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

BY

MS. NONTHAPORN RAMBUTH

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS IN BUSINESS LAWS (ENGLISH PROGRAM)
FACULTY OF LAW
THAMMASAT UNIVERSITY
ACADEMIC YEAR 2015

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THESIS

BY

MS. NONTHAPORN RAMBUTH

ENTITLED

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"BUSINESS INTERFERENCE"
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has been approved as partial fulfillment of the requirements for
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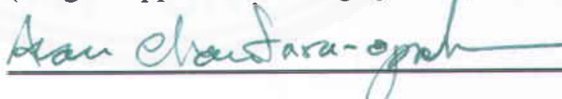
Member and Advisor 

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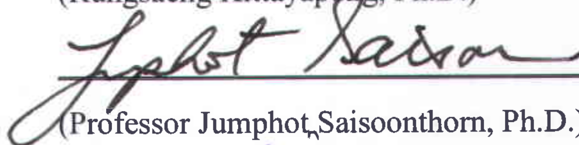
Member 

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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 thesis 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 thesis 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 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

THAMMASAT UNIVERSITY

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# LIST OF ABBREVIATIONS

| **Abbreviations** | **Terms** |
|---|---|
| EC | European Community |
| ECC | European Economic Community |
| EU | European Union |
| ECJ | The European Court of Justice |
| TCA | Trade Competition Act 1999 |
| TCC | Trade Competition Commission |
| TEC | Treaty establishing the European Economic Community |
| TEU | Treaty of European Union |
| TFEU | The Functioning of the European Union |
| US | United States |

# CHAPTER 1
# INTRODUCTION

## 1.1 Background and Problems

Competition laws across the world have the same mission – to promote free and fair competition in economic environments and control anti-competitive practices. Promotion and seeking to maintain market competition is a tool to stimulate economic growth, through the belief that competitive markets are the best way to generate economic efficiency and thus maximize total social welfare. Ultimately, consumers will benefit through fair and reasonable prices and increasing choice and offers. Competition Law is known by many names in various countries, such as the Antitrust Law in the US and EU, Anti-Monopoly in China and Russia, and Trade Practice Law in the UK and Australia. In Thailand, it is called the Trade Competition Law.

Player(s) with a significant market share try to use their dominant power to restraint trade, such as by tying, predatory pricing, cartel, etc., to reach a dominant position or monopolize the market; many industries are dominated by a small number of large firms. There are other unfair competition practices which may be used by dominant or monopolists in order to maintain their power – by kicking off other competitors in the market, such as by intervening in competitors' business prospective or relations – which is also known as "business interference", until small competitors are finally have kicked off of the market.

Most businesses face pressure from competition in the market. No business can compete effectively without good relationships with its distributors, customers and employees. To achieve this, some may create a formal written agreement, while others might have an informal oral agreement or no contract or agreement at all, relying on trustworthiness or the business tradition. Such a relationship will create an expectation that each party will fulfill their part. A good relationship will also

obviously gain an upper hand over competitors eventually; for example, if the drinking water enterprise has a good relationship with the bottle firm enterprise, the drinking water enterprise could purchase a bottle at a good price, while the bottle firm enterprise can be assured of their order number. Hence, virtually any contract qualifies for protection from unreasonable interference.

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.

Business interference occurs when one with the intention to interferes with another's contract or prospective contractual relation, and causes damages. Under Thai Competition Law, unreasonable or improper interference is prohibited by the Trade Competition Act 1999 (TCA) Section 25 (4). The provision provides that intervening with the business of other persons without a justifiable reason by a business operator who has dominant power will be deemed an abuse of market dominance by law. However, we have never experienced any case in court regarding business interference, except when Big C sued Tesco Lotus, which is the first case claim on the grounds of Section 25 (4). Unfortunately, according to the provision of the law, the claimed action cannot be considered business interference. It shows that the provision of business interference under the TCA is still far from clear and there is a lot of misunderstanding caused by the law not being as efficient as it should be.

After the Trade Competition Act B.E. 2542 (1999) of Thailand was announced, till today, the reports of the Office of Thai Trade Competition Commission show that 96 complaints have been lodged with the Office of the Trade Competition Commission, which claimed 18 cases on the grounds of Section 25, 25 cases on Section 27, and 53

cases on Section 29.[1] However, only one case was prosecuted – a case complaint on A.P. Honda Co. Honda, which, at that time, had almost 70 percent of market shares in the motorcycles industry in Thailand, and allegedly forced sales against its dealers to sell only motorcycles of its brand. This is the first case that the commission made a decision to bring to court, but the Office of the Attorney General decided it lacked evidence and issued a non-prosecution order, leaving it inconclusive.[2]

Back in 1999, there was a complaint on a tying case which involved distributors selling beer at low prices in order that the buyer would not purchase other beverages, which caused rivals' exclusion. However, the Trade Competition Commission held that there was no evidence of any breaches of the Act due to no specific criteria to consider on the dominant position at that time.[3] After this, the Trade Competition Commission announced a notice on January 2007 stating the market dominance criteria. While this cleared up the definition of market dominance, it remains unused due to a broad range of criteria; for example, the percentage of market share requirement to be considered a dominant position is very high and difficult to be found in the real market scenario.

Recently, the Trade Competition Commission (TCC) received a claim between two big hypermarket operators, Big C and Tesco Lotus. 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 discounts when they purchased products at either store during future visits. Following this, Tesco Lotus launched an advertisement inviting holders of Big C and Carrefour cash coupons to use them at their store, along with offering double values in order to compete for customers. On

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[1] Office of Trade Commission Competition, *"The Complains report 1999 – 2015"*. *available at* http://otcc.dit.go.th/?page_id=61.

[2] Office of Trade Commission Competition, *"The Complains report 2001"*. *available at* http://otcc.dit.go.th/wp-content/uploads/2015/04/2544.pdf.

[3] Office of Trade Commission Competition, *"The Complains report 1999"*. *available at* http://otcc.dit.go.th/wp-content/uploads/2015/04/2542.pdf.

August 15, 2011, Big C along with Cencar, filed complaints against Tesco Lotus alleging interference with other businesses under Section 25(4) of the Trade Competition Act.

However, it did not succeed in claiming under this Section, because Tesco Lotus alone does not qualify as having a market dominant position.[4] Moreover, Tesco Lotus's actions did not qualify as business interference under Section 25(4), and the court maintained silence on this point. Finally, Tesco Lotus was ordered to pay damage compensation of 4 million baht to Big C and Cencar on the grounds of unlawful marketing campaigns launched in 2011 under Section 421[5] of the Civil Code, as opposed to the Trade Competition Act.

**1.2 Hypothesis**

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.

Since business interference has a criminal sanction and shall be proven when fulfilled beyond a reasonable doubt, unclear provisions will pose a huge obstruction for plaintiff to prove and may lead to case dismissal.

These circumstances can be solved by adding provisions which empower and give responsibility to the Commission to announce guidelines stating the basic elements that the provision of business interference conduct under Section 25(4) requires to be met.

[4] At that time, Tesco Lotus has 40.4 percent of market shares.

[5] Section 421 "The exercise of a right which can only have the purpose of causing injury to another person is unlawful."

**1.3 Objective of Study**

(a) To study historical, development, and related theories of measures, laws and regulations on Competition law of US, EU and Thailand weight on the protection of the market efficiency from business interference and its related economic concept.

(b) To study, analyze and comparison measures, laws and regulations on Trade Competition in US and EU regarding to the protection of the market efficiency from business interference.

(c) To study and analyze measures, laws and regulations on the Trade Competition Act 1999 in regard to the protection of the market efficiency from abuse of dominant power and unreasonable business interference acted by dominant position.

(d) To propose the appropriate solutions by suggestion to adopt measures in order to achieve legislations intent on business interference provision under the Trade Competition Act 1999.

**1.4 Scope of Study**

(a) Mainly focuses on the study of the measures and existing legislation available in foreign countries: US and EU regarding to Control and protection of the market efficiency from business interference.

(b) Study the foreign measures and legislations, then comparison and find appropriate solutions for improvement of section 25(4) of the Trade Competition Act 1999 of Thailand.

### 1.5 Methodology

This Thesis is mainly based on documentary research involving the use of texts and documents as source materials, for instance, books, research, publications, journals, articles offline and online, of both government and private sectors including domestic and international laws.

### 1.6 Expected Results

(a) Understanding the intention of policies, measures and legislations regarding the Competition law on controlling and protection of abuse of dominant power which effect on market efficiency.

(b) Having a proposal for adoption of appropriate legislative measures to create an obviousness provision for efficiency of using the provision of unreasonable business interference under the Trade Competition Act 1999.

(c) Providing the policies, measures and legislations of foreign countries for implement the Trade Competition Act on the protection of abuse of dominant power by interfere other business.

# CHAPTER 2
# INTRODUCTION TO COMPETITION LAW AND BUSINESS INTERFERENCE

Across centuries, governments have opted for three methods to deal with industries: laissez-faire, public supervision, or competition law. The last is the most opted for choice, and also the most difficult and challenging. Understanding it requires mindsets characteristic not only of lawyers, but also of economists and businesspeople. In order to understand competition law decisions, let alone predict future trends in the field, one must be able to assimilate and apply basic economic principles.[6]

This chapter will first research on significant economic notions of Competition Law; the basic economic model or market structure; monopolist, dominant positions; and relevant markets. Second, two main approaches that courts have used in various cases since the 1930s will be studied – Harvard School and Chicago School, which also lead to two legal tests: the per se rule and the rule of reason. The characteristic of restraint of trade based on the level of parties in the market will be examined, and vertical restraint and horizontal restrain will also be looked into. Third, business interference will be introduced, along with its historical background and the view under the law of Torts and Competition Law.

## 2.1 Competition Law from an Economic Perspective

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.

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[6] Animesh Ballabh, *"Antitrust Law: An Overview"*, 879 (October 2006). *available at* HeinOnline, http://heinonline.org (accessed October 29, 2015).

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.[7] Some countries called Competition Law an economic constitution[8] 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.[9] Perfect competition or perfect market and price are market mechanism which 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 goods[10] or others factors,[11] a high price could reduce the quantity of demand while encouraging firms to produce more, while low price will increase the quantity of demand while discouraging production. It could therefore be said that market efficiency is reflected from an efficient market mechanism.

The theory of perfect competition or perfect market may be too abstract and hard to manifest; however, it is very useful as a tool to help us understand how markets

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

[8] Sakda Thanitcul, Explication and case study of Trade Competition Act 1999, 37 (2nd ed. 2010). (ศักดา ธนิตกุล, **คำอธิบายและกรณีศึกษาพระราชบัญญัติการแข่งขันทางการค้า พ.ศ.2542**, 37, พิมพ์ครั้งที่ 2 (2553).

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

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

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

would operate under conditions of the theory and competitive structures which reflect from real market conditions.[12] Study through the theory shows that no small firm can influence price, and that degree of concentration matters. A high degree of concentration may lead to few competitors, which could finally lead to monopoly due to few in the market having the market power to influence price, until the market finally becomes not competitive.

