

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

**ROUNDTABLE ON VERTICAL RESTRAINTS FOR ON-LINE SALES**

**-- Note by Japan --**

*This note is submitted by Japan to the Competition Committee FOR DISCUSSION under Item VII at its forthcoming meeting to be held on 26-27 February 2013.*

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## ROUNDTABLE ON VERTICAL RESTRAINTS FOR ON-LINE SALES

### -- Note by Japan --

#### 1. Introduction

1. With the increasing use of the Internet, e-commerce in Japan has trended upwards in recent years. In addition, an increase in demand for smart phones and tablets can be expected to expand the number of e-commerce users.

2. In light of the rapid popularization of e-commerce, the Japan Fair Trade Commission (hereinafter referred to as "JFTC") has responded aggressively to the enterprise's practices related to e-commerce including vertical restraints from the viewpoint of competition policy.

3. Firstly, this paper describes here the treatment of vertical restraints as defined by the Antimonopoly Act (hereinafter referred to as "AMA"), and then introduces results from a survey on the state of e-commerce, including vertical restraints "Survey of trade in B2C e-commerce such as electronic shopping malls" (December 2006). Finally, this paper describes the cases where vertical restraints related to e-commerce raised competition problems and other cases related to e-commerce.

#### 2. Treatment of vertical restraints under the AMA

4. Vertical restraints may be problematic under the AMA if they fall under the unfair trade practices or private monopolization. This is also true even if vertical restraints are conducted in e-commerce.

##### 2.1 *Unfair trade practices*

5. Article 19 of the AMA prohibits unfair trade practices. The following types of vertical restraints are regulated as unfair trade practices:

- Resale price maintenance (Item 4, Paragraph 9 in Article 2 of the AMA)
- Dealing on exclusive terms (Article 11 of Unfair Trade Practice)
- Dealing on restrictive terms (Article 12 of Unfair Trade Practice)

6. An enterprise is subject to a cease and desist order if it commits an activity which falls under any of the above practices (Paragraph 1 of Article 20 of the AMA). Regarding resale price maintenance, an enterprise is subject to a surcharge payment order, if it repeats a similar violation within 10 years after receiving a cease and desist order (Article 20-5 of the AMA).

##### 2.2 *Private monopolization*

7. The Article 3 of the AMA prohibits private monopolization. Private monopolization is a practice by which an enterprise substantially restrains competition in any particular field of trade, contrary to public interest, by excluding or controlling the business practices of other enterprises (Paragraph 5 of Article 2 of the AMA).

8. In relation to vertical restraints, if dealing on exclusive terms or restrictive terms substantially restrains competition in any particular field of trade, contrary to public interest, by excluding business practices of other enterprises, such an act falls under exclusionary type of private monopolization and is subject to a cease and desist order as well as a surcharge payment order (Article 7 and Paragraph 4, Article 7-2 of the AMA).

### **3. “Survey of trade in B2C e-commerce such as electronic shopping malls” (published in December 2006)**

9. Regarding the businesses of so-called electronic shopping malls, which constitute one form of e-commerce for consumers (hereinafter referred to as “B2C e-commerce”), the JFTC surveyed (i) transactions between operators of so-called electronic shopping malls (hereinafter referred to as “mall-operating enterprises”) and enterprises running shops in such malls (hereinafter referred to as “mall-participating enterprises”), and (ii) the relationships between enterprises aspiring to enter and develop their business in the B2C e-commerce field and supplying enterprises. Subsequently, the JFTC published its opinions under competition policy and the AMA in December 2006.

#### **3.1 *The features of the market***

10. The B2C e-commerce business, whose scale is expanding yearly, is conducted by mall-participating enterprises opening virtual shops on the internet, mall-operating enterprises managing virtual shopping malls that are composed of virtual shops on the internet and consumers. The existence of B2C e-commerce is important and can be advantages for mall-participating enterprises, for example, by having different outlets available to sell and potentially increasing sales, and on the other side, the wide selection of goods and the low prices are merits for consumers. The B2C e-commerce transactions are concentrated in the top three mall-operating enterprises.

11. While the scale of operation of the top three operators is large, smaller enterprises account for a large share of mall-participating enterprises. In addition, as the top three operators dominate transactions, shop owners depend very heavily on electronic shopping mall transactions in general and sometimes have difficulty in changing business partner operators. Hence, there is an operator that holds a dominant bargaining position in dealing with its shop owners among the top three operators.

#### **3.2 *Assessment of vertical restraints in the consumer e-commerce market under the AMA***

12. Below is an assessment of vertical restraints in the consumer e-commerce market under the AMA that were uncovered by surveys regarding the industrial structure and trade situation in the e-commerce market.

##### **3.2.1 *Dealing on restrictive terms which is imposed on mall-participating enterprises by mall-operating enterprises***

13. Some mall-operating enterprises prevented mall-participating enterprises from using customer information once they exited the mall. This activity constitutes Dealing on restrictive terms according to the AMA if it could adversely affect competition among online shopping malls, in spite of the fact that the act is not a necessary restraint to protect private information.

