

## Japan Fair Trade Commission

### Predatory Pricing

This questionnaire seeks information on ICN members' analysis and treatment of predatory pricing claims. Predatory pricing typically involves a practice by which a firm temporarily charges low prices in order to limit or eliminate competition, and thereby allows the firm to raise prices subsequently. This questionnaire concerns only treatment of single product discounts; rather than pricing practices involving multiple products (including bundling, tying, and related prices). Unless otherwise stated, the questions concern conduct by a dominant firm or firm with significant market power.

Respondents should feel free not to answer questions concerning aspects of your law or policy that are not well developed. Answers should be based on agency practice, legal guidelines, relevant case law, etc., rather than speculation.

#### *Analysis (elements and evidence)*

1. Please provide the main relevant texts (in English if available) of your jurisdiction's laws and guidelines on predatory pricing.

**Predatory pricing can be dealt with mainly under two provisions of the Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade, or the Antimonopoly Act (AMA). The relevant portion of those provisions is as follows:**

#### **Article 3 [Prohibition of private monopolization or unreasonable restraint of trade]**

**No entrepreneur shall effect private monopolization or unreasonable restraint of trade.**

**“Private monopolization” above is defined in Art. 2(5) of the AMA as follows:**

**The term “private monopolization” as used in this Act means such business activities, by which any entrepreneur, individually or by combination or conspiracy with other entrepreneurs, or by any other manner, excludes or controls the business activities of other entrepreneurs, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.**

**Note 1: “Exclusion” in this definition is interpreted as making it difficult for other firms to continue their business activities or preventing other firms from entering the market.**

**Note 2: With respect to the meaning of “substantial restraint of competition,” there are court rulings that defined it as a state in which there actually appears or at least is going to emerge a situation in which a**

**specific firm or trade association can control the market by controlling the price, quality, quantity or other conditions at its own will and freely to a certain degree (Refer to Tokyo High Court ruling on the Toho-Subaru case on September 19, 1951 and Tokyo High Court ruling on the Toho-Shinto case on December 7, 1953). It is understood that the expression refers to achieving, maintaining and strengthening the state of market dominance as depicted by these rulings (JFTC Decision on Nippon Telegraph and Telephone East Corporation case on March 26, 2007).**

**Article 19[Prohibition of unfair trade practices]**

**No entrepreneur shall employ unfair trade practices.**

**“Unfair trade practices” above are designated by the Japan Fair Trade Commission in its notification (Designation of Unfair Trade Practices) and unjust low price sales are designated as one of those unfair trade practices, which is set out below:**

**Section 6[Unjust Low Price Sales]**

**Without proper justification, supplying a commodity or service continuously at a price which is excessively below cost incurred in the said supply, or otherwise unjustly supplying a commodity or service at a low price, thereby tending to cause difficulties to the business activities of other entrepreneurs.**

**Note: In the past cases of Private Monopolization, the JFTC has applied the provision of Private Monopolization to the firms holding a market share over 70%. On the other hand, the regulation of Unfair Trade Practices has been applied not only to firms in a dominant position but also to those not in a dominant position. Therefore, as oppose to the provision of Private Monopolization, the regulation of Unfair Trade Practices is applicable to both dominant firms and non-dominant firms.**

2. Please list your jurisdiction’s criteria for an abuse of dominance/monopolization based on predatory pricing.

**(1) Private Monopolization**

**The criteria necessary to demonstrate predatory pricing as Private Monopolization are clearly described at Art 2(5) of the AMA as follows:**

- a. any entrepreneur,
- b. individually or by combination or conspiracy with other entrepreneurs, or by any other manner,
- c. excludes the business activities of other entrepreneurs,
- d. thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade

**(2) Unfair Trade Practices**

**In case of unfair trade practices, the criteria for finding unjust low price sales are as follows:**

**a. without proper justification, supplying a commodity or service continuously at a price excessively below cost, or otherwise unjustly supplying a commodity or service at a low price**

**b. tending to cause difficulties to the business activities of other entrepreneurs**

**Note 1: The following responses are mostly based on “Guidelines Concerning Unfair Price Cutting Under the Antimonopoly Act” issued in 1984.**

