

ICN Unilateral Conduct WG Questionnaire: Response from the JFTC

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:

- a. Constitution
- b. Statutes
- c. Regulations
- d. Agency enforcement policy (*e.g.*, guidelines, speeches)
- e. Case law
- f. Other (please identify)

A1. The objective of the Antimonopoly Act (hereinafter “AMA”) is stipulated in Section 1 of the AMA as the act aims “to promote free and fair competition, to stimulate the creative initiative of entrepreneurs, to encourage business activities of enterprises, to heighten the level of employment and people's real income, and thereby to promote the democratic and wholesome development of the national economy as well as to assure the interests of consumers in general” (Section 1 of the AMA).

Under such objective, the AMA regulates anticompetitive single-firm conduct by two different provisions: prohibition of Private Monopolization and that of Unfair Trade Practices.

(1) Private Monopolization

Private monopolization is prohibited in the Section 3 of the AMA. It is defined in the Article 2 (5) as: “*such business activities, by which any entrepreneur, individually or by combination or conspiracy with other entrepreneurs, or in 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.*”

“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.

“Control” in this definition is interpreted as depriving other firms of their freedom of decision-making concerning their business activities and forcing them to obey the controller's intent.

It should be mentioned that exclusion of competitors from the market is not within

the scope of regulation by the AMA if competitors are excluded from a market as a result of competition on the merits. Therefore, only in case where competitors are excluded from the market by means other than those based on competition on the merits, such exclusion can be subject to the AMA. In other words, the objective of regulation on Private Monopolization is to control activities which cause adverse effect on competition in the relevant market.

Regarding “substantial restraint of competition”, the Tokyo High Court (December 9, 1953) opined that “restraining competition substantially means bringing about a situation in which competition itself has significantly lessened and thereby a specific firm or firms can control the market by determining freely, to some extent, prices, qualities, volumes, and various other terms on its or their own volition.”

Unlike EC regulations on single-firm conduct, the provision of the AMA concerning Private Monopolization does not refer to the market position of a relevant firm in the market. Therefore, in our legal framework, dominant position of a firm or firm’s dominance is not a statutory prerequisite for establishing Private Monopolization, and in determining whether a specific single-firm conduct falls under Private Monopolization; that is, whether its specific unilateral conduct has substantially restrained competition in the relevant market, various relevant factors shall be considered in a comprehensive manner. Those factors to be taken into account would include market characteristics, market shares, entry barriers, buyer power as well as the relevant unilateral conduct itself and its anticompetitive effects.

It would be quite natural, however to presume that a firm which can control the market with some latitude of its own volition by excluding or controlling the business activities of other firms usually is in a dominant position or has substantial market power. As a matter of fact, that is the case for all the Private Monopolization cases the JFTC has handled so far.

(2) Unfair Trade Practices

The other provision stipulating regulations on single-firm conduct in the AMA is Unfair Trade Practices, which are prohibited by Section 19 of the AMA. The term “Unfair Trade Practices” is defined at Section 2 (9) as any act coming under any one of the following, which tends to impede fair competition and which is designated by the JFTC in its notification.

- (i) Unjustly discriminating against other entrepreneurs.
- (ii) Dealing at unjust prices.
- (iii) Unjustly inducing or coercing customers of a competitor to deal with oneself.
- (iv) Dealing with another party on such terms as will restrict unjustly the business activities of the said party.
- (v) Dealing with another party by unjust use of one’s bargaining position.

(vi) Unjustly interfering with a transaction between an entrepreneur who competes in Japan with oneself or the company of which oneself is a stockholder or an officer and another transaction counterparty; or in case such entrepreneur is a company, unjustly inducing, instigating, or coercing a stockholder or an officer of such company to act against the interests of such company.

The JFTC has, according to Section 2 (9) of the AMA, designated specifically 16 types of act as unfair trade practices by the JFTC's notification, which includes refusal to deal, discriminating price, and so on.

