

THE TAIPEI HIGH ADMINISTRATIVE COURT REVOKED THE FTC'S DECISION REGARDING PRICE FIXING BY THREE PAPER COMPANIES BECAUSE OF INSUFFICIENT EVIDENCE

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The Taipei High Administrative Court (THAC) granted a judgment on July 2012 revoking the Fair Trade Commission's (FTC) decision in which FTC found that three industrial paper companies, Cheng Loong, Long Chen and Yuen Foong Yu, had conducted concerted action and thereby violated the Fair Trade Act ("FTA").

The case arose from several price increase adjustments of industrial paper. The FTC investigation found that the above three industrial paper manufacturing companies, which together controlled over 90 percent of the industrial paper market, increased their prices at the same time and by the same amount to avoid competing with each other. Therefore, although there is no direct evidence showing that an agreement of concerted action existed among the three companies, the FTC still imposed fines on them for violating the FTA.

Nevertheless, the THAC's judgment emphasized that "government agencies are obliged to prove the requisite facts when applying penalties. After the investigation of a court, should the fact as to whether or not the plaintiffs' business activities constituted concerted action remains ambiguous, that would be favorable to the plaintiff." In addition, the THAC indicated that although the FTC may rely on indirect evidence to prove the existence of concerted action, it is obliged to convince the court that "the only reasonable interpretation for such business activities is an agreement of concerted action existed among competitors", otherwise the FTC would fail to comply with the evidential burden of "proof beyond a reasonable doubt".

Based on the above, the THAC further demonstrated that identical extrinsic acts as a kind of indirect evidence can be divided into "conscious parallelism" and "concerted action", and only the latter is prohibited by the FTA. On the other hand, conscious parallelism usually occurs in highly transparent oligopoly markets in which any company can immediately react as soon as it becomes aware of other competitors' actions, leading to eventual identical extrinsic acts. Given that conscious parallelism is different from a conspiracy of concerted action, it is not prohibited under the FTA. In this regard, when the FTC only addressed the matter of identical extrinsic acts regarding the same simultaneous price adjustments but did not consider the possibility that such business activities or strategies might have stemmed from conscious parallelism, it obviously failed to convince the court beyond a reasonable doubt, and its decision shall be revoked.

This THAC's judgment is crucial because it emphasizes the evidential burden the FTC shall comply with before making its determination regarding concerted action. For the past few years, the FTC frequently assumed an agreement of concerted action on the basis of indirect evidence derived from identical extrinsic acts. The increasing price of milk or fresh coffee by chain convenience stores are apparent examples. Thus, if the FTC still only relies on identical extrinsic acts after the above judgment, it may not be complying with its obligation to decide cases based on the proper evidential burden of proof.