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Challenges of Indonesian Competition Law and Some Suggestions for Improvement --From the Japanese Experiences--

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Contents

Ⅰ Introduction

Indonesia entered a circle of competition law countries in 1999. In March of the year, Law of the Republic of Indonesia Number 5 year 1999 (Indonesian competition law) was enacted. The enforcement agency, the Commission on Supervision of Business Competition (hereafter referred to as " KPPU ") has been in full force effort. It has encountered with many difficulties. One of the difficulties seems to lie in the some provisions of the competition law. (1)

In this article, I would like to show some suggestions for improvement of Indonesian Competition Law (hereafter sometimes refer to as " ICL ") based on the enforcement experiences of Japan

Ⅱ. The Features of Indonesian Competition Law

The features of Indonesian Competition Law are as follows.

(1) Many specific provisions on prohibited agreements

In total, 12 articles (2) prohibit 16 specific types of agreements including horizontal ones and vertical ones (3). Among them, 7 types such as horizontal price fixing agreement are provided for as per se illegal, and 9 types such as minimum resale price maintenance agreement as rule of reason(4).

(2) Rather complicated definition of “monopolistic practices”

(3) Amalgamation of cartel and abuse of market dominance in monopolistic practices

(4) Inclusion of “ unfair business competition ” in one of the elements of monopolistic practices

(5) Rather simple definition of “ unfair business competition”
I will analyze these features in Chapter Ⅳ.

(6) Deeming provisions based on market shares

Two thresholds are adopted : over 50% and over 75%.
The over 50% market share threshold is used on production or marketing control (art.17(2)c.), purchase control (Art.18 (2) and dominant position (Art.25(2)a.). The over 75 % market share threshold is used on production

or marketing joint control agreement (Art.4(2)), joint purchase control agreement (Art.13 (2)) and dominant position (Art.25(2)b.).

(7) Per Se Illegal provisions and Rule of Reason provisions

Eight articles are Per Se Illegal provisions which prohibit 11 types of activities outright such as price fixing agreement(5). Eighteen articles are Rule of Reason provisions which regulate 20 types of activities such as market division agreement and predatory pricing(6).

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(8) Independent Enforcement Agency, KPPU

KPPU is the sole enforcement agency of Indonesian competition law and policy. It is a so called "independent administrative commission". It is free from the government and other party's influence and authority and is responsible to the president.(art.30) It consists of a chairperson , a deputy chairperson and not less than 7 other members. All of them are appointed and dismissed by the President upon the approval of the Peoples Legislative Assembly. The term of office of any member is 5 years.(art.31) The Commission is assisted by a secretariat.(art.34) One of the causes for the termination of the membership is " dismissal ". (art.33 f)

The President has the power to appoint and dismiss all the members of KPPU, including a chairperson and a deputy chairperson. Therefore, KPPU may not be completely free from the influence of the President.

KPPU has amalgamation of powers, conducting investigation, evaluating alleged violation, issuing decisions , imposing administrative sanctions and providing advice and opinion on government policies related to anti competitive conducts. (art.35, 36 and 47)

(9) Broad Exemption provisions (art.5(2) and 50 a. and b.)

(10) Very strict procedural time constraints on KPPU (art. 43 (1) and (2))and courts (art.45 (2) and (4))
I will treat these features in Chapter Ⅳ.

Ⅲ The Features of Japanese Competition Law

1. Logical Consistency while keeping Elasticity

(1) Unifying Concept : Free and Fair Competition

Article 1 of Japanese Competition Law stipulates as its purposes the items in a complicated form, which has been interpreted as follows :

This law aims:

Prohibition of anti-competitive conducts, thereby
Promotion of free and fair competition, thereby
Full exercise of business persons' creative initiatives, thereby
Assurance of general consumers' interest and Promotion of democratic and wholesome development of the national economy.

Here we can find the unifying concept : Free and Fair Competition.