### 2.1.1 Basic economic model

To divide the categories and types of economic models, which are also known as market systems, the types of products, number of participants, availability of information, barrier to entry, and independence of competitors need to be studied. In different locations, types of economic models will be defined by types of products or services; for example, in Thailand, the gas and oil or vehicle industry is an oligopoly, and the beverage or frozen food industry is monopolistic.

#### 2.1.1.1 Perfectly competitive market

Perfectly competitive market is a market with many players and consumers, wherein no one can alter the prevailing price in the market or be a monopoly. If anyone attempts to do so, the market will correct itself. This kind of market has homogeneous products, is without any collusion or artificial restraint of trade, is free for entry and exit, allows free mobility of resources, and the competitors and consumer can easily access knowledge, since every competitor needs to compete with others to sustain their market shares.

#### 2.1.1.2 Imperfectly competitive market

Imperfectly competitive market is one that does not work as it should due to the number of market participants, types of goods or services, availability of information, and barriers to entry and exit, which can be divided into three types:

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[12] *Supra* note 9, 12.

**(1) Pure monopoly**

Pure monopoly is a market with one seller offering a unique product and that faces no competition from rivals.[13] This indicates monopolization over the power to control prices or exclude competition. Compared to the competitive market, the results of monopoly are higher prices and lower output. This means that the price is as high as the monopolist wishes it to be. In this kind of market, the monopolist will be the price maker, and wealth will transfer to the monopolist instead of the consumer, causing deadweight welfare loss and loose product efficiency.

**(2) Monopolistic competition**

Monopolistic competition is most likely a perfectly competitive market, which also combines the element of a monopoly. There is competition among numerous players in the market, and products and services are differentiated.

**(3) Oligopoly**

An oligopolistic market is a competition among few players, wherein products are pure oligopoly and differentiated oligopoly. However, this kind of market could lead to monopoly very easily due to few competitors and its characteristics. Oligopoly includes price setters rather than price takers.[14] The barriers for new players to enter are also high due to many factors such as economics of scale, complex technology, and existing players.

### 2.1.2 Monopolist dominant position and relevant market

#### 2.1.2.1 Monopolist

Monopolist refers to a single player/seller in the market who has the power to control prices and exclude competition. Such power also directly affects quantity and quality of goods and services in the market and causes deadweight welfare loss. Due to the

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[13] Stephen F. Ross, **University textbook series: Principles of Antitrust Law**, 21 (1993).

[14] Perloff J., **Microeconomic Theory and Applications with Calculus**, 445 (2008).

power in its hands, the monopolist can also block other competitors who wish to enter the market, leading to anticompetitive practices.[15]

#### 2.1.2.2 Dominant position

Dominant position has characteristics mostly like monopolization. The use of economic analysis in various competition laws help realize conducts that would harm market efficiency which are prohibited by law. A finding of dominance will be based on economic factors, the relevant market, market shares, and total sales volume.

#### 2.1.2.3 Relevant market

The relevant market is used as a tool for consideration of market boundary. It combines the product or service market and the geographic market, which are defined as follows:

##### (1) Relevant product or service market

A relevant product or service market indicates the place that sells or provides particular products or services, which is interchangeable or substitutable, as examined by the characteristics of products or services, its price and purpose.[16]

##### (2) Relevant geographic market

A relevant geographic market refers to the area that the business operators are involved in in the supply of products or services. Defining the relevant geographic market involves looking into an area which allows interaction of seller and buyer, and where the conditions of competition are sufficiently homogeneous.[17]

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[15] Cornell University Law School, *"Legal information Institute*, *Antitrust: An Overview."* *available at* https://www.law.cornell.edu/wex/antitrust

[16] EUR-Lex, *"Summaries of EU Legislation: Definition of relevant market"*. *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:l26073

[17] *Id.*

## 2.2 Competition Law

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. To understand the notion of Competition Law, its historical and theoretical background needs to be studied.

### 2.2.1 Historical and theoretical background

This section will introduce 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.

#### 2.2.1.1 Harvard School

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.[18] 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

[18] Raj Kumar, *"Structure – Conduct – Performance Paradigm."* **Industrial Economic, Delhi University.**

focuses on market structures as key, for example, disallowing mergers or any behavior that forces others competitors out of the market.

Many studies found that when markets are concentrated, firms are more likely to engage in anticompetitive conduct, even when it might lower costs and prices and benefit consumers.[19] A landmark case, United State v. Aluminum co. of America, [20] reflects on the Judge Learned Hand's decision that penalized Alcoa for engaging in aggressive competition that benefitted consumers.[21] He acknowledged on possibility of reaching monopoly by held that:

> "It was not inevitable that it should always anticipate increases in the demand for ingot and be prepared to supply them. Noting compelled it to keep doubling and redoubling its capacity before others entered the field. It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel"[22]

The approach has a purpose – protecting small competitors from the power of large firms by preventing the latter from engaging in competitive conduct that could harm firms with lower market shares, in turn harming consumers, even though they might benefit from it. As Thomas A. Piraino Jr. mentioned in his article that "Under the Harvard School approach, the courts and agencies presumed the illegality of any mergers, joint ventures, or agreements that allowed firms to obtain, enhance, or

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[19] Thomas A. Piraino Jr., *"Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century*," **Indiana Law Journal**. Vol. 82, Iss. 2, Article 4: 349 (2007).

[20] United State v. aluminum co. of America, 148 F2d 416 (2d Cir. 1945).

[21] *Supra* note 19.

[22] *Supra* note 20.

exercise market power, regardless of whether the conduct had the potential to benefit consumers by lowering prices or increasing output"[23]

As the approach weighs on the per se rule rather than rule of reason, it has usually been used in cases with more complex economic facts, specific situations, and those having a huge impact on competition, for example, in the case of monopolization and mergers. Therefore, the plaintiffs could usually prevail under a Harvard School approach because they were excused from proving complex economic facts, as the approach allowed courts to indulge in a presumption of illegality of many types of conduct without engaging in a complicated analysis of the economic circumstances in the relevant market.

#### 2.2.1.2 Chicago School

The Chicago School approach appeared in the 1970s, resulting from several studies by Robert Bork, William Posner and 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.[24] Judge Robert Bork argued that "both the original intention of antitrust laws and economic efficiency was pursuit only of consumer welfare, the protection of competition rather than competitors."[25]

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

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[23] *Supra* note 19, 346.

[24] *Supra* note 19, 350.

[25] Paul H. Brietzke, *Robert Bork, "The Antitrust Paradox: A Policy at War with Itself,"* **13 Val. U. L. Rev.403**, 404 (1978).

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.

**2.2.1.3 Per se rule and Rule of reason**

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.[26] The application of both these tests requires the court to undergo an extensive factual analysis of the claim[27] – 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.

**(1) Per se rule**

The per se rule is based on the pure facts of an activity, and not its circumstances.[28] The per se illegal is when the conduct is conclusively presumed to be illegal, without regard to the actual effects or to the possible justifications in a particular case.

There are two main reasons for using the per se rule. First, to promote efficiency in judgment – since it allows certainty as to the legal ramifications of the conduct and second, to avoid unnecessary complications in proving and preventing unreasonable actions which could harm competition, because it allows the courts to use a strict standard. For example, in the case of restrain, Northern Pacific Railway v. United States,[29] the Supreme Court held that:

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[26] 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.

[27] Richard C. Stanley and Noel J. Darce, "*Antitrust Law,*" **Loyola Law Review**, 703 (1989). *available from* HeinOnline, http://heinonline.org (accessed October 29, 2015).

[28] Lee Loevinger, "*The Rule of Reason in Antitrust Law,*" **Virginia Law Review**, Vol. 50, No. 1: 32 (1964). *available from* HeinOnline, http://heinonline.org (accessed October 29, 2015).

[29] Northern Pacific Railway v. United States, 356 U.S. 1, 5 (1958).

> "Restraints action which deemed to be per se illegal shall pernicious effect on competition and lacked any redeeming virtue and such restraints were conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[30]

However, the per se rule is very conservative, and could have an effect the other way round. In case restrains of trade, Chicago Board of Trade v. United States, the Supreme Court held that "the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition because every agreement concerning trade, every regulation of trade,…restrains."[31] When there is a contract among parties, naturally, it restrains others who are not in the contract. Sometimes, it can be considered a strategy of competition or a business tradition, and may promote competition environment in the market; therefore, courts use per se actions only when this will harshly effect competition or become "manifestly anticompetitive".[32] This reflects what antitrust laws pay attention to – protecting the competition and the market as a whole, and not only the individual.

Mostly, conducts that court deem per se illegal are horizontal price fixing, group boycotts, resale price maintenance or vertical price fixing, bid rigging, division of markets, and tying arrangements which impact the market structure.

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[30] Alden F. Abbott, "*A brief overview of American antitrust law,"* **The University of Oxford Centre for Competition Law and Policy The competition law and policy guest lecture programme** – paper (L) 01/05, 5 (2005). *available at* https://www.law.ox.ac.uk/sites/files/oxlaw/cclp_l_01-05_1.pdf

[31] Chicago Board of Trade v. United States, 435 U.S. 679, 687-88 (1978).

[32] In case GTE Sylvanis, 433 U.S. 36 at 49-50 (1977) the court held that "restraints had to be manifestly anticompetitive in order to be considered per se illegal."

**(2) Rule of reason**

The nature of the rule of reason allows it to be used for determining the efficiency of certain conducts with regard to consumer welfare as mentioned by Judge Robert Bork that "maximization of wealth or consumer want satisfaction… Acceptance of consumer want satisfaction as the law's ultimate value requires the courts to employ as their primary criterion the impact of any agreement upon output, and thus to determine whether the net effect of the agreement is to create efficiency, and thereby increase output or, alternatively, to restrict output."[33] The first occurrence of the rule of reason was established by Judge White in merger and monopolization in Standard Oil v. United States,[34] and United States v. American Tobacco cases.[35] He gave a statement which Judge Robert Bork summarized in his articles that:

> "The rule of reason contains three tests which may be rendered as
> (1) the per se concept;
> (2) the intention of the parties; and
> (3) the effect of the agreement." [36]

The rule of reason was the presumptive standard applicable to all horizontal restraints, other than the few types considered to be per se illegal.[37] In case Board of Trade of City of Chicago v. United States,[38] the Supreme Court stated, "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[39] This shows that the rule of reason weighs on balancing circumstances

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[33] Robert H. Bork, "*The Rule of Reason and the Per Se Concept: Price Fixing and Market Division Part II*," **75 Yale Law Journal 373**, 375 (1966).

[34] Standard Oil Co. v. United States, 221 U.S. 1 (1911).

[35] United States v. American Tobacco Co., 221 U.S. 106 (1911).

[36] *Supra* note 33, 385.

[37] *Supra* note 30, 6.

[38] Board of Trade of City of Chicago v. United States, 246 U.S. 231, 238 (1918).

[39] Id.

which may be procompetitive rather than anticompetitive, even if in fact its characteristic may be considered to restrain competition.

