

kompetisia

Newsletter on Indonesian competition law and policy



Published monthly by the Directorate of Communication
Commission for the Supervision of Business Competition (KPPU)
Republic of Indonesia

Vol. 04/1/2008

April 2008

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KOMPETISIA
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competition law and policy

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KPPU stops conspiracy in Indonesian music industry

On April 25, 2008, Commission for the Supervision of Business Competition utter decision on violation of the Law No. 5/1999, Article 23 concerning conspiracy behavior held by several recording companies, local band, and music entrepreneur in Indonesian music industry.

This violation was involving damage claim and conspiracy behavior that correlated with process in changing management of Dewa 19 (one of Indonesian famous local band) from Aquarius Musikindo, Corp. into EMI Music South East Asia, Corp. which involved EMI Indonesia, Corp. and several entrepreneurs, that caused damage to Aquarius Musikindo, Corp. with amount of more than Rp. 4.2 billion. These business actors are adequately proven to breach Article 23 that banned business actors from conspiring with other

parties to obtain information regarding business activities of their competitors classified as company secrets which may result in unfair business competition.

Based on examination, KPPU order reported parties to impede the conspiracy agreement in form of disclosing private (limited) information on company's secret that caused unfair business competition. Under this circumstance, KPPU impose reported parties (EMI Music South East Asia, Corp. and EMI Indonesia, Corp.) to pay damages to reporting party with amount of Rp 3,814,749,520 and to pay fine with amount of Rp 1,000,000,000 to the State.

Two recording companies alleged to pay damages to reporting party with amount of Rp 3,814,749,520 and to pay fine with amount of Rp 1,000,000,000



Brief view of decision announcement for cases on Indonesian music industry

Bid-rigging in procurement of educational television and equipment service

On April 9, 2008, Commission for the Supervision of Business Competition (KPPU) had carried out investigation and issued a decision towards case of No. 18/KPPU-L/2007 (procurement of the educational TV and equipment service in North Sumatra) regarding violation of Article 22 of Law No. 5/1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition. This violation was conducted by two reported parties, Auna Rahmat Corp, and Hari Maju Corp.

Based on series of the examination carried out by the Team of Investigator, Commissioner Council considered and concluded that the similarity of the supplied document of Auna Rahmat Corp, and Hari Maju Corp, similarity of signature in the Roll of the Counterpart, committee of procurement's mistake in carrying out the process of the bidding;

as a concrete evidence for this collusive behavior.

Based on assessment and considering Article 43 (3) and 47 Law No. 5/1999, Commissioner Council announced that committee of procurement, Auna Rahmat Corp, and Hari Maju Corp, were legitimately proven and convincingly against Article 22 of Law 5/1999, thus decided to pay fine with amount of Rp 1,000,000,000 (Auna Rahmat Corp) and Rp 300,000,000 (Hari Maju Corp).

...similarity of the supplied document, ...similarity of signature, ... as a concrete evidence for this collusive behavior.

KPPU take action in the share's auction that involved foreign investors

On April 11, 2008, Commission for the Supervision of Business Competition utter decision on violation of the Law No. 5/1999, Article 22 concerning bid-rigging behavior in auction process for 40% (1800 unit) of Dharmala Sakti Sejahtera Corp's shares in Manulife Indonesia Life Insurance Corp. This collusive behavior in determining certain winner was involving several insurance companies, an auction company, a foreign owned financial company, and some entrepreneurs. This allegation was condemn as result of conspiracy by reported parties in fixing certain bid winning (Manufacturers Life Insurance Company Corp.) with unreasonable share's value.

