Divestiture under Competition Law: A Comparative Study of Foreign and Thai Laws*

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Abstract

Foreign competition laws recognize divestiture as a structural remedy. The functions of divestiture order always result in restructuring the market, corporations or activities in order to maintain fair competitiveness of the market. Maintaining fair competition of the market is the primary goal for competition law. The government can decrease any market concentration which restraint the competition by enforcing divestiture order to restructure the market. Divestiture is the most famous structural remedy for US's antitrust law as well as EU's competition law. Despite enormous numbers of failure of divestiture orders that drew-back their enforcement in monopolization cases, divestiture is more acceptable and suitable as a structural remedy for the unlawful merger cases.

Recognition of divestiture in all major foreign competition laws remarkably reflects the importance of divestiture. As said, divestiture has been used as the most powerful structural remedy for violation of competition law therefore it would be benefit for Thailand to apply divestiture and use it as a powerful structural remedy under competition law.

In Thailand, divestiture is commonly known as a strategic tool of business sector to eliminate unprofitable business or division, financial exigency or change in the strategic orientation of the business. Whereas, Thailand's Trade Competition Act B.E. 2542 (1999) (TTCA) implies availability of divestiture application under Section 30 which prescribes power of Thai Trade Commission to issue a written order to amend market share that said to be in common with respect to the outcome of restructuring the market but the Thai Trade Commission has never applied divestiture order to any case where applicable. Therefore, sufficient knowledge and in-depth understanding about divestiture application under competition law together

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with the appropriate and sufficient determination of violation are vital elements and needed for Thailand to uphold its completion law enforcement. Thus, learning from foreign competition law's experience should be the most suitable solution for Thailand, as well as the TTCC in implementing the divestiture under its competition law.

Keywords: Thailand, competition law, divestiture

บทคัดย่อ

กฎหมายแข่งขันทางการค้าของต่างประเทศถือว่า การโอนขายกิจการเป็นมาตรการเยียวยาแก้ไขการผูกขาดทางการตลาดอย่างหนึ่ง โดยมีผลลัพธ์เป็นการแก้ไขโครงสร้างของตลาดหรือโครงสร้างองค์กรธุรกิจหรือกิจกรรมเพื่อดำรงรักษาไว้ซึ่งการตลาดที่มีการแข่งขันกันอย่างเป็นธรรม การดำรงรักษาไว้ซึ่งการตลาดที่มีการแข่งขันกันอย่างเป็นธรรมดังกล่าวเป็นแนวคิดพื้นฐานที่สำคัญของกฎหมายการแข่งขันทางการค้า การที่ประเทศสหรัฐอเมริกาและสหภาพยุโรป ซึ่งเป็นประเทศผู้นำในด้านการบังคับใช้กฎหมายการแข่งขันทางการค้า ได้ใช้การโอนขายกิจการเป็นมาตรการเยียวยาทางโครงสร้างตลาดที่สำคัญและเป็นเครื่องมือที่ทรงอานุภาพที่สุดในการแก้ไขโครงสร้างตลาดที่มีการผูกขาด ประเทศไทยจึงควรนำเอาแนวคิดหลักการโอนขายกิจการของต่างประเทศมาปรับใช้กับกฎหมายการแข่งขันทางการค้าของประเทศไทย สำหรับประเทศไทยนั้นพบว่าพระราชบัญญัติการแข่งขันทางการค้า พ.ศ. 2542 มาตรา 30 ได้กำหนดให้คณะกรรมการการแข่งขันทางการค้ามีอำนาจออกคำสั่งเป็นหนังสือ ให้ผู้ประกอบธุรกิจซึ่งมีอำนาจเหนือตลาดที่มีส่วนแบ่งตลาดเกินกว่าร้อยละเจ็ดสิบห้า เปลี่ยนแปลงการมีส่วนแบ่งตลาด ซึ่งคำสั่งดังกล่าวถือเป็นมาตรการเยียวยาทางโครงสร้างตลาดเพื่อให้มีการเปลี่ยนแปลงโครงสร้างตลาดเพื่อลดการผูกขาดอันมีผลลัพธ์เป็นเช่นเดียวกันกับคำสั่งการโอนขายกิจการของกฎหมายการแข่งขันทางการค้าของต่างประเทศ แต่จากปัญหาหลายประการทั้งในทางกฎหมายและในทางปฏิบัติ รวมทั้งการขาดความรู้และความเข้าใจในการบังคับใช้คำสั่งการโอนขายกิจการถือว่าเป็นอุปสรรคสำคัญ อันทำให้คณะกรรมการการแข่งขันทางการค้าไม่เคยออกคำสั่งดังกล่าวแต่อย่างใด บทความนี้ ได้ศึกษาแนวคิดและแนวปฏิบัติของการโอนขายกิจการภายใต้กฎหมายแข่งขันทางการค้าของประเทศสหรัฐอเมริกาและสหภาพยุโรป และความเป็นไปได้ของการบังคับใช้หลักการโอนขายกิจการภายใต้กฎหมายการแข่งขันทางการค้าของประเทศไทย ซึ่งปรากฏผลการศึกษาว่าประเทศไทยควรบังคับใช้หลักการโอนขายกิจการโดยต้องมีการออกระเบียบ ข้อบังคับ และแก้ไขเพิ่มเติมกฎหมายที่เกี่ยวข้อง

คำสำคัญ ประเทศไทย กฎหมายการแข่งขันทางการค้า การโอนขายกิจการ

Introduction

Under foreign competition laws, divestiture is commonly used as a structural remedy. Divestiture order always results in restructuring the market shares, corporations or activities in order to maintain fair competitiveness of the market. To maintenance of the fair competition in the market is the primary goal of competition law. Under certain circumstances, if the government found unlawful market concentration which lessens the competition, restructuring of market is the basic resolution using divestiture as the tool.

In the US's antitrust law, divestiture is the most famous structural remedy. However, failure enormous number of divestiture orders has controversially drew-back its enforcement in monopolization cases. On the other hand, similar to the EU's competition law, the divestiture is more acceptable and suitable to be used as a remedy for the unlawful merger cases.

Since divestiture is recognized by several major foreign competition laws, it would be a great benefit for Thailand to implement the application of divestiture. Therefore, study of foreign divestiture would help us decide whether or not Thai competition law should apply divestiture to what cases and how.

