International League of Competition Law - Congress 2019

Question A:

To what extent should competition law be concerned with differences in prices, terms and conditions and quality to different purchasers?

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General background

The authors of Question A have used the word "differences" and not "discrimination" and their choice is welcome since the word "discrimination" has potentially a more negative sense or meaning than the word "differences".

From a general point of view, differentiation or discrimination can be defined as treating differently people, firms, or goods that are in a similar situation. In that sense, discrimination contraries the core principle of equality, and is therefore usually presented as a behaviour that has to be legally prohibited.

Within the European Union, the sanction of discriminatory practices has become a core principle in the objective of the realisation of an Internal market between Member States. In this perspective, European courts have at many occasions sanctioned Member States for having implemented measures having the effect to discriminate firms on grounds of their nationality. But discriminatory practices have also been encompassed by EU competition law provisions to address discriminatory practices implemented by firms themselves.

From a competition law perspective, discrimination can stem from two different kinds of practices:

- discriminatory practices aimed at excluding rivals (first line or primary line discrimination) and

- discriminatory practices aimed at treating differently trading partners that are in equivalent situations (second line discrimination).

In the former case, the discriminating firm competes with those it discriminates; in the latter case, the firm is not present on the relevant market in which the discrimination is deemed to produce negative effects.

The effect of discriminatory practices upon competition clearly depends on their nature. Indeed, whilst it is widely recognized that discriminatory practices aimed at excluding rivals are expected to harm the competitive structure of the market (e.g. excluding efficient competitors) and should accordingly be sanctioned and remedied (provided certain conditions are met), there is no equivalent consensus on second-line discriminatory practices aimed at

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treat differently trading partners that are otherwise in equivalent situations, because their effects are more ambivalent. Indeed, if those discriminatory practices tend on the one hand to be exploitative, appropriating more of the surplus of the consumer to the benefit of the firm and have been analysed by some jurisdiction as anticompetitive practices, they may also be a factor of economic efficiency and welfare.

According to economic principles, price discrimination can in many circumstances bring significant efficiency benefits and increase social welfare. It does so by increasing total market output, relative to a situation in which discrimination is prohibited, i.e. a situation with uniform pricing in respect of customers in otherwise identical situations, by expanding sales to customers or markets that would not be served under uniform pricing. By expanding output, price discrimination can offer an effective means for a supplier to cover its fixed costs of production. It allows to address customers with a large willingness to pay for the goods or services considered and a limitedly elastic demand but also customers with a lower willingness to pay and highly price elastic demand – while the latter customers may be excluded from consumption under uniform pricing.

We note also that price discrimination can contribute to prevent tacit or explicit collusion between competitors, by making it more difficult to detect deviation from the collusive agreement if firms can offer secret discounts to their customers.

However, it is also the case that discrimination can harm consumer welfare (and harm trading partners) when dominant firms use it to exercise market power by indulging in exploitative conduct through e.g. personalized pricing or when discrimination distorts competition between trading partners in downstream markets.

Therefore, whether and in which circumstances discrimination would represent a competition law infringement and should be prohibited has fuelled an intense debate amongst competition law practitioners and scholars. Discrimination stands at the border between protection of the competitive structure and the protection of trading partners and/or consumers. While the US competition law doctrine has focused mainly on the first aspect, European courts and authorities have also expressed an interest in the second aspect of consumer protection.

The following questionnaire will deal with both aspects (protection of competition and protection of customers/consumers), with an aim to understand how these are dealt with in your national legal provisions and by courts and authorities enforcing them. In that perspective we have divided the survey into the following six main topics:

I. The notion of discrimination in national / regional substantive competition legal framework
II. The notion of discrimination in practice by competition authorities / courts
III. Objective justifications to discriminatory practice
IV. Objectives justifying to prohibit discriminatory practices
V. Relevance of other legal "areas" to apprehend discriminatory practices?
VI. Future of the prohibition of discriminatory practices on a competition law perspective
QUESTIONNAIRE

I. The notion of discrimination in national / regional substantive legal framework

In this section we would like you to present the existing legal provisions (statutory provisions or soft law provisions) concerning discrimination in your national or regional legal framework.

1. Please identify the statutory provisions concerning discrimination in your competition legal framework, as well as the potential soft law provisions that are relevant for discrimination cases.

2. Which types of discriminatory practices (if any) are specifically mentioned in your competition legal framework?

3. Is there other provisions covering the issue of discrimination in your commercial or business law that do not belong to competition law framework (i.e. provisions that predominantly pursue an objective different from that pursued by Article 101 and 102 of the Treaty on the Functioning of the European Union – thereafter "TFEU")?

Please also indicate for each answer whether the provisions you will present have evolved over time and the reasons for these evolutions.

**Answer I**

1. Unfair trade practices

1.1 Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act(November 30, 2010 Japan Fair Trade Commission)

<table>
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<th>“Introduction</th>
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<td>Abuse of superior bargaining position is banned by the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of 1947; hereinafter referred to as the &quot;Antimonopoly Act&quot;) as a form of unfair trade practices. The provisions on abuse of superior bargaining position were introduced in Article 2, paragraph (9), item (v) of the Antimonopoly Act by the Act for Partial Revision of the Antimonopoly Act (Act No. 51 of 2009; hereinafter referred to as the &quot;Act Amending the Antimonopoly Act&quot;) (Note 1).</td>
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(Note 1) In addition to Article 2, paragraph (9), item (v) of the Antimonopoly Act, the following provisions, which the Japan Fair Trade Commission designates based on item (vi) of the said paragraph, stipulate matters concerning abuse of superior bargaining position: [1] paragraph (13) (Unjust Interference with appointment of officer in one’s transacting party) of the Designation of Unfair Trade Practices applicable to all business types (Fair Trade Commission Notification No. 15 of 1982); and [2] unfair trade practices applicable to specific business types (hereinafter referred to as "special designations").
Special designations that have provisions on abuse of superior bargaining position are as follows:
Specific Unfair Trade Practices in the Newspaper Business (Fair Trade Commission Notification No. 9 of 1999)
Specific Unfair Trade Practices when Specified Shippers Assign the Transport and Custody of Articles
(Fair Trade Commission Notification No. 1 of 2004)
Specific Unfair Trade Practices by Large-Scale Retailers Relating to Trade with Suppliers
(Fair Trade Commission Notification No. 11 of 2005)

**Article 2, paragraph (9), item (v) of the Antimonopoly Act provides as follows:**

Taking any act specified in one of the following, unjustly in light of normal business practices by making use of one's superior bargaining position over the other party:
Causing the said party in regular transactions (including a party with whom one intends to have regular transactions newly; the same shall apply in (b) below) to purchase goods or services other than the one pertaining to the said transactions;
Causing the said party in regular transactions to provide for oneself money, services or other economic benefits;
Refusing to receive goods pertaining to transactions from the said party, causing the said party to take back the goods pertaining to the transactions after receiving the said goods from the said party, delaying the payment of the transactions to the said party or reducing the amount of the said payment, or otherwise establishing or changing trade terms or executing transactions in a way disadvantageous to the said party;

With the establishment of the Act Amending the Antimonopoly Act, the Japan Fair Trade Commission has become liable for ordering payment of a surcharge for any abuse of superior bargaining position that falls under Article 2, paragraph (9), item (v) of the Antimonopoly Act and that satisfies certain requirements (Note 2). Thus, the Japan Fair Trade Commission has formulated these "Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act" from the viewpoint of increasing the transparency of law enforcement and predictability for entrepreneurs by clarifying in regard to abuse of superior bargaining position, and with the aim of clarifying the concept under the Antimonopoly Act with regard to the abuse of superior bargaining position that falls under Article 2, paragraph (9), item (v) of the Antimonopoly Act (Note 3) (Note 4).

(Note 2) Since it is sufficient to apply the provisions of Article 2, paragraph (9), item (v) of the Antimonopoly Act to any abuse of superior bargaining position that falls under the said item, the provisions on abuse of superior bargaining position designated pursuant to the provisions of Article 2, paragraph (9), item (vi) of the Antimonopoly Act are never applied to the same abuse.
(Note 3) To date, the Japan Fair Trade Commission has formulated and made public the following guidelines in order to prevent in advance violations of the Antimonopoly Act, such as abuse of superior bargaining position, in regard to specific business types:
<Major guidelines concerning abuse of superior bargaining position>

- Guidelines Concerning Designation of Specific Unfair Trade Practices by Large-Scale Retailers Relating to Trade with Suppliers (Secretary General Notice No. 9 of 2005)
- Guidelines Concerning the Franchise System under the Antimonopoly Act (Fair Trade Commission on April 24, 2002)
- Guidelines Concerning Abuse of Superior Bargaining Position in Service Transactions under the Antimonopoly Act (Fair Trade Commission on March 17, 1998)

(Note 4) In Sections I through IV below, the term "abuse of superior bargaining position" refers to the abuse of superior bargaining position that falls under Article 2, paragraph (9), item (v) of the Antimonopoly Act.

Basic Concept of the Regulation of the Abuse of Superior Bargaining Position

The trade terms between entrepreneurs are basically left to the independent judgment of the transacting parties. Therefore, as a matter of course, the trade terms of either party could become disadvantageous compared to those of the other party or to those under a previous contract in any transaction, as a result of free negotiations between the transacting parties. However, if a party who has superior bargaining position against the other transacting party makes use of such position to impose a disadvantage on the transacting party, **unjustly in light of normal business practices**, such act would impede transactions based on the free and independently select of the said transacting party, and put the said transacting party in a disadvantageous competitive position against its competitors, while putting the party having superior bargaining position in an advantageous competitive position against its competitors. Since such act poses the risk of impeding fair competition, it is regulated under the Antimonopoly Act as "abuse of superior bargaining position," which constitutes a category of unfair trade practices (Note 5).

**The risk of impeding fair competition are identified case-by-case, considering factors including the degree of the disadvantage at issue and the extensiveness of the act.** For example, the act is likely to be found to impede fair competition [1] when the party having superior bargaining position organizationally imposes a disadvantage on a large number of transacting parties, or [2] when the party having superior bargaining position imposes a disadvantage only on a specific transacting party, but the degree of disadvantage is high or such act, if left unaddressed, is likely to be carried out to other transacting parties.

(Note 5) If the transactions between the parties fall under the category of transactions between main subcontracting entrepreneurs 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 publicized (Secretary General Notice No. 18 of 2003).
Acts that are categorized as abuse of superior bargaining position are those committed "unjustly in light of normal business practices by making use of one's superior bargaining position over the other party" and fall under any of the categories of Article 2, paragraph (9), item (v), (a) through (c) of the Antimonopoly Act. Thus, Sections II and III below describe the concept of "unjustly in light of normal business practices by making use of one's superior bargaining position over the other party," and then Section IV explains the concept of "abuse of superior bargaining position" for each type of acts that falls under the categories of Article 2, paragraph (9), item (v), (a) through (c) of the Antimonopoly Act.

Section II and below also present "case examples" and "supposed examples" in order to help the understanding of what specific acts are deemed to be abuse of superior bargaining position. The "case examples" are examples of acts that were at issue in past decisions or cease and desist orders. Meanwhile, the "supposed examples" are examples of supposed acts that could cause a problem; if those acts fall under Article 2, paragraph (9), item (v) of the Antimonopoly Act, they cause a problem of abuse of superior bargaining position.

As a matter of course, whether or not specific acts, including those that are not exemplified here, would cause a problem as abuse of superior bargaining position is determined case-by-case in light of the provisions of the Antimonopoly Act (Note 6).

(Note 6) Whether or not transactions between a parent and subsidiaries companies are regulated as abuse of superior bargaining position is set forth in the “Guidelines Concerning Distribution Systems and Business Practices under the Antimonopoly Act” (General Secretariat, Fair Trade Commission on July 11, 1991) “Appendix Transactions between a Parent and Subsidiaries Companies.”

1.2 The Subcontract Act
The Subcontract Act regulates the late payment or reduced payment of subcontract prices and ordering parties’ unreasonable treatment of subcontractors. It clearly defines prohibited acts on the part of ordering parties in wide-ranging business fields from manufacturing to service industries, and protects subcontractors by asking for simple and prompt remedial measures, if any illegal acts occur.

2. Types
In order to revitalize the market, it is necessary for entrepreneurs to engage in fair competition in an effort to offer products, which are better in quality and lower in prices than those of their competitors. For this purpose, the Antimonopoly Act designates the acts restraining free competition and undermining the foundation for competition as “unfair trade practices,” and prohibits such acts. “Unfair trade practices” consist of “general designation” applicable to the entire category of business and “Special designation” applicable only to specific category of business.

2.1 Refusal to Deal
It is unlawful and prohibited that several entrepreneurs jointly refuse to do business with specific entrepreneurs or cause the third party to do so. For example, if several entrepreneurs jointly force raw material manufacturers not to supply products to newcomers to the market with intent to prevent such newcomers from launching their operations, this falls under refusal to deal. Refusal to deal on an individual basis is also deemed unlawful, if deals are refused as a means of achieving an unjust purpose in terms of the Antimonopoly Act, such as making retailers abide by sales prices.
2.2 Discriminatory Pricing and discriminately treatment
It is unlawful and prohibited to set unjustly different prices and transaction terms for the same products or services depending on transaction partners and sales territories. For instance, if dominant entrepreneurs offer lower prices only to the customers of competitors in order to exclude them, and take an excessive dumping means only in the area competing with their competitors, such acts falls under this case.

2.3 Unjust high price purchasing
It is unlawful and prohibited to purchase what competitors need at prices extremely higher than the market prices in order to exclude them from the market by making it difficult for such competitors to procure necessary products or services. For instance, buying up raw materials indispensable to products of competitors at extremely high prices falls under this case.

2.4 Tie-in sales
It is unlawful and prohibited to force transaction partners to purchase products or services by tying them to the supply of other products or services. For instance, forcing purchasers to buy a combination of popular products and unsold unpopular ones against their will falls under this case.

2.5 Abuse of dominant bargaining position
It is unlawful and prohibited for large entrepreneurs in a dominant bargaining position to use their position to perform unreasonable acts to transaction partners to the disadvantage of the latter. Such acts include the late payment for subcontracted work due to one-sided reasons of ordering parties, forceful sales, unjust return of goods, request for dispatching employees, and request for money contribution. These acts often occur in subcontract transactions, and are regulated in detail by the Subcontract Act, a complementary law of the Antimonopoly Act.

2.6 Resale price restriction
It is prohibited, in principle, to give retailers, etc. instructions on sales prices because it restricts prices as a basic means of competition. It is also prohibited to impose economic disadvantage on retailers and suspend delivery to them in order to force them to sell products or services at designated prices.

2.7 Dealing on exclusive terms
If exclusive dealing, which makes transaction partners handle only one’s own products or services, and prohibits dealing with other competitors, has the possibility of depriving competitors of trade opportunities and distribution routes and hindering new entry, such conduct would be unlawful.

2.8 Dealing on restrictive terms
Carrying out trade on terms that unjustly restrict business activities of transaction partners is prohibited. Restriction of sales territories under the territory system and sales methods such as low-price sales falls under this case.

2.9 Interference with competitor’s transaction
It is unlawful and prohibited to unjustly obstruct business activities of competitors by obstructing the conclusion of contracts necessary for carrying out business activities and by inducing the non-fulfillment of such contracts. For instance, if import agents handling overseas brand-name products request overseas sales outlets to
discontinue transactions with other domestic import agents, it falls under this case.

2.10 Interference with internal operations of competitors
It is unlawful and prohibited to unjustly induce or abet the shareholders and officers of competitors to perform acts detrimental to them.

2.11 Special designations
In addition to 5 categories of business; large-scale retailers, textbook business, maritime business, physical distribution, and newspaper business, the maximum amount of premiums in advertisement is designated as special designation.

- Specific Unfair Trade Practices by Large-Scale Retailers Relating to the Trade with Suppliers
- Specific Unfair Trade Practices in the Textbook Business
- Specific Unfair Trade Practices in the Maritime Business
- Specific Unfair Trade Practices when Specified Shippers Assign the Transport and Custody of Articles
- Specific Unfair Trade Practices in the Newspaper Business
- Specific Unfair Trade Practices by Offering Economic Benefits through Lotteries or Other Means in Advertisements

3. Others
Telecommunications carriers are not allowed to unfairly discriminate about the provision of telecommunications services. (Article 6 of the Telecommunications Business Law).
II The notion of discrimination in practice by competition authorities / courts

This section will be aimed at having a first look at your national case law and decisional practice regarding discrimination. As we understand the notion of discrimination being a core component of competition law, relevant to all areas of antitrust and merger law, we have divided this section in three parts: abuses of dominance, anticompetitive agreements and mergers.

A. Discriminatory practices sanctioned as abuses of dominance

In the European Union, Article 102 TFEU prohibits discriminatory practices when a dominant firm "applies dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage". If this provision quite clearly deals with discrimination between customers (also called "secondary line discrimination", also referred to as exploitative abuses), in practice European courts and authorities have also strongly relied on this provision to sanction discrimination against rivals (also called "primary line discrimination", also referred to as foreclosure abuses).

Identification of cases of discriminatory practices

4. Does your competition courts/authorities have received complaints or investigated on their own initiative both "primary-line" and "secondary line" abusive discrimination conducts?

5. If yes, could you (i) indicate whether they reached any decision and (ii) provide us with figures (or best estimate) of the importance of these cases compared to the number of decisions that have been adopted on the basis of Articles 102 TFEU (or its equivalent under national law) by your national authority (and courts if any)?

6. When your competition authorities or courts have adopted specific decisions, could you indicate:
   
   o How many decisions give rise to sanctions? Could you distinguish between first line and second line discrimination?

   o Could you indicate the amount of fines that has been applied and whether the authorities/courts are more strict for one type of discrimination compare to the other one?

   o Did they impose specific injunctions or remedies in addition or in substitution of fines? If yes, could you describe the remedies that have been imposed (what kind of remedies, what was their objectives, etc...)?

    
    
    Conditions to fulfil to identify a discriminatory abuse

In EU law and more generally, it is necessary to identify dissimilar conditions imposed to equivalent transactions that create a disadvantage in competition, in order
to characterize and possibly sanction discriminatory behaviour.

7. Under which conditions are discriminatory practices assessed by your national courts and authorities?

8. Can you give details on (a) the criteria applied by your national courts and authorities to establish the equivalence of the purchaser situations and transaction conditions (b) the tests used to assess the dissimilarity of transaction conditions? (Does that pertain to the nature of products supplied, their substitutability, the relation of prices to costs etc.)

9. Is the analysis of the abuse of discrimination prohibited by itself or do legal provisions and/or case law impose an analysis of the effects of the practice?

10. In the second case, do your courts and competition authorities appraise the effects of discriminatory practices?
   - Do they look at actual effects or potential effects?
   - What are the typical indicators used to demonstrate (actual) effects?
   - Has the assessment of the effects of the practice evolved over time?

**Forms of "primary-line" discrimination prohibited as foreclosure abuse**

As mentioned above, the letter of Article 102 (c) of the TFEU addresses exploitative abuses. However, this provision has essentially been referred to by the European Commission and by the European Court of Justice to sanction foreclosure abuses. This could potentially be the case since it was easier to sanction anticompetitive practices aimed at foreclosing competition under the test provided for discriminatory practices than under the tests provided for specific types of abuses such as rebates, refusal to deal, predatory pricing, etc.

11. What are the typical foreclosure behaviours that have been grasped under your national provisions (if any) sanctioning discriminatory practices (for example, price discrimination, quantity discrimination, discrimination in the access to an essential facility, etc)?

12. If these practices were also identified as specific types of abuses, such as rebates, refusal to deal, predatory pricing, etc, have your courts/competition authorities also relied on the tests applicable to these specific practices or only on the applicable test to discriminatory practices?

13. Do you consider that the analysis of the effects of discrimination abuses should follow or match the analysis of the effects of other types of abuses (often stricter)?

14. Have you met specific cases in which national courts/competition authorities assessed a discriminatory behaviour yet without resorting to specific discriminatory provisions (possibly resorting to other Art. 102 provisions), for instance because the legal framework was not sufficiently helpful or past case law was too scarce? (for example, in the Google Shopping case, the Commission, although it has considered that Google treated differently its competitors against its own services, did not rely on Article 102
(c) of the TFEU, but rather it sanctioned Google because of the leveraging effect its conduct had on another market).

**Forms of "secondary-line" discrimination prohibited as exploitative abuses**

15. What are the typical exploitative abuses that are meant to be captured through your national provisions (if any) sanctioning discriminatory practices?

16. What kind of exploitative discriminatory practices has been most analysed and/or sanctioned by your national courts/authorities?

17. Would you say that the developments of the digital economy, thanks to which is now easier to discriminate, especially because of the algorithms and prevalent personalized pricing, have added to concerns to discrimination as exploitative abuse? Have your national courts/authorities been more preoccupied or alerted with these behaviours in recent years? Is there any on going investigation in relation to this?

**B. Identification and description of discriminatory practices pertaining to an anticompetitive agreement (Article 101 TFEU and its equivalent under your national law)**

18. Have you met (i) cartel, (ii) other kind of horizontal agreements or (iii) vertical restrictions cases dealing explicitly or implicitly with the notion of discrimination? (e.g. geographical discrimination, pricing discrimination, discrimination in the access to an organization or an association, criteria for accessing a distribution network, etc…)

19. If yes, what are the typical cases of discriminatory practices dealt with under the provisions related to anticompetitive agreements?

20. Could you describe the conditions (the tests) under which such discriminatory practices have been assessed by your national authorities/courts? Do these tests or conditions differ (and to what extent) from the tests and conditions used in relation to the ones used under abuse of dominant position cases (as indicated in your previous answers)? Please be specific and illustrate as far as possible your answer.

**C. Discrimination in mergers analysis**

21. Can you think of any circumstances in which discrimination has been discussed or taken into account in the competitive analysis of mergers?

