

Guidelines to application of the Antimonopoly Act
concerning review of Business Combination

May 31, 2004

Fair Trade Commission

Introduction

Chapter 4 of the Antimonopoly Act (Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54, 1947), hereinafter referred to as “the Act”) prohibits such that acquisition or possession (hereinafter referred to as “holding”) of the stocks of a company (including shares of partnership) (Section 10 of the Act), interlocking directorates (Section 13 of the Act), stockholding by a person other than a company (Section 14 of the Act) or a merger of companies (Section 15 of the Act), jointestablishment type demerger or absorption type demerger (Section 15-2 of the Act) or acquisition of businesses (Section 16 of the Act) (hereinafter referred to as “business combination”) where the effect of such a business combination may be substantially to restrain competition in any particular field of trade, or where such a business combination is implemented through an unfair trade practice. Business combination to be prohibited is subject to elimination measures under the provision of Section 17-2 of the Act.

With regard to reviewing whether the effect of a business combination may be substantially to restrain competition in any particular field of trade (hereinafter referred to as the “review of business combination” or the “review”), the Fair Trade Commission has already clarified underlining principles through the Guidelines for Interpretation on the Stipulation that “The Effect May Be Substantially to Restrain Competition in a Particular

Field of Trade” Concerning M & As on December 21, 1998. However, in order to enhance transparency and predictability regarding the review of business combination, the Fair Trade Commission issues “Guidelines to Application of the Antimonopoly Act concerning Review of Business Combination” (hereinafter referred to as “Guidelines”), taking into account its experience of the review so far.

These Guidelines, first of all, indicate the categories of business combinations which are to be reviewed under the Act (Part I). Second, they will indicate the criteria for defining a particular field of trade (Part II). Third, they shall clarify the meaning of “the effect may be substantially to restrain competition” (Part III). And then, they will indicate the analytical framework and the criteria for assessing whether the effect of a business combination may be substantially to restrain competition in accordance with the categories of the business combination (Parts IV and V). Finally, they will illustrate remedial measures for resolving the problems involved in the business combination whose effect may be substantially to restrain competition (Part VI).

The Fair Trade Commission will review business combinations and determine whether or not the effect of a business combination may be substantially to restrain competition in any particular field of trade along with these guidelines, irrespective of whether it is subject to current reporting or notification requirement under the provisions of Chapter 4 of the Act.

In addition, with the formulation of these guidelines, the Guidelines for Interpretation on the Stipulation that “The Effect May Be Substantially to Restrain Competition in a Particular Field of Trade” Concerning M&As (including Supplement thereof dated April 1, 2001) is hereby abolished.

Part I. Subject of the Review of Business Combination

Chapter 4 of the Act prohibits a business combination if the effect may be substantially to restrain competition in a particular field of trade. The Chapter regulates business combinations because they can have an impact on competition in the market through the formation, maintain or strengthening of the relationship where more than one company conducts business activities in a united form, fully or partially by stockholding, mergers or other transactions (this relationship is hereinafter referred to as a “joint relationship”). Accordingly, if two or more companies continue to engage in business activities as independent competitive units though there are stockholdings or interlocking directorates between them, and if these companies which have already had a joint relationship just alter merely the form of an organization, there are little impact on competition. Thus, these types of arrangements should be rarely prohibited. This part clarifies the categories of business combinations whose impact on competition should be reviewed.

1. Stockholding

(1) Stockholding by a Company

A. It is reviewed that a joint relationship is to be formed, maintained or strengthened between an acquiring company and an acquired one in the following cases.

(a) When the voting right holding ratio (the ratio of voting rights for stock held by an acquiring company to the overall shareholder’s voting rights in a stock issuing company) exceeds 50 %. However, if the acquiring company establishes the acquired company and the former acquired all of the voting rights of the latter concurrently with the establishment, it usually falls outside the scope of the review of business combination (see (4) A *infra*).

(b) When the voting right holding ratio exceeds 25 % and the acquiring company is the sole leading holder of voting rights.

B. Other than the cases described above, when the ratio of voting right holding ratio exceeds 10 % and acquiring company is ranked among the top 3 voting right holders, the following items will be taken into consideration in order to determine whether a joint relationship is formed, maintained or strengthened.

(a) The extent of voting right holding ratio

(b) The rank as a voting right holder, difference in the voting right holding ratios and distribution among the holders, and other relationships between holders

(c) Cross-holding of voting rights (the acquired company concurrently holds voting rights of the acquiring company) and other mutual relationships between the companies involved (hereinafter referred to as "parties")

(d) Whether officers or employees of one of the parties are holding the position of officers of the other parties

(e) Trading relationship between the parties (including financial relationship)

(f) Relationships between the parties based on business alliance, technical assistance and other contracts or agreements

(g) Items (a) through (f), when including companies that already have joint relationships with the parties

C. In the event of a joint investment company (a company which jointly established or acquired by two or more companies through a contract to pursue necessary operations in order to achieve mutual benefits; the same hereinafter), trading relationships between the parties and relationships based on business alliance, contracts, etc. will be considered in order to determine whether the business combination should be reviewed. (As far as a joint relationship between the investing companies is concerned, a joint relationship is indirectly formed, maintained or strengthened through the joint investment company. Accordingly, if the business activities of the stockholding companies are integrated through the establishment of the joint investment company, this fact itself indicates that there will be an impact on competition. (See 2 (1) C and 3 (1) D in Part IV later on))

(2) Stockholdings by a Person Other than a Company

“A person other than a company” means a person other than a joint stock company, mutual company, limited liability company, ordinary partnership, limited partnership or foreign company as prescribed by the Commercial Code and other laws and ordinances; it does not matter whether the person is an entrepreneur or not. Specifically, incorporated foundations, corporate juridical persons, special corporations, regional public bodies, cooperatives, associations, natural persons and all other persons that can hold stocks are included.

The existence of stockholdings by a person other than a company will be examined in accordance with item (1) above.

(3) Scope of Joint Relationship

If a joint relationship is formed, maintained or strengthened between the parties concerned through the stockholdings, a joint relationship is also formed, maintained or strengthened among the parties and the companies which already have a joint relationship with the parties.

(4) Stockholdings which do not fall within the Scope of the Review of Business Combination

In the case of A below, a joint relationship is not formed nor strengthened so that, in general, it does not fall within the scope of the review of business combination. In addition, even in the cases of item B to item F as below, a business combination is not formed nor strengthened so that, in general, most of them are not considered to fall within the scope of the review of business combination. However, in the case of that a joint relationship is formed or strengthened between the Company V to Z and other shareholders, such joint relationship falls within the scope of the review of business combination.

A. The acquiring company establishes the acquired company and the former acquired all of the voting rights of the latter concurrently with the establishment (See (1) A (a) above)

B. A company acquires the voting rights of the subsidiary of its subsidiary (In these Guidelines, a "subsidiary" means a company of which another company holds more than 50 % of its total stockholders' voting rights.) (Also see note 1)

C. A company acquires the voting rights of its sister company (In these Guidelines, a "sister company" means companies of which the same company holds more than 50 % of their total stockholders' voting rights.)

D. A company acquires the voting rights of a subsidiary of its sister company

E. A company acquires the additional voting rights of another company more than 50 % of whose total stockholders' voting rights are held by the acquiring company and its sister company jointly

F. A company acquires the voting rights of another company where two or more sister companies hold jointly more than 50 % of the total stockholders' voting rights of the acquiring and acquired company respectively

(Note 1) If

(a) a parent company and its subsidiary hold jointly more than 50 % of total stockholders' voting rights of a company or

(b) a subsidiary holds solely more than 50 % of total stockholders' voting rights of a company, the company is treated as a subsidiary of the parent company. This definition is adopted hereinafter except for the "subsidiary" mentioned in 2 (4) B (a), 3 (3) A, 4 (4) A and 5 (4) A.