(2) Two Effect Standards of Prohibition

Japanese competition law stipulates two effect standards which set the thresholds on degree of anticompetitive effect of a violation. Most of the violations should clear such effect standards. They are substantial restraint of competition in any particular field of trade (contrary to the public interest) and impediment of fair competition.

a. Substantial Restraint of Competition in any particular field of trade(contrary to public interest)

This effect standard is adopted on cartels (unreasonable restraint of trade), abuse of market dominance (Private Monopolization), part of prohibited conducts of a trade association and tight combinations of companies(7). Prevailing academic theory and court judgment has interpreted the standard as meaning "formation, maintenance and enhancement of market control power" ,where market control power is such power as can operate the level of prices, volumes, quality, etc. in a market or an industry somewhat freely at the will of an entrepreneur or a group of entrepreneurs(8).

b. Impediment of Fair Competition

The effect standard, Impediment of Fair Competition (tendency to impede fair competition) is adopted on unfair trade practices. (art. 2(9)).
According to the prevailing theory, there are three types of impediment of fair competition: ① lessening of free competition, ② unfairness of competition methods, and ③ impediment of free competition foundations.
The degree of suppression of competition under this concept is interpreted to be lower than that under substantial restraint of competition.(9)

By adopting these two effect standards , Japanese competition law has very useful tools to regulate anticompetitive conducts effectively.

2. Enriched Regulation of Unfair Trade Practices

(1) Regulatory Scheme of Unfair Trade Practices

The regulatory scheme of unfair trade practices in the JCL is rather complicated, making the explanation and understanding of it rather difficult.(see article 2(9))

(a) Framework setting by the provisions of the law

First of all, JCL sets 6 broad patterns of conducts as a framework of unfair trade practices. They are : ①unjust discrimination, ②unjust pricing,
③ unjust customer inducement and transaction coercion, ④ unjust binding terms dealing, ⑤abuse of trade dominance, and ⑥unjust trade hindrance and internal disturbance of a company

(b) impediment of fair competition

Next, JCL establishes impediment of fair competition (tendency to impede fair competition) as an effect standard (the degree of anticompetitive effect)

(c) Designation by Fair Trade commission (JFTC)

Lastly. the law provides that unfair trade practices shall be such conducts as Fair trade commission (hereafter sometimes refer to as "JFTC") designates as unfair trade practices out of the conducts which meet above two requirements.

Therefore, what are unfair trade practices are determined by JFTC's designation.

(2) Designations of Unfair Trade Practices by JFTC Notification
JFTC designates unfair trade practices by its notifications.

There are two types of designation. One is general designation. Another is specific designations. They are different in the area of application and ways of designation. General designation has general applicability and abstract wording. Specific designations have limited applicability and more clear cut wording. As of January 2006, one general designation and 7 specific designations has been notified(10).

(3) Enactment of Special Laws

In order to regulate unfair trade practices effectively in a specific area, two special laws have been enacted. One is Subcontract Law and another is Premiums and Representations Law.

(4) Guidelines by JFTC

The regulation of unfair trade practice needs very soft and delicate touch, causing it very obscure and difficult to know what conducts are prohibited. in practice. In order to increase transparency and promote self compliance, JFTC has issued 13 guidelines on unfair trade practices (11).

3. Regulation of abuse of Trade Dominance

The regulation of " trade dominance" abuse is unique in the world.
Trade dominance is different from market dominance. Trade dominance is where one transacting party is dominant over other transacting party., while market dominance is where one or a group of entrepreneurs is dominating over a relevant market.

The economic justification for regulating trade dominance abuses may be found in the theory of so called “hold up” or “ locked in” .situation such as

where one transacting party has invested a lot of money in a facility to cope with a specific transaction which can't be converted to other transactions without losing much money. Therefore, he strongly hopes to continue the transaction. Under such hold up or locked in situation, the abuses may tend to happen , making the transaction not socially optimal. Trade dominance situation is found in a continuous trade relationship such as subcontract, supplying goods to a large retailer, newspaper publisher v. newspaper retail distributor.

Abuse of trade dominance is one of the patterns designated as unfair trade practices in General Designation. Several specific designations(12) and Subcontract Law is specialized in the regulation of trade dominance abuse.

4. Independent Enforcement agency

Fair Trade Commission (JFTC) is the sole enforcement agency of Japanese competition law. It is a perfectly independent administrative commission. It consists of a chairperson and four commissioners. Their terms of office is five years. All of them are appointed by a prime minister with the assent of the Diet. JFTC has a strong independence of functions. Even a Prime Minister can't instruct JFTC. It has also heavy protection of status.
(13)

JFTC is endowed with amalgamation of powers. It has Investigative power, Adjudicative power, Enactment power, Policy making power, Advocacy power and Research power on competition law and policy(14). The amalgamation of investigative power and adjudicative power is the fundamental source of criticism against JFTC especially from big businesses. Such amalgamation of powers doesn't violate the due process ?

