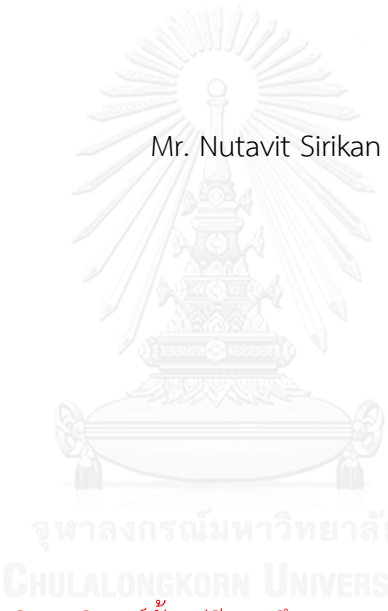
The Experiences of Private Competition Enforcement in the United States, the European Union, Japan, Singapore and Malaysia: Lessons for Thailand

Mr. Nutavit Sirikan



A Thesis Submitted in Partial Fulfillment of the Requirements
for the Degree of Master of Laws Program in Business Law
Faculty of Law
Chulalongkorn University
Academic Year 2016

การศึกษาประสบการณ์การดำเนินคดีแข่งขันทางการค้าโดยเอกชนในประเทศสหรัฐอเมริกา สหภาพยุโรป ญี่ปุ่น สิงคโปร์ และมาเลเซีย: บทเรียนสำหรับประเทศไทย

นายณัฐวิช ศิริกาญจน์

วิทยานิพนธ์นี้เป็นส่วนหนึ่งของการศึกษาตามหลักสูตรปริญญานิติศาสตรมหาบัณฑิต
สาขาวิชากฎหมายธุรกิจ
คณะนิติศาสตร์ จุฬาลงกรณ์มหาวิทยาลัย
ปีการศึกษา 2559

Thesis Title	The Experiences of Private Competition Enforcement in the United States, the European Union, Japan, Singapore and Malaysia: Lessons for Thailand
By	
Field of Study	Business Law
Thesis Advisor	Professor Sakda Thanitcul, Ph.D.

Accepted by the Faculty of Law, Chulalongkorn University in Partial Fulfillment of the Requirements for the Master's Degree

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มาตรา ๔๐ แห่งพระราชบัญญัติการแข่งขันทางการค้า พ.ศ. ๒๕๔๒ ให้สิทธิเอกชนในการดำเนินการฟ้องร้องเรียกค่าเสียหายจากผู้กระทำการฝ่าฝืนบทบัญญัติมาตรา ๒๕, ๒๖, ๒๗, ๒๘ และ ๒๙ อย่างไรก็ตามจากการศึกษาบทบัญญัติว่าด้วยการดำเนินคดีโดยเอกชนในกฎหมายป้องกันการผูกขาดและกฎหมายแข่งขันทางการค้าและคดีตัวอย่างของ ประเทศสหรัฐอเมริกา สหภาพยุโรป ญี่ปุ่น สิงคโปร์ มาเลเซีย พบว่า การเรียกร้องค่าเสียหาย เป็นเพียงสิทธิประการหนึ่งที่เอกชนสามารถเรียกร้องได้

นอกจากนี้ บทบัญญัติ มาตรา ๔๐ แห่งพระราชบัญญัติการแข่งขันทางการค้า พ.ศ. ๒๕๔๒ ยังมีปัญหาสำคัญสองประการเกี่ยวกับการตีความบทบัญญัติ เนื่องจากความคลุมเครือของถ้อยบัญญัติ ประการแรก คือ เอกชนสามารถฟ้องคดีต่อศาลเพื่อเรียกร้องค่าเสียหายได้เองหรือไม่ และ ประการที่สองคือ ภาระการพิสูจน์ของโจทก์

วิทยานิพนธ์นี้ได้เสนอแก้ไขบทบัญญัติมาตรา ๔๐ แห่งพระราชบัญญัติการแข่งขันทางการค้า พ.ศ. ๒๕๔๒ มีความชัดเจน และมีประสิทธิภาพในการบังคับใช้มากยิ่งขึ้น กล่าวคือ โจทก์จะฟ้องคดีเพื่อเรียกค่าเสียหายได้ เมื่อคณะกรรมการแข่งขันทางการค้ามีคำตัดสินว่ามีการกระทำความผิดเกิดขึ้น วิธีนี้จะช่วยลดภาระการพิสูจน์ของโจทก์ ทำให้ให้โจทก์มีโอกาสได้รับการชดเชยมากยิ่งขึ้น นอกจากนี้อายุความในการนำคดีขึ้นสู่ศาล ตามมาตรา ๔๑ สมควรแก้ไขใหม่ ให้สอดคล้องกับการแก้ไขบทบัญญัติมาตรา ๔๐ ดังกล่าว

สาขาวิชา กฎหมายธุรกิจ ลายมือชื่อนิสิต .....

ปีการศึกษา 2559 ลายมือชื่อ อ.ที่ปรึกษาหลัก .....

5786355034 : MAJOR BUSINESS LAW
KEYWORDS: COMPETITION LAW / ANTITRUST LAW / ANTIMONOPOLY LAW / PRIVATE ENFORCEMENT / PRIVATE ACTIONS FOR DAMAGES

NUTAVIT SIRIKAN: The Experiences of Private Competition Enforcement in the United States, the European Union, Japan, Singapore and Malaysia: Lessons for Thailand. ADVISOR: PROF. SAKDA THANITCUL, Ph.D., 201 pp.

Section 40 of Trade Competition Act, B.E. 2452 (1999) entitles private parties to bring claims for damages against violators who violate Sections 25, 26, 27, 28 and 29. However, the experience and study of the provisions on private antitrust/competition enforcement in the selected jurisdictions, namely the United States, the European Union, Japan, Singapore and Malaysia indicates that a claim for damages is one of the means, *inter alia,* of actions that private individuals can employ to enforce the antitrust/competition law.

Moreover, Section 40 of Trade Competition Act, B.E. 2452 (1999) has two critical legal issues regarding the interpretation of the ambiguous wordings thereof. First, it is questionable as to whether private plaintiffs can initiate the claim for damages without any prerequisite. The second issue is related to the application of the law with respect to the standard of proof of the plaintiffs.

This thesis puts forward the new amendment to Section 40 of Trade Competition Act, B.E. 2452 (1999) in order to make the wording clearer and enhance the effectiveness of enforcement. In other words, the decision of the Commission is a prerequisite to the exercise of rights of private claims for damages. This implementation will plausibly ease the burden of proof of the plaintiffs, and increase an opportunity for the plaintiffs to obtain compensation. Furthermore, the statute of limitations provided in Section 41 should also be amended in order that it will be consistent with the new amendment of Section 40 of the Act.

Field of Study: Business Law Student's Signature .....

Academic Year: 2016 Advisor's Signature .....

ACKNOWLEDGEMENTS

My sincere gratitude is extended to my thesis advisor, Professor Dr. Sakda Thanitcul, who provided me with detailed and valuable advice as well as his wholehearted support and devotion. This thesis would not have been brought to completion without his meritorious counselling. My sincere appreciation should also be shown to the other thesis committee members, Lecturer Santichai Santanwanpas and Assistant Professor Dr. Wirote Watinpongpun, who recommended some significant improvements to the contents of this thesis.

I am grateful to the members of staff of the Faculty of Law, Chulalongkorn University, especially Ms. Chompunud Chamchukun and Ms. Pimpanit Siriyasup for substantial assistance in facilitating all relevant processes for the completion of this thesis. In addition, I am obliged to Mr. Frans Middelkoop for his services as an editor, proof-reader and English language advisor. He promptly assisted me even during his holidays. In addition, I must also thank Mr. Vang Phu Tran for his help and responses to several questions about the thesis writing process.

Lastly, my heartfelt thanks must be expressed to my parents, grandmother, aunt and my close friends, Mr. Nakarin Yensuang (Aum), Ms. Suruedee Wayoopagtr (Honey), and Mr. Piya Gosalvitr (Mai) for their considerable encouragement. Without them, this thesis may not have been accomplished.

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CHAPTER I
INTRODUCTION

1. Background

The Thai Competition Act, B.E. 2542 (1999) came into force more than 15 years ago, in order to encourage competition in Thailand, and eliminate unfair trade practices, trade restraints, collusions, cartels, and abuse of market dominance, which through business conducts could result in trade competition barriers and barriers to entry. Thailand has, however, not made any substantial progress in the enforcement of competition law[1]. According to Office of Trade Competition Commission, only 101 claims in total have been lodged to the Office of Trade Competition; nonetheless, none of 101 claims ever made it to court[2] owing primarily to the weak enforcement of the law.

One of the most serious concerns about the private competition enforcement in Thailand is the limitations of the provision. Section 40[3] is the only provision on private action under the Thai Competition Act, B.E. 2542 (1999). Even though the Act entitles private individuals suffering an injury in consequence of the violation of substantive Sections, namely Section 25, Section 26, Section 27, Section 28 or Section 29 to initiate action for claiming damages from the violator in accordance

[1] R. Ian McEwin and Sakda Thanitcul, "Thailand," in *The Political Economy of Competition Law in Asia*, ed. Mark Williams (Cheltenham, UK: Edward Elgar, 2013).

[2] Office of Thai Trade Competition Commission, "Complaints Statistics," http://otcc.dit.go.th/wp-content/uploads/2015/02/Complaintstatistics1.pdf.

[3] Section 40 of Competition Act, B.E. 2542 (1999).

with Section 40, the Act does not grant rights to enforcement other than a claim for damages, such as a request for a court injunction.

On the contrary, the injured person may file a complaint to the Competition Commission in order that the Commission will initiate the investigation into any business conducts in line with the complaint, and may in turn give administrative orders for the suspension, cessation, correction or variation of activities by business operators[4], or the Commission may consider taking criminal proceedings, as they have the same power and duties as an inquiry official under the Thai Criminal Procedure Code,[5] by submitting the file together with an opinion as to whether an order of prosecution or non-prosecution.[6]

The aforesaid private rights and legal proceedings prescribed in the Act may mislead ordinary people into the spurious understanding that private enforcement in the context of competition law naturally refers to a private claim for damages. In fact, antitrust or competition law might have remedial or corrective measures other than damages such as right to seek injunction to cease and desist violated behaviours.

Not only is Section 40 confined to a claim for damages, the wording in Section 40 of The Thai Competition Act, B.E. 2542 (1999) is of vagueness. To elaborate, the injured persons may claim compensation from "the violator" in accordance with the Act. However, it is of predicament for private individuals to exercise their private actions for damages, as the Act has no clear delineation of "violation."

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[4] Section 31 of Competition Act, B.E. 2542 (1999).

[5] Section 15 of Competition Act, B.E. 2542 (1999).

[6] Section 141 or 142 of Civil Procedure Code of Thailand.

It is a preliminary for the injured private individuals to determining whether to abide by the decision of the Trade Competition Commission or Court as a reference to deciding on violated behaviours. Further, provided that the injured persons, pursuant to Section 40, shall abide by the decision of the court, it becomes questionable whether the injured persons should wait until the judgement of the court or court trial has become final or they may commence a lawsuit promptly after the decision of the court of first instance in order to claim damages from the violator.

Based on the issues arising from private competition enforcement provisions, i.e. Section 40, of the Thai Competition Act, B.E. 2542 (1999), it is worth examining the experience of the private enforcement of the foreign countries to prove that private action provision, Section 40, of Thai Competition Act, B.E. 2542 (1999) provides for a mere claim for damages, which is a subset of typical private enforcement.

In this regard, the private enforcement and related case study of the United States and the European Union will be extensively examined as it is claimed that the antitrust and competition laws of both countries dominated competition regimes around the world including Thailand. The competition laws of leading economic countries in Asia, and Thailand's neighbours as well as trade partners, namely Japan, Singapore, and Malaysia should also be surveyed as they share some common features including statements of the objectives of their competition laws and their market-share based presumptions of market dominance. Furthermore, the competition laws of these countries have generally been prioritised as a result of drastic economic growth in the countries.

In addition, the legal issues with regard to the vague wordings of the Section 40 will also be critically analysed, and the resolution on such complications

will be introduced based on the comparative experience-study. This paper will also propose initial amendment to Section 40 and the relevant provisions for the sake of clarity and applicability of the private enforcement under the Trade Competition Act, B.E. 2542 (1999) of Thailand.

2. Thesis Objectives

2.1 To distinguish between common private enforcement in antitrust/competition laws and a private claim for damages under the private action provision, Section 40, of the Thai Competition Act, B.E. 2542 (1999);

2.2 To study the experiences of private enforcement in the US Antitrust law, EU Competition law and the Anti-Monopoly law of Japan, the Competition law of Singapore and Malaysia; and

2.3 To analyse and address the legal issues on Section 40 of Thai Competition Act, B.E. 2543 (1999); and put forward a new amendment to Section 40

3. Thesis Scope

3.1 A mere private enforcement of antitrust and competition laws will be investigated in order to differentiate between common private enforcement and private actions for damages under Section 40;

3.2 The scope of a comparative study will be restricted to US Antitrust law, EU Competition law and the Anti-Monopoly law of Japan, the Competition laws of Singapore, Malaysia and Thailand; and

3.3 Section 40 of the Thai Competition Act, B.E. 2542 (1999) will be systematically examined in order to discuss and address the critical legal issues.

4. Thesis Hypothesis

The private competition enforcement provision of Thai Trade Competition Act, B.E. 2542 (1999); more precisely Section 40, is confined to a private claim for damages, which is one of the means, *inter alia,* of private actions for private individuals to enforce the antitrust/competition law. Further, the wordings of Section 40 of the Act are of ambiguity; thus, the provisions on private competition enforcement and case study of the selected jurisdiction should be analysed and examined in order to put forward the new amendment to Section 40.

5. Thesis Procedure

This thesis is dependent upon documentary research methods as it utilises documents from diverse sources to analyse any particular viewpoint. This research is supposed to be qualitative and exploratory in nature; it is involved in detailed analysis and investigation on the legal conceptual framework: private enforcement in the context of antitrust and competition. Furthermore, this thesis will draw on the study of experiences of private antitrust and competition enforcement across jurisdictions namely the US, the EU, Japan, Singapore and Malaysia to act as models and lessons for Thailand.

The data, to be systematically examined, will be collected from various reliable and authoritative Thai and foreign resources namely books, journal articles, published and unpublished research papers, and online databases such as WestLaw, LexisNexis and Kluwer Competition Law.

6. Benefits of the Thesis

6.1 Individuals will understand that private actions under private fclaim for damages as it is stipulated in Thai Competition Act, B.E. 2542 (1999).

6.2 It is understood that the experience-study of private competition enforcement in the selected jurisdictions will be of significant benefit for the amendment of the private enforcement provision in Thai competition Act, B.E. 2542 (1999) as the distinctive features embodied in the antitrust and competition laws of the selected jurisdictions will be observed and adapted.

6.3 Section 40 will possibly be amended so as to resolve critical issues arising out of its unclarity. It is expected that the new amendment will avail private parties who are adversely affected by violated conducts, thus resulting in the overall strength of competition law enforcement in Thailand

CHAPTER II

HISTORICAL BACKGROUND OF ANTITRUST / COMPETITION AND THE NOTION OF PRIVATE ENFORCEMENT

1. Restrictive Practices of Trade in Ancient Times

Anticompetitive practices could probably have been found since 3000 B.C. in the era of ancient Egypt and Greece, and a couple of centuries B.C. in India. Dating back to the Roman Republic at around 50 B.C.[1], the edict *lex Julia de Annona*[2] was the earliest comprehensive enactment[3] against monopolies and restrictive practices of trade by forestalling and regrating corn or wheat.[4] Subsequently, The Edict of Diocletian in A.D. 301 legislated against the increase in commodity prices, stockpiling goods, the concealing of foodstuffs and man-made scarcity."[5] Following the Edict of Diocletian, the Constitution of Zeno *Lex de Monopoliis*[6] in A.D. 483 was aimed at forbidding monopolies of goods and price fixing[7], which resulted from private monopolies; and eliminating exclusive rights granted by the Emperor.[8]

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[1] Michael Albery, "Restrictive Trade Practices and the Conflict of Law," *Transactions of the Grotius Society* 44 (1958): 130.

[2] Ulpian, D. 48, 12, 2.

[3] K.P. Ewing, *Competition Rules for the 21st Century: Principles from America's Experience* (Kluwer Law International, 2006), 76.

[4] W.L. Burdick, *The Principles of Roman Law and Their Relation to Modern Law* (Lawbook Exchange, Limited, 2004), 685.

[5] K.P. Ewing, *Competition Rules for the 21st Century: Principles from America's Experience*, 76.

[6] Cod. 4, 59.

[7] Simon Majaro, *International Marketing: A Strategic Approach to World Markets* (Routledge, 2012), 127.

[8] K.P. Ewing, *Competition Rules for the 21st Century: Principles from America's Experience*, 77.

2. Competition Legislations in the middle Ages

In Great Britain, the first legislation was in force before the Norman Conquest of England (A.D. 1066), and several laws were later enacted from the thirteenth to seventeenth century.[9] The common goals of the English laws were to establish price control mechanism[10]; and prohibit monopolies by forestalling, regrating and engrossing.[11] In Continental Europe, the *constitutiones juris metallici* was instituted by the King of Bohemia Wenceslas II between 1283 and 1305 to forbid ore traders from entering into agreements to increase ore prices. Then the municipal statutes of Florence of 1322 and 1325 were enacted to bar public monopolies.[12]

After that, the English court decided against restrictive trade agreement on *Dyer's Case* in 1414. The Court "denied the collection on a bond for John Dyer's breach of his agreement not to use his art of a dyer's craft within the town ... for half a year"[13] Since then, the judicial principles were gradually developed, and were later legislated in the form of statutes such as the Statute of Monopolies adopted in 1624.[14] During the first half of the sixteenth century, Germany passed the laws against practices akin to forestalling, engrossing and exclusive dealing. Laws against monopolies and

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[9] Ibid., 77.

[10] Damien Geradin, Anne Layne-Farrar, and Nicolas Petit, *Eu Competition Law and Economics* (Oxford University Press, 2012), 13.

[11] K.P. Ewing, *Competition Rules for the 21st Century: Principles from America's Experience*, 77.

[12] See Footnote 61, Damien Geradin, Anne Layne-Farrar, and Nicolas Petit, *EU Competition Law and Economics*, 13.

[13] Ernest Gellhorn, William E. Kovaic, and Stephen Calkins, *Antitrust Law and Economics in a Nutshell*, 5th ed., Nutshell Series (West Academic Publishing, 2004), 5.

[14] Anestis S. Papadopoulos, *The International Dimension of Eu Competition Law and Policy* (Cambridge University Press, 2010), 7.

contracts in restraint of trade were also enacted by the Emperor Charles V of Holy Roman Empire and Francis I of France.[15]

The emergence of the notion of market economy introduced by Adam Smith and the development of industrialisation empowered the domination of liberalism in England, and also consequent development of competition law and the enactment of several statutes in Continental Europe.[16]

3. Antitrust / Competition Law in Modern Times

As of 2015, an approximate number of 130 competition law systems have existed in the world.[17] Passed into law by Canada, the first competition statute in the modern era was the Act for the Prevention and Suppression of Combinations formed in Restraint of Trade of 1889[18] which criminalised the conspiracy to restrict a commodity supply or increase the prices.[19] One year later, 1890, the United States enacted *the Sherman Act* with support from both the Democratic and Republican Parties.[20] This enactment was the commencement of the modern US antitrust laws,

[15] K.P. Ewing, *Competition Rules for the 21st Century: Principles from America's Experience*, 80.

[16] Anestis S. Papadopoulos, The International Dimension of EU Competition Law and Policy, 8.

[17] Richard Whish and David Bailey, *Competition Law* (Oxford University Press, 2015), 1.

[18] Anestis S. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, 9-10.

[19] Thomas W. Ross, "Introduction: The Evolution of Competition Law in Canada," *Review of Industrial Organization* 13, no. 1/2 (1998): 3.

[20] Lawrence A Sullivan and Wolfgang Fikentscher, "On the Growth of the Antitrust Idea," *Berkeley J. Int'l L.* 16 (1998): 200.

which are viewed as an influential model for the EC[21] and for competition laws in numerous jurisdictions to pursue or study.[22]

This Section will briefly outline the history and development of antitrust and competition laws primarily in the selected jurisdictions, the US, the EU, Japan, Singapore and Thailand.

3.1 The US Antitrust Laws

The US Antitrust laws, were understood to be the English common law legacies[23] as they were derived from the common law principles which aimed to contend with restraint of trade and monopoly.

> ... in the second half of the Nineteenth century, the development of modern transport (railway and internal combustion engine) and telecommunications (telegraph and telephone) induced US firms ... to operate across several regions of the US territory, so as to take advantage of economies of scale[24]

The level of competition in US products and services markets also soared as a result of the second industrial revolution.[25]

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[21] Ibid., 200-09.

[22] David J. Gerber, *Global Competition: Law, Markets, and Globalization* (OUP Oxford, 2012), 121.

[23] Thomas E. Sullivan, Herbert Hovenkamp, and Howard A. Shelanski, *Antitrust Law, Policy, and Procedure : Cases, Materials, Problems*, 6th ed. (Newark, New Jersey: LexisNexis, 2009), 12-13.

[24] Damien Geradin, Anne Layne-Farrar, and Nicolas Petit, *EU Competition Law and Economics*, 14.

[25] Ibid., 14.

Due to the high competitiveness from continuous entries by new competitors, the large firms attempted to limit competition by cooperating with their rivals to form pools and trusts,[26] which refer to "legal organisations in which several independent firms of the same sector cooperate to determine their commercial policies".[27]Trusts were legally challenged as they represented unreasonable restraints of trade and unlawful monopolies, and created barriers to entry.[28]

It seems that trust arrangement was first formed in railroad business,[29] which dramatically escalated in the period from 1865 to 1890, leading to the development of anticompetitive practices. [30] To expound, railroads fetched discriminatory prices by inflating rates where they had monopolies[31] so as to subsidise rates for more competitive routes, thus contributing to monopoly pricing and eventually developed into pooling agreements for the purpose of fixing rail rates.[32]

In the 1880s and 1890s, there were plentiful large and national trusts including the Standard Oil Trusts (1882), the American Cotton Trust (1884), the National Linseed Oil Trust (1885), the Sugar Trust (1887), the Whisky Trust (1887).[33] The well-known Standard Oil Trust illuminated the inadequacy of the old common

[26] Anestis S. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, 9-10.

[27] Damien Geradin, Anne Layne-Farrar, and Nicolas Petit, EU Competition Law and Economics, 14.

[28] Ernest Gellhorn, William E. Kovaic, and Stephen Calkins, *Antitrust Law and Economics in a Nutshell*, 19.

[29] Anestis S. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, 10.

[30] Thomas E. Sullivan, Herbert Hovenkamp, and Howard A. Shelanski*, Antitrust Law, Policy, and Procedure : Cases, Materials, Problems*, 20.

[31] Ernest Gellhorn, William E. Kovaic, and Stephen Calkins, *Antitrust Law and Economics in a Nutshell*, 17-18.

[32] Thomas E. Sullivan, Herbert Hovenkamp, and Howard A. Shelanski, *Antitrust Law, Policy, and Procedure : Cases, Materials, Problems, 20.*

[33] Ibid.

law principles to provide safeguard to consumers. In other words, traditional common law jurisprudence was unable to govern some anticompetitive arrangements and the growth of abuses of market power.[34]

Because of the power of trusts to raise prices and limit output, the Sherman Act, introduced in the Senate in 1888 by Senator John Sherman of Ohio[35], was enacted in 1890 with the congressional aims "to enable consumers to purchase products at competitive prices;" to prevent "unfairly transforming consumer's wealth into monopoly profits;" to enhance "a competitive economy to encourage the greater efficiencies resulting from competition;" "to decentralise economic, social and political decision making to ensure that narrow private interests would be unable to override the public good flowing from free competition;" and "[to curb] the social and political power of large corporations and [to encourage] opportunities for small entrepreneurs to compete."[36]

The early interpretation of the Sherman Act engendered critical controversy both inside and outside the Court.[37] The U.S. Supreme Court decision of ***E. C. Knight case***[38] indicated the resultant toleration of merger arrangements, thus resulting in the proliferation of dominant enterprises, such as American Tobacco, Du Pont, Eastman Kodak, General Electric, International Harvester, Standard Oil of New

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[34] Ernest Gellhorn, William E. Kovaic, and Stephen Calkins, *Antitrust Law and Economics in a Nutshell*, 17-18.

[35] Thomas E. Sullivan, Herbert Hovenkamp, and Howard A. Shelanski, *Antitrust Law, Policy, and Procedure : Cases, Materials, Problems*, 21.

[36] Robert H. Lande, "Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged," *Hastings Lj* 34 (1982): 106.

[37] Ernest Gellhorn, William E. Kovaic, and Stephen Calkins, *Antitrust Law and Economics in a Nutshell*, 29.

[38] United States v. E. C. Knight Co., 156 U.S. 1 (1895)

Jersey, United Shoes and U.S. Steel, from the combination of a large number of small and medium-sized companies.[39] The narrow interpretation of the Court frustrated "the effective enforcement of the statute".[40] In addition, the subsequent Supreme Court principle of rule of reason as well as the uncertainty of reasonableness standard in the construction of the Sherman Act caused concern to businesses.[41]

Public perceived that the Sherman Act was ineffective to curb the surge of merger activities in the period from 1895 to 1904. Therefore, the Clayton Act of 1914 was enacted in response to populist concerns.[42] The Clayton Act regulates more specific anticompetitive arrangements namely prince discrimination in commodities (§3), exclusive dealing (§3) and mergers and interlocking directorates (§7-8).[43]

In the same year, the Federal Trade Commission Act of 1914 ("the FTC Act") was also enacted. Section 5 of the FTC Act in general prohibits all unfair methods of competition and unfair or deceptive practices.[44] By virtue of the FTC Act, the President would appoint five persons to form a Commission with confirmation from the Senate.[45]

> [The FTC Act] is enforceable only by [Federal Trade Commission] itself, whose only remedy is to issue a prospective

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[39] Ernest Gellhorn, William E. Kovaic, and Stephen Calkins, *Antitrust Law and Economics in a Nutshell*, 31.

[40] Thomas E. Sullivan, Herbert Hovenkamp, and Howard A. Shelanski, Antitrust Law, Policy, and Procedure : Cases, Materials, Problems, 22.

[41] Ernest Gellhorn, William E. Kovaic, and Stephen Calkins, *Antitrust Law and Economics in a Nutshell*, 34.

[42] Carlos D. Ramírez and Christian Eigen-Zucchi, "Understanding the Clayton Act of 1914: An Analysis of the Interest Group Hypothesis," *Public Choice* 106, no. 1/2 (2001): 158.

[43] Einer Elhauge and Damien Geradin, *Global Competition Law and Economics* (Hart, 2011), 12.

[44] 15 U.S.C. § 45(a).

[45] Ernest Gellhorn, William E. Kovaic, and Stephen Calkins, *Antitrust Law and Economics in a Nutshell*, 36.

order to cease and desist the activity, which is in turn subject to review by the federal courts of appeals. The FTC can go to court to seek a preliminary injunction pending a final resolution by itself and the courts.[46]

3.2 The European Union (EU) Competition Law

In the early twentieth century, cartels were prevalent in Germany, particularly in the period of the Nazi regime.[47] A number of German academics from the University of Freiburg, including Walter Eucken, was of the opinion that state intervention was required in order to promote market competition. This concept was later named ordo-liberalism[48] and enshrined in the development and enactment of competition law after the end of World War II.[49] Meanwhile, the notion of competition was pondered again in the period between the end of World War I and the beginning of World War II, or the Interwar period, thereby resulting in the enactment of the first anti-cartel law in Germany in 1923, like the laws in Sweden in 1925 and in Norway in 1926.[50]

Later, entire Europe experienced economic collapse and infrastructure destruction as a result of World War II. Coal and steel, basic raw materials in the industry

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[46] Einer Elhauge and Damien Geradin, *Global Competition Law and Economics*, 13.

[47] Damien Geradin, Anne Layne-Farrar, and Nicolas Petit, *EU Competition Law and Economics*, 15.

[48] Ibid.

[49] Anestis S. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, 13.

[50] Ibid., 12.

and power[51], were necessary for reviving countries.[52] Some European countries were concerned that Germany might abuse its dominant position in the coal and steel market, which previously led to the War, and could probably impair industry and economic rehabilitation.[53]Mr. Robert Schuman, the French Foreign Minister, proposed "the establishment of a common market for coal and steel for those countries willing to delegate control of these sectors of their economies to an independent authority"[54] in a ministerial meeting in London on 9 May 1950. The so-called Schuman Plan would therefore accommodate the prevention of future conflicts between France and Germany, an economic expansion and preservation of peace in Europe.[55]

On 18 April 1951, The Treaty Establishing the European Coal and Steel Community (ECSC) or the Treaty of Paris of 1951 was signed in Paris by France, West Germany, Italy, and Benelux countries, Belgium, the Netherlands and Luxembourg, and came into force on 23 July 1952.[56] The aim of the ECSC was to form a common market for coal and steel in Western Europe by means of the elimination of all customs duties, tariffs, quotas and other market restrictions assured compliance and enforcement by

[51] Preamble of Treaty establishing the European Coal and Steel Community, ECSC Treaty

[52] Karen J. Alter and David Steinberg, "The Theory and Reality of the European Coal and Steel Community," *The Roberta Buffett Center for International and Comparative Studies, Northwestern University* (2007).

[53] Ibid.

[54] The Editors of Encyclopædia Britannica, "European Coal and Steel Community (Ecsc)," in *Encyclopædia Britannica*, ed. Britannica's Editorial division (Encyclopædia Britannica, Inc. , 2014).

[55] Alan Dashwood et al., *Wyatt and Dashwood's European Union Law*, Fifth Edition ed. (London, the United Kingdom: Sweet & Maxwell, 2006), 5.

[56] Preamble of Treaty establishing the European Coal and Steel Community, ECSC Treaty.

independent High Authority, who was endowed with supranational powers, whose decisions would be binding on the member states.[57]

The Treaty of Paris of 1951 also embodied the first European competition rules,[58] which "represent the first instance of supranational legislation replacing the Member State's anti-cartel and de-concentration laws in the field of coal and steel."[59] Article 65 of the Treaty averts cartels, referring to

> all agreements among enterprises, all decisions of associations of enterprises, and all concerted practices, which would tend, directly or indirectly, to prevent, restrict or impede the normal operation of competition within the common market.[60]

Meanwhile, Article 66 of the Treaty confronts concentrations or mergers within the European territories of the member States. This article does not totally ban merger but a concentration arrangement is subject to prior authorization of the High Authority.[61]

The six founders of the ECSC were then desirous of closer integration in other than coal and steel sectors, so they opened negotiations for two treaties. One was the Treaty establishing the European Economic Community (EEC), or the Treaty of

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[57] D.G. Goyder, *Ec Competition Law*, Fourth Edition ed. (New York, the United States: Oxford University Press, 2003), 19.

[58] Alison Jones and Brenda Sufrin, *Eu Competition Law: Text, Cases & Materials*, Fourth Edition ed. (Great Britain, the United Kingdom: Oxford University Press, 2011), 36.

[59] Gerhard Bebr, "The European Coal and Steel Community: A Political and Legal Innovation," *The Yale Law Journal* 63, no. 1 (1953): 7.

[60] Article 65(1) of Treaty Establishing the European Coal and Steel Community.

[61] Article 66(1) and 79 of Treaty Establishing the European Coal and Steel Community.

Rome of 1957, with the aim of "the creation of a true European Common Market.[62] In other words, the Treaty of Rome of 1957 was intended to create customs union by means of the elimination of all customs duties and quantitative restrictions or quotas in trade between Member States and establishment of common customs tariff. The other was a Treaty establishing the European Atomic Energy Community (EURATOM) for peaceful uses of atomic energy.[63] Both of the Treaties were signed in Rome on 25 March 1957.[64] Later, the scope of activities was extended beyond a mere economic cooperation; the European Economic Community was renamed the European Community by Treaty on European Union (TEU) or the Maastricht Treaty of 1992,[65] which established the European Union (EU).[66]

To achieve the goals stipulated in Article 2[67] of the Treaty of Rome of 1957 and to ensure that the common market function effectively, the Treaty recognised the importance of undistorted competition as stipulated in Article 3(1)(f).[68] Three principal rules were thus implemented in order to safeguard competition, namely (1) prohibition

[62] Jean Claude Dischamps, "The European Community, International Trade, and World Unity," *California Management Review* 35, no. 2 (1993): 104.

[63] The Editors of Encyclopædia Britannica, "European Atomic Energy Community (Euratom)," in *Encyclopædia Britannica*, ed. European organization (Encyclopædia Britannica, Inc. , 2014).

[64] Jean Claude Dischamps, "The European Community, International Trade, and World Unity," 105.

[65] See Footnote 2, Richard Whish and David Bailey, *Competition Law*, 52.

[66] Matthew J. Gabel, "European Union (Eu)," in *Encyclopædia Britannica* (Encyclopædia Britannica, Inc., 2014).

[67] Article 2 of Treaty of Rome of 1957.

[68] Article 3 of Treaty of Rome of 1957.

of restrictive agreement by firms; (2) prevention of abuse of dominance; (3) prohibition of merger arrangement detrimental to competition.[69]

Articles 81 (ex Article 85) and 82 (ex Article 86) of the Treaty of Rome were "the original central pillars of the competition law of the European Unions,"[70] dealing with anticompetitive agreements and abuse of dominant position by powerful firms, respectively.[71] The scope of prohibitive undertakings stated in Articles 81 and 82 of the Treaty of Rome was wider than those prescribed in Article 65 and 66 of the Treaty of Paris, yet the discrepancies of substantive rules were not of significance as opposed to the implementation of rules in that the Community laws could not be enforced until pertinent regulations or Directives were to be adopted by the Council of Ministers, a legislative body.[72] Articles 87-89 regulate State Aids; Article 87 forbids aids granted by a Member State, which distort or may lead to distortion of competition or favour certain firms or production.[73] Merger control regulations, however, were not introduced until 1990 by Regulation 4064/89.[74]

The European Community was subsumed into the European Union and the name of Treaty of Rome was changed to the Treaty on Functioning of the European Union by the Treaty of Lisbon of 2009.[75] Articles contained in the Treaty were also

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[69] Giorgio Monti, *Ec Competition Law* (Cambridge, the United Kingdom: Cambridge University Press, 2007), 2.

[70] D.G. Goyder, *EC Competition Law*, 16.

[71] Barry J. Rodger and Angus MacCulloch, *Competition Law and Policy in the Ec and Uk*, Fourth Edition ed. (Routledge, 2009), 23.

[72] D.G. Goyder, *EC Competition Law*, 27-28.

[73] Article 87 of the Treaty Establishing the European Economic Community.

[74] Barry J. Rodger and Angus MacCulloch, *Competition Law and Policy in the EC and UK*, 23-24.

