

Unclassified

DAF/COMP/WP3/WD(2015)18

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

10-Jun-2015

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT

-- Indonesia --

15 June 2015

This document reproduces a written contribution from Indonesia submitted for Item III of the 121st meeting of the Working Party No. 3 on Co-operation and Enforcement on 15 June 2015.

More documents related to this discussion can be found at: <http://www.oecd.org/daf/competition/antitrust-enforcement-in-competition.htm>

Please contact Ms. Naoko Teranishi if you have any questions regarding this document [phone number: +33 1 45 24 83 52 -- E-mail address: naoko.teranishi@oecd.org].

JT03378259

Complete document available on OLIS in its original format

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

DAF/COMP/WP3/WD(2015)18
Unclassified

English - Or. English

-- Indonesia --

1. General Description of Public and Private Law Enforcement in Indonesia

1. According to the Indonesian legal expert, Satjipto Rahardjo, law enforcement basically contains three elements that must always be observed, namely: 1) legal certainty (*rechtsicherheit*); 2) usefulness (*zweckmassigkeit*); and 3) justice (*gerechtigkeit*). The community expects the existence of legal certainty since with the existence of legal certainty, the community will be more orderly, and it constitutes protection against arbitrary actions, so that someone will obtain something in a certain situation. Conversely, the community expects the existence of benefit in the implementation and enforcement of law, consequently, the implementation or enforcement of law should not pose any unrest for the community. The community is also very concerned that the implementation or enforcement of law must observe the element of justice, although law is not identical to justice, because law is general in nature, binding on every person or having the nature of treating everyone as equal, while justice is subjective, individualistic in nature, and not treating everyone as equal.

2. Indonesia is a country that adheres to civil law system, thus its legal system is divided stiffly between public law and private law. The judicature system is also separated expressly between Civil Section District Court and Criminal Section District Court.

3. Verification system and legal evidence in public law differ from substantiation system in private law. The following are different legal evidence in Criminal Law, Civil Law, and Law No. 5 Year 1999:

Civil: Article 164 of the Indonesian Civil Code	Criminal: Article 184 of the Indonesian Criminal Procedure Code	Law No. 5 Year 1999
Letters	Witness Depositions	Witness Depositions
Witnesses	Expert Depositions	Expert Depositions
Allegations	Letters	Letters and or documents
Confessions	Indications	Indications
Oaths	Defendant Depositions	Business Actor Depositions

4. Based on the above-mentioned table, the legal evidence (instruments of proof) adhered to by the Commission for the Supervision of Business Competition (KPPU) are the instruments of proof as contained in the Indonesian Criminal Code, in other words KPPU adheres to material substantiation. The banned treaties, prohibited activities, and abuse of dominant position with regard to business competition law constitute the materialization of economic relationship being *lex specialis derogat lex generalis*. Specifically for business competition cases, the same are only exercised in the authority of KPPU. However, remedy in the form of objection to KPPU decisions as provided for in Article 8 of the Regulation of the Supreme Court No.3/2005, the authority is exercised by the District Court at the domicile of the business actor (Reported Party) by using civil procedural law and is registered with the civil chamber. Consequently, the judges will assess legal evidence (instrument of proof) presented by KPPU by accepting the existence of economic instruments of proof.

5. Judges in Civil Section District Courts will use formal verification system frame, while KPPU in examining and trying business competition Cases will use material substantiation system, including the use of economic legal evidence and communication legal evidence. If District Court judges still use formal substantiation system frame, then the judges will not [?].

CD products	= 28,205/867,713 Pieces x 770,576 Pieces x Rp.16,961.- = Rp.424,831,717.- (approximately USD 30,000)
Total	= Rp.3,389,917,803.- + Rp.424,831,717.- = Rp.3,814,749,520.- (approximately USD290,000)

6. Based on adequate evidence and calculations of provable material losses, the Panel decided that Reported Parties were proven to have violated Article 23 of Law No.5/1995, ordering Arnel Affandi, SH., Dewa 19, and Iwan Sastra Wijaya not to commit a plot in the shape of leaking of company's confidential information that may result in unfair business competition and stipulated EMI Music Southeast Asia and PT EMI Indonesia to pay compensation to PT Aquarius Muskindo in the amount of approximately USD 290,000.

7. The Reported Party side could see the proofs presented by the Reporting Party in the hearing process. Immediately after the Panel of Commission read out the decision of the Commission, the Clerk conveyed the Excerpt from the Decision of the Commission along with the Copy of the Decision of the Commission to the Reported Party. Subsequently, the Clerk downloaded the same to the website of the Commission one day as of the reading out of the Commission Decision at the latest.

8. Unlike compensation assertions in business competition cases at KPPU, compensations in civil cases entitle the Plaintiffs to demand a maximum compensation in the form of immaterial and material compensations. Class action claims are possible in private law. Class action is a method for individual persons who have similar claims to join forces together to file a claim so as to be more efficient and someone who will participate in a class action must grant approval to the representatives. The role of court of law is huge since every representative to come before the court to litigate must obtain an approval from the court, wherein the court will assess/observe:

- Class action is the best action to file a claim;
- Having the same claim type;
- The plaintiffs are so many; and
- The representative is feasible or appropriate.

9. The basic purposes of class actions are among other things case efficiency, economical litigating process, avoiding repeated verdicts that may result in inconsistent verdicts in similar cases. However, regulation that includes class action is only contained in Consumer Protection Law, Environmental Management Law, and Forestry Law. Since Indonesia adheres to positive law, then legality principle applies, consequently, class action may not be applied yet outside the said Laws.

