities pose problems under the Antimonopoly Act even where those are nominally aimed at contributing to the realization of a green society.<sup>7</sup>

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 (e.g., whether there are any less restrictive alternatives).<sup>8</sup>

Under the above-mentioned framework, the Guidelines seek to present the relationship between the actual activities of enterprises, etc. and the Antimonopoly Act in a manner as plain as possible<sup>9</sup>. Accordingly, the supposed cases listed herein are merely abstracted examples broken down into patterns. When an act does not fit into any supposed cases provided as "Acts that do not pose problems under the Antimonopoly Act" in the Guidelines, it does not mean that the act violates the Antimonopoly Act. Furthermore, even if the Guidelines illustrate supposed cases as "Acts that pose problems under the Antimonopoly Act", the JFTC may exceptionally find such acts do not violate the act in consideration of various additional factors. Having these circumstances, the JFTC will actively address consultations from enterprises with meaningful communications in reference to what the guidelines say, to promote initiatives by enterprises toward realization of a green society. It should be needless to say that, whether a specific act of an enterprise, etc. including any cases which are not illustrated in the Guidelines constitutes a violation is finally to be determined on a case-by-case basis in light of the provisions of the Antimonopoly Act.<sup>10</sup>

Furthermore, on the basis that today, enterprises, etc. have centrally implemented activities

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<sup>4</sup> "Pro-competitive effects" mean effects toward the creation of new technologies, products, markets, etc. as a result of an activity of an enterprise, etc., thereby promoting competition among enterprises, etc. It is also called the improvement of efficiency in some cases.

<sup>5</sup> In the Guidelines, the term "problem under the Antimonopoly Act" means any action that is categorized as a violation or potential violation of the provisions of the Antimonopoly Act.

<sup>6</sup> "Anti-competitive effects" mean effects to restrain or impede competition among enterprises, etc. In the Guidelines, it means effects to restrain competition as to Private Monopolization, Unreasonable Restraint of Trade and prohibited Business Combination. As to Unfair Trade Practices, it means effects to impede competition. Although the degree of impact on competition between effects to restrain competition and effects to impede competition differs, the framework for determining such impacts is the same. Therefore, in the Guidelines, these are collectively referred to as "anti-competitive effects."

<sup>7</sup> Efforts by enterprise, etc. to realize a green society may be based on administrative guidance implemented in various forms in a wide range of fields. Regarding the efforts of enterprise, etc., even if they are induced by administrative guidance of administrative organs, the application of the Antimonopoly Act is not precluded. ("Guidelines under the Antimonopoly Act on Administrative Guidance" (June 30, 1994)). If efforts to realize a green society restrain or impede fair and free competition, enterprises, etc. will be held directly legally responsible even if they act in accordance with administrative guidance. This should be taken into consideration by administrative organs and enterprises, etc.

<sup>8</sup> The specific factors to be considered are explained in Parts I through IV according to conduct types.

<sup>9</sup> The underlines in the supposed cases in Parts I to III indicate the factors that affect whether or not they pose problems under the Antimonopoly Act. In addition, the underlined elements in the supposed cases in Part IV indicate important factors in the assessment or factors that affect whether or not there is any problem under the Antimonopoly Act.

<sup>10</sup> The guidelines are intended to serve as a reference when enterprises, etc. make their own assessment about whether or not there are problems under the Antimonopoly Act. However, when the JFTC makes decisions on the illegality of individual acts that have already been carried out, the framework and factors for the decision indicated in this Guidelines are considered to the extent necessary for each individual case.

to reduce greenhouse gas emissions as their efforts toward the realization of a green society, the Guidelines basically present viewpoints and supposed cases based on the Antimonopoly Act in connection with such activities. However, in addition to activities seeking to reduce greenhouse gas emissions, there are various activities implemented for socially and publicly desirable objectives and expected to contribute to the interests of consumers. It is highly possible that the analysis framework and other matters indicated in the Guidelines can also be applied to the activities of enterprises, etc. toward the achievement of the Sustainable Development Goals (“SDGs”) implemented similarly for socially and publicly desirable objectives, considering the characteristics of acts conducted as such activities.<sup>[11]</sup>

### 3. Structure of the Guidelines

The Guidelines are composed of the following five parts.

Part I covers those acts that may be conducted by enterprises, etc. as activities toward the realization of a green society and may potentially constitute “joint activities,” which include the establishment of voluntary standards and joint research and development (“R&D”), are carried out between/among competitors, and need to be reviewed in terms of Unreasonable Restraint of Trade and other relevant factors. In relation to such acts, this part broadly classified those activities into three categories: “Acts that pose problems under the Antimonopoly Act”, and “Acts that do not pose problems under the Antimonopoly Act” and “Acts that require attention in order not to pose problems under the Antimonopoly Act”. Then, it illustrates the framework and factors for finding problems under the Antimonopoly Act by reference to supposed cases of those.

Part II covers those acts that may be conducted by enterprises, etc. as activities toward the realization of a green society and may potentially constitute any “restraint on trading partners’ business activities or the selection of trading partners,” which includes the establishment of trading partner selection criteria, is carried out in a supply chain, and needs to be reviewed in terms of Unfair Trade Practices or Private Monopolization. In relation to such acts, this part explains the framework and factors for finding problems under the Antimonopoly Act by reference to supposed cases: “Acts that do not pose problems under the Antimonopoly Act” and “Acts that pose problems under the Antimonopoly Act”.

With respect to Part III, since acts associated with the counterparty to each transaction under Part II may need to be reviewed in terms of Abuse of a Superior Bargaining Position in some cases, Part III explains the framework and factors for finding problems under the Antimonopoly Act in connection with such acts by reference to supposed cases: “Acts that do not pose problems under the Antimonopoly Act” and “Acts that pose problems under the Antimonopoly Act”.

Part IV covers those acts which may need to be reviewed in terms of business combinations, such as where enterprises acquire each other’s shares or establish a joint investment company (meaning a company jointly established or acquired by two or more companies on the basis of a contract, etc. for the purpose of having this company execute necessary business for the sake of common benefits; hereinafter the same applies) to promote joint R&D or the streamlining of business activities. In relation to such acts, this part explains the framework and factors for finding problems under the Antimonopoly Act by reference to supposed cases: “Acts that do not pose problems under the Antimonopoly Act” and “Acts that pose problems under the Antimonopoly Act”.

Part V explains “Consultation with the JFTC,” describing how the JFTC responds to individual requests for consultation on the specific activities of enterprises, etc. toward the realization of a green society, and what preparations are required to ensure prompt and smooth implementation of the consultation procedure.

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<sup>11</sup> Unlike the target of carbon neutrality by 2050, Japan has not set specific goals for some of the Sustainable Development Goals (“SDGs”), and the importance of accomplishing each of those goals and the rationality and other factors of activities aimed at accomplishing those goals may not be consistent with how they are perceived in society. For that reason, it is not possible to definitely assert the applicability of the analysis framework and other matters described in the Guidelines to the activities of enterprises, etc. toward the achievement of the SDGs.

#### 4. Future actions

The JFTC will continuously review the Guidelines according to future changes in markets and business activities, specific cases of law enforcement and consultation, and other relevant matters. In order to encourage the activities of enterprises, etc. toward the realization of a green society, the JFTC will actively respond to their requests for consultation in light of the Guidelines. When an enterprise, etc. seeks, for example, preliminary consultation with the JFTC on its activity and asserts the rationality of the activity's purpose and the adequacy of the means employed in addition to pro-competitive effects based on a qualitative or quantitative rationale,<sup>12</sup> the JFTC will conduct prompt and accurate analysis on the basis of such rationale. At the same time, the JFTC will strictly deal with acts violating the Antimonopoly Act.

Furthermore, since diverse activities are expected to be implemented toward the realization of a green society, efforts have been made to improve predictability for enterprises, etc. by ensuring that the Guidelines cover as many conduct types supposed at present to be relevant in light of the Antimonopoly Act as possible and by describing hypothetical cases that may occur in the future as much as possible. However, it is envisaged that the diversity of activities to be implemented by enterprises, etc. will be even greater, given that a wide range of efforts has already been in progress toward the realization of a green society. Whether a specific activity that an enterprise, etc. plans to implement poses problems under the Antimonopoly Act is determined on a case-by-case basis in accordance with the provisions of the Antimonopoly Act. For other acts and points at issue than those covered in the Guidelines and for the acts and points that have different premises from the one assumed in the Guidelines, consultation cases, etc. to be released by the JFTC in the future should be useful references, in addition to the consultation cases, various guidelines based on the Antimonopoly Act,<sup>13</sup> etc. that the JFTC has so far released. The JFTC will actively publish consultation cases, etc. that are considered to be helpful for enterprises, etc.

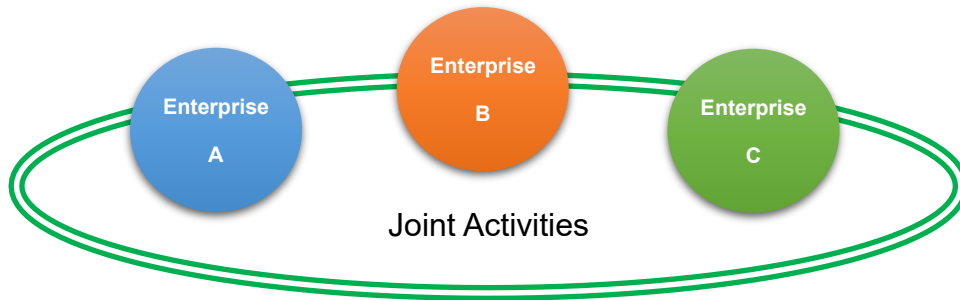
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<sup>12</sup> When such an assertion is made with a report on the results of an economic analysis, it is desirable to refer to the "Points to Consider When Submitting an Economic Analysis Report and Data (May 31, 2022)." In general, it is beneficial for both enterprises, etc. and the JFTC if enterprises communicate fully with the JFTC as early as possible.

<sup>13</sup> The guidelines, etc. include the following: the Guidelines Concerning the Activities of Trade Associations under the Antimonopoly Act (October 30, 1995; hereinafter referred to as "the Trade Association Guidelines"); the Guidelines Concerning Joint Research and Development under the Antimonopoly Act (April 20, 1993; "the Joint Research and Development Guidelines"); the Guidelines on Standardization and Patent Pool Arrangements (June 29, 2005; "the Standardization and Patent Pool Guidelines"); the Guidelines Concerning Distribution Systems and Business Practices under the Antimonopoly Act (July 11, 1991; "the Distribution and Business Practice Guidelines"); the Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act (October 28, 2009; "the Exclusionary Private Monopolization Guidelines"); the Guidelines Concerning Abuse of a Superior Bargaining Position under the Antimonopoly Act (November 30, 2010; "the Guidelines Concerning Abuse of a Superior Bargaining Position"); and the Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination (May 31, 2004; "the Business Combination Guidelines").

## Part I Joint Activities<sup>14</sup>

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.



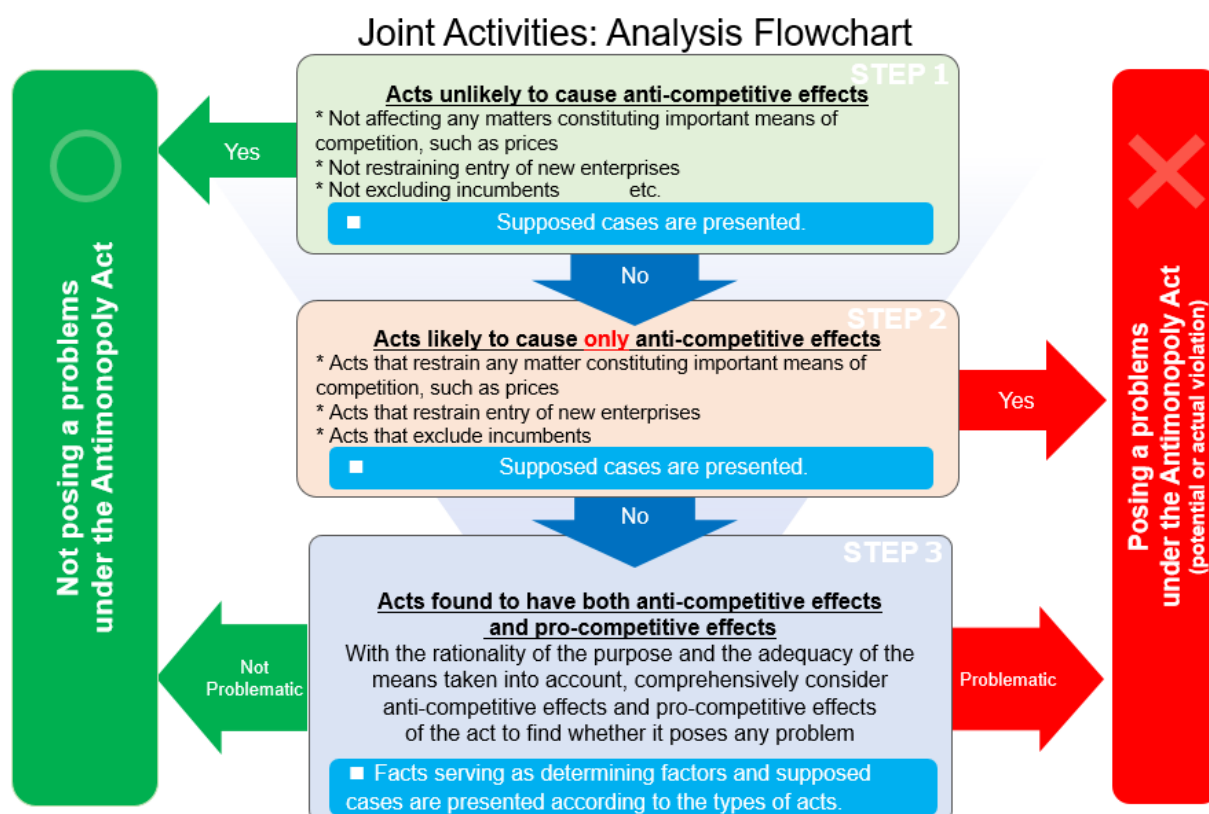
In the following, the Guidelines broadly classified joint activities into the three categories below and explained those with reference to supposed cases: “Acts that do not pose problems under the Antimonopoly Act,” “Acts that pose problems under the Antimonopoly Act,” and “Acts that require attention in order not to pose problems under the Antimonopoly Act.”

The analysis framework and other relevant details explained in Sections 1 through 3 below are collectively illustrated as follows. On the one hand, as described above, in many cases, the joint activities of enterprises, etc. are not expected to have anti-competitive effects,<sup>15</sup> in the first place, therefore, to be considered unlikely to pose problems under the Antimonopoly Act. On the other hand, when the joint activities of enterprises, etc. have only anti-competitive effects, the activities will basically pose problems under the Antimonopoly Act. Furthermore, when the joint activities of enterprises, etc. are expected to have both pro-competitive effects and anti-competitive effects, as described below in Section 3, whether the activities pose any problem under the Antimonopoly Act needs to be assessed by comprehensively considering these effects; in this assessment, careful consideration is required depending on the degree of anti-competitive effects.

<sup>14</sup> This part mainly organizes viewpoints on Article 2, paragraph (6) (Unreasonable Restraint of Trade) of the Antimonopoly Act while also illustrating viewpoints on the the same article, paragraph (5) (Private Monopolization) and Article 8 (Prohibitions Applicable to Trade Associations) of the Act. Article 8 of the Act may apply to the joint activities of enterprises, etc., depending on the types and other conditions of such activities. With respect to joint activities conducted by trade associations, such activities may potentially fall under the category of Article 8, item (i) of the Act if they substantially restrain competition in a particular field of trade, or may potentially fall under the category of Article 8, item (iii), (iv), or (v) of the Act even if such activities do not substantially restrain competition in a particular field of trade (for details, refer to the Trade Association Guidelines). Furthermore, if a joint activity tends to impede fair competition, such as where it amounts to discriminatory treatment, etc. in a trade association, the activity would fall under the category of Article 2, paragraph (9) (Unfair Trade Practices) of the Act.

<sup>15</sup> Since this part mainly organizes viewpoints on Article 2, paragraph (6) (Unreasonable Restraint of Trade) of the Antimonopoly Act, “anti-competitive effects” in this part mean, mainly, those to restrain competition; in the description concerning the viewpoints on Article 2, paragraph (9) (Unfair Trade Practices), nonetheless, “anti-competitive effects” mean those to impede competition.





#### 1. Acts that do not pose problems under the Antimonopoly Act

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<sup>16</sup> including prices, not restraining entry of enterprises, and not excluding incumbents from markets. Accordingly, it is likely that, in many cases, the joint activities of enterprises, etc. toward the realization of a green society can be implemented in a manner that does not pose any problem under the Antimonopoly Act.

Specifically, among the joint activities of enterprises, etc., such acts as those specified below are considered to have no anti-competitive effect.

#### <Supposed cases that do not pose problems under the Antimonopoly Act>

(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<sup>17</sup>)

- 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

<sup>16</sup> These matters mean the facets of an enterprise's business activities that exert a direct influence on the market mechanism if restraints are posed on those facets, such as the prices or quantities of products or services that are either supplied or received by the enterprise, the customers and sales channels for trade, and the equipment for supply (see Part II (2) of the Trade Association Guidelines).

<sup>17</sup> See Section II, 1 of the Recycle Guidelines.