In case Hornsby Oil Co., Inc. v. Chamion Spark Plug Co.,[40] Court mentioned "The rule of reason traditionally requires a determination about the reasonableness of a challenged restraint based on several factors:

(a) The competitive significance of the restraint in light of factors peculiar to the business;
(b) An inquiry into whether the restraint adversely affects competition in a particular product and geographic market;
(c) A determination of whether, on balance, the anticompetitive effects of the restraint outweigh any procompetitive benefits or justifications in the relevant market."[41]

Selection of using the per se rule or the rule of reason by the courts is still far from clear. Courts will consider the nature of the case and decide whether the case roughly effects competition or is "manifestly anticompetitive", then the per se rule shall be applied or go into the detailed economic analysis, based on how it distorts competition, and then, the rule of reason will be applied. However, recently, the rule of reason has become more popular as courts consider the per se rule too negative in the current scenario. It seems to promote efficiency by allowing competitors to act more freely on the market. On the other hand, it also caused judicial inefficiencies due to complicated economic strategies and techniques, which makes it hard for plaintiffs to prove a claim.

### 2.2.2 **Characteristics of restraint of trade**

Restraint of trade conducts can be separated into the two categories below:

[40] Hornsby Oil Co., Inc. v. Chamion Spark Plug Co., 714 F.2d 1384, 1392 (5th Cir. 1983).

[41] Id.

#### 2.2.2.1 Vertical restraint

Vertical restraints may occur under agreements between business operators or individuals at different levels, for example, distributor and retailer. Actions that could be defined as vertical restrain are tying arrangement, price discriminatory, resale price maintenance, market division, exclusive dealing, and vertical merger and acquisition.

Efficiency advocates believe that vertical restraints are rarely anticompetitive and should be treated leniently by antitrust laws. They conclude that vertical restraints can lead to inefficiencies only in narrow circumstances.[42] On the other hand, efficiency advocates argue that in the absence of widespread use in an industry prone to collusion, vertical restraints usually benefit competition.[43]

It is important to keep in mind the efficiency analysis approach in this issue with a view that private firms should be free to conduct their business as they see fit, unless their conduct restricts output, with a consequent misallocation of society's economic resources.[44]

#### 2.2.2.2 Horizontal restraint

Horizontal restraints may occur under agreements between business operators or individuals at the same levels, for example, retailers and retailers, and distributors and distributors. Any abuse by horizontal restraint will have an effect on the market structure and impact competition and market efficiency.

Actions that could be defined as horizontal restraint are cartel, market division, group boycott, and monopolization and attempt to monopolize, or abuse of dominant position.

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[42] *Supra* note 13, 225.

[43] *Supra* note 13, 225.

[44] *Supra* note 13, 226.

### 2.3 Business interference

Business interference occurs when person(s) intentionally intervene with another contractual in a written or verbal or business relationship, which is expected to occur with the third person and cause damages. For example, A already had a contract with C (third party); B knew about the contract between A and C, then induced C to breach that contract by offering a better benefit for C in return if C breached the contract with A and signed a new one with B instead. This causes damages to A.

There is a difference between business interference in Torts and Competition Law. Business interference in Torts focuses on the effect of the challenged behavior on the plaintiff, while Competition Law pays attention to markets, market power, and the effects of the challenged behavior on competition.[45] Hence, business interference under Torts Law is concerned with competitors' harm, while Competition Law concerns competition. According to the example above, in order to claim it under the Law of Torts, A, B, and C can be anyone, because claiming Torts only concerns individual harm. Unlike in the case of Antitrust Law, A, B, and C shall be competitors in the relevant market, where B's intention is not only to induce C to breach the contract with A and harm A, but B could either be a monopoly in the market or attempting to be a monopoly in the market, and such an interference might harm the competition environment or the market as a whole. This will be discussed in detail further.

#### 2.3.1 Historical background

Business interference first appeared in the Common Law system in the Law of Torts, which is known by many names: business torts, economic torts, commercial torts, or financial torts. It does not result in physical injuries to individuals or property, but only harms them economically.[46] In common law, a tort tries to balance the idea of

[45] Maurice E. Strucke, "*American Bar Association Section of Antitrust Law,"* **Business Torts and Unfair Competition Handbook** (3rd ed. 2014).

[46] *Id.*

promotion of economic competition and protection of existing or reasonably certain prospective contractual relations.

The first case in modern history of economic torts with tortious interference with contractual relation claims is Lumley v. Gye, 1853.[47] Johanna Wagner, a well-known soprano, made a contract with Lumley to sing exclusively at Her Majesty's Theatre. Gye, a rival, knew about the contract, and induced Wagner to sing at his opera house, causing a breach of contract with Lumley.

### 2.3.2 Business interference under Law of Torts

Plaintiff has to prove proximate causation in order to recover a claim for tortious interference.[48] Under the US Law of Torts, there are four elements which summarized in an article in the Business Torts Journal of American Bar Association:

(a) "Existence of a valid contractual relationship or business expectancy;
(b) the defendant's knowledge of the relationship;
(c) the defendant's intentional and unjustified interference with the relationship; and
(d) damage to the plaintiff as a result of the breach of the relationship."[49]

In a situation that claims interference in business relations which relies on an existing contract, plaintiff generally must allege the existence of a specific contractual relationship with the third person. In case of tortious interference with business

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[47] Lumley v. Gye. 118 Eng. Rep. 749 (K.B. 1853).

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

[49] Shaun K. Ramey, "*Tortious Interference with Another's Business Relationship,"* **Business Torts Journal**, Volume 14, No. 2: 1 (2007).

relations, the plaintiff has to show that such a business relationship will probably occur if not interfere by the defendant. In case there is a valid business expectancy with a reasonable likelihood or probability that will come to fruition, plaintiff needs to prove this by showing a specific opportunity that is reasonable to be achieved. Then, the plaintiff must allege actual knowledge of the defendant, otherwise, the court will dismiss the claim.

In order to impose liability, the essential element – that the third party has an intention to interfere with the plaintiff's contractual relations – needs to be proved. Plaintiff must prove that the damages resulted from a contractual relationship that has been disrupted; for example, lost profits, cost of plaintiff's direct expenses, damages for partially completed project, etc.

Same as in the concept of existence of a valid contract, the right to terminate the contract of parties under contracts terminable at will cannot satisfy the element required by tortious interference. There are some cases where courts recognize the validity of the cause of actions: the case grounding on a contract terminable at will, a contract itself violating the rule of law, an unenforceable and incomplete covenant, etc.

### 2.3.3 Business interference under Competition Law

Sometimes, business interference reaches against Competition Law. Most regulatory consider market efficiency or competition impact from such business interference as a core requirement.

Business interference could be considered violating the Antitrust Law, in which case it shall first be considered an anticompetitive conduct under Section 2 of the Sherman Act, where such a conduct has monopolized or tried to monopolize. Kevin McCann

and Alyse L. Katz has summarized from Spectrum Sports, Inc. v. McQuillan case in their article[50] that:

> "Business tort may rise to the level of an antitrust violation unless three fundamental elements must be present:
> (a) The defendant must have engaged in predatory or exclusionary conduct;
> (b) the defendant must be a monopolist or have a dangerous probability of achieving monopoly power; and
> (c) there must be harm to the market, not just to one competitor." [51]

In EU, there are many competition cases related to tortious action which may collectively be termed as the economic delicts.[52] EU Competition Law will consider business interference action against the provision of the Competition Law when done from a dominant position, and the action is deemed an abuse of the dominant position under Article 102.

Under the Trade Competition Act 1999 of Thailand, business interference lies in Section 25(4), which prohibits action of the dominant position which interferes with other business operations without justifiable reasons. Section 25 of the Trade Competition Act 1999 states:

> "A business operator having market domination shall not act in any of following manners: …

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[50] Kevin McCann and Alyse L Katz, "*When Business Torts Give Rise to Antitrust Liability*," (October 17, 2011).

[51] Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993).

[52] 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).

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

### 2.3.4 Differences between Business interference under Law of Torts and Competition Law

Business interference 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, 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.

# CHAPTER 3
# BUSINESS INTERFERENCE
# IN THE US AND EU COMPETITION LAWS

## 3.1 United States Antitrust 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.[53] 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:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding…"

In the United Sates, the Antitrust Laws were stated by the Supreme Court as "a charter of freedom" designed to protect the core Republican values regarding free businesses in America.[54] In the United Sates, the Antitrust Laws were stated by the Supreme Court as "a charter of freedom" designed to protect the core Republican

[53] *Id.*, 21.

[54] *Supra* note 6, 885.

values regarding free businesses in America. The main goal was to protect market efficiency and not consumers, because the law sees that the consumers will eventually benefit from 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. Almost a century later, the Antitrust Law works with the same basic objective as mentioned by the Federal Trade Commission that: "to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up".[55]

### 3.1.1 Historical and background of Antitrust Law in United States

In the late 1800s, the monopolies that dominated the American economy led to the announcement of the Sherman Act in 1890 by the Congress, exercising its constitutional authority to regulate commerce[56] to combat with anticompetitive practices, reduce market domination by individual corporations, and preserve unfettered competition as the rule of trade.[57] The Sherman Act is a foundation of the Antitrust Law in America, and later became the role model of most federal antitrust litigations.

### 3.1.2 Business interference in the United States Law

Business interference in the United States Law can be found in both the Law of Torts and the Antitrust Law. This section will focus on business interference under Torts Law through various provisions and cases, and business interference under Antitrust Law will be focused upon when addressing Section 2 of the Sherman Act.

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[55] Federal Trade Commission, "*The Antitrust Laws.*" *available at* https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws

[56] *Supra* note 15.

[57] *Id.*

**3.1.2.1 Business interference under Torts Law**

In the United States, the Restatement (Second) of Torts doctrine "prohibits the defendant from intentionally and improperly interfering with the performance of a contract."[58] 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.[59] It avoids imposing liability for the promisor's refusal to deal in case the promisor makes an independent decision to refuse such business relations with the plaintiff, therefore no tortious interference occurs.

In order to claim tortious interference, plaintiff has a burden of proof, the difference of which depends on jurisdictions and the case itself.

The restatement (Second) of Torts § 766A provides a prima facie case of tortious interference with contract exists that:

> "One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract."

The restatement (Second) of Torts § 766B provides on a case of prospective contractual relation that:

> "One who intentionally and improperly interferes with the another's prospective contractual relation (except a contract to marry) between

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[58] 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).

[59] *Id.*

> another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract."

### (1) Basic elements of tortious interference

There are three categories of tortious interference that courts have recognized: tortious interference with contracts, business relationships, and prospective economic opportunities.[60] The basic elements that a plaintiff needs to establish in order to fulfill the cause of action of tortious interference,[61] although announced differently by states, but are similar. Some states may have five elements, while others may have only four; for example, Florida and Virginia require four elements, while California and New York require five.

The four elements required by states are mostly similar, as summarized in an article in the Business Torts Journal of American Bar Association:

> (a) "Existence of a valid contractual relationship or business expectancy.
> (b) the defendant's knowledge of the relationship.
> (c) the defendant's intentional and unjustified interference with the relationship.
> (d) damage to the plaintiff as a result of the breach of the relationship."[62]

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[60] 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).

[61] *Supra* note 48, 9.

[62] *Supra* note 49, 1.

(a) **Existence of a valid contractual relationship or business expectancy.**

First, 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.

