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The Standard and the Burden of Proof in Competition Law Cases – Note by Indonesia

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Challenges in Proving Anti-Competitive Behavior: A Deep Dive into Indonesian Competition Commission's Legal and Practical Issues

1. Legal Doctrine in Competition Cases

1. The Indonesian Competition Policy and Law framework is primarily governed by The Law Number 5/1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition and Law (Indonesian Competition Law). This law represents a significant legislative effort to create a competitive market environment in Indonesia, aiming to prevent practices that could harm consumer welfare and stifle competition. While the law provides a comprehensive framework for evaluating anti-competitive behavior, it does not explicitly define a standard of proof, such as "beyond a reasonable doubt" or "balance of probabilities." Instead, it emphasizes general principles and procedures for assessing violations, allowing for a flexible application of standards based on the specifics of each case.

2. Law No. 5 of 1999 establishes the legal foundation for competition law in Indonesia. It prohibits various anti-competitive practices, including monopolistic behavior, collusion, and unfair business practices. The law is designed to promote fair competition, protect consumers, and encourage economic efficiency. The Indonesian Competition Commission (ICC or KPPU), as the regulatory body, is tasked with enforcing this law, investigating alleged violations, and imposing sanctions when necessary. The law's provisions are broad, encompassing a range of activities that could distort competition, thereby necessitating a nuanced approach to enforcement.

3. In practice, the Indonesian courts and The KPPU adopt a "rule of reason" approach to determine whether anti-competitive behavior exists and its effects on market competition. This method requires a thorough examination of evidence, including both direct and indirect forms, to ascertain the impact of business practices on competition. Contextual analysis is very important, it is possible that in a behavior seems to inhibit competition, but it turns out to advance competition because it opens new markets. For example, in the development of new products. Impact analysis also important to look after an action that turn out to be carried out as part of the exercise of rights that are recognized as legitimate by the government. The absence of a strictly defined standard of proof allows for flexibility, enabling The KPPU to tailor its approach to the unique circumstances of each case.

4. The "rule of reason" approach is a critical aspect of Indonesian Competition Law, as it allows for a contextual analysis of business practices. Under this framework, The KPPU evaluates whether the conduct in question has a net positive or negative effect on competition. This involves a detailed assessment of market conditions, the nature of the agreements or practices, and their actual impact on competition. The KPPU's reliance on this approach signifies a shift away from a per se prohibition of certain practices, allowing for a more nuanced understanding of competitive dynamics. The provisions of this rule of reason are used in several provisions that state the requirements for the consideration that there is a potential for monopolistic practices (oligopoly, geographical market division, cartel, trust, oligopoly, monopoly, market domination, predatory pricing, interlocking

directorate, and mergers). This rule of reason setting cannot be applied on price fixing agreements which is per se nature.

2. Use of Direct and Indirect Evidence

5. Based on Article 42 of the Indonesian Competition Law, to prove alleged violations of business competition, the evidence that can be used are both direct evidence (letters and/or documents, witness statements, expert statements, statements of business actors), and indirect or circumstantial evidence (economic evidence and proof of communication). The KPPU has been utilized circumstantial evidence, such as communications between parties and economic data, particularly in cartel cases where direct evidence may be scarce. For instance, in a notable 2017 case, The KPPU successfully used indirect evidence to substantiate claims of price fixing, which was later upheld by the Supreme Court. The case involved motorcycle scooter producers in Indonesia who were proven to have carried out price fixing. ICC used direct evidence and circumstantial evidence, where the commission found evidence of communication between competitors and followed by the movement of scooter motorcycle prices in the period afterwards. This case marked a significant precedent in the acceptance of circumstantial evidence within Indonesian competition law, demonstrating The KPPU's willingness to adapt its evidentiary standards to the realities of complex anti-competitive behavior.

6. The flexibility in the standards of proof is crucial, as it allows The KPPU to adapt its methodologies to the unique characteristics of each case. The commission employs economic analysis and market dynamics assessments to evaluate the evidence presented. This involves analyzing economic data related to the business actors under scrutiny and conducting market research to gauge the implications of their actions on competition. The KPPU's approach reflects an understanding that anti-competitive practices can manifest in various forms, necessitating a comprehensive evaluation of the available evidence.

7. The use of economic evidence, supported by quantitative and qualitative analyses, is particularly emphasized in The KPPU's guidelines, reflecting a shift towards an effects-based approach in competition law. This approach prioritizes the actual effects of business practices on market competition rather than merely focusing on the intentions behind those practices. By assessing the economic impact of conduct, The KPPU aims to ensure that its enforcement actions align with broader economic principles and contribute to a competitive market environment.

