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Understanding the Competition Law and Policy of Indonesia

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I. INTRODUCTION

The urgency of having a national competition law in Indonesia was first addressed in the 1980s, responding to major economic reforms. At that stage, Indonesia opened herself to globalization and started to promote foreign investment. It was then that the idea for a comprehensive competition policy was elevated for public discussion. Debates by scholars, enterprises, and the government occupied national newspapers. The question was: Does Indonesia need a competition law? It was a never-ending debate. No one ever won it. Drafts on national competition law prepared by the government and opposing political parties continued for many years.

Then the global crisis hampered the Indonesian economy in 1997-1998. With a vulnerable economic structure caused by concentrated industries, the crisis cracked the backbone of our long-standing and smooth development. The lack of a competitive environment caused “the big” to fail. Indonesia needed fresh funds to get her back on her financial feet. The International Monetary Fund offered to lend funds, but required Indonesia to put together a national reform agenda to obtain those funds. This agenda included the need to introduce competition law, as well as other provisions dealing with consumer protection, anticorruption, and the holding of a general election.

Indonesia raised the level of discussion about national competition law and put it on the agenda in the first quarter of 1999. We understand that if you rush something, you may not achieve an optimum result. That is what happened with competition law. It was clear to some people that the legislative outcome of this new competition law was more a political compromise and a result of intense negotiation rather than a coherent, undisputed piece of legislation.

A key point for the success of competition law is commitment. Commitment comes from awareness of the law and acknowledgement of its importance. To ensure awareness and acknowledgement of its importance, targeted outreach or advocacy activities should take place to promote interest among relevant parties. However, the problem is advocacy takes time and money. It is not cheap to engage in outreach activities. It takes time to build confidence by parties to agree on the introduction of something big like competition law.

Another way to introduce competition law is through foreign commitment, like bilateral or multilateral agreements. In the Indonesian case, many activities took place in helping with the drafting of competition law. But it was only our cooperation with international organizations

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that was able to force the introduction of competition law. In ASEAN, we have learned that the ASEAN Economic Community has become a trigger for the development of competition law in some countries, like Myanmar and Brunei Darussalam. Indonesia and Thailand were driven by financial commitments from international organizations as a result of the Asian Financial Crisis. China was driven by their membership at World Trade Organization. So we needed an international momentum to trigger the adoption of a national competition law.

II. UNIQUE FEATURES OF INDONESIAN COMPETITION LAW

Rules on competition existed in Indonesia for many years before 1999. In the Civil Law, for instance, Article 382 says that for those who gain, conduct, or expand their trade or their own company from unjust behavior that harms the public, or where their behavior will cause damages to their competitors because of unjust competition, can be imprisoned for one year and four months maximum or pay a fine of nine hundred rupiah. So in Indonesia the concept of competition law was already accepted. However, this law did not provide a complete coverage of anticompetitive practices, since it was purely a criminal law. Comprehensive competition law was systematically introduced by the Law No. 5 Year 1999 (on the Prohibition of Monopolistic Practices and Unfair Business Competition).

Law No 5 consists of 11 Chapters and 53 Articles. It is quite short. The law was produced as an initiative from the Parliament. The structure can be defined as six big rules, namely (i) prohibited agreements, (ii) prohibited behaviors, (iii) abuses of dominant position, (iv) defining and strengthening the commission, (v) case-handling procedures and sanctions; and (vi) exclusions and exemptions.

Regarding the first three rules, the **prohibited agreement** sections define types of unfair agreements like cartels, price-fixing, price discrimination, market allocation, boycott, and many more. The basic requirement is that they involve more than one enterprise.

Prohibited behaviors in unilateral conduct were defined by international practice and consist of prohibited acts by single enterprises. The assessment of the market power of such enterprise is crucial in proving unilateral conduct. Prohibited behavior in unilateral conduct includes exclusive agreements, bundling, market control, bid-rigging, conspiracy, resale price maintenance, and monopoly practices.

