

STRENGTHENING THE ROLE OF KPPU IN ASEAN ECONOMIC COMMUNITY: THE ISSUES AND CHALLENGES

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ASEAN has already agreed on the ASEAN Economic Blueprint (2007) as the Foundation for realizing the ASEAN Economic Community that one of the characteristics is the achievement of a Competitive Economic Region through the implementation of competition law and policy. Basically, competition policy and law business is necessary to be implemented in every country. Because by 2015, there will be free market flows. In the previous time, the trade transactions in goods or services are separate from 10 countries, namely Indonesia, Malaysia, Singapore, Thailand, the Philippines, Brunei Darussalam, Viet Nam, Cambodia, Laos, and Myanmar. But, by 2015, the trade transaction will be unified and integrate into a single market. This means that businessmen in Indonesia especially businessmen who would like to expense their business in other countries have to understand other countries policies. Indonesia as part of ASEAN, in performing the supervision of unfair competition exercised by the KPPU (*Komisi Pengawasan Persaingan Usaha*). Referring to law No. 5 of 1999 on Anti-monopoly and unfair competition, only KPPU that got the mandate to monitor and enforce the business activities that are not fair. KPPU already established since 1999. Yet, the role of KPPU is not optimal, in performing their authority and their role. Moreover, Indonesia has to protect their national interest through KPPU, that's why KPPU have to prepare themselves well. This paper would like to deal with the issue strengthening the role of KPPU in ASEAN Economic Community. Furthermore, the authors would discuss the issues and challenges in strengthening the role of KPPU in ASEAN era. As a result, *KPPU* as the state agency that supervises the unfair competition is very important. *KPPU* should be in one part of the strategy of the Government. KPPU is not only as a tool to protect the interest of the business company, to realize the fair competition. But also, the KPPU should be one of the instruments to win the "business competition", in an effort to protect the national interest of Indonesia.

Keyword(s): KPPU, ASEAN Economic Community, The Role, Issues and Challenges

I. Introduction

Regional cooperation amongst the ASEAN member states (AMSs) in recent years has been driven by their intention to establish the ASEAN Community by the year 2015. First announced in 2003, the ASEAN Community is to be underpinned by three main pillars, namely the ASEAN Economic Community (AEC), the ASEAN Security Community and the ASEAN Socio-Cultural Community.

ASEAN Economic Community (AEC) is aimed to accelerate the transformation of Southeast Asia region into a more stable, prosperous, and highly competitive area with equal distribution of economy development, reduced gap of social economy and poverty. The creation of AEC, which was then embodied in the blueprint, consists of free trade of goods and services, investment, asset, and mobility of skilled human resource in the service sector. In a nutshell, AEC eliminates most of the intra-ASEAN trade barriers, creates trade facilitation and policy harmonization programs. An effective AEC implementation ideally facilitates the efficient process for the production of goods or service beyond national borders regionally. (Dyah Ratih Sulistyastuti, 2014;155)

In the theory of international trade, competition will pressure higher than the domestic market conditions. Thus, for businessmen who want to go and win the global competition in the international world, efficiency and capability of innovation became the main capital. Efficiency and innovation is a competitive form of corporate behavior and the culture or applies the principles of a healthy business competition. (Tresna P. Sumardi, 2010;133)

Indonesia as a member of ASEAN, and as one country that enacted a competition law had been efforts play an active role in center of excellence in competition law development effort. In the perspective of competition, a consequence of the opening of the market due to the free flow of goods and services is the emergence of new competition (Masnur Tiurmaida Malau, 2014; 179). To oversee the implementation of law No. 5 of 1999 on Anti-Monopoly and Unfair Competition, Indonesia established a Commission.

This formation is based on article 34 of Law No. 5 of 1999 which instructs that the formation of the Organization, duties, and functions of the Commission are set through Presidential Decree. The Commission then formed based on Presidential Decree No. 75 in 1999 and was named the *Komisi Pengawasan Persaingan Usaha* or *KPPU* (Andi FahmiLubis et al, 2009; .311) This paper would like to deal with the issue strengthening the role of KPPU in ASEAN Economic Community. Furthermore, the authors would discuss the issues and challenges in strengthening the role of KPPU in ASEAN era.