22. For example, in the framework of the economic analysis of mergers, have you met circumstances where your national authorities have taken into account the ability of the merged entity to price discriminate (for the definition of relevant markets, the analysis of the market power of firms and the assessment of the effects of the merger, claimed efficiencies etc)?

**Answer II**
Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act II ~

III Concept of "by Making Use of One's Superior Bargaining Position Over the Other Party"

In order for one party to a transaction (Party A) to have superior bargaining position over the other party (Party B), it is construed that Party A does not need to have a market-dominant position nor an absolutely dominant bargaining position equivalent thereto, but only needs to have a relatively superior bargaining position as compared to the other transacting party. When Party A has superior bargaining position over Party B, who is a transaction counterpart, it means such a case where if Party A makes a request, etc., that is substantially disadvantageous for Party B, Party B would be unable to avoid accepting such a request, etc., on the grounds that Party B has difficulty in continuing the transaction with Party A and thereby Party B's business management would be substantially impeded.

1. In determining the presence or absence of superior bargaining position, the degree of dependence by Party B on the transactions with Party A, position of Party A in the market, the possibility of Party B changing its business counterpart, and other concrete facts indicating the need for Party B to carry out transactions with Party A are comprehensively considered (Note 7). (Note 7) Whether or not Party A has superior bargaining position in transactions with Party B is determined by comprehensively considering the specific facts set forth in the following (1) through (4). Accordingly, it should be noted that, not only in transactions between large enterprises and SMEs but also in transactions between large enterprises, as well as transactions between SMEs, there are some cases where either transacting party is deemed to have superior bargaining position in transactions with other parties.

(1) Degree of dependence by Party B on the transactions with Party A The degree of dependence by Party B on the transactions with Party A is, in the case where Party B supplies goods or services to Party A in the transactions, generally calculated by dividing Party B's amount of sales to Party A by Party B's total amount of sales. If the degree of dependency by Party B on the transactions with Party A is high, it would be highly necessary for Party B to carry out transactions with Party A. Therefore, should there be any difficulty in continuing the transactions with Party A, Party B's business management would likely be substantially impeded.

(2) Position of Party A in the market The position of Party A in the market is determined by considering Party A's market share and its ranking, among other
factors. If Party A's market share is large or has a high ranking, Party B can expect to increase its transaction volume or amount through transactions with Party A, and it would be highly necessary for Party B to carry out transactions with Party A. Therefore, should there be any difficulty in continuing the transactions with Party A, Party B's business management would likely be substantially impeded.

(3) **Possibility of Party B changing its business counterpart**

The possibility of Party B changing its business counterpart is determined by considering the possibility of Party B starting transactions with or increasing its transactions with the entrepreneur other than Party A, and investments made by Party B in association with the transactions with Party A, among other factors. If it is difficult for Party B to start or increase transactions with the other entrepreneurs, or if Party B has made a large investment in association with the transactions with Party A, it would be highly necessary for Party B to carry out transactions with Party A. Therefore, should there be any difficulty in continuing the transactions with Party A, Party B's business management would likely be substantially impeded.

(4) **Other concrete facts indicating the need for Party B to carry out transactions with Party A**

The other concrete facts indicating the need for Party B to carry out transactions with Party A is determined by considering the amount of transactions with Party A, the future growth potential of Party A, the importance for Party B of handling the goods or services subject to the transactions, the securing of confidence in Party B through its transactions with Party A, and the difference in business size between Party A and Party B, among other factors. If the amount of transactions with Party A is high, if Party A's business size is expanding, if, in the case where Party A supplies goods or services to Party B, the said goods or services have a strong brand power, if the confidence in the goods or services handled by Party B increases through the transactions with Party A, or if Party A's business size is substantially larger than that of Party B, it would be highly necessary for Party B to carry out transactions with Party A. Therefore, should there be any difficulty in continuing the transactions with Party A, Party B's business management would likely be substantially impeded.

*Case examples*[1] Company X ranks second in the Japanese convenience store chain industry in terms of the number of stores, operating 6,649 chain stores nationwide. The total annual sales of the chain stores operated by Company X amount to about 1.1 trillion yen, which is the second highest in the convenience store chain industry, and the fifth highest in the whole retail industry. Company X is increasing the number of its stores and amount of sales every year. Also, Company X's chain stores have gained a high level of consumer confidence for providing lines of goods in high demand. Since Company X operates chain stores nationwide and sales of those
stores are large, Company X is an extremely influential business partner for manufacturers, sellers, and wholesalers of daily goods handled by Company X's chain stores.(hereinafter referred to as "daily goods suppliers"). At the same time, daily goods suppliers have a strong desire to continue their supply transactions with Company X, because consumer confidence in their goods increases as a result of their goods being handled by Company X's chain stores, amongst other reasons. Accordingly, most of the daily goods suppliers that engage in continuous transactions with Company X are in a position where they are unable to avoid accepting various requests from Company X, apart from trade terms such as the quality and supply price of the supplied goods, in continuing their supply transactions with Company X. (JFTC recommendation decision, July 30, 1998)

[2] Bank X ranks the highest in Japan's banking industry in terms of the amount of total assets, with its total assets amounting to about 91 trillion yen as of the end of the fiscal year in question. Some entrepreneurs, particularly small- and medium-sized enterprises (SMEs), engaged in financial transactions with Bank X (hereinafter referred to as the "borrower entrepreneurs"), would have difficulty raising funds through loans, etc. from financial institutions other than Bank X in the immediate future if they were to lose access to the loans from Bank X for the following reasons: The borrower entrepreneurs’ demand for funds, to be provided by loans from financial institutions, is satisfied mainly by the loans from Bank X. - It is difficult for the borrower entrepreneurs to refinance the loans from Bank X immediately by using loans from other financial institutions. Since the borrower entrepreneurs, when purchasing land or equipment for their business activities, proceeded with the contract to purchase the land or equipment after it has been suggested that the entrepreneurs will be granted a loan from Bank X, it is difficult for the entrepreneurs to procure funds by another method if the entrepreneurs are not granted the said loan. Because the business activities of the borrower entrepreneurs would be impeded if the entrepreneurs are not granted loans from Bank X, they are in a position where they are unable to avoid accepting various requests from Bank X that are not covered under the trade terms of the loans, in continuing their financial transactions with Bank X, and they are in a weaker position than Bank X in the transactions. (JFTC recommendation decision December 26, 2005)

[3] Company X's directly operated convenience stores (hereinafter referred to as "directly-operated stores") and convenience stores operated by entrepreneurs who are members of Company X's franchise chain (such entrepreneurs are hereinafter referred to as "franchise members" and such stores are hereinafter referred to as "franchise stores") are located nationwide except in some areas. The total number of stores is about 12,000, with about 800 directly-operated stores and about 11,200 franchise stores, and the total
annual amount of sales is about 2.57 trillion yen, with approximately 150 billion yen sold by directly-operated stores and approximately 2.42 trillion yen sold by franchise stores. Company X is the largest entrepreneur among the entrepreneurs engaged in the convenience-store franchise business in Japan in terms of both the number of stores and the amount of sales. In contrast, almost all franchise members are small- and medium-sized retailers. Where Company X concludes a franchise store basic contract with the franchise members, the contract forbids the franchise members from becoming members of a franchise chain of an entrepreneur engaged in a convenience-store franchise business other than Company X for at least one year after the termination of the said contract. Under the franchise-store basic contract, Company X presents the goods recommended to be sold at the franchise stores (hereinafter referred to as the "recommended goods") and their suppliers to the franchise members. Since franchise members can use Company X's system as a simple way of placing orders, purchasing goods, settling payments, and processing other procedures when purchasing the recommended goods from the said suppliers, almost all goods sold at the franchise stores are the recommended goods. Company X allocates management advisors to districts where the franchise stores are located, and, under the franchise-store basic contract, provides guidance and assistance concerning the management of the franchise stores to franchise members through the management advisors, and franchise members manage their franchise stores in accordance with the contents of such guidance, etc. Due to these circumstances, should there be any difficulty in continuing the transactions with Company X, the franchise members' business management would be substantially impeded. Therefore, the franchise members are in a position where they are unable to avoid accepting various requests from Company X. Accordingly, Company X has superior bargaining position in transactions with the franchise members (Cease and Desist Order No. 8 of 2009; June 22, 2009). Also, when a party who has 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 superior bargaining position.

III Concept of "Unjustly in Light of Normal Business Practices"
The requirement, "unjustly in light of normal business practices," indicates that the presence or absence of abuse of superior bargaining position is determined case-by-case from the viewpoint of maintaining/promoting fair competition where entrepreneurs compete to provide better quality or lower prices. The term "normal business practices" means business practices that are endorsed from the viewpoint of the maintenance/promotion of the said fair competition. Therefore, an act is not immediately justified merely because it complies with the currently existing
VI. Categories of Acts That Constitute Abuse of Superior Bargaining Position
This section clarifies the concept of "abuse of superior bargaining position" for each category of acts, mainly those acts that clearly constitute abuse of superior bargaining position in light of the provisions of Article 2, paragraph (9), item (v), (a) through (c) of the Antimonopoly Act.
Acts that could become a problem in terms of the abuse of superior bargaining position are not restricted to the categories of acts shown below. In order to prevent various acts that could become a problem as abuse of superior bargaining position in advance, it is desirable for the transacting parties to make clear and confirm in writing in advance matters including the specific contents of and the quality evaluation standards for the goods or services subject to the transactions, the time of delivery, the amount of payment therefor, the due date for payment, and the payment method.
**Article 2, paragraph (9), item (v), (a) of the Antimonopoly Act (forced purchase/use)**
The provisions of Article 2, paragraph (9), item (v), (a) of the Antimonopoly Act are as follows:
Causing the said party in regular transactions (including a party with whom one intends to have regular transactions newly; the same shall apply in (b) below) to purchase goods or services other than the one pertaining to the said transactions;
The phrase "goods or services other than those pertaining to the said transaction" in these provisions includes not only the goods or services supplied directly by a party, but also goods or services supplied by entrepreneurs designated by that party. Meanwhile, "causing...to purchase" includes not only the case of specifying such purchase in the trade terms or the case of imposing a disadvantage against a failure to make such purchase, but also the case where the purchase is found in effect to be unavoidable (Note 8). (Note 8) The same applies to the concept of "causing...to provide" in Article 2, paragraph (9), item (v), (b) of the Antimonopoly Act. In the case where an entrepreneur who has superior bargaining position over a transacting party requests the transacting party to purchase goods or services other than those pertaining to the transactions in question, 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 transacting party does not require the said goods or services in performing its business and does not wish to purchase them, such act would unjustly impose a disadvantage on the transacting party in light of normal business practices, and cause a problem as abuse of superior bargaining position. On the other hand, in the case where an entrepreneur who has superior bargaining position over a transacting party, upon placing an order for the manufacture of goods or the provision
of services by designating certain specifications, causes the transacting party to purchase the raw materials required for manufacturing the said goods 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 goods 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 superior bargaining position. <Supposed examples> [1] An entrepreneur causes a transacting party to purchase goods or services by making a request that could be taken to mean that the purchase would have an influence on future transactions, such as suggesting the termination of transactions with the transacting party or a reduction of the transaction volume in the event of a failure to make the purchase. [2] An entrepreneur causes a transacting party, to purchase goods or services by having a person, such as a staff member in charge of purchasing, who could have an influence on the transactional relationship with the transacting party request the purchase. [3] An entrepreneur causes a transacting party to purchase goods or services by organizationally or systematically requesting the purchase. [4] An entrepreneur causes a transacting party to purchase goods or services in the case where the transacting party has expressed its intention not to make a purchase or where the transacting party is clearly found to have no intention of making a purchase even in the absence of such expression, by repeatedly requesting that the purchase be made or by one-sidedly sending goods to the transacting party. [5] An entrepreneur requests a transacting party with whom the entrepreneur places an order for the processing of components to recommend a purchaser of the goods produced by a manufacturer, a transaction partner of the entrepreneur, and causes the transacting party to purchase the said goods should the transacting party fail to recommend a purchaser. [6] In computerizing receipts/placement of orders, an entrepreneur, despite the fact that a transacting party has already signed a contract with another entrepreneur on Internet services that can respond to the said computerization, and therefore has been receiving such services, requests the transacting party to designate and use an Internet service provider that provides more expensive Internet services, and causes the transacting party to use the said provider, suggesting that the entrepreneur would not continue transactions with the transacting party.

<Case examples> [1] Company X, with the aim of increasing the operating rate and securing profits in the off-season at its six hotels located within Hokkaido, prepares hotel vouchers that can be used at those hotels within a limited period, and determines in advance the number of hotel vouchers which Company X is to request each supplier, etc. to purchase. Company X requests the purchase of the hotel vouchers in writing, and if there is no offer to purchase, Company X has a person, such as a divisional
manager, who could have an influence on the supply transactions, repeatedly request the suppliers, etc. to make such purchase. Company X requests the suppliers, etc. to purchase the hotel vouchers by having a person who could have an influence on the supply transactions hand over directly the number of hotel vouchers for which a purchase is requested, along with a document requesting the purchase of the hotel vouchers. Many of the suppliers, etc. who receive such a request are unable to avoid accepting the request in order to continue the supply transactions with Company X. (JFTC recommendation decision, November 18, 2004) [2] In the case of receiving an application for a new loan or for the renewal of an existing loan from a borrower entrepreneur, Bank X proposes the purchase of interest-rate swaps to the borrower entrepreneur in the process of advancing the procedure related to the loan. If the borrower entrepreneur does not accept the proposal, Bank X makes it unavoidable for the borrower entrepreneur to purchase the interest-rate swaps by the following methods: Bank X clearly indicates that the purchase of the interest-rate swaps is a requirement for providing the loan, or that more disadvantageous conditions than usual would be set for the loan if the borrower entrepreneur fails to purchase the interest-rate swaps. By having the staff member in charge visit the borrower entrepreneur together with its superior who is in a managerial position to make repeated requests that the borrower entrepreneur make the purchase, Bank X requests the purchase of interest-rate swaps, hinting that the purchase of the interest-rate swaps is a requirement for providing the loan, or that more disadvantageous conditions than usual would be set for the loan if the borrower entrepreneur fails to purchase the interest-rate swap. (JFTC recommendation decision, December 26, 2005) [3] When implementing an annual sales promotion campaign for a period of about one month at Store Y and Store Z, with the aim of attaining the sales target amount predetermined for each store, Company X has had the buyers at Store Y and Store Z request the suppliers of the goods sold at Store Y and Store Z and the employees of the said suppliers to purchase electric products, clothing, and other goods. Many of the suppliers and the employees of the said suppliers who received such a request were in a position where they were unable to avoid accepting the request in order for the suppliers to continue their transactions with Company X, and had purchased the above-mentioned goods. (Cease and Desist Order No. 3 of 2009; March 5, 2009)

**Article 2, paragraph (9), item (v), (b) of the Antimonopoly Act**

The provisions of Article 2, paragraph (9), item (v), (b) of the Antimonopoly Act are as follows:

Causing the said party in regular transactions to provide for itself money, services or other economic benefits; The term "economic benefits" in these provisions 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. Request for payment of
monetary contribution, etc. In the case where an entrepreneur who has superior bargaining position in transactions over a transacting party requests the transacting party to pay money under the title of monetary contribution, etc., and if the amount of such monetary contribution, to be paid, the basis for the calculation of such amount, and the use of such money have not been made clear between the entrepreneur and the said transacting party, thereby imposing a disadvantage on the said transacting party the cost of which the said transacting party cannot calculate in advance, or if the payment turns out to be a burden which exceeds the scope as deemed reasonable considering the direct benefit (Note 9), etc., to be acquired by the transacting party, thereby imposing a disadvantage on the transacting party (Note 10), such an act would unjustly impose a disadvantage on the transacting party in light of normal business practices, and would cause a problem as abuse of superior bargaining position. (Note 9) The term “direct benefit” refers to a benefit that actually arises, such as that in the case where an entrepreneur causes a transacting party to pay a portion of expenses required for preparing or distributing advertisements as monetary contribution in order to advertise the goods supplied by a transacting party, but such an act leads to a sales promotion of the goods supplied by the transacting party. It does not include an indirect benefit such as the case where the payment of a monetary contribution, etc. has an advantage for future transactions. (Note 10) In this case, even if the conditions for the payment of a monetary contribution, etc. has been made clear between the entrepreneur and the transacting party, such act would cause a problem as an abuse of superior bargaining position.

In some cases, when holding an event or placing an advertisement, an entrepreneur requests a transacting party to pay a monetary contribution, etc. as part of the required expenses. While such request is often made by distributors, in the case where a distributor requests a supplier to pay a monetary contribution, etc., the payment of such expenses could, at times, give the supplier a direct benefit, such as the payment leading to a sales promotion for the supplied goods. When a monetary contribution, etc. is paid by the transacting party on its free will, considering that the contribution is within the scope of the direct benefit to be acquired by such payment, the request for such payment would not unjustly impose a disadvantage on the transacting party in light of normal business practices, and therefore does not cause a problem as abuse of superior bargaining position.

<Supposed examples> [1] An entrepreneur requests, and causes a transacting party to pay a monetary contribution, etc. for holding an event, refurbishing the selling space, or placing an advertisement that does not directly contribute to the sales promotion of the transacting party's goods or services. [2] An entrepreneur requests, and causes a transacting party to pay a monetary contribution as a measure for
improving the settling accounts of the entrepreneur. [3] An entrepreneur causes a transacting party to pay, at the time of opening its new store or refurbished store, an amount equivalent to a certain percentage of the transacting party's amount of supply to the said store as a monetary contribution over a fixed period, without clarifying the amount of the payment, the basis for the calculation of the amount, and the purpose of the payment in advance, in order to secure the said store's gross profits. [4] In the case where it had been decided in advance that an entrepreneur receives a rebate on attaining a certain sales volume during a fixed period, the entrepreneur requests, and causes a transacting party to pay, the said rebate in spite of the fact that it has not attained the sales volume. [5] When placing an advertisement for a discount sale upon opening its new store or refurbished store, an entrepreneur requests, and causes a transacting party to pay, an amount of monetary contribution that exceeds the expenses actually required for placing the said advertisement. [6] An entrepreneur unilaterally requests a supplier to pay a fee for using a facility ("center fee") for its distribution operation, such as a logistics center, without sufficiently discussing the amount of the fee and the basis for the calculation of the amount with the supplier, and causes the supplier to pay an amount that exceeds a reasonable amount of fee for the level of use of the said facility. [7] An entrepreneur suspends the acceptance of the supply of goods in respect to transactions, which have been continued in order to gain money under the pretext of a "newly-introduced monetary contribution," and thereafter causes the transacting party to resume supply of the same goods. Through these measures, the entrepreneur requests the transacting party to provide money and causes the transacting party to pay the money.

<Case examples> Company X, when opening its own and its three subsidiaries' stores, requested the suppliers who supplies goods to each division of purchasing prepared foods or other goods, etc., to make the supply prices of specific goods to be supplied by the said suppliers upon the store-opening lower than the usual supply prices, obtained for example by multiplying the usual supply prices by a certain percentage, under the title of "instant discount," thereby causing the suppliers to provide economic benefits equivalent to the difference between the said price and the usual supply price, without clarifying the basis for the calculation of the amount, and the purpose of the payment in advance, in order to secure the said stores' gross profits. Many of the suppliers, etc. who have received such request were in a position where they were unable to avoid meeting the request in order to continue the supply transactions with Company X, and have provided the economic benefits. (Cease and Desist Order No. 15 of 2008; June 23, 2008)

Request for dispatch of employees, etc.
In the case where an entrepreneur who has superior bargaining position in transactions over a transacting party requests the transacting party to dispatch, employees, or the like (Note 11), and if the cases in which they are to be dispatched and the conditions for the dispatch have not been made clear between the entrepreneur and the transacting party, thereby imposing a disadvantage on the said transacting party the cost of which the transacting party cannot calculate in advance, or if the burden to be borne by the transacting party exceeds the scope as deemed reasonable considering the direct benefit (Note 12), etc., to be acquired by the transacting party through the dispatch of, employees, etc., thereby imposing a disadvantage on the transacting party (Note 13), such act would unjustly impose a disadvantage on the transacting party in light of normal business practices, and would cause a problem as abuse of superior bargaining position. The same applies in the case where an entrepreneur causes a transacting party to pay equivalent personnel costs in place of dispatching employees, etc. (Note 11) The term "employee, etc." includes a part-time worker, a dispatched worker, etc. whom the said transacting party employs in order accept such request. (Note 12) The term "direct benefit" refers to a benefit that actually arises, such as that in the case where if an entrepreneur causes a transacting party to dispatch employee, etc., of a transacting party to retail stores of the entrepreneur and sell goods to consumers, such act leads to an increase in sales of the goods supplied by the transacting party or a direct understanding of a trend in consumer needs by the transacting party. It does not include such an indirect benefit that makes future transactions advantageous through the dispatch of employee, etc. (Note 13) In this case, even if the conditions for the dispatch of, employees, etc. have been made clear between the entrepreneur and the transacting party, the act would cause a problem as abuse of superior bargaining position. In some cases, a manufacturer or a wholesaler, upon the request of a retailer such as a department store or a supermarket, dispatches employees, etc. for selling, etc. goods manufactured or supplied by the said manufacturer or wholesaler. Such dispatch of employees, etc. could be advantageous at times, such as allowing the manufacturer or wholesaler to directly ascertain the trend of consumer needs, or allowing the retailer to supplement a lack of knowledge about the goods. When employees, etc. are dispatched by the free will of the transacting party within the scope of the direct benefit to be acquired by such dispatch, the request for such dispatch would not unjustly impose a disadvantage on the transacting party in light of normal business practices, and therefore does not cause a problem as abuse of superior bargaining position. The same applies when a entrepreneur has made an agreement (Note 14) regarding the conditions for the dispatch of employees, etc. in advance with the transacting party, and pays the expenses normally required for such dispatch. (Note 14) The term "agreement" means that the substantial intentions of
both parties coincide, and that the transacting party has satisfactorily agreed on the terms and conditions after sufficient discussions between the parties. The same applies to the concept of an "agreement" in regard to "return of goods" (IV. 3(2)).

