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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

ROUNDTABLE ON MARKET STUDIES

-- Note by Japan --

This note is submitted by the Delegation of Japan to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 11-12 June 2008.

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1. Fact-finding surveys by the JFTC

1. The JFTC has been conducting “fact-finding surveys” almost every year since 1947 when the Antimonopoly Act (“AMA”) was enacted. Surveys by the JFTC have been conducted with the aim of achieving insight into specific markets, industries, trade practices and other issues in accordance with the different needs of competition policy at different times. These surveys differ from the JFTC investigations into individual acts in violation of the AMA. Fact-finding surveys carried out by the JFTC since FY 1997 are listed in the Annex. Such surveys number 31 at the end of FY 2007.

2. To achieve the purposes of the AMA, the JFTC shall take charge of matters relating to regulation on private monopolisation, unreasonable restraints of trade and unfair trade practices, as well as pertaining to monopolistic situations and other issues (Article 27-2 of the AMA). Fact-finding surveys are necessary for the JFTC to fulfil those missions. For this reason, the JFTC has been naturally considered to possess the authority to conduct such surveys under the Japanese legal system.

3. In answering the questions raised by the OECD, we would like to introduce in the following paper (i) the JFTC’s fact-finding survey approach, (ii) the relationship between fact-finding surveys and law enforcement, and (iii) uses of fact-finding surveys, together with actual examples.

2. Fact-finding survey approach

2.1 Selection of survey targets

4. The JFTC selects for its fact-finding surveys new trade fields, and existing trade fields where competitive environments notably change and where unreasonable trade practices have been identified. The following transaction fields are examples:

- i) New trade fields created as a result of advances in IT, including e-commerce and digital contents; for example, “Fact-finding Survey of B2C E-Commerce such as Electronic Shopping Malls” (published in December 2006).
- ii) Trade fields where deregulation has taken place; for example, “Survey of Trade Practices between Financial Institutions and Enterprises” (published in July 2001 and June 2006).
- iii) Trade fields relating to intellectual property; for example, survey of the animation industry (currently underway).

2.2 Collection of data and information

5. The JFTC gathers data and information by conducting interviews and questionnaires targeting business operators, trade associations and consumers, and by researching literature etc.

■ **Fact-finding Survey of B2C E-Commerce such as Electronic Shopping Malls (published in December 2006)**

<Survey targets>

- (i) Electronic shopping mall operators and tenants: 362 questionnaire respondents and 24 interviewees
- (ii) Consumers (Consumer Monitors and E-commerce Researchers¹): 1,173 questionnaire respondents

<Survey items; for example, questionnaire items for electronic shopping mall tenants>

- (i) Corporate profile
- (ii) Motives and triggers for starting consumer e-commerce services
- (iii) Advantages and disadvantages of consumer e-commerce services
- (iv) Provision of consumer e-commerce services (store-opening method, etc.)
- (v) Outline of consumer e-commerce services (merchandise suppliers, etc.)
- (vi) Relationship with consumers in consumer e-commerce services (complaints from consumers, etc.)
- (vii) Agreements on establishments of stores in electronic shopping malls (agreements on opening stores with electronic shopping mall operators, etc.)
- (viii) Challenges in operations of online stores (needed improvements in trade practices in the future, etc.)
- (ix) Challenges, problems, points for improvement, etc. in consumer e-commerce services in general

■ **Survey of Trade Practices between Financial Institutions and Enterprises (published in June 2006)**

<Survey Targets>

financial institutions, borrower enterprises, etc: 2,684 questionnaire respondents and 25 interviewees

<Survey Items; for example, questionnaire items for borrower enterprises>

- (i) Corporate profile
- (ii) Financial institutions with which questionnaire respondents have business relationships and reasons for selecting these financial institutions
- (iii) Whether to be invested in by those financial institutions
- (iv) Whether it is difficult to reject various requests from those financial institutions
- (v) Whether to be requested by financial institutions to purchase financial commodities or services from these financial institutions, after applying or receiving investment to or from these financial institutions
- (vi) Whether to be requested by financial institutions to purchase commodities or services from the affiliate companies of these financial institutions or companies with which these financial institutions have close business relationships, after applying or receiving investment to or from these financial institutions
- (vii) Whether to be requested by financial institutions to start business with or to change business partners to the affiliate companies of these financial institutions or companies with which these financial institutions have close business relationships, after applying or receiving investment to or from these financial institutions

¹

The JFTC entrusts 1,100 consumers nationwide, as “Consumer Monitors,” with the tasks of replying to its questionnaires, collecting advertisements, etc. The JFTC also asks 80 consumers out of these Consumer Monitors, as “E-commerce Researchers,” to monitor and report on Internet advertising representations.