Based on intense examination by Commissioner Council, it decided that:

1. This type of action stand on the definition of public bidding thus will include as the object of the Law No. 5/1999. Under this definition, KPPU has jurisdiction in examine this case;
2. Foreign reported party (International Finance Corporation Corp., a financial company) can be investigate by competent authority within their jurisdiction in which the reported party is located, based on the Article 6 Section 3, Articles of Agreement of International Finance Corporation, The United Nations Convention of The Privileges and Immunities of the Specialized Agencies. Within this definition, Commissioner Council argued that this financial company is a non profit organization, but when they extend their investment in Indonesia, then this foreign company is defined to conduct a

3. Manufacturers Life Insurance Company Corp. is a company that is not established by Indonesian law and not located in Indonesia. In this case, this party has listed as one of the stock owner of Manulife Indonesia Life Insurance Corp., thus will have voting right in determining company's policy and structure as well as gain profits or losses resulted by Manulife Indonesia Life Insurance Corp's activities. Before the auction process, Manufacturers Life Insurance Company Corp. has 51% share of Manulife Indonesia Life Insurance Corp. Thus, after this auction process, Manufacturers Life Insurance Company Corp. will have 91% of this share. Under this circumstance, this party can be treated as party by definition state in the Law No. 5/1999.
4. It was proved that reported party's action in fixing share's value is not intended to fix Manufacturers Life Insurance Company Corp. as an auction winner, thus will not treat as form of conspiracy that banned by Article 22 of the Law No. 5/1999.

Based on these facts, Commissioner Council in their decision recommended the Commission to send an advice and recommendation to Government and related parties (Minister of Law and Human Right, Minister of Finance, and Head of Investment Board) to arrange/regulate involvement of international business actor that owned shares in Indonesian companies.

...Commissioner Council in their decision recommended the Commission to send an advice and recommendation to Government and related parties...

Need for inter-institutional cooperation in reforming Indonesian sugar industry

KPPU and Minister of Industry Fahmi Idris valued the need for inter-institutional co-operation in straightening various problems in industry, especially national sugar and steel industry. This issue came forth in the bilateral meeting between KPPU and Minister of Industry on April 21 2008 in the Minister's Office.

In this meeting, KPPU (that was represented by the Chairman and the Vice Chairman together with several Commissioners and Board of Director) initially questioned Minister's view in the development blue print for national industrial policy in the future and sounded out potential for the policy harmonization between two country's agencies. This rose due to globalization challenge that increased together with the implementation of ASEAN Economic Community in 2015. Furthermore, KPPU considered that various industrial policies like determination of Indonesian National Standard, anti dumping duty, closing plan of the import of refine sugar, balancing industrial policy with liberalization, automotive policy plan, and other policies that still must be communicated further.

Minister of Industry welcomed KPPU and support their full efforts in harmonizing competition policy into the national industrial policy. The existence of blue print on national industrial policy is needed in developing national industry, thus have to be made as a base towards this harmonization. Moreover, Minister of Industry also viewed that industrial problems is vigorously influenced by specific factor or character of the industry. For example is the national sugar industry.

Minister of Industry conveyed that refine sugar necessarily might not enter general market because was only allocated for beverages, food and pharmaceutical industry. However it showed differently because of consumer's preference that tend to chose import sugar with good quality and its bright color, compared if being obliged to acquire sugar produced by domestic production with tanned colored with similar price or even a little higher. This condition caused import refine sugar spread up to the community. This matter was also supported by lack of supervision in certain port. To overcome this phenomenon, Minister of Industry supported by the Vice President, had encouraged importer of refine sugar not to enter general market that not their market and congested import of white sugar before stock available in the state companies was completely sold.

Apart from discussing the strategic policy of sugar industry, this meeting also discussed other industries that were becoming national attention, especially which was export potential and absorbed enormous labor force, such as the gas pipe, agribusiness, and automotive industry.

To summarized, Minister of Industry invite KPPU to together uncover the main factor of this monopolization for development of strategic national industry, especially the sugar industry.

