

Investigating in Indonesia

The Indonesian Competition Authority's search for more teeth

by **Dyah Paramita***

In February 2017, the Indonesian competition authority (the KPPU) finally decided its controversial cartel case concerning two Indonesian subsidiaries of Japanese motorcycle manufacturers. Both companies were found guilty of price-fixing in the market of 110–125cc automatic-transmission scooter products.

Known as the “automatic scooter cartel”, the investigation first came to media attention in early 2015, and continued with a series of investigations and hearings. Later in the process, one of the defendants objected to the validity of emails used by the KPPU as the evidence of the cartel, as it was allegedly collected during a visit to one of the defendants’ premises where an impromptu interview was held, with no lawyers present.

With the official copy of the decision finally made available, both defendants have expressed their intention to appeal, thereby calling into question the KPPU’s authority to conduct dawn raids.

Stretching its powers

In south-east Asia, the KPPU is regarded as a very active authority, with approximately 20 cases decided annually. It is also one of the first competition authorities ever established in the region. Oddly, it does not have any authority to conduct dawn raids, searches and evidence forfeiture, unlike other competition authorities around the world.

In the automatic scooter cartel investigation, the KPPU arguably exceeded its powers by conducting a visit where impromptu interview and document requests occurred. KPPU officials visiting the defendant’s premises were equipped with proper documentation, although the defendants dispute its validity. The visit resulted in the finding of internal email correspondence within the organisation of one of the defendants relating to a price co-ordination discussion between the directors of the defendants at a golf course. According to one defendant, there exists another email – also internal correspondence – which rejects the price co-ordination initiative and should be sufficient evidence that such price co-ordination never happened. The defendants argued that the KPPU turned a blind eye towards any evidence showing the absence of price co-ordination or the existence of fierce competition in the motorcycle industry.

Proposal to amend the law

In 2015, the KPPU launched a mission statement to eradicate cartels, and followed this with a number of well-publicised cartel investigations in the telecommunications, food, automotive and aviation industries. In these cases, the KPPU complained about their limited investigation powers, which they claimed prevented them from obtaining sufficient evidence to secure infringement decisions.

There are current discussions – at the level of the House of Representatives, the Indonesian legislature – to amend Law No 5 of 1999 on the Prohibition of Monopolistic and Unfair Business Practices. One of the most intensely debated sections

is whether the KPPU should be entrusted with the power to conduct dawn raids, searches and evidence forfeiture.

The institutional status of the KPPU as an auxiliary organ of the government has created challenges for its officials – who are not considered civil servants – as they cannot be classified as *penyidik* (detectives). Currently, only specifically trained *penyidik* from the police, attorney general and state apparatus can conduct dawn raids, search and document forfeiture.

This new proposal has divided the House of Representatives. The main argument against it is that it will give the KPPU extraordinarily wide powers of investigation – and this is prone to abuse as there is no governmental function supervising the KPPU as an auxiliary organ to the government. Moreover, as the KPPU investigators do not receive formal *penyidik* training, they may make procedural mistakes.

As seen from media coverage, the current preference is to grant the KPPU the power to inspect, and to prepare the underlying legal framework for this. In the proposed amendment, the KPPU will become a governmental institution under the executive. This will give its officials the status of state apparatus. Then, whether to entrust these authorities and remove the KPPU’s decision-making power (to be transferred instead to the court), to bring in trained *penyidik* from other authorities to be posted in the KPPU as investigators, or to introduce an internal control mechanism are some of the proposed methods of introducing a balance of power.

Trends and developments

Being initially known as a tender conspiracy watchdog, the KPPU has shown its willingness to diversify its case base in recent years. Despite limitations to its authority, the KPPU has developed considerably as a law enforcer and is able to maintain its aggressive image. The KPPU has equipped itself with an effective market monitoring team, which screens the press and other sources for possible antitrust violations that could be detrimental to consumer welfare.

The KPPU has also gained more confidence in enforcing failure to file cases since its first decision finding a violation of merger control rules in 2014. This includes an entirely offshore acquisition between two South Korean entities in 2016, whereby its late notification to the KPPU resulted in a fine of IDR2bn (approximately US\$150,000).

Critics have highlighted that more advocacy and awareness-raising activities are needed to build a more compliant business culture. Various initiatives are blossoming. For example, the launch of the Indonesian Competition Lawyers Association in March 2017 and the Indonesian Antitrust/Competition Academics Forum in April 2017 has invited synergy and co-operation between practitioners and academics to help shape the proposed amendments to Indonesian competition law, which are due to be issued before the end of 2017.

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