3.2.2 *Resale price maintenance which is imposed on mall-participating enterprises by supplying enterprises*

- Maintenance of a fixed price and prohibition of price reduction

In transactions between mall-participating enterprises and their supplying enterprises, some supplying enterprises asked mall-participating enterprises to maintain fixed prices, prohibiting price discount and set selling prices or low selling price limits that fall under Resale Price Maintenance and are prohibited under the AMA.

- Internet sales prohibitions

In transactions between mall-participating enterprises and their supplying enterprises, some supplying enterprises prohibited mall-participating enterprises from selling certain products on the Internet and set supplying prices higher. Prohibiting mall-participating enterprises from selling products on the Internet — because mall-participating enterprises may sell them in lower prices — and setting supplying prices so high that mall-participating enterprises cannot procure the product fall under dealing on restrictive terms and discriminatory pricing which are prohibited under the AMA.

**4. The cases where vertical restraints in e-commerce raised competition problems**

14. Following are two cases that the JFTC issued cease and desist orders after concluding that vertical restraints in e-commerce fell within unfair trade practices.

**4.1 Case regarding Hamanaka Co., Ltd.**

15. The JFTC issued a cease and desist order against Hamanaka Co., Ltd. (hereinafter referred to as “Hamanaka”) on June 23, 2008, on the ground that Hamanaka was engaging in conduct which falls within Paragraph 12 of Unfair Trade Practices<sup>1</sup>(Resale price maintenance), and therefore constitutes a violation of Article 19 of the AMA. Regarding this case, although Hamanaka made the hearing request to rescind the order, the JFTC dismissed the said hearing request. In addition, the courts dismiss lawsuit to rescind the hearing decision brought by Hamanaka. Through this process, the cease and desist order became final and binding.

16. Hamanaka fixed the discount limit price<sup>2</sup> for Hamanaka wool<sup>3</sup> around September 2005 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 wholesaler sold Hamanaka wool sell the product at the discount limit price or higher.

17. To assure the actual effect of the request to the retailers in paragraph a. above, Hamanaka stopped shipment of Hamanaka wool to the retailer that did not satisfy such request or the wholesaler distributing the product to such retailer.

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<sup>1</sup> By the amendment of the AMA, resale price maintenance is currently stipulated by the Paragraph 9, Item (iv)(a) and (b) in Article 2 of the AMA.

<sup>2</sup> “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.

<sup>3</sup> “Hamanaka wool” means the yarn for hand knitting or handicraft in the form of a ball with the trademark “Hamanaka” or “Rich More.”

18. Also for the sale of Hamanaka wool by means of Internet, Hamanaka decided around May 2007 to have retailers sell the product at a price equal to or higher than the discount limit price from July 1 that year. 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.

#### **4.2 Case regarding Johnson & Johnson K.K.**

19. The JFTC issued a cease and desist order against Johnson & Johnson K.K. (hereinafter referred to as “Johnson & Johnson”) on December 1, 2010, on the ground that Johnson & Johnson was engaging in conduct which falls within Paragraph 12 of Unfair Trade Practices (Dealing on restrictive terms), e.g. it forced its partner retailers to conceal the sale price for the vision corrective contact lens that was in the advertisements<sup>4</sup>, therefore constituting a violation of Article 19 of the AMA.

20. In the written cease and desist order on this case, the following fact is included as a specific example of violating the act mentioned above, that is, when its partner retailer indicated the sale price of a “One-day ACUVUE 90-package<sup>5</sup>” in the advertisement on the top page of its website, Johnson & Johnson forced its partner retailers to eliminate the sale price from the advertisement.

### **5. Other cases related to e-commerce**

#### **5.1 Case regarding DeNA Co., Ltd.<sup>6</sup>**

21. The JFTC issued a cease and desist order against DeNA Co., Ltd (hereinafter referred to as “DeNA”) on June 9, 2011, on the ground that DeNA was engaging in conduct which falls within Paragraph 14 of Unfair Trade Practices (Interference with competitor’s transactions), and therefore constitutes a violation of Article 19 of the AMA. The outline of this case is as follows.

22. DeNA and GREE, Inc. are companies that operate mobile social networking services (hereinafter referred to as “mobile SNS”)<sup>7</sup>, offer their own social games<sup>8</sup> and give their platforms for other enterprises to provide their social games.

23. DeNA has been an important business partner for many social game developers as it has ranked at the top in terms of revenue of social game in Japan from January 2010. Registered users of the mobile SNS that DeNA operates (hereinafter referred to as “Mobage-Town”) access the website of each social game developer through choosing links displayed on the first page of a “game” on the website of Mobage-Town, and social game are provided to them. In other words, the links displayed on the Mobage-Town website were designed to lead users to the websites of social games provided by developers, and are an important channel to attract and direct Mobage-Town registered users to the websites concerned.