[75] See Footnote 2, Richard Whish and David Bailey, *Competition Law,* 52.

renumbered and replaced. Competition provisions in the new Treaty of Lisbon of 2009 appear in Articles 101, 102 and 107 to 109, the substantive wordings of which are "almost identical to the wordings of competition rules of the EC Treaty [Treaty of Rome]"[76] and are hitherto effective.

3.3 The Anti-Monopoly Laws of Japan

Historically, Japan had engaged in international trade and cultural and scientific exchange with foreign countries until 1624 when Japan instituted the policy of *sakoku* (seclusion) or national isolation, resulting from the rapid spread of Christianity, which was perceived as a threat to Japanese social order.[77] However, trade with the Netherlands and China continued.[78] Free trade in Japan seems to have commenced in 1853 when the United States exacted the opening of Japanese markets, thereby leading to the execution of Japan-U.S. Friendship and Commerce Treaty, and subsequent similar treaties with Holland, Russia and France.[79]

After Tokugawa (Edo) shogunate, otherwise known as Takugawa Bukfu (the last feudal Japanese military government),[80] was defeated by alliances of regional samurai domains, The Meiji Revolution in 1868 ushered in the modernisation of Japan, by using the political, economic and educational system of Europe and the US as a

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[76] Damien Geradin, Anne Layne-Farrar, and Nicolas Petit, *EU Competition Law and Economics*, 19.

[77] Etsuko Kameoka, *Competition Law and Policy in Japan and the Eu* (Cheltenham, UK: Edward Elgar Publishing Limited, 2014), 3.

[78] Toshiaki Takigawa, "Japan," in *The Politial Economy of Competition Law in Asia*, ed. Mark Williams (Cheltenham, UK: Edward Elgar, 2013), 11.

[79] Hiroshi Iyori, "Competition Policy and Government Intervention in Developing Countries: An Examination of Japanese Economic Development," *Washington University Global Studies Law Review* 1 (2002): 36.

[80] Arne Markland, *Ichiban Number One: Perspectives on Japan's Pursuit of Power 1867-1945* (Lulu Press, Inc, 2015).

model. [81] By 1872, the incumbent government liberalised land trade, built communications and transportation systems while feudal domains and barriers and the status system were abolished. Further, currency, educational, banking and financial systems, securities exchange and legal system were also developed by 1882.[82] More precisely, the Japanese Civil Code was swayed by the Code Napoleon of France and the Civil Code of Germany.[83] The said transition signified the liberalisation of the Japanese economic regime.[84]

Japan was unfamiliar with the notion of "fair competition," and it was not the norm in the Japanese market even until the Second World War, yet they actually remained competitive in their market with their perceived rivals, i.e. foreigners, non-indigenous traders. [85] Japanese government greatly favoured its local industries together with publicly owned factories for the purpose of economic development. The consequent scenario was that there were too many new entrants in the markets, and excessive market competition provoked cartels.[86] Because of the far-reaching support from the government, industrial conglomerates or *zaibatsu* predominated in the late nineteenth century and early twentieth century[87], which the four largest

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[81] Toshiaki Takigawa, "Japan," in *The Politial Economy of Competition Law in Asia*, 11.

[82] Hiroshi Iyori, "Competition Policy and Government Intervention in Developing Countries: An Examination of Japanese Economic Development," 36.

[83] Etsuko Kameoka, *Competition Law and Policy in Japan and the EU*, 6.

[84] Hiroshi Iyori, "Competition Policy and Government Intervention in Developing Countries: An Examination of Japanese Economic Development," 37.

[85] Kenji Suzuki, *Competition Law Reform in Britain and Japan: Comparative Analysis of Policy Network* (Routledge, 2003), 18.

[86] Ibid.

[87] JR. H. Stephen Harris, "Competition Law and Patent Protection in Japan: A Half-Century of Progress, a New Millennium of Challenges," *Columbia Journal of Asian Law* 16 (2002): 89-90.

zaibatsu – Mitsui, Mitsubishi, Sumittomo and Yasuda, controlled about one-fourth of all paid capital in the Japanese economy.[88]

Once World War I had ended, the world went through post-war depression. Cartels in Japan were still permitted in order to limit competition and maintain market power.[89] A number of economic control laws were enacted such as two statutes in 1925, granted power to the government to approve cartel resolutions and control of non-cartel members' activities[90], the Major Industries Control Law of 1931, which allowed and supported cartelisation in primary industries.[91] After the worldwide depression, the democratic government was overthrown; Japan was militarised. Japan was involved in Second Sino-Japanese war and became allied with Nazi Germany in the World War II.[92] The *Zaibatsu* conglomerates were a principal source of production of supplies for WW II.[93]

After the end of the WW II, the US conquered Japan, and General MacArthur, as the Supreme Commander for the Allied Powers ("SCAP"), issued a directive to Japan's Government to

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[88] James D. Fry, "Struggling to Teethe: Japan's Antitrust Enforcement Regime," *Law and Policy in International Business* 32, no. 4 (2001): 828.

[89] H. Stephen Harris, "Competition Law and Patent Protection in Japan: A Half-Century of Progress, a New Millennium of Challenges," 90.

[90] Ibid., 91.

[91] Hiroshi Iyori, "Competition Policy and Government Intervention in Developing Countries: An Examination of Japanese Economic Development," 37.

[92] Toshiaki Takigawa, "Japan," in *The Politial Economy of Competition Law in Asia*, 11.

[93] H. Stephen Harris, "Competition Law and Patent Protection in Japan: A Half-Century of Progress, a New Millennium of Challenges," 91.

> [prohibit] Japanese participation in Private cartels or other restrictive private international contracts or arrangements ... and to dissolve the private industrial, commercial, and agricultural cooperatives in Japan so as to permit a wider distribution of income and ownership and to encourage economic institutions that would contribute to the growth of peaceful and democratic forces.[94]

In this regard, the Economic Democratisation Policy was devised and applied in Japan with support of the Allied Occupation Forces. The policy aimed at the liberalisation of Japanese enterprise, de-concentration of the Japanese economic system[95] and particularly the dissolution of the *Zaibatsu* conglomerates[96] with the purpose of weakening the Japanese military power.[97] The holding companies of the *Zaibatsu* were forced to surrender the ownership of stocks, and large companies were fragmented into many smaller companies, thus giving the chances for new market entrants to grow.[98] Furthermore, the General Headquarters of the Allied Powers

[94] Harry First, "Antitrust in Japan: The Original Intent " *Pacific Rim Law & Policy Journal* 9, no. 1 (2000): 32.

[95] Mitsuo Matsushita, *International Trade and Competition Law in Japan* (Oxford University Press, 1993), 77.

[96] Etsuko Kameoka, *Competition law and policy in Japan and the EU*, 11.

[97] Kenji Suzuki, *Competition Law Reform in Britain and Japan: Comparative Analysis of Policy Network*, 19.

[98] Mitsuo Matsushita, *International Trade and Competition Law in Japan*, 77.

("GHQ") requested the enactment of an antimonopoly law to ensure Japan's economic democratisation[99] by the SCAP Directive no. 6 of November 6, 1945.[100]

The draft of the Antimonopoly bill was passed into law after a couple of revisions,[101] on July 20, 1947[102], formally entitled the Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade or the Antimonopoly Act ("AMA"). The GHQ required that a Japanese Fair Trade Commission be established and be independent to enforce the AMA, similar to the US Fair Trade Commission. The Ministry of Commerce and Industry was responsible for substantive law whereas the Ministry of Justice supervised procedural provisions.[103]

The first AMA embodied several stringent provisions such as Article 4 which *per se* illegalised cartels, the prohibition of resale price maintenance, Article 3 which imposed remedial action on firms possessing disproportionate economic power[104] or Article 8 which prohibited "undue imbalance in business powers" in terms of productive capacity among enterprises.[105] It can be said that the AMA of Japan was

[99] Hiroshi Iyori, "Competition Policy and Government Intervention in Developing Countries: An Examination of Japanese Economic Development," 39.

[100] H. Stephen Harris, "Competition Law and Patent Protection in Japan: A Half-Century of Progress, a New Millennium of Challenges," 92.

[101] Hiroshi Iyori, "Competition Policy and Government Intervention in Developing Countries: An Examination of Japanese Economic Development," 39.

[102] H. Stephen Harris, "Competition Law and Patent Protection in Japan: A Half-Century of Progress, a New Millennium of Challenges," 93.

[103] Etsuko Kameoka, *Competition law and policy in Japan and the EU*, 11.

[104] Mitsuo Matsushita, "The Antimonopoly Law of Japan," in *Global Competition Policy*, ed. Edward Montgomery Graham and J David Richardson (Peterson Institute, 1997), 13.

[105] Mitsuo Matsushita, *International Trade and Competition Law in Japan*, 78.

relatively less lenient than the monopolisation in the US antitrust laws as it was strict in prohibiting private restrictive arrangements and controlling market structure.[106]

As a consequence of the Korean War in the beginning of 1950s, US and Japan decided to change policies in Japan in order to secure Japan against communism,[107] and respond to opposition demand from American businesspersons doing business in Japan.[108] "The AMA was amended in 1949 to relax the cross-shareholding, interlocking directorate and other prohibitions" [109] Subsequent to the 1949 amendment, the second amendment in 1953 removed *per se* cartelisation and allowed "depression cartel" and "rationalisation cartel". Furthermore, resale price maintenance of books and other copyrighted items and commodities, determined by JFTC was permitted. On the contrary, the AMA was strengthened by the 1953 amendment in that the phrase "unfair methods of competition" was substituted by "unfair business practices," of which the scope of prohibitions was wider.[110] Additional relaxation of AMA, introduced by the Japanese Diet was aborted owing to a backlash from consumers, farmers, small enterprises groups and journalists.[111]

A number of factors compelled Japan to revitalise its AMA enforcement in 1960 namely inflation and the surge of consumer prices, stemming from price-fixing cartels and resale price maintenance between manufacturers and retailers. The needs

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[106] Ibid., 79.

[107] Etsuko Kameoka, *Competition law and policy in Japan and the EU*, 13.

[108] Kenji Suzuki, *Competition Law Reform in Britain and Japan: Comparative Analysis of Policy Network*, 20.

[109] H. Stephen Harris, "Competition Law and Patent Protection in Japan: A Half-Century of Progress, a New Millennium of Challenges," 94.

[110] Mitsuo Matsushita, "The Antimonopoly Law of Japan," 152.

[111] Hiroshi Iyori, "Competition Policy and Government Intervention in Developing Countries: An Examination of Japanese Economic Development," 43.

for liberalisation of trade and investment, the protection of small enterprises and consumer protection also encouraged the government to strengthen its AMA. Hence, the National Diet passed the draft amendment of 1977[112] to challenge price-fixing, especially by oil companies, which exploited inflation and contributed to the Oil Crisis of 1973; and to implement administrative surcharge in order to forfeit illegally excessive profits reaped by cartel participants.[113]

As from the early 1980s, Japan has employed the new policies of privatisation and deregulation. In particular, Japan was on the verge of globalisation; the policies of deregulation and competition promotion were in place during the 1990s,[114] which, today is regarded as the beginning of the modernisation of Japanese Antitrust Law.[115] Since then Japan's Antimonopoly Act experienced a couple of reforms including the amendment in 2005, 2009 and 2013.[116]

3.4 The Competition Law of Singapore

Singapore had long been under the colonisation of British rulers. Dating back to early 1819, Singapore was modernised and founded as a British trading port by an agreement between Sir Stamford Raffles, the Lieutenant-Governor of Bencoolen, a representative of British colonisation, and with Sultan Hussein of Johor and the

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[112] Mitsuo Matsushita, *International Trade and Competition Law in Japan*, 81-82.

[113] Mitsuo Matsushita, "The Antimonopoly Law of Japan," 154.

[114] Hiroshi Iyori, "Competition Policy and Government Intervention in Developing Countries: An Examination of Japanese Economic Development," 44-45.

[115] Mel Marquis and Shingo Seryo, "The 2013 Amendments to Japan's Anti-Monopoly Act: Some History and a Preliminary Evaluation," *Competition Policy International* (2014): 4.

[116] Ibid., 6-7.

Temenggong, the incumbent rulers of Singapore.[117] After the other subsequent two treaties had been signed in 1824, Singapore was possessed by the British and was later under the administration of British India in 1826.[118] In 1941, with the onset of World War II, Japan penetrated and conquered Singapore until 1945 when Japan was compelled to return Singapore to the British Military Administration. Afterwards, Singapore became a Crown Colony in April 1946.[119]

Only during a short period of two years was Singapore merged with the Federation of Malaya, Singapore, Sarawak and North Borneo (now Sabah) by the proposal of the incumbent Malayan Prime Minister, Tunku Abdul Rahman. The integration plan obtained a strong constituency of support in referendum. Nonetheless, on 9 August 1965, Singapore, led by Mr. Lee Kuan Yew, separated from the rest of Malaysia and became a sovereign, democratic and independent nation in consequence of political collisions between Singapore and the federal government of Malaysia.[120]

The new independent Singapore encountered difficulties of natural resources shortage and a small domestic market.[121] At that time, Singapore was considered as a third-world country with a GNP per capita of less than US$320 in conjunction with poor infrastructure and limited capital.[122] To boost its economic

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[117] The Ministry of Communications and Information (MCI), "Founding of Modern Singapore," The Ministry of Communications and Information (MCI), http://app.singapore.sg/about-singapore/history/early-history.

[118] Ibid.

[119] "The Japanese Occupation," The Ministry of Communications and Information (MCI), http://app.singapore.sg/about-singapore/history/the-japanese-occupation.

[120] "Towards Independence " http://app.singapore.sg/about-singapore/history/towards-independence.

[121] May Fong Cheong and Yin Harn Lee, "Malaysia and Singapore," in *The Politial Economy of Competition Law in Asia*, ed. Mark Williams (Cheltenham, UK: Edward Elgar, 2013), 227-28.

[122] Singapore Economic Development Board, "The Sixies," https://www.edb.gov.sg/content/edb/en/why-singapore/about-singapore/our-history/1960s.html.

growth, therefore, Singapore had to be reliant on foreign investment promotion and export-led economic policies plus government investments in strategic government-owned businesses. [123]

In order to modernise the country's economy, Singapore adopted the policies of privatisation and industry deregulation; various industry sectors including telecommunication, media and energy were liberalised.[124] A number of sector-specific competition laws were enacted

> to facilitate the structural changes to these industries ... [and] to prevent dominant incumbent firms from exploiting their market dominance through conduct which could deter market entry or eliminate competition from smaller rivals.[125]

The epitome of aforesaid laws and regulations are Telecom Competition Code, Media Market Conduct Code, Media Development Authority of Singapore Act and Electricity Act.[126]

However, the introduction of general competition law, which would apply to all industry sectors, was understood to be consistent with the government's liberalisation policies. To wit, it was necessary to liberalise other protected industries such as banking, legal and financial services sectors in order to foster an investor-

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[123] May Fong Cheong and Yin Harn Lee, "Malaysia and Singapore" in *The Politial Economy of Competition Law in Asia*, 227-28.

[124] Burton Ong, "The Origins, Objectives and Structure of Competition Law in Singapore," *World Competition* 29, no. 2 (2006): 271.

[125] "The Competition Act 2004: A Legislative Landmark on Singapore's Legal Landscape," *Singapore Journal of Legal Studies* (2006): 176.

[126] Ibid.

friendly environment in Singapore.[127] In addition, general competition law would be proposed to strengthen competitiveness of domestic firms, thereby enabling them to compete in the regional and international markets; and open markets for new entrants.[128]

Moreover, Economic Review Committee (ERC), set up by Prime Minister Goh Chok Tong[129], recommended that general competition law be enacted to promote fair competition between large and small enterprises; to carry out the government pro-competition in the long term; and to develop infrastructure for entrepreneurship.[130] Particularly, ERC reiterated that the general competition law should also apply to Government-Linked companies (GLCs), and government should accord "a greater role in the growth of the external wing of Singapore's economy, rather than relying entirely on GLCs, which have traditionally performed this role"[131]

In accordance with government desirability and ERC recommendations to enact a general competition law, the conclusion of Free Trade Agreement (FTA) between Singapore and United States ("the USSFTA") also prompted the government to pass a general competition law. Chapter 12 of the USSFTA required Singapore to enact general competition legislation by January 2005, and the law had to cover all business sectors including state enterprises. More precisely, Article 12.3(2)(d) imposes

[127] "The Origins, Objectives and Structure of Competition Law in Singapore," 272.

[128] "The Competition Act 2004: A Legislative Landmark on Singapore's Legal Landscape," 176.

[129] "The Origins, Objectives and Structure of Competition Law in Singapore," 272.

[130] Cavinder Bull and Chong Kin Lim, *Competition Law and Policy in Singapore* (Singapore: Academy Publishing, 2009), 9.

[131] Burton Ong, "The Competition Act 2004: A Legislative Landmark on Singapore's Legal Landscape," 177.

an obligation on Singapore to ensure that government enterprises do not engage in anti-competitive arrangement or enter into anti-competitive agreements.[132]

Eventually, the Singapore Competition Act was passed by Parliament on 19th October 2014; assented to by the President on 4th November 2004 and first implemented on 1st January 2005.[133] It is noteworthy that provisions established Competition Commission of Singapore in 2005[134] to conduct a public hearing regarding the implementation and application of the legislation whilst the substantive provisions were actually enforced in January 2006 after the 12-month transition period.[135]

The structure of the Singapore Competition Act is based primarily on the UK Competition Act, which was derived from the European Union Competition law.[136] The objectives of the Singapore Competition Act is to "enhance the competitiveness of the economy through prohibiting anti-competitive activities that unduly prevent, restrict or distort competition".[137] There are three major prohibitions in the Act, which are akin to the UK Competition law. First, Section 34 confronted the multi-party collusive agreements, which prevent, restrict, or distort competition.[138] Second, Section 47 forbids the abuse of dominance by single firm conduct.[139] Third, Section

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[132] May Fong Cheong and Yin Harn Lee, "Malaysia and Singapore" in *The Politial Economy of Competition Law in Asia, 235.*

[133] Burton Ong, "The Competition Act 2004: A Legislative Landmark on Singapore's Legal Landscape," 172.

[134] Cavinder Bull and Chong Kin Lim, *Competition Law and Policy in Singapore*, 235.

[135] Burton Ong, "The Origins, Objectives and Structure of Competition Law in Singapore," 269.

[136] May Fong Cheong and Yin Harn Lee, 236.

[137] Cavinder Bull and Chong Kin Lim, 10.

[138] Section 34 of Competition Act (CHAPTER 50B).

[139] Section 47 of Competition Act (CHAPTER 50B).

54 outlaws any mergers that have resulted, or may be expected to result, in a substantial lessening of competition within any market in Singapore for goods or services.[140]

3.5 The Competition Law of Malaysia

Malaysia had been ruled by the Portuguese since 1511 until the control power shifted to the Dutch a century later.[141] Similar to Singapore in terms of the British colonialist experience, the Sultan of Kedah relinquished the island of Penang to the British East India Company, who used Penang as a trading post.[142] The whole of Malacca was under the control of the British by the Treaty of London of 1824 between the British and the Dutch.[143] The Treaty of Pangkor of 1874 constituted British Administration in Malaya, and the control of power was expanded to Selangor, Negeri Sembilan and Pahang.[144] Not until 1896 were the Federated Malay Sates (Selangor, Negeri Sembilan, Perak and Pahang) founded.[145]

The British conquest of the Malay Peninsular had been interrupted by the Japanese invaders in 1941 for a short period during World War II, before Japan was defeated and surrendered its occupation to the British in 1945.[146] The Malayan Union was founded by the British as a Crown Colony in 1946 so as to unify the Malay

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[140] Section 54 Competition Act (CHAPTER 50B).

[141] The Commonwealth, "Peninsular Malaysia," http://thecommonwealth.org/our-member-countries/malaysia/history.

[142] Ibid.

[143] Tim Lambert, "A Brief History of Malaysia," http://www.localhistories.org/malaysia.html.

[144] Virginia Matheson Hooker, *A Short History of Malaysia: Linking East and West* (Allen & Unwin, 2003), 7.

[145] The Commonwealth.

[146] May Fong Cheong and Yin Harn Lee, "Malaysia and Singapore" in *The Politial Economy of Competition Law in Asia*, 217.

Peninsular except Singapore. However, the Malayan union was strongly opposed by the Malays, and was unpopular amongst the Chinese and Indian communities.[147] As a consequence, the British surrendered their control of power over the Malaysian Union; it became independent, and it was changed to the Federation of Malaya with with Tunku Abdul Rahman as prime minister on 31 August 1957.[148] In 1963, North Borneo, Sarawak and Singapore joined the Federation and entered into the Malaysia Agreement to establish the new Federation of Malaysia before Singapore left the federation 2 years later.[149]

After the collision between the Malays and non-Malays and the return of peace and order, the Malaysian government adopted a new economic policy in 1971.[150] The economic policy had shifted from its dependence on agriculture[151] and primary products including rubber and tin to the diversification and modernisation into a multi-sector economy based on services and manufacturing.[152] Also, the initial objective of the new economic policy was to ensure a redistribution of wealth between the minority immigrant populations, most of whom were Chinese, and the majority *bumiputera*, indigenous people in Malaysia.[153]

[147] Ibid., 217.

[148] The Commonwealth, "Peninsular Malaysia," http://thecommonwealth.org/our-member-countries/malaysia/history.

[149] Ibid.

[150] Tim Lambert, "A Brief History of Malaysia," http://www.localhistories.org/malaysia.html.

[151] Ibid.

[152] May Fong Cheong and Yin Harn Lee, "Malaysia and Singapore" in *The Politial Economy of Competition Law in Asia*, 221.

[153] Ibid., 222.

To achieve the aim of the new economic policy, privatisation was adopted in 1984, which induced the proliferation of state-owned enterprise and subsequent government-linked companies (GLCs), tools of government to managing and manipulating the economy.[154] The deleterious consequence of GLCs was that the government's roles as regulator and policy maker contrasted with its roles as industry player and buyer. In other words, GLCs might have performed the roles as operator and regulator. These circumstances led to competition restriction, corruption, rent-seeking, patronage and conflicts between achieving social objectives and profit maximization.[155]

The National Economic Advisory Council (NEAC) was founded in 2009 to devise a New Economic Model (NEM) in order to drive Malaysia's economy, transforming from middle income to developed and competitive economy by 2020 with inclusive and sustainable growth. [156] The NEAC recommended that the government maintain its role as a regulator and facilitator rather than a direct participant in business. Business.[157] In addition, the NEAC suggested the promotion of an efficient market, which would provide investment and growth opportunities, partly through fair competition produced by the enactment of competition law.[158]

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[154] Ibid., 223-24.

[155] Ibid., 225.

[156] National Economic Advisory Council, *New Economic Model for Malaysia Part 1* (Putrajaya, Malaysia: Secretary of National Economic Advisory Council, 2009), iii-iv.

[157] May Fong Cheong and Yin Harn Lee, "Malaysia and Singapore" in The Politial Economy of Competition Law in Asia, 225-26.

[158] Natonal Economic Advisory National Economic Advisory Council, 13.

Taking more than 20 years, the Parliament of Malaysia successfully passed the first comprehensive national competition law in 2010.[159] The Competition Act 2010 was promulgated on 10 June 2010, and came into force on 1 January 2012.[160] Contrary to Singapore, the Malaysian Competition law was enacted in response to the encouragement of neighbouring countries and public demand, not external pressure from foreign countries.[161] The legislation was derived the European Competition Law, UK Competition Act 1998 and Singapore Competition Act 2004,[162] which mutually shares some similarities. [163] In addition, Parliament enacted the Competition Commission Act 2010, which provided for the establishment of the Competition Commission, to set out the powers and functions of such Commission.[164]

The aims of the Competition Act 2010 are "to promote economic development by promoting and protecting the process of competition, thereby protecting the interests of consumers"[165] There are two major substantive provisions in the Act. First, Section 4 prohibited horizontal or vertical agreement between enterprises, which significantly prevents, restricting or distorting competition in any market for goods or services.[166] Second, Section 10 precludes independent or

[159] Vince Eng Teong See, "Competition Act 2010: The Issues and Challenges," *European Journal of Law and Economics* 40, no. 3 (2015): 587.

[160] LEE Cassey, "Competition Law Enforcement in Malaysia: Some Recent Developments," in *ERIA Discussion Paper Series* (University of Wollongong, 2014), 3.

[161] Yo Sop Choi, "The Choice of Competition Law and the Development of Enforcement in Asia: A Road Map Towards Convergence," *Asia Pacific Law Review* 22, no. 1 (2014): 136.

[162] Vince Eng Teong See, 588.

[163] Ibid.; Yo Sop Choi, 136.

[164] Competition Commission Act 2010 (Act 713).

[165] Competition Act 2010 (Act 712).

[166] Section 4 of the Competition Act 2010 (Act 712).

collective enterprises from abuse of a dominant position in any market for goods or services.[167] It is noteworthy that the Act is silent on mergers, in contrast to the competition legislation of other ASEAN countries.[168]

3.6 The Competition Law of Thailand

The notion of freedom of trade and open market economy in Thailand may be traced back to the Sukhothai Kingdom at the end of the 13th century as evidenced by The King Ram Khamhaeng Inscription (RK) of 1292 A.D., a significant historical documentary of Thailand.[169] A relevant excerpt could be deciphered as illustrated below:

> In the time of King Rama Gamhen [Ram Khamhaeng] this land of Sukhodai is thriving. There is fish in the water and rice in the fields. The lord of the realm does not levy toll on his subjects (and) it is easy for them lead their cattle to trade or ride their horses to sell; whoever wants to trade in elephants, does so; whoever wants to trade in horses, does so; whoever wants to trade in silver or gold, does so.[170]

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[167] Section 10 of the Competition Act 2010 (Act 712).

[168] LEE Cassey, "Competition Law Enforcement in Malaysia: Some Recent Developments," in *ERIA Discussion Paper Series*, 3.

[169] The Thai National Committee on Memory of the World Programme of UNESCO, "Memory of the World Register," *Thailand – The King Ram Khamhaeng Inscription* (2003), http://portal.unesco.org/ci/en/file_download.php/a97b4d093c78cc59b8388de78f789559Thailand_The+King+Ram+Khamhaeng+Inscription.doc.

[170] Ibid.

However, there is no historical record evidencing the existence of competition law in the period of the Sukhothai Kingdom,[171] the law of which was in the form of *Volksrecht,* meaning that its substantive provisions were developed from simple natural reasons which were chiefly derived from and based upon *Dhamma* or morality.[172] Likewise, the law of the Ayutthaya Kingdom, which was modelled upon *Khamphi phra Thammasat* (Thammasat Holy Scriptures), the old law of India, and the Laws of Three Seals of the Rattanakosin Kingdom, which was also mingled in *Dhamma* or morality, did not provide for anti-monopoly and restraint of trade.[173]

It is likely that the idea of competition law or anti-monopoly and restrictive practices of trade were not entertained in the foregoing periods because Thailand's society and economy relied upon subsistence agriculture.[174] On the other hand, it is evident that trade of Ayutthaya was monopolized and carried out by elaborate organizations, i.e. the setting up Krom Phra Khlang (Treasury), Krom Tha Sai and Krom Tha Khwas: Port Authorities of the Left (i.e. East or what coming from the South China Sea) and the Right (i.e. West or what coming from the Indian Ocean). The royal trade monopoly was sustained into the early Rattanakosin[175] period, until Thailand was impelled to enter into Treaty of Friendship and Commerce between the British Empire and the Kingdom of Siam or Bowring Treaty in the reign of King Rama IV, resulting in

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[171] Sakda Thanitcul, *Kham Athibuy Lhae Koraneesuksa Phra Ratchabanyati Karnkangkan Tang Kanka, B.E. 2542 [Commentary and Case Study on Competition Act, B.E. 2542]* (Bangkok, Thailand: Winyuchon, 2010), 20.

[172] Sawang Boonchalerm-viphas, *The Thai Legal History* (Bangkok, Thailand: Winyuchon, 2015), 61.

[173] Sakda Thanitcul, 20.

[174] Ibid.

[175] Charnvit Kasetsiri, "Ayutthaya: Capital of Siam and Emporium of Southeast Asia " in *Sakai-Asia Cultural Partnership Conference 2008* (Ayutthaya Studies Institute, 2008).

the commencement of capitalism and commercial agriculture[176] and the end of the system of royal trade monopoly.[177]

Subsequently, Thailand was substantially modernised in the reign of King Rama V in order to confront the European colonisation and return the extraterritorial rights of the Kingdom.[178] At the same time, Thailand reached the age of modern law with influences from both Civil and Common Law systems.[179] After the ongoing debate, King Rama V decided to move to the codification of laws like modern Continental Europe.[180] The first codified law of Thailand is the Penal Code which was promulgated in 1 June 1908 (B.E. 2451).[181] The consecutive Civil and Commercial Code, Book I and II were enacted in 11 November 1923 (B.E. 2466).[182] As can be seen, Thailand took a long time to legislate the key provisions of law. Therefore, competition law, which is of secondary importance was not taken into consideration at that period.[183]

Until the period of the World War II, which contributed to the worldwide economic downturn, many manufacturers and sellers hoarded for speculation and unfairly increased prices of goods. Moreover, trade associations were formed in order

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[176] Sawang Boonchalerm-viphas, *The Thai Legal History*, 137.

[177] The Comptroller General's Department (CGD), "History," The Comptroller General's Department (CGD), http://www.cgd.go.th/cs/internet/internet/History.html.

[178] Sawang Boonchalerm-viphas, 157.

[179] Chatchawan Tomuan, "The Political Economy of the Enforcement of the 1999 Competition Act" (Chulalongkorn University, 2006), 28.

[180] Sawang Boonchalerm-viphas, 203-04.

[181] Ibid., 226.

[182] Ibid., 234-35.

[183] Sakda Thanitcul, *Kham Athibuy Lhae Koraneesuksa Phra Ratchabanyati Karnkangkan Tang Kanka, B.E. 2542 [Commentary and Case Study on Competition Act, B.E. 42]*. 21.

to obtain market dominance.[184] The incumbent government hence enacted the first anti-monopoly law of Thailand, [185] i.e. the Prevention of Excessive Profit Act, B.E. 2480 (1937) to control the prices of goods and prevent arbitrary price determination in state of emergency, belligerence and the declaration of Martial Law.[186] Nonetheless, this law did not cover normal situations, thus leading to the amendment in 1940 and 1941. After that, the Prevention of Excessive Profit Trade Act, B.E. 2480 (1937) was repealed and substituted with the new Prevention of Excessive Profit Trade Act, B.E. 2490 (1947), which outlawed trade for excessive profits all circumstances.[187]

In order to respond to the dynamics of social and economic changes, the in-charge government passed another 2 laws in relation to anti-monopoly, namely Trade Association Act, B.E. 2509 (1966) and Chamber of Commerce Act, B.E. 2509 (1966).[188] Further, the Prevention of Excessive Profit Trade Act, B.E. 2490 (1947) was also amended in 1974.[189]to confront the high inflation caused by the first oil crisis and the rise of commodity prices.[190]

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[184] Ibid., 21.

[185] Viboon Tangkittipaporn, "Enforcement of Anti-Trusts Laws in Thailand" (Chulalongkorn University, 1982), 172-73.

[186] Sakda Thanitcul, 21.

[187] Chatchawan Tomuan, "The Political Economy of the Enforcement of the 1999 Competition Act," 28.

[188] Viboon Tangkittipaporn, 173.

[189] Sakda Thanitcul, 21.

[190] Nipon Poapongsakorn, "The New Competition Law in Thailand: Lessons for Institution Building," *Review of Industrial Organization* 21, no. 2 (2002): 186.

Due to the surge of collusive business practices[191] by conglomerate firms under the control of a single family[192] and the ineffectiveness of the Prevention of Excessive Profit Trade law,[193] the new government, after the military coup in 1977 passed the new Price Fixing and Anti-Monopoly Act in 1979 with the support of a group of radical army commanders.[194] The objective of the Act was to prevent product supply shortages and protect consumers from excessive pricing of products[195] by controlling market structure and deterring business integration for the purpose of price determination.[196] This law was, however, defined by some scholars as "a quasi-competition law" since "[t]he provisions concerning anti-competitive was incomplete, as they did not cover mergers and many important vertical restrictive practices."[197]

Worse still was that the Act was not successful as it could not satisfactorily resolve the problems, especially non-competitive market, nor could it resist the economic power of the firms, which could manipulate the prices and quantities of goods in the market.[198] Further, the administration and enforcement mechanism of law were strongly criticised. The first weakness is that the law embodied criminal penalties.

[191] Ibid., 21.

[192] Mark Williams, "Competition Law in Thailand: Seeds of Success or Fated to Fail?," *World competition Law and Economics Review* 27, no. 3 (2004): 466.

[193] Nipon Poapongsakorn, "The New Competition Law in Thailand: Lessons for Institution Building," 186-87.

[194] Ibid., 187.

[195] Anan Chantara-Opakorn, "Thailand's Competition Law and Its Implications on International Mergers and Acqusitions," *Wisconsin International Law Journal* 18, no. 1 (2000): 592.

[196] Sakda Thanitcul, *Kham Athibuy Lhae Koraneesuksa Phra Ratchabanyati Karnkangkan Tang Kanka, B.E. 2542 [Commentary and Case Study on Competition Act, B.E. 42]*, 22.

[197] Deunden Nikomborirak, "The Political Economy of Competition Law: The Case of Thailand," *Northwestern Journal of International Law & Business* 26, no. 3 (2006): 598-99.

[198] Sakda Thanitcul, 22.

Therefore, a prosecutor must prove beyond any reasonable doubt to fully satisfy the court that the offence has actually been perpetrated and that the accused has committed that offence.[199] The other limitation is that the law could be enforced only when the Department of Internal Trade officially declares a certain business as "a business under control" in the Government Gazette.[200] Nevertheless, only ice-trading was declared as business under control according to the Notification of the Central Committee No. 14, B.E. 2523 (1980), which was later repealed by the Notification of the Central Committee No. 57, B.E. 2525 (1982).

Considerable economic growth during 1987 – 1990 substantially changed Thailand's economic structure.[201] Former diplomat-tuned businessman Mr. Anand Panyarachun, the new Prime Minister of Thailand appointed by the military after the Coup D'etat of 1991, instituted substantial economic reform. The government had a revolutionary vision of free market policies; encouraged free competition; rescinded policies that had distorted market mechanism[202]; and adopted policies of economic liberalisation, deregulation and privatisation accordingly.[203]

To promote and protect functional market mechanism, the government realised the necessity of free and fair competition.[204] It is questionable whether the

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[199] Section 227 of the Criminal Procedure Code of Thailand.

[200] Nipon Poapongsakorn, 187.

[201] Sakda Thanitcul, "Competition Law in Thailand: A Preliminary Analysis," *Washington University Global Studies Law Review* 1 (2002): 171.

[202] *Kham Athibuy Lhae Koraneesuksa Phra Ratchabanyati Karnkangkan Tang Kanka, B.E. 2542 [Commentary and Case Study on Competition Act, B.E. 2542]*, Kham Athibuy Lhae Koraneesuksa Phra Ratchabanyati Karnkangkan Tang Kanka, B.E. 2542 [Commentary and Case Study on Competition Act, B.E. 42], 25.

