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## **Global Forum on Competition**

### **SANCTIONS IN ANTITRUST CASES**

**Contribution by Indonesia**

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Ms Lynn Robertson, Global Relations Co-ordinator, OECD Competition Division,  
Tel: +33 1 45 24 18 77, Email: Lynn.Robertson@oecd.org

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## SANCTIONS IN ANTITRUST CASES

### -- Indonesia --

#### 1 Introduction

1. The legal system of Indonesia is predominantly inherited from the Dutch starting from the Dutch colonial era (year 1800 – 1942), under which regulation on unfair competition was rudimentary. Post-independence regimes continued to neglect any specific means to regulate competition until monopolies significantly bloomed during President Soeharto's New Order era (1966-1998). Family-controlled conglomerates' businesses flourished and monopolized various markets, jeopardizing the welfare of small business actors and correspondingly the economy at large.<sup>1</sup> Eventually, the 1997 Asian economic crisis and political reform beginning in 1998 saw the introduction of Law Number 5 of 1999 on the Prohibition of Monopolistic Practice and Unfair Competition ("Competition Law").<sup>2</sup> Competition Law is pro free market and reflects the socialist-populist genes of Indonesian political economy,<sup>3</sup> while ultimately seeking to correct infamous monopolistic abuses by private conglomerates and giant businesses. Competition in the market is intended to encourage quality development and innovation, so that the economy will in turn become more efficient and competitive as well.

2. The enforcement of Competition Law is spearheaded by the Commission for Supervision of Business Competition ("KPPU")<sup>4</sup> by cooperating with (2) the Court, as well as (3) the Police and Public Prosecutor.<sup>5</sup>

3. The KPPU is a state administrator formed to oversee entrepreneurs in conducting their business activities to ensure that they do not conduct monopolistic practices or unfair business competition.<sup>6</sup> It is theoretically a *quasi*-judicial body with wide-ranging duties including, among all others, to investigate allegations in relation to Competition Law and issue guidelines to implement such law. Practically, despite being a *quasi*-judicial body authorized to conduct the enforcement of Competition Law,<sup>7</sup> the KPPU is not a

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<sup>1</sup> Johnny Ibrahim, *Hukum Persaingan Usaha: Filosofi, Teori, dan Implikasi Penerapannya di Indonesia*, Malang: Bayumeda Publishing, 2006 Bayumeda Publishing, 2006, pg.15.

<sup>2</sup> Andi Fahmi Lubis, et all., *Hukum Persaingan Usaha: Antara Teks & Konteks*, Jakarta: GTZ, 2009, pg. x.

<sup>3</sup> Hadiputranto, Hadinoto & Partners, *Guide to Competition Law in Indonesia: 2004 Edition*, pg.1, 2014. <available at [http://www.hhp.co.id/files/Uploads/Documents/Type%20/HHP/br\\_hhp\\_guidecompetitionlaw\\_may14.pdf](http://www.hhp.co.id/files/Uploads/Documents/Type%20/HHP/br_hhp_guidecompetitionlaw_may14.pdf)>, last accessed by 26 October 2016.

<sup>4</sup> Art. 1(18), Competition Law.

<sup>5</sup> Muhammad Yasin, *KPPU Galang Penegakkan Hukum Terpadu*. Hukumonline.com. <available at: <http://www.hukumonline.com/berita/baca/lt4ed35c9270f44/kppu-galang-penegakkan-hukum-terpadu>>, last accessed by 26 October 2016.

<sup>6</sup> Art. 1(18), Competition Law.

