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Case Prioritisation and Prosecutorial Discretion – Note by Indonesia

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1. Information Sharing in Indonesian Competition Law

1. In modern competition law regimes, competition authorities cannot address all alleged violations simultaneously with the same level of intensity. Resource constraints, the complexity of the digital economy, evolving market structures, and increasing public expectations regarding effective law enforcement make the concepts of case prioritisation and prosecutorial discretion increasingly important.
2. In the Indonesian context, the issue of case prioritisation and enforcement discretion has become more relevant as the mandate of the Commission for the Indonesia Competition Commission (KPPU) has expanded. The KPPU now functions not only as a quasi-judicial authority acting as investigator and adjudicator, but also as a policy advocate and market supervisor.
3. Conceptually, case prioritisation is a governance instrument for law enforcement that enables authorities to maximise competitive impact through strategic allocation of resources. Prosecutorial discretion, meanwhile, refers to the institution's authority to determine whether a case should proceed, be discontinued, or be assigned a particular priority level based on legal, economic, and public policy considerations.

2. The Relationship between Discretion and Case Prioritisation

4. In competition law enforcement, discretion and prioritisation are closely interlinked. Prioritisation is essentially impossible without institutional discretion. Competition authorities must determine which cases have the greatest impact on consumer welfare, market structure, and economic efficiency.
5. In Indonesia, Law No. 5 of 1999 does not explicitly regulate case prioritisation mechanisms. In institutional practice, however, the KPPU inherently possesses administrative discretion to allocate enforcement resources. This is particularly evident in the stages of initiating investigations, handling public complaints, and selecting priority sectors.
6. Nonetheless, such discretion is not absolute. The principles of due process, legal certainty, administrative accountability, and judicial review serve as important limits. In Indonesia, KPPU decisions can be challenged through objections filed with the Commercial Court and further appealed to the Supreme Court. Although there is no specific appeal mechanism against non-prioritisation decisions, accountability pressure still arises through public scrutiny, the House of Representatives (DPR), the media, and internal institutional evaluation.

3. Limits on Enforcement Discretion

7. Theoretically, competition authorities cannot exercise discretion arbitrarily. In modern administrative law systems, discretion must meet the principles of rationality, proportionality, non-discrimination, and good governance.

8. In the case of the KPPU, several practical and normative limits apply. First, the KPPU's authority remains confined to the scope of Law No. 5 of 1999. Second, the use of discretion must consider public interest and significant economic impact. Third, the KPPU's institutional legitimacy depends heavily on perceptions of its independence and consistency in enforcement.

9. If the authority is overly selective without clear justification, the risk of regulatory uncertainty increases, and businesses may view enforcement as unpredictable. Therefore, transparency regarding prioritisation principles is essential to maintaining institutional credibility.

4. Accountability and Transparency in Prioritisation

10. One of the greatest challenges in prosecutorial discretion is ensuring checks and balances. Globally, modern competition authorities are increasingly adopting transparency frameworks to explain the reasons for selecting or discontinuing particular cases.

11. In Indonesia, transparency mechanisms are still developing. The KPPU generally publishes decisions, ongoing cases, and certain priority sectors. However, it has not yet issued a policy paper detailing a prosecutorial prioritisation framework comparable to those of the European Commission or the UK Competition and Markets Authority.

12. Going forward, developing prioritisation guidelines could enhance predictability and procedural fairness. For instance, the authority could clarify that cases affecting basic public needs, the digital economy, or strategic market structures will receive higher priority than those with minimal market impact.

5. Criteria for Case Prioritisation

13. Internationally, case prioritisation typically considers a combination of legal, economic, institutional, and public policy factors. A similar approach is implicitly evident in KPPU practice.

14. Economic factors are usually the primary consideration. Authorities are more likely to prioritise cases with broad consumer impact, involving essential goods, strategic sectors, or significant potential economic loss. Market structure is also important. Highly concentrated markets or those with high entry barriers are more vulnerable to anti-competitive practices.