- (viii) Whether to be requested by financial institutions not to have business with companies which compete with the affiliate companies of these financial institutions or companies with which these financial institutions have close business relationships, after applying or receiving investment to or from these financial institutions
- (ix) Whether they have confronted new problems since 2001 when receiving investment from financial institutions

2.3 Use of empirical evidence

6. Generally speaking, no analysis based on econometrics is performed in the course of fact-finding surveys conducted by the JFTC. Such analysis, if conducted, is likely to enable a quantitative and persuasive analysis of survey findings. However, additional human resources are necessary for collecting data and building models required for econometric analysis.

2.4 Interviews and questionnaires targeting business operators other than survey targets

7. In addition to direct survey targets, the JFTC often interviews their business partners and any other stakeholders, and sends questionnaires to them in some cases. These steps allow the JFTC to gain an overall understanding of trade fields subject to its survey. However, obtaining cooperation from such third parties may require additional efforts.

2.5 Transparency

8. The JFTC publishes final survey results and makes an effort to ensure transparency.

2.6 Set of timetables for surveys

9. Survey periods vary depending on the trade fields surveyed. However, periods are normally set within a general range of six months to one year, based on the number of surveyed business operators and other factors.

2.7 Human and financial resources devoted to market studies and results

10. At present, the Trade Practices Research Office under the Trade Practices Department mainly takes charge of fact-finding surveys at the JFTC. The Office has 9 regular staff members (as of FY 2007). It has a survey-related budget of 4.7 million yen (as of FY 2007). In addition, other divisions and offices at the JFTC conduct fact-finding surveys from the perspective of other acts under the jurisdiction of the JFTC other than the AMA, study regulated fields from the viewpoint of promoting regulatory reforms, and undertake research to grasp the state of economic concentration in major industries.

11. The JFTC performs an ex-post assessment of its policies implemented in accordance with the Government Policy Evaluations Act (Law No. 86 of 2001). With regard to fact-finding surveys, the JFTC performed an ex-post assessment of fact-finding surveys on gasoline distribution and home electric appliance distribution, both of which were conducted in 2004. The assessment was conducted in 2005 to verify whether the expected effects actually resulted from these fact-finding surveys.

2.8 Outsourcing

12. For example, the JFTC outsources the aggregation of questionnaire results to external business operators. This allows the JFTC to assign its own staff to substantive survey operations.

2.9 *Features of fact-finding surveys by the JFTC in comparison to those done in other jurisdictions*

13. We have no details of market studies conducted by competition authorities in other jurisdictions. However, as previously noted, the JFTC has conducted fact-finding surveys for more than 60 years. We think that the number of surveys executed by the JFTC is fairly large.

3. **Relationship with law enforcement**

3.1 *Complementary relationship between investigations on individual violations and fact-finding surveys*

14. Fact-finding surveys aim to prevent violations against the AMA, and to maintain and promote fair and free competition, by arbitrarily surveying actual business activities in an entire industry from the perspective of competition policy, and by showing the AMA perspectives on trade practices that may be in conflict with competition policy. As such, generally speaking, fact-finding surveys have no direct complementary relationship with investigations on violating acts.

15. However, fact-finding surveys can have certain links with investigations on violating acts in some cases. For example, the JFTC published the results of fact-finding surveys on trade practices between financial institutions and enterprises in July 2001, and presented an AMA perspective on the “abuse of dominant bargaining position”² which financial institutions have over borrower business operators and on other trade practices. However, in an AMA violation case, for which a recommendation decision was issued in December 2005, acts carried out by a major city bank against borrower business operators were judged to constitute an abuse of dominant bargaining position. This led to concerns over the existence of similar acts in transactions between other financial institutions and borrower business operators. Consequently, the JFTC conducted the fact-finding survey again, considering much information on individual violations was not reported. The JFTC published the results of the second survey in June 2006.