2. Interlocking Directorates

(1) Scope of Officers

An "officer" is defined in Section 2 (3) of the Act as "a trustee, director, executive, partner with unlimited liabilities and executive power, an auditor or any person with a similar position, a manager or other employee in charge of business of the main or branch office". Thus, officers are directors and auditors of joint stock companies, limited liability companies and mutual companies; managers defined by the Commercial Code (Section 37); and other employees in charge of business under the Commercial Code (such as the general manager of a head office, a branch manager, the head of a business division) and the like.

A "person with a similar position" means a person, while not directors or auditors, with the title of adviser, counselor, consultant or others who actually participates in the management of the company by attending board of directors' meetings or other measures. A person having only the title of division manager, department manager, section manager or supervisor is an employee, not an "officer".

Further, the restriction on interlocking directors will not apply if an officer or an employee of a company completes retirement procedures and is then appointed as an officer of another company.

(Note 2) Section 13 (1) of the Act defines in the parenthesis an “employee” as “a person other than officers in the regular employment of a company.” While temporary employments are not included, temporary transferees are included as employees.

(2) Joint Relationships through Interlocking Directorates

A. In the following cases, a joint relationship is formed, maintained or strengthened as an officer or an employee of a company serves concurrently as an officer of another company and that interlocking is within the scope of the review of business combination.

(a) The officers or employees of one company comprise a majority of the total number of officers of another company.

(b) Interlocking directorates hold the rights of representation of both companies.

B. Excluding item A above, the following items will be taken into consideration to determine whether a joint relationship is formed, maintained or strengthened.

(a) Whether there is interlocking directorate formed by the full-time or representative directors

(b) The ratio of officers or employees of one of the interlocking companies to the total number of officers of one of the other interlocking companies

(c) Mutual holding of voting rights conditions between the interlocking companies

(d) The trading relationships (including financial relationships), business alliance and other relationships between the interlocking companies

(3) Scope of Joint Relationships

When a joint relationship is formed, maintained or strengthened between interlocking companies through interlocking directorates, a joint relationships are formed, maintained and strengthened between companies including companies that already have joint relationship with the interlocking companies.

(4) Interlocking Directorates which are not within the Scope of the Review of Business Combination

A. In such cases as the following, a joint relationship is not formed, maintained or strengthened so that in general it is not within the scope of the review of business combination.

(a) No one but persons who do not have the right of representation serve concurrently as officers, and in either of the interlocking companies the ratio of officers or employees of the other company to the total number of its officers is 10 % or less.

(b) No one but persons other than full-time officers serve concurrently in companies with 10 % voting rights holding ratios or less, and in either of the interlocking companies the ratio of officers or employees of the other company to the total number of its officers is 25 % or less.

B. In the cases of item (a) and (b) below, a joint relationship is not formed or strengthened so that in general it is not within the scope of the review of business

combination. In addition, even in the cases of item (c) to (f) below, a joint relationship is not formed or strengthened so that in general most of them are not considered within the scope of the review of business combination. However, in the case of that a joint relationship is formed or strengthened with other shareholders, such joint relationship is subject to the review of business combination.

(a) Interlocking directorates between a company and its subsidiary

(b) Interlocking directorates between sister companies

(c) Interlocking directorates between a company and a subsidiary of the company's subsidiary

(d) Interlocking directorates between a company and a subsidiary of the company's sister company

(e) Interlocking directorates between a company and a subsidiary whose total stockholders' voting rights are held, by more than 50 %, by the company and its sister company

(f) Interlocking directorates between companies where two or more sister companies of an identical company hold jointly more than 50 % of the total stockholders' voting rights of the both interlocked company respectively

3. Mergers

(1) Mergers

In a merger, two or more companies combine to form a single company. Therefore, a merger is the strongest joint relationship that can be formed between companies. Consequently, even if a certain joint relationship formed through stockholdings or interlocking directorates may be deemed not to have a strong impact

on competition nor cause a problem, such a joint relationship could be strengthened through a merger under the same set of circumstances, and the merger could present a problem.

(2) Scope of Joint Relationships

When a merger is conducted, a joint relationship is formed, maintained or strengthened between the parties and the companies which have already formed a joint relationship with the parties.

(3) Mergers which are not within the Scope of the Review of Business Combination

In the cases of item A to C below, a joint relationship is not formed or strengthened so that in general it is not within the scope of the review of business combination. In addition, even in the cases of item D to G below, a business combination is not formed or strengthened so that in general most of them are not considered within the scope of the review of business combination. However, if a joint relationship is formed or strengthened among other shareholders, such a joint relationship is within the scope of the review of business combination.

A. Mergers between a company and its subsidiary

B. Mergers between sister companies

C. Mergers implemented solely for the purpose of conversion of an ordinary partnership, limited partnership, limited liability company or mutual company to a joint stock company, conversion of a joint stock company to a limited liability company of mutual company, conversion of ordinary partnership to limited partnership, or conversion limited partnership to an ordinary partnership

D. Mergers between a company and a subsidiary of the company's subsidiary

E. Mergers between a company and a subsidiary of the company's sister company

F. Mergers between a company and a subsidiary whose total stockholders' voting rights are held, by more than 50 %, by the company and its sister company

G. Mergers between companies where two or more sister companies of an identical company hold jointly more than 50 % of the total stockholders' voting rights of the both merged company respectively

4. Demerger

(1) Joint establishment type demerger / Absorption type demerger

A joint establishment-type demerger or an absorption-type demerger (hereinafter referred to as the "demergers") has an impact on competition similar to a merger in the sense that business (entire business or substantial part of it) which will be split off from the splitting company are integrated with the succeeding company.

It is determined in the light of the criteria of Section 1 ("Stockholding") whether or not a joint relationship is formed, maintained or strengthened between the succeeding company and the company which is to be allotted the shares of the said succeeding company.

(2) Scope of Joint Relationships

If a joint relationship is formed, maintained or strengthened through demergers between the succeeding company and the company which is to be allotted the shares of the said succeeding company, a joint relationship is formed, maintained and

strengthened between the succeeding and the allotted company and the companies which have already had a joint relationship with them.

(3) Substantial part of Business

The “substantial part” mentioned above does not mean substantial part for the succeeding company but for the splitting company. Moreover, it is limited to the case in which the split portion of the business must function as a single business unit, and the portion is objectively deemed to have a value to the business of the splitting company.

Consequently, whether a split business constitutes “substantial part” or not is examined on a case-by-case basis according to the actual state of the split business in the market. However, if the annual sales (or turnovers correspond to it. The same hereinafter.) of the split business does not exceed 5 % of the total sales of the splitting company nor one hundred million yen, this split business is not considered to be “substantial part” in general.

(4) Demergers which are not within the Scope of the Review of Business Combination

In the cases of item A and B below, a joint relationship is not formed or strengthened so that in general it is not within the scope of the review of business combination. In addition, even in the cases of item C to F below, a joint relationship is not formed or strengthened so that in general most of them are not considered within the scope of the review of business combination. However, in the case of that a joint relationship is formed or strengthened with other shareholders, such joint relationship is subject to the review of business combination.

A. Demergers between a company and its subsidiary

B. Demergers between sister companies

C. Demergers between a company and a subsidiary of the said company's subsidiary

D. Demergers between a company and a subsidiary of the said company's sister company

E. Demergers between a company and a subsidiary whose total stockholders' voting rights are held, by more than 50 %, by the company and its sister company

F. Demergers between companies where two or more sister companies of an identical company hold jointly more than 50 % of the total stockholders' voting rights of the both demerged company respectively

5. Acquisitions of Business, etc.

(1) An acquisition of an entire business has an impact on competition similar to a merger in the sense that business activities of the transferring company are integrated with the acquiring company. Since the transferring company and the acquiring company are not related after the transfer, it is sufficient to examine conditions when the acquired business is newly added to the acquiring company. Acquisitions of substantial part of business or fixed assets of business are examined in a similar manner.

(2) Scope of Joint Relationships

A joint relationship is formed, maintained or strengthened between companies including companies that already have a joint relationship with the acquiring company.

(3) Substantial part of Business

Concerning an acquisition of substantial part of a business or a fixed assets of a business, the idea of the “substantial part” is the same as mentioned in item 4(3) above.

