

## Unilateral Conduct Working Group Questionnaire

In case you have any questions on the questionnaire, please contact Elizabeth Kraus at the US FTC or Arno Rasek at the Bundeskartellamt. Please send the completed questionnaire by 31 October 2006 to [ekraus@ftc.gov](mailto:ekraus@ftc.gov) and [arno.rasek@bundeskartellamt.bund.de](mailto:arno.rasek@bundeskartellamt.bund.de), and provide a contact person who can answer possible questions on your response.

### A. Objectives of unilateral conduct laws

1. With regard to your jurisdiction's unilateral conduct rules – *e.g.*, rules concerning the prohibition of abuse of dominance or monopolization - please state the objectives of these rules (*e.g.*, consumer welfare, efficiency, protecting the competitive process), and identify the source from the following, as applicable:

Under the Anti Monopoly Act of Japan (the “AMA”) there are two different types of conduct subject to the unilateral conduct rules.

The first type of unilateral conduct specified under the AMA is “private monopolization.” This term means business activities, by which any firm, either individually, or in combination or conspiracy with other firm(s), excludes or controls the business activities of other firm(s), thereby causing a substantial restraint of competition in any particular field of trade. Private monopolization” is unique in that it requires “exclusion or control of business activities of other firm(s)”. Technically this differs from an “abuse of dominance type of conduct”. as the Japanese definition of “private monopolization” theoretically permits conduct which could be termed an “abuse of dominance” unless such conduct “excludes or controls the business activities of other firm(s)”. The objective of this restriction in the AMA has not been clearly explained, but some commentator explain that it is to prevent a firm from using suppressive means to create artificial control in the market .

The second type of unilateral conduct subject to legislative prohibition is “unfair trade practices.” This includes not only conduct widely recognized as being unilateral, such as a refusal to deal, but also conduct which may be considered as concerted conduct in another jurisdiction, such as resale price maintenance. Unfair trade practices are illegal if it tends to impede fair competition, even without a dominant position or market power. It is often explained that the objectives of the rule prohibiting “unfair trade practices” are to (i) prevent a decrease (even before the restraint) in fair competition, (ii) protect fair process in competition and (iii) protect freedom in business decisions.

- a. Constitution
  - b. Statutes
  - c. Regulations
  - d. Agency enforcement policy (*e.g.*, guidelines, speeches)
  - e. Case law
  - f. Other (please identify)
- a. Statutes (private monopolization and unfair trade practices); and
  - b. Regulations (unfair trade practices).

2. Are non-competition influences (such as promotion of industrial policy or distributive welfare) incorporated in these objectives? Please describe any such influences.

I would say No.

3. If there are multiple objectives, how are these balanced or reconciled?

While there is theoretical debate on the objectives of each type of unilateral conduct in the AMA, multiple objectives are often cited with regard to a particular type of conduct, such as a particular category of unfair trade practices. However, this does not give rise to conflicts in the practical application of the provisions.

4. How has your jurisdiction balanced the risks associated with over-deterrence (detering efficient, pro-competitive conduct as a result of excessive intervention) with the risks associated with under-deterrence (permitting anti-competitive conduct as a result of too little enforcement) in choosing its objectives for unilateral conduct rules? Is this choice affected by the nature of your economy?

The JFTC seems to be trying to avoid over-deterrence by limiting its enforcement to cases in which a violation is clear, given the fact that unilateral conduct may have pro competitive effect. This is particularly true in the case of unfair trade practices. However, the JFTC has, in the past, taken on controversial cases, such as those involving so-called NAP clause in the IT industry.

5. With regard to exemptions or exceptions to your laws specific to unilateral conduct (for example, for regulated sectors, government entities, purchasers, or exercise of intellectual property rights), please identify the exemption or exception and explain whether and how its goals differ from the objectives of your general unilateral conduct law and how the jurisdiction balances or reconciles these factors.

Although this is not directly related to abuse of dominance/monopolization, resale price maintenance of particular items, such as copy righted work or news papers, are exempt from the unfair trade practices restriction. Such exemptions are gradually being abolished by the JFTC.

6. If the objectives of, or exemptions or exceptions to, your unilateral conduct rules are influenced by the nature of your economy (*e.g.*, small, transition, or recently-liberalized), please explain.

7. If the objectives of, or exemptions or exceptions to, your unilateral conduct rules have been substantially reviewed or revised, please describe any change and the reason.