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 3: Industry targets and activity guidelines)

- In order to accomplish carbon neutrality, Trade Association X, which consists of manufacturers of Product A, set an industry-wide non-binding goal of X% reduction in the greenhouse gas emissions generated in the manufacturing processes of Product A. Then, X organized those challenges that needed to be resolved in order to achieve the goal and compiled general activity guidelines that made clear the specific measures that each manufacturer should make efforts to implement, including changes to the raw materials and procured parts, revisions to the manufacturing processes, and the introduction of new technologies.

(Supposed case 4: Dispatch of information)

- With respect to Trade Association X consisting of retailers of a specific business type, each member enterprise has, voluntarily and for the purpose of saving resources, conducted an effort wherein the packages used for products sold to consumers are switched to those made from recycled materials. In order to gain the understanding of general consumers, X has decided to set up a website for general consumers and therethrough to release information on each retailer's effort.

(Supposed case 5: Recommendation for energy saving at business establishments)

- In order to contribute to reducing electricity usage in the business activities of its member enterprises and thereby to the accomplishment of carbon neutrality, Trade Association X has set out the reference heating and cooling temperature levels that each member enterprise should use at its business establishments, and has recommended the use of LED light bulbs due to their effectiveness in saving electricity. The use of the heating and cooling temperature levels and LED light bulbs will not affect competition among the member enterprises of Trade Association X.

(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.

(Supposed case 7: Establishment of standards for reducing greenhouse gas emissions and publicizing the fact, necessary for the standards to be complied with)

- In relation to the manufacturing and sale of Product A that emits a large amount of greenhouse gases, Ministry X, which is the competent authority for the manufacturing and sale of Product A, amended laws applicable to the industry and thereby established a specific midterm target of reduction in greenhouse gas emissions which each manufacturer of Product A should accomplish. Trade Association Y, which consists of manufacturers of Product A, has set that statutory standard as the one with which each member enterprise should comply, and decided to publicize the fact of non-compliance, to the extent necessary for ensuring compliance with the standard.

## 2. Acts that pose problems under the Antimonopoly Act

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 any of the following types of conduct, 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<sup>18</sup>:

- (i) Act that restrains any matter constituting important means of competition such as prices;
- (ii) Act that restrains entry of new enterprises; or
- (iii) Act that excludes any incumbents from markets.

These types of acts exert a direct influence on the market mechanism. Acts falling under (i) above include so-called hard-core cartels such as bid rigging, coordination of order intake, price-fixing cartels, volume cartels, and technological restriction cartels. If such an act is conducted, it will cause anti-competitive effects, such as where a price or production quantity, which should essentially be determined at the discretion of each enterprise, is determined not by the enterprise concerned, or where the number of competitive units decreases because new market entrants or incumbents are excluded. At the same time, such an act does not normally lead to any pro-competitive effects. For that reason, no matter for what purpose or reason such an act is conducted, it cannot be justified on the grounds of its purpose or reason alone, irrespective of its specific form, means, or method.

As a matter of principle, the followings are supposed cases of joint activities that pose problems under the Antimonopoly Act.<sup>19</sup>

<Supposed cases that pose problems under the Antimonopoly Act>

(Supposed case 8: Joint collection of costs incurred for reduction in greenhouse gas emissions)

- Enterprises X, Y, and Z, which provide Service A, set up a working group to discuss how to reduce the greenhouse gas emissions generated through the provision of Service A. As this working group has found out that the implementation of various measures will increase costs to a certain level, a decision has been made to charge Service A users a common cost for measures against global warming in the provision of the service.

(Supposed case 9: Restraints on production volumes)

- In order to directly reduce the greenhouse gas emissions generated in the manufacturing processes of Product A, Trade Association X, which consists of manufacturers of Product A, discussed each member company's annual production volume of Product A and allocated a certain production volume to each member enterprise.

(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

<sup>18</sup> A trade association's restrictive conduct of the kind described above is considered in principle to constitute a violation of the Act, regardless of the specific form, means, or method involved in such conduct. Moreover, such conduct is considered to constitute a violation in principle regardless of the purpose or intent of the conduct, and is not justified by such purposes as to maintain appropriate price levels, to ensure the quality of products or services, or to equalize the opportunities of being awarded contracts (Part II (2) of the Trade Association Guidelines).

<sup>19</sup> In addition to the acts specified in this part, such acts as refusal to deal by an enterprise jointly with any competitor, trading partner, etc., or by a trade association, may potentially pose problems under the Antimonopoly Act (boycott). For details on boycotts, see Part II, 2 (2) below.

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.

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

As a joint activity conducted by enterprises, etc. toward the realization of a green society, there are followings examples: establishment of voluntary standards for the types, quality, specifications, etc. of products or services, and business alliances whereby enterprises enhance the relationship with others and jointly execute their operation. Most of these activities do not restrict competition, and have pro-competitive effects; therefore, in many cases, they do not pose problems under the Antimonopoly Act. Nonetheless, when, for instance, these activities affect matters that constitute important means of competition, they exceptionally pose problems under the Antimonopoly Act.

Accordingly, whether such an activity poses any problem under the Antimonopoly Act, in principle, 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 are any less restrictive alternatives) taken into account; when assessing, careful consideration is required depending on the degree of anti-competitive effects.

Since what facts are specifically assessed as factors for consideration differ according to the types of acts, viewpoints according to types of conduct are presented below.

#### (1) Establishment of voluntary standards

As an effort toward the realization of a green society, there are cases in which enterprises, etc. choose to establish voluntary standards for their business activities including the supply of products or services (hereinafter referred to as "voluntary standards"); for example, they possibly choose to formulate recommended standards concerning the types, quality, specifications, etc. of their products or services for the purpose of reducing greenhouse gas emissions (hereinafter referred to as the "establishment of voluntary standards"<sup>20</sup>). 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 carried out as an effort toward the realization of a green society 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 demand for such products.<sup>21</sup>

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,<sup>22</sup> or where it is unjustly discriminatory among enterprises,<sup>23</sup> such establishment may pose problems under the Antimonopoly Act, depending on the contents or implementation methods of voluntary standards.

<sup>20</sup> In addition, there are cases where enterprises receive certain certification, authorization, etc. that certifies their supply or receipt of products or services complying with standards or codes formulated by their trade associations, etc., and indicate their compliance with such standards or codes (Part II, 7 (2) B of the Trade Association Guidelines). Hereinafter the term "establishment of voluntary standards" includes such certification, authorization, etc.

<sup>21</sup> See Section II, 2 of the Recycle Guidelines and Part 2, 2 of the Standardization and Patent Pool Guidelines.

<sup>22</sup> For instance, this is the situation where the establishment of voluntary standards goes beyond what is regarded as the reasonably necessary extent in light of the legitimate purpose of reducing greenhouse gas emissions, restrains means of competition associated with the products/services subject to the voluntary standards, and thereby harms the interests of users.

<sup>23</sup> See Part 2, 2 of the Standardization and Patent Pool Guidelines.

In the assessment of whether establishment of voluntary standards poses any problem under the Antimonopoly Act, those voluntary standards are assessed in a manner such as the following according to the specific details of each individual case. First of all, the presence and degree of any anti-competitive effects need to be confirmed. Without any anti-competitive effects, the establishment of voluntary standards does not pose problems under the Antimonopoly Act. If any anti-competitive effects are found, the anti-competitive effects and pro-competitive effects of the voluntary standards need to be comprehensively considered with the rationality of the purpose of the activity concerned and the adequacy of the means employed for it taken into account; if the establishment of such standards is, as a result, found to substantially restrain competition in the relevant market,<sup>24</sup> it poses problems under the Antimonopoly Act. In this comprehensive consideration, the followings are taken into account: (i) whether it unjustly harms the interests of users by restraining means of competition; (ii) whether it unjustly discriminates among enterprises; and (iii) whether it is within what is regarded as the reasonably necessary scope in light of legitimate purposes such as social and public purposes.<sup>25</sup>

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, if it impedes competition in connection with the development, supply, etc. of diverse products or services, may 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.<sup>26</sup>

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.

#### <Supposed cases 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

<sup>24</sup> The term “substantially restrain competition” means “harming the market function of competition”; for instance, “when, concerning a certain bid market, the competition is restrained by the agreement about the basic method and procedure of order intake, the term refers to bringing about the situation where the agreement enables enterprises concerned to control the bidder and the contract price of the bid market, at their own discretion, freely to some extent (decision of the Supreme Court on February 20, 2012 (2010, Administrative, appeal-heard, No. 278)).

<sup>25</sup> See Part II, 7 (2) A of the Trade Association Guidelines.

<sup>26</sup> See Part II, 7 and 8 of the Trade Association Guidelines.

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 owing 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.

(Supposed case 15: Establishment of uniform calculation standards for greenhouse gas emissions)

- In order to support each member enterprise in the visualization of reductions in greenhouse gas emissions, Trade Association X, which consists of manufacturers of Product A, has established uniform calculation standards for the greenhouse gas emissions generated in the manufacturing processes of Product A. The use of those calculation standards is at the discretion of each member enterprise.

<Supposed cases that pose problems under the Antimonopoly Act<sup>27</sup>>

(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.

<sup>27</sup> "Supposed cases that pose problems under the Antimonopoly Act" include not only those activities that have both anti-competitive effects and pro-competitive effects but also those activities regarded as having only anti-competitive effects. Such activities are found on the basis of the above-mentioned viewpoints on "2. Acts that pose problems under the Antimonopoly Act." The same applies hereinafter.

(Supposed case 17: Rigid application of voluntary standards with possible impact on competition among enterprises)

- Trade Association X, which consists of enterprises providing Service A, for the purpose of contributing to carbon neutrality, whilst mentioning that avoiding Operation B as much as possible leads to greenhouse gas emissions reduction, set the voluntary standards for the provision of Service A; the standards left to each member enterprise's discretion the decision about whether to conduct Operation B. Nonetheless, X made and sent to the users the document to the effect that member enterprises uniformly, based on the voluntary standards, would not conduct Operation B anymore in the provision of Service A.

Whether to conduct Operation B is a factor for the users of Service A to consider when choosing the transaction partner, and one of the means of competition for the provider of Service A; the situation is such that making abovementioned document restrains competition among the member enterprise of X and harms the interests of the users.

(Supposed case 18: Establishment of specifications for products/services containing discriminatory contents against certain enterprises)

- Trade Association X consisting of manufacturers of Product A established specifications for Product A made with Raw Material C in substitution for Raw Material B since Raw Material C could reduce greenhouse gas emissions to a certain extent, and arranged that a certification label certifying Product A as a decarbonized product could be attached to Product A compliant with the established specifications. However, X did not authorize Raw Material D as a raw material compliant with the specifications just because only a few member enterprises were using it, despite the fact that it could clearly reduce greenhouse gas emissions to the same extent as Raw Material C. A member enterprise that had planned to manufacture and sell Product A made with Raw Material D could not attach the decarbonized product certification label and was consequently exposed to competitive disadvantages against other member enterprises that could attach the certification label, resulting in a decline in its volume sold to users.

(Supposed case 19: Restraints on use of facilities, 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.

## (2) Business alliances

### A. Basic concept

As an activity toward the realization of a green society, an enterprise may possibly arrange a business alliance to reinforce its relationship with another enterprise and jointly implement operations. Business alliances can be mainly classified into the following two categories from the aspect of analysis of their impact on competition: a "horizontal business alliance" formed between enterprises in competition with each other; and a "vertical/conglomerate business alliance", for instance, on the basis of which an enterprise

and its trading partner jointly engage in business activities within a supply chain. Below are explanations on horizontal business alliances.<sup>[28]</sup>

It is noted that concerning vertical/conglomerate business alliances,<sup>[29]</sup> unlike horizontal business alliance, there is no need to discuss competition between/among alliance partners. Nonetheless, when vertical/conglomerate business alliances lead to integration of alliance partners' business activities, the alliances, first of all, need considering the degree of the integration since they can cause the problems including consumer foreclosure<sup>[30]</sup> and input foreclosure.<sup>[31]</sup> When assessing the degree of the integration of alliance partners' business activities, the followings are, mainly, comprehensively considered: (i) the degree of closure between/among alliance partners (whether or not it is possible to trade with the enterprises outside the alliance); (ii) the degree of closure owing to information exchange/sharing (whether or not one of the alliance partner gets advantage against its competitor when the competitor is a customer of the other alliance partner and information about the competitor is shared between the alliance partners); (iii) the period of the alliance, etc. Furthermore, when information important from the viewpoint of competition regarding the competitor of one of the alliance partners is exchanged/shared between the alliance partners, it may get easier for the partner to anticipate its competitor's behavior; hence, the concerted practices between the partner and its competitor may be prompted. In addition, when the closure or exclusivity, etc. is caused between/among alliance partners, like the case of horizontal business alliance, it is necessary to consider impacts of the alliance on the entire market and decide whether the alliance poses problems under the Antimonopoly Act.

Often, business alliances do not have any anti-competition effect when they are formed for such purposes as reducing greenhouse gas emissions by developing innovative technologies that can contribute to the realization of a green society and by efficiently utilizing resources; on the contrary, pro-competitive effects may be expected from alliances in some cases. Business alliances in many of these cases are unlikely to pose problems under the Antimonopoly Act. On the other hand, a business alliance means to integrate, to a certain extent, the business activities of the parties to the alliance. Because the competition originally expected between/among alliance partners is lost due to their alliance, anti-competitive effects may be generated through such alliance depending on the details of the alliance and the market conditions, potentially resulting in problems under the Antimonopoly Act.

Since whether a business alliance poses any problem under the Antimonopoly Act differs depending on what facts are specifically taken into consideration as the factors for consideration according to the type of the alliance, Section B below presents viewpoints on each of the following alliance types: joint R&D, technical collaboration, standardization activities, joint purchasing, joint logistics, joint production and OEM (consignment of production to specified enterprises. The same applies hereinafter.), sales cooperation, and data sharing.

Meanwhile, in the judgment of whether general business alliances including those that do not fall under the above-mentioned types pose problems under the Antimonopoly Act, such alliances are assessed in a manner such as the following according to the specific details of each individual case. First of all, the presence and degree of any anti-competitive effects need to be confirmed. Without any anti-competitive effects, there is no

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<sup>28</sup> For viewpoints on horizontal business alliances and vertical/conglomerate business alliances in light of the Antimonopoly Act, the "Report of the Study Group on Business Alliances" (published by the JFTC Competition Policy Research Center on July 10, 2019; hereinafter referred to as the "Business Alliance Report") can be used as a reference.

<sup>29</sup> See Part V, 3 (2) of the Business Alliance Report.

<sup>30</sup> Refusal to purchase, etc. that leads to closure of or exclusion from the upstream market is called consumer foreclosure; when determining whether or not consumer foreclosure will be implemented, the followings are considered; whether or not alliance partners are capable of implementing input foreclosure and whether or not they are incentivized to implement foreclosure (Part V, 2 (2) of the Business Combination Guidelines)

<sup>31</sup> Refusal to supply, etc. that leads to closure of or exclusion from the downstream market is called input foreclosure; when determining whether or not input foreclosure will be implemented, the followings are considered; whether or not alliance partners are capable of implementing input foreclosure and whether or not they are incentivized to implement foreclosure (Part V, 2 (1) of the Business Combination Guidelines)



problem under the Antimonopoly Act. If any anti-competitive effects are found, the anti-competitive effects and pro-competitive effects generated by the activity concerned need to be comprehensively considered with the rationality of the purpose of the activity and the adequacy of the means employed for it taken into account. If the activity concerned is, as a result, found to substantially restrain competition in the relevant market, it poses problems under the Antimonopoly Act.

In the assessment of the anti-competitive effects of a business alliance in general, the impact of such business alliance on competition between/among the alliance partners needs to be checked. In cases where the impact of a business alliance on competition between/among the enterprises in alliance is small, its impact on competition in the relevant market is also small. Accordingly, such business alliance may be formed without causing problems under the Antimonopoly Act. Conversely, if competition between/among the enterprises in alliance is restrained, its impact on the entire market needs to be assessed to find whether it poses any problem under the Antimonopoly Act.

(A) Assessment of the impact on competition between/among the alliance partners

Specifically, the extent to which competition between/among the enterprises in a business alliance is restrained through their alliance is assessed with consideration given to the extent to which their business activities are integrated.<sup>[32]</sup> For this assessment, mainly the following determining factors should be comprehensively considered.

(i) Extent of integration of decision-making for important means of competition (e.g., prices)

In the case of a comprehensive alliance at the multiple stages such as production and sale, or in the case where the alliance partners share a common cost structure, it is necessary to exercise care since their decision-making pertaining to important means of competition, such as prices or production volumes, may be integrated.

(ii) Possibility of facilitating coordinated conduct

In a market where it is easy to predict the behavior of competitors,<sup>[33]</sup> if a common cost structure is shared between/among the alliance partners, it is easier for coordinated conduct to be facilitated.

(iii) Extensiveness of the business alliance such as the implementation period

In general, the greater the extensiveness of a business alliance is, the more significant impact on competition this business alliance will have.

(B) Assessment of the impact on the entire market

If competition between/among the enterprises in alliance is found, as the result of the assessment under (A), to be restrained, the impact of the business alliance on the entire market should be assessed. For this assessment, mainly the following determining factors<sup>[34]</sup> should be comprehensively considered.<sup>[35]</sup>

- Impact due to the integrated conduct of the alliance partners

Generally, the following factors are comprehensively considered: (i) the market shares and ranks; (ii) the past competition conditions between/among the alliance

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<sup>32</sup> See Part V, 3 (1) of the Business Alliance Report.