Among various types of Unfair Trade Practices, certain types of act such as unjust refusal to deal, unjust dealings on exclusive terms, unjust dealings on restrictive terms, unjust low sales price, unjustly discriminatory prices, and unjust tie-in sales can be considered to be used as means to unjustly create or maintain monopolies in the relevant market by controlling or excluding competitors. Regulations against those types of unfair trade practices are aimed at preventing Private Monopolization mentioned above at an incipient level. In short, a single-firm conduct falls under the Unfair Trade Practices, thereby prohibited, if such a conduct is found to belong to any of these specified conducts designated by the JFTC and to tend to impede fair competition.

"Tending to impede fair competition" is assumed not to have comparable anticompetitive effect to "substantial restraint on competition", which is necessary for violation of the prohibition of Private Monopolization.

The regulations on the Unfair Trade Practices are basically applicable to both "dominant" firms and "non-dominant" firms. However, regarding some types of conduct designated by the JFTC as Unfair Trade Practices, for example, unjust dealing on exclusive terms, whether a firm is "influential in the market" or not is to be considered.

Such an approach is based on the reasoning that, in the case of a firm ranked low in the market position or newly entered into the market, its conduct would not usually result in reducing the competitors' business opportunities or making it difficult for them to find alternative trading partners, both of which are described in "Guidelines concerning Distribution System and Business Practices" as examples tending to impede fair competition.

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

A2. As mentioned in A1, the objective of regulation on private monopolization and unfair trade practices is multi-fold, including promoting fair and free competition, however it is not to be influenced by non-competition influences.

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

A3. The objective of the AMA is to promote fair and free competition in the market, which leads to economic development and consumer welfare. Thus, there is no other objective than the foregoing.

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?

A4. The JFTC has made as much effort as possible, by taking into account all relevant factors in a comprehensive way, to avoid the risks associated with both over-deterrence and under-deterrence when enforcing unilateral conduct rules, and will continue to try to strike a balance in order to avoid both of the problems.

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.

A5. There are two types of exemption from application of the AMA, one of which is exemption stipulated within the AMA itself, and the other is exemption stipulated in other laws.

(1) Exemption stipulated within the AMA

Two clauses on exemption exist in the AMA.

a. Intellectual Property Rights (Section 21 of the AMA)

Section 21 of the AMA stipulates: *“The provisions of this Act shall not apply to such acts recognizable as the exercise of the rights under the Copyright Act, the Patent Act, the Utility Model Act, the Design Act or the Trademark Act.”*

In addition, “Guidelines for Patent and Know-how Licensing Agreements under the Antimonopoly Act” (published on July 30, 1999) describes points of the provision of Section 21, where the guideline explains the following two interpretations.

- (a) “Acts recognizable as exercises of rights” under the Patent Act, etc., are not subject to the AMA and shall not constitute violations of the AMA;
- (b) on the other hand, even if acts are considered to be the “exercise of rights” under the Patent Act, etc., if the said acts are considered to deviate from or contradict to the purposes of the intellectual property right system to, among other things, encourage innovation, then the said acts will no longer be deemed “acts recognizable as the exercise of rights” and the AMA shall be applicable to them.

For instance, even though an act is, on its face, considered to be an exercise of rights under the Patent Act, etc., if the said act is conducted under the pretext of exercising rights but in reality is considered to be employed as part of a series of acts that constitute an unreasonable restraint of trade, private monopolization, or unfair trade practices, the said act is considered to deviate from or to contradict the purposes of the intellectual property right system to, among other things, encourage innovation. For this reason, the said act is no longer deemed an “act recognizable as the exercise of rights” under the Patent Act, etc., and is subject to the AMA.

This exemption clause exists partly because the patent system and the AMA have a common objective and need to be well coordinated to achieve the objective, where the patent system shall promote industrial development through encouraging innovation and the AMA shall promote the democratic and wholesome development of the national economy as well as assure the interests of general consumers through achieving free and fair competition. That is, proper protection of intellectual property rights encourages innovation through more investment on researches and developments and thus promotes competition in a market, which is consistent with the objective of the AMA.

b. Exemption to the Resale Price Maintenance (Section 23 of the AMA)

The Section 23 of the AMA provides exemption to the Resale Price Maintenance in the field of copyrighted works¹. Relevant business parties have insisted on the need of this exemption describing as follows:

- (a) Selling copyrighted works at “fixed price had been an established business practice before the enactment of the AMA. It was felt necessary to make it clear that such sales at fixed price were not illegal.
- (b) From the viewpoint of maintaining certain cultural standard, it was considered necessary to maintain a system under which a large variety of books could be made readily accessible throughout the nation at the same price.

