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The Standard and the Burden of Proof in Competition Law Cases – Note by Chinese Taipei

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Antonio CAPOBIANCO
Antonio.Capobianco@oecd.org, +(33-1) 45 24 98 08

JT03555049

Chinese Taipei

1. Evidentiary Standards and Distribution of Burden of Proof

1.1. Evidentiary Value

1. The evidentiary value of evidence can generally be divided into the principle of legal evidence and the principle of discretionary evaluation of evidence. The principle of legal evidence stipulates the evidence and collection method of factum probandum as per the legal provisions. The legal executor (administrative agency or court) shall judge the authenticity of the facts as per the provisions. The principle of discretionary evaluation of evidence does not limit the evidence and its value is based on principles, allowing the legal executors to make a judgement on the truthfulness of the facts at the discretion and based on the firm confidence of the legal executors.

2. Article 43 of the *Administrative Procedure Act* stipulates that "In rendering an administrative disposition or carrying out other administrative acts, an administrative authority shall make a judgement of the truthfulness of the facts based on logical reasoning and the empirical doctrine after taking into consideration the statements presented and the conclusion reached upon the facts found and the evidence obtained, and shall then give the party a notice of its decision and reasons therefor." Paragraph 1 of Article 189 of the *Administrative Litigation Act* stipulates that: "Unless otherwise provided, in making a decision, the administrative court shall take into consideration the entire import of oral argument and the result of evidence-taking and apply the rules of logic and experience in determining the facts." The principle of discretionary evaluation of evidence is adopted in both stipulations.

1.2. Probative Value of Evidence

3. The probative value of evidence can be divided into three degrees in theory: "beyond a reasonable doubt," "clear and convincing evidence" and "preponderance of evidence." The required degree of discretionary evaluation of evidence for each of them approaches are 100%, 75% and 51%, respectively.

4. Based on the investigation authorization of the administrative authority and the public-welfare nature of administrative litigation, the *Administrative Procedure Act* and *Administrative Litigation Act* in general adopt the standard of "clear and convincing evidence." In other words, although the probative value of evidence need not reach the absolute assurance of beyond a reasonable doubt of common people, it should still have a high probability of the degree of proof.

1.3. Distribution of Burden of Proof

5. The burden of proof can be divided into a subjective burden of proof and objective burden of proof. The former refers to the responsibility of the conduct proposing evidence beneficial to oneself; the latter means that when the authenticity of cases is not unclear, one party shall take the danger of or adverse interest in nonoccurrence of the legal effect with this fact as the legal element into consideration.

6. Provisions regarding the objective burden of proof of administrative litigation are stipulated in Article 136 of the *Administrative Litigation Act*: "Unless otherwise provided

in this Act, Article 277 of the *Code of Civil Procedure* shall apply mutatis mutandis to the circumstances prescribed in this Section." Therefore, although the *Administrative Litigation Act* adopts the principle of ex officio investigation, the court shall conduct an ex officio investigation based on the evidence. Only when the authenticity of the facts is unclear, shall the litigating party that bears the burden of proof bear the adverse out come in the nonoccurrence of the legal effect of this fact.

7. People who think administrative acts impair their rights or legal interests shall file an action for dismissal. The authority rendering the disposition shall bear the burden of proof for legality ("with a legal basis" and "with facts satisfying all the required legal elements"). The subject of a disposition shall bear the burden of proof for "facts of exceptional legal elements" so as to deny the legality of disposition.

2. Law Enforcement by Competent Authorities and Court Review Practice –Taking a Mutual Understanding of a Concerted Action as an Example

2.1. Evidenting Rules of Competition Law Cases

8. The Chinese Taipei Fair Trade Commission（CTFTC） is one link of the administrative procedure for the investigation, review and disposition of competition law cases. The *Fair Trade Act* does not otherwise specify the evidenting rules to be adopted by competition law cases (excluding the provisions in Paragraph 3 of Article 14 of the *Fair Trade Act* which was revised and amended on February 4, 2015, for which the details are described below). Thus, evidentiary standards and the distribution of the burden of proof for competition law cases shall be subject to stipulations in the aforementioned *Administrative Procedure Act*.

9. The aforesaid provisions regarding the evidentiary standards and distribution of the burden of proof are not contradictory to the legal enforcement of general competition law cases. However, it is not easy to obtain direct evidence of a mutual understanding regarding a concerted action, and so the CTFTC sometimes adopts indirect evidence to infer the existence of facts for a mutual understanding regarding a concerted action. Hence, disputes about competition law cases with regard to the evidence rules mostly focus on disposition cases involving illegal concerted actions (especially fact-finding for a "mutual understanding" regarding a concerted action).