(4) Acquisitions of Business which are not within the Scope of the Review of Business Combination

In the cases of item A to C below, a joint relationship is not formed or strengthened so that in general it is not within the scope of the review of business combination. In addition, even in the cases of item D to G below, a joint relationship is not formed or strengthened so that in general most of them are not considered within the scope of the review of business combination. However, in the case of that a joint relationship is formed or strengthened with other shareholders, such a joint relationship is within the scope of the review of business combination.

A. Transfer of a business or fixed asset of business (hereinafter referred to as “acquisitions of business”) between a company and its subsidiary

B. Acquisitions of business between sister companies

C. Acquisitions of business which is a split-off of a corporate division effected through 100 % capital investment

D. Acquisitions of business between a company and a subsidiary of the company's subsidiary

E. Acquisitions of business between a company and a subsidiary of the company's sister company

F. Acquisitions of business between a company and a subsidiary whose total stockholders' voting rights are held, by more than 50 %, by the acquiring company and its sister company

G. Acquisitions of business between companies where two or more sister companies of an identical company hold jointly more than 50 % of the total stockholders' voting rights of the acquiring and acquired company respectively

(5) Leasing of Business

Leasing of business (conduct of a lessee to manage a leased business under its name and calculations, and pay leasing fees to the lessor in fulfillment of a leasing contract), delegation of management of a business (conduct of a company to delegate management of a business to another company in fulfillment of a contract), and contracts to share the total profits and losses of a business (contracts between two or more companies agreeing to share the total profits and losses of a business for a specific period) will be treated as acquisitions of business similarly.

Unlike what is described in item (1) above, a joint relationship can be formed, maintained or strengthened between companies and those which already have a joint relationship with them, depending on the content of the contracts.

Part II. A Particular Field of Trade

"A Particular Field of Trade" might be called a market. Every market will be defined as places where the business activities of all companies whose joint relationships are formed, maintained or strengthened by business combinations stipulated in Part I (hereinafter referred to as "the company group") take place, and the impact on competition in each market by business combinations will be examined in accordance with Part III to V of the Guidelines. The criteria for defining the scope of a particular field of trade are clarified below.

1. Basic Point of View for the Scope of a Particular Field of Trade

The scope of a particular field of trade is defined in terms of goods traded ("goods" include services), trading areas (geographic range), stages of trade, a trading partner and other factors. Therefore, the goods traded are first enumerated for all of the businesses engaged in by the company group, and the product range is defined among the goods traded, then geographic range is defined for each of the product range. Here, the range of the trading partners of the company group and the range of competitors which compete for the said trading partners are the criteria for definition of the goods range and the geographic range and other factors. It can happen that a particular field of trade is constituted by a product range (or geographic range) in accordance with the type of trading, while at the same time another one is constituted by a wider (or narrower) product range (or geographic range) overlappingly.

2. Product Range

The product range of a particular field of trade is determined by goods which have similar functions and efficacy to the users.

To determine whether the functions and efficacy of goods traded are similar to those of the other goods, it is considered whether, when the price of the goods traded increase or similar change of trading conditions occurs, the other goods can be the factor that prevent the price, quantity or etc. of goods traded from varying freely because the users can purchase the other goods as a substitute. For instance, when the price of the product X increase, the presence of the product Y may prevent the price increase of the product X because the users purchase the product Y as a substitute for the product X, the sales of the product X decreases. Thus, the products X and Y are considered to have the same functions and efficacy.

Here, the users mean those to whom business activities of a company group are directed. If a company group manufactures producers' goods, the users mean companies that process the goods into the next level of products. If a company group manufactures consumers' goods, the users mean general consumers. If a company group is a distributor, the users mean companies in the succeeding distribution level.

For example, when a product X and a product group Y have similar functions and efficacy in a certain application and a product Z which belongs to the product group Y has strong similarity in its functions and efficacy to the product X for a specific application, then there is a case that the product range of a particular field of trade is comprised of the product X and the product group Y and simultaneously of the product X and the product Z.

For the purpose of determining the product range of a particular field of trade, it is judged in light of the following viewpoint whether the functions and efficacy of a product are similar to those of the other goods from the view point of the users.

(1) Application

It is considered whether a product is, or is possible to be, employed for the same application to the product traded.

To determine whether both products are employed for the same application, the following factors are considered: external features such as size and form, specific material character such as strength, plasticity, heat-resistance and insulation, quality such as purity, technical features such as standards and systems. (However, there is a case in which both products are considered to be for the same application even though the above factors are different to a certain extent. (See (3) later))

When the product traded is employed for several applications, it is considered for each application whether any other products are actually or possibly employed for the same application. For instance, the products X and Y may have similar functions and efficacy in a certain application and products X and Z may have those for another application.

(2) Changes of the Price, Quantity and so on

There is a case in which the difference of price levels, the changes of the price, quantity, etc. are considered.

For example, the products X and Y can be used for the same application, but since the price levels of the products are different, the product Y is rarely used as a substitute for the product X. In such a case, it can not be considered that the products X and Y have similar functions and efficacy.

In the meantime, the products X and Y can be used for the same application and the price levels are not different, but the product Y is rarely used as a substitute for the product X in practice because, to substitute product Y for X, some costs are required to change the facilities or educate the employees. In such a case, it can not be considered that the product X and Y have similar functions and efficacy.

On the other hand, when the products X and Y have similar functions and efficacy, if the price of product X is increased, then users become to purchase the product Y and the price of product Y is likely to increase. Therefore, if the sales or the price of product Y increases in response to an increase in the price of product X, it can be considered that products X and Y have similar functions and efficacy.

(3) Recognition and actions of the Users

There is a case in which the recognition etc. of the users is considered.

For instance, even though the specific material characters of the product X and Y are different, there could be a case in which users can use either of them as raw materials to produce the product Z of the same quality. In such a case, it is considered that the product X and Y have the similar functions and efficacy.

It is also considered that whether a user substituted product Y for X when the price of product X was increased in the past.

3. Geographic range

The geographic range of a particular field of trade is determined by whether, when in a certain region the price increase or similar change of trading conditions occurs on goods which is defined in accordance with the Section 2 above, the producers in another region can be the factor which prevents the price, quantity or etc. in the former region from varying freely because the users can purchase the goods from the producers in the other region as a substitute. For instance, when the price in the region X is being increased, if the producers in the region Y may prevent the price in the region X from increasing because it is expected that the users in the region X purchase from the producers in the region Y, then it is determined that the region X and Y belongs to the same geographic range.

Accordingly, similar to the case of the determination of the product range, there is a case in which the geographic range of a particular field of trade is determined as both the region X and the region Y, which is a part of the former, if the users in the region Y especially tend to purchase from the suppliers in the region Y.

In the meantime, even if the business area of the parties extends to foreign countries, the competition to be maintained by the Act is the domestic competition in Japan. Therefore, main focus of the review will be on the scope of the business activities of domestic customers.

As a result, if the company group is on the supply side of the goods, the particular field of trade is not generally determined to include exports.

To determine the geographic range of a particular field of trade, the following factors are considered.

(1) Business Area of Suppliers, the Area for Users to Purchase etc.

The scope of the region where users can usually purchase the product is determined by the business area such as distribution network of suppliers, their supplying capacity and the area around which users purchase the product (purchase behavior of consumers) etc.

It is also considered from which region's suppliers the users purchased the product when the price of the products in a certain region was increased in the past.

(2) Features of Goods

The features of goods such as perishability, heaviness and fragility affect the range of transportation or the degree of difficulty to transport. Concerning this effect, it is considered in which regions the users can purchase the goods in general.

(3) Type or Cost of Transportation

According to the types of transportation, the proportion of the transportation cost to the price of goods, and/or the comparison between the transportation cost and the price difference between the regions of the original and the destination of the transportation, it is considered to what extent of regions the users can purchase the goods in general.

4. Others

Depending on the reality of trade between the company group and its trading partners, distribution levels, character of each trading partner and so on are considered to delineate a particular field of trade on the same criteria of the section 2 and 3 above.

