

# kompetisia

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KOMPETISIA  
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# KPPU

Komisi Pengawas Persaingan Usaha

## Bid-rigging on Procurement of Development of Distribution's pipe

Alleged violation of Article 22 of Law No. 5/1999 recently occurs on three package procurement of development distribution's pipe of Tirta Siak Water Company in Pekanbaru (<http://en.wikipedia.org/wiki/Pekanbaru>). This allegation was strengthening due several facts and evidences explain conduct by five business actor and the Bid Committee in determining the bid winner amongst them. The alleged parties are Sarana Indah Perkasa Abadi, Corp., Putra Rokan Perkasa, Corp., Adhiyasa, Corp., Karya Bukit Nusantara, Corp., Tobatakkas Abadi, Corp., and Citra Murni Abadi, Corp. The evidences involved the similarity of the bid offer documents (implementation methods, time schedule, substance in quality management, and letter of

offer) and company addresses. KPPU also found vertical collusion by inquiring a faulty crash program to advantage certain bid participant.

Five business actors as well as the Bid Committee, then, being decided to legally breach Article No. 22 of the Law No. 5/1999. Citra Murni Abadi, Corp. was not proved to be part of the collusion, hence liberated from the accusation. Moreover, the Commission Council in the decision imposed an administrative sanction (fines) which range from Rp 108,962,000 – Rp 221,183,000 to the alleged business actors and banned them to enter any procurement in construction service in Sumatera Island for two years.

*...KPPU also found vertical collusion by inquiring a faulty crash program to advantage certain bid participant...*

### Article 22:

Business actors shall be prohibited from entering into conspiracies with other parties in order to determine awardees of tenders which may result in unfair business competition.

## Price Fixing Cartel on All-in Tariff for Vessel Freight Expedition (EMKL) in Sorong Port

Thirteen business actors in Vessel Freight Expedition (EMKL) which also members of Association for Freight Company in Sorong Port ([http://en.wikipedia.org/wiki/Sorong\\_city](http://en.wikipedia.org/wiki/Sorong_city)) had proves to breached Article 5 point (1) of Indonesian competition law in form of price fixing for all-in freight services. This service includes documents handling and other tasks in receiving or handling freight through sea to be forwarded to other vessel and or land transportation. The business actors are namely Sabar Jaya Perkasa, Corp., Pelangi Intim Antar Nusa, Corp., Citra Irian Karya, Corp., Rabani Tambalo, Corp., Bhima Tirta, Corp.,

Samudra Irian Permai, Corp., Pelni, Corp., Samudera Tirta Mega, Corp., Waihury Makmur, Corp., Marisonta Iriana, Corp., Samudera Makmur Sentosa, Corp., Sumber Tirta Samudera, Corp., and Sarana Nusa Persada. The alleged business actors are decided by KPPU to stop their price fixing within thirty days and must announce this alteration through local and national newspapers.

*...This service includes documents handling and other tasks in receiving or handling freight through sea to be forwarded to other vessel and or land transportation...*

### Article 5(1):

Business actors shall be prohibited from entering into agreements with their business competitors to fix the price of certain goods and or services payable by consumers or customers on the same relevant market.

## Bid-rigging Behavior in Procurement of Construction Services

...At first, KPPU alleged the existence of horizontal and vertical collusion between the reported parties...

KPPU found the existence of violation of Article No. 22 of the Law No. 5/1999 (on bid-rigging) in the procurement of construction services in Brebes Regency (<http://en.wikipedia.org/wiki/Brebes>) and impose sanction to five alleged business actors, namely the Bid Committee, Bumirejo Tirta Kencana, Corp., Cempaka Putih Mitra Karya, Corp., and Widjojo Koesoemo Baroe, Corp. At first, KPPU alleged the existence of horizontal and vertical collusion between the reported parties. Moreover based on facts and evidence founded during the examination,

KPPU concluded that the alleged parties have not breached Indonesian competition law under a reason of common practices. The Commission Council, therefore, recommended the Commission to send an advice and recommendation to the Region of Brebes to impose administrative sanction to its Bid Committee in their absence in evaluating the tender's documents as well as banned other alleged business actors in joining other procurement in Brebes Regency for one year.

### Article 22:

Business actors shall be prohibited from entering into conspiracies with other parties in order to determine awardees of tenders which may result in unfair business competition.

## Bid-rigging Behavior in the Procurement of Solar Panel Electricity Bengkalis Regency

...The Examination team suspected that these reported parties was managed certain business actor to win the bid process...

