

PROBLEM ON APPLICATION OF “BUSINESS INTERFERENCE” UNDER TRADE COMPETITION ACT 1999*

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Abstract

Competition laws across the world have the same mission – to promote free and fair competition in economic environments and control anti-competitive practices. Business interference is one of many conducts prohibited by Torts Law and Competition Law. Under Thai Competition Law, unreasonable or improper interference by dominance position is prohibited by the Trade Competition Act 1999 Section 25 (4). However, confusion on application of business interference under the Trade Competition Act is a huge problem and caused by the law not being as efficient as it should be. This article aims to study the application of business interference conduct under the Competition Law and its historical development, and related theories of provisions of treaties, laws, and regulations of the United State Antitrust Law, the European Union Competition Law, and Thailand Competition Law to propose appropriate measures to achieve legislations intent on business interference provision under the Trade Competition Act 1999.

This article focuses mainly on the study of the measures and existing legislations in the United States and the European Union regarding control and protection of market efficiency from business interference. These will then be compared to find appropriate solutions for the improvement of Section 25(4) of the Trade Competition Act 1999 of Thailand.

The current legal provisions of the United States and the European Union on application of business interference under the

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Competition Law illustrate confusion in the application of business interference under the Trade Competition Act 1999, deeming it inefficient. This can be solved by amending the law by empowering and giving responsibility to the Trade Competition Commission in order to announce a guideline for Section 25, which consists of elements to allege business interference.

Keywords: Competition Law, Antitrust Law, Business interference, Intervention in business relation

บทคัดย่อ

กฎหมายแข่งขันทางการค้าทั่วโลกล้วนมีวัตถุประสงค์เดียวกันได้แก่การสนับสนุนการค้าที่เสรีและเป็นธรรม ตลอดจนความพยายามในการควบคุมพฤติกรรมที่ไม่พึงประสงค์ต่างๆอันมีผลเป็นการกีดกันทางการค้าและขัดขวางวัตถุประสงค์ของกฎหมาย การแทรกแซงทางธุรกิจเป็นหนึ่งในพฤติกรรม ที่กฎหมายไม่อนุญาตให้กระทำ ทั้งภายใต้กฎหมายละเมิดและกฎหมายแข่งขันทางการค้า ภายใต้กฎหมายแข่งขันทางการค้าของประเทศไทย การแทรกแซงการประกอบธุรกิจของผู้อื่น โดยผู้ประกอบธุรกิจซึ่งมีอำนาจเหนือตลาดโดยไม่มีเหตุผลอันสมเป็นพฤติกรรมต้องห้ามภายใต้มาตรา 25(4) แห่งพระราชบัญญัติแข่งขันทางการค้า พ.ศ.2542 อย่างไรก็ตามความสับสนและความไม่เข้าใจในคัมภีร์กฎหมายเกี่ยวกับการแทรกแซงทางธุรกิจภายใต้กฎหมายแข่งขันทางการค้านี้ได้กลายเป็นปัญหาหลักที่ทำให้การบังคับใช้มาตรานี้ไม่สอดคล้องกับวัตถุประสงค์ของกฎหมาย ดังนั้นบทความเรื่องนี้จึงได้มีวัตถุประสงค์เพื่อศึกษาถึงองค์ประกอบและการบังคับใช้บทบัญญัติเกี่ยวกับการแทรกแซงทางธุรกิจภายใต้กฎหมายแข่งขันทางการค้า โดยศึกษาประวัติความเป็นมา การพัฒนาของกฎหมายของประเทศสหรัฐอเมริกาและกลุ่มประเทศยุโรป เพื่อนำมาเปรียบเทียบกับกฎหมายแข่งขันทางการค้าของประเทศไทยและหาแนวทางที่เหมาะสมเพื่อให้การบังคับใช้กฎหมายดังกล่าวบรรลุวัตถุประสงค์อย่างที่ดีควรจะเป็น

