

STATE-OWNED ENTERPRISES (SOEs) IN INDONESIA'S COMPETITION LAW AND PRACTICE

Ari Siswanto; Marihot Janpieter Hutajulu

Faculty of Law, Satya Wacana Christian University

E-mail: arie.siswanto@staff.uksw.edu; marihotjanpieter@gmail.com

ABSTRACT

In the competition law discourse, one of the controversial issues is the position of State-Owned Enterprises (SOEs). There are basically two main views regarding the status of SOEs in the competition law. First, SOEs should be granted privileges, even excluded from the scope of business competition law. Secondly, since SOEs are basically businesses and competitors to private enterprises, SOEs must also be subject to competition law. This paper discusses the status of SOEs in Indonesia's competition law, both in the context of normative framework and in the implementation of competition law provisions. For this purpose, this paper examines the rules of competition law governing the SOEs and analyzes some cases of alleged violations of competition law examined by the KPPU as the Indonesian competition authority. This study found that basically Indonesia's competition law follows the so-called "competitive neutrality" principle in which the law treats both SOEs and private enterprises in equal manner. However, at the practical domain, the cases studied indicate that monopolistic or dominant position held by SOEs may be abused to favor subsidiaries which are in direct, head-to-head competition, with private enterprises. Thus, as a conclusion, regardless of the competitive neutrality principle adopted in the competition law, to some degree, unfair competition may still emerge from the SOEs' robust market position.

Keywords: competition law, state-owned enterprises, competitive neutrality

A. INTRODUCTION

Business competition law (or simply "competition law") is one branch of law that is closely related to commercial activities. The law is designed to provide guidelines for business actors about what action is allowed and what is not when they compete with one another. In general, it can be said that competition law encourages business actors to compete with each other honestly and fairly. For this reason, competition law contains norms that prohibit anti-competitive behavior and business structures which contain elements of unfair competition or unfairly encourage the establishment of monopoly (Arie Siswanto, 2002:76).

Competition law is not designed to protect competitors. The law is created to protect and maintain the competitive environment among the competitors. At the same time, competition law is also a part of broader competition policy aimed at the creation of vigorous competition culture (Zimmer, 2012: 380) Therefore, one of the important goals in competition law is to create the same level playing field among business actors. This also implies that the norms of competition law should be applied equally to the business actors who are competitors to each other in the the same market.

The principle of equality of treatment to establish an equal normative platform among competitors is not too much of a problem if the competing business actors are private undertakings. However, the situation will become more complicated when there are both private business and State-Owned Enterprises (SOEs) or sometimes called ‘Government-Owned Enterprises (GOEs)’ that are competing in the same market. The existence of State-Owned Enterprises which confronts private business entities in competition raises fundamental questions about whether these State-Owned Enterprises should be given similar treatment as private business actors or, on the contrary, should enjoy exceptions and privileges in the context of competition law.

On the one hand, the view that State-Owned Enterprises should enjoy special treatment is quite reasonable. This view, among others, is built on the assumption that different from private business actors, State-Owned Enterprises have a mission to provide public services or services of general public interest (Law Number 19 of 2003 on the State-Owned Enterprises, consideration). Thus, it is appropriate that the State-Owned Enterprise be privileged in business competition so that its role as a public service provider can be optimized. However, on the other hand, there is the view that State-Owned Enterprises are essentially business entities that are also profit-oriented, so they should be placed in a position equal to private business actors who become competitors, in order to establish a fair competition and bring economic benefits at large.

The issue of placing the State-Owned Enterprises appropriately within the framework of competition law is constantly faced by countries that adopts competition law and at the same time operate State-Owned Enterprises that serve the public interest through the business services provided. In a relatively competitive market in which both private enterprises and State-Owned Enterprises are competitors, the particular feature of the State-Owned Enterprises may pose important issues concerning their outstanding competitiveness. State-Owned Enterprises are most of all either wholly owned or predominantly by the state. The capital participation of the government in State-Owned Enterprises which may originate from the national budget scheme (in Indonesian context, see Article 4 of the Law Number 19 of 2003 on The State-Owned Enterprises) will likely strengthen the economic performance of State-

Owned Enterprises and open up the possibility of monopoly and dominant position. Furthermore, as indicated by the OECD (Organization for Economic Cooperation and Development), particular treatment enjoyed by State-Owned Enterprises in terms of taxation, cost allocation and public procurement practices may also influence the State-Owned Enterprises' competitiveness (OECD, 2018: 43).

