

**Country Submission for the Competition Committee Meeting
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**Topic:
“PROMOTING COMPLIANCE WITH COMPETITION LAW”**

INTRODUCTION

Compliance with competition law constitutes the basic requirement for achieving the main objectives of competition law enforcement in a country. Compliance is expected to decrease potential violations - thus eventually creating a fair business climate - which is beneficial for consumers, or in other words it can enhance public welfare. Business actors' compliance with competition law can be actualized by appropriate sanctions, particularly sanctions in the form of penalty or confinement. Compliance is also evident from the number of cases or the number of leniency applications. However, it needs to be admitted that these various efforts may not have been optimal in creating compliance effect among business actors. The purpose of this article is to review the existing conditions in Indonesia, along with various endeavors which may be applied with the aim of improving business actors' compliance, given the limited authority of the competition agency.

COMPETITION LAW ENFORCEMENT CONDITIONS IN INDONESIA

The enforcement of Law No.5/1999 by the Commission for the Supervision of Business Competition (KPPU) during the last 11 (eleven) years has become one of the spearheads for the efficiency movement in the economic sector through the business competition instrument. As the actual facts in several industrial sectors indicate, this has been a highly effective instrument in promoting efficiency in various industrial sectors. Price/rate reduction in several industrial sectors is closely related to the presence of competition in those sectors. If such conditions occur in all Indonesia economic sectors, it is not unrealistic to expect that an efficient economic sector can be realized in the near future.

The enforcement of competition law in Indonesia has been undergoing rapid development in recent years. This has been evident from the high intensity of reports as well as cases handled by KPPU. In 2010, KPPU received a total of 385 reports comprising 194 official reports and 191 written information. In total, during the period of 2000-2010, KPPU handled 249 competition cases which can be classified into 2 (two) groups, namely tender- and non tender- related cases. During the said period, the majority of reports received by KPPU were cases related to tender conspiracy (81%). The rest of the cases were non tender-related reports. Out of 249 cases, KPPU decided upon 198 cases. In addition to that, there were 51 stipulations, comprising 41 stipulations finding no indication of violation of Law No. 5 Year 1999, as well as 10 stipulations issued due to change that took place in conduct.

In addition to receiving reports from the community, KPPU also conducts examinations based on its own initiative as a result of supervision and research on competition issues. Last year, KPPU examined 4 (four) cases based on KPPU's initiative.

Thus far, KPPU has been focusing its attention on addressing sectors which are controlling the livelihood of the people at large, or various sectors which are prone to violation of Law No. 5 Year 1999. Those sectors include, among other things, energy, services, telecommunication, transportation and retail.

HOW IS COMPLIANCE IN INDONESIA?

Compliance can be indicated by the extent to which competition policy is adopted in each economic policy of the government, as well as the number of decisions being implemented (without any objection), the percentage of penalties paid, or the awareness indicators obtained through specific surveys.

In 2010, KPPU issued 13 (thirteen) recommendations and considerations to several strategic sectors. Out of these thirteen recommendations, the government has given positive response to four recommendations and considerations. This indicates that the rate of effectiveness of KPPU products reached 30.7% in 2010. Such figure may be relatively low compared to practices in developed countries, however, in developing countries with a relatively newly introduced competition policy, such figure is quite positive and it actually exceeded the target of KPPU's strategic plans set at 25% for that year.

With regard to the law enforcement aspect, out of 198 decisions issued by KPPU, 160 decisions stipulated that the parties involved were in violation. Of the aforementioned 160 decisions, 78 decisions (48.75%) were appealed against at the District Court. This indicates that business actors filed objections against almost half of KPPU's decisions. This may be considered as an indication of a low level of compliance by business actors in implementing KPPU decisions (by setting aside the aspect of substantiation in the decisions).

Furthermore, with regard to penalty payment, during the last 10 (ten) years, penalties and compensation imposed by KPPU reached a total of USD 220 million. Out of the aforementioned amount, penalties which had obtained permanent legal force (affirmed) reached a total of USD 21.5 million. Out of the said amount, USD 1.24 million was paid by business actors and was deposited at the State Treasury Office. Based on the aforementioned penalty amounts, it can be concluded that only 5.7% of penalties which had obtained permanent legal force were actually paid by business actors.