<Supposed examples> [1] An entrepreneur requests, and causes a transacting party to dispatch employees, etc., of the transacting party to engage in operations that only benefit the entrepreneur without paying the expenses for the dispatch. [2] An entrepreneur causes a supplier to dispatch employees, at the time of a discount sale upon opening its new store or refurbished store, in order to have them engage in sales operations, and has those employees engage in the sales operations of not only the goods supplied by the said supplier, but also the goods of other suppliers, thereby causing the supplier that has dispatched the employees to bear a burden that exceeds the scope as deemed reasonable considering direct benefit, etc. [3] While offering to bear the expenses for the dispatch of employees, etc. by transacting parties, an entrepreneur merely decides a uniform amount of daily allowance as dispatch expenses, and although expenses such as transportation expenses and accommodation expectations occur depending on an individual transacting party's circumstances, the entrepreneur causes the transacting parties to dispatch employees, etc. without paying such expenses. [4] In the case where an entrepreneur bears the expenses for the dispatch of employees, etc. by transacting parties, and such expenses to be borne include daily allowances, transportation expenses, and accommodation expenses, an entrepreneur uniformly decides that the daily allowance should be set at an amount lower than an appropriate amount corresponding to the salary of the said employee, etc. or the contents of the operations pertaining to the dispatch. [5] An entrepreneur causes a transacting party to pay the wage for a part-time worker whom it has employed for its inventory operations. [6] In the case where a contract only stipulates that a transacting party transports goods to a warehouse of an entrepreneur, the entrepreneur causes the transacting party to engage free of charge in loading and unloading work, etc., in the warehouse of the entrepreneur, which has not been set forth in the contract in advance.

<Case examples> Company X, at the time of opening its new store or refurbished store, causes suppliers to engage in work such as displaying goods, replenishing stock, and providing customer services (hereinafter referred to as "open work") at the store, irrespective of whether the goods are those supplied by the said suppliers, and without making an agreement with the said suppliers about the conditions for the dispatch of employees, etc. in advance, requests the suppliers to dispatch employees, etc. by informing the suppliers of the store, date, and time where and when Company X needs the suppliers’ employees to be dispatched to engage in open work. Many of the suppliers who received such a request were in a
position where they were unable to avoid accepting the request in order to continue the transactions with Company X, and have dispatched their employees, etc., while Company X has not paid the expenses normally required for such dispatch. (Cease and Desist Order No. 16 of 2008; June 30, 2008)

**Request for other economic benefits** Even if the request is other than that for the payment of monetary contribution, etc., or the dispatch of employee, etc., if an entrepreneur has a superior bargaining position over a transacting party, without a just reason, requests a transacting party to provide free of charge a design drawing or an intellectual property right such as a patent right on a die (including a wooden die and other types similar to a metal die; the same shall apply hereunder) or the like not contained in the order, as well as the provision of services other than the dispatch of employee, etc., or other economic benefits, and if the transacting party would be unable to avoid accepting the said requests from concerns about the possible effects on future transactions, such act would unjustly impose a disadvantage on the transacting party in light of normal business practices and therefore cause a problem as abuse of superior bargaining position (Note 15). (Note 15) In the case where not only the case of the free-of-charge provision, but also an entrepreneur who has superior bargaining position over a transacting party causes a transacting party to provide at an unjustly lower price in light of normal business practices, such act would cause a problem as abuse of superior bargaining position. In determining that whether such acts constitute abuse of superior bargaining position, the concept described in “unilateral decision on a consideration for transactions” (IV. 3 (5) A) is applied. On the other hand, even if the economic benefits described in A. above are provided free of charge, when it is a matter of course for the economic benefits to be provided accompanying the sale of certain goods and the economic benefits have originally been reflected in the prices of the said goods, such economic benefits would not unjustly impose a disadvantage on the transacting party in light of normal business practices, and therefore does not cause a problem as abuse of superior bargaining position.

<Supposed examples> [1] In the case where rights such as a copyright or a patent right, etc., are created or belong to a transacting party in transactions, an entrepreneur, on the grounds that those rights are acquired in the course of transactions with the entrepreneur, unilaterally causes the transacting party to transfer those rights to the entrepreneur exceeding the scope of use, which is a purpose of preparation of drawings. [2] In spite of the fact that the provision of design drawings is not contained in the order, an entrepreneur causes a transacting party to provide design drawings of dies free of charge. [3] An entrepreneur causes, due to
reasons specific to the entrepreneur, a transacting party to free of charge retain components for repairs, dies, etc., to be kept by the entrepreneur, or provide maintenance, etc., for retention. [4] In spite of the fact that an entrepreneur is responsible because of defects, of components or raw materials supplied by an entrepreneur or defects in designs made by the entrepreneur, etc., when an end user raises a complaint, the entrepreneur does not assume any responsibility and causes a transacting party to free of charge take measures to settle all complaints, including payment of compensation for damages to the end user. [5] In supplying goods, an entrepreneur unilaterally causes a transacting party, without sufficient discussion with the transacting party, to free of charge collect industrial waste or transportation equipment, etc., of other entrepreneurs, which the transacting party is not obligated to collect.

**Article 2, paragraph (9), item (v), (c) of the Antimonopoly Act**
The provisions of Article 2, paragraph (9), item (v), (c) of the Antimonopoly Act are as follows:
Refusing to receive goods pertaining to transactions from the said party, causing the said party to take back the goods pertaining to the transactions after receiving the said goods from the said party, delaying the payment of the transactions to the said party or reducing the amount of the said payment, or otherwise establishing or changing trade terms or executing transactions in a way disadvantageous to the said party;
Article 2, paragraph (9), item (v), (c) of the Antimonopoly Act indicates a "refusal to receive goods," "return of goods," "delay in payment," and "price reduction" as examples of acts that could lead to abuse of superior bargaining position, but it also includes various other acts that impose a disadvantage on a transacting party.

**Refusal to receive goods**
In the case where an entrepreneur who has superior bargaining position in transactions over a transacting party, after concluding a contract to purchase goods from the transacting party, refuses to receive (Note 16) all or part of the said goods without justifiable grounds, and if it is unavoidable for the transacting party to accept such refusal from concerns about the possible effects on future transactions, such act would unjustly impose a disadvantage on the transacting party in light of normal business practices, and cause a problem as abuse of superior bargaining position (Note 17).
(Note 16) The phrase "refuse to receive" means not receiving goods on the delivery date. It also includes the case where the entrepreneur does not receive all or part of the goods on the delivery date by unilaterally postponing the delivery date or by unilaterally canceling the order. (Note 17) After concluding a contract on receiving the provision of supply of services from a transacting party, if an entrepreneur refuses the
receipt of all or part of the supply of the said services, such refusal falls under
“changing trade terms or excuting transactions in a way disadvantageous to the said
party” set forth in Article 2, paragraph (9), item (v), (c) of the Antimonopoly Act and
may cause a problem as abuse of superior bargaining position (refer to IV. 3 (5) C).
On the other hand, [1] in the case where there are grounds attributable to the transacting
party's side, such as where the goods purchased from the transacting party were
defective, where the goods delivered differed from the goods ordered, or where the aim
of the sales could not be achieved since the goods were not delivered in time for the
delivery date, or [2] in the case where the entrepreneur decides conditions for return of
goods based on an agreement with the transacting party when purchasing the goods and
does not receive the goods according to those conditions (Note 18), or [3] in the case
where the entrepreneur obtains the consent of (Note 19) the transacting party in advance
and bears the loss that should normally occur (Note 20) on the transacting party as a
result of the refusal to receive the goods, such act would not unjustly impose a
disadvantage on the transacting party in light of normal business practices, and therefore
does not cause a problem as abuse of superior bargaining position. (Note 18) This is
limited to the case where the conditions for the refusal to receive the said goods are
decided within the scope of normal business practices. (Note 19) The phrase "obtain
the consent of" means to obtain the transacting party's manifestation of an intention
of acceptance and that the transacting party has satisfactorily given its consent. The
same applies to the concept of "obtain the consent of" in regard to "return of goods"
(IV. 3(2)), “delay in payment” (IV. 3(3)), and “request for redoing” (IV. 3(5) B). (Note
20) The phrase "loss that should normally occur" means a loss within the scope of
reasonable consequence, which arises as a result of a refusal to receive goods. For
example, it includes [1] expenses equivalent to a decrease in value due to a drop in the
market for the goods or the shortening of the use-by date due to the lapse of time, [2]
expenses required for physical distribution, and [3] expenses for the disposal of the
goods. The same applies to the concept of a "loss that should normally occur" in
"return of goods" (IV. 3(2)), “delay in payment” (IV. 3(3)), and “request for redoing”
(IV. 3(5) B). <Supposed examples> [1] In the case where a transacting party has
manufactured goods based on an order from an entrepreneur, and tried to deliver
the said goods, the entrepreneur refuses to receive the said goods on the grounds that
the goods are no longer required due to slack sales or due to a refurbishment of the
selling space or a change in the shelf arrangement. [2] An entrepreneur arbitrarily
makes the predetermined inspection standard stricter, and refuses to receive the said
goods on the grounds that the goods differ from those ordered or that the goods are
defective. [3] In spite of the fact that an entrepreneur has ordered goods to be
manufactured by designating certain specifications, the entrepreneur refuses to receive
the said goods on the grounds that its customer has cancelled the order for the said goods, or changes its sales projection. [4] In spite of the fact that a transacting party asked an entrepreneur to clarify the specifications, an entrepreneur has not clarified the specifications without justifiable grounds and causes the transacting party to continue engaging in work. Thereafter when the transacting party tries to deliver the goods, the entrepreneur refuses to receive the said goods on the grounds that the goods differ from those ordered. [5] After placing the order, an entrepreneur unilaterally shortens the delivery date agreed on in advance, without considering the transacting party's circumstances, and refuses to receive goods on the grounds that the delivery was not made in time for the shortened delivery date. [6] Although a contract provides that an entrepreneur is to inspect goods by each lot, and is to refuse to receive only a lot with defective goods included, the entrepreneur refuses to receive all lots when defective goods are found in one lot, without inspecting the other lots. [7] When an entrepreneur instructs a transacting party to adopt certain specifications and continues placing orders for manufacturing components, the entrepreneur, as it no longer needs to use the components due to a reason specific to the entrepreneur, rejects to receive the said components with the same level as those which the entrepreneur deemed to meet the specifications and passed on the inspection at the time of supply in the past on the grounds that the said components have a minor damage, dent, etc., which would not bear any influence on the performance of the components, such as durability and toughness.

**Return of goods**

In the case where an entrepreneur who has superior bargaining position in transactions over a transacting party returns goods which the entrepreneur has received from the transacting party, and the circumstances and conditions under which goods are to be returned have not been made clear between the entrepreneur and the transacting party, thereby imposing a disadvantage on the transacting party the cost of which the said transacting party cannot in advance, or in other cases where the entrepreneur, without justifiable grounds, returns goods which it has received from the transacting party and if it is unavoidable for the said transacting party to accept such return from concerns about the possible effects on future transactions, such act would unjustly impose a disadvantage on the transacting party in light of normal business practices, and would cause a problem as abuse of superior bargaining position.

On the other hand, [1] in the case where there are grounds attributable to the transacting party's side, such as where the goods purchased from the transacting party were defective, where the goods delivered differed from the goods ordered, or where the aim of the sales could not be achieved since the goods were not delivered in time for the
delivery date, goods are returned within the scope of a quantity that is found to be reasonable in light of the said grounds, within a reasonable period of time from the day of the receipt of the goods (Note 21), [2] in the case where conditions for return of goods are decided on based on an agreement with the transacting party when purchasing the goods, and the goods are returned according to those conditions (Note 22), [3] in the case where the entrepreneur obtains the consent of the transacting party in advance and bears the loss should that normally occur in regard to the transacting party from the return of the goods, or [4] in the case where the transacting party offers to accept the return of goods, and the disposal of the goods by the transacting party is of direct benefit to the transacting party (Note 23), such act would not unjustly impose a disadvantage on the transacting party in light of normal business practices, and therefore does not cause a problem as abuse of superior bargaining position.

(Note 21) While a "reasonable period of time" should be determined based on the circumstances of each case, if there is a defect that could be discovered immediately or if the goods differ from those ordered, the goods need to be returned promptly within an average period required for inspection after receiving the goods. The same applies to the concept of a "reasonable period of time" in "price reduction" (IV. 3(4)).

Meanwhile, even in the case of returning goods within a reasonable period of time, goods are not allowed to be returned without a limit. For example, defective goods or goods that differ from those ordered are allowed to be returned, but returning other goods (excluding goods that can only be sold with such goods as a set) together with such goods is not recognized as the return of goods "within the scope of a quantity that is found to be reasonable." (Note 22) This is limited to the case where the return of goods within the scope of a specific quantity within a specific period from the day of the receipt of the goods or the return of the goods within the scope of a specific quantity against the total quantity of the goods received follows normal business practices, and the conditions for the return of the goods are decided within the scope of such trade practices. (Note 23) The term “direct benefit” refers to a benefit that actually arises, for example, in the case where a supplier collects the goods it has delivered, which remain unsold at a store of the transacting party, and delivers new goods, thereby leading to an increase in sales of the supplier. It does not include an indirect benefit such as that in the case where the return of goods has an advantage to the transacting party for future transactions.

<Supposed examples>

[1] An entrepreneur returns goods that have been damaged due to being used for display. [2] An entrepreneur returns goods with retail price stickers attached thereto which are difficult to remove without damaging the goods. [3] An entrepreneur
unilaterally and independently decides on a sell-by date which is shorter than the freshness date decided on by a manufacturer, and returns goods on the grounds that the said sell-by date has expired. [4] An entrepreneur returns goods under its private brand.[5] An entrepreneur returns goods for the purpose of a month-end or term-end inventory adjustment. [6] An entrepreneur returns goods on the grounds of the refurbishment of the store or selling space or a change in the shelf arrangement conducted at its own discretion. [7] An entrepreneur returns goods on the grounds that the goods remained unsold after a discount sales period. [8] An entrepreneur returns goods merely on the grounds that the goods were returned from a customer who purchased the goods. [9] In spite of the defect, which can be discovered immediately, an entrepreneur returns goods to a transacting party on the grounds that a defect was found long after the average period of time required for inspection has passed.

**<Case examples>** At the time of closing or refurbishing its store, Company X requests the suppliers of those goods sold at the store which Company X has decided no longer to sell at that store and other stores to accept the return of such goods, in spite of the fact that there are no grounds attributable to those suppliers, no conditions have been decided on regarding the return of goods based on an agreement with those suppliers in advance, and the acceptance of the return of the said goods is of no direct benefit to those suppliers. Many of the suppliers who have received such a request were in a position where they were unable to avoid meeting the request in order to continue the transactions with Company X, and have accepted the return of the goods, while Company X has not borne the loss that should normally occur in regard to those suppliers as a result of the return of the said goods. (Cease and Desist Order No. 7 of 2009; June 19, 2009)

**Delay in payment**

In the case where an entrepreneur who has superior bargaining position in transactions over a transacting party fails to pay the consideration on the due date for the payment decided under a contract, without justifiable grounds, and if it is unavoidable for the transacting party to accept such failure of payment from concerns about the possible effects on future transactions, such act would unjustly impose a disadvantage on the transacting party in light of normal business practices, and would cause a problem as abuse of superior bargaining position. Not only in the case where an entrepreneur pays a consideration after the due date for payment decided under a contract, but also in the case where an entrepreneur who has superior bargaining position in transactions unilaterally sets the due date for payment on a later date or arbitrarily defer the arrival of the due date for payment, such act is likely to unjustly impose a disadvantage on the transacting party in light of normal business practices,
and cause a problem as abuse of superior bargaining position.

On the other hand, in the case where an entrepreneur obtains the consent of the transacting party in advance, and bears the loss that should normally occur in regard to the transacting party as a result of delay in payment of a consideration, such act would not unjustly impose a disadvantage on the transacting party in light of normal business practices, and therefore does not cause a problem as abuse of superior bargaining position.

<Supposed examples> [1] An entrepreneur fails to pay a consideration by the due date for payment decided under a contract due to reasons specific to the entrepreneur such as a delay in in-house payment procedures or changes in designs and specifications of goods. [2] In transactions where goods are delivered in installments, in spite of the fact that a consideration is to be paid after the delivery of the first installment, the entrepreneur unilaterally changes the payment conditions, and delays the payment of the consideration on the grounds that the delivery of all installments has not been completed. [3] In spite of the fact that provision of goods has been completed, an entrepreneur fails to pay a consideration by the due date decided on under a contract by arbitrarily delaying the receiving inspection of those goods. [4] In the case where a consideration is to be paid after an entrepreneur actually uses the goods or services pertaining to a transaction, the entrepreneur substantially delays the period for using those goods from the originally planned period, due to reasons specific to the entrepreneur. [5] In the case where an entrepreneur has received highly expensive goods/components, etc., in spite of the fact that it concluded a contract incorporating a lump-sum payment, the entrepreneur changes the lump-sum payment to an installment payment made over the years due to reasons specific to the entrepreneur, and refuses the lump-sum payment.

Price reduction
In the case where an entrepreneur who has superior bargaining position in transactions against a transacting party reduces the price decided on under a contract, without justifiable grounds, after purchasing goods or services, and if it is unavoidable for the transacting party to accept such reduction from concerns about the possible effects on future transactions, such act would unjustly impose a disadvantage on the transacting party in light of normal business practices, and would cause a problem as abuse of superior bargaining position. The same applies in the case of price reduction in effect without changing the price decided on under a contract, by changing the specifications of the goods.
On the other hand, [1] in the case where there are grounds attributable to the transacting party’s side, such as where the goods purchased from the transacting party or the services provided by the transacting party were defective, where the goods delivered or the services provided differed from the details of goods or services ordered, or where the aim of the sales could not be achieved since the goods were not delivered in time for the delivery date, the price is reduced within the scope of an amount that is found to be reasonable in light of the said grounds, within a reasonable period of time from the day of the delivery of the goods or the provision of the services (Note 24), or [2] in the case where a request for price reduction has been made as part of the negotiations on the consideration, and the amount is found to reflect the supply-and-demand relationship, such act would not unjustly impose a disadvantage on the transacting party in light of normal business practices, and therefore does not cause a problem as abuse of superior bargaining position.

(Note 24) Meanwhile, even in the case of price reduction within a reasonable period of time, the price is not allowed to be reduced without a limit. For example, if goods are defective, the price needs to be reduced within the scope of a justly evaluated amount according to the degree of the defect. However, price reduction above this level is not recognized as a price reduction "within the scope of amount that is found to be reasonable."

<Supposed examples> [1] In spite of having received the provision of goods or services, an entrepreneur reduces the price decided on under a contract, due to reasons specific to the entrepreneur, such as a business downturn, budget shortfall, or cancellation by a customer. [2] An entrepreneur arbitrarily makes the predetermined inspection standards stricter, and causes a transacting partner to give a discount on the supply price on the grounds that the goods differ from those ordered or that the goods are defective. [3] As a result of having requested, due to reasons specific to the entrepreneur, a change of specifications, or the redoing or additional provision of the goods or services subject to the transactions, the entrepreneur promised to pay a consideration for the substantially increased workload of the transacting party, but the entrepreneur only pays the consideration decided on under the initial contract. [4] An entrepreneur causes a transacting party to give an amount of discount equivalent to the amount of the discount by the entrepreneur, on the grounds that the entrepreneur has sold at a discount during a discount sales period or in order that it covers the decrease in profit in line with the discount sales. [5] Every month, in order to secure a certain level of profitability, an entrepreneur calculates the amount necessary for securing profitability, and causes a transacting party to give an amount of discount equivalent thereto. [6] In spite of having placed an order for the manufacture of goods, an entrepreneur calculates the amount necessary for attaining the cost reduction
target decided on in-house, and causes a transacting party to give an amount of
discount equivalent thereto. [7] In spite of the fact that a transacting party bears the
expenses for preparing the provision of goods or services to an entrepreneur, such as
making a capital investment or arranging personnel based on a request from the
entrepreneur, the entrepreneur cancels, due to the entrepreneur, a part of the
transaction of the said goods or services, and reduces the amount of the consideration
pertaining to such reduced portion of the transactions from the consideration decided
on under a contract. [8] An entrepreneur, without discussions with a supplier, pays
only a consideration obtained by deducting differences of sales prices between own
store and other stores on the grounds that the same goods are sold at a lower price at
other stores. [9] An entrepreneur reduces a consideration set forth in a contract
without payment of the amount equivalent to consumption tax or local consumption
tax, or by rounding down of fractions at the time of payment. [10] In spite of the fact
that an entrepreneur has changed designs or delayed the provision of drawings, etc.,
due to a the entrepreneur, it does not agree to the extension of the delivery date, and
pays only a consideration obtained by deducting a penalty imposed for late delivery.

**Case examples** With regard to goods handled by each division for purchasing
food, confectionary, and sundries, Company X has decided to conduct discount sales
of the goods, on the grounds that the turnover of the goods is low, the store is to be
closed, the sales period for seasonal goods has ended, or the goods have been
damaged as a result of falling from the display shelf, or for other reasons, and has
requested the suppliers of the goods subject to the said discount sales to reduce, from
the supply prices, an amount calculated by such method as multiplying the price
before the discount by 50 percent. Many of the suppliers who have received such a
request were in a position where they were unable to avoid accepting the request in
order to continue the supply transactions with Company X, and have given a discount.

