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ROUNDTABLE ON COMPETITION ISSUES IN FOOD CHAIN INDUSTRY

-- Note by Japan --

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ROUNDTABLE ON COMPETITION ISSUES IN FOOD CHAIN INDUSTRY

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1. Introduction

1. The food chain herein refers to the flow from production to consumption. This is the process by which foods are delivered by producers of edible agricultural and marine products inside and outside Japan through food manufacturers, wholesalers, retailers, etc. to final consumers.

2. According to the *Future Vision of the Food Industry (March 2013)* published by Japan's Ministry of Agriculture, Forestry and Fisheries, edible agricultural and marine products produced in Japan or imported from abroad are delivered to final consumers in the form of food services, processed goods, perishable products, etc.¹ via three routes: (1) through the food service industry, (2) through food manufacturers or (3) for final consumption. Among these routes, edible products delivered through food manufacturers are supplied from the manufacturers through (processed) foods wholesalers to food retailers or the food service industry. Then the food retailers deliver products to end consumers in the form of processed goods, perishable products, etc. and the products are delivered by the food service industry in the form of food services. The food chain includes all these flows.

3. In recent years, the international prices for corn, soybeans and other agricultural products are rising. However, the food price (food consumer price index) in Japan is rising relatively slowly compared to in the United States and the European Union². The food price is determined through the food chain. It is difficult to identify the reasons for the slow rise in food price in Japan as compared to other countries. It is presumed that a host of factors are interrelated in a complex way. These include Japanese Yen appreciation (Japan's ratio of foods import reaches about 60%³)⁴. They may also include the characteristics of Japan's food retail industry, such as diversified business types and low degree of concentration.

4. This report focuses on the food retail industry from among the various players in the food chain. Two issues exist: the horizontal issue of competition among retailers and this competition's effects on consumers, and the vertical issue of buying power, etc. exercisable against suppliers. The situations in Japan and the initiatives and efforts that the Japan Fair Trade Commission (JFTC) has made regarding

¹ Perishable foods, etc. include polished grain (rice, wheat, etc.), butchering (meats) and frozen seafood.

² "Changes in the food price" posted on the website of the Ministry of Agriculture, Forestry and Fisheries (in Japanese): <http://www.maff.go.jp/j/zyukyu/ampo/kouri/>

³ Calculated from the food self-sufficiency rate on a calorie basis for FY2012 indicated in "Food Self-sufficiency Rate for FY2012" posted on the website of the Ministry of Agriculture, Forestry and Fisheries.

⁴ The trend has reversed more recently. From 2013, the international prices for grains are decreasing, while the Japanese Yen is depreciating. Therefore the government continues to carefully observe the situations.

these issues are explained below. Lastly, the report about the so-called “waterbed effect” caused by retailers, prepared by the Competition Policy Research Center (CPRC) of the JFTC, is covered.⁵

2. Horizontal issues: Competition in Japan’s food retail sector

5. Regarding the horizontal issue of competition among retailers and this competition’s effects on consumers, the characteristics of Japan’s food retail industry are explained below. Then, the latest merger case among retailers will be discussed to demonstrate competition among retailers and such competition’s effects on consumers.

2.1 Characteristics of Japan’s food retail industry

6. Japan’s food retail industry is characterized by diversity and a low degree of concentration, as described below.

2.1.1 Diversity

7. According to the *Current Survey of Commerce 2007* published by the Ministry of Economy, Trade and Industry, the business types of the food retail industry can be divided into seven: (1) department store, (2) general merchandise store (GMS), (3) specialty supermarket (food supermarket⁶), (4) convenience store, (5) specialty store (food specialty store⁷), (6) store dealing mainly in food products (food-centered store)⁸, and (7) others. Stores dealing mainly in food products include small-scale stores such as independent food stores (mom-and-pop stores). In addition to these business types, also seen are sales by cooperatives (co-ops), food delivery (by placing orders online, by phone, by mail, by visiting customers, etc.), direct sales to end consumers by farmers, and other various business types⁹.

8. Foreign-affiliated retailers have entered Japan’s market directly or through mergers and acquisitions in GMS, food supermarkets and other segments. Such retailers include business operators from the United States, France, Germany and the United Kingdom. For instance, SEIYU, one of the leading GMSs established in 1963, at first received partial capital participation from the US corporation Walmart in 2002 and is now its wholly owned subsidiary.

