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**Contribution from Chinese Taipei**

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## *Judicial Perspectives on Competition Law*

### **-- Chinese Taipei --**

This report explains the administrative court practice of Chinese Taipei in concerted action cases involving the Fair Trade Act, as well as the law enforcement experiences of the Fair Trade Commission.

#### **1. The administrative court's evaluation of evidence in concerted action cases of the Fair Trade Commission**

1. The Fair Trade Commission (FTC) imposes the administrative dispositions defined by the Administrative Procedure Act on enterprises that violate the Fair Trade Act (FTA). If the enterprises refuse to accept the administrative dispositions imposed by the FTC, they can file administrative lawsuits in the administrative court in accordance with the Administrative Litigation Act. The evidence used by the FTC as a basis for imposing the administrative dispositions is the focus in administrative litigation, especially in evaluations that involve “economic evidence”, for which the FTC must explain the relationship between the evidence and the facts that need to be proven.

2. The FTC in 2015 summarized recent administrative lawsuits that involve concerted actions related to the FTA, and looked into whether or not the administrative court accepted the facts and legal opinions of the FTC<sup>1</sup>. The report pointed out that the constituent elements of concerted actions, including “the definition of the relevant market,” “mutual understanding,” “concerted action” and “sufficient to affect market function” are the issues concerned with administrative litigation. In recent years, the administrative court has ruled on 10 cases that involve concerted actions related to the FTA, in which the administrative court ruled in favor of the FTC in 7 cases, but there were still 3 cases regarding which the FTC was not supported by the administrative court. Hence, the following section explains court practice and the evaluation of evidence by the administrative court in regard to “the definition of the relevant market,” “concerted action” and “sufficient to affect market function” in concerted action cases involving the FTA.

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<sup>1</sup> No. 5 of the report of the 1,259th meeting of the FTC on December 23rd, 2015.

## 2. Court practice and evaluation of the evidence by the administrative court regarding “the definition of the relevant market,” “concerted action” and “sufficient to affect market function” in concerted action cases involving the FTA in recent years

### 2.1. Practice of the administrative court regarding the “the definition of the relevant market”

3. In the case of convenience store chains jointly raising the price of freshly brewed coffee<sup>2</sup>, when defining the relevant market, the FTC determined that the freshly brewed coffee of convenience store chains was convenient, highly accessible, and available 24 hours a day, the main consumers were different from those of coffee shop chains, and convenience stores had unique equipment, as well as special pricing, marketing, and business strategies. Hence, the freshly brewed coffee of convenience store chains was not highly replaceable by coffee store chains. After the sanctioned enterprises jointly raised the prices of their freshly brewed coffee, their total sales volume remained the same as before they raised their prices. After comparing profit changes before and after raising prices, the FTC determined that the sanctioned enterprises made a small but significant and non-transitory increase in price to increase their profits. According to the classification of coffee shops in the Standard Industrial Classification announced by the Directorate-General of Budget, Accounting and Statistics, the freshly brewed coffee of convenience store chains was determined to belong to a different market to that of coffee shops. Therefore, the FTC defined the market in this case as the “convenience store chains freshly brewed coffee market.”

4. In its judgment, the administrative court, however, believed that the FTC did not conduct the questionnaire surveys on consumers with respect to the quality of freshly brewed coffee, the purpose of use, and the subjective perspective of consumers when defining the product market in the case. The freshly brewed coffee of coffee shop chains, fast food restaurants, coffee specialty stores, supermarkets, hypermarkets, and stores are all able to satisfy the demand of consumers for freshly brewed coffee, and are therefore highly replaceable by each other. However, the FTC did not perform the test of a “small but significant non-transitory increase in price” (SSNIP), and only used the documentary reviews to define the product market within a short amount of time, lacking empirical evidence gathered from the market. In addition, there is no standard for whether qualitative or quantitative analysis should be adopted in defining the market. The qualitative factors proposed by the FTC (such as the above-mentioned coffee shop classification) were not based on the analysis of data collected from in-depth observations and interviews, and the FTC therefore lacked concrete evidence.

