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ROUNDTABLE ON HORIZONTAL AGREEMENTS IN THE ENVIRONMENTAL CONTEXT

-- Note by the Delegation of Japan --

This note is submitted by the delegation of Japan to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 27-28 October 2010.

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ROUNDTABLE ON HORIZONTAL AGREEMENTS IN THE ENVIRONMENTAL CONTEXT

-- Note by Japan --

1. Introduction

1. In June 2000, the Basic Act on Establishing a Sound Material-Cycle Society was enacted that stipulated a basic framework for the formation of a recycling-based society, including clarification on the responsibilities of the central and local governments, businesses, and the public, so that a recycling-based society can be implemented through the overall efforts of these entities. Under the framework of this Act, so-called extended producer responsibility (EPR) is established as a general principle, where the producers bear certain responsibility for the products, etc., they produce even after these products have been used and become waste.

2. With regard to activities for recycling, etc., on the part of businesses, it is considered desirable that the application of competitive principles will promote further efforts toward recycling, etc. However, in many cases, activities for recycling, etc., are characterized by weak incentives for businesses because they require continuous additional concomitant costs on the part of businesses and do not necessarily lead to direct benefits for individual producers. Therefore, there are often cases where laws or ordinances must make recycling, etc., mandatory, or in which businesses work toward recycling in response to strong social requests. In such cases, unless businesses jointly carry out activities for recycling, etc., it is sometimes difficult to build recycling systems or to promote recycling efficiently, which in certain cases results in difficulties in fulfilling the obligations as stipulated in the laws or ordinances. On the other hand, if such joint activities form a momentum of their own toward the smooth establishment of a recycling system and further developments, they will lead to the vitalization of the recycling market and create new demand in the market, the effect of which is expected to promote competition.

3. It is therefore necessary to duly consider the necessities of such activities from social and public objectives and the effect of promoting competition when conducting examinations on the existence or non-existence of problems related to the Antimonopoly Act (AMA) concerning joint activities by businesses toward recycling, etc. This contribution paper explains the views of the JFTC on horizontal agreements in the environmental context and introduces the JFTC's experiences, including its guidelines and consultation cases.

2. Views on horizontal agreements in the environmental context

4. Article 3 of the AMA prohibits "a substantial restraint of competition in any particular field of trade contrary to the public interest," which results from private monopolization or unreasonable restraint of trade such as cartels, etc. Furthermore, Article 19 of the AMA prohibits "unfair trade practices" which include such acts as refusing to supply or restricting the quantity or substance of goods or services pertaining to the supply to a certain enterprise concertedly with a competitor without justifiable grounds (concerted refusal to trade), etc. Therefore, even if horizontal agreements are concluded with the aim of environmental conservation, such agreements will be prohibited if they violate these provisions.

5. However, when a horizontal agreement has the purpose of environmental conservation, it is more often the case that inquiries are made on whether such purposes should be taken into account in determining possible violation of the AMA. The following are points of view described by the JFTC with regard to the action of businesses based on social and public objectives including environmental conservation.

- In many instances, a trade association's self-regulation activities that are intended for socially beneficial purposes, and that include the establishment of standards and codes related to the business activities of constituent firms, as well as the use of compliance with said standards and codes, pose no particular problem in light of the Antimonopoly Act. However, there may be cases in which self-regulation, depending on its content or conditions, impedes or restrains competition in terms of the diversity of goods or services or the manner in which business operations are conducted. (Guidelines Concerning the Activities of Trade Associations under the Antimonopoly Act)
- A joint R&D project which is intended to address so-called externalities, such as developing an environmental or safety measure, may not in itself immediately exclude the possibility for such project to pose a problem under the Antimonopoly Act. However, considering it may not be easy to carry out the project by a single undertaking in light of its cost, risk, and so forth related to the research, it is less likely to pose a problem under the Antimonopoly Act in such a case. (Guidelines Concerning Joint Research and Development under the Antimonopoly Act)

6. Based on these points, the JFTC has the view that the framework of horizontal agreements in the environmental context should be arranged without impeding the competition in the market while the JFTC considers the necessity of concluding such agreements on a case by case basis.

7. In addition, when other administrative agencies strengthen regulations or implement administrative guidance with the aim of environmental conservation, the JFTC holds consultations with these administrative agencies and arranges coordination with the AMA and the competition policy so that such regulations or administrative guidance will not induce violations against the AMA.

3. Guidelines concerning joint activities for recycling under the antimonopoly act

8. In accordance with the enactment of the Basic Act on Establishing a Sound Material-Cycle Society, whereby a basic framework was stipulated for the formation of a recycling-based society, the JFTC formulated the "Guidelines Concerning Joint Activities for Recycling under the Antimonopoly Act" (published by the JFTC on June 26, 2001, and last amended on January 1, 2010) to clarify the points of view concerning joint activities for recycling under the AMA.

9. Under these guidelines, the JFTC 1) demonstrates its basic recognition of recycling, etc., and describes its viewpoints under the AMA on 2) joint development of recycling systems and 3) joint activities by enterprises toward recycling, etc., by introducing and explaining actual cases.