(CEASE AND DESIST ORDER NO. 11 OF 2008; MAY 23, 2008)

**Other establishments, etc. of trade terms in a way disadvantageous to the
transacting party** Even when an act does not fall under any of the categories of acts
listed up to IV. 1, IV. 2 and IV. 3 (1) through (4) above, if an entrepreneur who has
superior bargaining position in transactions over a transacting party determines or
changes the trade terms or implements transactions in such a manner that would
unjustly impose a disadvantage on the transacting party in light of normal business
practices, such act causes a problem as abuse of superior bargaining position.
Generally, when negotiations on trade terms are not sufficient, the transacting party
tends to believe that the trade terms, etc., have been decided unilaterally. Therefore,
when presenting the trade terms, etc., to a transacting party, it is desirable for an
entrepreneur who has superior bargaining position in transactions to sufficiently explain
to the transacting party a reason for presenting the said trade terms, etc.

**Unilateral decision on a consideration for transactions** In the case where an entrepreneur who has superior bargaining position in transactions against a transacting party unilaterally requests a transacting party to carry out transactions for either an extremely low or extremely high consideration, and if it is unavoidable for the transacting party to accept the request from concerns about the possible effects on future transactions, such act would unjustly impose a disadvantage on the transacting party in light of normal business practices, and would cause a problem as abuse of superior bargaining position (Note 25). Whether or not such act constitutes abuse of superior bargaining position is determined after comprehensively considering the method for deciding on the consideration, such as whether or not the entrepreneur conducted sufficient discussions with the transacting party when deciding on the consideration, as well as whether or not the consideration is discriminatory in comparison to the consideration for other transacting parties, whether or not the consideration is lower than the transacting party's purchase price, the difference between the normal purchase price or selling price, and the supply-and-demand relationship of the goods or services subject to the transactions. (Note 25) A unilateral decision on a consideration for transactions falls under “establishing trade terms… in a way disadvantageous to the said party” set forth in Article 2, paragraph (9), item (v), (c) of the Antimonopoly Act. On the other hand, [1] in the case where a request to carry out transactions at a lower consideration or a higher consideration on the grounds that there is a competitor intending to carry out such transactions at the requested amount of consideration, or for other reasons, is made as part of the negotiations on the consideration, and where the said amount is found to reflect the supply-and-demand relationship, or [2] in the case where the request is found to be a just reflection on a difference in the trade terms, such as when goods are purchased at a lower price than usual for the purpose of purchasing a larger volume than usual (i.e., a volume discount) for conducting discount sales, etc., such act would not unjustly impose a disadvantage on the transacting party in light of normal business practices, and therefore does not cause a problem as abuse of superior bargaining position.

<Supposed examples>[1] An entrepreneur unilaterally sets a unit price that has been presented by a transacting party for large-lot orders as the unit price for small-lot orders.[2] In spite of the fact that a transacting party's personnel expenses and other costs substantially increased as a result of an entrepreneur having placed an order with a short delivery date, the entrepreneur unilaterally decides on the same unit price as when placing an order with a usual delivery date.[3] In spite of the fact that a
transacting party's workload has increased and the transacting party's personnel expenses and other costs have substantially increased as a result of an entrepreneur designating special specifications that are not designated in usual orders, or instructing a change in the delivery frequency, the entrepreneur unilaterally decides on the same unit price as when placing an order with a usual delivery date.[4] An entrepreneur unilaterally decides on a unit price which is substantially lower or substantially higher than the usual price, based solely on its budget unit price.[5] An entrepreneur unilaterally decides on a unit price substantially lower or substantially higher than the usual price through uniformly lowering or raising the unit price by a certain percentage, by using a unit price that has been decided on through discussions with some transacting parties or a unit price calculated based on an unreasonable criteria to revise the unit price for another transacting party, or by the periodical revision of the unit price which is not based on transacting parties’ decline in costs.[6] In spite of the fact that there are no reasonable grounds in light of the trade terms, such as the volume of orders, the delivery method, the settlement method, and whether or not the return of goods is possible, an entrepreneur treats specific transacting parties in a discriminatory manner, and unilaterally decides on an amount of consideration substantially lower or substantially higher than those of other transacting parties.[7] An entrepreneur, without discussion with a supplier, decides on a supply price that is lower than the supplier's purchase price with regard to the goods which the entrepreneur sells at a discount sale, and by unilaterally instructing the supplier to deliver the goods at such price, the entrepreneur causes the supplier to deliver goods at a price substantially lower than the supplier's usual supply price.[8] In spite of the fact that a transacting party's costs have substantially increased due to a price hike in raw materials, etc., an increase in research and development expenses in line with an improvement in the quality of parts and components, and in response to environmental control, an entrepreneur unilaterally decides on the same unit price as the conventional unit price.[9] An entrepreneur, at the time of a discount sale upon opening its new store, unilaterally decides a substantially lower price not only for supply of goods to the new store but also for supply of goods to nationwide stores of the entrepreneur.[10] An entrepreneur causes a transacting party to submit transacting party’s confidential materials for the calculation of manufacturing costs, labor management-related materials, etc., analyzes such materials, and unilaterally decides a substantially lower supply price, for example, insisting that the transacting party “can agree to price reduction because the profit margin is high.”

<Case example> At the time of a special thank-you sale conducted twice a year and the Tuesday bargain sales conducted about 50 times a year, Company X, with the aim of increasing sales, has the staff members in charge of purchasing at some stores
request intermediate wholesalers to supply a larger amount of goods than usual at a substantially lower price than the general wholesale price for the same type of goods as the fruits and vegetables to be used for any of the sales above, in light of the grade or the production area, etc., without discussing the supply price with the intermediate wholesalers in advance. Such request is made, for example, by informing the intermediate wholesalers about the featured goods to be shown on the sales flier, such as Japanese radish, cucumbers, and tomatoes, on the day immediately before a Tuesday bargain sale, and unilaterally instructing them to supply the said goods at a price lower than their purchase price. Many of the intermediate wholesalers who have received such requests are in a position where they are unable to avoid accepting the request in order to continue the supply transactions with Company X. (JFTC recommendation decision, January 7, 2005)

Request for redoing

In the case where an entrepreneur who has superior bargaining position over a transacting party, without justifiable grounds, requests the transacting party for redoing after the entrepreneur has received the goods or services from the transacting party, and where the transacting party to unavoidably accept such request from concerns about the possible effects on future transactions, such act would unjustly impose a disadvantage on the transacting party in light of normal business practices, and therefore causes a problem as abuse of superior bargaining position (Note 26) (Note 27). (Note 26) “Redoing” falls under “changing trade terms or executing transactions in a disadvantageous to the transacting party” set forth in Article 2, paragraph (9), item (v), of the Antimonopoly Act. (Note 27) Before receiving goods or receiving the provision of services from the transacting party, in the case where an entrepreneur changes the details of the provision and causes a transacting party to conduct work different from that initially decided on, such act falls under “price reduction” (refer to IV. 3 (4)) or “other establishments, etc. of trade terms in a way disadvantageous to the transacting party” (refer to IV. 3 (5) C) and may cause a problem as abuse of superior bargaining position. (b) On the other hand, [1] in the case where goods or services do not meet the conditions decided on at the time of placing orders, or [2] in the case where an entrepreneur bears the loss that should normally occur for redoing, based on the prior consent of the transaction party, or [3] in the case where the entrepreneur requests the transacting party for redoing concerning a prototype in transactions that include the creation of the prototype, in order to determine a specific specification, and expenses for the said redoing are found to be included in the initial consideration, such act would not unjustly impose a disadvantage on the transacting party in light of normal business practices, and therefore does not cause a problem as abuse of superior bargaining
position.

<Supposed examples> [1] Before receiving goods or services, in spite of the fact that an entrepreneur has changed specifications of goods or services decided on in advance due to a reason specific to the entrepreneur, the entrepreneur causes a transacting party to continue working without notifying the transacting party of the change and to redo on the grounds that such goods or services have not met the specifications at the time of delivery.[2] In spite of the fact that an entrepreneur was requested by a transacting party to confirm the details of entrustment and has agreed to them, and therefore the transacting party has manufactured goods or engaged in other work based on such entrustment, the entrepreneur causes the transacting party to redo, on the grounds that the goods, etc., provided by the transacting party differ from those of entrustment. [3] An entrepreneur arbitrarily makes the predetermined inspection standards stricter, and causes a transacting partner to re-provide goods, etc., on the grounds that the provided goods, etc., differ from those ordered or they are defective. [4] In spite of the fact that a transacting party requested an entrepreneur to clarify the specifications, the entrepreneur does not clarify the specifications without justifiable grounds and causes a transacting party to continue engaging in work. Thereafter when the transacting part delivered the goods, the entrepreneur causes the transacting party to redo on the grounds that the goods differ from those ordered.

Other

Even when an act does not fall under any of the categories of acts listed from IV. 3 through (4), as well as IV. 3 (5) A and B above, if an entrepreneur who has superior bargaining position in transactions over a transacting party unilaterally determines or changes the trade terms or implements transactions and when such act unjustly imposes a disadvantage on the transacting party in light of normal business practices, the said act causes a problem as abuse of superior bargaining position.

The following supposed examples could not generally fall under any of the categories of acts described earlier. However, if they fall under the provisions of Article 2, paragraph (9), item (v), (c) of the Antimonopoly Act, such act causes a problem as abuse of superior bargaining position.

<Supposed examples> [1] In the case where consideration is to be paid after a transacting party actually uses the goods or actually receives the provision of services pertaining to a transaction, in spite of the fact that the transacting party has yet to actually use the goods or has yet to actually receive the provision of the services, an entrepreneur causes the transacting party to advance the payment of a consideration due to reasons specific to the entrepreneur. [2] In spite of the fact that
an entrepreneur has ordered goods to be manufactured by designating certain specifications and a transacting party has procured raw materials, etc., based on such an order, the entrepreneur cancels an order for components due to reasons specific to the entrepreneur, without paying the transacting party’s expenses required for the said procurement. [3] In spite of the fact that an entrepreneur has directed a transacting party to introduce new machinery and equipment, has explained to and committed the transacting party that the entrepreneur places an order for a certain volume immediately after the introduction of the said machinery and equipment, and has given implicit approval to the fact that the transacting party is taking such actions as the introduction of machinery and equipment for the transaction with the entrepreneur, the entrepreneur substantially reduces the volume of the order or cancels the order due to reasons specific to the entrepreneur. [4] An entrepreneur delivers a bill that is difficult for a general financial institution to discount until due date such as a bill drawn by a company with poor performance, including a negative net worth, or a bill with a sight being substantially long, and causes a transacting party to bear discount fees higher than usual. [5] An entrepreneur unilaterally decides a substantially high amount of a guarantee deposit, which exceeds the necessary amount to preserve entrepreneur’s receivables arising from sales on credit, and causes a transacting party to make a guarantee deposit. [6] In the case where a transacting party fails to deliver goods by the delivery date or the goods delivered are defective, an entrepreneur unilaterally decides a penalty to be imposed on a transacting party, without sufficiently discussing the penalty amount and the basis for the calculation of the amount, etc., with the transacting party, and causes the transacting party to pay an amount exceeding an amount equivalent to the profit that would have been gained if the goods had been delivered and sold or if the goods had not been defective. As described below, in the case where the headquarters of a franchise chain makes it unavoidable for a franchise member to stop selling goods at a close-out price, thereby depriving a franchise member of the opportunity of reducing its burden based on its own reasonable management decisions, such act has imposed a disadvantage on the transacting party, and therefore has caused a problem as abuse of superior bargaining position (Note 28). (Note 28) Such act also falls under Article 2, paragraph 9, item(v),(c) of the Antimonopoly Act. Regarding the details of the concept for abuse of superior bargaining position in franchise transactions, refer to “Guidelines Concerning the Franchise System under the Antimonopoly Act.” (Fair Trade Commission on April 24, 2002)

**Case example** Company X has a system in which the franchise members of its franchise chain are to bear the entire amount equivalent to the cost of the goods discarded at the convenience stores managed by the franchise members. Company X
has taken the following measures under this system. If a management consultant finds out that a franchise member is intending to sell daily goods (foods and beverages of which quality is easy to deteriorate and also those which are delivered to stores daily. The same shall apply hereunder.) at a close-out price, it causes the franchise member not to sell the goods at a close-out price. If a management consultant finds out that a franchise member has sold goods at a close-out price, it causes the franchise members never to sell goods at a close-out price again. If a franchise member does not stop selling goods at a close-out price in spite of the measures set forth in (a) or (b) above, superior of the management consultant causes the franchise member not to sell goods at a close-out price or never to sell goods at a close-out price again by suggesting that the franchise member would receive disadvantageous treatment, such as the cancellation of the franchise-store basic contract. In this manner, Company X makes it unavoidable for a franchise member who intends to sell or is selling goods at a close-out price to stop selling goods at a close-out price, thereby depriving franchise members of the opportunity of reducing their burden regarding the amount equivalent to the cost of daily goods discarded, based on their own reasonable management decisions. *(Cease and Desist Order No. 8 of 2009; June 22, 2009)*
III  Objective justifications to discriminatory practices

As explained in the introduction, discrimination can also enhance economic efficiency and welfare. This section will therefore be aimed at identifying how these efficiencies have been taken into account in the analysis of discriminatory practices.

23. Under European law, some justifications to price discrimination are admitted (costs reduction and volume discounts, price reductions in return for services rendered (with conditions), new products and new markets (when a firm is launching a new product or entering a new market represents a short term effort to increase demand for the new product), fixed costs recovery, charges according to intensity of use or value in use, price reductions for "special customer status", etc.).

Do your national provisions or case law recognise that any such factor, alone or in combination with others, could justify discriminatory practices?

24. Did it happen that your national courts/authorities did not sanction discriminatory practices under investigation, because those practices were shown to be objectively justified on one of the above grounds?

25. If yes, can you please give details on the legal and economic effects analysis that has been undertaken to assess these positive effects?

ANSWER III

1. Success or failure of justification due to intellectual property involvement

1. 1 Reason for justification

Reasons for justification are substantial restrictions on competition (Article 2, Paragraph 5, Private Monopoly, Antitrust Law, Article 6, Unfair Transaction Restriction, Article 8, Paragraph 1, Item 1 Business Group Regulations, Articles 10 and 13-16, Business Combination Regulations) And fair competition inhibition (unlawful trade method, Article 2, Paragraph 9).

If there is a justification reason, the substantial limitation of competition and fair competition inhibition will not be satisfied (the first time there is no justification, the substantial limitation of competition and fair competition inhibition will be satisfied).

(Note) Unfair trading methods refer to the Antimonopoly Act 2 among the acts specified in Article 2, Paragraph 9, Items 1 to 5 of the Antimonopoly Act (subject to charges) and those that may impair fair competition. Those designated by the Fair Trade Commission based on Article 9, Paragraph 6 (excluded from surcharge) (See “Attachment” at the end of this document for “general designation” that applies to all industries.)

Judgment criteria for whether or not it is accepted as a justification reason is whether or not it is legitimate in terms of both purpose and means (Business Group Guidelines No. 2-7 (2) a) and No. 2-8 (4) The above SCE trial decision, Masataka Yamaguchi, water meter supreme decision investigator commentary, the final judgment was dismissed, 2000-201 pages in 2000).

A legitimate purpose is specifically something that the law determines that it should
be achieved even with the negative effects of anti-competitiveness and fraudulent means. The anti-competitiveness and detrimental effects caused by the act are weighed against each other, and the detrimental requirements are satisfied when the detriment exceeds. 

Further, even if the act is valid for the purpose, it is not recognized as a justification reason if it is not valid in the means. Judgment criteria for whether or not a means is justified is whether or not it can be said that there is something reasonably necessary to achieve a legitimate purpose.

1.2 Examples of justifications for securing incentives for intellectual creation and effort

Since intellectual creation and infusion of effort are often not made without the expectation of the fruits obtained thereby, guarantee a certain return on such things (invention of intellectual creation or injection of effort). Anti-competitiveness may be justified in some cases.

(1) Exercise of intellectual property rights (see the interpretation of Article 21 of the Antimonopoly Act above)

(2) Prohibition of manufacturing similar products for the purpose of know-how protection

Osaka District Court 2006/4/27 (Heisei 16 (Wa) 7539) [Medion vs. Sunkus Pharmaceutical] (Facts and Reasons 3-2 (2)) is contracted with the manufacturing contractor for a certain period after contract termination The ban on the production of similar or similar products imposed is reasonable from the viewpoint of know-how protection. In this case, it was a problem to prohibit the production of similar products as well as similar products in the success or failure of the means, but the judgment is difficult to prove because know-how is diverted and know-how justification was admitted as being due to the need to cover until only a slight modification.

(3) Obligation to avoid competition for the purpose of protecting trade secrets

Tokyo District Court Heisei 6/1/12 (Heisei 4 (wa) 12677), 1524, 56 pages [Nicomart] (pages 50-61) is subject to the duty to avoid competition imposed on franchisees in franchise contracts. It was for the legitimate purpose of preventing leakage to secret competitors.

(4) Transactions with exclusive conditions for the purpose of pursuing profits of pioneers

Tokyo District Court Showa 45/9/16 (Showa 42 (Wa) 3097) Shimomin Vol.21 9 = 10 No.1298, Judgment Vol.21 270 [Chackles Shiminmin Shu 1314-1315] is a product service Transactions with exclusive conditions to pursue pioneer profits commensurate with the risks associated with new developments and expansion of sales channels are rational from a social perspective.

(5) Fair price discrimination price

Tokyo High Court Heisei 17 March 10 (Heisei 16 (Ne) 4388) [Saitama Real Estate Appraisers Association] (Facts and Reasons Daiichi 3-2 (Heisei 4)) In light of the profits of Shushu, the admission fee cannot be said to be so high as to be unreasonable due to social wisdom, and the use price of various services of the real estate appraiser association is discriminated between members and non-members. Was for the legitimate purpose of impartial burden.

(6) Exclusive use of portrait rights, etc. for the purpose of protecting investment incentives
Tokyo district court 2006/8/1 (Heisei 17 (wa) 11826) [portrait of professional baseball player name] (facts and reasons 4-2 (2)) and No. 4-3 (3) (4)), the professional baseball team invested a lot to attract customers to their players and their players. In return for improving their power, it is said that there is a certain rationality for a professional baseball team to obtain exclusive licenses for their players' names and portraits and to perform a certain degree of collective collective processing.

(7) License fee according to contribution to collaborative research contract results Consultation Case Collection 12 published in 2004 [Chemicals Joint Research and Development] is known according to its contribution to joint research and development. Differences in license fees for intellectual property rights are allowed within reasonable limits.

(8) Most favorable supply conditions for joint research contract materials Consultation Case Collection Case 5 published in 2004 [Building Materials Joint Research and Development] is a building material that is the result of joint research and development. If a mechanism that allows the supply of drugs to be supplied under conditions that are as advantageous as or better than those of others is to be used as a means of allocating fruits of joint research and development, it is not a violation of the Antimonopoly Act. did.

(9) Obligation to use manufacturing equipment for know-how protection Consultation Case Collection 6 published in 2005 [Co-development of electronic component manufacturing equipment] is an intellectual property right developed independently. It is said that obligating the use of manufacturing equipment, which is the result of joint development, is allowed from the viewpoint of know-how leak prevention and recovery of joint development costs.

(10) Patent pool for efficiency improvement If the act increases the efficiency of actors' business activities, the act may have a legitimate purpose. For example, as seen in Joint Research and Development Guidelines No. 1 and Standardized Patent Pool Guidelines No. 3-1 (1), even if competition for R & D is stopped and joint R & D is conducted, the technology that is the result of R & D It is possible to promote competition for goods and services that are manufactured using the above (Shiraishi, page 97, footnote 252).

(11) Trademark credit and brand image maintenance purpose Distribution Trading Practice Guidelines Part 3 3-1 (2) (described later) cites acts to maintain trademark credibility as justification reasons. Heisei 10/12/18 (Heisei 6 (o) 2415) Minshu Vol. 52, No. 9, 1866 [Shiseido Tokyo Sales] (minshoku 1872 ~ 1873) and Heisei 10/12/18 (Heisei 9 (E) 2156) No. 1664, page 14 [Kao Cosmetics Sales] (page 17), it is speculated that the brand image may be justified as a legitimate purpose.

1.3 Example where justification is not accepted
On the other hand, if the need for guaranteeing incentives (returns) is low, or the antisociality caused by that is so great that it exceeds the necessity, there is no reason to justify it.

(1) About refusal of transaction of product service that is indispensable in competition
Suppose that the rejection of merchandise services that is indispensable for the refusal to compete in the target market, the possibility of being justified is low in the following cases.

① When the indispensable product service is established through joint work (Joint Research and Development Guidelines 1-2 (2), 2-2 (2) a ②, Standardized Patent Pool Guidelines 3-3 (1), Decision on Recommendation August 6, 1997 (Heisei 9 (Recommendation) 5) Examination collection Vol. 44, page 238 [Pachinko patent pool], etc.)

② When the product service is made indispensable by an unauthorized method (not by technical excellence, but by guiding by using unauthorized means so that joint standardization work moves in a direction advantageous to oneself. , If you have obtained the status of an essential intellectual property rights holder)

③ In the case of building such an indispensable product service with a lot of public assistance, etc. (Okayama Chika, 2004/4/13 (Heisei 8 (wa) 1089)) In concludes that refusal of use falls under General Designated Item 5, it is pointed out that the ranch is a public training ranch and has “public utility” in the sense that the foundation was made with the assistance of the prefecture, etc. (Facts and reasons 5-16, 5-24).

④ When a license for an intellectual property right that is indispensable on the premise of sublicensing to a competitor is received but no sublicense is issued (Warning April 22, 2003 [Konami]).

(2) When anti-competitiveness exceeds necessity
There is also a need to guarantee returns, but if the anti-competitiveness that arises outweighs the need to guarantee returns, justification is hardly recognized.
IV. Objectives justifying to prohibit discriminatory practices

In section I to III, we put into light how is discrimination defined in your legal provisions, what kind of practices are prohibited and why they could be objectively justified. Now we would like to understand the policy grounds justifying the intervention of competition authorities against discriminatory practices.