บทความเรื่องนี้มุ่งเน้นศึกษาถึงมาตรการและกฎหมายที่เกี่ยวข้องกับการควบคุมและป้องกันประสิทธิภาพของตลาดจากการแทรกแซงทางธุรกิจที่มีอยู่ปัจจุบันของประเทศสหรัฐอเมริกา กลุ่มประเทศยุโรป โดยใช้เปรียบเทียบเพื่อหาแนวทางที่เหมาะสมในการแก้ปัญหาและพัฒนาการบังคับใช้มาตรา 25(4) ของพระราชบัญญัติการแข่งขันทางการค้า พ.ศ. 2542

จากการศึกษากฎหมายแข่งขันทางการค้าปัจจุบันของประเทศสหรัฐอเมริกาและกลุ่มประเทศยุโรปได้สะท้อนให้เห็นถึงปัญหาความสับสนและความไม่เข้าใจในบทบัญญัติเรื่องการแทรกแซงทางธุรกิจโดยผู้ประกอบธุรกิจซึ่งมีอำนาจเหนือตลาดภายใต้มาตรา 25(4) นั้นมาจากความไม่ชัดเจนของบทบัญญัติซึ่งส่งผลให้การใช้กฎหมายไม่มีประสิทธิภาพ ดังนั้นการแก้ไขบทบัญญัติในมาตรานี้โดยการมอบอำนาจ

และหน้าที่ให้แก่คณะกรรมการการแข่งขันทางการค้าเพื่อออกประกาศกำหนดแนวทางการพิจารณาการกระทำที่เป็นความผิดตามมาตรา 25 จะเป็นแนวทางในการแก้ไขปัญหาดังกล่าวได้

คำสำคัญ: กฎหมายการแข่งขันทางการค้า, การแทรกแซงการประกอบธุรกิจ

Introduction

Competition laws across the world have the same mission – to promote free and fair competition in economic environment and control anti-competitive practices. Promotion and seeking to maintain market competition is a tool to stimulate economic growth, believing that competitive markets are the best way to generate economic efficiency and thus maximize total social welfare. Ultimately, benefits will lie on consumers through fair and reasonable prices and increasing choice and offers. The law protects the competitive market by prohibit any conduct that harm the competition environment for example tying, predatory pricing, cartel etc. Business interference is one of many conducts that restraint trade that can occur in both vertical and horizontal competition. If it occurs between vertical competitors, it will reduce the bargaining power of the interfered competitor, unlike among horizontal competitors, which could eliminate one out of the market. Therefore, interference in business relations by horizontal competitors will affect the market as a whole.

Under Thai Competition Law, the Trade Competition Act 1999 Section 25 states conduct considered as the abuse of dominant position to serve market efficiency protection under Competition Law. Business interference provision relies on Section 25(4), which protects competition and market efficiency from unreasonable interference by dominant positions. The obscure provision has become a problem, causing confusion in interpretation and may lead to case dismissal. This article focuses mainly on the study of the measures and existing legislations in the United States and the European Union regarding control and protection of market efficiency from business interference. These will then be compared

to find appropriate solutions for the improvement of Section 25(4) of the Trade Competition Act 1999 of Thailand.

I. Introduction to Competition Law

Competition Law is very complicated. It is not about fairness or morality, unlike in other laws, like murder in Criminal Law or liability to deliver on commitments, but reflects economics. Thus, the welfare effects of Competition Law are generally considered from a microeconomic standpoint. There is probably no concept in all of economics that is at once more fundamental and pervasive, yet less satisfactorily developed than the concept of competition.¹ Some countries called Competition Law an economic constitution² with a very close relation to mainstream economics. Neoclassical economic theory has been used to explain the modern market economic based on consumer welfare in a perfectly competitive market.³ Perfect competition or perfect market and price are market mechanism reflected from demand and supply. Demand shows the quantity of a good that consumers will buy at a certain price within a specific time period, and supply shows the quantity of goods and services which will be offered for sale at a certain price within a specific period, which means that price matters. Without exception, in the non-price influence clause, such as veblen goods⁴ or others factors⁵, a high price could reduce the quantity of demand while encouraging firms to produce more, while low price will increase the quantity of demand

¹ Daniel J. Gifford and Leo J. Raskind, **American casebook series: Federal Antitrust Law cases and materials**, 8 (1983).