For example, there could be a case in which the users who trade the product X with the company group are divided into large-scale customers and the small-scale ones, and peculiar trade conditions apply for respective customer group. In such a case, if the price of the product X for the small-scale customers is increased, they can not purchase the product X for the large-scale customers because of constraints on transportation, etc. and the product X for the latter can not prevent the price increase of the product X for the former. Then, a particular field of trade for large-scale customers and small-scale ones are determined respectively.

The difference of the facilities for supply or switching costs of them is also considered. If the time and the costs necessary to switch the facilities for supply or distribution network is small enough for the large number of the suppliers of the product X and Y, both products can be judged to be in the same particular field of trade.

Part III. The Effect May be Substantially to Restrain Competition

1. Interpretation of "The Effect May Be Substantially to Restrain Competition"

(1) Interpretation of "Substantially to Restrain Competition"

In a precedent (decision of the Tokyo High Court on December 7, 1953 concerning Toho Company, Limited, et al), the following interpretation concerning "substantially to restrain competition" was held.

A. Shin-Toho Company Limited (hereinafter referred to as "Shin-Toho") was capable of distributing the films it produced through its own network. However, an

arrangement with Toho Company, Limited (hereinafter referred to as "Toho") consigned all film distribution to Toho and limited Shin-Toho solely to production of films. Shin-Toho continued to adhere to the terms of the arrangement even after the agreement had expired. However, in November 1949 Shin-Toho stated that it would independently distribute the films it produced because of the expiration of the arrangement, which caused a dispute with Toho. As a result of this dispute, a hearing procedure was initiated by the Fair Trade Commission on the ground that the arrangement violated the Act. In conclusion, the Fair Trade Commission ruled in its decision of June 5, 1951 that the arrangement between Toho and Shin-Toho violated Section 3 (unreasonable restraint of trade) and Section 4-1-3 (See Note 3) of the Act.

Note: Section 4-1 of the Act (this provision does not exist in the current Act)

"Entrepreneurs shall not jointly engage in the following particular concerted practice"

Section 4-1-3 "concerned actions to restrain technologies, products, distribution channels, or customers"

B In response to the plaintiff's (Toho's) motion to quash the Fair Trade Commission decision, the Tokyo High Court ruled concerning substantial restraint of competition that "substantially to restrain competition means to bring about a state in which competition itself has significantly decreased and a situation has been created in which a specific firm or a group of firms can control the market by determining price, quality, volume, and various other terms with some latitude at its or their own volition."

(2) Interpretation of "The Effect May Be"

The provisions of Chapter 4 of the Act differ from the provisions of Section 3 and 8 of the Act, and prohibit business combinations where "the effect may be" substantially to restrain competition in any particular field of trade. This "the effect may be" does not mean that substantial restraint of competition will inevitably result from the business combinations. Rather, it means that it is probable that conditions which could

easily lead to substantial restraint of competition are furthered by the business combination. Consequently, if the market structure is altered in a non-competitive manner by the business combination, and conditions that would allow the company a certain latitude to manipulate price, quality, volume, and other conditions by unilaterally or acting cooperatively together with other companies are easily led to presence, then the effect of the business combination may be substantially to restrain competition in a particular field of trade, and it is prohibited by Chapter 4 of the Act.

2. Type of business combination and substantial restraint of competition

There are various types of business combinations. Those are divided into the following categories.

(1) Horizontal business combinations (The business combinations between the companies in the same particular field of trade. The same hereinafter.)

(2) Vertical business combinations (The business combinations between the companies which are in the different level of trade such as producers and its distributors. The same hereinafter.)

(3) Conglomerate business combinations (The business combinations which are neither horizontal nor vertical ones. For instance, mergers between the companies which belong to the different categories of business, or stock holdings between the companies whose product range are in the same particular field of trade but whose geographic range are different. The same hereinafter.)

Horizontal business combinations reduce the number of competing units in a particular field of trade. Thus they have the most direct effect on the competition and higher possibility to have the effect that may be substantially to restrain competition than vertical and conglomerate business combinations. On the other hand, vertical and

conglomerate business combinations do not reduce the number of the units. Then they have less impact on the competition than horizontal ones and, except for some particular cases, the effect of them may not be substantially to restrain competition in general.

Depending on the types of business combinations, the Fair Trade Commission uses different frameworks or determining factors to consider whether the effect of business combinations may be substantially to restrain competition. In the following Parts, the frameworks or the determining factors are explained for each type of business combinations, horizontal, vertical and conglomerate.

In addition, if a business combination is composed of, for example, the horizontal and vertical aspects, the effects of each aspects are examined based on the frameworks or the determining factors for the horizontal and vertical combinations respectively.

Part IV. The Effect of Horizontal Business combination May be Substantially to Restrain Competition

1. Guiding Principles

As mentioned above, horizontal business combinations reduce the number of competing units in a particular field of trade. Therefore, they have the most direct effect on the competition and it is more likely that the effect of the combinations may be substantially to restrain competition.

There are two possibilities that the effect of the horizontal business combinations may be substantially to restrain competition: Through unilateral conducts by the company group and through coordinated conducts between the company group and its one or more competitors (hereinafter referred as “competitors”). Individual cases should be reviewed in respect of these two conducts. Therefore, there will be a case, for

example, in which the effect of a business combination may be substantially to restrain competition from a view point of a coordinated conducts even though it will not have such an effect from a view point of a unilateral conduct.

(1) Substantial Restraint of Competition by Unilateral Conduct

The typical cases in which the effect of horizontal business combinations may be substantially to restrain competition in a particular field of trade by means of unilateral conducts is as follows, depending on whether goods are homogenous or differentiated in the field.

A. Homogenous Goods

When goods are homogenous, if the company group raises the price of the goods and the other companies do not, the users of the goods will switch the suppliers to the other companies and, in general, the sales of the company group will decrease and the sales of the others will increase. Therefore, in many cases, it is difficult for the company group to control the price etc. freely to a certain extent.

However, due to reasons that, for example, the production or sales capacity of the company group is large whereas that of the other companies are small, if the company group raises the price of the goods, there are cases in which the other companies can not increase their sales without raising their prices or the users can not switch their suppliers to these other companies.

In such cases, a situation easily emerges where the company group can control the price etc. freely to a certain extent. As a result, the effect of the horizontal business combinations may be substantially to restrain competition.

B. Differentiated Goods

When goods are differentiated by brands etc. and the price of one brand of goods is increased, the users of the brand goods do not intend to buy the other brand goods indiscriminately instead of the brand goods. The users may buy another brand of goods which is next preferable to the first brand, in other words, which has the higher substitutability to the first one.

In such a case, even though the company group increases the price of the first brand goods, if the group sells the second brand goods which have the high substitutability to the former, the increase of the sale of the latter compensate the loss of the sale of the former. Then, it is possible for the company group to increase the price without the decrease of the total sales of the company group.

Therefore, when goods are differentiated by brands etc, if the business combinations will be made between the companies which sell the substitutable goods for each other, and other companies do not sell such goods, a situation easily emerges where the company group can control the price etc. freely to a certain extent. As a result, the effect of the horizontal business combinations may be substantially to restrain competition.

(2) Substantial Restrain of Competition by Coordinated Conduct

The typical case where the effect of the horizontal business combinations may be substantially to restrain competition through the coordinated conduct is as follows.

For instance, when company X raises its price, other companies Y and Z will try to increase their sales without raising their prices. In response to it, company X, in general, will cut its price to the same level as the previous one or the lower, and try to retrieve the sales from companies Y and Z.

However, in addition to the reduction of the number of competitors, because of the market structure such as the concentration of the particular field of trade, the character of goods or the trade practices etc, there could be cases where the companies will be able to estimate behaviors one another with high predictability and the coordinated conduct bring the profits to them. In such cases, when the price rise by company X is followed by the other companies' raising their prices, even though company Y keeps the price to the previous level in order to gain the additional sales, the other companies will be able to detect the behavior of company Y easily and likely to reduce their price to the same level as previous one or to the lower in order to retrieve the sales which was gained by company Y. As a result, the expected profit which would otherwise be gained by the company Y temporarily when it keeps its price is much less than the expected profits which would be gained if company Y raises its price following the price rise by company X.