2.1.2 Degree of concentration

9. In terms of the number of business establishments of food retailers, business types are ranked in the following order: food specialty stores and food-centered stores, convenience stores, food supermarkets,

⁵ In Japan, agricultural cooperatives (abbreviated as ‘nokyo’ in Japanese) have great influence on collection of agricultural products, such as rice, for distribution. The Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (hereinafter the “Antimonopoly Act”) in principle is not applicable to agricultural cooperatives subject to certain requirements. However, “this [exemption] shall not apply to cases where unfair trade practices are employed, or where competition in any particular field of trade is substantially restrained, resulting in unjust increases of prices” (the Antimonopoly Act, Article 22). In fact, agricultural cooperatives received one cease and desist order and four warnings over the past 10 years due to dealing on restrictive terms, etc.

⁶ Food product sales account for 70% or more of the value of commercial sales of products.

⁷ Food product sales account for 90% or more of the value of commercial sales of products.

⁸ Food product sales account for 50% or more of the value of commercial sales of products.

⁹ Sales by cooperatives, delivery of foods, and direct sales by (certain) farmers are included in the Census of Commerce.

and GMS. In terms of value of commercial sales, however, business types are ranked in the following order: food supermarkets, food specialty stores and food-centered stores, GMS, and convenience stores. Among these, convenience stores are increasing both in terms of the number of establishments and the value of commercial sales. On the other hand, small- and medium-scale food supermarkets, food specialty stores and food-centered stores are decreasing in both the number and the value.

10. With respect to food supermarkets in Japan, noteworthy features are that several leading business operators are dispersed throughout Japan and that the leading food supermarkets differ from region to region. At the national level, the 5-firm concentration ratio in terms of sales in the food retail market is about 12% (FY2010)¹⁰. At the regional level, however, independent/local food supermarkets often have significant market shares where nation-wide GMSs and food supermarkets are not dominating, even though no leading independent/local food supermarket in each region has a market share of 50% or more¹¹.

11. In the meantime, many mergers and acquisitions took place between food-related business operators from the latter half of the 1990s until about 2008¹². Both in terms of the number of establishments and the value of commercial sales, small-scale food supermarkets, food specialty stores and food-centered stores have decreased. However, 5-firm concentration ratio in the food retail market has not substantially changed, staying at about 12% in both FY2000 and FY2010¹³.

2.2 *Examples of review of merger*

12. A recent merger case related to food retailers is the proposed acquisition of shares of Daiei, Inc. (hereinafter “Daiei”) by AEON CO., LTD. (hereinafter “AEON”) published by the JFTC on July 19, 2013.

13. In this case, AEON, which controls subsidiaries in the supermarket business and other areas planned to acquire shares of Daiei, also in the supermarket business and other areas. In terms of consolidated sales in 2012, AEON and Daiei, respectively, were the largest and 4-th largest among Japanese supermarkets. After the acquisition, Daiei would become a subsidiary of AEON. This acquisition principally falls under the category of horizontal mergers¹⁴.

14. In the review of this case, relevant markets are defined based on the following judgment: (1) in terms of service range, the “supermarket business” is defined as including both GMS and food supermarkets since competition exists between GMS and food supermarkets and consumers choose stores to buy food, etc. without distinguishing between these two supermarket types and (2) in terms of geographic range, since supermarkets compete with each other on a store-by-store basis, the relevant market is determined by the trading area of each store.

15. To examine the possibility of substantial restraint of competition, the JFTC made close review of the influence of share acquisition on competition in regions where one party’s store has chosen the other party’s store as the main competitor and in regions with few stores of competitors. It found that all

¹⁰ “Production/Sales Share of the Alcoholic Beverage And Food Industry - Demand trends and price changes - FY2011” edited by Nikkan Keizai Tsushinsha, Inc.

¹¹ *Food Supermarket Yearbook 2012 (national version)*, Ryutsukikaku Inc.

¹² “White Paper on Agriculture, Forestry And Fisheries 2012,” Ministry of Agriculture, Forestry and Fisheries

¹³ “Production/Sales Share of the Alcoholic Beverage and Food Industry - Demand trends and price changes - FY2011” and “Production/Sales Share of the Alcoholic Beverage and Food Industry - Demand trends and price changes - FY2005” edited by Nikkan Keizai Tsushinsha, Inc.