² Sakda Thanitcul, Explication and case study of Trade Competition Act 1999, 37 (2nd ed. 2010). (ศักดิ์ ธานีกุล, คำอธิบายและกรณีศึกษาพระราชบัญญัติการแข่งขันทางการค้า พ.ศ.2542, 37, พิมพ์ครั้งที่ 2 (2553).

³ Barry J Rodger and Angus MacCulloch, **Competition Law and Policy in the EC and UK**, 11 (4th ed. 2009).

⁴ for example; luxury goods, high-end brand name that changing of price will not effect to demand or supply of the goods.

⁵ for example; consumer income, substitute or complements price change which affect to consumer decision.

while discouraging production. It could therefore be said that market efficiency is reflected from an efficient market mechanism.

Competition Law has a long history and has developed through centuries. The doctrine of restraint of trade in early common law became the precursor to modern competition law, which developed in the Middle Ages as the United States Antitrust statutes and the European Community Competition Laws were developed after World War II.

the most developed notions of Competition Law – the Harvard School approach and the Chicago School approach – under the Antitrust Law of the United States, which try to balance an enforcement of the Competition Law in the market system through centuries; these were also used to develop the European Community Competition Laws. While there are other approaches to antitrust, these two are employed due to their widespread use. The “per se rule” and “rule of reason”, invented by the US Supreme Court to aid the interpretation of the antitrust law in the United States, will also be explicated.

The Harvard School or Pluralist School had been present since the 1930s. It places great emphasis on the market structure paradigm known as S-C-P (the Structure-Conduct-Performance Paradigm): structure, concerned with the number of competitors in the relevant market; conduct, concerned with the behavior or decisions of competitors related to pricing and objective matters; and performance, concerned with the welfare effects from structure and conduct of competitors in terms of efficiency distribution and others, such as impact on price and consumer choices.⁶ The S-C-P paradigm believes that market structures will prescribe the conducts of business operators and the conduct will refer to market performance. Therefore, it focuses on market structures as key, for example, disallowing mergers or any behavior that forces others competitors out of the market.

The Chicago School approach appeared in the 1970s, resulting from several studies by Robert Bork, William Posner and

⁶ Raj Kumar, “Structure – Conduct – Performance Paradigm.” **Industrial Economic, Delhi University.**

George Stigler. This approach believes is that some business or activities may promote competition and could correct against any competitive imbalances. The Chicago School considers market imperfections overstated, as it sees the potential of welfare-enhancing efficiency resulting from a high concentration, which is against the approach of the Harvard School. Therefore, this approach does not support and enforce intervention in the competitive process. It usually considers competition problems by using the price theory to observe in the real market, which differs from the Harvard School, which examines competition problems on the basis of empirical research. As the Chicago School approaches weight on the rule of reason, therefore, defendants could win owing to plaintiffs being unable to prove the economic effects of particular types of conduct, which are mostly difficult and complicated.

The “per se rule” and “rule of reason” were introduced by the US Supreme Court to aid interpretation in the Sherman Act, which is a very broad spectrum.⁷ The application of both these tests requires the court to undergo an extensive factual analysis of the claim⁸ – that if such a challenged activity does not fall within the category required in the per se rule, then the rule of reason shall be applied.

II. Business interference under Law of Torts and Competition Law

Business interference occurs when person(s) intentionally interfere with another contractual in a written or verbal or business relationship, which is expected to occur with the third person and cause damages. It can be found in both the Law of Torts and Competition Law; however, a significant difference in both laws is an objective of protection from different perspectives.

