專題演講：聯合行為合意證明時經濟證據及推理之運用

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一、 前言

- 公平交易法第 7 條第 1 項:「本法所稱聯合行為,謂事業以契約、協議或其他方式之合意,與有競爭關係之他事業共同決定商品或服務之價格,或限制數量、技術、產品、設備、交易對象、交易地區等,相互約束事業活動之行為而言。」
- 公平交易法第 7 條第 3 項:**其他方式之合意**指「契約、協議以外之意思聯絡,**不問有無法律拘束力,事實上可導致共同行為者。**」
- 由於聯合行為多秘密進行,直接事證取得不易,各國執法機關漸容許以**間接證據**或**情況證據**證明聯合行為「合意」之存在。
- 對於經濟學者而言,區分有合意的聯合行為及沒有合意的平行行為,並沒有意義,但對於法學家而言,構成要件的要求,絕對不能視之無物
- 間接或情況證據經常具有多重、甚至對立解釋意涵的特性,若完全依賴此類證據,可能導致正常競爭行為遭到不當禁止、處罰。
- 縱不排除間接或情況證據的利用,**但對其利用的適當性、證據力應嚴格檢視**,避免造成濫用,而斲傷事業的正常競爭及營業活動。
- 公平會曾在**毫無直接證據存在的情況下,僅以下列間接證據或附加因素**,認定被處分事業間存在聯合行為:
  (1) 系爭市場結構有利於聯合勾結之誘因。
  (2) 被處分人等考量調價之因素互異,及未提出一致性調漲行為之合理說明及佐證。
  (3) 建議售價表之價格吻合度極高,若非合意無以致之。
  (4) 超額之調漲決策印證具有聯合合意。
  (5) 系爭產品之相關公開資訊對聯合行為之穩固作用。

二、 我國法間接證據利用沿革之概觀

- 公平會最常沿用,且多次得到最高行政法院支持的**最高行政法院 92 年度判字第 1798 號判決**:

  「公平交易法上聯合行為之合意具有不要式性,且不以具有法律上的拘束力為必要,其意思聯絡並不以發生民法契約的合意為其成立要件。次按認定事實固應依證據認定之,**惟所謂證據,並不以直接證據為限,無違一般經驗法則之間接證據亦包括在內。**」。

  「查所謂『跟隨性之平行行為』與『聯合行為』之區別在於『有無意思聯絡』,惟因二者之外觀均呈現行為之一致性,**是以執法機關對於聯合行為取得合意之直接證據(例如書面會議記錄)有困難時,應採『合理推定』之方式...**換言之,如**市場上多數業者同時並且以相同幅度調整價格,**然市場上並無客觀之供需變化因素可資合理說明,應**可合理懷疑及推定業者就該次價格調整,存有聯合行為之『意思聯絡』**。」。

  「**要推翻此項『推定』,需行為人『合理說明』或證明,其價格之調整乃市場上客觀之供需變化因素所致。**申言之,當事者之企業,為共同一致之行為,自該各個企業之個別利益

觀點而言，無從解釋之，僅能基於有共同之目標及計畫加以了解時，即可認為有該等合意存在。」。

- 在**台灣中油與台塑石化的油價聯合行為案**中，公平會以「調整批售價格時，有以新聞稿對外發布，且上訴人歷次調價均能由媒體平台清楚揭露時點、調整幅度等資訊，**利用預告與實施時點一定之時間差視競爭對手反應，甚而透過媒體予以發布修正調價資訊**，倘非上訴人有意透過媒體平台交換資訊，何以多次價格調整均循此一模式」等為由，認定二家公司間存在有聯合行為的意思聯絡。

  最高行政法院也支持公平會之見解，認為「（被處分人等二家公司）**透過調價預告，偵測競爭對手反應或交換價格資訊進行意思聯絡**，致（二家公司）形成同時間、同幅度之一致性調價之結果，足認（二家公司）上開調價機制合致公平交易法第 7 條規定所稱『其他方式之合意』之構成要件。 」。