<sup>4</sup> Excluding the pages other than the top page of the website on the Internet where the advertisement was displayed as well as the advertisement at the store.

<sup>5</sup> The product in which 90 pieces of the one-day disposable vision corrective contact lens sold by the trademark of “One-day ACUVUE” is packaged in one box.

<sup>6</sup> <http://www.jftc.go.jp/en/pressreleases/uploads/110609DeNA.pdf>

<sup>7</sup> “Mobile SNS” means the service to provides mobile website, which is equipped with the communication function among the users, and which enables the use of this function in the applications software including the games.

<sup>8</sup> “Social game” means the games which are provided to the users through the mobile SNS and is available only on the internet.

24. Under the above situation, DeNA internally specified social game developers that were important to them. Some of these developers provided social games via the mobile SNS operated by GREE, Inc (hereinafter referred to as “GREE”) which has been ranked at the second place in terms of revenue of social game in Japan. In this case, DeNA forced social game developers not to provide the social games through GREE by disconnecting the links of the Mobage-Town website for the social games providing through Mobage-Town. This activity by DeNA was judged to constitute interference with a competitors’ transaction and was seen as a violation of the AMA.

## **5.2 *Yahoo Japan Corporation’s use of technological service such as search engine provided by Google Inc.*<sup>9</sup>**

25. The JFTC, in July 2010, after reviewing the plan that Yahoo Japan Corporation (hereinafter referred to as “Yahoo Japan”) would use search engine and search-advertising platform (hereinafter referred to as “search engine etc.”) provided by Google Inc. (hereinafter referred to as “US Google”), upon the request for consultation process from Yahoo Japan and Google (hereinafter referred to as “the two companies”), responded to the two companies that Yahoo Japan’s use of search engine etc. provided by Google (hereinafter referred to as “the provision of technology”) would not violate the AMA on the assumption of the two companies’ following explanation :

- i) Since Yahoo Japan did not have search engine etc. for its own website etc., it had so far been provided search engine etc. from Yahoo! Inc. (hereinafter referred to as “US Yahoo”). However, since it became impossible for Yahoo Japan to continuously use search engine etc. provided by US Yahoo, Yahoo Japan has decided to newly select search engine etc. provided by Google as the most suitable search engine etc. for it.
- ii) The two companies will independently operate their own online search services and online search advertising after implementing the provision of technology and will totally separately hold information about advertisers and their bidding prices etc., so that the two companies will remain competitive.
- iii) The contract period for the provision of technology is two years. After the end of the contract, Yahoo Japan will be able to select a new search engine etc., and also even in the middle of the contract period, Yahoo Japan will never be impeded from using other search engine etc.

26. On the other hand, because the provision of technology raises Google’s share of technology of search engine etc. in Japan to about 90%, the provision of technology, if it is implemented in a different manner from the two companies’ explanation, may have a strong anticompetitive impact on the online search engine and online search advertising market<sup>10</sup>. The JFTC conducted the preliminary investigation focusing on progress situation toward the provision of technology etc. The results of the investigation are as followed,

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<sup>9</sup> <http://www.jftc.go.jp/en/pressreleases/uploads/2010-Dec-2.pdf>

<sup>10</sup> The JFTC will, however, continue to monitor the provisions of technology and, when finding any indication of violations of the AMA, will vigorously conduct the necessary investigations. At the same time, the JFTC explained the results of the preliminary investigation to the two companies and demanded not to engage in conduct which may violate the AMA, including those which may cause difficulties to the business activities of their competitors or coordinated actions regarding the prices of online search advertising etc. between the two companies.

- i) With regard to the provision of technology, it is considered that Google has provided search engine etc. to Yahoo Japan, in response to its request based on its own judgment that Google's search engine etc. is the most suitable.
- ii) The provision of technology has been in progress toward implementation in line with the explanation made by the two companies in the consultation process. In addition, any fact that the two companies are taking coordinated actions by means of sharing commercially sensitive information relating to advertising price, etc. has not been found at present.
- iii) Any specific example that the two companies are taking any action which may raise a problem under the AMA has not been found at present.

27. As mentioned in (i)-(iii), the JFTC concluded that it was not necessary for the JFTC to conduct further investigation toward taking legal measures of the AMA into the provision of technology at this moment and published the conclusion on December 2, 2010<sup>11</sup>.

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<sup>11</sup> The JFTC will continuously monitor it, and when finding any specific fact that may constitute a violation of the AMA, the JFTC will vigorously address it by conducting necessary investigations etc. In addition, the JFTC explained to the two companies the results of the preliminary investigation, and also demanded that the two companies shall not engage in conduct which may raise a problem under the AMA, for example, Google unilaterally or in conspiracy with Yahoo Japan causes difficulties to the business activities of their competitors, or the two companies take coordinated actions regarding the prices of online search advertising etc.