- Basic recognition of recycling, etc.

In the examination into the existence or non-existence of problems related to the AMA concerning joint activities by enterprises toward recycling, etc., it is therefore necessary to duly consider the necessities from their social and public objectives. However, even if such necessities can be considered, problems related to the AMA arise in cases where joint actions on recycling, etc., among the enterprises result in adverse effects on the competitive order of the product and recycling markets.

- Joint Development of Recycling Systems

Specific examples of recycling systems that are developed by enterprises in joint operations include cases of using processing facilities jointly for waste recycling, or establishing such facilities jointly, such as when consumer electronics manufacturers establish factories for reprocessing and recycling household electrical appliances that have been disposed of, etc.

In determining whether the above-mentioned joint operations become problems under the AMA, examinations are undertaken into what effect the joint operations have on the product and recycling markets.

- Product Market

In the event that enterprises develop a recycling system in a joint operation to deal with product waste, although the necessary costs for recycling, etc. (usage charges for recycling facilities, usage charges for collection facilities, transportation charges, etc.) are shared, in cases where the proportion of the required costs for recycling, etc., of the product concerned compared to the selling prices are small, the joint operation has an indirect effect on competition in the product market itself, and is therefore considered unlikely to become a problem under the AMA.

However, if the recycling system covers a broad scope, for example, by the inclusion of the collection and transportation of waste and the process for recycling, there will be cases where the proportion of the required costs for recycling, etc., of the product concerned through joint operations are large compared to the selling prices. In such cases and when the total share of the participating enterprises in the product market becomes large, it would have an effect on competition in the product market and become problematic under the AMA as an “unreasonable restraint of trade.”

Furthermore, in the event that enterprises jointly develop a recycling system because it is difficult to independently develop a recycling system in doing business in the product market, by denying or restricting the use of that recycling system to new entrants or certain existing enterprises without justifiable grounds, by for example, obstructing new entry of other enterprises into the product market or causing difficulties in the business activities of existing enterprises, in the case that such actions substantially restrain competition in the product market, they shall fall under the provisions prohibiting private monopolization or unreasonable restraint of trade.

In addition, even if such actions do not substantially restrain competition in the product market, if there is a possibility that such actions cause difficulties in the normal business activities of enterprises that are denied or restricted participation in the recycling system, they shall be problematic under the provisions prohibiting unfair trade practices as concerted refusal to trade.

- Recycling Market

Because the construction of recycling systems creates the recycling market and new opportunities for trade in the recycling market could be expected to expand, it is normally unlikely to restrain competition in the recycling market and therefore become a problem under the AMA. However, in cases where many enterprises develop a recycling system jointly and by doing so cause difficulties in the business activities for the existing recycling enterprises or make difficulties for other enterprises to enter the recycling market, resulting in the substantial restraint of competition in the recycling market, such cases fall under the provisions prohibiting private monopolization or unreasonable restraint of trade.

In addition, in cases where enterprises jointly develop a recycling system that covers a broad scope, there is often no other recycling system existing in the recycling market. In such cases,

having examined whether it is necessary for enterprises to jointly develop a recycling system and if there are alternative means, the JFTC will consider (1) if participation in the recycling system is free and (2) if the development of a recycling system by each participating enterprises is unreasonably restrained, and thereby determines if any problems arise under the AMA.

- Joint Activities Pertaining to Recycling, etc.

In the event that enterprises jointly develop or a trade association develops a recycling system, there are cases where various ancillary arrangements are made concerning the development of such a system for the purpose of its efficient operation, etc. In addition, even when a recycling system is not jointly developed, there are cases where similar arrangements are made by enterprises or a trade association in order to enhance the effectiveness of recycling, etc.

The guidelines show the viewpoints under the AMA with regard to the following 6 cases: (1) Decision on a target for recycling ratio, etc., (2) Integration of specifications for components that are easy to recycle and component standardization, (3) Joint research and development of products that are easy to recycle, (4) Standardization of formats of waste management forms (so-called “Manifest”) and enforcement of their use, (5) Joint activities concerning recycling expenses and (6) Development of a deposit system.

Table: The principles of the Antimonopoly Act for the joint activities pertaining to recycling, etc.

Types of Joint Activities	The viewpoints under the Antimonopoly Act
<i>Decision on a target for recycling ratio, etc.</i>	No problem in principle under the AMA, except for the cases where unduly discriminatory compliance with the target is forced among the members, or where the product of the member who failed to reach the target is unduly excluded from the market.
<i>Integration of specifications for components that are easy to recycle and component standardization</i>	No problem in principle under the AMA, except for the cases where a specific manufacturer or component manufacturer is unduly discriminated against or forced to observe the standards.
<i>Joint research and development of products that are easy to recycle</i>	Less problematic if it is considered to be difficult for a single manufacturer to carry out the R&D in terms of related risk, cost, etc.
<i>Standardization of format of waste management forms (so-called “Manifest”) and enforcement of their use</i>	No problem.
<i>Joint activities concerning recycling expenses(1)</i> - <i>Setting voluntary standards regarding the collection method, the timing of collection, and the displaying method</i>	No problem in principle, except for the cases where the trade association and the like forces observance of the voluntary standards they formulated.
<i>Joint activities concerning recycling expenses(2)</i> - <i>Joint determination of specific recycling costs or fees by manufacturers and sellers</i>	Causes a problem.
<i>Development of a deposit system*</i>	Usually no problem, except for the cases where trade associations or enterprises jointly determine the amount of deposit which is higher than the payback amount for covering collection cost.