3.2 *JFTC’s practice when fact-finding surveys turn up problems on competition policy*

16. The JFTC surveys actual business activities from the perspective of competition policy. In case the JFTC finds out in surveys that trade practices may pose problems for competition policy, the JFTC points out the concern, encourages the parties to voluntarily improve such practices, and publishes its survey findings.

■ **Fact-finding Survey of B2C E-Commerce such as Electronic Shopping Malls (published in December 2006)**

Based on the survey findings, the JFTC showed its AMA perspectives on transactions between electronic shopping mall operators and mall tenants including the following points; (i) restrictions on business activities including sending direct mails, (ii) the unilateral change of commission rate, (iii) the imposition of excessive funds for reward systems, and (iv) the obligatory use of a card transaction service offered by electronic mall operators. In addition, the JFTC pointed out that such acts by mall operators might pose problems with the AMA.

² Such an act falls under unfair trade practices prohibited by the AMA.

The JFTC also requested electronic shopping mall operators to improve consumer e-commerce services overall, including to inspect trade practices and to review anti-competitive practices, based on its survey findings.

■ **Survey of Trade Practices between Financial Institutions and Enterprises (published in June 2006)**

As a result of the survey, the following facts were identified regarding transactions between financial institutions and enterprises:

- Approximately 30% of borrower enterprises felt it “difficult to reject” the requests from financial institutions in connection with financing.
- Regarding the ratio of borrower enterprises that accepted financial institutions’ requests against their will, the ratio rose in certain survey categories while the ratio generally declined in comparison to a similar survey in July 2001.
- Approximately 60% of borrower enterprises that accepted the requests against their will did so out of fear that rejecting the requests might “make loans difficult to obtain the next time.”
- More than 20% of surveyed financial institutions didn’t recognise the previous survey, etc. In addition, more than 40% had made no effort though they knew the previous survey.

Based on the survey findings, the JFTC explained the purpose of the survey report to trade associations for banks, and requested these organisations to report on their efforts implemented based on the survey report. In response to the request, the bank associations sent the survey report to its members, sponsored seminars for presidents, equivalent senior executives and officials in charge of compliance at banks, and reported these activities to the JFTC.

3.3 *Exercise of legal power in fact-finding surveys*

17. Article 40 of the AMA stipulates that “The Fair Trade Commission may, if necessary for the performance of its duties, order public offices, juridical persons formed by special laws and regulations, entrepreneurs or organisations of entrepreneurs, or their personnel to appear before the Fair Trade Commission, or require them to submit necessary reports, information or materials.” With this provision, the AMA sets out a power over general surveys, separate from investigations on individual acts of violation. Paragraph 1 of Article 94-2 of the AMA provides that “Any person who, in violation of measures pursuant to the provisions of Article 40, has failed to appear or to submit a report, information, or materials, or submitted a false report, information, or materials...shall be punished by a fine of not more than two hundred thousand yen.”

18. The exercise of power under Article 40 of the AMA offers the advantage of access to information that can’t be supplied on a voluntary basis. However, whether to exercise this power in fact-finding surveys should be carefully decided since the power is binding based on the penal provision.

19. In general, the JFTC conducts fact-finding surveys today by obtaining voluntary cooperation from survey targets. We are confronting no particular problem in survey activities

4. Application Methods

4.1 *Purpose of fact-finding surveys*

20. Fact-finding surveys aim to prevent violations against the AMA and to maintain and to promote fair and free competition by arbitrarily surveying actual business activities in an entire industry from the perspective of competition policy, and by showing the AMA perspectives on trade practices that may be in conflict with competition policy.

4.2 *Relationship with regulatory reforms*

21. Besides the “fact-finding surveys” conducted for the purpose stated above, the JFTC undertakes studies on regulated fields for the purpose of promoting regulatory reforms. These studies enable us to clarify the effects of regulations on competition. They also allow us to recommend the abolishment and review of existing regulations so as to prevent their adverse effects on competition, and to propose desirable regulations in the view of further promoting competition in the markets.

22. For example, the JFTC published a report titled “Issues Concerning Electricity Market and Competition Policy” (in June 2006) after conducting a comprehensive set of interviews and questionnaires targeting relevant business operators and customers. This report made a recommendation to consider introducing a new scheme that aims to sustain a stable electric power system as well as taking into account the needs for the promotion of competition.