In Thailand, divestiture is commonly known as a strategic tool of business sector to eliminate unprofitable business or division, financial exigency or change in the strategic orientation of the business. Whereas, Thailand's Trade Competition Act B.E. 2542 (1999) (TTCA) implies availability of divestiture application as embodied in Section 30 which empowers Thai Trade Commission (TTCC) to issue a written order to amend market share despite of that the TTCC has never applied divestiture order to any case where applicable.

This article examines divestiture application under foreign competition laws, the US and the EU, and reveals availability of divestiture order possibly applicable under existing competition law and other relevant laws of Thailand. This article points out problems in implementing divestiture under Thai competition law and proposes solutions for Thai Trade Commission to adopt, apply and carry out implementation of divestiture under existing laws, and to implement divestiture order more effectively.

Foundations of Competition law

Competition law is about economics and economic behavior, and it is essential for anyone involved (i.e. – lawyers, regulators, civil servants in any capacity) to have some knowledge of the economic concepts concerned.[1] Economics is the study of how people make choices under conditions of scarcity

[1] Richard Whish, *Competition Law* (5th edn, Oxford University Press 2005) 1.

and of the results of those choices for society.[2] In addition, economics is a science that deals with the allocation of limited resources to satisfy unlimited human needs.[3] The aim of the competition law is to promote efficient economic allocation.[4] The competition policy is shaped by economic analysis in determining the proper treatment for competition rules and regulations of practices distorting economic efficiency. Professor Posner said[5] '*...in an economic analysis, we value competition because it promotes efficiency...*' Therefore, economics is an integral part of policy making of the competition law.

The most basic economic concept of competition law concerns basic needs and wants of human being. A human need is a state of felt deprivation.[6] While, the human wants are described in terms of objects that will satisfy needs, and shaped by culture and individual personality.[7] Economics is the science that deals with the allocation of limited resources to satisfy unlimited human wants.[8] Economics is basically separated into two general areas: microeconomics and macroeconomics. Microeconomics is the study of individual choices and of group behavior in individual markets. By contrast, macroeconomics is the study of the performance of national economies and of the policies that governments use to try to improve that performance such as the national unemployment rate, the overall price level, and the total value of national output.[9]

The concept of the free market policy was basically introduced by the most famous classical economist, Adam Smith, who had prominently introduced economy as a social science,[10] described in his masterpiece published in 1776, the Wealth of Nations, that the government should not restraint competition of the market but allow the market to be freely competed and led by the invisible hand (where supply is driven by demand and moving toward equilibrium) to achieve the goal of the free market economy.[11] For the US, two prominent schools of thought proposes different approaches that the Harvard and Chicago emphasizes theories of

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[2] Robert H. Frank & Ben S. Bernanke, *Principles of Economics* (4th edn, McGraw-Hill 2009) 4.

[3] David Besanko et al., *Macroeconomics* (3rd edn, John Wiley & Sons Inc. 2008) 3.

[4] Stephen F. Ross, *Principles of Antitrust Law* (The Foundation Press 1993) 3.

[5] Richard A. Posner, *Antitrust Law: An Economic Perspective* (The University of Chicago Press 1976) 22.

[6] Philip Kotler et al., *Principles of Marketing* (5th edn, Prentice-Hall Inc. 1991) 4.

[7] Ibid 5.

[8] Besanko et al. (n4) 3.

[9] Frank and Bernanke (n3) 15-16.

[10] Alison Jones and Brenda Sufrin, *EU Competition Law 1* (4th edn, Oxford University Press 2011) 2-4.

[11] Robin Bade and Michael Parkin, *Foundations of Economics* (3rd edn, Pearson Education Inc. 2007) 17.

collusive behavior that is to say the Harvard School embraces structuralism as a means of approaching antitrust analysis but the Chicago School reject it.[12]

Nature of Business Divestiture

Generally, divestiture is a disposition or sale of an asset by a business, such as through sales, spin-off, split-up, split-off, equity carve-outs, recapitalizations, merger securities, post-bankruptcy and liquidations.[13]

There are four types of divestiture which are basically found in the corporate divestiture, namely: (1) Spin-Off; (2) Split-Off; (3) Split-Up; and (4) Equity Carve-Out.

Firstly, 'Spin-Off' is a corporate divestiture in which a division of a corporation becomes an independent company and stock of the new company is distributed to the corporation's shareholders.[14]

Secondly, 'Split-Off' is the creation of a new corporation by an existing corporation that gives its shareholders stock in the new corporation in return for their stock in the original corporation.

Thirdly, 'Split-Up' involves creation of a new class of stock for each of the original corporation's operating subsidiaries, paying current shareholders a dividend of each new class of shares and then dissolving the remaining corporate shell.[15] On the other hand, split-up is the division of a corporation into two or more new corporations. Whereas the shareholders in the original corporation typically receives shares in the new corporations, and the original corporation goes out of business.

Fourthly, 'Equity Carve-Out' is the separation from equity of the income derived from the equity. The equity carve-out is sharing similarity with the spin-off that they both result in the subsidiary's stock being traded separately from the original corporation's stock. Unlike the spin-off, the original corporation retains control of the subsidiary in the equity carve-out. There are two basics forms of the equity carve-out:[16] (1) 'Initial Public Offering' (IPO), it is first offering to the public of common stock of a formerly privately held firm; and (2) 'Subsidiary Equity Carve-Out', it is a transaction in which the original corporation creates a wholly owned

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[12] See Herbert Hovenkamp, *The Rationalization of Antitrust,* 116 Harv. L.Rev. 919 (2003) (reviewing Richard A. Posner, Antitrust Law (2001)) < http://www.jstor.org/stable/1342585 > accessed 16 March 2016)

[13] See USLegal.Com, *Divestiture Law & Legal Definition*, < http://definitions.uslegal.com/d/divestiture/ > accessed 26 March 2012.

[14] Donald M. DePamphilis, *Mergers, Acquisitions, and Other Restructuring Activities* (3rd edn, Elsevier Academic Press 2005) 516.

[15] Ibid 519.

[16] Ibid 521-523.

independent legal subsidiary, with stock and a management team that is different from the original corporation's and issues a portion of the subsidiary's stock to the public.

In a business perspective, divestiture basically is a sale of a portion of the company to an outside party resulting in a cash infusion to the parent company.[17] To be more specific, divestiture is referred to as a strategic solution of corporate restructuring whereas the corporation that has acquired other companies or developed other divisions through activities such as product extensions may decide that the divisions no longer fit into the corporation's plan. Moreover, the poor performance of a division, financial exigency, or change in the strategic orientation of the corporation may cause the corporation to sell part(s) of its division.[18] The merger and acquisition of the businesses or corporations usually involve the sales of divisions, subsidiaries and operations.