Under the Law of Torts, plaintiff is required to prove damages occurred to themselves, or economic losses, for example, lost profits,

⁷ Per se rule was created in 1897 in Trans Missouri case, and rule of reason has been added in Standard Oil case after that in 1911.

⁸ Richard C. Stanley and Noel J. Darce, “Antitrust Law,” **Loyola Law Review**, 703 (1989). *available from* HeinOnline, <http://heinonline.org> (accessed October 29, 2015).

cost of plaintiff's direct expenses, damages for partially completed project, etc. The law focuses on the effect of the challenged behavior on the plaintiff or private damage action.

On the other hand, Competition Law focuses on the market, market power, and the effects of the challenged behavior on competition or public enforcement. Therefore, plaintiff needs to show that damages due to the interference of the defendant impacted competition in the market or the market as a whole, and not only the competitors or players.

Therefore, claiming business interference under the Law of Torts needs to prove only damages to the plaintiff or competitor, while claiming under Competition Law needs to prove the impact on competition or the market as a whole.

III. Business Interference in the US, EU, and Thailand Competition Laws

1. Business interference in the United States Law

Competition Law in the United States, known as the Antitrust Law, reflects a national commitment to the principal source of economic growth, the use of free markets, allocating resources efficiently, and spurring innovation. The main statutes in the federal law are the Sherman Act 1890, which restricts restraint of trade, creation of a monopoly, and abuse of monopoly power; the Clayton Act 1914, which restricts mergers and acquisitions; and the Federal Trade Commission Act 1914, which prohibits unfair competition conducts. Most states' Antitrust Laws follow the Sherman Act, with only a few issues differing with states.⁹ However, due to federal law supremacy, those states' Antitrust Laws will not come to conflict according to the provision in Article 6 of the US constitution. The main goal was to protect market efficiency and not consumers, because the law sees that the consumers will eventually benefit from

⁹ Barry E. Hawk and Laraine L. Laudati, "Antitrust Federalism in the United States and Decentralization of Competition Law Enforcement in the European Union: A Comparison," **Fordham International Law Journal**. Vol. 20, Issue 1, Article 2: 25 (1996).

an efficient market. Therefore, American Antitrust Laws prohibit the use of power to control the marketplace, resulting in the structure control system in the United States Antitrust Law.

1.1 Business interference under Torts Law

The tortious interference protects practically all contracts, except those under conditions provided by laws: void by law, contracts terminable at will, or unenforceable by operation of law.¹⁰ The four basic elements that a plaintiff needs to establish in order to fulfill the cause of action of tortious interference,¹¹ although announced differently by states, but are similar.

First, a plaintiff need to show an existence of a valid contractual relationship or business expectancy. There are three categories of tortious interference that courts have recognized: tortious interference with contracts, business relationships, and prospective economic opportunities.¹² In case of a claim on interference in business relations which rely on an existing contract, plaintiff must generally allege the existence of a specific contractual relationship that he has with the third person. The plaintiff is also required to show the actual harm or damage resulting from such interference. In case of tortious interference with business relations, plaintiffs bear to show that such business relationships will probably occur if not interfered by the defendant. In case that there is a valid business expectancy which has a reasonable likelihood or probability to come to fruition. In case there is a valid business expectancy which has a reasonable likelihood or probability to come to fruition. In order to prove the existence of a valid business expectancy.

¹⁰ Jesse Max Creed, “*Integrating Preliminary Agreements into the Interference Torts*,” **Columbia Law review**, Vol. 110:1253: 1258 (2010), available from HeinOnline, <http://heinonline.org> (accessed October 5, 2015).

¹¹ David N. Anthony, “*Tortious Interference with Contract or Business Expectancy: An Overview of Virginia Law*,” **The Virginia Bar Association News Journal**,9 (October-November 2006).

¹² Zachary G. Newman and Anthony P. Ellis, “*Navigating the Nuances of Tortious Interference Claims*,” **Business Torts Journal American Bar Association Section of Litigation**, Vol. 18, 20 (November 4 summer 2011).