General Secretariat is attached to JFTC.(15) It is the source of expertise and efficiency in competition policy. The number of personnel is 695 (as of January 2005).

5. Enriched Guidelines

As much as 18 guidelines in addition to 13 those on unfair trade practices have been issued in order to increase transparency, clarity and foreseeability of law and to promote self- compliance(16).

6. Variety of Measures against Violations

Japanese competition law has three categories of corrective measures against violations : administrative measures, criminal measures and private enforcement measures.

a. administrative measures

They are elimination measure order by JFTC(17) and surcharge payment order by JFTC against price cartel, volume cartel, market share cartel, customer restriction cartel and control type private monopolization.(18)

b. Criminal measures

Imprisonment up to 3 years against natural persons, criminal fine up to 500 Million yen against entrepreneurs and up to 5 million yen against natural persons regarding certain gross violations such as cartels (19)

b. private enforcement

Damage suits, injunction suits (against unfair trade practices) (20)

7. Ex Post rather perfect Hearing Proceeding and Due Process

The alleged entrepreneur who complains against an elimination measure order or surcharge payment order may request a hearing proceeding on the case. This hearing proceeding is very similar to court proceeding. It is the full trial on the matters of fact and law (interpretation) The alleged entrepreneur has full opportunity to submit assertions and evidences and to carry out cross examinations of witnesses with assistance of his attorney. The hearing proceeding is held under triangle structure consisted with investigator, alleged entrepreneur and trial examiner.(21)

8. Centralized Court Review System

An entrepreneur who complaints against JFTC's decision issued at the final stage of the hearing proceeding may bring a suit requesting cancellation of such decision to Tokyo High Court. The reason for this jurisdiction is considered to have unified court decision on competition law cases. Such court review is not a de novo trial but an examination of whether or not JFTC's decision is based on "substantial evidences", where substantial evidences have been interpreted to be those evidences based on which a reasonable person reaches the same conclusion.

Therefore, substantial evidence rule means legal deep respect of the JFTC's

fact findings by the court. Of course, under such review Tokyo High Court also examines whether or not JFTC's interpretation of law is right.(22)

Ⅳ Challenges for Indonesian Competition Law and Suggestions for Improvement

1 Introduction of unifying concept " Free and Fair Competition "

(1) The concept " Free and Fair Competition " is very useful to have the interpretation and enforcement of the competition law focus on the right targets while keeping coordination and integrity.

(2) The present article 3 of Indonesian Competition Law (ICL) cites four items as the purposes of the law but no unifying concept " Free and Fair Competition " at least explicitly. The cited four purposes may sometimes collide against each other(23). So, unifying concept is useful and necessary.

(3) The importance of promoting free and fair competition has been increasing under progress of economic globalization. We can foster national economy which can prosper under globalization only through promotion of domestic active free and fair competition.

(4) I would like to suggest that the present article 3 may be interpreted or preferably amended by changing the items order and inserting the new item " to promote free and fair competition" as follows :

" The purposes of enacting this Law shall be as follows :
a. to prevent monopolistic practices and or unfair business competition that may be committed by business actors, thereby
b. to promote free and fair competition, thereby
c. to create a conducive business climate in order to ensure the certainty of equal opportunities for large, middle- as well as small-scale business actors in Indonesia,
d. to create effectiveness and efficiency in business activities, and
e. to safeguard the interests of the public and to improve national economic efficiency as one of the efforts to improve the people's welfare."

2. Clarification of the definition of “ monopolistic practices “

The concept of " monopolistic practices " plays an important role in Indonesian Competition Law. It works as illegality determination standard of 13 types out of 31 types of prohibited conducts in total(24). The problem is its definition. It is very complicated and difficult to understand what is prohibited in practice. It seems necessary to clarify by reasonable interpretation or preferably by amendment of the law.

(1) Related provisions of ICL

The related provisions to monopolistic practices in ICL are defined as follows.

a. Monopolistic practices shall be the centralization of economic power by one or more business actors, resulting in the control of the production and or marketing of certain goods and or services thus resulting in unfair business competition and potentially harmful to the interest of the public. (article 1 (2))

b. The centralization of economic power shall be the actual control of a market by one or more business actors, enabling to determine prices of goods and or services. (article 1 (3))

c. Unfair business competition shall be competition among business actors in conducting activities for the production and or marketing of goods and or services in an unfair or unlawful or anti-competitive manner. (article 1 (6))

(2) Synthesis of related provisions

a. When we synthesize the related provisions, we get the following.

