

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

**ROUNDTABLE ON COMPETITION IN ROAD FUEL**

**-- Note by Japan --**

*This note is submitted by Japan to the Competition Committee FOR DISCUSSION under Item IX at its forthcoming meeting to be held on 19-20 June 2013.*

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## ROUNDTABLE ON COMPETITION IN ROAD FUEL

### -- Note by Japan --

#### 1. Introduction

1. In Japan, most all of gasoline, which is recognized as the most common road fuel, is sold through gas stations called “service stations” (hereinafter referred to as the “SSs”. SSs can be found in about 37,000 places all over the country. Most of them are run by small and medium enterprises (“keiretsu” SSs of the primary distributor makes up the majority, but there are also private brand SSs run by business firm families.). Also, because of market entry by other types of business enterprises such as home improvement centers etc., competition among SSs is getting active.

2. Under such circumstances, it has been observed that some SSs sell gasoline at a price below their costs required for their supply, so that there are strong calls for the Japan Fair Trade Commission (hereinafter referred to as the “JFTC”) to regulate such unjust low price sales. The JFTC has issued cease and desist orders, warnings and other measures for cases in which it is considered that the enterprise’s low price sales of gasoline fall or may fall under unjust low price sales, which are prohibited by the Antimonopoly Act.

3. First, we would like to introduce a fact-finding survey on gasoline distribution. Next, this paper will describe the provisions of the Antimonopoly Act concerning unjust low price sales, the JFTC’s policy to deal with them and the current law enforcement situation.

#### 2. Fact-finding survey on gasoline distribution

4. In Japan, the following problems have been pointed out; low price sales in the retail stage were activated; discriminatory pricing in the wholesale stage was pointed out as the background of low price sales. In addition, it is said that these problems are affected by “gyotengyoku”<sup>1</sup> (gasoline that a primary distributor sells without attaching its own brand or that business firms obtained from abroad and sell by themselves). Based on these facts, in 2004, the JFTC surveyed the actual conditions of the gasoline distribution and published a “Fact-finding survey on gasoline distribution” in order to explain its outlook on the conditions in light of the Antimonopoly Act.

5. In this survey, for example, in primary distributors’ trademark license agreements exchanged with “keiretsu” special agents, the primary distributors prohibit the “keiretsu” special agents from selling the gasoline provided by other primary distributors except for the relevant primary distributors in SSs (as to “keiretsu” special agents, the products are distributed through specific “keiretsu” appointed stores) where the agents display the trademark of the primary distributors. Therefore, “keiretsu” SSs that conduct business under the brand of primary distributors can stock gasoline only from their primary distributor. In accordance with the above situation, the report explained the following outlook.

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<sup>1</sup> Generally, the transaction price of “gyotengyoku” is lower than that which is supplied to “keiretsu” special agents or “keiretsu” appointed store.

6. The prohibition by primary distributors upon “keiretsu” agents to sell “gyotengyoku” in SSs that display their signposts is generally considered to be, to a certain extent, necessary for the primary distributors to maintain confidence in their trademark. It therefore is not problematic with regard to the Antimonopoly Act, taking into account the fact that gasoline is a product to which no trademark can be directly attached; the trademark indicated on the signposts of SSs is the only identifying factor.

7. However, the survey identified three situations in which this conduct from primary distributors may be problematic with regard to the Antimonopoly Act (dealing on exclusive terms, discriminatory treatment, dealing on restrictive terms, abuse of dominant bargaining Position, etc.); (i.) arbitrarily and discriminatorily exercising their trademark right which directly and seriously affects the competitive functioning of the keiretsu special agents who are being unfavorably treated. (ii.) through prohibiting keiretsu special agents to handle the low price “keiretsugyoku” obtained from large scale appointed store of same “keiretsu” , impeding the free business activities of keiretsu special agents and bringing disadvantage to them. (iii.) prohibiting the keiretsu special agents from handling the “gyotengyoku” despite the fact that the primary distributor did not distribute the products as the “keiretsugyoku” with its trademark.

