

GUIDELINES CONCERNING UNFAIR TRADE PRACTICES ASSOCIATED WITH MUTUAL ENTRY BY AND BETWEEN BANKS AND SECURITIES COMPANIES

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Introduction

1. Under the so-called Financial System Reform Act that came into effect in April 1993, financial institutions and securities companies (hereinafter referred to collectively as “financial institutions”), which are engaged in banking, trusts and securities, may enter into another of the three categories through the so-called subsidiary-by-business-category method. The reform of the financial system will be carried out, under circumstances of increasing areas of business interaction in line with the progress in the recent liberalization, globalization and securitization of finance, to provide people with financial products and services of better quality through the promotion of competition by breaking down the boundary between business categories. The reform will also develop internationally harmonious financial systems. Therefore, it is considered that the reform of the financial system can be fundamentally appreciated in terms of the competition policy because it promotes competition.

Concerning the market entry through the subsidiary-by-business-category method, however, there is the concern financial institutions may engage in activities to place their subsidiaries in an advantageously position in competition through the unjust use of their economic power. If such activities are carried out, the competitive conditions of entrepreneurs will be affected by factors other than the price and quality of goods and services, thereby conflicting with the basic principle of the Antimonopoly Act, which aims at fair and free competition. In addition, the financial institutions supply funds to and intermediate between general entrepreneurs. Since they are often in a position to exercise different kinds of influence over entrepreneurs through the supply of funds and suchlike, there is a concern that reforming the financial system may increase all the better such influence.

Therefore, with the objective of promoting free and fair competition in the financial markets in line with the purpose of reforming the financial system, it is necessary to be careful to prohibit activities preventing competition as a result of the entry of the

financial institutions through the subsidiary-by-business-category method.

2. The purpose of these “Unfair Trade Practices Associated with Mutual Entry by and between Banks and Securities Companies” is to maintain and promote free and fair competition in the financial market through the prevention of acts violating the Antimonopoly Act by identifying activities that will present problems under the Antimonopoly Act as a result of the entry into other businesses through the subsidiary-by-business-category method.

The activities indicated here are major activities that, for the moment, are considered possibly taking place where entry is made through the subsidiary-by-business-category method. Activities that present a problem under the Antimonopoly Act are, of course, not limited to these activities. Where any other activity that present a problem under the Antimonopoly Act occurs with the progress in mutual entry in the future, it is needless to say that the activity will be judged appropriately.

The following illustration of activities that will present a problem under the Antimonopoly Act shows those centering on cases for which banks, securities companies or their subsidiaries are the major actors. However, it should be noted that the activities that present problems under the Antimonopoly Act are not limited to these activities.

I. Parent company’s unjust activities to support its subsidiaries

1. A parent company’s coerced transactions with its subsidiaries

Where a financial institution coerces a customer to enter into a transaction with a subsidiary of the financial institution against a background of influencing the approval of loans or suchlike, there is the possibility that transactions based on free and independent decision of the customer will be impeded, and competitors of the subsidiary will be put in a competitively disadvantageous position.

For example, the following activities present problems under the Antimonopoly Act.

- (i) A parent company’s requiring a customer to enter into a transaction with a subsidiary of the parent company by implying that the parent company will treat the customer in a unfavorable treatment concerning loans and suchlike unless the customer enters into a transaction with the subsidiary

(NOTE 1) (Paragraphs 10 and 14 of the General Designation)

- (ii) A bank coercing a customer to purchase securities through a securities subsidiary of the bank when extending a loan to the customer (NOTE 2) (Paragraphs 10 and 14 of the General Designation)
- (iii) A securities firm coercing a company issuing securities to enter into a transaction with a trust bank subsidiary of the securities firm when undertaking the securities (Paragraphs 10 and 14 of the General Designation)

(NOTE 1) The following is considered the details of the demands for transactions, for example, in a case where a subsidiary is a securities subsidiary.

? Making a demand so that a securities subsidiary may obtain securities underwriting business

? Demanding the appointment of a securities subsidiary as manager or the security of an underwriting share of more than a fixed percentage for a securities subsidiary when underwriting securities

? Demanding the purchase of securities through a securities subsidiary

(NOTE 2) “Coercion” involves not only a case where specific disadvantage is implied but also a case where an entrepreneur is substantially coerced into conducting a transaction on account of the degree of dependence of the entrepreneur on the financial institution and the possibility of changing the financial institution.

Where a financial institution requests an entrepreneur to enter into a transaction with a subsidiary of the financial institution, an entrepreneur that does not wish to conduct the transaction may comply with the request because of a concern about influence on future transactions including loans. Therefore, it is likely to arise a problem under the Antimonopoly Act as abuse of dominant bargaining position. Accordingly, at the time of the request, it is necessary to be careful not to restrict the freedom of customer selection by entrepreneurs by requiring only the provision of information or clearly indicating that, if a request is not complied with, no disadvantage will result for that reason.