"Monopolistic practices shall be the actual control of a market by one or more business actors, enabling them to determine prices of goods and or services, resulting in the control of the production and or marketing of certain goods and or services, thus resulting in business competition in unfair or illegal or anti-competitive manner and potentially harmful to the interest of the public..

This is rather complicated. It seems necessary to clarify by reasonable interpretation.

b. Suggestion for Reasonable Interpretation

One of the clarifications by reasonable interpretation may be as follows:

" Monopolistic practices shall be any anti-competitive conduct by one or more business actors or a group of business actors which forms or maintains or strengthens the actual control of the production and or marketing of certain goods and or services to the extent to be able to determine the prices of them in a market or an industry, potentially harmfully to the interest of the public."

The reason why omit the phrase " resulting in business competition in unfair or illegal or anti-competitive manner " is as follows.

(a) The meaningful phrase in this context is " in anti-competitive manner ".
(b) Where any anti-competitive conduct to form、maintain or strengthen actual market control is taken, the business competition there is certainly always in anti-competitive manner.
(c) Therefore, omission of them is better for clarification.

c. Suggestion for Amendment

(a) The best choice for increasing clarity and stability is amendment
(b) The suggested draft is as follows.

" Monopolistic practice shall be any anti-competitive conduct by one or more business actors or a group of business actors which forms, maintains or strengthens a market control power potentially harmfully to the interest of the public."

" Market control power shall be such power of one or more business actors as is capable of operating, somewhat freely at his or their will, the level of prices, qualities , volumes, technologies and the like of goods or services in a market or an industry. "

" One or more business actors shall be prohibited from engaging in monopolistic practices, either individually or jointly. "

3. Enrichment of the definition of "unfair business competition"

(1) Unfair business competition also plays an important role in Indonesian Competition law. It works as the illegality determination standard of 20 types out of 31 types of prohibited conduct in total.(25)

(2) The problem is that the present definition of unfair business competition is too simple. A few clue to the patterns of conduct and degree of restraint of competition is shown. (26) All is left to the reasonable interpretation. (see Ⅳ 2(1) c.)

(3) One of the reasonable interpretation of unfair business competition may be as follows.

" Unfair business competition includes such types of conducts as unjust discrimination, unjust pricing, unjust customer inducement or transaction coercion, unjust binding terms dealing, abuse of trade dominance and unjust trade hindrance or internal disturbance of a company, and as which tends to impede fair competition."

This interpretation introduces two standards on prohibited conducts. One is pattern standard which is pattern of conduct such as unjust binding terms dealing. Another is effect standard on the degree of suppression of competition by the conduct. That is tendency to impede fair competition (impediment of fair competition). By adopting these two standards, the clarity of law is enhanced while keeping the room for soft touch regulation which is necessary to avoid damaging economic efficiency by over regulation.(27)

(5) Utilization of Guideline Issuing Power

In practice KPPU can attain purposes mentioned above (3) by utilizing its guideline issuing power (article 35 f).

(6) Suggestion for amendment

The better choice for more enhanced clarity and stability is such amendment as mentioned above (3) and insertion of new article such as below :

" A business actor shall be prohibited from engaging in unfair business competition. "

(7) Suggestion for Introduction of Designation System by KPPU

a. Introduction of Unfair business competition designation system by KPPU will increase elasticity and quickness to cope with the rapidly changing economic conditions and business actors conducts.

b. Such system will endow KPPU with the measures to meet the sense of local justice, thereby to get support for competition law and policy from consumers and small and medium sized enterprises (SMEs).