<sup>33</sup> This means a market that exhibits such traits as a high level of transparency, a high degree of concentration (oligopolistic), stability (less fluctuations in supply and demand), and a high degree of symmetry (cost structures, market shares, products manufactured, etc. are homogeneous).

<sup>34</sup> In the consideration of each determining factor, the viewpoints specified in Part IV, 2 of the Business Combination Guidelines can be a reference.

<sup>35</sup> In the assessment of the impact of a vertical/conglomerate business alliance on the entire relevant market, the Business Alliance Report states that the following determining factors should be comprehensively considered in relation to the potential closure or exclusivity of the market: (i) the positions of the alliance partners and the situation of competitors; (ii) import pressure, entry pressure, and competitive pressure from adjacent markets; (iii) competitive pressure from users; (iv) comprehensive business capacity; and (v) efficiency. With respect to the possibility of coordinated conduct with competitors other than the alliance partners, the following determining factors should be comprehensively considered: (i) the number of competitors, etc.; (ii) any excess capacity of the alliance partners and competitors; (iii) the ease of obtaining information such as on trading conditions; (iv) the past competition conditions; (v) import pressure, entry pressure, and competitive pressure from adjacent markets; and (vi) efficiency.

partners; (iii) the disparity with the market share of each competitor (the presence of any powerful competitor); (iv) any excess capacity of competitors and the degree of product differentiation; (v) import pressure, entry pressure, and competitive pressure from adjacent markets; (vi) competitive pressure from users; (vii) overall business capabilities; and (viii) efficiency.

- Possibility of coordinated conduct with competitors other than the alliance partners

Generally, the following factors are comprehensively considered: (i) the number of competitors; (ii) the past competition conditions between/among the alliance partners; (iii) any excess capacity of the alliance partners and competitors; (iv) the ease of obtaining information such as on trading conditions; (v) the past competition conditions; (vi) import pressure, entry pressure, and competitive pressure from adjacent markets; and (vii) efficiency.

#### B. Main factors for consideration, etc. by type of business alliances

For each type of business alliances, whether it poses any problem under the Antimonopoly Act is found by considering the factors described below according to business alliance types, as well as the general factors set forth in Section A for assessing business alliances.<sup>36</sup>

##### (A) Joint R&D<sup>37</sup>

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. Furthermore, it is often difficult for an enterprise to conduct research alone due to its risks, cost, etc. when it is conducted for the purpose of addressing the reduction of greenhouse gas emissions, which is so-called externality.<sup>38</sup> The implementation of joint R&D activities can make such activities active and efficient, promote technological innovation, and generate pro-competitive effects in many cases. In such cases, joint R&D activities are unlikely to pose problems under the Antimonopoly Act.<sup>39</sup>

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, 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<sup>40</sup>), 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

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<sup>36</sup> The applicable sections of the guidelines published by the JFTC in the past and listed in the footnotes for each topic can also be useful references.

<sup>37</sup> See Part I, 2 of the Joint Research and Development Guidelines.

<sup>38</sup> Here, this means that there is a situation where various costs generated by greenhouse gas emissions are not reflected in the prices of relevant products and services (external diseconomy).

<sup>39</sup> See Section II, 3 of the Recycle Guidelines.

<sup>40</sup> Even where this total market share exceeds 20%, it does not immediately mean there is a problem. Whether there is any problem under the Antimonopoly Act is found by comprehensively considering the matters set forth in (i) through (iv) (see Part I, 2 (1) [1] of the Joint Research and Development Guidelines).

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 problems 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 be more likely to pose problems under the Antimonopoly Act;<sup>41</sup>

- (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).

Without any anti-competitive effects, there is no problem under the Antimonopoly Act. If any anti-competitive effects are found, whether the joint R&D substantially restrains competition is found by comprehensively considering its anti-competitive effects and pro-competitive effects with the rationality of the purpose of the act concerned and the adequacy of the means employed for it taken into account.

Furthermore, even where the joint implementation of R&D itself does not pose problems under the Antimonopoly Act, any arrangements for implementation of joint R&D may be found to pose such problems if those arrangements pose the risk of unjustly restricting the business activities of its participants and impeding fair competition. In addition, if there are mutual restraints to be imposed on business activities in relation to the price, quantity, etc. of any product developed through joint R&D, problems under the Antimonopoly Act may arise.

<Supposed case that does 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.

<Supposed cases 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

<sup>41</sup> See Part I, 2 (1) [2] of the Joint Research and Development Guidelines.

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.

(B) Technology collaboration<sup>42</sup>

Through cross-licensing,<sup>43</sup> patent pools,<sup>44</sup> <sup>45</sup> or multiple licensing<sup>46</sup> of the technologies that each enterprise, etc. owns and that can contribute to the realization of a green society, there are cases in which enterprises complements technologies that they require for the manufacturing, etc. of a specific product (hereinafter referred to as “technology collaboration”). Technology collaboration may facilitate the efficient use of technologies through combination of different technologies, help form new technology markets and markets for products to which the technologies covered by technology collaboration apply, or lead to increased competitive units. Accordingly, technology collaboration has pro-competitive effects in many cases and thus is unlikely to pose problems under the Antimonopoly Act in such cases.

However, if any restraints are imposed through technology collaboration, for example where restraints are imposed on the business activities of a licensee in connection with the licensing of a technology, such technology collaboration may potentially and adversely affect technology-related or product-related competition, depending on the form or contents of such technology collaboration. If such act is found to deviate from the objective of the Intellectual Property System or violate its purpose, it is not recognized as the exercise of a right, becomes subject to the Antimonopoly Act,<sup>47</sup> <sup>48</sup> and, in the case where such act substantially restrains competition or tends to impede fair competition, poses problems under the Antimonopoly Act.

Therefore, in the assessment of whether technology collaboration poses any problem under the Antimonopoly Act, the presence and degree of any anti-competitive effects are assessed first of all with consideration given to the following points<sup>49</sup>:

- (i) the details and manner of the technology collaboration;
- (ii) the usage of the technology concerned and how influential the technology will be;
- (iii) whether the parties to the technology collaboration are in competition with each other;
- (iv) the parties' positions (such as their market shares and ranks);
- (v) the conditions of the entire relevant market (such as the number of the parties' competitors, the degree of market concentration, the characteristics of the relevant product to be traded, the degree of differentiation, the distribution channels, and the difficulty in newly entering the market);
- (vi) whether there are any reasonable grounds for implementing the technology collaboration; and
- (vii) the impact on incentives for R&D and licensing.

Without any anti-competitive effect, there is no problem under the Antimonopoly Act. If any anti-competitive effects are found, whether the activity concerned substantially

<sup>42</sup> See Part 3 (2) of the Intellectual Property Guidelines.

<sup>43</sup> This means that multiple parties holding rights to a certain technology mutually license their rights to one another.

<sup>44</sup> This means that multiple parties holding rights to a certain technology concentrate their respective rights, etc. in a particular entity, etc. so that the members of the relevant patent pool or other relevant parties may be granted the necessary licenses through the entity, etc.

<sup>45</sup> For the assessment of problems with patent pools formed for specification-related patents under the Antimonopoly Act, see Part 3 of the Standardization and Patent Pool Guidelines.

<sup>46</sup> This means that the right-holder of a certain technology licenses its rights to multiple enterprises.

<sup>47</sup> The Antimonopoly Act does not apply to acts found to constitute the exercise of a right under the Copyright Act, the Patent Act, the Utility Model Act, the Design Act, or the Trademark Act (Article 21 of the Antimonopoly Act).

<sup>48</sup> Therefore, even in the case of an act that can be perceived as the exercise of a right, if it is found, after due consideration has also been given to the purpose and form of the act and the degree of its impact on competition, to deviate from the objective of the Intellectual Property System, which is to enable enterprises to bring out their ingenuity and thereby facilitate the utilization of technology, or to violate the purpose of the same system, the act is not recognized as the “exercise of rights” under Article 21 above and becomes subject to the Antimonopoly Act (Part 2 (1) of the Intellectual Property Guidelines).

<sup>49</sup> See Part 2 (3) of the Intellectual Property Guidelines.

restrains competition is found by comprehensively considering the anti-competitive effects and pro-competitive effects generated by the activity with the rationality of the purpose of the activity and the adequacy of the means employed for it taken into account.

There is a significant impact on competition, for example, in cases where the act concerned is conducted between/among competitors, or where the technology for which technology collaboration is implemented is an influential technology. Concerning technologies recognized as influential, acts restraining the use of such technologies have a relatively greater impact on competition, compared with the impact of other technologies. Generally, whether a certain technology is influential or not is found with such factors as the following comprehensively taken into consideration, rather than on the basis of the relative merits of the technology: the usage of the technology in the product market; the difficulty in developing alternative technology or in switching to any technical substitute; and the position of the right-holder of the technology concerned in the technology market or product market.

On the other hand, anti-competitive effects are regarded as minor, for example, in cases where the enterprises that conduct business activities with the technology covered by their technology collaboration have a market share of 20% or less in total in the relevant product market.<sup>50</sup>

<Supposed case that does not pose problems under the Antimonopoly Act>

(Supposed case 23: Cross-licensing of the technology that is indispensable in the manufacturing, etc. of products aimed at reducing greenhouse gas emissions)

- The manufacturing processes of Product A are regarded as problematic due to a large amount of greenhouse gas emissions generated in these processes. Meanwhile, the use of a new manufacturing technology, Manufacturing Technology B, can significantly reduce the greenhouse gas emissions. The use of Manufacturing Technology B is becoming an international standard, and its use has become essential for manufacturers of Product A. The patents required for the use of Manufacturing Technology B are held by Enterprises X, Y, and Z, which are manufacturers of Product A. These enterprises have decided to cross-license their respective essential patents under fair, reasonable, and non-discriminatory conditions.

In their negotiations for licensing conditions, X, Y, and Z are not exchanging information on the matters constituting their important means of competition such as their prices of Product A. Furthermore, those enterprises will not restrain their respective R&D activities and sales activities in relation to Product A.

<Supposed case that poses problems under the Antimonopoly Act>

(Supposed case 24: Formation of a patent pool involving restraints on prices, etc.)

- With respect to a new manufacturing technology, Manufacturing Technology B, that can significantly reduce greenhouse gas emissions in the manufacturing processes of Product A, Enterprises X, Y, and Z, which are manufacturers of Product A and hold the patents required for the use of Manufacturing Technology B, have decided to form a patent pool and license their patents, only through the patent pool, to manufacturers of Product A under fair, reasonable, and non-discriminatory conditions. Under the licensing conditions, X, Y, and Z request each manufacturer to set its price of Product A above a certain level in the case of being granted a license.

(C) Standardization activities<sup>51</sup>

There are cases where enterprises, etc. jointly formulate the specifications of new products/services and conduct activities aimed at widely disseminating such specifications (hereinafter referred to as “standardization activities”). Standardization activities have pro-competitive effects since they can ensure compatibility among products and thereby contribute to the speedy launch of markets for products and

<sup>50</sup> See Part 2 (5) of the Intellectual Property Guidelines.

<sup>51</sup> See Part 2, 2 of the Standardization and Patent Pool Guidelines.

services that adopt jointly formulated specifications and to the expansion of demand for such products and services. Accordingly, these activities themselves do not immediately pose problems under the Antimonopoly Act.

However, problems under the Antimonopoly Act may arise from standardization activities if such activities substantially restrain competition in a relevant market or tend to impede fair competition, for example, by making arrangements for the business activities of standardization activity participants, such as arranging their selling prices.

Therefore, in the assessment of whether standardization activity poses any problem under the Antimonopoly Act, the presence and degree of any anti-competitive effects are assessed first of all to find out whether such contents as those set forth below are included:

- arrangements for selling prices, etc.;
- exclusion of competing specifications;
- unreasonable expansion of the scope of specifications;
- unreasonable exclusion of technology proposals, etc.; and
- restraints on participation in the standardization activity.

Without any anti-competitive effects, there is no problem under the Antimonopoly Act. If any anti-competitive effects are found, whether the activity concerned substantially restrains competition is found by comprehensively considering the anti-competitive effects and pro-competitive effects generated by the activity with the rationality of the purpose of the activity and the adequacy of the means employed for it taken into account.

Furthermore, there are cases where several enterprises took part in a standardization activity and jointly endeavored to have their patented technology incorporated into the relevant specifications. If, after the specifications have been formulated and widely disseminated, a party that is to adopt the specifications is refused a license for the patent without reasonable grounds, such refusal may, as problems under the Antimonopoly Act, result in Private Monopolization in the situation where it is difficult for the refused enterprise to develop or manufacture products that adopt the specifications and thereby competition in the relevant product market will be substantially restrained, or may result in Unfair Trade Practices (e.g., Other Refusal to Trade) in the situation where it impedes fair competition even if it does not substantially restrain competition.<sup>52</sup>

#### <Supposed case that does not pose problems under the Antimonopoly Act>

(Supposed case 25: Formulation of the specifications of components, etc. with the aim of facilitating efficient use of resources)

- Since the manufacturing processes of Product A generate waste from Component B used for the manufacturing of the product, one of the issues that manufacturers of Product A face are how to achieve the efficient reuse of such waste in order to reduce environmental burdens and greenhouse gas emissions. For that reason, X, Y, and Z, which are manufacturers of Product A, have decided to formulate common specifications for Component B and use Component B based on those specifications as much as possible for the purpose of facilitating the recycling of the component and raising its recycling ratio.

#### <Supposed cases that pose problems under the Antimonopoly Act>

(Supposed case 26: Standardization activities involving restraints on prices, etc.)

- In order to contribute to the development of a recycling-oriented society, Enterprises X, Y, and Z, which are manufacturers of Product A, decided that each company was to collect used Product A and reuse it as raw material in the manufacturing of Product A, and established the specifications of an easily-recyclable version of Product A. Taking advantage of the establishment of the specifications, X, Y, and Z also jointly decided the range of price increase for Product A to pass on the soaring costs of its raw materials to its price.

<sup>52</sup> See Part 2, 3 of the Standardization and Patent Pool Guidelines.

(Supposed case 27: Standardization activities that exclude alternative specifications)

- In order to reduce the greenhouse gas emissions generated in the use of Passenger Transportation Equipment A, Enterprises X, Y, and Z, which are manufacturers of Equipment A, have formulated Specifications B for a version of Equipment A that generates a relatively low amount of greenhouse gas emissions. X, Y, and Z have agreed to stop the R&D that each of those companies has conducted in its own right with respect to the alternative specifications, Specifications C and Specifications D, so as to avoid competition among the different specifications in the sales market of Equipment A.

(D) Joint purchasing<sup>53</sup>

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. (hereinafter referred to as “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.

That is to say, 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 substantial 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,<sup>54</sup> and

<sup>53</sup> See Part II, 11 of the Trade Association Guidelines.

<sup>54</sup> There are cases in which the adoption of a common cost structure may facilitate coordinated conduct among the joint purchasing participants. Also, the adoption of a common cost structure may lead to the integration of decision-making of each joint purchasing participant concerning cost reduction; this is supposed to be one of the matters that constitute their important means of competition. Although the proportion of costs shared is a factor to be taken into consideration in relation to the above problems, it is not appropriate to rely solely on whether the proportion is high or low in finding any problem under the Antimonopoly Act; the proportion should be considered together with other factors (such as the market condition) in a comprehensive manner (see Part IV, 2 of the Business Alliance Report).

- 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.

Without any anti-competitive effects, there is no problem under the Antimonopoly Act. If any anti-competitive effects are found, whether the activity concerned substantially restrains competition is found by comprehensively considering the anti-competitive effects and pro-competitive effects generated by the activity with the rationality of the purpose of the activity and the adequacy of the means employed for it taken into account.

<Supposed case that does 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.

<Supposed case that poses 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, 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 get 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 the concerted practices.

(E) Joint logistics<sup>55</sup>

In relation to the supply of their own products, there are cases in which enterprises set up a common delivery system for specific destination regions or jointly use logistics facilities located in specific regions (hereinafter referred to as "joint logistics"). Joint logistics is not only expected to streamline logistics but also able to thereby reduce greenhouse gas emissions depending on cases. In such cases, it is considered that joint logistics can make contributions to the realization of a green society.

Since joint logistics is an operation incidental to the main business operations of enterprises and does not affect their important means of competition (such as prices) in many cases, it is unlikely to pose problems under the Antimonopoly Act, compared with joint production, joint purchasing, etc. However, problems may arise if competition is

<sup>55</sup> See Part II, 11 of the Trade Association Guidelines.



substantially restrained by joint logistics in the procurement market of logistics services or in the selling market of products subject to joint logistics.

That is to say, when, for instance, the joint logistics participants' shares of procurement market of logistics services 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 substantial restraints on competition in the relevant procurement market of logistics services. Furthermore, when, for instance, the joint logistics participants' shares of procurement market of logistics services are high, and the ratio of purchased amount of joint logistics services to the cost required for the supply of the products/services subject to the joint logistics is high, competition in the relevant sales market of the products can be substantially restrained through the integration of decision-making among the joint logistics participants concerning the matters constituting important means of competition such as sales price of the products or through the facilitation of concerted practices.

