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INDEPENDENCE OF COMPETITION AUTHORITIES - FROM DESIGNS TO PRACTICES

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INDEPENDENCE OF COMPETITION AUTHORITIES – FROM DESIGNS TO PRACTICES

- Indonesia -

1. Introduction

1. The problem that firstly appears in discussing a supervisory or determiner institution in a dispute is the independence of the institution from the influence of any parties. Independence is a fundamental thing considering that this term is a manifestation of institution's neutrality and an alignment above the interest of both litigant parties. In competition, the position of competition authority is very important considering the duties and functions as a regulator as well as a law enforcer. A jurisdiction is said to achieve the requisite independence by ensuring that the competition authority can make decisions free from the influence of elected officials (such as heads of state or legislators) or appointees subject to their control. In principle, the condition of independence improves policy outcomes by enabling the enforcement agency to exercise its authority according to widely accepted competition policy principles and to resist demands that it serve special interests at the expense of the larger public welfare¹.

2. The issue of the independence of competition authorities has been increasingly important in the debate about the design of a competition authority and it can have several dimensions: structural independence from government, operational/decision-making independence, organizational independence and financial independence. It will focus, however, on the notion of independence of competition enforcers from political interferences in their enforcement activity and will not address the equally important principle that competition authorities should be independent of business interests to avoid the risk of capture.

3. The subsequent topic will explain a brief description related to the independence of competition authority in Indonesia, Commission for the Supervision of Business Competition (KPPU), hereinafter referred to as Commission.

2. Implementation of the independence of competition authority (KPPU) in Indonesia

4. The term of independents based on Law No. 5 Year 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition (Law No. 5/1999) explicitly stipulated in Article 30 paragraph (2) which states "*The Commission shall be an independent institution free from the influence and authority of the Government and other parties*". This provision indicates that structurally, the Commission has a guarantee of independence in Law No. 5/1999 either from the elements of executive, legislative, judicial, as well as from the pressure of political parties or business practitioners.

5. However, there are several obstacles which are faced by the Commission, especially in the interaction with government party. There are several government regulations on the national and local level that violate the Antimonopoly Law in principle, but given that there are exceptions in the provision of Article 50 letter a) Law No. 5/1999 which states that "*...excluded from the provisions of this law shall be*

¹ William E. Kovacic, "Competition Agencies, Independence and the Political Process", OECD meeting, Paris, December 17-18, 2014.

the following: actions and or agreements aimed at implementing applicable laws and regulations...". Therefore, the Commission tries to coordinate with the Coordinating Minister for the Economic Fields to ensure that the Ministries' policies related to the fields of economy, like trade and industry, give more attention to the principle of fair competition.

6. Likewise, the Commission also makes guidelines for using competition policy checklist². The implementation of this competition checklist guidance is realized through coordination with central government through the Coordinating Minister for the Economic Fields and follow up this coordination into every ministerial regulation draft which is related to the fields of economy. At the local government level, the Commission has undertaken regional cooperation through MoU and socialization of the regulation in order to ensure that the law and guidelines become the basis of consideration to determine local regulations and policies. The purpose of this checklist establishment is to check the suitability of various legislations with the principles of fair competition policies in Law No. 5/1999. This includes all actions which are exempt or not exempt, the regulations which give monopoly rights, protection of the micro-small to medium-large businesses as well as the protection of domestic businesses from the foreign business practitioners.

7. While in the judicial field, there are several obstacles which are faced by the Commission especially related to the court verdict of competition case on appeal or objection. In case there is no legal remedy of appeal or cassation, the Commission's decision does have binding legal force. This provision brings the consequence that the Commission's decision is not final and binding but must be confirmed by the court, either at the level of appeal or cassation. The obstacles which are faced by the Commission today is that at least half of the Commission's decisions were canceled at the level of appeal, although some of them were reaffirmed on cassation³. Therefore, an increasing proficiency of judges in dealing with competition cases is required, while also improving the quality of the Commission's decisions in its verification aspect.

8. From the political aspect, the determination of the members of the Commission should be executed by any appointment and dismissal from the President with the approval from the House of Representatives⁴. However, the implementation practice nowadays are executed by the President proposing the candidates three times of the number of commissioners' candidates, where the House of Representatives (parliament) is given an authority to choose one-third of the proposed candidates. This process will lead to insecurity in the determination process considering that there will be a political bargaining process in order to select and decide commissioners who will run the institutions to five years period, especially for the candidates who are affiliated to any certain related political parties. Therefore, it is recommended for the subsequent amendments of Antimonopoly Law that the prohibition of affiliation with any certain related political parties should be stated as an additional requirement to become a commissioner.

9. Operationally, the Commission independently determines its institution's organizational structure⁵. For this matter, besides the establishment of Presidential Regulation, institutional regulation related to main duties and functions of institutional organization is also established in order to improving performance and working procedure of the organization, as well as cooperation between institutions and ministries in the national and local level⁶. Basically, the regulation is regulating the organizational structure, promotion of position/rank and the duties and functions.

² Commission Regulation Number 4 Year 2016 on Guidelines on Using Competition Policies Checklist.

³ Article 44 jo. Article 45 Law No. 5/1999.

⁴ Article 37 paragraph (2) Law No. 5/1999.

⁵ Article 34 paragraph (1) and paragraph (4) Law No. 5/1999.