Abuses of dominant position defines the type of behavior that relates to the use and the creation of a dominant position. So it talks about the threshold for being dominant, abuse of dominant behaviors, interlocking directorates, share-ownership, mergers, and acquisition. Indonesia uses a 50 percent market share for single dominance threshold, and 75 percent for group dominance. Merger and acquisition are part of the chapter on abuses of dominant, due to its role in increasing market structure and share. M & A is regulated further in the Government Regulation No. 57 Year 2010 on Merger and Acquisition that may lead to Unfair Business Competition.

Overall, Indonesian competition law has multiple objectives, namely public interest, national economic efficiency, equal opportunity, preventing unfair competition, and promoting effective and efficient business. To avoid confusion among these objectives, the commission tries

to put the improvement of the people's welfare and their standard of living as their main objectives.

An additional feature of Indonesian competition law is the existence of a list of articles that do not reflect international practices, for instance, the provision regarding cartels (Article 11). Based on the applicable competition law, cartels are mentioned only with respect to control over the marketing and production of certain products or services, and use a rule of reason approach. In other most countries, cartel offenses such as price-fixing are *per se* offenses; Indonesia should follow this practice and not put the sin of cartels as a general rule of reason.

Competition law in Indonesia has been in place for about fifteen years. In the early years, the KPPU needed to let the public know of their existence and how competition law benefited society. Vigorous enforcement was initiated, putting aside our institutional arrangements. Cartel and bid-rigging became the big issues, occupying almost all (70 percent) of our enforcement activities. During this time it was believed that aggressive enforcement was the way to advocate businesses.

This priority has changed somewhat, and bid-rigging cases have dropped to less than 60 percent. Other types of violations are being examined, including anticompetitive practices such as exclusive dealing, monopoly, and price-fixing. The KPPU has moved to stop anticompetitive practices while focusing on strategic sectors like food, energy, financial services, health and education, logistic, and infrastructure.

Regarding mergers and acquisitions, KPPU has also been more active. It received 52 merger notifications and four consultations in 2014. Most of the mergers took place in agriculture (16 percent), financial services (16 percent), and telecommunications (10.7 percent). Two examples are: (i) a case on delaying notification for the acquisition of PT HD Finance Tbk by PT Tiara Marga Trakindo; and (ii) an acquisition of a 95 percent share of PT Axis Telekom Indonesia (AXIS) by PT XL Axiata Tbk (XL). This action increased XL's market share to 26 percent, causing Indonesian telecommunication to be dominated by three operators (XL, Telkomsel, and Indosat) with joint market share of 89.5%.

Regarding **strengthening the Commission**, the KPPU is moving toward amending Law No 5 with the aim to improve its enforcement power. The first proposed amendment is the improvement of the legal powers of the commission, especially in conducting dawn-raids. It is extremely difficult to find hard evidences in cartel agreements without being able to seize documents at the (reported party) premises. So, if a competition agency is able to find it without a dawn-raid, then the reported party is ignorant of the law, or someone else provides it to the KPPU. Therefore, having dawn-raid authority will clear half of the problems involved in investigating possible cartel infringements.

A second proposed amendment is the legalization of circumstantial evidence in competition litigation. It will put into Law No 5 what the KPPU has actually been using for the past fifteen years. Other programs like corporate compliance and leniency programs are important, but it seems Indonesia will act on them without waiting for an amendment. Therefore, it can be said that Indonesia has been conducting effective competition enforcement in the absence of strong enforcement legislation. Providing escalated powers through the new

(amended) competition law will help bring complete enforcement powers to ensure more effective enforcement.