Minister of Industry welcomed KPPU and support their full efforts in harmonizing competition policy into the national industrial policy



Picture (from left to right)
Prof. Tresna P. Soemardi (Vice Chairman), Dr. Syamsul Maarif (Chairman), and Mr. Fahmi Idris (Minister of Industry)

Abuse of Superior Bargaining Position in Indonesia

The existence of modern market acknowledge as a risk for traditional market in Indonesia by which empowered by their efficient distribution network, convenience, and variety of goods has absorb consumer like a magnet. As for retail supplier, this increasing number of potential consumer and outlets has created quite significant buyer power by dominant supplier. In several term, this dominance was sometimes used to squeeze retail supplier directly and consumer indirectly. Some calls this phenomenon as abuse of superior bargaining position. This issue has been so interested that discussed exclusively at the 7th Annual Conference of International Competition Network which held in Kyoto, Japan, from 14-16 April 2008.

In Indonesia based on our perception, "abuse of superior bargaining position" is known as every single activity of business actor on using or exploiting their bargaining position to determine their business policy. In Law No 5/1999 concerning prohibition of monopolistic practices and unfair business competition, abuse of superior bargaining position is not exclusively regulated. However various activities of abuse of bargaining position can be subject to others articles in Law No. 5/1999, especially related to market control and abuse of dominance. Based on the Law, the Parties is every business actor which falls in definition that stated by article 1 of the law. Therefore, these parties can be applied to either supplier or buyer.

Further, Law No. 5/1999 does not regulate abuse of superior bargaining position exclusively. But every type of the activities can be subject to other articles in this law. Therefore, KPPU has not published guideline on implementation of abuse of superior bargaining position yet. We are still in position to try to open cooperation with other stakeholder to define it. Up until now, KPPU has only released one guideline, which is guideline on bid-rigging (which is being translated into English). By now, there is no other law that applied on abuse of superior bargaining position. Regulation on abuse of superior bargaining position will be implemented exclusively in retail industry when the presidential decree on modern market is being enacted effectively. Although specifically in retail industry, this abuse of superior bargaining position is regulated by a Presidential Decree, law enforcement for violations of the regulation is still referring to the Law No. 5/1999 that falls in KPPU's jurisdiction.

Related articles

Indirectly, this regulation can be associated with articles on market control and dominant position as stated by article 19 and 25 of the Law No. 5/1999. These articles stated:

Article 19

Business actors shall be prohibited from engaging in one or more activities, either individually or jointly with other business actors, which may result in monopolistic practices and or unfair business competition, in the following forms:

- a. reject and or impede certain other business actors from conducting the same business activities in the relevant market; or
- b. bar consumers or customers of their competitors from engaging in a business relationship with such business competitors; or
- c. limit the distribution and or sales of goods and or services in the relevant market; or
- d. engage in discriminatory practices towards certain business actors.

Article 25

- (1) Business actors shall be prohibited from using dominant position either directly or indirectly to:
 - a. determine the conditions of trading with the intention of preventing and or barring consumers from obtaining competitive goods and or services, both in terms of price and quality; or
 - b. limiting markets and technology development; or
 - c. bar other potential business actors from entering the relevant market.
- (2) Business actors shall have a dominant position as intended in paragraph (1) in the following events:
 - a. if one business actor or a group of business actors controls over 50% (fifty per cent) of the market segment of a certain type of goods or services; or
 - b. if two or three business actors or a group of business actors control over 75% (seventy-five per cent) of the market segment of a certain type of goods or services.

Measures for abuse of superior bargaining position

KPPU used several considerations in analyzing abuse of dominant position and market control as well as abuse of superior bargaining position. These considerations will involves degree of trade dependence on the firm by the other, probability of finding an alternative trade partner, supply and demand forces of the product or service, difference in scale of business between the parties, and harm to consumer welfare. As quantitative measurement on effects of competition is rarely used in case handling, KPPU tends to use qualitative and legal approach due to limitation of time on case handling that strictly limited by the law

Furthermore on handling cases, KPPU always consider positive aspect to ensure decision's independence and availability of a balance conclusion

... "abuse of superior bargaining position" is known as every single activity of business actor on using or exploiting their bargaining position to determine their business policy.

based on opinions and evidences that presented by both side. Generally, KPPU put emphasis on motive/reason that motivates business actor activity and the effect which strengthen the statement. If presented opinion and evidence are reasonable and widely accepted, it is not impossible an activity may not be qualified as violations. For example, KPPU has justified business actor behavior to other business actor because of its bad reputation.

