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**Use of Economic Evidence in Cartel Cases – Contribution from Chinese Taipei**

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More documentation related to this discussion can be found at: [oe.cd/egci](https://oe.cd/egci).

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## *Use of Economic Evidence in Cartel Cases*

### *- Contribution from Chinese Taipei –*

1. This report describes how the Chinese Taipei Fair Trade Commission (hereinafter referred to as the CTFTC) uses economic evidence in cases to infer the mutual understanding of concerted actions, and explains the implications for market competition through general economic viewpoints.

#### **1. Economic Evidence of Concerted Actions Overview**

2. Competition authorities do not limit themselves to use only direct evidence to establish mutual understanding of concerted actions when handling such cases. The competition authorities may use “economic evidence” in support of the view that the businesses attempt to avoid legal sanctions from concerted actions and most will not leave trails of direct evidence of concerted actions. Hence, most competition authorities or courts in different countries will accept “economic evidence” and the effect of this inference to indirectly support the existence of a mutual understanding in concerted actions.

3. As is stipulated in Paragraph 3, Article 14 of the Fair Trade Act, “The mutual understanding of the concerted action may be presumed by a number of factors, such as market condition, characteristics of the good or service, cost and profit, and economic rationality of the business conducts.” The same businesses at the same marketing stage and which have competitive relationships with each other, will not have identical cost and profit considerations due to their having different equipment and operating scales. All businesses will adjust their prices in normal competitive markets according to their own reasoning as mentioned above, and therefore the probability of making the same or similar price adjustments is extremely low. For this reason, the unity of all businesses making the same price adjustments concurrently or within a short period of time of one another is clearly in violation of general economic principles and normal market conditions. Therefore, by taking into consideration the market condition, merchants or service characteristics, cost and profits, if the analysis does not reflect any economic reasoning, it could be inferred as constituting the mutual understanding of a concerted action.

4. “Economic evidence” can in practice be divided into structural evidence, conduct evidence, and evidence of facilitating practices. “Structural evidence” refers to the market characteristics in favor of the existence of cartels and stability such as, for example, a high degree of market concentration, high product homogeneity, high market access barriers, similar cost structures, and the absence of excess production capacity. Structural evidence may supplement the finding of concerted actions but it cannot directly prove the existence of a mutual understanding and will therefore require complementary evidence from other forms of economic evidence to make the evidence persuasive.

5. “Conduct evidence” refers to business behaviors and evidence of conformity to the behavior of concerted action organizations in the market or industry, for example, parallel pricing, abnormally high profits, stable market shares, concurrent reductions in capacity, and past records of violations of the competition law. When using this type of evidence, it is necessary to clearly identify the performance of such actions to determine whether they

were the result of individual decisions of the business or a mutual understanding among businesses.

6. “Evidence of facilitating practices” refers to evidence that makes it easier for businesses to reach or maintain a mutual understanding of concerted actions, including information exchange, price signals, same freight charges, price protection, most favored treatment clauses, as well as unnecessary pricing standard restrictions. However, the facilitation itself does not necessarily violate the law; only when the law enforcement agencies discover other situations and evidence pointing to the existence of a mutual understanding in concerted actions can the evidence of facilitating practices be used as an important supplementary proof.

## 2. Related cases

### 2.1. Five Premixed Concrete Suppliers Engaged in Price Fixing

7. Five suppliers of premixed concrete, including Goldsun Building Materials Co Ltd., were reported to the authorities for their notice to clients in December 2018, in which they asked them to start raising the price of premixed concrete from 250 New Taiwan Dollars to 280 New Taiwan Dollars per cubic meter from January 1, 2019, which raised the suspicion that they were engaging in a concerted action to raise the price of premixed concrete.

8. Premixed concrete is a blended mixture of raw materials such as sand and gravel, cement, and water. The gravel and sand accounts for the largest weight in the cost structure, or approximately 43%, followed by 25% for the cement and 13% for transportation costs. The 3 foregoing costs together account for 81% of the total cost. The premixed concrete is mainly used in residential, bridge, road and other civil engineering construction, as a product with high homogeneity and completely substitutable in an intensively competitive market.

9. The case involved 5 companies with a market share of over 75%, thereby constituting an oligopoly. A price adjustment reflects “mutual containment” and price competition is a normal market condition. Hence, if the individual businesses adjust their prices independently, they will face the risk of losing customers and hence competitors have an incentive to fix the price to safeguard their common interest.

10. The CTFTC conducted its investigation and discovered that the related industries would adjust their prices incrementally and progressively to avoid losing customers through sudden increases. Hence the five companies concurrently and subsequently raised their prices in 2019 by going against the norm. Hence, this increase in price resulted in a new price of NT\$250. This price increase with the same date for the price and quantity adjustments, and a compatible level with consistent appearance in terms of the timing, plus a pre-notice of the price change could help competitors to determine their prices and were adequate to facilitate the reaching of a consensus.