Due to this claim on interference with existing contract or prospective contract, it is a Tort claim and not a contract claim, therefore the plaintiff can claim for all losses proximately caused by the wrongful interference and not limited to the contract damage. This has been stated by the South Carolina Court of Appeals that:

> "While the causes of action [of breach of contract and tortious interference with contract] involve separate and distinct wrongful acts committed by different parties, there are important commonalities which affect the damages question. The exist between the two causes of action is the breach of the contract, for…breach of the contract is an element of both causes of action. This is the element from which the injured party's actual damages flow on both the contract and tort claims. This does not mean, however, that the measure of actual damages on both causes of action are coextensive." [63]

Second, in case of tortious interference with business relations, plaintiffs bear to show that such business relationships will probably occur if not interfere by the defendant. The Court noted some guidance in case Alvord-Polk, Inc. v. F. Schumacher & Co.,[64] that "a business relationship is something less than a contractual right, something more than a mere hope and exists only when there is a reasonable probability that a

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[63] Daniel F. Blanchard, "*Interference with Contractual and Business Relations*," **The South Carolina Bar's**, Volume 2 (2004).

[64] Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 1015 (3d Cir 1994).

contract will arise from the parties' current dealings."[65] On the other hand, courts may recognize a cause of action with an economic advantage in case neither a business relationship nor the existence of a valid contract can be established.[66] Unlike the claim on interference with existing contract or prospective contract, there is no requirement to establish the existence of any actual contract.

Third is in case that there is a valid business expectancy which has a reasonable likelihood or probability to come to fruition. Third is 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, the Court concluded in Am. Tel & Tel. Co. v. E. Pay Phones, Inc.,[67] that "the expectancy of remaining in business is too general to support a tortious interference claim",[68] which means that plaintiff have to show a specific opportunity that is reasonable to be achieved. In Commercial Bus. Sys., Inc., v. Halifax Corp.,[69] the Court ruled that "mere proof of a plaintiff's belief and hope that a business relationship will continue is inadequate to sustain the cause of action".[70]

**(b) The defendant's knowledge of the relationship.**

The plaintiff is required to allege actual knowledge of defendant. Implied knowledge or constructive knowledge in general are insufficient.[71] Otherwise, the court will dismiss the claim. This has been noted by the Restatement (Second) of Torts § 766 that:

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[65] *Supra* note 60, 20.

[66] *Id.*

[67] Am. Tel & Tel. Co. v. E. Pay Phones, Inc., 767 F. Supp. 1335 (E.D. Va. 1991).

[68] *Supra* note 48, 10.

[69] Commercial Bus. Sys., Inc., v. Halifax Corp., 253 Va.292, 301, 484 S.E.2d 892, 897 (1997).

[70] *Supra* note 48, 10.

[71] *Supra* note 60, 20.

> "There is no technical requirement as to the kind of conduct that may result in interference with the third party's performance of the contract. The interference is often by inducement. The inducement may be any conduct conveying to the third person the actor's desire to influence him not to deal with the other. Thus it may be a simple request or persuasion exerting only moral pressure. Or it may be a statement unaccompanied by any specific request but having the same effect as if the request were specifically made. Or it may be a threat by the actor of physical or economic harm to the third person or to persons in whose welfare he is interested. Or it may be the promise of a benefit to the third person if he will refrain from dealing with the other."

**(c) The defendant's intentional and unjustified interference with the relationship.**

This 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.[72] Plaintiff is also required to show that an actionable wrong committed by the defendant was independently tortious or wrongful.

To judging the propriety of an interference, the restatement sets forth seven factors in the restatement (Second) of Torts § 767 to be considered that:

> "In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:
>
> (a) The nature of the actor's conduct,

[72] W. Page Keeton, **Prosser & Keeton on the Law of Torts section 129**, 970-80 (5th ed. 1984).

(b) The actor's motive,

(c) The interests of the other with which the actor's conduct interferes,

(d) The interests sought to be advanced by the actor,

(e) The social interests in protecting the freedom of action of the actor and the contractual interests of the other,

(f) The proximity or remoteness of the actor's conduct to the interference, and

(g) The relations between the parties."

**(d) Damage to the plaintiff as a result of the breach of the relationship.**

Plaintiff must prove the cause of damages resulting from the contractual relationship that has been disrupted, for example, lost profits, cost of plaintiff's direct expenses, damages for partially completed project, permanent destruction of the business relationship, or damage to plaintiff's business reputation. An actual loss needs to be shown because the Torts claim will not be complete unless actual damages have been suffered.

(2) **Additional elements**

There are some cases where the courts recognize the validity of the cause of actions, such as in the cases below.

On the grounds that a contract terminable at will may be ended at any time by parties, the mere intentional interference will not be protected under the Antitrust provisions. This has mostly caused failure to claim tortious interference, because the plaintiff failed to address the question of how to treat interferences with contracts terminable at will.[73] Others are, for example, given by the court of Virginia through cases. Courts

[73] Alex B. Long, "*Attorney Liability for Tortious Interference: Interference with Contractual Relations or Interference with the Practice of Law*," **Georgetown**

mentioned that "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," [74] or in a situation where it is impossible for parties to fulfill or perform the contract unless the impossible occurs by an intentional unlawful act of the defendant.

Like the concept of existence of a valid contract, the right to terminate a contract terminable at will cannot satisfy the element required by tortious interference as stated in the Restatement (Second) of Torts § 768 that:

> "Tortious interference extends liability even when the underlying contract that has interrupted is voidable or terminable at will. In other words, although the promisor herself could have walked away from the contract with impunity, the interferor who induced the termination of the relationship could be subject to a tortious interference action. The reason for the policy is that, although a promise with an at-will contract may not have a legal right to performance of the contract, she does have certain reasonable expectations of future relations with the promisor which warrant some protection. Most jurisdictions follow the Restatement compromise and treat an interference with an at-will contract as an interference with prospective advantage, to which the competition privilege applies, and not as an interference with contract."

The Restatement (Second) of Torts § 768 also gives preference to the competitors if the action is competitive and not by wrongful means or to create an unlawful restraint of trade. The Court acknowledged this concept in case United Wild Rice, Inc. v. Nelson that "As a matter of public policy, courts encourage competition and frown

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**Journal of Legal Ethics**, Vol. 18:471: 477 (2005). *available from* HeinOnline, http://heinonline.org (accessed October 5, 2015).

[74] *Supra* note 48, 10.

upon a litigant's attempt to stifle competition or to promote one's self interest. In fact, competitors have a preference in the eyes of the law such that it is not a tort to interference with contract if the action is competitive and the actor does not employ unlawful means or create an unlawful restraint of trade."[75]

In case that alleged interference arises from the behavior of "a bona fide competitor", Gary commented that "the plaintiff should have the burden of proving that the interference was improper. If the plaintiff can prove that the defendant engaged in some unlawful act, including a violation of the antitrust law as stated in the Restatement (second) of Torts § 767, then the plaintiff has established this element of its tortious interference claim."[76]

In case the purpose analysis under the Restatement (second) of Torts § 768 is retained, the plaintiff shall show the subjective element at least. If plaintiff cannot show the bad faith of the defendant, then tortious interference would fail.

**3.1.2.2 Business interference under Antitrust Law**

Business interference under the Antitrust Law of the United States has developed through the years. A growing number of federal antitrust decisions in state Tort claims show an action brought under Section 2 of the Sherman Act, with pending state claims for tortious interference in contract.[77]

**(1) The Sherman Act**

The Sherman Act protects trade and commerce against unlawful restraints and monopolies. This Act focuses on the protection of competition rather than

[75] United Wild Rice, Inc. v. Nelson. 313 N.W.2d 628, 633 (1982).

[76] Gary Myers, "*The Differing Treatment of efficiency and competition in Antitrust Law*," **Minnesota Law Review**, Vol. 77:1097: 56 (1993).

[77] Harvey I. Saferstein, "*The Ascendancy of business tort claims in antitrust practice,"* **Antitrust Law Journal**, Vol. 50: 385 (1991). *available from* HeinOnline, http://heinonline.org (accessed October 5, 2015).

competitors. This has appeared in many cases in courts, for example, in Spectrum Sports, Inc. v. MaQuillan case which the Supreme Court explained that:

> "The purpose of the Sherman Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly to destroy competition itself." [78]

The Supreme Court also stated in case N. Pac Ry. Co. v. United States that:

> "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress…"[79]

The main provisions, Sections 1 and 2 of the Sherman Act, follow the fundamental purpose of the Sherman Act that focuses on the promotion and protection of competition in the market and increases economic growth. Section 1 delineates and prohibits specific means of anticompetitive conduct, while Section 2 condemns not only the acquisition or maintenance of monopoly, but also attempts to monopolize that which fills in a gap in the Antitrust Law.[80] The Department of Justice solely enforces authority over the Sherman Act through criminal or civil actions, and the Federal Trade Commission enforces, through Section 5 of the Federal Trade Commission Act, any unfair competition through civil administrative proceedings.

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[78] *Supra* note 51.

[79] N. Pac Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

[80] *Supra* note 13, 99.

This research will focus on Section 2, which prohibits the conduct of business interference.

(a) **Section 1**

Section 1 of the Sherman Act prohibits any contract or trust or conspiracy restraint of trade or commerce as the Section states:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

Office of the United States Attorneys of the United States Department of Justice established essential elements of offense that must be proved in order to claim violation under Section 1 of the Sherman Act as follows:

(a) "The charged conspiracy was knowingly formed and was in existence at or about the time alleged;
(b) The defendant knowingly joined the charged conspiracy; and
(c) The charged conspiracy either substantially affected interstate or foreign commerce or occurred within the flow of interstate or foreign commerce."[81]

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[81] United States Department of Justice, "*Antitrust Resource Manual: Elements of the Offense of Section 1 of the Sherman Act,"* (October 2011). *available at* https://www.justice.gov/usam/antitrust-resource-manual-7-elements-offense.

The key element of the Sherman Act is a conspiracy or agreement to fix prices or to rig bids. To prove an intention and conspiracy, an agreement, understanding or meeting between competitors which shows a deliberate intention for an unreasonable restraint of trade needs to be established.

(b) **Section 2**

Section 2 of the Sherman Act prohibits any abuse of monopolization and attempt to monopolize alone, or conspiracy as the Section states:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

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. However, being a monopoly is not illegal; an example is a monopoly by a good corporate and which is successful in the market, unless accompanied by an element of anticompetitive conduct. On the other hand, if the company becomes a monopolist in the market using oppressive tactics, including bribery, harassing lawsuits, price cutting, for example, then it is illegal. The courts acknowledged following requirements in case United States v. Grinnell Corp. for using as criteria to consider "monopolization":

(a) "the possession of monopoly power in the relevant market; and
(b) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[82]

The first requirement is that the offense of monopolization requires the possession of monopoly power in the relevant market. Monopoly, as mentioned earlier, means a power in the market that allows the monopolist to control prices and exclude competition. However, besides being a monopolist, the monopolist must be willing to acquire a monopoly unlawfully or maintain such unlawful monopoly power.