As far, KPPU has decided or reviewed several cases relating market control (approximately 21

cases until end of 2007), but using ICN's definition on abuse of superior bargaining position, a situation in which a party makes use of its superior bargaining position relative to another party with whom it maintains a continuous business relationship to take any act such as to unjustly, in light of normal business practices, cause the other party to provide money, service or other economic benefits, KPPU has decided one case of abuse of superior bargaining position for the last seven years since KPPU established, which is the Carrefour Case.

The Carrefour Case

This case was registered as Case No. 02/KPPU-L/2005: the allegation of violating Law No. 5/1999 regarding Prohibition of Monopoly Practice and Unfair Business Competition related to agreement of trading terms applied to goods suppliers by PT. Carrefour Indonesia (Carrefour).

This case started from a report submitted to KPPU on October 20, 2004 focusing on allegation of violating Article 19 letter a (reject and or impede certain other business actors from conducting the same business activities in the relevant market), Article 19 letter b (bar consumers or customers of their competitors from engaging in a business relationship with such business competitors) and Article 25 sub-section (1) letter a (having dominant position in determining the conditions of trading with the intention of preventing and or barring consumers from obtaining competitive goods and or services, both in terms of prices and quality) of Law No. 5/1999 conducted by Carrefour (as the Reported Party) in determining trading terms to goods suppliers.

Based on investigation result, the Commission Council found facts that Carrefour carried out business relation of purchasing and selling product with its suppliers using sell-off system. This business relation was stated in written agreement named National Contract mentioning trading terms which can be negotiated with supplier such as : listing fee, fixed rebate, minus margin, term of payment, regular discount, common assortment cost, opening cost/new store and penalty. As mentioned in their report, suppliers deemed that the trading terms was difficult to be applied, particularly on item requiring listing fee and minus margin, because every year Carrefour does adding item type, increasing cost and percentage of fee trading terms.

Listing fee pursuant to Carrefour was suppliers fee to supply new product in Carrefour and having

function as guarantee if the products were not sold out. Listing fee was only determined once and not refundable. Some suppliers were understood with listing fee condition as item registration fee for product supplied to Carrefour. Listing fee was applied to suppliers for per-item of product per-Reported Party's shop. The fee amount was different between small and big suppliers. Listing fee was not applied to all suppliers. Carrefour's revenue from this listing fee term in 2004 was 25 billions Rupiahs.

Minus margin was suppliers' guarantee to Carrefour that their product selling price was the lowest selling price. If Carrefour obtained written evidence that its competitor could sell the same product with cheaper price than Carrefour's purchasing price, Carrefour had a right to ask compensation from suppliers as amount as difference price between Carrefour's purchasing price with competitor's selling price. Compensation obtained by Carrefour through applying minus margin sanction was suppliers' invoice deduction without giving a chance to suppliers to prove that suppliers did not conduct discrimination of selling price. Invoice deduction was calculated by multiplying price difference with amount of the suppliers' rest of product in Carrefour shop. Carrefour's objective applied minus margin was to keep cheaper selling price among its competitors. Carrefour's revenue from applying minus margin sanction, from 99 suppliers agreed on requirement of minus margin in 2004 was 1.9 billion Rupiahs.

The relevant market in this market was hypermarket retail which competed directly in Jakarta, Tangerang, Bandung, Surabaya and Medan for household necessity product such as food and beverage products in instant package, staple food, fresh product, household product and electronics. Carrefour competitors in hypermarket retail market were Giant, Hypermart and Clubstore. The Commissioner Council did not include Makro and

...suppliers deemed that the trading terms was difficult to be applied.

Alfa, because their concepts did not compete with hypermarket directly. Makro recognized with wholesaler concept and Alfa with rebate store-house concept.