**Note 2: “Cost” above means “gross cost of sales” that is explored below.**

**Note 3: While the price in the first half of “a.” above, i.e., “without proper justification, supplying a commodity or service continuously at a price excessively below cost,” means that the price is below “purchase price” over a certain period of time in the retail industry, the price in the second half of “a” above, i.e., “unjustly supplying a commodity or service at a low price,” is not limited to the price below “purchase price” but has to be below “gross cost of sales.” There can also be cases that the price in “unjustly supplying a commodity or service at a low price” is not set “continuously.”**

3. Please explain the circumstances under which a firm’s pricing is, or may be, considered “predatory” in your jurisdiction, by responding to the following questions:

a. As part of your analysis, does the price have to be below one or more measures of cost? **Yes/No**

i. If yes, please identify which of the following measures is/are used, as applicable:

Cost benchmark/measure	Used?		Comment
	Yes	No	
<u>Below marginal cost</u> (the cost of producing one more unit of output)			
<u>Below average variable cost</u> (cost that varies with output)	<b>Yes</b>		<b>Described as “purchase price”</b>
<u>Below average avoidable cost</u> (all costs that can be avoided by not producing some or all output)			
<u>Below average long run incremental cost</u> (average			

variable costs and product-specific fixed costs)			
<u>Below average total cost</u> (cost including variable, fixed and sunk – non-recoverable – costs)	<b>Yes</b>		<b>Described as “gross cost of sales”</b>
<u>Other measure of cost</u> (Please identify)			

- b. For each cost measure employed, please provide the definition of the measure used in your jurisdiction.

**The term used as the cost benchmark for “without proper justification, supplying a commodity or service continuously at a price excessively below cost” is “purchase price” which seems to be close to “average variable cost” in the economic sense. It should be noted, however, that this cost measure is principally applied to the retail industry and thus cost measures can vary depending on industries although the basic idea is the same.**

**The term used as the cost benchmark for “unjustly supplying a commodity or service at a low price” is “the gross cost of sales,” which seems to be close to “average total cost” in the economic sense. In concrete terms, “the gross cost of sales” is equivalent to “Purchase Price” + “Selling, General and Administrative Expenses.” It should be noted, however, that this cost measure is principally applied to the retail industry and thus cost measures can vary depending on industries although the basic idea is the same.**

- c. Is the same cost measure applied in all cases? Yes/No

- i. If different cost measures can be applied, for example on the basis of industry, please explain and provide examples, as available.

**The cost measure for “unjust low price sales” is principally applied to the retail industry and thus cost measures can vary depending on industries although the basic idea is the same. There is no established cost measure for “private monopolization.”**

- ii. If more than one cost measure can be applied in any individual case, please explain why and whether, in practice, this has raised issues.

N/A

- d. If price must be shown to be below cost, for which of the dominant firm’s sales must this be shown?

i. Is the only relevant comparison between the cost measure and the dominant firm's average price for all of its sales in the relevant market? Yes/**No**

1. If no, over which of the dominant firm's sales can cost be compared?

**Each selling price of goods of the firm is compared to each gross cost of sale or purchase price of goods.**

e. Could a firm's price above average total cost ever be found to be predatory? Yes/No

**The price in question has to be below average total cost to constitute "unjust low price sales." However, the price in question does not have to be below average total cost to constitute "private monopolization."**

i. If so, please explain the instances in which this might occur, and identify whether this has been the basis for actual enforcement.

f. If prices do not have to be below a cost benchmark to be considered predatory, please explain the circumstances under which the firm's prices are considered predatory.

4. To be unlawful, must the alleged predatory pricing occur in the market in which the firm holds a dominant position/substantial market power? Yes/No

**The market power is not required to constitute "unjust low price sales." However, the position of the firm in the market is taken into consideration when determining the effect on the business activities of other entrepreneurs. As for "private monopolization," the alleged predatory pricing does not necessarily have to occur in the market in which the firm holds a market power. For example, if a firm conducts the alleged predatory pricing in the market in which the firm does not hold a market power, subsidized by the profits earned in the dominant market, the conduct could constitute "private monopolization."**

a. If no, please explain.

5. Apart from the cost criteria referenced in question 3 above, must other objective criteria, such as the duration or continuity of the pricing behavior, be demonstrated for a finding of liability under a predatory pricing theory? Yes/No

**When applying “supplying a commodity or service at a price continuously excessively below cost,” the continuity of the pricing behavior is required. On the other hand, the continuity is not necessarily required in case of “unjustly supplying a commodity or service at a low price” and “private monopolization.” It should be noted that the duration, amount of a commodity or service sold, the position of the firm in the market are also taken into account to find “tendency to impede fair competition” or “substantial restraint of competition”**

- a. If so, please explain. For example, if the behavior must be sustained over a certain time period, why, and for what period?