¹⁴ “Nikkei Industry map 2013FY”, Nihon Keizai Shinbunsha

geographic ranges fall under either situation described below: (a) Where the parties' store was in a weaker competitive position due to size or other disadvantages, there was one or more competitive stores of other competitors; (b) Where one party's store is located relatively apart from the other party's store within the same geographic range, there exist one or more competitive stores, located relatively close to the parties' store, which is owned by other competitors; and (c) Where one party's store is located relatively close to the other party's store and in active competition with each other, there also existed one or more competitive stores of other competitors within the same actual trading area. Consumers in this region can switch between the parties' and competitors' stores. Thus, the JFTC concluded that, even after the acquisition, there will still be active competition between the parties' and their competitors' stores, and approved the acquisition without remedy.

2.3 Conclusion of this section

16. To summarize, Japan's food retail industry currently has diversified types of business. The degree of market concentration is not high either in the national or regional level and competition between retailers is considered unlikely to be restrained. Consequently, in Japan's food chain, retailers' horizontal market power is not at present a crucial issue requiring urgent attention from the competition policy viewpoint.

17. Still, as regards individual companies, some of the major retailers' scales are extremely large when compared to those of most suppliers, and there are more than a few abuse of superior bargaining position cases, as discussed in the following section.

3. Vertical issues: Buying power

18. Regarding the vertical issue of buying power, etc. against suppliers, two types of regulation are present in Japan: (1) regulation on abuse of superior bargaining position (as a part of the regulation on unfair trade practices) and (2) regulation under the Act against Delay in Payment of Subcontract Proceeds, Etc. to Subcontractors (hereinafter the "Subcontract Act"). The outline of these regulations is explained below, together with related cases and the survey on actual situations.

3.1 Regulation on abuse of superior bargaining position

3.1.1 Outline of regulations

19. The Antimonopoly Act prohibits abuse of superior bargaining position, which is defined as taking specified acts (to be explained below) "unjustly in light of the normal business practices by making use of one's dominant bargaining positioning over the other party" (Antimonopoly Act, Article 2 (9), v).

20. The regulations on abuse of superior bargaining position are different from those on abuse of a dominant position in market. That is to say, it is not required that a party (Party A) has market-dominant position or an absolutely dominant bargaining position equivalent thereto. It is sufficient that Party A has relatively superior bargaining position as compared to the other transacting party (Party B).

21. Party A is said to have superior bargaining position over Party B, who is a transaction counterpart, in such a case where if Party A makes a request, etc., that is substantially disadvantageous for Party B, Party B would be unable to avoid accepting such a request, etc., on the grounds that Party B has difficulty in continuing the transaction with Party A and thereby Party B's business management would be substantially impeded.

22. In determining the presence or absence of superior bargaining position, the degree of dependence by Party B on the transactions with Party A, position of Party A in the market, the possibility of Party B

changing its business counterpart, and other concrete facts indicating the need for Party B to carry out transactions with Party A are comprehensively considered.

23. Acts that will be regulated as abuse of superior bargaining position are categorized mainly into the following: (1) forcing Party B to purchase goods or services other than the one pertaining to the said transactions, (2) request for payment of monetary contribution, etc., (3) request for dispatch of employees, etc., (4) request for provision of other economic benefits¹⁵, (5) refusal to receive goods pertaining to the transactions, (6) return of such goods, (7) delay in payment, (8) price reduction, and (9) other establishments, etc. of trade terms in a way disadvantageous to Party B.

24. The JFTC published the “Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act” (hereinafter the “Guidelines”) in November 2011 to improve the transparency of application of laws and foreseeability of business operators.

25. In addition to the existing measure of cease and desist order against abuse of superior bargaining position, surcharge payment order¹⁶ was introduced into the Antimonopoly Act in 2010.

3.1.2 *Examples of legal actions against abuse of superior bargaining position*

26. A recent case in which legal action was taken against abuse of superior bargaining position is the case against SANYO MARUNAKA K.K. (hereinafter “Sanyo-Marunaka”)¹⁷. In another case, a warning was issued against the possibility of unjust low price sales by liquor wholesalers (the review was also conducted regarding the abuse of superior bargaining position by liquor retailers).

