

Fair Trade Commission Disposal Directions (Guidelines) on the Application of Article 25 of the Fair Trade Law

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1. Purpose

Given that Article 25 of the Fair Trade Law (hereinafter referred to as "Article 25") is a general provision, the Guidelines are specifically adopted to facilitate its concrete, clear-cut and categorized applications.

2. Basic Principles of the Application of Article 25

To clarify the distinction between Article 25 and related provisions of other laws and regulations such as the Civil Code and the Consumer Protection Law, the requirement of "sufficient to affect trading order" should be the first criterion applied when screening for the applicability of the Fair Trade Law or Article 25. In other words, the Fair Trade Commission (hereinafter referred to as "the FTC") will review a case under Article 25 only if the act at issue is sufficient to affect trading order in the market. If the requirement of "sufficient to affect trading order" is not met, remedy should be further sought under the Civil Code, Consumer Protection Law, or other laws or regulations. Article 25 plays a supplemental role for the application of the Fair Trade Law. While the Fair Trade Law cannot enumerate numerous categories of competition behavior, Article 25 is made as a general "catch-all" clause to avoid any omission or deficiency.

Therefore, in addition to be applied as the supplementary provisions for other articles of the Fair Trade Law regarding the existing categories of illegal conducts, the application of Article 25 shall be determined, based on the legislative purposes

of the Fair Trade Law and this Article, whether there is any possibility of its supplemental role to play when a new category of illegal conduct which does not directly relate to the existing categories of illegal conduct emerge (i.e. "creative and supplemental application").

The distinction in the application of Article 25 and other articles of the Fair Trade Law lies in that Article 25 is applicable only as a supplementary provision. To ascertain the scope governed by Article 25, it is necessary to examine whether the alleged illegal practice could not be fully corrected by, first of all, the provisions dealing with restrictions of market competition (e.g. monopoly, cartel, and vertical restraints, etc. on competition) and, second, provisions aiming at unfair competition (e.g. false advertising, business defamation, etc.). In other words, Article 25 is applicable only to acts that are out of the reach of other articles of the Fair Trade Law.

Thus, if a certain unlawful act is caught by other provisions in the Fair Trade Law, meaning either that the application of those specific provisions could fully evaluate the illegality of the act, or the illegality of the alleged act could be exhaustively covered by those provisions, there won't be any room for the supplementary application of Article 25. To the contrary, only if those specific provisions fail to evaluate the alleged unlawful act in its entirety will there be ground for the supplementary application of Article 25.

With respect to the issue of "protecting consumers interest," the applicability of Article 25 will be determined by examining whether the enterprise concerned is taking advantage of information asymmetry or is abusing its market dominant position to use "deceptive" or "obviously unfair" sales tactics to harm consumers' interest. If the answer is positive, the requirement of "sufficient to affect trading order" is accordingly met.

3. Clarification of Overlapping Laws

The application of Article 25 usually gives rise to the question of overlapping with other laws. The question should be resolved according to how the following factors are judged:

- (1) Whether the contracts between enterprises or enterprises and consumers are trade terms agreed upon by both parties out of their own free will. Regardless of whether their contents are unfair or whether they are subsequently performed, contractual actions should in principle be regulated by civil law. Article 25 is applicable only in exceptional circumstances where the behavior at issue threatens market competition or market trading order. If some obviously

unfair content of a contract fails to meet the requirement of "sufficient to affect trading order," it should be resolved through civil remedies proceedings. Only if this requirement is met and public interests of market trading order are at stake should Article 25 be invoked.

- (2) Although protecting consumers' interest is among the legislative purposes expressly set forth in Article 1 of the Fair Trade Law, it is necessary to distinguish between the core legal interests protected by the Fair Trade Law and those protected by the Consumer Protection Law. Article 25 should be invoked only in cases where the requirement of "sufficient to affect trading order" is met and where, moreover, the conduct by its very nature has a bearing on the public interest. Examples would be where an enterprise's information asymmetry or market dominant position vis-a-vis its consumers is so endemic in the industry that most of consumers are lack of enough information for dealing, are highly dependent on the information and at the same time lack of alternatives, or many consumers' interests are under risk.

4. Distinctions of the Applicability of Article 25 vis-a-vis Other Articles of the Fair Trade Law

Application of Article 25 should be guided by the principle of "supplementariness," which means that Article 25 is applicable only to unlawful acts that could not be completely covered by the other articles of the Fair Trade Law. If a certain unlawful act could be completely covered by one of the other articles of the Fair Trade Law, that is, if the illegality of the alleged acts could be comprehensively evaluated or exhaustively regulated by those articles, then those articles will take precedence and there are no ground at all for the supplementary application of Article 25. Conversely, if it is impossible to apply those articles to tackle with the illegality of the act at issue, Article 25 may then come into play.