- **最高行政法院 99 年度判字第 503 號判決**：「若經調查確實有意思聯絡之事實，或**其他間接證據**（如誘因、類似之漲價時間或數量、發生次數、持續時間、行為集中度及其一致性等）**足以判斷事業間已有意思聯絡，且為其外部行為一致性之唯一合理解釋**，即可認定該等事業間有聯合行為。」。

  此判決增加「**間接證據為外部行為一致性之唯一合理解釋**」 之要件，以此要求公平會對於聯合行為合意或意思聯絡，負高度的舉證及說明責任，而非將所有的舉證責任強加諸被處分人。

- **最高行政法院 102 年判字第 251 號**：合意之舉証向為各國主管機關執法上之最大難題，若一味要求聯合行為合意之存在需要直接證據方得以成立，將造成不當之脫法行為，與公平交易法之規範目的不合。換言之，當執法機關對於取得聯合行為合意之直接証據（例如書面會議紀錄）有困難時，應採「合理推定」之方式，要推翻此項「合理推定」，須行為人合理說明或証明其價格之調整乃市場上客觀之供需變化因素所致，否則即可推定有聯合行為之意思聯絡存在。此為本院多數判決所採之見解。原處分從鮮奶成本、生產現煮咖啡所需使用咖啡豆、耗材、人工、咖啡機等成本、調漲作業期間、新聞稿之發布、促銷活動準備期間等多項間接証據觀察，在眾多變動因素下，並無客觀之供需變化可資合理說明何以被上訴人等 4 家連鎖便利商店外觀上有一致性之行為（除「有意識之平行行為」及「價格跟隨行為」外），依上開「合理推定」之實務見解，自可合理推定被上訴人等有聯合行為之合意。惟原判決不採「合理推定」之見解，並未要求被上訴人等 4 家連鎖便利商店對於渠等何以外觀上有一致性之調價行為？何以能在新的鮮乳進貨價格還未確定前即作成調漲含乳現煮咖啡之決定？負合理說明之舉証責任，卻認應由上訴人舉証証明聯合行為之合意，且其証明須達「沒有合理可疑」之程度，若經法院依職權調查，仍有待証事實真偽不明之情況，上訴人即應負擔敗訴之風險等語，逕將舉証責任倒置於上訴人，有違舉証責任分配之原則，不但有悖上開本院實務之見解，亦有適用証據法則不當之違法，上訴意旨執以指摘，非屬無據。

- 最高行政法院 102 年判字第 251 號：在高度透明化的寡占市場中，廠商對競爭者之行為，通常在很短的時間內即可得知，且產品同質性越高，市場越以價格競爭為主要方式，此時廠商對於產品價格之決策，往往須視對手所實施之競爭策略而定，並非一定以低價競爭為惟一策略，亦有可能是為因應對手策略所不得不為之「有意識之平行行為」或「價格跟隨行為」，此亦為兩造所不爭。本件上訴人係以被上訴人等均極力辯稱調價額度及時機係內部口頭決定，並未參考或跟隨同業等語，作為否定被上訴人間有「有意識之平行行為」或「價格跟隨行為」可能之依據；惟被上訴人上開辯解之主要用意係在否認渠等間有聯合行為之合意，並不能完全排除「有意識之平行行為」或「價格跟隨行為」之可能，是被上訴人上開辯解之真意為何，仍有進一步探究之必要。又上訴人認「有意識之平行行為」多出現於「跟跌不跟漲」，故不會出現於本件跟漲之情形，其理論依據及市場實証為何，未見上訴人予以說明釐清。是本件被上訴人間是否有「有意識之平行行為」及「價格跟隨行為」。