[203] Nipon Poapongsakorn, "The New Competition Law in Thailand: Lessons for Institution Building," 188.

[204] Sakda Thanitcul, *Kham Athibuy Lhae Koraneesuksa Phra Ratchabanyati Karnkangkan Tang Kanka, B.E. 2542 [Commentary and Case Study on Competition Act, B.E. 2542]*, 26.

Price Fixing and Anti-Monopoly Act of 1979 remained apt for the new economic structure in that period.[205] The Ministry of Commerce (MOC) hence formed a Working Committee consisting of the MOC authority together with university professors to scrutinise this query.[206] The Working Committee posited two serious flaws. First, "[t]he anti-monopoly provisions were simply ancillary to the price control of the statute."[207] Second, the provisions of price fixing had to be enforced in order to enforce those of anti-monopoly.[208] The Working Committee, in addition, proposed that the new competition law be legislated.[209]

> Also, the 1997 Thai Constitution enshrined the concept of a market economy, the prevention of monopoly and undue State regulation of the economy together with the right of citizens to engage in economic activity under conditions of fair competition.[210]

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[205] Mark Williams, "Competition Law in Thailand: Seeds of Success or Fated to Fail?," 467.

[206] Sakda Thanitcul, "Competition Law in Thailand: A Preliminary Analysis," Competition Law in Thailand: A Preliminary Analysis, 171.

[207] Mark Williams, 466.

[208] Sakda Thanitcul, "Competition Law in Thailand: A Preliminary Analysis," 171.

[209] *Kham Athibuy Lhae Koraneesuksa Phra Ratchabanyati Karnkangkan Tang Kanka, B.E. 2542 [Commentary and Case Study on Competition Act, B.E. 2542]*, 26.

[210] Mark Williams, 468.

Sell also Section 50 and 87 of the Constitution of Thailand, B.E. 2540 (1997)

Section 50. *A person shall enjoy the liberties to engage in an enterprise or an occupation and to undertake a fair and free competition.*

Section 87. *The State shall encourage a free economic system through market force, ensure and supervise fair competition, protect consumers, and prevent direct and indirect monopolies, repeal and refrain from enacting laws and regulations controlling businesses which do not correspond with the economic necessity, and shall not*

With respect to the statutory framework, the drafters appreciated the predicaments of the integration of antimonopoly law and price fixing law into the Price Fixing and Anti-Monopoly Act of 1979; as a result, they separated them into its particular legislation, namely Trade Competition Act and Price Fixing Act.[211] The drafters also realised that the economic structure of Thailand is akin to South Korea in that the majority of domestic product markets are monopolistic and oligopolistic.[212] The new Trade Competition Bill was thus legislated against unreasonable or anticompetitive pricing behaviour from dominant firms rather than directly prohibiting monopolisation.[213]

The Trade Competition Bill was first presented to Parliament on 12 June 1997, yet the Bill was not considered until the government of Mr. Chuan Leekpai in 1998 after the economic crisis of 1997.[214] The Bill was eventually passed into law and promulgated in the Government Gazette on 31 March 1999. The Trade Competition

engage in an enterprise in competition with the private sector unless it is necessary for the purpose of maintaining the security of the State, preserving the common interest, or providing public utilities.

[211] Anan Chantara-Opakorn, "Thailand's Competition Law and Its Implications on International Mergers and Acqusitions," 594.

[212] Sutee, Supanit, *Economic Law Reform and Competition Policy, in* Law, Justice and Open Society in ASEAN 301 (Piruna Tingsabadh ed., 1997) as cited in Sakda Thanitcul. "Competition Law in Thailand: A Preliminary Analysis." *Washington University Global Studies Law Review* 1, (2002): 172.

[213] Pallop Rattanadara, Kodmai Karnkaenkan Tang Kanka Pratettai [Thailand's Competition Law], *Chulalongkorn Law Review* 1, (2000): 20-21 as cited in Sakda Thanitcul. "Competition Law in Thailand: A Preliminary Analysis." *Washington University Global Studies Law Review* 1, (2002): 172.

[214] Sakda Thanitcul, *Kham Athibuy Lhae Koraneesuksa Phra Ratchabanyati Karnkangkan Tang Kanka, B.E. 2542 [Commentary and Case Study on Competition Act, B.E. 2542]*, 28.

Act, B.E. 2542 became effective on 30 April 1999.[215] It took around eight years and five governments of the day when the cabinet finally approved the draft law.[216]

> The objectives of the [Trade] Competition Act are to deal with social and economic challenges as well as to promote and enforce competition in Thai markets ... competitive markets will provide strong incentives for achieving economic growth and efficiency. It will also help Thai enterprises to improve their competitiveness in a global environment.[217]

By virtue of the Act, the Trade Competition Commission is responsible for enforcement of the law, and the Office of Trade Competition Commission is a secretariat body.[218]

[215] Ibid., 30.

[216] Nipon Poapongsakorn, "The New Competition Law in Thailand: Lessons for Institution Building," 188.

[217] Sutee Supanit, "Thailand: Implementation of Competition Law," *International Buiness Lawyer* 27, no. 2 (1999): 497.

[218] Deunden Nikomborirak, The Political Economy of Competition Law: The Case of Thailand, 599.

Chapter III
THE NOTION OF PRIVATE ANTITRUST/COMPETITION ENFORCEMENT

1. Background of Provisions of Private Enforcement

1.1 Private Antitrust Enforcement in the US

As a matter of fact, history of antitrust enforcement in American states began before the adoption of the Sherman Act.[1] Nonetheless, "[p]rivate enforcement has been an integral part of US Antitrust law experience since the enactment of the first antitrust law statute in 1890."[2] The Sherman Act was a result of codification of existing case law in order to strengthen the enforcement of prevailing common law principles with substantive principles, the functions of administrative support and private enforcement.[3]

The original antitrust bill, introduced by Senator Sherman in 14 August 1888, set out the provision of a private civil remedy; Senator Sherman explained:

> if any combination should be made to strike down any particular person or corporation, if that person or corporation

[1] Clifford A Jones, "Exporting Antitrust Courtroom to the World: Private Enforcement in a Global Market," *Loy. Consumer L. Rev.* 16 (2003): 409-10.

[2] David J Gerber, *Private Enforcement of Competition Law: A Comparative Perspective*, The Enforcement of Competition Law in Europe (Cambridge, England: Cambrige University Press, 2007), 434.

[3] Ibid.

> should be injured by the combination, he or it can sue in the courts and recover according to the language of the bill.[4]

At first, the private enforcement provision was in Section 2 of the original bill, providing that "any person or corporation injured by a prohibited contract or trust could sue in a federal court for double the amount of damages suffered by such person or corporation."[5] After lengthy discussion amongst the members of Congress, the bill was fully revised by the Judiciary Committee. Private enforcement was moved to Section 7 of the bill with two substantial amendments. First, the wording of the provision did no longer refer to any person injured by an unlawful arrangement, but the phrase was changed to "any person injured in his business or property." Second, the amount of compensatory remedy, which could be granted, was increased from double to threefold the damages that were sustained by the injured person.[6]

No clarification on such two amendments was documented.[7] As for the rise on the amount of damages granted, it is possible that the provision was modelled upon the English Statute of Monopolies of 1623, which provided for treble damages,[8] reading partially: "*wherein all and every such person and persons which shall be so hindered, grieved disturbed or disquieted ... shall recover three times so much as the damages*

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[4] "50 Cong. Rec. 1167 ", (1889). as cited in First, Harry. "Lost in Conversation: The Compensatory Function of Antitrust Law." NYU Law and Economics Research Paper, no. 10-14 (2010): 7, accessed 2 May 2016.

[5] "S. 3445, 50th Cong.," (1888). as cited in Harry First, "Lost in Conversation: The Compensatory Function of Antitrust Law." NYU Law and Economics Research Paper, no. 10-14 (2010): 7, accessed 2 May 2016.

[6] Harry First, "Lost in Conversation: The Compensatory Function of Antitrust Law," *NYU Law and Economics Research Paper*, no. 10-14 (2010): 11.

[7] Ibid.

[8] Clifford A Jones, "Exporting Antitrust Courtroom to the World: Private Enforcement in a Global Market," 410.

which he or they sustained ...”[9] Furthermore, it might be a congressional intent to make a private antitrust remedy “available to the people”[10] and to encourage private litigation by providing the successful plaintiff with damages commensurate with the predicaments of bringing their suits as well as attorney’s fees.[11]

The Sherman bill was passed by the Senate and adopted by both Houses, and subsequently signed into law by President Harrison on 2 July 1890.[12] Section 7 of the original Sherman Act, which provided for private antitrust remedy, reads as follows:

> *Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.*[13]

When the Sherman Act was enacted, it transpired that private litigation was a predominant mechanism to enforce the statute[14] owing plausibly to budgetary

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[9] Statute of Monopolies, 21 Jam. I, C. 3 (1623) (Eng.). as cited in Donald I. Baker. "Revisiting History-What Have We Learned About Private Antitrust Enforcement That We Would Recommend to Others." Loy. Consumer L. Rev. 16 (2003): 379. Accessed 25 March 2016.

[10] "21 Cong. Rec. 2456," (1890). at 3146. As cited in Richard Alan Arnold. "Implied Right of Action under the Antitrust Laws." Wm. & Mary L. Rev. 21 (1979): 437.

[11] Harry First, 5-11.

[12] Ibid.

[13] Section 7 of the Sherman Act of 1890.

[14] David J Gerber, *Private Enforcement of Competition Law: A Comparative Perspective*, 434.

appropriation for the public enforcement to which the U.S. Department of Justice ("DOJ") was allocated until 1903.[15] However, there were very few private antitrust cases between 1890 and 1903; only eleven cases were lodged by private individuals for damages under Section 7 of the original Sherman Act.[16]

In 1910s, The US Antitrust law was bolstered after the Supreme Court rendered a judgement in *Standard Oil Co. of New Jersey v. United States*[17] to break up Standard Oil Co. into 34 companies in 1911 together with the presidential election in 1912.[18] On 20 January 1914, President Wilson, at a joint session of Congress, exhorted Congress to the pitfalls of monopoly and several combinations that could have an unfair impact on individuals.[19] He reiterated that private individuals should be able to rely on facts proved government lawsuits as it was not fair for them to re-prove the facts that had already been ascertained, and they were unable to use the same process as the government. Furthermore, a statute of limitation should be tolled until the government action was concluded.[20]

On account of President's Wilson's address[21] and the recognition by the Congress in regard to the unsuccessful enforcement of Section 7 of the original Sherman Act[22], the House Judiciary Committee, on 16 May 1914, proposed the new

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[15] Clifford A Jones, "Exporting Antitrust Courtroom to the World: Private Enforcement in a Global Market," 410.

[16] Harry First, "Lost in Conversation: The Compensatory Function of Antitrust Law," 16.

[17] Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911).

[18] Harry First, 18.

[19] Ibid., 18-19.

[20] "H.R. Rep No. 63-627," (1914).

[21] Ibid.

[22] "S.Rep. 84-619," (1955).

antitrust bill. Section 5 of the Clayton bill was a re-enactment of Section 7 of the original Sherman Act; Section 6 set out the principle of estopple whenever any final judgement or decree was rendered in a government suit as well as the tolling of statute of limitation; Section 14 provided for injunctive relief to any person, firm, corporation or association.[23]

Section 5 provided for private rights of actions for damages as a restatement of Section 7 of the original Sherman Act. Nonetheless, Section 5 of the Clayton bill extended private rights to sue all antitrust violations under all of the US antitrust laws, not only under the Sherman Act like Section 7 of the Sherman Act.[24] Representative Webb elucidated that such extension of Section 5 was to "[open] the door of justice to every [person]... and [give] injured parties ample damages for wrongs suffered".[25] Eventually, the Senate Judiciary Committee accepted the principle of Section 5 of the House bill with no objection.[26]

However, the principle of estopple in Section 6 was substituted by the principle of *prima facie*[27] as it was argued that estopple may be claimed conversely by a defendant against a plaintiff.[28] In addition, the statute of limitations was extended from three to six years whilst the House's tolling provision remained untouched.[29]

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[23] "H.R. Rep No. 63-627."

[24] "S.Rep. 84-619."

[25] "H.R. Rep No. 63-627."

[26] "S. Rep. No. 63-698," (1914).

[27] Ibid.

[28] "H.R. Rep No. 63-627."

[29] "S. Rep. No. 63-698."

After a number of amendments, the Clayton Act had been rearranged; treble damages, statute of limitations, *prima facie* evidence and injunctive relief were placed in Section 4(a), 4(b), 5(a) and 16, respectively.

The Supreme Court in *Reiter v Sonotone,*[30] pointed out that private litigations 'provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.' Well and Tomasic reiterated that the flaws and variations of public enforcement are counterbalanced by private enforcement.[31] As such, statistical information supported the reiteration of Wells and Tomasic in that approximately 90 per cent of US antitrust cases were initiated by private individuals.[32] In 2015, 880 antitrust cases were filed by means of private enforcement whereas only 10 cases were instituted through public enforcement the US Federal District Court.[33]

1.2 Private Competition Enforcement in the EU

The European Union Competition law is comparatively more recent than the US antitrust law.[34] The development of national competition laws in Europe commenced after the Second World War as a result of the introduction of competition rules in European Communities in 1958.[35] Specifically, private competition

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[30] Reiter v. Sonotone Corp., 442 U.S. 330 (1979).

[31] Caron Beaton-Wells and Kathryn Tomasic, "Private Enforcement of Competition Law: Time for an Australian Debate," *University of New South Wales Law Journal* 35, no. 3 (2012): 653.

[32] Donncadh Woods, "Private Enforcement of Antitrust Rules-Modernization of the Eu Rules and the Road Ahead," *Loy. Consumer L. Rev.* 16 (2003): 435.

[33] The Administrative Office of the U.S. Courts, "Statistical Tables for the Federal Judiciary," ed. The Administrative Office of the U.S. Courts (the Administrative Office of the U.S. Courts 2015).

[34] Darragh Killeen, "Following in 'Uncle Sam's' Footsteps? The Evolution of Private Antitrust Enforcement in the European Union," *EUROPEAN COMPETITION LAW REVIEW* 34, no. 9 (2013): 480-81.

[35] Ibid., 481.

enforcement has been underdeveloped as opposed to the US private antitrust enforcement, possibly owing to divergent points of view on recourse to claims for damages, and relevant procedural and legal framework.[36]

Fundamentally, competition law is necessary for single-market integration of the European Communities, and eliminating private practices which could obstruct the integration.[37] Rules on competition were incorporated in Treaty of Rome, which took effect in 1958, yet the implementation of the competition rules could not be achieved until The Council of the European Union enacted Regulation 17, which set out specific measures for the implementation in 1962.[38]

Both Treaty and the Regulation 17 were silent on private rights to damages remedies.[39] Article 3(2)(b) of the Regulation 17 only allowed natural persons to end the infringement of competition rules, i.e. Article 85 and 86 (now Article 81 and 82), which is so-called right of nullity[40]. Nonetheless, no provision in the Regulation explicitly provided for rights of individuals to compensation.

In 1963, the European Commission issued a manual for firms or associations of firms as a guide in connection with the application of Articles 85 and 86 of Treaty establishing the European Economic Community (the EEC Treaty). The manual affirmed the availability of civil proceedings or civil actions for annulment of contracts or for

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[36] Donncadh Woods, "Private Enforcement of Antitrust Rules-Modernization of the EU Rules and the Road Ahead," 435-36.

[37] Clifford A. Jones, *Private Enforcement of Antitrust Law in the Eu, Uk, and USA* (Oxford University Press, 1999), 25.

[38] Ibid., 29.

[39] Ibid., 33.

[40] See Article 3. Termination of infringements of EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty

damages.[41] The manual reiterates that domestic courts of Member States are one of the authorities who ensure compliance with the rules of Articles 85 and 86.[42]

In general, the principle direct effects, which 'enables individuals to immediately invoke a European provision before a national or European court',[43] is recognised in the European Union. It was established by the European Court of Justice in the judgement of Van Gend en Loos of 1963.[44] Also, the principle of direct effects was accepted and applied in competition cases. The historic competition case involving Article 85 and 86 which initially illustrated the application of the principle of direct effects is *BRT V. SABAM*.[45] In that case, the court affirmed that Article 85 and 86 (now 81 and 82) produced direct effects, and the Regulation 17 could not deprive individuals of rights which were granted by the Treaty.[46] Furthermore, the European Court of Justice (ECJ) insisted that the courts of the Member States must provide for remedies and procedures for breach of community law.[47]

In connection with remedial actions, the European Commission and the ECJ ensured the availability of individual rights to damages[48]. In 2001, the ECJ rendered its

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[41] European Community Information Service, *Articles 85 and 86 of the Eec Treaty and the Relevant Regulations: A Manual for Firms* (Publication Service of the European Communities, 1963), 1.

[42] Ibid., 5.

[43] The European Union, "The Direct Effect of European Law," http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3Al14547.

[44] Case 26-62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, [1963].

[45] Case C-127/73 BRT V Sabam, [1974].

[46] Ibid.

[47] Donncadh Woods, "Private Enforcement of Antitrust Rules-Modernization of the EU Rules and the Road Ahead," 434.

[48] Fernando PeÑA Lopez, "Issues and Problems Regarding E.U. Competition Law Private Enforcement: Damages and Nullity Actions," *USV Annals of Economics & Public Administration* 13, no. 1 (2013): 231.

judgement *Courage v Crehan*, which was regarded as 'a landmark case in private competition enforcement.'[49] The judgement established the rights to damages,[50] which should be available to individuals injured by a breach of EC completion rules,[51] and individuals could rely on a breach of EU competition rules before a national court.[52] The Court held that

> The full effect of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.[53]
>
> Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert and which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.[54]

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[49] Richard Whish and David Bailey, *Competition Law* (Oxford University Press, 2012), 298.

[50] Ibid.

[51] Bojana Vrcek, "Overview of Europe," in *The International Handbook on Private Enforcement of Competition Law*, ed. Albert A. Foer, et al. (Cheltenham, UK: Edward Elgar, 2012), 278.

[52] Lubos Tichy, Jorg Philipp Terhechte, and Jurgen Basedow, *Private Enforcement of Competition Law* (Baden-Baden, Germany: Nomos Verlagsgesellschaft, 2011), 22.

[53] Case 453/99 Courage Ltd V Crehan, [2001] ECR I-6297, at paragraph 26.

[54] Ibid, at paragraph 27.

However, it is important to note that the judgement provided for legal basis for private enforcement concerning damage claims, yet it did not formulate any principle that the Member States could adopt.[55]

Afterwards, the Council of the European Union enacted the Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Regulation 1/2003).[56] The Regulation decentralised the enforcement of EC competition law[57] as the Commission realised the major impediments to application of competition rules by national court, which stemmed from the centralised power of the European Commission.[58]

In the Regulation 1/2003, Recital 6[59] empowered national competition authorities to apply community competition rules, i.e. Article 81 and 82. Recital 7[60] of the Regulation expressly assumed the role on national courts to decide disputes between private individuals, and award damages to the victims of infringements. The texts in Recital 7 also highlighted the consequence of a private action.[61]

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[55] Christopher H. Bovis and Charles M. Clarke, "Private Enforcement of Eu Competition Law," *Liverpool Law Review* 36, no. 1 (2015): 55.

[56] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

[57] Donncadh Woods, Ailsa Sinclair, and David Ashton, "Private Enforcement of Community Competition Law: Modernisation and the Road Ahead," *Competition policy newsletter*, no. 2 (2004): 31.

[58] Ibid.

[59] See Recital 6 of Regulation 1/2003.

[60] See Recital 7 of Regulation 1/2003.

[61] Bojana Vrcek, "Overview of Europe" in *The International Handbook on Private Enforcement of Competition Law*, 279.

The Ashurst's study on the conditions of claims for damages in case of infringement of EC competition rules was released in 2004. The report illustrated that the competition law in the EU was 'total development' as only 28 out of 60 cases for damages actions were awarded damages as of the time the study was conducted.[62] The report also identified considerable obstacles to successful private enforcement such as (1) lack of clarity in law; (2) access to courts; (3) level of risks involved; (4) difficulty of proof; (5) financial costs involved in the litigation; (6) low damages awarded; (7) lack of knowledge about the availability of damages claims and (7) lack of transparency.[63]

On 19 December 2005, the Commission of the European Communities adopted the Green Paper and the Commission Staff Working Paper on damages actions for breach of EC antitrust rules. The Working Paper underlined the benefits of private enforcement and regarded private enforcement as an effective means to compensate victims who suffer loss arising out of competition violation; and to complement public enforcement, which in turn enhanced the level of enforcement in general.[64] The Woking Paper indicated that firms would be incentivised to abide by the law by the increased level of enforcement. In other words, private enforcement would be an addition to public enforcement, thereby contributing to deterrent effect.[65]

The Green Paper and the attached Working Paper presented a number of 'obstacles to a more efficient system of damages claims',[66] which were pointed out in

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[62] Denis Waelbroeck, Generaldirektion Wettbewerb Europäische Kommission, and London Ashurst Morris Crisp, "Study on the Conditions of Claims for Damages in Case of Infringement of Ec Competiton Rules: Comparative and Economics Reports by Ashurst for the European Commission, Dg Competition," (Brussels, Belgium European Commission, Competition DG, 2004), 1.

[63] Ibid., 9-12.

[64] The Commission of the European Union, "Commission Staff Working Paper Annex to the Green Paper on Damages Actions for Breach of the Ec Antitrust Rules," (Brussels, Belgium2005), 6.

[65] Ibid., 6-7.

[66] "Green Paper on Damages Actions for Breach of the Ec Antitrust Rules," (Brussels, Belgium 2005), 4.

the Ashurst's study published in 2004.[67] The key issues discussed in both documents consist of (1) access to evidence; (2) fault requirement or fault required for damages claims; (3) legal definition and quantification of damages; (4) the passing-on defence and indirect purchaser's standing; (5) collective actions to defend consumer interests; (6) costs of actions or rules on cost recovery; (7) coordination of public and private enforcement; (8) jurisdiction of courts and applicable law and other issues.[68]

The Green Paper and the attached Working Paper outlined a couple of options for each of the respective problems[69] to facilitate damages actions[70]; and to improve damages actions both for stand-alone actions and for follow-up actions and the conditions for competition damage claims.[71] In this regard, the Commission invited all interested parties to study and comments on the suggested options in order that the Commission would have a better idea as to further measures to be adopted at Community level.[72] However, the Green Paper and the attached Working Paper did not reach a conclusion on which alternatives had been opted to confront the hindrances to damages actions.

After *Courage* case marked the important milestone in private competition enforcement, the ECJ confirmed the private rights to damage claims for victims

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[67] "Commission Staff Working Paper Annex to the Green Paper on Damages Actions for Breach of the Ec Antitrust Rules," 12.

[68] Ibid., 4-11.

[69] "Green Paper on Damages Actions for Breach of the Ec Antitrust Rules," 4.

[70] Eddy de Smijter, Constanze Stropp, and Donncadh Woods, "Green Paper on Damages Actions for Breach of the Ec Antitrust Rules," news release, 2006.

[71] The Commission of the European Union, "Green Paper on Damages Actions for Breach of the Ec Antitrust Rules," 4-5.

[72] Ibid.

suffered from competition law infringements before national court in the *Manfredi* case.[73] The Court reiterated the statement made in the *Courage* judgement that:

> It follows that any individual can rely on a breach of Article 81 EC before a national court ... and therefore rely on the invalidity of an agreement or practice prohibited under that article.[74]

> ... as regards the possibility of seeking compensation for loss caused by a contract or by conduct liable to restrict or distort competition, it should be recalled that the full effectiveness of Article 81 EC and, in particular, the practical effect of the prohibition laid down in Article 81(1) EC would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition (Courage and Crehan, cited above, paragraph 26).[75]

The Court thus held that "... any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC".[76]

Moreover, the ECJ imposed the obligation to the national courts to apply Article 81 and 82 EC as they were "a matter of public policy." The Court set out the legal framework for national court to apply Community competition rules in some

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[73] Eddy de Smijter and Denis O Sullivan, "The Manfredi Judgment of the Ecj and How It Relates to the Comission´ S Iniciative on Ec Antitrust Damages Actions," news release, 2006.

[74] C295/04 to C298/04 Vincenzo Manfredi V Lloyd Adriatico Assicurazioni Spa, [2006] ECR I-6619, at paragraph 59.

[75] Ibid, at paragraph 60.

[76] Ibid, at paragraph 61.

respects including court jurisdiction and limitation periods in actions for damages. The Court ruled that in the case where the Community rules were silent, national courts shall apply domestic rules provided that such rules to be applied must not violate the principle of equivalence and the principle of effectiveness.[77]

To elucidate, the principle of equivalence refers to the circumstance that the domestic rules which secured individual rights derived directly from Community law must not be less favourable than the rules governing similar domestic actions.[78] Meanwhile, the principle of effectiveness refers to the fact that the domestic rules must not cause practical impossibilities or excessive difficulties for private individuals to exercise their rights granted by the Community law.[79]

On 2 April 2008, the Commission of the European Communities adopted the White Paper on Damages actions for breach of the EC antitrust rules[80] and the Commission Working Paper accompanying the White Paper.[81] In contrast to the Green Paper, which identified the chief impediments to effective private antitrust damages actions in the Community; and outlined the different options to be implemented for better stand-alone and follow-on actions[82], the White Paper analysed the comments and opinions on the Green Paper made by the European Parliament, the European

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[77] Ibid, paragraph 62.

[78] Ibid, paragraph 61.

[79] Ibid.

[80] The Commission of the European Communities, "White Paper on Damages Actions for Breach of the Ec Antitrust Rules," (Brussels, Belgium 2008).

[81] "Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the Ec Antitrust Rules," (2008).

[82] Rainer Becker, Nicolas Bessot, and Eddy de Smijter, "The White Paper on Damages Actions for Breach of the Ec Antitrust Rules," news release, 2008.

Economic and Social Committee (EESC) and the Member States in a period of public consultation and debate in conjunction with relevant case law.[83]

It is evident in the Green Paper and a couple of case law that the Commission and the ECJ acknowledged the necessity of private enforcement as a complement to, but not substitute for, public enforcement[84], and private actions could assure victims of right to damages.[85] Accordingly, the White Paper primarily aimed to 'improve legal conditions for victims to exercise their right under the Treaty to reparation of all damage suffered as a result of a breach of the EC antitrust rules'.[86] As such, viable solutions and facilitating measures were put forward in order to enrich current compensation system[87]; and enhance the level of actions for damages.[88]

The White Paper provides details in relation to definition of damages to be granted. It was confirmed that the victims are entitled to full compensation, which incorporated actual loss *(dammum emergens)*, loss of profit *(lucrum cessans)* plus interest from the time damage occurred until the capital sum awarded was actually paid.[89] Although the Commission also raised concerns about overcompensation or unjust enrichment, which could potentially be enjoyed by the victims,[90] the White

[83] The Commission of the European Communities, "Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the Ec Antitrust Rules," 7.

[84] Ibid., 10 - 11.

[85] Ibid.

[86] "White Paper on Damages Actions for Breach of the Ec Antitrust Rules," 3.

[87] Rainer Becker, Nicolas Bessot, and Eddy de Smijter, "The White Paper on Damages Actions for Breach of the EC Antitrust Rules," 1.

[88] The Commission of the European Communities, "Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the Ec Antitrust Rules," 10, at paragraph 15.

[89] Ibid., 57.

[90] Ibid., 58.

Paper did not address this point. The issue was left to the determination based on the domestic rules of the Member States, but it was required that unjust enrichment be prohibited.[91]

Due to the peculiarity of the European Union integration, binding effect of decisions is another issue, which was discussed in the White Paper. Some commentators pointed out in pubic consultation that it may cause uncertainties of decisions on claims for damages if there is a lack of binding effect of decisions made by NCAS.[92] Several stakeholders, on the contrary, were concerned about the potential collision with the principle of judicial independence and incitement to undue claims.[93] Meanwhile, many respondents agreed with a rebuttable presumption of the decisions of a violation of Article 81 or 81 taken by an NCA.[94]

However, the Commission seems to concur with the partisans for the notion of binding effects of the NCAs decisions. The Commission realised that effective facilitation of antitrust damages actions required the legally binding effects of NCAs decisions in damages cases before national civil courts.[95] The consequences of this rule are the enhanced consistent application of Article 81 and 82; and the enriched legal certainty of the decisions in different jurisdictions.[96]

[91] Ibid.

[92] Ibid., 41, at paragraph 137.

[93] Ibid., 42, at paragraph 138.

[94] Ibid.

[95] Ibid., 43, at paragraph 143.

[96] "White Paper on Damages Actions for Breach of the Ec Antitrust Rules," 5 - 6.

The Commission, therefore, suggested in the White Paper that national courts could not render judgements, which contradict a final decision[97] finding an infringement of Article 81 and 82 taken by a National Competition Authority in the European Competition Network.[98] Nevertheless, the rule would not debar national courts to request clarifications or interpretation of the Treaty from the Court of Justice under Article 234 EC Treaty[99] in the case where national courts of Member States have serious challenges to the correctness of the interpretation of Article 81 and 82 by the NCA.

In regard to the binding effect of decisions by the Commission, reference was made to the Article 16(1) of Regulation 1/2003, which was derived from the codification of the ECJ's interpretation of the Treaty.[100] According to Article 16(1), national courts could not render judgements, which contradict the decisions adopted by the Commission concerning an infringement of Article 81 and 82.[101] This means that victims may rely on the Commission decisions as binding proof or irrebuttable proof in their actions for damages.[102] Similar to the binding effects of decisions by NCA,

[97] In the Commission Working Paper, final NCA decisions referred to the decisions finding an infringement of Article 81 and 82 taken by a National Competition Authority which was accepted by their addresses by refraining from an appeal or which were confirmed upon appeal by the competent review courts.

"Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the Ec Antitrust Rules," 45.

[98] "White Paper on Damages Actions for Breach of the Ec Antitrust Rules," 6.

[99] Article 234 of EC Treaty.

[100] The Commission of the European Communities, "Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the Ec Antitrust Rules," 42.para 139

[101] Article 16(1) of Regulation 1/2003.

[102] The Commission of the European Communities, "White Paper on Damages Actions for Breach of the Ec Antitrust Rules," 5; "Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the Ec Antitrust Rules," 41.para 135

national courts may exercise their right under Article 234 of the EC Treaty to refer a question to the Court of Justice for a preliminary ruling.[103]

It is obvious that the Commission decided not to adopt the model of private antitrust actions from the United States, on a ground of the predominant discrepancies in history, culture, politics, and institutions and idiosyncrasies of each Member States.[104] This statement was corroborated by the reflection on different legal attitudes, proposed measures and policies choices to be implemented in the White Paper such as legal standing of indirect purchasers, collective redress, amount of damages to be granted, and passing-on defence. These points will be discussed and amplified in Chapter 4.

As can be seen, interested parties in public consultation reflected their need for specific legislative instrument on actions for damages for breaches of antitrust law.[105] Aimed to accomplish more effective enforcement of EU competition rules,[106] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union was adopted on 10 November; signed into law on 26 November and published in the official Journal of the European Union on 5 December 2014. The

[103] "Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the Ec Antitrust Rules," 42.

[104] Darragh Killeen, "Following in 'Uncle Sam's' Footsteps? The Evolution of Private Antitrust Enforcement in the European Union," 482-83.

[105] The European Parliament, "European Parliament Resolution of 2 February 2012 on the Annual Report on Eu Competition Policy (2011/2094(Ini))," EU competition policy (2011), 8, at paragraph 27.

[106] The Competition Directorate–General, "Competition Policy Brief," news release, 2015.

directive was based on the proposal submitted to the European Commission on 11 June 2013.[107]

Directive 2014/104/EU was designed for optimising the interaction between the public enforcement and private enforcement of competition law; resolving a wide diversity of national legislations of the Member States; and ensuring the victims of competition rules infringements the right to full compensation for the harm suffered.[108] The Directive addressed several issues and concerns, which were discussed in former public consultations including principles of effectiveness and equivalence, disclosure of evidence, biding effects of NCA decisions, limitation periods, right to full compensation, passing on defence, indirect purchasers, and guidelines for national courts as regards quantification of harm.[109] The Member States are required to implement the Directive in their legal systems by 27 December 2016.[110]

It is noteworthy that whilst a huge number of sessions and documentations were arranged for improving damages actions for breaches of EU competition rules, seldom did a dossier prove the attempt of the Commission on developing measures on interim relief or injunction. It is possible that there should not be any complication in regard to the interim measure as the Court of Justice asserted in *Camera Care v Commission* that the Commission has authority to order interim measure under Article

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[107] The European Commission, "Proposal for a Directive of the European Parliament and of the Council on Certain Rules Governing Actions for Damages under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union," (Strasbourg, France2013).

[108] Ibid., 3-4.

[109] DIRECTIVE 2014/24/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on public procurement and repealing Directive 2004/18/EC

[110] The European Commission, "Implementation of the Directive," http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html.

3 of Regulation 17.[111] Subsequent to the adoption of Regulation 1/2003, the Commission has authority to order interim measures under Article 8 of the Regulation.[112] Also, national competition authority and domestic courts have such authority conferred by their domestic rules. To exemplify, the UK Competition and Markets Authority (CMA) may exercise its power under Section 35 of UK Competition Act 1998 to order interim measures.[113]

1.3 Private Competition Enforcement in Japan

The evidential legislative history demonstrates that the enactment of competition in Japan was markedly influenced by the United States after Japan defeated the World War II.[114] The Antimonopoly Act was modelled on US Antitrust law, by way of combining of the Sherman Act and the Clayton Act.[115] However, drafting history depicts the collisions between Japan and United States towards business culture[116], regulatory culture[117] and competition enforcement culture,[118] particularly private enforcement.[119]

[111] Case 792/79 R Camera Care Ltd V Commission of the European Communities, [1980] 1980-00119, at paragraph 13-19.

[112] Article 8(1) of Regulation 1/2003.

[113] Section 35 of the UK Competition Act 1998.

[114] Mitsuo Matsushita, *International Trade and Competition Law in Japan*, 77.

[115] Etsuko Kameoka, *Competition law and policy in Japan and the EU*, 19.

[116] Harry First, "Antitrust Enforcement in Japan," *Antitrust Law Journal* 64, no. 1 (1995): 139.

[117] Ibid., 142.

[118] Harry First, "Antitrust in Japan: The Original Intent " 71.

[119] Simon Vande Walle, *Private Antitrust Litigation in the European Union and Japan: A Comparative Perspective* (Maklu, 2013), 35.