¹ Section 23 of the AMA stipulates “Legitimate acts performed by an entrepreneur whose business is to publish copyrighted works or by an entrepreneur whose business is to sell such published works, in order to fix and maintain with another entrepreneur who buys such works the resale price thereof, shall be exempted from the application of the provisions of this Act.”

However, these objectives have been challenged along with the government's comprehensive deregulation efforts. In 1992, the JFTC established a study group on the Resale Price Maintenance in order to consider whether the exemption should be abolished or not, and the conclusion issued by the study group was that abolishment of the exemption was appropriate. The recent effort to abolish the exemption was made five years ago, but the exemption system was decided to remain, mainly because the public consensus for abolishing this exemption system was not yet reached.

(2) Exemption stipulated in other legal instruments

Exemptions to the AMA are often found in other legal instruments such as "Aviation Act". Many of them have something to do with regulated sectors, but since almost all of them provide the exemption not to unilateral conduct, but to cartel activities, and therefore, these exemptions are not within the scope of this questionnaire.

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.

A6. The JFTC does not consider that the objectives of Section 3 and 19 (provisions of regulation on single-firm conduct) or exemptions of the AMA are influenced by the nature of the Japanese economy.

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.

A7. There have been no revisions of the objectives of the unilateral conduct rules so far. On the other hand, the degree of necessity of an exemption has been changing at every corner of economic situation or technical development, and at the same time, whether an exemption should be maintained or abolished has been considered from the viewpoint of promoting fair and free competition. In practice, exemption for specific conducts based on natural monopoly was abolished in 1999.

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.

A8. The JFTC's decisions cannot be overturned by any ministry (needless to say, the Court has an authority to overrule the JFTC's decisions), and the JFTC is not required to consult with other government agencies in case of enforcing regulation on single-firm conduct. Therefore, there are no institutional features that affect the JFTC's ability to achieve the objective of regulation on single-firm conduct.

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?

A9. To avoid negative effect on sound competition by either over-deterrence or under-deterrence against single-firm conduct, transparency and predictability of regulation are significant. Based on this viewpoint, the JFTC has issued several guidelines such as "Guidelines concerning Distribution Systems and Business Practices" to promote transparency and predictability of regulation on single-firm conduct. In the future, in addition to those guidelines, accumulation of relevant cases and further discussions on single-firm conduct rules are believed to contribute to enhancing transparency and predictability.

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").

A1. Illegal activity by a firm holding dominance/monopoly power can be regulated by two regulatory means, that is, Private Monopolization and Unfair Trade Practices under the Antimonopoly Act (AMA).

As there are no particular criteria for determining dominance/monopoly power, a comprehensive judgment is made based on the situation and on various factors of the market in which the illegal activity is carried out.

(1) Private Monopolization (Section 3 of the AMA)

Private Monopolization is prohibited as stated in Section 3 of the AMA. It is defined in Section 2 (5) as: *"such business activities, by which any entrepreneur, individually or by combination or conspiracy with other entrepreneurs, or in 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."*

"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. "Control" in this definition is interpreted as depriving other firms of their freedom of decision-making concerning their business activities and forcing them to obey the controller's desire.

It should be mentioned that exclusion of competitors from the market is not within the scope of regulation by the AMA if competitors are excluded from a market as a result of competition on the merits. Therefore, only in case where competitors are excluded from the market by means other than those based on competition on the merits, such exclusion can be subject to the AMA.

Unlike EC regulations on single-firm conduct, the provision of the AMA concerning Private Monopolization does not refer to the market position of a relevant firm in the market. Therefore, in our legal framework, dominant position of a firm or firm's dominance is not a statutory prerequisite for establishing Private Monopolization, and in determining whether a specific single-firm conduct falls under Private Monopolization; that is, whether its specific unilateral conduct has substantially restrained competition in the relevant market, various relevant factors shall be considered in a comprehensive

manner. Those factors to be taken into account would include market characteristics, market shares, entry barriers, buyer power as well as the relevant unilateral conduct itself and its anticompetitive effects.