10. "Indirect evidence" refers to evidence that cannot directly prove factum probandum, but it can prove certain mediate datum or supplementary facts and then the existence of factum probandum can be inferred by virtue of such mediate datum or supplementary facts. Moreover, the adoption of indirect evidence must comply with the evidentiary rules, i.e., "when indirect evidence is adopted, though its sustainable evidence can only prove other facts in direct relationship, other facts are sufficient to prove factum probandum through inference by virtue of such other facts. This is legal. Indirect evidence is legal only in such a case."[1]

2.2. Law Enforcement Standard of the CTFTC

11. The CTFTC adopted the method of inferring a mutual understanding regarding a concerted action with indirect evidence many years ago. For instance, the "Joint Price Increase by Cable Broadcasting System Companies" case handled in 2009 pointed out that

[1] Supreme Court Precedent (1943) Shang Tzu No. 67.

in order to distinguish a single parallel action and illegal concerted practices, whether a mutual understanding regarding concerted actions has been concluded can be proved if there is the same or a similar extrinsic act between enterprises and if there is a meeting of minds between enterprises, e.g., exchanging sensitive market information concerning competition or communicating operating strategies with each other, or directly exchanging commercial information; or furthermore, whether there are mutual understandings between enterprises, shall be judged and their concerted external practices shall be reasonably explained with other objective indirect evidence (e.g., inducement, economic benefit, time and amount of price increase, substitution possibility of different actions, times of occurrence, time of duration and concentration and consistency of actions, etc.). The subject of a disposition in regard to this case objectively gave rise to the situation of increasing charges for cable television programs and there was no specific competition action between them. There was no rational reason to explain such a concerted action after economic analysis and evaluation. In such a case, it could be deemed subjectively that the subjects of a disposition had a meeting of minds, and there was supposition of violating relevant specifications regarding concerted actions in the *Fair Trade Act*.[2]

12. The "Joint price increase case of cylinder inspection plants" also pointed out that although factum probandum should be confirmed based on evidence, the so-called evidence was not limited to direct evidence but also included indirect evidence. Although this indirect evidence could not directly prove factum probandum, such so-called indirect evidence is sufficient to prove other facts, and such other facts can be confirmed as factual basis through inference, i.e., it conforms to the laws and regulations. Besides proving "concerted external practices," although it is impossible to obtain evidence about a "mutual understanding of facts" between enterprises, the competent authority shall explain, based on enterprise participation motivation, inducement, economic interest, similar price increase time or amount, substitution possibility of different actions, times of occurrence, time of duration, concentration of actions, other concerted market competition actions and other indirect evidence, whether there was meeting of minds between enterprises beforehand, that there is no way to reasonably explain its market action, and the fact that there exists a mutual understanding regarding a concerted action between enterprises that can therefore be inferred.[3]

2.3. Court Review

13. The Administrative Court basically affirms that a mutual understanding regarding a concerted action can be inferred through indirect evidence. It suggests that the "burden of proof of mutual understandings has been the biggest difficulty in law enforcement of the competent authorities of all countries. If it is blindly required to confirm the existence of a mutual understanding regarding a concerted action with direct evidence, the improper evasion of statutes will occur, which is contrary to the normative purpose of the *Fair Trade Act*. In other words, when it is difficult for a law enforcement agency to obtain direct evidence (e.g., meeting minutes in written form) about a mutual understanding regarding a concerted action, a [reasonable inference] method can be adopted. In order to overturn this [reasonable inference], perpetrators need to reasonably explain or prove that the adjustment

[2] Disposition Kung Chu Tzu No. (88) 070 of CTFTC.

[3] Disposition Kung Chu Tzu No. (88) 124 of CTFTC.

of price is caused by objective supply and demand change elements in the market. Otherwise, it can be inferred that there is a meeting of minds for concerted actions."[4]

14. However, the court does not propose an explicit standard about what indirect evidence can be reasonably inferred / to prose a mutual understanding regarding a concerted action and what degree of proof such indirect evidence should reach. As a result, different courts have different opinions for individual cases concerning whether the indirect evidence provided by the competent authority for the competition law is sufficient to infer a mutual understanding regarding a concerted action and if such indirect evidence can only be adopted when it reaches the degree of proof of being the "sole reasonable interpretation." Such an inconsistency is especially obvious when judging whether concerted actions of enterprises in an oligopolistic market are based on a mutual understanding regarding a concerted actions or conscious parallelism.

