

## **A Study of the Application of the Administrative Penalty Act in Enforcement of the Fair Trade Law**

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

There are provisions in the Fair Trade Law regarding administrative sanctions to be made for practices in violation of the Fair Trade Law, including imposing administrative fines and ordering offenders to cease from continuing the conduct, rectify their conduct or take necessary corrective measures. These are the measures of administrative sanction that the FTC is empowered to consider and administer on enterprises in violation of the Fair Trade Law. In other words, they are the administrative liability violators of the Fair Trade Law are subject to.

To maintain order and achieve the goals of administration, various administrative sanctions are established and to be imposed on violators of administrative obligation. The regulations regarding imposition of administrative penalties, parties to penalize, principles of forfeiture, and procedure of sanction are clearly specified in the Administrative Penalty Act that come into force on February 5, 2006. As these regulations are general provisions of penalties for breach of administrative duty, and thus the Administrative Penalty Act is therefore a common law. To ensure there are clear principles to follow when sanctions are to be administered on violators of the Fair Trade Law, as well as to protect human rights, the FTC is required to abide by the Administrative Penalty Act when making administrative sanction decisions unless there are other special provisions in the Fair Trade Law.

This study is intended to sort out and review issues associated with culpability, separate punishments on parties engaging in joint offense, decision on imposition, increase and reduction of penalty, and period of limitation with respect to the power to impose sanction in disposition cases and administrative litigation cases between 2006 and 2019. The principles specified in the Administrative Penalty Act and how they are applied in administrative courts' practice will be explained and issues likely to occur in application of the Administrative Penalty Act in enforcement of the Fair Trade Law and how to apply more appropriately will be analyzed. It is to provide the FTC with suggestions regarding how to comply with the regulations and principles set forth in the Administrative Penalty Act when enforcing the Fair Trade Law in the future and to avoid differences in interpretation with the court in administrative litigation in order to maintain the results of the FTC's law enforcement.

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

To achieve the aforementioned objectives, practicality is the main focus of this study. Opinions in practice and application on cases processed in the past are adopted.

As the resources of information, except for propositions to be discussed during the Commissioners' Meetings, dispositions, appeal decisions and court verdicts, academic papers are also reviewed. By analyzing the opinions in practice that the principles of the Administrative Penalty Act has been applied, this study intends to provide related information as a reference to the FTC regarding composition of dispositions and administrative litigation for future cases.

Historical analysis and empirical analysis are applied in the study to explain the background and history of the legislation of the Administrative Penalty Act and the administrative sanction system in the Fair Trade Law. Since the Administrative Penalty Act was promulgated on Feb. 5, 2005 and took effect on Feb. 5, 2006, cases involving the Administrative Penalty Act conducted between 2006 and 2019 are collected and the opinions of the petitions and appeals committee and administrative

courts are summarized in a table in the appendix. In addition, to analyze the issues and challenges encountered in enforcement, cases with referential value are described and discussed from Chapter 3 to Chapter 6. As for the doctrine of “Nulla poena sine lege; Nullum crimen, nulla poena sine praevia lege poenali (no penalty without a law)” set forth in Article 4 of the Administrative Penalty Act and the doctrine of “observing new laws and old ones when with lighter punishment” in Article 5 of the same Act, they are not included in this study.

### 3. Main suggestions

- (1) According to Article 7 of the Administrative Penalty Act, during case investigation, the FTC should clarify whether the violation was made intentionally or negligently in order to facilitate the examination of whether the offender’s unlawful conduct is intentional (including directly and indirectly intentional) or a result of negligence (including unforeseeable and foreseeable negligence) during the administrative litigation. As for the conditions for determination of the liability of organizations, according to Paragraph 2 of Article 7 of the Administrative Penalty Act, the intent or negligence of the person with the authority to represent it is presumed the intent or negligence of a juristic person, unless the juristic person that offends administrative obligations is able to prove that the inappropriate conduct of the employee is not out of its teaching or instruction.
- (2) Articles 14 and 15 of the Administrative Penalty Act provide the legal basis for punishment to the natural persons engaging in practices in violation of administrative law. As long as it is proved that an individual, other than the obligor, jointly and intentionally engages in an act in breach of duty under administrative law or one with the authority to represent an enterprise knows or is able to know the enterprise is engaging in illegal conduct, then citing both Articles 14 and 15 of the Administrative Penalty Act to impose penalties on the actors will have the rightful legal basis and will be supported by administrative courts. In actual cases, the matters that the FTC needs to investigate and clarify include the identity of the actors, whether the illegal conduct carried out of the actors jointly are intentionally or whether the actors know or are able to know the act would be illegal, as well as the level of involvement and implementation of the actors in the illegal conduct.
- (3) Since the Administrative Penalty Act took effect in 2006, related theories and opinions in the academic sector or court decisions have been inconsistent about the controversy of whether the whole or part of the profit gained by an actor through breach of duty should be deprived in accordance with Article 18 of the Administrative Penalty Act, whether the cost and other expenses should be deducted in calculation of the profit gained by the actor through breach of duty, or whether the total profit directly connected to the illegal conduct should be taken into consideration. Before stipulated regulations are enacted by the legislators or consensus of related theories and opinions has been reached by the academics, determination of the imposition of fine should be precise and fair. Even if some illegal practices are similar, the seriousness of the conduct of individual actors must be fully considered to prevent criticism that administrative agencies abuse their discretionary power.
- (4) In recent years, the FTC has faced the dilemma that the five-year period of limitation with respect to the power to impose sanction on many cases of competition restraint, especially cross-border ones were about to expire even

though the FTC launched investigations into the cases as soon as related information was received. Besides, the complexity of cases would also compress the amount of time for handling cases. In order to reinforce the effectiveness of law enforcement in monopolization, merger and concerted action cases that involving competition restraints, the FTC had referred the international trend in competition law legislation, reviewed existing provisions in the Fair Trade Law according to the actual law enforcement condition, and proposed the draft amendments to Articles 28, 39 and 41 of the Fair Trade Law. The amendment adds to Article 41 the provisions starting that, on the day the competent authority launches investigations into competition restraint cases, the period of limitation may be suspended. However, the suspension may not exceed five years in total, so that the public interests will not be jeopardized and the FTC can exercise its power as early as possible. The amendment will comply with the legislative purpose of the period of limitation with respect to the power to impose sanction while effectiveness of law enforcement is also taken into account, so that the FTC can continue to maintain market trading order, protect free and fair competition and promote economic stability and prosperity in order to achieve the legislative purposes of the Fair Trade Law.