

GUIDELINES CONCERNING ADMINISTRATIVE GUIDANCE UNDER THE ANTIMONOPOLY ACT

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Fair Trade Commission

Introduction

In Japan, diverse forms of administrative guidance are exercised in a broad range of fields and constitute a significant part of public administration. Such administrative guidance is exercised to respond quickly to demands for administrative action, to ensure administrative flexibility, and to achieve administrative objectives smoothly. On the other hand, the Administrative Procedures Law (Law No. 88 of 1993) was enacted to ensure the fairness and increase the transparency of administrative operations. This Act contains a set of provisions regarding the norms with which administrative organs should comply when offering administrative guidance, to prevent its abuse, and to ensure its clarity and fairness.

In recent years, there have been calls from both inside and outside the country for the assuring of consumer interests and for making the Japanese market more open. To meet these demands it is important to help maintain and promote fair and free competition. From this viewpoint of further promoting fair and free competition, deregulation is being actively pursued, but even if any restriction through law or regulation is relaxed or abolished, should any administrative guidance result in a similar restriction, this would go against the purpose of deregulation.

Because administrative guidance is exercised by administrative organs to achieve various objectives, it should be kept firmly in mind that what directly or indirectly affects a firm's entry or withdrawal in various areas, the prices and volume of its goods or services, and its equipment or facilities may restrict or inhibit fair and free competition and even bring about conduct which violates the Antimonopoly Act, depending on the purpose, contents methods, etc. of such administrative guidance.

Any such conduct by a firm or a trade association is by no means exempt from the application of the Antimonopoly Act, even if it was brought about through the administrative guidance of an administrative organ.

The Fair Trade Commission will take legal or similar measures to make a firm or a trade association cease and desist any form of conduct if this conduct meets the conditions that would establish it as a violation of the Antimonopoly Act. If a firm or trade association carries out an activity or activities in compliance with administrative guidance which are questionable under the Antimonopoly Act, it will be directly held legally responsible for that conduct. Therefore, from this point of view as well, administrative organs are called upon to be cautions in exercising administrative guidance. At the same time, firms and trade associations should keep firmly in mind that in such cases, even if said conduct is in compliance with administrative guidance, it will pose a problem under the Antimonopoly Act.

Regarding administrative guidance which may be likely to pose problems under the Antimonopoly Act, the Fair Trade Commission has attempted prior coordination with the administrative organs concerned with respect to each case like this, pointing out problems and requesting improvement. In order to lay out more specifically its interpretations concerning administrative guidance under the Antimonopoly Act, the Fair Trade Commission has now decided to formulate and publish its *Guidelines Concerning Administrative Guidance under the Antimonopoly Act* (hereinafter referred to as "the Interpretations"), which are based on past cases identified in the process of investigations which are suspected violations of the Antimonopoly Act. Administrative organs are expected to take full note of the Interpretations and to carry out prior coordination with the Fair Trade Commission regarding each individual instance of such administrative guidance when they exercise the kind of administrative guidance that may be likely to pose problems under the Antimonopoly Act as indicated in the Interpretations.

The Interpretations, now that it is formulated and published, supersedes the Interpretations Concerning the Relation between the Antimonopoly Act and Administrative Guidance (March 16, 1981, Fair Trade Commission).

In the Interpretations, the following terms shall have the following meanings, respectively.

- {1} Administrative guidance: Guidance, recommendation, or advice given by an administrative organ which requires a specific person to perform or abstain from performing a certain act in order to achieve a certain administrative objective, or an act which cannot be legally dealt with, within the scope of the administrative organ's responsibilities or field of operations.
- {2} Administrative organ: It may also be an organ of a local administrative organization.
- {3} Law or regulation: It means a law, an order based on a law (including a notification), regulations (including a bylaw) of the executive organ of a local administrative organization.

- {4} Permit, approval or the like: A permit, approval, license or any other measure which provides some kind of benefit to a firm or firms in accordance with a law or regulation.
- {5} Firm: An entity engaged in commerce, industry, finance or any other business activity.
- {6} Trade association: A joint body of two or more firms, or a federation of such bodies, whose main objective is to promote the common interests of the firms.
- {7} Entry or withdrawal: It may be entry into or withdrawal from a new field of business, a geographical market or the like, in addition to entry into or withdrawal from an existing field of business.
- {8} Price: It includes other substantial constituent elements of price, such as rebate, discount, etc.
- {9} Equipment: It may be a store or the like, in addition to manufacturing facilities or equipment.