Under such circumstances, it is much more profitable for each company to increase the price than to gain the additional sales by keeping the price to the previous level. Thus, a situation easily emerges where the company group can control the price etc. freely to a certain extent by means of the coordinated conduct between the competitors and the effect of the horizontal business combinations may be substantially to restrain competition in a particular field of trade.

(3) The Effect may not be Substantially to Restrain Competition

It is decided in light of the factors described in the Section 2 and 3 below whether the effect of each horizontal business combination may be substantially to restrain competition in a particular field of trade. However, when the market share of the company group after the combination (it is the total of each companies' shares in the company group. (See Note 4)) falls within the condition either A or B below, the effect of a horizontal business combinations may not be substantially to restrain competition in a particular field of trade.

A. The market share of the company group after the combinations is not more than 10%

B. The market structure is not oligopolistic and the market share of the company group after the combinations is not more than 25% (Note 5)

(Note 4) The market share of each company is the percentage of its sales quantity (in case of the manufacturers) to the total sales quantity in a particular field of trade. However, when it is not suitable to calculate the share based on the quantity because there are considerable price differences among goods and sales achievements are usually calculated on monetary bases, the share is calculated by the amount of sales.

When there are imports for domestic users, their market shares are calculated as domestic supplies.

Concerning production capacity, percentage of exports or in-house consumption, there are cases in which these excess capacity, exports or in-house consumption will be directed to the sales for domestic market and in turn expanding the market share in response to the domestic demand. Then these excess capacity etc. are taken into consideration if necessary.

(Note 5) "The case that the market structure is not oligopolistic" means that the Herfindahl- Herschmann Index (hereinafter referred to as "HHI") after a business combination is less than 1000.

HHI is the sum of the squared market share of each company in a particular field of trade.

When it is difficult to identify the market share of all companies and to calculate the accurate figure of HHI, estimated figure is used to decide whether the HHI

is less than 1000 or not. This estimating figure is calculated by the following formula which is drawn up from the Production Concentration Study:

$$\text{HHI} = 69.5 \times \text{cumulative market shares of top three companies} - 2344.4$$

However, this does not apply to the case where the HHI with the identified market shares is obviously above 1000.

2. The determining factors to decide the Substantial Restraint of Competition through the Unilateral Conduct

To decide whether the effect of a horizontal business combination may be substantially to restrain competition in a particular field of trade through the unilateral conduct, the following determining factors are considered comprehensively.

(1) The position of the company group and the state of competitors

A. The market share and the ranking

When the market share of the company group after the combination is relatively larger, it is more difficult for other companies in place of the company group, while keeping the same price level, to supply sufficiently in response to the company group's attempt to raise the price. Thus it could be said that the constraining power of the other companies for the price rise of the company group would be weaker.

As a result, the larger market share of the company group or the increment of it after the business combination is, the greater the impact of the business combination on the competition is. (Note 6)

(Note 6) To calculate the change of a market share by a business combination, if it is expected that the market share will change drastically after the combination with respect to the recent sales quantity, the trend of sales or the change of the users' preferences, such expectation should be taken into consideration to review the impact on competition.

Similarly, when the business combination puts the rank of the company group's market share at a high position or raises the rank to a great degree, the combination will have much more impact on the competition.

For example, the business combination, when the companies concerned are at the high positions on the market shares, has much more impact on the competition than when they are at the low positions.

B. Competition among the Parties etc. in the Past

There are cases where vigorous competition among the parties, or parties' actions which enhance market competition lead to the reduction of market prices or the improvement of the quality or variety of goods. In such cases, even though the combined market share of the parties or its rank is not high, the business combinations bring the large impact on the competition when this combination eliminates the possibility of the price reduction or the quality improvement as above mentioned.

For example, there could be a vigorous competition between the parties such that the expansion of the market share of one party causes the reduction of the market share of the other party. In such a case, after the combination, the loss of the sales of the other party would be compensated by the increase of the sale of the former party. As a result, the parties will be able to raise the price of goods without losing the sales of the group as a whole, then this business combination has a large impact on the competition.

When goods are differentiated by brands and there is high substitutability between the goods sold by the parties, after the combination, the sales loss of one of goods would be compensated by the sales increase of the other goods. As a result, the parties will be able to raise the price of goods without losing the sales

of the group as a whole, then this business combination has a large impact on the competition.

C. Treatment of Joint Investment Company

If certain business department of the investing companies completely spun off by consolidation in the joint investment company, the connection between the business of the investing companies and that of the joint investment company would be considered to be weak.

Therefore, when all of the business such as the production, sale, research and development etc. for certain goods are spun off by the consolidation in the joint investment company, the market share, rank etc. of the joint investment company itself would be considered in the review.

On the other hand, if a part of certain business departments of the each investing companies is transferred to the joint investment company, there is a possibility that the coordinated relationship between the investing companies would arise through the operation of the joint investment company. To determine whether the coordinated relationship between the investing companies would emerge or not, the specific contents of the investing contract, the actual conditions of the combination and the transactions between the companies are considered.

Suppose that, the production sections of goods are transferred to the joint investment company while each of the investing companies continue to sell goods. When the coordinated relationship between these investing companies would occur through the operation of the joint investment company, the impact on the competition is considered by taking such means as summing up market shares of the investing companies. On the other hand, even though the investing companies continue to sell goods after founding the joint investment company, when some measures are taken to

prevent coordinated relationship between these investing companies from arising through the operation of the joint investment company, there will be much less impact on the competition. (See 3 (1) later)

D. Market Share Differences from the Competitors

When the combined market share of the company group has relatively larger difference from those of competitors, it is more difficult for the competitors in place of the company group, without the price increase, to supply goods sufficiently in response to the company group's attempt to raise the price. Thus the competitors' constraining powers for the price rise of the company group would be weakened.

Therefore, the larger the market share differences between the company group and the competitors are, the bigger the impact of the business combination on the competition is.

On the other hand, after the business combination, when there are the competitors with the market shares equal to or higher than those of the company group, these competitors could be the factors which prevent the company group from controlling the price etc. freely to a certain extent.

Concurrently, in considering the market share differences from the competitors, the excess capacity of the competitors and the degree of substitutability between goods sold by the company group and the competitors are considered. (See E below)

E. Excess capacity and the Substitutability of the Competitors

When the company group raise the price of goods, if the excess capacity of the competitors is not sufficient, it is not easy for the competitors, without increasing the price, to expand the sales of goods. Thus the competitors' constraining

powers for the price rise by the company group could be weakened. In this manner, even though the market share differences between the company group and the competitors are not large, it could be considered that the business combination's impact on the competition would not be small when the excess capacity of the competitors are not sufficient.

In the mean time, when goods are differentiated by brands and there is high substitutability between goods sold by the parties, the degree of substitutability between goods sold by the competitors and the company group is considered. When the substitutability is small, even though the market share differences between the company group and the competitors are not large, it could be considered that the business combination's impact on the competition would not be small.

F. The Case that the Effect of Business combination May not be Substantially to Restrain Competition

To decide whether the effect of a business combination may be substantially to restrain competition or not, the factors including those mentioned above and later in section (2) and so on are taken into consideration in each specific case. However, in the following cases, the possibility that the effect of horizontal business combinations may be substantially to restrain competition in a particular field of trade through the unilateral conduct is usually thought to be small. (Nonetheless, this only apply to the cases where the business combination will not have any problem in respect of the previous condition of competition among the parties or excess capacity and the substitutability of the competitors. Concurrently, when goods are differentiated, the substitutability between goods sold by the competitors with 10% and more market share and goods sold by the company group is considered.)

(a) The market structure is not highly oligopolistic, the market share of the company group after the combination is not more than 25%, and there are one or more competitors whose market shares are more than 10% (See note 7 and 8)

(Note 7) "The market structure is not highly oligopolistic" means that the HHI after business combination is less than 1800.

