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

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ROUNDTABLE ON RESALE PRICE MAINTENANCE

-- Note by Japan --

This note is submitted by Japan to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 22-23 October 2008.

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1. Introduction

1. The Antimonopoly Act (“AMA”) prohibits “Unfair Trade Practices” (Article 19). The term “Unfair Trade Practices” means any acts prescribed in each Item of Paragraph 9 of Article 2 of the AMA which tend to impede fair competition and are designated by the JFTC. The designation of “Unfair Trade Practices” is stipulated by Public Notice.

2. In Item 4 of Paragraph 9 of Article 2 of the AMA, “Dealing with another party on such conditions as will unjustly restrict the business activities of the said party” is stipulated. Resale Price Maintenance (“RPM”) is prohibited as unjustly restricting another party’s selling price of goods under Paragraph 12 of the “Designation of Unfair Trade Practices“ (Fair Trade Commission Public Notice No. 15, 1982) (hereinafter referred to as “General Designation”), which stipulates as follows:

1.1 Designation of Unfair Trade Practices (Fair Trade Commission Public Notice No. 15 of June 18, 1982)

Resale Price Restriction

(12) Supplying goods to another party who purchases the said goods from oneself while imposing, without justifiable grounds, one of the restrictive terms listed in the following items:

- (i) Causing the said party to maintain the selling price of the goods that one has determined, or otherwise restricting the said party's free decision on the selling price of the goods; or
- (ii) Having the said party cause an entrepreneur who purchases the goods from the said party to maintain the selling price of the goods that one has determined, or otherwise causing the said party to restrict the said entrepreneur's free decision on the selling price of the goods.

3. In the following sections, we would like to introduce the viewpoint on RPM under the AMA and the exemption system from the AMA on the provision of RPM. We would also like to introduce preceding court cases and recent JFTC cases, which are related to the theme of this roundtable.

2. Viewpoint on RPM

2.1 The position of RPM under the AMA

4. The JFTC published “the Guidelines Concerning Distribution Systems and Business Practices under the Antimonopoly Act“ (published on 11 July 1991, and amended on 1 November 2005) (hereinafter referred to as “Distribution Systems and Business Practices Guidelines”) and shows the viewpoint on RPM. In these guidelines, RPM is regarded as “in principle illegal as an unfair trade practice” because “it is one of the most basic matters in a firm’s business activities that it independently determines its own sales price, in keeping with conditions in a market, and moreover this secures competition among firms and consumer choice.”

2.2 Viewpoint expressed in Supreme Court Decisions

5. The Courts defined the meaning of a “justifiable ground” for RPM as follows:

- (1) In a Supreme Court Decision (the Wakodo case described later) in 1975, the plaintiff claimed that it had a “justifiable ground” based on the appropriateness of its business judgment. However, the court ruled that an action which might look appropriate in the ordinary sense, i.e., an action that was rational or necessary merely from the viewpoint of business management or business transactions not directly related to the maintenance of the competitive order, was not therefore necessarily supported as having a “justifiable ground.” The plaintiff further claimed that the resale price maintenance taken for goods with weak market competitiveness in the course of business activity would promote further competition with other goods and that such action should be considered to have a “justifiable ground.” To this claim, the court replied that resale price restriction was prohibited mainly to exclude restriction on competition in the business activities of the restrained party. The court explained that, even if the resale price maintenance enhanced the competition between the party taking such action and its competitors, the tendency of such action to impede competition could not be denied; insofar as such action did not always have the same economic effect, as in a case where free price competition was maintained among the sellers of the goods concerned that the party put restraints on.
- (2) In another Supreme Court Decision in the same year (the Meiji Shoji case described later), the plaintiff claimed that the restraint of prices did not constitute a "restraint of trade" described under Item 8 of the former General Designation of Unfair Trade Practices. It also claimed that its actions, taken to defend itself from loss leader selling, substantially satisfied the requirements of the designated resale price maintenance system¹ and had a "justifiable ground." However, the Supreme Court ruled as follows: “From the viewpoint of promoting fair competition, prices in trade and selection of suppliers, which are essential contents of the trade, should be individually decided by the free discretion of the trading party considering the economic efficiency. Any restraint imposed on these issues by an entity other than the above party is exactly the restraint of “trade” as described above." The court further defined a “justifiable ground” as follows: “This is an idea solely from the viewpoint of maintaining a fair competitive order and means that the restrictive term is not concerned with hampering free competition in the other party’s business activity. Simply because it is necessary or rational in business management for an entrepreneur to impose the restrictive term cannot be regarded as being a ‘justifiable ground’.” Further, in response to the plaintiff’s argument that substantial satisfaction of the requirements of the designated resale price maintenance system was sufficient to constitute a “justifiable ground,” the Supreme Court stated “whether implementation of the resale price maintenance was appropriate or not should be judged from the viewpoint of public benefits by the appellee (JFTC) in the above designation procedure, considering various circumstances. The court ruled that if an entrepreneur without designation by the JFTC took an action to maintain resale prices generally and systematically imposed on all resellers, such entrepreneur did not have a legally ‘justifiable ground’.”