Therefore, in the assessment of whether joint logistics 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 market shares of the joint logistics participants in the procurement market of logistics operations, the presence of competitors in such market, etc.;
- (ii) if the market shares of the joint logistics participants in the procurement market of logistics operations are high, the ratio of the cost of the joint logistics to the cost required for the supply of the products subject to the joint logistics;
- (iii) the situation surrounding independent activities in the sales field of the products concerned (information on the prices, quantities, etc. is not to be exchanged or shared); and
- (iv) whether participation in the joint logistics is voluntary without any restraints imposed.

It is noted that when the ratio in (ii) is low, problems under the Antimonopoly Act are unlikely to arise since the joint logistics itself does not affect the price, quality, etc. of the relevant products.

Without any anti-competitive effects, there is no problem under the Antimonopoly Act. If any anti-competitive effects are found, whether the activity concerned substantially restrains competition is found by comprehensively considering the anti-competitive effects and pro-competitive effects generated by the activity with the rationality of the purpose of the activity and the adequacy of the means employed for it taken into account.

#### <Supposed case that does not pose problems under the Antimonopoly Act>

(Supposed case 30: Joint logistics to reduce greenhouse gas emissions through streamlined delivery, etc.)

- For the purpose of reducing the greenhouse gas emissions generated through the delivery of products to their own stores, Retailers X, Y, and Z, which are of a specific type of business, have decided to jointly deliver their products when using those specific routes on which streamlined delivery is expected to reduce greenhouse gas emissions.

With respect to the implementation of the joint delivery, X, Y, and Z are to implement the necessary measures to block information on matters concerning their important means of competition such as the prices and quantities of the products to be sold at each store.

Furthermore, the ratio of the cost of the joint logistics to the cost required for the sale of the products at each store is extremely low. In addition, there are various enterprises in the procurement market of delivery operations, and the total market share of X, Y, and Z is around 10%.

#### <Supposed case that poses problems under the Antimonopoly Act>

(Supposed case 31: Joint logistics involving the exchange or sharing of information such as that on prices)

- For the purpose of reducing the greenhouse gas emissions generated in the transportation of Product A to its users, Enterprises X, Y, and Z, which are manufacturers

of Product A and account for a total share of 70% in the manufacturing and sales market of Product A, decided to mutually make their respective logistics centers available for use in facilitating their efficient transportation. Through mutual use of those logistics centers, X, Y, and Z shared information on the prices, quantities, etc. of Product A that they set in selling the product to their customers, and jointly, on a regular basis, decided the range of price increase for Product A.

(F) Joint production and OEM

There are cases in which an enterprise engages in joint production by, for instance, establishing a co-parent company and OEM for specific products. Joint production and OEM (hereinafter referred to as “joint production, etc.”) may lead to reductions in greenhouse gas emissions by enabling more efficient production compared with production carried out by an enterprise alone, and may also, in some cases, facilitate the switching of production equipment to what can significantly reduce greenhouse gas emissions. Furthermore, joint production, etc. is also implemented for the purpose of increasing the supply volumes of products that can help greenhouse gas reduction, thus expected to make contributions to the realization of a green society.

Joint production, etc. can enable efficient production, have pro-competitive effects, and can thus be implemented often without causing problems under the Antimonopoly Act. However, problems may arise in the case where joint production, etc. substantially restrains competition in the selling markets of products subject to such joint production, etc.

That is to say, when, for instance, the market shares of the participants of the joint production, etc. in the selling market of the products subject to the joint production, etc. are high, and the cost structure for the supply of the products subject to the joint production, etc. gets similar among the participants, competition in the relevant sales market of the products can be substantially restrained through the integration of decision-making among the joint logistics participants concerning the matters constituting important means of competition such as sales price of the products or through the facilitation of concerted practices.

Therefore, in the assessment of whether joint production, etc. 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 market shares of the participants of the joint production, etc. in the selling market;
- (ii) the ratio of the cost of the joint production, etc. to the cost required for the supply of the products subject to the joint production, etc.;<sup>56</sup>
- (iii) the situation surrounding independent activities in the selling field of the products concerned (information on the prices, quantities, etc. is not to be exchanged or shared); and
- (iv) whether participation in the joint production, etc. is voluntary without any restraints imposed.

In particular, if the values in (i) are high or it is likely to restrain any matter constituting important means of competition such as the price, it is necessary to exercise care.

Without any anti-competitive effects, there is no problem under the Antimonopoly Act. If any anti-competitive effects are found, whether the activity concerned substantially restrains competition is found by comprehensively considering the anti-competitive effects and pro-competitive effects generated by the activity with the rationality of the purpose of the activity and the adequacy of the means employed for it taken into account.

<Supposed cases that do not pose problems under the Antimonopoly Act>

(Supposed case 32: Joint production, etc. toward greenhouse gas reduction in the case where a company does not have the relevant production technology, etc.)

<sup>56</sup> This is the cost required for the supply of the relevant finished product in the case where the subject matter of the joint production, etc. is a component constituting part of the finished product and where the participants of the joint production, etc. sell the finished product using the component.

- In recent years, users of Product A have requested reduction in the greenhouse gas emissions generated in its manufacturing processes. Since Enterprise X, which is a manufacturer of Product A, cannot fulfill such request, X has decided to stop its own manufacturing of Product A and to outsource the manufacturing of its whole quantity of Product A to Enterprise Y, which also engages in the manufacturing and sales of Product A. With respect to the outsourcing of the manufacturing, X and Y are to implement the necessary measures to block information on matters concerning their important means of competition such as their selling prices of Product A for their users, and continue to independently conduct their respective sales activities into the future. In addition, there are several other influential manufacturers of Product A; the situation is such that competitive pressure from these manufacturers is expected to work.

(Supposed case 33: Joint production, etc. toward greenhouse gas reduction in the case where a company intends to suspend its production equipment)

- In order to reduce the greenhouse gas emissions generated in the manufacturing processes of Product A, Enterprises X and Y, which are manufacturers of Product A, individually considered switching their existing production equipment to new production equipment with new technology applied thereto for less greenhouse gas emissions. For switching to the new production equipment, it is necessary for each of the enterprises to temporarily close its own production equipment. X has, at its own discretion, decided the time of temporary closure of its own production equipment and to outsource the manufacturing of Product A to Y for the period during which X cannot manufacture the product. In addition, after accepting the outsourced manufacturing from X, Y has, at its own discretion, decided the time of temporary closure of its own production equipment and to outsource the manufacturing of Product A to X for the period during which Y cannot manufacture the product.

With respect to the outsourcing of the manufacturing, X and Y are to implement the necessary measures to block information on matters concerning their important means of competition such as their selling prices of Product A for their users, and continue to independently conduct their respective sales activities into the future.

Furthermore, the manufacturing quantities of Product A outsourced by and to X and Y account only for around 10% of their respective whole supply volumes of Product A.

[Commentary]

First of all, this act will not cause the problem of joint suspension since they decided the time of closing at each of own discretions. On top of that, because of the measures to block information, and low degree of integration of cost structure, there cannot be any concern that they will act in collaboration; hence, the outsourcing itself can be conducted without pausing any problem under the Antimonopoly Act.

<Supposed case that poses problems under the Antimonopoly Act>

(Supposed case 34: Joint production, etc. involving restraints on operation of production equipment, etc.)

- Enterprises X and Y, which are manufacturers of Product A, account for a share of 70% in total in the manufacturing and sales market of Product A. In order to effectively reduce the greenhouse gas emissions generated in the manufacturing and sale of Product A, X and Y have, having given their respective preferences and made adjustments, decided to close the manufacturing site belonging to one of them in each region in which they both have their respective manufacturing sites, and outsource the manufacturing of Product A taking place at the closed site to the other enterprise whose manufacturing site in the region remains operational.

(G) Sales cooperation<sup>57</sup>

There are cases in which enterprises, etc. jointly process sales affairs, conduct promotional activities for their products/services, and so on (hereinafter referred to as "sales cooperation"). For example, when sales cooperation facilitates the speedy launch

<sup>57</sup> See Part II, 11 of the Trade Association Guidelines.

of markets for new products/services that adopt technologies useful for greenhouse gas reduction or the expansion of demand for such products and services, sales cooperation can be considered to increase the amount of reduction in greenhouse gas emissions and to contribute to the realization of a green society.

Sales cooperation is a collaborative relationship at the level closest to users. While it is necessary to exercise care not to directly integrate important means of competition (such as prices), there are some cases in which sales cooperation can be implemented without causing problems under the Antimonopoly Act. However, problems under the Antimonopoly Act may arise if competition is substantially restrained by sales cooperation in the selling market of products/services subject to sales cooperation.

Therefore, in the assessment of whether sales cooperation 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 market shares of the sales cooperation participants in the selling market of the products/services subject to the sales cooperation, the presence of competitors in the market, etc.; and
- (ii) where any matters constituting important means of competition, such as the prices, quantities, and users of the products subject to the sales cooperation, are not restrained.<sup>58</sup>

Without any anti-competitive effects, there is no problem under the Antimonopoly Act. If any anti-competitive effects are found, whether the activity concerned substantially restrains competition is found by comprehensively considering the anti-competitive effects and pro-competitive effects generated by the activity with the rationality of the purpose of the activity and the adequacy of the means employed for it taken into account.

<Supposed cases that do not pose problems under the Antimonopoly Act>

(Supposed case 35: Implementation of promotional activities for products/services contributing to greenhouse gas reduction)

- Although it was pointed out that a large amount of greenhouse gas emissions had been generated in the manufacturing processes of Product A, the amount of greenhouse gas emissions associated with the recent version of Product A has been significantly reduced as a result of the R&D implemented so far by each manufacturer of Product A. However, such reduction has not succeeded in changing the perception of users that the amount of greenhouse gas emissions generated is large, and consequently the demand for the recent version of Product A has not grown. In response, Trade Association X consisting of manufacturers/distributors of Product A has decided to make a document and send to the users to demonstrate that the recent version of Product A can contribute to carbon neutrality for the purpose of enlightening the users. Meanwhile, the member enterprises of X will not exchange information among them on the matters constituting their important means of competition such as their prices of Product A and will independently continue their respective sales activities.

(Supposed case 36: Joint use of equipment for the provision of products/services contributing to greenhouse gas reduction)

- In recent years, there has been progress in the development of Transportation Equipment B equipped with Lithium-ion Battery A that can significantly reduce greenhouse gas emissions. In order to create a new market and significantly reduce greenhouse gas emissions through expansion of demand for Transportation Equipment B, Enterprises X, Y, and Z, which are planning to manufacture and sell Transportation Equipment B, have decided to jointly support the installation of dedicated charging stations for the recharging of Lithium-ion Battery A. The installation is expected to cost a

<sup>58</sup> If any matter constituting important means of competition, such as the prices, quantities, and customers of the products subject to the sales cooperation, is restrained through the sales cooperation, the sales cooperation amounts to an act causing only anti-competitive effects (according to Section 2 above) and, in principle, poses problems under the Antimonopoly Act.

lot, whilst it is essential to the expansion of the demand.

X, Y, and Z are to entrust the operation of the installed dedicated charging stations to a third party that is also to be responsible for the installation, and will not be involved in business operations for those stations, such as setting usage charges.

Furthermore, X, Y, and Z will not exchange information among them on the matters constituting their important means of competition such as their selling prices of Transportation Equipment B, and will independently conduct their respective sales activities. Aside from X, Y, and Z, there are a large number of other enterprises planning to install dedicated charging stations in the future. At the opportunity of the joint activity concerned, the market of Transportation Equipment B is expected to expand.

#### <Supposed case that poses problems under the Antimonopoly Act>

(Supposed case 37: Joint implementation of promotional activities involving restraints on prices, etc.)

- Enterprises X, Y, and Z, which provide Service A, have individually worked on reducing the greenhouse gas emissions generated through the provision of Service A. Since they had managed to make certain achievements, they decided to jointly promote such achievements to expand consumers' demand. Accordingly, X, Y, and Z launched a website to publish information on their reductions in the greenhouse gas emissions associated with the provision of Service A and published, on the website, the reference price of Service A jointly determined by the enterprises.

#### (H) Data sharing<sup>59</sup>

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 of 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.<sup>60</sup>

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.;

<sup>59</sup> See Chapter 4, 1 (2) of the Report of the Study Group on Competition Policy for Data Markets (published by the JFTC Competition Policy Research Center on June 6, 2017; hereinafter referred to as the "Data Report").

<sup>60</sup> Data sharing between/among enterprises not in competition with each other does not normally pose problems under the Antimonopoly Act since its impact on competition is not significant compared with data sharing between/among competitors; such data sharing does not decrease the number of competitive units in the relevant market, unless the former type of data sharing poses any problem associated with substantial restraints on competition caused by the closure or exclusivity of the market, coordinated conduct, etc. (p. 40 of the Data Report).

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

Without any anti-competitive effects, there is no problem under the Antimonopoly Act. If any anti-competitive effects are found, whether the activity concerned substantially restrains competition is found by comprehensively considering the anti-competitive effects and pro-competitive effects generated by the activity with the rationality of the purpose of the activity and the adequacy of the means employed for it taken into account.

<Supposed case that does 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.

(Supposed case 39: Joint collection/analysis of the data necessary for activities toward greenhouse gas reduction)

- Enterprises X, Y, and Z, which are manufacturers of Product A, were planning to jointly establish and operate a new production facility in order to reduce greenhouse gas emissions generated in manufacturing Product A. It was a joint project with Enterprise W, a manufacturer of Material B which is used as an input for manufacturing Product A. The facility would be employed in the manufacturing process of Product A. For the planning, it is essential for X, Y, and Z as well as W to collect competitively sensitive information with each other such as production capacity of X, Y, and Z and their affordable cost, and to analyze such information.

Accordingly, X, Y, and Z as well as W founded a special task force which does not involve representatives from their sales departments. They decided that the task force collects and analyzes information provided from X, Y, and Z, and conducts necessary research for establishing and operating the new facility. X, Y, and Z as well as W prohibited the task force from transferring collected information to outside of the task force. They also decided that, if X, Y, and Z inevitably require relevant information for making decisions as project members to establish and operate the new facility, they have to take necessary measures not to promote concerted sales practices of Product A by using information collected by the task force. It meant that they conduct statistical processing of collected information in objective manner, anonymize the information to prevent them from noticing who submits it, and share such edited information only with back offices of X, Y, and Z as well as W.

<Supposed case that poses problems under the Antimonopoly Act>

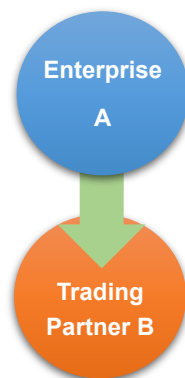
(Supposed case 40: Joint collection/use of the data necessary for activities toward greenhouse gas reduction which involves the sharing of prices, etc.)

- 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.

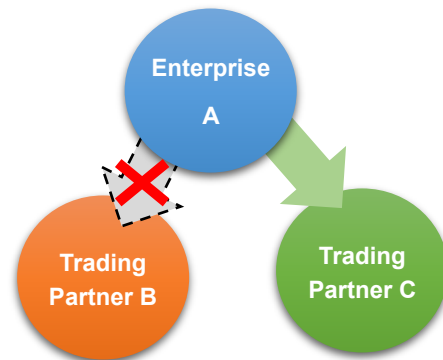
## Part II Restraints on Business Activities of Trading Partners and Selection of Trading Partners

There are cases in which an enterprise, etc., for the purpose of reducing greenhouse gas emissions, conducts any acts that restrain trading partners' <sup>61</sup> products for sale, sales territories, purchasers, sales methods, etc. <sup>62</sup> 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 <sup>63</sup> 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 the selection of trading partners is carried out as an activity toward the realization of a green society.



Restraints on Business Activities  
of Trading Partners



Selection of Trading Partners

<sup>61</sup> The term “trading partner” means a direct or indirect trading partner unless otherwise described; the same applies hereinafter in this part.

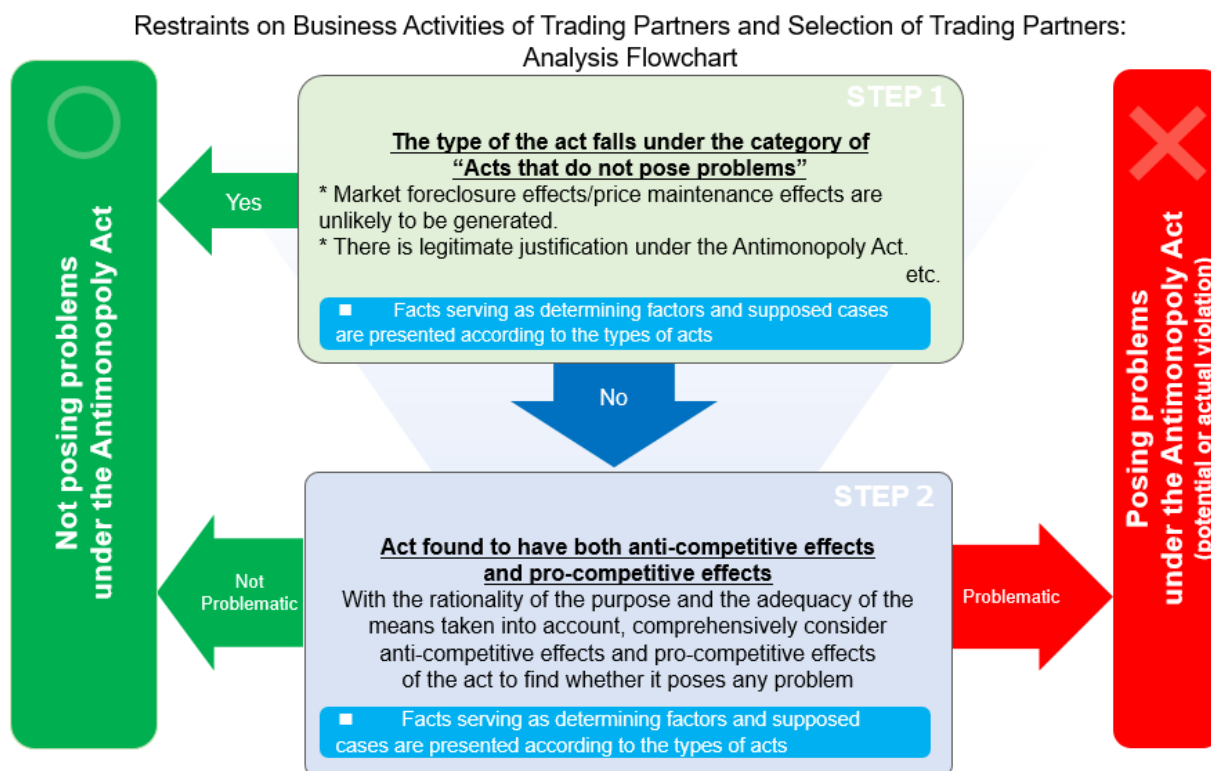
<sup>62</sup> Enterprises’ acts that restrain the business activities of their trading partners include Resale Price Maintenance and those acts that restrain trading partners’ products, sales territories, customers, etc. (acts constituting non-price restraints). The Guidelines present viewpoints on those acts constituting non-price restraints which are expected to be carried out as activities toward the realization of a green society.