1. Basic Interpretations Concerning the Relation between Administrative Guidance and the Antimonopoly Act

(1) Administrative guidance based on specific provisions in laws or regulations

In the case of administrative guidance based on a specific provision in a law or regulation regarding advice, guidance, recommendation, directive, or the like, the purpose, content, method, etc. of said administrative guidance should conform to the relevant provision in the law or regulation. As long as a party receiving such administrative guidance follows said guidance of its own accord, no related conduct by the party receiving said administrative guidance would pose any problem under the Antimonopoly Act. However, unless the Antimonopoly Act contains a relevant provision for exemption from the Act, the Antimonopoly Act may be applied to any form of conduct which meets the conditions that would establish it as a violation of the Antimonopoly Act, even if arose as a result of said administrative guidance.

Furthermore, when a law or regulation provides for an order, an approval, a recommendation, an instruction or the like, and there are substantive conditions which would justify the invocation of the relevant provision in the application of the law or regulation, administrative guidance given as a preliminary step to or as a substitute for the invocation of the provision shall be considered similar to administrative guidance based on a specific provision in law or regulation in the interpretation of its relation to

the Antimonopoly Act.

Furthermore, the following cannot be regarded as administrative guidance based on a specific provision in law or regulation in the present context: even when a law or regulation contains a specific provision, if the purpose, content, method or the like of a particular piece of administrative guidance does not agree with the pertinent provision in the law or regulation, or administrative guidance is provided on the basis of general supervisory authority granted under the law providing for the establishment of ministries or agencies, or under a business law.

(2) Administrative guidance not based on any specific provision in law or regulation

In the case where administrative guidance is not based on any specific provision in law or regulation is to be given, the administrative organ concerned should take full note of the possibility that said administrative guidance, depending on its purpose, content, method or the like, may restrict or inhibit fair and free competition or even bring about conduct which violates the Antimonopoly Act. It goes without saying that the Antimonopoly Act will not be hindered in its application to any conduct which meets the conditions that would establish it as a violation of the Antimonopoly Act, even if this conduct was brought administrative guidance.

Interpretations concerning the purpose, content and method of administrative guidance which is not based on any specific provision in law or regulation and its relation to the Antimonopoly Act are stated below.

a. Relation to the purpose of administrative guidance

Administrative guidance is given to serve diverse administrative objectives, including stabilizing commodity prices, stabilizing or improving of people's lives, ensuring the fairness and transparency of business transactions, protecting the environment, improving public health, improving safety, and protecting medium or small enterprises. However, there is some administrative guidance, which is given to prevent excessive competition, to adjust supply and demand, to keep prices from declining, to adjust advantages and disadvantages among firms, or to maintain order in industrial circles, and these have a direct impact on the market mechanism.

b. Relation to the content of administrative guidance

Administrative guidance is diverse in content and in the impact it may have on competition in the market.

Entry or withdrawal into various areas, the prices of goods or services, volume, equipment/facilities, and the like are essentially to be created or determined through the fair and free competition of firms operating in the market. Administrative guidance

which may restrict the free activities of firms in these domains have a direct impact on the market mechanism.

On the other hand, business techniques, quality, standards, advertising, representations and the like, though they are important means of competition for firms, are not necessarily regarded as having a direct impact on the market mechanism in comparison with entry and/or withdrawal, prices, volume, equipment or facilities, and the like.

c. Relation to the method of administrative guidance

Administrative guidance which is specific in content is often accepted by a firm provided other firms follow suit. However, when compliance is made through a trade association, conduct which violates the Antimonopoly Act could easily arise. Even if this administrative guidance is directed at individual firms, for instance, at the leaders in a specific field of business, or uses a method that prescribes unified standards for a considerable number of firms belonging to a specific field of business, or in a situation where tacit understanding or common intent to restrict competition can be readily formed among firms, this would very likely bring about conduct that violates the Antimonopoly Act.

Note: Regarding administrative guidance given for the purpose of restraining prices where restraint of commodity prices is the foremost national priority, reference is made to the government's unified view issued at the time of the first oil crisis (see Appendix).

