

## INDONESIAN ANTI-TRUST RELAXATION: URGENCY FOR IMPLEMENTATION PROVISION AND ITS CORRELATION WITH *GOTONG ROYONG* PRINCIPLE

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### ABSTRACT

During the Covid-19 pandemic, numerous jurisdictions have used Anti-Trust Relaxation, also known as Anti-Trust Immunity (ATI) in the United States, recognised as block exemption, authorisation, or dispensation in other jurisdictions. Essentially, this ATI states that collaboration between business actors does not always imply an infringement in competition. There are times when cartels and teamwork can be beneficial to the environment. Many businesses have suffered enormous losses because of the Covid-19 outbreak, and they require assistance and support to survive in this unique scenario. Most likely, survival is only possible when business competitors embrace '*gotong royong*' or collaboration. Anti-trust immunity, which allows collaboration, usually defined as a cartel in a normal situation, will be assessed and authorised accordingly by Business Competition Supervisory Commission (KPPU). Another possibility is to include this ATI in the new bill, which would be even more authoritative. In November 2020, KPPU Regulation No. 3 of 2020 on Competition Relaxation was enacted. However, detailed implementation provisions will be required to implement the Regulation.

**Keywords:** anti-trust immunity; authorization; block exemption; cartel relaxation; dispensation.

### INTRODUCTION

The covid-19 pandemic this 2020 has affected many businesses in the whole world. Many businesses are confused about how to deal with this unprecedented situation. Some countries have responded by applying the so-called anti-trust immunity, block exemption, authorisation, or dispensation to legalise collaboration, which is deemed an illegal cartel in a normal situation. This seems inevitable in facing this emergency circumstance, which threatens business actors' sustainability as pillars of the economy.

The same goes for Indonesian business actors. Collaboration is not generally acceptable from a fair competition perspective, as regulated in Article 11 of Law Number 5 of 1999. However, the approach taken by the legislator to this Article is not a per se illegal approach, but instead a rule of reason approach. This approach spares some room for legal collaboration when it doesn't impair competitive restraint. While Indonesia always claims that *gotong royong* or collaboration is our native culture, this is the right time to collaborate to sustain and survive this pandemic.

On 9 November 2020, the Indonesian Competition Authority, known as Business Competition Supervisory Commission (KPPU), published KPPU Regulation No. 3 of 2020 on the Relaxation of Legal Enforcement of Monopoly Practices and Unfair Business Practices and Monitoring of Partnership Implementation to Support the National Economic Recovery. This article will give the supporting facts and doctrines and eventually analyse the effectiveness of this new regulation, using the statute approach, conceptual approach, and comparative approach.

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## DISCUSSION

### Cartel in Indonesia

A cartel, also known as a collusive oligopoly, is generally introduced as an agreement or business arrangement to limit business competition by determining market division, price-fixing, production and sales conditions, or any other conditions. Such agreement or arrangement may be explicitly or implicitly. A cartels cartel may be conducted by most or all the product manufacturers. It may form in price-fixing between the manufacturers, diminishing the competition. Accordingly, business actors then compete in product differentiation instead.

However, in a more complex form, the cartel may appear in price and market fixing, limit total production, including applying a quota system to each business actor, coordinating adjustment on capacity, preventing overcapacity and coordinating capacity expansion<sup>1</sup>. Another reason to form cartels is to apply the benefit of market power of each business actor or to survive from the deadly competition (predatory competitors), or to survive in lowering demand market (crisis cartel).

The various cartels in the business world can be divided into several types<sup>2</sup>: (A) Cartel Condition: This cartel is manifested in the same seller terms as the terms of delivery of goods and payment. This cartel limits competition in providing services to consumers outside of what is agreed upon, and cartel members are free in other fields. (B) Price cartel: In this cartel, price competition between cartel members is eliminated because cartel members are not allowed to sell below the specified price except for the minimum price; a certain price is also agreed upon for cartel members. There are several price cartels; for example, the shipping business of a price cartel is called Conferences. The slightest obstacle in a price cartel is determining the minimum selling price. Less efficient firms object to lower selling prices. However, a minimum price that is too high will result in cartel members increasing their production, thus triggering the quantity of the product concerned. Price cartels only exist in companies with similar products. If the products of cartel members are not uniform, it will be difficult to agree on a selling price, and in this case, people will apply to the third cartel.

Moreover, the next type of cartel, (C) Cartel Calculations: This cartel is distinguished between an open and a closed calculation scheme. For those open, the cartel only agrees that the selling price must consist of some elements. For those closed, an agreement is made on the amount of money, which may be included in the calculation elements. A calculated cartel with a closed calculation scheme has the same effect as a price cartel. For those that are open, the prices of various Cartel members can vary, so there is still competition in prices. An example of a closed calculation scheme is publishing companies. (D) Production and Sales Cartel: Cartel members may only produce or sell a certain amount within a certain period. Determination of the amount for each (quota) can vary. The quota can be expressed in a certain number of units, but it can also be in the form of a certain

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<sup>1</sup> Suhasril and Mohammad Taufik Makarao, "Law on the Prohibition of Anti-Monopoly and Unfair Business Practices in Indonesia", Ghalia Indonesia, Bogor: 2010, p. 127.