11. The five companies in this case stated that their price increases merely reflected their costs but the increase in cost for each company ranged between NT\$141 and NT\$225, which showed that their costs differed. Hence, the result of each company’s reflecting its costs by increasing price should also have varied. However, these five companies concurrently raised their prices by NT\$200 to NT\$280 and their level of adjustment involved the amount of their cost increase, which was unreasonable.

12. The CTFTC has taken into consideration the market situation, products or service features, costs, profits, and the economic rationality of behavior to determine whether the actions of the five companies cannot be reasonably justified in terms of their price increase, if they do not have a mutual understanding of concerted actions. Hence it is inferred that this case involves a mutual understanding of concerted actions and was ruled in 2019. Currently, the administrative proceedings are ongoing.

## **2.2. Deng Fong Group and Ly An Trading Co., Ltd. engaged in a concerted action to raise the price of dried scallops.**

13. The CTFTC discovered that the dried scallop companies had increased their prices in January 2022 by 20% due to the pandemic and congested cargo in ports, which showed signs of there being a concerted action.

14. Domestic dried scallops are imported from overseas while the Deng Fong Group and Ly An Trading Co., Ltd. are both major importers of dried scallops, together accounting for over 70% of the market share, and constituting an oligopoly market with a high degree of concentration. The two groups have handled the products for more than two generations, and are familiar with each other, keeping in frequent contact.

15. The two groups raised the price of dried scallops in November 2021, before the Lunar New Year's Eve. The price of large-sized products was raised from NT\$3,300 per 600 grams to NT\$3,800 and NT\$4,500, the price of medium-sized products was raised from NT\$2,100 per 600 grams to NT\$3,300 and NT\$3,250. For other products the price was raised by between 10% and 30%. The two groups concurrently adjusted the price of other sizes of products based on the market demand for large-sized dried scallops. The two groups claimed that this price increase was to reflect the 50% increase in the cost of imports, but they could not explain the cost increase for each size of product in the process nor propose the decision process of this price increase and the reference for relevant product pricing.

16. The CTFTC discovered from the custom import data that the Deng Fong Group and Ly An Trading Co., Ltd. imported 120,000 kg and 41,000 kg of dried scallops in 2021. With regard to the import cost, the overall import price for Deng Fong was on average NT\$129 lower than that for Ly An Trading Co., Ltd. In particular, the medium- and large-sized products had cost differences in imports reaching NT\$200 between the two companies, indicating that the Deng Fong Group had a competitive advantage both in quantity and price.

17. After the second comparison of the import data between 2021 and 2020, the two groups had an average import cost in 2021 that was lower than that in 2020, and did not have a 30% increase in import costs as stated above. Moreover, the overall import cost dropped in 2021 but the import cost for the Deng Fong Group for medium- and large-sized products increased in 2021 compared with 2020, unlike for Ly An Trading Co. Ltd. which had a lower import cost for all sizes of products in 2021, compared with 2020.

18. Based on the earlier import data, the average import costs for the two groups differed in terms of cost and the import costs for all sizes of products also exhibited rises and falls, which could be attributable to the different buffering capacities. However, both companies showed consistent actions in terms of price increases, and which were inconsistent with the economic rationality. Moreover, the two groups exchanged information on prices for dried scallops through a message app as well as on the operation of their product markets, indicating that both sides had exchanged information and could be reminded of and recognized the rise in the dried scallop price. The CTFTC consolidated

the foregoing evidence and inferred that the two groups had reached a mutual understanding on the price rise for dried scallops and tacit collusion.

### 2.3. Nine IPPs engaged in a concerted action

19. To ensure the stability of the power supply, TaiPower Co., Ltd. (hereinafter referred to as Taipower) has opened itself up to Independent Power Producers (hereinafter referred to as IPPs) since 1995, when 9 IPPs passed a review and started operations. The total power distribution accounted for 19% of the power generation market. The 9 IPPs generated power for sale only to Taipower and Taipower signed the Power Purchase Agreement (hereinafter referred to as the PPA) with the 9 IPPs, to determine the hours of electricity purchased and the rate of electricity sold through agreements.

20. Taipower determined the power purchase rate for each IPP in three stages. Taipower estimated the equivalent costs and determined the bottom price for the first and second stages, which was bid by IPPs from a price lower than the bottom price, and the final bidding price was used as the power purchase price rate. A total of five IPPs determined the rate used for this method. In the 3<sup>rd</sup> stage, Taipower estimated the equivalent cost and announced the price as the power purchase rate for the remaining 4 IPPs. Hence, Taipower does not offer the same rate for negotiation with all IPPs.

21. The content of the power purchase rate was divided into a “capacity rate” and “power rate.” In particular, the “capacity rate” was mainly the capital rate that reflects the fixed cost of the IPP but the “power rate” was mainly the fuel cost rate that reflected the variable cost of the IPP. Taipower follows the principles of “economic allocation” and paid the “capacity rate” and “power rate” during the guaranteed period and paid only the “power rate” during the non-guaranteed period. Those with lower rates would be given priority in allocating the power. In addition, the PPA formulated the annual routine adjustment mechanism for the fuel costs of the power purchase. In particular, the power generated by natural gas was adjusted according to the “average thermal cost of Taipower’s natural gas plants in the year before.”