2. Various Types of Administrative Guidance and the Antimonopoly Act

Interpretations regarding administrative guidance which is not based on any specific provision in law or regulation are specifically stated below with respect to each type of administrative guidance, indicating what kind of administrative guidance may pose a problem under the Antimonopoly Act.

(1) Administrative guidance regarding entry and/or withdrawal

In order to help maintain and promote fair and free competition, freedom of entry and/or withdrawal should be guaranteed, and administrative organs should take special care to see that any administrative guidance which is not based on any specific provision in law or regulation not be apt to restrict or inhibit fair and free competition. The following kinds of administrative guidance, for example, would be likely to pose a problem under the Antimonopoly Act (Section 3, Section 8 (1) (i), (iii) and (iv) of the Act).

- {1} Guidance requiring new entrants to obtain the consent of existing firms or the trade association in the relevant field of business or to coordinate the conditions for entry with such parties.

Such guidance may tempt the existing firms or trade association to make the prospective new entrants give up by refusing them consent to enter, to limit the number of firms in the field of business, or to impose conditions that would very likely place unreasonable restrictions on the business activities of the prospective new entrants.

{2} Guidance requiring new entrants to join the trade association in the relevant field of business for the purpose of coordinating interests with existing firms.

Such guidance may tempt the trade association to make the prospective new entrants give up by refusing them membership, to limit the number of firms in the field of business or to impose conditions for membership that would very likely would place unreasonable restrictions on the business activities of the prospective new entrants.

{3} Having the trade association in the relevant field of business intervene in the procedures for obtaining a necessary loan, or the like, from a public organ for engaging in business activities, with a view to adjusting supply and demand, coordinating interests among firms, or the like.

Such guidance may tempt the trade association to make the prospective new entrants give up by refusing to handle their applications, to limit the number of firms in the field of business, or to impose conditions that would very likely place unreasonable restrictions on the business activities of the prospective new entrants.

(2) Administrative guidance regarding prices

In order to help maintain and promote fair and free competition, it is necessary to leave the pricing of goods or services up to each firm and administrative organs should take special care to see that any administrative guidance regarding prices which is not based on any specific provision in law or regulation not restrict or inhibit fair and free competition. The following kinds of administrative guidance, for example, would be apt to pose a problem under the Antimonopoly Act (Section 3, Section 8 (i), (iv) and (v), Section 19 of the Act).

{1} Guidance regarding raising or reducing prices, stating specific figures relating to amount, percentage (range), or the like, which would serve as standards.

Such administrative guidance may tempt firms acting together or their trade association to decide to raise or lower prices to the level of the stated standards. "To decide" in this context may mean not only an explicit decision or agreement but also tacitly agreeing or deciding on a common purpose (the same applies hereinafter).

{2} In a situation in which prices have come down, or the like, guidance which urges self-restraint from selling at discount prices, accepting orders at discount prices, or lowering prices.

Such administrative guidance may tempt firms acting together or their trade

association to decide to maintain or raise prices.

- {3} Requiring reports, through the trade association, on matters which are usually considered the trade secrets of individual firms, such as prices in the particular transactions of member firms.

Such administrative guidance may tempt the trade association to take charge of the coordination of such activities, which would result in price-fixing.

- {4} Giving guidance to manufacturers, distributors or their respective associations so as to stabilize the prices offered to their trading partners, including retail prices.

Such administrative guidance may invite conduct which would lead to the maintenance of resale prices.

- {5} Where prior reporting is required on prices which are supposed to be determined by individual firms of their own accord, guidance on matters to be reported which gives specific figures that would serve as standards, having firms coordinate among themselves or through their trade association, having the trade association submit its members' reports collectively, or having reports submitted through the trade association.

Such administrative guidance may tempt firms acting together or their trade association to decide upon the prices which are to be reported.

(3) Administrative guidance regarding quantities and equipment

It is necessary to leave business activities regarding quantities and equipment to the discretion of each firm to help maintain and promote fair and free competition, and administrative organs should take special care to see that any administrative guidance regarding volume and equipment or facilities which is not based on any specific provision in law or regulation not restrict or inhibit fair and free competition. The following kinds of administrative guidance, for example, would be likely to pose a problem under the Antimonopoly Act (Section 3, Section 8 (1) (i), (iii) and (iv) of the Act).