Second, the plaintiff is required to allege actual knowledge of defendant. Implied knowledge or constructive knowledge in general are insufficient.¹³ Otherwise, the court will dismiss the claim.

Third, is the essential element, in that the defendant should have an intention to interfere with the plaintiff's contractual relations. In order to impose liability under the provision of tortious interference, the plaintiff must prove defendant action with knowing that the act done under this improper purpose will interfere with the plaintiff's contractual relation with the third person and harm the plaintiff.

There are some cases that Courts recognize its validity of the cause of actions for example, a contract terminable at will, a contract itself violating the rule of law, an unenforceable covenant not to compete, a lawfully terminated lease, a contract to which the defendant himself is a party, a non-binding letter of intent to negotiate in good faith.

1.2 Business interference under Antitrust Law

Business interference that could be considered as violating the Antitrust Law shall be considered as anticompetitive conduct under Section 2 of the Sherman Act, when such conduct has monopolized or attempted to monopolize. This section establishes three offenses: monopolization, attempt to monopolize, and conspiracy to monopolize, which will be considered under the scope of relevant markets, and can be defined to two dimensions: a relevant product market and a relevant geographic market. A rival or competitor in a specific market that can control prices and exclude competitors will be deemed by law to possess monopoly power under Section 2.

In order to claim for business interference under Section 2 of the Sherman Act, three fundamental elements must be present. First, the defendant must have engaged in predatory or exclusionary conduct which means application of Tort standards of wrongfulness will not be sufficient to discover whether improper conduct should be considered exclusionary under the Sherman Act. Conduct, lawful and unlawful, may force another competitor out of a market.

¹³ *Id.*

However, not every lawful and unlawful act will be considered to fall under the provisions; only conduct that is anticompetitive will be considered improperly exclusionary, and thus, violating Antitrust Laws.¹⁴ The second requirement is the claimed conduct must be undertaken by a defendant who has monopoly power or has the potential to achieve monopoly power under the relevant market. Third, it has to be proved that such conduct harms competition in the relevant market. These elements make a tortious interference claim rise to anti-competition claim by proving that they pose harmful effects to the market as a whole, and not only individual competitors, as required by Tort Law.¹⁵

Sometimes, the same conduct could turn out another way, for example, an exclusive agreement, an aggressive competition, etc. Therefore, the Court will usually will consider based on the facts and on a case-by-case basis.

2. Business interference in EU Competition Law

The very first Community competition control was the Treaty of Paris in 1951, which established the European Coal and Steel Community after World War II. Around six years after that, in 1957, the European Community was formed by an international agreement, which established the European Economic Community (TEC), known as the Treaty of Rome. This foundation further established the European Economic Community (EEC), which later developed to the European Community (EC). In 1992, the Treaty of European Union (TEU), known as the Maastricht Treaty – an amendment of the Treaty of Rome – created a European Union and the single European currency. Again, the treaties of Amsterdam, which devolved certain powers from the national government to the European Parliament, were amended, along with the Nice Treaty, which reformed the institutional structure of the European Union and the treaties of Lisbon, also known as the Reform Treaty. The Treaty of Lisbon formed the constitutional basis for the European Union (EU), and the

¹⁴ Kevin McCann and Alyse L Katz, “*When Business Torts Give Rise to Antitrust Liability*,” (October 17, 2011).

¹⁵ *Id.*

Treaty of Rome or the TEC was renamed to the Treaty on the Functioning of the European Union (TFEU) in 2009. The TFEU reformed details of the basis of the EU law and stated new legislatures and principles of the law under the EU, including renumbering of all the Articles.¹⁶

EU Competition Laws have two objectives – to deal the problems that can arise when an undertaking exercises a significant degree of market power, and the creation of a single market within the European Single Market. A principal objective of the EU Competition Law is to prevent business from distorting or dividing up markets. It is based on the notion of the treaty that supports and maintains the competitive market environment of an internal market from any anticompetitive behavior from companies within the union, including national authorities.