¹ According to Article 24-2, Paragraph 1 of the AMA before its amendment, which exempts goods designated by the JFTC from prohibitions against resale price maintenance, cosmetics and medicines were designated as of 1975, when this Supreme Court Decision was issued. However, no item is designated as such at present (Refer to IV later).

Lawsuit brought by Wakodo Co., Ltd. seeking to overturn a JFTC Decision (Supreme Court Decision on July 10, 1975)

6. Wakodo Co., Ltd. (hereinafter referred to as "Wakodo"), which was an exclusive seller of powdered baby milk manufactured by Sankyo Nyugyo K.K., established a retailer registration system, reward money system and distribution route confirmation system as sales promotion measures for powdered baby milk. It decided the powdered milk price for wholesalers, the wholesale price for retailers and the retail price, and requested that wholesalers sell the products at the designated wholesale price. It implemented the sales systems described above by notifying the wholesalers that, if they did not follow the request, it would consider adjusting the amount of the reward money as a disadvantage of noncompliance.

7. The JFTC considered such action by Wakodo to be trade with wholesalers on conditions that restrict trades between wholesalers and retailers. The JFTC ruled that this action fell under Item 8 of the former General Designation of Unfair Trade Practices and was in violation of Article 19 under the AMA. It ordered Wakodo to (1) abolish its sales promotion measures, (2) prohibit calculation of the reward money based on the extent of cooperation on the respondent's request and (3) disseminate the measures taken according to (1) and (2) among the wholesalers (Hearing decision on October 11, 1968).

8. Wakodo filed a suit to rescind the JFTC decision, but the judgment by the Tokyo High Court on July 17, 1971, entirely upheld the JFTC decision and rejected the request. Wakodo appealed again, objecting to the decision, but the Supreme Court ruled on July 10, 1975, that Wakodo's resale price maintenance of powdered baby milk was not supported by a "justifiable ground" and fell under Item 8 of the former General Designation of Unfair Trade Practices and was in violation of Article 19 under the AMA.

Lawsuit brought by Meiji Shoji Co., Ltd. seeking to overturn a JFTC Decision (Supreme Court Decision on July 11, 1975)

9. Meiji Shoji Co., Ltd. (hereinafter referred to as Meiji Shoji) was an exclusive seller of powdered baby milk manufactured by Meiji Dairies Corporation. When introducing a new product in 1964, Meiji Shoji decided to register the wholesalers and retailers and to establish a large amount payment system and incentive system so that the price of powdered baby milk could be maintained. It had the wholesalers swear to observe the wholesale price fixed by Meiji Shoji and to trade with only registered retailers. It had trading with the wholesalers under the condition that it would largely reduce the rebate or cancel registration of the wholesalers who did not cooperate under such a system.