- {1} Guidance regarding production and sales volumes, export and import volumes, percentage (range) of production cutback, volume of purchase of raw materials, etc. which gives specific figures which would serve as standards.

Such Administrative guidance may tempt firms acting together or their trade association to decide upon volume, etc.

- {2} Stating specific standards, such as short-term supply/demand projections, and requiring submission of business plans concerning production and sales volumes, export and import volumes, the construction of new facilities, or the expansion of existing ones, and the like.

Such administrative guidance may tempt firms acting together or their trade association to formulate business plans conforming to the stated standards and to decide to undertake business activities accordingly.

- {3} Requiring reports, through trade association, on matters which are usually considered the trade secrets of individual firms, such as volumes in the

particular transactions of member firms.

Such administrative guidance may tempt the trade association to take charge of coordination of such activities, which would result in the determination of its member firms' production and sales volumes, export and import volumes, and the like.

- {4} Having firms engage in exchange of opinions, or the like, among themselves of through their trade association regarding supply plans when formulating short-term supply and demand projections.

Although there should be no problem as long as the administrative organ listens to the opinions of individual firms in formulating supply and demand projections, such administrative guidance may tempt the firms acting together, or the trade association, to fix the production and sales volumes, and the like.

- {5} Guidance by stating specific standards, such as a rotation system, regarding the timing or scale of investment in, or elimination of, facilities or equipment.

Such administrative guidance may tempt the firms acting together or the trade association to decide upon facilities or equipment investment, etc.

- {6} Where prior reporting is required on production and sales volumes, export and import volumes, the construction of new facilities, or the expansion of existing ones, and the like, which are supposed to be determined at each firms' own discretion, giving guidance on the matters to be reported by indicating specific standards, having firms coordinate among themselves or through their trade association, having the trade association submit its members' reports collectively, or having such reports submitted through the trade association.

Such administrative guidance may tempt firms acting together, or their trade association, to decide upon volume, and the like, which are to be reported.

- (4) Administrative guidance regarding business techniques, quality, standards, advertising, representations, etc.

The business techniques, quality, standards, advertising, representations, etc. are important means of competition in which firms display creativity and ingenuity, and administrative organs should take special care to see that any administrative guidance regarding business techniques, quality, standards, advertising representations and the like which is not based on any specific provision in law or regulation not unreasonably restrict the above activities by firms, or restrict or inhibit fair and free competition.

Administrative organs may impose specific restrictions or exercise guidance to urge firms or their trade association to engage in voluntary restraint in connection with business techniques, quality, standards, advertising, representations and the like, out of consideration for the public interest. For example, with a view to having laws or regulations faithfully observed, preventing illegitimate conduct or the like, ensuring the transparency of business transactions, improving public health, improving safety, etc.

Furthermore, to streamline the production or distribution of goods or the supply of services, administrative organs may impose specific restrictions or exercise guidance to urge firms or their trade association to work toward standardization. Although this administrative guidance, in principle, poses no problems under the Antimonopoly Act, if standards or the like are decided upon under a particular instance of administrative guidance by firms acting together, or their trade association, or unreasonably harm consumer interests, or force constituent firms or the like to observe these standards, the decision by the firms or their trade association to have such standards or the like would pose a problem under the Antimonopoly Act. Therefore, administrative organs should keep this point fully in mind.

Furthermore, when an administrative organ exercises guidance in connection with business techniques, quality, standards, advertising, representations and the like, if the firms acting together, or their trade association, make a decision under said administrative guidance, even if it concerns the conditions of transactions, including prices, this decision would pose a problem under the Antimonopoly Act even if its observance is not compulsory. Administrative organs should therefore keep this point firmly in mind as well.

3. Interpretations Concerning Administrative Guidance Involving Permits, Approvals, etc.

In some fields of business, entry and/or withdrawal, prices, volume, equipment and the like are regulated through permits, approvals, etc. Such regulation through permits, approvals, etc. should be exercised only on the basis of requirements prescribed by law or regulation, and administrative organs should take special care that the business activities of firms and fair and free competition not be restricted or inhibited by such granting of permits, approvals, etc. as may transcend the requirements prescribed by law or regulation. There are cases in which provisions in a law or regulation make reporting mandatory regarding entry and/or withdrawal, prices, volume, equipment or facilities, and the like. However, the same provisions apply to the restriction of business activities of firms regarding said matters by treating the reports in virtually the same manner as applications for permits, approvals, etc.

