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**Agenda Item 3c. Enhancing international cooperation in the  
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procedures**

Contribution by  
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# Enhancing International Cooperation in the Investigation of Cross-border Competition Cases: *Tools and Procedures*

Indonesia's Contribution to the 16th IGE on Competition Law and Policy

## Introduction

1. The number of countries engaging competition laws has increased dramatically and businesspersons operating in the global market find themselves subject to complex national and international legislation. Differences in the implementation of competition law in each country have become an obstacle to business persons involved in cross-border business. An example is the implementation of the legal systems in the United States, the European Union, and Asia. Implementation of the three legal systems in the region differs, making it difficult to engage in international cooperation in competition law and policy, particularly cross-border cooperation. To overcome these problems, cooperation in the investigation of anti-competitive cases is very important.

## Cooperation in Competition

2. Indonesia has so far officially cooperated with Japan, Korea and Mongolia, Australia, and New Zealand on enforcing competition law. Cooperation with Japan in the framework of economic relationship is under the Indonesia–Japan Economic Partnership Agreement (IJEPA). This agreement was implemented in August 2007 and includes a special section on competition policy, particularly concerning notification of law enforcement (*KPPU has made notification of law enforcement for decision on cartel in scooter matic by two multinational companies (Yamaha and Honda)-2017* and vice versa, *JFTC has made notification to KPPU for CTR Case*, information exchange, and technical assistance. This partnership agreement helps the JFTC and the KPPU to enforce competition law in both countries.

3. In 2014 the KPPU also established bilateral cooperation with the Korea Fair Trade Commission (KFTC). This cooperation constitutes a follow-up to the bilateral meeting between the two leaders of the two institutions in Jakarta in May 2009. The cooperation aims to contribute to the effective implementation of the competition laws of each party by promoting cooperation in the field of competition law and policy between Indonesia and Korea. Cooperation arrangement between KPPU and KFTC, November 2013, Scope and content of cooperation, namely:

- a. Notification of law enforcement against anti-competitive activities that may have an effect on any substantial interest of the other party; For example, *KPPU sent notification of law enforcement for delay on merger notification by Toray Advanced, Material Korea Inc (2016), and vice versa KFTC sent notification about APP Paper Case and LG International Case.*
- b. Regular joint dialogue between the parties to share information on recent enforcement efforts and key issues regarding each party's competition laws and/or economic and policy issues of mutual interest;
- c. Direct communication in exchanging available information on major issues of mutual interest, including sectoral study, experiences and activities in competition law enforcement, new institutional and regulatory development, and multilateral competition–related issues; and
- d. Technical assistance to enhance each competition authority's competition law and policy enforcement capacity through exchange of personnel, secondment of experts, capacity building programmes, support for competition advocacy and public outreach, contact to

certain international aid agencies, research collaboration and other forms mutually agreed upon by the parties.

4. Not too long ago, on 5 May 2017, KPPU also established cooperation agreement with The Authority for Competition and Consumer Protection (AFCCP) Mongolia. Two agencies agreed to built capacity of competition agencies through technical assistance programs, data exchanges, and sharing knowledge.

5. Cooperation with Australia (ACCC) and New Zealand (NZ ComComm) in the framework of economic relationship is under the ASEAN-Australia-New Zealand Free Trade Agreement. This agreement was implemented in 2009 and includes a special section on competition policy, in the field of competition, including exchange of experience regarding the promotion and enforcement of competition law and policy; exchange of publicly available information about competition law and policy; exchange of official for training purposes; exchange of consultant and expert on competition law and policy; participation of officials as lecturers, consultants, or participating at training courses on competition law and policy; participation of officials in advocacy programme; and other related activities following the introduction of a competition law in a Party.

### **Outcome and Challenge of International Cooperation**

6. Bilateral agreements have proven to be the most successful for several reasons. First, it is easier for two parties to reach agreement than for many parties to do so. Second, a bilateral agreement can address issues that are important to the two parties concerned. Third, a proliferation of bilateral agreements will create a network of such agreements and could pave the way for a plurilateral or multilateral agreement through the accumulation of experience in international cooperation in competition law matters, thereby creating a spirit of cooperation among officials of enforcement agencies. Bilateral agreement is definitely very important in enforcing the competition law. This partnership agreement facilitates the enforcement of the competition law by authorities in both countries.

