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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
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**COMMITMENT DECISIONS IN ANTITRUST CASES**

-- Note by Indonesia --

15-17 June 2016

*This document reproduces a written contribution from Indonesia submitted for Item 9 of the 125th meeting of the OECD Competition Committee on 15-17 June 2016.*

*More documents related to this discussion can be found at  
[www.oecd.org/daf/competition/commitment-decisions-in-antitrust-cases.htm](http://www.oecd.org/daf/competition/commitment-decisions-in-antitrust-cases.htm)*

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## INDONESIA

### 1. Introduction

1. In the past, the enforcement of competition law often pursued establishing infringements and imposing financial sanctions and/or injunctions. Until the modernization of the European legal framework that occurred in 2003, introduced a formal way to close a case, referred to as a “commitment decision”. Under the commitment procedure, a firm suspected of implementing anticompetitive practices may offer to bring them to an end in exchange for fine immunity and the European Commission may formally close the case under investigation.<sup>1</sup> Similar practice which known as consent decree has also been implemented in the United States.

2. Consent decree represents a distinctive and imaginative amalgam: It operates both as a contract between two or more parties to settle disputes between them and as a final judgment of the court that has entered it. It thus marries the flexibility of a private contract to the legal clout of a final judgment. The settlement mechanism spares both sides the risk and expense of a prolonged trial. Incorporating that settlement into a final judgment makes sure that the settlement will hold over time.<sup>2</sup>

3. Nowadays, this kind of practice has changed from “exceptional” to “preferred” enforcement practice that performs by most competition authority in the world. Due to the convenience its hold, despite the give and take it may brings.

### 2. Early Implementation of Commitment Decision in Indonesia

4. The Indonesian competition authority, KPPU, holds the mandate of Law Number 5 Year 1999 in the enforcement of competition law. This law not only covers prohibited conduct and agreement, but also covers case handling procedure, although the investigation process was not stipulated in detailed manner.<sup>3</sup> In order to increase its effectiveness in law enforcement, KPPU feels the need to define each steps of its case handling procedure and formalize it into a guideline. Therefore, in 18 April 2006, KPPU issued Commission Regulation Number 1 Year 2006 concerning Case Handling Procedure. This is where KPPU first introduce the form of commitment decision that also known as behavioural change provision in Indonesia.

5. The inclusion of behavioral change provision in the Commission Regulation Number 1 Year 2006 was triggered by Mandiri Bank case in 2001. In this case, Mandiri Bank was reported due to its conduct in restricting the number of insurance companies that became its partner. Due to this violation allegation, Mandiri Bank was investigated by KPPU.

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<sup>1</sup> [http://www.crest.fr/ckfinder/userfiles/files/Pageperso/Chone/Commitments%20in%20Antitrust\\_IRLE\\_ReSub2\\_Version2.pdf](http://www.crest.fr/ckfinder/userfiles/files/Pageperso/Chone/Commitments%20in%20Antitrust_IRLE_ReSub2_Version2.pdf)

<sup>2</sup> Epstein, Richard A., “*Antitrust Consent Decrees in Theory and Practice: Why Less is More*”, The AEI Press, Washington DC, 2007, Pg. 4.

<sup>3</sup> KPPU’s Case Handling Procedure based on Law Number 5 Year 1999 stipulated these provisions; requirement of complaint, right and obligation of complainant, general timeline of preliminary examination and further examination, confidential information, ex-officio investigation, right and obligation of businesses and other related party, instrument of evidences, hearing process, execution process, objection and cessation process.

6. In the beginning of investigation process, Mandiri Bank could not explain the term and condition that has to be fulfilled by insurance company to become their partner. Mandiri Bank stated that the partners that they have today, are mostly legacy of the banks that merge into Mandiri Bank. Mandiri Bank itself was established in 2 October 1998, and was a part of bank restructuring program held by the government of Indonesia to tackle with the severe monetary crisis. The bank was formed through a merger of 4 (four) government-owned bank in July 1999, which are Bumi Daya Bank, Indonesian Exim Bank, Government Trade Bank, and Indonesian Development Bank.

7. Furthermore, Mandiri Bank admitted that they do not aware that their practice is a violation to the Indonesian competition law, which was just promulgated in the year of 1999. Thus, Mandiri Bank decided to accept KPPU's recommendation and commit a behavioural change by processing all application from insurance companies to be their partner.

8. It was later identified that after the investigation, Mandiri Bank started to promote competitive process in their selection of insurance companies. The evaluation process of insurance company's applications put 3 (three) main aspects into consideration; namely capital aspect, financial aspect, and geographical aspect. Each year, Mandiri Bank will evaluate the financial condition and performance of their partners based on Ministry of Finance's Decision Number 481/KMK.017/1999 about financial condition of insurance company and re-insurance company. More of it, the customers are also having their freedom in selecting insurance company from the list of the bank partners. Considering these commitments, the Commission then decide to close the case.

9. After the case was closed, the Commission became aware of the effectiveness of such commitment and then decided to formalize it in the Commission Regulation.

