Fair Trade Commission Disposal Directions (Policy Statements) on Cable Television Related Enterprises

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1. Background

The cable television related enterprises are comprised mainly of upstream cable channel providers and downstream cable system operators, both of which are subject to oversight and regulation by the central regulatory agency. Most of activities of the cable television related enterprises are subject to and regulated by the Cable Radio and Television Act and the Satellite Broadcasting Act (hereinafter referred to as "the Radio and TV law"). However, conducts not explicitly regulated by the Radio and TV law, such as businesses engaged in various forms of restrictive or unfair competition, could lead to violations of some provisions of the Fair Trade Law. In view of the complexity of the market at present time, the Fair Trade Commission (hereinafter referred to as "the FTC") has undertaken compilation and analysis of assorted conducts in violation of the Fair Trade Law under the existing framework of cable television regulations. This Regulatory Policy Statement is made with an eye to facilitate enterprise compliance and to serve as a reference for the FTC while tackling with related cases.

2. Definitions

Terms used in the Regulatory Policy Statement are defined as follows:

(1) The term “cable television channel provider” means satellite broadcasting program supplier, foreign satellite broadcasting business, other type channel and program supply business, and channel agent.
(2) The term “cable television system operator” means cable radio and television system operator, cable radio and television program transmission system, and multiple system operator.
(3) The term “multiple system operator” includes not only the enterprise having a controlling and subordinate relationship with one single shareholder, but also those have controlling and subordinate relations with two or more cable radio and television system operators or cable radio and television program transmission system.
(4) The term “channel agent” means a business, authorized to represent the satellite broadcasting program suppliers, the foreign satellite broadcasting business, or other type channel and program supply business, act as an intermediary for channel program’s broadcasting.

3. Market Definition

The relevant market for cable television related enterprises is reviewed by the FTC in accordance with the Commission’s Guidelines on the Definition of Relevant Market. In addition, the FTC will take into account the business model, transaction features, industrial characteristics and other factors of the cable television industry at issue when it conducts a substantive review on a specific case.

Product market, in principle, is defined as follows:

(1) Cable television system market:

A. Cable television system market includes the cable radio and television system operator, the cable radio and television program transmission system; and
B. Multiple system market.

(2) Cable television channel supply market

A. Satellite broadcasting program supply market, and
B. Channel agent market.

Geographic market, in principle, is defined as follows:

(1) Cable television system market: The cable television system business is a franchise industry by its nature. It requires a special license issued by the

regulatory authority to operate the cable television system within a given operation area. As such, the regulatory framework of the current cable television laws and regulations is a factor in defining the scope of the market. However, the definition of the geographical market will still take into account the actual situation of market competition and is not limited to the operating area announced by the competent authority.

(2) Multiple system market: According to the general practices of the multiple system operation, the multiple system operators represent the cable radio and television system operators under their control to engage in channel bargaining, network construction, marketing planning and other commercial activities. As the area for them to engage in market competition is not limited to a specific single operating area, the geographic market is nationwide.

(3) Satellite broadcasting program supply market: The trading counterparts of a satellite broadcasting program supplier scatter all over the country. Therefore, the geographic market is nationwide.

(4) Channel agency market: The trading counterparts of a channel agent are cable television system operators all over the country. Therefore, the geographic market is nationwide.

4. Market Share Calculation

The market share is calculated as follows,

(1) Cable television system market:

A. Cable radio and television system operating Market: The market share of the cable radio and television system operator or the cable television program transmission system is the calculation result that divides the number of subscribers of the cable radio and television system operator or the cable television program transmission system by the total number of subscribers in the relevant market.

B. Multiple system market: The market share of the multiple system operator is the calculation result that divides the aggregation of the number of subscribers for both of the cable radio and television system operator and the cable television program transmission system under the control of the multiple system operator by the total number of subscribers in the nation.

(2) Cable television channel supply market:

A. Satellite broadcasting program supply market: The market share of the satellite broadcasting program supplier is the calculation result that divides the turnover or advertising revenue of the satellite radio and television program supplier by the total amount of the turnover or advertising revenue of each business in the relevant market.

B. Channel agency market: The market share of the channel agent is the calculation result that divides the channel agent's turnover or the license fee received from the cable television system operator by the total amount of the turnover or license fees received from the cable television system operator of each business in the relevant market.

5. Merger

Unless otherwise provided in this Regulatory Policy Statement, cable television related enterprises should submit a merger notification to the FTC prior to the merger and the merger case will be reviewed under the FTC’s Guidelines on handling merger filings.

In vertical merger cases of cable television related enterprises, if a cable television system operator and a cable television program transmission system having a controlling or subsidiary relationship with the vertically merged enterprise, whose number of subscribers is greater than one-quarter and less than one-third of the total number of subscribers nationwide, such circumstances would be treated by the FTC as likely to result in significant competition restrictions. In reviewing the overall economic interests, particular attention shall be given to the following factors:

(1) Whether the merger promotes the digitalization of cable television;
(2) Whether the merger benefits the development of program content industry;
(3) Whether the merger facilitates cross-platform industry competition;
(4) Whether the merger promotes digital convergence and competition;
(5) Whether the merger offers consumers diverse options.