Nature of Competition Law Divestiture

Competition law's divestiture is referred to an order of court or competition law enforcement to a defendant alleged for have been violated the competition law.[19] The court may order divestiture in preventing business combination that may result in restraint trade or competition,[20]or making a problematic merger or acquisition, or a restrictive monopolization unacceptable to the federal antitrust enforcement authorities.[21] The US's antitrust law interchangeably refers the two, dissolution and divorcement, as divestiture.[22] The divorcement has similar purpose

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[17] Ibid 516.

[18] Patrick A.Gaughan, *Mergers, Acquisitions, and Corporate Restructurings* (4th edn, John Wiley & Sons Inc. 2007) 18.

[19] Michael Rosenthal et al., *European Merger Control* (Verlag C.H. Beck Munchen 2010) 244.

[20] Daniel J. Gifford & Leo J. Raskind, *Federal Antitrust Law: Cases and Materials*, (West Publishing Co. 1983) at 379. (cited *United States v. Aluminum Co. of America*, 91 F.Supp. 333, 418 (S.D.N.Y. 1950) that: The Alcoa case that the purpose of this divestiture was to prevent Alcoa and Aluminium Ltd. from combining to the detriment of Reynolds and Kaiser and to provide competition from an independent Canadian firm.)

[21] Douglas F.Broder, *A Guide to U.S. Antitrust Law* (Sweet & Maxwell 2005) 209.

[22] Walter Adams, *Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust,* 27 Ind. L.J. 1,1 (1951) < http://www.repository.law.indiana.edu/ilj/vol27/iss1/1 > accessed 20 March 2012; See also, Michael Stepanek, *Implied Powers of Federal Agencies to Order Divestiture,* 39 Notre Dame L. Rev. 581, 581 (1964) < : http://scholarship.law.nd.edu/ndlr/vol39/iss5/4 > accessed 15 March 2012; See also, Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. Chi. L. Rev. 1, 49 (2001) < : http://www.jstor.org/discover/10.2307/1600442 > accessed 23 January 2012; See also, Spencer Weber Waller, *The Past, Present and Future of Monopolization*

as divestiture and dissolution, to reduce the degree of concentration in the market.[23] Divorcement may be used to determine the effect of a decree if certain types of divestiture are ordered, especially the antitrust case against vertically integrated ownership.[24]

The primary objective of divestiture order is to restore the competition.[25] At the passage of the Sherman Act the first antitrust law of the US, divestiture had begun with attempt of the US's government to create competition by breaking up a trust that found conspiring monopoly in the oil market and ended up by the dissolution order to dissolve the trust creating 38 independent companies.[26] The Ma Bell breakup reflected strong preference of the antitrust agencies in imposing divesture as the structural remedy as it deemed the fastest and cleanest tool to restore the competition.[27]

The divestiture simply allows the government to restructure an industry and restores the competition increasing number of player in the market. Generally, divestiture order aims to restore the competition of the market and fixing a competition problem and preserving the economic efficiency.[28] In merger case, the DOJ pursues divestiture as to preserve the competition and eliminate any anticompetitive merger.[29]

Remedies, 76 Antitrust L.J. 11,16 (2009) < : http://lawecommons.luc.edu/cgi/viewcont en t. cgi?Article= 1075&context=facpubs > accessed 11 March 2013; S*ee* also, *Private Divestiture: Antitrust's Latest Problem Child*, 41 Fordham L. Rev. 569, 588 (1973) < http://ir.lawnet.fordham.edu/flr/vol 41/ iss3/4. > accessed 25 February 2013.

[23] Fordham L. Rev (n23) 106.

[24] *See* note 1 and note 18 cited in, Adams (n23) ("...United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948). ...the Government's greatest economic victory in the sixty year history of antitrust enforcement...battled through three court decisions, a war, and two intervening consent decrees in order finally to achieve the complete divorcement of the major motion picture producers from their affiliated exhibition outlets....obtained, in addition to vertical divorcement, a considerable measure of horizontal dissolution on the exhibition level...").

[25] *See* U.S. v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 326 (1961).

[26] Robert W. Crandall, *Costly Exercise in Futility: Breaking Up Firm to Increase Competition* (The Brooking Institution) < http://www.brookings.edu/research/papers/2003/12/ competition-crandall.pdf. > accessed 28 December 2013.

[27] Philip J. Weiser, *Rethinking merger remedies: toward a harmonization of regulatory oversight with antitrust merger review, in* Antitrust and Regulations in the EU and US: Legal and Economic Perspectives, MPG Books Group 2008, (Francois Leveque & Howard Shelanski eds., 2008) 84.

[28] Penelope Papandropoulos & Alessandro Tajana, *The Merger Remedies Study – In Divestiture We Trust?*, 27 Eur. Competition L. Rev. 443, 443 (2006) < : http://crai.co.nz/ec p/assets/Papandropoulos_and_Tajana.pdf. > accessed 16 March 2012.

[29] U.S. Department of Justice, Antitrust Division, Antitrust Division Policy Guide to Merger Remedies, (Jun. 2011), 5.

Divestiture is functioned as a structural remedy[30] for violation of antitrust law. U.S. Supreme Court noted that, "divestiture serves three remedial functions:

(1) ending illegal combinations or conspiracies;

(2) depriving antitrust violators of the benefits of their unlawful action; and

(3) breaking up or neutralizing monopoly power."[31]

William F. Baxter,[32] an architect of the AT&T divestiture, believes that the remedy should end the conduct should end the conduct that is harmful to the consumer welfare.[33] In the US, antitrust law enforcement reviews divestiture as an equitable remedy proportionate to monopoly or abuse of dominance. The court or antitrust law enforcement may impose divestiture order on violating corporation to divest itself of the stock, or other shares capital or asset.[34] Divestiture order includes requirements that violating corporation must divest in whole or part of its stocks or assets, or liquidation of assets or line of businesses.[35]

Divestiture as Structural Remedy

US Supreme Court addressed the choice of remedy for antitrust violations as to unfetter a market from anticompetitive conduct and to terminate the illegal

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[30] There are two types of remedies available under competition law: structural and behavioral. Structural remedies may consist of Divestiture, Dissolution and Divorcement. Behavioral remedies may consist of order to cease or desist and injunctive relief to stop or eliminate any unlawful conduct.