B. PROBLEM STATEMENT

This article is intended to view and review the issue in the context of Indonesia's Competition Law. Specifically, there are two things that are the focus of the study, namely (1) how the status of State-Owned Enterprises is regulated in Indonesia's competition law, and (2) how Indonesia's Competition Law treats State-Owned Enterprises in practice.

C. RESEARCH METHOD

The research is a normative legal research (doctrinal research). It used a qualitative analysis, and statute as well as conceptual approaches. Thus, the choice of relevant material and integrated interpretation during interviews with stakeholders related to the main research issues

D. DISCUSSION AND RESEARCH RESULT

1. Regulation of Business Competition in Indonesia

Competition is essentially an antithesis of monopoly. In a competitive situation, competing business within the relevant product market will more likely make efforts to strive for the same consumers. Competition is believed to be able to stimulate the emergence of various conditions that have a positive impact on the economy and also on consumers. (Healey, 2011: 1). Business competition will encourage business actors to strive to offer good products at the lowest possible price to get consumers. Similarly, business competition will encourage business actors to adopt various innovations to make their products superior to their competitors' products. From the consumer's point of view, business competition puts consumers in a more protected position, because they are in a position that requires competing business actors to value them.

All the beneficial conditions described above are not generally found in monopolistic condition in which business competition is not present. In monopolistic markets, consumer's position tend to be weaker because they are not contested by business actors. Business actors are not encouraged to invent various innovations to outperform competitors that basically do not exist. Even

worse, the monopolistic position allows the holder to exploit consumers through high product pricing without giving them many alternatives.

Therefore, it can be understood that in many countries the presence of business competition is preferred over the monopolistic conditions. Currently most countries have already enacted a set of regulations commonly known as competition law to ensure the establishment of fair and vigorous competition to achieve market effectiveness (Whish & Bailey, 2012: 18). In addition to providing benefits to consumers, the existence of competition law in a country serves as an indicator for a robust business climate which in turn will be an attraction for investors to conduct business activities. Furthermore, increased business activity will encourage economic growth. Those are the reasons why competition law is adopted in many countries.

Indonesia also considers that the existence of business competition law will bring many benefits to the country's economy. For this reason, in conjunction with the law reform conducted since the late 1990s, Indonesia also promulgated a law that regulates business competition comprehensively, namely the Law of the Republic of Indonesia Number 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition ("Indonesia's Competition Law"). The promulgation of the Indonesia's Competition Law has particular significance since previously the legal norms of Indonesian business competition are not comprehensive and are still fragmented in various laws (Arie Siswanto, 2002).

Indonesia's Competition Law is established based on several reasons as reflected in the consideration of the law. Just like any other countries, the main reason behind the formulation of the Indonesian Business Competition Law is the need to establish a robust and fair competition climate, while preventing the concentration of economic power on certain business actors. In addition, it can be mentioned that another reason for the establishment of the Indonesia's Competition Law is to develop an economic democracy in which everyone has equal opportunity in the production and distribution of goods and services. With the support of a robust business climate, the situation is expected to boost economic growth through efficient market economy.

Referring to the Indonesia's Competition Law, it can be seen that this law has defined several objectives, namely: (a) to safeguard the public interest and improve the efficiency of the national economy as one of the efforts to improve people's welfare; (b) to create a conducive business climate through the regulation of fair competition so as to ensure the certainty of equal business opportunity for big business actors, medium business actors, and small business actors; (c) to prevent monopolistic practices and / or unfair business competition caused

by business actors; and (d) to create effectiveness and efficiency in business activities.

Of the many objectives, one of them is particularly relevant to the analysis of the status of State-Owned Enterprises in the Indonesia's Competition Law. The phrase "public interest" contained in the first objective of the competition law, for instance, can be attributed to one characteristic of a State-Owned Enterprise, that is, to be a provider of a product that is a basic public need.