**Although the effect on the business activities of other entrepreneurs in case of “unfair low price sales” would be large when the price cutting is carried out continuously over a relatively extended period of time, the concrete length of period is not clear. In case of “private monopolization,” similarly the effect on competition would vary according to the length of the period of the price cutting.**

6. On what type of evidence do you rely to prove predatory pricing? Please explain, including examples as appropriate.

- a. Are cost data used? **Yes/No**
  - i. If so, are cost data from the firm used? **Yes/No**
- b. Are there circumstances when cost data of other firms can be used? **Yes/No.**
  - i. If so, please specify the circumstances.

**Cost data of other firms can be used in order to prove the effect of the pricing behaviour on competition. Those data can show whether other firms are able to compete on the merits with the firm carrying out price cutting.**

- c. What other data or information is used, if any? Please provide examples as relevant.

**Information such as the degree of the difference between the price of the alleged predator and that of his competitor, decrease of sales of his competitor**

7. Does pricing below a particular cost benchmark create a presumption of predatory pricing? **Yes/No**

If yes, is this presumption rebuttable or irrebuttable? Please explain.

**This presumption is rebuttable because the effects on the competition and existence of justification are also considered.**

- b. If the presumption is rebuttable, what must be shown to rebut the presumption?

**Effects on the competition and existence of justification are taken into account to rebut the presumption.**

- 8. Is there a “safe harbor” from a finding of predatory pricing for pricing above a particular cost benchmark? Yes/No

- a. If yes, please explain, including the terms of the safe harbor.

**Pricing above the gross cost of sales is never challenged in case of “unjust low price sales,” which means essentially a safe harbour.**

**In case of “private monopolization,” there can be cases where pricing above the gross cost of sales constitutes “exclusion.” Those cases include the case where the price of the firm is below the cost of his competitors.**

- 9. Is recoupment (obtaining additional profits that more than offset profit sacrifices stemming from predatory pricing) required for a finding of liability under predatory pricing rules in your jurisdiction? Yes/No

If so:

- a. Is this assessment conducted separately from the analysis of the firm’s market power and the predation? Yes/No
- b. What factors are employed in assessing recoupment in your jurisdiction?
- c. Is there a specific recoupment calculation or amount to be shown? Yes/No
  - i. If so, what is this?
- d. Is there a relevant time period for recoupment? Yes/No
  - i. If so, what is it?
- e. Is it possible for recoupment to occur in a market different than the one in which the predatory pricing took place? Yes/No
  - i. If so, please explain and provide relevant examples.
- f. What degree of likelihood of recoupment is required (*e.g.*, possibility or probability)?

- i. Please provide examples of the recoupment standard of likelihood employed as part of your recoupment assessment.

10. Is the firm's intent relevant in predatory pricing cases? **Yes/No**

- a. If so, please describe the relevant type(s) of intent, and the evidence used to show the required intent, providing available examples.

**The Supreme Court (December 14, 1989) opined that “the existence of proper justification for the conduct is judged in the totality of the circumstances, taking into consideration the firm’s intent and purpose, state of the conduct, status of competition and condition of the market in the case, from the viewpoint of maintenance of fair competition” when finding “unjust low price sales.” Accordingly, the firm’s intent is relevant when examining “proper justification.” In case of “private monopolization,” the intent can be taken into consideration when finding “exclusion” although it is not clear from the provision.**

- b. If objective conditions for predatory pricing -- for example, pricing exceeding a certain cost benchmark or recoupment – are not demonstrated, does intent matter? **Yes/No**

**In case of “private monopolization,” there can be cases where pricing above the gross cost of sales constitutes “exclusion” when taking into account the intent and purpose of the firm.**

- i. If so, please explain.

11. In addition to proving below-cost pricing, must effects, such as market foreclosure or consumer harm, be demonstrated to establish liability? **Yes/No**

- a. If yes, please explain the elements assessed (*e.g.*, exit or delayed entry of competitors, price increases, prevention or delay of price decreases) and the types of evidence required to do so.