10. The JFTC considered such action by Meiji Shoji to be trade with registered wholesalers on conditions that restrict the trading between registered wholesalers and registered retailers. The JFTC ruled that this action fell under Item 8 of the former General Designation of Unfair Trade Practices and was in violation of Article 19 under the Antimonopoly Act. It ordered Meiji Shoji to (1) abandon its sales promotion policy, (2) prohibit calculation of the rebate based on the extent of cooperation with the sales promotion policy of Meiji Shoji, and (3) disseminate the measures taken according to (1) and (2) among the registered wholesalers (Hearing decision on October 11, 1968).

11. Meiji Shoji filed a suit to rescind the JFTC decision, claiming that its restraint of prices did not constitute the restraint of "trade" described under Item 8 of the former General Designation and that its action was a self-defense measure against loss leader selling and therefore based on a "justifiable ground." The Tokyo High Court rejected Meiji Shoji's claim on July 17, 1971, dismissing its request. On appeal, the Supreme Court ruled on July 11, 1975, that there was no "justifiable ground" for any actions taken by Meiji Shoji to maintain prices for powdered baby milk, and that such actions fell under Item 8 of the former General Designation of Unfair Trade Practices and were in violation of Article 19 under the AMA.

2.3 *JFTC's administrative viewpoints on RPM*

12. In the Distribution Systems and Business Practices Guidelines, the JFTC shows the administrative viewpoint on the provision of RPM in the AMA. The viewpoint is as follows.

Viewpoint

- It is one of the most basic matters in a firm's business activities that it independently determines its own sales price, in keeping with conditions in a market, and moreover this secures competition among firms and consumer choice.

In cases where, as one aspect of marketing activities, or as requested by distributors, a manufacturer restricts the sales price of distributors, it is in principle illegal as an unfair trade practice, because it reduces or eliminates price competition among distributors.

- In cases where a manufacturer's suggested retail price or quotation is indicated to distributors as a reference price, such conduct itself is not a problem².

In cases where the price is not merely given as a reference price, however, and the manufacturer seeks to restrict the resale price of the distributors by causing them to keep the reference price, such conduct falls under the conduct described in A above, and is in principle illegal.

Restricting Resale Price

13. If a manufacturer restricts the free decision of the sales of distributors, such act corresponds to RPM, which is in principle illegal as an unfair trade practice (General Designation Paragraph 12). The "Guidelines Concerning Distribution Systems and Business Practices" stipulated the criteria under which resale prices are restricted or not:

- Whether resale prices have been restricted is to be judged based on the determination of whether any artificial means is taken to secure the effectiveness in attaining sales at the price indicated by the manufacturer. In the following cases, it shall be judged that the effectiveness in attaining sales at the price indicated by the manufacturer is secured:
 - In cases where a written or oral agreement between a manufacturer and its distributors causes the distributors to sell at the price indicated by the manufacturer, as shown in the following examples:
 - Where a written or oral contract provides that sales are made at the price indicated by a manufacturer;

² In cases where a manufacturer sets a suggested retail price, it is preferable that it is not shown as "True Price" (Seika), "Set Price" (Teika), or the number of the price alone, but shown as non-binding expressions such as "Reference Price" (Sanko Kakaku) or "manufacturer's suggested retail price" and that in case of announcing the suggested price to distributors and consumers, the manufacturers clearly state that the suggested retail price is given solely for reference and that each distributor should determine its resale price independently.