The notion of "public interest" is in fact derived from Article 33 of the 1945 Constitution of the Republic of Indonesia which set the foundation and principles for the development of Indonesia's economy. Paragraph 2 of Article 33 clearly stipulates that "sectors of production which are important for the country and affect the life of the people shall be under the powers of the State." Thus, the idea of "public interest" is reflected by the phrase "affect the life of the people." It follows that to implement its power over certain sectors of production, including that which concerns public interest, the state may establish State-Owned Enterprises. However, the constitution also stipulates that economic democracy that upholds the principles of solidarity, efficiency along with fairness, sustainability, keeping the environment in perspective, self-sufficiency, and that is concerned as well with balanced progress and with the unity of the national economy. The term "economic democracy" implies the idea that private business actors should also be given proper opportunities to participate in the national economy.

To achieve these objectives, the Indonesia's Competition Law adopts an important principle which is also relevant to the discussion of the topic of this paper, namely the principle of "economic democracy with due regard to the balance between the interests of business actors and the public interest." Similarly, as in the first objective of Indonesia's Competition Law, the phrase "public interest" is also contained in the statement of the principles of the law. From one side, the phrase "public interest" can be interpreted as the basis for providing privilege of treatment for State-Owned Enterprises which carries out the mission of providing products of public interest.

2. State-Owned Enterprises in Indonesia

As suggested by the name, State-Owned Enterprises, or sometimes called Government-Owned Enterprises, are business enterprises owned by governments. According to Aharoni, State-Owned Enterprises should have the following particular characteristics: owned by governments, engaged in the production of goods and services for sale, and their sales revenues should bear some relationship to cost (MacAvoy, et al., 1989:10).

Contrary to the common belief, the existence of State-Owned Enterprises have their roots deep down in ancient history (Vernon & Aharoni, eds., 1981: 8). Once regarded as an instrument to achieve public goals, this type of corporations were established in many countries, including those in the Western hemisphere. However, in the 1980-s until early 1990-s there was a negative perception concerning the intervention of the state in the market and many industrialized countries started to privatize their SOEs in order to decrease the state's intervention (Toninelli, ed., 2000: ix).

In the Indonesian context, the term State-Owned Enterprises is used in this paper to refer to enterprises owned by the central government (which in this context is called "State-Owned Enterprises" or SOEs), as well as those owned by provincial and municipal governments (Local Government Enterprises of LGEs). In relation to the competition law, enterprises owned by the central government as well as local governments are equally relevant because both have characteristics as business entities that can compete with private business actors. Nevertheless, given the scale of its business, this paper is more focussed on SOEs, rather than on LGEs.

In a normative sense, State-Owned Enterprises are regulated in at least two regulations, namely Law Number 19 of 2003 on the State-Owned Enterprises ("SOEs Law") and, for LGEs, Law Number 23 of 2014 on Local Government ("Local Government Law"). Referring to the relevant legislations, SOEs are defined as "business entities wholly or largely owned by the state through direct participation derived from separated state assets." Whereas LGEs are briefly defined as "business entities in which the local government own the capital wholly or partially." The two definitions have something in common in that they both emphasize the ownership of the enterprise by the state or government as public bodies. Furthermore, Article 9 of the SOEs Law stipulates that SOEs may take the form of a Limited Liability Company (*Persero*) and a Public Company (*Perum*). The law defines *Persero* as "SOEs in the form of limited liability company whose capital is divided into shares, in which the whole or at least 51% (fifty one percent) of shares are owned by the Republic of Indonesia whose main purpose is to pursue profit." Meanwhile, *Perum* is defined as "SOEs whose capital is not divided into shares, wholly owned by the state, which aims for general benefit in the form of providing goods and / or services of high quality and pursuing profit based on the principles of corporate management."