7. KPPU and other Indonesian institution have benefited from a variety of bilateral and multilateral technical assistance programme. Capacity building of KPPU technical staff has been facilitated by bilateral cooperation with the German Bundeskartellamt, United States Federal Trade Commission, Japan Fair Trade Commission, Chinese Taipei Fair Trade Commission, Australia Competition and Consumer Commission and UNCTAD. These institution have also facilitated training programs for academics and judges, among others. Multilateral assistance has included KPPU participation in International Competition Network (ICN) programme to enhance competition policies in young jurisdiction, in partnership with JFTC. Moreover, KPPU has benefited in-depth evaluations such as those by JICA and OECD. KPPU was an observer at the OECD Competition Committee for several period. KPPU is a member off several international organization concerned with competition, namely the ICN, the Asean Expert Group on Competition, and the East Asia Competition Forum.

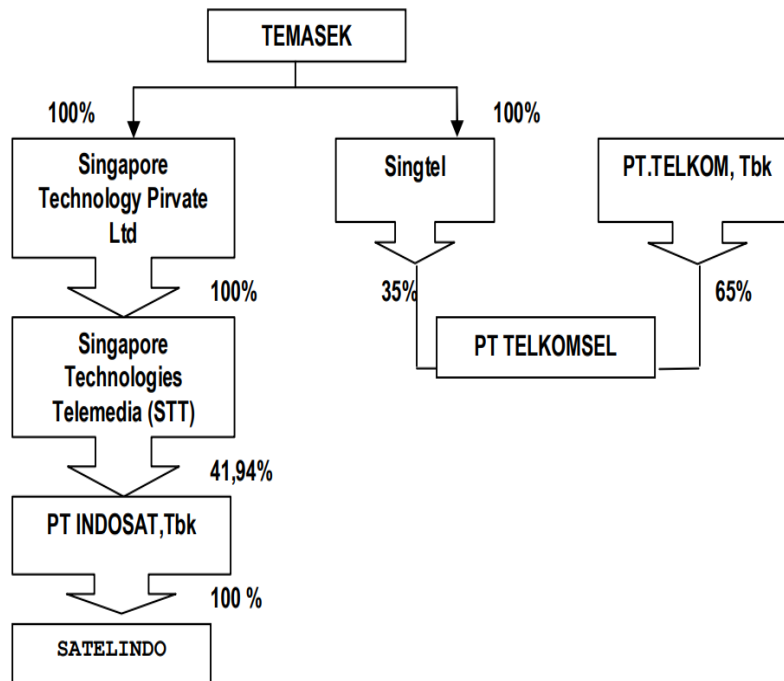
8. Investigation of cross-border cases became one of challenges in Komisi Pengawas Persaingan Usaha (KPPU). KPPU still facing the challenges in investigation of cross border competition cases due to several reasons as follows:

a. Law Number 5 year 1999 has no specific provision governing cross-border competition issues. Article 1 (5) of the Indonesian Competition Law defines a business person as any individual or business entity, either incorporated or not incorporated as a legal entity, established and domiciled or conducting activities within the jurisdiction of the state of the Republic of Indonesia, either individually or jointly based on agreement, conducting various

- business activities in the field of economy;
- b. Exclusion article in Law Number 5 year 1999, especially exclusion in export agreement which is not intrusive to domestic need or market supply. As for anti-competitive practices with international dimensions can be known on three things. First, anti-competitive practices with their influence on some markets primarily by international cartels. Secondly, anti-competitive practices affecting market access include the import cartels, the unfair vertical agreement of distribution practices. Third, anti-competition whose effect is found on foreign markets which for example is export cartel;
  - c. Lack of international definition of confidential information. There is still no definite rules related to confidential information, like its definition or protection of such confidential information;
  - d. Absence of waivers of confidentiality. Every country still protect the confidentiality of information, while there is legal framework on waiver in Indonesian competition law;
  - e. Limitation in admissibility of information. There is still no definite rules related to admissibility of information;
  - f. Still has no authority to leniency programme by the existing competition law. The leniency programme has proven to be very successful in fighting cartels. The incentives are obtain in the form of reduction and even elimination of penalties entirely. With this programme, definitely cartel member compete to get immunity elimination of fines. Indonesia competition law does not have a leniency programme yet; and,
  - g. Lack of mutual understanding, trust and interaction between competition authorities. The existing competition authority in the world has more than 104 agencies and 92 jurisdictions (ICN Factsheet and Key Messages, April 2009) and there is a tendency to continue to grow. The growing presence of business competition agencies has indicated that the issue of business competition is widespread and important to follow up and that cases of cross-border business competition caused by globalization increasingly need to be coordinated.