When it is difficult to identify the market share of all companies and to calculate the accurate figure of HHI, estimated figure is used to decide whether the HHI is less than 1800 or not. This estimating figure is calculated by the following formula which is drawn up from the Production Concentration Study:

$$\text{HHI} = 69.5 \times \text{cumulative market shares of top three companies} - 2344.4$$

However, this does not apply to the case where the HHI with the identified market shares is obviously above 1800.

(Note 8) To calculate the market share, the market share of import is treated as the market share of the competitors except for the import by the manufactures from its overseas subsidiaries.

(b) The market structure is not highly oligopolistic, the market share of the company group after the combination is not more than 35%, and there are two or more competitors whose market share are more than 10% (See not 7 and 8)

(c) The increment of market share is in significant and there is one or more competitors whose market shares are more than 10% (See not 8 and 9)

(Note 9) "The increment of market share is in significant" means that the increment of HHI figure by the business combinations is less than 100.

(2) Import

When there is sufficient pressure from imports, the possibility that the effect of business combinations may be substantially to restrain competition in a particular field of trade is usually thought to be small.

When the amount of imported goods which are homogeneous with domestic ones is easy to increase, and the imported goods at lower price is likely to increase if the company group raises the domestic price of goods, the company group will not raise the domestic price taking into consideration that their sales will be taken by the imports.

The following factors all together are considered in deciding whether the pressure from imports is sufficient or not.

(a) Trend of import, the relationship of the amount of imports to the price differential between the domestic goods and the imports

(b) Competitiveness of the imports with respect to price, quality etc.

(c) Existence of the problems in distribution, storage facilities of import or so-called users' familiarity with domestic goods

(d) Major users' experience to use the imports

(e) likelihood of import by leading foreign competitors, the number of such competitors and their excess capacity etc.

(f) Demand and supply balance in the exporting countries

(g) Factors influencing the pricing of the imports, exports or domestic goods and the price difference between them

(h) Import tax system such as customs or other legislative regulations

To consider whether import can be the factors which prevent the company group from controlling the price etc. freely to a certain extent, excess capacity of the imports is considered if domestic goods and the imports are homogenous. If those are differentiated, the degree of the substitutability between goods sold by the company group and the imports is considered.

Even though the current market share of the imports is small, if the users can increase the use of the imports easily when the price of domestic goods is raised, it is considered that there is pressures from import.

(3) Entry

When the entries into the markets are easy, they can be the factors which prevent the company group from controlling the price etc. freely to a certain extent. When the entries are easy, and it is likely that some companies try to entry the market by selling goods at the lower price if the company group raises the price, the group will refrain from increasing the price taking into consideration that their sales will be taken by the entrants.

To consider whether entries can be the factors which prevent the company group from controlling the price etc. freely to a certain extent, excess capacity of the entrants is considered if goods are homogenous. If those are differentiated, the degree of the substitutability between goods sold by the company group and the entrants is considered.

The following factors all together are considered to determine the possibility of entry.

(a) Existence of legislative entry regulations

(b) Degree of entry barriers in practice (e.g. the minimum scale of the capital for entry, the geographical and social conditions of location, technical conditions, conditions for the purchase of raw materials, sales conditions, state of the differentiation of goods, state of competitors such as entry and exit, change of the number of competitors, the trend of the change of the cumulative market shares of top three companies etc.)

(c) Existence of companies that can supply goods without significant change in the production facilities

(d) Existence of entry plans by other companies

(e) Likelihood of the entry to the domestic market by foreign companies

(4) Competitive Pressure from Related Markets

Competitive conditions in markets related to the particular field of trade determined in Section 2 are also considered. Such markets are, for example, those geographically neighboring to the defined particular field of trade, markets of the products processed from the goods defined as the particular field of trade, markets at the next level of transaction and markets of the products which have comparable functions and efficacy to the goods defined (such goods hereinafter referred to as "competing goods").

For instance, when there is vigorous competition in the neighboring markets, it will be evaluated as a factor which stimulates competition in the particular field of trade.

A. Comparable goods

When competing goods have comparable functions and efficacy to goods but have the separated market for it, these competing goods can be a factor which prevents the company group from controlling the price etc. freely to a certain extent depending on the comparability of functions and efficacy from the view points of users, prices, distribution networks etc.

B. Geographically neighboring market

When a particular field of trade is limited geographically and there are another geographically neighboring market where the same goods are supplied, the competition in the neighboring markets can be a factor which prevents the company group from controlling the price etc. freely to a certain extent depending on the closeness of location, distribution style, transportation, scale of the competitors.

C. State of the transaction at the next level

The competition in the markets situated as the next level to the particular field of trade can be a factor which prevents the company group in the markets from controlling the price etc. freely to a certain extent through the transactions between these markets.

As for the business combinations between raw materials producers, for instance, when the competition in the finished goods' markets is vigorous, the finished goods' producers who are the users of the raw materials try to purchase them as cheaply as possible in order to reduce the price of the finished goods. In this case, if the company group raises the price, they are likely to lose their sales significantly. Therefore, the competition in the next stage can be a factor which prevents the

company group from controlling the price etc. freely to a certain extent. Similarly, in view of the demand and supply balance of raw materials as well as major users' means of procurement, degree of diversity of their suppliers and their ease of switching trade partners, if the bargaining power in price of the producers of the finished goods is strong, it can be a factor which prevents the company group from controlling the price etc. freely to a certain extent.

(5) Overall Business Capabilities

In addition to the market share of the company group after the business combination, changes in the overall business capabilities of the company group such as raw material procurement ability, technological capability, marketing capability, credit worthiness, brand popularity, and advertising capability will be examined. For example, if the raw material procurement ability, technological capabilities, marketing capability, access to credit, brand power, advertising capability and other business capabilities of the company group is enhanced after the business combination and the competitiveness of the companies increases greatly due to the combination, its competitors may have difficulty to take competitive actions as a result.

(6) Efficiency

Economy of scale, integration of production facilities, specialization of factories, reduction in transportation costs, efficiency in research and development and other improvements of efficiency caused by the business combinations are examined in terms of their impact on competition. When improvement of efficiency is deemed likely to stimulate competition (for example, a low-ranking company increases its cost competitiveness, financing capability, raw material procurement ability and other fundamentals through a merger, which leads to lower product prices and higher product quality, and in turn promotes competition with high-ranking companies), these positive impacts are considered.

(7) Financial Conditions of the Company Group

A. Poor Business Performance etc.

To evaluate the business ability of the company group, the financial conditions such as poor business performance of a part of the company group or a business section concerned to the combination are also considered.

Meanwhile, the possibility that the effect of the business combination may be substantially to restrain competition in a particular field of trade is usually thought to be small in such conditions as follows: a party to the combination is in excess of debt or unable to obtain loans for working capital and it is likely to go bankrupt and exit from the market in the near future; In addition, it is difficult to find any company that can relieve the party by a combination which gives less impact on competition than the other party to the combination.

B. Cases that The Effect may not be Substantially to Restrain Competition

Whether or not the effect of a business combination may be substantially to restrain competition is determined by the comprehensive considerations of all the relevant determining factors in each of the specific cases. However, in the following cases, it normally is not considered that the effect of a horizontal business combination may be substantially to restrain competition in a particular field of trade by unilateral conducts.

(a) Market share of the company group after the combination is not more than 50%. In addition, a party to the combination is in excess of debt or unable to obtain loans for working capita and it is likely to go bankrupt and exit from the market in the near future. Furthermore, it is difficult to find any company that can relieve the party by a combination which gives less impact on competition than the other party to the combination.

(b) Market share of the business department in question of the company group after the combination is not more than 50%. In addition, the business department of a party to the combination is in depression and likely to exit from the market in the near future. Furthermore, it is difficult to find any company that can relieve the business department by the combination which gives less impact on competition than the other party to the combination.

3. The determining factors to decide the Substantial Restraint of Competition through the Coordinated Conduct

To decide whether the effect of horizontal business combinations may be substantially to restrain competition in a particular field of trade through the coordinated conduct, the following factors are considered comprehensively.

(1) The position of the company group and the state of competitors

A. Number of the competitors

When there are few competitors in the particular field of trade or the market share is concentrated into a few leading companies, the behavior of the competitors can be predicted with high reliability.