We observe that the prohibition of discriminatory practices can find numerous objectives: protection of competition, market liberalisation, fairness, equal treatment, etc…

As regards fairness, it is an objective that has somehow been largely debated as being – or not – in the scope of competition law objectives. Brice Allibert, the deputy head of the antitrust unit of the European Commission DG competition reckoned that competition law "somehow directionally go[es] towards more fairness on the market but not because that's your objective. It is because you're abiding the law and as a side effect, you rectify something that was not in line with competition law".

26. Has the sanction of discriminatory practices been used as a tool to restore an effective competitive structure in a given market, i.e. sanctioning dominant operators that were excluding equally efficient rivals or even less efficient competitors that the incumbent operator?

27. Has the sanction of secondary line discrimination also been used as tool to open market to competition, for instance by enabling market entry on customer segments that would have been targeted with low prices if discrimination had been possible?

28. Is fairness a defined objective of your competition policy? Or do you think that the re-establishing of fair situation between competitors/trading partners was somehow a side effect of the sanction of a practice which was anticompetitive in itself?

29. In this latter case, do you think that the prohibition of discrimination, which is aimed at sanctioning the treatment differences between partners in equivalent situations under competition law, introduces an implicit objective of fairness in the scope of your competition policy?

30. Has the notion of fairness already been used in the balancing between the procompetitive and anticompetitive effects of a discriminatory practice?

ANSWER IV

The Japan Fair Trade Commission has been strengthening efforts to regulate mega platformers since the year before last. The following is a summary of recent Fair Trade Commission announcements.

The Study Group on Improvement of Trading Environment regarding Digital Platforms (“Study Group”) has held discussions nine times, starting from the first meeting on July 10, 2018. This Interim Discussion Paper sorts out the content of the discussion so far, which considers opinions collected through interviews with businesses conducted by this Study Group, as well as opinions submitted through a Public Comment.

The Study Group expects that the Ministry of Economy, Trade and Industry (“METI”), the Japan Fair Trade Commission (“JFTC”), and the Ministry of Internal Affairs and Communications will advance policy discussions on improvement of the trading environment surrounding digital platforms based on the discussion of this Study Group.

### 1. Roles and Features of Digital Platforms

- Services called “digital platforms (online platforms)”, which utilize ICT and data to provide users a “field”, include various categories of services such as:
  - Online shopping malls, internet auctions, online flea markets, application markets, search services, contents delivery services (movies, videos, music, e-books etc.), booking services, sharing economy platforms, social networking services (“SNS”), video sharing services, electronic payment services, etc.

- With the swift development of ICTs and generation of massive data under the Fourth Industrial Revolution, digital platform operators have become innovation leaders that continue to drive new businesses and markets, and have achieved rapid growth. As the layerization (stratification) of digitalized industries and businesses progresses, this trend of “platformization”, through covering certain layers, is irreversible on the whole.

- These digital platforms dramatically raise the possibility of small and medium-sized companies, as well as startup companies, to access both domestic and international markets, and sometimes bring opportunities for explosive growth.
Digital platforms are also beneficial to consumers since they not only provide consumers with a variety of choices of goods and services, but also enable them to make transactions under certain secure and safe environments provided by digital platform operators.

Digital platforms are described by the following factors appearing remarkably in economic order:
- In general, a platforms business is a multi-sided market composed of multiple different layers of users, creating one whole ecosystem.
- It is pointed out that, as far as such multi-sided platforms are concerned, not only direct network effects (e.g., as the number of users of an SNS increases, they can communicate with more people, resulting in increasing the benefit of the SNS) but also, as an equally important feature, indirect network effects (e.g., in online shopping malls, as the number of members increases, the sellers will enjoy more opportunities to gain profit) work, which would tend to facilitate monopolization or oligopolization.
- As for businesses that make full use of ICT technologies, unlike hard infrastructure, production costs are generally low mainly due to small marginal cost for reproduction of data, and economies of scale continue to work with the continuous decrease of per unit cost even if the scale of business expands.
- While network effects and economies of scale increases the utility of users by concentration of data, they also raise switching costs between different platforms, which would tend to facilitate monopolization or oligopolization.
- In addition, it is pointed out that once a business model based on data is established through accumulation and utilization of data, a virtuous cycle may be created, where the competitive advantage of such business is maintained and strengthened through further accumulation and utilization of data (as a way of such accumulation of data, a business model where goods or services are provided for free in exchange of obtaining personal data, may sometimes be adopted).

With these features, some digital platform operators have grown rapidly and have become extremely large. They tend to expand their business through acquiring different businesses, forming conglomerated corporate groups, and oligopolizing or eventually monopolizing the market. These giant digital platform operators now provide consumers (individuals) and businesses with socio-economically more or less essential basis.
According to the world ranking of market capitalization as of March 2018, digital platform operators occupy top rankings, as shown below:
1st Apple (approx. $851 billion), 2nd Alphabet (Google) (approx. $719 billion),
4th Amazon.com (approx. $700 billion), 6th Tencent (approx. $492 billion, 7th
Alibaba Group (approx. $467 billion), 8th Facebook (approx. $464 billion)
On a worldwide basis, the number of Google searches is 230 million per hour
on average (2016), the annual sales amount of Amazon is approx. $177.8
billion (2017), and the number of Facebook’s active users is approx. 2.2 billion
(2018).

2. Perspective of Legal Evaluation of Digital Platform Operators

O As mentioned above, digital platform operators include various types of
businesses and there is no established definition.[1]

O In this regard, there is an international movement towards establishing legal
discipline on digital platforms by targeting some types of such digital platforms
under certain conditions.

- In April 2018, the European Commission published the “Proposal for a
Regulation on Promoting Fairness and Transparency for Business Users of
Online Intermediation services” (the “EU New Regulation Proposal”). The
EU New Regulation Proposal suggests imposing disciplines on “online
intermediation services”[2] where B2C digital platform operators are assumed,
from the viewpoint of fairness and transparency in the relationship with their
business users. In addition, in April 2018, the European Commission
published the “New Deal for Consumers” package which proposes to impose
certain disclosure obligations for consumers on “online marketplace”[3]

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1 During the interview with businesses conducted by this Study Group, some digital platform
operators expressed concerns that, since there are a variety of different kinds of digital platform
operators, generalized discussions could cause unexpected adverse effects. Likewise, during the
Public Comment procedure implemented on the Interim Discussion Paper (Draft), there were
opinions which expressed the importance of clarifying the targeted digital platform operators based
on the possible harm they may cause in order to avoid overregulation.
2 The EU New Regulation defines “online intermediation services” as services that meet certain
conditions including allowing “business users to offer goods or services to consumers, with a view to
facilitating the initiating of direct transactions between those business users and consumers,
irrespective of where those transactions are ultimately concluded.”
3 EU’s “Consumer New Deal” package, the “online marketplace” is defined as “a service provider
which allows consumers to conclude online contracts with traders and consumers on the online
marketplace’s online interface.”
- China’s “E-commerce Law” adopted in August 2018 stipulates duties and responsibilities of “e-commerce platform operator” and “operator inside a platform”.  

O In Japan, traditionally, the prevailing view has been that digital platform operators do not, in principle, owe responsibilities, since they merely provide a field for transactions.

O However, a court case in which the plaintiff argued that an internet auction operator should bear responsibility with respect to fraudulent transactions that took place on the platform (Judgment of Nagoya District Court on March 28, 2008, Judgment of Nagoya High Court on November 11, 2008) held that, in general, a platform operator owes a duty to users to “build a system without defect when providing services concerned.” The judgment further stated that the actual duty of an operator should be found “through comprehensive consideration of various factors, including social circumstances surrounding internet auctions at the time when the service was provided, relevant laws and regulations, technical standards of the system, the cost for structuring and maintenance of the system, the effect of introducing the system, the convenience for users”. Taking this in mind, we should consider the current social circumstances, technical standards and user’s convenience when considering appropriateness of legal rules to be applied to digital platform operators.

O Currently, there is a global trend to regard digital platform operators as a so-called points of control of regulation (an entity designated among other dispersed entities as a subject of exerting regulation to effectively realize control by the government) or as a gatekeeper.

- In the United States, at the state level, there is a movement to clarify the legal status of Uber as a “Transportation Network Company”, place them under control by introducing a license system, and to impose responsibilities of management on drivers.

- Mainly in the EU, there is a movement to impose responsibilities on digital platform operators to take proactive measures against copyright infringing contents or terrorism-related contents etc.

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4 In China’s E-commerce Law, the “e-commerce platform operator” means “an legal or non-legal entity that provide services to a counterparty or a related party in e-commerce such as a place to operate internet businesses, transaction matching, and information sharing.”

5 See “Guidelines on E-commerce and Information Material Commerce” Section I-6.
- These movements can be seen as an attempt to integrate digital platform businesses into the system of industry-specific regulations, and impose certain responsibilities on them as a point of control from the viewpoint of safety management, while allowing them to conduct business.

O With respect to digital platform operators that have become giant and provide an essential basis for socio-economy, some opinions attempt to justify placing certain responsibilities or disciplines on them by referring to the so-called essential facilities doctrine or public utilities doctrine.

O Digital platform operators design and operate rules and systems to be applied to consumers (individuals) and businesses participating in such digital platforms while integrating them with contracts (terms and conditions) (Along with the progress of digitalization, among factors that discipline people’s actions such as “law” and “market”, the importance of so-called “code/architecture” is said to have greatly expanded. Digital platform operators can be seen as a private designer of such code/architecture.). Contracts signed between users through digital platforms also depend on how such platforms are designed.

O As a result, especially as for giant digital platform operators, they could be seen as not only mere intermediaries of transactions but also as an entity that, with its market power, designs, operates and manages a market itself participated by many consumers (individuals) and businesses. However, unlike stock exchanges (regulated by Financial Instruments and Exchange Act) or wholesale markets (regulated by Wholesale Market Act), they are not subject to any industry-specific regulations on how to design, operate and manage the market.

O In addition, today’s digital platform operators place algorithms supported by technologies including AI as an important factor of their rules and systems, and design and operate platforms based on analysis (i.e. profiling) using such algorithms. It is pointed out that this type of market tends to be essentially highly manipulative and non-transparent because digital platform operators can easily change the disciplines of the market based on their market power, or can provide

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6 In general, “code/architecture” is used to express a “physical or technological structure that restricts or enables actions of certain subject” in the cyber space. In this Interim Discussion Paper, it is also used to mean a legal structure with respect to digital platforms, such as contracts (terms and conditions), depending on the context.
information which is seemingly neutral but is actually biased by manipulating parameters.\footnote{During the Public Comment procedure implemented on the Interim Discussion Paper (Draft), there were opinions which expressed concerns that expression, speech or commercial activities would be restricted by a unilateral decision of digital platform operators.}

O As described above, giant digital platform operators notably have the following features, and the problem is how to improve the trading environment from which viewpoint in each aspect, and with what measures based on such features.
- They provide an essential basis for socio-economy.
- They design, operate and manage a market itself participated by many consumers (individuals) and businesses.
- This type of market is highly manipulative and non-transparent.

O When examining the specific way of disciplines based on the viewpoints above, since digital platform operators include various types of businesses, it is also helpful to analyze each digital platform business from the viewpoint of whether it is a matching platform business or a non-matching platform business\footnote{In general, digital platforms which intermediate users’ transactions (e.g., online shopping malls and application markets) are often called “matching platforms (in a narrow sense)” and other digital platforms (e.g., SNSs or video sharing services) are often called “non-matching platforms”. Having said so, it is pointed out that the differences between matching and non-matching platforms are fluid and they have some common features, including such that huge amount of information is accumulated to digital platforms. Also, even non-matching platforms can be seen as providing a field to intermediate information with respect to transaction when they obtain information from users and deliver advertisements.} what kind of business model, such as its revenue structure, is used, whether the transactions between users are B2C or C2C, and whether the governance should be structured based not only on individual transactions but also on the ecosystem as a whole.

3. **Designing Responsibilities of Digital Platform Operators as Innovation Leaders (the way of Industry-Specific Regulation etc.)**

O It is extremely important to facilitate further development of digital platform businesses in our country, considering the irreversible trend of platformization due to layerization as well as the roles of digital platform operators as discussed in the aforementioned 1. For this purpose, in addition to developing and attracting innovative technologies and companies, it is also necessary to consider
appropriately easing barriers to entry from institutional aspects such as reviewing industry-specific regulations as discussed below.

The core of services provided by digital platform operators is to analyze and optimize customers and goods or services by making use of ICT including big-data analysis, IoT, and AI, and connect consumers (individuals) and consumers (individuals), consumers (individuals) and businesses, and businesses and businesses. Companies with advanced ICT are expected to enter different industry sectors or provide customers with functions and services integrated across various industries.

It can be said that traditional industry-specific regulations, given existing business models, mainly targeting the entity at the endpoint of the vertically sectioned value chain, select certain entities that can be recognized as reliable by permits and approvals, and impose codes of conduct such as transaction rules and safety standards. On the other hand, digital platform businesses do not necessarily fall within the forms of “industry” envisioned by the existing industry-specific regulations. Therefore, with regard to industry-specific regulations where the emergence of digital platform businesses was not necessarily expected (e.g., platforms for private lodging services, ride-sharing, social lending, etc.), certain phenomena such as the following has occurred.

- The existing industry-specific regulations have become obstacles to conducting platform businesses.
- The existing industry-specific regulations have failed to adequately exert control over platform businesses, thereby failing to legally secure the social benefits and values (e.g., consumer protection and safety ensuring) which must be protected.

In order to facilitate a sound development of digital platform businesses in our country, it would be necessary to consider whether we should review each industry-specific regulation, turning back to concrete social benefits and values (e.g., ensuring consumer protection and redress, safety and health, and fair competition) and especially taking the following viewpoints in mind (when considering reviewing, it would be possible to utilize the regulatory sandbox system):

- Whether the existing industry-specific regulations exert adequate controls from the viewpoints of social benefits and values to be protected under the current social circumstances including the progress of digitalization (e.g., whether the
contents of existing regulations are still reasonable now, whether there are legal
infringement phenomena that the existing regulations fail to capture).

- How to appropriately divide the roles between digital platform operators on
  one side, and consumers (individuals) and businesses on the other side (It would
  be possible to devise effective consumer protection and ensuring safety by
  placing digital platform operators as points of control of regulation).

- Whether a level playing field with regard to competition conditions is ensured
  between businesses operating existing businesses (existing businesses) and digital
  platform operators (e.g., whether existing businesses are advantageous or
  disadvantageous depending on industry-specific regulations), and whether a level
  playing field with regard to competition conditions vis-à-vis foreign business
  operators is ensured (e.g., whether certain regulations in Japan are only
  applied to domestic businesses).

- Whether there is room to design systems that effectively make use of
certification and audit in order to ensure trust for entities in digital markets such as
digital platform operators.9

- As a method of regulatory system design, it would be appropriate to introduce
  co-regulation, a flexible way of regulation that combines self-regulation and
  legislation.

4. Ensuring Transparency to Achieve Fairness

(1) Necessity of achieving transparency and fairness

There would be issues such as the following with respect to transparency and
fairness in rules (code/architectures) designed, operated and managed by digital
platform operators.

[Viewpoint from business(es)]

- In the relationship with businesses (especially small and medium-sized
  enterprises), lack of transparency in rules concerning platforms could possibly
  become a hotbed of unfair trade practices.

- As the background of Japanese regulations on abuse of superior bargaining
  position and Guidelines concerning Distribution Systems and Business
  Practices, there is the basic recognition that lack of transparency in trade

9 As to sharing economy that expands in the digital market, Sharing Economy Association Japan (a
general incorporated association) establishes a system that certifies sharing economy businesses that
make efforts to ensure safety and trust.
practices will lead to unfair trade practices and eventually to anti-competitive effects in the market.

- As a matter of fact, some issues with regard to trade practices between giant digital platform operators and businesses have been pointed out.¹

  - The EU carried out a large-scale questionnaire with respect to B2B transactions and figured out that many businesses have experienced problems with online platform operators or recognized issues in trade practices.

  - In 2016, the METI and the JFTC conducted “Joint Hearing Survey with respect to Internet-related Businesses” in which they interviewed businesses such as e-commerce operators including contents developers. As a result, several actual trade practices by certain digital platform operators were identified such as restrictions on payment method, rigid pricing structure, prohibition of the use of common virtual currencies between applications, exclusion of applications that compete with those offered by the digital platform operator itself, scarce information about sales and refund, lack of transparency in the reviewing standard and its operation, limitations on providing services without going through the application store, and conclusion of excessively broad non-disclosure agreement (METI, “Report by The Cross-sectional System Study Group for the Fourth Industrial Revolution”).

  - In addition, an online questionnaire to businesses conducted by METI in October 2018 revealed that, while many businesses enjoy the benefit of utilizing digital platforms, such as obtaining new customers or reduction of costs, a lot of businesses replied that they were not satisfied with the operations, contracts or trade practices of the digital platforms.

  - However, in these surveys, it was sometimes the case that businesses subject to the survey refused to provide detailed information due to non-disclosure agreement, and as a result that it was not possible to sufficiently grasp the problems in trade practices.

¹ During the Public Comment procedure implemented on the Interim Discussion Paper (Draft), there were opinions which pointed out that there are problematic trade practices which need to be improved such as unilateral change or termination of contracts or services, or burden of excessive penalties or service fees. There were some opinions that we should consider establishing a framework that requests public disclosure of terms and conditions and enables the monitoring, as well as designing systems that protect one-person businesses or small and medium-sized enterprises.
- Considering these circumstances, it would be necessary to ensure transparency and fairness in the relationship between businesses and platforms.

[Viewpoint from consumers (individuals)]
- In the relationship with consumers (individuals) as well, lack of transparency could become a hotbed of unfair trade practices or causes of infringement of rights.
- These days, along with the spread of IoT and advancement of AI-related technologies, the importance of data has increased and it has become important to utilize such data on business activities. In this regard, the data which digital platform operators collected from consumers (individuals) using such platforms can be considered to have economic value in their business activities, just like money.
- In addition, depending on the way of handling personal data and of profiling, this could damage the personal rights of consumers (individuals) by leading to invasion of privacy or discrimination. Further, consumers (individuals) could suffer from economic disadvantage caused by profiling to produce credit information. When we consider the desired relationship between digital platform and consumers (individuals), it is also important to take account of the risks to the moral interests and the economic interests of consumers (individuals), in addition to the economic value the personal data itself has.
- Considering these arguments, it would be necessary to pursue transparency and fairness in the relationship between digital platforms and consumers (individuals) as well.
- In addition, with regards to the methods of redressing consumers (individuals), the task is to ensure an effective redressing method, taking into account that there are cases where individuals' exercise of their legal rights cannot be expected due to the small amount of damages suffered by each individual as such.

[Viewpoint from regulators]
- It would be necessary to shed light on the actual state of trade practices surrounding digital platform operators, as a premise for regulators to

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appropriately enforce laws on unfair trade relationship or to consider the necessary policy measures such as amending the laws.

- Further, expertise and ability to understand rules (code/architecture) of digital platforms is becoming important.
- It would be appropriate to regard both businesses and consumers (individuals) as users of platform, and deliberate building transparency and fairness of transaction as protection for users in such mean.

(2) The way of efforts to achieve transparency and fairness

○ As a starting point for a discussion to achieve transparency and fairness in trade practices surrounding digital platform operators, it would be necessary to conduct large-scale, comprehensive and thorough surveys with stakeholders.

- When conducting a survey, as necessary, it would be appropriate to exercise the general investigation power (compulsory investigation power) provided for under Article 40 of the Antimonopoly Act, since there would be situations where the effectiveness of a survey without compulsory power is limited, for example in the case where businesses subject to the survey may refuse to offer information for reasons such as non-disclosure agreements.

○ In addition, it would be appropriate to consider establishing an expert organization with certain continuity, having expertise and professional capability not only in law but also in economics, information processing, and system engineering, and have the organization competent to support law enforcement and policy making of each ministry.

- This expert organization would continuously research and analyze the ways that digital platform operators design, operate and manage the rules (code/architecture) (including contract analysis), and make reports to relevant ministries and regulatory agencies.

- In addition, how about making the expert organization suggest general interpretation of laws and necessary legislations and provide information to the regulatory agency when it recognizes facts of an individual case which shows suspicion of illegality.

○ It would be appropriate to consider introducing disciplines from the viewpoint of ensuring transparency and fairness in trade practices between digital platform operators and users of digital platforms.
- As a means to complement the Antimonopoly Act, it would be possible to oblige digital platform operators to make available and disclose the important parts of their rules (code/architecture) to businesses.
- It would be necessary to consider the contents and measures of disciplines and the scope of digital platform operators that are subject to the rules, by taking account of the speed of business changes, the magnitude of the burden, the risk of impeding new entry, consideration on intellectual property rights, trade secrets and know-how, as well as in-camera proceedings.  
- In order to create a competitive environment where innovations in the digital areas constantly keeps occurring, it would be necessary to consider, taking account of the balance with innovation, the contents of rules and the ways of such rules including co-regulation, a flexible way of regulation that combines self-regulation and legislation, from the viewpoint of making a flexible framework that can adapt itself to the speed of changes of technologies and businesses.  
- It would be appropriate to consider introducing an effective dispute settlement mechanism whereby users of platforms can resolve problems with digital platform operators by themselves.
- It would be appropriate to consider a mechanism to ensure effective disclosure of information.

