

**Presuming a Mutual Understanding of Concerted Actions: Comparative Law
Research on U.S. Antitrust Law**

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Abstract

This article proposes suggestions concerning the interpretation and application of the new Paragraph 3 of Article 14 of the Fair Trade Act (“FTA”) after introducing the practice and theories concerning inferring an agreement by means of indirect evidence, pricing problems in oligopolistic markets, and facilitating practices, by referring to judgments of the Taiwan Supreme Administrative Court related to the presumption of a mutual understanding of concerted actions, and then analyzing the differences in the language of anti-trust law, litigation systems, and enforcement approaches between the United States and Taiwan. The article points out that, in administrative litigations in Taiwan, the mutual understanding of the concerted action may be presumed by indirect evidence under Paragraph 3 of Article 14 of the FTA provided that the mutual understanding of the concerted action is the only reasonable explanation, i.e., it has been proved beyond a reasonable doubt. Then the court may reduce the burden of proof to the degree of high probability on a case-by-case basis.

As for the factors set forth in Paragraph 3 of Article 14 of the FTA, these may be evaluated and analyzed under the plus-factor model developed in the United States. In addition, the economic evidence should be included at the end of the analysis and the other plus factors should be prioritized. Moreover, if there is insufficient indirect evidence to prove that the enterprises agreed to adopt the facilitating practice in dispute or the outcome caused thereby, the Taiwan Fair Trade Commission (“TFTC”) shall not enforce Articles 14 and 15 of the Fair Trade Act against the enterprises. Even though the TFTC, by referring to U.S. Federal Trade Commission enforcements related to the invitation to collude and the unilateral disclosure of information, intends to regulate the enterprises’ unilateral facilitat-

ing practice under Article 25 of the FTA, the FTA shall exercise caution by considering the differences between these two antitrust law systems.

Keywords: Concerted Action, Presumption of Mutual Understanding, Tacit Collusion, Conscious Parallelism, Cartel.