A rival or competitor in a specific market who has undergone an action which has anti-competitive consequences will be deemed as attempting to monopolize. To consider "attempted monopolization", the court gave guidelines by setting the following three requirements, which shall be proved as in case Spectrum Sports, Inc. v. McQuillan:

(a) "the defendant has engaged in predatory or anticompetitive conduct with;
(b) a specific intent to monopolize; and
(c) a dangerous probability of achieving monopoly power." [83]

The first requirement is predatory or anticompetitive conduct by the defendant which affects competition. However, conduct that is illegal for a monopolist may not be illegal for others who have no monopoly power, unless taken by the firm that already possess monopoly power. The second requirement is predatory or anticompetitive conduct by defendant with a specific intent to monopolize. A specific intent to monopolize does not mean an intent to successfully compete with other rivals, but to

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[82] United States v. Grinnell Corp., 384 U.S. 563, 57071 (1996).

[83] *Supra* note 51.

an intent to destroy competition or build monopoly power for the company itself.[84] The last requirement is "dangerous probability", which refers to the defendant's ability to destroy competition environment in the market and increase the possibility of achieving monopoly power.

Investigating a conspiracy to monopolize with others, the court gave requirements that need to be met in Paladin Associates v. Montana power as follows:

(a) "the existence of a combination or conspiracy to monopolize;
(b) an overt act in furtherance of the conspiracy;
(c) the specific intent to monopolize; and
(d) causal antitrust injury"[85]

In order to prove the existence of such a combination or conspiracy to monopolize the market, courts usually find the relation of defendants from their agreement, and whether or not it is in written. Unlike requirements of attempt to monopolize, a conspiracy to monopolize does not require proving dangerous probability of success.

The Sherman Act has very board provisions according to the intention to give federal courts and antitrust enforcement agencies room to develop a federal common law of antitrust regulations; therefore, courts are allowed to interpret and consider what mostly depends on age and fact. Different facts could create different outcomes. Therefore, courts' decisions and ways of interpretation of the Sherman Act through centuries have been various. The United States Department of Justice summarized seven core principles regarding section 2 as follows:

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[84] The United States Department of Justice, "*Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act: Chapter I.*" available from https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-1

[85] Paladin Associates, Inc. v. Montana Power Co., 328 F.3d 1145 (9th Cir. 2003).

(a) "Unilateral conduct is outside the purview of section 2 unless the actor possesses monopoly power or is likely to achieve it.

(b) The mere possession or exercise of monopoly power is not an offense; the law addresses only the anticompetitive acquisition or maintenance of such power (and certain related attempts).

(c) Acquiring or maintaining monopoly power through assaults on the competitive process harms consumers and is to be condemned.

(d) Mere harm to competitors – without harm to competitive process – does not violate section 2.

(e) Competitive and exclusionary conduct can look alike – indeed, the same conduct can have both beneficial and exclusionary effects – making it hard to distinguish conduct that should be deemed unlawful from conduct that should not.

(f) Because competitive and exclusionary conduct often look alike, courts and enforcers need to be concerned with both underdeterrence and overdeterrence.

(g) Standards for applying section 2 should take into account the costs, including error and administrative costs, associated with courts and enforcers applying those standards in individual cases and businesses applying them in their own day-to-day decision making."[86]

As the identifying conduct violated under Section 2 is difficult and courts have evolved over time, sensitivity to efficiency justifications have increased, and the costs of incorrect enforcement decisions that may discourage innovative or other efficiency enhancing conduct. It is most difficult when such conduct is defined as aggressive competition or improper conduct which harms competition. This issue, distinguishing competitive and exclusionary conduct, will be discussed below.

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[86] *Supra* note 84.

Distinguishing competitive and exclusionary conduct is very difficult and has been accepted by the courts through their comment in many cases. To determine what acquiring and maintaining monopoly power means, and which shall be prohibited as improper conduct under Section 2 of the Sherman Act, is complicated, and depends on the fact and types of claimed conducts. This became problematic for business owners and business planners because they need clarity on what they can do and what will be prohibited by law. The courts have tried to give a definition and scope for considering an exclusive conduct. For example, in United States v. Grinnell Corp., the Supreme Court defined a conduct that consists of "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident…";[87] the most cited judicial definition is a "competition not on the merit"; however, it is not clear what is exactly.

Sometimes, the same conduct could turn out another way, for example, an exclusive agreement, an aggressive competition, etc. Judge Easterbrook also observed that "Aggressive, competitive conduct by any firm, even one with market power, is beneficial to consumers. Courts should prize and encourage it. Aggressive, exclusionary conduct is deleterious to consumers, and courts should condemn it. The big problem lies in this competitive and exclusionary conduct look alike."[88] In case Spectrum Sports, Inc. v. McQuillan, the Supreme Court held that "section 2 of the Sherman Act should not be applied against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself."[89] A. Douglas also agreed that the hardest part is to distinguish competitive and exclusionary conduct when the conduct both promotes as well as harms competition. As he mentioned in his article that:

[87] *Supra* note 82.

[88] *Supra* note 84.

[89] *Supra* note 51.

> "The challenge in exclusion cases is how the law should treat conduct that has both efficiency benefits and exclusionary harm. The benefits are usually realized at least in part by the defendants, but the exclusionary harm is experienced by rivals and indirectly by consumers. In other words, by contrast to collusion conduct, which reduces the defendants' output, exclusionary conduct reduces the output of the defendant's excluded rivals. The law has struggled uneasily with exclusion cases because it has not yet embraced a conceptual framework for dealing with these competing considerations."[90]

Reasons have been given in decisions which concern whether such conduct will harm or promote competition. Some basic boundaries are provided by the law's requirements: that the conduct harms competition, that it be willful, and that it will not be competition on merits, but these maxims offer insufficient guidance to be of much use in many difficult cases. In many cases, the courts found that conduct did not harm competition, but promoted it. The courts have often stated that unlawful conduct prohibited by Section 2 of the Sherman Act must harm competition and affect the consumer. It has been mentioned by the Courts in many cases including United States v. Microsoft Corp. case. The Court stated:

> "The anticompetitive act must harm the competitive process and thereby harm consumers. In contrast, harm to one or more competitors will not suffice...whether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern: the means of illicit exclusion, like the means of legitimate competition, are myriad. The challenge for an antitrust court lies in stating a general rule for distinguishing between

[90] A. Douglas Melamed, "*Exclusionary Conduct under the Antitrust Laws: Balancing, Sacrifice, and Refusals to Deal*," **Berkeley Technology Law Journal,** Vol. 20:1249 (2005).

> exclusionary acts, which reduce social welfare, and competitive acts, which increase it."[91]

This is also problematic for the United States courts to solve since differences in cases and circumstances could create differences in outcomes. The court often found that the same conduct can both generate efficiencies and exclude competitors. Judicial experience and advances in economic thinking have demonstrated potential procompetitive benefits of a wide variety of practices that were once viewed with suspicion when engaged in by firms with substantial market power. Exclusive dealings are a good example that can be used to encourage beneficial investment by the parties, while also making it more difficult for competitors to distribute their products.

United States v. Microsoft Corp. is a suitable example for this: Microsoft was found to have illegally used "de facto exclusive contracts"[92] to control the two most effective distribution channels for browser and software through computer manufacturers and Internet access providers. The court concluded that these exclusive contracts did not involve "competition on the merits" because the contracts placed Netscape at a significant competitive disadvantage and lacked a legitimate efficiency rationale.[93] The study shows an exclusive contracts, actually "facilitate contracting for distributor promotion by creating dedicated distributors who cannot easily "free-ride" on the manufacturer's promotion compensation arrangement by switching their promotional efforts to the sale of rival brands. Exclusive contracts also maximize the returns received by distributors for promotion by permitting distributors to broker all their customers as a group to a single manufacturer which frequently are a procompetitive element of distribution contracts that enhance consumer welfare."[94]

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[91] United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir.2001).

[92] Benjamin Klein, "*Exclusive Dealing as Competition for Distribution ON THE MERITS,"* **Geo. Mason. Rev.,** Vol. 12, 120 (2003).

[93] *Supra* note 91.

[94] *Supra* note 92, 121.

Professor Andrew I. Gavil stated, "because it can be so difficult for courts to restore competition once it has been lost, the true cost of exclusion to consumer welfare and its benefit to dominant firms are likely to be understated."[95] Therefore, courts usually focus on conduct that is clearly improper and harms competition. The Supreme Court has consistently emphasized the potential dangers of over-deterrence. The Court's concern with overly inclusive or unclear legal standards may well be driven in significant part by the particularly strong chilling effects created by the specter of treble damages and class-action cases.

Courts have recognized that Section 2 cannot embody every economic complexity and qualification, and have sought to craft legal tests that account for these limitations. Judge Breyer gave an explanation which still using over decades in case Barry Wright Corp. v. ITT Grinnel Corp. that:

> "While technical economic discussion helps to inform the antitrust laws, those laws cannot precisely replicate the economists' (sometimes conflicting) views. For, unlike economics, law is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients. Rule that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve."[96]

**(2) Basic elements of 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

[95] *Supra* note 84.

[96] Barry Wright Corp. v. ITT Grinnel Corp., 724 F. 2d 227, 234 (1st Cir. 1983).

such conduct has monopolized or attempted to monopolize. Kevin McCann and Alyse L. Katz has summarized from Spectrum Sports, Inc. v. McQuillan case in their article[97] that:

> "Business tort may rise to the level of an antitrust violation unless three fundamental elements must be present:
> (a) The defendant must have engaged in predatory or exclusionary conduct;
> (b) the defendant must be a monopolist or have a dangerous probability of achieving monopoly power; and
> (c) there must be harm to the market, not just to one competitor." [98]

**(a) The defendant must have engaged in predatory or exclusionary conduct**

Only the 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. 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.[99]

It has been agreed that it is difficult to consider whether such conduct is anticompetitive and impacts competition in the market. Courts have found it difficult to establish a general standard for determining whether conduct may be considered "anticompetitive".[100]

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[97] *Supra* note 50.

[98] *Supra* note 51.

[99] *Supra* note 50.

[100] *Supra* note 50.

In the 1996 case United States v. Grinnell Corp.,[101] the court stated, "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." Thus, for such a conduct to be deemed anticompetitive, it must show that it harms the competitive process and thereby ultimately harms consumers and not just competitors.[102]

**(b) The defendant must be a monopolist or have a dangerous probability of achieving monopoly power**

The second requirement is that 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.

The relevant market can be defined in two dimensions: a relevant product market and a relevant geographic market. If the actor can control prices or exclude competition in a properly defined relevant market, they will be deemed to possess monopoly power under Section 2 of the Sherman Act.

**(c) There must be harm to the market, not just to one competitor**

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.[103]

### 3.1.3 Business interference enforcement in the United States Antitrust Law

Antitrust statutes allow enforcement on Antitrust for both the state attorney's general and private parties. For right to private antitrust enforcement, it has been stated in

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[101] United States v. Grinnell Corp., 384 U.S. 563 (1966).

[102] *Id.*

[103] *Supra* note 50.

Section 4 of the Clayton Act that only those plaintiffs who have suffered antitrust injury can bring a private lawsuit under the Antitrust Law to recover for their losses.