10. Referring to the Commission Regulation, the evaluation of businesses' behavioural change conducted during the Preliminary Examination process.<sup>4</sup> Detailed provision on behavioural change is stated in Article 37, Commission Regulation Number 1 Year 2006 as follow:

- The Commission is able to decide it is unnecessary to conduct Further Examination, even in the existence of violation allegation, should the businesses commit to change their behaviour;
- The behavioural change as stated in paragraph (1) could be conducted by ceasing agreement and/or ceasing activity and/or ceasing abuse of dominant position which allegedly violating and/or paying the damage caused by their violation;
- The implementation of this behavioural change as stated in paragraph (2) could be conducted no later than 60 (sixty) working days and could be extended based on Commission Stipulation.

11. During the time window of 60 (sixty) working days, a dedicated monitoring team formed by the Commission will monitor and evaluate the businesses behavioural change. Should the businesses fail to fulfil their commitment and there is no stipulation on time extension of the monitoring process, the Commission will continue the enforcement procedure to Further Examination.

12. One of the examples of commitment decision in Indonesia after the implementation of Commission Regulation Number 1 Year 2006 is the price fixing by Pest Control Association in 2007 (Case Number 09/KPPU-I/2007). The case was started as initiative by KPPU who found the existence of price fixing in fumigation services by Indonesia Pest Control Association. During the Preliminary

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<sup>4</sup> KPPU's Case Handling Procedure based on Commission Regulation Number 1 Year 2006 stipulated these stages; Complaint Clarification and Investigation, Presentation of Report, Preliminary Examination, Further Examination, Hearing Process of Commissioner Council, and Commission Decision.

Examination, the reported parties raised their willingness to change their behaviour. Thus, KPPU decided not to continue the case to Further Examination. To comply with the competition law, they agreed to perform several adjustments like, (i) to announce the cancellation of their price fixing in national newspaper; and (ii) not to further fix the price of their services. Following the commitment, KPPU supervise the implementation for 60 days and concluded that they complied to the commitment made, and therefore decided to close the case.

13. During 4 (four) years of the implementation of Commission Regulation Number 1 Year 2006, KPPU has issued 7 (seven) commitment decisions regarding the behavioral change. But then after 4 (four) years of its implementation, the commitment decision start to raise challenges. Most of the challenges came from the legal basis of this practice, and the issue of moral hazard that it may brings.

### **3. Challenges Faced by KPPU**

14. Commitment decision surely brings a lot of benefits. It creates simple and procedural efficiency. The Commission doesn't need to spend too much of their times on further examination when the businesses already commit to change their wrongdoing. It gives faster solution to the on-going problems, and immediately improves market condition and allows the Commission to reallocate their resources to other priorities.

15. However, it becomes a problem when the Indonesian competition law does not clearly stipulate the commitment decision in its article, which makes this practice, has an unclear legal basis. Since 2006 to the beginning of 2010, KPPU was only implementing this commitment decision based on Commission Regulation Number 1 Year 2006 on KPPU's Case Handling Procedure. Later on, in the middle of 2009, the Commission realized that the challenge of judicial review on their commitment decisions might not be something that they hoped for after all those years.

16. Especially when the legal community was protesting about the Commission of being a super body; who has the authority to receive complaint, to investigate the violation, to conduct the hearing process, to decide whether the violation is proven or not, and ultimately, to give sanctions on the reported parties.

17. Referring to all of those authorities, the Commission also has its concern on the moral hazard between the businesses and the Commission when settling their commitment to conclude a case. The Commission does not want to put their credibility at risk, when practicing commitment decision without a strong basis and a clear interpretation.

18. Afterward, KPPU made changes to the case handling procedure with an objective to improve its effectiveness and due process of law, and then, the revised version of case handling procedure under Commission Regulation Number 1 Year 2010 was issued. In the recent procedure, improvement was made in the aspect of transparency and the quality of substantiation. At the present time, a case could only be examined if there are at least two kinds of evidence (statements and documents), unlike the previous rules, which allowed the use of single evidence in the examination of case. In addition, every related parties and general public could attend the hearing process to follow the course of Commissioner Council examination and they should comply with the examination code of ethic. The cease and desist order is also included as one of the sanction in the Decision.

19. After being introduced in April 2010, the Commission Regulation Number 1 Year 2010 convinced each party (investigators and reported businesses) that they will be treated fairly by the Commissioner Council. Each party has the right to propose witnesses and experts to support their arguments. Adversarial systems that brought to this hearing, guarantees the decision making process by the Commissioner Council is distinguished from investigation process that was conducted by the Secretariat (Investigators).

20. The Commission Regulation Number 1 Year 2010 has a clear due process of law and a strong position, and it is shown from the rejection of Supreme Court to conduct judicial review on Commission Regulation Number 1 Year 2010, which was submitted by a group of lawyers.

#### **4. Conclusion**

21. Commitment decision has its own benefits and challenges in the implementation; however, it will be more advantageous to competition authority to have a clear legal basis in implementing such practice. As for Indonesia, the long walk might be start by the amendment of Law Number 5 Year 1999. Soon after the legal basis is clear, KPPU will still need a comprehensive guideline to prevent multiple interpretation and politicisation of this commitment decision. That way, the competition authority will gain maximum benefits on procedural economy and efficiency, immediate improvement of market, and increased legal certainty for businesses, and in the long run will contribute to robust investment in Indonesia.