三、 外國法關於間接證據之利用

- OECD, Prosecuting Cartels without Direct Evidence (2006)，p18：There is a trend in OECD countries toward building cases based on direct evidence.
- 我國公平會眼中的外國法：參酌各國競爭法主管機關就『一致性行為』（concerted action）之執法經驗，考量相關『附加因素』（plus factors）而排除調價係屬業者出於經濟理性之獨立行動，亦即除非業者有採取聯合行為，否則無法合理解釋一致性之市場現象，則可論證屬聯合行為態樣之一。故有關一致性行為之違法證明，倘未具被處分人間意思聯絡之積極事實，而據間接證據可解釋被處分人間若無事前之意思聯絡，即無法合理解釋其市場行為，則可推論其間存有意思聯絡。
- OECD 關於間接證據之分類：
  (1) 溝通證據（Communication Evidence）：例如當事人間的聚會、通話記錄、旅行至同一地點等事證。
  (2) 行為證據（Conduct Evidence）：例如當事人間同步漲價行為、採行同樣的交易條件、獲取超競爭利益、穩定的市占率、過去違反競爭法的紀錄等事證。
  (3) 市場結構證據（Market Structure Evidence）：例如市場集中度高、市場進入障礙高、高度的垂直整合、商品同質性高等事證。
  (4) 促進措施（Facilitating Practices）：例如資訊交換、價格訊息放送、運輸費用平準化、最惠國待遇等價格保護措施、不必要的產品標準設定等事證。

四、 美國法關於間接證據之利用

- 刑事訴訟 vs. 民事訴訟及行政爭訟
- 刑事訴訟要求 **beyond reasonable doubts**，故而對於證據之要求非常高，通常須以直接證據為之，最少必須有強烈的溝通證據，因此舉證責任的高度要求，故而設計出寬恕政策。
- 民事及行政程序則多僅要求，**preponderance of evidence**，於程序中交叉運用各該程序，但似乎未見完全運用溝通證據以外進行舉證者。
- 美國學者對於間接證據運用之爭論，主要見於 Turner 與 Posner 間的爭議：
  Turner 教授的見解：conscious parallelism, without more, cannot be an agreement, or at least an illegal agreement under Section 1, because the rivals are only acting rationally based on available information, like competitive firms. Moreover, it would be vain to try to prevent this sort of conduct, because the remedy would require firms to act irrationally or to submit to direct price regulation.

  Posner 法官的見解：because tacit collusion requires conscious choices, it should be viewed as 'a form of concerted action' that the law could remedy without 'telling oligopolists to behave irrationally'.
  法院實務迄今為止，多支持 Turner 教授之見解。
- Blomkest Fertilizer, Inc. v. Potash Corp. of Sask.(203 F.3d 1028, 1032-33)：An agreement is properly inferred from conscious parallelism only when certain "plus factors" exist. A plus factor refers to "the additional facts or factors required to be proved as a prerequisite to finding that the parallel action amounts to a conspiracy.
  由此可知，所謂的附加要素乃是於外觀或結果的價格一致性外，其他足以說明非有合意不足以產生共謀之附加事實或因素。

- Interstate Circuit v. United States, 306 U.S. 208 (1939):It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan. They knew that the plan, if carried out, would result in a restraint of commerce, … and knowing it, all participated in the plan. The evidence is persuasive that each distributor early became aware that the others had joined. With that knowledge they renewed the arrangement and carried it into effect for the two successive years.
- 但自 1950 年代開始，聯邦最高法院開始限縮間接證據的利用方式及其證據力。Theatre Enters., Inc. v. Paramount Film Distrib. Corp.（346 U.S. 537（1954））：business behavior is admissible circumstantial evidence from which the fact finder may infer agreement. But this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but "conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely.
- Matsushita Elec. Indus. Co. v. Zenith Radio Corp. （475 U.S. 574 （1986））：conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy…To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently.
- 由此可知，當一件行為其可能是競爭的結果、亦可能是非法合意的結果時，系爭間接證據即無法用來作為推定合意存在的事證。因此，聯邦最高法院在將本件發回原審時強調，原審法院必須審視系爭間接證據是否充分毫無疑義而得令事實認定者得以推斷合意或共謀的存在：「whether there is…evidence that is sufficiently unambiguous to permit a trier of fact to find that petitioners conspired.」。
- Bell Atlantic Corp. v. Twombly (127 S. Ct. 1955 (2007)：[t]he crucial question" is whether the challenged anticompetitive conduct "stem[s] from independent decision or from an agreement, tacit or express,"…While a showing of parallel "business behavior is admissible circumstantial evidence from which the fact finder may infer agreement," it falls short of "conclusively establish[ing] agreement or… itself constitut[ing] a Sherman Act offense."…Even "conscious parallelism," a common reaction of "firms in a concentrated market [that] recogniz[e] their shared economic interests and their interdependence with respect to price and output decisions" is "not in itself unlawful." The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market. …Accordingly, we have previously hedged against false inferences from identical behavior at a number of points in the trial sequence. An antitrust conspiracy plaintiff with evidence showing nothing beyond parallel conduct is not entitled to a directed verdict…proof of a §1 conspiracy must include evidence tending to exclude the possibility of independent action…and at the summary judgment stage a §1 plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently…
- FTC 資深經濟學家 Gregory J. Werden 於其有關間接證據利用的重要文章中主張，欲推證合意存在，經濟學家或法院應遵守下列四項原則：「(1) Something more than interdependence must be shown before agreement can be inferred. Interdependence is normal and innocent in oligopoly.…(2) The existence of an agreement cannot be inferred