It is implicitly known that the US ambition forcing Japan to enact the antimonopoly law was to dissolve the *Zaibatsu* businesses.[120] As can be seen, the US rejected the Bill of Industrial Order prepared by the Japanese Ministry of Commerce and Industry as it deviated from what the US desired.[121] Afterwards, the US sent the joint working group from State Department and War Department to Japan on 6 January 1946.[122] The group, led by Corwin Edwards, had a special mission on deconcentration of Japanese conglomerates – *Zaibatsu*; this mission is known as 'Edwards Mission' or 'Zaibatsu mission'.[123] The product of Edwards Mission is the Edward Report, which herald the beginning of competition legislation in Japan.[124]

The Edward Report did not provide a draft antitrust statute, yet it suggested detailed recommendations for antitrust legislation with a concentration on *Zaibatsu* dissolution and various structural reforms.[125] The Report was not a replication of US antitrust law, and it voiced that the US antitrust law was not adequate for Japan.[126] On the contrary, the Report proposed the tailor-made recommendations for Japan's troubles.[127] It is worth noting further that the Report was the essential reference for the draft of antitrust law in Japan.[128]

After the US rejected the Bill of Industrial Order, the US assigned Posey T. Kime, an attorney with the Antitrust Division of the Department of Justice and a former

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[120] Kenji Suzuki, *Competition Law Reform in Britain and Japan: Comparative Analysis of Policy Network*, 19.

[121] First, "Antitrust in Japan: The Original Intent " 33.

[122] Ibid., 21.

[123] Ibid., 21, 25.

[124] Ibid., 33.

[125] Ibid., 25, 34.

[126] Ibid., 25, 35.

[127] Ibid., 25.

[128] Simon Vande Walle, Private Antitrust Litigation in the European Union and Japan: A Comparative Perspective, 37.

judge on Indiana Court of Appeals, to commence with the first antitrust law from the US side.[129] Although Kime leaned towards the Edward Report, it is not the case for private antitrust provision as the Report did not mention private antitrust litigation.[130] Kime thus backtracked to the private antitrust provisions in the US Clayton Act.[131] Originally, private antitrust litigation of the Kime draft was in Section 14, and it was a virtual copy of Section 4 of Clayton Act,[132] meaning that successful plaintiff could recover threefold damages plus attorney fees in antitrust damages claim.[133] In contrast, Section 14 of Kime draft provided additional conditions and limitations on attorney's fees to be granted.[134]

In August 1946, the US submitted the Kime draft to the Japan government, yet the government issued the memorandum in response to the Kime draft in September 1946.[135] In the memorandum, the Japan government expressed its strong disagreement to the Kime draft in regards to conduct rules and structural provision,[136] and rejected the draft in October 1946 accordingly.[137] In addition, the government did not want to pursue common law approach in development and application of antitrust law, and thereby it was reluctant to accept the provisions on private enforcement,

[129] First, "Antitrust in Japan: The Original Intent " 35.

[130] Simon Vande Walle, *Private Antitrust Litigation in the European Union and Japan: A Comparative Perspective*, 37.

[131] Ibid., 37.

[132] First, "Antitrust in Japan: The Original Intent " 40.

[133] Simon Vande Walle, 37.

[134] First, "Antitrust in Japan: The Original Intent " 40.

[135] Ibid., 42.

[136] Ibid., 43.

[137] Ibid., 42 - 44.

which enabled the court to play a vital role in applying and developing the antitrust law.[138]

After Kime had left Japan in October 1946, the assignment of drafting Japanese antitrust law was carried out by Lester Salwin.[139] The Japan government proposed the new draft entitled "Outline of the Antitrust Law", and the draft was submitted to the U.S. authorities in December 1946.[140] Although the new proposal rested on the Kime draft, it reflected the independent views of Japan's government towards competition law.[141] In the draft, the private enforcement provision was rearranged from Section 14 to Section 7, and was changed from treble damages to single damages[142], based on the general principle of Japanese Civil Code.[143]

Henceforth, there were several serious negotiations between Japan and the US.[144] The Japan government submitted the "Law Relating to Prohibition of Private Monopoly and Preservation of Lawful Trade (Tentative Draft)" to Salwin on 4 February 1947. The Tentative Draft made three important changes to private enforcement provisions. First, the damages granted to successful victims would be single, not treble, which was consistent with the Outline of the Antitrust Law. Second, it introduced the compulsory follow-on actions, meaning that private individuals could not initiate a lawsuit before the prior final decision by the Commission, the antitrust enforcement agency, that a person in question infringed competition law. Third, the defendant had

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[138] Simon Vande Walle, *Private Antitrust Litigation in the European Union and Japan: A Comparative Perspective*, 38.

[139] First, "Antitrust in Japan: The Original Intent " 44.

[140] Simon Vande Walle, 38.

[141] First, "Antitrust in Japan: The Original Intent " 45.

[142] Ibid., 49.

[143] Simon Vande Walle, 38.

[144] Ibid., 40.

a defence against the claim if they could prove that the “act was not done wilfully nor any actions committed”.[145]

The Tentative Draft was the key reference to the discussion and negotiation between Japan and the U.S. As such, Japan nominated Kashiwagi from the Ministry of Finance to assist in legislative drafting. The negotiations between both parties resulted in at least five successive drafts, which were collectively called “The Revised Drafts”. There were also a couple of vital amendments to the private enforcement provisions. The wilfulness defence or gross negligence was underlined by Salwin in the First Revised Draft, and was eliminated in the Third Revised Draft.[146] Whilst the precondition for prior final decision by antitrust enforcement agency was removed from the March 15 draft, it was brought back in the final bill.[147]

Eventually, Japan and US reached agreement on the final bill in March 1947. It was noticeable that the final bill substantially deviated from what the US desired.[148] Both parties partially achieved the favourable outcomes. Japan was triumphant in denying treble damages, and private individuals were unable to bring the lawsuit prior to a final decision rendered by public antitrust enforcement agency,[149] which were entirely different from the US private antitrust enforcement. Meanwhile, the US succeeded in omitting the wilfulness defence or gross negligence. Additionally, the statute of limitations was extended from one year to three years as from a final decision rendered by the Japan Fair Trade Commission.[150]

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[145] First, "Antitrust in Japan: The Original Intent " 56.

[146] Ibid., 64.

[147] Ibid.

[148] Simon Vande Walle, *Private Antitrust Litigation in the European Union and Japan: A Comparative Perspective*, 40.

[149] Ibid., 41.

[150] Ibid., 40.

With regard to the injunctive relief, it did not appear in the Antimonopoly Act of 1947, but private individuals could seek interim relief under Civil Provisional Remedies Act.[151] However, according to the reports of study groups established by Ministry of International Trade and Industry and the JFTC in 1997 and 1998 respectively, plaintiffs experienced difficulties in obtaining injunctive relief under the existing provisions, and the report indicated the need for a new injunction system in order to provide better civil remedies.[152] Accordingly, the JFTC amended Antimonopoly Act, and the amendment was promulgated by the government on 19 May 2000, and came into effect on 1 April 2001.[153]

1.4 Private Competition Enforcement in Singapore

Legislative history proves that one of the powerful forces behind the enactment of the Singapore Competition Act in 2004 is the United-States-Singapore Free Trade Agreement (USSFTA).[154] Chapter 12 of the USSFTA obliged Singapore to legislate against anti-competitive business conducts, and for generic competition law. [155] On the contrary, the Act is considerably based upon UK's Competition Act 1998, which was modelled upon the European Commission competition legislation. [156] According to the legislative source key of the Competition Act (Chapter 50B), provided by Singapore Government[157], competition laws from diverse countries such as Canada, India, Ireland were also studied as a reference to the draft Competition Act. Unexpectedly, there is no US Federal Antitrust Act on the list of such reference;

[151] Ibid., 81.

[152] Ibid., 85 - 86.

[153] Ibid., 86.

[154] Cavinder Bull and Chong Kin Lim, *Competition Law and Policy in Singapore*, 7.

[155] Ibid., 7-8.

[156] Gillian Lee, "New Competition Legislation in Singapore," *Int'l J. Franchising L.* 3 (2005): 19.

[157] The Singapore Government, "Legislative Source Key - Competition Act."

nevertheless, Lee contended that the United States Antitrust laws was also included in the study during the legislation of Singapore competition law.[158]

As for private enforcement provision, the legislative source key elaborates on the derivation of Section 86, which prescribes the rights of private action, in that it was modelled upon Section 6(1) and (3) of the Ireland Competition Act 1991; and Section 47A (1), (5) to (7) and (9) of the UK Competition Act 1998.[159]

It is vital to compare and contrast the relevant part of Section 86 of the Singapore Competition Act 2004 with Section 6(1) and (3) of the Ireland Competition Act 1991, which are quoted as follows:

- **Section 86 of Singapore Competition Act 2004**

(1) Any person who suffers loss or damage directly as a result of an infringement of the section 34 prohibition, the section 47 prohibition or the section 54 prohibition shall have a right of action for relief in civil proceedings in a court under this section against any undertaking which is or which has at the material time been a party to such infringement.

...

(8) The court may grant to the plaintiff in an action under subsection (1) all or any of the following reliefs:

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[158] Gillian Lee, "New Competition Legislation in Singapore," 19.

[159] The Singapore Government, "Section 86. Right of Private Action," http://statutes.agc.gov.sg/aol/search/display/view.w3p;ident=d8e29abf-4996-480c-9430-72af1fba9b4b;query=Status%3Acurinforce%20Type%3Aact,sl%20Content%3A%22Competition%22%20Content%3A%22Act%22;rec=0;resUrl=http%3A%2F%2Fstatutes.agc.gov.sg%2Faol%2Fsearch%2Fsummary%2Fresults.w3p%3Bquery%3DStatus%253Acurinforce%2520Type%253Aact,sl%2520Content%253A%2522Competition%2522%2520Content%253A%2522Act%2522#pr86-he-.

(a) relief by way of injunction or declaration;

(b) damages; and

(c) such other relief as the court thinks fit.

- **Section 6(1) and (3) of the Ireland Competition Act 1991**

(1) Any person who is aggrieved in consequence of any agreement, decision, concerted practice or abuse which is prohibited under section 4 or 5 shall have a right of action for relief under this section against any undertaking which is or has at any material time been a party to such agreement, decision or concerted practice or has been guilty of such abuse.

...

(3) The following reliefs, or any of them, may be granted to the plaintiff in an action under this section:

(a) relief by way of injunction or declaration,

(b) subject to subsection (6), damages, including exemplary damages.

In the light of both provisions quoted above, it is ascertained that relevant part of Section 86 of the Singapore Competition Act 2004 was derived from Section 6(1) and (3) of the Irish Competition Act 1991. However, it is noticeable that there are two significant differences. First, the Singapore Competition Act authorises the Court to determine remedial measures other than injunction and damages. The other discrepancy is that the Singapore Competition Act did not adopt exemplary damages or punitive damages which is prescribed in the Irish Competition Act 1991.

Section 67 of the Competition Act provides for interim measures. The legislative source key demonstrated that the provision was modelled upon Section 35

of UK Competition Act 1998.[160] This provision was slightly amended in 2007 by the Bill no.11/2007 which was later pass into Competition (Amendment) Act 2007 (No. 23 of 2007) by Parliament on 21st May 2007 and assented to by the President on 1st June 2007.

1.5 Private Competition Enforcement in Malaysia

The legislative process of Malaysia's competition law began in 1990s.[161] The current Competition Act was developed from the Trade Practices Bill which The Bill was derived from various competition laws from various Commonwealth countries including Australian Trade Practices Act 1974 and the New Zealand Commerce Act 1986.[162] It should be further noted that when the structure of the Malaysia Competition Act was thoroughly reviewed, it was found that it was fundamentally similar to that of UK Competition Act 1998 and Singapore Competition Act 2004 (Chapter 50B).

Rights of private action was set out in Section 64 of Malaysia Competition Act. The historical documentation of this provision could not be found, but it can be ascertained that it might have been derived from Section 86 of Singapore Competition Act as it almost virtually duplicated verbatim. However, it is important to note that even though both of the aforesaid provisions are remarkably alike, they adopted different conceptual approaches, which will be analysed and discussed in detail in the following chapter.

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[160] "Section 67. Interim Measures," http://statutes.agc.gov.sg/aol/search/display/view.w3p;ident=995a47c4-b02c-4d18-bc02-6868b0fe1900;query=Status%3Acurinforce%20Type%3Aact,sl%20Content%3A%22competition%22%20Content%3A%22act%22;rec=0;resUrl=http%3A%2F%2Fstatutes.agc.gov.sg%2Faol%2Fsearch%2Fsummary%2Fresults.w3p%3Bquery%3DStatus%253Acurinforce%2520Type%253Aact,sl%2520Content%253A%2522competition%2522%2520Content%253A%2522act%2522#pr67-he-.

[161] May Fong Cheong and Yin Harn Lee, "Malaysia and Singapore," in *The Political Economy of Competition Law in Asia*, ed. Mark Williams (Cheltenham, UK: Edward Elgar, 2013), 231.

[162] Hwang Lee et al., "A Study on Malaysian Competition Law," (Seoul, Korea: OECD Centre for Competition in Seoul, 2012), 63.

In the light of the provision of interim measures which is provided in Section 35 of Malaysia Competition Act, it is possible that the provision was modelled upon Section 35 of UK Competition Act 1998.

1.6 Private Competition Enforcement in Thailand

It is undiscoverable and unclear as to the derivation of competition legislation in Thailand. Professor Sakda Thanitcul, who is an eminent competition law scholar and professor at Faculty of Law, Chulalongkorn University in Thailand, suggests that competition law of Thailand adopted salient features of diverse foreign competition laws; it was not primarily based on any specific competition legislation from one country. Ascertaining the underlying ideology and analysing the structure together with the etymology of the Act may thus be helpful in identifying what laws upon which Competition Act of Thailand was modelled.

It is transpired that Thai Competition Act, B.E. 2542 (1999) adopted some concepts from US Antitrust law. First, the Act provides for preventive measure against concentration of economic power[163] The ideology of deconcentration of economic power was enshrined in the US Sherman Act of 1890 as the American People were afraid that behemoth companies would exert strong influence on country's politics.[164] In addition the Act aims at protection of market access and a fair opportunity for Small-Medium Enterprises (SMEs) to compete on merits. This idea appears in the Robinsan-Patman Act of 1936.[165]

It is vital to note that the Competition Act, B.E. 2542 (1999) did not adopt the principle of prohibition of monopolization or the attempt at monopolization, which

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[163] Sakda Thanitcul, *Kham Athibuy Lhae Koraneesuksa Phra Ratchabanyati Karnkangkan Tang Kanka, B.E. 2542 [Commentary and Case Study on Competition Act, B.E. 2542]*, 32.

[164] Alan B. Morrison, *Fundamentals of American Law*, Reprinted 1998 ed. (New York, USA: Oxford University Press, 1998), Non-fiction, 44.

[165] Sakda Thanitcul, *Kham Athibuy Lhae Koraneesuksa Phra Ratchabanyati Karnkangkan Tang Kanka, B.E. 2542 [Commentary and Case Study on Competition Act, B.E. 2542]*, 33.

is set out in Section 2 of the Sherman Act. On the contrary, the Act seems to lean towards the principle of abuse of dominance position, a salient feature of EU competition law,[166] which is intended for conduct control rather than structure control like the US Antitrust law.[167] Furthermore, Thai Competition Law also incorporates the principal objective of Competition law of Canada, which is the promotion of consumer choice, considering price, quality and service.[168]

It seems utterly unable to determine the original source of private enforcement provision prescribed in Section 40 of the Act as the legislative documentation could not be discovered. Lexical items contained in private enforcement provisions from various regimes were hence studied in order to relate the derivation of the provision. It is likely that Section 40 of the Thai Competition Act may be derived from Section 82(1) of Australian Trade Practices Act 1974. The academic background of Associate Professor Sutee Supanit, one of the legislative drafters[169] and members of the first batch of Trade Competition Commission of Thailand[170] may be able to validate the foregoing assumption. He obtained a Master's of Laws (LL.M.) from Monash University, Australia.[171] For the purpose of comparison, both provisions are illustrated below.

- **Section 40 of Competition Act, B.E. 2542 (1999)**

[166] Ibid., 69.

[167] Ibid., 63.

[168] Ibid., 33.

[169] Sutee Supanit, *Principles and Rules of the Competition Act of 1999*, 1st ed. (Bangkok, Thailand: Thammasat University Press, 2012), (10).

[170] Sakda Thanitcul, *Kham Athibuy Lhae Koraneesuksa Phra Ratchabanyati Karnkangkan Tang Kanka, B.E. 2542 [Commentary and Case Study on Competition Act, B.E. 2542]*, 446.

[171] Winyuchon Publication House, "Assoc Prof. Sutee Supanit," http://www.winyuchon.co.th/writer_profile.php?writer_id=90.

A person sustaining damage as a consequence of the violation of section 25, section 26, section 27, section 28 or section 29 shall have the right to bring an action for damages against the violator.

- **Section 82(1) of Australian Trade Practices Act 1974**

A person who suffers loss or damage by an act of another person that was done in contravention of a provision of Part IV or V may recover the amount of the loss or damage by action against that other person.

As can been seen, the legislative terminology of both of the aforesaid provisions are fundamentally similar to each other. Minor discrepancies might be in consequence of word selections or translation of the drafters or translators, as the case may be. Nonetheless, the gist and contents are substantially identical.

2. The Relationship and Interaction between Public and Private Enforcement in Antitrust/Competition law

In general, antitrust/competition law can be enforced through public and private enforcement. Private individuals may rely on the specific private competition provisions whereas most legal systems do not provide for specific provisions[172], but antitrust victims can opt for general tort or contract provisions under national civil and commercial laws[173] to instigate private lawsuits. In some jurisdictions, right to compensation or damages for any harm, not only antitrust harm, is recognised as the Constitutional principle, and is enshrined in the Constitution of these jurisdictions accordingly.[174]

Even if the public and private enforcement systems are primarily designed to work in tandem, it is worth considering the relationship between them in certain aspects, which will be discussed in this section.

2.1 Objectives of Enforcement

Enforcement objectives and implementation may vary according to the underlying ideology of respective regimes. Although the mutuality of public and private enforcement is to achieve the prime goals of competition law, they are basically understood to serve different enforcement targets. That is, public enforcement is regarded as punishment and deterrence instruments whereas private enforcement advocates the idea of compensation to victims.[175]

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[172] Horacio Vedia Jerez, *Competition Law Enforcement and Compliance across the World: A Comparative Review* (Kluwer Law International, 2015), 241.

[173] Denis Waelbroeck, Generaldirektion Wettbewerb Europäische Kommission, and London Ashurst Morris Crisp, 29; Reza Rajabiun, "Private Enforcement and Judicial Discretion in the Evolution of Antitrust in the United States," *Journal of Competition Law and Economics* 8, no. 1 (2012): 190.

[174] Horacio Vedia Jerez, 241.

[175] Ibid., 315.

It can be argued that damages can be awarded to injured parties by means of public enforcement. For example, competition authorities of the US and France can claim damages on behalf of an injured individual.[176] Likewise, The UK Consumer Rights Act 2015 assumes the power for Competition and Markets Authority to approve the application for the redress scheme, which will enable competition victims to obtain without legal proceedings in court.[177] However, this implementation is rather limited to some certain jurisdictions, and it might be a mere facilitation of claims for damages for the victims, but not a prime aim of public enforcement.[178]

There has been a long-standing debate on the objectives of private enforcement. One the one hand, it is true that private enforcement can remedy negative impacts stemming from competition infringements by awarding damages to victims being that this compensatory remedy transcends the competence of competition authorities in public enforcement.[179] On the other hand, private enforcement can also achieve the other goals, viz. prevention or deterrence of competition violations, and punishment for anticompetitive conducts.[180]

In the United States, it is evident that private enforcement has been a major instrument for antitrust enforcement since the enactment of the Sherman Act.[181] Also, private enforcement has been playing a more substantial role than public

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[176] The Business and Industry Advisory Committee (BIAC) of OECD, "Relationship between Public and Private Enforcement" (paper presented at the roundtable on the relationship between public and private antitrust enforcement, 15 June 2015), 3.

[177] The Competition and Markets Authority (CMA), "Guidance on the Cma's Power to Approve Voluntary Redress Schemes for Infringements of Competition Law," (2015).

[178] The Commission of the European Communities, "Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the Ec Antitrust Rules," 11.

[179] Horacio Vedia Jerez, *Competition Law Enforcement and Compliance across the World: A Comparative Review*, 239.

[180] Ibid., 239.

[181] David J Gerber, *Private Enforcement of Competition Law: A Comparative Perspective*, 434.

enforcement.[182] Private antitrust enforcement apparently serves both compensatory and deterrent purposes[183] as it embodies deterrent-oriented features in the form of treble damages.[184] To elucidate, by virtue of the availability of treble damages, victims can be awarded up to three times the actual amount of harm arising out of antitrust violations.[185] In addition to compensation, the deterrent goal can be achieved through the award of treble damages.[186] The foregoing statements are corroborated by the interpretation of the US Supreme Court in *Blue Shield of Virginia v. McCready,*[187] which held that:

> The lack of restrictive language in § 4 reflects Congress' expansive remedial purpose of creating a private enforcement mechanism to deter violators and deprive them of the fruits of their illegal actions, and to provide ample compensation to victims of antitrust violations.

Some academic scholars verified that private enforcement, specifically treble damages, can serve deterrent objectives. Professor Cavanagh, for example, reiterated that in addition to compensation, mandatory trebling can lead to deterrent effect.[188] He elucidated that treble damages incentivised private parties to act as private attorney generals, and pursue antitrust lawsuit although the competent

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[182] Ibid., 435.

[183] Clifford A Jones, "Exporting Antitrust Courtroom to the World: Private Enforcement in a Global Market," 410.

[184] The Business and Industry Advisory Committee (BIAC) of OECD, "Relationship between Public and Private Enforcement," 3.

[185] David J Gerber, Private Enforcement of Competition Law: A Comparative Perspective, 437.

[186] Clifford A Jones, "Exporting Antitrust Courtroom to the World: Private Enforcement in a Global Market," 410.

[187] Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982).

[188] Edward D. Cavanagh, "The Private Antitrust Remedy: Lessons from the American Experience," *Loyola University Chicago Law Journal* 41 (2010): 633.

government agencies do not proceed. Accordingly, it is likely that the rise of successful private litigations will contribute to the deterrence of antitrust violations.[189]

Moreover, *Lyons v. Westinghouse Electric Corporation* is the landmark case that confirms the existence of punitive element in treble damages. The court explained that as for treble damages, whilst one third is a civil remedy, two thirds is not for a remedial purpose, but for punitive purposes.[190] Professor Cavanagh also confirmed the court's explanation in his academic article.[191]

However, the European Union seems to have a different attitude towards private enforcement objectives. Private enforcement has predominantly been recognised as a tool to provide compensatory remedies to victims. The Ashrust report, the Green Paper, and the White Paper all aimed at strengthening private enforcement by identifying obstacles to private enforcement in order to facilitate damages actions for competition infringement. In brief, the paramount goal of private damages actions in the EU is to ensure full compensation to victims for the loss suffered from competition violations.[192]

It is obvious that the EU member states opposed the US private enforcement, which offers strong incentives to private parties, i.e. treble damages, thus contributing to unmeritorious and vexatious litigation.[193] In contrast, the EU regards damages as a compensatory instrument.[194] Most respondents to the Green Paper were antagonistic to the system which allows victims to receive damages that were higher

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[189] Ibid.

[190] Lyons v. Westinghouse Electric Corporation, 235 F. Supp. 526 (S.D.N.Y. 1964)

[191] Edward D. Cavanagh, "The Private Antitrust Remedy: Lessons from the American Experience," 635.

[192] The Commission of the European Union, "Commission Staff Working Paper Annex to the Green Paper on Damages Actions for Breach of the Ec Antitrust Rules," 6.

[193] Ibid., 15.

[194] The Commission of the European Communities, "Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the Ec Antitrust Rules," 55.

than they suffered.[195] Exemplary or punitive damages are contrary to public order of most EU member states such as Germany.[196] For these reasons, it is the implication that the EU decided not to follow US private enforcement system.

Whereas the EU emphasised the compensatory damages, they did not entirely dismiss the deterrent effect produced by private enforcement. In the Green Paper and the White Paper, the EU apparently recognised deterrence as one of the advantages of private enforcement.[197] However, it seems that the EU is of the view that deterrence is an indirect benefit resulting from the increased private enforcement and the maximised amount of enforcement, but not a fundamental principle of private enforcement.[198]

Some competition law academics strongly oppose the US private antitrust system. To illustrate, Professor Kovacic, the former Commissioner of the United States Federal Trade Commission (FTC), is of the view that 'private rights of action US-style are poison. They over-reached dramatically.'[199] In addition, Professor Wouter P.J. Wils, a Hearing Officer of the European Commission and Visiting Professor at King's College

[195] Ibid.

[196] The Commission of the European Union, "Commission Staff Working Paper Annex to the Green Paper on Damages Actions for Breach of the Ec Antitrust Rules," 36.

[197] Ibid., 6; The Commission of the European Communities, "Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the Ec Antitrust Rules," 10.

[198] The Commission of the European Union, "Commission Staff Working Paper Annex to the Green Paper on Damages Actions for Breach of the Ec Antitrust Rules," 6-7; The Commission of the European Communities, "Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the Ec Antitrust Rules," 10.

[199] Wash REGULATORY REPORTING Assocs, *FTC:Watch*, no. 708 (2007): 4.(quoting William E. Kovacic, speaking at an ABA panel on Exemptions and Immunities)

London, also emphatically disagrees with the US conception of private actions for damages as an instrument of deterrence and punishment.[200]

Professor Wils claimed that public enforcement is better to serve deterrence and punishment objectives than private enforcement with three major supporting reasons. First, competition authorities have state power, which confers better investigative and discoverable powers to obtain undisclosed information.[201] Furthermore, public enforcement can impose a variety of sanctions including fines, director disqualifications and imprisonment, the combinations of which can lead to a more effective deterrence than private enforcement does.[202] Second, private damages actions are compelled by private interests, but not general interest.[203] Lastly, private litigations require higher administrative costs than public enforcement owing to a lack of specialisation of private parties.[204]

In summary, it seems uncontroversial that private enforcement is a substantial complement to public enforcement.[205] Also, private enforcement can serve a variety of purposes, namely providing compensation to victims of anticompetitive conducts, enhancing deterrence and competition law compliance[206] Nevertheless, previous academic literature points out that two dominant competition regimes, the US antitrust law and the EU competition law, value different goals of

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[200] Wouter P. J. Wils, "Private Enforcement of Eu Antitrust Law and Its Relationship with Public Enforcement: Past, Present and Future," in *Cartel Damages in Europe* (the Mannheim Centre for Competition and Innovation Law and Economics2016), 17.

[201] "The Relationship between Public Antitrust Enforcement and Private Actions for Damages," *World Competition: Law and Economics Review* 32, no. 1 (2009): 7.

[202] Ibid.

[203] Ibid., 9.

[204] "Should Private Antitrust Enforcement Be Encouraged in Europe?," ibid.26, no. 3 (2003): 16.

[205] Andreas Reindl, "Oecd Policy Rountables on Private Remedies 2007" (paper presented at the The Rountable discussions on Private Remedies, 2006), 9.

[206] Ibid.

private enforcement. By way of elucidation, the US private damages actions equally serve as compensatory and deterrent instrument. Meanwhile, the EU private damages actions primarily aim to compensate victims of competition infringements, but the deterrent goal would be achieved through a consequence of properly functional private enforcement.

Professor David J. Gerber stated that 'most competition law systems in the world resemble European competition laws rather than the US antitrust law'.[207] One of the facts that might substantiate Professor Gerber's statement is that many competition regimes such as Japan, Singapore, Malaysia and Thailand did not adopt treble damages, one of the prominent features in the US private antitrust enforcement. As for the author's opinion, this may imply further that private competition enforcement in many jurisdictions ultimately fulfil a monetary compensation purpose while the deterrence objective is likely to be of secondary importance.

2.2 Public competition authorities' decision as a precondition to private litigation

It might be one of uniqueness when it comes to private competition enforcement. In competition law, private parties may take civil actions either on a stand-alone, on a follow-on basis or both, depending on the statutory requirements of certain regimes. In stand-alone actions, private parties can take civil actions prior to a competition authority finding a competition infringement.[208] Meanwhile, follow-on actions refer to civil actions that are brought after the competition infringement has been found by the competition authority.[209]

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[207] David J Gerber, *Private Enforcement of Competition Law: A Comparative Perspective*, 431.

[208] The Commission of the European Communities, "Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the Ec Antitrust Rules," 7. Footnote 3

[209] Ibid. Footnote 3

As for the US Antitrust Law, Section 4(a) of the Clayton Act entitles private parties to the rights to claims for damages; in other words, private parties can initiate a private antitrust lawsuit on a stand-alone basis. Alternatively, the private plaintiffs may pursue follow-on actions whereby they can rely on final judgement or decree against a defendant rendered in any civil or criminal proceeding brought by the antitrust authorities. Section 5(a) of the Clayton Act provides that the final judgement or decree can be used as *prima facie* evidence against the defendant in the private antitrust claim.

Similar to the US Antitrust law, the Directive 2014/104/EU on antitrust damages actions entitles any natural and legal person to claim for damages on a stand-alone basis.[210] Also, private plaintiffs may opt for follow-on actions. According to Article 9(1) of the EU Directive, the infringement of competition law found by the final decision of the national competition authority or by a review court is deemed to be as 'irrefutably established for the purposes of an action for damages brought before a national court of respective Member States. Moreover, the Member states are obliged to treat the said decision rendered in another Member State as *prima facie* evidence which the national courts may assess along with any other evidence adduced by the parties pertaining to Article 9(2) of the Directive.[211]

In Japan, it is unique that there are two systems providing for the right to claim for damages. Under Act on the Prohibition of Private Monopolization and Maintenance of Fair Trade of Japan or the Antimonopoly Act (AMA), although private parties are conferred the right to claim for damages, they must only rely on follow-on actions. In other words, private parties are not allowed to exercise the right until the Japanese Fair Trade Commission issues cease and desist order, and it becomes final and binding in accordance with Article 26(1) of the Act.[212] Alternatively, an injured party

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[210] Recital 13 of Directive 2014/104/EU on antitrust damages actions.

[211] Article 9 of Directive 2014/104/EU on antitrust damages actions.

[212] Article 26 and 49 of Act on Prohibition of Private Monopolization and Maintenance of Fair Trade. (Act No. 54 of April 14, 1947).

may rely on a tortious claim under Article 709 of the Civil Code of Japan to initiate a civil action.[213] Both claims can be brought to the court by the same plaintiff concurrently.[214]

Similar to Japan, the Singapore Competition Act 2004 (Chapter 50B) as revised in 2006 also provides the right of private actions in Section 86, but a decision of the competition authority is a pre-requisite for the exercise of such right. That is, according to Section 86 of the Act, it is required that a final decision of competition infringement by the Competition Commission of Singapore must be made, and the statute of limitations for filing an appeal to the Competition Appeal Board or the competent court has been exhausted or has expired.[215] After the aforesaid requirements are fulfilled, private parties are entitled to instigate a private action against an infringer.[216] In other words, private plaintiffs have to opt for follow-on actions while they are unable to take stand-alone actions.

Meanwhile, under the Malaysian Competition Act 2010, private parties can exercise the right of private action in accordance with Section 64 without any prior finding of competition infringement by the Malaysia Competition Commission (MyCC).[217] There is no precondition as is required by Singapore or Japan competition provisions. In other words, private parties may opt for either stand-alone actions or follow-on actions.

Thailand competition law has also recognised and set out the right of private damages action in Section 40 of Competition Act, B.E. 2542 (1999). However,

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[213] Etsuko Kameoka, *Competition law and policy in Japan and the EU*, 170.

[214] Ibid.

[215] Cavinder Bull and Chong Kin Lim, *Competition Law and Policy in Singapore*, 267.

[216] Ibid.

[217] Sharon Tan and Nadarashnara Sargunaraj, "Private Antitrust Litigation in Malaysia: Overview," (2016), https://uk.practicallaw.thomsonreuters.com/0-633-2588?__lrTS=20170607160714119&transitionType=Default&contextData=(sc.Default)#a649650.

the provision is rather unclear as to whether there is a prerequisite requirement for private parties to instigate a private claim for damages. On the one hand, Judge Pasuk Charoenkiat explains that a private plaintiff can bring private actions for damages, however, a violator has not yet been prosecuted.[218] He argues that the provision does not set out the precondition requiring that the violator is already found guilty.[219]

On the other hand, Waranon Amorntumrong interpreted that Section 40 paragraph 1 requires the precondition that the court must render the judgement that the defendant is proved guilty of the offence.[220] After that, the private plaintiffs are entitled to initiate civil lawsuit for damages by reliance on the former court judgement.[221] These foregoing issues will be thoroughly discussed and analysed in the following chapters.

2.3 The relationship between leniency policies and private actions for damages

According to UNCTAD, '[l]eniency programs are designed to give incentives to cartel members to take the initiative to approach the competition authority, confess their participation in a cartel and aid the competition law enforcers.'[222] Jerez amplifies that definition that leniency programs are

> investigative tools established to detect cartel activity by encouraging undertakings and individuals to report their cartel activity and cooperate in the investigation instituted by the competition authority with the purpose of receiving in exchange

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[218] Pasuk Charoenkiat, "The Enforcement of Competition Law by Private Parties," *Dulapaha* September - December 2008, no. 3 (2008): 102.

[219] Ibid.

[220] Waranon Amorntumrong, "A Comparative Study on Administration and Enforcement of Competition Law" (Chulalongkorn University, 2004), 212.

[221] Ibid., 212-13.

[222] Philippe Brusic, "Competition Guidelines: Leniency Programmes," *UNCTAD MENA Programm* (2016): 1.

full or partial immunity from any sanctions that would have been imposed upon them for the infringement of the anti-cartel provisions.

Indeed, leniency policies and private actions for damages are the fundamentals of competition enforcement.[223] The increase in leniency participation, which will help explore secret cartels and the strength of public and private enforcement will ultimately produce a deterrent effect and reduce the number of anti-competitive arrangements and cartels.[224] It should be noted that to some extent, both seem to have complex interaction with each other.

On the one hand, it is undeniable that hard-core cartels are considered as 'serious violations' of competition laws, and it is naturally difficult to discover and delve into.[225] Leniency programs will be advantageous to public enforcement as it allows applicants to voluntarily disclose the 'sensitive information,'[226] self-report or submit evidence to competition authorities in order to be immune from fines or secure reduction of fines to be imposed on them.[227]

On the other hand, the number of private damages claims is likely to escalate as detailed information disclosed to the competition authorities may be accessed and utilized by the injured persons in follow-on actions.[228] As such, cartel

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[223] The Commission of the European Union, "Commission Staff Working Paper Annex to the Green Paper on Damages Actions for Breach of the Ec Antitrust Rules," 63.

[224] Ibid.

[225] Philippe Brusic, "Competition Guidelines: Leniency Programmes," 1.

[226] Horacio Vedia Jerez, *Competition Law Enforcement and Compliance across the World: A Comparative Review*, 325-26.

[227] The European Commission, "Leniency," http://ec.europa.eu/competition/cartels/leniency/leniency.html.

[228] The Commission of the European Union, "Commission Staff Working Paper Annex to the Green Paper on Damages Actions for Breach of the Ec Antitrust Rules," 64.

members will not be able to defend themselves that no cartel is committed[229] as the exposure of their wrongdoings is like an estoppel. These consequences will definitely decline the attractiveness of leniency programs.[230] Cartel members may not be encouraged to confess their anti-competitive behaviours if they will be sued by the injured parties upon their exposure,[231] thereby contributing to the impediments to discovery and detection of cartels.