<sup>63</sup> Since this part processes viewpoints on Article 2, paragraph (9) of the Anti-monopoly Act (Unfair Trade Practices), although “anti-competitive effect” means an effect to impede competition in this part mainly, it means an effect to restrain competition in the parts on the viewpoints on Article 2, paragraph (5) (Private Monopolization) and the same Article, paragraph (6) (Unreasonable Restraint of Trade) of the Antimonopoly Act.



In the following, the Guidelines broadly classified acts constituting either “Restrains on Business Activities of Trading Partners” or “Selection of Trading Partners” into the two categories below according to types of conduct and explained those with reference to supposed cases: “Acts that do not pose problems under the Antimonopoly Act” and “Acts that pose problems under the Antimonopoly Act.”

The analysis framework and other relevant details explained in Sections 1 and 2 below are collectively illustrated as follows.



## 1. Restrains on business activities of trading partners

### (1) Restrains on trading partners' dealings with competitors and on trading partners' handling of competing products<sup>64</sup>

As a part of marketing practice and in dealing with its trading partners, there are cases in which an enterprise restrains those partners from dealing with its (including other enterprises having close relations with the enterprise<sup>65</sup>; hereinafter the same applies) competitors or imposes other similar restraints on them in the enterprise's activities toward the realization of a green society.

Specifically, such restraints can be exemplified by the following acts conducted by an enterprise:

- dealing with trading partners on some condition that restrains those trading partners from dealing with the competitors of the enterprise concerned;
- causing its trading partners to refuse to deal with the competitors of the enterprise concerned; and
- dealing with its trading partners on some condition that restricts those trading partners' handling of products that compete with the products of the enterprise concerned (hereinafter referred to as a “competing product”).

<sup>64</sup> See Part I, Chapter 2, 2 of the Distribution and Business Practice Guidelines.

<sup>65</sup> “An enterprise ‘having a close relation with the enterprise’ means an enterprise having common interests with the enterprise concerned. Whether an enterprise has common interests with another enterprise is found on a case-by-case basis, taking comprehensively into consideration such factors as its stockholding relationship, interlocking or dispatching of directorates, common membership in so-called corporate groups, and trading and financing relationship.” (Part I, Chapter 2, 2, Note 6 of the Distribution and Business Practice Guidelines)

A. 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<sup>66</sup>

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

(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.

B. 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<sup>67</sup> imposing restraints on its trading partners in terms of their dealings

<sup>66</sup> "Case where market foreclosure effects are generated" refers to a case where an act effecting non-price restraints may cause a situation in which new entrants to the relevant market and the enterprise's existing competitors are excluded and/or trade opportunities available to them are reduced (for example, a situation where such restraints make it difficult for them to easily acquire alternative trading partners, cause an increase in their expenses for conducting business activities, and/or discourage them from entering the market or developing new products). (Part I, (2) a of the Distribution and Business Practice Guidelines)

<sup>67</sup> "Whether 'an enterprise is influential in a market' is in the first instance found by the market share of the enterprise; that is, whether it has a share exceeding 20% in the market (meaning a product market consisting of a group of products that have the same or similar functions and utilities as the product subject to the restraints concerned, and that compete with each other in terms of geographical conditions, transactional relations, and other factors; which is determined, in principle, in terms of substitutability for users and also, when necessary, with consideration given to substitutability for suppliers). Nevertheless, even where an enterprise's share exceeds the

with the enterprise's competitors or their handling of competing products, problems under the Antimonopoly Act arise.<sup>68</sup>

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<sup>69</sup>.

#### <Supposed case that poses problems under the Antimonopoly Act>

(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 purchasers.

#### (2) Restraints on sales territories<sup>70</sup>

There are cases in which an enterprise adopts an area-of-responsibility system<sup>71</sup> or location system<sup>72</sup> in connection with its distributors, for example, in order to ensure efficient setup of outlets for products or secure an after-sales service system.

##### A. Acts that do not pose problems under the Antimonopoly Act

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specified level, the enterprise's act is not necessarily held to be illegal. An act is illegal if it generates 'market foreclosure effects' or 'price maintenance effects.' (Part I, 3 (4) of the Distribution and Business Practice Guidelines)

<sup>68</sup> Problems under the Antimonopoly Act may arise if an act has certain anti-competitive effects which substantially restrain competition in a market (Article 2, paragraph (5) and (6) of the Antimonopoly Act) or tend to impede fair competition (Article 2, paragraph (9) of the Antimonopoly Act).

<sup>69</sup> See Part I, 3 of the Distribution and Business Practice Guidelines.

<sup>70</sup> See Part I, Chapter 2, 3 of the Distribution and Business Practice Guidelines.

<sup>71</sup> Under this system, an enterprise assigns a specific territory to each distributor as the area of the distributor's primary responsibility and imposes on the distributor the requirement that the distributor should carry out active sales activities within its own territory (i.e., the establishment of an area of the distributor's primary responsibility only, not involving strict territorial restraints or restraints on passive sale to outside customers).

<sup>72</sup> Under this system, an enterprise limits areas where a distributor may establish outlets such as stores, or designates a place where such outlets are to be established (i.e., the establishment of an area of the distributor's primary responsibility only, not involving strict territorial restraints or restraints on passive sale to outside customers).

An act by an enterprise does not normally generate price maintenance effects and thus poses no problem under the Antimonopoly Act<sup>73</sup>, unless it falls under the category of either strict territorial restraints<sup>74</sup> or restraints on passive sale to outside customers.<sup>75</sup>

Also, with regard to strict territorial restraint, case where an enterprise with market a share of no more than 20% or a new entrant acts generally does not tend to impede fair competition, does not become illegal.

<Supposed case that does not pose problems under the Antimonopoly Act>

(Supposed case 43: Assignment of a sales territory for the purpose of promoting the capital investment, etc. which is necessary for providing products)

- Although Transportation Equipment A, which Enterprise X, a manufacturer, newly markets, has good energy saving performance compared with conventional products, it is manufactured by using special technology and thus requires the installation of a dedicated system for which each distributor is required to bear a huge amount of cost in order for the distributor to conduct repair and maintenance operations.

For the purpose of arranging incentives for distributors to actively install the dedicated system and ensuring their sufficient capital investment, as well as for the purpose of enabling users to access sufficient repair and maintenance, X has decided, in connection with Transportation Equipment A which it newly sells, to assign a certain territory for the sale of the equipment only to each selected distributor and have such distributor take on the responsibilities for sales activities and repair and maintenance operations within the territory. Meanwhile, X has decided not to supply its newly available Transportation Equipment A to distributors to which no sales territory is assigned. X will not impose on distributors any strict territorial restraints or restraints on passive sale to outside customers.

B. Acts that pose problems under the Antimonopoly Act

If an enterprise is engaged in an act falling under the category of either strict territorial restraints or restraints on passive sale to outside customers, thereby generating price maintenance effects<sup>76</sup> depending on the substance and form of the act concerned and the market condition, problems under the Antimonopoly Act arise.<sup>77</sup>

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, among other factors, the restraints on business activities of 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 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 that poses problems under the Antimonopoly Act>

<sup>73</sup> See Part I, Chapter 2, 3 of the Distribution and Business Practice Guidelines.

<sup>74</sup> This type of restraints means that an enterprise assigns a specific territory to a distributor, thereby restraining the distributor from carrying out its sales activities elsewhere other than within the territory.

<sup>75</sup> This type of restraints means that an enterprise assigns a specific territory to a distributor, thereby restraining the distributor from carrying out its sales activities at the request of customers outside the territory.

<sup>76</sup> "Case where price maintenance effects are generated" refers to a case where an act effecting non-price restraints may cause a situation in which competition between the counterparty to the act and its competitors is impeded and the counterparty can freely, to some extent, control its prices at its own discretion and thereby maintain or raise the price of the product in question. (Part I, (2) B of the Distribution and Business Practice Guidelines)

<sup>77</sup> Problems under the Antimonopoly Act may arise if an act has certain anti-competitive effects which substantially restrain competition in a market (Article 3 of the Antimonopoly Act) or tend to impede fair competition (Article 19 of the Antimonopoly Act).

(Supposed case 44: Strict territorial restraints)

- In commencing the sale of a new version of Product A with a lower environmental burden compared with the previous one, Enterprise X, which is a manufacturer of Product A, has decided to assign a certain territory to each distributor and prohibit the distributor from selling the new version of Product A outside the territory in order to prevent its price collapse and recover the enormous cost incurred for the development of the product. X holds a share of 50% in the manufacturing and sales market of Product A, and this product has been differentiated from its competing products, rendering it difficult for competition between Product A and such competing products to occur. Accordingly, X's act gives rise to a situation where each of its distributors can, at its own discretion, freely control its price to some extent and can maintain or raise the price of the product concerned.

### (3) Selective distribution<sup>78</sup>

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.

#### A. 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 that does not pose problems under the Antimonopoly Act>

(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.

#### B. Acts that pose problems under the Antimonopoly Act

An influential enterprise in a market may set 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.<sup>79</sup>

In such case, whether it is problematic under the Antimonopoly Act is found by comprehensively considering the anti-competitive effects and pro-competitive effects

<sup>78</sup> See Part I, Chapter 2, 5 of the Distribution and Business Practice Guidelines.

<sup>79</sup> Problems under the Antimonopoly Act may arise if an act has certain anti-competitive effects which substantially restrain competition in a market (Article 3 of the Antimonopoly Act) or tend to impede fair competition (Article 19 of the Antimonopoly Act).

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 that poses problems under the Antimonopoly Act>

(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.

(4) Restraints on retailers' sales methods<sup>80</sup>

There are cases in which an enterprise restrains the sales methods (except those related to selling prices, sales territories, and customers) of retailers.

A. Acts that do not pose problems under the Antimonopoly Act

Restraints on retailers' sales methods may not themselves pose problems under the Antimonopoly Act in the case where such restraints are found to be based on reasonably rational grounds that ensure proper sale of the products concerned, such as the ensuring of the safety of the products, the maintenance of their quality, or the preservation of the credibility of their trademarks, and also where equivalent conditions are imposed on other retailers.

<Supposed case that does not pose problems under the Antimonopoly Act>

(Supposed case 47: Making it obligatory to carry out the provision, etc. of the equipment necessary for using the products concerned)

- In planning the sale of a new version of Transportation Equipment A, which is equipped with Lithium-ion Battery B that can significantly reduce greenhouse gas emissions, Enterprise X, which is a manufacturer of Transportation Equipment A, expects the level of users' convenience to be reduced since the number of currently available charging facilities dedicated to new Transportation Equipment A is not sufficient. In order to ensure the convenience of users, X has decided to sell the new version of Transportation Equipment A on the condition that dedicated charging facilities are installed in each distributor's store, and that the distributor also provides a recharging service for the equipment. Equivalent standards are applicable to all the distributors that wish to handle the new version of Transportation Equipment A.

B. Acts that pose problems under the Antimonopoly Act

<sup>80</sup> See Part I, Chapter 2, 6 of the Distribution and Business Practice Guidelines.

In the case where an influential enterprise in a market makes it obligatory for retailers handling its products to use a certain sales method, and if, for example, the enterprise fails to base the use of such method on any reasonably rational grounds for ensuring proper sale of the products or to impose equivalent conditions on other retailers, or places restraints on handling of competing products, sales territories, customers, etc.<sup>[81]</sup> by means of the restraint on the sales method, problems under the Antimonopoly Act may arise.<sup>[82]</sup>

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 the restraint on the sales methods of such retailers, 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 that poses problems under the Antimonopoly Act>

(Supposed case 48: Establishment of criteria in the case where equivalent restraints are not applied to all trading partners)

- Although Household Electrical Appliance A, which its manufacturer, Enterprise X, newly markets, has good energy saving performance compared with conventional household appliances, its operation method is made different from that of conventional appliances. For that reason, X has decided to supply Household Electrical Appliance A only to those retailers which offer polite explanations on the operation method to general consumers who are conscious of environmental problems. However, in reality, although polite explanations on the operation method are available even by retailers sell products online, X has selected retailers solely on the basis of whether they sell products online, and has not applied the criterion "offering polite explanations on the operation method" to online dealers, therefore, competition between retailers sell products in real shops and those sell products online is disturbed.

## 2. Selection of trading partners

### (1) Individual refusal to deal<sup>[83]</sup>

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.

#### A. 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 cases that do not pose problems under the Antimonopoly Act>

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

<sup>81</sup> Acts that restrain retailers' selling prices pose the problem of Resale Price Maintenance (Part I, Chapter 1 of the Distribution and Business Practice Guidelines).

<sup>82</sup> Problems under the Antimonopoly Act may arise if an act has certain anti-competitive effects which substantially restrain competition in a market (Article 3 of the Antimonopoly Act) or tend to impede fair competition (Article 19 of the Antimonopoly Act).

<sup>83</sup> See Part II, Chapter 3 of the Distribution and Business Practice Guidelines.

- 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 Enterprise 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 Enterprise Y has so far sold to Enterprise 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.

(Supposed case 50: Termination of dealings with a trading partner that does not meet the specifications of a product associated with greenhouse gas reduction)

- In the manufacturing and sale of Product A, Enterprise X, which is a manufacturer of Product A, procured Component B from its manufacturer Enterprise Y and Component C from its manufacturer Enterprise Z. For the purpose of reducing greenhouse gas emissions generated in its entire supply chain, X hoped to procure components whose manufacturing processes would generate 5% less greenhouse gas emissions compared with the manufacturing processes of the existing components, Components B and C. Then, X terminated its dealings with Y and Z due to the fact that those enterprises were not able to supply those components which could meet the requirement.

#### B. 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,<sup>[84]</sup> problems under the Antimonopoly Act may arise.<sup>[85]</sup>

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 cases that pose problems under the Antimonopoly Act>

(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

<sup>84</sup> The subject matters of refusal to deal include not only transactions associated with specific technologies or products/services but also transactions associated with data as indispensable input resources in terms of conducting business activities for specific technologies or products/services (see Chapter 4, 2 (1) of the Data Report; and Part VI, 4 (3) B (B) of the Business Alliance Report).

<sup>85</sup> Problems under the Antimonopoly Act may arise if an act has certain anti-competitive effects which substantially restrains competition in a market (Article 3 of the Antimonopoly Act) or tend to impede fair competition (Article 19 of the Antimonopoly Act).

With respect to cases where such an act restrains competition in a market and is thus found illegal as Private Monopolization, viewpoints on such cases are set out in the Exclusionary Private Monopolization Guidelines.



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.

## (2) Boycotts<sup>86</sup>

There are cases in which an enterprise in concert with its competitors, trading partners, etc., or a trade association, makes it considerably difficult for enterprises to enter markets or excludes incumbents from markets, by refusal to deal or other types of conduct. Such an act conducted by any enterprise, etc. is called a boycott.

### A. Acts that do not pose problems under the Antimonopoly Act

Although, in principle, a boycott poses problems under the Antimonopoly Act, there may be case where it is expected to have anti-competitive effects minimal and also it is expected to have pro-competitive effects.

In the assessment of whether such an exceptional case poses problems under the Antimonopoly Act, it is found by comprehensively considering the anti-competitive effects and pro-competitive effects brought by the act concerned, with the rationality of the purpose of the act and the adequacy of the means employed for it taken into account on a case-by-case basis.

### <Supposed case that does not pose problems under the Antimonopoly Act>

(Supposed case 54: Refusal of certification of products that fail to meet the voluntary standards of a trade association)

- Trade Association X, which consists of manufacturers of Product A, established voluntary

<sup>86</sup> See Part II, Chapter 2, 1 of the Distribution and Business Practice Guidelines.

standards including a standard requiring a 10% reduction in the greenhouse gas emissions generated in the manufacturing processes of Product A compared with conventional products. X approves its constituent enterprises to attach to their Product A meeting the above standards a label assuring general consumers of the product's greenhouse gas reduction effect, and issues the label at the request of each constituent enterprise manufacturing Product A that meets the voluntary standards. However, certain consumers are buying Product A without the said label.