[31] *See* Schine Train Theatres v. United States, 334 U.S. 110, 128-29 (1948). Cited in Jith Jayarantne & Carl Shapiro, *Simulating Partial Asset Divestitures to 'Fix' Mergers*, 7 Int'l J. Econ. Bus. 179, 180 (2000) < : http://faculty.haas.berkeley.edu/shapiro/divestitures.pdf > accessed 30 June 2013.

[32] *William F. Baxter* (1929 – 1998) was Assistant Attorney General the head of the DOJ (1981 – 1983) and chief of the seven years old antitrust litigation case against AT&T which finalized in 1982 with the most successful antitrust divestiture of AT&T breakup. Then he returned to the law school becoming a law professor at Stanford University. His devotion in AT&T case has been remarkably named the Bell Doctrine or the Baxter's Law.

[33] Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. Chi. L. Rev. 1, 1-2 (2001) < : http://www.jstor.org/discover/10.2307/1600442 > accessed 23 January 2013.

[34] See, *Aspects of Divestiture as an Antitrust Remedy*, 32 Fordham L. Rev. 135, 139 (1963) < : http://ir.lawnet.fordham.edu/flr/vol32/iss1/4 > accessed 20 February 2013, note 46 *cited* 38 Stat. 734 (1914), as amended, 15 U.S.C. s. 21 (1958).

[35] Michael Stepanek, *Implied Powers of Federal Agencies to Order Divestiture*, 39 Notre Dame L. Rev. 581, 581 (1964) < : http://scholarship.law.nd.edu/ndlr/vol39/iss5/4 > accessed 15 March 2013.

monopoly, deny the defendant the fruits of its statutory violation and ensure that there remain no practices likely to result in monopolization of the future.[36]

The DOJ prefers structural remedies more than conduct remedies because they are relatively clean and certain, and avoid costly government entanglement in the market.[37] The remedy must not be harmful to the business itself, the remedy is more drastic than the underlying offense.[38]

Structural involves the separation of a firm by sale of the tangible and intangible asset, and licensing the intellectual property for the buyer to be viable for competition. In many case the structural remedies can be simple, easy to administer and certain for preserving the competition.[39]

Divestiture Differentiated by Integration

The horizontal merger creates restraint of trade and threat to the competition, horizontal divestiture tentatively is a reversion of horizontal merger. The horizontal divestiture is the breakup of a corporation into two or more independent companies have equally ability to competition.[40] The antitrust law enforcement may pursue divestiture remedy to defendant to divest its securities, business and other asset in the manner that the divesting business or asset must be capable and viable to compete in the same market with the defendant.[41]

On the other hand, vertical divestiture is opposite to the vertical merger. The vertical divestiture involves the separation or divestment of asset or property of corporation in order to prevent anticompetitive conduct. Result of a vertical divestiture is the creation of separate company at different stages of the same production.[42] Generally, antitrust law enforcement will step forward to resolve the

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[36] Ford Motor Co. v United States, 405 U.S. 562, 577 (1972); United States v united Shoes Machine Corp., 391 U.S. 244, 250 (1968); United States v Grinnell Corp., 384 U.S. 563, 577 (1966) Cited in Richard A. Epstien, *Antitrust Consent Decrees in Theory and Practice* (National Book Network 2007) 9.

[37] Dionne C. Lomax, *Merger Remedies After Evanston: Analysis of the FTC's Adoption of a Conduct Remedy in Lieu of Structural Relief*, < http://www.velaw.com/uploaded Files/VEsite/Overview/Evanston Remedies PaperFinal.pdf > accessed 30 June 2013.

[38] Epstien (n37) 47.

[39] USDOJ (n30) 6-7.

[40] Robert W. Crandall, *The Failure of Structural Remedies in Sherman Act Monopolization Cases*, The Brooking Institution < http://www.brookings.edu/ research/papers/2001/ 03/monopoly-crandall > accessed 25 March 2013.

[41] See USDOJ (n30), "Consequently, if a competitive problem exists with a horizontal merger, the typical remedy is to prevent common control over some or all of the assets, thereby effectively preserving competition. Thus, the Division will pursue a divestiture remedy in the vast majority of cases involving horizontal mergers. ...can effectively preserve competition that the merger otherwise would eliminate".

[42] Crandall (n41).

vertical integrated corporations only if it finds that the vertical integration reduces the efficiency of downstream market or harms consumers.[43] The most successful vertical divestiture case was the breakup of the Ma Bell that resulted in creation of 7 Baby Bells. However, the cost of a vertical divestiture is extremely high.[44]

Elements Essential for Divestiture Considerations

Structural relief is appropriate and straightforward to eliminate the monopoly. Divestiture should be favor if three goals are achieved, firstly, it should introduce the workable competition into the market within a short period of time, secondly, should reduce the applications barrier to entry to establish economic condition that are conducive to workable competition in the market, and thirdly, it should reduce the ability of the monopoly to project its current monopoly power into other markets, to preventing new monopolies in those other market and inhabiting the monopoly from reinforcing its monopoly power in current market.[45]

However, there several reason that the court would reluctant to order structural remedy. Court is likely to disapprove the dissolution if the procedure of such relief is too difficult to accomplish, if the speculative outcome of such relief is not utilities, and if there will be any harmful to the firm itself, shareholders, employee and any other interests.[46]

In contrast, in merger, the structural relief is the most effective remedy suitable for merger. Merger law enforcement prefers divestiture more than conduct remedies because they are relatively clean and certain, and avoid costly government entanglement in the market.[47] The remedy must not be harmful to the business itself, the remedy is more drastic than the underlying offense.[48] Divestiture involves the separation of a firm by sale of the tangible and intangible asset, and licensing the intellectual property for the buyer to be viable for competition. In many case the structural remedies can be simple, easy to administer and certain for preserving the competition.[49] Furthermore, allocation of proposing divestiture must be adequate and must be sufficient to purchaser to compete in the long-term.

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[43] Paul L. Joskow & Roger G. Noll, *The Bell Doctrine: Applications in Telecommunications, Electricity, and Other Network Industries*, 51 Stan. L. Rev. 1249, 1255 (1999) < : http://www.jstor.org/stable/1229409 > accessed 25 March 2013.

[44] Robert W. Crandall, *The Failure of Structural Remedies in Sherman Act Monopolization Cases*, The Brooking Institution < http://www.brookings.edu/ research/papers/2001/ 03/monopoly-crandall > accessed 25 March 2013.

