

## **A Study of Resale Price Maintenance**

### **1. Background of study**

Resale price maintenance is a type of vertical restraints on competition. What impact such practices can have on market competition remains rather controversial in economics. As a result, this makes assessment of the advantages and drawbacks thus created and the type of regulatory standpoint and approaches of enforcement of regulations to be adopted in legislative and legal applicability theories calling into question for further consideration.

The sixth amendment to the Fair Trade Law (hereinafter referred to as the Law) was announced on Feb. 4, 2015. One of the major changes was the regulation on resale price maintenance. Before the amendment, the provisions regarding resale price maintenance were prescribed in Article 18 under the unfair competition chapter. After the amendment, the provisions were set forth in Article 19 under the competition restraint chapter to specify resale price maintenance had to be brought under regulation because they could lead to competition restraints. However, the regulatory standpoint was relaxed from the original “all forbidden” to “forbidden in principle and exceptionally allowed when justifiable causes exist.” The question is, there is plenty of room for interpretation of what makes a “justifiable cause” and how it can be interpreted in practice becomes a key problem in application of Article 19 of the Law.

The so-called “justifiable cause” is an uncertain legal concept and its connotation was not clearly described in the reason for amendment. The principal consideration was it involved high-level economic expertise and, therefore, the competent authority would have to accumulate experience after handling enough cases before it could define the content with precision. Hence, how to establish a set of precise and feasible law enforcement standards in compliance with the legislative objective became a major issue in the FTC’s application of Article 19 of the Law. For this reason, this paper is intended, by examining resale price maintenance, to come up with some suggestions to be references for the FTC. It is hoped that the suggestions can help clarify the content and applicability of Article 19 of the Law to maintain free competition in the market, reduce the law enforcement cost of the FTC as well as assure enterprises know the regulations to follow and their rights and interests are fully protected.

### **2. Methods and process of study**

Literature analysis, comparative analysis and case analysis are adopted in this study. The laws and regulations on resale price maintenance in the EU, Japan and the US are sorted out, compared and studied. Information associated with how the law enforcement agencies in the aforesaid countries handled resale price maintenance is compared and analyzed. The results are again compared with the resale price maintenance regulations set forth in the domestic Fair Trade Law, the amendments made, and the law enforcement measures taken and the results. Afterwards, reference is made to suggestions concerning resale price maintenance from the academic sector before conclusions and feasible suggestions with regard to future adjustments and law enforcement are presented.

Initially, the definition of resale price maintenance and likely types of such restrictions are pointed out. Possible competition restraints and likely effects of competition promotion resale price maintenance can lead to are also analyzed to set the basis in examination of the principal contents of resale price maintenance regulations, law enforcement practices and related cases in the EU, Japan and the US. Then, the legislative history of moving provisions on resale price maintenance from under the unfair competition chapter to the competition restraint chapter, changes in actual law enforcement and suggestions from the academic sector in the country are discussed. Examples of the FTC's detailed interpretation of its decisions in resale price maintenance cases after the amendment and differences in law enforcement after the amendment are also examined. In the end, the regulations in different countries and the regulations before and after the 2015 amendment in the country are compared and analyzed to come up with the suggestions presented in Chapter 6.

### 3. Major suggestions

#### A. Suggestions for short-term measures to be taken

- (1) Since the FTC has not accumulated enough cases and experience, it is not appropriate to adopt the rule of reason in the near future to request concerned parties in all cases to take the responsibility of proving the effects of competition restraints.
- (2) In principle, enterprises have the responsibility to prove the justifiable causes. Nonetheless, with cases involving restrictions on the highest resale price, the FTC ought to make it an exception and take the responsibility to prove there are no justifiable causes.
- (3) The factors to be considered as specified in the proviso in Paragraph 1 of Article 19 can include effects of competition restraints or market power of enterprises.
- (4) When weighing the interests of consumers to assess justifiable causes, besides considering the price of product or service and productivity, etc., the FTC can also take quality into account.
- (5) When the FTC assesses justifiable causes, if imposition of minimum restrictions on competition is a complementary standard, the intensity of review should be reduced. The focus of assessment ought to be set on measurement between the results of competition promotion and competition restraints.
- (6) Before more precise standards are established for assessment of validity of justifiable causes and ways of proving such causes, the FTC can give clear descriptions, help enterprises produce the evidence or lower the degree of proof required to reduce the burden of proof of enterprises. Through this process, the FTC can also accumulate cases and law enforcement experience.

#### B. Suggestions for mid-term measures to be taken

- (1) After accumulating cases and law enforcement experience as described above, the FTC should establish a set of finer standards for assessment of justifiable causes and approaches to prove the justifiability. The FTC can also consider incorporating such standards and approaches in the Enforcement Rules of Fair Trade Law or other administrative rules for enterprises to follow.
- (2) The FTC can assess the impact of resale price maintenance on economy, use the outcome as the basis to adjust the connotation of justifiable cause and gradually develop a system for review of justifiable causes, including whether any factor to be considered is optional or prerequisite, the sequence of review, preventing of total reliance on general assessment.
- (3) If intending to relax control on resale price maintenance after assessment, the FTC can establish a safe harbor for a specific industry. If the FTC intends to set up a general safe harbor, caution must be taken before setting the threshold which has to be rigorous, and adjustments can be made after it is put to use and assessed.

#### C. Suggestions for long-term measures to be taken

- (1) By going through the aforesaid process, the FTC can make applicability of justifiable causes become more mature and at the same time accumulate enough cases and experience based on which the FTC can further assess whether the rule of reason can be adopted domestically.
- (2) If the rule of reason is to be adopted, related regulations must be amended to provide the legal basis.