3.1.2.1 Case against Sanyo-Marunaka

27. Given that Sanyo-Marunaka conducted the following acts against some of the suppliers in an inferior bargaining position (hereinafter referred to as “specific suppliers”), the JFTC issued a cease and desist order and a surcharge payment order on June 22, 2011 (Total amount of surcharge: 222 million JPY).

a) Request for dispatch of employees, etc.

28. On the occasion of opening stores etc., Sanyo-Marunaka forced the specific suppliers who supplied the merchandise to these stores to dispatch employees to move the merchandises including what had not been supplied by the specific suppliers.

b) Request for monetary contribution, etc.

29. On the occasion of opening stores etc., Sanyo-Marunaka forced the specific suppliers to offer money, even though there was no merit for the specific suppliers such as sales promotion effects for the merchandise they had supplied.

c) Return of products

¹⁵ For instance, patents and other intellectual property rights are included in “other economic interests”

¹⁶ The amount of surcharge is calculated by multiplying the total amount of trading between the business operator subject to abuse and the breaching party by a certain calculation rate (1%).

¹⁷ The other most recent case is that against RALSE Co., Ltd. (a cease and desist order and order for payment of surcharge was issued on July 3, 2013).

30. Regarding the merchandise dealt with by the food division of the supermarket (hereinafter referred to as “food division merchandise”), Sanyo-Marunaka returned the food division merchandise that was past the expiration date for sale originally set by Sanyo-Marunaka to the specific suppliers of said merchandise, even though the expiration date came after Sanyo-Marunaka purchased the merchandise from these suppliers.

d) Price reduction

31. Regarding the food division merchandise or merchandise dealt with by the supermarket’s daily food division which was to be sold at a discount price due to stock clearance associated with renovation of the stores, Sanyo-Marunaka reduced the amount to the equivalent of the discounted amount at the said discounted sales from what should be paid to the specific suppliers of the merchandise, even though there was no attributable reason.

e) Forced purchase and use

32. On the occasion of selling the Christmas-related merchandise, Sanyo-Marunaka forced the specific suppliers to buy the merchandise. For example, its buyers distributed order sheets to the specific suppliers, indicating the minimum amount of purchase, and forced them to place an order.

3.1.2.2 Case against liquor wholesalers

33. The JFTC issued a warning to three liquor wholesalers on August 1, 2012 since they engaged in an act that was likely to fall under unjust low price sales. These wholesalers continually supplied certain beer products to liquor retailer X, a leading supermarket, at a price substantially below the supply cost. Consequently, it was likely that the liquor wholesalers might hinder business operations of the other liquor retailers located in the areas around X’s stores. In this case, under the Antimonopoly Act, in addition to the issue of unjust low price sales by liquor wholesalers, the issue of abuse of superior bargaining position by liquor retailer X also needed to be considered. After the close review, the JFTC ultimately issued warning to the liquor wholesalers on the ground of unjust low price sales.

3.1.3 Report on survey on actual situations

34. Regarding retail industries, the JFTC published the following three reports in relation to abuse of superior bargaining positions during the past three years: (1) “Report on the Fact-Finding Survey on Trading Between Food Manufacturers and Food Wholesalers,” (2) “Report on the Fact-Finding Survey on Trading Between Large-Scale Retailers, etc. and Suppliers,” and (3) “Report on the Fact-Finding Survey on Trading Through the Use of Distribution Centers.” These reports are summarized below.

a) “Report on the Fact-Finding Survey on Trading Between Food Manufacturers and Food Wholesalers”

35. In view of the presence of cases that appear to be an abuse of superior bargaining position in the trading of food products, the JFTC conducted a survey on the actual conditions surrounding trade between manufacturers and wholesalers of food products with an additional focus on trade between food products wholesalers and large-scale retailers,

36. According to the survey results (published in October 2011), there were indications of food product manufacturers being subject to actions that could lead to the abuse of superior bargaining position by food product wholesalers, such as undue return of products, undue purchase of goods and services, requests for payment of monetary contributions, requests for dispatch of employees. It was also found that food wholesalers engaged in such acts not only to secure their own benefits but sometimes also to respond

to the requests, etc. from their own customer retailers. As such, it was inferred that a structure existed under which large-scale retailers were the root cause for the issue (of abuse of superior bargaining position).

b) “Report on the Fact-Finding Survey on Trading Between Large-Scale Retailers, etc. and Suppliers”

37. Following the above report that revealed the presence of cases in which the wholesalers made unreasonable requests to the manufacturers due to such requests they received from retailers, the JFTC conducted a fact-finding survey on the trades between large-scale retailers and suppliers in order to investigate the level of recognition among enterprises of the Superior Bargaining Position Guidelines and the actual situation about requests or conducts categorized in the guidelines as those that come under the abuse of superior bargaining position, and to contribute to appropriate law enforcement in the future.