The Commissioner Council found facts that Carrefour had market power compared with Hypermarket, Giant and Clubstore, because Carrefour had the greatest number of shops, strategic location with high convenience and facility completeness level, Carrefour also had total of product item which was more complete than others instead. With the market power, it caused dependence for suppliers who want their products can be sold and displayed in Carrefour. This dependence was due to many Carrefour shops opened, consequently Carrefour had more powerful in access ability to sell products to consumers so that suppliers can sell more product in Carrefour. Besides, Carrefour can be promotion location for supplier's products and their new products.

With its superior, Carrefour owned bargaining power toward suppliers in negotiating item trading terms. The facts founded in investigation, Carrefour used its bargaining power to push down suppliers in order to accept the addition of item trading terms, cost increase and percentage of fee trading terms. Form of pressure conducted such as: holding the payment in due, breaking the cooperation one side not to sell suppliers' products by not issuing purchase order, decreasing order amount of suppliers' product item.

There was a activity to impede Carrefour's competitor to have the same business activity in relevant market. It was shown by applying minus margin requirement causing one of suppliers terminating its business to supply Carrefour's competitor which sells with lower price than Carrefour's selling price for the same product.

Considering that Carrefour had market power in relevant market, the Commissioner Council stated that Carrefour in carrying out its business activity needs to pay closer attention to the following issues:

- a. every item of trading terms applied to suppliers should provide added value for both Carrefour and suppliers (partnership win-win solution);
- b. not doing a such difficulty to suppliers particularly small and medium business category when conducts negotiating;
- c. not applying excessive trading terms to suppliers.

As mentioned in the decision, the Commission conducted appraisal many regulations related to private markets operating which have not been

managed effectively. For that reason, the Commissioner Council provided advice and suggestion regarding :

- a. Executing the existing private market regulation effectively;
- b. Formulating and issuing regulation on private market issue applied in national scope;
- c. Formulating and issuing provision regulating definition, system, determination of amount and listing fee particularly to suppliers categorized small and medium business so instruments used to impede suppliers who want their products to be sold and displayed in modern retail market.

Finally, based on the results of investigation in this case, the Commissioner Council decided that:

- a. Stating that Carrefour Corp. was legally and convincingly proven to violate Article 19 letter "a" of Law No 5/1999 that prohibit business actors to reject and or impede certain other business actors from conducting the same business activities in the relevant market;
- b. Stating that Carrefour Corp. was not proven violating Article 19 letter "b" of Law No. 5/1999 that prohibit business actors to bar consumers or customers of their competitors from engaging in a business relationship with such business competitors;
- c. Stating that Carrefour Corp. was not proven violating Article 25 sub-section (1) letter a of Law No. 5/1999 that prohibit business actors to use their dominant position either directly or indirectly to determine the conditions of trading with the intention of preventing and or barring consumers from obtaining competitive goods and or services, both in terms of price and quality;
- d. Instructing Carrefour Corp. to terminate activity applying minus margin term to suppliers;
- e. Imposing sanction to Carrefour Corp. with the amount of Rp. 1,500,000,000 (one billion five hundreds millions Rupiahs) that has to be paid to State Cash Treasury.

This case was appeal by Carrefour Corp. to the District Court and the Supreme Court. Nevertheless, KPPU won this battle as Carrefour Corp. had paid fine to the State as result of their behavior.

The Commission Council found facts that Carrefour had market power compared with Hypermarket, Giant and Clubstore...



...this cooperation ensure certainty in recommendation on best practices and human resources development that vigorously needed...

Activities related to the 7th Annual Conference of ICN

Beside sharing experience as Panelist for Special Program on Abuse of Superior Bargaining Position, KPPU, that represented by Syamsul Maarif (Chairman), Sukarmi (Commissioner), and Deswin Nur (Head of Inter-institution Cooperation Division), was also represent their view on cooperation model between KPPU and Japan Fair Trade Commission (JFTC). In this one of the breakout session, KPPU viewed that this partnership is very comprehensive and unique, even though it is hard to separate impact of this partnership statistically from others. This partnership also shall develop balance policy planning capacity and competition

law enforcement. We also viewed that this partnership gave broad expectation in identifying characteristic of international competition law as well as convince us of being in the right band. Further, this cooperation ensure certainty in recommendation on best practices and human resources development that vigorously needed by developing competition agency. In the end, this partnership also gave birth to a specific chapter in Indonesian Japan Economic Partnership Agreement that hope will be follow-up with an implementing agreement in the near future.