**The elements assessed are as follows:**

- a. **scale and state of business of the price cutting firm**
- b. **amount of commodity or service sold and its duration**
- c. **state of advertisement activities of the price cutting firm**
- d. **character of the commodity or service**
- e. **situation of competitors such as the decrease of sales of competitors and situation of the exit and entry of competitors caused by the price cutting**

**Types of evidence include statement and document.**

## *Justifications and Defenses*

12. What type of justifications or defenses, if any, are permitted for predatory pricing, *e.g.*, an efficiency, meeting competition or objective necessity defense? Please explain and provide examples, as relevant.

**Where there is “proper justification” for the alleged predatory pricing, there is no “unjust low price sales” in case of “unfair trade practices.” The following cases are generally considered as “proper justification.” For example, with perishable goods (the quality of which can decline precipitously) and seasonal goods which have not been sold during the period of peak demand, clearance sales can sometimes be a necessity, in which case reduced prices are not considered unfair. This also holds true when the price of a given product drops due to a change in supply and demand conditions. Furthermore, concerning products that are damaged, part of an incomplete set, or otherwise impaired, it is only natural that such imperfections be reflected in the price, thus those cases are also deemed to be “proper justification.”**

**“An efficiency” is one of the elements considered to judge whether the alleged predatory pricing constitutes “exclusion” in “private monopolization.” Those elements include the firm’s intent and purpose, state of the conduct and justifications.**

**Note: As for “meeting competition,” if a firm conducts predatory pricing even in order to meet competition from his competitors, that conduct does not constitute “proper justification” so long as it causes difficulties to the business activities of his competitors.**

- a. What is the standard of proof applicable to these defenses? Who bears the burden of proof? What evidence is required to demonstrate that these defenses or justifications are met?

## *Enforcement*

13. Please provide the following information for the past ten years (as information is available):
- a. The number of predatory pricing cases your agency reviewed (investigated beyond a preliminary phase).

**The number of cases concerning predation handled by the JFTC in FY 1998-2007 (as of October) amounted to 142, including 3 cases resulting in agency decisions, 40 cases resulting in warnings, and 75 cases resulting in cautions.**

**Note 1: If the JFTC finds suspected violation, then it issues “warning” to entrepreneur(s) concerned and guides them to take elimination measures (a “warning” is considered an administrative guidance.”).**

**Note 2: If the JFTC does not find violation but finds conduct which**

**may lead to violation, then it issues “caution” as a preventive measure for it (a “caution” is more lenient than “warning,” and not considered an administrative guidance).**

- b. The number of these cases that resulted in (i) an agency decision that the conduct violates antitrust rules; (ii) a settlement with relief.

**See “a” above.**

- c. The number of agency decisions issued, if any, that held that the practice did not violate your jurisdiction’s predatory pricing rules (*i.e.*, “clearance decisions”).

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- d. Each of the number of agency decisions or settlements that were (i) challenged in court and, of those, either (ii) overturned by court decision or (iii) confirmed by court decision.

**(i) 1 (Pending before Tokyo High Court as of October 2007)**

**(ii) None**

**(iii) None**

- 14. Does your jurisdiction allow private cases challenging predatory pricing?  
Yes/No.

- a. Please provide a short description of representative examples, as available.

**Art. 24 of the Antimonopoly Act provides that “[a] person whose interests are infringed or likely to be infringed by an act in violation of the provisions of...Article 19 and who is thereby suffering or likely to suffer extreme damages is entitled to seek the suspension or prevention of such infringement from an entrepreneur...that infringe or is likely to infringe such interests.” Predatory pricing is one of “unfair trade practices” prohibited by Article 19.**

**Moreover, Art. 25 stipulates that “[a]ny entrepreneur that has committed an act in violation of the provisions of Articles 3, ... 19...shall be liable for damages suffered by another party.”**

**It should be also noted that the violation of Art. 3 and 19 is generally subject to damage suit as tort in accordance with Art. 709 of Civil Law.**

- 15. Is predatory pricing a civil and/or a criminal violation of your jurisdiction’s antitrust laws?

Since “private monopolization” could be a criminal violation as well as administrative, predatory pricing could be a criminal violation as long as it constitutes “private monopolization.” On the other hand, if predatory pricing is treated as “unfair trade practices,” it is an administrative violation.