<sup>7</sup> Jimly Asshidiqie, *Fungsi Campuran KPPU Sebagai Lembaga Quasi-Peradilan*, pg.7. <available at: [http://www.jimly.com/makalah/namafile/61/Makalah\\_KPPU\\_Koreksian.pdf](http://www.jimly.com/makalah/namafile/61/Makalah_KPPU_Koreksian.pdf)>, last accessed by: 25 October 2016.

special court tasked to adjudicate violations of Competition Law. Consequently, the KPPU cannot apply either criminal or civil sanction, but can impose administrative sanction for violations of Competition Law under the control of the Court.<sup>8</sup>

## 2. Enforcement of Competition law

### 2.1 Administrative Sanction in Competition Law

4. As has been mentioned previously, the KPPU mainly imposes administrative sanctions for violations of Competition Law due to its limited authority as an administrative body. In addition to such limitation, it is also important to consider that the standard of “beyond reasonable doubt” required in criminal procedure is often hard to fulfill when dealing with Competition Law as it requires extremely detailed economic analysis, theories, and evidence.<sup>9</sup> Applying criminal sanctions to cases of anticompetitive merger, vertical conduct, and abuse of dominance could also be undesirable if it creates a strong disincentive for businesses to engage in forms of conduct that can either be pro-competitive or anticompetitive depending upon market circumstances.

5. The KPPU is authorized to impose a range of administrative penalties that are imposed either cumulatively or alternatively under Competition Law, including:

- termination of all violations, through
  - the revocation of all agreements or mergers that violate Competition Law. Prohibited agreements include oligopoly (Art. 4), price-fixing (Art. 5–8), market allocations (Art. 9), boycotts (Art. 10), cartel (Art. 11), trust (Art. 12), and oligopsony (Art. 13) agreements.
  - The order for business actors to terminate all actions that violate Competition Law. These actions comprises:
    - those that constitute monopolistic practices, such as oligopoly (Art. 4(1)), market allocation (Art. 9), cartel formation (Art. 11), trust (Art. 12), oligopsony (Art. 13(1)), making contracts with foreign parties (Art. 16), monopoly (Art. 17(1)), monopsony Art. 18(1), market control (Art. 19,20), dominant position (Art. 26(c)), as well as merger and acquisition (Art. 38(1), (2));
    - those that constitute unfair competitions, such as oligopoly (Art. 4(1)), price-fixing (Art. 7,8), market allocation (Art. 9), cartel formation (Art. 11), trust (Art. 12), oligopsony (Art. 13(1)), vertical integration (Art. 14), making contracts with foreign parties (Art. 16), monopoly (Art. 17(1)), monopsony (Art. 18(1)), market control (Art. 19, 20), tender-fixing (Art. 22, 23), dominant position (Art. 26(c)), as well as merger and acquisition (Art. 28(1), (2)); and
    - those that cause losses to the society, such as vertical integration (Art. 14).
- payment of compensation, through
  - the obligation to pay compensation for damages to respective parties bearing loss; and
  - the obligation to pay fines of between IDR 1 billion and IDR 25 billion.

<sup>8</sup> General Elucidation of Competition Law, Competition Law.

<sup>9</sup> Organisation for Economic Co-operation and Development, *OECD Reviews of Regulatory Reform: Competition Law and Policy in Indonesia*, 2012. <available at: <https://www.oecd.org/indonesia/chap%203%20-%20competition%20law%20and%20policy.pdf>>

6. In assessing violations, Competition Law categorizes prohibited agreements and acts into<sup>10</sup> (i) illegal *per se* or has fulfilled the illegality requirements stipulated under the Law so that there is no need to establish whether it harms the economy or (ii) qualified prohibition (the Rule of Reason), meaning that the act or agreement is prohibited only if it has harmed or might cause harm to the economy by causing monopolistic practices or unfair competition.

### 3. Calculating Administrative Sanction

7. In calculating compensation, the Commission will look into and calculate the actual damages that are borne by the parties suffering loss from monopolistic practices and unfair competition. The burden of proof therefore lies on those who petition for compensation, to submit relevant evidences proving the amount of such losses.<sup>11</sup>

8. In calculating fines, the KPPU has to limit the amount of fines imposed between IDR 1 billion and IDR 25 million<sup>12</sup> as has been mentioned previously. Such amount must also not exceed 10% of the violator's current turnover.<sup>13</sup> In the event that the fine imposed is less than IDR 1 billion, the KPPU could impose other means of sanction according to the principle of justice. In determining the amount of such fines, there are two steps that the KPPU will take: *first*, the KPPU will determine the basic starting amount of fines that can be imposed according to the severity of the violations and *second*, the KPPU will implement aggravating and mitigating elements to increase or decrease such basic starting amount.<sup>14</sup>

