

The Regulation of Sales Promotion in Japan

From discounters, general merchandise stores, department stores, supermarkets, convenience stores to traditionals (or "mom-and-pops"), Japan's retail market boasts a broad and diverse range of retailers of all shapes and sizes. Japan is a highly competitive market for retail, and sales promotion is an essential marketing tool. It can take many different forms: free gifts, discounts, prize competitions, money-off vouchers, loyalty schemes, etc. Retailers doing business in Japan should know that regardless of their size, they are subject to certain restrictions and regulations aimed at preserving fair trade and protecting consumers.

The local legal framework is generally business friendly but sales promotion is still subject to fairly intricate regulations. This briefing note provides an overview of the regulations that apply to certain sales methods and practices used by retailers to sell their products.

Price Reductions

99% off all items! – was extortionate, now affordable! The indication of an original and discounted price is generally permitted but subject to certain restrictions under the Improper Premiums and Improper Representations Prevention Act (the "**IPIRPA**") and guidelines of the Fair Trade Commission of Japan¹ (the "**FTC**", the Japanese competition authority), to prevent misleading pricing. Artificial price reductions can be used to deceive consumers into thinking they have chanced across a bargain, through a process known as "double-pricing". Double-pricing is a method by which the original price of a product is marked-up, immediately prior to discounting the marked-up price, which means that the resulting discounted price, while appearing to be a bargain, is not really a discount at all.

The IPIRPA requires that the reference price on the label is genuine and has been in effect for at least four weeks during the eight weeks preceding the offer and no more than two weeks before the start of the offer. In other words, the former price must be offered during a sufficiently long period that is not too remote from the starting date of the offer at a discount.

Subject to a few exceptions, discounts are not deemed to be premiums regulated by the IPIRPA. According to a notice and guidance issued by the FTC, these exceptions apply where (i) the benefit of the reduction is subject to a lottery or competition, (ii) an additional product, whether identical or not, is offered as a premium (the customer has the choice between a price discount and an additional product); and (iii) use of the cash discount is limited. On the other hand, the following schemes are in principle regarded as discounts and not as premiums: price reduction (including a reduction subject to subsequent purchases) (e.g., X yen discount if you buy more than Y pieces; X% discount on the price of a coat if you buy a suit; X yen discount on the next purchase if you buy more than Y yen today) and a cash refund (including cash back conditioned by subsequent purchases) (e.g., X% cash refund on your payment, X yen cash refund if you buy for Y yen).

Key issues

- Price Reductions
- Free Gifts
- Games and Lotteries
- "Open" Prize Competitions
- Loyalty Cards
- Sanctions for Breaches

¹ Policy concerning Abusive Price Indication in connection with the IPIRPA (*Futouna kakaku hyouji ni tsuite no keihin-ho jou no kangae kata*)

Sales below-cost - Unbelievable prices, limited time only! Retailers may be tempted to offer goods at a price below their cost to attract customers. However this practice may have the effect of driving competitors out of the market or may deter competitors from entering the market. As a result, regular sales below-cost price without justification are prohibited as unfair trade practices under the Antimonopoly Law.

Free Gifts

Spend more and get a gift absolutely free! The value of free gifts is regulated under the IPIRPA and guidance issued by the FTC². The maximum value of a free gift must be whichever is the lower of (i) an amount which is appropriate by reference to industry standards and business customs, or (ii) a value generally capped as follows: 200 yen or 20% of the transaction value, whichever is the higher. The valuation of the transaction varies according to circumstances, such as whether the gift is made by the manufacturer or the retailer.

Buy one – get one free! This sounds like a free gift but it is actually a discount. A "free gift" of an identical or similar product or service (e.g., 1 shirt given if you buy 3 shirts, a pair of trousers if you buy a suit, an air ticket to Honolulu if you fly more than 10,000 miles) is treated as a discount. If the free gift is a different product or service (e.g., free French fries if you buy a hamburger), it is a gift and the above-mentioned maximum value applies. One should be careful not to engage in "sales below-cost" when "free gifts" are offered.