- a. If both, what are the differences in the criteria applied to these categories?
- b. On what basis does the agency choose to bring a criminal or civil case?

**Although “private monopolization” could be a criminal violation, the JFTC has sole discretion on whether or not it files an accusation with the Prosecutor General. The JFTC takes a position that the JFTC actively files criminal accusations if the violation is vicious and serious, and has wide spread influence on people’s living, or if the violation involves those firms or industries who are repeat offenders or those who do not abide by the cease and desist order, in which administrative measures by the JFTC are not considered to fulfil the purpose of the AMA. However, we do not have a case yet.**

16. As relevant, please provide a short English summary of the leading predatory pricing decisions/cases in your jurisdiction, including information on the method used to calculate costs, to the extent applicable, and, if possible, a link to the English translation, an executive summary or press release of the case.

**The Commission issued a cease and desist order to a retailer (X) of oil products in violation of Article 19 of the Antimonopoly Act in May 2006.**

**The Commission found that X set the price of normal volatile oil in two gas stations at the lowest price among the prices of retailers operating in that area and advertised the price on the billboard in front of the gas stations to show the price to the consumers with the intent to exclude other retailers operating in the area.**

**One gas station of X set the price below the gross cost of sales (purchase price and selling expenses including salaries) for the period of 26 days and set the price below the purchase price for the period of 80 days. The other gas station of X set the price below the gross cost of sales for the period of 13 days and set the price below the purchase price for the period of 30 days. The sales of competitors of X have decreased during the period of X’s price cutting.**

**The Commission found that X’s conduct tended to cause difficulties to the business activities of other retailers of oil products operating in that area.**

17. Please provide any additional comments that you would like to make on your experience with predatory pricing rules and their enforcement in your jurisdiction, including, as appropriate but not limited to:

- a. Whether there have there been or you expect there to be major developments or significant changes in the criteria by which you assess predatory pricing, explaining these developments as relevant.
- b. Whether there are significant policy and/or practical considerations that may lead to greater or lesser agency enforcement against predatory pricing pursuant to unilateral conduct rules in your jurisdiction, *e.g.*, concern with the risks of false positives/false negatives, the existence of related laws such as a general ban on below-cost pricing, limited evidence of consumer harm, and/or difficulties in obtaining reliable cost data (please provide explanation as relevant).

## Exclusive Dealing/Single Branding

This questionnaire seeks information on the analysis and treatment of exclusive dealing (referred to as single branding in some jurisdictions) by ICN member competition authorities. For purposes of this questionnaire, we refer to “exclusive dealing” and “single branding” as conduct that requires or induces customers or suppliers to deal solely or predominantly with that firm. Nevertheless, this questionnaire does not cover tying, bundling, loyalty discounts, rebates or related practices, which your responses should therefore not address. Unless otherwise stated, the questions concern conduct by a dominant firm or firm with significant market power.

Respondents should feel free not to answer questions concerning aspects of your law or policy that are not well developed. Answers should be based on agency practice, legal guidelines, relevant case law, etc., rather than speculation.

### *Legal Basis and Specific Elements*

1. Please provide the main relevant texts (in English if available) of your jurisdiction’s laws and guidelines on exclusive dealing/single branding.

**Exclusive dealing can be dealt with mainly under two provisions of the Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade, or the Antimonopoly Act (AMA). The relevant portion of those provisions is as follows:**

**Article 3 [Prohibition of private monopolization or unreasonable restraint of trade]**

**No entrepreneur shall effect private monopolization or unreasonable restraint of trade.**

**“Private monopolization” above is defined in Art. 2(5) of the AMA as follows:**

**The term “private monopolization” as used in this Act means such business activities, by which any entrepreneur, individually or by combination or conspiracy with other entrepreneurs, or by any other manner, excludes or controls the business activities of other entrepreneurs, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.**

**Note 1: “Exclusion” in this definition is interpreted as making it difficult for other firms to continue their business activities or prevent other firms from entering the market.**

**Note 2: With respect to the meaning of “substantial restraint of competition,” there are court rulings that defined it as a state in which there actually appears or at least is going to emerge a situation in which a**

**specific firm or trade association can control the market by controlling the price, quality, quantity or other conditions at its own will and freely to a certain degree (Refer to Tokyo High Court ruling on the Toho-Subaru case on September 19, 1951 and Tokyo High Court ruling on the Toho-Shinto case on December 7, 1953). It is understood that the expression refers to achieving, maintaining and strengthening the state of market dominance as depicted by these rulings (JFTC Decision on Nippon Telegraph and Telephone East Corporation case on March 26, 2007).**