- Where distributors are required to pledge in writing to sell at the price indicated by the manufacturer:
- Where a manufacturer only starts dealing with such distributors that accept such a condition that they sell at the price indicated by the manufacturer; and
- Where a manufacturer deals with distributors on conditions that the distributors sell at the price indicated by the manufacturer and that unsold goods are not to be discounted but to be repurchased by the manufacturer.
- In cases where any artificial means, such as imposing or suggesting to impose economic disadvantage if sales are not made at a manufacturer's indicated price, causes distributors to sell at the indicated price, as shown in the following examples:
 - Where the curtailment of shipments or any other economic disadvantage (including the reduction of quantities shipped, raising of shipment price, reduction of rebates, refusal to supply other products: hereinafter the same) is imposed in the event that sales are not made at a manufacturer's indicated price or where a notification or suggestion to that effect is made to distributors;
 - Where rebates or other economic rewards (including lowering of the shipment price, supplying of the products; hereinafter the same) are provided in the event that sales are made at a manufacturer's indicated price, or where a notification or suggestion to that effect is made to distributors; and
 - Where a manufacturer gets distributors to sell at the manufacturer's indicated price by the following means:
 - Collecting sales price reports, patrolling retail establishments, conducting price supervision by salespersons dispatched to shops, examining ledgers or records of retailers, and so forth in order to ascertain whether sales are being made at the manufacturer's indicated price;
 - Identifying price-cutting distributors by making use of secret marks and requesting wholesalers who supplied the goods to such distributors not to sell to them;
 - Buying goods from price-cutting distributors and requesting such distributors or wholesalers who supplied them to buy the goods or pay the cost of their purchases; and
 - Transmitting complaints to price cutting distributors from nearby distributors with regard to low-price sales, and requesting the price -cutting distributors to end such sales.
- In cases where discriminatory treatment in the form of refusals to deal or provision of rebates, and so on, has been used to secure the effectiveness of restrictions on resale price, such conduct itself is illegal as an unfair trade practice (Paragraph 2 (Other Refusal to Deal) or 4 (Discriminatory Treatment on Transaction Terms, etc.) of the General Designation).
- In A above, the price indicated by a manufacturer to distributors includes both a specific price and any of the following types of price level:

- Price to be within x% discount from the manufacturer’s suggested retail price;
 - Price to be in a specific range (no less than Y JPY and no more than Z JPY);
 - Price to be approved in advance by the manufacturer;
 - Price to be not less than that charged by nearby stores; or
 - Price to be suggested by the manufacturer to the distributors as the lowest limit by such means as warning the distributors against discount.
- The guidance regarding restrictions on resale price described in A, B and C above shall apply not only to conduct by a manufacturer vis-à-vis direct customers but also to conduct vis-à-vis secondary wholesalers or retailers which are indirect customers, either directly or indirectly via wholesalers (Paragraph 12, 2, or 4 of the General Designation).

Cases which are usually not illegal

14. In cases where in the following kinds of transactions, a direct purchaser from a manufacturer only functions as a commission agent, and if it is recognised that in substance the sale is being done between the manufacturer and its ultimate purchasers, even if the manufacturer instructs resale price to the direct purchaser, it is usually not illegal:

- In case of consignment sales, and if the transaction is made with a consignor on its own risks and account so that a consignee bears no risk beyond that associated with its obligation to exercise the care of a good manager in the shortage and handling of goods, collection of payments, and so on, i.e., is not liable for loss of goods, damage to them, or for unsold goods; or
- In case of transactions where a supply price is negotiated and decided directly between a manufacturer and a retailer (or user), and the manufacturer instructs a wholesaler to deliver goods to the retailer (or the user), and if the manufacturer is deemed, in substance, to sell the goods to the retailers (or the user), under such circumstances that the wholesaler is charged only with responsibility for the physical delivery of the goods and collection of payment, and a fee is paid for such work.

3. Recent cases

15. The JFTC took legal measures against RPM as an Unfair Trade Practice in 10 cases in the past 10 years. Recent cases are described below.

