

# **Empirical Analysis of Judicial Practices Regarding Penalties for Concerted Actions under Fair Trade Law**

## **I. Research Background**

The Fair Trade Law (hereinafter referred to as the “Law”) is an economy law. It is the core economic law that regulates market practices of enterprises. Concerted actions are strictly prohibited and violators are severely punished to create a good environment for business and competition, and to prevent market competition from being weakened. Hence, in response to the complexity of markets and emerging economic practices, the Law uses many “indefinite legal concepts” as elements of concerted action, and it has allowed the Fair Trade Commission (FTC) to make the most appropriate judgment while ensuring legal values and justice in cases.

Over two decades have passed since the Law was enacted in 1992, and the FTC’s investigations into concerted action are gradually becoming more mature, but many enterprises filed for administrative remedy or litigation and had their penalty revoked. In light of the severe damage to market functions caused by concerted actions, as well as the effects of its penalty, it is necessary to summarize and organize legal opinions concerning the indefinite legal concepts of elements constituting concerted action in practice. This analysis and comparison will help the FTC propose predicable and operable standards for handling concerted action cases and administrative litigation, and prevent its law enforcement results from being revoked due insufficient elements, which is the purpose of this study.

## **II. Research Methodology and Process**

The framework of this study is based on the four elements of concerted action (i.e. the “actor,” “mutual understanding,” “means for restricting competition,” and “sufficient to affect market function”). Rulings of administrative courts on concerted action between January 1<sup>st</sup>, 2012 and November 30<sup>th</sup>, 2016 were collected from the Judicial Yuan’s verdict search system, and legal opinions, interpretations, and applications regarding the four elements of concerted action are summarized and compared with theory. This empirical comparison and analysis will benefit the FTC in litigations.

Research methods adopted in this study include “theoretical analysis,” “comparative analysis” and “case analysis.” Both legal theories and economic theories are taken into consideration for the theoretical analysis, but legal theories are the core issue; primary data is used for comparative analysis, and common rules are further explored; case analysis is adopted to support the theory this study attempts to establish, so that it is closer to operational requirements in practice.

## **III. Recommendations**

This research report summarizes verdicts regarding concerted action in the last five years and opinions of scholars, and makes the following recommendations for future law enforcement:

- (I) When enterprises appear to engage in the same market practices, “indirect evidence rule” and “plus factors theory” are adopted based on the experience with using comparative methods in judicial practice. Indirect evidence, such as market structure, media disclosure, the type, characteristics, cost and profit of the product, the market share of the enterprises, and market scope and characteristics, is supported with comparisons of scale of operations, business strategy, sales method, and profit goals, and deduction is used based on experience and theories to determine a mutual understanding between enterprises to engage in concerted action. From the perspective of enterprises, the defense used to claim their actions were decided independently is that the action is economically reasonable

and maximizes their profitability. In this regard, the FTC should improve its reasoning with economic analysis, and counter by arguing how the action is not economically reasonable.

- (II) Contents of the mutual understanding must restrict activities of other enterprises and thereby restrict competition before constituting concerted action. In the case of an association, even if it notifies members in the form of a “suggestion,” if the contents already have the “appearance” of concerted action, determining based on the motive, purpose, contents, and actual restricting ability on members, the “suggestion” may still have the effect of restricting business activities and constitute concerted action by an association. The FTC’s intervention in concerted actions of accountant and lawyer associations is frequently challenged, making it necessary to consider whether or not the FTC should revise descriptions of provisions on associations, and provide more detailed standards for determining violations by associations of professionals.
- (III) In judicial practice, the definition of markets is determined based on “product market,” “geographic market,” and time factors. In which “product market” is analyzed from the perspective of consumers and suppliers with demand substitution and supply substitution. The FTC established “Principles for the Definition of Relevant Markets,” which discloses judgment standards, factors of consideration, and analysis methods. In the future, the FTC should strengthen the connection between market definition and evidence, and data from empirical methods of the “cross elasticity test” or “hypothetical monopoly test” should be consistent with the theory of “reasonable interchangeability of use” to clear define the scope of the relevant market, in order to gain support in judicial practice.
- (IV) The market share of enterprises engaging in concerted action can be calculated after defining the relevant market, which is an important indicator of whether or not the concerted action is sufficient to affect market function. In judicial practice the concerted action is determined as being sufficient to affect market function if the market share reaches a certain percentage, or it is determined after taking into consideration “quantity” and “quality” using the theory of detectability of the German Method, or using “per se illegal” of the American Method, or a combination of the two. In judicial practice, it is also common to use evidence of reduced market competition for determining that concerted action is sufficient to affect market function. During future investigations, the FTC should pay attention to evidence gathering, analysis tools of “sufficient to affect market function,” and more detailed and thorough descriptions of evidence. The standard for quantity (total market share of enterprises engaging in the concerted action) and quality (nature of the action and degree it restricts competition) should be adjusted after considering its applicability to the industry’s current status and economic development, so that the FTC will become more persuasive and provide evidence beyond reasonable doubt.
- (V) With regard to the starting point of the statute of limitations for concerted action, when enterprises do not carry out the contents of the mutual understanding, the starting point should be “when the mutual understanding is terminated”; when enterprises go through with the concerted action as agreed, the starting point should be “when the concerted action ends.” Legislators authorized large fines for violations of concerted action. Hence, the court has correspondingly higher requirements on reasoning given by the FTC when considering factors for imposing penalties.