#### **Article 19[Prohibition of unfair trade practices]**

**No entrepreneur shall employ unfair trade practices.**

**“Unfair trade practices” above are designated by the Japan Fair Trade Commission in its notification (Designation of Unfair Trade Practices) and dealing on exclusive terms is designated as one of those unfair trade practices, which is set out below:**

#### **Section 11[Dealing on Exclusive Terms]**

**Unjustly dealing with the other party on condition that the said party shall not deal with a competitor, thereby tending to reduce transaction opportunities for the said competitor.**

**Note: In the past cases of Private Monopolization, the JFTC has applied the provision of Private Monopolization to the firms holding a market share over 70%. On the other hand, the regulation of Unfair Trade Practices has been applied not only to firms in a dominant position but also to those not in a dominant position. Therefore, as oppose to the provision of Private Monopolization, the regulation of Unfair Trade Practices is applicable to both dominant firms and non-dominant firms.**

2. Please list your jurisdiction’s criteria for an abuse of dominance/monopolization based on exclusive dealing.

#### **(1) Private Monopolization**

**The criteria necessary to demonstrate exclusive dealing as Private Monopolization are clearly described at Art 2(5) of the AMA as follows:**

- a. any entrepreneur,
- b. individually or by combination or conspiracy with other entrepreneurs, or by any other manner,
- c. excludes the business activities of other entrepreneurs,
- d. thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade

#### **(2) Unfair Trade Practices**

**In case of unfair trade practices, the criteria for finding dealing on exclusive terms are as follows:**

- a. unjustly dealing with the other party on condition that the said party shall not deal with a competitor,**
- b. tending to reduce transaction opportunities for the said competitor**

**Note: The following responses are mostly based on “Guidelines Concerning Distribution Systems and Business Practices” issued in 1991.**

### *Exclusive Purchasing and Supply Arrangements*

3. How does your jurisdiction define single branding or exclusive dealing? For example: Must a firm require that all purchases come from it or that all sales go to it? Can something less than “all purchases” or “all sales” be considered single branding or exclusive dealing? Please specify (providing actual percentages, as relevant).

**Because “Dealing on Exclusive Terms” is defined as “[u]njustly dealing with the other party on condition that the said party shall not deal with a competitor, thereby tending to reduce transaction opportunities for the said competitor,” the concept requires a firm to mandate that all purchases come from it or all sales go to it. It should be noted, however, that all purchases does not have to come from a firm or all sales do not have to go to a firm when applying “private monopolization.”**

4. Is the duration of the arrangement relevant to your assessment? Yes/No

**However, the duration of the arrangement may become relevant in some cases. For example, the possibility to “tend to reduce business opportunities of the competitors and making it difficult for them to easily find alternative trading partners” or “restrain competition substantially” may increase when the duration of the exclusive arrangement is long rather than short.**

- a. If so, please explain how and why, providing examples.

5. Must the firm’s use of such arrangements cover a substantial portion of the market? Yes/No

**However, the firm’s use of such arrangements do not necessarily cover a substantial portion of the market in some cases as long as those arrangements “tend to reduce business opportunities of the competitors and making it difficult for them to easily find alternative trading partners” or “restrain competition substantially.”**

- a. If so, how do you interpret this requirement, including any relevant percentage thresholds for the purchase or supply covered, and the evidence needed to determine whether this is met?

**If the firm is a seller (meaning the relevant market is supplier's market), when the firm's market share is no less than 10% or the firm's position is within the top three in the market, the possibility is relatively high that the firm's conduct might result in tending to reduce business opportunities of the competitors and making it difficult for them to easily find alternative trading partners in case of Unfair Trade Practices.**

**In the past cases of Private Monopolization, the JFTC has applied the provision of Private Monopolization to the firms holding a market share over 70%.**

**If the firm is a buyer, in case where an influential finished product manufacturer in a market requests to influential parts manufacturers that they do not sell parts to competitors of the said influential finished product manufacturer or restrict the sales of parts to competitors, and obtains consent from such parts manufacturers to that effect, such conduct could constitute "unfair trade practices." In this case, the firm influential in a market means that the firm's share in the market where the firm sells to his customers is no less than 10% or the firm's position is within the top three in the market.**

6. Does it matter whether the arrangement was requested by the non-dominant customer or supplier? Yes/No

**The arrangements are not justified even if they were requested by the non-dominant firms as long as the arrangements "tend to reduce business opportunities of the competitors and making it difficult for them to easily find alternative trading partners" or cause "substantial restraint of competition."**

- a. If so, how and why?

