GUIDELINES CONCERNING UNJUST LOW PRICE SALES UNDER THE ANTIMONOPOLY ACT

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General Secretariat, Fair Trade Commission

1. Introduction

Unjust low price sales is banned by the Antimonopoly Act as a form of unfair trade practices. When a report is received from the public concerning unjust low price sales, the Fair Trade Commission carries out all necessary investigations, and where violations are suspected, it issues corrective guidance in the form of warnings, reprimands, etc.

Reports received from the public concerning suspected unjust low price sales have increased in recent years. The Fair Trade Commission receives several thousands of reports per year, most of which involve complaints from manufacturers and small-and medium-sized retailers about the price charged by large retailers. Investigation often reveals that the party being investigated has acted improperly due to lack of understanding of regulations concerning unjust low price sales, but there are also many cases in which the party which has requested the investigation has done so without reasonable cause due to ignorance of the objectives and content of regulations concerning unjust low price sales.

The retail sector in Japan comprises many types of retailers, including department stores, supermarkets, specialty shops, convenience stores, and regular retailers. Large retailers coexist with small-and medium-sized retailers, while retailers which deal in a diverse array of products coexist with retailers which only handle specific products. There is need for fair competition among these different types of stores.

With full consideration of the situation described above, the present document, "Guidelines Concerning Unjust low price sales", has been prepared to provide retailers with a concise summary of the major points in the Antimonopoly Act which have a bearing upon the issue of unjust low price sales, thereby increasing awareness and understanding in the business community and among the public of the issue of unjust low price sales and helping to prevent infractions of the laws from occurring.

This document is only a general description of the provisions of the Antimonopoly Act concerning unjust low price sales. Actual cases must, of course, be judged in light of individual circumstances.

2. The objectives of regulations concerning unjust low price sales

The purpose of the Antimonopoly Act is to maintain and promote fair and free competition, and to help entrepreneurs devise creative means to provide high-quality, inexpensive products. In this sense, low prices are not considered inherently improper, of course, but on the other hand, neither are they always looked upon favorably. There is nothing wrong with efficient operations allowing a business to offer inexpensive products, but if a firm cuts prices without any regard for profitability in order to attract customers, such behavior runs counter to the objectives of the Antimonopoly Act and, thus, requires regulation, because when a firm seeks to win away the customers of a competitor by selling a product at below cost- in other words, if it sells a product at a price which could not be maintained definitely unless the losses thereby incurred were compensated for by profits from the sale of other products, or by other sources of funds- that firm is using unfair means of competition.

Thus, the purpose of regulations concerning unjust low price sales is to maintain a fair competitive environment, not to protect inefficient businesses which are incapable of providing high-quality, inexpensive products.

3. Clarification of what constitutes "unjust low price sales"

Article 6 of the General Designation of Unfair Trade Practices (Fair Trade Commission Notification No.15 of 1982) provides a definition of unjust low price sales.

(Unjust low price sales)
6. Without proper justification, supplying a commodity or service continuously at a price which is excessively below cost incurred in the said supply, or otherwise unjustly supplying a commodity or service at a low price, thereby tending to cause difficulties to the business activities of other entrepreneurs.

The fairness or unfairness of price cutting is determined on the basis of the following three factors: 1) the relationship of price to costs; 2) impact upon competitors; or 3) lack of a justifiable reason for the price cut.

(1) Relationship of price to costs

First, unjust low price sales involves the sale of products or services at unjustifiably low prices. As stated above in Article Ⅵ, a price is considered unfair when products or services are sold "...at a price which is excessively below cost incurred in the said supply..., or otherwise unjustly (supplying)...at low prices..." The phrase "cost incurred in the said supply" refers to the "cost incurred" by the provider of said products or services "in the said supply". Note well that the "cost incurred in the said supply" are not the costs generally incurred by other companies in the same industry, nor are they the costs of a specific competitor.

The phrase, "at a price which is excessively below cost incurred in the said supply", is understood to refer to prices which fit the classic definition of unjustifiably low prices. Since this, in effect, means prices that are far below the gross cost of sales, in the retail sector this phrase is interpreted as referring to prices which are below purchase price. Thus, a comparison of selling price versus purchase price is always one of the standards by which the Fair Trade Commission judges the fairness of prices.

In this context, the term, "purchase price", refers to the price paid for the products alleged to have been sold at unfair prices by the company which has carried out the sales in question. Furthermore, this term refers not to the officially listed price of said products, but to the actual purchase price. Any discounts, rebates, or physical goods received by the purchaser in connection with said purchase must be taken into account in calculating the real purchase price (i.e. the actual amount of money paid by the purchaser to acquire the products in question). Furthermore, if purchase prices are under reported (for example, if the purchase price for a particular product is under reported for a given period of time, during which the product is sold at an unfairly reduced price, and later added to the normal purchasing price) in order to evade regulations concerning unjust low price sales, the Fair Trade Commission shall adjust under reported figures up to their actual level and determine price fairness on the basis of normal purchase prices.