With regard to awareness, in 2009 KPPU conducted a study of business awareness to assess the extent of business actors' knowledge of competition law nationally. Based on the above mentioned study, 83% of all the samples of business actors (300 samples) stated that they are aware of the existence and the substance of competition law. This figure is quite encouraging and it can serve as a supporting factor in enhancing compliance with competition law.

With reference to the aforementioned factors, it would appear that the current level of public awareness of competition law enforcement in Indonesia is still limited to knowing about the existence of the law, and it is still quite far from compliance with the existing provisions. This certainly creates rather difficult challenges for KPPU, because it indirectly affects the commission's image indirectly at the national and international levels.

WHAT ARE THE POSSIBLE CAUSES?

There are several potential factors causing the relatively low level of compliance with competition law in Indonesia, particularly the relatively low sanctions imposed and the lack of the competition agency's investigative powers.

To date, the sanctions imposed by the commission are limited to administrative measures as provided for in article 47 of Law No. 5/1999. Such sanctions include cancellation of agreement, termination of activity, cancellation of M&A, stipulation of

compensation and penalty ranging between USD 111,764 – USD 2.94 million (1 USD = IDR 8,500).

The amount of penalty is often insignificant if it is correlated with the assets and profits of the reported parties. This has certainly not been able to create a deterrent effect to large-scale business actors in Indonesia due to the relatively low sanctions imposed by KPPU. For instance, in the case involving Carrefour Indonesia, KPPU decided that the party concerned had violated monopoly rules and abused dominant position. In the said case, Carrefour Indonesia was imposed with the maximum amount of penalty of IDR 25 billion or USD 2.94 million. This amount was certainly disproportionately small considering Carrefour's penetration into the expansive Indonesian market with a market share of 57.99%¹. Each year, the profits generated by Carrefour indicated a relatively rapid progress, so that in 2008, profits reached IDR 1.4 trillion (USD 167.3 million)². The sanction imposed was certainly far smaller than the profits, only approximately 1.8% of the company's profits in 2008. Carrefour Indonesia did not only violate the law once, however, they had also been proven to of violating the law in other competition cases.

Furthermore, in a case involving a State-owned Enterprise engaging in the oil and gas sector, PT. Pertamina, it was decided that the company had committed a discrimination practice in the making of its corporate logo. In this case, Pertamina was subject to a penalty sanction amounting to IDR 1 billion (USD 111,764), which was notabene only 0.45% of its annual profits in the relevant year (IDR 22.4 trillion)³. As in the case of Carrefour, Pertamina has also been involved in several legal proceedings with KPPU.

Criminal sanctions can actually be imposed in competition cases; however, criminal sanctions can only be imposed by a Court of law in cases of objection to KPPU decisions. The primary criminal sanctions as set forth in article 48 of Law No. 5/1999 include pecuniary criminal sanctions ranging from IDR 1 billion (USD 111,764) to IDR 100 billion (USD 11.7 million) or criminal sanction of imprisonment ranging from 3 (three) months to 6 (six) months. In addition to that, the court can also impose additional criminal sanctions, such as termination of activity, prohibition from holding management positions and revocation of business permits. The problem is that, until now, such criminal sanctions have not been imposed by District Courts in competition cases.

Such a relatively low level of sanctions in competition cases has been one of the factors hampering compliance, along with the lack of the commission's investigate powers. Pursuant to the law, KPPU has the authority to investigate, examine and impose sanctions for competition violations. However, in investigation, KPPU investigators have not been given the authority to conduct search, interception, arrest or seizure. Documents and information used as evidence are obtained only in the field investigation process (monitoring), as well as documents and information provided by reported parties/witnesses/experts during examinations.

A combination of the aforementioned two facts has been undeniably the main factor causing the low level of compliance in Indonesia. Other factors, such as the absence of leniency program, have also indirectly reduced the level of compliance in Indonesia since business actors do not have any incentive to report competition law violations.

COMPLIANCE IMPROVEMENT METHODS APPLIED BY KPPU

Realizing the low level of compliance in Indonesia, KPPU has been continuously making endeavors in order to ensure effectiveness in the enforcement of competition law in

¹ The data is based on the copy of Commission for the Supervision of Business Competition's Decision No. 09/KPPU/L/2009

² Equal to the above

³ <http://berita.kapanlagi.com/ekonomi/nasional/2006-laba-pertamina-diperkirakan-naik-dua-kali-lipat-h1croy2.html>

Indonesia. The commission has applied several methods to improve compliance, including advocacy (both to the public as well as to the government), amendments of regulations, and cooperation with other law enforcement apparatuses.