7. Might otherwise legal exclusive dealing/single branding arrangements be deemed abusive if they contain other provisions, *e.g.*, an "English Clause" (requiring *e.g.*, the customer to report any better offers to the supplier, and prohibiting the customer from accepting the offer unless the supplier does not match it), rights of first refusal (right of, *e.g.*, the supplier to enter into an agreement with the customer according to specified terms, before the customer is entitled to enter into an agreement with a third party)? Yes/No

- a. If so, please explain and provide examples.

**Those other types of arrangements do not necessarily constitute "Dealing on Exclusive Terms" but can constitute "Dealing on Restrictive Terms," which is one of "unfair trade practices." "Dealing on Restrictive Terms" is designated as below by the Japan Fair Trade Commission as one of "unfair trade practices" like "Dealing on Exclusive Terms."**

**Section 13[Dealing on Restrictive Terms]**

**Dealing with the other party on conditions which unjustly restrict any transaction between the said party and his other transacting party or other business activities of the said party.**

**For example, in case where an influential financial firm in a market provides finance for an influential distributor on condition that the distributor exclusively deals with manufacturer having close relations with the financial firm, tending to reduce business opportunities of the competitors of the manufacturer and making it difficult for them to easily find alternative trading partners, such conduct could constitute “dealing on restrictive terms.”**

**Of course, those arrangements can constitute “private monopolization” as well if they cause “substantial restraint of trade.”**

### *Presumptions and Safe Harbors*

8. Are there circumstances under which a firm’s use of single branding or exclusive dealing arrangements is presumed illegal? **Yes/No**
  - a. If so, please identify the circumstances.
  - b. Is the presumption rebuttable? **Yes/No**
    - i. If so, what must be shown to rebut the presumption?
9. Is there a “safe harbor” from a finding of liability under your single branding/exclusive dealing provisions? **Yes/No**
  - a. If so, please explain, including its terms.

**In case of a low-ranked or newly-entered firm which has a market share of less than 10% and whose position is the fourth or later, the conduct usually would not result in reducing business opportunities of the competitors and making it difficult for them to easily find alternative trading partners, and such conduct is not illegal.**

### *Effects*

10. Must a market foreclosure effect be shown for an abuse? **Yes/No**

**Note: We do not use such a word as “abuse.”**

- a. How is market foreclosure defined in your jurisdiction?

**“Tending to reduce business opportunities of the competitors and making it difficult for them to easily find alternative trading partners” or “substantial restraint of competition.”**

- b. Which factors are taken into account to assess a market foreclosure effect (level of dominance, percentage of market demand/purchases or supply covered by the arrangement, existence of alternative sources of supply, entry barriers, scale economies, possibility and practicability of switching, others)? Please specify the factors considered, including, as relevant, the percentage of demand/supply covered.

**The following factors are taken into account to assess a market foreclosure effect:**

**(1) Structure of the market (market concentration, characteristics of the product, degree of product differentiation, distribution channels, difficulty in the market entry, etc.);**

**(2) Position of the firm in the market (in terms of market share, rank, brand name, etc.);**

**(3) Market share of parties affected by the conduct at issue and their positions in the market; and**

**(4) Impact of the conduct on business activities of the affected parties (extent, manner, etc. of the conduct)**

- c. What evidence is used to demonstrate these effects and must the effects be actual, likely or potential effects?

**Evidence used includes statement and document.**

11. Must other effects, *e.g.*, on consumer welfare, be shown for an abuse? Yes/No
- a. If yes, please specify what must be demonstrated and the evidence required.

### ***Justifications/Defenses***

12. What justifications/defenses are available to the dominant firm, *e.g.*, an efficiency, meeting competition or objective necessity defense? Please specify.

