

Economic Evidence of Concerted Action

I. Research Background

The Fair Trade Commission (FTC) has spared no effort in the investigation of illegal concerted action cases. As a result, enterprises engaging in illegal concerted action have improved their practices and techniques to avoid detection by the FTC. In the light of this, the FTC introduced a leniency program for concerted action, and also set up a reward system for reporting concerted action, hoping that the economic incentives will encourage enterprises engaging in concerted action and their employees to come forward and turn themselves in.

Most enterprises involving in major concerted action cases investigated by the FTC have filed for administrative litigations. Even though the FTC has maintained the original disposition in a high percentage of cases reviewed by the high administrative court and Supreme Court, some penalties were revoked. The main cause of penalties being revoked was the evidence of concerted action, especially the investigation and determination of economic evidence (indirect evidence).

It is a common legal saying that: “where there is evidence giving, there is a failing lawsuit,” and burden of proof is truly crucial to winning a lawsuit. It has been extremely difficult for the FTC to gather direct evidence of concerted action in recent years. In order to effectively regulate concerted action, the FTC continuously pushed for law amendment and finally completed an amendment on February 4th, 2015, adding Paragraph 3 of Article 14: “The mutual understanding of the concerted action may be presumed by considerable factors, such as market condition, characteristics of the good or service, cost and profit considerations, and economic rationalization of the business conducts.” This allows the competent authority to use the abovementioned grounds to presume the mutual understanding element of concerted action.

The abovementioned market condition, characteristics of the good or service, cost and profit considerations, and economic rationalization of the business conducts may all be used as economic evidence for the FTC to presume concerted action, but what exactly are their contents? What is the correlation between their legal components, standard for determination, and analysis method for economic evidence of concerted action? What are the latest developments in academic theory of economic evidence of concerted action and what practices are implemented? It is necessary to further explore all of these questions.

II. Research Methodology and Process

This report starts with economic incentives for human behavior, and then discusses the conditions leading to concerted action. Then, contents mainly include types of evidence of concerted action, burden of proof, and economic evidence in domestic and foreign cases of concerted action.

Two research methods in the field of social sciences are adopted, namely “document analysis” and “empirical analysis,” in which “document analysis” uses journal papers and monographs of international organizations on competition law, of other countries and Chinese Taipei; “empirical analysis” uses the economic analysis of well-known cases and the FTC’s cases, experience, and methods to gain a comprehensive understanding of theories and practical experiences related to such issues.

Chapters of this study are arranged as follows: Chapter one is the introduction and briefly describes the motive for this study. Chapter two is on economic incentives and its effect on concerted action, and briefly describes the economic analysis model for concerted action. Chapters three, four and five summarize and discuss incentives, types of evidence, and cases of concerted action. Economic analysis by the FTC in practical cases is then reviewed, and recommendations for handling future cases or administration are provided.

III. Recommendations

The purpose of developing economic evidence of concerted action is to prove a mutual understanding of concerted action using indirect evidence, and thereby effectively deter and punish concerted action. Hence, effective prevention using economic analysis before a concerted action takes place, economic analysis used to prove ongoing concerted actions, and economic analysis and experience sharing with respect to law enforcement on concerted action are extremely important issues. Finally, recommendations of this study are as follows:

(I) Continuously collect and use industry data to prevent concerted action from forming

The FTC should pay attention to enterprises in markets with high concentration rates, high barrier to entry, slowing industrial growth, and low level of innovation. In practice, the FTC may use the industry, commerce, and service industry survey report of the Directorate-General of Budget, Accounting and Statistics and the FTC’s industry database to gather data on number of enterprises, total revenue, CR4 and HHI, accession rate of enterprises, profit market, ratio of R&D expenditure to total revenue, and revenue growth rate, and use the data to establish market structure indicators, such as scale, concentration, entry barrier, operating performance, innovation, and industry growth trend. Industries that are rated high in the market structure indicators should be prioritized for data collection and case investigation.

When the competent authority of competition law uses structural methods to focus on industries prone to have concerted action, and suitably announce the industries or conduct investigation, it will increase the efficiency of competition law enforcement, and deter enterprises from violating law as they will be aware the FTC already has information on concerted action. This will help prevent and put a stop to

concerted actions

(II) Become familiar with economic evidence of concerted action to effectively determine concerted actions of enterprises

Evidence used to prove concerted action can be divided into direct evidence and economic evidence. It should be noted that both direct evidence and economic evidence help when handling cases. The FTC can first consider market structure, competitive behavior patterns, and changes in intensity to prove tacit understandings between enterprises engaged in concerted action. And then investigate whether if there is facilitating conduct with respect to prices, information exchange, or industry associations or organizations. The FTC should then use “plus factors” and indirect facts determined by circumstantial evidence for overall analysis and judgment using all evidence collected in the investigation. It is necessary that the circumstantial evidence prove a mutual understanding in the concerted action to be “the only reasonable explanation,” and eliminate any doubt that the concerted action is the result of enterprises acting independently based on business considerations.

(III) Step up training related to concerted action to improve investigation techniques and accumulate experience

Provisions of the Fair Trade Law on direct evidence and economic evidence of concerted action have become more complete after amendments on November 23rd, 2011, February 4th, 2015, and June 24th, 2015. Theories of anti-trust economics on concerted action are also most robust. Hence, authority and analysis tools provided by the law and economics are more complete than ever before, only that “laws alone cannot carry themselves into practice,” and practical application of theory still relies on the flexibility of the FTC’s staff members. Therefore, for nomothetic explanations the FTC should continue to hold discussions or even conferences on anti-trust law or economic, and absorb new knowledge of competition law from different sources to enhance its law enforcement capabilities; for idiographic explanations the FTC should practice debates for cases to stimulate critical thinking and logical analysis abilities of staff members, so they will ponder on the most suitable method for applying laws and economic theory in practice. The FTC must require staff members be familiar with provisions of the Fair Trade Law and understand economics (especially anti-trust economic), as it will allow them to flexibly apply economic knowledge in gathering and analyzing evidence during investigations, and thereby effectively put a stop to concerted actions.