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THE INTERFACE BETWEEN COMPETITION AND CONSUMER POLICIES

Contribution from Japan

-- Session IV --

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-- Japan --

1. Position of the Japan Fair Trade Commission

1. The Antimonopoly Act provides that, "The purpose of this Act is, by prohibiting private monopolisation, unreasonable restraint of trade and unfair trade practices, by preventing excessive concentration of economic power and by eliminating unreasonable restraint of production, sale, price, technology, etc., and all other unjust restriction on business activities through combinations, agreements, etc., to promote fair and free competition, to stimulate the creative initiative of entrepreneurs, to encourage business activities, to heighten the level of employment and actual national income, and thereby to promote the democratic and wholesome development of the national economy as well as to assure the interests of general consumers," (Article 1) and the direct purpose of the Act is interpreted as "to promote fair and free competition." In order to achieve this purpose, the Japan Fair Trade Commission ("JFTC") was established (Article 27) and is responsible for competition policy in Japan. The AMA makes it clear that the JFTC independently carries out its authority concerning the enforcement of the Act (Article 28).

2. Integrated Implementation of Competition and Consumer Policies

2. From the provision of Article 1 of the AMA, it is clear that the ultimate purpose of competition policy is "to assure the interests of consumers." In order to accomplish this purpose, it is important to help the market mechanism work effectively by maintaining and promoting competition among companies, and to create and ensure an environment in which consumers, as key players in the market, can make decisions in an independent and reasonable manner.

3. The JFTC had held Study Group on Consumer Transactions meetings comprised of experts in competition and consumer policies since November 2001. In a bid to help the JFTC positively tackle consumer transaction issues, the Group had discussed several topics, including the relationship between competition and consumer policies and the realisation of proper choices made by consumers. As a result, it produced a report in November 2002, affirming the view mentioned above and the integrated implementation of competition and consumer policies:

1. Integrated Implementation of Competition and Consumer Policies

- (1) The purpose of competition policy is to promote fair and free competition in the market and to assure the interests of consumers by increasing the efficiency of all economic activities through competition.

In order to achieve this policy purpose, the JFTC has been actively working on competition policy with a main focus on making the market mechanism work effectively by maintaining and promoting competition among companies through the strict enforcement of the AMA, surveys and recommendations on anticompetitive non-government regulations, proposals on regulatory reforms and the like. Consumer

interests realised through this competition policy means the fact that good quality, low price and various goods and services are sufficiently supplied to consumers.

However, the purpose of competition policy, namely “to assure the interests of consumers” cannot be achieved only through the sufficient supply of good quality, low price and various goods and services to consumers. It is also necessary to enable consumers to make independent and reasonable decisions on the choice among goods and services supplied. Unless these two conditions are both met, consumers cannot maximise their utility by purchasing goods and services that suit their needs. This means that consumer policy for building and ensuring an environment in which consumers can make independent and reasonable decisions is essential for realising “the interests of consumers,” the purpose of competition policy.

Moreover, if consumers can take independent and reasonable action as the end users of goods and services, entrepreneurs who are able to meet their needs appropriately will survive while those who fail to do so will drop out of the market, which is the most fundamental function of the market mechanism. In ensuring this function, consumers play an important role in terms of competition policy. Thus, consumer policy to create and assure an environment in which consumers can make independent and reasonable decisions is closely associated with competition policy in that it helps the market mechanism work more effectively.

Therefore, it is important to maintain two perspectives at the same time - the so-called “narrow sense” and “broad sense” of competition policy - in order to adequately realise “the interests of consumers.” In the narrow sense, competition policy places its focus on making the market mechanism work effectively by maintaining and promoting competition among companies. In the broad sense, competition policy is implemented in an integrated manner with consumer policy that creates and ensures an environment in which consumers can make independent and reasonable decisions.

Competition policy to promote fair and free competition and consumer policy to create and ensure a decision-making environment in which consumers can make proper choices both have a common purpose, “to assure the interests of consumers.” In addition, they are closely related to each other since the implementation of consumer policy helps the market mechanism work effectively. Consequently, the JFTC should actively carry out consumer policy, as an integral part of competition policy, for creating and securing a decision-making environment in which customers can make sound choices.

3. Significance of the JFTC’s Commitment to Consumer Policy

4. In addition to the importance of the integrated implementation of competition and consumer policies, as discussed in 2 above, the significance of a role played by the JFTC in consumer policy is also recognised in Japan, given the organisation character of the JFTC, responsible for competition policy. With respect to this significance, the report from the Study Group on Consumer Transactions states the following:

In order to ensure sound consumer transactions, ministries and agencies governing specific business sectors have been implementing their consumer policy by enforcing sector-specific laws that provide, for example, for a ban on the unjust act of solicitation for business-to-consumer contracts, for an obligation to display and explain important facts and for invalidation of unfair contractual terms.

On the other hand, the Premiums and Representations Acts¹ (“PRA”) and the AMA are general laws covering all industries, so they can be extensively applied to any field, irrespective of whether it is subject to regulations under sector-specific laws. They can also be applicable even to those industries that have emerged as new businesses so recently that there is still no sector-specific law, as well as to those areas where regulations for ensuring proper consumer transactions are not adequately enforced even if there is a sector-specific law.