9. To calculate the basic starting amount mentioned above, the KPPU will consider (1) the sales value of the goods/services concerned before tax; (2) the level of severity of violation; and (3) the period of violation. *First*, the sales value of the goods/services concerned shall be assessed according to corresponding market value, derived from that of the preceding year to facilitate easy estimation should a business actor is unable to provide exact amount of current sales value. In the case that there is a group of violators, the KPPU will take the aggregate sales value of all violators. *Second*, the level of severity of violation is assessed case by case, by considering several factors including company scale, type of violation, aggregate market of violators, geographical scope of violation, and whether the violation has been carried out. Violations such as horizontal combinations, market allocations, or tender-fixing constitute some of the gravest violations of Competition Law. In other words, these are violations of the highest level of severity. *Third*, in determining the period of violation, the KPPU will count the period of less than six months as a half year and the period of more than six months as a year.

Basic Starting Value =	Sales value, Level of Severity	X	Period
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<sup>10</sup> Andi Fahmi Lubis et.all, *Hukum Persaingan Usaha: Antara Teks & Konteks*, Jakarta: GTZ, 2009, pg. 55–56.

<sup>11</sup> Regulation of the Commission No. 4 of 2009 on Guidelines for the Implementation of Administrative Sanction, pg.2.

<sup>12</sup> Art. 47(g), Competition Law.

<sup>13</sup> Regulation of the Commission No. 4 of 2009 on Guidelines for the Implementation of Administrative Sanction, pg.8.

<sup>14</sup> Regulation of the Commission No. 4 of 2009 on Guidelines for the Implementation of Administrative Sanction, pg.10.

10. After determining the basic starting value, the KPPU will move on to determine the aggravating and mitigating elements. Aggravating elements will increase the amount of fines imposed and comprise:<sup>15</sup>

- continuation and repetition of violation, which will result in a 100% addition of basic starting value for each violation;
- rejection to undergo examination, unwillingness to give information, or uncooperativeness that can hinder investigation; and
- the status of leader or initiator of violation, which will result in special scrutiny on the leader's role in pressuring or threatening other parties.

11. Mitigating elements will decrease the amount of fines imposed and comprise:

- proof of termination of violation;
- proof that violation was not conducted deliberately;
- proof of minimum involvement;
- proof of good behaviour and cooperativeness during examination;
- proof that the alleged violation is actually in line with the law and based on the approval of authorized institutions; and
- statement of willingness to change attitude by the business actors.

#### **4. Enforcement of Administrative Sanction**

12. As has been explained previously, the KPPU has an authority to investigate on cases of monopolistic practices and unfair competition, as well as imposing administrative sanction on violations of Competition Law. However, despite having a final and binding character, the Commission's decision has to be referred to the District Court in order to have an execution power.<sup>16</sup> If such execution power is not granted to the KPPU's decision, the decision cannot be executed and administrative sanctions cannot be forcefully imposed.

13. The requirement to forward the KPPU's decision to the District Court causes both technical and substantive problems in the enforcement of Competition Law. On one hand, such procedure increases the period of resolving a case because the KPPU cannot execute its decision promptly and efficiently. On another hand, as violations of Competition Law concerns economic aspects, problems start arising when the KPPU's decision is handled by District Court judges (instead of Special Court judges, e.g. Commercial Court judges) who may not have the expertise to handle such case.<sup>17</sup>

14. Nevertheless, Competition Law provides an enforcement mechanism to ensure that all sanctions, including administrative ones, are enforceable. According to Competition Law, after the KPPU's decision has been read in an open trial and notified to violators,<sup>18</sup> they are obligated to execute such decision and submit an

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<sup>15</sup> Regulation of the Commission No. 4 of 2009 on Guidelines for the Implementation of Administrative Sanction, pg.10.

<sup>16</sup> Art.46(2), Competition Law.