[45] Robert E. Litan & William D. Nordhaus, *Efffective Structural Relief in U.S. v. Micosoft*, AEI Brookings (May, 2000) < : http://www.brookings.edu/ research/papers/2000/ 05/microsoft-litan > accessed 23 January 2012.

[46] Waller (n23).

[47] Lomax (n38).

[48] Epstien (n37) 47.

[49] USDOJ (n30) 6-7.

Divestiture under Foreign Competition Laws

Divestiture under U.S. Antitrust Law

In monopolization cases, Section 2 of the Sherman Act prohibits unilateral monopolization and attempted monopolization, as well as monopolization by combination or conspiracy. The offense of unlawful monopolization is defined as the possession of monopoly power – the power to control prices and/or exclude competition – plus an element of deliberateness, that is, a general intent or purpose to acquire, use, or preserve this power.[50]

Violation of Section 2 is a felony, punishable by a fine up to $100 million for a corporation and $1 million for individual and/or imprisonment up to 10 years. However, The Criminal Fine Improvements Act 1984,[51] applying to criminal offenses, allows courts to impose even larger fines than those prescribed by the Sherman Act, up to double the amount gained by the violator or lost by the victim.[52] Furthermore, Section 4[53] of the Sherman Act authorizes the district courts with the jurisdiction to prevent and restrain violations of Section 2. Remedies for violations of Section 2 are desirable including structural and conduct remedies, and imposition of monetary penalties. Typically, US Courts have issued injunctions against the continuation of the conduct found to be illegal and have included provisions to eliminate the effects of the unlawful conduct in the marketplace.[54]

Structural remedies include divestiture. Divestiture allows the court to restructure an unlawful monopolizing market to enhance market competition. Section 4 of the Sherman Act grants jurisdiction to the district court to favor actions

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[50] Section of Antirust Law of American Bar Association, *Antitrust Law Developments* (2nd student edn, ABA Press 1984) 109 – 110.

[51] 18 U.S.C. §§ 3621 - 3624.

[52] Broder (n22) 39 – 40.

[53] 15 U.S.C. S. 4 provides that: "The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.".

[54] Alistair Davey, Report prepared for Coles Pty Ltd, *The Introduction of a General Divestiture Provision under Australian Competition Law* < http://www.coles.com.au/~/media/Files/Coles/PDFs/Industry%20Reports/ General-divestiture-provision-under-Australian-competition-law.pdf > accessed 28 December 2013.

brought by the competent government. Injunctions relief sought by government enforcement may also be to alter the structure of the corporation or industry (market).[55]

The Supreme Court has recognized divestiture as the "most dramatic" remedy available.[56] In the Microsoft case, the Court of Appeals for the District of Columbia stated that "... *divestiture is a remedy that is imposed only with great caution, in part because its long-term efficacy is rarely certain* ..."[57]

In merger cases, the principal statutory provision for merger control is Section 7 of the Clayton Act.[58] Section 7 implies that, stock and asset acquisitions including mergers and joint ventures, may be held illegal where their effect "... *may be substantially to lessen competition, or to tend to create a monopoly* ..."[59] in any particular geographic and product market. Violations of Section 7 also constitute "unfair methods of competition" and are deemed unlawful under Section 5 of the Federal Trade Commission Act.[60]

Richard A. Posner stated that divestiture is the natural and normal remedy in a merger case and is simpler to effectuate where the firm to be broken up is itself the product of mergers.[61] Divestiture of an entire business is more likely to be successful than the divestiture of parts of a business. Buyers who must rely on respondents for continuing support to enter a business with the divested assets are more vulnerable than buyers who do not need that support. Small entrepreneurial firms have been at least as successful with divested assets as large corporations.[62]

The Supreme Court affirmed the District Court's decision that only divestiture would correct the condition caused by the unlawful acquisition.[63]

The original of the enforcement of Section 7 dealt with the apparent death blow by the Supreme Court in *Arrow-Hart & Hegeman Elec. Co. v. FTC*[64] that "...

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[55] Thomas Sullivan, Herbert Hovenkamp & Howard A. Shelanski, *Antitrust Law, Policy and Procedure: Cases, Materials, Problems* (6th edn, LexisNexis 2009) 155 – 157.

[56] See, United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 326 (1961).

[57] See, United States v. Microsoft Corp., 253 F.3d 34, 171 (D.C. Cir. 2001).

[58] 15 U.S.C. S. 18.

[59] 15 U.S.C. S. 18.

[60] 15 U.S.C. S. 45.

[61] Posner (n6) 84 – 85.

[62] William J. Baer, the Federal Trade Commission, *A Study of the Commission's Divestiture Process* < http://www.ftc.gov/sites/default/files/attachments/merger-review/divestiture.pdf > accessed 20 March 2011.

[63] *See*, Ford Motor Co. v. United States, 405 U.S.562, (1972).

[64] *See*, Arrow-Hart & Hegeman Elec. Co. v. FTC, 291 U.S.587, (1934).

section 7 was merely held for divestiture of illegal held stock and not to apply to assets acquired by direct purchase or otherwise. ...".[65]

U.S.'s Enforcement Agency - DOJ

The DOJ[66] is responsible for enforcing the Sherman, Clayton and Robinson-Patman Acts. The DOJ may bring civil lawsuit under Sections 1, 2 and 3 of the Sherman Act, Section 2, 3 and 8 of the Clayton Act (as amended by the Robinson-Patman Act) and Section 14 of the Clayton Act with enforcement by either the DOJ or the FTC.[67]

The DOJ usually applies the "fix-it-first" policy which the merging companies must divest themselves before completion of their merger. If the divestiture is not possible before the merger, the DOJ would allow the merger to be consummated if the parties enter into a biding consent agreement to divest the merged company within a certain period, usually six months, after the merger is consummated.[68]

In 2004, the DOJ announces its policies on merger remedies known as the "Antitrust Division Guide to Merger Remedies". The Guide emphasizes the following essential points: (1) structural remedies involving the divestiture of physical or intangible assets are preferred to conduct remedies in limited circumstances; (2) the divestiture must include all assets necessary for the purchaser to be an effective, long-term competitor, including critical intangible assets; (3) the divestiture of an existing business entity that possesses all of the assets necessary for the efficient production and distribution of the relevant product is preferred to a partial divestiture; (4) if the DOJ believes the merger will result in a violation, the Division will be willing to forego filing a case and accept instead a structural "fix" that the parties implement before the merger is consummated as long as it fully eliminates the competitive harm arising from the merger; and (5) the Division will ensure that remedies are completely implemented and will fully enforce its judgments.[69]

U.S.'s Enforcement Agency – FTC

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[65] Fordham L. Rev (n28).