The 4th East Asia Top Level Official's Meeting on Competition Policy

Prior to the 7th ICN Annual Conference, KPPU also participated in the 4th East Asia Top Level Official's Meeting on Competition Policy in Kyoto, Japan, April 16, 2008. The activity that host by the JFTC and the ADB Institute was an annual gathering for senior officials from competition agencies in East Asia. Besides discussing recent development of competition policy and law enforcement in South Korea, Chinese Taipei, and Singapore, this meeting also formalized the Technical Assistance Task Force that aimed to facilitate efficient technical assistance in competition policy area with consideration to coordination between donors, changes of information between relevant agen-

cies, and updating calendar on technical assistance. As conclusion, this forum agreed that better coordination between competition agencies need to be escalated in defining needs of agency separately due to unique economic and law system in each economy. Furthermore, there was also needs for intense coordination between "the three musketeers" (Japan Fair Trade Commission, Korea Fair Trade Commission, and Taiwan Fair Trade Commission) to avoid recurrence in providing technical assistances. It was also fixed that the 5th East Asia Top Level Official's Meeting on Competition Policy in 2009 will be host in Mongolia.

...better coordination between competition agencies need to be escalated in defining needs of agency separately...



Picture (top to bottom)

Dr. Syamsul Maarif (Chairman), Mrs. Sukarmi (Commissioner), and Mr. Deswin Nur. KPPU's delegation to the 7th ICN Annual Conference and the 4th East Asia Top Level Official's Meeting on Competition Policy.

Creating fair competition through changes of behavior

Over this last month, Commission for the Supervision of Business Competition identified three decisions that being enacted (executed) by the predestined parties, Case No. 04/KPPU-I/2003 on Jakarta International Container Terminal, Case No. 01/KPPU-L/2004 on loading service for palm oil in Belawan Port, and Case No. 06/KPPU-L/2007 on bid-rigging in fogging service procurement. Furthermore, KPPU also identified two cases that being affirmed by the Supreme Court in April 2008. These cases are involving discrimination in logo design for a state-owned enterprises and auction of illegal import sugar.

Affirmation by the Supreme Court accompanied by predestined parties to paid fines showed increased affectivity of competition law enforcement in creation of better and fair business competition in Indonesia. The way business actor act in facing the eight years establishment of competition law is confirmed by their behavioral changes. These concrete actions have become positive support for KPPU in running their commitment for

competition law enforcement and advocacy. Thus, in the battle of many distinct views on Indonesian competition law, proudly saying that KPPU has recorded quite accomplishment in changing this behavior.

KPPU recorded that over the past two years, there were seven behavioral changes that significantly affected healthy business climate in Indonesia. This can be traced from motivation by business actors in avoiding unfair business practices and limitation of competition values. The change of behavior is an important part in ensuring sustainability of Commission regulation No. 1/2006 on Case Handling Procedures in KPPU. A pro competitive business actors is viewed as same value as the predestined business actor that change its behavior toward KPPU's order/decision. This will treat as an achievement in competition law enforcement and as a positive signal by business actor on the creation of fair business competition in Indonesia.

Upcoming international events

1. APEC Seminar for Sharing Experiences in APEC Economies on Relations between Competition Authorities and Regulator Bodies, **June 11-13, 2008**, Ramada Bintang Bali Resort & Spa, Bali, Indonesia
2. The 4th APEC Training Course on Competition Policy, **November 5-7, 2008**, Sanur Paradise Plaza Hotel & Suites, Bali, Indonesia

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