III. Discussion

A KPPU and Business Competition in South East Asia

a. The ASEAN Economic Community

ASEAN countries have articulated their vision of regional economic integration in terms of the concept and goal of the AEC. The key characteristics of the AEC have been formally identified as 1) a single market and production base 2) a highly competitive economic region 3) a region of equitable economic development, and 4) a region fully integrated into the global economy.

Basically, Competition policy and law business is necessary to be implemented in every country. Because by 2015, there will be free market flows. In the previous time, the trade transactions in goods or services are separate from 10 countries, namely Indonesia, Malaysia, Singapore, Thailand, the Philippines, Brunei Darussalam, Viet Nam, Cambodia, Laos, and Myanmar. But, by 2015, the trade transaction will be unified and integrate into a single market. This means that businessmen in Indonesia especially businessmen who would like to expense their business in other countries have to understand other countries policies.

One of the important essentials for this free-market competition is the market makers in meeting the needs of consumers. In this competition, the venture is a process where the businessmen were forced into an efficient company by offering choices of products and services at lower prices. Competition only when there are

two or more businessmen who offer products and services to its customers in a market. To win the hearts of consumers, the businessmen trying to offer attractive products and services, both in terms of price, quality, and service. The combination of these three factors in order to win the competition and win the hearts of the consumers can be obtained through innovation, application of appropriate technologies, as well as the managerial ability to direct the resources of companies in winning the competition. If not, the businessmen will be expelled naturally from the market. (Fahmi Lubis et all, 2009; .311)

To run the fair market competition, then the national economic policy in developing countries should first provide a number of preconditions: that first of all it takes is a functioning market and realize the price mechanism. In such context, the other is the provision of market access as freely as possible and at the same time provide an incentive to increase the number of entrepreneurs nationwide.

One of the ways to eradicate the number of unfair competition and monopoly in Indonesia is through law No. 5 of 1999. The basis of Act No. 5 of 1999 as set forth in article 2 that: "businessmen in Indonesia in carrying out its business activities based on economic democracy by observing the balance between the interests of the businessmen and the public interest". The principle of economic democracy is the elucidation of article 33 Constitution and scope of understanding of economic democracy are meant in the past can be found in the explanation of Article 33 the 1945 Constitution.

As for the purpose of Act No. 5 of 1999 as set forth in section 3 is for:

- a. safeguarding the public interest and increase the efficiency of the national economy as one of the efforts to improve the people's welfare;
- b. embody a conducive business climate through the settings of the competition the same effort for big businessmen, businessmen of medium and small business offender;

- c. prevent monopolistic practices and/or unhealthy business competition posed by trade, and
- d. the creation of the effectiveness and efficiency of business activities

b. Strengthening the Role of KPPU in ASEAN Economic Community

On the other hand, to run the supervision. The body who has authority is KPPU or *Komisi Pengawasan Persaingan Usaha*, in terms of competition law, Indonesia is better than other countries. Because Indonesia already has their own competition law and who run the body have the authority to do it.

According to article 35 of Law No. 5 of 1999, the duties of the Commission shall include the following:

- a) assess agreements that may result in monopolistic practices and or unfair business competition as set forth in Article 4 up to and including Article 16;
- b) assess business activities and or actions of business actors which may cause monopolistic practices and or unfair business competition as stipulated in Article 17 up to and including Article 24;
- c) assess the existence or absence of the abuse of dominant position which may cause monopolistic practices and or unfair business competition as set forth in Article 25 up to and including Article 28;
- d) undertake actions in accordance with the Commission's authority as set forth in Article 36;
- e) provide advice and opinion concerning Government policies related to monopolistic practices and or unfair business competition;
- f) Prepare guidelines and or publications related to this Law;
- g) Submit periodic reports on the results of the Commission's work to the President and the People's Legislative Assembly.

