KEYNOTE SPEECH

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Good morning,

Thank you to OECD for granting me an opportunity to provide a keynote speech for this important workshop.

Before I start to explain about what are key lessons in investigating abuse of dominance cases, I will briefly explain about Indonesian competition law. As some of you might aware, a comprehensive competition law is systematically introduced in Indonesia by the Law No. 5 Year 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition. The Law consists of 11 Chapters and 53 Articles. 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 behaviours; (iii) abuses of dominant position; (iv) about the commission; (v) case handling procedure and sanction; and (vi) exclusion and exemption.

The prohibited agreement defines type of unfair agreements like cartel, price fixing, price discrimination, market allocation, boycott, and many more. The basic requirement is they involve more than one enterprise. The prohibited behaviour defines as unilateral conduct by international practices. It consists of prohibited act by single enterprises. Therefore, the assessment of market power of such enterprise is crucial in proving unilateral conduct. The behaviour includes exclusive agreement, bundling, market control, bid-rigging, conspiracy, resale price maintenance, and monopoly practices. Abuse of dominance defines type of behaviour that relate to the use and the creation of dominant position. So it talks about threshold for being dominant, abuse of dominant behaviours, interlocking directorate, share ownership, merger, and acquisition. Merger and acquisition are put as part of chapter on abuses of dominance, due to its role in increasing market structure and share.

Komisi Pengawas Persaingan Usaha (KPPU) or the Commission is the only institution dealing with competition law in Indonesia. It introduces through the

Law and the organization legalized by the Presidential Decree No. 75 Year 1999. KPPU consists of nine Commissioners, including Chairman and Vice Chairman. They elected by the Parliament with recommendation from the President for five years term. The term is renewable for one time. KPPU has three main tasks from the competition law. They enforce the law, provide advice on competition policy, and review merger and acquisition. Since 2008, the Law No. 20 Year 2008 concerning Micro, Small, and Medium-sized Enterprises (MSME) provide this agency with addition task to supervise business partnership between MSME and large-sized enterprises.

Currently Indonesia is moving toward the amendment of their competition law, with an aim to improve the enforcement power of competition agency. One of the aspects is the improvement of legal power by the commission, especially in conducting dawn-raid. It is understandable that, it is extremely difficult to find hard evidences in abuse of dominance without being able to seize documents at the (reported party) premises. So, if a competition agency is able to find it such evidence without the dawn-raid, then the reported party is brainless, or someone provides it to us. Therefore, having this authority will clear half of Indonesian problem in investigation.

Therefore, it can be said that, Indonesia has been conducting effective competition enforcement with the absent of its strong enforcement supremacy. Providing escalated power through the new (amended) competition law will bring complete enforcement features of the commission for a more effective and high quality defences.

KPPU approaches on dominance and unilateral conduct

On abuse of dominance, pursuant to Article 1 point 4 in the General Provisions of Law Number 5 Year 1999, dominant position defines as "*a situation in which a business actor has no substantial competitor in the relevant market in relation to the market segment controlled, or a business actor has the strongest position*

among its competitors in the relevant market in relation to financial capacity, access capacity to supply or sales, and the capability to adjust supply or demand of certain goods or services".

Abuse of dominance position rules by Article 25 of the Law. Its regulates that enterprise is prohibited to use their dominance position to directly or indirectly: (i) provide trading requirements with the purpose of preventing and or stopping consumer from obtaining competitive product and or services, both in-term of price nor quality; (ii) limiting price and technological development; (iii) stop other enterprises with the likelihood to become competitor to enter the relevant market.

Abuse of dominance is a complex issue in Indonesian competition law. It is because the article has an overlap with other provisions in the law. At least abuse of dominance is related to 9 (nine) other provisions in the law, namely (i) Article 6 on Price Discrimination; (ii) Article 15 on Exclusive Dealings; (iii) Article 17 on Monopoly; (iv) Article 18 on Market Allocation; (v) Article 19 on Market Power; (vi) Article 20 on Predatory Pricing; (vii) Article 26 on Interlocking Directorate; (viii) Article 27 on Share Cross-ownership; and (ix) Article 28 on Merger and Acquisition.