Next, even if products are sold at the type of price described above, such a price is not considered unfair if it occurs infrequently, lasts for only a very short period of time, and does not effect competitors in the manner further described below. Price cutting is not unfair unless it is to some extent carried out "continuously". The phrase, "continuously", means either that price cutting is carried out continuously over a relatively extended period of time, or that the company carrying out such price cutting has adopted a sales policy which provides an objective basis for expecting such price cutting to be carried out, even though it may not be carried out every day.

Thus, a typical example of unjust low price sales involves the sale of a product for less than its purchase price on a more or less continuous basis, but in certain cases, depending on the nature of a product and the purpose and effect of a given price cut, prices which are slightly above purchase price (provided that they are below the gross cost of sales) or which occur only infrequently can still be deemed unfair.

(2) Impact upon competitors

The second characteristic of unjust low price sales is the fact that it "tending to cause difficulties to the business activities of other entrepreneurs." The term, "other entrepreneurs," here generally refers to retailers which sell the same product for which the price has allegedly been reduced unfairly, and other retailers which are competitors of the firm which has carried out this price cutting. However, because price cutting also affects the sale of competing products, the term, "other entrepreneurs," can sometimes also refer to the manufacturers of these competing products.

The phrase, "tending to cause difficulties to the business activities of other entrepreneurs," means that a price cutting action need not necessarily create an actual disruption of business operations in order to be determined unfair. It is enough that the price reduction creates a recognized possibility of such disruption. The impact of price cutting upon competitors is determined on a case-by case basis, taking various factors into consideration, including: the size and circumstances of the firm which has carried out the price cutting; the quantity of products subject to the price cut; the duration of the price cut; advertising and publicity associated with the price cut; and the nature of the product.

(3) Proper justification

The third important factor which is examined in order to determine the fairness of a price cut is whether there is "proper justification" for it. The case described immediately below would not be considered an instance of unjust low price sales even though, strictly speaking, it does exhibit the aforementioned characteristics (1) and (2).

With perishable goods (the quality of which can decline precipitously) and seasonal goods which have not been sold during the period of peak demand, clearance sales can sometimes be a necessity, in which case reduced prices are not considered unfair even if they go below purchase price. This also holds true when the price of a given product drops due to a charge in supply and demand conditions.

Furthermore, concerning products that are damaged, part of an incomplete set, or otherwise impaired, it is only natural that such imperfections be reflected in the price. Such products should be clearly identified, however to avoid creating the mistaken impression that a standard product is being sold at a low price.

4. Other regulations related to price cutting

The Antimonopoly Act and the Premiums and Representations Act have various provisions which deal with price cutting, the most important of which are described below.

(1) Price cuts targeted selectively for certain areas or competitors may be regarded as prohibited activity of the type listed in Article 3 (Discriminatory Pricing) of the General Designation of Unfair Trade Practices. Such pricing practices may take one of the following forms:

1) A powerful company, in order to eliminate a particular competitor, reduces prices only in areas where that competitor is active;

2) A company reduces prices only for the clients of its competitors in order to lure away these clients.

(2) A powerful retailer or wholesaler users unfair means to force a supplier to lower its prices

When a powerful retailer or wholesaler abuses its purchasing power to force a supplier to sell to it at excessively low prices, such behavior may be regarded as prohibited activity of the type listed in Article 14 (abuse of dominant bargaining position) of the General Designation of Unfair Trade Practices.

(3) Misleading representation of bait advertising, etc.

(i) If a business announces the sale of products at low prices when in reality it has no intention of selling at the advertised prices, or when a firm places quantity or time limits upon the sale of products without indicating such limits clearly in its advertising, such behavior may be regarded as improper representation, and thus be banned under the provisions of the Premiums and Representations Act. (Please refer to the Representations Concerning Bait Advertising [Fair Trade Commission Notification No.13 of 1982].)

(ii) With double price representations, when a fictitious price is listed alongside a real one, or when a manufacturer's suggested retail price which has already been voided by the manufacturer is listed, such action may be regarded as a misleading representation and, thus, a violation of the Premiums and Representations Act. (Please refer to the Guidelines for Section 4 (2) of the Act Against Unjustifiable Premiums and Misleading Representations Concerning Misleading Price Representations [Secretary-General Notice No.4 of 1969].)

In addition, when advertising creates the mistaken impression that all of a company's products are on sale at a low price when in reality only some products are, such advertising may be regarded as misleading representation.