III. INSTITUTIONAL SETTING

Komisi Pengawas Persaingan Usaha (KPPU) or the Commission is the only institution that deals with competition law issues in Indonesia. It was introduced through Law No. 5/1999 and by the Presidential Decree No. 75 Year 1999. It is based in Jakarta, the capital, but can establish representative offices throughout major cities in Indonesia. Currently the KPPU has five representative offices that are spread through five major islands in Medan, Batam, Surabaya, Balikpapan, and Makassar. There was a representative office in Manado until two years ago, but after some years of operation it was shut down due to shifting priorities and low (area) performance.

The KPPU consists of nine Commissioners, including a Chairman and a Vice Chairman. They are elected by the Parliament with a recommendation from the President for a five-year term. The term is renewable for one time. KPPU has been assigned three main tasks in the competition law: they enforce the law, provide advice on competition policy, and review mergers and acquisitions. Since 2008, the Law No. 20 Year 2008 concerning Micro, Small, and Medium-sized Enterprises (“MSME”) assigned the KPPU with an additional task to supervise business partnerships between MSME and large-sized enterprises. In doing its job, the KPPU can receive complaints, conduct research and investigations, summon any parties related to investigations, require assistant from police investigators, issue decisions, and impose sanctions.

An interesting fact about the Commission is that they cannot reject complaints or prioritize the complaints. In the absence of a dismissal procedure, the Commission is obliged to follow up every complaint submitted to it, regardless of the gravity and the urgency of other complaints.

A second fact is that the level of sanctions is relatively low and has not changed for the past fifteen years. This level may not provide a sufficient deterrent effect to enterprises. Sanctions in many instances are ineffective due to the limitation of the maximum fine amount, as stipulated in the law. However the KPPU has tackled this issue by imposing non-financial sanctions that create a similar deterrent effect to infringements. These include a prohibition against participating in public procurement for a certain period of time, peer pressure, and media coverage (social deterrence). All of these deter business actors from continuing anticompetitive practices.

IV. NEW AUTHORITY IN MSME

As mentioned above, the KPPU was given a new mandate by the Law No. 20 Year 2008 concerning the Micro, Small, and Medium-sized Enterprises (MSME) and further instructed through Government Regulation No. 17 Year 2013 to supervise partnerships between MSME and Large-sized enterprises. The objective is to promote a constructive business climate and to provide opportunity to MSMEs, as this supervision is considered an attempt to help with competition law objectives. This supervision is conducted using proper coordination with other government agencies. The law also gives the KPPU a right to impose administrative sanctions on large and medium-sized enterprises violating the law.

One of the objectives of this supervision is to identify fraud. The other is to prevent any abuse of their bargaining position by large-sized enterprises with MSMEs, as included in their partnership agreement. Ownership structure is also part of the supervision, since it is prohibited for large-sized enterprises to own and or control MSMEs, and for medium-sized enterprises to own and or control small and micro-sized enterprises.

Prior to the MSME law, KPPU found it was difficult to supervise abuses of superior bargaining positions by large-sized enterprises, since this responsibility was not reflected in the competition law. Provisions within competition law cannot reach abuse of superior bargaining position in low market share enterprises. Partnership supervision by the competition agency is relatively new to Indonesia, and thus the KPPU is making a proactive effort to achieve buy-in for its initiatives to protect MSMEs when entering partnerships. The KPPU is authorized to impose administrative sanctions in term of fines and license revocation (in coordination with other authorities).

To effectively supervise partnerships, the commission needs to look at many elements of the partnership agreement, especially those relating to institutional issues like human resources and budgets. Staff competency in reviewing contracts has improved, as has cooperation with other relevant parties, in particular, the government. Intensive outreach activities are to be established to gain public awareness, both at the national and regional levels. Currently the internal regulation relating to this activity is being finalized, and expected to be approved before the summer end. Meanwhile, opportunities for outreach activities have been realized.

V. INTERACTION WITH REGULATORS

Competition policy is a cross-sector policy. It affects sectoral policies that directly affect market competition. Competition policy is usually part of a common regulatory-making process. The only way for a competition agency to deal with competition policies is through policy advice. In some countries, mostly Commonwealth, competition policy advice is entrusted to the legislators/regulator, which react to specific requests.