With the long list of correlated articles of abuse of dominance and unilateral conducts, it does not have implication to review all related articles when we investigating an abuse of dominance case. In other words, the Commission can apply Article 25 as a single indictment, if related to the market structure. Or the Commission will apply other articles (like Article 6. 15, 19, and 20) for multiple indictment related to the of proof of market structure and behaviour of the reported party in investigating the alleged abuse of dominance position.

Cases related to abuse of dominance was not frequent in Indonesia. Last year, we did not have any verdict or decision on abuse of dominance related cases. Most of the cases were cartel and bid-rigging. The latest was in 2014, where we

managed to issue 3 (three) verdicts on abuse of dominance related cases. One involving exclusive dealings (tying) by one of Indonesian SOE in banking and life insurance. The other was involving monopoly practices by one of Indonesian airport operators on the ground handling services in Bali International Airport. And the last one was involving exclusive dealings (tying) and monopoly practices by Indonesian port operator on the use of gantry luffing crane for port services in Jakarta Port, Tanjung Priok.

So, abuse of dominance cases was relatively rare in Indonesia, since it will require deep analysis in understanding whether a violation can constitute as an abusive conduct. From what we had learned, we can identified that, for a success of abuse of dominance and unilateral conduct case, at least we need to consider at least **5 (five) requirements** in the analysis.

First is the evidence of the dominance

The main thing that needs to be proven in the enforcement of abuse of dominant position is, of course, evidence of market power of the enterprise concerned on the product in question. Is that specific market completely controlled by one enterprise or group of particular enterprises? Is that specific market share is above the limits of existing dominance in the competition law? Indonesia uses 50% market share for one enterprise or 75% for the group of enterprise. Another country definitely has its own threshold in its laws. Vietnam, for example, they use a minimum limit of 30% for certain enterprise to be dominant. Canada uses 35% limit for a particular enterprise or 60% for group of enterprise. Indonesia is said to have a dominant threshold that high enough. This threshold difference of course is adapted to the conditions and the economic structure of a country and the purpose he maintained. But considering the high threshold is Indonesia is expected to have a high market concentration? The answer, of course, will get back to the time of the drafting of the law, where Indonesia is known for many monopolies by various companies.

However, not all countries use certain threshold in its law for a dominant position. United Kingdom, for example, does not use the specific amount as the dominant market share. In assessing dominant, their competition authority considers whether the enterprise faces constraints on its ability to behave independently. The most important constraints exist and potential competition, and other factors, likes countervailing influence of powerful buyers, or regulation. To them, an enterprise is more likely to be dominant if its competitors enjoy relatively weak positions or if it has enjoyed a high and stable market share. However, in their regional practice, European Court in the AKZO Chemie case has stated that dominance can be presumed in the absence of evidence to the contrary if an undertaking has a market share persistently above 50 per cent. Meanwhile the UK competition authority, Competition and Market Authority considers it unlikely that an undertaking will be individually dominant if its share of the relevant market is below 40 per cent, although dominance could be established below that figure if other relevant factors (such as the weak position of competitors in that market and high entry barriers) provided strong evidence of dominance.

Defining the disturbed market is the main point for this investigation. In practice, market definition is generally started from a very concentrated or narrow market, and gradually expands the scope of the market when it is not support by the initial criteria. Besides this manner, competition authorities can use a behavioural approach rather than structural approach. This approach is generally carried out by the authorities of the heavy rule of reason, such as the US. In Indonesia, the approach is still based on structure, so on the abuse of dominant position, the debate on the behaviour would be easily defeated if the limitation on market share cannot be proven unequivocally.

Second is evidence of the abusive behaviour

The second key factor in abuse of dominant position is whether the dominant position acquired or used in a way that contradict to fair competition? When

does dominance become abuse of dominance? Having dominant position is not prohibited by the competition laws. I am not sure whether with the absence of disorderly conduct shown; competition authorities will conduct an assessment on the process of how these businesses get their dominant position. This will reduce firms' incentives to grow and promote investment. This makes law enforcement on the dominant position done quite late, because in a country with a low culture of competition, consumers or businesses easily submit to the behaviour of the owner of dominant position.