4. Enrichment of Exemption Provisions

(1) Related Provisions

a. The problematic exemptions may be as follows :
(a) an agreement entered into in the context of a joint venture (article 5(2)a),
(b) an agreement entered into based on the prevailing law (article 5(2)b),
(c) actions and or agreements intended to implement applicable laws and regulations (article 50a)
(d) agreements related to intellectual property rights such as licenses, patents, trademarks, copyright, industrial product design, integrated electronic circuits, and trade secrets as well as agreements related to franchise (article 50b),
(e) business actors of the small-scale group (article 50h), or
(f) activities of cooperatives aimed specifically at serving their members. (article 50i)

(2) Suggestions

Regarding to the exemptions mentioned above, it seems necessary to have them reviewed and more finely tuned. Otherwise most of the effect of ICL may be lost. What conduct, in what manner and for what purpose is exempted and the case where exemption is denied or cancelled should be prescribed in the law. Where the exemption is based on the prevailing laws, the relevant articles of such law should be clearly stipulated. This will also strengthen the foothold for policy coordination by KPPU with other ministries

(3) Japanese examples

One of the Japanese provisions on cases where exemption is denied is as follows:

" Provided, However, That the foregoing shall not apply to such cases as where unfair trade practices are employed, and where competition in any particular field of trade is substantially restrained, and thereby unjust raise of prices is to be caused. " (proviso of article 22 of JCL regarding cooperatives exemption)

(4) Elimination of intellectual property right, etc. exemption and joint venture exemption

It seems advisable that intellectual property right, etc. exemption (article 50b) and joint venture exemption (article 5 (2) a) should be eliminated because there may found no reasonable grounds for such exemptions.
In this regards, JCL has a bad example. The article 21 stipulates as follows:

> " The provisions of this law shall not apply to such cases as recognizable to be the exercise of right under the Copyright Law, the Patent Law, the Utility Model Law, the Design Law or the Trade Mark Law "

This provision is interpreted as the exemption of proper exercise of intellectual property rights. No exemption is given such conduct as using intellectual property rights as means of cartel, private monopolization or unfair trade practices, etc. by deviating from the purpose of intellectual property right system.(28) Therefore, the practical exemption effects of article 21 is reduced to almost none by interpretation.

5. Relaxation of procedural time constraints

(1) Related Provisions

a. KPPU is obligated to complete a follow-up investigation within 90 days. (article 43(1) and (2))

b. The district court must make a decision within 30 days from the commencement of the hearing. (article 45(2))

c. The Supreme Court must make a decision within 30 days from the time the appeal is received. (article 45(4))

(2) Suggestions for improvement

The above mentioned time constraints are too strict to follow in a very difficult and complicated case.(29) If it is interpreted as binding one in a sense that the procedure is null and void when these time constraint is not kept(for example, KPPU can't issue a decision when it can't complete the follow-up investigation within 90 days.), the practical effects of such time constraint may strengthen the tendency that only easy cases are eliminated while difficult and

complicated cases are left untouched.

One of the improvements is by interpretation, that is : the time constraints mentioned above (1) are endeavor targets, and has no binding power in a sense that for example KPPU may issue a decision even if it can't complete a follow up investigation within 90 days in spite of its full force endeavor.

Better choice may be by amendment to set more reasonable and practical endeavor targets such as 6 months for KPPU follow-up investigations and 3 months for local court and the Supreme Court decisions.

6 Introduction of Centralized Court Review System

The concept of " Free and Fair Competition " is new in Indonesian judicature and it needs expertise to deliver a reasonable decision on competition law violation cases. Under the circumstances, one of the measures to attain reasonable and unified court decisions on appeal cases against KPPU's decisions may be introduction of centralized court review system. Indonesia has already adopted such special court system as commercial court, which deals with commercial cases including bankruptcy and a decision of which is appealed directly to the Supreme Court.(30)

7. Publication of Court decisions

Publication of court decisions are strongly recommended because of following effects:

(1) effective accumulation of enforcement experiences,
(2) increase of clarity on what the law really prohibits,
(3) priceless materials for research on better enforcement and better law, and
(4) prevention of corruptions.

V Concluding Remarks

When we visit KPPU in Jakarta, we are impressed by an atmosphere of zeal for effective enforcement of competition law and policy in Indonesia. If the suggestions for improvement mentioned above may contribute to such enforcement, it is my great pleasure.