According to Article 36 of Law No, 36 of 1999, the Commission's authorities shall include the following:

- a) Receive reports from the public and or business actors regarding allegations of the existence of monopolistic practices and or unfair business competition;
- b) conduct research concerning allegations of the existence of business activities and or actions of business actors which may cause monopolistic practices and or unfair business competition;
- c) conduct investigation and or examination of allegations of cases of monopolistic practices and or unfair business competition reported by the public or by business actors or discovered by the Commission as a result of its research;
- d) make conclusions regarding the results of its investigation and or examination as to whether or not there are any monopolistic practices and or unfair business competition;
- e) summon business actors alleged of having violated the provisions of this law;
- f) summon and present witnesses, expert witnesses, and any persons deemed to have knowledge of the violation of the provisions of this law;
- g) seek the assistance of investigators to present business actors, witnesses, expert witnesses, or any persons as intended in sub-articles e and f, who are not prepared to appear in response to the Commission's summons
- h) request the statement of Government institutions related to the investigation and or examination of business actors who have violated the provisions of this law;
- i) obtain, examine and or assess letters, documents or other instruments of evidence for the purpose of investigation and or examination;
- j) determine and stipulate the existence or non-existence of losses suffered by other business actors or society;
- k) notify the business actors alleged of having engaged in monopolistic practices and or unfair business competition about the Commission's decisions;
- l) Impose administrative sanctions on business actors violating the provisions of this Law.

Competition Policy in the ASEAN Economic Community Competition is clearly an important aspect of ASEAN's vision of regional economic integration. It is integral to all four characteristics of the AEC. The formation of a single market and production base is premised upon the notion of competition across markets in the ASEAN countries. The economic competitiveness of the ASEAN region and its integration into the global economy requires that its member countries are able to compete globally. The competition also ensures that the benefits from regional integration are equitably distributed between and amongst consumers and producers in the region as well as amongst ASEAN-member countries. In this regard, competition policy, defined as any governmental policy that promotes competition in markets, is an important policy in the realization of the AEC.

Amongst AMSs with competition law, Indonesia can claim to have the most mature competition regime in terms of enforcement experience. KPPU, the enforcement agency, has handled a total of 249 cases during the period 2000-2010. And it is increasing every year, until 2015.

KPPU as the state agency that supervises the unfair competition has very important role. *KPPU* should be in one part of the strategy of the Government. *KPPU* is not only as a tool to protect the interest of the business company, to realize the fair competition. But also, the *KPPU* should be one of the instruments to win the "business competition", in an effort to protect the national interest of Indonesia.

B. The Issues and the Challenges in Strengthening the Role of KPPU in Asean Economic Community Era

ASEAN Member States (AMSs) have committed in the ASEAN Economic Community (AEC) Blueprint, to endeavor to introduce national competition policy and law (CPL) by 2015. In August 2007, the ASEAN Economic Ministers (AEM) endorsed the establishment of The ASEAN Experts Group on Competition (AEGC) as a regional forum to discuss and cooperate on CPL. The AEGC has focused on strengthening competition-related policy capabilities and best practices among AMSs, developing the "ASEAN Regional Guidelines on Competition Policy" and

compiling a "Handbook on Competition Policy and Law in ASEAN for Business". The efforts made by the AEGC must also be followed by the KPPU to make efforts to strengthen its role in this AEC era. There are several issues and challenge in an effort to strengthen the role of the KPPU in this AEC era.

The issues are classified into

1 Domestic Issues namely the institution, the legislation, the law enforcement

a. The institution

KPPU is super body agency because as an independent institution established under Law No. 5 In 1999, the KPPU has the authority investigate, examine, hear and decide cases of alleged monopolistic practices and unfair business competition. To conduct the authority in the investigation, KPPU has no authority to seize documents which may be used as evidence, to expropriate it, it must cooperate with the police. (Sukarmi, 2010;14). KPPU investigators often have difficulty in presenting both parties during the preliminary investigation and during the follow-up examination. It should be noted that the KPPU should not decide the case in absentia, in other words, all litigants must be presented in the proceedings process. The role of the police in the enforcement of competition law is also included when businesses actor refused to be examined, provide information required in an investigation or examination, or inhibit the process investigation or examination. The rejection of the investigation and the examination conducted by the KPPU can be categorized as a crime (See also article 261 of the Criminal Code). This practice seems to be not as easy as it is written in the law. Police can not perform their duties in cooperation with Commission beforehand, without contained in the form of MoU. The decision of KPPU only imposes the administrative sanction. Even toward the decision of the commission are not executed, it only can be sufficient for the preliminary evidence for the police investigation.