As an effort to improve compliance by the public, particularly business actors, KPPU has been intensively conducting advocacy among stakeholders. Such advocacy is intended to enhance the public's understanding of competition law. Advocacy has become a preventive measure undertaken by KPPU enabling people to take an active part in competition policy compliance and enforcement.

Throughout the year 2010, there were 51 (fifty-one) public advocacy activities conducted by KPPU in the form of dissemination of information to journalists, the media, public and government institutions, universities and business associations, both at the central and the regional levels. Such public advocacy activities were conducted by involving business actors, the media and the government. Their involvement (particularly of the media and business actors) has been extremely important in improving compliance since they are able to create positive public opinion. Business actors should and have been frequently involved in every advocacy activity, as they are the stakeholders having the greatest level of interest in it. Relationship with the media can also be one of the determining factors in improving compliance, since they have the capacity to build public opinion by way of media communication. Therefore, the commission has been making continuous efforts towards building a good relationship with the media, for instance by regularly organizing forums with journalists and joint events with journalists.

In addition to active advocacy among stakeholders, KPPU has also involved in cooperation with law enforcement agencies, such as the National Police of the Republic of Indonesia. Such cooperation has been established with the aim of enhancing the investigation functions performed by KPPU in various cases. The institutional conditions of KPPU's Secretariat, which is not yet a part of the Civil Service, have created a barrier in the performance of the formal investigation function, as the formal investigation function must be implemented by state apparatuses, namely by police officers or civil servant investigators. By establishing cooperation with the police, KPPU will obtain a supporting instrument in enforcing competition law and policies in Indonesia.

The cooperation between KPPU and the National Police of the Republic of Indonesia had been established a long time ago; however it was not officially realized until October 8, 2010. This cooperation is expected to result in a synergy among the elements of both institutions enabling them to handle monopoly and unfair competition cases. In the context of such cooperation, both KPPU and the Police can exchange information related to alleged criminal acts and unfair business competition.

In addition to the cooperation with the National Police of the Republic of Indonesia, KPPU has also engaged in an unofficial cooperation with the Supreme Court. In the context of such cooperation, KPPU has been organizing regular and intensive education and training programs - related to competition law and policies for District Court Judges and Supreme Court Justices. It is expected that through such training, the courts will attain the necessary knowledge and skills required for addressing cases related to unfair business competition.

KPPU has also made changes in law enforcement rules with the aim of improving effectiveness in the handling of cases and due process of law, as well as improving business compliance. This was provided for in the changes of the case handling procedures under Commission Regulation No. 1/2010 concerning the new proceeding procedures before the commission. Based to such rules, improvements have been made in the aspect of transparency in the handling of cases and the quality of substantiation. At the present time, a new case can only be examined if there are at least two means of

evidence (statements and documents), unlike the previous rules, which allowed the use of a single evidence in the examination of a case. In addition to that, at the present time anyone (the public) may be present in the hearing room to follow the course of panel examination, provided of course that they comply with the existing examination code of ethics.

In the context of supervision (monitoring), KPPU has also introduced the granting of awards to business actors that comply with the terms stipulated by the commission and the provisions of the law for 3 (three) consecutive years. The granting of awards is expected to serve as an incentive to business actors to comply with the provisions of the law. The mechanism for the granting of awards is currently still subject to careful formulation by the commission, in order to ensure that it will not become a disincentive in the enforcement of the law in the future.

Another method applied by the commission has been the strengthening of the fundamental aspects of competition law, namely disseminating knowledge about competition law to educational institutions (through universities). KPPU considers academicians as potential targets for instilling the values of competition in Indonesia as academic circles are very dynamic and open to information. Therefore, KPPU has been cooperating with academic circles throughout Indonesia for improving the understanding of competition law and policies, particularly by way of official cooperation. In particular KPPU has also prepared text books regarding competition law. The books written by KPPU along with leading professors of economy and law are expected to become primary reference materials in classes at all universities (nationally).

