

# Analysis of Important Domestic Competition Law Cases: Focusing on Concerted Action Issues

## ABSTRACT

Keywords: Competition Law, Concerted Action, Competing Enterprises, Trade Association, Enterprise, Mutual Understanding, A Meeting of Minds, Concerted Practice of Firms, Conscious Parallel Behavior, Affect Market Supply and Demand Function, Hard Core Cartels

This research project aims to provide suggestions and assistances for the future enforcement of Fair Trade Commission regarding horizontal cartels by collecting and analyzing important judgements of the courts. In the course of the research, comparative-law-research of major countries such US, EU, Germany and Japan will be used for contrast with domestic law enforcement as well. However, for the reason of time constraint, this research project will focus on the following five issues: (1) the subjects of cartels such as enterprises, association of enterprises (including affiliates and association being established without legal foundation); (2) "agreement" of cartels (including parallelism) and mutual conduct-restraining; (3) appreciable effects on the function of market mechanism; (4) rule of evidence regarding "agreement"; (5) calculation of civil penalty according to the enterprises' revenues.

After studying and analyzing the judgments' reasons for the five constituent elements, this research project has the following important findings and recommendations:

### 1、the judgment regarding the subjects of cartels

- (1) Relationships with controlling affiliation Among the enterprise groups, the subordinate company and the controlling company operate the same business and have a competitive relationship. If the subordinate company is under the command of the controlling company and acts together to restrain the activities, it cannot be considered as a cartel. The "consciousness" exists. He is also a subordinate company controlled by the company and participates in the cartel of his business. The controlling company should be the subject of cartel. In other words, when judging the business in a relational enterprise group as a joint behavioral entity, it is not possible to judge only from the formal behavioral subject, but

should make judgments based on the actual decision makers of the behavior. If the subordinate company participates in the cartel independently, although its controlling company is also a participant in the cartel, it does not affect the subordinate company's determination as a cartel, that is, the subordinate company and its controlling company are all cartel.

- (2) The internal organization resolution or the chairman of the board of directors or the board of directors or the board of supervisors decides personally, and allows him to issue a document to all members in the name of the trade association or business group. In explanation, it may be considered to have a trade association or career. The "implicit authorization" of a group; or the "other methods" referred to in paragraph 4 of Article 14, which makes the trade association or business group the subject of cartel. On the other hand, if the chairman of the board of directors informs the members in the name of the chairman of the board of directors rather than convening the members of the meeting, then there are resolutions that involve the members' business activities, and the members participating in the meeting cooperate with the resolution, and The trade association or business group cannot be the subject of cartel, and the main body of the cartel should be the members participating in the resolution.

## 2 、 the establishment of the agreement and its rule of evidence

- (1) " Not speaking" is not an effective defense against "not agreeing".
- (2) After the cause is communicated through the transfer of sensitive information such as the promotion of cartel, there is evidence that the actor who has achieved the meaning of the contact can be interpreted as a " realization of intention " method and the previously delivered message. Or reach a consensus for the cause of the contact.
- (3) If there is direct evidence to prove that there is a consensual depositor, there is no need to rely on circumstantial evidence such as consistent appearance to avoid the possibility of misunderstanding.
- (4) To prove the strength of the proof of the existence of the agreement by circumstantial evidence, and to the extent that it is not necessary to achieve the "unique and reasonable interpretation", the appropriate criteria for the determination

should be such that "there is a more reasonable explanation than the unreasonable follow-up". That is enough.

- (5) Inferences about the market conditions, the characteristics of goods or services, the cost and profit considerations, and the economic rationality of business conduct ("economic evidence") are sometimes insufficient to distinguish the appearance of the business in the oligopolistic market. The behavior of price adjustment is the conscious parallel behavior (price leadership behavior) or the joint behavior of price, so it presents the factual evidence that leads to the subjective meaning of the common behavior, for example, the relevant personnel have gathered and have frequent contacts. Platforms, interactive holdings, or each other's supervisors become the focus of proof of the fact that sensitive information is transmitted, exchanged, and obtained.

### 3、judgments regarding appreciable effects on the function of market mechanism

- (1) there is a foreign law view on the price and other joint "to restrict competition for the purposes of this Agreement," the deterioration in the cartel, however because of the vicious nature of the behavior can be considered illegal, of course, no longer on the "quantity" of its effect on the market of the problem is discussed in detail. However, the current Fair Trade Law, "sufficient to affect the market supply and demand function" is still one of the elements of the cartel. Before the change of the law, it should still pay attention to the availability of the element.
- (2) In practice, whether the market forces formed by the cartels are "sufficient to affect the market supply and demand function" are critical, whether the definition of the relevant market is correct, whether the scope is too large or too small, and the market is evaluated or calculated. The standard of the force (sales amount, sales quantity or number of business owners) is judged whether the market situation of the case is reasonable. Therefore, the correct definition of the relevant market and the market forces formed by the cartels are evaluated or calculated with reasonable criteria to solve this problem.

### 4、calculation of civil penalty according to the enterprises' revenues

- (1) the European Commission decided to practice fines, worth learn from that premise to be listed first with the relevant provisions

and principles, then enter the identification of the minor premise, and will be construed in case the relevant facts Han photo , and to The data obtained are supported, such as the annual sales of the business involved in each business or the annual average sales during the illegal period, the beginning and the end of the illegal act , and if the data is confidential, it will be treated confidentially. According to the illegal circumstances, the proportion is calculated, and the basic amount of each business is calculated. If there are adjustments such as additions or deductions, then the explanations will be explained one by one. If there are forgiveness and penalty reasons, they will be discussed in detail. Finally, the conclusion is that the specific exact amount of the penalty is reached within the limit of 10% of the total sales.

- (2) The trade association itself does not have any operating income. When it is treated as a subject, how to apply the sales amount linked penalty is easy to explain the dispute. In this regard, the EU "Guidelines for the Method of Fine Determination" The total sales of the members, as a profit of the illegal activities of the business group, this point can be used for reference in our country's law, and will be clearly defined to dispute.

## 5. Considerations for amendment

Finally, if in the future TFTC intentionally amends the cartel rules, the effectiveness of the joint behavioral norms will be increased. This study suggests that the text of Article 14(2) of the current Fair Trade Law should be amended to read: "Whenever enterprise or enterprises communicate with its or their competitor or competitors other than contracts or agreements, no matter whether it is done under binding legal effects, to such an extent that it results or they result in concerted practice, it shall be deemed cartel as well." The reason for the amendment is: the meaning of the contact or agreement can actually mislead the enterprises that are not necessary to have a meeting of minds. The current provision stipulates that it is "other means than agreements", which is easy to cause misunderstanding and require to prove the existence of "agreement".