5. Ensuring Fair and Free Competition in Digital Markets

Enforcement of competition law as an ex-post regulation will become more and more important as digital platform operators have become essential for socio-

12 During the interviews with businesses conducted by this Study Group, digital platform operators addressed the necessity of facilitating innovation, ensuring fair competition conditions domestically and internally, and pursuing policies balanced between improvement of consumer convenience and consumer protection. They also expressed their opinions that the contents of disciplines should be considered carefully taking account of the adverse effects such as impeding innovation. In addition, during the Public Comment procedure implemented on the Interim Discussion Paper (Draft), there were opinions which insisted to avoid obstructing innovation by overregulation, and the importance of the mid- to long-term perspective and the balance between freedom and regulation.

13 During the interviews with businesses conducted by this Study Group, some users of digital platforms pointed out that, in order for the better functioning of co-regulation, it would be ideal to ensure the incentives of the private sector by legislations, while ensuring legal enforcement. In addition, during the Public Comment procedure implemented on the Interim Discussion Paper (Draft), there were some opinions which addressed that utilization of co-regulation should be considered, that an incentive scheme where voluntary efforts of businesses are positively evaluated would be necessary, and that ensuring effective and fair treatment against digital platform operators who do not participate in such voluntary efforts would be important.
economy whereas they tend to grow giant and oligopolize or monopolize the market.

Meanwhile, there are international discussions on whether traditional competition law disciplines (tools) are applicable to digital platform operators, and if there is a situation where that is impossible or difficult, what should be revised in what way (e.g., how either competition law, consumer protection law, or data privacy protection law should be reviewed, or whether other regulatory measures are necessary).

It would be necessary to consider the necessity of ensuring “fair and free competition” in digital markets, in Japan as well, taking into account the following points of view:

- Whether digital platform operators owe any responsibility based on the fact that they provide an essential basis for socio-economy.
  - Whether the so-called essential facilities doctrine is applicable. Or whether it is possible to go back to the public utilities doctrine.
  - How to evaluate the fact that digital platform operators design, operate and manage a market based on their market power.
  - How to evaluate the fact that the market is essentially highly manipulative and lacks transparency due to analyses using algorithms (profiling) and so on.
  - Whether it is necessary to consider the relationship not only among online competitors but also with offline competitors when considering the effects of the conducts of digital platform operators on competition, since they expand their business areas to offline industries such as manufacturing.

Specific issues for ensuring “fair and free competition” in digital markets include the following.

The prevailing view is that many of possible anti-competitive conducts by digital platform operators can be regulated by the current Antimonopoly Act. However, at the level of operation of law, issues such as the following are pointed out as complicated whether to define multiple mutually related markets individually or as one market and how to evaluate the effects which one market brings to another market and the network effects or the impacts of data accumulation on

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14 During the Public Comment procedure implemented on the Interim Discussion Paper (Draft), there were opinions which addressed the necessity to consider that digital platform operators are exposed to highly competitive environments.
competition, since markets related to platforms are multisided markets. It is also pointed out that the concept of market is vague with respect to digital platforms. It is further pointed out that even though accumulation and utilization of data itself do not necessarily become problematic under the Antimonopoly Act, it could raise an issue under the said Act if there are adverse effects on competition in such cases where the data collection was conducted by unfair means or it leads to coordinated conduct with regard to pricing decisions by way of sharing the same pricing algorithms between businesses. After all, it would be necessary to consider discussing reinforcement of competition policy or to further discuss those issues from the viewpoint of competition law, including reviewing the operation of competition law, as well as discussions on rules concerning data transfer and releasing data.

How to consider business combinations where digital platform operators nip a potential competitor in the bud.
- For example, Germany and Austria established a threshold based on transaction values, in addition to a threshold based on the turnover of the parties, as a threshold for pre-notification of business combination control.
- How to evaluate possible impacts on competition brought about by accumulation of data, concentration of research and development investments (e.g., intellectual properties including patents with respect to AI), and of excellent human resources (researchers) and know-how, as a result of a business combination.
- As is pointed out that more detailed examination was necessary in cases such as Facebook’s acquisition of WhatsApp or an online company Amazon’s acquisition of Whole Foods, an offline company, there are cases where digital platform operators acquire a company which is not even a potential competitor at the time of acquisition but conducts business somehow related to the acquiring digital platform. In this regard, it would be necessary to consider how to review horizontal, vertical or conglomerate business combinations where digital platform operators are involved.

With respect to the relationship with consumers who, like business users, continue to provide data that has economic value for platform businesses, it would be necessary to consider applying rules about abuse of superior bargaining position.
It would be necessary to consider appropriate enforcement regime to deter violation of laws, including surcharge systems.

6. Considering Rules on Data Transfer and Open Data

- Rules on data transfer and open data such as data portability or open API have been being developed globally.
  - EU’s GDPR (General Data Protection Regulation) introduced the right to data portability with respect to personal data as a general right of individuals. This right not only reinforces the basic right of individuals to control their own data but also enables startups and small and medium-sized companies to gain more customers by lowering barriers to entry to the markets dominated by digital giants. In addition, the European Commission published in September 2017 the “Proposal for a Regulation on a Framework for the Free Flow of Non-personal Data in the European Union” which encourages and facilitates the development of self-regulatory codes of conduct concerning data portability with respect to non-personal data.
  - In the U.S., a mechanism whereby individuals are able to access their own personal data electronically for the purpose of reuse is being constructed in each sector (e.g., health care, electricity, finance) under “My Data Initiative”.
  - In the U.K., a system is being constructed, where individuals could obtain their personal data electronically in specific sectors including energy, finance, mobile and credit, originally under the “midata” project.
  - In Japan, efforts have been made in each sector. For example, in the finance sector, open API of banks to Fintech businesses is being developed based on the amended Bank Act and other regulations. As another example, in the electricity sector, standardization of data and disclosure of the data to consumers of smart meters have progressed.
  - These kinds of open data to businesses will accelerate innovations by connected businesses and will contribute to the development of new services.

- It would be necessary to discuss the necessity and the content of the rules on transfer of data and open data, such as data portability and open API, since they are important not only as consumer policy in the data-driven society, but also as competition policy and as improvement of competitive environment.

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15 During the interviews with businesses conducted by this Study Group, digital platform operators
- Before that, it would be appropriate to consider the importance of recognizing the right regarding the management or access to personal data, just like the right to control its information admitted in the EU.
- It would be important to improve competitive environment which keeps generating innovation, in relation to digital platform operators that accumulate data intensively and provide an essential basis for socio-economy or in areas where there is a high level of interoperability.

7. International Point of View

(1) Fair application and effective enforcement of laws

O Along with the further internationalization of transactions as a result of the progress of digitalization, it is becoming a big problem that certain laws are only applied to businesses based in Japan, and that law enforcement on foreign businesses is practically difficult.

O From the viewpoint of an equal footing, as well as that of protection of domestic consumers, it would be necessary to consider the ideal way of extraterritorial application of Japanese laws so that domestic businesses and foreign businesses providing equivalent services will be subject to equivalent rules.

O It would be necessary to consider the system concerning effective enforcement of applicable laws on foreign businesses.\[9\]

(2) International Rule Making

O Considering that digital platform operators conduct businesses globally, it would be necessary to seek international harmonization of the disciplines on digital platform operators.

expressed opinions that the rules on transfer of data including data portability should be discussed carefully considering the increasing importance of data uniquely owned by each business, the effects of excessive freedom of data transfer on industries (businesses), as well as taking account of the businesses that collected data with cost. During the Public Comment procedure implemented on the Interim Discussion Paper (Draft), there were opinions which insisted that the right to data portability is a fundamental condition which allows users to transfer data freely when there appears a digital platform which they find to be more attractive. Other opinions argued that while it is important to consider the right of data management or data access of individuals, it would be also necessary to take into account the incentive for research and development investment and the burden of introducing a new institutional framework such as changing system design.

During the interviews with businesses conducted by this Study Group, digital platform operators addressed the necessity to ensure that Japanese laws are applied to and enforced on foreign businesses equally in order to make sure fair competition conditions in Japan and overseas.
According to past experiences in enforcement of competition laws, international harmonization is a premise for effective international cooperation among relevant competition agencies. Considering that international cooperation in law enforcement would be important when enforcing competition laws on digital platform operators that develop business activities globally, while it would of course be necessary to take into account the actual situation of competitive environment and the legal systems in Japan, it would be desirable to decide Japan’s position basically in the direction of seeking international harmonization even at the rulemaking phase, based on such experiences and knowledge.

The EU, under the political goal of creating a digital single market, has newly established the “Observatory on the Online Platform Economy”, and is planning to analyze and monitor the economic activities of digital platform operators, while at the same time ensuring transparency and fairness by the EU New Regulation Proposal.

In the U.S., under huge data markets, the innovative digital platform operators have grown in free market with less ex-ante regulation.

In China as well, digital platform operators have achieved rapid growth under giant data markets, but the markets are closed, allowing digital platform operators to store up strong competitiveness. It would be necessary to have international discussions as to whether the entry of such digital platform operators into other markets can be evaluated as fair.

Given such trends in foreign countries, it would be necessary to discuss, in an internationally coordinated way, the way of effective disciplines on digital platform operators (including co-regulation, a flexible way of regulation that combines self-regulation and legislation), seeking international harmonization.
2. Fundamental Principles for Improvement of Rules Corresponding to the Rise of Digital Platform Businesses (December 18, 2018)

Ministry of Economy, Trade and Industry Japan Fair Trade Commission, Ministry of Internal Affairs and Communications

1. Basic Evaluation of Digital Platform Operators

- Digital platform operators, which utilize ICT and data to provide users with a “field” upon which various services are offered under the Fourth Industrial Revolution, have become innovation leaders that continue to drive new businesses, and have become important for Japan’s socio-economy as their benefits are dramatically raising the possibility of access to the market for small and medium-sized companies and benefitting consumers.

- On the other hand, digital platform businesses operate multi-sided markets composed of multiple layers of users, and their characteristics, including network effects, small marginal costs and economies of scale tend to facilitate monopolization or oligopolization.

- Based on these evaluations, under the following fundamental principles, consideration of institutions and enforcement to improve trading environment surrounding digital platform operators will be advanced promptly under the cooperation of relevant ministries.

2. Fundamental Principles

(1) Perspective of Legal Evaluation of Digital Platform Operators

- In considering the institution and enforcement for safety management of users and consumer protection, the importance, technical standards, and users’ convenience of digital platform operators at the point of time and in the business field under consideration will be taken into account. The design of institution and enforcement will be considered in the way that digital platform operators are regarded not merely as a “provider of field” but also as the points of control.

- In such consideration, it will be taken into account that digital platform operators often have the following features, and that giant digital platform operators notably are more likely to have these features.
① They provide an essential basis for socio-economy.
② They design, operate and manage a field itself participated by many consumers (individuals) and businesses.
③ Such field is essentially highly manipulative and technically non-transparent.

(2) Promotion of Sound Development of Platform Businesses

- Along with the platformization of industries and businesses, it is necessary to facilitate further development of digital platform businesses in Japan, so that innovation keeps being generated.
- Therefore, in addition to developing and attracting innovative technologies and companies, consideration on institutional improvement of industry-specific regulations that are not able to respond to platform businesses will be proceeded, including discussion on whether they need to be revised, while maintaining consideration of the following factors.
  ① Whether or not the existing industry-specific regulations exert adequate controls from the viewpoints of their respective social benefits and values to be protected.
  ② How to appropriately divide the roles and responsibilities concerning protection of interests protected by laws between digital platform operators on one side, and businesses and consumers (individuals) on the other side.
  ③ Whether a level playing field with regard to competition conditions is ensured between existing businesses and digital platform operators, and between domestic and foreign digital platform operators.
  ④ Whether there is room to design systems that effectively make use of certification and audit in order to ensure trust, or to introduce flexible ways of regulation such as co-regulation, which combines self-regulation and legislation.

(3) Ensuring Transparency to Achieve Fairness with respect to Digital Platform Operators

- With regard to digital platform operators, lack of transparency of the rules and systems could possibly lead to a hothead of unfair trade practices and infringement of privacy in the relationship with users (businesses and consumers (individuals)), and the possibility of this is notably higher when it comes to giant digital platform operators.
Therefore, in order to realize transparency and fairness, the following measures will be implemented.

1. As a starting point to achieve transparency and fairness, understanding of the actual state of trade practices will be advanced through large-scale, comprehensive and thorough surveys.

2. The establishment of an expert organization with advanced knowledge in a variety of fields including digital technology and businesses will be considered.

3. The introduction of disciplines to ensure transparency and fairness, such as obligations to make available and disclose certain rules or trade conditions, will be considered.

(4) Ensuring Fair and Free Competition in Digital Markets

Enforcement of competition law as an ex-post regulation will become more and more important as digital platform operators tend to expand and oligopolize or monopolize the market, so measures based on the characteristics of the digital market should be implemented.

Therefore, the operation of the Antimonopoly Act and related institutions to ensure fair and free competition in digital markets will be considered, such as the review of business combination that takes into account of data and innovation, the application of the rules about abuse of superior bargaining position with respect to the relationship with consumers, who provide data related to themselves as a consideration for the services.

(5) Considering Rules on Data Transfer and Open Data

As digital platform operators accumulate massive amounts of data, rules on transfer of data and open data, such as data portability and open API, have certain significance in this data-driven society, not only as consumer policy but also as competition policy and improvement of competitive environment.

Therefore, consideration on the content and appropriateness of rules on transfer of data and open data will be advanced, taking into account various viewpoints such as the approach that regards them as an individual’s right to manage and control access to their own data, or an approach that aims for the improvement of competitive environment which keeps generating innovation.
(6) Establishment of Balanced, Flexible and Effective Rules

In considering each of the above, establishment of effective rules will be intended, taking into account flexible ways such as co-regulation, which combines voluntary regulation and legal regulation, in order to sufficiently and appropriately ensure the effectiveness of rules, while taking innovation in the digital sector into account.

(7) International Application of Laws and Harmonization

From the viewpoint of international equal footing, consideration on the extraterritorial application of Japanese laws and systems concerning effective enforcement of applicable laws on foreign businesses will be proceeded, so that domestic businesses and foreign businesses conducting similar businesses for Japan are subject to equivalent rules.

In considering disciplines surrounding digital platform operators, consideration will be proceeded in the direction of intending international harmonization.
V Relevance of other legal "areas" to apprehend discriminatory practices?

As seen in section IV, the prohibition of discrimination in competition law can sometimes follow objectives that are not intrinsically part of the objectives of general competition law policy. In this section, we would like to get your opinion on whether other areas of law seem more appropriate to deal with the issue of discrimination.

31. Do you have in your legal framework provisions under which courts and authorities would be able to sanction some discriminatory practices that are sometimes grasped by competition authorities (restrictive practices, consumer protection, data protection, distribution law, IP law etc.)?

32. If yes, do you think that these legal provisions are more efficient and appropriate?

33. Have your sectoral regulators intervened on an ex ante basis to impose an incumbent operator certain obligations necessary to open the market to competition (access to infrastructures regulations, unbundling, etc.) and prohibited it to discriminate against new entrants?

34. If yes, how do think that ex ante regulation and ex post control of anticompetitive practices should interact with each other?

Answer V

III Summary of the Survey Results and Evaluation from the Perspective of the Antimonopoly Act and Competition Policies

1 Characteristics of the B2C e-commerce market
(1) Impact on competition caused by the expansion of e-commerce

A Survey results

The use of e-commerce has been expanding with the development of Internet technology (Part II-1 (p.4)), and according to the results of a questionnaire for enterprises, on the one hand, enterprises enjoy such benefits as expanding new business areas, customer bases and sales channels (II-2(2)A(A) (p.11)), 3(2)B(C) (p.48)), but are also faced with greater competition than in the past over prices and product lineup (II-2(2)C(B) (p.18)).

On the other hand, according to the results of the questionnaire for enterprises, some retailers have had restrictions imposed on their online sales by the manufacturers and others (II-2(3)A(A) (p.36)). Moreover, there are a large number of enterprises that check the sales prices of other enterprises by browsing their online sales sites (II-2(2)E(B)c (p.26)), 3(4)B(C)(p. 64), C(C) (p.65)). In addition, since a large number of manufacturers stated that, with regard to the retail prices of the manufacturer’s own products, it was easier to ascertain the
online sales prices than the sales prices at brick and mortar stores (II-3(4)B(B)(p.63)), it was confirmed to a certain degree that retailers engaging in online sales were more likely to receive instructions and demands from manufacturers and others relating to sales prices and advertising or display of sales prices (II-2(3)B(B) (p.42)), and it was also confirmed that in recent years, there is an increasing tendency for distributors to make requests and offer opinions to the manufacturers relating to the sales prices etc. of other retailers (II-3(3)C(C) (p.61)).

According to the results of the questionnaire for enterprises, the use of automatic pricing tools and other such tools are currently limited to a number of large-scale retailers and manufacturers (II-2(2)H(A)(p.33), 3(5)C (p.70)). In addition, the main purpose of using automatic price renewal tools by retailers was to offer competitive prices, but there was also a tendency for enterprises that were aware of other companies using automatic price renewal tools to counteract by making it difficult for their sales prices to be gauged from the outside (II-2(2)H (p.33)).

**B Evaluation and future policy**
Online sales have become an important tool for enterprises, including manufacturers, to expand their business areas, customer bases and sales channels. Moreover, the expansion of online sales has significant benefits such as ramping up competition among retailers in the prices and product lineup, as well as benefits for consumers since they have a greater choice when purchasing products. In this way, it is thought that e-commerce has pro-competitive effects, bringing great benefits to both enterprises and consumers.

On the other hand, due to retailers engaging in online sales, a situation may arise where it becomes easier for a retailer’s state of transactions to be ascertained by other enterprises. This raises the concern that manufacturers will be able to gauge the retail prices and therefore control the retail prices much more easily, as well as the emergence of adverse effects on competition such as the promotion of concerted action on prices among manufacturers or among retailers.\(^6\)

For this reason, from the viewpoint of encouraging fair and free competition in B2C e-commerce business, the Japan Fair Trade Commission will clarify as outlined in 2 below (p. 112 to p.116) its opinion under the Antimonopoly Act in relation to acts conducted between manufacturers and retailers that constitute a problem, and will strive to prevent acts in violation of the Antimonopoly Act, as well as gather information on the state of transactions in e-commerce, and deal strictly with acts in violation of the Antimonopoly Act.

In recent years, issues relating to cartels (so-called digital cartels) which use AI and algorithms are attracting attention, but in Japan, the effect of the use of automatic price renewing tools and other tools on competition is thought to be acting in the direction of ramping up price competition. However, with increased use of such tools, adverse effects on competition may emerge in the future such as the promotion of concerted practices, and therefore, there is a need to closely monitor the actual use of such tools.

(2) The position of online shopping mall operators in the market

A Survey results

According to the results of the questionnaire for enterprises and the questionnaire for consumers, it can be seen that three major online shopping malls

\(^6\) In situations where the transactions of retailers are likely to be easily ascertained by other enterprises, since a retailer’s attempts to obtain profits by deviating from the collaborative relationship built between manufacturers or between retailers will be easily discovered by other enterprises and may be retaliated against, there is reduced incentive for retailers to deviate from the collaborative relationship. Therefore, it is thought that the collaborative relationship is more likely to be maintained in such a situation than when the retailers’ transactions are not easily ascertained.
dominate in terms of merchants opening stores at the online shopping mall and use by customers (II-4(2)A (p.72), 5(1)A (p. 91)).

According to the results of the questionnaire for enterprises, when choosing which online shopping mall to open a store at, many merchants prioritize online shopping malls with a large number of consumers, and according to the results of the questionnaire for consumers, when choosing an online shopping mall for their purchases, many consumers prioritize there being a large number of products, and therefore, it seems that there is a two-sided indirect network effect (II-4(2)B(A) (p.75), 5(1)B (p.91)).

The e-commerce market has been expanding year by year. This is thought to be due to the increase in sales amounts at online shopping malls rather than an increase in sales amounts through the enterprise’s own website (II-2(1)D(B) (p.10), 3(2)B(B) (p.46)). In addition, with regard to selling at online shopping malls, retailers with a smaller start-up capital tended to respond that they wanted to increase or start sales at the online shopping malls (II-2 (2)D (p.20)), and therefore, online shopping malls are considered to be an important sales tool, especially for small and medium-sized businesses.

B Evaluation and future policy

In the B2C e-commerce market in Japan, the stores and consumers tend to be concentrated at the top three online shopping malls. Where online shopping malls are concerned, in light of the fact there is an indirect network effect where the greater the number of consumers, the more stores gather there, and the greater the selection of products, the more consumers gather there, it is thought that the online shopping mall operators, which have a particularly large concentration of stores and consumers, will be an influential enterprise in the area of online shopping mall operations, and that they will have a superior bargaining position against the other transacting party.64 Naturally, the fact that the online shopping mall operators are in such a position is not a problem in itself, but if the online shopping mall operators where there are a large concentration of stores and consumers exclude other competing online shopping malls or unilaterally and

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64 An online shopping mall operator might not have an influential position in the market or have a relatively superior bargaining position against the other transacting party throughout the entire B2C e-commerce market. Even if this is not the case for the entire B2C e-commerce market, such an online shopping mall operator may be in such a position in a specific field of product. In addition, since the indirect network effect works in the online shopping malls, at present, even if an online shopping mall does not have an influential position in the market or does not have a superior bargaining position against the other transacting party, it may quickly increase its position in the market or its position relative to the transacting party.
unfairly change the trade terms with the stores, it is highly likely that these practices will constitute a problem under the Antimonopoly Act.

In addition, as abovementioned in A, online shopping malls are an important sales tool in the Japanese B2C e-commerce market for small and medium-size retailers in particular, and they are also thought to play a significant role in ramping up competition. For this reason, if fair trade terms are not assured when selling products at an online shopping mall, enterprises with large sales amounts or a high degree of dependence on the online shopping malls, in particular, may unexpectedly suffer an unfair disadvantage leading to a situation in which their business opportunities are unfairly restricted, eventually leading to the impeding of fair competition throughout the Japanese B2C e-commerce market.