22. Nonetheless, starting in 2006, the CPC Corporation has constantly increased the price of natural gas used for power generation so that the previously agreed power purchase rate stipulated in the PPA could not instantly reflected the fuel cost at the time. Hence, IPPs have requested that Taipower modify the fuel cost rate adjustment mechanism. Alternatively, the interest rate in the capital market dropped from 7.54% in 1995 to 2.37% in 2006, that is, the capital cost of the IPP industry was significantly lower than that previously established. The previously purchased power could not reflect the decline in the capital rate for the IPPs and needed to be adjusted.

23. In response to the IPPs’ urgent demands to raise the fuel cost, Taipower agreed to modify the fuel cost rate adjustment mechanism in September 2007. Both parties agreed to negotiate the price purchase rate due to the fall in the interest rate, to reflect the variability in the interest rate level. However, the IPPs disagreed to adjust and vary the power purchase rate with floating interest rates and did not reach a mutual understanding to complete the adjustment of the power purchase rate with Taipower. The CTFTC investigated and deemed that the 9 IPPs had refused to adjust the power purchase rate with Taipower by means of a concerted action and it was ruled in 2013 that they had violated paragraph 1 of Article 14 of the Fair Trade Act.

24. The 9 IPPs appealed to the Taipei High Administrative Court. The court deemed that the purpose of establishing the IPPs was not to open up the market to competition but to transfer the costs and risks incurred by Taipower to construct power plants to the private sector. Moreover, according to the PPA, IPPs were refrained from determining the price of

the power generated and hence IPPs by nature were only the contractually outsourcing units of Taipower. There were no competition among 9 IPPs based on price, quantity, quality, service, or other criteria for transaction opportunities. Hence, the 9 IPPs were not “horizontal competitors”, which was a prerequisite for establishing violation of Article 14 of the Chinese Taipei Fair Trade Act.

25. Nonetheless, the opinions from legal and economic experts and scholars stressed that the existence of economic or industry conditions unfavorable to market competition, or non-economic restrictions on competition were not necessarily an indication that competition could never have occurred in such markets. For example, the government could use bidding when dealing with a state business oligopoly in order to achieve the target of creating competition, so that those interested may participate, converting the market competition to *ex ante* “competition for the market” rather than the *ex post* “competition in the market.”

26. Hence, inferring the existence or non-existence of market competition based on “current” market conditions is likely to result in a fallacy of “reverse causation.” The market conditions observed could be the result of competition. For example, the fact that a market in high-tech industry is dominated by one production technology may not be the result of lacking market competition; instead, it could be the result of fierce competition among firms to establish industry standard. The non-existence of market rivalry could be the equilibrium of market competition. It should not be hastily and arbitrarily taken to mean that market is not competitive.

27. The case underwent two appeals to the Supreme Administrative Court. The court ruled in 2023 that the 9 IPPs had indeed a potential horizontal competition relationship and the reasons for this included: (1) All the IPPs have signed a PPA with Taipower for the power purchase rate but both parties revised the mechanism for adjusting the fuel cost in 2007. Moreover, before the actual trading of power and the determination of the average price, the IPPs still had room for the determination. They could also take into account whether an adjustment in the relevant power purchase rate should be negotiated with Taipower during the agreement period or upon its expiration. (2) The level of the power rate was the key consideration for Taipower when purchasing power. The 9 IPPs will compete according to the capacity rate during the non-guaranteed period for trading opportunities or the quantity of power purchased.

28. Although the Supreme Administrative Court reached the conclusion that the 9 IPPs were horizontal competitors based on reasons different from the CTFTC’s, the discourse in regard to *ex ante* “competition for the market” should facilitate the clarification of competition among IPPs and can be used as a reference when handling such types of cases in the future.

### 3. Future direction of law enforcement

29. In the absence of direct evidence, it is necessary to use economic evidence to prove business conduct has deviated from economic rationality and differs from the condition of the normal operation of the market mechanism to infer concerted action. The CTFTC has accumulated experience from considerable cases of law enforcement. Nevertheless, the Administrative Court does not fully support the CTFTC’s use of indirect evidence as inferring a mutual understanding of concerted actions. In view of the past court rulings, the relevant cases challenged have involved the recognition of a consistent appearance, market situation, the mastering of industry characteristics, evidence of information exchange, and indirect evidence of cost structure, as well as intensely consolidating the economic analysis

with legal applicability to strengthen the discourse inferring concerted actions. These are key to acquiring support from the court in the future handling of relevant cases.

30. In addition, the application of AI and algorithms in business models is becoming increasingly popular, raising the difficulty in detecting concerted actions and acquiring direct evidence. The competition authorities will need to rely more on economic evidence for law enforcement. For this reason, strengthening market research and industry surveys can be a means to constantly understand market developments, identify and detect potential competition problems, and grasp the usage of algorithms and market characteristics of collusive behavior to serve as reference in the overall analysis of related cases.