15. For example, in "Domestic Dairy Companies Jointly Raised Fresh Milk Prices," the court held that enterprises making price adjustment decisions had to face the risks of losing the market, and not the follow-up of rivals and price competition. However, the number of enterprises in an oligopolistic market is small and it is easy to monitor violations and impose sanctions. Therefore, the operation of concerted actions was stable and the market structure could easily cause an inducement of union and collusion. The print media had taken the lead to disclose the news of the price rises for fresh milk. This news is conducive for rivals to monitor the market and can reduce the risk of not being followed up by those rivals. It is also beneficial for the consolidation of concerted actions. Moreover, fresh milk companies not only proposed highly similar suggested price lists in the first place, but there were also no cases of prices being corrected. The factors to be considered in the price adjustments for fresh milk are both complicated and variable. Fresh milk companies failed to immediately put forward a calculation method and information about their price adjustments upon investigation. Thus, it can be inferred that the concerted action by fresh milk enterprises increasing the price of fresh milk was a concerted action that originated from a meeting of minds.[5]

16. As for "Domestic Chain Convenience Stores Jointly and Uniformly Increased the Prices of Fresh Brewed Coffee" which was imposed with a disposition during the same period as "Domestic Dairy Companies Jointly Raised Fresh Milk Prices," the court had distinct opinions on the indirect evidence. The administrative litigation for this case was filed by the subjects of the disposition and the case was heard four times by the courts [the Taipei High Administrative Court passed judgement and the CTFTC was defeated (original judgement). The CTFTC instituted an appeal which was remanded by the Supreme Administrative Court (the first judgement of the Supreme Administrative Court). The Taipei High Administrative Court passed judgement and the CTFTC was defeated again (it remanded the decision of the first judgement). The Supreme Administrative Court maintained the opinion regarding the remanded decision of the first judgement and its judgement that the CTFTC had been defeated was final and binding after the CTFTC launched an appeal (the second judgement of the Supreme Administrative Court)]. However, the opinions of the four hearings were obviously different.

17. In the first judgement of the Supreme Administrative Court, the CTFTC deemed that there were no objective supply and demand changes that could reasonably explain why the four chain convenience stores had apparently engaged in a concerted action considering the multiple changing elements according to the observation of multiple pieces of indirect

[4] Supreme Administrative Court Judgement (2013) Pan Tzu No.251.

[5] Supreme Administrative Court Judgement (2014) Pan Tzu No.294.

evidence, such as the production cost, operational duration of the price increase, press release and preparation period of promotional activities. Thus the decision to rationally infer that there was a mutual understanding regarding a concerted action between the companies was worth affirming. Furthermore, the first judgement of the Supreme Administrative Court held that the original judgement "does not require the stores to bear the responsibility of providing a reasonable explanation of the concerted price increase, but required the CTFTC to prove that there was a mutual understanding regarding a concerted action through the burden of proof and the proof was required to reach the degree of [beyond a reasonable doubt]" and bear the risk of being defeated when the authenticity of the facts was unclear. Such opinions breached the distribution principles of the burden of proof, and the evidenting rules were improperly applied.[6]

18. However, in the second judgement of the Supreme Administrative Court, it was deemed that apparently the same actions of enterprises were probably concerted actions and also probably conscious parallelism. While the cost structures of enterprises are different, making similar price adjustments at a very close time is inherently a common phenomenon of parallel actions in an oligopolistic market. Although the CTFTC claimed that the brewed coffee of chain convenience stores is characterized by a high degree of homogeneity, rivals know well the cycles of commodity adjustment of each other and the market structure can easily induce union and collusion. However, the previous characteristics can also prove that a concerted price increase action of the stores is reasonable economically. A concerted price increase action can occur naturally without a mutual understanding regarding a concerted action between enterprises. Hence, the indirect evidence proposed by the CTFTC was not sufficient to infer the fact of a mutual understanding regarding a concerted action.[7]

3. Dilemma and Breakthrough in Competition Law Cases

3.1. Litigation Dilemma of Competition Law Cases

19. As mentioned above, the *Fair Trade Act* does not otherwise stipulate evidentiary rules for competition law cases, while the CTFTC relies to extensively on the gathering and application of indirect evidence in concerted action cases. Therefore, the courts, on the one hand, affirm evidenting rules that infer the existence of factum probandum with indirect evidence and, on the other hand, as to whether indirect evidence obtained by the CTFTC is sufficient to infer a mutual understanding regarding a concerted action, their review standards differ with each individual case. This also means that for the distribution of the objective burden of proof the CTFTC must bear an adverse interest due to the nonoccurrence of the legal effect with this fact as the legal element when the authenticity of the facts for a mutual understanding regarding a concerted action are unclear.