Notes

1 See Hikumahanto Juwana, Experience on Indonesia's Competition Law : Challenges Confronting the Enforcement, Key Note Speech produced at the 5th APEC Training Program on Competition Policy, Yog Yakaruta, Indonesia, Dec. 6, 2004 , Page 5

2 They are article 5,6,7,8,9,10,11,12,13,14,15,and 16.

3 Prohibited horizontal agreements are:
① price fixing agreement (article 4(1)),
② low price fixing agreement (article 5(1)),
③ market division agreement (article 9),
④ entrance deterring agreement (article 10(1)),
⑤ refusal-to-sell agreement (article 10(2)), and
⑥ production or marketing coordination agreement (article 11)

Prohibited vertical agreements are
① discriminated price payment agreement (article 6),
② minimum resale price maintenance agreement (article 8),
③ parts production control agreement (article 14),
④ resupply prohibition agreement (article 15(1)),
⑤ separately purchase obligation agreement (article 15(2)), and
⑥ specific price or price discount agreement (article 15(3))

Prohibited horizontal and or vertical agreements are :
① joint control agreement (article 4(1)),
② joint company establishing, etc. agreement (article 12)
③ purchase control agreement (article (13(1)), and
④ specific foreign company agreement (article 16).

note : The naming is according to the author's consideration reckoning the content of the agreement provided by ICL. The same in note 4, 5, 6, and 24.

4 See Ningrum Natasya Sirait, Indonesia's Experience with Its Competition Law and Challenges Ahead, ASL Inaugural Conference 2004, Page 471, and Hikumahanto Juwana, Outline of Indonesian Competition Law, Kokusai-syouji-houmu Vol. 30, No.4 (2002), Page 462.

Per se illegal agreements seem to be :
① price fixing agreement (article 5(1)),
② discriminated price payment agreement (article 6),
③ new entry deterring agreement (article 10(1)),

④ specific refusal- to- sell agreement (article 10(2) b),
⑤ resupply prohibition agreement (article 15(1)),
⑥ separate purchase obligation agreement (article 15(2)), and
⑦ specific price or price discount agreement (article 15(3)).

Rule of reason agreements seem to be :
① joint control agreement (article 4(1)),
② low price fixing agreement (article 7),
③ minimum resale price maintenance agreement (article 8),
④ market division agreement (article 9),

⑤ specific refusal- to- sell agreement (article 10(2) a),
⑥ production or marketing coordination agreement (article 11),
⑦ joint company establishing, etc. agreement (article 12),
⑧ purchase control agreement (article 13(1)).
⑨ parts production control agreement (article 14), and
⑩ specific foreign company agreement (article 16).

5 Per se illegal types of conduct excluding agreements seem to be :

① production or marketing impedance conspiracy (article 24).
② abuse of dominant position (article 25(1)),
③ multiple position (article 26), and
④ share ownership (article 27).

6 Rule of reason types of conduct excluding agreements seem to be :
① production or marketing control (article 17(1)),
② monopsony (article 18(1)),
③ specific market control activities (article 19),
④ predatory pricing (article 20),
⑤ unfair cost determination (article 21),
⑥ bid rigging conspiracy (article 22),
⑦ company secret obtaining conspiracy (article 23),
⑧ specific multiple position (article 26 C),
⑨ specific merger or consolidation (article 28(1)), and
⑩ specific share acquisition (article 28(2)).

7 See article 2 (5) and (6), 8(1), 10(1), 13(1), 14(1), 15(1), 15-2 (1) and 16(1).
8 See, for example, Kanai, Kawahama and Sensui ed., Antimonopoly Law, 2004 (kobundo) Page 26 and Tokyo High Court Judgments on Toho-Subaru Case (19 Sep. 1951) and on Toho-Shintoho Case (7 Dec. 1953).
9 See, for example, Kanai et al. ed., note 7 Page 27.

10 General designation : Unfair Trade Practices (JFTC Notification No.15 of 1982)

Specific designations are related to the following industries or cases:

① Textbook industry (JFTC Notification No.5 of 1956)
② Marine Transportation industry (JFTC Notification No. 17 of 1959)
③ Food Canning and Bottling industry (JFTC Notification No. 12 of 1961)
④ Where Offering Economic Benefits by Lotteries, etc. in Advertisement (JFTC Notification No. 34 of 1971)
⑤ Newspaper industry (JFTC Notification No. 9 of 1999)
⑥ Where a Specific Shipper Consigns Transportation or Custody of Goods (JFTC Notification No. 1 of 2004), and
⑦ Large Scale Retail Industry (JFTC Notification No.11 of 2005)

11 Guidelines (unfair trade practices) as of January 2006

These are guidelines concerning such matters as mentioned below :