Originally, Enterprise Y, which is a constituent enterprise of X, conducted sales activities with the label issued by X on the grounds that Y's Product A met the voluntary standards. However, it has been revealed that Y did not actually meet the voluntary standards. Since the label issued by X guarantees, as a trade association, Product A's greenhouse gas reduction effect and this information is necessary for general consumers to select products on the basis of correct information, the attachment of the label on Product A that does not meet the voluntary standards may cause general consumers to make errors in their choice of products and thereby cause the credibility of the label to be damaged.

For that reason, in order to protect general consumers from being misled and maintain the credibility of the label, X has decided to refuse to issue the label to Y until this enterprise becomes able to sell Product A that meets the voluntary standards.

[Commentary]

This act is refusal of issuing the label by Trade Association X assuring the fulfillment of voluntary standards to a constituent enterprise selling Product A which does not fulfill the voluntary standards. With regard to a constituent enterprise's fulfillment of the voluntary standard, the constituent enterprise's freedom must be inherently secured. However, the purpose of the act, which is to prevent disadvantages to consumers caused by the situation where the label is attached to Product A which does not fulfill the voluntary standards, is found to be rational. In addition, the implementation of the act within limited period which is genuinely necessary for solving the problem is found to be adequate as a mean. Therefore, the act can be implemented without posing problems under the Antimonopoly Act.

#### B. Acts that pose problems under the Antimonopoly Act

Boycotts may infringe on the freedom of market entry of enterprises, which is a prerequisite for effective competition, and cause a direct impact on the market mechanism. If an enterprise in concert with its competitors, trading partners, etc., or a trade association, holds a boycott, thereby making it considerably difficult for enterprises to enter the market or excluding incumbents from the market, this boycott may pose problems under the Antimonopoly Act.<sup>87</sup>

#### <Supposed cases that pose problems under the Antimonopoly Act>

(Supposed case 55: Boycotting a competing enterprise as means to achieve to exclude it)

- Enterprises X, Y, and Z, which are manufacturers of Product A, developed a new version of Product A, respectively, which uses Material B to significantly reduce the greenhouse gas emissions generated in its manufacturing processes, compared with the previous version. While the demand for the new version of Product A is regarded as high, Material B is indispensable for the realization of the product specifications. As means to exclude Z, which has, over a period of time, expanded its share in the manufacturing and sales market of Product A, from the market, X and Y has requested a number of manufacturers of Material B not to sell Material B to Z.

(Supposed case 56: Boycotting a new enterprise by means of for the purpose of blocking its market entry)

<sup>87</sup> Problems under the Antimonopoly Act may arise if an act has certain anti-competitive effects which substantially restrain competition in a market (Article 2, paragraph (5) or (6), or Article 8 of the Antimonopoly Act) or tend to impede fair competition (Article 2, paragraph (9) of the Antimonopoly Act).

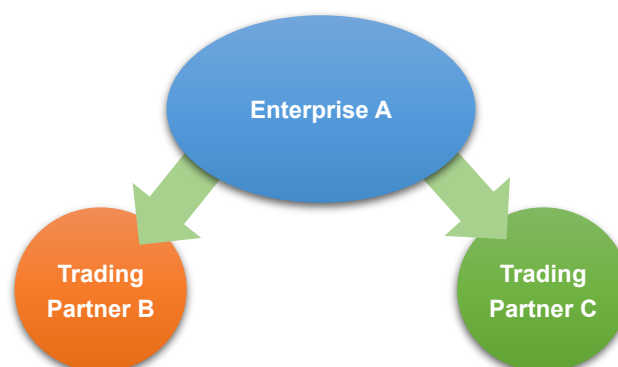
- In R&D to reduce the greenhouse gas emissions generated through the use of Product A, it is essential to collect data on the amount of such greenhouse gas emissions from as many users as possible. In order to support the R&D for technology to reduce the greenhouse gas emissions generated through the use of Product A, Trade Association X consisting of manufacturers of Product A collects data on the amount of greenhouse gas emissions from each of its members and provides such data to those members. By means to block the market entry of enterprises planning to manufacture Product A whose greenhouse gas emissions during use have been reduced, X has decided not to provide the data that it collects to new entrants.

### Part III Abuse of a Superior Bargaining Position

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.<sup>88</sup>



Abuse of a Superior Bargaining Position

<sup>88</sup> If the transactions between the parties fall under the category of transactions between main subcontracting enterprises and subcontractors as provided under the Act against Delay in Payment of Subcontract Proceeds, Etc. to Subcontractors (Act No.120 of 1956; hereinafter referred to as the "Subcontract Act") as well as the category of [1] manufacturing contract, [2] repair contract, [3] information-based product creation contract, or [4] service contract as provided under the Subcontract Act, such transactions are regulated under the Subcontract Act. In respect to the basic approach to the application of the Subcontract Act, the "Guidelines on Application of the Act against Delay in Payment of Subcontract Proceeds, Etc., to Subcontractors" have been formulated and published (Secretary General Notice No. 18 of 2003)(Guidelines Concerning Abuse of a Superior Bargaining Position under the Antimonopoly Act(Note 5)).

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.

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.<sup>89</sup>

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.<sup>90</sup> 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.<sup>91</sup>

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.

In the following, the Guidelines broadly classified acts that constitute abuse under (iii) into the two categories below according to types of conduct and explained those with reference to supposed cases: "Acts that do not pose problems under the Antimonopoly Act" and "Acts that may potentially pose problems under the Antimonopoly Act."<sup>92</sup>

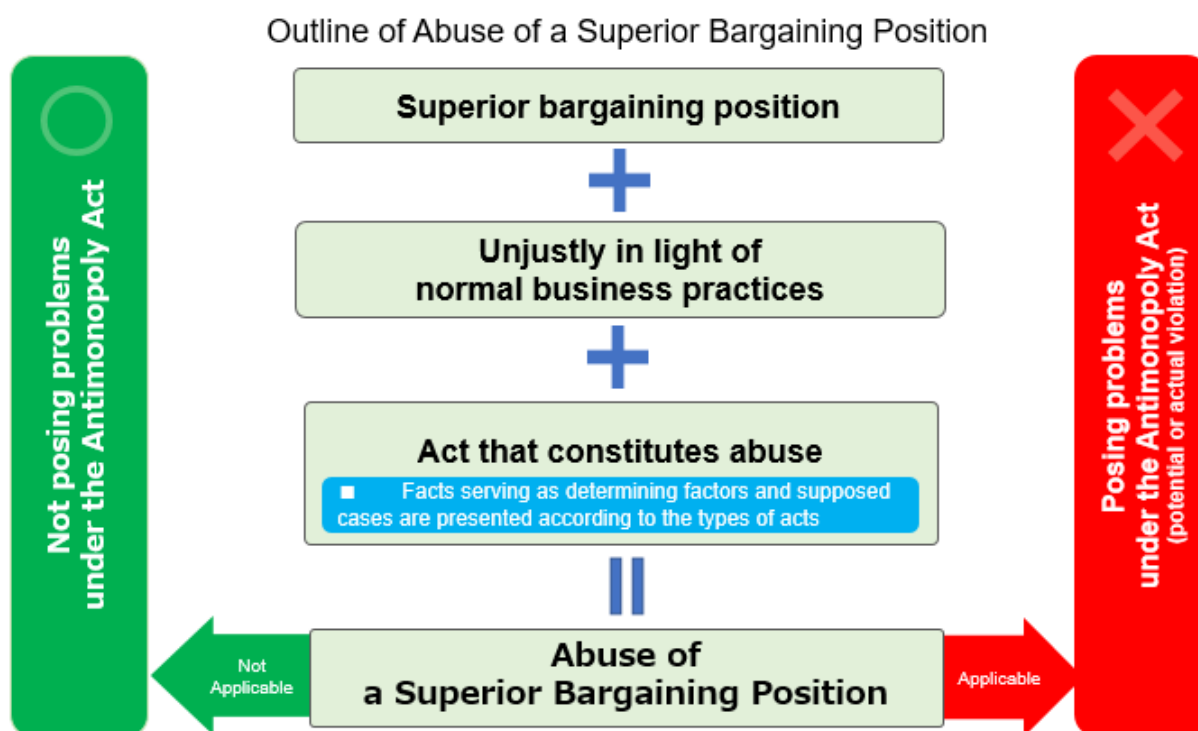
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<sup>89</sup> See Section II of the Guidelines Concerning Abuse of a Superior Bargaining Position.

<sup>90</sup> See Section I, 1 of the Guidelines Concerning Abuse of a Superior Bargaining Position.

<sup>91</sup> See Section III of the Guidelines Concerning Abuse of a Superior Bargaining Position.

<sup>92</sup> The Guidelines indicate viewpoints on activities toward the realization of a green society under the Antimonopoly Act, and do not exhaustively cover the acts prescribed in subitems (a) through (c) of Article 2, paragraph (9), item (v) of the Antimonopoly Act. In addition to any acts not illustrated in the Guidelines, whether a specific act poses problems as Abuse of a Superior Bargaining Position requires to be determined on a case-by-case basis in light of the provisions of the Antimonopoly Act.



#### 1. Forced purchase/use<sup>93</sup>

There are cases in which an enterprise forces the counterparty to its transaction to purchase or use certain products/services for purposes such as for reducing greenhouse gas emissions, .

##### A. Acts that do not pose problems under the Antimonopoly Act

In the case where an enterprise who has a superior bargaining position over a counterparty, for purposes such as for reducing greenhouse gas emissions, upon placing an order for the manufacture of products or the provision of services by designating certain specifications, causes the transacting party to purchase the raw materials required for manufacturing the said products or the equipment required for providing the said services based on a reasonable need, such as a need to standardize or improve the quality of the said products or services, such act would not unjustly impose a disadvantage on the transacting party in light of normal business practices, and therefore does not cause the problem of Abuse of a Superior Bargaining Position.

##### <Supposed case that does not pose problems under the Antimonopoly Act>

(Supposed case 57: Request for purchase of the raw materials, etc. designated by the specifications)

- For the purpose of reducing the greenhouse gas emissions generated in the disposal of Product A, among other purposes, Enterprise X, which is a manufacturer of Product A, decided to manufacture a new version of Product A mainly with components made from naturally degradable Raw Material B. Intending to advertise the new version of Product A on the basis of its use of Raw Material B and thereby promote its sale to general consumers, X has instructed Enterprise Y, which is the counterparty to the outsourcing transaction whereby X has outsourced the manufacturing of Component C used in the manufacturing of Product A, to procure Raw Material B without fail and use it in the manufacturing of Component C as part of the designated specifications.

When ordering the manufacturing of Component C for the new version of Product A, X clearly specified the specifications of the component to Y and then conducted sufficient price negotiations in light of Y's increased cost due to the procurement of Raw Material B.

<sup>93</sup> See Section IV, 1 of the Guidelines Concerning Abuse of a Superior Bargaining Position.

## B. Acts that pose problems under the Antimonopoly Act

In the case where an enterprise who has a superior bargaining position over a counterparty requests the transacting party to purchase products or services other than those pertaining to the transactions in question, for purposes such as for reducing greenhouse gas emissions and if it is unavoidable for the transacting party to accept such request from concerns about the possible effects on future transactions even where the counterparty does not require the said products or services in performing its business and does not wish to purchase them, such act would unjustly impose a disadvantage on the counterparty in light of normal business practices, and cause problems as Abuse of a Superior Bargaining Position.

### <Supposed case that poses problems under the Antimonopoly Act>

(Supposed case 58: Request for purchase of products not required by the counterparty to a transaction)

- For greenhouse gas reduction, Enterprise X, which is a manufacturer of Product A, installed a system to measure greenhouse gases emitted in the enterprise's manufacturing processes of Product A. X has suggested its intention not to place orders in the future with the counterparty to the outsourcing transaction whereby X has outsourced the manufacturing of Product A's component unless the counterparty installs the system for its manufacturing of the component, despite the fact that it is not necessary for the counterparty to newly install it, such as where the counterparty has already installed an equivalent system. Thereby X has caused the counterparty to purchase the greenhouse gas measurement system supplied by the specific enterprise designated by X.

## 2. Request for provision of economic benefits<sup>94</sup>

There are cases in which an enterprise requests the counterparty to its transaction to provide economic benefits<sup>95</sup> for purposes such as for reducing greenhouse gas emissions.

### A. 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<sup>96</sup> 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 cases that do not pose 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. Enterprises participating in the consortium are requested to pay a certain sponsorship fee.

X received an application from the counterparty to its transaction to participate in the consortium. In advance of the participation, X explained the amount and use of the

<sup>94</sup> See Section IV, 2 of the Guidelines Concerning Abuse of a Superior Bargaining Position.

<sup>95</sup> "The term provision of 'economic benefits' refers to the provision of money as a monetary contribution, financial assistance, or under any other title, the provision of labor services, and the like." (Section IV, 2 of the Guidelines Concerning Abuse of a Superior Bargaining Position)

<sup>96</sup> The term "direct benefit" refers to a benefit that actually arises from the provision of economic benefits, such as where such provision leads to an increase in the sales of the products that are sold by the counterparty to a transaction or to such counterparty's direct understanding of trends in consumer needs, and does not include any indirect benefit such as where such provision leads to an advantage for future transactions. (Part IV, 2 (Notes 9 and 12) of the Guidelines Concerning Abuse of a Superior Bargaining Position)

monetary contribution requested of the participants so that the counterparty was able to decide whether to provide it as a reasonable burden. After consideration by the counterparty, X had 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, 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.

#### B. 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 problems 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 cases that pose problems under the Antimonopoly Act>

(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 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 62: Request for provision of services not included in the order made, such as waste collection)

- In order to reduce its amount of waste, Retailer X caused its supplier to collect the packing materials used for the products supplied by the supplier on the spot without any compensation, despite the fact that such collection was not stipulated in their contract. In some cases, the collection of packing materials by the supplier involved the collection of packing materials used for products supplied by other suppliers, and this collection did not generate any profit to the supplier since, due to this collection, the supplier had to bear a certain cost for subsequent disposal or reuse of the collected packing materials.

(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, 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.

### 3. Unilateral decision on the consideration for a transaction<sup>97</sup>

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.

#### A. 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 case that does not pose problems under the Antimonopoly Act>

(Supposed case 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.

#### B. 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

<sup>97</sup> See Section IV, 3 (5) A of the Guidelines Concerning Abuse of a Superior Bargaining Position.

unjustly impose a disadvantage on the counterparty in light of normal business practices and therefore cause problems under the Antimonopoly Act.

Whether 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. A judgment on whether this is the case is made by comprehensively considering such factors as the following: the method employed for determining the consideration, such as whether sufficient consultations were held between the enterprise and the counterparty in deciding on the consideration, as well as whether the consideration is discriminatory in comparison to the considerations for the counterparties to other transactions, whether the consideration is lower than the counterparty's purchase price, the difference between the consideration and the normal purchase price or selling price, and the supply-and-demand relationship of the products or services covered by the transaction.

<Supposed case that poses problems under the Antimonopoly Act>

(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.

4. Establishments of other trade terms, etc.

There are cases in which an enterprise sets or changes the trade terms, or implements a transaction, with the counterparty thereto in many different forms for purposes such as for reducing greenhouse gas emissions.

If such an act falls under any of the types of conduct set forth in 1 through 3 above, whether it poses problems under the Antimonopoly Act is found on the basis of the viewpoint described in the relevant section. Furthermore, even if an act does not fall under any of the types of conduct set forth in 1 through 3 above, but if it falls under any of the types of “refusal to receive products,”<sup>98</sup> “return of products,”<sup>99</sup> “delay in payment”<sup>100</sup> and “price reduction,”<sup>101</sup> and “request to redo an order,”<sup>102</sup> whether it poses problems under the Antimonopoly Act is found on the basis of the viewpoint described in the applicable section of the Guidelines Concerning Abuse of a Superior Bargaining Position.

<sup>98</sup> See Section IV, 3 (1) of the Guidelines Concerning Abuse of a Superior Bargaining Position.

<sup>99</sup> See Section IV, 3 (2) of the Guidelines Concerning Abuse of a Superior Bargaining Position.

<sup>100</sup> See Section IV, 3 (3) of the Guidelines Concerning Abuse of a Superior Bargaining Position.

<sup>101</sup> See Section IV, 3 (4) of the Guidelines Concerning Abuse of a Superior Bargaining Position.

<sup>102</sup> See Section IV, 3 (5) B of the Guidelines Concerning Abuse of a Superior Bargaining Position.

Besides, even if an act does not fall under any of these types of conduct, but if the enterprise concerned is in a superior bargaining position over the counterparty to the relevant transaction and unilaterally sets or changes the conditions of the transaction or unilaterally carries out the transaction,<sup>103</sup> and if such act of the enterprise is to unjustly impose a disadvantage on the counterparty in light of normal business practices, problems under the Antimonopoly Act would arise.

If such act is not found to unjustly impose a disadvantage in light of normal business practices, it would not pose problems under the Antimonopoly Act. In making a judgment in this regard, the viewpoints described in 1 through 3 A above may be useful as references.