38. The survey results (published on July, 2012) indicated that certain large-scale retailers engaged in acts that might lead to abuse of superior bargaining position. According to suppliers’ responses, large-scale retailers made requests for the following acts; payment of monetary contributions, return of products, and request of purchases and uses (in decreasing order).

39. In addition, the survey results implied that suppliers sometimes passed the burden arising from an act that might lead to abuse of superior bargaining position by large-scale retailers onto the supplier’s suppliers (manufacturers).

c) “Report on the Fact-Finding Survey on Trading Through the Use of Distribution Centers.”

40. The JFTC conducted this survey to wholesalers and manufacturers dealing primarily in foods or daily necessities and retailers trading with such wholesalers and manufacturers (published in August, 2013). It purports to comprehend the realities of trading through the use of distribution centers because earlier cases and observations suggested possible abuse of superior bargaining position through the use of distribution centers.

41. When wholesalers or manufacturers use distribution centers operated by retailers, it can be considered that the following cases may constitute possible abuse of superior bargaining position: (1) when retailers demand payment of center fees from wholesalers or manufacturers without prior negotiation, not indicating the grounds for determination of the fees, the purpose of the fees, etc., (2) when wholesalers or manufacturers are forced to pay center fees exceeding the direct profits obtained through the use of such centers and without satisfactorily consent to it upon negotiation and (3) when retailers raise the center fees (rates) without prior negotiation, not indicating the grounds for determination of the fees, the purpose of the fees, etc. The results of the survey to wholesalers and manufacturers indicated the presence of such cases. In particular, many cases were observed in which retailers demanded payment of center fees without prior negotiation, not indicating the grounds for determination of the fees, the purpose of the fees, etc., that is, pattern (1) above. In some of these cases, based on responses from some wholesalers showing that they demanded payment of center fees from manufacturers in whole or in part, it was found that wholesalers could not bear payment of the fees demanded by retailers and thus demanded payment from manufacturers.

3.2 Regulation under the Subcontract Act

3.2.1 The Subcontract Act

42. The Subcontract Act was enacted to complement the Antimonopoly Act (regulation of abuse of superior bargaining position) with the purpose of ensuring fair trade between subcontractors and their main

subcontracting companies in an economically dominant position and protecting the interests of subcontractors.

43. The Subcontract Act provides for simplified procedures as compared to those under the Antimonopoly Act to promptly and appropriately ensure the interests of subcontractors. Specifically, the Subcontract Act limits the scope of trade it governs based on the details of the trade such as the manufacturing contract and provides that superior bargaining position is formally determined according to capital classification. The Subcontract Act also explicitly provides for specific prohibited acts.

44. Under the Subcontract Act, subcontract trade, among others, is focused as trade with high likelihood of abuse of superior bargaining position. Subcontract trade subject to the Subcontract Act is further categorized into the following: (1) manufacturing contracts, (2) repair contracts, (3) information-based product-creation contracts and (4) service contracts. Among these, manufacturing contracts, which are frequently seen in food distribution, refer to “contracts of manufacturing of articles for a business operator by another business operator specifying the specifications, quality, performance, shape, design, brand, etc.” For instance, when retailers and wholesalers order suppliers to manufacture private-brand products (PB products) this constitutes a manufacturing contract subject to the Subcontract Act. On the other hand, when food manufacturers supply national brand products (NB products) manufactured and sold under their own specifications and brands, this transaction does not constitute a manufacturing contract, and thus it is not subject to the Subcontract Act.

3.2.2 *Permeation of private brands in Japan*

45. In recent years, the scale of the market for PB products has been expanding. These products are developed by supermarkets, convenience stores and other retailers under their own plans/specifications and sold under their original brands. The PB product market scale was about 2,400 billion Japanese Yen in 2010; 1.5 times the scale of about 1,600 billion Japanese Yen in 2007¹⁸.