Indonesian competition law in particular Article 25 establishes an understanding for the actions referred to as an abuse of dominant position. Such actions can be made directly or indirectly to set the terms of trade in order to prevent or deter consumers to obtain competitive goods or services, in terms of both price and quality; or constrain the market and technological development; or impede other businesses that have the potential a competitor to enter the relevant market. So there are three forms of abuse of dominant position in Indonesia, namely (i) the determination of the terms of trade which deter customers, (ii) limiting market and technology, and (iii) hamper future businesses. This specific arrangement could be said to inhibit the ability of the authorities to find abuse of dominant position cases. Other countries approaches, sometimes provide a wider space for the determination of abuse of dominant position, and simply define it as the actions that lessen competition in existing market or markets in the future.

Proving abuse of dominance is heavy economics. One must able to prove the evidence of the dominant to limit the ability of consumer, or to limit market or technology, or to create barrier to future competitor. It is not an easy task. One must able to prove some economics indicator like, whether the activity raise competitors' costs, reduce their revenues, or prevent their access to key inputs or facilities. Does the activity constitute predatory conduct, particularly in a market with high barriers to entry? Or does the activity facilitate or enhance the

ability for groups of dominant firms to monitor each other in order to maintain or increase price levels?

The debate for abuse of dominance is a debate of assumption. I, an economist, love assumption. Assumption is our way of answering question that cannot be defined by common knowledge. For instance, in predatory pricing, economists will debate on what constitutes as a predatory price. Some use average variable cost as their fair price, due to the difficulties of data for calculating a short term marginal cost. Some uses long term marginal cost, and some use average cost. In AKZO case by the European Commission, price set above the average variable cost but still below the average total cost can be treated predatory, when it has an objective to remove competition. So, all price indicators are reliable, as long as we provide assumptions to support the using.

Economic evidence is not quite able to prove the occurrence of abuse of dominant position, since the written evidence like document is still required by court. Generally, the case at KPPU, on the abuse of dominant position, we also based our finding on written evidence such, a contract made by the owner of dominance, the document on terms of trade, written communication, minutes of meetings that show the deliberation of his actions, and the primary survey results done directly to inflicted consumers or businesses. Economic indicators such as trend of the number of businesses, trend of sales growth in the industry, and so on are also very helpful in proving abuse of dominance. In a country where culture of competition has not been fully adapted by the court, such evidence is more acceptable than those of economic evidence which based on assumptions developed by competition agencies.

Third is evidence of impact it's created

The third key point we consider in handling abuse of dominance case is, the extend by which the behaviour of the dominant firm can create a damage to the competition in general, and consumer in specific. High dominance will provide

market advantage to an enterprise in form of their ability to exercise their market price, and act as a price leadership. Other form of impact for abuse of dominance position like predatory pricing is the short term benefit to consumer in the form of consumer surplus. But when the dominant firm has able to remove its competitor, then they may perform a recoupment on the lost and provide high price and trigger consumer loss in the form of excessive price or lower quality.

Another complication that may in all likelihood arise in developing countries is that a significant portion of the available evidence may be anecdotal. Further, the sources of this evidence are likely to have vested interests in the investigation. This suggests that, despite its greater analytical requirements, a 'rule of reason' analysis of alleged abuses of dominance may be preferable to a 'per se' approach that does not balance pro-competitive and anti-competitive factors.

Other factor correspondence to impact in the abuse of dominance is that one sometime must consider potential remedies in situations where an abuse of dominance has been demonstrated. A preliminary matter is the purpose of the remedy being imposed. If compensation of victims of abusive conduct is desired, the remedy may involve private litigation. Alternatively, if the primary concern is to ensure the dominant firm does not profit from its behaviour, some form of disgorgement or other financial penalty may be required. Another potential remedial goal may be to eliminate the anti-competitive effects of the abusive conduct; in this case, behavioural or structural remedies may be appropriate including voiding contractual terms, changes to regulatory environments, prohibition orders, mandatory licensing, and other forms of mandatory orders or even 'de-mergers'.

Forth is the necessities of understanding motive for an abuse

The fourth point we noticed in proving abuse of a dominant position is sometime we need to understand the motive for abuse of dominant position. This motive becomes important whether the dominant enterprise has doing exercising their dominant position. It is given that the entire article related to abuse of dominant position is the chapter of rule of reason. For example in the case of predatory pricing, we have to prove whether the price is extremely low and set with an intend to shut competitors. If we cannot prove an attempt, then we will not be able to conclude that there has been a predatory effort. In specific, our investigation will be helped when there's a company is dying or even put to their death. In another article, for example, we are asked to be able to prove that the terms of trade are set intended to prevent or deter customers.