Besides, strengthening of the Commission into something absolute, given as a permanent state institution, the Commission need support in the strengthening of the real. The ability of the secretariat and the human resources committee of this competition must be able to offset the human resource capacity of business organizations litigants in the Commission, including the consultants hired by litigants.

b. The Legislation

Law No. 5 of 1999 does not provide a clear status on the Commission, This step was taken based on the report, that many of the Commission's decision are economically able to create many efficiencies canceled. Decision of the Commission were defeated in both the District Court and the Supreme Court is not because of the results of the investigation and economic arguments or legal, but due to weak of status and Law (Hendrawan Supratikno,2013,12), also did not strengthen the institutional Commission in undertaking the seizure of documents, collecting evidence in performing its duties investigations (M.Nawir Messi, 2013;17),

c. The Law Enforcement

Lack of integration of law enforcement officials to enforce competition law. In the enforcement of competition policy, so far the Commission is the sole perpetrator. Often in the face of the case both in the calling of witnesses and the enforcement of the decision of the case which is legally binding, the Commission can not do much. Synergies with the other law enforcer especially the Police is seen as a step that is expected to improve compliance with the law (Tadjuddin Noer Said, 2010,116)

2. International issue

A policy of competition law is different in each country. If this condition is maintained in the long term, it is possible, potentially causing problems for each ASEAN country. (Fahmi Radhi, 2013;15). The countries have the fair competition law are Indonesia dan Thailand. Indonesia and Thailand enacted their national competition laws in 1999. Indonesia's decision to implement competition law was influenced by IMF assistance program (Pangestu, *et al.*, 2002;205-224). Thailand's decision was purely internally driven and was facilitated by the passage of the country's new constitution in 1997 (Nikomborirak, 2006). Singapore and Viet Nam's decisions to implement competition laws in 2005. In Singapore's case, the Competition Act was enacted due to legal obligations set out in the U.S.-Singapore Free Trade Agreement (2003) (Ong, 2006;269-284). The WTO accession was the main driver to Viet Nam's implementation of its competition law. The Malaysian government started drafting competition law as early as 1991 (Lee, 2005). Prior to the present law, two entirely different set of draft competition laws were completed (and subsequently abandoned). Malaysia finally implemented its competition law in 2010. The Malaysian government's decision to implement competition law was not influenced by the AEC Blueprint.

Of the five remaining countries that have not implemented competition laws, three countries, namely, Cambodia, Lao PDR and the Philippines have draft competition laws either at the ministerial level (Cambodia and Lao PDR) or legislatures (the Philippines). In the case of the Philippines, the Executive Order No.45 dated 9 June 2011 designated the Office for Competition, Department of Justice (OFC) as the competition authority. Pending the enactment of a national competition law, the OFC will draw from existing legislations that have competition-related provisions. In this regard, the agency will work in partnership with different government agencies which implement/enforce competition law, or regulate/monitor anti-competitive behavior, at the sectoral level on the basis of competition-related laws within their purview. Despite these recent developments, the Philippines is not counted as having a comprehensive national competition law – as two different draft legislations are currently be considered in the country's

parliament. Two countries, Brunei and Myanmar have yet to draft their competition laws. (Cassey Lee and Yoshi Fumikufunaga,2013;7-9)

Besides, another international issue is the level of progress of each country. This difference is just a matter of considerable real interfere with the harmonization competition policy. Nawir Messi illustrates that there are three layers of ASEAN member countries. Lower layers are Laos, Cambodia, Myanmar. Middle layers are Indonesia, Thailand, Philippines, and in the upper layers are Brunei, Singapore, and Malaysia. (M.Nawir Messi, 2013;8)

The Challenges are grouped into,

1 Internal Challenges

Giving more authority to the KPPU and give a clearance status of KPPU and strengthens the role of KPPU.

2.External Challenges namely the legislation, the law enforcement, international challenges

a The Legislation

To amend Law No 5 of 1999, a new draft law is being prepared. It will mainly reform the procedure (e.g. providing for an extended investigation timeframe and increased investigative powers) and the institutional capacity of the authority (functions of the KPPU).(NN, 2013;17) as the State Commission which has the authority to supervise and enforce competition law in Indonesia.This is necessary for a view of competition law is a relatively new thing in Indonesia. It takes more understanding, by another law enforcer to obtain one perception with the Commission, especially in the process of business actors objection against the Commission's Decision (KPPU, 2013;3).

b. The law enforcement

It needs to integrate Competition Justice System among Law enforcer. To integrate competition, law enforcement is done through various means.