COMPLIANCE IMPROVEMENT METHODS APPLIED BY OTHER GOVERNMENT INSTITUTIONS

To date, compliance improvement methods applied by KPPU have been relatively effective since they have operated in two-ways, both repressive and preventive. Another similar institution, such as the Corruption Eradication Commission (KPK), has also applied the same method in eradicating corruption. During the early days of its establishment, KPK tended to apply a repressive method in taking action against corruptors. However, in recent years, KPK has been more focused on the use of persuasive methods in which they are more focused on nurturing public awareness of the risks of corruption and on way of addressing the same. By applying this method, it is expected that it can improve public awareness of corruption.

One of the KPK's preventive actions has been establishing cooperation with the Supreme Court and the Constitutional Court in eradicating corruption, referred to as the Judiciary Exaltation Program. This has been one of the KPK's efforts in eradicating practices of corruption in judicial institutions. In addition to the above, KPK has also been making efforts for reforming the bureaucracy and businesses potentially having the element of corruption. However, it cannot be denied that the effectiveness of corruption eradication efforts in Indonesia have also been supported by KPK's authority to conduct inquiry.

The same kind of authority has also been exercised by the Directorate of Taxes of the Ministry of Finance in taking action against disobedient taxpayers. Since last year, they have been trying to reform and restore public trust through linkage with the national mass media and advocacy regarding awareness in paying taxes. This method has proven to be effective because it has enabled people to understand gradually the importance of punctuality in paying taxes. In addition to that, the government has also made amendments in the internal procedures for imposing taxes in order to ensure greater transparency. With regard to regulations, they have also introduced the sunset policy in order to grant lenience to taxpayers who have not paid their taxes before the due date,

thus enabling them to pay their taxes without being subject to penalty for delay in payments.

The Directorate General of Taxes has also been making efforts to promote compliance of individual and corporate taxpayers through the law enforcement mechanism. Law enforcement measures have also been taken through collection, examination and follow-up inquiry. In fact, in very extreme conditions, they have also cooperated with other law enforcement apparatuses in order to search and seize the assets of delinquent taxpayers.

Based on the several above described practices, it is undeniable that investigation authority is an important factor in improving compliance in Indonesia, in addition to effective preventive measures.

OTHER WAYS TO IMPROVE COMPLIANCE

Business actors are KPPU's main stakeholders because its main mission is to ensure fair treatment in conducting business activities in Indonesia. All this time, KPPU's direction and objectives have been inversely proportional to the main mission of business actors. Business actors have a natural tendency to dominate the market and retain their dominance in various ways. However, in this respect, KPPU has the role to control business actors' conduct in order to ensure that it is in accordance with applicable legal principles. KPPU is making endeavors to create a comfortable business climate for business actors and fair treatment to all circles.

As for companies which have gone public (listed on the stock exchange), most of their attention is focused on fluctuating share value as well as the building of image presented to the public. Shares are an important key to a company's success. The value of shares is often parallel to the progress achieved by the company. The rapid growth of the company is accompanied by an increase in the value of its shares, in line with its development.

At the same time, the image of the company is closely related to the existing public image building. External factors such as this affecting a company are highly significant as a means of public control of the company. Therefore, many companies conduct Corporate Social Responsibility (CSR) to strengthen their image before the public. In addition to actualization, image building also serves as a stabilizing media in competition with competitors, as competitors are likely to make efforts, either directly or indirectly, to take a company down and take over its market share.

In several cases, the decisions made by KPPU can affect the image and image building of a company. An example of this has been the commission's decision regarding the trading term of Carrefour Indonesia, in which several regions have put a negative stigma on the company for violating Law No. 5/1999. This occurred when Carrefour was refused the opportunity to expand its business in Palembang (one of the provincial capital cities in Indonesia) after KPPU's decision⁴ had been issued, even though it was due to the misinterpretation of KPPU's decision by the regional government. This condition at least implies that the legal product issued by KPPU has obtained legitimacy and has served as a reference for stakeholders in their conduct. This proves that KPPU's decisions can effectively change a firm's conduct and that there has been adequate awareness in the community of competition law and policies.

A similar situation was also experienced by PT. Telkomsel when KPPU imposed a sanction in the case of cross ownership and monopoly practice by Temasek business group (a Singaporean entity). At that time, KPPU considered that Temasek group of companies had tried to gain control over Telkomsel and Indosat (other similar business

actors) leading to less competitive cellular market in Indonesia. The cross ownership structure of the Temasek group caused a condition of price-leadership in the telecommunication industry in Indonesia.