The proof on motive can complicate an investigation into the competitive implications of an allegedly abusive conduct. One such potential complication arises when a dominant firm's allegedly abusive conduct has multiple purposes and effects - some of which may be competitively neutral or even promote the goals of the competition regime, for instance, increasing efficiency. For example, the owner of the intellectual property rights of a particular product simply gives the distribution right of its products to domestic businesses or state-owned enterprises with the purpose of protection of national interests or enhance the competitiveness of domestic enterprises. Or raise rivals costs through higher setting of quality standards with the reason of protecting consumer. In the agreement like bundling, for example, we should be able to explain their motives of linking a product with another product, not an intentional act to affect competition in the market.

These conditions certainly require a strong argument of evidence to the court. The competition authorities must be careful in proving the case for a conduct that increases market power, but at the same time may have beneficial effects for competition and consumers. These efficiencies or pro-competitive effects

that can be brought about by the dominant undertaking will have to be weighed against the negative effects to competition caused by the increase in market power.

Fifth is prevailing conditions where the owner of dominance cannot exercise it dominance

The fifth key point that we need to think in the case of abuse of dominant position or unilateral conducts is, whether there are conditions where the dominant companies cannot abuse their dominant position or market power. This condition is important to know because; it is not rare when a dominant enterprise would hide behind this excuse when we conduct an investigation into them.

Our experience concluded that there are at least three (3) prevailing conditions in which they are difficult to exercise their dominant position. The first condition is, if they work in the downstream market (regardless of ownership in the upstream market), it will be very difficult for them to abuse their dominant position. For instance, in the palm oil market, if they are dominant in the market but have a high dependence on suppliers of palm fruits, it will be difficult for them to have a high bargaining power. Supplier of raw materials can easily switch to the other businesses and affect their market share. So no wonder that the dominant business operators in the area downstream want to dominate the source of raw materials (upstream market). Palm oil sector, water, sugar, etc. are some examples on the matter.

The second condition is the extent to which they want to achieve efficiency of their products. Globalization is a condition that cannot be avoided nowadays. Globalization creates tremendous competition pressure for domestic businesses, especially with the increasing free trade agreements made by the State. If the company has a high dependence with globalization (like most of their product goes for export, or their need to import their materials, or the

sector with high competition from foreign product), then they would be giving priority to efficiency in achieving productivity in their business activities. They are aware that it is impossible to avoid efficiency, if they were affected by the international business competition. Abuse of dominant position tends to lead to the creation of inefficiency, so it will affect their ability to compete in the world. It will be a suicidal when they want to abuse their dominant when foreign products are in line to take down his crown.

The third condition that makes it difficult to exercise a dominant position is an elasticity of their products, which associated with the ease of consumers to move between markets or products. We understand that not all products are able to provide ability for the owner of a dominant to utilize their position. Products with high elasticity will make consumers easily shift to other businesses and of course, would reduce their market share. This is generally found in much highly monopolistic market with a high level of product diversification. It is so obvious that in this highly diversified market, a strategy by dominant businesses will relate to the creation of high brand loyalty so that they remain able to maintain their dominant position. But for that, they should always observe their customers, particularly in understanding whether the consumer have a high dependency on their products. They will find it hard to think about their competitors, because they will be too busy observing the interests of their consumers.

Finally, additional twist to upgrade the challenges

Those are several key elements KPPU seek in dealing with abuse of dominance. Some key elements may correspond to your practice, while in some; become the unique characteristic of Indonesian competition law. In addition to such, there will be further twists that may complicate abuse of dominance analysis. Those issues are like the presence of large state-owned enterprises (SOEs) that some of which may both regulate a market and compete in that market or in related markets. There is also the attempt for the

creation of private monopolies through divestitures of SOEs and concession. Common issues like general business culture, market restriction by government's policies, size of economies, and unfavourable state aids may also trouble the mind of competition agency in deciding abuse of dominance while safeguarding the objective it may observed.

I hope this workshop can provide you with comprehensive insight on how to deal with the key elements and challenges that I have described. Thank you, and enjoy your workshop.

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