<Supposed case that poses problems under the Antimonopoly Act>

(Supposed case 66: Cancellation of placement of an order after having given instructions to install machinery and equipment for greenhouse gas reduction)

- Enterprise X, which is a manufacturer of Product A, instructed Enterprises Y and Z, to which X had outsourced the manufacturing of Component B used in the manufacturing of Product A, to install new machinery and equipment for greenhouse gas reduction. X assured Y and Z that X was going to place an order for a certain quantity of the component immediately after the installation of such machinery and equipment by Y and Z. Then, despite X's tacit approval of the fact that Y and Z were taking actions to realize the transaction, such as their installation of the required machinery and equipment, X subsequently cancelled its planned placement of an order unilaterally for its own convenience alone.

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<sup>103</sup> See Section IV, 3 (5) C of the Guidelines Concerning Abuse of a Superior Bargaining Position.

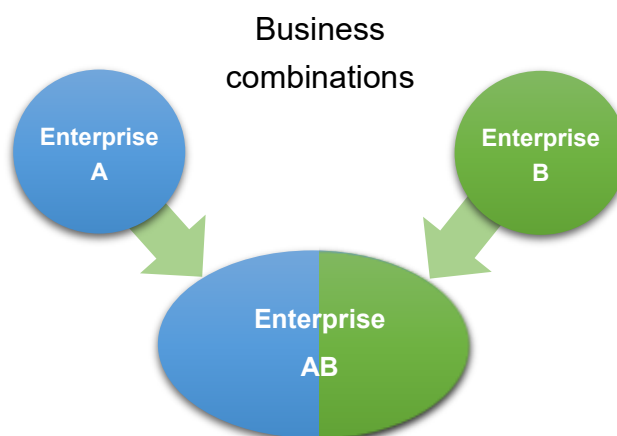
## Part IV Business Combinations

Enterprises may implement business combinations<sup>104</sup>, 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.

In the following, the flow and basic concept of business combination review are explained by reference to supposed cases.

For cases of collaboration between enterprises not falling under the category of business combinations, refer to the details on business alliances in Part II.



### 1. Flow of business combination review

#### (1) Business combination plan that requires notification

When a company satisfying certain conditions such as those set forth in Figure 1 below plans a business combination, the company must notify the JFTC of its plan in advance. In such case, the flow of business combination review is as shown in Figure 2.

When the JFTC finds, within 30 days from the date of acceptance of the notification of a business combination plan, that the notified business combination plan presents no problem in light of the provisions of the Antimonopoly Act, the review will be closed within the period (preliminary investigation).

Furthermore, when finding it necessary to conduct a detailed review, the JFTC requires the notifying company to submit necessary report and other relevant documents

<sup>104</sup> 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).

(secondary investigation). Then, within 90 days of receipt of all the reports, etc., the JFTC concludes whether the business combination plan concerned poses any problem in light of the provisions of the Antimonopoly Act.

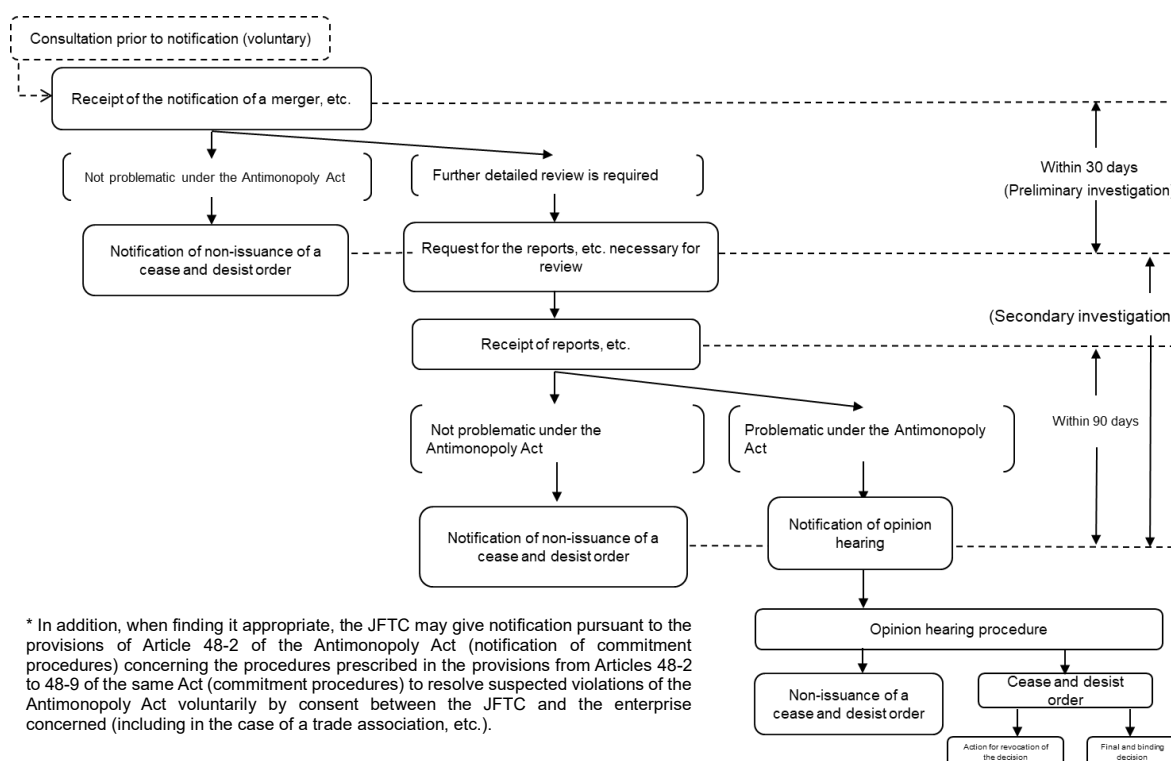
Even in the case where the JFTC initially finds a business combination may be substantially to restrain competition in a market, such business combination may be found to pose no problem under the Antimonopoly Act (meaning that the planned business combination may be carried out) if the parties to the combination can remedy the problem of it being such restraint by taking certain appropriate measures (hereinafter referred to as a “remedy” or “remedies” as appropriate).

**Figure 1 Outline of Cases Where Notification Is Required According to Type**

| Type (applicable provision)                              |                                | Outline of cases where notification is required  |
|--|--------------------------------|--|
| Acquisition of shares (Article 10)                       |                                | (i) Where a company whose total domestic sales (Note 1) exceed 20 billion yen<br>(ii) acquires some shares of a share issuing company whose domestic sales and the domestic sales of its subsidiaries exceed 5 billion yen in total, and<br>(iii) consequently the ratio of the voting rights (Note 2) held by the acquiring company exceeds 20% or 50%  |
| Merger (Article 15), joint share transfer (Article 15-3) |                                | (i) Where a company whose total domestic sales exceed 20 billion yen and<br>(ii) another company whose total domestic sales exceed 5 billion yen<br>(iii) merge (or implement a joint share transfer)  |
| Split<br>(Article 15-2)                                  | Joint incorporation-type split | (i) Where a company whose total domestic sales exceed 20 billion yen and<br>(ii) another company whose total domestic sales exceed 5 billion yen<br>(iii) cause a company incorporated through a joint incorporation-type split to succeed to their businesses in their entirety etc.  |
|  | Absorption-type split          | (i) Where a company whose total domestic sales exceed 20 billion yen<br>(ii) causes another company whose total domestic sales exceed 5 billion yen<br>(iii) to succeed to the former company's business in its entirety etc.  |
| Acceptance of assignment of business, etc. (Article 16)  |                                | (i) Where a company whose total domestic sales exceed 20 billion yen<br>(ii) accepts the assignment of the whole business of another company whose domestic sales exceed 3 billion yen<br>Or<br>(i) Where a company whose total domestic sales exceed 20 billion yen<br>(ii) accepts the assignment of a substantial part of the business of (or all or a substantial part of the fixed assets used for the business of) another company whose domestic sales exceed 3 billion yen |

(Note 1) Total domestic sales mean the amount obtained by totaling the domestic sales of each company, etc. belonging to the relevant group of combined companies (a group consisting of the ultimate parent company of the notifying company and its subsidiaries).

(Note 2) The ratio of voting rights held means the ratio of the voting rights held by the companies, etc. belonging to a group of combined companies.

**Figure 2 Flowchart of Business Combination Review**

## (2) Business combination plan that does not require notification

When a company that is planning a business combination not requiring notification seeks consultation with the JFTC on its business combination plan with the specific contents of the plan presented, the JFTC will respond in the same manner as in the case where a company notifies the JFTC of a business combination plan that requires notification.

Furthermore, in the case where a business combination plan does not require notification because only the amount related to the domestic sales, etc. of the substantially acquired company between the parties to the business combination does not meet the notification thresholds, and where the total consideration for acquisition is large and is expected to affect domestic users, the JFTC will request the parties to submit relevant documents, etc. and conduct business combination review.

## 2. Basic viewpoints in business combination review

The viewpoints of the JFTC in conducting business combination review are released as the Business Combination Guidelines.

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 planned 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 planned business combination would give rise to a situation where users cannot secure sufficient options.

### (1) Particular field of trade

A particular field of trade denotes the scope for determining whether a business combination may restrain competition or not (“product range” and “geographic range”).

A particular field of trade is defined, in principle, in terms of substitutability for users and, when necessary, from the perspective of substitutability for suppliers.

Substitutability for users is found by, on the assumption that a specific product is supplied by a monopolist in a specific region, considering the degree to which users can substitute

an alternative product or region for the purchase of the product in the case where “a small but significant and non-transitory increase in price”<sup>105</sup> has been implemented by the monopolist with the aim of maximizing its profit.

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. In this regard, for users preferring products that can contribute to reduction of greenhouse gas, etc., novel products may be regarded as not substitutable for existing products. For such novel products, two fields of trade may be separately defined on the basis that those products can constitute a particular field of trade distinguishable from that of existing products.

<Supposed cases of defining a particular field of trade>

(Supposed case 67: Market definition for products with different power sources)<sup>106</sup>

- 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)<sup>107</sup>

- 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

<sup>105</sup> Under normal circumstances, “a small but significant and non-transitory increase in price” means a price increase in the range of 5-10% over a period of about one year.

<sup>106</sup> See Case 6 in Major Business Combinations in FY 2019 (Establishment of a joint investment company concerning on-board lithium-ion battery business and others by Toyota Motor Corporation and Panasonic Corporation).

<sup>107</sup> See Case 5 in Major Business Combinations in FY 2021 (Acquisition of shares of Japan Renewable Energy Corporation by ENEOS Corporation).

business of renewable energy-based electricity generation” have been defined in an overlapping manner.

(2) Substantial restraint of competition

It is found by comprehensively taking into consideration the determining factors as described in C below whether a business combination may be substantially to restrain competition in a particular field of trade, and this applies to each of the following types of business combinations: Horizontal Business Combination (e.g., a business combination between companies in competition with each other in the same particular field of trade; the same applies hereinafter); Vertical Business Combination (e.g., a business combination between companies which are in different trading stages, such as a merger between a manufacturer and its dealer; the same applies hereinafter); and Conglomerate Business Combination (e.g., a business combination that is neither horizontal nor vertical one, such as a merger between companies in different types of business or shareholding between companies whose geographic ranges in a certain particular field of trade are different; the same applies hereinafter). However, when a business combination falls under either of the criteria set forth in A and B below (hereinafter referred to as “the safe-harbor criteria”), it is normally considered that the business combination may not be substantially to restrain competition in a particular field of trade.

A. Safe-harbor criteria for Horizontal Business Combination

When the Herfindahl-Herschman Index (the index calculated from the sum of the squared market share of each enterprise in a particular field of trade; hereinafter referred to as the “HHI”) after a business combination falls under one of items (i) through (iii) below, it is not normally considered that the horizontal business combination concerned may be substantially to restrain competition in a particular field of trade:

- (i) the HHI after the business combination is not more than 1,500;
- (ii) the HHI after the business combination is more than 1,500 but not more than 2,500 while the increment of the HHI<sup>108</sup> is not more than 250; or
- (iii) the HHI after the business combination is more than 2,500 while the increment of the HHI is not more than 150.

Even when a horizontal business combination does not meet the above-mentioned criteria, it does not immediately mean that the business combination may be substantially to restrain competition; this is rather found on the basis of the facts of each case. In light of past cases, if the HHI after the business combination is not more than 2,500 and the market share of the company group after the business combination is not more than 35%, the possibility that the business combination may be substantially to restrain competition is usually considered to be small.

B. Safe-harbor criteria for Vertical Business Combination and Conglomerate Business Combination

When the company group after a business combination falls under either item (i) or (ii) below, it is not normally considered that the vertical or conglomerate business combination concerned may substantially to restrain competition in a particular field of trade:

- (i) the market share of the company group after the business combination is not more than 10% in all the particular fields of trade in which the parties to the combination are involved; or
- (ii) the HHI after the business combination is not more than 2,500 and the market share of the company group after the business combination is not more than 25% in all the particular fields of trade in which the parties to the combination are involved.

Even when a vertical or conglomerate business combination does not meet the above-mentioned criteria, it does not immediately mean that the business combination may be substantially to restrain competition; this is rather found on the basis of the facts of each

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<sup>108</sup> In the case where a business combination concerns only two parties (A and B), the increment of the HHI ( $\Delta$ ) derived from the business combination can be calculated by doubling the value obtained by multiplying the market shares of the parties ( $A = a\%$  and  $B = b\%$ ;  $\Delta = 2ab$ ).



case. In light of past cases, if the HHI after the business combination is not more than 2,500 and the market share of the company group after the business combination is not more than 35%, the possibility that the business combination may be substantially to restrain competition is usually considered to be small.

C. Where the safe-harbor criteria are not applicable

When the safe-harbor criteria are not applicable to a business combination, the business combination is assessed to find out whether it may be substantially to restrain competition in a particular field of trade (i) through unilateral conduct by the company group or (ii) through coordinated conduct between the company group and its competitor(s).

In this assessment, the JFTC will conduct review as follows in each Horizontal Business Combination, Vertical Business Combination, and Conglomerate Business Combination.

(A) Substantial restraint of competition by Horizontal Business Combination<sup>109</sup>

For the purpose of effectively working on reduction of greenhouse gas, companies competing with each other in the same particular field of trade implement a horizontal business combination, such as integrating part of their R&D activities or other business activities. Since positive activities seeking to accomplish the purpose of reducing greenhouse gas emissions involve certain business risks and costs, it is necessary to attain economies of scale, etc. in order to press ahead with such activities, and horizontal business combinations can be an effective means to achieve those targets. Accordingly, horizontal business combinations may facilitate improvement in efficiency and benefit interests of consumers. However, because horizontal business combinations reduce the number of competitive units in particular fields of trade, they have the most direct impact on competition and thus may be more likely to substantially restrain competition in particular fields of trade, compared with vertical business combinations and conglomerate business combinations.

A horizontal business combination may substantially restrain competition in a particular field of trade, potentially either through unilateral conduct by the company group or through coordinated conduct between the company group and one or more of its competitors (hereinafter referred to as a “competitor”). In the case where the unilateral conduct of the company group or its coordinated conduct with its competitors can readily give rise to a situation in which the company group has some control over the price and other factors of relevant products, the horizontal business combination concerned may be substantially to restrain competition in the relevant particular field of trade.

(I) Determining factors concerning substantial restraint of competition through unilateral conduct

To find whether a horizontal business combination may be substantially to restrain competition in a particular field of trade through unilateral conduct, the following factors are taken into consideration.

- (i) The positions, etc. of the company group and its competitors, the competitive situation in the market, and other matters (market shares and the ranks thereof, the past competitive situation and other relevant matters between the parties to the business combination, market share differences from competitors, competitors' excess capacity and the degree of differentiation, the R&D situation, and the characteristics of the market)
- (ii) Import (the degree of institutional barriers, the degree of import-related transportation costs and the existence of problems in distribution, the degree of substitutability between the imported product and the company group's product, and the potential for supply from overseas)
- (iii) Entry (the degree of institutional barriers to entry, the degree of barriers to entry in practice, the degree of substitutability between entrants' products and the

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<sup>109</sup> See Part IV of the Business Combination Guidelines.

- company group's product, and the potential for market entry)
- (iv) Competitive pressure from adjacent markets
- (v) Competitive pressure from users
- (vi) Overall business capabilities
- (vii) Efficiency
- (viii) Financial conditions of the company group
- (ix) Scale of the particular field of trade

If improvements in the efficiency of the company group after its business combination, for example through economies of scale, integration of production equipment, specialization of factories, reduction in transportation costs, or efficiency in R&D system, are likely to lead the company group to take competitive actions, this factor is also considered to determine the impact of the business combination on competition. That is, if a business combination toward the realization of a green society is likely to generate pro-competitive effects such as the creation of innovations including new technologies to contribute to reduction of greenhouse gas or the creation of new products that can contribute to reduction of greenhouse gas, the business combination will also be highly regarded from the aspect of "efficiency" among the above determining factors.

However, efficiency is determined from the following three aspects: (i) improvement in efficiency should be an effect specific to the business combination; (ii) improvement in efficiency should be feasible; and (iii) improvement in efficiency should enhance the interests of users.<sup>[110]</sup> Furthermore, business combinations that create a state of monopoly or quasi-monopoly are hardly ever justified by efficiency.

(II) Determining factors concerning substantial restraint of competition through coordinated conduct

To find whether a horizontal business combination may be substantially to restrain competition in a particular field of trade through coordinated conduct, the following factors are taken into consideration.