Further comparison will reveal that there are similarities and differences between *Persero* and *Perum*. Similarly, both *Persero* and *Perum* are SOEs whose ownership is dominated by the state. The difference is that the dominant state ownership in *Persero* is indicated by the ownership of capital (in the form of

shares) which is determined to reach at least 51%, whereas in *Perum* the state completely owns all of its capital. Another difference that exists between *Perum* and *Persero* is in terms of its capital form. *Persero*'s capital must be divided into shares, while the *Perum*'s capital is not. The provision that the *Persero* capital should be divided into shares is a consequence of the *Persero* categorization as a special form of Limited Liability Company. However, there is a more substantial difference between *Persero* and *Perum*. Referring to the definitions given by the law, *Persero*'s main objective is to pursue profits, whereas *Perum* is explicitly founded to carry out the function of serving public interest.

The dichotomy of SOEs to *Persero* and *Perum* is also followed by arrangements for LGEs at regional levels. The SOEs at the regional level consist of two different types, namely Regional Limited Liability Company (*Perseroda*) and Regional Public Company (*Perumda*).

Article 339 of the Local Government Law defines *Perseroda* as "LGEs in the form of a Limited Liability Company whose capital is divided into shares with one local government holds a whole or at least 51% (fifty one percent) of its shares." Meanwhile, *Perumda* is defined as "LGE whose capital is owned by one local government and not divided into shares".

From the above description, it can be asserted that Government-Owned Enterprises, either owned by the central government (SOEs) or local government (LGEs) have two dualistic characteristics. On the one hand, they have a role as the representative of the state to fulfill its obligation to provide goods and services that constitute public interest. At the same time, however, these enterprises also possess the characteristic of a business entity that aims to make a profit.

As of 2017, there are totally 115 SOEs owned by the Indonesian government. Of these, 14 SOEs (12%) are *Perum* and 101 (88%) are *Persero* and *Persero Terbuka*. (<http://www.bumn.go.id/berita/0-Statistik-Jumlah-BUMN>).

3. The Status of State-Owned Enterprises in Competition Law

State-Owned Enterprises are also common in any other countries. The dualistic character of State-Owned Enterprises as business entities and at the same time as government entities have ultimately raised issues in the field of business competition. The central competition law issue in relation to the existence of State-Owned Enterprises is whether State-Owned Enterprises should be placed on the same regulatory platform as private enterprises or should be excluded from the application of competition law as practiced among others by the United Arab Emirates. (Fox and Healey, 2013: 11).

The issue emerged from the fact that to certain degree State-Owned Enterprises, --which are basically business entities--, are controlled by government and that this characteristic may bring various advantages in competition against private entities. This concern has been voiced by OECD in its 2009 policy brief which stated that “[d]ue to their privileged position SOEs may negatively affect competition and it is therefore important to ensure that, to the greatest extent possible consistent with their public service responsibilities, they are subject to similar competition disciplines as private enterprises.” (OECD, 2009: 9).

There are basically two opposing opinions related to the issue whether or not State-Owned Enterprises should be given privilege treatment by competition law. On the one hand, there is a view that State-Owned Enterprises should enjoy special treatment, but on the other hand there is also the opinion that State-Owned Enterprises should be subject to the business competition law norms applicable to all business, both private and government-controlled. The notion that State-Owned Enterprises should not be treated equally with private entrepreneurs in the context of business competition is based on the main argument that State-Owned Enterprises prioritize the provision of public services, so it should enjoy privileges and conveniences not given to private and purely profit-seeking business actors. From this point of view, placing State-Owned Enterprises under the general competition law norms is considered unproductive for the state’s efforts to meet the basic needs of its citizens through the activities of State-Owned Enterprises. From a theoretical perspective, this position is also reinforced by the existence of a doctrine called the Doctrine of State Action that developed in the United States. This doctrine emerged in a lawsuit related to the US antitrust law, in particular the Sherman Act. The case, known as *Parker v. Brown*, was examined by the US Supreme Court in 1943. In this case the regulation issued by the State of California governing the production and price of raisin products was challenged and brought before the court for being considered contrary to the principles of business competition contained in the Sherman Act. The Government of California argued that the regulation was necessary to stabilize the selling price of the State’s prime product, raisin. In that case, the US Supreme Court ultimately ruled that the issuance of regulations was within the domain of state authority and thus legitimate. However, it was also acknowledged that the regulation affected the performance of business competition amongst the producers of grapes, raisin’s raw materials. In the relevant section, the US Supreme Court ruling in the case affirms (*Parker v. Brown*, 317 U.S. 341 (1943)):

Such regulations by the state ... are to be upheld because, upon a consideration of all the relevant facts and circumstances, it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and wellbeing of local communities...