2.1 Abuse of dominant position under EU Competition Law

The EU Competition Law has a provision to prohibit any abuse of the dominant by one or more undertakings under Article 102 of TFEU.¹⁷ Article 102 focuses on protecting competition and consumer benefit from competition through lower prices, choice, better quality, innovation, and not simply protecting competitors. Any abuse conduct by one or more undertakings is prohibited. The Guideline given by the Commission specify three basic elements which need to be met for claiming under this Article.

First, a conduct must have done by one or more undertaking of a dominant position. In order to access the dominant position, other factors shall be applied as well, which the Commission and the courts will consider based on the facts and on a case-by-case basis. Two main elements shall be met in order to test the dominant position: first, the ability to act independently refers to an economic view of market power, and second, the ability to prevent other potential competitors from entering the market, known as market

¹⁶ European Union, “*EU treaties*,” (September 2015). *available at* http://europa.eu/eu-law/decision-making/treaties/index_en.htm.

¹⁷ Article 102 ex Article 82 of TEC which renumbering by the TFEU in year 2009.

barrier. Because the dominant position can only exist in a particular market, therefore, the relevant market shall be first examined. The step after defining the relevant market, is the position of economic strength or market position of the mentioned undertaking in the relevant market.

Second is a conduct must be an abusive conduct. Merely holding a dominant position will not be found illegal unless that position is abused. Same as in the US Antitrust Law, there is no exact definition of an abusive conduct in the EU Competition Law; the courts will identify on a case-by-case basis whether the conduct or behavior in question is abusive or not. In proving whether a conduct by dominance undertaking is an exclusionary conduct, several factors will be used, for example, behavior that establish increase market power, behavior that entrench market power, and behavior that exploit market power.

Third, is the possibility that trade between member states may be affected.

2.2 Business interference under EU Competition

Law

Business interference can be found in the Torts Law of each country of the EU, which is also known as business torts. The objective is most likely with the US Torts Law, which concerns harm to the individual. There are many forms of competition-related tortious actions and such claim on tortious interference or economic torts will normally be determined based on general principles of liability on tortious prohibition as a breach of the statutory duty.¹⁸

Under the EU Competition law, an intentional interference or intervention in other business relationship or contract by dominant position is not specifically mentioned in the provision of the TFEU. However, it may be prohibited by the EU Competition law provisions under Article 102 as an abusive dominant position.

Business interference will be prohibited by the EU Competition Law Article 102 when the defendant is dominance undertaking with the intention to establish or increase their own

¹⁸ *Supra* note 3, 25-26.

market power or entrench market power, or exploit market power by interfering in others' business contract or relations, and such interference has an impact on competition in the market due to his dominant power in the market, for example by having other competitors eliminated from the market. Therefore, if an impact occurs with an individual or just competitors, then it will not fall under the Competition Law.

3. Business interference in the Trade Competition Act 1999

In 1979, the Thai Ministry of Commerce established the Price Fixing and Anti-Monopoly Act to protect consumers that could be affected by price fixing by business operators through¹⁹ antimonopoly provisions. Unfortunately, this Act was ineffective, creating huge problems in interpretation and enforcement. In 1999, the Trade Competition Commission, a competition agency, and the Office of Trade Competition Promotion under the Ministry of Commerce separated fixing price from antimonopoly, which then became two Acts: Trade Competition Act 1999 (TCA) and Price of Goods and Services Act 1999. It is clear that here, the objective of protection of consumers and market efficiency have been officially separated.

The objective of the TCA are to separated provisions of price fixing and anti-competition, systemize provisions of anti-competition and restraint of trade, promote fair and free trade with competitive environment, and prevent an unfair competition practices.²⁰ Due to the notion that the best way to promote economic efficiency and maximize total economic welfare is the competitive market, the provision of the Trade Competition Act aims to protect, promote and maintain fair and free competition environment in the market place

¹⁹ Duenden Nikomborirak, "*Building Constituency in Competition Policy: Thailand Competition Law & Policy*," **Thailand Development Research Institute**, 5 (August 2002).