(2) “Substantial restraint of competition” on case law

As stated above, “substantial restraint of competition” is a prerequisite to prove Private Monopolization stipulated in Section 2 (5) of the AMA.

The case law (Toho and Shin-Toho Co., Ltd. Case (decision by Tokyo High Court on December 9, 1953)) states that “to restrain competition substantially 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 conditions with some latitude of its or their own volition.”

Therefore, it would be quite natural to presume that a firm which can control the market with some latitude of its own volition by excluding or controlling the business activities of other firms usually is in a dominant position or has substantial market power. As a matter of fact, that is the case for all the Private Monopolization cases the JFTC has handled so far.

(3) Unfair Trade Practices

Unfair Trade Practices are prohibited in Section 19 of the AMA. Unfair Trade Practices refer to conduct which tends to impede fair competition, designated by the Japan Fair Trade Commission (JFTC) based on Section 2 (9).

When a firm with a high market share in a particular market engages in a conduct designated by the JFTC as Unfair Trade Practices, such as Dealing on Exclusive Terms (Item 11 of Designation of Unfair Trade Practices), Unjust Low Price Sales (Item 6), and Discriminatory Pricing (Item 3), it also can be considered such a conduct may fall under Private Monopolization, when it excludes or controls competitors and substantially restrains competition in the relevant market.

Regulations against Unfair Trade Practices target those typical behaviours which are used to create monopolies by controlling and eliminating competitors and are aimed at prohibiting monopolies at an incipient level. An activity falls under the Unfair Trade Practices if such an activity “impedes fair competition”, which fails to reach the criterion of “substantial restraint of competition in the relevant market”, which should be shown to prove Private Monopolization. Therefore, a firm that is not subject to the regulations of Private Monopolization because it does not have enough power to obtain a dominant position in a market may still be subject to the regulations of Unfair Trade Practices if it engages in conduct that falls under the designated conduct as Unfair Trade Practices.

forming, maintaining, and reinforcing dominance without proper justification by making it difficult for others to compete in a particular field of trade. In other words, as mentioned above, if a company excludes its competitors from a market as a result of competition on the merits and acquires substantial market power, such conduct is not within the scope of regulation by the AMA.

3. Does your law contain or do you use a market share threshold at which you presume single-firm dominance/substantial market power and/or as a “safe harbour”? yes/no

A3. Since the AMA contains no particular criteria for determining dominance/monopoly power, the JFTC considers various economic conditions such as market share, entry barrier, product characteristics, alleged conduct itself, and so on, in a comprehensive manner in order to judge whether the alleged conduct constitutes Private Monopolization that substantially restrains competition in a particular field of trade.

4. Does your competition law enable the competition agency to intervene against unilateral conduct at a level below the dominance/substantial market power threshold? yes/no If so, please explain why and in which circumstances.

A4. As mentioned above, there is no specific indication of any threshold on the dominance/substantial market power in the AMA, while a conduct of company with no dominance/substantial market power does not usually fall under Private Monopolization prohibited by Section 3.

On the other hand, the regulations on Unfair Trade Practices are basically applicable to both “dominant” firms and “non-dominant” firms.

Among various types of Unfair Trade Practices, certain types of act such as unjust refusal to deal, unjust dealings on exclusive terms, unjust dealings on restrictive terms, unjust low sales price, unjustly discriminatory prices, and unjust tie-in sales can be considered to be used as means to unjustly create monopolies in the relevant market by controlling or excluding competitors. Regulations against those types of unfair trade practices are aimed at preventing Private Monopolization at an incipient level.

Regarding some types of conduct designated by the JFTC as Unfair Trade Practices, for example, unjust dealing on exclusive terms, whether a firm is “influential in the market” or not is taken into consideration.

Such an approach is based on the reasoning that, in the case of a firm ranked low in the market position or newly entered into the market, its conduct would not usually result

in reducing the competitors' business opportunities or making it difficult for them to find alternative trading partners, both of which are described in "Guidelines concerning Distribution System and Business Practices" as examples tending to impede fair competition.