[66] The Antitrust Division of the Department of Justice (DOJ).

[67] Keith N. Hylton, *Antitrust Law: Economic Theory & Common Law Evolution* (Cambridge University Press 2003) 47 – 48.

[68] J. William Rowley & Donald I. Baker, *International Mergers: The Antitrust Process Volume II* (2nd edn, Sweet & Maxwell 1996) 1671 – 1672.

[69] Broder (n22) 154 – 155.

The FTC[70] is an independent regulatory agency that has authority to enforce the Clayton Act and the Federal Trade Commission Act. FTC has five commissioners nominated by the President and reconfirmed by the Senate for terms of seven years. The Chairman of the commissioners is designated by the President and act as the chief of the agency. The FTC has power to investigate, prosecute and exercise adjudicative authority.[71]

U.S.'s Enforcement Agency - State Attorneys

The State Attorneys have investigative and prosecutorial authority, and most of their offices have special sections devoted to antitrust enforcement under both antitrust and merger laws. In 1990, the Supreme Court's decision in *United States v. American Stores Co.* makes clear that the State Attorneys General have the full range of merger remedies including divestiture.[72]

Divestiture under E.U. Competition Law

Divestiture is solely imposed in merger case under the EU competition law. The EU Treaty does not contain specific provisions on mergers. Even though Articles 81 and 82 catch some concentration (relatively merger) but these provisions were inadequate as a tool for merger control. The ECMR[73] adopted by the EU Council of Ministers as the tool for the merger control entered into force on September 21, 1990.[74] The EU Commissioner will ensure that the businesses are divested to a suitable purchaser within a specific time period. The Commissioner may require the parties to find a buyer prior to completion of the notified operation (fix-it-first). The Commissioner sometimes may accept alternative remedies packages, recognizing that divestiture option preferred by the parties may be uncertain or difficult to complete.

Alternative divestiture commitments or "crown jewel" is an implementation for preferred divestiture option of the parties who may review themselves as being at the risk of uncertainty in the third parties' pre-emption rights, transferability of key contracts, intellectual property rights or finding the suitable purchaser. The parties may propose the divestiture commitments to the Commissioner. The commitment must provide that the first divestiture proposed would consist of a viable business, and the parties will have to propose a second alternative divestiture if they are not able to implement the first commitment within the given time frame.

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[70] The Federal Trade Commission (FTC).

[71] Rowley and Baker (n69) 1642 – 1645.

[72] Ibid 1645 – 1646.

[73] The European Community Merger Regulation (ECMR) adopted by EU Council of Ministers in 1989.

[74] Whish (n2) 793 – 797.

The commitment also has to establish clear criteria and a strict timetable as to how and when the alternative divestiture obligation will become effective and the Commissioner may require shorter period for its implementation.[75]

In all analyzed divestiture remedies, it was up to the parties to steer the divestiture process and to find a suitable purchaser for the divested business. The preferred method of divestiture lay largely in the hands of the divesting parties. This corresponded to a current practice. Different sales processes are acceptable to the Commission, as long as they result in finding a suitable purchaser and concluding a final binding SPA within the foreseen divestiture period. In only one of the analyzed remedies did the Commission object to the parties' proposal to make an IPO of the shares on the stock exchange.[76]

The Commissioner prefers to impose the structural remedies – divestiture – rather than the behavioral remedies for the merger cases whereby structural problem, such as the accretion of the market shares, is directly addressed by the merger.[77] The Commission Notice on Remedies Acceptable under Council Regulation (EEC) No. 4064/89 and under Commission Regulation (EC) No. 447/98 states the types of remedy acceptable to the Commissioner that divestiture is applied where a proposed merger threatens to create or strengthen a dominant position which would impede effective competition. The most effective way to restore effective competition, apart from prohibition, is to create the conditions for the emergence of a new competitive entity or for the strengthening of existing competitors via divestiture.[78]

E.U.'s Enforcement Agency

The Merger Task Force within the DGIV deals with all notifications under the Regulation. The director of the DGIV will report directly to the Commissioner.

The Commissioner requires divestiture commitment from the merging parties who are required to strictly comply with the conditions and timeframe as stated therein. Divestiture commitments have to be implemented within a fixed time period the length of which is considered by the Commission on a case-by-case basis and should in general be as short as feasible. Long implementation periods would unnecessarily prolong the uncertainty hanging over the divested business, affecting

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[75] Jones and Sufrin (n11) 973 – 974.

[76] European Commission, *Merger Remedy Study* < http://ec.europa.eu/competition/mergers/legislation/remedies _study.pdf > accessed 24 January 2012.

[77] Whish (n2) 852 – 853.

[78] European Commission, *The Commission Notice on Remedies Acceptable under Council Regulation (EEC) No. 4064/89 and under Commission Regulation (EC) No. 447/98* < http://ec.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:068:0003:0011:EN:PDF > accessed 24 January 2012.

its viability and ability to compete in the market and thus reduce the chances of effective competition being restored by the remedy.[79]

Finally, if divestiture periods are long, the Commission has long-standing monitoring responsibilities with associated costs both to the parties and the Commission. Also, after a long divestiture period, it becomes increasingly difficult to roll-back the original transaction in case the divestiture fails. Excessively short divestiture periods could also pose a problem: the parties may not have enough time to find a suitable purchaser, or candidate purchasers may have more scope to act strategically with delaying tactics to improve their bargaining position artificially, knowing that parties are faced with a forced-sale scenario at the end of the deadlines. Equally, prospective purchasers may not have sufficient time to carry out their due diligence and may end up offering too much for the divested business or they may unwittingly miss out on obtaining some vital assets.[80]

Divestiture under Thai competition law

At the early era of Thailand's competition laws, Thailand had two major antimonopoly laws, the price fixing law and the antimonopoly law. Unlike the US and the EU, Thailand was just been aware the importance of economic laws that may help the country to keep free market competition. Before 1997[81], Thailand, by the Ministry of Commerce, had commenced the study of international competition law of many countries, such as: the United States, Canada and Japan.[82] Moreover, the 1997 Constitution had remarkably enabled the enactment of the TTCA in 1999. By virtue of the article 50 of the 1997 Constitution,[83] Thailand eventually had promulgated its competition law, the Trade Competition Act, in 1999.