⁶ Commission Regulation Number 1 Year 2011 on the Guidelines of Main Duties, Functions and Authority of Chairman/Vice Chairman of the Commission, the Member of the Commission, Secretary of the

10. In aspect of the leadership of the institution, the Commission's commissioners are collegial⁷, where the Commission consists of a Chairman who is also a member, a Vice Chairman who is also a member and at least seven members who are appointed and dismissed by the President with the approval of the Parliament⁸. In the implementation regulation, the election of the Chairman and the Vice Chairman is executed by a mutual agreement of the members or by majority voting⁹. Besides that, in the implementation, the duties are based on the justice principles and equal treatments, and the decision-making mechanism of strategic and fundamental decisions is executed by a Commission (plenary) Meeting. By a provision that regulates the decision-making mechanism through mutual agreement and voting, the institutional independence from any interventions from other state's agencies or parties is guaranteed.

11. The financial independence aspect is based on Article 37 Law No. 5/1999 which states that "the cost for performing Commission's duties is imposed on the State Revenues and Expenditures Budget and/or other resources that are permitted by applicable legislations". This independent budget management is based on the Presidential Regulation No. 80 Year 2008 on the Amendment of Presidential Decree No. 75 Year 1999 on Commission for the Supervision of Business Competition. Basically, the state is responsible for the operational implementation of the Commission's duties. However, since the scope and coverage of the Commission's duties are very broad and diverse, then the Commission may obtain any funds from other sources which are not in the contrary with the applicable legislation, are not binding and do not influence the independence of the Commission. The Commission received funding program several times from donor agencies related to training and workshop of the Commission's staff improvement skills, as well as a funding for the commissioners comparative study and capacity building to German and Japan in the beginning period of their tenure.

12. In performing their duties both in making policy (commission regulation) as well as law enforcement (decision), the Commission has full autonomy from Law No. 5/1999. The government needs to establish strategic steps plan in managing its state. The establishment of state strategic plan is stated in a Law of National Medium-Term Development Plan. This law will be stipulated once in every five years in the beginning period of presidential tenure.

13. Related to the execution of the function of the Commission as a determiner of disputable case on competition, the government cannot do any interventions on the process of examination and stipulation of the decision which usually is executed along with an administrative sanction. The government cannot intervene both the legal proceedings of competition cases or lawsuits as well as any things related to investigation, examination and verification until the stipulation of case decision which allegedly violates Law No. 5/1999. The sources of competition case are from any report from the public (government, research institutions or the injured party) and the initiative of the Commission. The case is reported to the plenary meeting after the investigation is considered complete and clear. The investigation result is considered complete and clear if there are business practitioners who allegedly violate the law, the types of violation, and two items of evidence are found. In the plenary meeting, Chairman, Vice Chairman and members attending make a decision in quorum by conducting a mutual agreement or voting in order to determine whether or not the case is continued to examination session. Therefore in this case, it is difficult for the government to intervene.

Commission in the environment of the Commission, which has been repealed by Commission Regulation Number 1 Year 2014 on Organization and Working Procedure of the Commission.

⁷ Article 31 paragraph (1) Law No. 5/1999.

⁸ Article 31 paragraph (1) and paragraph (2) Law No. 5/1999.

⁹ Article 9 paragraph (1) Commission Regulation Number 1 Year 2014 on Organization and Working Procedure of the Commission.

14. The arrangements of the Commission's secretariat is based on the Article 34 Law No. 5/1999, which states that in order to ease the execution of the duties, the Commission is assisted by secretariat, and may establish a working group. This provision is then regulated by Presidential Decree Number 75 Year 1999 jo. Presidential Regulation Number 80 Year 2008, Commission Regulation Number Year 2010 on Promotion and Mutation of Structural Officials of the Commission's Employee, Commission Regulation Number 12 Year 2010 on Employee Pension, Commission Regulation Number 1 Year 2011 on the Main Duties and Functions of the Commission and Commission Secretariat which had been repealed by Commission Regulation Number 1 Year 2014 on Organization and Working Procedure of the Commission. These provisions regulate from a recruitment process, development, until promotion of any positions or ranks. Managerial operational activities are led by a Secretary General who is responsible and reports to the Commission's Chairman in performing the duties.

15. These regulations give an authority to the Chairman in making internal decisions related to the operational activities of the institution, such as an establishment of a review team, case examination team, employee's appointment, structural office placements etc. The decisions may be renewed by the mandate-maker in accordance with the position.

3. Conclusions

16. Based on the above description written, it can be concluded that in general, the Commission is an authority institution of competition which is independent either institutionally, operationally, and financially as well as internally. In the aspect of institution structure, the Commission is an independent body that is free from the element of government. The institution has an obligation to report the activities to the President. Similar to the previous aspect, the Commission's decision-making process does also have independence, both in deciding policy in making regulation, as well as determining the decision of antimonopoly case. In the aspect of financial management and internal organization, the Commission may independently manage them based on Presidential Regulation and Commission Regulation which are related to those matters. Political pressure starts to appear in the election process of the Commission's members since the law states that the Commission is appointed and dismissed by the President upon the approval of the Parliament. In practice, however, the Parliament does not only give an approval, but also may determine whether or not the proposed commissioner's candidates are chosen by the Parliament.

17. Related to that matter, it is then necessary to clarify the meaning of the term "approval" in the Law No. 5/1999, so that the Parliament is not actively involved in choosing and determining which candidates are chosen as the Commission's members, since the Parliament usually will choose the candidates who agree and support the political party of the Parliament.