In conformity with that consideration, it is also asserted that (*Parker v. Brown*, 317 U.S. 341 (1943)):

...the adoption of legislative measures to prevent the demoralization of the industry by stabilizing the marketing of the raisin crop is a matter of state, as well as national, concern, In the exercise of its power, the state has adopted a measure appropriate to the end sought.

From the ruling above, it is quite clear that the actions of the government in regulating certain lines of business may be justified if done properly for the public interest concerning the security, health and public welfare.

For those who support the exclusion of State-Owned Enterprises from the provisions of competition law, the doctrine is used to construct the argument that the establishment of a State-Owned Enterprise is a manifestation of an action within the scope of state authority, and thus should be excluded from competition law norms that bind private business. Referring to *Parker v. Brown*, it can be said that at the beginning of its development the US antitrust law does not include State-Owned Enterprises, before different preemptive approach was adopted. (Fox & Healy, 2013: 51).

On the other hand, the opinion that requires a State-Owned Enterprise to comply with the norms of competition law affirms that State-Owned Enterprise is a business entity that carries on business activities in the same market as private business actors, and thus may engage in anticompetitive practices *vis-à-vis* private enterprises (Sappington & Sidak, 2003: 484). Based on the premise, it is argued that State-Owned Enterprises should also be regulated by the same legal norms of business competition in order to realize a business environment conducive to the state economy. In other words, government ownership of a business entity is not a proper basis for giving special treatment that benefits the enterprises. This concept is also known as “competitive neutrality” which the OECD defines as “a regulatory framework (i) within which public and private enterprises face the same set of rules and (ii) where no contact with the state brings competitive advantage to any market participant.”(Aproskie, Hendriksz & Kolobe, 2014: 5).

Between these two opposing views, there is also an eclectic position viewing that State-Owned Enterprises are essentially subject to competition law rules as private business are, but under certain conditions it is also possible that some State-Owned Enterprises, especially those that are vital to the fulfillment of basic needs of the society, be exempted from the enforcement of business competition law. The main problem of this view is certainly to define the concept of “vital to the fulfillment of the basic needs of society.”

4. The Regulation of State-Owned Enterprises in Indonesia's Competition Law

The Indonesia's Competition Law does not mention much about the status of the State-Owned Enterprises in its provisions. In general, it is implied that the Competition Law applies to every entity categorized as a business actor. This is evident from the stipulation of Article 1(e) which provides the definition of business actors as:

“any individual or business entity, whether in the form of legal entity or non-legal entity, established and domiciled or conducting activities within the jurisdiction of the Republic of Indonesia, who is conducting various business activities in the field of economy, either alone or jointly through agreements.”

Referring to this definition, it can be concluded that the business actors who became the subjects of the Indonesian Competition Law may be an individual or business entity, in the form of a legal entity or not a legal entity, and that is established and domiciled or conducting activities within the territory of the Republic of Indonesia. Based on such definition, both private and public business actors, including State-Owned Enterprises, fall within the category of business actors who are subjected to the Indonesia's Competition Law regulations.

The other provision that is also relevant to understand the position of State-Owned Enterprises in the Indonesia's Competition Law is Article 51 which reads:

“Monopoly and/or concentration of activities related to the production and/or distribution of goods and/or services affecting the livelihood of the public and important production branches for the state shall be regulated by law and shall be carried out by a State-Owned Enterprise and/or a body or institution which is formed or appointed by the Government.”

In addition, the other relevant provision is Article 50 which govern the exclusion of the Indonesia's Competition Law which read, “...excluded from the provisions of this law are: a. actions taken and or agreements made as implementation of applicable laws and regulations ...”

Referring to the provisions of Article 1(e) of the Indonesia's Competition Law, it could be inferred that entities categorized as business actors are determined to have the following qualifications:

- a) any individual or business entity;
- b) in the form of legal entity or non-legal entity;
- c) established within the jurisdiction of the Republic of Indonesia;
- d) domiciled or conducting activities within the jurisdiction of the Republic of Indonesia;
- e) alone or jointly through agreements;
- f) conducting business activities in the economic field.