### **Case Example**

9. An example of Indonesian Competition Law having been applied to a company established and conducting business outside Indonesian territory is case No. 07/KPPU-L/2007 (Temasek case-cross ownership). The reported party was a company resides in Singapore – Singapore Temasek Holdings Pte. Ltd., Singapore Technologies Telemedia Pte. Ltd., STT Communications Ltd., Asia Mobile Holding Company Pte. Ltd., Asia Mobile Holdings Pte. Ltd., Indonesia Communications Limited., Indonesia Communications Pte. Ltd., Singapore Telecommunications Ltd., Singapore Telecom Mobile Pte. Ltd (Temasek Group). KPPU was authorised to conduct an examination of the Temasek Group, which is based on the principle of 'single economic entity doctrine'. Said doctrine states that the parent company's relationship with its subsidiaries means that the subsidiaries are not independent in determining the policy direction of the company. The implication of this principle is that the business person can be liable for acts committed by other business persons in the economic union, even though only one businessperson operates outside the jurisdiction of Indonesia; so competition law can be extraterritorial.



Picture 1 : Cross Ownership In Temasek Case

10. KPPU has been trying to carry out its duties and functions and use its powers in an optimal fashion. It has issued 302 decisions, with many of the cases receiving public attention, such as the Temasek Case, the Cooking Oil Cartel Case, and the SMS Cartel case. The KPPU has also provided 142 opinions and advices to the government during 2000–2014. Their impact on several sectors, such as telecommunications and transportation, has been positive. However, the Indonesian Competition Law contains some loopholes, both in terms of substance and procedures, which are particularly apparent in the enforcement of the law. This has created difficulties in practice, which would be best resolved by amending the competition law.

### Recommendation for Better International Cooperation

11. The urgency of globalization has led to business competition for both domestic and overseas business people who are not impossible to do cross-border business. With the urgency and the development of the world, it is essential if there is a need for cross-border coordination on the issue of business competition. In order to have better international cooperation in competition, countries need to have the following suggestions and recommendations. Things to fix before engaging international joint investigation in Cross-Border competition cases may includes :

12. **Needs the similarity in legal platform between participants countries.** The diversity of traditions in the implementation of law in each country in the world has become an obstacle for business actors involved in cases of anti-business competition across borders. The tradition of organizing law in a diverse world can be grouped into three main types, namely US (America), EU (European Union), and Asia. The implementation of the legal system in these three regions is not the same and hence it becomes difficult to conduct international cooperation in business competition law and policy, especially in coordinating across borders

13. **Should be legally exempted from any charges of other law in the participant**

**countries.** In general it can be said that the handling or cooperation of investigation of anti-competitive business case is not enough to be done only with 1 or 2 jurisdictions. The more jurisdictions that can be embraced to cooperate with, for example, the level of investigation or cooperation in terms of formulating the compensation procedure, the better it will be than just a handful of jurisdictions. Will certainly be much more effective and efficient if cross border coordination on business competition is done with many parties to facilitate the handling of the case and also of course to conduct fair business.

**14. Similarity in mind perspective to handle the arrangement.** A similarity or convergence in dealing with cases involving multiple jurisdictions is necessary, including in handling cases of anti-business competition. If there is no similarity it will certainly be a challenge in international cooperation on competition law and policy.

## **Conclusion**

15. On July 2009 in Geneva, UNCTAD has stated on peer review session titled implementation of Indonesian law and policy that KPPU is the most active competition authority in South East Asia and becoming role model how a young and dynamic competition authority can be a model for other countries. Various results and achievements show that international recognition of KPPU is very satisfactory. This indicator of international relations and cooperation achievement shows a positive value, so it can be said that the institution has been on the right path in communicating its achievements and position to the international world. In the end, regardless of the form of cooperation among the competition institutions, it can certainly be seen as a link for improving the performance of KPPU. KPPU continues to look for the right formula to collaborate with competition authorities from several countries. Furthermore, cooperation is not only limited to the implementation of discussion forums but also in the broader scope includes cooperation in the form of investigation of cross-border competition cases that continue to be developed positively over time.

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