Section 4 states:

> "…any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States …"

To bring a private lawsuit under the Antitrust Law to recover for their losses,[104] it requires the plaintiff to prove elements in order to present the type of injury that the laws were designed to prevent. Failing to allege and show such elements will cause case dismissal.

As both Antitrust and business torts in the United States arise from the common law on unfair competition, the Supreme Court treats the Sherman Act as a common law statute as acknowledged in case Leegin Creative Leather Products, Inc. v. PSKS, Inc.,[105] that "Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on 'restrains of trade' evolve to meet the dynamics of present economic conditions."[106] In terms of the types of claims, there was a strong confirmation that when it came to state Tort Law claims, or state claims generally, some type of the so-called tortious interference tort was used most often, in addition to antitrust claims.[107]

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[104] *Supra* note 27, 688.

[105] Leegin Creative Leather Products, Inc. v. PSKS, Inc. 511 U.S. 877 (2007).

[106] Supreme Court of the United States, "*Opinion of the Court on case Leegin Creative Leather Products, Inc. v. PSKS, Inc.," 20* (June 28, 2007). *available at* https://www.justice.gov/atr/case-document/file/501231/download.

[107] *Supra* note 77, 385.

The plaintiff must allege attempted monopolization under the Sherman Act Section 2, and novel tortious interference theory under Section 766A in case of breach of contract, or Section 766B in case of prospective contractual relation, as provided by the Restatement (Second) of Torts. The proof should be accompanied by all the elements required by law, otherwise they will be dismissed.

The difference between business interference claim under Torts Law and Antitrust Law are the focus and the level of requirement. Business interference under the Law of Torts focuses on individual harm, which means the plaintiff who claimed needs to show only such action by defendant which shows an intentional interference harmful to the plaintiff himself, while claiming under the antitrust law is different.

Claiming business interference under the Antitrust Law, the plaintiff needs to prove beyond reasonable doubt that such action by the defendant shows an intentional interference that is harmful to the plaintiff himself, since the provision requires that only those plaintiffs who have suffered antitrust injury can bring a private suit under the Antitrust Law to recover for their losses, and need to show antitrust standing and a competitive injury, spending more time in discovery and more expenses on economic expert testimony in order to meet the requirements.

Therefore, claiming business interference under the Law of Torts is easier to prove than antitrust claims. Below is an example of a case that succeeded in claiming business interference under the Law of Torts and failed the claim under the Antitrust Law.

## 3.2 EU Competition Law

### 3.2.1 Historical and background of 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 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.[108]

The Union Law is a separate legal order which applies throughout the European Union, that both governments and private citizens, including companies that operate within the Union, are required to comply with.[109] An establishment of the European Union has been set in Article 1 of the TEU. This has been amended by the Treaty of Lisbon, which replaced the European Community by the European Union.

The common provisions, Article 1 of TEU (as amended by the Treaty of Lisbon in 2007), established the European Union states:

> "By this Treaty, THE HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION, hereinafter called "the Union", on which the Member States confer Competences to attain objectives they have in common

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[108] European Union, "*EU treaties*," (September 2015). *available at* http://europa.eu/eu-law/decision-making/treaties/index_en.htm.

[109] *Supra* note 4, 22.

> This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.
>
> The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as "the Treaties"). Those two Treaties shall have the same legal value. The Union shall replace and succeed the European Community."

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. This intention appeared in many articles, including the protocol in Article 3 of the TEU which states:

> "5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, *free and fair trade*, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter."

Protocol No. 27 on the internal market and competition also concerns protection of competition in the internal market from being distorted as states that:

> "The High Contracting Parties,
> Considering that the internal market as set out in Article 3 of the Treaty on European Union includes a system *ensuring that competition is not distorted*…This protocol shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union"

The Competition Law of the European Union, as mentioned earlier, began with the Treaty of Rome to support and maintain the competitive market environment of an internal market, and protect it from anticompetitive behavior from companies within the union, including national authorities. To achieve this purpose, the Union is empowered to have exclusive competence to establish the competition rules for the internal market in order to maintain free and fair market as set out in Article 3 of the TFEU that:

> "1.The Union shall have exclusive competence in the following areas:
> …
> (b) the establishing of the competition rules necessary for the functioning of the internal market…
> (e) common commercial policy…
> 2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope."

The Treaty of Rome's main provisions concern prohibited conducts in Article 85, which prohibit anticompetitive agreements and abuse of dominant position in Article 86 with the objective of protection of competitors in the marketplace, even at the

expense of market efficiencies and consumers.[110] In 2009, an establishment of TFEU renumbered the Articles of competition rules under the Treaty of Rome. The main provisions are Articles 101 and Article 102 TFEU (formerly Articles 85 and Article 86 TEC), which govern undertakings in both public and private sectors.

As mentioned earlier, TFEU Article 101 and Article 102 are the main provisions which prohibit agreements on anticompetitive agreements and abuse of dominant position. Article 101 prohibited any agreement that have as their object or effect to prevent, restrict or distort competition, and Article 102 prohibited any abusive conduct by dominance undertakings.[111] This research will summarize Article 101, since it is one of main provisions, and will focus on Article 102, which are related to the study topic of this research.

Article 101 TFEU (previously Article 81 TEC) prohibits any agreements between two or more operators in both horizontal and vertical levels that intends prevention, restriction or distortion of competition, for example, price fixing, control and limit number of production, cartel. Any agreements prohibited under this article will be automatically void.

Article 101 states:

> "1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

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[110] Cseres, Katalin Judit, "*Competition law and consumer protection,*" **Kluwer Law International**, 291-293 (2005).

[111] Peter R. Willis, **Introduction to EU Competition Law**,1 (2005).

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;
- any decision or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

### 3.2.2 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.

#### 3.2.2.1 Article 102 TFEU (previously Article 82 TEC)

Article 102 focuses on protecting competition and consumer benefit from competition through lower prices, choice, better quality, innovation, and not simply protecting competitors. The Article prohibits exclusionary conduct by undertaking(s)[112] that hold a dominant position in relevant markets.

Article 102 states:

> "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.
>
> Such abuse may, in particular, consist in:
>
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> (b) limiting production, markets or technical development to the prejudice of consumers;
>
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts."

[112] both single dominance and collective or jointly dominance.

**3.2.2.2 Application of Article 102 (previously Article 82 TEC)**

Article 102 concerns abuse of dominant position, which poses restrictions in competition that may impact trade between member states and elements required for proving abuse, and elements to apply Article 102. Any abuse conduct by one or more undertakings is prohibited.

In 2009, the Commission has announced the guideline for enforcing Article 82,[113] "Guidance on the Commission's enforcement priorities in Applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings"[114], herein after called "the Guideline", with an intention to provide a greater clarity on how to apply Article 82 to undertakings dominant's exclusionary conduct for the Commission and those undertakings to know their scope of action as mentioned in the notice that "it is intended to provide greater clarity and predictability as regards the general framework of analysis which the Commission employs in determining whether it should pursue cases concerning various forms of exclusionary conduct and to help undertakings better access whether certain behavior is likely to result in intervention by the Commission under Article 82."[115]

In order to apply Article 102, all three of the following elements should be present:

(1) Act done by one or more undertaking of a dominant position;
(2) An abuse of a dominant position; and

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[113] former of Article 102 and the Guideline is still in use.

[114] Information from European Union Institutions and Bodies, "*Communication from the Commission: Guidance on the Commission's enforcement priorities in Applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings,"* **Official Journal of the European Union,** C 45/7 (24 February 2009). *available at* http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52009XC0224(01).

[115] *Supra* note 114.

(3) The possibility that trade between member states may be affected.

**(1) Dominant Position**

The basic notion on this Article is that a dominant company always has a special responsibility to ensure that its conduct does not and will not distort competition, therefore, being in a dominant position itself is not illegal unless unlawful conduct is undertaken.[116] The scope of the dominant's special responsibility will depend on how high a percentage of market shares the dominant company holds,[117] as mentioned in the guideline, that "holding a dominant position confers a special responsibility on the undertaking concerned, the scope of which must be considered in the light of the specific circumstances of each case".[118] This is a reference to the power of the dominant that is able to set a price, control quantity and quality of products in the market, or even eliminate other rivals, which will affect the market competition system.

A definition of the dominant position was established by the the European Court of Justice (ECJ) through the first case of abuse of dominant position in the year 1979, which is used to this day:

> "The dominant position relates to a position of economic strength enjoyed by an *undertaking*, which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers. Such a position does not preclude some competition, which it does where there is a monopoly or quasi-monopoly, but enables the undertaking,

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[116] European Commission, "*Competition: Antitrust procedures in abuse of dominance*," (July 2013). *available at* http://ec.europa.eu/competition/antitrust/procedures_102_en.html.

[117] *Supra* note 111, 131.

[118] *Supra* note 114.

> which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment."[119]

"Undertakings" in this section is not defined clearly; however, the ECJ has given a definition through the interpretation in the case Höfner and Elser v. Macrotron: "the concept of an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed."[120] Two years later, further interpretation of "undertakings" was given in Poucet v. Assurances Generales de France and Pistre [121] by the ECJ: "there was a distinction to be made based on whether the body concerned was engaged in economic activity as such, or whether, as in this case, the body pursued activities on the basis of solidarity and with no intention to make a profit."[122] According to both interpretations, it can be presumed that anyone – common person, legal person or even public bodies – could fall under this provision if they have engaged in economic activity.

Dominant position in the EC differs from economists' concept of power over price that it is a legal concept developed by the Commission and the courts. In virtually all its judgments in the case of United Brands, the ECJ has defined a dominant position as "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving in the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers."[123]

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[119] Hoffmann-La Roche v. Commission, [1979] ECR 461.

[120] Höfner and Elser v. Macrotron, [1991] ECR I- 1979.

[121] Poucet v. Assurances Generales de France and Pistre, [1993] ECR I-637.

[122] Lydia Scholz, "*The ECJ's interpretation of an undertaking*," **Wikis De Freien Universität Berlin** (2012).

[123] United Brands v. Commission, [1978] ECR 207.

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 barrier. However, to access dominance power depends on its factors, for example, technical knowledge and expertise, access to raw materials and capital, which courts will consider on a case-by-case basis.

Examples of relevant factors used for accessing dominance are market shares, price elasticity of demand, profitability measurement, barriers to entry, exit or expansion, structural factors, and behaviors. The Commission notice also gave examples of behavior that are usually found in cases on abuse of dominant position: "requiring that buyers purchase all units of a particular product only from the dominant company (exclusive purchasing), setting prices at a loss-making level (predation), refusing to supply input indispensable for competition in an ancillary market, charging excessive prices."[124]

Using an application under Article 102, abuse of dominant position shall be first accessing a dominant position. In order to recognize whether the undertaking concerned is dominant or not, the ECJ has given the following key factors:

(a) "the relevant market; and
(b) the relevant undertaking's position of economic strength on that market"[125]

**(a) The relevant market**

Because the dominant position can only exist in a particular market, therefore, the relevant market shall be first examined. The main purpose to classify the relevant

[124] *Supra* note 116.