5. Hence, the case shows that the administrative court still needed to conduct an empirical study on the FTC’s economic evidence for defining the relevant market, and not just base the definition on the documented reviews. Regardless of whether a qualitative or quantitative approach is used to define the market, it is still necessary to have concrete evidence to describe the substitutes. In light of this, the FTC announced the “Principles of the FTC Regarding the Definition of Relevant Markets” on March 6<sup>th</sup>, 2015, specifying determination guidelines, consideration factors, and analysis methods. The FTC will thus strengthen the connection between the definition of the market and

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<sup>2</sup> Disposition Kung-Chu-Tzu No.100220 of the FTC on November 9th, 2011, and Judgment 2014 Pan-Zi No.195 of the Supreme Administrative Court on April 18th, 2014 (the FTC lost in the final judgment).

evidence, and match data gathered through empirical studies on the market with reasonable substitutes to gain the administrative court's support.

## 2.2. Practice of the administrative court for determining “concerted actions”

6. In the case of industrial paper manufacturers jointly raising the price of base paper<sup>3</sup>, with regard to a concerted action, the FTC determined that the 3 sanctioned enterprises had a 98.5% market share in the primary industrial paper market, which is an oligopoly that is favorable to forming concerted actions. The sanctioned enterprises appeared to jointly raise the invoice price of base paper between November 2009 and March 2010, and the act of jointly raising prices did not conform to past experiences of raising prices. The increase in price also did not match the trend in international prices, and there were frequent gatherings between the sanctioned enterprises that appeared strange among competitors, and for which the sanctioned enterprises did not provide reasonable explanations. In the secondary cardboard market, the FTC also determined that 2 of the sanctioned enterprises raised the prices of secondary cardboard to similar prices at a similar time between January and March 2010, and used their control over the paper supply of upstream and downstream paper factories to jointly raise the prices of secondary cardboard. Since the product specifications and codes of the two sanctioned enterprises for the cardboard were different, with complex formulas for calculating prices, it was clearly unusual for the two enterprises to set the same prices. Therefore, the above-mentioned actions of the 3 sanctioned enterprises constituted the concerted actions by means of “other forms of mutual understanding.”

7. According to the practice of the administrative court, the FTA determines a “mutual understanding” regarding a concerted action based on substantial evidence. Even if there is no direct evidence of a mutual understanding between enterprises regarding a concerted action, a mutual understanding in relation to a concerted action can be inferred from the gathering and analysis of indirect evidence, which can be used in support of the view that the concerted action in the market cannot be reasonably explained unless the enterprises engage in such a concerted action. The administrative court believed that the FTC's inference regarding the concerted actions by the 3 enterprises based on the indirect facts of the case, product types, oligopoly market structure, cost and source of raw materials, import and export ratio, price adjustment experience in the past, and prices in the international market were reasonable. The Supreme Administrative Court also cited economic theories such as game theory and the prisoner's dilemma in the final judgment to explain the competition characteristics in an oligopoly market structure, and pointed out that a mutual understanding regarding a concerted action usually only exists between the competitors, making it hard for the competent authority to provide evidence without assistance from a party involved, otherwise the competent authority can only use direct or indirect evidence.

8. Therefore, the case showed that the administrative court adopts indirect evidence and additional factors when evaluating the FTC's economic evidence regarding a concerted action. Such indirect evidence includes that related to the market structure, press releases, the product's type, characteristics, costs and profits, the market share of the enterprises, and the scope and characteristics of the relevant market. The scale of

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<sup>3</sup> Disposition Kung-Chu-Tzu No.099054 of the FTC on May 5th, 2010, and Judgment 2017 Pan-Zi No.265 of the Supreme Administrative Court on May 25th, 2017 (the FTC won in the final judgment).

business operations, business strategy, sales technique and profit goals of the enterprises are also compared, and mutual understanding between the enterprises to engage in a concerted action is thus inferred based on the rule of thumb and rule of reason. In light of this, Paragraph 3 of Article 14 of the Act was added on February 4th, 2015: “The mutual understanding of the concerted action may be presumed by considerable factors, such as market conditions, characteristics of the good or service, cost and profit considerations, and economic rationalization of the business conduct.” The FTC may presume that a mutual understanding regarding the concerted action is based on relevant evidence and considerable factors. If enterprises intend to overturn this legal presumption, they must provide strong evidence to explain their actions.