The stock exchange immediately gave a negative response. For 3 (three) days, the price of Telkomsel's shares decreased due to KPPU's decision. Although the decrease of the share price did not persist over a long period of time, it has given legitimacy to KPPU in view of its decision.

Specific research has also been conducted regarding the effect of KPPU's decisions on share prices. Noor (2009), by applying the abnormal return approach, found that the share prices of several companies had been affected by KPPU's decisions during event window period (in different periods). Specifically, by calculating average standardized abnormal return of all companies observed, it was proven that KPPU's decisions significantly affected the companies' share value on the (-) 3rd day before the decision and on the D day or the day on which KPPU's decisions were made. However, it was observed that such changes were still incidental, as the companies' share price experienced a rebound on the first day following the issuance of the decisions.

The aforementioned facts prove that legal products issued by KPPU have significantly affected competition law and policies. On the other hand, such condition indicates a relatively strong awareness of competition law and policies among business actors and the Indonesian people in general. The evidence presented above also indicates that the influence of the media in creating public opinion through reports on the commission's decisions has been rather significant. The image of a company (particularly a large-scale or foreign company) is likely to be highly affected if it is found guilty by the competition agency. As a result, they will be very careful when they are involved in the handling of competition cases by KPPU. This can be certainly used to improve compliance in the implementation of competition law in Indonesia.

WHAT ARE THE LESSONS LEARNED?

Compliance with competition law means acceptance by KPPU's stakeholders of the rules set forth in Law No. 5 Year 1999, in a manner that they are able and prepared to adapt to various provisions therein. Compliance as a foundation for self-assessment can be achieved once the key elements have been applied effectively.

The way see it, compliance in Indonesia today is still very closely related to fear of the potential consequences when dealing with a competition case. Such fear is generally identical to the risks being faced. The high level of risk will also be highly dependent on the competition agency's authority of investigation and enforcement. Admittedly, other elements, such as advocacy and other similar elements, have a rather significant influence on compliance, on the other hand, namely the strengthening of fundamental aspects which are a useful investment for compliance in the future. These two factors have a very crucial role, indeed. Their scale of priority will be highly dependent on the economic conditions in the country concerned. In Indonesia's case, it is undeniable that endeavors for improving law enforcement authority are still a priority.

CONCLUSION

The enforcement of competition law in Indonesia has created a special dynamic in the industry and trade sectors. The enforcement of competition law in Indonesia has brought positive developments in investment and the national economy. Such a harmonious relationship between competition policies and investment has provided strong support for KPPU in enhancing the enforcement of competition law with the aim of improving the welfare of the Indonesian people.

Compliance can be indicated by the extent to which competition policies have been adopted in each economic policy of the government, the number of decisions implemented (without any objection), the percentage of penalties paid, or based on indicators of awareness obtained through specific surveys. Given the aforementioned facts based on experience, it can be concluded that there has been a rather sufficient development of awareness in Indonesia, however the level of compliance is still low. This is closely related to the relatively low level of sanctions imposed in competition cases, and the lack of the competition agency's investigative powers.

The Commission has been addressing such low level of compliance in various ways, particularly through advocacy (either to the public or to the government), amendments of regulations, and the establishment of cooperation with other law enforcement apparatuses. The lessons learned from other similar institutions also indicate that in addition to preventive measures which are effective, investigative powers are a very important factor in improving compliance in Indonesia.

Another method which can be applied is the development of public opinion through the media (by way of good media relations) which can potentially affect companies' image and value as reflected in their share prices on the stock exchange.

The combination of the aforementioned various methods (the level of sanctions, authority, advocacy and development of public opinion) may become the best combination for improving compliance with the implementation of competition law and policies in Indonesia, as well as in other countries in the World.

This report is prepared by the Foreign Cooperation Division with valuable input from internal sources to contribute for series of the OECD Competition Committee Meeting in June 2011. Further information or clarification on stipulated issues may be obtained from Mr. Deswin Nur (Head of Foreign Cooperation Division) through his e-mail addresses, deswin@kppu.go.id or from our international team at international@kppu.go.id.