The scope of the exempt items in the resale price maintenance context mentioned above has been remarkably reduced. The reason for this is the change in the public's perception of items to be restricted.

8. Are there institutional features (*e.g.*, the possibility for a ministry to overrule competition agency decisions or the requirement the competition agency consult with

other governmental agencies) that affect your agency's ability to achieve the objectives of the unilateral conduct rules? If so, please explain.

9. Please describe any difficulties that your jurisdiction has experienced with its objectives for unilateral conduct rules. Based on your experience, what, if any, suggestions (including selection of other objectives) would you have for your or other jurisdictions, and why?

The distinction between "private monopolization" and "unfair trade practices" is often unclear. They sometimes overlap. A typical example is that exclusionary conduct, if committed by an influential firm, may fall under both "private monopolization" and "dealing on exclusive terms" which is one of the unfair trade practices. The sanctions for each of them are practically the same. However, since "unfair trade practices" only requires a tendency to impede competition, even without restraint of competition, the JFTC often applies the provision regarding unfair trade practices even in a case where it could apply the section of the AMA relating to private monopolization. Therefore, the expected roles of private monopolization and unfair trade practices may be unclear and/or questionable in some context.

## **B. Assessment of Dominance/Substantial Market Power**

1. Please provide a brief description of single-firm dominance/substantial market power as defined in the provisions of your jurisdiction's general competition law, relevant agency policy statements (e.g. guidelines, speeches) and/or case law that pertain to unilateral conduct. As appropriate, please also explain whether and how your agency categorizes different levels of dominance/substantial market power (e.g., "super dominance").

Though not exactly the same as "dominance or substantial market power", the term "substantial restraint of trade (*kyoso no jisshitsu teki seigen*)", as defined in a somewhat dated case, is often referred to in the context of economic power.

The term "competition is to be substantially restrained" means that competition itself is diminished, thereby creating a situation where a particular firm, or particular group of firms, could control the market by freely setting the price, quality, quantity or various other conditions. Judgment of the Tokyo High Court December 9, 1953 (*Toho v. JFTC*).

In addition, in the case of unfair trade practices, unilateral conduct which tends to impede fair competition is a violation of the AMA. In this sense, the conduct of a single firm having a much lower level of influence in the market than that needed to substantially restrain the competition may be enough to be a violation of the AMA.

2. Under your general competition law governing unilateral conduct, at which stage(s) can your competition agency intervene against potentially abusive unilateral conduct?

- If dominance/substantial market power is present  
     yes/no      Yes (for clarification, the existence of market power is not a violation, but the conduct to maintain market power may be a violation).





For instance, brand loyalty, uniqueness of products, switching costs (perhaps these might be sub-factors of buyer power).

7. Of the criteria that you use to assess single-firm dominance/substantial market power, which are the most important criteria?

I would say there is no clear answer.

8. Please explain how your authority evaluates each of the criteria that you use, and also how it weighs the different factors.

Normally, the JFTC says it considers them as a whole.

9. How do you evaluate the competitive significance, if any, of intellectual property rights (patents, trademarks, copyrights, etc.) in assessing dominance/substantial market power?

IP is a very big factor. It would be particularly true in the context of standards setting.

Is intellectual property presumed to create dominance/substantial market power in your jurisdiction?

yes/no

I am not aware of a case in which the courts have clearly ruled on this issue.

10. Does the assessment of dominance/substantial market power differ in a small or isolated economy from the assessment in a large or integrated economy? For example, might dominance in small markets be presumed at lower (or higher) levels of market share than in other jurisdictions? Do free trade agreements alter the assessment of dominance/substantial market power? If so, please explain why. [NB: Jurisdictions that do not consider themselves “small” economies are welcome to skip this question.]

11. Please explain briefly the link between the definition and assessment of dominance/substantial market power in your jurisdiction and the objectives of your unilateral conduct laws.

### **C. State-created Monopolies**

Throughout this section of the questionnaire, the term “state-created monopolies” refers to firms that are dominant or that have substantial market power due to state-imposed restraints of competition. In most cases, these firms were (or are still) owned by the state and the state did not (or still does not) allow for any private competitor. In an effort to avoid duplication with the ICN’s previous work, this project does not address the interface with network access or price-cap regulation implemented by a

sector-specific regulator. Accordingly, we request that you do not focus on sectors that are/were regarded as “natural monopolies” and that are now subject to such regulation. Therefore, please answer the questions excluding references to the *telecoms, energy, water, and railways* sectors.