When one of the following circumstances applies to the vertical merger of cable television system operators, the disadvantages of its resulting restriction on market competition obviously outweighs the overall economic benefits:

(1) The total number of channel programs of cable television system operators participating in such a vertical merger with their affiliated enterprises exceeds one-quarter of available channels.
(2) The total number of subscribers of cable television system operators and cable television transmission system participating in such a vertical merger with their affiliated enterprises exceeds one-third of the number of cable television system

operators nationwide.

6. "Joint Sales" by Cable Television Channel Providers

When cable television channel providers, along with other enterprises, engage in joint channel programming sales, that is, if their trading counterparts are compelled to purchase together with the channel programming of each channel provider, or, if the trading counterparts are not explicitly demanded to make joint purchases, but the joint action nevertheless results in the possibility that trading counterparts purchase each participating channel program (for instance, by purchasing the programming of each participating channel provider, one may enjoy an obviously unreasonable package price), or, other vertical transaction restrictions adopted towards system operators for the purpose of horizontal concerted action, the joint sales actions among cable television channel providers as detailed above may constitute a violation of Article 15 of the Fair Trade Law.

If a joint sale among cable television channel providers has the appearance of one of the following situations, the risk of "concerted action" is high:

(1) Joint price quotations to trading counterparts.
(2) Joint negotiation with trading counterparts.
(3) Agree to collect transaction money jointly and then share apportioned costs.
(4) Offer assistance to the promotion of the channel programming of other channel providers. However, when the cable television channel provider who offers the help adopts coercion, inducement or other inappropriate means to set terms to restrict market competition and thus other enterprises cannot engage in price competition, it may constitute a violation of Subparagraph 4, Article 20 of the Fair Trade Law.

7. "Unified Purchasing" by Cable Television System Operators

When the joint purchase of cable television programming engaged by a cable television system operator with other cable television operators is sufficient to hinder market competition functions, it may constitute a violation of Article 15 of the Fair Trade Law.

If a cable television channel provider uses coercion, inducement, or other inappropriate means to make cable television system operators jointly purchase its channel programming, it may constitute a violation of Subparagraph 4, Article 20 of the Fair Trade Law when it is considered possible that the market competition would be therefore constrained.

8. Joint Pricing or Joint Sanctions by Cable Television System Operators

If cable television system providers behave in any of the following ways that results in an impact on the market function with respect to production, trade in goods or supply and demand of services, it is a concerted action in violation Article 15 of the Fair Trade Law:

(1) Jointly decide the pricing of cable television, refuse to broadcast certain channel programming, or require channel providers not to transact with other competitors (including other cable television system operators, direct satellite radio and television service operators, multimedia content transmission platform, on-line television operators, or other service providers transmitting signals via cable or wireless networks and etc.) by means of contract, agreement or any other forms of mutual understandings.

(2) Multiple system operators, with an agreement or any other forms of mutual understandings, jointly require major channel providers to adopt a licensing fee allocation arrangement, or negotiate to collect transaction money jointly and then share apportioned costs.

9. Abuse of Market Power by Cable Television System Operators

When a cable television system operator situated in a relevant market with a non-competitive condition or a dominant market position, abuses its market power to inappropriately setting prices, it may constitute a violation of Article 9 of the Fair Trade Law.

If a monopolistic cable television operator, taking advantage of the lengthy cable television channel program license negotiation process, collects more than one month in advance payment from its subscribers on the one hand, whilst on the other hand forcing channel providers to agree upon extending the licensing period so that their transmission services would not become unavailable and viewers' interests would not be damaged, it is an inappropriate setting, maintenance, or alteration of pricing for goods or remuneration for services, or it may cause difficulties for channel providers to continue their operations, that involves a violation of Article 9 of the Fair Trade Law.

When a cable television system operator not deemed a "monopolistic enterprise" by the Fair Trade Law but abusing its dominant market position to compel its trading counterparts (such as viewers or channel providers) to accept unfair trading terms and conditions likely to restrain market competition or able to affect the trading order, it may constitute a violation of Subparagraph 5, Article 20, or Article 25 of the

Fair Trade Law.

10. Exclusive Regional Licensing

If a cable television channel provider grants, without justification, a specific cable television system operator exclusive authorization for sales and marketing of its programming so that other cable television system operators have to rely on a competitor receiving exclusive licensing rights as their source of programming, it may constitute a violation of Subparagraph 2, Article 20 of the Fair Trade Law when it is considered possible that the market competition would be therefore restrained.

If a cable television system operator, for the purpose of injuring a specific enterprise, prompts upstream channel providers not to license to such specific enterprise for its broadcasting, improperly requires upstream channel providers to grant only exclusive rights or exclusive rights to itself within the specific region, or forbids channel providers to transact with other cable television system operators, it may constitute a violation of Subparagraph 1, Article 20 or Subparagraph 6, Article 20 of the Fair Trade Law when it is considered possible that the market competition would be therefore restrained.