Furthermore, when the companies sell homogeneous goods and have similar cost conditions, they tend to take coordinated conduct as they share common interests. In addition, it is easier to predict with high reliability whether competitors take coordinated conduct or not. Therefore, if the business combination brings such situations mentioned above, there will be large impact on the competition.

B. Competition among the Parties in the Past, etc.

In such cases where the parties have been scrambling for each other's market share or one of these parties has been aggressive in cutting prices, the fact that the parties have competed vigorously or their conduct in the market have invigorated

competition may be deemed to contribute to the reduction of prices throughout the market, the improvement of qualities or the variety of goods. If the combination eliminates such conditions as above mentioned, it brings large impact on the competition even if the combined market share or the rank of the parties is not high.

C. Excess capacity of the Competitors

If a company does not have sufficient excess capacity, the opportunities to expand market shares by cutting prices or deprive competitors of their market shares are limited. As a result, the company can not earn large profit by such conducts, and it is likely to commit to a coordinated conduct with the competitors.

On the other hand, if excess capacity of a company is large while that of competitors is small, when it reduces prices to gain sales, the sales to be deprived of by competitors through a price reduction in the near future is limited. Therefore, the incentive to commit to a coordinated conduct with the competitors will be smaller since profits from expanded sales are expected through reducing prices.

D. Treatment of Joint Investment Company

If certain business departments of the investing companies are completely spun off by consolidation in the joint investment company, the connection between the business of the investing companies and that of the joint investment company would be considered to be weak.

Therefore, when all of the business such as the production, sale, research and development etc. for certain goods are spun off by the consolidation in the joint investment company, whether the joint investment company itself will be committed to a coordinated conduct with its competitors is examined.

On the other hand, if a part of certain business departments of the each investing companies is transferred to the joint investment company, whether the investing companies are committed to coordinated conducts with their competitors is examined as well.

To determine whether the coordinated conduct of investing companies with their competitors would emerge or not, the contents of the investing contract between the investing companies in terms of the joint investment, the actual conditions of the combination, and the transactions between the investing companies, if any, are considered.

For example, when only the production sections of the goods are integrated into the joint investment company while each of the investing companies continue to sell the said goods, even though measures are taken to prevent coordinated relationship between the investing companies through the operation of a joint investment company, the production cost will become common. As a result, there will be less room for price competition and they will have incentive to commit to coordinated conduct with their competitors including the other investing company.

(2) Actual Situation of Trade, etc.

A. Conditions of Trade, etc.

When, for example, a trade association collects and provides such information of the member companies such as prices or production quantities, and each company can easily know the competitors' terms of trade, it is possible for each company to predict the behavior of the competitors in high reliability, and also easy to know whether the competitors are taking coordinated conducts or not. Furthermore, under these circumstances, if a company cuts its price in order to increase the sales, its competitors are easily aware of it and they are likely to try to recover the sales taken by

price cut of the company. As a result, the company has little incentive to take such an action.

On the other hand, when trade contracts are not in regular bases and the volume of orders are in a large unit, large profit are expected by cutting price and getting such contracts while such opportunities for the contracts are limited. Therefore, the party has little incentive to take coordinated conducts with the competitors and it is difficult to predict the competitors' behavior.

On the contrary, if the trade contracts are carried out regularly and the volume of orders is small, the coordinated conducts with the competitors are likely to occur.

B. Trend of Demand, Technological innovation etc.

When the demands are changing significantly or the technological innovation is frequent and the life cycle of goods is short, it is possible to get large profits by cutting price and increasing sales or depriving the sales of competitors. As a result, there will be less incentive to take coordinated conducts with competitors as well as it will be difficult to predict competitors' behavior, so that coordinated conducts with competitors are not likely to occur.

C. Past Competition Conditions

To determine whether the coordinated conducts will be taken or not, the changes of the market shares or prices in the past are considered as well.

For example, when these changes are large, the coordinated conducts with the competitors are not likely to occur because it is difficult to predict the competitors' behavior.

On the other hand, if these changes are small, it will be easier to predict the competitors' behavior and the possibility is higher that the coordinated conducts will occur. And, for example, when there were coordinated conducts regarding the revision of prices of goods, possibility is higher that the market conditions for trade are prone to coordinated conducts.

(3) Competitive Pressure from Import, Entry or Related Market

When there is a significant import pressure, if the companies raise the domestic price, they will lose their sales because of the increase of the imports. Therefore there will be less possibility of the coordinated conducts.

Due to the same process as mentioned above, it is difficult for the company group and the competitors to control the price etc. freely to a certain extent. However, when the importers have established themselves as domestic players, such importers may take coordinated conducts with the competitors including the parties.

The conditions regarding import described in the Section of 2 (2) (a) to (h) above are considered comprehensively to evaluate whether there are import pressures or not.

Entry pressures will have a similar influence on the possibility of coordinated conducts. Regarding the possibility of entries, the conditions described in the section 2 (3) (a) to (e) above are considered comprehensively.

The competitive pressures from the related market may also be a factor which prevents the coordinated conducts from emerging or the company group and its competitors from controlling the price etc. freely to a certain extent by the coordinated conduct.

For example, in case where the bargaining power in price of the users is stronger with reflecting the demand and supply conditions, major users' means of procurement, degree of diversity of their suppliers and their ease of switching trading partners, it will often be difficult for the company group and its competitors to commit to coordinated conducts.

(4) Efficiency and the Financial Conditions of the Company Group

Efficiency and the financial conditions of the company group are evaluated based on Section 2 (6) and (7) above.

Part V. The Effect of Vertical and Conglomerate Business combination May be Substantially to Restrain Competition

1. Guiding Principles

As mentioned above, vertical and conglomerate business combinations do not reduce the number of the competitive units. Therefore, they have less impact on competition than horizontal ones, and the effect of them usually may not be substantially to restrain competition except for cases where substantial restraint of competition is caused by closures of or exclusion from markets by coordinated conducts, etc. Similar to horizontal business combinations, vertical and conglomerate ones are also reviewed from both view points of unilateral conducts and coordinated conducts.

(1) Substantial Restraint of Competition by Unilateral Conduct

The typical cases in which the effect of vertical and conglomerate business combinations may be substantially to restrain competition in a particular field of trade by means of unilateral conducts are as follows.

When a vertical combination is completed, it is profitable for the parties to trade within the company group. As a result, there could be cases where other

companies would in fact lose the opportunities to trade actually and the transactions among the company group may raise the problems of closure or exclusivity. Supposing, a manufacturer of finished goods has a large market share and purchases raw materials from many suppliers. When such a manufacturer merges with one of its suppliers and only uses the raw materials from it, the other suppliers are likely to lose their business opportunities with the manufacturer that is their large customer. On the contrary, a supplier of a raw material has a large market share and supply with many manufacturers of finished goods. When the supplier merges with one of the manufacturers and only supply the raw materials to it, the other manufactures are likely to lose the business opportunities with their major supplier of raw materials. Similarly, when a strong manufacturer merges with a strong distributor, if it becomes difficult for the other manufacturers to enter unless they establish the distribution network by themselves, the merger will have a large impact on competition.

In addition, even when the company group continues the business with its competitors after the vertical combination, if the competitors in more disadvantage position in their business with the group than before, the impact on competition will be significant since effective competition between them can no longer be expected.

When the market share of the company group is large, a situation may easily emerge where the company group will be able to control the price etc. freely to a certain extent resulting from closure or exclusivity on the trade within the company group by the vertical business combination. In such cases, the effect of vertical business combination may be substantially to restrain competition.

A conglomerate business combination may raise the problem of closure or exclusivity when it increases the overall business capabilities of the company group. For example, if the combination increases the company group's business ability such as raw material procurement ability, technological capability, marketing capability, access to

credit, brand power, and advertising capability etc, and its competitiveness is greatly enhanced, its competitors may have difficulty to take competitive actions.

(2) Substantial Restraint of Competition by Coordinated Conduct

The typical cases where the effect of vertical and conglomerate business combinations may be substantially to restrain competition in a particular field of trade by means of coordinated conducts are as follows.