### I. State-created Monopolies

1. What are the main sectors of your country in which state-created monopolies exist? Please describe important sector examples, including whether these monopolies are state-owned<sup>2</sup>, state-controlled<sup>3</sup>, state-enabled or facilitated<sup>4</sup>, recently privatized and/or liberalized, regional monopolies,<sup>5</sup> etc.

Mail delivery service - government owned.  
It was privatized very recently.

2. Please discuss the objectives behind the creation and/or perpetuation of state-created monopolies by providing specific examples from your jurisdiction. If the rationale for retaining the state-created monopoly was challenged (for example as a condition of membership in an international organization or to join an economic alliance or regional trade agreement) or has changed over time, please explain.<sup>6</sup>

3. Are there any legal or practical restrictions or difficulties faced by your competition agency in antitrust enforcement against state-created monopolies? If yes, please provide details and/or sample cases, for example:

- Legal restrictions/scope of application: Is there a "state action defense" (i.e. competition law does not apply to state entities or state acts) or any special exemptions/exceptions for the state-created monopolies from the general antitrust law in your jurisdiction?
- Practical restrictions/difficulties: Please describe any practical restrictions that you have faced or may face in antitrust enforcement against state-created monopolies, such as instructions that your agency may receive from the government, political pressure, or overcoming vested interests.

4. How does the assessment of dominance/substantial market power of state-created monopolies differ from other dominance/substantial market power cases?

### II. Privatization and Liberalization Process and the Advocacy Role of Competition Agencies

<sup>2</sup> Those undertakings that are 100% owned by the State.

<sup>3</sup> The control belongs to the State, without taking into consideration the amount of the % of the State share.

<sup>4</sup> E.g. where a monopoly exists due to exclusive rights granted by the state or due to state-imposed restraints of competition.

<sup>5</sup> Includes public/private undertakings that are granted exclusive rights within a certain region.

<sup>6</sup> The relevant information for answering questions 2, 5 and 6 may not readily be available within your agency. In this case, it is not necessary for you to conduct a research effort.

5. Please briefly describe the ongoing or past privatization and liberalization process in your country. Is there a specific legal framework for the privatization in your country (e.g. a specific privatization law) ?
6. What are the objectives of your government in the privatization and liberalization of state-created monopolies (for example, raising competition/consumer welfare, maximizing revenue from the sale, etc.)?
7. Is competition law applicable to privatization transactions (e.g. approval of interested bidders or the successful bidder under its merger control powers)?
8. Please summarize the advocacy role of your agency in the privatization and liberalization of state-created monopolies, including as applicable:
- What are the legal instruments used by your agency for that purpose? To what extent are other government entities obliged or encouraged to seek the competition agency's opinion on or approval of privatization and/or liberalization proposals?
  - To what extent does the advocacy role of your agency have impact on privatization and liberalization? Please provide examples of successes or failures if available.

#### **D. General**

1. From among the following, how would you characterize your jurisdiction:  
developed / developing / transitioning?

Developing.

2. Please provide English-language citations to or summaries or excerpts of legislative history, leading judicial or agency decisions, or articles that explain your jurisdiction's choice of its unilateral conduct law objectives, its definition and assessment of dominance/substantial market power and/or its approach to state-created monopolies and privatization.

- ACT CONCERNING PROHIBITION OF PRIVATE MONOPOLIZATION AND MAINTENANCE OF FAIR TRADE (Act No. 54 of 14 April 1947) (Tentative Translation)  
[http://www.jftc.go.jp/e-page/legislation/ama/amended\\_ama.pdf](http://www.jftc.go.jp/e-page/legislation/ama/amended_ama.pdf)
- DESIGNATION OF UNFAIR TRADE PRACTICES, June 18, 1982, Fair Trade Commission Notification No. 15 of 1982  
<http://www.jftc.go.jp/e-page/legislation/ama/unfairtradepractices.pdf>
- GUIDELINES CONCERNING DISTRIBUTION SYSTEMS AND BUSINESS PRACTICES UNDER THE ANTIMONOPOLY ACT, July 11, 1991, Secretary General, Fair Trade Commission  
<http://www.jftc.go.jp/e-page/legislation/ama/distribution.pdf>