Existence of Divestiture under Existing Competition Law

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[79] Rowley and Baker (n182) 465 – 470.

[80] European Commission (n201).

[81] In 1997, Thailand's economy was drastically plunged into its bottom due the economic crisis famously known as Tom Yum Kong crisis. The Tom Yum Kong crisis was a financial crisis which vastly affected many Asian countries, such as: Thailand, Indonesia, Malaysia, Philippines, Singapore and South Korea.

[82] Sakda Thanitkul (ศักดา ธนิตกุล), *Explanation and Case Study of Trade Competition Act A.D. 1999* (คำอธิบายและกรณีศึกษาพระราชบัญญัติการแข่งขันทางการค้า พ.ศ. 2542) (2nd edn, Winyuchon Publication House 2010).

[83] Deunden Nikomborirak, *Political Economy of Competition Law: The Case of Thailand, The Symposium on Competition Law and Policy in Developing Countries* <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1636&context=njilb> accessed 25 June 2017.

Under existing competition law, the TTCA is similar to the US's antitrust law and EU's competition law that they do not clearly state in its provisions that divestiture is applicable. Section 30 of the TTCA implies the applicability of the divestiture as follows:

"*The Commission shall have the power to issue a written order instructing a business operator who has market domination, with market share of over seventy five percent,* ***to suspend, cease or alter the market share****. For this purpose, the Commission may prescribe rules, procedure, conditions and time limit for compliance therewith*"

As highlighted in bold letter, section 30 empowers the TTCC to issue written order in three categories, namely: (1) to suspend the market share; (2) to cease the market share; or (3) to alter the market share. The three categories pointed out previously reflect the application of structural remedy as an injunctive relief. Particularly, altering the market share and restructuring the market share have the same outcome as the market must be restructured. Similar to the outcome of divestiture order the primary purpose is to restructure the market share. Initially, the drafters of the Act did not include Section 30, as a structural remedy, into the draft Act. Section 30 was included into the Act at the stage of consideration the draft Act by the House of Senate.[84]

Under Section 30, the business operator must be a market dominant and holding more than 75 percent of market share. On the other hand, any business operator who has market domination is not automatically qualified unless such business operator held more than 75 percent of the market share and of course the sale volume must be greater than one billion baht in one goods or service market. Presently, it is possibly rare for Thailand to have a large scale market of any single product available for this application. Nevertheless, any business operator who is a market dominant holding market share more than 75 percent and sale volume more than one billion baht is qualified to be given the TTCC's order under Section 30. Once a person is qualified, that person has just pulled the trigger ready for the TTCC to fire.

Apparently, no investigation is required by law at the pre-issuance stage. None of any provision of the TTCA provides that duly investigation must be taken place prior to issuance of the order. Moreover, the alleged business operator will not be able to defense or present any evidence against the issuing order. In this regard, the TTCC can issue the order without investigation and the TTCC has absolute discretion to decide whether to take action by issuing the order or do nothing. However, Section 30 requires the TTCC to prescribe rules, procedures, conditions

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[84] Anan Chantara-opakorn (อนันต์ จันทรโอภากร), *Basic Understanding of Trade Competition Law* (ความรู้พื้นฐานเกี่ยวกับกฎหมายการแข่งขันทางการค้า) Thammasat L. Rev. 29 (Sept. 2012) (Thammasat University Press 2012) 359.

and time limit for compliance of the order.[85] Therefore, theoretically, prior to issuance of order, the TTCC should carry out in-depth study of targeting market. So, the TTCC can make better judgment.

Appeal of the Divestiture Order

Nevertheless, section 30 of the TTCA does not provide the appeal process of the TTCC's order issued under section 30. In this regard, administrative order issued under section 30 may not be appealable unlike any administrative order issued by the TTCC. For instance, TTCC's order issued under section 31 for violation of section 25, 26, 27, 28 or 29[86] is appealable to the Appellate Committee.[87]

TTCC's order made under the TTCA is administrative order by virtue of Section 3 of the Establishment of Administrative Court and the Procedural of Administrative Court Act B.E. 2542 (TEACP). Therefore, even though the TTCA does not provide the process of the appeal against the TTCC's order made under section 30 but the alleged business operator whom received the order may appeal against the order by carrying out administrative legal proceeding.

Enforcement of Divestiture Order

If the business operator fails to comply with the order, the TTCC shall appoint an inquiry sub-committee to conduct investigation and inquiry.[88] After completion of investigation and inquiry, the TTCC shall submit its opinions to prosecute alleged business operator to the public prosecutor.[89] The public

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[85] TTCA S. 30's last sentence provides that "For this purpose, the Commission may prescribe rules, procedure, conditions and time limit for compliance therewith".

[86] TTCA S. 31.

[87] TTCA S. 46.

[88] TTCA S. 14 provides that "...The Commission shall appoint one or more inquiry sub-committees consisting of, for each sub-committee, one person possessing knowledge and experience in criminal cases who is appointed from police officials, public prosecutors and, in addition, not more than four persons possessing knowledge and experience in economics, law, commerce, agriculture, or accountancy, as members, with the representative of the Department of Internal Trade as member and secretary...The inquiry sub-committee shall have the power and duty to conduct an investigation and inquiry in relation to the commission of offences under this Act and, upon completion thereof, submit opinions to the Commission for further consideration. The inquiry sub-committee shall elect one member as the Chairman...".

[89] TTCA S. 15 provides that "...In the case where the Commission submits to the public prosecutor the opinion for prosecution, an objection to the public prosecutor's non-prosecution order under the Criminal Procedure Code shall be the power, vested in the Commissioner-General of the Thai Royal Police Force of the Changwad Governor as the case may be, to be instead exercised by the Chairman of the Commission...".

prosecutor shall institute the criminal proceedings with the competent court imposing punishment to the default business operator according to section 52 of the TTCA.[90] However, the TTCA is merely empowered to provide sanctions for person who fails to comply with its order under section 30 but the TTCC may not be able to enforce its divestiture order by conducting the divestiture process directly. Thus, the TTCC may take to carry out the measure of enforcement which is an administrative enforcement measure under to the TAPA[91] to enforce the divestiture order or bring the case to the court of justice seeking the enforcement of the order.[92]