[125] *Supra* note 111, 6.

market is to identify the competitive constraint system that the undertakings are involved in, which include demand and supply substitutability and potential competition. The EC Commission has announced the guidance, known as "Commission Notice" to give definitions and guidelines of relevant markets before accessing dominance[126] as mentioned in the Notice that:

> "Market definition is a tool to identify and define the boundaries of competition between firms. In serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face."

The notice explains the method used by the Commission to define a relevant market on a case-by-case basis. The relevant product market concerns what the consumer chooses for each product or service due to its characteristics, price, and intention to use. The geographic market concerns an area where an undertaking and its competitors are based, and where a given product is homogeneous. The Commission provides definition of relevant market as follows:

> "The relevant market combines the product market and the geographic market, defined as follows:
>
> (1) a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use;
> (2) a relevant geographic market comprises the area in which the firms concerned are involved in the supply of products or services and in

[126] *Supra* note 16.

> which the conditions of competition are sufficiently homogeneous."[127]

However, it is not easy to define a relevant market, since several factors apply as the Commission notice stated, "the concept of relevant market is different from other definitions of market often used in other contexts. For instance, companies often use the term market to refer to the area where it sells its products or to refer broadly to the industry or sector where it belongs."[128]

**(b) Position of economic strength**

The step after defining the relevant market, is the position of economic strength or market position of the mentioned undertaking in the relevant market. There are several factors to define a dominant position. In the guidelines, the Commission concluded three factors for finding and accessing the dominant position of undertakings as follows:

> (a) "constraints imposed by the existing supplies from, and the position on the market of, actual competitors (the market position of the dominant undertaking and its competitors);
> (b) constraints imposed by the credible treat of future expansion by actual competitors or entry by potential competitors (expansion and entry); and
> (c) constraints imposed by the bargaining strength of the undertaking's customers (countervailing buyer power)"[129]

First, in market position, the Commission will consider the percentage of market shares. The Commission suggests that if the undertaking has market shares less than 40 percent, then it is unlikely to be found holding dominant power, unless other

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[127] *Supra* note 114.

[128] *Supra* note 114.

[129] *Supra* note 114.

significant factors are found, for example, a factor on capacity limitations.[130] On the other hand, if the undertaking has market shares over 50 percent, then it will be presumed to hold a dominant position, and if the undertaking has market shares more than 75 percent, it will be found to be dominant on the basis of its market share alone. The lowest market shares that the Commission has established was 39.7 percent[131] in the case of British Airways v. Commission.[132] Sometimes, an undertaking succeeds in accessing dominant position, but only for a short period, and loses market shares to other competitors; the ECJ will view this as highly competitive. Therefore, the ECJ held in case Companie Maritime Belge v. Commission that "holding a high market share for a period of over three years is sufficient to be considered relevant."[133] However, these are not precise rules. When it comes with a different set of circumstances, the court will consider others factors along with the number of market shares, such as an ability to control price or quantity of products of the mentioned undertaking, consumers' power to buy, market barriers or ability to enter or exit of other competitors in the relevant market.

Second is expansion or entry. The Commission found that an expansion has the potential to impact other rivals in the same market, or others who wish to enter the market. Dominance undertakings could increase or control prices to create a market barrier. There are various forms of barriers, for example, legal barrier, barrier on access to resources, business or sales network.

Third, countervailing buyer power will be considered based on the outcome of consumers' view through their power to bargain. In the existing market situation, it will reflect well on consumers' demand and ability to switch quickly to other products or services instead of products or services of the dominant when the dominant

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[130] *Supra* note 114.

[131] *Supra* note 111, 124.

[132] British Airways plc v. Commission, [2004] 4 CMLR 19.

[133] Companie Maritime Belge v. Commission, [1996] ECR II-1201.

increases prices or reduces quantities. However, there is a limit when consumers are shielded from market power, then, this factor is not necessary to be considered.

**(2) Joint or collective dominance**

The provisions of Article 102 on abuse of dominant position, also prohibited a joint dominance by two or more undertakings. A group of undertakings together may acquire a dominant position. To establish the connection between joint parties that enjoyed a dominant position, economic links or links in law shall be proved, such as a link of ownership, contract or concerted.[134] However, only links in law may not be enough to prove such joint or collective dominance; other connecting factors need to be proven together as well, as the EJC stated in the case Companie Maritime Belge v. Commission on applying the test of collective dominance that:

> "The existence of a collective dominant position may therefore flow from the nature and terms of an agreement, from the way in which it is implemented and, consequently, from the *links or factors* which give rise to a connection between undertakings which result from it. Nevertheless, the existence of an agreement or other (links in law) is not indispensable to finding of a collective dominant position: such a finding may be based on other connecting factors and would depend on an economic assessment and, in particular, on an assessment of the structure of the market in question"[135]

There are three elements that need to be met in order to prove collective or joint dominance:

(a) an undertaking must be by independent economic entities;

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[134] Valentine Korah, **An Introductory Guide to EC Competition Law and Practice**, 124 (9th ed. 2007).

[135] Companie Maritime Belge v. Commission, [2000] ECR I9297.

(b) two or more undertakings are bound by economic links, legal links, or factors; and

(c) Undertakings must together hold a dominant position.

The three elements above are referred to in order to investigating whether firms in question are collective or joint dominance, examining both entities' position. If the entities are found to be a single economic unit, they will be considered as one undertaking and will not fall under this part of the provisions.

There must be a sign showing a connection or relation between undertakings –a link, economic links, legal links, or factors showing a relationship or connection between collective dominance, for example, business relationships, contracts, agreements, license, cross-shareholdings, or sharing of a common infrastructure. Simple examples are a subsidiary and its parent company which mostly will be presumed as a collective dominant if a subsidiary abuses dominant position due to their business relation and its single policy, or in case of two large firms in a relevant market, jointly by a joint venture agreement to deter new entrants, or in cases of a merger between two competitors, in order to reach a dominant position by controlling price or quantity of product in the market.

Factors to identify the position of economic strength are most likely to a have single dominant position that involve first finding the relevant market, then investigating a dominant position. The questioned undertakings must together hold a dominant position, meaning that undertakings will be identified in their position of economic strength together. For example, in a relevant market, if Company A holds 25 percent of market shares and Company B holds 20 percent of market shares alone, it will not be presumed as a dominant position. However, if they agree to adopt the same conduct, which could be considered an abusive conduct, their percentage of shares will be merged when calculating the percentage of dominant position. Therefore, in this example, Company A and Company B are together in a dominant position, and their market shares are 45 percent.

**(3) An abusive conduct**

Merely holding a dominant position will not be found illegal unless that position is abused. The ECJ has mentioned the concept of abuse of dominant position in the case Hoffman-La Roche, which says "methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."[136]

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, because it is very difficult to have a specific provision that could cover all improper conducts. Provisions on Article 102 (a)-(d) are only examples of such conducts.[137] Basically, the courts will consider under the notion of the Competition Law whether the conduct in question harms the competition environment in the market, for example, causing other competitors to be eliminated from the market, or harm consumer benefit by raising prices or providing less choices. However, harm from abusive conduct is not always required in certain markets; it may also occur in the related market if it is sufficiently connected with the market where the company is dominant.[138] The subject of critical consideration of conduct prohibited under Article 102 is a topic that has been widely discussed. Therefore, the Guideline was announced to provide greater clarity on abusive exclusionary conduct by dominant undertakings. In this Guideline, the Commission announced factors required for considering abusive exclusionary conduct concluded from previous cases and also a specific guideline for specific forms of abuse that are most common.

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[136] *Supra* note 119.

[137] Mark R. Joelson, **An International Antitrust Primer: A Guide to the Operation of United States, European Union and Other Key Competition Laws in the Global Economy,** 374 (3rd ed. 2006).

[138] *Supra* note 111, 131.

In the Guideline, the Commission announced general factors to be inquired when alleging abusive conduct as follows:

(a) "the position of the dominant undertaking;
(b) the conditions on the relevant market;
(c) the position of the dominant undertaking's competitors;
(d) the position of the customers or input suppliers;
(e) the extent of the allegedly abusive conduct;
(f) possible evidence of actual foreclosure; and
(g) direct evidence of any exclusionary strategy."[139]

In proving whether a conduct by dominance undertaking is an exclusionary conduct, seven general factors will be used. The courts will use these factors to consider, together with more specific factors, certain types of exclusionary conduct or other appropriate ones on a case-by-case basis.

Abusive prices by dominance undertakings is an abusive conduct found most often and enforced under Article 102, albeit not specifically mentioned. There are many forms price-based exclusionary conduct which affect the market system or consumer benefits: unfair and excessive pricing, margin squeezing, predatory pricing, cross-subsidization, discriminatory pricing, loyalty-inducing pricing, pricing practices.[140] The Commission also gives specific forms of abuse in the Guideline on exclusive dealing, tying and bundling, and predation refusal to supply and margin squeeze.[141]

An objective justified behavior is also a factor to be considered. The courts have given two examples of objective justified behavior – first is a legitimate public interest objective, and second is efficiency gains that outweigh alleged anti-

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[139] *Supra* note 114.

[140] *Supra* note 111,134-138.

[141] *Supra* note 114.

competitive effects.[142] An interesting study by Peter R. Wills concluded three general categories of abuse separated by behavior, which relate to wrongdoer intention and an outcome of such action as follows:

(a) "behavior that establish or increase market power;
(b) behavior that entrench market power; and
(c) behavior that exploit market power."[143]

Predatory pricing is a general example for "behavior that establish increase market power", where dominance undertakings try to reduce the competitive environment by taking control on the price to eliminate its rivals or any other new face to enter the market for the purpose of increasing its own market power. In a significant period, it may tie consumers to stick with the dominance company. Loyalty bonus is one conduct that dominance undertakings use for "entrenching market power". Excessive pricing, such as unreasonable prices, is an example of "behavior that exploits market power.

### 3.2.3 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.[144]

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

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[142] *Supra* note 111,132.

[143] *Supra* note 111,10.

[144] *Supra* note 9, 25-26.

law provisions under Article 102 as an abusive dominant position. According to the study above, three basic elements shall be alleged as follows:

(a) act done by one or more dominance undertakings;
(b) the action is abuse of the dominant position under Article 102; and
(c) impact to competition in the market.

An application of Article 102 required a dominant position, therefore, it shall first consider whether such undertaking(s) hold a dominant position. If undertakings do not hold a dominant position, then it will not fall under this Article. Second, to prove whether the action done by dominant undertakings is a conduct prohibited under Article 102, such conduct must have a behavior that establishes or increases market power, or entrenches or exploits market power. Third, the outcome impact to competition in the market is not just on a competitor, for example, increasing barriers to entry or obstructing or interfering with the working of market mechanism.

Referring to the three basic elements above, 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 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 competitor, then it will not fall under the Competition Law.

**3.3 Comparison and summary**

Competition Laws in the US and EU are implemented through a dual enforcement system.[145] Both the US and EU have well-developed competition policies and

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[145] *Supra* note 52, 18.

practices against anticompetitive behaviors. Same as other Competition Laws over the world, the US Antitrust Law and the EU Competition Law have the same objectives – to maintain a fair and free market by promoting a competitive environment in the market, therefore benefiting consumers.