Whether a firm is "influential in a market" is judged by, among others, the firm's market share, that is, whether it holds no less than 10% of the market, or its position is among the top three in the market.

5. Does your jurisdiction's analysis of dominance/substantial market power first require that a relevant product and geographic market be defined? yes/no
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A5. Although the AMA does not have any specific threshold of dominance/substantial market power, the definition of a relevant product and geographic market is critical to assess how an alleged conduct affects competition in a particular field of trade. This assessment would not be able to be done without defining a relevant product and geographical market.

6. Which of the following criteria do you use for the assessment of single-firm dominance/substantial market power? ³ Please specify any other criteria that you use to assess single-firm dominance/substantial market power.
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A6. As stated before, the provision of the AMA concerning Private Monopolization does not refer to the position of a relevant firm in the market. In determining whether a specific single-firm conduct falls under Private Monopolization; that is, whether its specific unilateral conduct has substantially restrained competition in the relevant market, various relevant factors shall be considered in a comprehensive manner. In other words, whether each of the listed criteria is considered or not is dependent on a specific case, and other factors not listed would also be taken into account depending on a situation.

- | | |
|--|--------|
| - Market share of the firm and its competitors | yes/no |
| - Market position and market behavior of competitors | yes/no |
| - Barriers to entry or expansion | yes/no |
| - Buyer power | yes/no |

³ The answer "yes" should be provided if you use this criterion (amongst other criteria) at least in some of your cases. Conversely, the answer "no" should be provided if in practice you have not ever used that criterion.

- Access to upstream markets/vertical integration	yes/no
- Access to essential facilities	yes/no
- Market maturity/vitality	yes/no
- Financial resources of the firm and its competitors	yes/no
- Profits of the firm	yes/no
- High prices (at absolute or comparative level)	yes/no

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

A7. The JFTC judges whether illegal conduct significantly restrains competition in the relevant market or not, looking at various conditions in a comprehensive manner. The degree of importance on each of the conditions in assessing the market power is dependent on each case.

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

A8. See above 7.

9-1. How do you evaluate the competitive significance, if any, of intellectual property rights (patents, trademarks, copyrights, etc.) in assessing dominance/substantial market power?

A9-1. Intellectual property right is one of the factors to be assessed in determining whether a company has dominance/substantial market power or not, and the right by itself could provide a company with dominance/substantial market power in a market.

On the other hand, as “Guidelines for Patent and Know-how Licensing Agreements under the Antimonopoly Act” (published on July 30, 1999) clearly states, acts “recognizable as exercises of rights” under the Patent Act, etc., are not subject to the AMA and shall not constitute violations of the AMA, unless the said acts are considered to deviate from or contradict to the purposes of the intellectual property right system (see the answer to the question 5 of Part A.).

9-2. Is intellectual property presumed to create dominance/substantial market power in your jurisdiction? yes/**no**

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.]

A10. N/A

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.

A11. Sections 3 and 19 have no specific objective just for single-firm conduct regulation, but Section 1 stipulates the objective that is common among regulations based on the AMA like:

This Act, by prohibiting private monopolization, unreasonable restraint of trade and unfair trade practices, by preventing excessive concentration of economic power and by eliminating unreasonable restraint of production, sale, price, technology, and the like, and all other unjust restriction of business activities through combinations, agreements and otherwise, aims to promote free and fair competition, to stimulate the creative initiative of entrepreneurs, to encourage business activities of enterprises, to heighten the level of employment and people’s real income, and thereby to promote the democratic and wholesome development of the national economy as well as to assure the interests of consumers in general.

The JFTC enforces regulation on single-firm conduct along with this objective, considering how a specific conduct affects competition in a market taking into account various factors such as market characteristics, market shares, entry barriers, buyer power as well as the relevant unilateral conduct itself, and so on.

C. State-created Monopolies

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-owned⁴, state-controlled⁵, state-enabled or facilitated⁶, recently privatized and/or liberalized, regional monopolies,⁷ etc.