Therefore, in light of the position of the online shopping mall operators in the market mentioned above, the Japan Fair Trade Commission, as described later in 3 (p.117 to p.122) will clarify its opinion that online shopping mall operators should work on ensuring transparency in their trade terms with stores from the perspective of ensuring fair competition, and identity the acts of online shopping mall operators that constitute a problem under the Antimonopoly Act, as well as strive to gather information on the state of transactions by online shopping malls and deal strictly with acts that violate the Antimonopoly Act.

(3) Substitution of online sales and sales at brick and mortar stores

A Survey results

According to the results of the questionnaire for enterprises, it was confirmed that there is not that much of a difference between online selling and selling at brick and mortar stores regarding the product lineup, pricing, and frequency of price revisions (II-2(2)B(B)b (p.14), 3(5)B(B) (p.69), (C) (p.69)). On the other hand, with regard to the differences in customer bases, opinions were divided almost equally into responses stating the customer bases differed and responses stating the customer bases did not differ, and many retailers cited the same sales style of other retailers as the source of reference for other competitors and their prices, while many retailers also responded that the sales strategy differed depending on the sales style (II-2(2)B(B)a (p.3), E(A) (p.23), (B)b (p.26), C(A) (p. 17)).

In addition, based on the results of the questionnaire for consumers, it is thought that there is a certain degree of substitution for the consumers between the online shopping malls and other sellers (II-5(3) (p.97).
B Evaluation and future policy
It is not possible at the moment to give a definitive evaluation of whether online sales and brick and mortar store sales, and online sales and brick and mortar store sales as well as sales through the retailer’s own site, in general, share the same market. Moreover, there are also slight differences in the degree of substitution for the consumers depending on the product category. Since Internet technology is progressing day by day, and e-commerce is becoming even more convenient, the situation of the market is likely to change with the passing of time\(^6\), and therefore, if the need arises to specifically examine the degree of substitution in applying the Antimonopoly Act, an examination needs to be conducted on a case-by-case basis.

2 Acts that present a problem between manufacturers and retailers
(1) Resale price maintenance practices, etc.
A Survey results
According to the results of the questionnaire for enterprises, some manufacturers were seen to be issuing instructions or demands to the retailers in relation to the sales prices or advertising and display of the sales prices (II-2(3)B(A) (p.40), 3(4)D (p.66)), and in addition, retailers were making requests to the manufacturers about the sales prices, etc. of other retailers (II-3(3)C(B) (p.60)). Moreover, according to the results of the questionnaire for enterprises, there are a large number of enterprises that check the sales prices of other enterprises by browsing the online sales sites of other enterprises (II-2(2)E(B)c (p.26), 3(4)B(C) (p.64), C(C) (p. 5)). In addition, with regard to the retail prices of the manufacturer’s own products, since a large number of manufacturers stated that it was easier for them to check the sales prices through online selling than through brick and mortar store sales (II-3(4)B(B) (p. 63)), there was a certain tendency for manufacturers to issue instructions and demands to retailers in relation to the sales prices and advertising and display of sales prices due to retailers engaging in online sales (II-2(3)B(B) (p.42)). In addition, in recent years, a trend was confirmed of an increasing number of requests and opinions from distributors to

\(^6\) Looking at the substitutability of purchases for consumers at brick and mortar stores and online purchases, with regard to consumers who purchase at a brick and mortar store due to this being more convenient than online purchases, the substitutability of the two choices is likely to increase due to developments in e-commerce, while with regard to consumers who make online purchases due to this being more convenient than brick and mortar stores, since they are expected to make further online purchases, it is thought that the substitutability of the two choices will decrease as e-commerce further develops.
the manufacturers relating to the sales prices and other information of other retailers (II-3(3)C(C) (p.61)).

B Evaluation and future policy
Compared to when products are sold only at brick and mortar stores, when retailers engage in online sales, it is easier for manufacturers to check the sales prices and other information online, and if they engage in resale price maintenance practices, it is easier for them to ensure the effectiveness of such conduct. Likewise, it is easier for retailers to gauge sales prices and other information among themselves, and it is thought that concerted practices on prices will also be easier to engage in.

In terms of the instructions and demands issued by manufacturers to retailers relating to retail prices and methods of advertising and displaying sales prices, the act of issuing instructions or demands, which are not simply limited to indicating a reference price, but have the effect of ensuring retailers sell the products at the price indicated by the manufacturer, in principle, are deemed illegal (restriction of resale prices, restrictions on ways of advertisements and representations (Distribution Systems and Business Practices Guidelines Part I, Chapter 2, Section 6, Subsection (3))).

In addition, the act of a retailer making a request to a manufacturer relating to the sales prices or other information of another retailer has the risk of inducing an act of resale price maintenance by the manufacturer, and becomes a way for the manufacturer to ensure the effectiveness of such conduct, and therefore may constitute a problem under the Antimonopoly Act as unreasonable restraints on trade by retailers (using the manufacturer as a hub), and manufacturers.

While paying close attention to the progress and spread of technology that facilitates price monitoring, the Japan Fair Trade Commission will strive to gather information on the state of transactions between manufacturers and retailers from the viewpoint of determining whether manufacturers are engaging in acts of resale price maintenance, whether retailers are inducing such acts, and also, whether unfair restrictions are being imposed on transactions by retailers and manufacturers, and deal strictly with acts that violate the Antimonopoly Act.

(2) Acts of restricting online sales
A Survey results
According to the results of the questionnaire for enterprises, manufacturers were seen to be specifying the design of the online sales sites of the retailers in
order to maintain the brand image of the products (II-2 (3)A(B) (p.37), 3(3)B(B) (p.57)).

According to the results of the questionnaire for enterprises, manufacturers were seen to be prohibiting retailers from engaging in any form of online sales, including selling on their own site for the purpose of maintaining the brand image, etc. (II-2(3)A(B)(p.37),3(3)B(B)(p.57)). In addition, there were some manufacturers who adopted selective distribution in that they only allowed distributors to handle their products if they fulfilled certain set criteria, and prohibited the distributors from reselling to distributors other than those who were permitted to handle their products. Some of the criteria that distributors had to fulfill in the selective distribution were having a brick and mortar store in order to ensure proper use of the products, and having staff on hand with the relevant expertise to be able to adequately explain the characteristics of the products, which in some cases, in practical terms, had the effect of restricting online sales (II-3(3)A(B) (p.53)).

Furthermore, some cases were confirmed where manufacturers restricted online sales in order to maintain the sales prices (II-2(3)A(B) (p.37)) or adopted selective distribution to prevent discount prices (II-3(3)A(B) (p.53)).

**B Evaluation and future policy**

In general, e-commerce has the effect of promoting competition, and it is thought that online sales are an important sales tool for enterprises, and there are great benefits for consumers as well. In such a situation, restrictions imposed by manufacturers on online selling by retailers will not only greatly restrict the business opportunities available to retailers, but will also impose a great disadvantage on consumers. In addition, as greater restrictions are imposed on online selling, there will be a greater adverse effect on competition. On the other hand, in order for retailers to be able to sell goods appropriately and for consumers to be able to properly use their purchases, there are some instances where there are sufficient justification for manufacturers to restrict online selling, such as when confirmation or adjustments made in person are indispensable.

Regarding such restrictions on online sales, the opinions under the Antimonopoly Act of the Japan Fair Trade Commission have been compiled as follows.

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66 For example, if manufacturers prohibit retailers from any form of online sales including selling on their own websites, it is thought that the adverse effect on competition will generally be greater than when only prohibiting sales at online shopping malls.
(A) Specification of the design of the online sales site

Acts by the manufacturer of specifying the design for a retailer’s online sales site within the scope of the objective of maintaining the brand image, are generally accepted to be with plausibly rational reasons for the proper sale of goods, and if the same condition is imposed on other retailers, such acts themselves do not constitute a problem under the Antimonopoly Act (restrictions on retailers’ sales methods (Distribution Systems and Business Practices Guidelines Part I, Chapter 2, Section 6)).

(B) Complete prohibition of selling online and prohibition of sales at online shopping malls

a. There are some cases where the manufacturer prohibits the retailer from engaging in any form of online sales, including sales on the retailer’s own website, or prohibits selling at an online shopping mall by means of adopting selective distribution and in some cases without adopting selective distribution. In either case, such prohibitions not only have the effect of imposing restrictions on the retailers’ sales methods, but also have the nature of limiting the actual distributors who handle the goods, and therefore, the adverse effect on competition is thought to be greater than when the retailers’ sales methods are simply being restricted.67

b. The Distribution Systems and Business Practices Guidelines state with regard to selective distribution that, “It is generally not problematic in itself even if, as a result of any enterprise’s adoption of the selective distribution, certain price-cutters (and/or other distributors) that do not satisfy the enterprise’s criteria are prevented from handling the enterprise’s product, to the extent that such criteria are deemed to have plausibly rational reasons from the viewpoint of

67 Selective distribution is a system of limiting a distributor’s trading partners by prohibiting reselling to distributors other than those who have been approved by the manufacturer to handle their products, and the adverse effect on competition is thought to be greater than cases where the retailer’s sales methods are merely being restricted.

In addition, if retailers are completely prohibited from selling online as a restriction on sales methods, since (1) it is easy for manufacturers to find those retailers who are selling online contrary to these restrictions compared to when retailers are simply selling at brick and mortar stores, it would not be easy for such retailers to continue selling online which means that retailers who specialize in online sales would not, in practice, be able to sell the products, and (2) there is the possibility that if restrictions are imposed on online selling that generally leads to expansion in business areas and customer bases, the resulting impact would have nationwide repercussions, and therefore, there would be a greater adverse effect on competition than when restrictions are simply imposed on the retailers’ sales methods.
the consumers’ interests such as preservation of quality of the product and/or assurance of appropriate use of the product and that such criteria are equally applied to other distributors who want to deal in the product.” 68

It cannot be said that “it is generally not problematic” when it comes to prohibiting selling online in any form or prohibiting selling at online shopping malls when there is no plausibly rational reason for this restriction from the viewpoint of consumer interests such as for the sake of maintaining the quality of the goods or ensuring proper use, or when such restriction is deemed to be based on plausibly rational reasons but is not applied equally to all distributors wishing to handle the products. Therefore, judgments need to be made on a case-by-case basis as to whether these actions constitute a problem under the Antimonopoly Act by weighing up the anti-competitive effects as well as the pro-competitive effects. Specifically, these actions limit intra-brand competition, and are considered to be a problem under the Antimonopoly Act when the effect of price maintenance occurs. 69

Conversely, when pro-competitive effects emerge and intra-brand competition is promoted such as in cases where a “free rider” problem is resolved through these restrictions, these pro-competitive effects also need to be taken into consideration. 70

On the other hand, when the act of prohibiting online sales in any form or prohibiting selling at an online shopping mall in order to limit the purchase of products to face-to-face sales, such as when confirmation or adjustment is required in person due to the characteristics of the product, is deemed to be based on plausibly rational reasons from the viewpoint not of the enterprise but the consumer, and it is deemed that the same criteria are being applied to other distributors who wish to handle the goods, such act is usually not considered to constitute a problem under the Antimonopoly Act.

a. The points to keep in mind are as follows:

First of all, it is illegal in principle for a manufacturer to discontinue

68 Distribution Systems and Business Practices Guidelines Part I, Chapter 2, Section 5
69 This refers to the risk of a state where competition between the transacting party (in this case, the retailer) and competitors is impeded through acts of non-price restraints, and the retailer is able to freely influence the prices at will to maintain or raise the prices of the products (Distribution Systems and Business Practices Guidelines Part I, Section 3, Subsection (2), (b)).
70 Distribution Systems and Business Practices Guidelines Part I, Section 3, Subsection (1)
shipments to a distributor that is its current customer on account of the distributor’s online price-cutting (prohibition of sales to price-cutting retailers (Distribution Systems and Business Practices Guidelines Part I, Chapter 2, Section 4, Subsection (4)).

With regard to whether or not there are plausibly rational reasons for these acts being carried out from the viewpoint of consumer interests, such as the need to maintain the quality of the goods and to ensure proper use, even when, at present, the necessary confirmation or adjustment has to be done in person, there will be an increasing number of cases in the future where it will be possible to perform such necessary actions via the Internet due to developments in Internet technology. For this reason, even if plausibly rational reasons are accepted at the present time from the viewpoint of consumer interests with regard to restricting the purchase of the products to face-to-face sales, it should be noted such grounds might not apply in the future.

While bearing in mind that the criteria for whether plausibly rational reasons exist in relation to restricting online sales from the viewpoint of consumer interests such as maintaining the quality of the product and ensuring proper use will change with the development of Internet technology, the Japan Fair Trade Commission will strive to gather information on the state of transactions between manufacturers and retailers to determine whether manufacturers are restricting selling online by retailers, and deal strictly with acts that violate the Antimonopoly Act.

3 Problematic acts by online shopping mall operators

(1) Online shopping mall usage fees and payment methods

A Survey results

According to the results of the questionnaire for enterprises, a number of retailers were dissatisfied with the trade terms imposed by the online shopping mall operators since the online shopping malls were able to unilaterally increase the usage fees or the enterprises were only able to use the stipulated payment methods (II-4(2)E(A) (p.82)).

On the other hand, according to the results of the interview survey of online shopping malls, the usage fees were described in a standard contract, and
in some cases specific payment methods were specified from the viewpoint of providing greater convenience for the consumers (II-4 (2)E(B) (p.84)).

**B Evaluation and future policy**

As stated in I(2)(p.109) above, online shopping malls are an important sales tool especially for small and medium-sized retailers in the Japanese B2C e-commerce market, and are also considered to play a significant role in ramping up competition.

Online shopping mall operators stipulate the online shopping mall usage fees and payment methods in standard contracts or other agreements, but if they unilaterally raise the fees or restrict the payment methods, retailers with large amounts of sales or retailers who are highly dependent on the online shopping mall may, in particular, unexpectedly suffer an unfair disadvantage or find their business opportunities unfairly restricted, which may impede fair competition in the entire B2C e-commerce market in Japan. Therefore, from the viewpoint of securing an environment of fair competition, online shopping mall operators should continue to work on making the trade terms as transparent as possible for the stores in order to ensure that the stores do not unexpectedly suffer an unfair disadvantage such as a unilateral change in the usage fees or payment methods, and that sufficient negotiations and explanations in relation to the trade terms are conducted beforehand and that a certain degree of predictability is ensured.

In addition, there is the risk that a problem will arise under the Antimonopoly Act in cases where an online shopping mall operator, which is in a superior bargaining position against the other transacting party, in light of normal business practices, unfairly changes the usage fees and payment methods and imposes a disadvantage (abuse of a superior position, etc.). The Japan Fair Trade Commission will strive to gather information on the status of transactions between online shopping mall operators and stores so that online shopping mall operators do not unjustly change the online shopping mall usage fees and payment methods, and deal strictly with acts that violate the Antimonopoly Act.

(2) Screening for the opening of stores or display of products at the online shopping mall

**A Survey results**

According to the results of the questionnaire for enterprises, some
retailers responded that the screening criteria were not disclosed at the time of the screening of the opening of a store or the display of products at the online shopping mall (II-4(2)D(A) (p.81)).

On the other hand, according to the results of an interview survey of online shopping malls, although there were no details prohibiting selling at the online shopping mall in standard contracts or other agreements or any clear criteria preventing unscrupulous enterprises from taking measures, some online shopping malls stated that in some cases where an enterprise, which had previously caused problems such as committing a fraudulent act, might be refused permission to open a store at the online shopping mall (II-4(2)D(B) (p.82)).

B Evaluation and future policy

As stated in I(2) (p.109) above, online shopping malls are an important sales tool especially for small and medium-sized retailers in the B2C e-commerce market in Japan, and are also thought to play a significant role in ramping up competition.

Although there were cases where some of the screening criteria were not disclosed in the screening of the opening of a store or display of products at an online shopping mall, there were cases where there were reasonable justification for the screening criteria not being disclosed in detail from the viewpoint of consumer interests such as it being necessary to prevent unscrupulous enterprises from taking measures. However, in cases where the opening of a store or the display of products is denied or a store is made to leave the online shopping mall due to ambiguous reasons, enterprises with large amounts of sales or which are highly dependent on the online shopping malls may sometimes unexpectedly suffer an unfair disadvantage or find their business opportunities unreasonably restricted, which may eventually lead to the impeding of fair competition in the entire B2C e-commerce market in Japan.

Therefore, in order to avoid retailers who wish to open a store at an online shopping mall unexpectedly suffering a disadvantage such as being refused permission to open a store or display goods or being told to leave the online shopping mall due to ambiguous reasons, from the viewpoint of ensuring fair competition, online shopping mall operators should continue to make the trade terms as transparent as possible for the stores so that predictability is ensured regarding the screening criteria.

In addition, there is the possibility that cases where online shopping mall
operators that refuse an application to open a store or display products as a means of securing the effectiveness of illegal acts under the Antimonopoly Act, or cases where online shopping mall operators, which are influential enterprises in the retail market, refuse an application to open a store or display products or force a store to leave the online shopping mall as a means of achieving an unfair purpose under the Antimonopoly Act, such as excluding competitors from the retail market, will constitute a problem under the Antimonopoly Act (Primary Refusals to Deal by a Single Enterprise (Distribution Systems and Business Practices Guidelines Part II, Chapter 3, etc.)).

The Japan Fair Trade Commission will strive to gather information on the state of transactions between online shopping mall operators and stores to ensure that online shopping mall operators do not unjustly refuse to allow the opening of a store or the display of products at an online shopping mall or force a store to unfairly leave the online shopping mall, and deal strictly with acts that violate the Antimonopoly Act.

(3) Restrictions on opening stores at other online shopping malls

A Survey results

It was not confirmed through the survey whether online shopping mall operators imposed restrictions on stores in connection with opening a store at other online shopping malls (II-4(2)F (p.85)).

B Evaluation and future policy

Online shopping malls are thought to play a significant role in ramping up competition in the B2C e-commerce market in Japan, but for this to occur, it is important that there is strong competition not only among the stores but also among the online shopping malls.

As described in I(2)A (p.109) above, a two-sided indirect network effect arises in the online shopping malls, but in order for the online shopping mall to function as an effective competitive unit in the market, it is thought that it is necessary for the online shopping mall to secure a certain constant number of stores and consumers. For this reason, if an online shopping mall operator which has an influential position in the market restricts merchants from opening a store at another online shopping mall and prevents other online shopping malls from acquiring a sufficient number of stores, there is the possibility that such acts will render new entry into the market difficult, and also make it more difficult for small and medium-size online shopping mall operators to continue
operating when compared to other markets where an indirect network effect does not arise. In this way, restrictions imposed by online shopping mall operators on retailers to stop them opening a store at another online shopping mall serves to hinder competition among the online shopping malls, and eventually leads to impeding fair competition in the entire B2C e-commerce market in Japan.

Regarding the act of online shopping mall operators restricting merchants from opening a store at another online shopping mall, the Japan Fair Trade Commission published a case on May 23, 2018 of suspicion of violating the Antimonopoly Act against Minnanopetto Online Corporation, and published a case on October 10, 2018 of suspicion of violation of the Antimonopoly Act against Airbnb Ireland UC and Airbnb Japan71, and with regard to such acts, if an influential enterprise in the market engages in such conduct, there is the possibility that such acts will hinder the business activities of existing competitors or raise entry barriers to the market, and in the event of a market foreclosure effect occurring,72 there is the risk that a problem will arise under the Antimonopoly Act (Refusals to Deal in Concert with Competitors (Distribution Systems and Business Practices Guidelines Part I, Chapter 2, Section 2)).

The Japan Fair Trade Commission will strive to gather information on the state of transactions between online shopping mall operators and stores from the viewpoint of determining whether online shopping mall operators are restricting merchants from opening a store at another online shopping malls, and in the event of such restrictions being imposed, what effect this act has on the market, and deal strictly with acts that violate the Antimonopoly Act.

(4) MFN clauses
A Survey results

It was confirmed through the survey that online shopping mall operators

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71 Regarding online shopping mall operators, as described in footnote 3 in this report, a platform operated as a “place to sell products” constitutes an “online shopping mall”, but Minnanopetto Online Corporation operates a website to broker transactions between breeders and ordinary customers for transactions relating to dogs and cats (the dogs and cats are not bought or sold on the website), and Airbnb Ireland UC operates a website that brokers accommodation services. Therefore, although the act of suspected violation in both cases is not an act by the online shopping mall operator referred to in this report, it serves as a reference as acts of so-called platform businesses.

72 This refers to a state where due to acts of non-price restraint, it becomes impossible for new businesses to enter the market and for existing competitors (in this case, other online shopping mall operators) to secure alternative trading partners, and moreover, increased costs are required for business activities, which causes the possibility of new businesses and existing competitors being excluded or of there being fewer business opportunities available to them due to reduced motivation for new businesses to enter the market and for existing competitors to develop new products (Distribution Systems and Business Practices Guidelines Part I, Section 3, Subsection (2), a).
demand stores to sell at or below the sales price when selling the same product on the retailer’s own site or at other online shopping malls, or to offer an equal or greater product lineup (establishment of equivalent price clauses or equivalent product lineup clauses in the contract with stores) (II-4 (2)G (p.85)).

B Evaluation and future policy

Online shopping malls are also thought to play a significant role in terms of ramping up competition in the B2C e-commerce market in Japan, but for this to occur, there needs to be strong competition not only among the stores but also among the online shopping malls.

When an online shopping mall operator establishes so-called MFN clauses 73 such as equivalent price clauses and equivalent product lineup clauses in contracts entered into with stores, it becomes impossible, for example, for stores to cut prices or expand their product lineup at specific online shopping malls, which means there will be reduced incentive to cut prices and expand the product lineup, and even if another online shopping mall operator were to request price cuts or expanded product lineups at their online shopping mall, since prices would have to be cut and the product lineup expanded at the same time at the online shopping mall where the MFN clause was established, there will be reduced incentive for other online shopping malls to make such requests. In this way, the establishment of MFN clauses by online shopping mall operators hinders competition among the stores and online shopping malls, which in turn will eventually impair fair competition in the entire B2C e-commerce market in Japan.