### **3. Guidelines and provisions of the Antimonopoly Act concerning unjust low price sales**

#### **3.1 *Provisions of the Antimonopoly Act***

8. Concerning unjust low price sales, Article 2, Paragraph (9), item (iii) of the Antimonopoly Act stipulates that “(w)ithout justifiable grounds, supplying goods or services continuously for a consideration which is excessively below the cost required for the supply, thereby likely to cause difficulties to the business activities of other enterprises” falls under unfair trade practices. The Designation of Unfair Trade Practices (Fair Trade Commission Public Notice No. 15 of June 18, 1982) which is based on Item (vi) of said paragraph stipulates that “(i)n addition to any act falling under the provisions of Article 2, Paragraph (9), item (iii) of the Act, unjustly supplying goods or services for a low consideration, thereby tending to cause difficulties to the business activities of other enterprises” also falls under unfair trade practices. These activities are prohibited based on Article 19 of the Antimonopoly Act.

9. In the past, unjust low price sales had been only the subject of cease and desist orders (Article 20 of the Antimonopoly Act). However, an amendment of the Antimonopoly Act in 2009 made it possible for the JFTC to issue surcharge payment orders when the unjust low price sales are repeated (in the case where the enterprise has been the subject of cease and desist orders within the past ten years before the investigation start date etc.)(Article 20-4 of the Antimonopoly Act).

#### **3.2 *Guidelines concerning unjust low price sales under the Antimonopoly Act (December 18, 2009)***

10. The JFTC published “Guidelines concerning unjust low price sales under the Antimonopoly Act” (hereinafter referred to as the “Guideline”) explaining its position on unjust low price sales. The outline of the Guideline is as follows.

##### **3.2.1 *The purposes of regulations concerning unjust low price sales***

11. The price competition through corporate efforts constitutes the essential core of competition on merits (meaning the competition in which enterprises try to win customers by supplying high-quality and low-cost products), that competition policy aims to maintain and promote. In this sense, low prices in themselves are not immediately considered to be improper, but neither are they always considered to be

proper. If an enterprise tries to acquire customers by offering a low price that has been not achieved through an enterprise's efficient operations, but completely disregards profitability, it is possible that such behavior could be considered contrary to the purposes of the Antimonopoly Act and, if so, it must be regulated. This is because an act of winning over the customers of a competitor by selling goods below their real cost without justifiable grounds — selling at such a low price that the supply of the goods cannot be continued unless the losses thereby incurred were compensated for by profits from the supply of other goods, or by other sources of funds — does not reflect corporate efforts or the proper competition process, and could cause difficulties to the business activities of enterprises that are just as efficient as or more efficient than the enterprise engaged in unjust low price sales (hereinafter referred to as the "price cutter") and could harm the fair competition order.

### 3.2.2 *The outlooks on each requirement*

#### 3.2.2.1 Article 2, paragraph (9), item (iii) of the Antimonopoly Act (Statutory unjust low prices)

##### a) "Excessively below the costs required for the supply"

The term "costs required for the supply" refers to the total cost of sales<sup>2</sup> of the price cutter, and for an ordinary manufacturing business, it refers to the production costs<sup>3</sup> plus the selling costs and general and administrative costs. In case that total costs are less than the costs that would not be generated unless the price-cut goods are supplied (hereinafter referred to as "variable-featured costs"), then they would be presumed to be "Excessively below the costs required for the supply".

##### b) "Continuously"

The term "continuously" either means that an enterprise engages in price cutting repeatedly over a considerable period of time, or that an enterprise is objectively predicted to be engaged in price cutting for a continuous duration based on the enterprise's sales policy, etc., although this does not necessarily require price cutting to be carried out every day in a continuous manner.

##### c) "Likely to cause difficulties to the business activities of other enterprises"

The term "other enterprises" as used in the phrase "likely to cause difficulties to the business activities of other enterprises" generally refers to the competitors of the price cutter, but could also include non-competitors, depending on the manner of price cutting.

Also, the phrase "likely to cause difficulties to the business activities of other enterprises" does not necessarily require that price cutting makes business activities difficult in reality; it includes cases where a concrete possibility of the price cutting inviting such result is found based on various circumstances<sup>4</sup>. The presence or absence of such a possibility is determined on a case-by-

<sup>2</sup> "Total cost of sales" here does not mean the cost of all the sales activities for the accounted period, it means the total costs of sales of the price-cut goods.

<sup>3</sup> "Production costs" means the total amount of costs required for the costs incidental to the purchase of goods, such as shipping costs and receiving inspection costs.