46. Food manufacturers undertaking production of PB products and food retailers selling PB products have also increasingly expressed their intent to be willing to deal in such products^{19, 20}. Therefore, the PB ratio is expected to rise in the future despite the current low PB ratio as compared to those of Western countries²¹.

3.2.3 *Cases of the Subcontract Act*

47. In recent years, the number of cases where the JFTC issues recommendations to wholesalers and retailers regarding manufacturing contracts of PB products has been increasing. In FY2012, 11 of the 16 recommendations issued under the Subcontract Act were related to PB products, including food and clothing. As an example of a violation related to PB products under the Subcontract Act, the recent case of the Japanese Consumers’ Co-operative Union (JCCU) is briefly discussed below.

48. The JCCU contracted out manufacture of its PB food products, etc. to subcontractors. Even though the subcontractors were not responsible or liable for them, the JCCU reduced the subcontract proceeds payable to the subcontractors, delayed payment and engaged in other similar acts. Given the

¹⁸ “White Paper on Agriculture, Forestry and Fisheries 2012,” Ministry of Agriculture, Forestry and Fisheries

¹⁹ “Survey on Food Industry Trends for the Latter Half of 2012,” Japan Finance Corporation

²⁰ Ibid, Ministry of Agriculture, Forestry and Fisheries

²¹ The average PB ratio of European countries was 35% and that of the US was 17% in 2009 (according to “The Rise of the Value-Conscious Shopper – A Nielsen Global Private Label Report,” 2011). On the other hand, the average PB ratio of Japan is 8.5% (according to “Comprehensive Survey on the Realities of the PB Food Market,” Fuji Keizai Co.,Ltd.).

above findings, on September 25, 2012 the JFTC issued recommendations and instructions to the JCCU on the grounds of violation of the provisions of the Subcontract Act.

49. It should be added that the JCCU paid the subcontractors (about 450 firms) a total reduced amount (2,560 million Japanese Yen), interest for delayed payment (1,320 million Japanese Yen) and other amounts payable, and resolved the issue of delayed payment prior to the issue of the JFTC's recommendation.

3.3 *Conclusion of this part*

50. As shown by the recent cases described in 3.1.2 and 3.2.3 above, there occurred many cases involving regulation of abuse of superior bargaining position or issue of the Subcontract Act with respect to trade between retailers and suppliers in the food chain. As already stated in 2.1 above, there are cases where leading retailers expand their business scale through (horizontal) mergers and acquisitions in the food retail industry. In the case in which AEON acquired shares of Daiei, likewise, AEON stated that “[a] close capital tie-up is likely to enable both AEON and the Target Company to procure merchandise more effectively and efficiently leveraging the scale of economy as well”²². Under these circumstances, it cannot be denied that there may still occur abuse of superior bargaining position cases or violations of the Subcontract Act in the food chain field. Therefore, attention is warranted on the issue of vertical trading relationship between retailers and suppliers in Japan's food chain.

4. Waterbed effect

4.1 *What is the waterbed effect?*

51. The waterbed effect²³ refers to the effect of a rise in purchasing expenses borne by some retailers when large-scale retailers can purchase products at a low price from suppliers by exercising their buyer power (including unreasonable requests for discounts). It occurs as suppliers have to compensate for losses arising from supply of products at a low price to large-scale retailers. That is, suppliers have no choice but to raise the price for products supplied to other retailers (involuntary price discrimination).

4.2 *Questionnaire results published in CPRC joint research report*

52. The JFTC's Competition Policy Research Center (CPRC) published a joint research report titled “Impact of Buyer Power on Competition in the Distribution Market – Large-Scale Retailer” in December 2010²⁴. This report sought to identify the existence of waterbed effect with reference to responses to requests for discount from retailers (whether or not suppliers engage in involuntary price discrimination) based on the results of the questionnaire conducted for suppliers (food manufacturers and wholesalers) on their sales prices to the retailers by the latter's type, in particular large-scale supermarkets versus small-scale retailers.