A1. Correspondence delivery business can be cited as one of the business sectors in Japan where state-created monopolies exist.

Since its inception as a state undertaking in 1871, correspondence delivery business was exclusively provided by the state's administrative branch until March 2003. In April 2003, Japan Post, a public corporation, was established as the provider of postal services, including the mail service. At the same time, the correspondence delivery market was opened to the private sector.

However, there has so far been no private sector entry into the market for nationwide general correspondence delivery business, which is one form of mail services. Reasons for no private sector entry include the legal requirement that the entity concerned must provide nationwide and impartial services (collecting even one piece of correspondence left in one of 100,000 posts installed nationwide everyday and delivering the mail within three days in principle).

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.⁸

A2. Postal law obliges Japan Post to offer universal services, by delivering postcards, letters and other mail nationwide and impartially, at reasonably low prices. The requirements include delivering mail to remote islands and other geographically difficult

⁴ Those undertakings that are 100% owned by the State.

⁵ The control belongs to the State, without taking into consideration the amount of the % of the State share.

⁶ E.g. where a monopoly exists due to exclusive rights granted by the state or due to state-imposed restraints of competition.

⁷ Includes public/private undertakings that are granted exclusive rights within a certain region.

⁸ 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.

locations and the supply of Braille postal services for blind people.

Along with the postal law, there are regulations on providers of the general correspondence delivery business to secure nationwide and impartial services for correspondence delivery.

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.

A3. There are no particular restrictions for the application of the AMA, such as exemption from the application enjoyed by state-created monopolies. There are no legal or practical restrictions or difficulties in applying the AMA for violations by state-created monopolies.

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

A4. Assessment of dominance/substantial market power of state-created monopolies is made on the basis of conditions of the market and competition. There is no particular difference in treating state-created monopolies and other companies.

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

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) ?

A5. The process of privatization of the postal services is explained below.

Under the law of the privatization of the postal services enacted in October 2005, the postal mail, postal savings and postal insurance services, now being provided by Japan Post, will be taken over by the postal service company, the postal savings bank and the postal insurance company, respectively. The Japan postal services holding company will be a parent company of these three companies and the post office company, which will provide over-the-counter services (hereinafter called business corporations).

These companies will launch operations on October 1, 2007, by taking over the business from Japan Post. These companies will be subject to regulations now applied to their competitors in principle. At that moment, all stocks of the Japan postal services holding company will be owned by the government, while all stocks of the business companies will be owned by the Japan postal services holding company.

Beyond that date, the government will be obliged to possess more than one-third of Japan postal services holding company stocks. The Japan Post Corporation, while possessing the entire stocks of the postal service company and the post office company, will be obliged to sell all its stocks in the postal savings bank and the postal insurance company by September 30, 2017.

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.)?

A6. The privatization or liberalization of state-created monopolies has been promoted as a part of structural reform committed by the Japanese government for the purpose of realizing a vital, energetic and robust economy and society. Moreover, streamlining business operations, improvements in services, and an increase in revenue through the sell-off are also cited as objectives in general.

7. Is competition law applicable to privatization transactions (e.g. approval of interested bidders or the successful bidder under its merger control powers)?

A7. In the absence of particular restrictions, privatization transactions are also subject to the AMA.

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.

A8. The JFTC, for the purpose of promoting regulatory reform, conducts research and studies on the problems over government regulations and ways to improve the situation from the standpoint of competition policy, and publicizes recommendations and coordinates laws and regulations with other governmental agencies as necessary. Over the issue, "The Three-Year Plan for the Promotion of Regulatory Reform and Market Opening to the Private Sector," adopted by the Cabinet meeting in March this year, states, "The JFTC shall take appropriate policy measures to promptly and effectively cope with attempts to block entry into a monopolistic and oligopolistic market. The governmental agency concerned and the JFTC shall conduct close coordination, by fully taking into account the need to maintain policy consistency under the relevant business law and the AMA in order not to cause confusion in business companies."