Regarding the establishment of MFN clauses in contracts concluded with stores by online shopping mall operators, the Japan Fair Trade Commission published a case on June 1, 2017 of a suspected violation of the Antimonopoly Act by Amazon Japan, and with regard to such acts, if an influential enterprise in the market engages in such conduct, there is the risk of reduced competition in price and product lineup among online shopping malls and stores, and of impeding the willingness of other online shopping mall operators to adopt innovative selling methods, and of hindering the motivation of new businesses to enter the market, and in the event of such risks occurring, problems may arise under the Antimonopoly Act (trading with restrictive conditions, etc.). In

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73 Here an example is given of a so-called MFN clause such as when an online shopping mall operator demands that the store sells at a price at or below the price when selling the same product on its own site or at another online shopping mall, or with an equivalent or greater product lineup, but the same also applies in terms of the impact on competition in general when the effectiveness of the act is secured through imposing such trade terms on the store.
addition, when multiple online shopping mall operators establish MFN clauses, the probability of such problems under the Antimonopoly Act occurring are likely to increase compared to cases where such clauses are not established.

The Japan Fair Trade Commission will strive to gather information on the state of transactions between online shopping mall operators and stores from the viewpoint of determining whether online shopping mall operators have been establishing MFN clauses in the contracts with the stores, and in cases where they have established such clauses, how these MFN clauses affect the market, and deal strictly with acts that violate the Antimonopoly Act.

(5) Restrictions on use of the customer information at online shopping malls

A Survey results

In the results of the questionnaire for enterprises, there were stores which stated that they were not allowed to use customer information for purposes other than shipping the products, as well as enterprises which stated that customer information could not be used after leaving the online shopping mall (II-4(2)H(A) (p.87)). Also in the interview survey of online shopping mall operators, the online shopping malls responded that they gather customer information in compliance with standard contracts, and provide customer information to the stores only to the extent necessary in shipping the products, and in addition prohibit use by the store for purposes other than the purpose of use, and prohibit customer information being taken out or used after the store leaves the online shopping mall (II-4(2)H(B) (p.89)).

B Evaluation and future policy

In order for the B2C e-commerce market to develop and to provide greater convenience for the consumers, enterprises that engage in e-commerce related business activities should use the customer information appropriately, and achieve more efficient product development, sales methods and marketing.

The fact that the stores on online shopping malls are not freely able to use customer information does not immediately constitute a problem under the Antimonopoly Act, and there are cases where there are reasonable justification

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74 A proposal was made in the 2016 survey report on the actual situation conducted by the Japan Fair Trade Commission (“Survey Report Relating to B2C E-commerce Transactions of Electronic Shopping Malls, etc.”) concerning restrictions on use of customer information after leaving the online shopping mall that “in cases where a store operator is restricted from freely moving to another electronic shopping mall even when it cannot be said that such restriction is necessary to protect information and there is the risk of an adverse effect on competition among electronic shopping centers in the B2C e-commerce market”, this could constitute a problem under the Antimonopoly Act.
for restricting the acquisition and use of information on account of the need to prevent “free rider” problems, and protect personal information. However, from the viewpoint of securing fair competition, online shopping mall operators should continue to work on making the trade terms as transparent as possible so that stores operating at online shopping malls will be ensured predictability with regard to the conditions of use of the customer information at the online shopping malls so that they do not suffer an unexpected disadvantage such as the available customer information or conditions of use being unilaterally changed.

In addition, there is the risk that if an online shopping mall operator that is itself operating a retail business uses the customer information obtained through sales conducted by one of the stores operating on its online shopping mall in order to gain an advantage in carrying out its own retail business on the online shopping mall, but does not allow the store to similarly use the customer information, thus unfairly interfering with the retail business of the store, this act may constitute a problem under the Antimonopoly Act (obstruction of the trade of competitors, etc.).

The Japan Fair Trade Commission will strive to gather information on the state of transactions between online shopping mall operators and stores as well as the state of use of customer information by the online shopping mall operators from the viewpoint of whether online shopping mall operators are imposing unfair conditions on the use of customer information against stores, and deal strictly with acts that violate the Antimonopoly Act.

4 Others

(1) Survey results

In the questionnaire for enterprises, some criticism was expressed about the deterioration in distribution conditions, and the leaking of personal information, etc. as problems of e-commerce (II-6 (p.106)).

(2) Evaluation

In general, the view of the Japan Fair Trade Commission is that the various issues in the area of e-commerce are not problems in terms of the Antimonopoly Act or competition policies, but there is the possibility that, in part, for example, acts that fall under the abuse of a superior bargaining position or which violate The Subcontract Act may be a contributing factor to deterioration in the distribution conditions. Therefore, persons engaging in business related to e-
commerce should not only comply with the items of the abovementioned 2 and 3 (p.112 to p.122), but should also comply with a wide range of laws including the Antimonopoly Act.

IV Future responses of the Japan Fair Trade Commission

The rapidly growing B2C e-commerce market environment has undergone a massive change in recent years, and e-commerce is proving to be an important sales channel for retailers and manufacturers. Also, along with this, the trade practices related to B2C e-commerce are also likely to undergo major changes.

Under such circumstances, it will be easier than in the past for acts related to B2C e-commerce between manufacturers and retailers and between online shopping mall operators and stores, which constitute a problem under the Antimonopoly Act, to be carried out. In addition to the actions described above in 3, there is the possibility that future developments in digital technology will create new Antimonopoly Act issues and concerns in terms of competition policies.

E-commerce is thought to generally have the effect of promoting competition, bringing great benefits for both consumers and enterprises, but if acts that restrict competition are carried out, this will impede the development of the B2C e-commerce market in Japan. Therefore, the Japan Fair Trade Commission expects that competition in the entire retail market will be further promoted and that consumers will be able to more easily obtain low-priced products of good quality without manufacturers engaging in resale price maintenance acts or imposing restrictions on online sales thus causing a price maintenance effect, or online shopping mall operators engaging in acts that constitute a problem under the Antimonopoly Act in the B2C e-commerce market.

Since online shopping malls play an important role in the B2C e-commerce market in Japan and because specific online shopping malls are more likely to have a superior position in the market owing to the existence of an indirect network effect, the Japan Fair Trade Commission believe that if acts by online shopping mall operators which hamper fair and free competition are carried out, this could lead to impeding fair competition in the entire B2C e-commerce market. With this in mind, the Japan Fair Trade Commission will strive to gather information on trends in B2C e-commerce business, especially acts conducted by online shopping mall operators, and deal strictly with acts that violate the Antimonopoly Act.
VI Future of the prohibition of discriminatory practices on a competition law perspective

Now that we have a good understanding of what your legal framework provides for the sanction of discriminatory practices in business relationship and how it has been implemented by our national courts/authorities, we would like your opinion on the future of the enforcement of competition law regarding discriminatory practices.

35. Exploitative abuses are coming back in the decisional practice of the European commission. Did your national practice experience the same evolution? Did your national competition authority or national courts give specific reasons for this evolution or could you identify specific reasons?

36. Have you identified specific sectors/behaviours that could trigger discrimination cases issues in the future? For example, many competition authorities are now concerned with digital sectors. Do you think this will a particularly relevant area to analyse and possibly prevent new types of discriminatory practices?

37. The European Commission is currently thinking about the adoption of specific regulations applicable to the digital sector (e-commerce and geo-blocking)? Do you think that such a regulatory tool will be more adapted that competition law rules to deal with discriminatory conduct in the digital sector?

38. How do you think that the developments of digital sectors will impact the economic analysis of market power (either in the framework of mergers or of abuses of dominance) of firms active in the digital economy, e.g. by making discriminatory (price and non-price) behaviour more suspicious and more prone to be sanctioned?

ANSWER VI

As above mentioned, on July 10, 2018, the Ministry of Economy, Trade and Industry, the Fair Trade Commission, and the Ministry of Internal Affairs and Communications established the “Investigation Committee on Improving the Business Environment for Digital Platformers” (hereinafter referred to as “the Study Committee”).

The basics of rule development corresponding to the rise of platformer-type business based on the mid-point arrangements announced on December 12, 2018. As a general rule, "Implementation of antitrust laws to ensure fair and free competition in the digital market, such as the application of regulations on the abuse of superior positions in relation to consumers who provide data relevant to themselves as a price for services. And how the related system should be considered."

The digital platform constitutes a “bilateral market,” which has greatly improved the benefits for both businesses and consumers, and has characteristics such as easy oligopoly and monopoly. In the background, problems related to the uncertainties and unfairness of business practices, such as the intentional change / change of contract conditions and rules, the push of services and excessive costs, have been pointed out.

Therefore, as a result of the establishment and examination of the “Working Group for Ensuring Transparency and Fairness “ and “ Working Group on the Way of Data Transfer
and Opening “under this Study Group, on 21 May, 2019 “Options on how to develop rules for ensuring transparency and fairness in the trading environment” (Figure 1) and “Options on how to transfer and open data” (Figures 2-1 and 2-2) has been announced.

First of all, as a basic point of view, (1) not just the status achieved by free competition and innovation (market dominance) itself, but the act of misusing the competitive advantage and distorting fair competition is a problem.

① For the sound development of the platform economy, it is necessary to realize fair trading practices, including relationships with users as well as relationships with users.

② On the other hand, comprehensive and interventional regulation, rigid The need to prevent unknown innovations and reduce user benefits through strict regulation, and to maintain rules that maintain and promote innovation in the rapidly changing digital market is of utmost importance “Rules and Options for Rule Development” centered on the post-regulation of acts that may limit competition by mega-platformers.

In addition, regarding the rules for data transfer / release, the types of rules and the issues and directions for introducing the rules were shown.

| “Options for data transfer / opening” |
| Study group for improving business environment for digital platformers”( Working group on data transfer and release on May 21, 2019) |

- While digital platformers use their data to improve their services, when viewed by society as a whole, the inclusion of data can limit competition and as a result, there is a possibility that the value of data may not be utilized to its fullest, and there is a possibility that opportunities for user selection will not be secured. For this reason, it is important to have a mechanism that allows data collected on a digital platform to be reused smoothly, easily, and while ensuring safety and security. It is necessary to consider.

- Features of the digital platform The digital platform is characterized by a double-sided market where direct and indirect network effects work. A digital platformer collects data resulting from intermediary services or data provided by the service itself, and uses the accumulated data to provide new services or improve existing services, attract more users. For example, digital platformers offer services “free” to consumers, attract more consumers, and encourage business participants to face other markets. Often uses network effects in the market. Through this mechanism, it has been pointed out that digital platforms tend to bring about data accumulation and promote oligopoly in the market.

- Users have difficulty in shifting to other services due to the need to refer to past usage history, convenience of services tailored to their preferences, and the complexity of shifting to other services (Locked in). In this way, the lock-in of users and the refusal to access and disclose data to other service providers may damage the fair competition environment.

- Securing opportunities for user selection to promote competition

- When providing data about themselves to a digital platform, users may not always be fully aware of the substantial cost of providing the data. In addition, once a user uses a particular digital platform and gets used to it, for example, an unintended psychological switching cost may occur, and the user may be locked into the digital platform. When a user is locked in, it becomes difficult to select other than the digital platform, and as a result, for example, the digital platform is used from the viewpoint of protection of personal data and privacy and security. Even if the level is not sufficient compared to the user’s expectations, or even when the handling conditions are unilaterally changed to a disadvantage for the user, the user must remain in the service. There may be situations where these
disadvantages must be accepted. For this reason, the range of options for users is narrowed, which makes it difficult for the competition mechanism to work, and there is an incentive for digital platformers to secure opportunities for users to make choices. May be insufficient.

- Limitations of application of existing laws

In order to solve these digital platform issues, it is possible to apply the Antimonopoly Act. However, the antitrust Act immediately states that data is accumulated and that the data is not provided to other service providers. It's not illegal. In addition, for example, how to define multiple interrelated markets for the double-sided market, which is one of the features of the platform, and how to evaluate the effects of network effects and data accumulation on competition. Has also been pointed out. For this reason, it is necessary to consider measures to promote competition that complement the Antimonopoly Act. In particular, with regard to the transfer and release of data, the Fair Trade Commission Competition Policy Research Center “Data and Competition Policy In the Study Group Report, “There may be policy measures that are considered desirable in competition even if they are not an immediate problem under the Antimonopoly Law.” “Lock-in effects such as SNS occur. For potential services, it is easier to maintain market dominance in the relevant service market if personal data portability is not secured. Is considered expensive.

- (1) Necessity of data transfer / release

Regarding the accumulation of data on the digital platform, from the perspective of promoting competition, in order to create a fair competitive environment and secure opportunities for users to choose, it is necessary to ensure an environment in which users can choose autonomously so that self-related data accumulated in the digital platform can be reused by themselves or used by other online service providers. To this end, data related to users collected on the digital platform can be retrieved by the user himself / herself, as required by other digital platformers and online services, if necessary to promote competition. Copying / transferring to providers, etc., or releasing data through APIs on digital platforms at the request of users so that other online service providers can use the data. Therefore, it is important to enable the transfer and release of data.

- (2) Approach to discipline

In order to impose discipline on the digital platformer in light of these needs, it is necessary to examine the basis. Specifically, in considering the discipline for data transfer / opening, the data collected from users by digital platformers during the provision of services should be reused. At that time, as seen in (1), it is important to consider both aspects of creating a fair competitive environment and securing opportunities for user choice from the viewpoint of promoting competition.

① Aspects of creating a fair competitive environment

In terms of the creation of a fair competitive environment, when externalities such as network effects exist and both sides of the market arise or users are locked in due to switching costs, the monopoly / oligopoly is a risk of an oligopoly, and it is said that there will be a market failure where social welfare cannot be maximized by competition. Digital platformers also have no incentive to actively provide data about users to other service providers, so there is a high possibility that the potential value of data will not be fully utilized. it is conceivable that.

For this reason, by taking measures to improve monopoly and oligopoly conditions, including the transfer and release of data, while paying attention to the impact on investment incentives of digital platforms, other digital platforms and It is possible to consider the point of economic regulation that it is necessary to improve the social welfare by promoting the potential entry and the creation of new services by online service providers.
Regarding the aspect of securing opportunities for user selection, when users provide data related to themselves to the digital platform, such as the handling of service contents and data analysis results with the digital platform. There is an asymmetry of information, and it is considered that rational actions based on all objective facts are not necessarily taken. Therefore, after the fact, regarding the handling of the provided data, by giving the user the opportunity to retrieve the data from the locked-in state and reuse it for other services, it is possible to consider the point of economic regulation that it is necessary to improve the social welfare by using a competitive mechanism with platformers and online service providers. From the viewpoint of social regulation, for example, it is necessary to enable users to select services that meet the expected levels of privacy protection and security by enabling safe and secure data reuse.

On the other hand, it should be noted that the integration of data on the digital platform can improve the services provided on the digital platform. For this reason, digital platformers are investing to improve services when users are free to re-use data about themselves that they have provided to digital platforms to other digital platforms and services. There is a need to avoid losing excessive incentives. It is necessary not to impose an excessively heavy duty that would increase the burden of maintaining the internal database and the method of transferring / opening data in relation to the transfer / opening of data, resulting in the suspension of provision of existing services, etc. is there. Also, given the characteristics of the digital platform that it is easy to collect data, simply transferring the data related to users on the digital platform to a digital platform on which data has already been accumulated. It is also necessary to pay attention to the possibility of data accumulation.

5. Organizing options for approach to data transfer / release

(1) Approach options

① Laws and regulations

There are two main laws and regulations: one that involves new legislative measures and one that establishes guidelines based on the existing legal system. New legislation measures include: There is a method to require specific rules by law for the detailed operational rules and technical standards to enable the transfer and release of data described in section 1. In this case, all disciplines are legally binding, and it is possible to ensure that the discipline is enforced. On the other hand, the speed of innovation is fast and technical disciplines are established. It is not practical to provide detailed operational rules and technical standards for all necessary data transfer / opening rules by law. There is a risk of it.

The formulation of guidelines based on the existing legal system has the advantage of being able to respond quickly compared to the new legislative measures, while the response is in principle within the scope of the current law. For example, guidelines based on the Antimonopoly Act and the Personal Information Protection Act have been established in the telecommunications business and financial fields, but the transfer and release of data to digital platforms is specifically governed by guidelines. It is necessary to carefully consider what kind of discipline is possible.

② Self-regulation (voluntarily formulate codes of conduct and private guidelines)

Self-regulation can be an effective way to respond flexibly to changes in innovation speed and technology. On the other hand, self-regulation has a problem of binding power, and even if some people respond voluntarily, the issues related to digital platforms will not be
solved in general. Therefore, if an organization such as an industry group that voluntarily
develops codes of conduct and private guidelines can be created and many digital
platformers can participate, it can be an option.

However, if a person who does not belong to the industry group comes out, it may be
necessary to deal with the fact that it may be handled differently from the person to whom
it belongs, or it may prevent new entry or cause self-regulation that is disadvantageous to
consumers. It is necessary to keep in mind that there are.

Even if self-regulation is used, if sufficient self-regulation is not expected to be enacted at
an early stage, or if it is deemed that the self-regulation is insufficient, paying close
attention to the operational status It is imperative that the government ensure the
effectiveness of self-regulation by committing to review and implement laws and
regulations.

③ Combination of laws and regulations, code of conduct and private guidelines (joint
regulation)

As a method of solving the above-mentioned issues of legal regulations and self-regulation,
the basic framework is legal regulations, and regarding technical aspects and detailed
operational rules, stakeholder 22 himself / herself has a code of conduct and private
guidelines. A so-called joint regulation mechanism can be considered.

Co-regulation makes it possible to flexibly utilize appropriate rules established by other
countries and international organizations for technical details and operational rules,
ensuring international consistency and international rules. There is also the advantage of
encouraging effective compliance by digital platformers that conduct business in the future.
In joint regulations, it may be possible to ensure the appropriateness and effectiveness of
the rules by the government's involvement in the formulation and operation of the rules by
stakeholders. In this case, the government-stakeholder dialogue is important because
government regulations and stakeholder agreements play a complementary role.

In joint regulations, it is important to consider an appropriate framework for joint
regulations from the viewpoint of ensuring the effectiveness of law enforcement. At that
time, it is necessary to take into consideration that the balance between the scope of
regulations, including related laws and regulations, and the balance established by
stakeholders varies depending on the market.

6. Issues related to the transfer and release of data used in public services
There is a great need for data collected in relation to public services, including medical and
financial services, even if they are anonymously processed, and it is necessary to consider
how to access them.

First, in order to transfer and release data, it is necessary to work on computerization of
data as a precondition. However, as far as the examples in other countries are concerned,
active efforts by the government are effective. It is important for the government to take the
initiative and tackle it, especially when the target industry is a field regulated by the
government.

At that time, for example, in fields where there are certain restrictions on entry, such as the
medical field and the financial field, there are many existing industry organizations to
which affiliated companies are affiliated. As an approach to this, it is easy to adopt a self-regulation common to the industry, or a joint regulation approach that combines laws and regulations with codes of conduct and private guidelines.

While data from these fields is expected to create a wide variety of innovations, it cannot be said that there are no worries or concerns about whether they will be handled appropriately at the new location. For this reason, it is necessary to examine the use of data in these fields, including the necessity of safeguards related to data distribution, while balancing innovation creation. At that time, it is necessary to consider the case of relocation to overseas based on international agreements.

In addition, for data subject to transfer / opening, it is not necessarily required to disclose all data to users according to the nature and public interest of the data in the relevant field. It should be noted that the need to place

In addition to the medical and financial fields, the data held by public institutions and public utilities of national and local governments can be used smoothly to create a wide variety of services and to create appropriate policies. It can lead to formation. From this point of view, it is also desirable to consider measures to promote the release of data held by public institutions and public utilities, while keeping in mind that it does not infringe on the rights of others.

According to the “Growth Strategy Execution Plan” announced on June 21, 2019, “Digital platform companies have dramatically improved the possibility of access to international markets etc. for SMEs, venture companies and individual users. On the other hand, some users have heard that it is difficult to negotiate individually, the rules are unilaterally changed, the usage fee is high, etc. Therefore, ensuring transparency and fairness in transaction practices. In addition, there is a risk that competition in the digital market may be hindered by data monopoly, and a similar response is required at the same time. In order to make policy adjustments, etc., highly specialized knowledge is required. For this reason, we will proceed with the development of a new system.”

The headquarters is set up in the Cabinet Secretariat to develop rules for ensuring the transparency and structure of transactions. It is stipulated that specific system design should be considered for data portability and API opening for each medical field.

On August 29, 2019, the Fair Trade Commission announced that the “Concept of Antimonopoly Act on the Abuse of Superior Position in Transactions between Digital Platformers and Consumers who Provide Personal Information (Draft)” Here are four types of actions that can be used to abuse a superior position.

1. Obtaining personal information without informing consumers of the purpose of use
2. Acquire and use personal information beyond the scope necessary to achieve the purpose of use, against the will of consumers
3. Acquiring and using personal strength without taking necessary and appropriate measures for safety management of personal information
4). To allow consumers who continue to use the services they provide to provide economic benefits, such as personal information, separately from the personal information that consumers provide as consideration for using the service

* Other cases where the act of obtaining and using personal information provided by
consumers through digital platformers will unfairly disadvantage consumers in light of normal business practices.

On September 27, 2019, the government established the Digital Market Competition Conference under the Digital Competition Headquarters. Fair Trade Commission, the guidelines related to abuse of dominant position to the consumer by the digital platform company, is scheduled to be established in the prospect of the 2019 year.

https://www.kantei.go.jp/jp/singi/digitalmarket/kyosokaigi/dai1/sankou1_e.pdf

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