① where offering economic benefits by lotteries in advertisement (1971)
② sub-contract in construction industry (1972),
③ undue low price sale (1984),
④ consignment transaction of services (1998),
⑤ patent and know-how license (1999),
⑥ electricity transaction (1999),
⑦ undue low price sale of alcoholic drinks (2000)
⑧ Undue low price sale of gasoline (2000)
⑨ gas transaction (2000),
⑩ electric communication (2002),
⑪ franchise system (2002),
⑫ relaxation of classification of financial institutions business (2003), and
⑬ large scale retail industry (2005)

12 See note 9 ⑤, ⑥, and ⑦.

13 See article 27, 27-2, 28, 29, 30, and 31.

14 See article 40, 41, 42, 43, 44, 47, 49, 52, 55, and 66.

15 See article 35.

16 Guidelines (general) as of January 2006

These are guidelines concerning such matters as mentioned below :

① monopolistic situation (1977),
② medical doctors association (1981),
③ distribution and trade practices (1991),
④ joint research and development (1993),
⑤ administrative guidance (1994),
⑥ public bid (1994),
⑦ trade association (1995),
⑧ recycle (2001),
⑨ professional associations (2001),

⑩ business control power (2002),
⑪ voting rights holding by banks or insurance companies (2002),
⑫ converting debts into shares (2002),
⑬ pre-consultation on company combination (2002),
⑭ company combination examination relating to company or industry rehabilitation (2003),
⑮ portability of mobile phone numbers (2003),
⑯ company combination (2004),
⑰ cross entrance in public utilities (2005) and
⑱ patent pool in standardization (2005)

17 See article 7 (1) and (2), 8-2 (1), (2) and (3), 17-2, 20 (1), 21 (2), and 49.

18 See article 7-2 (1) and (2), 8-3, and 50.

19 See article 89, 90, 91, and 95.

20 See article 24, 25 and 26.

21 See article 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70-2, 70-3, 70-4, and 70-5.

22 See article 80, 85, and 86. Recently the central court review system was mitigated. See article 84-2, 84-3, and 84-4.

23 See Ningrum Natasya Sirait, Note 3 page 468 and 481.

24 They are :
① joint control agreement (article 4 (1))
② market division agreement (article 9)
③ production or marketing coordination agreement (article 11)
④ Joint Company establishing, etc. agreement (article 12)
⑤ purchase control agreement (article 13 (1))
⑥ foreign company agreement (article 16)
⑦ production or marketing control (article 17)
⑧ monopsony (article 18 (1))
⑨ specific market control activities (article 19)
⑩ predatory pricing (article 20)
⑪ multiple position (article 26 C)
⑫ merger and consolidation (article 28 (1)), and
⑬ acquisition of shares (article 28 (2))

25 They are types of conduct below in addition to those cited in above note 23 :
① low price fixing agreement (article 7),
② minimum resale price maintenance agreement (article 8),
③ parts production control agreement (article 14),
④ unfair cost determination (article 21),
⑤ bid rigging conspiracy (article 22),
⑥ trade secret acquiring conspiracy (article 23), and
⑦ deterring conspiracy (article 24).

26　See　Wolfgang Kartte et al.., Undang-Undang No.5 tahun 1999, Jakarta Katalis, 2002, Page 67.
27　Of course, there may be still some necessity to coordinate by interpretation articles with unfair business competition as illegality threshold.
28　See, for example, Kanai et al. ed., note 7, Page 323-345.
29　See Hikumahanto, Note 1, Page 5.
30　See the Supreme Court of Indonesia and Faculty of Law, University of Indonesia ed., Indonesian Legal System, 2005, Page 61-62.

参考

インドネシア競争法（１９９９年法律第５号）の手続規定

第７章　事件処理手続き

１　〔申告〕（３８条）
（１）〔違反行為を知っている者等の申告〕（１項）
本法違反が起こったことを知っているか合理的に疑っている者は、身元を明らかに　して、違反について明記して、委員会に申告することができる。
（２）〔被害者の申告〕（２項）
本法違反によって損害を受けている者は、身元を明らかにして、違反と損害の状況を明記して、書面により委員会に申告することができる。
（３）〔申告者の身元について秘密の保持〕（３項）
１項の申告者の身元は、委員会が秘密として保持しなければならない。
（４）〔委員会による申告手続の補充規定〕（４項）
１項及び２項に言う申告手続については、委員会が更に補充規定を設ける。