<sup>17</sup> Komisi Pengawas Persaingan Usaha, *Laporan Tengah Tahun 2008 Komisi Persaingan Usaha Republik Indonesia* pg.4. Jakarta, 2008.

<sup>18</sup> Art. 43(4), Competition Law.

execution report to the KPPU within 30 days.<sup>19</sup> The KPPU has the right to hand over such decision to the investigators, indicating the possibility of criminal charges through the decision of the court should the violators refuse to bear and carry out the sanctions imposed by the KPPU.<sup>20</sup> This enforcement practice is actually similar to those of Japan and Korea, whereby these countries' competition agencies impose either non-criminal penalties in the form of "surcharges" or criminal sanction as determined by the court.<sup>21</sup> While some jurisdictions apply the principles of proportionality in determining the amount of sanction,<sup>22</sup> the KPPU considers social and economic context in assessing violator's ability to pay sanction. Decrease in the amount of sanction will be granted to individual violators who could submit objective evidence that such sanction could be detrimental and drive the business bankrupt.<sup>23</sup>

15. The KPPU, based on violator's request, could take into consideration violator's ability to pay sanctions.

## 5. Looking at Enforcement Number

16. The KPPU reports that by the end of 2016 it has rendered a total of 103 final and binding (*inkracht*) decisions, with a total amount of IDR 410,020,305,035 (approximately USD 31.5 million) fines. However, the total paid fines merely amounts to IDR 225,064,383,935 (approximately USD 17 million), which indicates that there is an IDR 184,955,921,100 (approximately USD 14 million) state's loss due to unpaid fines. When compared to the amount of IDR 61,000,000,000 (approximately USD 4 million) of unpaid fine in 2015,<sup>24</sup> the 2016 state's loss exceeds that of the previous year by IDR 123,955,921,100 (approximately USD 9.5 million).

17. These figures signify that there is indeed a need for the KPPU to enforce the payment of sanctions more rigorously. In fact, efforts to improve the performance of the KPPU and amend Competition Law have consistently become the priority program of the Government of Indonesia.

## 6. Looking forward

18. The draft for the Amendment of Competition Law ("the draft Amendment") has been included in the 2015 National Legislation Program 2015 (*Program Legislasi Nasional* or "Prolegnas") of the Indonesian Parliament, making such amendment one of the laws prioritized for enactment by the Government. The Government perceives that the current Competition Law no longer fulfils the Government's needs to create a more established competitive regime in Indonesia. This view is shared by the KPPU, whose purpose is to keep improving Competition Law regime and ensure that healthy competition is guaranteed under Indonesia's economy.

19. The Amendment introduces several new changes, including the increase in penalties from the maximum fine for Competition Law violations from a maximum of IDR 25 billion to a maximum of 30%

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<sup>19</sup> Art. 44(1), Competition Law.

<sup>20</sup> Art. 44(4), Competition Law.

<sup>21</sup> International Competition Network, *Setting of Fines for Cartels in ICN Jurisdictions*, pg. 9. Kyoto, 2008.

<sup>22</sup> International Competition Network, *Setting of Fines for Cartels in ICN Jurisdictions*, pg. 26. Kyoto, 2008.

<sup>23</sup> Regulation of the Commission No. 4 of 2009 on Guidelines for the Implementation of Administrative Sanction, pg.11.

<sup>24</sup> Muhammad Yasid, *Piutang Denda Administrasi KPPU Rp 61 Miliar*. Kontan.co.id. <available at: <http://nasional.kontan.co.id/news/piutang-denda-administrasi-kppu-rp-61-miliar>>, last accessed by: 25 October 2016.

of the total profit of cartels. Other expected changes include institutional structure, expansion of the definition of business actors, shifting to mandatory pre-merger notification, and leniency application.

20. It can be seen clearly that the KPPU has a lot of homework when it comes to the enforcement of Competition Law. The lack of successful execution of administrative sanction specifically reflects the extent of improvement that the Government and the KPPU must fulfil. It is the hope of the entire nation that through constant improvement of Competition Law, Indonesia could achieve a healthier economic climate that ensures the welfare of its entire citizens.