Thailand's Enforcement Agency

The TTCC is the sole agency who has full power and authorization to issue order and enforce divestiture order. The TTCC has power to appoint or authorize competent officials to carry out or supervise the implementation of divestiture order on behalf of the TTCC and the TTCC can also appoint a sub-committee[93] to perform any act necessary to implement the divestiture order. The TTCC and the inquiry sub-committee are empowered by law to have the same power and duty as those of the inquiry officials under Thai Criminal Procedure Code.[94] Thus, after completion of investigation and inquiry, the TTCC shall submit its opinions of prosecution to the public prosecutor to proceed the criminal case with the competent court. Therefore,

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[90] TTCA S. 52 provides that "...Any person who fails to comply with the order of the Commission under section 30...shall be liable to imprisonment for a term of one year to three years or to a fine of two million to six million Baht, and to a daily fine not exceeding fifty thousand Baht throughout the period of such violation...", section 15 provides that "...a member of the Commission and member of an inquiry sub-committee....shall have the same powers and duties as an inquiry official under the Criminal Procedure Code", and section 16 provides that "...the Commission submits to the public prosecutor the opinion for prosecution..."

[91] Thailand's Administrative Procedure Act B.E. 2539 (1996) (TAPA) specifies the procedure for enforcement of an administrative order in section 55 to section 63 of Part VIII under Chapter II. Under these provisions, the TAPA authorizes power to the administrative officials to enforce their administrative orders or acts by using the measure of enforcement. For an administrative order that instructs one to perform or not to perform any act, the officials may take the measure of enforcement either by themselves or authorize other person enforce the order with the alleged party's expenses or order payment of administrative fine of an amount not exceeding twenty thousand baht per day.

[92] Ruethai Hongsiri (ฤทัย หงส์สิริ), *The Administrative Court and Administrative Court Procedure* (ศาลปกครองและการดำเนินคดีในศาลปกครอง) (4th edn, Thai Bar Association 2012) 57-8.

[93] TTCA S. 11 provides that "...The Commission may appoint a sub-committee to consider and make recommendations on any matter or perform any act as entrusted and prepare a report thereon to the Commission...".

[94] TTCA S. 15 provides that "...In the performance of duties under this Act, a member of the Commission and member of an inquiry sub-committee under section 14 shall have the same powers and duties as an inquiry official under the Criminal Procedure Code...".

in case where the business operator fails to comply with divestiture order, the TTCC may also seek power of the court to enforce divestiture order and the public prosecutor will undertake to represent the TTCC and submit the motion or case to the competent court.

Problems of Divestiture Implementation under Existing Laws

The problems of implementation of divestiture order can be summarized as follows:

1. Section 30 provides broad power to the TTCC to significantly exercise its powerful structural remedy to restructure the market share while the lack of sufficient information and knowledge may lead to the misuse of the power.

2. The law, the TTCA, does not provide legal process for decision making of issuing order under section 30, unlike section 31.

3. Divestiture order severely affects the business operator and marketplace and creates large disobedience. Culture and society perception are the great barriers to the implementation of divestiture order.

4. There is a lack of economic experts who are capable to handle the large scale of the market.

5. Implementation of divestiture order is costly and time consuming in inquiring whether or not the business has truly been divested to other.

Conclusion and Recommendation

Divestiture under competition law is referred to order of competition law enforcement or court instructs defendant to divest property, securities, or other assets to prevent monopolization, restraint of trade or unlawful merger or acquisition.[95] Also, divestiture is simply referred to as a remedy for violation of competition law.[96]

Divestiture is structural remedy and in many case it can be simple, easy to administer and certain for preserving the competition. The divestiture order will be made when the government finds unlawful market concentration which threatens market competition. The restructuring of market is the basic and most reasonable resolution. The divestiture order will be in favor if three goals are achieved, firstly, it should introduce the workable competition into the market within a short period of time, secondly, should reduce the applications barrier to entry to establish economic condition that are conducive to workable competition in the market, and thirdly, it should reduce the ability of the monopoly to project its current monopoly power

[95] Douglas F.Broder, *A Guide to U.S. Antitrust Law* (Sweet & Maxwell 2005) 209.

[96] Rosenthal (n20).

into other markets, to preventing new monopolies in those other market and inhabiting the monopoly from reinforcing its monopoly power in current market.

A divestiture order is said to be successful if its outcome has met these criteria, such as: market's competition increased, industry output has risen, price of goods or services reduced, the divested businesses are still viable and operative.[97]

For US' antitrust law, divestiture is applicable in cases of monopolization and unlawful merger. The US is the most prominent country in enforcement of divestiture. The US's court uses divestiture order as a tool to restructure an unlawful monopolizing market to enhance market competition. Many leading cases in the US, in this paper played the model role of divestiture implementation, such as: *Standard oil, Alcoa, AT&T*. Major antitrust law enforcements include DOJ, FTC and State Attorney.

For EU's competition law, divestiture is solely imposed in merger case. The EU Commissioner prefers to impose the structural remedies – divestiture – rather than the behavioral remedies for the merger cases.[98] The EU Commissioner the sole competition law enforcement.

For Thailand, divestiture is commonly known as a strategic tool for business resolution. Despite that Section 30 of the TTCA implies possibility of divestiture implementation but Thailand has never implemented divestiture under the existing provision of competition law due to lacking of sufficient knowledge and understanding function of divestiture.

The author's recommendation is that Thailand should adopt, apply and carry out implementation of divestiture under its competition law. The author encourages the TTCC to apply divestiture implementation by exercising its legitimate power under Section 30 to restructure market share and may also be applied to any merger or business combination that violates any provision of the TTCA. Prior to issuance of the divestiture order, the TTCC should carry out the analysis and evaluation of the consequences of divestiture order. The TTCC may appoints a sub-committee which consists of a number of experts covering all related fields, such as economic, law, accounting and finance to carry out the said analysis and evaluation.

The TTCC is recommended to prescribe rules of procedure of the issuance of divestiture order. These rules should consist of the determination of the process of issuance, implementation and enforcement of divestiture order. Distinctively, the TTCC should also prescribe the divestiture rules to determine divestiture process, requirement for party who involves in divestiture, TTCC roles in divestiture process and obligations of involved parties.

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[97] Crandall (n45).

[98] Whish (n2).

The TTCC should recruit more personnel who have expertise in finance, accounting, judgment execution, property assessment and litigation. And the TTCC is encouraged to work closely with the Department of Judgment Execution.

Furthermore, the TTCC may propose the amendment to the TEACP law to include lawsuits for violation of competition law to be under the jurisdiction of the administrative court.

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