２　〔予備審査・正式審査〕〔３９条〕
（１）〔予備審査〕（１項）
１項及び２項に言う申告に基づき、委員会は予備審査を行う義務を負い、更に申告受理後３０日以内に正式審査を行う必要があるか否かを決定する義務を負う。
（２）〔被申告事業者の調査〕（２項）
正式審査において、委員会は被申告者である事業者を取り調べる義務を負う。
（３）〔事業者の企業秘密の保持〕（３項）
委員会は事業者から収集した資料で企業秘密とされるものを秘密として保持しなければならない。
（４）〔証人尋問等〕（４項）
必要があると考えるときは、委員会は、証人、鑑定人及びその他の者の証言を聴取することができる。
（５）〔令状の授与〕（５項）

２項及び４項に言う活動を行うに際して、委員会のメンバーは令状を授けられる。

3　〔申立によらない審査〕（４０条）

（1）　委員会は、申告が無い場合であっても、本法違反の申立があるときは、事業者を審査することができる。

（2）　１項の審査は、３９条に規定する手続きに従って行われなければならない。

4　〔証拠書類の提出等〕（４１条）

（1）〔証拠書類の提出〕（１項）

審査を受ける事業者その他の者は、要求される証拠書類を提出しなければならない。

（2）〔聴取拒否等の禁止〕（２項）

事業者は、聴取の拒否、求められ情報の提供の拒否、又は審査若しくは審問の手続の妨害を禁止される。

（3）〔検察官への告発〕（３項）

２項の規定違反は、委員会が現行法に従って捜査されるよう検察官に告発する。

5　〔証拠書類〕（４２条）

委員会の審査における証拠書類は次のものを言う。

a. 証人の証言
b. 鑑定証言
c. 手紙及び又は書類
d. 情報
e. 事業者による声明

6〔正式審査の完了〕（４３条１項、２項　）

（1）委員会は、３９条１項に規定する正式審査の開始日から６０日以内に当該審査を完了すべき義務を負う。（１項）

（2）必要があるときは一項の正式審査の期間は３０日間以内に限り延長することができる。（２項）

7〔委員会の決定〕（４３条３項、４項）

（3）委員会は、一項又は二項の正式審査が完了した日から３０日以内に本法に違反する行為があったか否かを決定すべき義務を負う。（３項）

（4）第三項の委員会の決定は公衆に開かれた審問で読み上げられ、その後関係事業者に通知されなければならない。（４項）

8〔決定の履行〕（４４条１項）

（1）関係事業者は、４３条４項の委員会の決定についての通知を受領した後３０日以内に当該決定を履行し、履行報告書を委員会に提出すべき義務を負う。

9〔決定取消の訴え〕（４４条２項）
（２）事業者は、前述の委員会の決定を受領した日から１４日以内に地方裁判所に訴えを提起することができる。

10〔訴えを提起しない場合の決定受諾のみなし規定）（４４条３項）
（３）事業者は、二項の期間内に訴えを提起しない場合は、当該決定を受諾した者とみなされる。

11〔決定等不履行の場合の検察官への決定の引き渡し〕〔４４条４項〕
（４）関係事業者が一項又は二項を履行しない場合は、委員会は、現行法又は規則に従って捜査されるよう検察官に当該決定を引き渡すものとする。

12〔地方裁判所における審理〕（４５条１項、２項）
（１）関係地方裁判所は、４４条２項の事業者の異議の申立を受理した後１４日以内に審理しなければならない。（１項）
（２）地方裁判所は、前述の訴えの審理開始後３０日以内に判決しなければならない。（２項）

13〔最高裁判所への上告〕（４５条３項）
（３）二項の地方裁判所の判決に不服がある者は、１４日以内にインドネシア共和国最高裁判所に訴えを提起することができる。

14〔最高裁判所における審理〕（４５条４項）
（４）最高裁判所は、当該訴えを受理した後３０日以内に判決しなければならない。

15〔決定の確定、執行〕（４６条１項、２項）
（１）訴えが提起されない場合は、４３条３項の委員会の決定は恒久的な法的効力を有する。（１項）
（２）一項の委員会の決定の執行については、地方裁判所に要請されなければならない。（２項）

注
1　依拠したのは、ＫＰＰＵ発行の英訳「インドネシア競争法（１９９９年法律第５号)」である。
2　〔　　〕内は、筆者による整理のための題名である。
3　インドネシア競争法（１９９９年法律第５号）の他の部分の概要については、中川政直「インドネシア競争法の制定・内容と問題点」関東学院法学１５巻１号の別紙を参照されたい。