KPPU was also faced bid-rigging behavior during its supervision on the implementation of Law No. 5/1999. This time, this violation was take place in the procurement of solar panel electricity for counties in Bengkalis Regency at the Riau Province (<http://en.wikipedia.org/wiki/Bengkalis>). This examination was based on preliminary indication which showed conspiracy between bid participants (through the similarity of typing mistakes in bid offer documents and Area Recognition Methodology) and the Bid Committee. The Examination team suspected that these reported parties was managed certain business actor to win the bid process. The reported parties are namely, Pancuran Mas Jaya, Corp., Segorolor, Corp., Simponi Jaya, Corp., two consultants, and the Bid Committee.

However based on the examination, the Commission Council did not found evidences the alleged behaviors, and thus released them from their charges.

Moreover, the Commission Council was recommended the Commission to advice and recommends the Region of Bengkalis Regency to impose an administrative sanction to their Bid Committee due to their indifferent in formulating the technical specification as well as price and technical evaluation and have them prepared by a Consultant. The Council also viewed the need to send an advice and recommendation to Consultant Center for Energy Studies of the University of Gadjah Mada as the consultant for this project.

### Article 22:

Business actors shall be prohibited from entering into conspiracies with other parties in order to determine awardees of tenders which may result in unfair business competition.

## Bid-rigging on Procurement of Development of Sekokat-Mbawi Road in Nusa Tenggara Barat Province

Three reported parties, Metro Indo Wahanataka, Corp., Bakti Mekindo, Corp., and the Bid Committee are alleged for a bid rigging behavior in the procurement of Development of Sekokat-Mbawi Road in Nusa Tenggara Barat Province ([http://en.wikipedia.org/wiki/Nusa\\_Tenggara\\_Barat](http://en.wikipedia.org/wiki/Nusa_Tenggara_Barat)). This allegation was supported by facts and evidences obtained during the examination process which takes form of the similarity of bid offer documents, similarity in equipment used, and cooperation in fixing the bid offer price. The facts were as follows:

1. Similarity in bid offer document between business actors; Both business actors are different and independent entity thus shall fairly compete in the tender process. The interlocking directorate between two companies showed their daily activities are run by the same management. This supported by fact on coordination and cooperation between both companies in preparing bid offer document to fix on the bid winner.
2. Similarity in equipments used by both alleged business actors; Both business actors shall fairly compete by offering their own resources, either their financial support, equipments, and human resources. The similarity in their resources showed their coordination and cooperation in preparing the bid offer document.

3. Formulation of bid offer price; Evidences showed confession by Bakti Mekindo Tatamulia, Corp., in shifting bid offer price of Metro Indo Wahanataka, Corp., to be lower than bid offer price by Bakti Mekindo Tatamulia, Corp in order to manage Metro Indo Wahanataka, Corp. as the bid winner.
4. Bid Committee's mistakes in evaluating offers; Bid Committee has made mistakes in calculating Basic Requirement and valuating Bakti Mekindo Tatamulia. Corp.'s experiences, thus it's shall failed the qualification process. This was believed as an individual act by the Bid Committee in fixing Bakti Mekindo Tatamulia as the bid winner. KPPU also found that the Bid Committee also made a mistake in implementing the Law No. 18/1999 concerning Construction Services for the bid process.

The Commission Council also decided that the Bid Committee is proved guilty for its absence in evaluating the bid offer and also the lack of tender requirement. Based on mentioned findings, the Commission Council decided to ban Metro Indo Wahanataka. Corp., and Bakti Mekindo Tata Mulia, Corp. in joining other procurement within the Office of Public Work in Nusa Tenggara Province for one year.

*...allegation was supported by facts and evidences obtained during the examination process which takes form of the similarity of bid offer documents, similarity in equipment used, and cooperation in fixing the bid offer price...*

### Article 22:

Business actors shall be prohibited from entering into conspiracies with other parties in order to determine awardees of tenders which may result in unfair business competition.

## Finding Ways to Harmonize Competition Policy with Industrial Policy, and Cartel Enforcement in Domestic and International Market

..., the training took two different themes, "Competition Policy and Industrial Policy" and "Challenges on Cartel Cases in Domestic/International Market"...

### Introduction

APEC (Asia Pacific Economic Cooperation) member economies (particularly the foras of Competition Policy and Law Group (CPLG), Economic Committee (EC) and Strengthening Legal Infrastructure (SELI)), in consistently held several meetings in order to realize global economic market which was initiated by APEC economic leaders as stated in Bogor Goal. One of the activities was the Fourth APEC Training on Competition Policy which was held by KPPU coordinated with APEC Secretariat and JFTC (Japan Fair Trade Commission) in Sanur Plaza Hotel and Suites on November 5-7, 2008. The training was part of similar training series held in Thailand, Vietnam and Singapore.