Also, if the PRA and the AMA facilitate proper consumer transactions, civil remedies under the provisions of the AMA are expected, such as a claim for no-fault damages and a petition for injunction against violations, in addition to the JFTC’s cease and desist order against these violations. This provides an advantage whereby the government and private parties conduct law enforcement in an integrated manner.

In addition, the JFTC, which governs no particular industry, should play a central role in resolving consumer problems as a neutral administrative institution that can effectively enforce the laws with investigative powers and divisions.

In view of these advantages, the JFTC should in the future make positive efforts toward consumer policy to create and ensure a decision-making environment in which consumers can make sound decisions.

4. Consumer Policy Implemented by the JFTC

4.1. *Legislation Enforced by the JFTC*

5. In order to implement consumer policy for creating and ensuring a decision-making environment in which consumers can make sound decisions, the JFTC enforces the PRA, which regulates the unjust inducement of customers, including misleading representations to consumers.

6. Japan’s AMA prohibits conduct that tends to impede fair competition as unfair trade practices (Article 19), which include the unjust inducement of customers. However, although expeditious proceedings are necessary to eliminate the unjust inducement of a large number of consumers and to minimise damage to them, a long time is required in order to take action against the unjust inducement under the AMA. In order to address this problem, the PRA was enacted in 1962, granting the special treatment of the AMA procedures. Based on the PRA, the JFTC has been strictly and promptly regulating misleading representations that prevent consumers from making sound decisions as well as making efforts to help consumers exercise good judgment on the details of and transaction conditions for goods and services and to provide appropriate information to them.

4.2. *Enhanced Regulations against Ungrounded Representations*

7. Essentially, any entrepreneur who fails to provide consumers with true, correct and useful information when offering goods and services and who fails to provide goods and services as represented will be unable to gain the trust of consumers in the market. Such entrepreneurs will also lose out in competition with other entrepreneurs who provide appropriate information and will be removed from the market. However, as social and economic structures change in response to rapid technical innovations, the increased amount of complex information and diversified consumer needs, new goods and services,

¹ See 4.1.

transaction methods and contracts that are so advanced and complicated as to exceed the ability of consumers to process and comprehend the information are continually emerging. In such a situation where there is a large disparity between consumers and entrepreneurs in their capacity to process information and to negotiate, it is important to make efforts in order to promote proper consumer transactions, including immediate actions against misleading representations under the PRA.

8. For instance, as consumers become more interested in health and weight loss, we see an increasing number of representations stressing the superior “performance” of goods and services and “benefits” that consumers may expect from them as a result, such as products and/or devices advertised as being beneficial in relation to weight loss or the recovery of eyesight. Before taking action under the PRA against misleading representations on the benefits or performance of goods and services, the JFTC once had to conduct investigations and examinations through special organisations and prove that such goods and services were not able to provide the benefit or performance advertised. For this reason, even if the entrepreneur had no justifiable grounds for making the representations, it took considerably long time before administrative measures could be carried out. Meanwhile, the goods and services that were suspected of making misleading representations might continue to be sold, thereby expanding consumer damage. In light of these circumstances, a new regulation was introduced in 2003 to pave the way for effectively regulating representations on goods and services without reasonable grounds. Pursuant to Article 4 (2) of the PRA, the JFTC may request any entrepreneur making a representation referring to any benefit provided by goods or services to submit reasonable grounds that support the representation within a predetermined period. When the entrepreneur fails to submit such materials, the JFTC can now regard it as an infringement without specifically demonstrating that it differs from fact and take the necessary action, which may include issuing an injunction to the representation.

5. Conflict and Coordination between Competition and Consumer Policies

9. In order to deter the unjust inducement of customers, such as misleading representations that distort the consumer choices of products, thereby ensuring fair competition, it is effective for individual industries to set up self-regulations based on the particular features of their products and their own trade practices and to comply with them. However, these self-regulations developed by separate industries may deviate from their objective of preventing the unjust inducement of customers and have the effect of restricting competition.

10. In terms of coordinating such possible conflicts between consumer and competition policies, the PRA provides for a system that requires entrepreneurs or trade associations who prepare self-regulations that aim at deterring the unjust inducement of customers and ensuring fair competition to have such self-regulations authorised by the JFTC in order to prevent them from being anticompetitive. Self-regulations authorised under the PRA are called fair competition codes.

11. The JFTC does not authorise any self-regulation unless it satisfies all four requirements listed below. Any act of entrepreneurs or trade associations under the authorised fair competition code is exempted from the applications of the AMA and PRA.

- It is appropriate for preventing the unjust inducement of customers and for maintaining fair competition;
- It is not likely to unreasonably impede the interests of consumers in general or related entrepreneurs;
- It is not unjustly discriminatory; and

- It does not unreasonably restrict the participation in or withdrawal from the fair competition code.

12. As of the end of 2007, there are 105 fair competition codes established in a wide range of fields. Such codes can ensure fair competition in their respective industries and provide an environment that is helpful to consumers in making sound decisions in relation to goods and services. In addition, they can be expected to eventually produce the effect of promoting competition, such as expanding the market size and facilitating new entry, by enhancing the confidence of consumers in individual industries.

6. Conclusion

13. Japan is facing the urgent challenge of actively implementing a policy from the standpoint of consumers. Like the JFTC, other relevant ministries and agencies are working to carry out different consumer policies in their respective areas. The JFTC will continue its positive efforts, largely in accordance with the PRA, to implement consumer policy in order to create and ensure a decision-making environment in which consumers can make appropriate choices.