* A system that entails collecting a specific amount of deposit at the time of sale of the product, and returning the same amount once the waste is collected.

4. A consultation case from businesses and the reply of the JFTC

10. The JFTC provides consultation services to give advice regarding whether a specific action planned by an enterprise or trade association will constitute a problem under the AMA. The following introduces the case of “The initiative to impose a charge for plastic shopping bags (hereinafter, referred to as “plastic bags”) on consumers”, one of the consultations related to horizontal agreements concluded in the environmental context.

4.1 Contents of the consultation

11. Each retailer in the city A has so far been providing free plastic bags to its customers for shopping.

12. For the last several years, each retailer in the city A has been involved in activities to reduce the use of plastic bags by customers, for example, by introducing a point system. (Customers get a point every time they refuse to use a plastic bag and can get a discount from the retailer based on the acquired points.)

13. While the introduction of a point system reduced the use of plastic bags to a certain level, its effect seems to have peaked and thus, to further promote the reduction of their use, retailers have focused on an initiative to impose a fee for using plastic bags.

14. However, only a fraction of retailers actually introduced a fee on plastic bags due to retailers’ concern that their competitors might deprive them of their customers if they charge for plastic bags ahead of their competitors who provide free plastic bags.

15. In such a situation, the Revised Act on the Promotion of Sorted Collection and Recycling of Containers and Packaging was enforced in April 2007, where the introduction of fee-based plastic bags is regarded as one of the recommended actions by retailers to further reduce the use of plastic bags. However, in the city A, while the consensus was formed among the residents that they should reduce garbage through reducing the use of plastic bags, it is hard to say that they have reached the consensus that fee-based plastic bags should be implemented as a practical method of containing the use, and accordingly, very few retailers decided to introduce fee-based plastic bags ahead of their competitors.

16. In response to this situation, the city A decided to set up a committee by calling for the participation of resident groups and respective retailers in the city to consider how to reduce the use of plastic bags. Although it was up to each retailer whether to participate in this committee or not, almost all the retailers in the city decided to join the committee.

17. The city A explained the reason why it also called for the participation of the resident groups in the committee, stating that it would be necessary to listen to the consumers’ opinions since consumers will be imposed certain financial burdens if fee-based plastic bags are introduced as the most effective method for the reduction of plastic bag use.

18. After the discussion at the committee mentioned in above, the city A, the resident groups, and participating retailers in this city (hereinafter, referred to as “Three Parties”) concluded an agreement that customers should pay for the plastic bags when they buy things at retailers in the city starting from xx date/month, 2007, at the unit price of 5 yen per bag.

19. Does such an approach to introducing fee-based plastic bags for reducing bag use constitute any problem under the AMA?

4.2 Views under the Antimonopoly Act

20. It is necessary to examine this case as one where participating retailers, etc., agreed to cooperatively decide the implementation of fee-based plastic bags and their unit price.

21. In this case, the business activity subject to the agreements in question is that each participating retailer provides a plastic bag at the price of 5 yen. Generally speaking, it can be said that the customers seldom visit the retailer for the purpose of buying its plastic bags and the act of providing plastic bags to the customers is regarded as one of ancillary services rather than the act of selling goods, from the viewpoint of business activity on the part of retailers.

22. Therefore, the market in which participating retailers compete with each other is considered not the trade of plastic bags but the trade of all the goods sold by the concerned retailers.

23. Since almost all of the retailers in the city A will join this initiative, customers who need plastic bags will have very little room to choose retailers that provide free or inexpensive plastic bags.

24. However, the following can be considered:

- The decision in this case does not restrict competition for selling goods by retailers.
- Plastic bags are not necessarily indispensable for customers when they shop in retailers, and they never visit retailers to buy plastic bags.
- Social awareness of the necessity of reducing plastic bag use has been prevailing, which justifies the appropriateness of the aim of this initiative.
- The contents of agreements in this case are regarded within the scope that it is reasonably necessary with respect to their objectives from the following reasons:
 - Conventional methods such as the point system only produce limited effects
 - for achieving the goal of bag use reduction, while in contrast, introducing fee-based plastic bags can be considered more effective than the point system.
 - If the unit price of the bag is not fixed, a lower unit price would be implemented, which might result in failing to reach the goal of bag use reduction.
 - The 5-yen unit price as a result of agreements on the unit price cannot be considered as a too expensive burden for customers to achieve the objective.

25. Based on the above mentioned, this case does not immediately constitute a problem under the AMA.

Form of the Agreements