Competition regimes which have adopted leniency policies must determine as to what extent the leniency applicants shall be protected. Otherwise, the prospect of damages claims may discourage cartel members to engage in the leniency programs.[232] Rather, the right of victims to full compensation may not be asserted.

To exemplify this, the US Leniency Program, which was first adopted in 1978, has been claimed to be 'the most successful tool' used by the United States Department of Justice, Antitrust Division to detect and prosecute criminal cartel conduct.[233] The program was significantly amended whereby the Corporate Leniency Policy and the Leniency Policy for Individuals were introduced in 1993 and 1994, respectively.[234]

The US leniency programs granted protection for the applicants who reported their illegal antitrust activities which involved price fixing, bid rigging, capacity

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[229] Ibid.

[230] Horacio Vedia Jerez, Competition Law Enforcement and Compliance across the World: A Comparative Review, 326.

[231] Ibid.

[232] The Commission of the European Union, "Commission Staff Working Paper Annex to the Green Paper on Damages Actions for Breach of the Ec Antitrust Rules," 65.

[233] Niall E. Lynch, "Immunity in Criminal Cartel Investigations: A Us Perspective," (2011), https://www.lw.com/presentations/immunity-in-criminal-cartel-investigations-us-perspective.

[234] Ibid., 2.

restriction, or allocation of markets, customers, or sales or production volumes from criminal conviction.[235] In addition, the civil damages could be lowered to not exceeding the actual damages sustained by a claimant provided that the corporation or individual (so-called cooperating individual) assist the investigation of the Antitrust Division or cooperate with the claimant in providing the relevant facts and documents in civil proceedings.[236]

The European Commission also realised the noticeable interaction between leniency and civil damages actions as testified by the extensive discussion in the Commission Working Staff annex to the Green Paper and White Paper. In the Green Paper, it is apparent that the Commission attempted to maintain the incentives and attractiveness of the leniency programs and ensure the right of an injured party to civil damages. The Green Paper proposed three policy options for further discussions to ensure the achievement of the principal objectives of leniency programs and damages claims, namely (1) exclusion of discoverability of the leniency application; (2) rebate on damages claim; and (3) removal of joint liability for the leniency application.[237]

According to the White Paper, the respondents unanimously favoured the first policy option, that was, the exclusion of discoverability of the leniency application with some certain exceptions.[238] Corporate statements, voluntarily presented by the leniency applicants would be granted protection against disclosure by the competition authority neither before nor after the competition authority renders the decision.[239] In

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[235] The Antitrust Division, "Frequently Asked Questions About the Antitrust Division's Leniency Program and Model Leniency Letters," ed. The United States Department of Justice (2017), 6.

[236] Ibid., 18.

[237] The Commission of the European Union, "Commission Staff Working Paper Annex to the Green Paper on Damages Actions for Breach of the Ec Antitrust Rules," 65-66.

[238] The Commission of the European Communities, "Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the Ec Antitrust Rules," 81-82.

[239] Ibid., 86.

contrast, many respondents were against the idea of rebate on damages claims as they asserted the rights of injured persons for full compensation.[240]

As for Thailand, leniency policies are not available in competition law while there are criminal punishments for competition infringements. In criminal lawsuit, it is a general principle that in case any doubt exists as to the accused has committed the offence, the benefits of doubt will be given to a defendant in accordance with Section 227 of the Criminal Procedure Code. Thus, it might be of considerable difficulty for the prosecution to prove beyond reasonable doubt in cartel cases where the discovery of essential evidence is extraordinarily complicated.

The detailed discussion and analysis on leniency policies transcends the scope of this research study. Nevertheless, further studies as to whether it is appropriate for Thailand to adopt the leniency programs will be beneficial for the development and amendment of Competition Act, together with the competition enforcement in Thailand.

2.4 Benefits of Private Competition Enforcement

It has been found that most of academic articles and textbooks in the realm of competition law simply explains the provisions of private competition enforcement, and discuss the relevant cases in certain jurisdictions. In other words, a small number of them have written about the benefits and drawbacks of private competition enforcement. Those pertinent articles and textbooks, which were examined, pointed out similar advantages of private competition enforcement, which can be summarised as follows:

2.4.1 The right of victims to compensation

As formerly discussed, public enforcement primarily serves as a deterrence and punishment purposes through fines, director disqualifications and

[240] Ibid., 82.

imprisonment.[241] Meanwhile, one of the key objectives of private enforcement is to grant compensation to victims of illegal anticompetitive behaviour,[242] but this goal cannot be accomplished by public enforcement.[243] Thus, damages actions, which are part of private enforcement, will be a primary means for victims to claim for damages.[244]

It is obvious that in the US, the number of private antitrust enforcement cases is considerably greater than those of public enforcement cases.[245] In particular, the EU commission has endeavoured to facilitate the damages actions in order to ensure the right of victims to full compensation as substantiated by various publications and discussion including the Ashrust report, the Green Paper and the White Paper. Furthermore, many competition regimes including Australia,[246] Japan,[247] Singapore,[248] Malaysia,[249] and Thai[250] adopted the provisions of private damages actions.

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[241] Wouter P. J. Wils, "The Relationship between Public Antitrust Enforcement and Private Actions for Damages," 6-8.

[242] Donncadh Woods, Ailsa Sinclair, and David Ashton, "Private Enforcement of Community Competition Law: Modernisation and the Road Ahead," 32.

[243] Horacio Vedia Jerez, *Competition Law Enforcement and Compliance across the World: A Comparative Review*, 239.

[244] The Commission of the European Union, "Commission Staff Working Paper Annex to the Green Paper on Damages Actions for Breach of the Ec Antitrust Rules," 6.

[245] Robert H. Lande and Joshua P. David, "Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases," *University of San Francisco Law Review* 42 (2008): 888.

[246] Section 82 of Competition and Consumer Act 2010 (Cth)

[247] Article 25(1) of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of April 14, 1947) or the Antimonopoly Act.

[248] Section 85 of Competition Act (CHAPTER 50B)

[249] Section 64 of Competition Act 2010 (Act 712)

[250] Section 40 of Competition Act, B.E. 2542 (1999)

2.4.2 Complement to public enforcement

It is probable that public enforcement may undergo adversities on account of limited resources,[251] budget constraints,[252] political intervention[253] and corruption,[254] which may negatively affect the capability of competition authorities to manage all competition infringement cases.[255] Professor Horacio Vedia Jerez stated that even the best funded competition authority will not have sufficient resources to proceed with all competition violations.[256] The competition authorities must prioritise, and be selective in taking actions against competition infringements.[257]

As a consequence, private enforcement will be a substantial complement to public enforcement and fulfil the enforcement gap,[258] which may stem from lax public enforcement.[259] It means that by way of private enforcement, private parties can pursue legal proceedings against persons in question in case competition authorities decide not to prosecute them. [260] Furthermore, private

[251] Donncadh Woods, Ailsa Sinclair, and David Ashton, "Private Enforcement of Community Competition Law: Modernisation and the Road Ahead," 32.

[252] The Business and Industry Advisory Committee (BIAC) of OECD, "Relationship between Public and Private Enforcement," 6.

[253] David J Gerber, *Private Enforcement of Competition Law: A Comparative Perspective*, 438.

[254] Ernest Gellhorn, William E. Kovaic, and Stephen Calkins, *Antitrust Law and Economics in a Nutshell*, 543.

[255] The Business and Industry Advisory Committee (BIAC) of OECD, 3.

[256] Horacio Vedia Jerez, 238.

[257] The Business and Industry Advisory Committee (BIAC) of OECD, 6.

[258] Ibid., 7.

[259] Ernest Gellhorn, William E. Kovaic, and Stephen Calkins, 543.

[260] The Business and Industry Advisory Committee (BIAC) of OECD, 7.

enforcement can reduce the workload of competition authorities and they can allocate their limited resources to the most serious anticompetitive conducts.[261]

2.4.3 Deterrence effects and legal compliance

Generally, private enforcement can provide compensation to victims through damages, prevent anticompetitive behaviours through interim relief or injunction, and punish infringers through punitive damages.[262] Private actions can also result in the maximisation of overall levels of enforcement,[263] meaning that infringers are more likely to bear the costs for such infringements.[264] It will in turn develop a culture of competition amongst stakeholders and raise awareness of competition rules.[265] Hence, it can be concluded that effective private enforcement can enhance the deterrence effect on competition infringement and legal compliance[266]

Moreover, Robert H. Lande and Joshua P. Davis collaboratively conducted research entitled “Benefits Form Private Antitrust Enforcement: An Analysis of Forty Cases”.[267] The authors analysed the selected forty successful private antitrust cases that were settled after 1990 and produced approximately more than 50 million in cash benefits. The result of the study shows that the amount recovered in private cases is also higher than the aggregate amount of fines levied by the Department of

[261] Horacio Vedia Jerez, *Competition Law Enforcement and Compliance across the World: A Comparative Review,* 238.

[262] Ibid., 239.

[263] The Commission of the European Union, "Commission Staff Working Paper Annex to the Green Paper on Damages Actions for Breach of the Ec Antitrust Rules," 6.

[264] The Commission of the European Communities, "Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the Ec Antitrust Rules," 11.

[265] Donncadh Woods, Ailsa Sinclair, and David Ashton, "Private Enforcement of Community Competition Law: Modernisation and the Road Ahead," 32.

[266] Ibid., 32.

[267] Robert H. Lande and Joshua P. David, "Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases".

Justice.[268] The authors concluded that private enforcement produced a more extensive deterrent effect than criminal prosecutions, and could help deter illegal wealth transfer from consumers to violators, especially to foreign undertakings.

2.4.4 The increase in competition infringements detection

To a certain extent, private parties may have better information about the market and violations than public authorities.[269] To illustrate, consumers who buy raw materials from suppliers should accurately detect suspicious anticompetitive practices committed by the suppliers.[270] Particularly, certain types of competition infringements such as those in commercial arrangements between two parties[271] and hard-core cartels[272] are basically difficult to discover and examine. In addition, the information associated with the arrangements is not available to competition authorities if it is not disclosed by insiders or in the absence of whistle-blowers. In this respect, private enforcement seems to be superior to public enforcement in detecting competition infringements.

2.4.5 The development of legal doctrines

Some scholars may contend that private parties will trade-off their expenses for their private interests in private actions, which may not coincide with general interest. They will typically attempt to obtain legal interpretations that can

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[268] Ibid., 893.

[269] Horacio Vedia Jerez, *Competition Law Enforcement and Compliance across the World: A Comparative Review*, 238.

[270] Ernest Gellhorn, William E. Kovaic, and Stephen Calkins, *Antitrust Law and Economics in a Nutshell*, 543.

[271] Donncadh Woods, Ailsa Sinclair, and David Ashton, "Private Enforcement of Community Competition Law: Modernisation and the Road Ahead," 32.

[272] Philippe Brusic, "Competition Guidelines: Leniency Programmes," 1.

support their financial and commercial gains.[273] It cannot be denied that private litigations can influence the development of substantive provisions.[274] In the OECD roundtables on Private Remedies held in June 2006, a myriad of participants concurred that more private litigations and court decisions will foster the development of 'sound antitrust policy'.[275] The EU Commission and Australian contributors also inferred that courts will be able to develop competition law, policy and doctrines through private litigations.[276] Most importantly, private enforcement will ensure the integrity of the legal system and legal standards.[277]

[273] Wouter P. J. Wils, "The Relationship between Public Antitrust Enforcement and Private Actions for Damages," 6.

[274] David J Gerber, *Private Enforcement of Competition Law: A Comparative Perspective*, 440.

[275] Andreas Reindl, "OECD Policy Rountables on Private Remedies 2007," 12.

[276] Ibid., 12.

[277] Ernest Gellhorn, William E. Kovaic, and Stephen Calkins, *Antitrust Law and Economics in a Nutshell*, 543.

Chapter IV

PRIVATE ENFORCEMENT OF ANTITRUST/COMPETITION LAWS IN THE SELECTED JURISDICTIONS

1. The United States

1.1 Right of Private Enforcement

Under the Clayton Act, private parties are authorised to claim for damages and injunctive relief.

1.1.1 Claim for Damages

Injured parties are entitled to initiate private actions against violators in accordance with Section 4(a) of the Clayton Act which stipulates that:

> *Except as provided in subsection (b), 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 in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee...*[1]

By virtue of Section 4(a), successful plaintiffs can be awarded treble damages and attorney's fees incurred in the lawsuit. However, the plaintiff must

[1] 4(a) Clayton Act, 15 U.S.C. § 15.

prove to the satisfaction of the court in regard to the *sine qua non* and standing requirements[2] set out by the Supreme Court as discussed in the following:

(a) Injury to business or property

Plaintiffs in the civil proceedings are required to demonstrate that they are harmed by the defendant's conduct.[3] In *Hawaii v. Standard Oil Co. of California (1972)*[4], the U.S. Supreme Court broadly defined the term 'business or property' as 'commercial interests or enterprises'. The Supreme Court also articulated the principle of injury to property in *Reiter v. Sonotone Corp. (1979)*[5]. Put simply, if consumers pay a higher price for goods purchased for personal use as a result of antitrust violations, they are deemed to sustain an injury in their 'property' in the meaning of Section 4 of the Clayton Act. Thus, the consumers are eligible to sue for damages.

(b) Antitrust Injury

In addition to illustrating the injury to their business and property, plaintiffs must prove that they suffer from antitrust injury. According to *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. (1977)*[6], the plaintiff was the owner of the bowling alleys while the defendant, who was one of the two largest manufacturers of bowling equipment in the United States. The plaintiff alleged that the defendant violated Section 7 of the Clayton Act by means of the acquisition of the other bowling centres that were in default on payment for bowling equipment that they had bought

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[2] Randy Stutz and Albert A. Foer, *Private Enforcement of Antitrust Law in the United States : A Handbook* (Cheltenham, U.K.: Edward Elgar Publishing, 2012), 66.

[3] Ernest Gellhorn, William E. Kovaic, and Stephen Calkins, *Antitrust Law and Economics in a Nutshell*, 545.

[4] Hawaii v. Standard Oil Co. of California, 405 U.S. 251 (1972) at 405.

[5] Reiter v. Sonotone Corp., 442 U.S. 330 (1979) at 337-345.

[6] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) at 477-492.

from the defendant, which might lead to the diminution of competition and the creation of monopoly. The Supreme Court established the requirement on antitrust injury that "[p]laintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."

The Court thus dismissed the plaintiff's allegation as the plaintiff were unable to prove that the defendant's conduct would result in anticompetitive effects, and the acquisition in this case were not considered unlawful. The Court also cited *Brown Shoe Co., Inc. v. United States (1962)*[7] that "the antitrust laws, however, were enacted for the protection of competition, not competitors".

Notwithstanding, the court had continued developing standing requirements. In addition to considering the principle set out in the previous presence, the court introduced the principle of proximity to the alleged harm in *Blueshield of Virginia v. McCready (1982)*.[8] In this dispute, even though the health plan was purchased by McCready's employer from Blue Shield of Virginia, it was for the benefits of McCready herself. McCready engaged the services from psychologists, which was contrary to Blue Shield's policy that required subscribers be treated by psychiatrists and billed through a physician. Once she claimed reimbursement from Blue Shield, her claim was denied accordingly. She alleged that Blue Shield had been involved in an unlawful conspiracy which violated Section 1 of Sherman Act. Further, the anticompetitive conduct of Blue Shield had caused injury to her business or property. Thus, she had a basis on which to claim damages under Section 4 of the Clayton Act.

[7] Brown Shoe Co., Inc. v. United States 370 U.S. 294 (1962) at 320.

[8] Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982) at 472-485.

In order to determine whether the injury suffered by the McCready was too remote from the alleged violation, which could constitute the basis, the Court took into consideration (1) the physical and economic nexus between the alleged violation and the harm to the plaintiff; (2) the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making the defendant's conduct unlawful. The Court held that McCready had a basis to sue under Section 4 of the Clayton Act as she had financial benefits under the Blue Shield health plan, and she was economically harmed by the curtailment of competition caused by the Blue Shield's selective refusal to reimburse.

A year later, the Court set out more stringent standing requirement in *Associated General Contractors, Inc. V. California State Council of Carpenters (1983).*[9] The Court identified five factors for its analysis: (1) the casual connection between the antitrust violation and injury to the plaintiff; (2) the nature of the plaintiff alleged injury, and whether the plaintiff was a customer or a competitor in the relevant market; (3) the directness and indirectness of the asserted injury and whether the injury and the alleged harm were too speculative; (4) the potential for duplicative recoveries and the danger of complex apportionment of damages; and (5) the existence of more direct victims. In this case, the court concluded that respondents were the union, which were parties to collective bargaining agreements. The union lacked the basis to claim damages as it was not a person under Section 4 of the Clayton Act. More precisely, the union was neither a consumer nor a competitor.

[9] Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519 (1983).

1.1.2 Claim for Injunctive Relief

Similar to claims for damages, plaintiffs who wish to seek injunctive relief under Section 16[10] of the Clayton Act must prove to have suffered antitrust injury. However, the Supreme Court interpreted in *Cargill, Inc. v. Monfort of Colorado, Inc. (1986)*[11] that according to the wordings in Section 16, plaintiffs do not need to demonstrate actual injury, but Section 16 requires the proof of 'threatened loss or damage' apart from proving antitrust injury. In *McCarthy v. Recordex Serv. Inc., (1996)*,[12] the Court set out the precedence over claims for injunctive relief requiring that the plaintiffs show (1) threatened loss or injury cognizable in equity; and (2) proximately resulting from the alleged antitrust violation.

1.2 Idiosyncratic Characteristics of the US Private Antitrust Enforcement

1.2.1 Punitive damages

Successful civil plaintiffs claim damages under Section 4(a) of the Clayton Act are entitled to threefold or treble actual damages sustained by them, plus reasonable attorney's fees. In addition to remedial provision, the US Supreme Court recognised that the major aims of treble damages are (1) punishing previous antitrust violations and (2) deterring future violations of the laws.[13] Simply put, treble damages serve as quasi-punitive sanctions.[14]

However, treble damages provision is available in the US antitrust law whereas it is not adopted in competition laws of the other selected jurisdiction,

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[10] § 16 Clayton Act, 15 U.S.C. § 26.

[11] Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986) at 104, 112.

[12] McCarthy v. Recordex Serv. Inc., 80 F.3d 842, 856 (3d Cir. 1996).

[13] Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 138 -139 (1968); Mitsubishi v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985).

[14] Randy Stutz and Albert A. Foer, *Private Enforcement of Antitrust law in the United States : A Handbook*, 236.

i.e. the European Union, Japan, Singapore, Malaysia and Thailand. The rationale might be due to the dichotomy of legal ideology as thoroughly discussed in 2.1 Objective of Enforcement in Chapter 3.

1.2.2 *Prima facie* Evidence

As examined in 2.2 Public competition authorities' decision as a precondition to private litigation in Chapter 3, in the US antitrust law, plaintiff may opt to bring an antitrust lawsuit by way of either stand-alone or follow-on actions. However, Section 5[15] of the Clayton Act provided that a final judgement or decree in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws against a defendant shall be a *prima facie* evidence. In general, *Prima facie* is a Latin phrase, which means 'at first sight', and *Prima facie* evidence is referred to as "sufficient to establish a fact or raise a presumption unless disproved or rebutted."[16] *Prima facie* is not intended to be conclusive[17]; it acts as presumptive evidence against the opposing party until it is proven otherwise or on the presentation of conflicting evidence.[18]

The legislative intent of this provision was to assist private plaintiffs in recovering damages for violation of antitrust laws being that prior to the enactment of this provision in 1914, private antitrust cases were not successful, owing chiefly to cost of litigation and budget constraint.[19] Therefore, Congress decided to allow private plaintiffs to rely on facts and judgements established by government

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[15] § 5(a) Clayton Act, 15 U.S.C. § 16.

[16] Legal Information Institute of Cornell University Law School, "Prima Facie," https://www.law.cornell.edu/wex/prima_facie.

[17] Black's Law Dictionary Free 2nd Ed. and The Law Dictionary, "What Is Prima Facie Evidence?," http://thelawdictionary.org/prima-facie-evidence/.

[18] Inc. US Legal, "Prima Facie Evidence Law and Legal Definition," https://definitions.uslegal.com/p/prima-facie-evidence/.

[19] "Section 5(a) of the Clayton Act and Offensive Collateral Estoppel in Antitrust Damage Actions," *The Yale Law Journal* 85, no. 4 (1976): 548.

enforcement lawsuits,[20] thereby plausibly resulting in the increase in the chances of success in treble damages recoveries.[21]

Similar provisions can be found in the competition law of some of the selected jurisdictions, namely the European Union, Japan and Singapore. The details thereof will be analysed later in this Chapter.

1.2.3 Legal Standing of Indirect Purchasers

There is no statutory definition or provision concerning the direct and indirect purchaser standing in antitrust cases. According to the US Supreme Court precedence, direct purchasers are "immediate buyers from the alleged antitrust violators."[22] It has transpired that the US Supreme Court has merely allowed the direct purchasers to have a standing in initiating civil antitrust claims. Indirect purchasers are basically prohibited to take civil action, but there are very restrictive exceptions whereby indirect purchasers would have a legal standing in civil claims.

The landmark Supreme Court judgement ruling on the standing of direct purchaser is *Hanover Shoe, Inc. v. United Shoe Machinery Corp. (1968)*.[23] In the dispute, the Court confirmed that the plaintiff, Hanover Shoe, Inc., who had directly purchased shoe machinery from the defendant, had a legal standing to claim treble damages. Meanwhile, the defence raised by the defendant was that the plaintiff passed on the overcharge to its customer was dismissed.

Another prominent case directly concerning the standing of direct purchaser and indirect purchasers is *Illinois Brick Co. v. Illinois (1977)*.[24] The Supreme Court was of the view that the legislative purpose of the Clayton Act in terms of

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[20] Ibid., 549 and 61.

[21] Ibid., 559-60.

[22] Kansas v. Utilicorp United, 497 U.S. 199 (1990) at 207.

[23] Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968).

[24] Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

remedying injured parties would be better achieved if direct purchasers are awarded the full amount of overcharge. On the contrary, the apportionment of the recovery throughout the distribution chain would increase the overall costs of recovery and would increase if the Court attempted to apportion damages to indirect purchasers throughout the distribution chain, and the benefits to each plaintiff would be diminished by dividing the potential recovery among parties involved.

Moreover, the Court in both cases articulated its serious concerns that permitting indirect purchasers to bring civil lawsuit will lead to multiple litigations and liabilities, complication of litigations, the diminution of deterrence and incentive to sue for damages resulting from the more difficult in recovering for overcharges; and administrative predicaments regarding the apportionment of damages along the distribution chain. Accordingly, the Court decided to preclude indirect purchasers from instigating claim for damages.

However, the foregoing determination is not definitive. The Court carves out certain exceptions which indirect purchasers would have standing to sue for damages. First, the indirect purchasers will be entitled to sue for damages if they enter into 'pre-existing cost-plus contract' with the direct purchasers whereby indirect purchasers are obliged to buy a fixed quantity irrespective of prices.[25] Second, in cases where a defendant owns or controls the direct purchasers in which the "relationship involving such functional economic or other unity between indirect purchaser that there effectively has been only one sale," the defendant could proceed with civil damages actions.[26] Nonetheless, it might not be effortless to prove, and courts were doubtful about such exceptions.[27]

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[25] Section 5(a) of the Clayton Act and Offensive Collateral Estoppel in Antitrust Damage Actions, 736.

[26] Jewish Hospital Association v. Stewart Mechanical Enterprise, Inc., 628 F.2d 971 (6th Cir. 1980); Royal Printing Co. v. Kimberly-Clark Corp., 621 F.2d 323, 326-27 (9th Cir. 1980).

[27] Kansas v. Utilicorp United, 497 U.S. 199 (1990); McCarthy v. Recordex Serv., 80 F.3d 842 (3d Cir. 1996).

The Court also recognised the other quasi-exceptions in which the principle from *Illinois Brick Co. v. Illinois (1977)* would not apply. First, if a direct purchaser is a member of antitrust conspiracy, the first innocent purchaser would have a legal standing.[28] In this circumstance, it can be explained that the first-level buyer who purchases from conspiracy members is the actual direct purchaser.[29] Lastly, in cases where indirect purchasers receive an express assignment from direct purchasers which is specific to antitrust claims, the indirect purchasers would have antitrust standing to sue for damages.[30]

Proof of antitrust standing for indirect purchasers will be relatively different in a claim for injunctive relief. In *Cargill, Inc. v. Monfort of Colorado, Inc. (1986)*[31], the Court inferred that the precedence established in *Illinois Brick Co. v. Illinois (1977)* aimed to rule on the standing of direct and indirect purchasers to claim damages under Section 4 of Clayton Act. In contrast, such precedence and indirect purchaser status did not debar indirect purchasers themselves from seeking an injunction[32] by any means.

It should be noted that several states passed *Illinois Brick* whereby repealing statutes to confer standing on customers who were indirect purchasers to claim damages under respective state laws.[33] The Supreme Court acknowledged the enactment of the repeal. Nonetheless, the Court stated that indirect purchasers would

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[28] Paper Systems Inc. v. Nippon Paper Indus. Co., Ltd., 281 F.3d 629, 632 (7th Cir. 2002); Lowell v. American Cyanamid Co., 177 F.3d 1228 (11th Cir., 1999); In Re Brand Name Prescription Drugs Antitrust Litigation, 186 F.3d 781 (7th Cir. 1999); Arizona v. Shamrock Foods Co., 729 F.2d 1208 (9th Cir. 1984); Fontana Aviation, Inc. v. Cessna Aircraft Co., 617 F.2d 478 (7th Cir. 1980);

[29] In re Wyoming Tight Sands Antitrust Cases, 695 F. Supp. 1109 (D. Kan. 1988).

[30] Gulfstream III Assoc. v. Gulfstream Aerospace Corp., 995 F.2d 425, 440 (3d Cir. 1993).

[31] Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986).

[32] Ibid.; Campos v Ticketmaster Corp. (8th Cir 1998) 140 F.3d at 1172

[33] Randy Stutz and Albert A. Foer, *Private Enforcement of Antitrust law in the United States : A Handbook*, 84.

not be precluded from seeking recoveries under state laws although federal antitrust rule limits the antitrust recoveries to only direct purchaser.[34] Also, states are not prohibited to enact the law which establishes antitrust standing for indirect purchaser.[35] In some states where there is no specific statute to repeal, such as Tennessee, courts allowed indirect purchasers to bring claims for damages.[36]

1.2.4 Passing-on Defence

It is apparent that passing-on defence is not permitted in federal antitrust cases, the precedence of which was established in *Hanover Shoe, Inc. v. United Shoe Machinery Corp. (1968)*[37] and *Illinois Brick Co. v. Illinois (1977)*[38]. In *Hanover Shoe* case, the Court held that if pass-on defence is allowed, it is likely to induce the prolongation of treble-damage actions and complicated proceedings involving massive evidence and complicated theories. Furthermore, pass-on defence would be likely to discourage ultimate consumers to pursue damages claims as they have a tiny stake in the lawsuit. In *Illinois Brick* case, the Court clarified that if pass-on theory is permitted to be used offensively by an indirect purchaser, the consequential risks is a multiple liability for defendants. Additionally, the pass-on theory would complicate treble-damages suits, thus resulting in the undermining of effectiveness of the damages provision.

[34] California v. ARC America Corp., 490 U.S. 93 (1989).

[35] Randy Stutz and Albert A. Foer, *Private Enforcement of Antitrust law in the United States : A Handbook*, 84.

[36] Ibid., 85.

[37] Ibid., n.23.

[38] Ibid., n.24.

1.2.5 Class Action

A class action is "a procedural device that permits one or more plaintiffs to file and prosecute a lawsuit on behalf of a larger group, or class."[39] Like general class action lawsuit, it is required that requirements for the class certification as stipulated in Rule 23 of the Federal Rules of Civil Procedure to be fulfilled. Both antitrust claims for damages and injunctive relief must meet prerequisite requirements set out in Rule 23(a), Nevertheless, additional requirements for each of the claims are of difference.

The prerequisites under Rule 23(a) comprise of four requirements First, Rule 23(a)(1) so-called "numerosity" requires that the putative class has such a large number of members that the individual joinder is impracticable. The U.S. Courts have not determined the number of members that make the joinder impracticable, but previous judgements have implied that the class of 20 are not numerous while the class of 40 or more could meet this requirement.[40] It is noted that the courts do not merely consider number of the class, but also investigate specific facts on a case-by-case basis.[41]

Second, Rule 23(a)(2) so-called "commonality" requires that all class members commonly have questions of law or fact. The courts interpreted that members of the class may not need to share all questions of facts in common, but at least one mutual question of law or fact would suffice to satisfy this precondition.[42] In

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[39] Legal Information Institute of Cornell University Law School, "Class Action: An Overview," https://www.law.cornell.edu/wex/class_action.

[40] Sarah Somers and Jeffrey S. Gutman, "7.2 Rule 23 Class Certification Requirements," http://federalpracticemanual.org/chapter7/section2#footnote14_dequxe3.

[41] Ibid.

[42] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011); Jamie S. v. Milwaukee Public Schools, 668 F.3d 481, 497 (7th Cir. 2012); D.G. Ex Rel. Stricklin v. DeVaughn, 594 F.3d 1188, 1198 (10th Cir. 2010); In Re Am. Med. Sys. Inc., 75 F.3d at 1080; Baby Neal, 43 F.3d at 56; Lightfoot v. District of Columbia, 246 F.R.D. 326, 337 (D.D.C. 2007).

addition, the class may prove commonality by relying on expert opinion and statistical evidence.[43]

Third, Rule 23(a)(3) so-called "typicality" requires that the claims or defences of the class representatives are typical of the whole class. This requirement aims to ensure that the interests of class representatives may not diverge from those of class members which may lead the class representatives to do in favour of their own interests rather than the class's advantages.[44] The Court ruled in *General Telephone Company of the Southwest v. Falcon*[45] that the class representative had to "possess the same interest and suffer the same injury as the class members".

Fourth, Rule 23(a)(4) so-called " adequacy of representation" requires that the interests of the class be fairly and adequately protected by the class representatives. It seems that adequacy of representation may overlap with " typicality" in that divergent interests of the class representative who is an atypical class member is frequently a justification for an inadequacy of representation.

In a claim for damages, the class must satisfy the other two requirements in accordance with Rule 23(b)(3). First, the so-called " predominance" requires the court discovers shared questions of law and fact which predominate over those of individual members. To exemplify, in deciding a question of law, if the same question can be asked amongst each class member, this question can be considered predominant.[46]

Second, the so-called "superiority" requires that a class action be superior to other available methods which could fairly and efficiently settle the

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[43] Sarah Somers and Jeffrey S. Gutman, "7.2 Rule 23 Class Certification Requirements"

[44] Randy Stutz and Albert A. Foer, *Private Enforcement of Antitrust law in the United States : A Handbook*, 115.

[45] General Tel. Co. v. Falcon, 457 U.S. 147 (1982).

[46] Ian Simmons and Alexander Okuliar, "Private Enforcement of the U.S. Antitrust Laws through Class Actions," *ICLG TO: COMPETITION LITIGATION 2009* (2009): 2.

controversy. It might be said that this requirement is a " catch-all" enabling the court to deliberate additional factors which are of vitality for any particular case.[47] Nevertheless, the U.S. courts practically adhere to requirements set out in Rule 23, and refrain from analysing "free-ranging" criteria.[48]

As for a claim for injunctive relief, in addition to satisfying the aforementioned prerequisites, it must appear that a defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole".[49] In contrast, class plaintiffs do not need to prove " predominance" and " superiority" elements[50] as required for a claim for damages.

1.2.6 Statutes of Limitation

Under Section 4B of the Clayton Act,[51] injured persons must bring lawsuit within four years after the cause of action accrued.

1.3 The Selected Cases Studies

1.3.1 *Airline Ticket Commission*[52]

In February 1995, a nationwide class of travel agents and agencies joined a class action to file a lawsuit against seven airlines, namely Delta Airlines, American Airlines, Northwest Airlines, United Airlines, USAir, Continental Airlines, and Trans World Airlines. The plaintiff class alleged that the defendants were involved in a

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[47] Randy Stutz and Albert A. Foer, 124.

[48] Ibid.

[49] Federal Rules of Civil Procedure 23(b)(2).

[50] Robert J. Herrington, "Should You Beware of 23(B)(2) Class Actions? ," (2010), http://www.lexology.com/library/detail.aspx?g=accbef0f-b97f-4b87-9685-f6e26b62b8c4.

[51] § 4B Clayton Act, 15 U.S.C. § 15b.

[52] In Re Airline Ticket Commission Antitrust Litigation, 953 F. Supp. 280 (D. Minn. 1997).

conspiracy to fix airline travel agent commissions by uniformly setting a "commission cap," which limited travel agents' and agencies' ticket commissions to maximums of $25.00 on one-way tickets and $50.00 on round-trip tickets. The plaintiff class also sought a preliminary injunction in June 1995m but the Court denied the motion in August 1995. The U.S. District Court facilitated the settlement and allocation plan between the plaintiffs and the defendants whereby each the defendants agreed to pay damages at the different amount as agreed with the plaintiffs.

1.3.2 *Graphite Electrodes*[53]

The plaintiffs, steel companies, were direct purchasers who had bought graphite electrodes from the defendants. This litigation contained three class action lawsuits whereby the defendants were alleged to undertake horizontal price-fixing in the graphite electrodes industry. The plaintiffs and the defendants could reach settlement whereby each the defendants agreed to pay damages at the different amount as agreed with the plaintiffs. For example, Mitsubishi and Nippon agreed to pay the class at the amount of $45,000000 and 2,875,000 respectively. According to the Roanoke Electric Steel Corporation, in the first quarter of 2004, its earnings of $1.4 million out of $1.5 million of profits was attributable to damages from the settlement.[54] This consequence may imply that the award of damages materially affected the earnings of some defendants.

1.3.3 *NASDAQ*[55]

In the litigation, over 1 million individual and institutional investors nationwide joined the class action to file a complaint against thirty-seven market makers on the NASDAQ Exchange. Having Purchased and sold shares of class securities in the market, the plaintiffs alleged that the defendants conspiratorially fixed buy and

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[53] In Re: Graphite Electrodes Antitrust Litigation, 2003 (E.D.Pa. 2003).

[54] *Roanoke Electric Steel Corporation Reports First Quarter Results*, P.R. Newswire, March 9, 2004.

[55] In Re NASDAQ Market-Makers Antitrust Litigation, 894 F. Supp. 703 (S.D.N.Y. 1995)

sell price and the spread in the NASDAQ Exchange. The plaintiffs actively collaborated with U.S. Securities and Exchange Commission and Antitrust Division of the Department of Justice in the discovery process; for example, they reviewed and analysed over 3,000,000 pages of documents and over 10,000 hours of audiotape. Finally, the plaintiffs were awarded damages at the aggregate of about $1.027 billion from the settlements signed in 23 March 1998.