This doesn't work in Indonesia. Article 35 of competition law provides KPPU with the main authority to provide policy advice to the government and other regulators on competition policy. This is a voluntary process; any government agency can request input or comments from the KPPU on pre-existing regulations.

A sound competition policy is a critical element of Indonesia's competitiveness agenda but, to date, competition has not been mainstreamed into general economic policies, and legislators/regulators do not see the necessity to undertake competition impact analyses. As a result, new legislation/regulations can create restrictions to competition while the KPPU is often marginalized in the policy-making process. Currently, the level of government acceptance of advice provided by the KPPU is relatively low (around 47 percent). So the record indicates that promoting competition policy in Indonesia is not an easy task; further, the record raises issues of policy coordination, which is weak in Indonesia.

The Coordinating Ministry of Economic Affairs coordinates all economic policies in Indonesia. They supervise the work of fourteen ministries handling economic issues. Hence, they play a vital role in shaping the Indonesian economy, including on competition policy.

The Ministry is becoming a closer collaborator with the KPPU on competition-related issues, and this collaboration is increasing as ASEAN market integration approaches. Given the importance of an effective competition policy, the Ministry has established a specific unit to deal with competition policies. This unit has become the main conduit for the voice of the KPPU to the other ministries. It has been agreed that the KPPU shall be consulted on any economic policy being discussed at the coordinating ministry that might affect competition.

Indonesia is lucky to have achieved an important milestone with the approval of the National Development Plan (on January 5, 2015) that includes competition policy as an important factor to help promote investment. The Government has agreed to implement strategic goals on competition policy as follows: (i) repositioning and strengthening of the competition agency (KPPU); (2) prevention of anticompetitive practices and enforcement of the competition law; (3) supervision of defined sectors, including food commodities, energy, finance, health and education, and infrastructure and logistics; (4) enhancing government policy harmonization toward fair competition principles; and (5) supervision of partnerships between MSME and Large enterprises.

While endorsing the national development plan, the KPPU has also been endorsing a competition policy checklist for several regional governments. This checklist will serve as a guide for local governments in their policy making process. It is expected that through this checklist, the objective of achieving sound competition principles across all economic policies will be improved. In early 2015, the KPPU entered into formal cooperation with the Director General on Regional Development at the Ministry of Home Affairs to implement competition policy in all regional governments.

VI. RELATION WITH THE JUDICIARY

Existing competition law does not provide the KPPU with strong enforcement powers, like dawn-raids, document seizures, non-sanction to non-cooperative parties, and/or an ability to execute sanctions. These are the powers that would enable KPPU to obtain hard evidence. Without such powers, cartel (including bid-rigging) enforcement suffers. It was even worse when the KPPU had a short time frame, which forced the KPPU to make quick final decisions. This situation creates business uncertainty.

The KPPU uses several different kinds of evidence in making a case at a hearing, including direct evidence such as testimony, documents and other information, and expert statements. Indirect evidence has been another tool used to prove the existence of anticompetitive violation or agreements. Indirect evidence or circumstantial evidence is evidence, which leads to, but does not by itself, prove specific conclusions. It can take the form of communication or economic evidence. In Indonesia, as in other countries, circumstantial evidence has gained a significant place.

Since the beginning of the KPPU's enforcement activities, circumstantial evidences has been widely used in competition cases; for instance, the conspiracy on the privatization of one of Indonesia's state-owned enterprises (in 2000) and the cross ownership in a telecommunication case (in 2006). Both decisions were overturned by a District Court, and then affirmed by Supreme Court. At first, there was opposition to the use of circumstantial evidence from legal practitioners and judges. Most of them valued actual facts and questioned the use of indirect

evidence in competition enforcement. They seemed to believe that the KPPU made decisions on the basis of circumstantial evidence alone. However, in fact, the KPPU uses at least two types of evidence in each case, one of which is based on hard evidence. Circumstantial evidence is then used to support the hard evidence.