**For “unfair trade practices,” in case where there is such proper justification in restricting transactions with competitors as follows, such restriction is not illegal:**

**(1) In case where a finished product manufacturer which commissions parts manufacturers, supplying materials, to make parts made with the materials exclusively to itself; or**

**(2) In case where a finished product manufacturer which commissions parts manufacturer to make parts, providing know-how (meaning those related to industrial technologies and excluding those that are not secret in nature), requires them to sell parts exclusively to itself, and if such**

**restriction is deemed necessary for keeping the know-how confidential, or preventing from unauthorized diversion of it.**

**Although there is no established justification or defences in case of “private monopolization,” the argument above concerning “proper justification” would hold true as well for “private monopolization.”**

- a. If there is an efficiencies defense, what efficiencies are considered (*e.g.*, relationship-specific investments, facilitating innovation, reduced transaction costs)? How are claims of improved service quality or reputation assessed?

N/A

- b. Are efficiencies balanced against competitive harm to determine whether liability attaches, or do they provide a complete defense without consideration of harm?

N/A

- c. Is there a meeting competition defense? Yes/ No.

- i. If yes, please explain.

- d. What is the standard of proof applicable to these defenses? What type of evidence is required to demonstrate that the defenses are met?

### ***Enforcement***

13. Please provide the following information for the past ten years (as information is available):
  - a. The number of exclusive dealing/single branding cases your agency reviewed (investigated beyond a preliminary phase).

**The number of cases concerning predation handled by the JFTC in FY 1998-2007 (as of October) amounted to 39, including 2 cases resulting in agency decisions, 3 cases resulting in warnings, and 19 cases resulting in cautions.**

**Note 1: If the JFTC finds suspected violation, then it issues “warning” to entrepreneur(s) concerned and guides them to take elimination measures (a “warning” is considered an administrative guidance.”).**

**Note 2: If the JFTC does not find violation but finds conduct which**

may lead to violation, then it issues “caution” as a preventive measure for it (a “caution” is more lenient than “warning,” and not considered an administrative guidance).

- b. The number of these cases that resulted in (i) an agency decision that the conduct violates antitrust rules; (ii) a settlement with relief.

See “a” above.

- c. The number of agency decisions issued, if any, that held that the practice did not violate your jurisdiction’s exclusive dealing/single branding rules (*i.e.*, “clearance decisions”).

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- d. Each of the number of agency decisions or settlements that were (i) challenged in court and, of those, either (ii) overturned by court decision or (iii) confirmed by court decision.

None

- 14. Does your jurisdiction allow private cases challenging exclusive dealing/single? Yes/No

- a. Please provide a short description of representative examples, as available.

**Art. 24 of the Antimonopoly Act provides that “[a] person whose interests are infringed or likely to be infringed by an act in violation of the provisions of...Article 19 and who is thereby suffering or likely to suffer extreme damages is entitled to seek the suspension or prevention of such infringement from an entrepreneur...that infringe or is likely to infringe such interests. Predatory pricing is one of “unfair trade practices” prohibited by Article 19.**

**Moreover, Art. 25 stipulates that “[a]ny entrepreneur that has committed an act in violation of the provisions of Articles 3, ...19...shall be liable for damages suffered by another party.”**

**It should be also noted that the violation of Art. 3 and 19 is generally subject to damage suit as tort in accordance with Art. 709 of Civil Law.**

- 15. As relevant, please provide a short English summary of the leading exclusive dealing/single branding cases in your jurisdiction and, if possible, a link to the English translation of the decision, an executive summary or the press release of the case.

**The Commission issued a recommendation to a distributor (X) of Central Processing Unit (CPU), which is a component in a computer, in violation of Art. 3 of the AMA in March 2005.**

**The Commission found that X promised to provide pecuniary interests to those PC manufacturers on condition that they carried X's CPU in their PCs to the extent that 90% to 100% of CPU inside their PCs was X's CPU, thus prevented those PC manufactures from carrying CPU of X's competitors.**

**The Commission found that X substantially restrained the competition in the distribution market of CPU for PC manufacturers in Japan by excluding the business activities of his competitors.**

**<http://www.jftc.go.jp/e-page/pressreleases/2005/March/050308intel.pdf>**

16. Please provide any additional comments that you would like to make on your experience with exclusive dealing/single branding rules and their enforcement in your jurisdiction, including, as appropriate but not limited to whether there have there been or you expect there to be major developments or significant changes in the criteria by which you assess exclusive dealing/single branding, explaining these developments as relevant.