1.3.4 *Sun Microsystems v. Microsoft*[56]

Sun Microsystems brought an antitrust lawsuit against Microsoft Inc. in March 2002 on the grounds that Microsoft illegally attempted to monopolise the Intel-compatible PC operating market the browser market, the Office suit market, and the workgroup server marker. In addition, Microsoft were alleged to conduct tying arrangement of its Internet Explorer with Personal Computers (PCs), and exclusive dealing arrangement for its browser whereby Microsoft entered into exclusionary agreements with Apple and Intel, not to develop and use Sun's Java Platform. Apart from seeking damages, Sun also filed a motion for a mandatory preliminary injunction requiring Microsoft to tie Sun's Java software to operate as "middleware" in every copy of Windows PC operating system and web browser. On top of that, Sun sought to bring about a preliminary injunction forbidding Microsoft from distributing any software developments of Java software, other than products licensed to Microsoft by Sun in a 2001 settlement agreement. In summary, the United States Court of Appeals for the Fourth Circuit vacated the mandatory preliminary injunction, but granted the preliminary injunction. On 2 April 2004, Sun and Microsoft reached the accommodation whereby Microsoft agreed to pay $700 million to settle antitrust issues.[57]

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[56] Sun Microsystems v. Microsoft, 333 F.3d 517 (4th Cir. 2003).

[57] Microsoft Inc., "Microsoft and Sun Microsystems Enter Broad Cooperation Agreement; Settle Outstanding Litigation," https://news.microsoft.com/2004/04/02/microsoft-and-sun-microsystems-enter-broad-cooperation-agreement-settle-outstanding-litigation/#XgYsWzqE8BbCgdrt.97.

1.3.5 *Visa Check/Master Money and MasterCard*[58]

On October 25, 1996, roughly 5 million merchants, including Was-Mart, Sears, and Safeway initiated class action seeking damages against that Visa and MasterCard violated Sections 1 and 2 of the Sherman Act. The plaintiffs alleged that Visa and MasterCard's 'Honor All Cards' policy constituted tying arrangements as it demanded the plaintiffs to accept Visa and MasterCard debit cards, which violated Section 1. In addition, 'Honor All Cards' policy together with other anti-competitive conduct exposed the attempt to monopolise the debit card market, which violated Section 2. This litigation was complex and prolonged involving more than 400 lawyers and paralegals. In April 2003, the plaintiffs and the defendants entered into a settlement whereby Visa and MasterCard agreed to compensate the plaintiffs at approximately $2 billion and $2 billion respectively. The United States District Court and the Court of Appeal for the Second Circuit approved the settlement and the allocation plan.

2. The European Union

2.1 Right of Private Enforcement

2.1.1 Claim for Damages

The EU has endeavoured to ensure the effective enforcement of the EU competition rules and effective mechanism for victims of infringements of EU competition laws for obtaining full compensation. This statement could be proven by considerable research studies and discussion amongst the Member States such as the Ashurst's report, the Green Paper and the White Paper which are extensively discussed in Chapter 3.

[58] In Re: Visa Check/MasterMoney Antitrust Litigation, a/k/a Wal-Mart Stores, Inc. et. al v. Visa U.S.A. Inc. and MasterCard International Inc., 396 F. 3d 96, 114 (2d Cir. 2005).

As a consequence, the EU adopted the Directive 2014/104/EU on antitrust damages actions[59] which was signed into law on 26 November 2014 and published in the Official Journal of the European Union on 5 December 2014.[60] The Directive aims to pursue the aforementioned objectives, and to harmonise the national rules prescribing damages actions of the Member States.[61] The Member States have to implement and transpose the Directive into Member States' legal systems within 27 December 2016.[62] However, the Directive does not embrace the provisions for other forms of private enforcement.[63]

The Directive sets out the legal framework and instruments to ease private damages claims for victims of competition violations,[64] and requires that national competition laws provide for effective procedural rules assuring victims of infringements of the exercise of the right to full compensation.[65] If there is no Union law or the Directive is silent on any particular matters, national rules and procedures of the Member States will govern and apply to actions for damages.[66]

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[59] DIRECTIVE 2014/104/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

[60] The European Commission, "Directive on Antitrust Damages Actions," http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html.

[61] "Proposal for a Directive of the European Parliament and of the Council on Certain Rules Governing Actions for Damages under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union," "Directive on Antitrust Damages Actions," 9.

[62] "Directive on Antitrust Damages Actions".

[63] Wouter P. J. Wils, "Private Enforcement of Eu Antitrust Law and Its Relationship with Public Enforcement: Past, Present and Future," 25.

[64] The Competition Directorate–General, "Competition Policy Brief," 1.

[65] Recital 4 of Directive 2014/104/EU on antitrust damages actions.

[66] Recital 11 of Directive 2014/104/EU on antitrust damages actions.

According to Article 3(1) of the Directive[67], both natural and legal person who has suffered harm from competition infringements are entitled to claim for damages and obtain full compensation. Nonetheless, the legal procedures which are not stipulated in the Directive such as a causal relationship between harm and infringement of competition law will be governed by national rules.[68] Essentially, the Directive requires that the national rules conform to the principle of effectiveness and equivalence.[69] This means that the national rules must not pose excessive difficulties or practical impossibilities for injured persons to exercise their right to compensation conferred by the TFEU or the national rules governing the right to compensation must not be less favourable than those governing similar domestic actions.[70]

For instance, Under the UK competition law, cause of action competition cases is fundamentally based upon the tort of breach of statutory duties, i.e. the European Communities Act 1972 or the Competition Act 1998.[71] The burden of proof is imposed on the claimant.[72]

2.1.2 Claim for Interim Relief

According to Article 8(1) of the Regulation 1/2003[73], the Commission assumes authority to order interim measures or interim relief provided that there is an 'urgency due to the risk of serious and irreparable damage to competition'. A claimant may alternatively file a petition to a national court seeking interim relief; this way seems to be more effective than the order of the Commission.[74]

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[67] Article 3(1) of Directive 2014/104/EU on antitrust damages actions.

[68] Recital 11 of Directive 2014/104/EU on antitrust damages actions.

[69] Ibid.

[70] Ibid.

[71] Richard Whish and David Bailey, *Competition Law*, (Oxford University Press, 2012), 331.

[72] Ibid., 332.

[73] Article 8(1) of Regulation 1/2013.

[74] Richard Whish and David Bailey, *Competition Law*, (Oxford University Press, 2012), 320.

The conditions to grant interim relief will vary according to the domestic rules and court precedence. On this occasion, the UK Court would likely to grant interim relief if it is found that the individuals' livelihoods are at stake.[75]

2.1.3 Claim for Nullity

Private litigation under the EU Competition law can be used offensively as a 'sword' and defensively as a 'shield'[76] In a sword litigation, private parties can bring civil lawsuit to claim damages, and injunctive relief.[77] Meanwhile, in a shield litigation, when a plaintiff files contractual claim for a performance of contract or damages against a defendant,[78] the defendant may raise the nullity of the contact resulting from the violation of competition rules as a defence against the claim. Hence, the defendant may be shielded from contractual obligations.[79]

It seems to be a misnomer that this section is named as 'claim for nullity'. Fundamentally, any agreements, contractual clauses, between undertakings, decisions by associations of undertakings and concerted practices which violate Article 101 of TFEU are automatically void.[80] From the author's understanding, such agreement, decisions, and practices are automatically void by virtue of this provision whilst they need not be declared void by the Court. Nonetheless, the existing nullity of contract can defend the defendant in such contractual dispute.

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[75] *Cutsforth v Mansfield Inns Ltd* [1986] 1 CMLR 1.

[76] Wouter P. J. Wils, "Private Enforcement of Eu Antitrust Law and Its Relationship with Public Enforcement: Past, Present and Future," 4.

[77] Ibid.

[78] Ibid.

[79] Horacio Vedia Jerez, *Competition Law Enforcement and Compliance across the World: A Comparative Review*, 237.

[80] Article 101(2) TFEU.

On a separate note, the Court may use two legal terms, void and null and void, interchangeably, and its nominalisation is invalidity and nullity.[81]

2.2 Idiosyncratic Characteristics

2.2.1 Actual Damages

In contrast to the US, the EU commission did not recognise nor adopt the doctrine of the exemplary or punitive, multiple or other damages, which can lead to overcompensation. The Directive clearly states in its Recitals that victims of competition rules infringements are entitled to full compensation, that is, actual loss (*damnum emergens*) and loss of profit plus interest.[82] Nonetheless, the full compensation under the Directive should not result in overcompensation which includes punitive, multiple or other damages.[83] The right to full compensation and prohibition of overcompensation are also restated in Article 13 of the Directive.[84]

The forgoing implementation are the fruits of discussion of the Member States in the Green Paper and White Paper. Most participants concurred that damages should be a compensatory instrument. In addition, they strongly disagreed with overcompensation[85] as exemplary or punitive damages is contrary to public policies of the majority of Member States.[86]

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[81] Simon Vande Walle, *Private Antitrust Litigation in the European Union and Japan: A Comparative Perspective*, 207.

[82] Recital 12 of Directive 2014/104/EU on antitrust damages actions.

[83] Recital 13 of Directive 2014/104/EU on antitrust damages actions.

[84] Article 3 of Directive 2014/104/EU on antitrust damages actions.

[85] The Commission of the European Communities, "Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the Ec Antitrust Rules," 59.

[86] The Commission of the European Union, "Commission Staff Working Paper Annex to the Green Paper on Damages Actions for Breach of the Ec Antitrust Rules," 36.

2.2.2 *Prima facie* Evidence

The Directive provides two scenarios for the binding effects of decisions of the national competition authority. First, Article 9(1) of the Directive requires that in case a decision finding of an infringement of Article 101 or 102 TFEU of a national competition authority of any Member States has become final or has been reviewed by a review court, such decision is deemed to be 'irrefutably established for the purposes of an action for damages brought before the national court of the Member State.[87] It means that the same cause of action decided by the national competition authority or the review court cannot be re-litigated. The underlying logic of this provision is to ensure legal certainty and consistency of the application of Article 101 and 102 TFEU as well as enhancing the effectiveness and procedural efficiency of actions for damages.[88]

Article 9(2) of the Directive stipulates the second scenario. The provision requires that the Member States must ensure that the final decisions of national competition authority in either Member States will at least constitute *prima facie* evidence before the national court of the other Member States.[89]

2.2.3 Legal Standing of Indirect Purchasers

The Directive 2014/104/EU on antitrust damages actions provides the definition of direct purchaser and indirect purchaser. Direct purchaser means "a natural or legal person who acquired, directly from an infringer, products or services that were the object of an infringement of competition law."[90] Indirect purchaser means "a natural or legal person who acquired, not directly from an infringer, but from a direct purchaser or a subsequent purchaser, products or services that were the object

[87] Article 9(1) of Directive 2014/104/EU on antitrust damages actions.

[88] Recital 34 of Directive 2014/104/EU on antitrust damages actions.

[89] Article 9(2) of Directive 2014/104/EU on antitrust damages actions.

[90] Article 2(23) of Directive 2014/104/EU on antitrust damages actions.

of an infringement of competition law, or products or services containing them or derived therefrom."[91]

According to the Directive, both direct and indirect purchasers should have a legal standing to claim for damages.[92] The Directive requires Member States to ensure that any persons who suffered from the violations of competition rules regardless of whether they are direct or indirect purchasers can claim compensation.[93] However, direct purchasers cannot claim damages for the overcharge that they have passed on to customers.[94] The Commission is also required by the Directive to issue guidelines for national courts on how to estimate the share of the overcharge which was passed on to the indirect purchaser.[95]

Before the adoption of the Directive, the EU competition legislation was silent on the legal standing of indirect purchasers. Some EU legal scholars interpreted the ECJ judgements in *Courage* and *Manfredi* cases, and concluded that the Court had affirmed the legal standing of indirect purchasers to sue for damages.[96] They claimed that the word 'any individual' used by the Court in *Courage*[97] and *Manfredi*[98] embodies indirect purchasers. Subsequently, respondents in the Green Paper and White Paper agreed that the indirect purchasers should have legal standing to sue for damages.

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[91] Article 2(24) of Directive 2014/104/EU on antitrust damages actions.

[92] Recital 44 of Directive 2014/104/EU on antitrust damages actions.

[93] Article 12(1) of Directive 2014/104/EU on antitrust damages actions.

[94] Simon Vande Walle, *Private Antitrust Litigation in the European Union and Japan: A Comparative Perspective*, 174.

[95] Article 16 of Directive 2014/104/EU on antitrust damages actions.

[96] Simon Vande Walle, 175.

[97] Case 453/99 *Courage Ltd V Crehan*, [2001] ECR I-6297, at paragraph 26.

[98] C295/04 to C298/04 *Vincenzo Manfredi V Lloyd Adriatico Assicurazioni Spa*, [2006] ECR I-6619, at paragraph 61.

It should be noted that no competition rules or the ECJ's judgements directly ruling on the standing for indirect purchasers to seek interim relief. Nonetheless, if the same interpretation on the standing to sue for damages applies, indirect purchasers should also have the standing to seek interim relief.

2.2.4 Passing-on Defence

Under the EU Competition law, the defendant is allowed to invoke passing-on defence against the claimant. The underlying of this stipulation is laid in the Green Paper and White Paper. In the Green Paper, it is generally admitted that the direct purchasers may pass on some or all of their loss to the next purchaser in the chain who has indirect connection with the seller.[99] In the White Paper, it is further clarified that a defendant may use passing-on of overcharge as a shield against direct purchasers or other purchasers other than final consumers to mitigate damages claimed.[100] On the contrary, a plaintiff who is not the direct purchaser may use passing-on of overcharge as a sword against the defendant to prove its loss suffered.[101]

According to the White Paper, if the defendant is not permitted to invoke the passing-on defence, it would contribute to unjust enrichment. To elucidate, the claimant would be unjustly enriched by the overcharge fully or partially passed on to other purchasers in the distribution chain.[102] Moreover, if the passing-defence is not allowed, the defendant may be faced with multiple litigations from direct purchaser and indirect purchaser, thereby also resulting in multiple

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[99] The Commission of the European Union, "Commission Staff Working Paper Annex to the Green Paper on Damages Actions for Breach of the Ec Antitrust Rules," 46.

[100] The Commission of the European Communities, "Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the Ec Antitrust Rules," 63.

[101] Ibid.

[102] Ibid., 64.

compensation of illegal overcharge.[103] The Directive thus recognise that the passing-on defence may be invoked as a defence against a claim for damages[104]

2.2.5 Collective Redress

Collective redress refers to "Collective redress and is a procedural mechanism which allows for reasons of procedural economy and/or efficiency of enforcement, many single claims (relating to the same case) to be bundled into a single court action."[105] The Directive does not require the Member States provide for a collective redress mechanism. In contrast, the Commission released the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law.[106]

The Recommendation outlines the non-binding principles for collective redress mechanisms in the Member States to ensure a coherent approach to collective redress across the EU.[107] Unlike the US class action, the collective redress suggested by the European Commission is opt-in based whereby individuals or legal persons can be encompassed in the represented group of lawsuits only when they decide to join the group.[108] In addition the European Commission determined not to

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[103] Ibid.

[104] Article 16 of Directive 2014/104/EU on antitrust damages actions.

[105] The European Commission, "Frequently Asked Questions: European Commission Recommends Collective Redress Principles to Member States," The European Commission, http://europa.eu/rapid/press-release_MEMO-13-530_en.htm.

[106] "Commission Recommendation of 11 June 2013 on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted under Union Law," ed. The European Commission (2013).

[107] Richard Whish and David Bailey, *Competition Law*, (Oxford University Press, 2012), 319.

[108] The European Commission, "Frequently Asked Questions: European Commission Recommends Collective Redress Principles to Member States".

adopt the concept of contingency fees and punitive damages in order the avoid the risk of abusive litigation occurred in the US.[109]

2.2.6 Statutes of Limitation

The Directive does not prescribe the limitation periods or statutes of limitation; the Member States are authorised to legislate on this matter. However, it sets out the minimum standard which requires the limitations periods for proceeding with action for damages of at least five years.[110] However, the limitation periods must be suspended or interrupted in the case where the competition authority proceed with the investigation or any proceedings related to competition infringements and damages action.[111]

2.3 The Selected Cases Studies

2.3.1 *GT-Link v DSB*[112]

GT-Link, a ferry company, filed a complaint on 27 September 1989 against DSB, the stated-owned company and the sole owner of the ports of Rødby and Gedser, for abuse of, and dominant position by levying excessive high port duties which violated Article 86 of the EEC Treaty (Article 102 TFEU). The claimant claimed repayment from DSB of the sum of the amount equal to the total sum of port duties paid by the claimant from 18 February 1987 to 31 December 1989, or alternatively, reimbursement from DSB of the import surcharge paid over during such period. The Danish Court referred the case to the Court of Justice to determine as to whether the defendant who was the state-owned company was liable to compensate the claimant for abusive of charges for the use of the ports under Article 86 of the EEC Treaty (Article 102 TFEU). The Court reaffirmed that Article 86 of the EEC Treaty (Article 102 TFEU)

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[109] Ibid.

[110] Article 10(3) of Directive 2014/104/EU on antitrust damages actions.

[111] Article 10(4) of Directive 2014/104/EU on antitrust damages actions.

[112] C-242/95 *GT-Link A/S v De Danske Statsbaner (DSB)*, [1997] ECR I-4449.

has direct effect, and the national court is required to protect individual rights derived from the direct effect of this provision. Moreover, it is duties of each Member State to provide for the detailed procedural rules including the legislation on burden of proof in the event that the Community laws are silent on these particular matters. However, the domestic rules must not "less favourable than those governing similar domestic actions and do not render virtually impossible or excessively difficult the exercise of rights conferred by the Community law".

2.3.2 *Intel Corporation v. Via Technologies Inc.*[113]

On 27 September 2001, Intel Corporation, the claimant, lodged two complaints against Via Technologies Inc., the defendant, for infringements of five of Intel's patents. The defendant argued in the High Court of Justice Chancery Division that the claimant abused the exercise of intellectual property rights by forestalling a rival from making components compatible with CPU and Chipset of the claimant; and abuse of a dominant position by refusing to grant a licence to the defendant which violated Article 81 and 82 EC Treaty (Article 101 and 102 TFEU) and the corresponding provisions of the Competition Act 1998. The Court by Judge Lawrence Collins J awarded the claimant summary judgement on each of the competition issues on 14 June 2002, and granted the defendant permission to appeal on some parts of the issues raised. The Court of Appeal allowed the appeal of the defendant and upheld the defence claim (Euro-defence) raised by the defendant.

2.3.3 *Sportswear SpA v Stonestyle Ltd* [114]

The plaintiff is the manufacturer of garments and the owner of trademarks, including work mark Stone Island and a related graphic mark. The plaintiff granted territorial exclusivity to Four Marketing Limited by nominating it as a sole authorised distributor to sell the plaintiff's clothes in the UK, Éire and the distributor

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[113] Case Nos A3/2002/1380, A3/2002/1381 *Intel Corporation v Via Technologies Inc.*, [2002] EWCA Civ 1905.

[114] Case No A3/2005/2316 *Sportswear SpA v Stonestyle Ltd*, [2006] EWCA Civ 380.

agreed not to sell in other areas. Stonestyle Ltd., which is the defendant and clothes seller in England who obtained the plaintiff's clothes from a source other than the distributor. The plaintiff sued the defendant for trademark infringement while the defendant raised the Euro-defence that the distributorship agreement breached Article 81 of the EC Treaty. The lower court rejected the Euro-defence raised by the defendant as the court was of the view that there is no adequate nexus between the defence and the claim of the plaintiff. However, the defendant lodged an appeal, and the Court of Appeal reversed the decision of the lower court and affirmed that the defendant could mount such defence.

2.3.4 *Devenish Nutrition Ltd v Sanofi-Aventis Sa (France) and others*[115]

This case is a follow-on damages actions initiated after the decision of the European Commission in 2001, in which the Commission found cartels amongst various vitamin manufacturers including Sanofi-Aventis Sa (France) who determined sales quota allocations entered into collusive agreements, thereby resulting in a breach of Article 81 of the EC Treaty. Devenish Nutrition then brought a claim to the English High Court for restitutionary damages, but the Court rejected to award such damages. The plaintiff filed an appeal, but the Court of Appeal dismissed the application. The Court of Appeal ruled that restitutionary remedies would be awarded in exceptional circumstances. Importantly, the Court of Appeal also recognised the availability of a passing-on defence which was raised by the defendant on Appeal, and as such, the overcharge passed on to the customers of the defendant should be taken into consideration.

[115] Case A3/2008/0080 *Sportswear SpA v Stonestyle Ltd*, [2008] EWCA Civ 1086.

3. Japan

3.1 Right of Private Enforcement

3.1.1 Claim for Damages

Under the Japanese law, a party suffering from monopolisation, unreasonable restraint of trade or unfair trade practices is entitled to sue for damages under the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of April 14, 1947) or the Antimonopoly Act (AMA) and Article 709 of the Civil Code, as discussed below.

(a) Under the Antimonopoly Act (AMA)

According to Article 25(1) of the AMA, a private party is entitled to initiate private actions against the other party who violates certain AMA provisions.[116] Article 25(1) required plaintiffs to prove four essential elements: (1) antitrust violations; (2) damage and (3) causal links between the infringement and the damage.[117] However, the plaintiffs do not need to prove intention or negligence of defendants as Article 25(2) rules that although the enterprise or trade association can show that they do not have intention or negligence, they will not be released from liabilities arising from the antitrust violations.[118] It can be said that Article 25 imposes strict liability for antitrust violations.[119]

Article 26(1) imposes a precondition whereby the private plaintiffs will not be able to proceed with private damages actions in accordance with

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[116] Article 25(1) of the Antimonopoly Act.

[117] Simon Vande Walle, *Private Antitrust Litigation in the European Union and Japan: A Comparative Perspective*, 50.

[118] Article 26 of the Antimonopoly Act.

[119] Simon Vande Walle, 50.

Article 25(1) unless the Japanese Fair Trade Commission (JFTC) issues a cease and desist order, which becomes final and binding; or imposes surcharge by the Payment Order according to Article 62(1) in cases where there is no final cease and desist order.[120] In the event that JFTC has issued a cease and desist order after the discovery of antitrust violations, and the order has been annulled afterwards in consequence of the cessation of such antitrust violations, but the JTFC affirms the antitrust violations, the plaintiffs can still base the claim for damages on the JFTC under Article 25(1).[121] To conclude, private plaintiffs must rest on the follow-on action in case they opt to bring a civil lawsuit under the AMA.

(b) Under Article 709 of the Civil Code

Apart from the AMA, the plaintiffs may sue for damages by virtue of Article 709 of the Civil Code. In the initial state of enactment of the AMA, legal scholars asserted that specific provisions of claim for damages under the AMA did not deprive the plaintiffs of right to tortious claims under the general tort provision, that is, Article 709 of the Civil Code.[122] Later, the Supreme Court first inexplicitly affirmed this proposition in 1972 in *Ebisu Shokuhin Kigyo Kumiai* case where the Court ruled that the plaintiff can bring tortious claims separate from the claim for damages under the AMA, in cases where unlawful conduct also constituted a tort.[123]

In order to pursue the tort-based claim under Article 709 of the Civil Code, the plaintiffs must demonstrate four key elements: (1) intent or negligence; (2) wrongful conduct; (3) damage and (4) causal link between wrongful

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[120] Article 26(1) of the Antimonopoly Act.

[121] Simon Vande Walle, *Private Antitrust Litigation in the European Union and Japan: A Comparative Perspective*, 51-52.

[122] Ibid., 54.

[123] Ibid.

conduct.[124] As can be seen, a tortious claim requires the intent or negligence whereas the private antitrust clam does not require this element.

It is contended that in practice, a private antirust claim under the AMA and tortious claim under the Civil Code is not substantially different[125] being that to satisfy the elements of intent or negligence and wrongful conduct can be satisfied by the proof of antitrust violations.[126] In addition, the plaintiffs would rather sue for damages under the general tort provision[127] for several reasons.

First, the AMA requires that the plaintiffs bring a claim for damages under Article 25 before the Tokyo District Court[128] whilst the tortious claim under Article 709 may be filed with the court where the tort took place.[129] It is claimed that the plaintiff may prefer Article 709 as the court, which has jurisdiction over the case, is 'close to home,' and the plaintiff can also gain various advantages such as geographical proximity and proximity of evidence.[130]

Second, the claim under Article 25 of the AMA is relatively restrictive. The plaintiffs' claim must adhere to the JFTC decision, and the plaintiff

[124] Article 709 of Civil Code (Act No. 89 of April 27, 1896).

[125] Simon Vande Walle, "Private Enforcement of Antitrust Law in Japan: An Empirical Analysis," *The Competition Law Review* 8, no. 1 (2011): 10.

[126] *Private Antitrust Litigation in the European Union and Japan: A Comparative Perspective*, 55.

[127] "Private Enforcement of Antitrust Law in Japan: An Empirical Analysis," 10.

[128] Article 85-2 of the Antimonopoly Act.

[129] Article 5(9) of the Code of Civil Procedure.

[130] Simon Vande Walle, *Private Antitrust Litigation in the European Union and Japan: A Comparative Perspective*, 57.

cannot add other defendants, issues or violations which were not addressed by the JFTC order.[131]

Finally, the investigation and determination of the JFTC may be prolonged. The JFTC order can normally be subject to the appeal in judicial proceedings, which may extend the entire proceedings.[132] Hence, the plaintiffs may have to await the final and binding JFTC decisions for several years. If the JFTC rendered its final decision that no antitrust violation has been found, the plaintiffs must initiate a tort claim under Article 709 of the Civil Code. It may turn out that the right to demand compensation based on tort has been extinguished as a result of the lapse of prescription, which is three years from the time when the damages had been found and the perpetrator had been identified.[133]

It is vital to note that the plaintiffs may bring separate actions under Article 25 of the AMA and Article 709 of the Civil Code on a simultaneous basis.[134] By pursuing this strategy, the plaintiffs can submit the JFTC opinion to the court which has jurisdiction over the tortious claim[135], probably to lessen the burden of proof.

3.1.2 Claim for Injunction

Injured parties can obtain an injunction only in the case where trade association or enterprise commit unfair trade practices under Article 8(v) or Article

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[131] Ibid., 58.

[132] Ibid.

[133] Article 724 of Civil Code (Act No. 89 of April 27, 1896).

[134] Etsuko Kameoka, *Competition law and policy in Japan and the EU*, 170.

[135] Simon Vande Walle, *Private Antitrust Litigation in the European Union and Japan: A Comparative Perspective*, 57.

19 which infringe or likely to infringe upon their interests.[136] The plaintiffs are also required to prove that they are suffering or likely to suffer extreme damage arising from unfair trade practices.[137]

However, unlike the damages claim, Article 24 of the AMA does not impose any pre-requisite requiring the final and binding JFTC. If this provision is interpreted based on the *Argumentum e contrario* doctrine, the plaintiffs should have a right to seek an injunction though there is no final and binding decision from the JFTC.

3.1.3 Claim for Voidness

The Antimonopoly Act of Japan does not prescribe that a juristic act or agreement, which violates the provisions of the AMA is void. Nonetheless, it may be invoked as a defence on the ground that such juristic act or agreement is contrary to public policy in accordance with Article 90 of the Civil Code.[138] This is different from the EU competition law which has Article 101(2) TFEU ruling that any agreements or decisions violating competition rules are automatically void.[139] However, this provision of the Civil Code leads to the same effect as Article 101(2) TEFU in that such legal acts or agreements are automatically void. The courts do not need to render any judgement to declare them void, yet the courts merely affirm as void, right from the beginning.[140]

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[136] Article 24 of the Antimonopoly Act.

[137] Ibid.

[138] Article 90 of the Civil Code.

[139] Article 101(2) TFEU.

[140] Simon Vande Walle, *Private Antitrust Litigation in the European Union and Japan: A Comparative Perspective*, 117.

3.2 Idiosyncratic Characteristics

3.2.1 Actual Damages

Unlike the US Clayton Act, punitive damages or treble damages are not available in the AMA, which provides that those who infringe will be 'liable for damages suffered by another party'.[141] The doctrine of the Japanese tort system does not recognise the punitive damages as a tool to deter or punish the tortfeasor, but the principal objective of damages is to compensate victims and restoring the status quo of the victims.[142]

3.2.2 *Prima facie* Evidence

Article 25 of the AMA establishes the irrebuttable presumption for intent or negligence when the JFTC rendered the final and binding order.[143] Therefore, the plaintiffs are not required to prove this element while they still bear the burden of proof for the antitrust violations. Nonetheless, Article 25 does not establish a *prima facie* or legal presumption, but a mere *de facto* presumption.[144]

3.2.3 Legal Standing of Indirect Purchasers

There is no provision in the AMA ruling on the standing of indirect purchasers, nor does the it restrict the indirect purchasers to sue for damages.[145] Consequently, it is interpreted that indirect purchasers should have a legal basis, from which to bring damages and actions under the Article 25 of the AMA. This interpretation was confirmed by the Supreme Court in several cases, such as *Second Tokyo Oil Cartel*

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[141] Article 25 of the Antimonopoly Act.

[142] Simon Vande Walle, *Private Antitrust Litigation in the European Union and Japan: A Comparative Perspective*, 60.

[143] Ibid., 73.

[144] Ibid.

[145] Ibid., 61.

case and *Tsuruoka Oil Cartel* case where the Court ruled that the law did not deny the basis of the plaintiffs, no matter whether they are a direct or indirect purchaser.[146] However, proof of the casual link between wrongful conduct on the part of the defendant and the damage sustained by the plaintiff might not be as straightforward.[147]

3.2.4 Passing-on Defence

Like the legal basis of the indirect purchaser, there is no restriction on passing-on defence. Thus, it should be interpreted that if the damage is mitigated and the overcharge is passed on to other consumers, the plaintiffs can only be granted damages equivalent to the actual harm suffered from the antitrust violations.[148]

3.2.5 Class Action

Class action is available in the Japanese law, but Japan did not adopt the US opt-out class action. Article 30(1) of the Code of Civil Procedure provides for the opt-in class action.[149] To clarify the opt-in mechanisms, injured persons will become a member of a group only when they affirm their participation in the group, and appoint their representative in writing.[150] Once the representative is appointed by the represented parties, they are authorised to act on behalf of all the represented parties, but the represented parties are not deemed as a party in the case.[151] The judgement will be binding upon all parties involved in the case.[152]

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[146] The two cases were cited in Walle, 61.

[147] Mitsuo Matsushita, "The Antimonopoly Law of Japan," 160.

[148] Simon Vande Walle, *Private Antitrust Litigation in the European Union and Japan: A Comparative Perspective*, 61-62.

[149] Article 30 (1) of the Code of Civil Procedure.

[150] Simon Vande Walle, *Private Antitrust Litigation in the European Union and Japan: A Comparative Perspective*, 64.

[151] Ibid., 63.

[152] Ibid., 64.

3.2.6 Statutes of Limitation

With respect to damages actions under the AMA, Article 26(2) provides for the prescription of three years as from the date on which the Cease and Desist Order or the Payment Order has become final and binding.[153]

In respect of a tort-based claim under the Civil Code, Article 724 provides for the prescription of three years as from the time at which the damage is known and the perpetrator is identified, or twenty years as from the time at which the tortious act has been undertaken.[154]

3.3 The Selected Cases Studies

As virtually almost all primary sources, particularly the court judgments were written in Japanese, it is unavoidable to rely on the secondary sources which are available in English.

3.3.1 *The Toshiba Elevator case*[155]

The plaintiffs are the building owner in which the elevators from Toshiba were installed and the independent elevator maintenance service companies. the defendant is Toshiba Elevator, a subsidiary of the Toshiba group. The plaintiff brought damages actions before the Osaka District Court against the defendant alleging that Toshiba conducted illegal tie-in arrangements, whereby Toshiba refused to supply spare parts and components to the building owner and independent service companies. This refusal by Toshiba to supply spare parts caused difficulties to the building where the Toshiba elevators were installed and the building owner had entered into a service contract with independent contractors. In 1990, the Osaka High Court held the defendant liable for damages sustained by the plaintiffs. The

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[153] Article 26(2) of the Antimonopoly Act.

[154] Article 724 of the Civil Code.

[155] Cited in Mitsuo Matsushita, "The Antimonopoly Law of Japan," 167.

defendants filed an appeal on the ground that the safety of elevator operations necessitated the tie-in arrangement. The Osaka High Court took product safety into consideration, but the Court was of the view that the independent contractors were proficient in the maintenance of the Toshiba elevators. Therefore, the Court granted damages to the plaintiffs.

The Toshiba Elevator case marked a significant achievement as this was the first case in which private plaintiffs were awarded damages.

3.3.2 *The Shisheido case*[156]

The plaintiffs are retailers who sold cosmetics products of the defendant which is Shiseido, Japan's largest cosmetics company. The plaintiffs brought a civil action before the Tokyo District Court alleging that the defendant intended to engage in resale price maintenance. The fact was that the defendant required the plaintiffs to provide services to customers by means of a person-to-person sales strategy, meaning that they must explain the Shisheido products to the customers on a one-on-one basis. Also, plaintiffs were not permitted to use other forms of sales such as sales by catalogue. It further appeared that the defendant set the recommended retail price. Once the plaintiffs had violated the contract by offering the products in catalogues to the customers, the defendant terminated the contract, and discontinued the supply of products. The Tokyo District Court found that the retail price policy was contrary to the Antimonopoly law, and hence, the court ordered the defendant to renew the supply of products to the plaintiffs. However, the defendant filed an appeal to the Tokyo High Court. On 14 September 1994, the Court held that no evidence could demonstrate that the defendant's stipulation, which required the plaintiffs to provide services to the customers face-to-face aimed to maintain the resale price of Shiseido's products. Nonetheless, the Court was silent on whether the undertakings of the defendant violated the Antimonopoly law.

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[156] Cited in ibid., 168.

3.3.3 *The Kao Cosmetics Sales Company case*[157]

The plaintiffs are the retailers of Kao cosmetics while the defendant is Kao cosmetics, which is the subsidiary of Kao Soup group, large manufacturers of soup, cosmetics, toiletries and related commodities. The plaintiffs resorted to catalogue sales by sending advertisements to business offices by fax, and sold the products at discounted prices, which was lower than those suggested by the defendant. The plaintiffs also sold products to unauthorised shops. The defendant terminated the contract claiming that the plaintiffs had breached contractual conditions requiring the plaintiffs to use a counselling sales approach, which was similar to the face-to-face selling in the Shiseido case. The plaintiffs thereby sued the defendant before the Tokyo District Court. The Court held the termination of contract violated Item 13 of the General Designation of Unfair Business Practice issued by the JFTC, which forbade resale price maintenance, and the Court ordered the defendant to continue its supply of products to the plaintiffs. The defendant filed an appeal, yet the Tokyo High Court found that the conduct of the defendant infringed the Antimonopoly law.