ANNEX

LIST OF THE JFTC FACT-FINDING SURVEYS SINCE FY 1997

	<i>Survey title</i>	Published in
1	<i>Fact-finding Survey on Distribution, Trade Practices and Other Aspects of Contact Lenses</i>	Jun 25, 1997
2	<i>Fact-finding Survey on Distribution, Trade Practices and Other Aspects of Medical Devices</i>	Aug 4, 1997
3	<i>Survey on Low Bidding Prices in Recent Open Tenders Offered by Local Public Entities and the Like</i>	Mar 11, 1998
4	<i>“Survey on Changes in the Distribution Structure and Responses of Business Operators” (reported by the Distribution Issue Study Group): Business Activities of Processed Food and Everyday Sundries Wholesalers</i>	Mar 19, 1998
5	<i>Fact-finding Survey on Business Activities of Wholesalers and Others</i>	Mar 19, 1998
6	<i>Fact-finding Survey on Advertising Restrictions, Store Opening Restrictions and Other Aspects of Pharmacies and Drugstores</i>	Jun 19, 1998
7	<i>Fact-finding Survey on Advertising Restrictions and Other Aspects of Professions (Judicial Scriveners and Administrative Scriveners)</i>	Sep 18, 1998
8	<i>Fact-finding Survey on Price Lists Produced by Construction Industry Associations</i>	Mar 19, 1999
9	<i>Fact-finding Survey Report on Distribution of Flat Glass</i>	May 20, 1999
10	<i>Fact-finding Survey on Trade Practices and Other Aspects in Liquefied Petroleum Gas Sales</i>	Jun 23, 1999
11	<i>Fact-finding Survey on Automobile Maintenance Services and Others</i>	Apr 27, 2000
12	<i>Fact-finding Survey on Changes in the Distribution Structure and Use of Information Technology: Focusing on Business-to-Business Transactions of Consumer Goods</i>	Jun 28, 2000
13	<i>Survey on Prices Stated in “Sekisan Shiryo,” “Kensetsu Bukka” and the Like Prepared by Organisations Related to the Construction Industry</i>	Sep 8, 2000
14	<i>Survey on Low Price Sales of Information Systems Procured by Public Offices and the Like</i>	Jan 31, 2001
15	<i>Survey Report on Trade Practices between Financial Institutions and Enterprises: Results of the Questionnaire Conducted from the Perspective of Unfair Trade Practices against Borrower Enterprises</i>	Jul 4, 2001
16	<i>Survey of Competition Conditions and Other Aspects in the Domestic Passenger Airline Business Field</i>	Jul 11, 2001

	<i>Survey title</i>	Published in
17	<i>Survey Report on Competition in Service Fields to Which Nursing-care Insurance Is Applied</i>	Mar 13, 2002
18	<i>Fact-finding Survey Report on the Representations of Hot Springs</i>	Jul 31, 2003
19	<i>Survey of Competition Conditions Surrounding the Management and Maintenance of Apartment Buildings: For Realising Fair and Free Transactions</i>	Oct 24, 2003
20	<i>Fact-finding Survey of Subcontracting in Four Business Categories Including Software Production, and the Details of the Amended Subcontract Act: For the Smooth Enforcement of the Amended Subcontract Act</i>	Feb 13, 2004
21	<i>Fact-finding Survey Report on Gasoline Distribution</i>	Sep 22, 2004
22	<i>Fact-finding Survey Report on Home Electric Appliance Distribution: Challenges for Realising Appropriate Transactions</i>	Sep 24, 2004
23	<i>Fact-finding Survey of Funeral Service Transactions</i>	Jul 20, 2005
24	<i>Follow-up Survey of Gasoline Distribution</i>	Sep 29, 2005
25	<i>Follow-Up Survey of Home Electric Appliance Distribution</i>	Sep 29, 2005
26	<i>Fact-finding Survey of Transactions in the Advertising Industry</i>	Nov 8, 2005
27	<i>Fact-finding Survey of Medical Equipment Distribution</i>	Dec 27, 2005
28	<i>Survey of Trade Practices between Financial Institutions and Enterprises</i>	Jun 21, 2006
29	<i>Fact-finding Survey of Ethical Drug Distribution</i>	Sep 27, 2006
30	<i>Fact-finding Survey of B2C E-Commerce such as Electric Shopping Malls</i>	Dec 27, 2006
31	<i>Fact-finding Survey Report on Textbook Distribution</i>	Aug 3, 2007