from actions consistent with Nash, non-cooperative equilibrium in a one-shot game oligopoly model.…(3) The existence of an agreement can be inferred from actions inconsistent with Nash, non-cooperative equilibrium in a one-shot game oligopoly model, …(4) The existence of an agreement should not be inferred absent some evidence of communications of some kind among the defendants through which an agreement could have been negotiated. In other words, the evidence must support the existence of a spoken agreement.」

最後的第四項最為重要，該項原則要求合意存在的推論，不能欠缺「溝通」的間接證據，易言之，間接證據必須支持當事人間曾有過協商或口頭合意的存在。氏對於必須如此要求，有如下說明：「First, there is little reason to believe that unspoken agreements are a significant phenomenon. Second, permitting a jury to find a Section 1 violation when an agreement is unspoken gives it license to find a Section 1 violation when there is no agreement at all. Third, liability should not attach unless a workable remedy is available, and there is apt to be none for an unspoken agreement…」

- 以上所述各項間接證據運用的判決，皆為民事訴訟或行政程序，刑事責任要求更高的舉證責任。
- 因此，美國法乃首先設計出所謂寬恕政策，其適用對象為刑事訴訟之當事人，此與美國法對於惡質聯合有嚴苛的刑事責任有關。

五、 歐盟競爭法關於間接證據之利用

- Agreement vs. concerted practices
- 沒有理由認定 EU 競爭法因有所謂 concerted practices 的概念，故而其關於聯合行為的認定比較寬，只要有外觀的一致性即可。
- 近年來，歐洲法院實務及學者通說，已不區別二者之差異。
- Woodpulp II（Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, A.Ahlström Osakeyhtiö e.a. (Woodpulp II) [1993] ECR I-1307.）：it must be noted that parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct. It is necessary to bear in mind that, although article 85 of the Treaty prohibits any form of collusion which distorts competition, it does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors".
- Woodpulp II：To begin with, the system of price announcements may be regarded as constituting a rational response to the fact that the pulp market constitute a long-term market and to the need felt by both buyers and sellers to limit commercial risks. Further, the similarity in the dates of price announcement may be regarded as a direct result of the high degree of market transparency, which does not have to be described as artificial. Finally, the parallelism of prices and the price trends may be satisfactorily explained by the oligopolistic tendencies of the market and by the specific circumstances prevailing in certain periods. Accordingly, the parallel conduct established by the Commission does not constitute evidence of concertation. In the absence of a firm, precise and consistent body of evidence, it must be held that concertation regarding announced prices has not been established by the commission.
- 歐盟執委會的見解：The CFI has also pronounced that, if the Commission could not base the proof of incriminating facts exclusively on statements of the accused, or on the statements of other accused undertakings, "the Commission's burden of proving conduct contrary to Articles [81] and [82] of the Treaty would be unsustainable and

incompatible with the task of supervising the proper application of those provisions which is entrusted to it by the Treaty".

The past experience of the Commission has shown that it is very difficult to base a decision imposing fines on undertakings relying exclusively or in a large extent on economic evidence. Until now the Commission's efforts to rely on economic data were not seen as sufficient by the European Courts, as the allegedly infringing parties can often come up with plausible alternative explanations for market movements, which were sufficient to render unsafe inferences that might be drawn to support the finding of a cartel.