3. Burden of Proof

8. The burden of proof in Indonesian competition law lies with the plaintiff, who must demonstrate the existence of anti-competitive behavior and its adverse effects on the market. Although this burden is not explicitly detailed in the law, it is generally understood that substantial evidence is required to support claims of violations. This allocation of the burden of proof places a significant responsibility on plaintiffs, often requiring them to gather extensive evidence to substantiate their claims. Despite the challenges associated with proving anti-competitive practices, the KPPU's decisions have often been upheld by the judiciary, indicating a growing acceptance of indirect evidence and economic analysis in the enforcement of competition law. The judiciary's support for the KPPU's methodologies reinforces the legitimacy of the commission's approach and encourages a more robust enforcement of competition law in Indonesia.

9. In the context of competition law enforcement in Indonesia, particularly from the perspective of the KPPU, several legal and practical challenges arise when proving violations and meeting the standard of proof. These challenges are multifaceted and can be summarized as follows:

3.1. Difficulty in Gathering Sufficient Evidence

10. One of the primary challenges is the difficulty in gathering sufficient evidence to substantiate claims of anti-competitive behavior, such as cartels or abuse of dominance. The clandestine nature of these violations often makes it hard for the KPPU to obtain direct evidence, leading to a reliance on indirect evidence. This reliance complicates the process of meeting the legal standards of proof required in competition cases, as indirect evidence may not always provide the clarity needed to establish a violation conclusively.

3.2. Variability in Standard of Proof

11. The standard of proof in competition cases can vary depending on the nature of the violation. For instance, proving a cartel typically requires a higher threshold of evidence compared to cases of vertical restraints or abuse of dominance. This variability can create confusion and inconsistency in enforcement practices, as the KPPU must navigate different evidentiary standards while ensuring that all cases are treated fairly and justly. The complexity of dynamic markets further exacerbates this challenge, as the behavior of firms can be complex and multifaceted, making it difficult to apply traditional legal standards effectively.

3.3. Insufficient Evidence Leading to Case Closure

12. The KPPU has encountered instances where cases have been closed due to insufficient evidence to meet the required standard of proof. This situation often arises in cases involving indirect evidence, where the connection between the alleged anti-competitive behavior and its impact on the market may not be sufficiently demonstrated. As a result, the KPPU may find itself constrained in its ability to enforce competition laws effectively, leading to potential annulments of cases by courts when the evidence presented fails to meet the requisite legal standards.

3.4. Ongoing Discussions on Standard of Proof Calibration

13. There are ongoing discussions within Indonesia regarding the calibration of the standard of proof in competition law enforcement. Stakeholders are debating whether the current standards adequately reflect the complexities of modern markets and whether adjustments are necessary to enhance the effectiveness of competition enforcement. This discourse is critical as it addresses the need for a more nuanced understanding of how competition law can adapt to evolving market conditions and the challenges posed by digital economies.

3.5. Burden of Proof and Resource Allocation

14. The burden of proof often shifts in competition cases, particularly when private parties present arguments that require significant resources from the KPPU. This situation can lead to disparities in the enforcement of competition laws, as the KPPU may struggle to allocate resources effectively to investigate and substantiate claims made by private entities. As such, there is a growing consensus that the standards of proof may need

recalibration to ensure that competition law enforcement remains robust and capable of addressing the challenges posed by both traditional and emerging market dynamics.

3.6. Limited Authority

15. The KPPU does not have the authority to conduct wiretaps and dawn raid. It is difficult to enforce competition law when the information provided is limited. Even information from the government is sometimes not clearly enough, so more effort is needed such as wiretapping and dawn raid.

4. Efforts to overcome challenges

16. To overcome the challenges in proving competition cases, the KPPU seeks to overcome them by giving the parties an opportunity to change their behavior in the alleged anti-competition case being investigated by the KPPU. This is stated in Commission Regulation Number 2 Year 2023 concerning Procedures for Handling Cases of Monopoly Practices and Unfair Business Competition, with note the commitment can only be made during the preliminary examination period and do not apply to cases of alleged cartels. If necessary, the KPPU can also cooperate with other law enforcement officers to obtain evidence of violations, as well as take a persuasive approach to the parties to provide the requested data and information. In addition, the KPPU has also intensified prevention efforts by a compliance program, in which the business actors can check whether their company's code of ethics and internal regulations are contrary to the values of fair competition in the Indonesian Competition law

5. Conclusion

17. The current landscape of Indonesian antitrust law is characterized by a flexible application of standards of proof, a significant reliance on indirect evidence, and a strong emphasis on economic analysis. The judicial approach aligns with an economic or effects-based perspective, ensuring that business practices are rigorously evaluated for their impact on market competition. The KPPU's evolving methodologies and the acceptance of indirect evidence mark a progressive shift in the enforcement of competition law in Indonesia. As the regulatory environment continues to develop, it is essential for stakeholders to remain vigilant and adapt to the changing dynamics of competition law enforcement in the country.