- (i) The positions, etc. of the company group and its competitors, the competitive situation in the market, and other matters (the number of competitors, etc., the past competitive situation and other relevant matters between the parties to the business combination, and the excess capacity of competitors)
- (ii) Trade realities, etc. (the conditions of trade, etc., trends in demand, technological innovation, etc., and the past competitive situation)
- (iii) Competitive pressure from import, entry, and adjacent markets, etc.
- (iv) Efficiency<sup>[111]</sup> and the financial conditions of the company group

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<sup>110</sup> (i) Improvement in efficiency should be specific to the business combination

Improvement in efficiency has to be a result specifically derived from a business combination. Therefore, with respect to such factors related to the efficiency expected from a business combination as economies of scale, integration of production facilities, specialization of factories, reduction in transportation costs, and efficiency in R&D for next-generation technology, environmentally-friendly capabilities, etc., it is necessary for those factors not to be achievable by other less anti-competitive means.

(ii) Improvement in efficiency should be feasible

Improvement in efficiency has to be feasible. In this regard, for example, such documents as the following are considered: documents on the internal procedures leading to the decision on the relevant business combination; explanatory materials for shareholders and financial markets regarding the expected efficiency; and materials, etc. prepared by external specialists concerning improvement in efficiency, etc.

(iii) Improvement in efficiency should enhance the interests of users

The outcome of improvement in efficiency through a business combination has to be returned to users, for example, through the reduced prices of products and services, improved quality, the supply of new products, or streamlined R&D for next-generation technology, environmentally-friendly capabilities, etc. In this regard, in addition to the materials listed in (ii) above, the matters to be scrutinized include information related to improved capabilities that may bring effects such as price reduction and the history of actual price reductions, quality improvements, supply of new products, etc. implemented under competitive pressure from both the demand and supply sides. (Part IV, 2 (7) of the Business Combination Guidelines)

<sup>111</sup> This is assessed in accordance with (I) above.

<Supposed cases of business combination 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 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 70: 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.

<Supposed case of business combination that poses 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 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 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.

(B) Substantial restraint of competition by Vertical Business Combination<sup>112</sup>

For the purpose of effectively working on reduction of greenhouse gas, companies at different trading stages may implement a vertical business combination between them so as to enhance their procurement of raw materials, manufacturing of components, R&D, etc. With time constraints presenting a big obstacle to the accomplishment of “carbon neutrality by 2050,” vertical business combinations with specific enterprises with necessary management resources can be an effective means for enterprises to promptly and effectively advance their activities.

Since vertical business combinations do not reduce the number of competitive units in a particular field of trade, their impact on competition is not as great as that of horizontal business combinations. Furthermore, vertical business combinations may potentially contribute to the interests of consumers, for example through facilitation of efficient provision of products that can contribute to greenhouse gas reduction.

Vertical business combinations are normally considered that they may not be substantially to restrain competition in a particular field of trade, except in cases in which the problem of substantial restraints on competition is caused by the closure or exclusivity of a market, coordinated conduct, etc.

A vertical business combination may be substantially to restrain competition in a particular field of trade, potentially either through unilateral conduct by the company group or through coordinated conduct between the company group and its competitors. In the case where the unilateral conduct of the company group or its coordinated conduct with its competitors can readily give rise to a situation in which the company

<sup>112</sup> See Part V of the Business Combination Guidelines.

group has some control over the prices and other factors of relevant products, the vertical business combination concerned may be substantially to restrain competition in the relevant particular field of trade.

(I) Determining factors concerning substantial restraints on competition through unilateral conduct

To find whether a vertical business combination may be substantially to restrain competition in a particular field of trade through unilateral conduct, the factors set forth in 2 (2) C (A) (I) (i) through (viii) above, such as competitive pressure, are taken into consideration upon consideration of whether the problem of the closure or exclusivity of the downstream market may arise from the refusal to supply, etc. or the obtaining of confidential information, and whether the problem of the closure or exclusivity of the upstream market may arise from the refusal to purchase, etc. or the obtaining of confidential information.

(II) Determining factors concerning substantial restraints on competition through coordinated conduct

To find whether a vertical business combination may be substantially to restrain competition in a particular field of trade through coordinated conduct, the factors set forth in 2 (2) C (A) (II) (i) through (iii) above and in 2 (2) C (A) (I) (vii) and (viii) above, such as competitive pressure, are taken into consideration upon consideration of whether the company group and its competitors are likely to engage in coordinated conduct after the vertical business combination.

<Supposed case of business combination that does not pose problems under the Antimonopoly Act>

(Supposed case 72: Vertical business combination that does not cause the problem of the closure or exclusivity of the market)

- Enterprise X, which is a service provider in Passenger Transportation Business A, has been increasing in a stepwise manner the procurement volume of Fuel B that is effective in reducing greenhouse gas emissions generated through the provision of its services. In order to increase the stable procurement of Fuel B and the ratio of Fuel B to all the fuels used with the aim of accomplishing its carbon neutrality, X has decided to acquire the majority of shares of Enterprise Y, which is a supplier of Fuel B. Other than X, there are a number of enterprises which are service providers in Passenger Transportation Business A, each of which holds a market share equivalent to that of X and intends to increase its procurement volume of Fuel B on a stepwise manner, as is the case for X. Furthermore, other than Y, there are a number of enterprises which are suppliers of Fuel B, each of which holds a market share equivalent to that of Y and has a sufficient excess capacity.

[Commentary]

It is necessary to consider whether the vertical business combination concerned may result in causing two problems: the problem of Y not supplying Fuel B to enterprises providing services in Passenger Transportation Business A, except to X (input foreclosure); and the problem of X not purchasing Fuel B from enterprises supplying Fuel B, except from Y (customer foreclosure). In this case, there are multiple companies whose market shares are at the same level as X in relation to Passenger Transportation Business A or as Y in relation to the Fuel B supply business. Enterprises other than X can purchase Fuel B from a number of enterprises with sufficient excess capacities for Fuel B other than Y, and enterprises other than Y can supply Fuel B to a number of enterprises intending to increase their procurement volumes of Fuel B other than X. Accordingly, it is considered that the parties to the business combination concerned are not capable of implementing input foreclosure or customer foreclosure, and thus that the business combination in this case may not be substantially to restrain competition.

<Supposed case of business combination that poses problems under the Antimonopoly Act>

(Supposed case 73: Vertical business combination that causes the problem of the closure or exclusivity of the market)

- Under the circumstances where the sales of products generating less greenhouse gas emissions have been exponentially growing due to changes in the viewpoints of users, each enterprise engaged in the manufacturing and sale of Device A works on reducing greenhouse gas emissions generated in the manufacturing processes of Device A. Today, it is understood that the use of Component B, which is manufactured with a special method, as the main component of the device is the most effective way to reduce greenhouse gas emissions generated in the manufacturing processes of Device A. However, Enterprise Y is the only manufacturer of Component B in Japan, and it is practically difficult to import it from overseas due to transportation costs. Against this background, Enterprise X has decided to acquire all the shares of Y for the purpose of ensuring efficient procurement of Component B for its manufacturing of Device A.

There is no component similar to Component B in terms of its significant greenhouse gas reduction effect in the manufacturing processes of Device A, and thus manufacturers of Device A are required by their purchasers to use Component B. Hypothetically, if Y refuses to supply Component B to X's competitor, the competitor would be excluded from the market of Device A and, in this situation, X and Y would be able to expand the sales of Device A and make profits more than sufficient to cover the decreased sales of Component B.

[Commentary]

It is considered that the business combination in this case would potentially cause Y to refuse to supply Component B to competitors of X, which would be its parent company after the combination, such competitors' loss of supply of Component B would cause them to lose transactional opportunities with Device A purchasers demanding the use of Component B, and this situation would cause those competitors to be excluded from the market for Device A. X and Y are found to be capable of, and to have incentives for, inducing the closure or exclusivity of the market. Therefore, the business combination in this case may be substantially to restrain competition.

#### (C) Substantial restraint of competition by Conglomerate Business Combination<sup>113</sup>

For the purpose of effectively working on greenhouse gas reduction, a company may implement a conglomerate business combination, such as a merger, with another company in a different type of business, in order to acquire a business, etc. to supplement its insufficient R&D capabilities or its own business. For the realization of a green society, new businesses are expected to be created without being constrained by existing businesses. For enterprises to promptly and effectively advance their activities, conglomerate business combinations with specific enterprises having necessary management resources may potentially be an effective means.

Since conglomerate business combinations do not reduce the number of competitive units in a particular field of trade, their impact on competition is not as great as that of horizontal business combinations. Furthermore, conglomerate business combinations may potentially contribute to the interests of consumers since such a combination can enable the parties thereto to provide complex products which the parties were not previously able to provide, and therethrough it can facilitate, for example, the creation of new markets. Accordingly, it is normally considered that conglomerate business combinations may not be substantially to restrain competition in a particular field of trade, except in cases in which the problem of substantial restraint of competition is caused by the closure or exclusivity of a market, the extinction of potential competition, coordinated conduct, etc.

A conglomerate business combination may be substantially to restrain competition in a particular field of trade, potentially either through unilateral conduct by the company group or through coordinated conduct between the company group and its competitors. In the case where the unilateral conduct of the company group or its coordinated conduct with its competitors can readily give rise to a situation in which the company

<sup>113</sup> See Part VI of the Business Combination Guidelines.

group has some control over the prices and other factors of relevant products, the conglomerate business combination concerned may be substantially to restrain competition in the relevant particular field of trade.

(I) Determining factors concerning substantial restraint of competition through unilateral conduct

To find whether a conglomerate business combination may be substantially to restrain competition in a particular field of trade through unilateral conduct, the factors set forth in 2 (2) C (A) (I) (i) through (viii) above, such as competitive pressure, are taken into consideration upon consideration of whether the problem of the closure or exclusivity of a market may arise from combined supply<sup>114</sup> or the obtaining of confidential information, and whether it is a case of business combination with an influential potential competitor whereby affecting competition.

(II) Determining factors concerning substantial restraints on competition through coordinated conduct

To find whether a conglomerate business combination may be substantially to restrain competition in a particular field of trade through coordinated conduct, the factors set forth in 2 (2) C (A) (II) (i) through (iii) above and in 2 (2) (A) (I) (vii) and (viii) above, such as competitive pressure, are taken into consideration upon consideration of whether the company group and its competitors are likely to engage in coordinated conduct after the conglomerate business combination in the case where the company group obtains the confidential information of its competitors or where the number of competitive units decreases because of conglomerate market foreclosure.<sup>115</sup>

<Supposed cases of business combination that do not pose problems under the Antimonopoly Act>

(Supposed case 74: Conglomerate business combination to enhance a company's own R&D capabilities)

- Company X, which is a manufacture of Product A, had conducted R&D to reduce greenhouse gas emissions generated in the manufacturing processes of Product A but had not been successful in resolving some technical issues. However, Company Y, which is not in competition or any trade relationship with X, succeeded in developing a new technology, Technology B, that could resolve the issues. In order to enhance its R&D department, X has decided to acquire all the shares of Y. Product A and Technology B have their respective different users, each of which is frequently supplied on its own. Furthermore, no problem is likely to arise between X and Y in connection with the sharing of the competition-related material confidential information of competitors.

[Commentary]

This case is categorized as a case of conglomerate business combination since X is to purchase Y, which is not in competition or any trade relationship with X. Since the problem of combined supply or that of sharing confidential information is unlikely to arise according to the facts of the case, the business combination in this case may not be substantially to restrain competition.

(Supposed case 75: Conglomerate business combination to acquire a business that the acquiring company itself does not offer)

- Since there are great customer needs for consulting services concerning actions to take in relation to climate change, X, which provides consulting services concerning companies' overall business activities, offers suggestions on methods of reducing

<sup>114</sup> The term "combined supply" means that the products of each of the parties to a conglomerate business combination are combined technologically or contractually and supplied to the market subsequent to the business combination, or that the products the parties to a conglomerate business combination are, subsequent to the business combination, supplied all at once at a price lower than the total of the prices applied to those products when they are individually supplied. (Part VI, 2 of the Business Combination Guidelines)

<sup>115</sup> This means a case of combined supply leading to the problem of the closure or exclusivity of a market.

greenhouse gas emissions generated in the manufacturing processes of products for which greenhouse gas reduction is demanded by their customers. To respond to such customer needs further, X has decided to offer a service of calculating and visualizing an amount of greenhouse gas emissions. However, since X does not have any know-how for calculating the amount of greenhouse gas emissions and operations or the necessary system, the company has decided to acquire the majority of the shares of Y, which has for some time provided a service of visualizing the amount of greenhouse gas emissions. Although X and Y are not in competition or any trade relationship with each other at the moment, the degree of complementarity between X's consulting services and the visualizing service concerned is regarded as high. Nonetheless, no problem is likely to arise between X and Y in connection with the sharing of the competition-related material confidential information of competitors. Furthermore, there are multiple competitors with market shares equivalent to X's market share, and there are multiple competitors with market shares equivalent to Y's market share.

[Commentary]

This case is categorized as a case of conglomerate business combination since X is to purchase Y, which is not in competition or any trade relationship with X. Furthermore, while the problem of sharing confidential information may not arise according to the facts of the case, the problem of combined supply may potentially arise since there is a high level of complementarity between X's consulting services and the service of visualizing the amount of greenhouse gas emissions. However, the market positions of X and Y are not considerably high, and it is unlikely that combined supply would elevate the position of either of those companies or weaken the competitiveness of X's or Y's competitors and thereby reduce such competitors' constraining abilities. Therefore, the business combination in this case may not be substantially to restrain competition.

<Supposed case of business combination that poses problems under the Antimonopoly Act>

(Supposed case 76: Conglomerate business combination that eliminates potential competition)

- Company X, which is a manufacturer of Fuel A, accounts for a share of 70% in the manufacturing and sales market of Fuel A. The use of Fuel A generates a large amount of greenhouse gas emissions, and various companies including X have been conducting R&D for Fuel B, which is to generate significantly less greenhouse gas emissions. Since the practical application of Fuel B has not been achieved yet, Fuel B is not really regarded as an alternative product to Fuel A. However, it has been found that, with a new technology recently developed by Company Y, the practical application of Fuel B can be achieved within a few years, and thus that Fuel B is to compete against Fuel A. Assuming that any companies utilizing Y's technology will be X's strong competitors, X has decided to acquire all the shares of Y to eliminate the possibility of such companies newly entering the market. Other than Y, there is no company possessing any technology to realize the practical application of Fuel B, and accordingly any competitive pressure from new entrants, etc. cannot be expected.

[Commentary]

This case is categorized as a case of conglomerate business combination since X is to purchase Y, which is not in competition or any trade relationship with X. With the practical application of Fuel B yet to be achieved, companies utilizing Y's new technology would be influential competitors to X since X manufactures and sells Fuel A. On the basis of the market situation where X accounts for a share of 70% in the manufacturing and sales market for Fuel A, the elimination of potential competition against Fuel B would cause a serious impact on competition. Therefore, the business combination in this case may be substantially to restrain competition.

### (3) Remedies<sup>116</sup>

Even where a business combination may be substantially to restrain competition in a

<sup>116</sup> See Part VII of the Business Combination Guidelines.



particular field of trade, the parties to the business combination may be able to remedy such restraint by taking certain appropriate measures ("remedies"). What measures constitute appropriate remedies are considered on a case-by-case basis according to each case of business combination. While remedies should basically be those that can restore the competition that may be lost as a result of a business combination, and should, in principle, be structural measures such as business transfer, there are also cases in which it is rather adequate to take certain behavioral measures when the structure of the market intensely fluctuates due to, for example, technological innovation.

## Part V Consultation with the JFTC

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 problem 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.

### 1. Outline of the consultation system

There are the following two methods (1) and (2) of seeking consultation with the JFTC, and an enterprise may choose either of the methods. However, with respect to an application for consultation under the “Prior Consultation System for Activities of Businesses, etc.” (hereinafter referred to as the “Prior Consultation System”) in (1) below, it is necessary to satisfy the following requirements: an enterprise or trade association to carry out an act that is the subject matter of consultation must file an application; the applicant must present specific facts associated with the act to be carried out in the future; and the applicant must agree that the name of the applicant, the details of the consultation, and the JFTC’s responses will be published.

For business combinations, a company planning to give notification to the JFTC pursuant to the provisions of the Antimonopoly Act (hereinafter referred to as a “company planning to give notification”) may seek consultation with the JFTC on its business combination plan prior to notification (hereinafter referred to as “consultation prior to notification”). In this type of consultation, a company planning to give notification may consult with the JFTC, for example, on how to fill in a written notification form.

#### (1) Consultation through the Prior Consultation System<sup>117</sup>

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.

#### (2) 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.

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<sup>117</sup> For details on the Prior Consultation System, see the guide on the Prior Consultation System published on the JFTC website.

2. Desirable preparation by enterprises, etc. for prompt and smooth consultation

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 purposes 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 opinions of the party seeking consultation with regard to the relationship between the act concerned and the provisions of the Antimonopoly Act

## 3. Contact points

| Details of covered consultation   | Headquarters<br>03-3581-5471<br>(Main phone number)  | Local Offices   |
|---|--|---|
| [Re: Parts I to III]<br>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]<br>Consultation and Guidance Office<br><Contact point for green related case consultation><br><br>[Re: Part III]<br>Inter-Enterprise Trade Division | [Re: Parts I and II]<br>Director of Economic Affairs, General Affairs Division, or General Affairs Section<br><br>[Re: Part III]<br>Trade Division or General Affairs Section |
| [Re: Part IV]<br>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