- 歐洲法院近年來對於證據採用傾向嚴格之趨勢，部分理由在於其違反的高額罰鍰。
- 歐洲競爭法對於違反者可處以全世界營業額的 10%以下的罰鍰，近年來 Microsoft, Intel 等企業在歐洲遭受嚴厲處罰。
- 若競爭法的違反主體主要在於事業，則嚴格的罰鍰，其制裁效力高於刑事罰的罰金，亦因此故，歐盟之寬恕政策乃針對罰鍰為之。
- 寬恕政策實施後，可以取得直接證據，對於間接證據的利用，就不再依賴那麼深。

六、 日本法關於間接證據之利用

- 日本競爭法執法機關基本上亦肯認，在沒有直接證據存在的情況下，得藉由間接證據的提出，證明聯合行為合意存在
- 在 1995 年東芝化學一案判決中，日本東京高等法院：「Recognition and intention of the entrepreneurs should be considered by examining various circumstances before and after the price-raising, and then evaluation of whether there is mutual recognition or acceptance among entrepreneurs regarding the price-raising or not. Thus, in the absence of any explicit, mutually binding agreement, the existence of a tacit agreement may be proven by indirect evidence attesting to: (i) the existence of prior exchange of information and opinions among the parties concerned; (ii) the content of negotiations among the parties concerned; and (iii) a concerted act as a result.」
- 競爭法主管機關所提出之間接證據必須證明下列三項情事：（1）當事人間曾於事前交換資訊或意見（the existence of prior exchange of information and opinions among the parties concerned）；（2）當事人間交涉之內容（the content of negotiations among the parties concerned）；（3）結果所產生之一致性行為（a concerted act as a result）。日本競爭法主管機關認為，為證明上開三項情事之存在，應針對各該情事提出下列各項證據。例如，針對上開（1）之情事，可提出下列間接證據：（a）價格調漲前的經常聚會行為（Frequent meetings prior to the price increase）、（b）有關此類聚會之通話記錄或電子郵件（Telephone conversation or e-mail on such meetings）；而於上開（2）之情事上，則可提出下列間接證據：（c）系爭產業現在的狀況（Current condition of the industry）、（d）針對現行價格等之資訊交換行為（Exchange of information on current price, etc）、（e）價格調漲意圖的宣布（Declaration of intention to raise the price）、（f）針對降價者之處罰措施的討論（Discussion of measures to be taken against discounters）；最後，有關（3）之情事，可提出下列間接證據：（g）事業價格調漲之事實（Actual price-raising by the entrepreneurs）、（h）事業價格決定之過程（Entrepreneurs' pricing decision process）。

七、 我國法未來運作之省思

- 重新省思我國聯合行為規範的構成要件：(1)合意、(2)共同決定、(3)相互約束。
- 所謂「合意」，乃是事業間共同決定對特定事項相互約束彼此間之行為的合意。
- 但公平會完全忽略「共同決定」及「相互約束」二項構成要件，其似乎認為該二項要件已為「合意」所吸收，此是否為一合理解釋。
- 若將「共同決定」及「相互約束」二項構成要件考慮進來，會不會使得我國法亦跟外國法一樣，必須要求至少要有溝通證據，方足以成立。
- 欲證明之要件事實，若為「合意」，則要證明什麼？
- 需要證明何人於何時針對何種內容，達成實施多少價格上漲的合意嗎？
- 如果公平會要花二年的觀察才知道中油、台塑曾經有合意，則其合意時點發生於何時？時效時間從什麼時候，開始計算？
- 最近的民營電廠之「以拖待變」的聯合行為，其消極的不與台電重新議約之合意，發生於何時呢？
- 引發事業間一致行為的市場結構，作為間接證據是否適當，縱令容許，其證明力的評價應如何為之？
- 若其他證據也不過是市場結構或環境的重複敘述，是否具有足夠的證據力？
- 採行寬恕政策之意涵？
- 針對刑事採行寬恕政策的美國法、針對以營業額連動之罰鍰採行寬恕政策之歐盟、日本法，對於間接證據的運用都相當嚴格。
- 價格上漲幅度一致，真的有那麼重要嗎？