5. Factors to be Considered in Determining "Sufficient to Affect Trading Order"

"Trading order" as used in Article 25 refers to the economic order of the marketplace for all goods or service transactions. It may involve all the stages regarding research and development, production, sales, and consumption. Its concrete content includes horizontal competition order, market order of vertical trading relationship, and trading order that comports with the spirit of free and fair competition.

In determining "sufficient to affect trading order," the factors to be considered

include the following: the number of victims, the quantity and degree of harm caused, the deterrent effect on other enterprises, whether specific organizations or groups have been targeted by the alleged acts, whether the case would affect a majority of future potential victims, the method or the means of the act, the frequency and size of the alleged acts, the reciprocity of the information with respect to the actor and his trading counterpart, the amount of dispute resolution resources, the size of the market power, the presence of the dependency, the trade habit and industry characteristics, etc. However, the trading order has in fact been affected is not required. On the other hand, for single, individual and non-recurring trade disputes, civil remedies, rather than the application of Article 25, should be pursued as the default route.

6. Factors to be Considered in Determining "Deceptive"

The term "deceptive" as used in Article 25 refers to acts of engaging in trade with trading counterparts by misleading them through defrauding, misguiding or concealing material trading information.

"Material trading information" as used in the preceding paragraph refers to the trading information sufficient to affect trading decisions. Whether an act is "misleading" should be determined by whether objectively there is a reasonable likelihood (and not merely some possibility) that it would mislead the general public or deceive trading counterparts, together with the evaluation of trading counterparts' ability of judgment based on the "reasonable judgment" standard (An extremely low level of care should not be taken as the standard.)

Examples of usual types of deceptive behavior are illustrated as the following:

- (1) Pretending or free riding on the credibility of another entity. For instance,
 - (A) Gas safety equipment enterprises engage in the sales of gas safety equipment by using pretexts such as gas disaster prevention propaganda or gas safety inspection so that people are misled and transact with them.
 - (B) People attach to the activities of government agencies or public interest groups with the purpose of promoting their sales of goods, thereby making their trading counterparts mistakenly associate government agencies or public interest groups with them and transact with them.
 - (C) People pretend or attach themselves to a well-known business or organization to engage in transactions.

(2) Disingenuous sales tactics which are not related to advertisement.

(3) Concealing material trading information. For instance,

(A) When engaging in the broking business of real estate sales, the real estate broker fails to inform the buyer in writing the difference between the earnest money contract and the Ministry of the Interior's "Offer Papers" and its alternatives, or conceal the negotiation information related to a prospective buyer from the seller.

(B) Requiring buyers to make up the deficiency about the selling prices for items regarding area of common space which are not included in pre-sale houses contracts.

(C) When promoting products, conceal the characteristics of such products that are not easy to resell by misleading the trading counterparts through defrauding or misguiding trading information. Consequently, the trading counterparts made their transaction decisions by mistakenly believing that a considerable amount of interest would result from reselling such products.

(D) To sell newspapers in the name of sponsoring scholarships.

(E) To promote the sale of health equipment on the pretext of conducting a health check.

(F) An airline claims airfares reduction while concealing the information about unable to reasonably accommodate the number of low-cost seats based on the past sales situation due to the significant ratio change of class seats.

7. Factors to be Considered in Determining "Obviously Unfair"

"Obviously unfair" as used in Article 25 refers to engaging in market competition or commercial transactions by obviously unfair means.

Types of obviously unfair conduct are illustrated as follows:

(1) Impeding market competition for the purpose of injuring a particular enterprise.

For instance,

(A) Carrying out improper business interference, such as disseminating the unconfirmed information about one's competitor's infringement in the premises of its trading counterparts.

- (B) Inappropriate issuance of warning letters alleging intellectual property rights infringement: Sending warning letters or other written statements to its own or other enterprise's trading counterparts or potential trading counterparts alleging that the other enterprise infringes its copyrights, trademarks, or patent rights.
 - (C) Disseminating certain competitor's infringement information by using press releases, websites or other means known to the public and sufficient to raise concerns in the minds of the competitor's trading counterparts.
- (2) Exploiting the fruits of others' work. For instance,
- (A) Use the name of another enterprise in a keyword advertising, or use the name of another enterprise as its own name, use the words related to the name, trade name or business, etc. of another enterprise, with the purposes of free-riding on the goodwill of another or misleading trading counterparts into believing that the goods or services derive from the same source, product line or an affiliated enterprise, for the promotion of its own products or services.
 - (B) Register the symbol of others as one's own domain name to increase its trading opportunities;
 - (C) For the purpose of increasing one's website bounce rate, improperly use the symbol of others by taking advantage of website programming and designing.
 - (D) Plagiarize the website information of other who has invested considerable amount of efforts on the website or database, and commingle with the content of one's own website or database in order to increase one's own trading opportunities.
 - (E) With positive act to makes people mistakenly believe the goods are imported or sold by an import agent but in fact they are parallel importation of genuine goods.
- (3) Improperly soliciting customers: disturbing the decision of the trading counterpart by coercion, inducement with interest, or other improper means, such as one to one marketing, long-term and high-pressure tactics, or engaging in sales when the consumer is embarrassed or in the middle of receiving the