<sup>4</sup> For example, when an influential enterprise engages in price cutting, supplying goods at a price that is lower than the variable-featured costs, with the intention of excluding other enterprises from the relevant market, and as a result, its sales quantity increases rapidly, making the price cutter the top seller in said market, such price cutting is regarded as "tending to cause difficulties to the business activities of other

case basis, by comprehensively taking into consideration the actual status of other enterprises as well as the size and type of business of the price cutter, the quantity of price-cut goods, the duration of price cutting, the status of advertising and publicity associated with the price-cut goods, the characteristics of the price-cut goods, and the price cutter's intention or purpose of price cutting.

d) "Justifiable grounds"

Even when the requirements set forth in a), b) and c) above are satisfied, if there are special circumstances that justify price cutting, such action is not regarded as impeding fair competition; thus it does not constitute unjust low price sales. "Justifiable grounds" are considered to exist for setting a low price according to the market conditions of the goods or the raw materials. For example, in cases where the market price of the price-cut goods declines due to a supply-and-demand imbalance or the replacement cost of the raw materials for the price-cut goods becomes lower than the acquisition cost of said raw materials. Also, in cases where the price of the raw materials soars unexpectedly in a transaction for procuring the raw materials after the price of the goods is decided, and as a result, the price of the price-cut goods becomes excessively below the costs required for the supply, "justifiable grounds" are considered to exist.

3.2.2.2 Paragraph (6) of the Designation of Unfair Trade Practices (Designated unjust low price sales)

12. Even in cases where the said price cutting does not satisfy either or both of the price/cost relationships and continuity, which are requirements for unjust low price sales, if the price cutting harms the fair competition order, judging from the characteristics of the price-cut goods, the intention or purpose of the price cutter, the effects of the price cutting, the status of the entire market, and other factors, the said price cutting falls under the provisions of paragraph (6) of the Designation of Unfair Trade Practices and is regulated for being unjust low price sales,

13. Whether or not price cutting is "likely to cause difficulties to the business activities of other enterprises" is determined on a case-by-case basis, by comprehensively taking into consideration the actual status of other enterprises as well as the size and type of business of the price cutter, the quantity of price-cut goods, the duration of the price cutting, the status of advertising and publicity associated with the price-cut goods, the characteristics of the price-cut goods, and the price cutter's intention or purpose of price cutting.

**3.3 *The JFTC's policies concerning unjust low price sales and discriminatory price etc. in distribution of gasoline etc. (December 18, 2009)***

14. In order to ensure fair competition in sales of gasoline etc., the JFTC issued "Policies concerning unjust low price sales and discriminatory price etc. in distribution of gasoline etc." which clarifies the JFTC's policies concerning unjust low price sales and discriminatory prices on the basis of the trade situation of gasoline etc. The main points of this guideline are as follows.

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enterprises" even if the business activities of the other enterprises are not found to be facing difficulty in actuality.

- A. Cases where complaints have been made should be dealt with expeditiously. In principle, a limit of two months is set as a targeting period to notify the results of complainants. Also, in accordance with the characteristics of the cases, the JFTC will deal with enterprises who may receive cautions<sup>5</sup> again regardless of the fact that they have already received cautions in the past as follows; (i.) In some cases, the JFTC invites the manager and gives him/her a caution. (ii.) If the low price sales by enterprises will extensively negatively impact neighboring distributors, the JFTC will deal with it, not by an easy and swift manner, but by a strict one through the procedure of B (described below).
- B. In cases where the unjust low price sales which are conducted by large scale enterprise or are conducted repeatedly, and the negative impact on circumjacent distributors is expected to be extensive, the JFTC will survey whether it will have negative impact on neighboring distributors' business activities. Thereafter, when faced with problematic cases, the JFTC will deal with the cases in a strict manner. In addition, even if those do not result in a cease and desist order or warning<sup>6</sup>, the JFTC will invite the manager and give a strict caution in writing.
- ※ Unjust low price cases classified by type of measures which are dealt with by the JFTC within recent 3 years are as follows.

	Cease and Desist Order	Warning	Caution
FY 2010	0	0	714
FY 2011	0	0	444
FY 2012	0	1	426

<sup>5</sup> "Warnings" are to be issued in cases where there is insufficient evidence to take legislative action, but there is suspicion of violation.

<sup>6</sup> "Cautions" are to be issued in cases where there is insufficient evidence to have suspect a violation, but are possibilities for violation in the future.