This year, the training took two different themes, "Competition Policy and Industrial Policy" and "Challenges on Cartel Cases in Domestic/International Market". The training was attended by 25 international participants from 13 different APEC member economies (Mexico, Chile, China, Singapore, Russia, Malaysia, Australia, Chinese Taipei, Peru, Japan, Indonesia, Thailand, and Vietnam). This number did not yet include the participation of domestic participants, that mostly representatives from various government institutions, sectoral regulators and academicians.

### Competition Policy and Industrial Policy

The relation between competition law and policy with industrial policy was a problem which was always been questioned on the implementation of competition policy in every economy, which means a distinctive separation on how to harmonized those two policies were highly needed. M.

Nawir Messi (KPPU Commissioner) on his opening presentation clearly stated that: in general, competition policy was defined as an approach to allocated resources and to obtained efficiency in the basis of equality to be able to participate on the market. This situation led different definitions of Industrial Policy in each economy. There was a possibility that every economy will have its own instrument on Industrial Policy to protect its industries and exports imports activities. Several aspects on Industrial Policy might be inconsistent with those in Competition Policy. This situation demanded the existence of particular mechanism to harmonize it. Asia and Latin America countries already had some experiences with it, and it showed that the relation between Competition Policy and Industrial Policy substantially were support each others.

For further discussion on the topic, the training divided into two different group discussions. In the first topic, every APEC economy representatives shared it experiences in defining industrial policy and competition policy and their efforts to harmonize it. Economies who conveyed its presentation were: China, Indonesia, Japan, Malaysia, Mexico, Peru, Russia, Chinese Taipei, Thailand and Vietnam.

On its presentation, China explained that she had a principal policy to consolidated State Owned Enterprises (SOE's) in order to enhance its competition power and its efficiency. There were also several implementing regulations and national review process. Up to this time, Indonesia is in the middle of process to change its restrictive industrial policy into deregulation or privatization in several industrial sectors. While Japan already experienced industrial policy implementation which was being positioned higher than competition law

for several decades, but the result was not as good as it expected before. The 1990's economic failure had resulted in radical political changing by the Government, including some efforts to strengthening the competition law enforcement.

Malaysia shared her experience that they already released various industrial policies and competition policies, while internal discussion on the aspect of competition law was continually carried out. Mexico's experiences was quite interesting, in which previously they already had various industrial policies and import substitution, but the 1980's economic crisis had changed everything. The emergence of new power had forced the Government to be more active in promoting business competition along with enhancing transparency in policy making. Just like Mexico, Peru also had various industrial policies and experienced adjustments due to the similar economic crisis, and it culminated in several privatizations, deregulation, and promotion of business competition. Russia's experience explained significant changing on her industrial policy, where alteration had been done on the aspect of strengthening law enforcement, and equality treatment on merger (whether it had been done by the SOE or private enterprise).

Furthermore, Taiwan explained that major changes in industrial policy had been done in 1980 due to awareness on the need for changing economic policy direction as a result of the external pressure. But it was also explained that the emphasis on high political support was also needed. In Thailand, the implementation of competition policy was still at the early stage, where the public policy in the infrastructure area was still being done in order to make it more competitive. Vietnam personally had the exception on competition

law for several behaviors of small and medium enterprises, export cartel, and other efforts which aimed to enhance country's international competitiveness.

Based on the various experiences, it could be concluded that the industrial policy also covered various policies to promote economic interest for certain industry and company (whether it was SOE or private enterprise), by giving a protection from business competition, such as special access to the production factors or access to enter the market for certain products and services. The discussion had proved that a disharmony relation was tending to be occurred between competition and industrial policy. The clarity of policy objectives could help to solve the conflict. Various operational measurements were needed to reduce conflict and to coordinate the policy formation, the review development and the implementation improvement. Moreover, the assessment of national policy objectives was periodically needed, especially in facing the crisis of economic and financial.

Based on these discussions, the participants concluded that the training gave various definitions on industrial policy in various aspects. That is included the wider social aspect or infrastructure investment in promoting economic growth and the welfare of a company or certain sector that in the long run headed to the social welfare improvement. Participants also saw facts that the various economies' experiences showed that SOE's tended to be promoted as the national champion and protected industry, while the SME's tended to received various special treatments.