10. With regard to competition law, consumers who feel that they are harmed in the 2007 SMS cartel case once took a class action that made the decision of KPPU as their cause of action. In KPPU's decision relating to such case, KPPU stated at least there were consumer losses in a minimum amount of Rp.2,827,700,000,000 (approximately USD 217,000,000).

11. Claims are more toward rehabilitation (correction) in the Indonesian Criminal Code and are only limited to provable costs or fees that have been expended by the victim side. The nature is narrower within the scope of criminal law as compared to civil law. Judges may not pass judgment more than the claim put forward.

3. Competition Law Enforcement System

12. If brought back to the provisions of Article 45 of Law No. 5/1999, then the substantiation of competition cases shall use material substantiation system.

13. Remedy in the form of objection to KPPU decisions shall be lodged to Civil Section District Court. Problems will arise when judges use standard evidences from civil proceeding. KPPU' decision using economic evidences and or indirect evidence tends vulnerable to annulations by the District Court.

14. In competition proceeding at KPPU, the defendant is very likely to hide evidences while KPPU has no authority to do raid or document seizure. With relate to the affirmed KPPU's decision, should they failed to comply, then KPPU will request the District Court to execute the decision.

15. In the case of objection at court level, KPPU and the defendant refer to the Party. KPPU will have chances to shape their examination and evidence collection when the court orders the necessity for an additional examination.

16. Amicus curiae knows in common law system. They are someone who is not a party to the litigation, but who believes that the court's decision may affect its interest. It means that amicus curiae defines as inviting neutral third party to provide information that relates to the case. When a competition case become KPPU's jurisdiction, then in term of objection to KPPU decision where KPPU and the defendant is the party. Hence, they cannot be an amicus curiae.

4. Interaction between Public and Private Law

4.1 Interaction in damage claim in both public and private law

17. In the conventional court system, several terms are applied, namely restitution or damage to the victim, and restoration. Restoration consists of revocation to the relation between the victim and the executor. The revocation is based on the common agreement between both conflicting parties.

18. The victim side may convey the losses suffered and the perpetrator is given the opportunity to compensate it through compensation mechanism, amicable settlement, volunteer work, and other agreements.

19. With regard to compensations in civil law, the judicature that has the authority to examine this compensation assertion is civil judicature with Civil Judges. In the meantime, the Indonesian Criminal Procedure Code regulates criminal-related problems, but with the existence of positive relationship in Article 98 of the Indonesian Criminal Procedure Code combining compensation assertions with their criminal cases at the same time. Therefore, all existing in civil law and criminal law can be brought together, being previously not subject to the Indonesian Criminal Procedure Code, with this Article 98 of the Indonesian Criminal Procedure Code, becomes subject to criminal procedure law.

20. Article 98 of the Indonesian Criminal Procedure Code says that if an action becoming a basis of indictment in an examination of criminal case at a District Court poses losses for other person, then the Presiding Judge of the hearing at the request of the relevant person may decide to combine compensation assertion case with criminal case. Based on the formulation of Article 98 of the Indonesian Criminal Procedure Code, there is a definition that three conditions are needed in order to be able to combine those cases, i.e.:

1. The existence of defendant's acts.
2. The existence of defendant's acts as the first requirement must pose losses for other persons.

3. The existence of request and the party feeling being harmed addressed to Court of Law to combine their compensation assertion cases.

21. Whereas actually compensation assertions according to Article 98 of the Indonesian Criminal Procedure Code are civil in nature, but the same are provided through criminal proceedings. For the purpose of providing protection for criminal act victims, they will be provided with easy ways to obtain such compensations through the combination of their civil case and criminal case.

4.2 *Overlap of Material Substantiation System in Competition Law and Private Law*

22. Since objection to KPPU decisions is lodged to Civil Section District Courts, competition cases constitute a private law, while examination processes by KPPU use material substantiation system and are based on Article 45 of Law Number 5/1999, the hierarchy of legal evidence adhered to by KPPU implicitly constitutes material substantiation constituting a public law domain.

23. Inconsistent use of substantiation system in competition cases becomes a boomerang to KPPU, especially if there is a remedy in the form of objection and cassation. Judges examining competition law cases must understand competition law. In order to facilitate the understanding of judges in Indonesia in the field of competition law, KPPU has organized workshops on competition law the participants of which are judges.

5. Conclusions

24. The legal system adhered to by Indonesia expressly separates public law enforcement from private law enforcement. Compensation assertions in private cases and public law have differences, namely Plaintiffs in private cases may ask for a maximum compensation, while in public law, Plaintiffs may only demand material and provable matters. However, it is possible to combine compensations in Article 98 of the Indonesian Criminal Procedure Code. If an action that becomes indictment basis in a criminal case examination at District Courts poses losses for other person, then the Presiding Judge of the hearing at the request of the relevant person may stipulate to combine such compensation assertion case with criminal case.

25. With regard to competition law constituting *lex specialis*, then Law has granted the authority to KPPU to receive reports, examine, try, and decide competition law violation cases. Remedy in the form of objection to KPPU decisions as provided for in Article 8 of the Regulation of the Supreme Court No.3/2005 shall be exercised by District Courts at the domicile of the business actor (Reported Party) by using civil procedural law and shall be registered with the civil chamber. Consequently, judges will assess legal evidence put forward by KPPU by accepting the existence of economic legal evidence.