3.2. Mitigation of proof – Paragraph 3 of Article 14 of the *Fair Trade Act*

20. Paragraph 3 of Article 14 of the *Fair Trade Act* which was revised and enlarged on Feb. 4th, 2015 stipulates: "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

[6] Same as Note 4.

[7] Supreme Administrative Court Judgement (2014) Pan Tzu No.195.

conducts." It points out that "presenting proof is the key to winning or losing a lawsuit. In practice, the competent authority intends to obtain direct evidence for a concerted action, which is very difficult. In order to regulate concerted actions effectively, the competent authority shall be allowed to infer mutual understanding elements of concerted actions based on an appropriate basis."

21. In general, the previous stipulations that specify the indirect evidenting rules formed through the insights of practice and theory over many years affirm that the CTFTC shall infer and prove the existence of facts for a mutual understanding regarding a concerted action through indirect evidence so as to alleviate the burden of proof of the CTFTC.

22. However, whether previous stipulations mean that the mutual understanding regarding the concerted action can be reasonably presumed only by indirect evidence, such as the market condition, the characteristics of the good or service, cost and profit considerations, and economic rationalization of the business conducts, still remains doubtful. For instance, in the case of the "Joint Price Increase of Premixed Concrete Companies in Southern Taiwan" judged in 2019, in regard to the disposal that the CTFTC inferred a mutual understanding regarding a concerted action based on market situation and other indirect evidence according to Paragraph 3 of Article 14 of the *Fair Trade Act*, the judgement (original judgement) of the Taipei High Administrative Court pointed out that inferring a mutual understanding regarding a concerted action based on indirect evidence and taking it as the basis for a disposition is an exceptional case and should be reviewed strictly by the courts. Although the apparent phenomenon of a concerted prediction of a price increase exists in pre-mixed concrete companies, a price increase action taken by them can be considered economically reasonable. The occurrence of such parallel actions can be considered as the economic action of companies making independent decisions based on the market situation, marketing strategy of rivals, economic rationality and the pursuit of maximum benefits. The CTFTC inferred a mutual understanding regarding a concerted action based on the situation where the price increase situation of the companies was different from past practices, and the amount of the adjustment exceeded the increased amount of the cost. The predicted price increase of the pre-mixed concrete price was released when the price increase and increases in the amounts of upstream sand and gravel material were not determined, which was not adopted.[8] Although this case was remanded by the Supreme Administrative Court for judgement again and sentencing has not taken place so far after being filed by the CTFTC, it can be seen from this that even if Paragraph 3 of Article 14 were to be revised and extended in the *Fair Trade Act*, the judicial review would still raise doubts about inferring facts for providing mutual understanding regarding a concerted action based on indirect evidence.

4. Conclusion

4.1. Strengthening Evidence Investigation Tools - Leniency Policy and Payment of Rewards for Reporting of Illegal Concerted Actions

23. To sum up, when investigating cases and executing dispositions, besides the burden of proof for the legality of disposition, the CTFTC shall bear the risk of adverse interest for a lawsuit when the authenticity of facts is unknown, while for the disposal of cases concerned with illegal concerted actions, the easiest and the most challenging part is the existence of facts for a mutual understanding regarding a concerted action. Thus, whether

[8] Taipei High Administrative Court Judgement (2019) Su Tzu No.1007.

it is possible to obtain sufficient and powerful proofs for a mutual understanding regarding a concerted action (including direct evidence and indirect evidence) is always the key that affects winning or losing lawsuits in joint action cases. Therefore, the CTFTC included a leniency policy in 2011 and enlarged the provisions regarding the payment of rewards for reporting illegal concerted actions in 2015 in order to enhance evidence collection in the investigation of illegal concerted action cases and mitigate the difficulty of verifying the facts for a mutual understanding regarding a concerted action.

4.2. Communication and Advocacy with Judiciary Authorities

24. On the other hand, there is a great difference between cases related to competition law cases and general administrative act cases, because the judicial review authorities are not familiar with the intent of the stipulations in the *Fair Trade Act* and do not agree with the disposal of the CTFTC inferring a mutual understanding regarding a concerted action rationally through indirect evidence (even though Paragraph 3 of Article 14 is added to the *Fair Trade Act*. How the courts apply this provision for individual cases has yet to be observed). Therefore, the CTFTC shall continuously intensify communication and advocacy with the judicial authorities and expect that competition law cases obtain the support and affirmation of the courts when filing lawsuits.