

A Study on the Application of the New and Old Regulations of the Fair Trade Law

1. Study Background

In principle, laws and regulations are applicable only after they take effect or legal relations exist. Laws and regulations do not apply to facts or a legal relation that has ended before they take effect. In other words, laws and regulations are not retrospective. If a violation has ended before the new regulation is announced to take effect, should the FTC decide on the sanction according to the new or old regulation and what is the standard to be applied? As set forth in Article 4 of the Administrative Penalty Act, “An act in breach of duty under administrative law is punishable only if it is explicitly prescribed so by law or by any self-governing ordinance in force at the time when the act is committed,” describing the principle of no penalty without law. Moreover, it is also specified in Article 5 of the same act, “In the case of change in law or self-governing ordinance after the commission of the act, the law or self-governing ordinance in force at the time when sanction therefor was initially imposed by the administrative agency shall apply; provided, however, that the provision most favorable to the person punished shall apply if the law or self-governing ordinance in force prior to the imposition of the sanction is more favorable to him.” That is, the principle of applying the newer or more lenient law should be adopted. .

The amendments to the Fair Trade Law over the years show the key revisions have included constituent elements of violations, legal effects and application of procedures. However, how should the aforesaid principles be applied to decide whether the new or old regulation is to be adopted in an actual case? How should it be assessed to determine the new regulation is more advantageous to the offender? These are the motive and background of this study.

The objective of this study is to sort out information associated with the amendments over the years and raise concrete questions regarding application of new and old regulations while viewpoints based on the results of analysis of actual practices and past cases will also be offered as references when decisions are to be made in administrative remedy cases. In the future, if there happens to be a transitional period because of an amendment takes place, reference can also be made to these viewpoints to decide what regulations are to be applied.

2. Study Methods and Process

To achieve the objective mentioned above, this study is focused on practicality. At the same time, due to limitation of length of writing, only past documents, practices and cases are presented. The sources of information are mostly cases discussed in commissioners’ meetings, internal documents of the FTC, appeal decisions made and court verdicts. No academic papers are collected or discussed. Related documents indicate that application of new or old regulations in individual cases sometimes was presented to be deliberated in commissioners’ meetings or to be decided in court. For example, as the sixth amendment to the Fair Trade Law in 2015 was to be conducted, the question of how a pre-merger notification should be reviewed if the passed new regulations were presented to be deliberated in the 1168th Commissioners’ Meeting on Mar. 26, 2014. Meanwhile, after the regulation on announcement of monopolistic

enterprises was deleted in the first amendment to the Fair Trade Law in 1999, the dilemma of whether the new or old regulation was to be applied in a case involving an enterprise abusing its monopoly status during a period spanning before and after the deletion was announced actually took place. It was taken to court and the results can be found in the 2007 Pan-Zi Decisions No. 553 and 554 from the Supreme Administrative Court. Such documents carry referential value. They ought to be sorted out and analyzed for future reference at any time.

In this study, the key revisions made in the amendments to the Fair Trade Law over the years are arranged chronologically to make the processes and key revisions easy to understand. Then, according to the framework of provisions in the Fair Trade Law and types of conduct, this paper is divided into sections respectively dedicated to monopoly, merger, concerted actions, other competition-restraining conduct, unfair competition, penalty provisions and procedures to discuss likely issues involving application of new and old regulations, including the standpoints of the FTC, interpretations from the Ministry of Justice, appeal decisions or court verdicts, and possible disputes. Due to limited length of writing, multi-level marketing and the civil liability of endorsers in false advertising are not included in this study.

3. Main Suggestions

- A. Application of new or old regulations in decision of administrative penalties should be determined according to related regulations in the Administrative Penalty Act and past practices, including the principle of no penalty without law prescribed in Article 4 of the Administrative Penalty Act, the principle of applying the newer or more lenient law in Article 5 of the same act, and the principle of good faith and protection to safeguard the legal interests or expected interests of the concerned party.
- B. Merger notification filing has its special nature. To avoid application disputes, addition of transitional provisions can be adopted when amendment is made.
- C. When an illegal practice continues after the new regulation has taken effect, it does not involve change of law after conduct and the new regulation should apply. The question of whether the new or old regulation applies does not exist. Although the Supreme Administrative Court did point out in a decision that application of old regulations had to be considered to protect the interests of the offender, the enterprise sanctioned in that case had not been announced as a monopoly enterprise before the Fair Trade Law was amended; hence, it was not to be sanctioned according to monopoly regulations. Despite that the conduct had its “de facto” continuity and appeared to span over the change of law, “legally” speaking, it was subject to the regulation only after the amendment in February 1999. Therefore, the FTC could only sanction the enterprise for the conduct after February 1999. In other words, the case had to be dealt with according to the principle of no penalty without law.
- D. Whether the new or old regulation is to be applied should be decided with the overall consideration of which one is the more advantageous to the offender. Take resale price restrictions for example. When the regulation was revised in the sixth amendment in 2015, “illegal per se” was revised to become “principally illegal,

exceptionally allowed.” At the same time, the fines were increased. If any constituent element of violation existed, it was illegal per se before the amendment. After the amendment, enterprises were allowed to present reasons to justify their conduct. Hence, the regulation after the amendment was more advantageous to the concerned party. However, since the upper limit of administrative fine was raised, the regulation before the amendment was more advantageous to the concerned party. In other words, when the conduct takes place before the old regulation stops to apply and the sanction is made after the new regulation takes effect, there remains the question whether the new or old regulation is more advantageous to the concerned party. According to the interpretation of the Ministry of Justice, both old and new regulations have to be compared in each case to determine which is more advantageous to the concerned party. The FTC made an analysis when reviewing a case involving a number of pet food suppliers imposing restrictions on resale prices. The result can serve as a reference.

- E. The seventh and eighth amendments to the Fair Trade Law did not touch upon any administrative penalty regulation. The sixth amendment was made on Feb. 4, 2015 and took effect on Feb. 6, 2015. Until Feb. 5, 2018, any violation taking place and ending during the period when the old regulation was effective will not be subject to any sanction because the power to impose administrative penalties expires in three years. Therefore, the question of whether the new or old regulation should apply does not exist.