²⁰ Anan Chantara-Opakorn, "*Basic knowledge on Competition Law*," **Law Journal** 29, No. 3, 339-340 (September 2542). (อนันต์ จันทราโอภากร, "ความรู้พื้นฐานเกี่ยวกับกฎหมายการแข่งขันการค้า," *วารสารนิติศาสตร์* ปีที่ 29 ฉบับที่ 3, กันยายน 2542)

rather than an individual competitor.²¹ In the Trade Competition Act, as it has been separated to protect, promote and maintain competition, we will not see any provision in this Act referring directly to the consumer. However, it believes that the competitive market will finally benefit the consumer through more efficient pricing and increased choice in product and services.

3.1 Section 25 Abuse of dominant position

Section 25 of the Trade Competition Act 1999 is a provision to control unlawful conduct of a business operator who is considered having market domination, focusing on prohibiting unlawful conduct of a business operator with market domination on price, quantity, and business interference. The TCA defines business operator with market domination in Section 3 that “business operator with market domination means one or more business operators in the market of any goods or service who have the market share and sales volume above that prescribed by the Commission with the approval of the Council of Ministers and published in the Government Gazette, having regard to the market competition.” This section provides requirements for consideration of a dominant position that depends on market share and total sales volume prescribed by the Commission. In 2007, the Commission announced the notification concerns on the consideration of dominant position.

To apply the dominant position according to the notification, the relevant market of the product or service in question will be defined first. This will depend upon what counts as competing in that market. In 2009, guidelines for Section 25 were announced by the commission to define consideration of the relevant market by using categorization of products or services based on factors such as supply substitutability, demand substitutability, barrier to entry, and the structure of the market.

Second, business operators’ market shares and sales volume under the relevant market are evaluated alone. Market share and sales volume are general tools for evaluating the power of the business

²¹ Sakda Thanitcul, “*Competition Law in Thailand: A preliminary Analysis*,” **Washington University Global Studies law Review**, Vol. 1, 174 (2002).

operator, and whether it has a dominant power as determined in the notification and meets the qualifications of Section 25. Evaluating business operators' market share and sales volume does not mean market share or sales volume of both plaintiff and defendant; it calculates that of the defendant alone. In case there is a conspiracy abuse of dominant by two or more business operators, calculating market share or sales volume shall be concluded together.

It is very important to deliberate over horizontal and vertical. Due to the intent of Section 25, protection of any abuse from dominant position should be only a practice against opponent competitor by the competitor in the horizontal market that will affect market efficiency. It is the reason why Section 25 prevents any action that could impact market efficiency as it is required that it be done by the player who is/are in a dominant position. If such conduct is done by such an operator, it will be deemed as having an impact on the market as a whole.

3.2 Business interference under Section 25 (4)

Business interference, which appeared in Section 25(4) of the Trade Competition Act 1999, states:

“A business operator having market domination shall not act in any of following manners...

(4) Intervening in the operation of business of other persons without justifiable reasons.”

Business interference is prohibited under this section when such conduct is done with an intention to interfere or intervene with other business's operation by one or more dominant position without justifiable reasons. This section has no guidelines over how to examine or interpret on the application of business interference under the TCA Section 25(4) issue and no guidelines to give greater clarity on this section. The study also shows that the core problem on application of business interference under the Trade Competition Act 1999 is an ambiguity of the provision under Section 25(4) caused by three circumstances.

First, from 1999 – 2015, for almost sixteen years, there has been no court precedent regarding the provision of business interference under TCA Section 25(4).