4. Singapore

4.1 Right of Private Enforcement

Under the Singapore Competition Act,[158] Section 86 confers the right of action for relief in civil proceedings in a court to private parties who suffer from harm arising out of (1) anticompetitive agreements or decisions; (2) abuse of dominant position; and (3) mergers that have resulted, or may be expected to result, in a substantial lessening of competition[159], all of which are subject to certain exemptions. The courts are authorised by virtue of Section 86(8) to grant to the plaintiff in civil

[157] Cited in ibid., 169.

[158] Competition Act (Cap 50B, 2006 Rev Ed.).

[159] Section 86(1) of Competition Act (Cap 50B, 2006 Rev Ed.).

proceedings the relief by way of injunction or declaration[160], damages[161], and such other relief as the court thinks fit.[162]

In whatever type of remedies to be sought, Section 86(2) imposes the same precondition requirement. That is, the right of private actions will be asserted when the Competition Commission of Singapore (CCS) has made a decision, and all the appeal procedures, both in Competition Appeal Board and in the competent courts have been exhausted, or the appeal period has expired,[163]

4.1.1 Claim for Damages

The plaintiffs can proceed with a civil action to claim damages in accordance with Section 86(8)(b).[164] The damages to be awarded to the plaintiff for the losses sustained, which include lost profits on actual and potential sales, lost sales and lost market share.[165] Specifically, Article 86(9) of the AMA imposes significant restrictions whereby parties to anti-competitive agreements violating Section 34 are not entitled to exercise the right of private actions under Section 86.[166]

On a separate issue, some academic scholars point out that private parties are not able to claim damages based on tort or breach of statutory duty. They reasoned that the wordings of Section 86 limit the right of private parties to only claim under Section 86. On top of that, they drew comparisons with Section

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[160] Section 86(8)(a) of Competition Act (Cap 50B, 2006 Rev Ed.).

[161] Section 86(8)(b) of Competition Act (Cap 50B, 2006 Rev Ed.).

[162] Section 86(8)(c) of Competition Act (Cap 50B, 2006 Rev Ed.).

[163] Cavinder Bull and Chong Kin Lim, Competition Law and Policy in Singapore, 267.

[164] Section 86(8)(b) of Competition Act (Cap 50B, 2006 Rev Ed.).

[165] Ajinderpal Singh and Ganesh Bharath Ratnam, "Competition Law - Rights of Private Action," JD Supra, http://www.jdsupra.com/legalnews/competition-law-rights-of-private-action-56779/.

[166] Section 86(9) of Competition Act (Cap 50B, 2006 Rev Ed.).

47A of the UK Competition Act 1998[167], which is the model of Singapore's Competition Act, and concluded that Section 86 does not embody any stipulation permitting the plaintiffs to bring other proceeding.[168]

4.1.2 Claim for Injunction

Section 86(8)(a) allows the plaintiffs to seek relief by way of injunction or declaration.[169] However, it has been observed that a final injunction is relatively rare in private actions as the CCS has issued the order to cease and desist anti-competitive conducts.[170]

4.2 Idiosyncratic Characteristics

4.2.1 Actual Damages

The rudimentary ideology of private damages claims Under Singapore's competition law is to award compensation to the victims for their losses suffered from the competition violations.[171] Punitive damages or exemplary damages are not recognised in the Singapore Competition Act for a couple of reasons. First, the Act grants authority to the Commission to impose fines as financial penalties. Thus, if the exemplary damages are granted, the defendant may be subject to 'double jeopardy', which is contrary to the legal principle that "one should not be punished for the same offence twice"[172] The other rationale laid in the legislative history of the Act. The first Draft Competition Bill includes exemplary damages, but some respondents in public consultation articulated their concerns over the exemplary

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[167] Section 47A (10) of UK Competition Act 1998.

[168] Cavinder Bull and Chong Kin Lim, *Competition Law and Policy in Singapore*, 274.

[169] Section 86(8)(a) of Competition Act (Cap 50B, 2006 Rev Ed.).

[170] Cavinder Bull and Chong Kin Lim, 273.

[171] Ibid., 269.

[172] Ibid., 272.

damages; eventually, and as a result, the idea of exemplary damages was eliminated from the Act.[173]

4.2.2 *Prima facie* Evidence

There is no provision in the Singapore Competition Act stipulating that the final decision of the Commission establishes the *prima facie* evidence.

4.2.3 Legal Standing of Indirect Purchasers

There is no provision ruling on the standing of indirect purchasers in competition law. However, the word 'directly' in Section 86 can be read in the way that indirect purchasers are not entitled to sue under this Section as they do not directly sustain loss and damage from violation of competition infringements.[174]

4.2.4 Passing-on Defence

Singapore's Competition Act is silent on the passing-on defence, and it remains untested as to whether such defence is allowed in private actions. Based on the consistent interpretation on the standing of indirect purchasers, if the indirect purchasers are not allowed to bring private actions under Section 86, it is likely that the passing on-defence may not be permitted.

4.2.5 Class Action

As a general rule, class action is not available under Singapore law, but Order 15 Rule 12 of the Rules of Court[175] provides for representative

[173] Ibid.

[174] Ibid., 266.

[175] Rules of Court, G.N. No. S 71/1996 (Revised Edition 2014).

proceedings which can be analogous to a class action lawsuit.[176] The provision derived from Article 19.6 of the UK Civil Procedural Rules[177]

In order to bring representative action, the plaintiffs must meet two requirements imposed by Order 15 Rule 12. First, the plaintiffs in the same lawsuit must have the same interest.[178] After the first requirement is satisfied, the courts will further consider as to whether the representative action should be continued.[179]

The court judgement in representative proceedings will be binding upon all parties in the claim. Nonetheless, it cannot be enforced against persons who are not a party to the claim, unless the courts order otherwise.[180]

4.2.6 Statute of Limitation

The statute of limitation for private action under Section 86(1) is two years as from when the appeal period expired.[181]

4.3 The Selected Case Studies

Due to the limitation of available resources, no case study which is directly related to this research study can be found.

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[176] Joy Tan and Koh Swee Yen, "Club Members Permitted to Bring Representative Action against Club Owner," *Casewatch* (2013), http://www.wongpartnership.com/files/download/1071.

[177] Ian Roberts and Vanessa Kilner, "Representative Action in Singapore: The Decision in Koh Chong Chiah V Treasure Resort," (2014), https://www.clydeco.com/insight/article/representative-action-in-singapore-the-decision-in-koh-chong-chiah-v-treasu.

[178] Order 15 Rule 12(1) of Rules of Court, G.N. No. S 71/1996 (Revised Edition 2014).

[179] Order 15 Rule 12(1) of Rules of Court, G.N. No. S 71/1996 (Revised Edition 2014).

[180] Order 15 Rule 12(3) of Rules of Court, G.N. No. S 71/1996 (Revised Edition 2014).

[181] Section 86(6) of Competition Act (Cap 50B, 2006 Rev Ed.).

5. Malaysia

5.1 Right of Private Enforcement

5.1.1 Claim for Damages

According to Section 64 of the Competition Act 2010 (Act 712), private parties who lose or suffer damage directly as a result of an infringement of any prohibition of anti-competitive agreements and, or abuse of a dominant position are entitled to pursue private actions for relief in civil proceedings.[182] It should be noted that, by virtue of this provision, private plaintiffs can file a civil lawsuit against enterprise or any legal entity, they are not allowed to sue individuals.[183]

There is no pre-requisite for the finding of the Malaysia Competition Commission (MyCC), meaning that plaintiffs can proceed with stand-alone actions.[184] Further, even though the MyCC finds no competition infringement, private parties may bring private actions on the same course of action as the courts and are not bound by the decision of the MyCC.[185] However, the plaintiffs must demonstrate to the court competition infringements, loss and, or damage, causal links between infringements and any loss suffered.[186]

5.1.2 Claim for Interim Measures

It is interpreted that Section 64 confers the rights to bring private damages actions, but not the claim for interim measures. Notwithstanding, the plaintiffs

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[182] Section 65 of Competition Act 2010 (Act 712).

[183] Tan and Sargunaraj. "Club Members Permitted to Bring Representative Action against Club Owner".

[184] Ibid.

[185] Ibid.

[186] Ibid.

may seek preventive relief under Section 50 of the Specific Relief Act 1950, which includes temporary and perpetual injunctions.[187]

5.2 Idiosyncratic Characteristics

5.2.1 Actual Damages

Similar to Singapore's competition law, the objective of damages in Malaysian competition law is for compensation. The court will award damages upon the proof of actual loss suffered by the plaintiff. However, the court may award exemplary damages in limited circumstances.[188]

5.2.2 *Prima facie* Evidence

It is uncertain as to whether the finding of the MyCC will establish *prima facie* evidence in the court. The Malaysia Competition Act is silent on this aspect, so it may be interpreted that the concept of *prima facie* is not adopted.

5.2.3 Legal Standing of Indirect Purchasers

In principle, indirect purchasers have legal standing to instigate private actions in accordance with Section 64(2) which provides that any person is entitled to bring private actions against any infringing enterprise "*regardless of whether such person dealt directly or indirectly with the enterprise*".

However, one of the requirements of Section 64(1) is direct loss and suffering from infringements. Normally, infringements will have a direct impact on the first level of purchasers in the chain as they have to purchase goods or services directly from the infringing enterprise. Meanwhile, indirect purchasers purchase goods and services from other sellers in the chain rather than from infringing enterprises. In this situation, the overcharge was passed on from the direct purchasers to indirect

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[187] Section 50 of Specific Relief Act 1950 (Act 137).

[188] Tan and Sargunaraj. "Club Members Permitted to Bring Representative Action against Club Owner".

purchasers, and indirect purchasers will be indirectly affected by such overcharge, which will be passed on to them, not directly from such infringements. Therefore, it might be questionable as to how indirect purchasers will be directly affected by an infringing enterprise.

5.2.4 Passing-on Defence

Tan and Sargunaraj indicated that passing-on defence is not available in Malaysia.[189]

5.2.5 Class Action

Like Singapore, only representative proceedings are available in Malaysia, which can be comparable to a class action lawsuit. Order 15 Rule 12[190] which governs the representative proceedings was duplicated from the Rules of Court of Singapore as the wordings in both pieces of legislation are virtually the same. Logically, the application of the provisions should also correspond.

5.2.6 Statutes of Limitation

The competition Act does not stipulate statutes of limitation of private actions under the Competition Act; thus, it should be governed by the general provision on the limitation period. Section 6(1) prescribes that the limitation period to bring an action is six years from the date on which the cause of action accrued.[191]

[189] Ibid.

[190] Order 15 Rule 12 of Rules of Court 2012.

[191] Section 6(1) of Limitation Act 1953 [Act 254].

5.3 The Selected Cases Studies

The publication reported that as of January 2017, no private actions have commenced by any person in the courts of Malaysia.[192]

6. Thailand

6.1 Right of Private Enforcement

6.1.1 Claim for Damages

Section 40 of Competition Act, B.E. 2542 (1999) entitles any person who sustains loss damage from a violation of abuse of market dominance, anti-competitive merger, collisions, and unfair trade practices to bring private damages actions against a violator.[193] It should be noted that there are two controversial interpretative issues which will be meticulously examined in Chapter 5.

Apart from Section 40 of the Competition Act, B.E. 2542 (1999), the injured person may claim compensation based on the tort provisions under the Civil and Commercial Code, i.e. Section 420.[194] However, the plaintiffs must prove the four elements: (1) intent or negligence; (2) competition violation; (3) damage and (4) causation between competition violations and damage.

6.1.2 Claim for Injunction

In principle, the Commission is granted power to issue a cease and desist order or injunction against business operators who violates the competition rules.[195] Also, when the Court finds business operators guilty of an offence under the

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[192] Nigel Parr and Euan Burrows, Cartel 2017, (Global Legal Insights, 2017), https://www.globallegalinsights.com/practice-areas/cartels/global-legal-insights---cartels-5th-ed.

[193] Section 40 of Competition Act, B.E. 2542 (1999).

[194] Section 420 of the Civil and Commercial Code.

[195] Section 31 of Competition Act, B.E. 2542 (1999).

Competition Act, the Court has the power to impose injunctions on such business operators.[196] The Act does not confer the right to seek injunction on private parties.

However, plaintiffs who initiate private litigation, claiming compensation based on tort provisions under the Civil and Commercial Code may seek interim measures in accordance with the provisions on Provisional Measures before judgement under the Division IV, Title I of the Civil Procedure Code. According to Section 254(2) of the Civil Procedure Code, the plaintiffs may file an *ex pate* application to the Court at the time they file the complaint seeking damages or at any time before the judgement to seek a temporary injunction restraining the defendant from repeating or continuing wrongful acts; or other order minimising trouble or injury which may potentially be sustained by the plaintiffs.[197] Nevertheless, the plaintiffs are not permitted to seek interim measures under this provision if their claim is regarded as a petty case[198] where the amount of the damages claim does not exceed Baht 300,000.[199]

In the case where the plaintiffs bring private damages actions before the court based on Section 40 of the Competition Act, B.E. 2542 (1999), it is questionable whether the plaintiffs will be able to seek interim measures under Section 254(2) of the Civil Procedure Code. The author's analysis is that the provisions in the Civil Procedure Code are designed to apply for any general civil proceedings. The claim for damages under Section 40 of the Competition Act, B.E. 2542 (1999) is covered by civil proceedings, and thus, those of Civil Procedure Code should also apply for such damages actions. For this reason, the plaintiffs seeking damages under this Section may be entitled to seek an injunction under Section 254(2) of the Civil Procedure Code.

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[196] Section 34 of Competition Act, B.E. 2542 (1999).

[197] Section 254(2) of Civil Procedure Code.

[198] Section 254 of Civil Procedure Code.

[199] Section 189(1) of Civil Procedure Code.

6.1.3 Claim for Nullity

Similar to Japan, Thailand's Competition Act does not prescribe that a juristic act or agreement which violates the provisions of the Act is automatically void. Nonetheless, the anti-competition agreements which violates the Competition Act may be void in accordance with Section 150 of the Civil and Commercial Code as it is deemed to be contrary to public order and good morals.[200] Any interested person may be able to invoke this nullity as a defence for the allegation of non-performance being that the voided act cannot be ratified.[201]

In principle, if any part of the agreement is void, the entire agreement is also void, unless it can be assumed that parties have the intention to separate the valid part from the invalid part.[202] However, well-drafted agreements typically incorporate the severability clause stipulating, for example, that if any part of the agreement is declared invalid, illegal and unenforceable, the remainder shall remain valid and enforceable. It is uncertain whether certain parts of the agreements will be able to survive by this clause.

The author is of the view that it might need to be considered on a case-by-case basis. In the case where the entire agreement is indeed intended to restrict competition such as the non-competition agreement, such agreement should be entirely void regardless of whether such agreement provides for the severability clause. On the contrary, if the agreement consists of only a couple of clauses that can contribute to competition restriction, and such agreement provides for the severability clause, only the infringing clauses should be void and unenforceable. By way of exemplification, the distribution agreement naturally determines the rights and obligations of each contractual party, but it may embody some clauses that can

[200] Section 150 of the Civil and Commercial Code.

[201] Section 172 of the Civil and Commercial Code.

[202] Section 173 of the Civil and Commercial Code.

constitute the competition violations. Only infringing clauses should be void and unenforceable, whilst the remainder should be valid and enforceable.

6.2 Idiosyncratic Characteristics

6.2.1 Actual Damages

Section 40 does not authorise the court to grant punitive or exemplary damages, so it can be construed that the court can award actual damages. Nonetheless, Kamolvan and Praechanok argue that actual damages may not cover expenses actually incurred by the plaintiffs which would normally encompass fees for discovery of evidence[203] and economic expert.[204] Kamolvan further points out that actual damages cannot bring about the deterrence effect on business operators who foresees that the benefits which they will gain are more than the damages that they are required to pay.[205]

The Lew Reform Commission had also proposed the draft Amendment to Competition Act in 2015 wherein the US treble damages had been adopted.[206] However, the final draft which was presented to the King for Royal assent does not contain the treble damages.

6.2.2 *Prima facie* Evidence

There is no provision in the Competition Act, B.E. 2542 (1999) ruling on the *prima facie* evidence.

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[203] Kamolvan Chiravisit, "15 Years with the Emptiness of Competition Act, B.E. 2542 (1999)," in *Reformation of Private Laws for Fair and Sustainable Economy*, ed. Law Reform Commission of Thailand (Nonthaburi Province, Thailand: Mata Publishing, 2015), 122-23.

[204] Praechanok Sriwisan, "Damages for Breach of Section 25 and 29 of Trade Competition Act, B.E. 2542 (1999)" (Thammsat University, 2014), 82.

[205] Kamolvan Chiravisit, 123.

[206] Law Reform Commission of Thailand, *Reformation of Private Laws for Fair and Sustainable Economy* (Nonthaburi Province, Thailand: Mata Publishing, 2015), 72.

6.2.3 Legal Standing of Indirect Purchasers

The Competition Act, B.E. 2542 (1999) does not provide for the provision on legal standing of indirect purchasers, nor is there any prohibition. Moreover, the plain reading of Section 40 stipulating that '*any person … shall have the right to bring an action for damages against the violator*'.[207] It might be concluded that indirect purchasers should have legal standing under this provision.

6.2.4 Passing-on Defence

The Competition Act, B.E. 2542 (1999) is silent on the passing-on defence. It is unclear whether such defence is recognised and permitted by the court.

6.2.5 Class Action

Section 40 paragraph 2 provides for the representative action, but not a class action. The provision authorises he Consumer Protection Board or associations recognised under the law on consumer protection to bring actions for damages on behalf of the injured person.[208]

Regarding the class action lawsuit, Thailand adopted the provisions on the class action, and transposed into the Civil Procedure Code in 2015 by virtue of the Amendment to the Civil Procedure Code No. 26, B.E. 2015. Section 222/8 (3) clearly permits a class action lawsuit in competition law.

6.2.6 Statutes of Limitation

Section 41 of the Competition Act, B.E. 2542 (1999) rules that plaintiffs must bring private damages actions within one year from the date the

[207] Section 40 of Competition Act, B.E. 2542 (1999).

[208] Section 40 paragraph 2 of Competition Act, B.E. 2542 (1999).

plaintiffs knew or ought to have known of the basis of the violations. Otherwise, such right will lapse.[209]

6.3 The Selected Cases Studies

To date, only one private claim for damages possibly related to competition violations has been found in Thailand. However, the plaintiff opted for the general tort provisions under the Civil Commercial Code, but not Section 40 of the Competition Act, B.E. 2542 (1999).

This case is concerning the dispute between two retail stores and hypermarkets in Thailand; namely *Big C Supercenter v. Tesco Lotus*. In 2011, Big C Supercenter ("Big C") acquired the business of Carrefour. Tesco Lotus ("Tesco") then launched a campaign whereby Tesco Lotus allowed customers to use the discount coupons offered by Big C and Carrefour to purchase products at Tesco. The discounted amount granted by Tesco would double the face value of the coupons. Furthermore, Carrefour "I Wish" card holders could obtain a Club Card, a membership card issued by Tesco, for free, together with 200 Baht gift voucher.

Big C filed a complaint to the Trade Competition Commission and brought a private action before the Court. According to the database of the Office of the Trade Competition Commission, this case has been pending for the consideration of the Commission since 2011.[210] With regard to the civil proceeding, the court held that Tesco unlawfully exercised its right which only purpose was, the causing of injury to other persons, which violates Section 421 of the Civil and Commercial Code.[211] The Court ordered Tesco to pay damages to Big C, the plaintiff, and Cencar Limited, the co-plaintiff, at the amount of Baht 2.45 and 1.52 million, respectively.

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[209] Section 41 of Competition Act, B.E. 2542 (1999).

[210] See Codification of complaints at http://otcc.dit.go.th/wp-content/uploads/2015/04/2554.pdf.

[211] Section 421 of Civil and Commercial Code.

As can be seen, the Court applied the general tort provisions under the Civil and Commercial Code rather than competition law provision. Further, the Court was silent on whether or not Tesco's campaign and arrangements violated competition law of Thailand.

Chapter V
Legal Issues on the Provisions on Private Enforcement under Thai Competition Act, B.E. 2542 (1999)

1. Available Remedies for Private Antitrust/Competition Enforcement

It might not be unusual if some people may misunderstand that private enforcement only provides for the right of damages actions. As can be seen, claims for damages has been regularly featured in discussions about private enforcement. To testify, the European Union has dedicated numerous papers and studies such as the Ashrust Paper, the Green Paper and the White Paper to the consultation on damages actions whilst the EU leaves the provisions on right to injunction to the domestic rules of the Member States. Moreover, competition law in some jurisdictions including Malaysia and Thailand do not have the provision grating private parties the right to claim injunction.

However, according to the OECD report, private enforcement is defined as "litigation initiated by an individual, a legal entity, an organisation or a public entity ... to have a court establish an antitrust infringement and order the recovery of damages suffered or impose injunctive relief".[1] The Green Paper reiterates that "[d]amages actions are part of private enforcement".[2] Furthermore, the survey and analysis of private antitrust/competition enforcement in the selected jurisdictions can substantiate the definition of private enforcement proposed by the OECD and the reiteration of the Green Paper. That is, private enforcement may provide for claim for damages and claim for injunction.

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[1] The Business and Industry Advisory Committee (BIAC) of OECD, "Relationship between Public and Private Enforcement," 3.

[2] The Commission of the European Union, "Commission Staff Working Paper Annex to the Green Paper on Damages Actions for Breach of the Ec Antitrust Rules," 6.

On a separate note, as mentioned in the preceding Chapter, claim for voidness or nullity are not actually rights conferred by private enforcement provisions. The nullity arises when the contractual clauses violate antitrust or competition rules. There is no need for the Court to declare such clauses void, but they are automatically void by virtue of certain provisions such as Article 101 TEFU of the European Union or Section 150 of Civil and Commercial Code of Thailand. However, the courts in those jurisdictions have recognised the claim for nullity as defence against the non-performance allegations.

In summary, remedies which private parties can seek in private litigation are generally damages and injunctions whereas private claims for injunctions are not available in competition laws of some jurisdictions including Malaysia and Thailand. However, it cannot be concluded that those jurisdictions entirely prohibit private plaintiffs to seek redress through injunctions in competition cases, as they may opt for general civil procedure provisions or other rules to seek an injunction instead of competition rules.

2. The Analysis on the Legal Issues on the Wordings of Section 40

The wording of this provision seems ambiguous and academically contentious in two critical issues. First, it is debatable as to whether or not injured persons can rely on stand-alone action. As formerly analysed and discussed in Chapter 3, Judge Pasuk asserted that an injured person can bring a private damages claim on a stand-alone action basis, albeit no prosecution against the suspect, as Section 40 does not set out any pre-requisite for such civil proceeding.[3] In principle, this explanation seems to be correctly rested on the plain reading of Section 40. However, the problem still adheres to the word 'violation' in the provision. That is, if there is no requirement, that the violator must be found guilty before the plaintiffs bring a lawsuit, it may raise doubt as to how the plaintiffs are able to realise that a illegal violation has been constituted,

[3] Pasuk Charoenkiat, "The Enforcement of Competition Law by Private Parties," 102.

and when their right of private actions is asserted. Even Judge Pasuk also stated that it is difficult for plaintiffs to prove competition violations.

Moreover, as the competition law of Thailand imposes criminal sanction on violators, it is questionable why the suspect becomes the violator without any legal proceeding to prove guilty, which is also contrary to the principle of the presumption of innocence. One may argue that the provision on private action in the competition law of Thailand is akin to that of the competition law of Malaysia, which uses the comparable word 'infringement' Notwithstanding, the competition law of Malaysia does not impose criminal sanctions against violators, meaning that the standard of proof and legal proceedings should be different. The other counter-argument is that Japan's Antimonopoly Act also imposes sanctions against monopolisation and unreasonable restraint of trade, but the plaintiffs must rely on the findings of the JFTC that the offence has been committed.

Meanwhile, Waranon contended that Section 40 imposes the essential prerequisite whereby private parties must rely on follow-on action after the court decides that the defendant is found guilty of the violation.[4] However, Waranon did not provide further clarifications on his argument. In the light of Section 40, it does not determine as to whether the Trade Competition Commission or the Court will have the authority to decide whether a violation was committed. If it is the Court who has such authority, as explained by Waranon, it is arguable as to whether the plaintiffs must rely on the judgement of the Court of First Instance, the Court of Appeal or the Supreme Court. Furthermore, it is also questionable as to whether the plaintiffs must await until the judgement becomes final or not.

One may explain that as Thailand's Competition Act imposes penal sanctions, the general provisions of Filing cases in connection with an offence in Chapter II of the

[4] Waranon Amorntumrong, "A Comparative Study on Administration and Enforcement of Competition Law," 212.

Criminal Procedure Code will apply. Section 46 of the Criminal Procedure Code[5] stipulates that the Court which has jurisdiction to hear a civil case shall be bound by the facts as they appeared by the decision in the criminal case. This means that the civil proceedings must be pending until the judgement in the criminal proceedings becomes final.

In this respect, it can be inferred from Kamolvan's research paper that the plaintiffs can initiate private damages actions without prior decision of the Commission or the Court. However, Kamolvan is concerned in the case that the plaintiffs bring civil proceedings before the public prosecutor files an indictment, and the court has already rendered its decision. Meanwhile, the court, which has jurisdiction to hear a civil case is required to be bound by the facts as established by the decision in a criminal case, albeit the criminal proceedings commences afterwards. Therefore, it will lead to inconsistent and unsystematic due process in the case where the courts discover the discrepancies in facts. [6]

Provided that the analysis of Waranon is correct, the injured parties may have to wait for a trial for several years until the decision of a criminal case becomes final. To elaborate, criminal proceedings commence when the injured person files a complaint alleging a violation of competition law to the Trade Competition Commission as the injured persons are not permitted to instigate the criminal lawsuit by themselves.[7] If the Commission finds that the violation has been committed, it will submit an opinion advocating a prosecution to the Public Prosecutor. Complication will again arise if the Commission finds no violation, and thus it does not pass on the case to the Public Prosecutor; or the Public Prosecutor has its final non-prosecution order.

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[5] Section 46 of the Criminal Procedure Code

[6] Kamolvan Chiravisit, "15 Years with the Emptiness of Competition Act, B.E. 2542 (1999)," *in Reformation of Private Laws for Fair and Sustainable Economy*, 123.

[7] Section 55 of Competition Act, B.E. 2542 (1999).

As from the comparative study in the previous Chapter, if the law requires the finding of the competition commission as a precondition for the exercise of right of private actions, the law will expressly provide for such requirement in the legislation, as demonstrated in the competition laws of Japan and Singapore. Meanwhile, the Clayton Act does not have such pre-requisite requirements; thus, the Federal Court has allowed the plaintiffs to sue without any prior decision of the commission on a stand-alone action. Provided that the interpretation applies to the competition law of Thailand, the plaintiffs may be able to initiate a civil lawsuit on a stand-alone action basis as there is no pre-requisite requirement in the Competition Act, B.E. 2542 (1999), as it is required in competition laws of Japan and Singapore.

Praechanok Sriwisan raised another issue on the ambiguous wording of Section 40. According to her thesis, there are two legal opinions on the standard of proof of the plaintiffs. On the one hand, academic scholars pointed out that right of private damages actions under Section 40 is asserted by a specific law.[8] Therefore, it is implied that the general provisions on tort or wrongful act are not applicable.

On the other hand, Judge Nopporn Bhotirungsiyakorn explained that the general provisions on tort or wrongful act must apply to the claim for damages under Section 40, *mutatis mutandis*.[9] This mean that the plaintiffs are required to prove the four essential elements in accordance with Section 40 of the Civil and Commercial Code: (1) intent or negligence; (2) competition violations; (3) damage and (4) causation between competition violations and damage.[10] Provided that the construction of Judge Nopporn is correct, Section 40 is not designed to facilitate private damages actions. Nonetheless, it may obstruct the exercise of right of private actions, and private parties may find Section 40 unpersuasive accordingly.

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[8] Praechanok Sriwisan, "Damages for Breach of Section 25 and 29 of Trade Competition Act, B.E. 2542 (1999)," 76.

[9] Ibid., 76-77.

[10] Section 420 of the Civil and Commercial Code.

3. The Optimal Solutions and Proposed Amendments

The analysis in the previous discussion reveals that the critical legal issues are the ambiguity of the wordings of Section 40. In order to address these issues, this section will be devoted to the discussion on various conditions, and requirements for the exercise of right of private action. The optimal solutions will be suggested, and the new amendments to certain provision will be put forward.

3.1 Discussion on the Prerequisite to the exercise of right of private action

In addition to making the wording in Section 40 of the Competition Act, B.E. 2542 (1999) clearer, prerequisite to the exercise of right of private action should also be discussed and determined in order to propose pragmatic solutions for the amendment to the provision.

3.1.1 No precondition

No precondition for the exercise if right of private action means that private plaintiffs can bring a civil action before the courts directly on a stand-alone basis. By means of this option, plaintiffs are not required to await the decision of the Trade Competition Commission or the judgement of the court. On the one hand, it seems to be the best option for injured persons as they do not need to wait for years for unpredictable outcomes of the court or the Commission decision.

On the other hand, although the benefits of private enforcement are globally recognised, the risks thereof should not be disregarded. Competitors may potentially utilise private enforcement as a tool to impede business operations of direct opponents or vertically-related customers or customer, which can lead to

overdeterrence[11] or excessive litigation.[12] The foregoing also results in unmeritorious claims where the plaintiffs bring an action against pro-competitive behaviours of their rivals such as reduction of prices of goods and services.[13] Moreover, private enforcement substantially exhausts social resources[14], and thereby causing unnecessary costs on society,[15] for instance, in terms of administrative cost.[16]

Consequently, it may not be conceptually appropriate to permit a private plaintiff to initiate their claim on a stand-alone basis. To some extent, public enforcement should be designed to work in tandem with private enforcement in order to scrutinise the exercise of right of private action.

3.1.2 Findings of competition violations of the Trade Competition Commission

The Trade Competition Commission is one of the key mechanisms for public enforcement as the criminal proceedings commence with the investigation of the Commission. In case the decision of the Trade Competition Commission is required as a precondition for the exercise of right of private action, plaintiffs must only opt for the follow-on action after the Commission rendered its decision.

Professor Wils strongly argues that public enforcement assumes superior investigation power to private enforcement thereby leading to a better detection and proof of competition violations.[17] Under Section 16 paragraph 3 of

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[11] Ernest Gellhorn, William E. Kovaic, and Stephen Calkins, *Antitrust Law and Economics in a Nutshell*, 544.

[12] Andreas Reindl, "OECD Policy Rountables on Private Remedies 2007," 9.

[13] Wouter P. J. Wils, "Should Private Antitrust Enforcement Be Encouraged in Europe?," 14.

[14] Ernest Gellhorn, William E. Kovaic, and Stephen Calkins, 544.

[15] Andreas Reindl, 9.

[16] Wouter P. J. Wils, "Should Private Antitrust Enforcement Be Encouraged in Europe?," 14.

[17] Ibid., 11.

Competition Act, B.E. 2542 (1999), the Commission normally has power to issue a summons requiring a person to give a statement or to submit certain documents to the Commission for the purposes of investigation.[18]

One may object that private insiders should have better information; or they are at least closer to relevant information than public authorities, particularly in collusive agreements. To counter-argue this critic, if the collusive practices are not exposed by insiders, private individuals may not be able to prove the competition violations. On the contrary, private individuals can file a complaint to the Commission to commence the investigation process. The Commission may exercise its power in accordance with Section 16 paragraph 3 for the purposes of investigation. As a consequence, the potential for the discovery of competition violations may be enhanced. Having relied on the finding of the Commission, private parties will probably have a better chance of success in the dispute as their burden of proof of wrongful conduct may be eased.

However, the specific problems regarding the functions of Thailand's Trade Competition Commission (TCC) cannot be ignored. The statistical data on the complaints being filed to the Commission indicates the ineffectiveness of the Commission in enforcing the law. For 18 years from the enactment of the law, only 101 complaints were lodged to the commission while status of many cases is shown to be on investigation process.

By comparison, Japan Fair Trade Commission (JFTC) investigated 138 suspected violations of the Antimonopoly Act (AMA) in the Fiscal Year of 2015,[19] which is more than the total investigations of the TCC for the period of 18 years. The investigation process of 123 out of 138 cases were completed within the same fiscal

[18] Section 16 paragraph 3 of Competition Act, B.E. 2542 (1999)

[19] Japan Fair Trade Commission, "Annual Report of Fy 2015 (Summary)," (Tokyo, Japan: Japan Fair Trade Commission,, 2016), 2.

year[20] while status of some of the cases filed with the TCC has been shown to be on process. When it comes to the public competition enforcement in Singapore, furthermore, statistical data shows that the Competition Commission of Singapore (CCS) has investigated more than 300 cases over the period of ten years from its establishment.[21]

The statistical comparisons in the preceding paragraph implies that the TCC may take several years to complete the investigation process. If the finding on competition violations of the Trade Competition Commission is required as a precondition for the exercise of right of private action, the plaintiffs may have to wait for years until the right of private action is asserted. It is likely that the plaintiffs may no longer have a right to bring private litigation under Section 40 as a result of the lapse of limitation period in accordance with Section 41, which is relatively short.[22] Moreover, in case the TCC does not find any competition violations, and the plaintiffs must bring a claim based on the tort provisions under the CCC, the limitation period of tort claims may also lapse.[23]

3.1.3 Judgements of the court

In cases where a judgement of the court is required as a precondition for the exercise of right of private action, the following question is whether or not the plaintiffs must wait until the judgement of the court becomes final. On top of that, a serious concern of this option is the protracted court proceedings, especially if the plaintiffs have to wait until the judgement of the court becomes final. The plaintiffs' claims will be more likely to be debarred by the lapse of prescription.

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[20] Ibid.

[21] Lim Kwee Lan and Justin Lau, "10 Years of Championing Growth and Choice," (Singapore: Competition Commission of Singapore, 2015), 80.

[22] Section 41 of the Trade Competition Act, B.E. 2542 (1999).

[23] Section 448 of the Civil and Commercial Code.

Therefore, judgements of the court may not be a pragmatic solution for the exercise of right of private action.

3.2 Discussion on the Essential Features of the Provisions on the Right of Private Actions

3.2.1 Damages

The question about damages is whether Thailand should adopt punitive damages. Some authors such as Kamolvan suggested punitive damages should be awarded to successful plaintiffs to compensate their actual damages arising from competition infringements and expenses incurred from the court proceedings.[24] As can be seen, the concept of punitive damages in private action for competition infringement were objected and removed from the draft amendment. In this regard, Praechanok suggested in her thesis that the Commission, which is the enforcement authority, should issue guidelines on the calculation of damages, and types of damages which can be claimed. In preparing the guidelines, the Commission should also consider the relevant economics principle.[25]

The author concurs with Praechanok's suggestions, and further proposes that the Competition Act should have a new provision on the calculation of damages or the compensation that the court can award to the victims. The rationale is that competition law is closely associated with economics. Economic experts are required for the calculation of damages, the honorarium of which is relatively high.[26] In cases where the victims cannot be compensated for these out-of-pocket expenses, they may be discouraged to bring a private action, thereby resulting in the weak

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[24] Kamolvan Chiravisit, "15 Years with the Emptiness of Competition Act, B.E. 2542 (1999)," *in Reformation of Private Laws for Fair and Sustainable Economy*, 122-123.