2. Activities to unjustly restrict transactions with the competitors of subsidiaries

Where a financial institution coerces a customer not to enter into a transaction with a

competitor of the subsidiaries of the financial institution, there is the possibility that the customer's freedom of selection will be restricted, and the trading opportunities of the competitor of the subsidiary will be restricted. For example, the following activities are problematic under the Antimonopoly Act.

- (i) A bank requesting a customer not to enter into a transaction with the competitor of a securities subsidiary of the bank by implying that the bank will impose unfavorable conditions concerning loans if the customer fails to comply with the request (Paragraphs 13 and 14 of the General Designation)
- (ii) A bank providing a customer with a loan on condition that the customer will restrict transactions with the competitors of the securities subsidiary of the bank (NOTE) (Paragraphs 13 and 14 of the General Designation)

(NOTE) The following is considered, for example, as a restriction on trade.

- ? Demanding competitors of the subsidiaries of a bank not be appointed as the manager for securities underwriting
- ? Imposing a limit on the volume underwritten by competitors of the subsidiaries of a bank for securities underwriting

3. Unjust inducement using a parent company

Inducement of customers by offering more favorable conditions than competitors is the essence of free competition. In principle, the means used by entrepreneurs to acquire customers shall not be restricted. However, inducement by causing customers misunderstanding or by providing customers with excessive economic benefits distorts the proper and free selection of products. Where these activities are not regulated, the competitive conditions of entrepreneurs will be determined without regard to the price and quality of their goods and services, and it will violate the basic principle of the Antimonopoly Act, which is free and fair competition.

For example, the following activities present problems under the Antimonopoly Act.

- (i) A securities subsidiary soliciting customers to enter into transactions with the securities subsidiary through favorable loan conditions provided by the parent bank (Paragraph 9 of the General Designation)
- (ii) A trust bank subsidiary inducing customers to enter into transactions with the

trust bank subsidiary through favorable securities services provided by the parent securities firm (Paragraph 9 of the General Designation)

It may be problematic under the Antimonopoly Act when a subsidiary obtains information from its parent company that is not normally disclosed, and induces customers to enter into transactions with the subsidiary by providing the information to customers of the subsidiary. In this event, whether the information and the method it is provided are acknowledged proper in the light of “normal business practice” will be determined on a case-by-case basis.

In the event of (i) or (ii) above, where competitors of a subsidiary of a bank are eliminated because the financial institutions treats a customer favorably for the only reason that the customer enters into transactions with the subsidiary of the bank, it becomes problematic under the Antimonopoly Act as discriminatory pricing (Paragraph 3 of the General Designation) or as discriminatory treatment (Paragraph 4 of the General Designation).

4. Other unjust activities

An entrepreneur’s attraction of customers by providing products and services at lower prices than those of competitors by lowering costs through its own efforts is normal business behavior, and this indicates competition itself. However, an activity to attract customers at low prices in disregard of profitability, without providing products and services at low prices that are achieved through efficient operation in the business, may present a problem under the Antimonopoly Act.

For example, the following activities present problems under the Antimonopoly Act if the activities a liable to create problems for the business activities of a competitor.

? A subsidiary providing goods and services continuously at prices that are excessively below the cost (NOTE) required to supply the products and services by obtaining economic assistance from a parent company (Paragraph 6 of the General Designation)

(NOTE) In this case, when calculating the subsidiary’s “cost incurred in the said supply,” the decline in cost due to economic assistance from a parent company should not be taken into account.

II. Acts related to increasing the power to control entrepreneurs

Financial institutions are often in a position to influence entrepreneurs through the provision of funds and by other means.

From this point of view, when entering in other businesses through the subsidiary-by-business-category method, it is problematic when the ownership by a financial institution as set out in Section 11 of the Antimonopoly Act exceeds 5% of the total outstanding shares of another domestic company, after combining the shares owned by its subsidiaries.

In addition, where a specified entrepreneur engages in transactions with both the financial institution and its subsidiaries, there is a concern that the level of influence over the entrepreneur will be increased overall (increase in an entrepreneur's dependence on a specified financial institution, etc.). In this event, it is considered that the group of the parent financial institution and its subsidiaries will be in a dominant position. Therefore, it is necessary to pay close attention so that the abuse of a dominant bargaining position as set forth in Paragraph 14 of the General Designation may not occur and other unfair trade practices may not be used.

For example, the following activities carried out by a financial institution or their subsidiaries against the background of influence over entrepreneurs will be problematic under the Antimonopoly Act.

1. Unjust coercion concerning equity contribution to a subsidy

? Coercing a customer to contribute equity to a subsidiary to be established by the financial institutions by implying that, if the request is not complied with, transactions with the customer will be rejected or the customer will receive other disadvantageous treatment, by taking advantage of the financial institutions' bargaining position that is dominant over that of the customer (Paragraph 14 of the General Designation)

2. Unjust restraint upon the procurement and investment of funds by companies

? Causing disadvantage to a customer by restricting the procurement and investment of funds by interfering with the selection of fund procurement by the customer by taking advantage of the financial institutions' bargaining position that is dominant over that of the customer (Paragraph 14 of the General Designation)