3.1 Case against Hamanaka Co., Ltd. (Cease and desist order on 23 June 2008)

16. Hamanaka Co., Ltd. (hereinafter referred to as “Hamanaka”) is a company that commissions the manufacture of yarn for hand knitting or handicrafts in the form of a ball with the trademark “Hamanaka” or “Rich More” (hereinafter referred to as “Hamanaka wool”) to other contract manufacturers, and sells Hamanaka wool. Hamanaka wool is more popular than other products as it is often used for knitting or handicraft works which appear in knitting magazines published by Hamanaka and others. Because of this, many consumers purchase Hamanaka wool by designating it, so that Hamanaka wool is an indispensable product in the merchandise of retailers who sell yarn for hand knitting or handicrafts. Hamanaka engaged in the following acts without any justifiable grounds.

- Hamanaka fixed the discount limit price³ for Hamanaka wool and thereafter requested that retailers sell the product at such discount limit price or higher and had the wholesalers request that retailers to which such wholesalers sold Hamanaka wool also sell the product at the discount limit price or higher. To assure the actual effect of the request to the retailers, Hamanaka stopped shipment of Hamanaka wool to retailers that did not satisfy such requests or to wholesalers distributing the product to such retailers.
- b Also for the sale of Hamanaka wool by means of the Internet, Hamanaka decided to have retailers sell the product at a price equal to or higher than the discount limit price. Hamanaka requested the retailers to sell the product at the discount limit price or higher and had the wholesalers request the retailers to which it sold Hamanaka wool to sell the product at the discount limit price or higher.

17. The JFTC deemed this act to be in violation of Article 19 of the AMA (Item 1 and 2, Paragraph 12 [Resale Price Restriction] of Unfair Trade Practices) and issued a cease and desist order on 23 June 2008.

3.2 *Case against Nissan Chemical Industries, Ltd. (Cease and desist order on 22 May 2006)*

18. Nissan Chemical Industries, Ltd. (hereinafter referred to as “Nissan Chemical”) is an agricultural chemical manufacturer/seller, which imports and sells herbicides to prevent and remove weeds with the trademark “ROUNDUP High Load” for wholesalers. Wholesalers sell ROUNDUP High Load to retailers such as home improvement retailers selling commodities and goods for gardening, retailers specialised in selling materials for agriculture such as agrichemicals, etc., directly or via wholesalers at the next distribution level. As ROUNDUP High Load is more widely known compared to other herbicides through its advertising in television, radio and newspaper leaflets, more than a few consumers purchase it by designation or continuously, so that it is an indispensable product for home improvement retailers in their merchandise.

19. Nissan Chemical directly or indirectly through its partner wholesalers and without justifiable ground, forced home improvement retailers to sell three kinds of “ROUNDUP High Load” at the recommended retail prices by means of:

- Requesting them to sell the products at the recommended retail prices set by the manufacturer/seller while suggesting that shipment would be suspended unless the request was met and by, directly or indirectly through its partner wholesalers, halting or reducing the quantity of shipment to those home improvement retailers which failed to meet the request; and
- by supplying packages of three five-litre or 0.5-litre bottles trademarked with “ROUNDUP High Load” merely to those home improvement retailers which had accepted a proposed trading condition, which was to sell them at the suggested retail prices.

20. The JFTC deemed this act to be in violation of Article 19 of the AMA (Item 1 and 2, Paragraph 12 [Resale Price Restriction] of Unfair Trade Practices) and issued a cease and desist order on 22 May 2006.

³ “Discount limit price” means the price 10% lower than the standard price for sale by the unit of a ball or other prices as the lower limit when the retailer sells the product with a discount.

4. Exemption

21. The provisions of the AMA shall not apply to “a commodity, which is designated by the JFTC” and “the work” even if manufactures restrict resale prices (Paragraph 1 and 4 of Article 23). There has been no commodity designated by the JFTC since April 1997. The meaning of “the work” is limited to 6 items, which had been institutionalised to be sold at set prices at the time of the introduction of the exemption provision on RPM in 1953. The 6 items include 4 items such as books, magazines, newspapers and record disks and 2 items such as music tapes and music CDs, whose function and availability are identical with record disks (hearing decisions against Sony Computer Entertainment Co., Ltd., on 1 August 2001).