In the cooking oil and fuel surcharge cartel cases, the KPPU adopted a statistical methodology used in eleven similar cases that had been published in international journals and has been regarded as jurisprudence by courts across Europe and the United States. In this context, the KPPU applied statistical methodologies on such cartel cases and found convincing arguments to support their cases. However, they had to prove that the cartel agreements had been brought to the implementation stage. KPPU managed to provide minutes of a meeting by the business association to confirm their price-fixing conduct, and so secure the cases. Thus, the statistical test, followed by the implemented agreement of price-fixing, confirmed the existence of the cartels. This changed judicial perspectives, although some legal practitioners argued that KPPU enforcement relied too much on economic approaches.

The question for effective enforcement is not whether “more” or “less” economics should be used, but rather what kind of economics and especially how the economic analysis should be used. The current change in the practice of Indonesian competition policy is all about the way in which economic principles and economic evidence are brought to bear in the context of decision making. The assessment of decision making in light of economic principles that are robust and empirically tested, as well as reliance on a number of empirical methodologies that help identify a theory of harm, is at the core of this approach. But the KPPU always keeps in mind that strong evidence means non-deniable defenses.

It has not been an easy task, but the KPPU has managed to get there. Courts have started to become aware of the use of circumstantial evidences. Nowadays, most appeals on KPPU decisions are affirmed by Courts. It’s well believed that this is due to the result of long and sweaty efforts by the KPPU in convincing public and judiciary on the validity of new approaches in competition enforcement. International best practices have become an important guide toward an effective enforcement system in Indonesia.

VII. EXCLUSION AND EXEMPTION

Indonesian competition law supports giving priority to economic development through exemptions and exclusions. The Law is applicable to all sectors and enterprises in Indonesia, but exclusion is provided for specific cases defined by Article 50 of the law. These exclusions provide an application of competition law to several situations including: (i) behavior to implement certain laws; (ii) agreements on standard setting, research and development, franchise, patent, and others items that are the result of innovation; (iii) agent contracts; and (iv) business acts of cooperatives and small-sized enterprises.

An exemption is provided by Article 51 to enterprises doing their business activities, as defined by certain laws, in a sector that affects the interests of people at large. Some define this as an exemption to public service obligations or activities by a natural monopolist. The natural monopolist may not just be a state-owned enterprise, but can include other enterprises as long they are required by certain laws to provide public service obligations. For example, if an enterprise was asked by the government through a law to build public facilities for a rural area,

they may become a monopolist in that area, and they may be given a condition that the enterprise shall provide equal access to the facility to other enterprises that wish to cooperate with them.

VIII. How Does the Public Perceive Competition Policy?

Gaining public support on competition is a challenge for competition authorities, especially in Indonesia. Implementation is complicated because its introduction has required a cultural change in both the community and in businesses. Among the public, competition has often been considered to be a bad thing. Society is not accustomed to competition; traditionally, in Indonesia, the public's culture is to work together in resolving problems (amicably). In this context, businesses always conducted various meetings to discuss and solve a problem with their competitors. As such, business associations frequently became the means to solve competition disputes but, in turn, business associations have created some of the competition cases handled in Indonesia. For example, a cartel carried out by the domestic tire manufacturers was terminated by the KPPU earlier this year.

Studies conducted by the Commission on business awareness in the Jakarta Metropolitan area during 2009 showed that only 26 percent of businesses were aware of the existence of the Indonesian competition law. Later studies on public and business awareness conducted by the Commission in 2014 showed that business awareness had increased to 60 percent, while the public (community) awareness had reached 57.5 percent. In general, about half of the respondents (55 percent) saw the benefits of a competitive climate and more business opportunities in Indonesia. Therefore, it can be seen that Indonesia now shows a high rate of public and business awareness after fifteen years of implementing competition law and policy.