One of them through mutual understanding among law enforcer in the form of signing a Memorandum of Understanding (MoU). MoU signing efforts are intended to enhance the enforcement of the criminal law in Integrated Competition Justice System. According to the Chairman of the KPPU M Nasir Messi, KPPU so far has socialized Integrated Competition Justice System intensively with the judges both at national and provincial levels. Coordination is also done by the Commission with the Supreme Court, in improving the understanding of Judges of the substance in the Competition Law. So far the cooperation with the Supreme Court implemented through competition law workshop for judges.(KPPU,2013;20)

KPPU has an agreement of understanding with the Police in the form of a Memorandum of Understanding (MoU) No. 002 / MOU / K / X / 2010 dated October 8, 2010. The MoU which includes the scope of cooperation is the development of economic intelligence and training, operational assistance to the Commission, such as presenting the parties and the assignment of investigators and police investigators to the Commission, and information exchange. Post- signing of the Memorandum of Understanding between the Commission and the Police, they coordinate to compose System Operating Procedure (SOP) that is the reference technical cooperation of the two law enforcer. The SOP No. 002 / SJ / NKV / 2011 which contains technical references related development, operational, information exchange procedures related to alleged criminal acts and unfair competition, as well as the evaluation and coordination at central and local levels. After intensive discussions over several months, the SOP was finally ratified on May 5, 2010.

In addition to the police, the Commission also has a MoU with the KPK on Cooperation in Combating Corruption and Monopoly and Unfair Competition by No. 001 / MOU / K / II / 2006 dated February 6, 2006.

And the latter the KPPU cooperated with the Attorney General. It was marked by the signing of a Memorandum of Understanding on cooperation and coordination in law enforcement prohibition of monopolistic practices and unfair business competition. Signing held at the House of the Attorney General carried out by the KPPU Chairman, M. Nawir Messi and Attorney General, Basrief Arief (Ahmad Junaidi, 2013,23).

Integrating competition law enforcement is also done through forum seminar among the law enforcer. The goal is that each institution providing information, views and basic thoughts about the offense anti-unfair competition. (KPPU, 2013,7-8)

C International challenges

ASEAN Ministers economy, support the establishment of ASEAN Experts Group on Competition (AEGC) as a regional forum for discussion and cooperation in Justice and Competition Policy. Meeting AEGC first performed in 2008, and agreed that 5 (five) years in the future to focus on capacity building and best practices on policies competition in the ASEAN member countries, develop the ASEAN Regional Guidelines on Competition Policy, compiled Handbook on Competition Policy and Law in ASEAN for Business. Guideline and the Handbook have been launched during the 42nd AEM Meeting in August 2010. ASEAN Competition Conference (ACC) which was held in Bali, November 15-16, 2011 and aims to achieve a regional reception the importance of competition policy from various stakeholders, for example, government agencies, members parliament, businessmen, politicians, and academia. Acceptance and the support will be required Member states to encourage and accelerate the adoption and strengthening policies and laws competition (CPL) in the region ASEAN. ASEAN member countries have done business through ASEAN Economic Community Blueprint which has set a target to introduce

policies competition in the ten ASEAN countries in 2015. In addition, the formation of ASEAN Expert Group on Competition (AEGC) by the ASEAN Economic Minister in 2007 to step important in the process of harmonization regional competition policy.

ASEAN evolved into a competitive single market and investment area of internationally by utilizing regional competition law and policy. By harmonizing the various laws regulating competition is different in each country can reduce the problems that arise in doing business in the ASEAN single market. Didin S. Damanhuri, also agrees business competition law enforcement be the key in regulating the entry into force of the free market economy (Didin S Damanhuri, 2011;12), as applicable in the Europe region, countries in Europe have laws or regulations regarding the Business Competition universally applicable in the EU or Bring up the " Model Law " of Competition Law compatible in ASEANASEAN. Indonesia could also propose a treaty related international business competition issues, with the hope that ASEAN countries under international agreements this, have an obligation to translating the existing provisions in the agreement, into domestic law products (Hikmahanto Juwana,2010;11).

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Regulations

1945 Constitution

Law No. 5 of 1999 concerning The Prohibition of Monopolistic Practices and Unfair Business Competition