### **2.3. Practice of the administrative court for determining “sufficient to affect market function”**

9. In the case of Tainan City pet shops jointly refraining from price competition<sup>4</sup>, when determining “sufficient to affect market function,” the FTC determined that the sanctioned enterprises jointly decided to refrain from price competition during a meeting between pet shops in Tainan, so that price competition would not affect their profits. The sanctioned enterprises also asked upstream suppliers to control and cut off supply to pet shops that did not cooperate, so that the pet shops would be forced to raise prices. This pressured retailers to refrain from price competition and damaged consumer interests. The sanctioned enterprises had up to 17.34% of the pet food and products market in Tainan City. After the meeting, many pet food suppliers demanded that other retailers raise prices and some retailers had their supply cut off. Therefore, the actions of the sanctioned enterprises substantially damaged market competition, and were sufficient to affect the market function of the Tainan City pet food and products market.

10. In the judgment the administrative court believed that market share was not the only standard for determining whether or not a concerted action is sufficient to affect the market function. When determining whether or not the concerted action of the enterprises impacted market competition and distorted the market function in the circumstances at the time, it should have been a violation of the FTA regardless of the market share if the nature of the concerted action might have restrained market competition. The administrative court also agreed with the FTC in that the sanctioned enterprises were mainly national and regional chains with high revenue and were the main trading counterparts of upstream suppliers, giving them considerable influence on suppliers, which was sufficient to affect the market function of this case.

11. Hence, this case shows that when the administrative court is evaluating economic evidence deemed “sufficient to affect market function” by the FTC, the evidence only needs to be “sufficient.” In other words, the concerted action does not necessarily need to cause actual damage, and the evidence is sufficient if the concerted action weakens the pressure of competition or has a negative effect on the intensity of competition. In light of this, the FTC issued an interpretation order referred to as the “Standard for Determining Concerted Actions of Minor Importance” on March 1st, 2016. Besides the concerted actions that limit the prices and quantity of products or services, trading counterparts or trading territory, regardless of whether or not the combined market share of the

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<sup>4</sup> Disposition Kung-Chu-Tzu No.104100 of the FTC on October 14th, 2015, and Judgment 2016 Cai-Zi No.1276 of the Supreme Administrative Court on October 6th, 2016 (the FTC won in the final judgment).

enterprises engaging in the concerted actions reaches 10%, is used as the basis for determining “sufficient to impact the market function with respect to production, trade in goods or the supply and demand for services” in Paragraph 1 of Article 14 of the FTA. If the concerted action limits price, quantity, trading counterparts, or trading territory, the concerted action is viewed as a “hardcore cartel” and is highly hazardous to market competition. Therefore, regardless of the market share of the involved enterprises, the concerted action is deemed sufficient to affect the market function.

#### **2.4. Influence of administrative court practice on law enforcement by the FTC**

12. Since the administrative court’s review of administrative dispositions imposed by the FTC includes the determination of facts and the application of law, the administrative court’s judgment in cases related to the FTA over the years will affect the FTC’s determination of constituent elements. Furthermore, according to Article 216 of the Administrative Litigation Act, if the administrative court rules to revoke the original administrative disposition, administrative agencies must decide on a different administrative disposition according to the court’s judgment. If the administrative court points out that an administrative agency has misunderstood the applicable law, the administrative agency shall be constrained by the judgment and may not impose an administrative disposition that differs from the legal opinion. This shows that the administrative court’s determination and interpretation of the constituent elements in the FTA will affect the FTC’s decisions when examining the facts, evidence, and applicable law of a case.