Gifts are not limited to products and they can include services, vouchers, securities, cash, entertainment and anything else. They are defined as a "Premium" under the IPIRPA. As mentioned above, the maximum value of Premiums is regulated by the IPIRPA. However, certain gifts, such as samples and promotion materials, discount coupons, items necessary for the sale and/or use of the goods or services, items offered in connection with an opening ceremony or anniversary celebration, are exempt from this maximum value limit insofar as these items are considered to be appropriate by reference to ordinary business customs.

Even if the free gift is not subject to a purchase, the maximum value of the gift is still limited to (i) 200 yen or (ii) 20% of the cheapest product in the store (if the cheapest product is more than 100 yen), whichever is higher, and must be appropriate by reference to business customs.

Games and Lotteries

Buy more and you'll have a chance to win! When Premiums are given by way of games, quizzes or lotteries ("*kenshou*"), different rules apply. The IPIRPA and a notice issued by the FTC³ regulate the permissible value of Premiums. For instance, for purchases of JPY5,000 or more, the Premium is capped at a maximum of JPY100,000. The value of the Premium must not exceed 2% of the total sales forecast of the product within the period of the game, quiz or lottery. When the game, quiz or lottery is run jointly with other sellers in the same region, the maximum value of the Premium may be increased to JPY300,000 and the total Premium value to 3% of total sales, subject to certain conditions.

Games involving card-matching games are prohibited by the IPIRPA.

"Open" Prize Competitions

Prize draw – No purchase necessary! The distribution of prizes in a game, quiz or lottery to the public using a free entry route not conditional upon entering a shop or purchasing a product/service is not regulated by the IPIRPA. For example, when a company runs a quiz competition in a newspaper, any reader can enter the game by telephoning the newspaper offices, or sending an entry by email or fax, and winners are chosen by lottery from the readers having sent the right answer and are given a gift. Such gift is not a Premium under the IPIRPA because there is no connection with a particular transaction. Such offer of a gift to the public is called an "Open" Prize Competition. The maximum value of a gift given in such a scheme is not restricted.

² Restriction on Offering Premiums to the Consumer Public (*ippan shouhi-sha ni taisuru keihin-rui no teikyo ni kansuru jikou no seigen*)

³ Restriction on Offering Premiums by Lotteries (*kensho ni yoru keihin-rui no teikyo ni kansuru jikou no seigen*)

Loyalty Cards

Collect extra points! Loyalty cards, depending on how they are operated, can be classified either as a discount or a Premium, and regulated in the same way as above.

Sanctions for Breaches

The price of non-compliance... If the Consumer Affairs Agency (the "CAA") suspects that a retailer is in breach of the IPIRPA, the CAA will conduct an investigation. If the investigation identifies facts suggesting a breach, the CAA will give the retailer a chance to produce contrary evidence, submit its views in writing, and take necessary measures to end the practice. If the CAA is not convinced by the evidence it may issue a cease and desist order (a "CDO")⁴.

A CDO is published in the Official Gazette and on the CAA's website and the CDO may order the retailer to cease and desist from conducting the unlawful activity, announce it was conducting unlawful activities, and take measures to prevent a recurrence of the activity and any other necessary measures and make them known to the retailer's officers and employees. The CDO may also include an obligation to report remedial measures to the CAA. A retailer is given the opportunity to appeal against the CDO by filing a complaint with the Chairman of the CAA or by initiating a lawsuit before the courts. If no such appeal is made, the CDO becomes final. Depending on the matter, the CAA may issue a warning instead of a CDO.

Violation of a final CDO is punishable by up to two years imprisonment and/or a criminal fine of up to JPY3,000,000. If an officer or employee of a company commits a violation of a CDO, in addition to the aforesaid sanctions, the company may be subject to a fine of up to JPY300,000,000. Repeat offenders engaged in below-cost sales without justification over a ten-year period may be subject to an administrative fine up to 2% (for retailers) or 1% (for wholesalers) of turnover during the period of violation. Retailers will also be exposed to claims for damages by consumers.

Given these sanctions, retailers doing business in the Japanese market should be aware that it may not be business as usual and that comprehensive professional advice may be needed to successfully navigate the regulatory framework.

Where Japanese legal concepts have been expressed in the English language, the concepts concerned may not be identical to the concepts described by the equivalent English terminology as they may be interpreted under the laws of other jurisdictions.

⁴ *Sochi meirei*

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