There is no specific legal provision that requires opinions of the competition authorities to be reflected in the handling of these matters. However, as the JFTC is affiliated with the Cabinet Office, Section 8 of Article 58 of the Law on the Establishment of the Cabinet Office stipulates, "The head of each commission and agency, when finding the need for coordination between administrative agencies for the implementation of the duties of the commission and agency, can ask the head of the administrative entity concerned to submit necessary information materials and provide explanation, and can express opinions on the policy taken by the entity concerned, after clarifying the need to do so."

The announcement of reports and the submission of opinions to other governmental agencies are among the JFTC's recent efforts to advocate competition on the occasion of privatization of state-created monopolies and market liberalization. For instance, the JFTC publicized a report entitled "Issues Concerning Postal Services and Competition Policy coinciding with the Enactment of the Law of the Privatization of the Postal Services," in July this year. Also in October this year, the JFTC expressed its opinion on the postal savings and postal insurance services after the privatization of the postal services from the perspective of the competition policy and the AMA to the committee for the privatization of the postal services, which is in charge of monitoring the progress in the privatization of the postal services.

D. General

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

A1. Developed.

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.

(1) Legislations

Act Concerning Prohibition of
Private Monopolization and Maintenance of Fair Trade
(referred to as "AMA" in the main text)

Sec. 1 [Purpose]

This Act, by prohibiting private monopolization, unreasonable restraint of trade and unfair trade practices, by preventing excessive concentration of economic power and by eliminating unreasonable restraint of production, sale, price, technology and the like, and all other unjust restriction of business activities through combinations, agreements and otherwise, aims to promote free and fair competition, to stimulate the creative initiative of entrepreneurs, to encourage business activities of enterprises, to heighten the level of employment and people's real income, and thereby to promote the democratic and wholesome development of the national economy as well as to assure the interests of consumers in general.

Sec. 2 [Definitions]

...

(5) The term "private monopolization" as used in this Act shall mean 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.

...

(9) The term "unfair trade practices" as used in this Act shall mean any act coming under any one of following paragraphs, which tends to impede fair competition and which is

designated by the Fair Trade Commission as such:

- (i) Unjustly discriminating against other entrepreneurs;
- (ii) Dealing at unjust prices;
- (iii) Unjustly inducing or coercing customers of a competitor to deal with oneself;
- (iv) Dealing with another party on such terms as will restrict unjustly the business activities of the said party;
- (v) Dealing with another party by unjust use of one's bargaining position;
- (vi) Unjustly interfering with a transaction between an entrepreneur who competes in Japan with oneself or the company of which oneself is a stockholder or an officer and another transaction counterparty; or, in case such entrepreneur is a company, unjustly inducing, instigating, or coercing a stockholder or an officer of such company to act against the interests of such company.

Sec. 3 [Prohibition of private monopolization or unreasonable restraint of trade]

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

Sec. 19 [Prohibition of unfair trade practices]

No entrepreneur shall employ unfair trade practices.

(2) Designation by the JFTC

Designation of Unfair Trade Practices

June 18, 1982 Fair Trade Commission Notification No. 15 of 1982

In accordance with the provisions of Section 2 (9) of Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade (Law No. 54 of 1947), Unfair Trade Practices (Fair Trade Commission Notification No. 11 of 1953) shall be totally amended as follows and put into force on September 1, 1982.

Unfair Trade Practices

(Concerted Refusal to Deal)

1. Without proper justification, taking an act specified in one of the following paragraphs concertedly with another entrepreneur who is in a competitive relationship with oneself (hereinafter, referred to as a "competitor"):

(1) Refusing to deal with a certain entrepreneur or restricting the quantity or substance of a commodity or service involved in the transaction with a certain entrepreneur; or

(2) Causing another entrepreneur to take an act which comes under the preceding paragraph.

(Other Refusal to Deal)

2. Unjustly refusing to deal, or restricting the quantity or substance of a commodity or service involved in the transaction with a certain entrepreneur, or causing another entrepreneur to take any act which comes under one of these categories.

(Discriminatory Pricing)

3. Unjustly supplying or accepting a commodity or service at prices which discriminate between regions or between the other parties.

(Discriminatory Treatment on Transaction Terms, etc.)

4. Unjustly affording favorable or unfavorable treatment to a certain entrepreneur in regard to the terms or execution of a transaction.