53. Among suppliers engaging in food-product-related businesses, three manufacturers and three wholesalers (six business operators in total) responded to the questionnaire. The responses from a certain wholesaler lead to the presumption that the wholesaler had no choice but to engage in price discrimination

²² Press release of AEON Co., Ltd. titled “Notice regarding Commencement of Tender Offer for stock of Daiei, Inc.” dated March 27, 2013, p. 5.

²³ Competition Commission, Safeway plc and ASDA Group Limited (owned by Wal-Mart Stores, Inc.); Wm Morrison Supermarkets plc; JSainsbury plc; Tesco plc, Cm5950, HMSO (2003)

²⁴ CPRC reports CR 04-10 available at www.jftc.go.jp/en/cprc/reports.html (only summary is available in English with the main text in Japanese only).

and raise prices applicable to some suppliers (retailers, especially small-scale general retail stores) since it is forced to meet demands from large-scale supermarkets, etc. for discounts not agreed upon under contracts. This case can be considered an example of waterbed effect and suggests that small-scale general retail stores may have been placed under more stringent market conditions, such as decrease in gross profit margin, since they had to purchase products at a relatively higher price (as compared to that for large-scale supermarkets, etc.) as a result of price discrimination by suppliers. It is inferred from the case that ultimately the position of large-scale supermarkets, etc. that forced their wholesalers to cause the waterbed effect may be reinforced in the market.

4.3 Regulation on the waterbed effect

54. The waterbed effect is the influence of suppliers' involuntary price discrimination arising from acts of retailers possessing buyer power over third parties, which are these retailers' competitors.

55. The possible *ex post* regulation measure is to regulate the exercising of buyer power by retailers that may cause the waterbed effect by applying regulation of abuse of superior bargaining position. However, it is not easy to determine whether a trading price is decided as a result of retailers' abuse of superior bargaining position.

56. The regulation on price discrimination can be also applied to the suppliers. However, it is difficult to distinguish between price discrimination based on reasonable grounds such as volume discount and that which may violate the Antimonopoly Act.

5. Conclusion

57. As stated above, diversified business types are seen in Japan's food retail industry. At the moment, the degree of market concentration seems low. There can be said to be active competition between retailers. Consequently, the horizontal market power of retailers is not a crucial issue requiring urgent attention in Japan's food chain. However, cases of merger involving leading retailers are expected to still possibly occur. In review of such cases, it may occur that the JFTC must consider not only influences on the market in which such companies sell their products but also those on the market in which they purchase their products.

58. On the other hand, many abuse of superior bargaining position cases or the Subcontract Act with respect to trade between retailers and suppliers have been seen in the food chain. With regard to the trade, competition policies have to be implemented maintaining a balance not impeding market trade based on free bargaining and restricting unfair trade by making use of superior bargaining position.

59. In recent years, both the number and ratio of cases for issuing recommendation regarding manufacturing contracts of PB products, etc. by retailers under the Subcontract Act have been increasing and expanding. It is necessary to establish a system for retailers to comply with the Subcontract Act and take other needed measures. There also occurred some cases of dispute over trade terms and conditions when paying a price under an order placed orally or without providing for explicit trading terms and conditions. It is necessary to encourage preparation of documents stating the terms, conditions and other details of a trade and secure transparency of the trade. The Subcontract Act mandates the obligation to issue an order form in writing.

60. These issues of course arise in various other industries as well as the food distribution industry, such as orders placed by clothing manufacturers with sewing companies, orders by assemblers with suppliers, and orders by system companies with programmers. In the food retail industry, likewise, these issues have become visible as PB food products have increased.

61. There may still occur many cases of (horizontal) merger in the food retail industry. These merger cases must be appropriately reviewed. In addition, when any merger produces a larger-scale company or a company with a large market share, such companies must be monitored so that no abuse of superior bargaining position or violation under the Subcontract Act against suppliers arises and no waterbed effect caused by the buying power or foreclosure effect on other retailers arises. In particular, changes in market environment and technological developments are bringing about the opportunity for retailers of new business types, such as online mail-order sales, to acquire market share. It also generates movement to develop new systems for purchasing and delivery in response to the aging of consumers, regional depopulation and other changing social conditions. Active competition between enterprises adopting new business models and existing food retailers beyond conventional market boundaries will promote competition in the food retail industry and increase consumer benefits. The JFTC, as the competition authority, must closely monitor the food retail industry so that procompetitive movements will not be impaired.