However, there are a few differences between both systems. In the Fordham International Law Journal, Barry E. Hawk and Laraine L. Laudati summarized that: "The EU has an administrative system for antitrust enforcement, in which companies are penalized with fines while the US antitrust enforcement is based on criminal law, with financial and custodial penalties against individuals."[146] This is not only an administrative system, but also the nature of the governed market. The United States has a very high competitive market, but the market size scale is a one-nation market, while the European Union consists of various nations and therefore, is wider and bigger that the United States. That is why the United States pays attention to monopoly, while the European Union prioritizes dominant power. Due to the difficulty in distinguishing conduct that could be infringed by the Community courts, kinds of conduct that would not infringe US Antitrust Law may infringe under EC Competition Law; especially recently, when the Commission seems concerned about the interest of a trader entering a market of his choice, and consumers' interest.

Business interference of the US and EU can be found on the grounds of tortious interference under the Law of Torts when it impacts an individual or private benefit. On the other hand, if such interference impacts competitors in the market or market structure or consumer welfare, then the Competition Law will step forward. The difference between the US Antitrust Law and EU Competition Law is that the US Antitrust Law will focus on monopoly or anyone likely to reach monopoly, while EU focuses on dominance power.

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[146] Gregor Erbach, "*EU and US competition policies Similar objectives, different approaches,"* **Members' Research Service,** EPRS- European Parliamentary Research Service (March 2014).

# CHAPTER 4
# BUSINESS INTERFERENCE
# UNDER THE TRADE COMPETITION ACT 1999

## 4.1 Historical and background of Thai Competition Law

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 through[147] 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.

### 4.1.1 Objective and protection

The objective of the TCA has been defined as follows:

(a) Separated provisions of price fixing and anti-competition,
(b) Systemize provisions of anti-competition and restraint of trade,
(c) Promote fair and free trade with competitive environment, and

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

(d) Prevent an unfair competition practices. [148]

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 rather than an individual competitor.[149] 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.

Core provisions of the Trade Competition Act 1999 are to control abuse of dominance through Section 25, merger of business through Section 26, restraint of trade by business operators through Section 27, and unfair practice through Section 29.

The Act applies to all types of business operations and business activities, with the exception of state enterprises under the law on budgetary procedure, central, provincial or local administration, group of farmers, cooperative or cooperative societies, and business prescribed under the Ministerial Regulation as provided in Section 3[150] and Section 4.[151]

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

[149] Sakda Thanitcul, "*Competition Law in Thailand: A prelimary Anlysis,"* **Washington University Global Studies law Review,** Vol. 1, 174 (2002).

[150] TCA Section 3

> "Business operator means a distributor, producer for distribution, orderer or importer into the Kingdom for distribution or purchaser for production or redistribution of goods or a service provider in the course of business."

### 4.1.2 Enforcement

The Trade Competition Act is enforced by the Trade Competition Commission under the Ministry of Commerce. The commission consists of the Minister of Commerce, Permanent-Secretary for Ministry of Commerce, Permanent-Secretary for the Ministry of Finance, qualified persons in the fields of law, economics, commerce, business administration or public administration, and the Secretary-General, with conditions as prescribed in the Ministerial Regulation as stated in Section 6,[152] and

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[151] TCA Section 4

"This Act shall not apply to the act of:

(1) Central administration, provincial administration or local administration;
(2) State enterprises under the law on budgetary procedure;
(3) Farmer's groups, co-operatives or co-operative societies recognized by law and having as their object the operation of business for the benefit of the occupation of farmers;
(4) Business prescribed by the Ministerial Regulation, which may provide for exemption from the application of this Act in whole or only in respect of any particular provision thereof."

[152] TCA Section 6

"There shall be the Competition Commission consisting of the Minister of Commerce as a Chairman, Permanent-Secretary for Ministry of Commerce as Vice-Chairman, Permanent-Secretary for the Ministry of Finance, and not less than eight, but not more than twelve, qualified persons with knowledge and experience in law, economics, commerce, business administration or public administration appointed by the Council of Ministers, provided that at least on-half of whom shall be appointed from qualified members in the private sector, as members and the Secretary-General shall be a member and Secretary.

shall not be a political official, holder of a political position, executive member or holder of a position with the responsibility in the administration of a political party, as stated in Section 7.[153]

The Commission is responsible for enforcing regulations required by law, such as making recommendations to issue regulations, prescribing additional rules such as criteria for being in a dominant position, issuing notifications and conditions for the application for permission to merge businesses, considering complaints, and taking criminal proceedings as requested in the complaint as stated in Section 8.[154]

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The appointment of the qualified persons under paragraph one shall be in accordance with the rules and procedure prescribed in the Ministerial Regulation."

[153] TCA Section 7

"A qualified person appointed as member must not be a political official, holder of a political position, executive member or holder of a position with the responsibility in the administration of a political party."

[154] TCA Section 8

"The Commission shall have the powers and duties as follows:

(1) to make recommendations to the Minister with regard to the issuance of Ministerial Regulations under this Act;
(2) to issue Notifications prescribing market share and sales volume of any business by reference to which a business operator is deemed to have market domination;
(3) to consider complaints under Section 18(5);
(4) to prescribe rules concerning the collection and the taking of goods as samples for the purposes of examination or analysis under Section 19(3);
(5) to issue Notifications prescribing the market share, sales volume, amount of capital, number of shares, or amount of assets under Section 26 Paragraph two;

**4.2 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 as follows:

Section 25 states:

> "A business operator having market domination shall not act in any of following manners:
> (1) Unreasonably fixing or maintaining purchasing or selling prices of goods or fees for services;

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(6) to give instructions under Section 30 and Section 31 for the suspension, cessation, correction or variation of activities by a business operator;
(7) to issue Notifications prescribing the form, rules, procedure and conditions for an application for permission to merge businesses or jointly reduce and restrict competition under Section 35;
(8) to consider an application for permission to merge businesses or jointly reduce or restrict competition submitted under Section 35;
(9) to invite any person to give statements of fact, explanations, advice or opinions;
(10) to monitor and accelerate an inquiry sub-committee in the conduct of an inquiry of offences under this Act;
(11) to prescribe rules for the performance of work of the competent officials for the purpose of the execution of this Act;
(12) to perform other acts prescribed by the law to be powers and duties of the Commission;
(13) to consider taking criminal proceedings as in the complaint lodged by the injured person under Section 55."

(2) Unreasonably fixing compulsory conditions, directly or indirectly, requiring other business operators who are his or her customers to restrict services, production, purchase or distribution of goods, or restrict opportunities in purchasing or selling goods, receiving or providing services or obtaining credits from other business operators;

(3) Suspending, reducing or restricting services, production, purchase, distribution, deliveries or importation without justifiable reasons, or destroying or causing damage to goods in order to reduce the quantity to be lower than the market demand;

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

**4.2.1 Application of Section 25**

According to Section 25, there are two criteria required for the application of the provisions, which are as follows:

(1) An act done by one or more persons who has/have reach "dominant position" under Section 3 and standards designated by the Trade Competition Commission, and

(2) The act is against any of the provisions prescribed under Section 25 (1) – (4).

**4.2.1.1 Dominant position and Relevant market**

Trade Competition Act 1999 defines business operator and business operator with market domination in Section 3.

TCA Section 3 states:

"*business operator* means a distributor, producer for distribution, orderer or importer into the Kingdom for distribution or purchaser for production or redistribution of goods or a service provider in the course of business."

> "*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, as summarized below:

1. "Business operator who has market share and total sales volume reach following criteria will be deemed business operator with market dominant:
   (1) A business operator in the market of a goods or a service has net previous year market share over fifty percent and sales volume above 1,000 million baht, or
   (2) The three largest business operators in the market of a goods or a service who altogether had over seventy percent of market shares and total sales volume not less than 1,000 million baht.

   The exception is for a business operator with a market share less than ten percent or turnover less than 1,000 million baht in the previous year"[155]

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

[155] The Notification February, 8 2007.

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 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. In case the claim has one defendant, clause (1) shall be applied. In case claimed actions are done jointly by more than one business operator, clause (2) shall be considered.

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. The regulations and its guidelines mentioned above show that the intention of Section 25 is to prevent 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.

### 4.2.2 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."

According to the provisions, it can be interpreted that the law requires following elements to be met:

(1) Actor shall be a business operator(s) who is in a dominant position;
(2) Intervening with other business operation; and
(3) 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. It only has a short definition that the Commission announced in 2009:[156]

> "Intervening in the operation of business of other persons without justifiable reasons mean unfair interfere other business operation without general commercial reason and caused market barrier or reduce efficiency of other competitors, for example, interference or defame other business operation by using any action with expectation on unfair price, quantity and quality of goods or services."

**4.3 Analysis of the problem on application of business interference**

The study so far in this thesis found that there are no studies 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 the following circumstances:

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[156] Trade competition commission, "*Guide line for Section 25 of the Trade Competition Law B.E. 2542: Abuse of Dominant,"* 11 (2009). *available at* http://otcc.dit.go.th/wp-content/uploads/2015/07/Guidelines-under-Section-25.pdf

(1) No court precedent application of this provision;

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

(2) 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.

This case did not succeeding 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 421[157] of the Civil Code. With regard to claiming under the Trade Competition Act, the Court has maintained silence.

This conduct, in my opinion, cannot count as business interference under TCA Section 25(4), because it neither impacts the competition of the market nor consumer

[157] The Thailand Civil and Commercial Code Section 421:

> "The exercise of a right which can only have the purpose of causing injury to another person is unlawful."

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

(3) 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.

# CHAPTER 5
# CONCLUSIONS AND RECOMMENDATIONS

## 5.1 Conclusions

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. However, this does not mean that the direction of the protection provisions of the law include consumer or competitors directly; its only target remains to directly protect the market system as a whole. Consumers and competitors are protected indirectly by protecting competition under the Competition Law.

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.[158] However, the core difference is that Competition Law focuses on the importance of competition, while the business Torts

[158] Gary Myers, "*The Differing Treatment of efficiency and competition in Antitrust Law*," **Minnesota Law Review**, Vol. 77:1097: 12 (1993).

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.

**5.2 Recommendations**

As mentioned in Chapter 4, in TCA on business interference provision Section 25(4), since 1999, there has been no court precedent application of this section due to its unclear provisions, which lead to confusion. Besides, as business interference has a criminal sanction and must be proven beyond a reasonable doubt, unclear provisions will be a huge obstruction to the claim. I would like to suggest three points to rectify this:

(1) empower and give responsibility to the Commission to announce guidelines;

Section 8 recently stated the power and duties of the Commission but no provision stating the power and duties on providing guidelines for examining abusive conduct under Section 25, which is unclear and therefore not effective. I would recommend to empowering and giving responsibility to the Trade Competition Commission in order to establish guidelines and any further necessary steps on application of section 25 in section 8.

(2) add basic elements for examining application of business interference under Section 25(4) of the TCA.

Referring to the study in this thesis, I would like to suggest that the Trade Competition law of Thailand should add the following elements to the principle guidelines in order to clarify the application of business interference that Section 25(4) requires to be met.

"(a) the defendant must be a dominant position in the market.

(b) the defendant must have engaged in unjustifiable predatory or exclusionary conduct;

(c) there must be harm to the competition within the defined market, not just to one competitor."

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