[25] Praechanok Sriwisan, "Damages for Breach of Section 25 and 29 of Trade Competition Act, B.E. 2542 (1999)," 87.

[26] Ibid., 78-79.

enforcement of the law. An amendment in this respect will not be suggested in this thesis, as Praechanok has already proposed a pragmatic solution in this regard.

3.2.2 Injunction

In the light of the structure and legislative intent, the Trade Competition Act, B.E. 2542 (1999) may not be designed to grant private plaintiffs the right to seek an injunction. The Act only grants the Commission an authority to impose interim measures in accordance with Section 31 of the Act.[27] However, if the plaintiffs wish to seek an injunction in their private claim, they may opt to the general provisions on the provisions on Provisional Measures before judgement under the Division IV, Title I of the Civil Procedure Code. Accordingly, it might not be necessary to specifically address this aspect in the Competition Act.

3.2.3 *Prima facie* Evidence

In comparison with strict liability under Article 25(2) of the AMA, *prima facie* constitutes a legal presumption while strict liability constitutes a mere factual presumption. Furthermore, strict liability waives the proof of intent or negligence whereas the plaintiffs are still required to prove violations, damage and causation between violations and damage.

Similar to the abstraction of the US Congress, if the facilitation of the exercise of right of private action under the competition law is the priority, the finding of the Commission for competition violations should constitute a *prima facie* evidence in a private action. This implementation can relieve the burden of proof of the plaintiffs. The uncomplicated civil proceedings will encourage the exercise of right of private action, and hence promote the efficacy of private enforcement.

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[27] Section 31 of the Trade Competition Act, B.E. 2542 (1999).

3.2.4 Legal Standing of Indirect Purchasers and Passing-on Defence

As far as the US antitrust law and the EU competition law are concerned, Thailand should adopt the legal doctrines in this area from the EU competition law. Indirect purchasers should be entitled to claim for damages like any victim should have the right to be compensated. If they are unable to bring private damages action, private enforcement of the law will be unreasonably restrictive. In addition, direct purchasers will naturally pass on their overcharges to other purchasers in the chain, and end consumers will be most affected from the overhang passed-on to them. Therefore, the direct purchasers may not sustain any loss or damage. If only direct purchasers can claim damages, it may lead to the problem of unjust enrichment which is one of the primary concern of the EU in this perspective.

Likewise, if a pass-on defence is not allowed in private damages action, it might result in unjust enrichment issues. One may argue that whether or not the passing-on defence is allowed will not make any difference in the burden of proof of the plaintiffs' harm or damage. If the plaintiffs cannot prove the amount of damages to the satisfaction of the court, the court will not award the damages for the amount they are claiming. Accordingly, the unjust enrichment may not be constituted even though the passing-on defence is not allowed.

In this regard, further study with regard to the legal standing of indirect purchasers and passing-on defence should be undertaken in order to suggest necessary and appropriate amendments to Thailand's Competition Act.

3.2.5 Class Action

It is not necessary to address this point in the Competition Act as the provisions on class action are provided in the Civil Procedure Code of Thailand.

3.2.6 Statute of Limitations

Thailand should adopt the limitation period for private actions from Japan's Antimonopoly Act as it is neither too short nor too long. Nonetheless it

should be revised so as to accommodate and correspond with the specific procedures in Thailand. To elaborate, the prescription should begin when the Commission renders its decision that a competition violation has been committed, and advocates prosecution.

3.3 Proposal for the optimal solutions and amendments to the provisions on private actions in Competition Act, B.E. 2542 (1999)

As discussed in the former section, no precondition for the exercise of right of private actions potentially cause ramifications in terms of overdeterrence, excessive litigations, unnecessary social costs, and unmeritorious claims. Meanwhile, the judgement of the court requires longevity of the court proceedings which may not reflect and enhance the effectiveness of private enforcement.

The findings of the TCC can be a feasible precondition for the exercise of right of private action. Also, the findings of the TCC should constitute *prima facie* evidence in civil proceedings in order to facilitate the exercise of right of claims for damages, However, in the light of the limited resources and problematic function of the TCC as discussed in the former section, the law should determine a non-mandatory timeframe for the TCC for its investigation process. Mandatory timeframes should not be imposed as complications might be found in some cases, and a prolonged investigation process may be required to discover possible competition violations. Provided that the investigation process by the TCC cannot be completed within the specified non-mandatory timeframe, the plaintiffs should be entitled to initiate civil actions whilst the TCC has been obliged to continue the investigation process.

In case the TCC finds any competition violations, the plaintiffs should not bear the burden of proof of intent or negligence and wrongful conduct as required in tort provisions under the Civil and Commercial Code. Otherwise, the TCC's decision will not avail, nor facilitate the exercise of right of private action. However, in the event that the TCC finds no competition violations in a particular case, the rights of private actions should not be prejudiced or forfeited, but the burden of proof may be different

from a case where the TCC finds the competition violations. That is, they must prove the four elements of tort: (1) intent or negligence; (2) wrongful conduct; (3) damage and; (4) causation between wrongful conduct and damage.

The representative actions in the last paragraph of Section 40 should remain intact as it can facilitate a claim for damages of private parties. That is, the Consumer Protection Board or associations which are recognised under the law of consumer protection can bring a civil lawsuit on behalf of the plaintiffs. However, the Consumer Protection Act, B.E. 2522 (1979) was amended in 2013 to authorise a foundation to bring civil and criminal proceedings on behalf of consumers.[28] For the sake of consistency, a foundation should also be added to the last paragraph of Section 40 of the Trade Competition Act, B.E. 2542 (1999).

As can be seen, the investigation process of the TCC may be longer than one year. The prescription period for the right of private action in Section 41 should also be extended in order that the right of private actions will not be relinquished after the TCC renders its final decision. In other words, the prescription period should not start from the date on which the person sustaining the damage knew or ought to have known that the competition violations were committed. In contrast, it should start when the TCC has its final decision on any particular complaints.

Importantly, the decision of the Commission should be made available promptly and publicly, at least via the website, in order that interested persons can have access to the information, and decide whether to take further action. A mandatory timeframe for the dissemination of the decision should also be imposed on the Commission accordingly.

Consequently, the amendments are proposed as follows:

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[28] Section 40 and 41 of the Consumer Protection Act, B.E. 2522 (1979) as amended up to No.3, B.E. 2556 (2013).

Section 40. Any person sustaining damage as a consequence of the violation of section 25, section 26, section 27, section 28 or section 29 shall have the right to bring an action for damages against the violator.

The right to bring an action for damages under to the provisions of the preceding paragraph may not be asserted before the Court until the Commission finds that the accused committed the violations as prescribed in the preceding paragraph, and advocates a prosecution.

The decision of the Commission shall be prima facie evidence before the Court, but nonetheless, it shall not prejudice the accused to prove to the satisfaction of the Court otherwise.

In the case where the Commission has not rendered its decision within one year as from the date on which the complaint has been filed thereto, the injured person shall be entitled to bring an action for damages against the accused. In this regard, the Section 420 of the Civil and Commercial Code shall apply, mutatis mutandis.

In bringing an action for damages pursuant to paragraph one, the Consumer Protection Board, associations, or ***foundations*** *recognised under the law on consumer protection shall be entitled to bring an action for damages on behalf of consumers or members of the associations, as the case may be.*

Section 41*. If an action for damages pursuant to section 40 is not brought before the Court within three years as from the date on which the accused commits violations as prescribed in the preceding Section, and advocates a prosecution; or as from the date on which the time as prescribed in Section 40 paragraph 4 lapses, as the case may be, the right to bring the case before the Court shall lapse.*

Section 16/1*. The Commission shall notify the complainant and the accused, and shall disclose its official decision to the public within 90 days as from the date on which the decision has been rendered.*

As the official language of Thailand is Thai, it is significant to provide for the Thai version of the proposed amendments as follows:

มาตรา ๔๐ *ให้บุคคลซึ่งได้รับความเสียหายอันเนื่องจากการฝ่าฝืนมาตรา ๒๕ มาตรา ๒๖ มาตรา ๒๗ มาตรา ๒๘ หรือมาตรา ๒๙* ***มีสิทธิ****ฟ้องคดีเรียกค่าเสียหายจากผู้กระทำการฝ่าฝืนนั้นได้*

ให้ผู้เสียหายมีสิทธิในการนำคดีขึ้นสู่ศาลเพื่อฟ้องร้องเรียกค่าเสียหายได้ เมื่อคณะกรรมการมีคำตัดสินว่าผู้ประกอบธุรกิจได้กระทำการฝ่าฝืนตามที่บัญญัติไว้ในวรรคหนึ่ง และมีความเห็นควรสั่งฟ้องไปยังพนักงานอัยการ

ให้ศาลสันนิษฐานไว้ก่อนว่า ผู้ถูกกล่าวหาได้กระทำความผิดจริงตามคำตัดสินของคณะกรรมการ แต่ทั้งนี้ ไม่ตัดสิทธิผู้ถูกกล่าวหาที่จะพิสูจน์เป็นอย่างอื่นจนเป็นที่พอใจแก่ศาล

ในกรณีที่คณะกรรมการไม่อาจทำคำตัดสินได้ภายในกำหนดหนึ่งปี นับแต่วันที่ได้รับเรื่องร้องเรียน ผู้เสียหายมีสิทธิฟ้องคดีเรียกค่าเสียหายจากผู้ถูกกล่าวหานั้นได้โดยพลัน ในการนี้ให้นำบทบัญญัติมาตรา ๔๒๐ แห่งประมวลกฎหมายแพ่งและพาณิชย์มาบังคับใช้โดยอนุโลม

ในการฟ้องคดีเรียกค่าเสียหายตามวรรคหนึ่ง ให้คณะกรรมการคุ้มครองผู้บริโภค สมาคมหรือมูลนิธิตามกฎหมายว่าด้วยการคุ้มครองผู้บริโภค ***มีสิทธิ****ฟ้องคดีเรียกค่าเสียหายแทนผู้บริโภคหรือสมาชิกของสมาคมได้ แล้วแต่กรณี*

มาตรา ๔๑ การฟ้องคดีเรียกค่าเสียหายตามมาตรา ๔๐ ถ้ามิได้นำคดีสู่ศาลภายในกำหนดสามปีนับแต่วันที่คณะกรรมการมีคำตัดสินว่าผู้ถูกกล่าวหาได้กระทำการฝ่าฝืนตามที่ได้บัญญัติไว้ในมาตราก่อนหน้านี้และมีความเห็นควรสั่งฟ้องไปยังพนักงานอัยการ หรือ นับแต่วันที่กำหนดเวลาตามมาตรา 40 วรรคสี่ได้สิ้นสุดลง แล้วแต่กรณี ให้สิทธิในการนำคดีขึ้นสู่ศาลเป็นอันสิ้นไป

มาตรา ๑๖/๑ ให้คณะกรรมการแจ้งผลของคำตัดสินไปยังผู้ร้องเรียนและผู้ถูกร้องเรียน และให้เผยแพร่คำตัดสินดังกล่าวอย่างเป็นต่อสาธารณะภายในกำหนด 90 วัน นับแต่วันที่มีคำตัดสินนั้น

Chapter VI

Conclusions and Recommendations

1. Conclusions

In general, a comparative study of competition law in the selected jurisdictions, namely the United States, the European Union, Japan, Singapore, and Malaysia shows that private enforcement can refer the claim for damages and the claim for injunctions or interim measures. However, people may misunderstand that private individuals can only seek damages in private action. This misunderstanding may stem from the fact that some countries such as the EU put their concentration on the legislation on private damages action. Furthermore, some of the countries such as Malaysia and Thailand obviously provide for the right of private damages action while there is no provision for a private claim for injunction in their competition laws.

This research paper also surveys the idiosyncratic characteristics of the provisions on private antitrust/competition enforcement of the jurisdictions namely (1) amount of damages to be awarded for the successful plaintiffs; (2) the binding effect of the decision of the competition authorities; (3) legal standing of the indirect purchasers; (4) passing-on defence; (5) the availability of a class action lawsuit; and (6) statutes of limitation. The results of the study indicate the dichotomy of legal ideology across jurisdictions, and legal transplantation from one jurisdiction to the other jurisdiction. For ease of reference and study, the comparative study of private enforcement of antitrust/competition laws in the selected jurisdictions are tabulated in the table below:

Table 1:Comparison of the substantive legislations on private antitrust/competition enforcement in the US, EU, Japan, Singapore, Malaysia and Thailand.

		US	EU	Japan	Singapore	Malaysia	Thailand
	Right of Private Enforcement						
1.	Claim for damages	√	√	√	√	√	√
2.	Claim for Injunction	√	√	√	√	√	√
	Idiosyncratic Characteristics						
1.	Damages	Treble	Actual	Actual	Actual	Actual	Actual
2.	Prima Facie	√	√	×	×	×	×
3.	Legal Standing of Indirect Purchasers	×	√	√	×	√	-
4.	Passing-on defence	×	√	√	-	×	-
5.	Class Action	√	√	√	×	×	√
6.	Statutes of Limitation	4 years after the cause of action accrued	at least 5 years with suspension or interruption if the competition authority takes action	3 years as from the date on which the order of JFTC becomes final and binding	2 years as from the appeal period is expired	6 years from the date on which the cause of action accrued	1 year as from the date the plaintiffs knew or ought to have known of the ground of the violations

Descriptions of symbol:

√ = if the feature is available in the jurisdiction

× = if the feature is not available in the jurisdiction

\- = if it cannot be concluded whether the feature is available in the jurisdiction.

On a separate issue, it can be said that private enforcement in Thailand is weak. The evidence of this claim is that since the enactment of the Competition Act, B.E. 2542 (1999), there has only been one private claim for damages for competition violations. Notwithstanding, it should be noted that the court award damages to the victims by virtue of the general tort provisions under the Civil and Commercial Code, but not the provision on private action for damages under Section 40 of the Competition Act, B.E. 2542 (1999).

The research study points out that Section 40 of the Act has two critical issues. First, the wording thereof, especially the word "violation" is of ambiguity regarding the pre-requisite for the exercise of right of private claim for damages. Judge Pasuk argued that Section 40 does not determine any precondition for the plaintiffs to exercise such rights. In other word, private plaintiffs are allowed to bring the damage actions before the court on a stand-alone basis.

However, Waranon contended that the plaintiffs must await the court's decision before they can initiate civil proceedings. It is unclear as to how Waranon reached this conclusion. The most possible explanation is that Thailand's Competition Act imposes criminal sanctions on violators. Section 46 of the Criminal Procedure Code requires that the Court which has jurisdiction to hear a civil case shall be bound by the facts as appeared by the decision in the criminal case, and thus the civil proceedings must be pending until the criminal case becomes final.

The other issue of Section 40 is the burden of proof of the plaintiff. Academic scholar, Professor Suthee, implied that the right of private action under Section 40 is recognised by specific law, and elements of tort as prescribed by the Civil and Commercial Code will not be relevant.

Nevertheless, Judge Nopporn argued that even though the plaintiffs exercise the right under Section 40, the general tort provision or Section 420 of the Civil and Commercial Code will apply, *mutatis mutandis*. The plaintiffs are required to prove four essential elements namely (1) intent or negligence; (2) competition violation; (3)

damage and (4) causation between competition violation and damage. The interpretation of Judge Nopporn will probably inhibit the exercise of right of private damages action in competition cases.

In order to come up with the optimal solutions, the precondition for the exercise of right of private action must therefore be determined. Moreover, several conditions and requirements including the amount of damages, claim for injunction, *prima facie* evidence, legal standing of indirect purchasers, passing-on defence, class action, and statute of limitation should also be taken into consideration.

The Competition Act should impose the precondition for the exercise of right of private action. The most effective precondition is the decision of the Commission. The underlying reasons are that private enforcement, albeit being beneficial, has significant disadvantages such as overdeterrence, excessive consumption of social resources, undue obstruction of rivals' business operations and unmeritorious claims. Thus, it might not be appropriate to grant the right to private individuals without any pre-requisite. On the other hand, the judgement of the court cannot be a pre-requisite as the court proceedings may take several years until the judgement has become final, which will discourage the plaintiffs to opt for Section 40.

However, statistical data shows that the investigation process of the Commission may take a couple of years. This problem can be resolved by imposing a non-mandatory timeframe on the Commission. In case the Commission is unable to complete the investigation process and renders the decision within the timeframe, the plaintiffs can proceed with a civil lawsuit directly.

The decision of the Commission, finding competition violations should be a *prima facie* evidence like Section 5 of the US Clayton Act. By way of this resolution, the plaintiffs will not be required to prove intention or negligence and competition violations, which can ease the burden of proof on the plaintiffs, and encourage the use of private enforcement under the Competition Act. Notwithstanding, if the plaintiffs directly bring a private action before the court because the Commission cannot render

its decision within the timeframe, the plaintiffs should still be required to prove the four elements of tort as it has no prior nor proved evidence.

In addition, the decision of the Commission should be notified to the complainant and the accused. It should also be made publicly available without unreasonable delay in order that the interested persons can realise that the violations have been committed and their right of private damages action is asserted.

The statutes of limitation for bringing the action for damages under Section 41 is unreasonably short, i.e. one year as from the date the plaintiffs knew or ought to have known on the grounds of the violation. It should be extended and initiated after the Commission finds the violations, and advocates a prosecution; or after the non-mandatory timeframe for the Commission's investigation process lapses. In this respect, the prescription period of Japan's Antimonopoly Act should be adopted, as three years are not too short or too long.

Thailand may not be ready to adopt the punitive damages into a Competition Act. It is evident that treble damages were objected and eliminated from the final draft amendment. However, actual damages cannot cover considerable expenses which the plaintiffs may incur in court proceedings, particularly for the economic expert witness. Thus, it is proposed that the Competition Act should have new provisions on the calculation of damages or the compensation that the court can award to the victims. Also, Praechanok's suggestion in her Master's thesis should be considered for the purpose of the amendment of the law.

Private claim for an injunction may not need to be addressed in the Competition Act, as it aims to facilitate the right of private damages action. Furthermore, the plaintiffs may opt for the provisions on Provisional Measures before judgement under the Division IV, Title I of the Civil Procedure Code to seek interim measures.

The research study leaves the issues on legal standing of indirect purchasers and passing-on defence for further study and investigation. Meanwhile, class action is

provided for in the Civil and Procedure Code, there is no need to further legislate in the Competition Act.

2. Recommendations for Further Research

2.1 A further study should analyse and examine as to the legal standing of indirect purchasers and passing-on defence should be allowed

2.2 A further study should analyse and examine as to whether a leniency program should be adopted, particularly for violations resulting from cartels and collusions

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APPENDIX

The United States

The Clayton Act

§ 4 Clayton Act, 15 U.S.C. § 15

Suits by persons injured

(a) Except as provided in subsection (b), 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 in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or

court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

§ 4B Clayton Act, 15 U.S.C. § 15b

Limitation of actions

Any action to enforce any cause of action under sections 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.

§ 5 Clayton Act, 15 U.S.C. § 16 (Tunney Act)

Judgments

(a) Prima facie evidence; collateral estoppel

A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Provided, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken. Nothing contained in this section shall be construed to impose any limitation on the application of collateral estoppel, except that, in any action or proceeding brought under the antitrust laws, collateral estoppel effect shall not be given to any finding made by the Federal Trade Commission under the antitrust laws or under

section 45 of this title which could give rise to a claim for relief under the antitrust laws.

§ 16 Clayton Act, 15 U.S.C. § 26

Injunctive relief for private parties; exception; costs

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of Title 49. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

Federal Rules of Civil Procedure

Rule 23. Class Actions

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) *Certification Order.*

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment.

(2) *Notice.*

(A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(I) the nature of the action;

(II) the definition of the class certified;

(III) the class claims, issues, or defenses;

(IV) that a class member may enter an appearance through an attorney if the member so desires;

(V) that the court will exclude from the class any member who requests exclusion;

(VI) the time and manner for requesting exclusion; and

(VII) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) *Judgment.* Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) *Particular Issues.* When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) *Subclasses.* When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

The European Union

Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU)

Article 101.

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

Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

Article 8

Interim measures

1. In cases of urgency due to the risk of serious and irreparable damage to competition, the Commission, acting on its own initiative may by decision, on the basis of a prima facie finding of infringement, order interim measures.

2. A decision under paragraph 1 shall apply for a specified period of time and may be renewed in so far this is necessary and appropriate.

DIRECTIVE 2014/104/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union

Article 3

Right to full compensation

1. Member States shall ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm.

2. Full compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed. It shall therefore cover the right to compensation for actual loss and for loss of profit, plus the payment of interest.

3. Full compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages.

Article 9

Effect of national decisions

1. Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to

be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law.

2. Member States shall ensure that where a final decision referred to in paragraph 1 is taken in another Member State, that final decision may, in accordance with national law, be presented before their national courts as at least prima facie evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties.

3. This Article is without prejudice to the rights and obligations of national courts under Article 267 TFEU.

Article 10

Limitation periods

1. Member States shall, in accordance with this Article, lay down rules applicable to limitation periods for bringing actions for damages. Those rules shall determine when the limitation period begins to run, the duration thereof and the circumstances under which it is interrupted or suspended.

2. Limitation periods shall not begin to run before the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know:

3. Member States shall ensure that the limitation periods for bringing actions for damages are at least five years.

4. Member States shall ensure that a limitation period is suspended or, depending on national law, interrupted, if a competition authority takes action for the purpose of the investigation or its proceedings in respect of an infringement of competition law to which the action for damages relates. The suspension shall end at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated.

Article 12

Passing-on of overcharges and the right to full compensation

1. To ensure the full effectiveness of the right to full compensation as laid down in Article 3, Member States shall ensure that, in accordance with the rules laid down in this Chapter, compensation of harm can be claimed by anyone who suffered it, irrespective of whether they are direct or indirect purchasers from an infringer, and that compensation of harm exceeding that caused by the infringement of competition law to the claimant, as well as the absence of liability of the infringer, are avoided.

2. In order to avoid overcompensation, Member States shall lay down procedural rules appropriate to ensure that compensation for actual loss at any level of the supply chain does not exceed the overcharge harm suffered at that level.

3. This Chapter shall be without prejudice to the right of an injured party to claim and obtain compensation for loss of profits due to a full or partial passing-on of the overcharge.

4. Member States shall ensure that the rules laid down in this Chapter apply accordingly where the infringement of competition law relates to a supply to the infringer.

5. Member States shall ensure that the national courts have the power to estimate, in accordance with national procedures, the share of any overcharge that was passed on.

Article 13

Passing-on defence

Member States shall ensure that the defendant in an action for damages can invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law.

The burden of proving that the overcharge was passed on shall be on the defendant, who may reasonably require disclosure from the claimant or from third parties.

Article 14

Indirect purchasers

1. Member States shall ensure that, where in an action for damages the existence of a claim for damages or the amount of compensation to be awarded depends on whether, or to what degree, an overcharge was passed on to the claimant, taking into account the commercial practice that price increases are passed on down the supply chain, the burden of proving the existence and scope of such a passing-on shall rest with the claimant, who may reasonably require disclosure from the defendant or from third parties.

2. In the situation referred to in paragraph 1, the indirect purchaser shall be deemed to have proven that a passing-on to that indirect purchaser occurred where that indirect purchaser has shown that:

(a) the defendant has committed an infringement of competition law;

(b) the infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant; and

(c) the indirect purchaser has purchased the goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or containing them.

This paragraph shall not apply where the defendant can demonstrate credibly to the satisfaction of the court that the overcharge was not, or was not entirely, passed on to the indirect purchaser.

Japan

Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of April 14, 1947) or The Antimonopoly Act (AMA)

Chapter VII Injunctions and Damages

Article 24

A person whose interests are infringed upon or likely to be infringed upon by an act in violation of the provisions of Article 8, item (v) or Article 19 and who is thereby suffering or likely to suffer extreme damage is entitled to seek the suspension or prevention of such infringements from an enterprise or a trade association that infringes upon or is likely to infringe upon such interests.

Article 25

(1) An enterprise that has committed an act in violation of the provisions of Articles 3, 6 or 19 (for enterprise that have committed acts in violation of the provisions of Article 6, limited to enterprises that have effected unreasonable restraint of trade or employed unfair trade practices in the international agreement or contract concerned) and any trade association that has committed an act in violation of the provisions of Article 8 is liable for damages suffered by another party.

(2) No enterprise or trade association may be exempted from the liability provided in the preceding paragraph by proving the non-existence of intention or negligence on its part.

Article 26

(1) The right to claim damages under to the provisions of the preceding Article may not be asserted in court until the Cease and Desist Order provided for in the provisions of Article 49 (if no such order has been issued, the Payment Order provided in Article 62, paragraph (1) (excluding those issued against an enterprise that constitutes a trade

association that has committed an act in violation of the provisions of Article 8, item (i) or (ii))) has become final and binding.

(2) The right set forth in the preceding paragraph expires by prescription after a lapse of three years from the date on which the Cease and Desist Order or the Payment Order set forth in the same paragraph became final and binding.

Civil Code (Act No. 89 of April 27, 1896)

Article 90

A juristic act with any purpose which is against public policy is void.

Article 709

A person who has intentionally or negligently infringed any right of others, or legally protected interest of others, shall be liable to compensate any damages resulting in consequence.

Article 724

The right to demand compensation for damages in tort shall be extinguished by the operation of prescription if it is not exercised by the victim or his/her legal representative within three years from the time when he/she comes to know of the damages and the identity of the perpetrator. The same shall apply when twenty years have elapsed from the time of the tortious act.

Code of Civil Procedure

Article 30

(1) Persons with a common interest that do not fall under the provisions of the preceding Article may appoint one or more persons from among themselves to stand as the plaintiff or defendant on behalf of all.

Singapore

Competition Act (Chapter 50B)

Rights of private action

86.—(1) Any person who suffers loss or damage directly as a result of an infringement of the section 34 prohibition, the section 47 prohibition or the section 54 prohibition shall have a right of action for relief in civil proceedings in a court under this section against any undertaking which is or which has at the material time been a party to such infringement.

(2) No action to which subsection (1) applies may be brought —

(*a*) until after a decision referred to in subsection (3) has established that the section 34 prohibition, the section 47 prohibition or the section 54 prohibition has been infringed; and

(*b*) during the period referred to in subsection (4).

(3) The decisions which may be relied upon for the purposes of an action under this section are —

(*a*) the decision by the Commission under section 68;

(*b*) the decision of the Board under section 73 (on an appeal from the decision of the Commission under section 71);

(*c*) the decision of the High Court under section 74 (on an appeal from the decision of the Board under that section); and

(*d*) the decision of the Court of Appeal under section 74 (on an appeal from the decision of the High Court under that section).

(4) The periods during which an action may not be brought under this section are —

(*a*) in the case of a decision of the Commission, the period during which an appeal may be made to the Board under section 71(1);

(*b*) in the case of a decision of the Commission which is the subject of an appeal to the Board as referred to in paragraph (*a*), the period following the decision of the Board during which a further appeal may be made under section 74 to the High Court; and

(*c*) in the case of a decision of the High Court which is the subject of a further appeal to the Court of Appeal, the period during which an appeal may be made under section 74 to the Court of Appeal.

(5) Where any appeal referred to in paragraph (*a*), (*b*) or (*c*) of subsection (4) is made, the period specified in that paragraph includes the period before the appeal is determined.

(6) No action to which subsection (1) applies may be brought after the end of 2 years after the relevant period specified in subsection (4).

(7) In determining a claim under this section, the court shall accept as final and conclusive any decision referred to in subsection (3) which establishes that the prohibition in question has been infringed.

(8) The court may grant to the plaintiff in an action under subsection (1) all or any of the following reliefs:

(*a*) relief by way of injunction or declaration;

(*b*) damages; and

(*c*) such other relief as the court thinks fit.

(9) Nothing in this section shall be construed as conferring on any party to an agreement which infringes the section 34 prohibition a right of action for relief.

Supreme Court of Judicature Act (Chapter 322, Section 80)

Rules of Court, G.N. No. S 71/1996 (Revised Edition 2014)

Representative proceedings (O. 15, r. 12)

12.—(1) Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in Rule 13, the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

(2) At any stage of the proceedings under this Rule the Court may, on the application of the plaintiff, and on such terms, if any, as it thinks fit, appoint any one or more of the defendants or other persons as representing whom the defendants are sued to represent all, or all except one or more, of those persons in the proceedings; and where, in exercise of the power conferred by this paragraph, the Court appoints a person not named as a defendant, it shall make an order under Rule 6 adding that person as a defendant.

(3) A judgment or order given in proceedings under this Rule shall be binding on all the persons as representing whom the plaintiffs sue or, as the case may be, the defendants are sued, but shall not be enforced against any person not a party to the proceedings except with the leave of the Court.

(4) An application for the grant of leave under paragraph (3) must be made by summons which must be served personally on the person against whom it is sought to enforce the judgment or order.

(5) Notwithstanding that a judgment or order to which any such application relates is binding on the person against whom the application is made, that person may dispute liability to have the judgment or order enforced against him on the ground that by reason of facts and matters particular to his case he is entitled to be exempted from such liability.

(6) The Court hearing an application for the grant of leave under paragraph (3) may order the question whether the judgment or order is enforceable against the person against whom the application is made to be tried and determined in any manner in which any issue or question in an action may be tried and determined.

Malaysia

Competition Act 2010 (Act 712)

Rights of private action

64. (1) Any person who suffers loss or damage directly as a result of an infringement of any prohibition under Part II shall have a right of action for relief in civil proceedings in a court under this section against any enterprise which is or which has at the material time been a party to such infringement.

(2) The action may be brought by any person referred to in subsection (1) regardless of whether such person dealt directly or indirectly with the enterprise.

Specific Relief Act 1950 (Revised 1974) (Act 137)

Preventive relief how granted

50. Preventive relief is granted at the discretion of the court by injunction, temporary or perpetual.

Limitation Act 1953 [Act 254]

6. Limitation of actions of contract and tort and certain other actions

(1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say-

(a) actions founded on a contract or on tort;

(b) actions to enforce a recognisance;

(c) actions to enforce an award;

(d) actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or of a sum by way of penalty or forfeiture.

Thailand

Trade Competition Act, B.E. 2542 (1999)

Section 15.

In performing the duties under this Act, commission members and members of an inquiry sub-committee under section 14 shall have the same powers and duties as an inquiry official under the Criminal Procedure Code.

Section 31.

In case where the Commission considers that a business operator violates section 25, section 26, section 27, section 28 or section 29, the Commission shall have the power to issue a written order requiring the business operator to suspend, cease or vary such action. For this purpose, the Commission may specify therein the rules, procedures, conditions and time limits for compliance therewith.

A business operator who receives the order pursuant to paragraph one and disagrees therewith shall have the right to appeal in accordance with section 46.

A business operator shall not claim damages from the Commission by reason of

the Commission's issuance of the order pursuant to paragraph one. Section 40.

Section 34.

In case where the Court passes a judgment finding any business operator guilty of an offence under section 25, section 26, section 27, section 28 or section 29, the Court shall also issue an order requiring such business operator to suspend, cease, or vary the action.

Section 40.

A person sustaining damage as a consequence of the violation of section 25, section 26, section 27, section 28 or section 29 shall have the right to bring an action for damages against the violator.

In bringing an action for damages pursuant to paragraph one, the Consumer Protection Board or associations recognised under the law on consumer protection shall be entitled to bring an action for damages on behalf of consumers or members of the associations, as the case may be.

Section 41.

If an action for damages pursuant to section 40 is not brought before the Court within one year as from the date on which the person sustaining damage knew or ought to have known of the ground thereof, the right to bring the case before the Court shall lapse.

Civil and Commercial Code

Section 150.

An act is void if its object is expressly prohibited by law or is impossible, or is contrary to public order or good morals.

Section 172.

A void act cannot be ratified, and its nullity may be alleged at any time by any interested person.

The return of a property arising from a void act shall be governed by the provisions on Undue Enrichment of the Code.

Section 173.

If any part of an act is void the whole act is void, unless it may be assumed under the circumstances of the case that the parties intended the valid part of the act to be separable from the invalid part.

Section 420.

A person who, wilfully or negligently, unlawfully injures the life, body, health, liberty, property or any right of another person, is said to commit a wrongful act and is bound to make compensation therefore.

Section 421.

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

Civil Procedure Code

Section 189. Petty cases are the following.

(1) the cases where relief applied for can be computed in terms of money not exceeding Baht forty thousand or not exceeding the sum as prescribed by the Royal Decree.[741]

Section 254. In a case other than a petty case, the plaintiff is entitled to file with the Court, together with his plaint or at any time before judgement, an *ex parte* application requesting the Court to order, subject to the conditions hereinafter provided, all or any of the following protective measure:

(2) a temporary injunction restraining the defendant from repeating or continuing any wrongful act or breach of contract or the act complained of , or other order minimising trouble and injury which the plaintiff may thenceforward sustain on account of the defendant's act, or a temporary injunction restraining the defendant from transfer, sale, removal or disposal of the property in dispute or the defendant's property, or an order stopping or preventing the wasting or damaging of such property, until the case becomes final or until the Court otherwise ordered;

Criminal Procedure Code

Section 46.

In adjudicating the civil part, the court shall adhere to the facts as appeared in the judgment as to the criminal part.

[741] Section 3(1) The Royal Decree re: Determination on the amount of money in Petty Cases, B.E. 2546 (2003) stipulates that petty cases are cases where the sum of the requested money or the amount of money in dispute does not exceed Baht 300,000.

Consumer Protection Act, B.E. 2522 (1979) as amended up to No.3, B.E. 2556 (2013)

Section 40.

Any association and foundation which has the object of protecting consumers or combating unfair trade competition and of which the regulations with respect to the Executive Committee, members and methods of operation satisfy the conditions prescribed in the Ministerial Regulation may submit an application to the Board for its accreditation by the Board to the effect that such association and foundation have the right and power to pursue legal actions under section 41.

The accreditation of associations or foundations by the Board under paragraph one shall be for a term of two year as from the date of the accreditation.

The submission of the application under paragraph one shall be in accordance with the rules and procedures prescribed in the Ministerial Regulation.

The accreditation of associations and foundations under paragraph one shall be published in the Government Gazette.

Section 41.

In pursuing legal actions in connection with violation of rights of consumers, associations or foundations accredited by the Board under section 40 have the right to institute civil and criminal actions and pursue any proceedings in the litigation in the interest of consumer protection beneficial to consumers at large in accordance with such descriptions and types of actions as prescribed by the Notification of the Board and shall have the power to claim property or damages on behalf of consumers if powers of attorney authorising the same are obtained from the consumers.

In pursuing a legal action in Court, no association or foundation shall withdraw the action unless the Court grants permission when the Court considers that such withdrawal is not prejudicial to the protection of consumers at large. With respect to

a civil action in connection with a claim of property or damages on behalf of consumers, any withdrawal or delivery of judgment in the case where parties reach an agreement or make a compromise must be made upon production to the Court of written consent of consumers having authorised the claim of property or damages on their behalf, as the case may be.

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