The application of competition policy also discussed various issues, such as what kind of industry sector that need to be protected, what kind of

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*...discussion focused to the situation and challenge that were dealt by the law enforcer, such as the limitations of the inspection power, utilization of indirect evidence, creation of leniency program, utilization of economic evidence in cartel cases, international law issues, sanctions and fines, compensation, and class action potential in cartel enforcement*

mechanism that should be used, the need for benefit cost analysis, was the protection given for the certain period, whether any higher policy and the national security should be considered. In order to measure the success, the training recommended several issues that must be paid attention to, such as a periodic implementation review to determine the success or the failure of the policy, should the policy implementation be continued or the economic cost also need to be considered in the policy implementation. Concerning the conflict between industrial policy and competition policy, there were several issues that need to be considered, for instance the exception that could be given and the certain mechanism in guaranteeing the co-ordination between the regulator and the competition agency.

### **Cartel Enforcement**

Cartel behavior was the most often emerged behavior in competition law enforcement by every competition agency all over the world. Prof. Makoto Kurita from Chiba University, Japan explained as an agreement between business actor to not to compete through price fixing, restriction of production result, market allocation, and tender conspiracy. Unlike any other topics, cartel definition was already acknowledged internationally. In Japan, since year 1990, the Japan anti-monopoly law had gained the acknowledgment from the Japanese companies as a result of the cartel behavioral impact. Promoting business competition was not enough in overcoming anti-competitive behaviors in the market, thus several methods need to be explored and implemented in order to create and motivate business competition. This will include competition policy enforcement, privatization, deregulation, liberalization, in-

novation effort, and the creation of market integration.

In the group discussion session on this issue, various APEC economy representatives (from China, Chile, Indonesia, Mexico, Peru, Russia, Chinese Taipei, Thailand and Vietnam) shared their experiences in handling various cartel cases in their own economy. From the emerge discussion, it can be seen that APEC member economies already had shown significant improvement in fighting against cartel, through the development cooperation between regulator and competition agency. The discussion focused to the situation and challenge that were dealt by the law enforcer, such as the limitations of the inspection power, utilization of indirect evidence, creation of leniency program, utilization of economic evidence in cartel cases, international law issues, sanctions and fines, compensation, and class action potential in cartel enforcement. This discussion also addressed the importance of advocacy to the government and public (companies, associations, academicians, judges and community).

This group discussion had produced several recommendations. First, related to the limitation of the inspection power, the group gazed that there should be an effort to strengthen the agency power. The utilization of indirect evidences (such as telephone, meeting result, etc.) and economic evidences also need to be considered in the aspect of attestation. To be more effective, the group also addressed the importance of leniency program and had to socialite it to the companies, associations, academicians, judges and community in order to create better public awareness. Another aspect that needs to be considered was the importance of international cooperation in preventing international

cartel and enhancing the role of the domestic agency and court in imposing sanction on company and foreign individual that carried out behavior which had an impact on his economy. Moreover, the group also recorded that sanction given by the law tended to be smaller than the benefit that could be received by the cartel companies. To overcome it, the group suggested considering the sanction implementation based on the market measurement and the benefit received by the cartel's company, criminal sanction, and class action possibility on the cartel behavior.

As the closing remark, KPPU as the host agency considered the two issues to be often found towards the implementation of the competition

law and policy enforcement in many economies. It was seldom to see various prevention efforts must faced a dead end as a result of certain party interest, which usually get behind the background of an industrial policy. This surely will create distortions towards the development of competition policy in each economy. In facing these conditions, re-definition of national interests in each of industrial policy become important, hence shall not be treated as the main reason for every protection on certain industry/sector.

*\* Please contact us for receiving a full summary report and or presentation materials for this training.*

## Competition Seminar in Jayapura

As an agency to supervise competition law in Indonesia, one of the effort conducted to socialize Indonesian competition law is by hosting a competition seminar in several regions. November was targeted to the eastern region in Indonesia, the Jayapura Province (<http://en.wikipedia.org/wiki/Jayapura>). The seminar which focused on "The Implementation of the Law No. 5/1999 in KPPU's Supervision" was attended by Secretary of Jayapura Province and head of offices in the municipals of Jayapura.

Substances performed dealt with the objective and benefit of competition law and policy for local government. This was hoped to provide better understanding to the local regulator in harmonizing competition policy and local regulation. Especially when facing the existence of special autonomy regulation for Jayapura that require province to develop according

to their needs, hence tends to open opportunity for discriminatory behaviors. This shall be shaped due to the existence of local regulation which gave special rights to certain ethnic group and separatist issues occur in the region.

Based on our report, this seminar gains positive response by the participant. This enthusiasm glazed by their support as well as questions on application of fair competition. KPPU hopes that this advocacy could bring positive contribution for the regulation supporting fair competition in a healthy competition in Jayapura.

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