### **3. Interaction between the FTC and the Administrative Court**

#### **3.1. The court’s trial in administrative litigation of the FTA**

13. Administrative litigation involves a two-tier trial system with three levels of administrative court. The three levels refer to the Supreme Administrative Court, High Administrative Court, and the administrative litigation division of the district court. The two-tier trial refers to the first instance of simple procedural cases in the administrative litigation division of the district court, and the High Administrative Court serves as the court of second instance and the court of final appeal. For normal procedures, the High Administrative Court is the court of first instance, while the Supreme Administrative Court is the court of second instance and the court of final appeal. In addition, administrative litigation cases that involve intellectual property are heard in the Intellectual Property Court.

14. According to Article 9 of the Administrative Court Organization Act, the number of divisions in the High Administrative Court is dependent on the case load; if necessary, special tribunals may be set up. In practice, the administrative court does not set up a special tribunal for cases related to the FTA. Most administrative litigation cases are heard in the Taipei High Administrative Court, while only a few administrative litigation cases with administrative penalties of under NT\$400 thousand are heard by the Administrative Litigation Division of the Taipei District Court. In addition, a few cases related to the FTA that involve intellectual property are heard by the Intellectual Property Court.

### 3.2. The FTC's experience of exchanges with the administrative court

15. The competition activities of enterprises have become increasingly diverse and complex in recent years, and cases that violate the FTA often cross over law, economics, finance, or intellectual property rights. If the evidence used in administrative procedures involves the sales amounts and market shares of the enterprises, or industrial and economic knowledge of the relevant industry, the FTC's execution and maintenance of administrative dispositions will be affected if the judge in the administrative court does not understand the development trends and multi-disciplinary characteristics of the FTA and competition law of other countries, or if the judge does not have a good grasp of economic concepts and cannot understand the economic analysis and evidence used by the FTC in administrative litigation.

16. Hence, the FTC often arranges lectures and academic conferences. Besides inviting scholars and experts in competition law-related fields, the FTC also invites judges and lawyers to speak on topics or attend the events. This provides members of the FTC, judicial authorities, and industries with the opportunity to exchange law enforcement experiences and legal opinions. The FTC can also use the events to explain its position in law enforcement and the development trends of competition law in international society.

## 4. Conclusion

17. Important issues in administrative litigation related to the FTA often involve the evaluation and analysis of economic evidence, such as defining the relevant market, whether or not enterprises are competitors, and the impact of the illegal actions on market function. The administrative court must determine the facts and applicable law in relation to such issues. Hence, if the judge of the administrative court is an expert in economics, the judge will be able to better understand the economic evidence and analysis used by the FTC in administrative litigation. Yet, the key to persuading the administrative court to support the administrative dispositions imposed by the FTC is whether or not the facts and evidence are sufficient to prove the illegal action.

18. Based on administrative litigation cases involving the concerted actions of the FTA in recent years, when the administrative court is evaluating the economic evidence for "defining the relevant market," the FTC should explain reasonable substitutability based on the evidence, in which an empirical study of the market is especially important. When evaluating the economic evidence for a "concerted action," the administrative court supports the use of indirect evidence and additional factors by the FTC in presuming that a mutual understanding exists between enterprises in regard to the concerted actions. The administrative court's practice concerning a "concerted action" has also affected the addition of Paragraph 3 of Article 14 of the FTA for presuming that a concerted action exists. Furthermore, when evaluating the economic evidence that a concerted action is "sufficient to affect market function," the administrative court believes that market share is not the only indicator for measuring market power. If the concerted action can reduce the pressure of competition or negatively affect the intensity of competition, then it is "sufficient" to affect the market function, which is consistent with the FTC's opinion.

19. In addition to administrative litigation cases related to the FTA, the FTC often arranges lectures and academic conferences for interaction with the administrative court. The FTC invites judges of administrative courts, judges of the Intellectual Property Court, and personages in the field of competition law to speak or give comments on topics related to the FTA. Besides allowing the judicial authorities to understand the enforcement of the FTA and development trends in international competition law, these exchanges and discussions will also drive developments of the FTA and competition policy.