Relying on such definition, it may be briefly stated that a State-Owned Enterprise meets the qualifications contained in Article 1(e). State-Owned Enterprises (both SOEs and LGEs) are business as well as legal entities, established and domiciled in the jurisdiction of Indonesia, and conducting business activities in the economic field. Therefore, under this provision, it is clear that State-Owned Enterprises are business actors as defined in the Indonesia's Competition Law. As a consequence, in principle, State-Owned Enterprises are also subject to the provisions of the Indonesia's Competition Law.

Nevertheless, Article 51 indicates the possibility of special treatment for certain business sectors, namely the production and distribution of goods and/or services that affect the livelihood of the people and the production branches that are important to the state. Article 51, implies that the monopoly and concentration of activities related to the production and/or distribution of goods and or services for the above business sectors shall be regulated separately by law. This means that the monopoly and concentration of production and distribution activities of goods and or services for the business sector above, - a condition that is *prima facie* contrary to the principle of fair competition - are excluded from the scope of the Indonesia's Competition Law. The important phrase of that article is "held by a State-Owned Enterprise" which indicates that SOEs can become one of the parties authorized to manage the production and distribution of products deemed important to the public and the state, that can be exempted from the Indonesia's Competition Law rules.

The special governmental ownership status enjoyed by SOEs may also create the "administrative monopoly" which Kovacic defines as "the abuse of government powers to eliminate or restrict competition." As mentioned by Kovacic in his study on SOEs in China, the so called administrative monopoly may appear in the form of misallocation of resources arising from local protectionism and the creation of regional monopolies, as well as the misuse of business licenses to restrict local market entry. (Kovacic, 2017: 699-700). In many cases, these measures are against foreign companies wishing to enter China's market, and thus to some degree is regarded as threats to the "socialist market economy" by the government. (Chow, 2016: 476). Thus, since privileges enjoyed by SOEs may harm foreign companies in terms of competition, the issues concerning "administrative monopoly" could expand to international trade as well. (Wylemins, 2016: 657-658). This international aspects of SOEs are also intensely discussed in the Trans-Pacific Partnership (TPP) context (Kim, 2017: 230).

Article 50 of the Indonesia's Competition Law which has been quoted above may also have close links with State-Owned Enterprises. Any action or agreement

made by a State-Owned Enterprise that is basically in contravention of the legal norms of competition law shall be permitted if it is performed or concluded to implement statutory regulations.

5. The Practice of Indonesia's Competition Law concerning State-Owned Enterprises

In practice, the Business Competition Supervisory Commission (KPPU) as the authority responsible for enforcing the provisions of Indonesia's Competition Law tends to regard the State-Owned Enterprises as business actors that are subject to the provisions of competition law. This can be seen from several cases examined by KPPU regarding the alleged violation of the Indonesia's Competition Law conducted by State-Owned Enterprises. For example, in Case No. 04 / KPPU-L / 2012 regarding alleged violation of Article 22 of the Indonesia's Competition Law concerning the conspiracy involving 2 SOEs as the respondents, namely PT Waskita Karya (Persero) and PT Adhi Karya (Persero) Tbk, the KPPU clearly qualifies both SOEs as business actors as referred to in the Indonesia's Competition Law. In this case, both SOEs are found to be in violation of Article 22 and are required to pay fines.

Similar principle can also be found in Case No.10 / KPPU-L / 2001 with PT Bank Negara Indonesia (Persero) Tbk as the respondent. The KPPU expressly qualifies PT Bank Negara Indonesia (Persero) Tbk as a business actor bound by obligation to comply with the provisions of the Indonesia's Competition Law. Qualification of State-Owned Enterprises as business actors as referred to in the Indonesia's Competition Law can also be found in Case No. 08 / KPPU-I / 2005 involving PT Surveyor Indonesia (Persero) and PT Superintending Company of Indonesia (Persero) which later were proven guilty of violating competition law and obliged to pay fines.