The Commission understands that the acceptance of competition law and policy will result from an effort to change the culture of community and businesses. Therefore, in line with the implementation of the national development plan 2015-2019, the Commission and the government will start implementing a mandate to mainstream competition policy through changing community attitudes. To do so, the Commission is preparing a formal cooperation with the ministry in charge of higher education to include competition law and policy as a compulsory curriculum in all universities and government education agencies. It is hoped that this step will create a culture of its own and be able to change the mindset of society regarding competition.

IX. HOW DO WE SEE THE ASEAN INTEGRATION?

Indonesia places high expectations about what ASEAN will be after integration. People are optimistic to see how ASEAN will work with zero tariffs and free movement of goods, services, and investments within the group. However, there is still some skepticism raised by experts who foresee that a single ASEAN Economic Community ("AEC") is still a work in progress. It is undeniable that ASEAN is an exciting, diverse, and vibrant region for businesses, as it boasts a combined population of more than 600 million people, with 60 percent below the age of 30. The group is also on track to become the world's fifth largest economy, with the world's third largest market.

The problem is that ASEAN is well known with its diversity and sensitivity on different issues and sectors. At least four features differentiate ASEAN with other regions, namely different economic movements, cautious pragmatism, consensus-based decision-making, and resistance to common external trade regimes.

Indonesia is one of the founding countries of ASEAN, along with Thailand, Singapore, Malaysia, Brunei, and the Philippines. Indonesia is the first country with a fully implemented competition policy and law regime in ASEAN. Indonesia has initiated many regional forums in competition for ASEAN, starting from ASEAN Consultative Forum on Competition (“ACFC”), which later transformed to the ASEAN Experts Group on Competition, and the ASEAN Competition Conference, which serves as a common platform for multi-stakeholders in competition policy. Indonesia has recorded a tremendous positive implication for results from competition policy and has really perceived a great deal of trust for better competition policy and law in the region.

What the KPPU wants to pursue now is international cooperation. Cooperation is believed to be important as a means both of improving the effectiveness of the agency and for producing consistent outcomes in similar circumstances. Indonesia and the KPPU currently define several needs for cooperation. For example, the KPPU sees a need for building a knowledge hub with academicians, building a competition culture with the public, creating policy harmonization with governments, complying with businesses, improving the quality of studies with other information-related institutions, and working with other law enforcers for effective enforcement. International cooperation falls within the larger attempt to improve the quality of studies and effective enforcement to meet domestic priorities.

To pursue international cooperation in competition law and policy for ASEAN is not an easy task. Therefore, Indonesia may start by promoting national or group cooperation as the champion or role model for cooperation in competition. Indonesia is aimed at becoming such a champion, and has as its strategy to serve as a regional knowledge hub for competition policy. Moreover, Indonesia will initiate a bottom-to-top approach for cooperation in competition enforcement, and initiate a top-to-bottom approach for cooperation in competition advocacy. It shall continuously adapt to changes and move together with other sector policies at both the national and regional levels.

X. CONCLUSION

After 15 years of activity, competition policy and law has become an important pillar of Indonesia’s economy. Such an instrument has been adapted throughout many government policies, including those of central and local economic policies. Since the beginning of KPPU, many activities have been put in place to prove its commitment for an effective competition law. Benefits of competition have been proved to improve opportunities for the growth of the business environment in this country. Direct and indirect benefits have been acknowledged by the society.

Throughout its journey, KPPU has been dynamic in adjusting itself to address ongoing challenges. Many improvements have been made in term of case proceedings, policies, and institutional processes. Advocacy and outreach activities have been massively executed. These activities have led to a high public and business awareness of competition law and policy.

Through higher education competition will become an increasingly important element in Indonesian knowledge and consciousness, forming its own community that will play an important role as a strategic partner in disseminating and promoting business competition.