(Discriminatory Treatment in a Trade association, etc.)

5. Unjustly excluding a specific entrepreneur from a trade association or from a concerted activity, or unjustly discriminating against a specific entrepreneur in a trade association or a concerted activity, thereby causing difficulties in the business activities of the said entrepreneur.

(Unjust Low Price Sales)

6. 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.

(Unjust High Price Purchasing)

7. Unjustly purchasing a commodity or service at a high price, thereby tending to cause difficulties to the business activities of other entrepreneurs.

(Deceptive Customer Inducement)

8. Unjustly inducing customers of a competitor to deal with oneself by causing them to misunderstand that the substance of a commodity or service supplied by oneself, or terms of the transaction, or other matters relating to such transaction are much better or much favorable than the actual one or than those relating to the competitor.

(Customer Inducement by Unjust Benefits)

9. Inducing customers of a competitor to deal with oneself by offering unjust benefits in the light of normal business practices.

(Tie-in Sales, etc.)

10. Unjustly causing the other party to purchase a commodity or service from oneself or from an entrepreneur designated by oneself by tying it to the supply of another commodity or service, or otherwise coercing the said party to deal with oneself or with an entrepreneur designated by oneself.

(Dealing on Exclusive Terms)

11. 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.

(Resale Price Restriction)

12. Supplying a commodity to the other party who purchases the said commodity from oneself while imposing, without proper justification, one of the restrictive terms specified below:

(1) Causing the said party to maintain the selling price of the commodity that one has determined, or otherwise restricting the said party's free decision on selling price of the commodity; or

(2) Having the said party cause an entrepreneur who purchases the commodity from the said party to maintain the selling price of the commodity that one has determined, or otherwise causing the said party to restrict the said entrepreneurs' free decision on selling price of the commodity.

(Dealing on Restrictive Terms)

13. Other than any act coming under the preceding two paragraphs, 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.

(Abuse of Dominant Bargaining Position)

14. Taking any act specified in one of the following paragraphs, unjustly in the light of the normal business practices by making use of one's dominant bargaining position over the other party:

(1) Causing the said party in continuous transaction to purchase a commodity or service other than the one involved in the said transaction;

(2) Causing the said party in continuous transaction to provide for oneself money, service

or other economic benefits;

(3) Setting or changing transaction terms in a way disadvantageous to the said party;

(4) In addition to any act coming under the preceding three paragraphs, imposing a disadvantage on the said party regarding terms or execution of transaction; or

(5) Causing a company which is one's other transacting party to follow one's direction in advance, or to get one's approval, regarding the appointment of officers of the said company (meaning those as defined by Subsection 3 of Section 2 of the Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade).

(Interference with a Competitor's Transaction)

15. Unjustly interfering with a transaction between another entrepreneur who is in a domestic competitive relationship with oneself or with the company of which one is a stockholder or an officer and its other party to such transaction, by preventing the formation of a contract, or by inducing the breach of a contract, or by any other means whatsoever.

(Interference with Internal Operation of a competing company)

16. Unjustly inducing, abetting, or coercing a stockholder or an officer of a company which is in a domestic competitive relationship with oneself or with a company of which one is a stockholder or an officer, to take an act disadvantageous to such company by the exercise of voting rights, transfer of stock, divulgence of secrets, or any other means whatsoever.

(3) Guidelines

Guidelines Concerning Distribution Systems and Business Practices

Part1. Antimonopoly Act Guideline Concerning the Continuity and Exclusiveness of Business Practices among Firms.

Note 7: Whether a firm is “influential in a market” is in the first instance judged by a market share of the firm, that is, whether it has no less than 10% or its position is within the top three in the market (meaning a product market which consists of a group of products with the same or similar function and utility as the product covered by the conduct, and competing with each other judging from geographical conditions, transactional relations and other factors.)

Nonetheless, even if a firm falls under this criterion, the firm’s conduct is not always illegal. In cases where the conduct may result in reducing business opportunities of the competitors and making it difficult for them to easily find alternative trading partners, such conduct is illegal.

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.

The same shall apply in Chapters 5 through 7 of Part I with regard to whether a firm is “influential in a market.”