Close examination on competition cases involving State-Owned Enterprises shows that there is no elaborated defense from the respondents developed upon the argument that the respondent is a State-Owned Enterprise that should not be bound by the provisions of the Indonesia's Competition Law. The absence of a defensive argument that accentuates the position of the State-Owned Enterprises shows that in practice, there is no doubt that the State-Owned Enterprises are essentially covered by the definition of business actors as referred to in Article 1(e) of the Indonesia's Competition Law.

So far, in practice, the treatment of State-Owned Enterprises in competition cases litigation is in line with the prevailing regulations. It shows that the idea of "competitive neutrality" is also adopted by Indonesia's Competition Law.

The practice of KPPU shows that basically State-Owned Enterprises do not enjoy preferential treatment different from private business actors.

For the present conditions, the normative principle which may be used as the basis for excluding of State-Owned Enterprises from the scope of Indonesia's Competition Law is contained in Article 50 and Article 51 of the Indonesia's Competition Law. The basic principle that can be drawn from the two articles is that the State-Owned Enterprises have the opportunity to be exempted from the provisions of competition law if there are laws and regulations that exclude such State-Owned Enterprises because their business activities are related to the production and distribution of certain products or because they perform actions or conclude agreements as the implementation of law.

From these provisions it can be inferred that the regulation of State-Owned Enterprises and the possibility of those entities to obtain preferential treatment tend to emphasize formal aspects. As long as there is a legal basis, there is an opportunity to justify the actions taken by a State-Owned Enterprise, even if it substantially violates the norms of fair competition. It should be remembered however, that most State-Owned Enterprises are in a competitive relationship with private business actors and they also have the potential to engage in unfair competition. Substantially, the unfair competition practices perpetrated by any business actor remain damaging to fair competition, even if they are legitimized by legislation.

Therefore, the legislator should consider to reform Indonesia's Competition Law to provide clearer guidance on the extent to which and in what matters the conduct of State-Owned Enterprises may be exempted from the application of the competition law provisions. This criterion becomes particularly important given that the monopolistic position granted by the legislation can be implemented in such a way that it has a negative impact on business competition. A good example of this situation can be seen from Case No.8 / KPPU-L / 2016 in which PT Angkasa Pura Logistik, a subsidiary of PT Angkasa Pura I (Persero), a State-Owned Enterprise, obtains exclusive rights in the provision of terminal facilities for cargo and postal transport services as well as inspection services and controlling cargo and postal security at several airports in Indonesia. This exclusive right may be legitimate from the legal point of view as it originates from legislation. However, the problem becomes more complicated because this enterprise also manages business units that compete with private business in the field of Aircraft Flight Expedition. Competition in the field of Aircraft Flight Expedition becomes unfair because PT Angkasa Pura Logistik as a legal monopolist in cargo and postal freight services has the privilege that can be enjoyed also by its own business units, including business unit in the field of Aircraft Flight Expedition.

From this case it is evident that the legal monopolistic position held by the State-Owned Enterprises can also open up opportunities for unfair competition in related business fields, in which State-Owned Enterprises competes with private business actors. In order to develop fair competition practices, these conditions need to be addressed in more detail.

E. CLOSING

Based on what has been described above, the following conclusions can be drawn:

- a) Indonesia's Competition Law basically applies the principle of competitive neutrality which assumes that State-Owned Enterprises should not enjoy different treatment from private business actors. This principle is contained in the provisions of Article 1(e) of the Indonesia's Competition Law. However, Indonesia's Competition Law also provides provisions that make it possible for State-Owned Enterprises to be exempted from competition law rules. Unfortunately, there has not been any elaborated provisions concerning the possibility of a State-Owned Enterprise to abuse its legal position and authority which is formally justified.
- b) As for the practice, so far the KPPU has adopted the "competitive neutrality" principle in a consistent manner, which is in line with the provisions of the Indonesia's Competition Law. Nevertheless, the recent case shows that a State-Owned Enterprise that hold justified monopoly may use that monopolistic position to support its affiliating business units in their competition against private players. Therefore, the Indonesia's Competition Law needs to address the issue of competition law that involves State-Owned Enterprises more comprehensively in order to clarify the position of those enterprises in competition law.

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