Second, a confusion on application of business interference under TCA Section 25(4). A good case study showing confusion using the business interference provision is the case between two hypermarkets, Big C and Tesco Lotus. Big C claimed Tesco Lotus on the grounds of business interference under Section 25(4), saying that Tesco Lotus interfered with Big C business operation. Big C, after acquiring Carrefour from Cencar, jointly conducted an advertising and promotion campaign by issuing cash coupons worth 80 baht to its customers to use for discount when they purchased products at either store in future visits. Following this, Tesco Lotus launched an advertisement inviting holders of Big C and Carrefour cash coupons to use them at its store, along with offering double values in order to compete for customers. The case did not succeed in claiming under Section 25(4) of the Trade Competition Act because abuse of dominant position under Section 25 requires a dominant position, and Tesco Lotus alone is not qualified, due to, at the time, having only 40.4 percent of market share in the relevant market. Tesco Lotus was ordered by the court to pay damage compensation of 4 million baht to Big C and Cencar on grounds of unlawful marketing campaigns launched in the year 2011 under Section 421²² of the Civil Code. With regard to claiming under the Trade Competition Act, the Court has maintained silence.

However, this conduct cannot count as business interference under TCA Section 25(4), because it neither impacts the competition of the market nor consumer benefits, but promotes competition, and benefits consumers. Therefore, it shall be considered an aggressive competitive conduct or hardcore competition, and not business interference. Another reason why it cannot qualify as business interference is the lack of a specific contractual relationship between BigC, Carrefour and their customers, which is not enough to be an expectancy on business relationship. It is just an offer that BigC and

²² Section 421 “The exercise of a right which can only have the purpose of causing injury to another person is unlawful.”

Carrefour gave their customers, and it is the customer's right to choose to use the coupon without being bound by such an offer.

Third, as business interference has a criminal sanction and shall be proved beyond a reasonable doubt, unclear provisions will be a huge obstruction for plaintiff to prove and may cause case dismissal. As plaintiffs bear to allege on the allusion, unclear provisions will make plaintiffs unable to meet the burden of proving the adverse economic effects of particular types of conduct. Not only is it hard to prove beyond a reasonable doubt, but considerable interpretation cost and time which needs to be spent. An explicit provision on the application of business interference Section 25(4) would help guide and give greater clarity for everyone, especially business operators, to know exactly what provisions to protect, what they can do for competing in the market, and what will cross the line. Most of all, without confusion in the provisions, the law will be effectively used as it should be.

Conclusions and Recommendations

The Competition Law in most countries have the same view – that competitive market is the best way to promote economic efficiency and maximize social welfare, and the consumer will benefit through price choices, quality, and innovation. To maintain a competitive market, the market mechanism needs to work by itself without any interference. However, there are many factors in the market that demand supply buyers or sellers. All business operators want profits and success, and some strategies to achieve their aim could destroy the competition environment due to the differentiation of power in the market of the competitors. The Competition Law therefore, creates and maintains a good atmosphere for competitors and new rivals by setting down rules for everyone equally. Hence, the Competition Law concerns competition and consumer benefits, and not competitors or others individual. Consumers are found to be indirectly harmed by the reduction of competition, or other competitors in the market are harmed due to such abusive conduct.

Business interference is involved in Torts Law, Contract Law, and Competition Law. The law of tortious interference, like Antitrust, recognizes that competition and efficiency are significant social values.²³ However, the core difference is that Competition Law focuses on the importance of competition, while the business Torts Law has a less direct consideration of these economic issues on market competition. Therefore, consideration of business interference cases must concern whether such interference has any effect on the market competition. If the answer is no, then it will be considered an act against individual right under Torts Law. On the other hand, if such an act affects competition in the market, then Competition Law shall be applied to the case.

The study so far found that the current legal provisions of the United States and the European Union on application of business interference under the Competition Law illustrate confusion in the application of business interference under the Trade Competition Act 1999, deeming it inefficient. This can be solved by amending the law by empowering and giving responsibility to the Trade Competition Commission in order to announce a guideline for Section 25, which consists of elements to clarify the application of business interference that Section 25(4) requires to be met.

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