15. Deterrence effect is another consideration. Certain cases are prioritised because they have high precedential value and can send a strong signal to the market. In some instances, authorities also consider enforcement feasibility, including the availability of evidence, likelihood of successful litigation, and resource efficiency.

6. Information Gathering and Initial Assessment

16. Effective prioritisation requires sufficient data at the early stage. For the KPPU, information may come from public complaints, market monitoring, inter-agency cooperation, media monitoring, whistleblowers, or own-initiative research.

17. Economic analysis is increasingly important during screening. The authority needs to assess market definition, market power, concentration levels, entry barriers, pricing

behaviour, and potential consumer harm. With the growth of the digital economy, data analytics and digital intelligence are becoming more relevant.

18. In practice, balancing these factors is often multidimensional. A case may have significant economic impact but be difficult to prove evidentially. Conversely, a case may have strong evidence but limited market impact. This is where institutional discretion plays a central role.

7. Changes in Prioritisation Approaches

19. Over the past two decades, prioritisation approaches in many countries have shifted significantly. Initially, many authorities focused on quantity-based enforcement, emphasising the number of cases. The modern trend, however, is toward impact-based enforcement.

20. Indonesia shows a similar evolution. In the early phase after the KPPU's establishment, the main focus was building institutional legitimacy through cartel and tender conspiracy cases. Over time, enforcement priorities have expanded to include strategic sectors, the digital economy, MSMEs, food, energy, and issues related to national economic transformation.

21. The COVID-19 pandemic also influenced prioritisation paradigms. Many competition authorities began balancing enforcement with the need for economic stability and supply chain resilience, showing that prioritisation is never static but shaped by economic and public policy dynamics.

8. Organisational Priorities and Individual Case Decisions

22. In modern institutions, organisational priorities and individual case decisions must be integrated. Competition authorities typically set strategic priorities at the institutional level and then translate them into the selection of specific cases.

23. The KPPU has, in various periods, focused on sectors such as food, energy, transport, the digital economy, and government procurement. These priorities are usually reflected in strategic plans, leadership statements, and public advocacy activities.

24. This approach is important because competition law enforcement aims not only to punish violations but also to shape a systemically healthy market structure. Therefore, case selection should ideally support national economic development goals, market efficiency, and consumer protection.

9. Setting Priorities at the Authority Level

25. Setting priorities at the authority level typically involves a combination of macroeconomic analysis, government policy direction, global market trends, and institutional capacity.

26. In Indonesia, enforcement priorities are likely to focus increasingly on the digital sector, artificial intelligence, the data economy, supply chains, sustainability, and strategic market consolidation. Economic structural changes require the authority to move beyond traditional price-fixing approaches toward analysing platform dominance, data concentration, and ecosystem foreclosure.

27. Political economy factors are also unavoidable. Competition authorities must balance robust enforcement with the need to maintain a conducive investment climate. Thus, prioritisation is not merely a legal issue but also an instrument of national economic governance.

10. Procedural Law and Due Process Dimensions

28. In competition procedural law, case prioritisation must still respect the principle of procedural fairness. Businesses whose complaints are not pursued should ideally receive adequate explanation for non-prioritisation.

29. This transparency is important for maintaining public trust in the institution. Consistency of enforcement is also essential so that businesses can understand the authority's enforcement signals.

30. Internationally, some authorities publish enforcement priorities to provide guidance to the market. Indonesia has the potential to adopt a similar approach to enhance legal certainty and the quality of competition law governance.

11. Conclusion

31. Going forward, case prioritisation and prosecutorial discretion will become increasingly central to Indonesian competition law. The complexity of the digital economy, institutional resource constraints, and rising public expectations demand enforcement that is more strategic, data-driven, and impact-oriented.

32. Indonesia needs a more explicit and transparent prioritisation framework so that enforcement discretion can be exercised accountably. Strengthening capacities in economic analysis, digital intelligence, and governance frameworks will be crucial to ensuring that enforcement resources generate maximum competitive benefits for the national economy.

33. Ultimately, the success of a modern competition authority is no longer measured solely by the number of cases decided, but by its ability to create markets that are more competitive, innovative, and efficient through strategically chosen interventions.