11. Causing Refusal to Deal by Cable Television System Operators

If a cable television system operator demands, by means of adjusting channel position, channel delisting, reduction of channel licensing fees or other unfair methods, thereby restricting market competition, an upstream channel provider not to transact with another horizontal competitor (such as other cable television system operators, multimedia content transmission platform, direct satellite broadcast television service providers, on-line television enterprises, or other channel service providers transmitting signals via cable or wireless network), it may constitute a violation of Subparagraph 1, Article 20 or Subparagraph 5, Article 20 of the Fair Trade Law.

12. Promotion Activities by Cable Television System Operators

If cable television system operators prevent their competitors from participating or engaging in market competition by inducements with low price or other improper means, this is likely to restrain market competition, or, through the provision of gifts or prizes, may be in violation of Regulations Governing the Amount of Gifts and Pries Offered by Businesses. Such conduct may constitute a violation of Subparagraph 3 of Article 20 or Article 23 of the Fair Trade Law.

If a cable television system operator makes false or misleading representations or symbols concerning gifts or prizes in its sales promotion advertisements, such conduct may constitute a violation of Article 21 of the Fair Trade Law.

13. Discriminatory Channel Program Provision by Cable Television Channel Providers

When a cable television channel provider refuses to transact with a specific business (such as a cable television system operator or a multimedia transmission platform service provider), or, applies different pricing terms or other non-pricing conditions to competing businesses over the same channel program without justification, it may constitute a violation of Subparagraph 2, Article 20 the Fair Trade Law if it is considered possible that the market competition would be therefore restrained.

14. Programming Tie-in Sales or Discounts by Cable Television Channel Providers

When a cable television channel providers compels cable television system operators to negotiate prices for the majority of programming, use bundling, and other such programming "tie-ins", or force cable television system operators to purchase bundled channel packages in setting the "a la carte" and "package" prices of programming that, despite the fact the quotation for a single channel program has been provided, could objectively dampen the interest of cable television system operators in selecting single channel programming for purchase, this may constitute compelling tie-in channel sales. The aforesaid conducts may be in violation of Subparagraph 5, Article 20 of the Fair Trade Law if it is considered possible that the market competition would be therefore restrained.

Whether "a la carte" and "package" pricing is tantamount to compelling channel tie-in sales can be assessed as described in the following two stages:

(1) The first stage begins with a quick look approach that helps to eliminate situations that could not possibly qualify as forced tie-in channel sales through "package prices": generally speaking, if a cable television channel provider offers cable television system operators to simultaneously purchase N number of channels at a package discount, and the discount price is not less than the total sum of the unit price of any individual channel (N-1) included in the package, the package discount would not be sufficient to force a cable television system operator originally intending to purchase one of the channels (N-1) to purchase N channels simultaneously, because the cost of an individual channel (N-1) selected for purchase does not exceed the cost of that of purchasing N channels at one time. Consequently, there is no risk that such a package discount would constitute the forced tie-in purchase of channel programming.

(2) In cases where the first stage test of "package pricing" cannot be passed, the following factors are taken into consideration all together:

A. The arrangement and relative relationship between the "a la carte price" and "package price" for the programming package in question.
B. The reasonable cost savings to cable television channel providers selling channel packages.
C. The quantity and content of the packaged channel programming in question.
D. The impact on other competing channel programmings.
E. The impact on the leeway for trading counterparts to make selections.
F. Other reasonable justifications.

When a cable television channel provider negotiate with cable television system operators on channel programming transactions, actual transaction quantities, forms of payment, credit risks, cost differentials, ancillary transaction conditions (such as contracts for broadcasting of all or select channel programming) and other reasonable matters should be taken into account. An appropriate discount could be granted to cable television system operators under the condition that it does not violate the prohibitions imposed by the Fair Trade Law regarding discriminatory treatment or inappropriate restriction of trading counterparts' business activities.

15. Concealment of Important Transaction Information by Cable Television Channel Providers

A cable television channel provider engaging in one of the following conducts that are obvious unfair and sufficient to affect trading order, is likely to become in violation of Article 25 of the Fair Trade Law:

(1) Failure to disclose to its trading counterparts the license fee or other discount calculation methods for individual channel programs.
(2) Failure to disclose to its trading counterparts the discount calculation methods for other discount packages for the sale of two or more programs.
(3) Refusal to openly disclose license fee or discount calculation methods without any justifiable reason.

Adjustments to license fee or discount calculation methods must be disclosed to its trading counterparts in advance.

16. Division of Responsibilities with the Competent Authority Concerning the Cable Television Industry

The division of responsibilities between the FTC and the central regulatory agency shall be administered in accordance with the conclusions of the coordination meeting of 5 November 2010 between the FTC and the National Communication Commission.

17. This Regulatory Policy Statement merely set out examples and explanations of some common types of practices of cable television related enterprises that may constitute violations of the Fair Trade Law. How individual cases would be handled shall be determined by the specific facts of the case.