For example, when a manufacturer and a distributor become combined vertically, manufacturer can obtain the competitors' information of prices and so on through the distributor. As a result, manufactures which include the company group might be able to estimate the each other's behavior with high reliability. In such cases, a situation is likely to emerge where the company group and its competitors will be able to control the price etc. freely to a certain extent; thus the effect of vertical business combination may be substantially to restrain competition.

The same may be true for conglomerate business combinations.

(3) The Effect may not be Substantially to Restraint Competition

It is decided in light of the factors described on Section 2 later whether the effect of each vertical or conglomerate business combination may be substantially to restrain competition in a particular field of trade or not. However, when the market share of the company group after the combination falls within the conditions A and B below, the effect of the vertical or conglomerate business combination may not be substantially to restrain competition in a particular field of trade.

A. The market share of the company group after the combination is not more than 10% in all of the particular field of trade where the company group is involved

B. The market structure is not oligopolistic and the market share of the company group after the combination is not more than 25% in all of the particular field of trade where the company group is involved (See Note 5)

2. The determining factors to decide the Substantial Restraint of Competition through the Vertical and Conglomerate Business Combinations

(1) The determining factors to decide the Substantial Restraint of Competition through the Unilateral Conduct

To decide whether the effect of vertical and conglomerate business combinations may be substantially to restrain competition in a particular field of trade through the unilateral conduct, the following factors are considered comprehensively.

A. The position of the company group and the state of competitors

After the combination, if the size of the market share of the company group is small and the rank of it is also in a low position, there is less possibility that the problems of closure or exclusivity arise.

Also when the difference of the market shares between the company group and the competitors is small or excess capacities of the competitors are large, it is relatively easy for buyers from or sellers to the company group to find the alternative trade partners. Therefore, the possibility is smaller that the problems of closure or exclusivity arise.

To decide whether the effect of each vertical or conglomerate business combination may be substantially to restrain competition or not, the determining factors including those mentioned later in Section B and so on are taken into consideration. However, in the following cases, the possibility that the effect of vertical and

conglomerate business combinations may be substantially to restrain competition in a particular field of trade through the unilateral conduct is usually thought to be small.

(a) All of the particular field of trade where the company group is involved are not highly oligopolistic, the market share of the company group after the combination is not more than 25%, and there are one or more competitors whose market shares are more than 10% (See note 7 and 8)

(b) All of the particular field of trade where the company group is involved are not highly oligopolistic, the market share of the company group after the combination is not more than 35%, and there are two or more competitors whose market shares are more than 10% (See note 7 and 8)

B. Import, Entry, Overall Business Capabilities, Efficiency etc.

These factors are evaluated in light of the same standard in Section 2 (2) to (6) in Part IV above.

C. Financial Conditions of the Company Group

This is evaluated in light of the same standard in Section 2 (7) A in Part IV above.

D. Other factors

It is also considered that the business combination will eliminate the possibility of new entries if a part of the parties are the potential competitors to the other part of the parties.

(2) The factors to decide the Substantial Restraint of Competition through the Coordinated Conducts

This is evaluated in light of the same standard in Section 3 (1) to (3), 2 (6) and (7) A in Part IV above.

Part VI. Measures to Remedy the Substantial Restraint of Competition

1. Guiding Principles

Even though the effect of business combination may be substantially to restrain competition in a particular field of trade, such restraint may be remedied by certain appropriate measures taken by the company group. (Such measures referred to as “remedy(ies)” hereinafter).

It is considered on a case-by-case basis what kind of measures are appropriate as the remedies. However, the remedies basically should be ones which recover the lost competition after the combination in order to prevent the company group from controlling the price etc. freely to a certain extent.

In addition, the remedies should be completed before the implementation of the combination in principle.

Even if the remedies are to be taken unavoidably after the implementation of the combination, the dead line for the remedies should be imposed appropriately and definitely. Moreover, to divest the whole or a part of the businesses as remedies for example, it is desirable to decide the partners who succeed the business in advance of the implementation of the combination. Otherwise, the parties are required to obtain the permissions from the Fair Trade Commission in regard with the divesting partners.

2. Types of the Remedies

Typical remedies are illustrated as follows. To make the remedies appropriate, those measures are taken independently or in combinations.

(1) Divestiture of Business etc.

The most effective measures to solve the problems of the substantial restraint of competition by the business combinations are to establish new independent competitors, or to strengthen the existing competitors to be able to have the effective competitive constraint.

Such measures include a divestiture of a part of or whole of the business of the company group or a dissolution of the business combination such as the cancellation of the voting rights holding, reduction of the holding ratio of voting rights or cancellation of interlocking directorates and so on in another company.

When, as an exceptional example, it is difficult, because of the decrease of demand, to find a partner who takeover a part of or whole of the company group's business (e.g. section of production, sale or development), and research and development or services such as improvement of goods in response to users' requests are not important because goods are on a mature stage, it may be considered as effective remedies to give the competitors a right of trading at the price equivalent to the production cost of it. (In other words, to make contracts of long term supply.)

(2) Others

A. Measures to Promote Import and Entry

When the divestitures of business could not be taken as remedies because demand is decreasing and it is expected that a company which takes over a part of or whole of the company group's business do not appear easily, promotions of import or entry are exceptionally considered as remedial measures to solve the problem of the substantial restraint of competition in a particular of field.

For example, when the company group holds the storage facilities needed to import, the problems of the substantial restraint of competition in the

particular of field would be solved by the promotion of import by means of making such facilities available to the importers. Alternatively, the problems could be solved by granting the licenses of company group's patents to the competitors or new entrants on their requests.

B. Measures concerning Actions of the Company Group

In addition to the cases in Item (1) and (2) above, the measures concerning the actions of the company group could be considered as the measures to solve the problem of the substantial restraint of competition in the particular of field.

For example, when in a business combination goods are produced by the joint investment company but the sales of them are done by the respective investing companies, the problems of the substantial restraint of competition in a particular of field are solved by the measures which make it possible to block the exchange of information on each other's sales of the goods between the investing companies and between the investing companies and the joint investment company. (However see 3 (1) D in Part IV.) The problems of closure or exclusivity in markets could be solved by prohibiting discriminatory treatment of non- affiliated companies with regard to uses of essential facilities for the business.

(Attachment 1) Prior Consultation

When the Fair Trade Commission receives inquiries from companies into whether the effect of an actual plan of business combination may be substantially to restrain competition in a particular field of trade, it will review the plan based on these Guidelines and respond whether the effect of the business combination will substantially to restrain competition in light of Chapter IV of the Act.

Concerning the prior consultations, the Fair Trade Commission will handle them based on the guiding principle, "Policies dealing with prior consultation regarding enterprise combination plans". (December 11, 2002)

(Attachment 2) Shortening of the Waiting Period

Section 15 (4) of the Act (including such cases where the said provisions are applied mutatis mutandis by Section 15-2 (6) and 16 (5)) prohibits any company from effecting a merger until the expiration of a thirty-day waiting period from the date of the acceptance of the notification of the intended merger (including joint establishment type demerger, absorption type demerger or acquisition of business etc.). However, the same Subsection authorize the Fair Trade Commission, when it finds it necessary to do so, to shorten the waiting period. The shortening of the waiting period will be granted, in principle, when the requirements of both A and B below are satisfied.

A It is evident that the effect may not be substantially to restrain competition in any particular field of trade.

This requirement will be satisfied in those cases where the responses of the Fair Trade Commission to prior consultation indicates that the intended merger involves no problems under the Act and the notification is consistent with the consultation. Also, those cases which fall under the category of cases described in 1(3), 2(1)F and (7)B in the Part IV, 1(3) and the later part of 2(1)A of the Part V of these guidelines are very much likely to satisfy the requirement.

B There is a rational reason or reasons for the shortening of the waiting period.

This requirement will be satisfied in those case where there is a probability that unless the merger is effected within a certain time limit, the business of one or more of the merging companies would be imposed (for instance, bankruptcy, desertion of employees, loss of customers etc.).