weight loss and body care services.

(4) Improper use of the relative market dominant position:

An enterprise is assumed to have a relative market dominant position if its trading counterparts depend on it in such a way that sufficient and reasonable possibilities of turning to alternative trading counterparts does not exist. An enterprise with a relative market dominant position shall not abuse its market position. Examples on abusing relative market dominant position are illustrated as below:

- (A) Lock-in: For instance, an elevator enterprise abuses its relative market dominant position by taking advantage of the dependency of the trading counterparts on after the completion of the installation of the elevator (such conduct shall be reviewed at first according to Article 20 of the Fair Trade Law, if applicable), such as charging unrelated expenses or forcing elevator users to pay for the settlement of maintenance disputes owed by others.
- (B) With no negotiations with its trading counterpart in advance or without attaching a clear and explicit conditions or standards on discontinuance or withdrawal in written form, the retailer enterprise improperly requests the trading counterpart to discontinue or withdraw the provision of the products, or to change the transaction terms without fully disclosure of supporting documents.
- (C) After an enterprise obtains the tender in a government procurement case on audio-visual data, the film agent raises the trading terms with such an enterprise.
- (D) The copy of the distribution contract is held in custody so as to hinder the distributors from exercising their rights.
- (E) The patentee requires the patent licensee to provide sensitive information that is not royalty-related.

(5) Use of asymmetry information. For instance,

- (A) In the course of the franchising recruitment process, franchisers fail to provide their trading counterparts with the material franchise information in writing or fail to allow them a reasonable period of time for contract review.
- (B) When engaging in the sale of presale houses, the real estate developer or the

real estate broking agency fail to provide the purchasers with the material trading information in writing, or improperly restrain the purchasers from contract review.

(6) Supplementary to provisions of the Fair Trading Act regarding restrictive conduct on market competition, such as those supplemental to provisions governing concerted action. Nevertheless, it is not applicable to government procurement cases on a person who borrows or assumes any other's name or certificate to tender.

(7) Hinder the customers' exercise of their legitimate rights: For example, a real estate developer fails to deliver the purchaser with one copy of the contract or require return copy of the contract from the purchaser upon entering into a presale house agreement.

(8) Improper use of standard form contracts. For instance,

(A) Inserting unfair clauses in standard form contracts, such as those restricting the hesitation period for rescinding contract in door-to-sales, requiring certain proportion of the unexpired balance in the undue installment shall be paid as penalty in addition to the return of the goods upon rescinding contract, demanding the full amount of the tuition fee shall be paid for classes unattended upon rescinding contract, and the English version of the contract shall govern if there are disputes related to clauses interpretation.

(B) The public utility enterprise of gas compels the current user to pay the arrears for the former user.

In determining whether the act of an enterprise's engaging in transaction with the its trading counterparts without disclosing the material trading information is "deceptive" or "obviously unfair" as described in Article 25, whether such an enterprise is in a dominant position with respect to the trading information shall be taken into account. If the FTC has determined that a specific industry is under disclosure obligations, such an industry has trading information dominant position (e.g., the franchiser has the disclosure obligation with respect to important franchising information) and its violation of disclosure obligations should be regarded as "obviously unfair".

8. Clarifications on the Illustration for Types of Misconduct

Item (3) of Point 6 and Item (2) of Point 7 of the Guidelines only illustrate a number

of types of deceptive and obviously unfair conduct regarded as in violation of the Fair Trade Law. Circumstances that violate Article 25 are not limited to those types stated in the above Items. When handling each case, the FTC will make its decision based on the facts available on each specific conduct, with the relevant guidelines (or policy statements) it promulgated as the guidance.

9. Imitation to a Substantial Degree can Seek Civil Remedy

If an enterprise is injured by other enterprise's imitation to a substantial degree and Article 22 of the Fair Trade Law is not applicable because it does not meet the criteria as set forth in Article 22, such enterprise can still seek resolution through civil remedy under relevant provisions of the Fair Trade Law.