Even when an administrative organ exercises administrative guidance in the granting of permits, approvals, etc. as prescribed by law or regulation, administrative guidance, depending on its content or method, may invite conduct by firms or their trade association which violates the Antimonopoly Act, and administrative organs should take full note of the possibility that administrative guidance, especially that which is supported by permits, approvals, etc., is apt to have a virtually compulsory effect. Any instance of individual guidance by an administrative organ regarding change in the contents of a firm's application for permit, approval, etc. in the light of legally prescribed requirements in itself poses no problem under the Antimonopoly Act. However, if this organ exercises guidance so as to have any firm or trade association intervene regarding

the contents or procedures of any application for a permit, approval or the like, this may give rise to conduct by the firm or trade association which violates the Antimonopoly Act (Section 3, Section 8 (1) (i), (iii) and (iv) of the Act).

{1} Guidance requiring new entrants, when applying for a permit, approval or the like, to obtain the consent of existing firms or the trade association in the relevant field of business, or to coordinate the conditions of entry with such parties.

Such guidance may tempt the existing firms acting together, or the trade association, to make the prospective new entrants give up by refusing to consent to their entry, to limit the number of firms in the field of business, or to impose conditions that would likely place unreasonable restrictions on the business activities of the prospective new entrants.

{2} Guidance requiring new entrants, when applying for a permit, approval or the like, to join the trade association in the relevant field of business, from the standpoint of coordinating interests with existing firms.

Such guidance may tempt the trade association to make the prospective new entrants give up by refusing them membership, to limit the number of firms in the field of business, or to impose conditions for membership that would likely place unreasonable restriction on the business activities of the prospective new entrants.

{3} In cases in which, for instance, applications for a permit, approval or the like have been filed by more than one firm, guidance given so as to have the applicant firms or the trade association in the relevant field of business or the like exercise coordination.

Even if a law or regulation prescribes a so-called supply/demand adjusting clause as one of the requirements for a permit, approval or the like, coordinating conduct by the applicant firms or the trade association in the relevant field of business, or the like, which is in accordance with such guidance would likely be a violation of the Antimonopoly Act.

{4} With respect to applications for permits, approvals, etc. regarding price, etc., each firm, by law, is to file the application of its own accord, and guidance is given to have the trade association file the applications collectively at the request of its member firms.

Such administrative guidance may cause the trade association to decide upon the contents of the applications for permits, approvals, etc.

{5} With respect to applications for permits, approvals, etc. regarding price, each firm, by law, is to file the application of its own accord, and guidance is given to have firms coordinate among themselves, or to have coordination take place through their trade association, or to have the applications submitted through the trade association, or to file the applications with the consent of the existing firms or their trade

association.

Such administrative guidance may cause firms acting together, or their trade association, to decide upon the contents of the applications for permits, approvals, etc.

(Appendix) Unified Opinion of the Government Regarding Price Fixing Cartels and Administrative Guidance (reply by Director-General Yoshikuni of the Cabinet Legislation Bureau at the Budget Committee Meeting of the House of Representatives during the 72nd Session of the National Diet (on March 12, 1974)

I would like to present an opinion regarding price fixing cartels and administrative guidance.

First, since prices should essentially be established through free competition by firms on the basis of market supply and demand, it is obvious that price manipulation by firms through a cartel constitutes and "unreasonable restraint of trade" as referred to in Section 2 (6) of the Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade.

Second, on the other hand, in consideration of the fact that the restraint of commodity prices has become the top national priority in recent times, it is regarded as necessary and inevitable that a government agency responsible for commodity affairs exercise administrative guidance regarding prices with a view to restraining prices, and its basis can be found in the acts concerning the establishment of various ministries. For instance, there is Section 3 (ii) of the Act Concerning the Establishment of the Ministry of International Trade and Industry, and petroleum is covered by Section 36-7 (i).

Third, even through administrative guidance regarding prices is acceptable, if firms which have received guidance further act in concert to manipulate prices, if firms which have received guidance further act in concert to manipulate prices, it goes without saying that such conduct will be unacceptable, as I said in the first part of my reply.