<sup>2</sup> *Ibid*, p. 61-62.

percentage of total production and sales. The first system has no flexibility, while the last supply system can be adjusted according to the development of demand.

Furthermore, the following types of cartels are (E) Market sharing cartels: This cartel limits competition by dividing the market among members. This division can be based on region, type of goods, etc. (F) Profit-Sharing Cartel: This cartel has a wide range of cooperation. This cartel determines that all profits are paid to the central cash (pool), divided based on a certain formula. Thus, competition is very limited. With this cartel, mutual interests arise between cartel members. Profit-sharing cartels exist, among others, in the shipping services sector, which is international, and many cartels are international. (G) Syndicate Cartels: Its sales syndicate-type cartel is centred on a sales market. The merger is centred on a sales market. The merger can go so far that there is no contact between the company and its customers.

Based on Article 11, Law Number 5 of 1999, the cartel is regulated as follows: Business actors are prohibited from making any contract with other business competitors to influence the price by determining the production and marketing of goods and services, which can cause monopolistic practices and unfair business practices. Despite Article 11, the cartel is not merely which are stated. Cartel includes oligopoly in Article 4, price-fixing in Article 5, market division in Article 9, and even article 12 on Trust (Pool).

Cartel is widely known for its negative impact. Yet, the cartel has some positive impacts<sup>3</sup>. Cartels allow the collaboration between company management and workers to be more conducive because all demands that are a source of conflicts, such as wage increases and employee welfare, can be more easily granted. In addition, the risk of termination of employment can be minimised or even avoided because companies that are members of cartels tend to have a more stable position in free competition. Therefore, the risk of loss due to low sales levels can be minimised because either production or sales are regulated, and the amount is guaranteed.

Risk of termination of employment, lowering sales levels, and employee industrial relation risk are common problems faced by business actors in this Covid-19 Pandemic due to decreasing market demands. It is worth mentioning that all positive impacts of cartels are likely to be solutions for those issues.

Besides those abovementioned positive impacts, there are also negative impacts that are both disadvantages and dangerous to cartels in trade. The following is the negative impact of the cartel<sup>4</sup>, comprising a lack of innovation development since corporate revenues are mostly constant and predictable. Also, companies do not have the freedom to develop innovations and expand their business because of the regulations agreed upon in the cartel and the sanctions. Moreover, lack of innovation development because the profits earned by companies tend to be stable and certain. The business climate becomes less conducive due to the absence of healthy competition among producers. In the long term, certainly, it will affect people's purchasing power because product prices

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<sup>3</sup> "What is a Cartel? What is the Impact on the Economy?"<https://www.simulasikredit.com/apa-itu-kartel-apa-dampak-bagi-perekonomian/>, [accessed 17/11/2020]

<sup>4</sup> *Ibid.*

are vulnerable and unstable. The profits earned and enjoyed by cartel member producers may be too large and long-term. The price of products controlled by cartels can trigger inflation detrimental to society at the macro level. Therefore, it is reasonable that in a normal situation, that cartel in a normal situation is not allowed.

The cartel is not necessarily impairing Law Number 5 of 1999 since this article was drafted in the rule of reason approach, not per se illegal. It is concluded that the rule of reason approach used in this article means that some cartels are deemed tolerated and legal if it has no harmful effect on the economy of society and no anti-competitive restraint. Cartel is not necessarily attainable; several requirements must be fulfilled<sup>5</sup>: first, most large producers in an industry must become members so that there is a certainty that the cartel is truly strong. Second, all the members shall submit to whatever is decided together beforehand. Third, the amount of demand for their product must increase. The cartel is deemed less effective if demand falls because it will be difficult to maintain the prevailing price level. Fourth, newcomers are difficult to enter the market (entry barrier).

When a cartel is formed to create a monopolistic condition to gain more profits from the price increase and production is limited, such a cartel is harmful to society, known as an offensive cartel. The offensive cartel is the one renowned in society. Quite the reverse, there is a positive cartel, identified as a defensive cartel, which is formed to avoid unfair business practices and price war which leads business actors to destruction<sup>6</sup>. Certainly, as its destructive nature, offensive cartels shall be prohibited. In contrast, the defensive cartel is survival conduct, which is commonly acceptable. Legislator approach to this cartel conduct of Article 11, which uses the rule of reason approach instead of per se illegal approach, may be interpreted as recognition on the defensive cartel in actual business course, besides offensive cartel. Suhasril and Makarao even mentioned that a defensive cartel should be legally protected by Government<sup>7</sup>.

Applying this rule of reason approach in cartel cases is regulated in KPPU Regulation No. 4 of 2010 concerning Cartel (Guidelines for Article 11), where reasons of business actors in setting up cartel shall be carried out. It shall be checked whether any reasonable restraint in setting up the cartel and whether such restraint is acceptable. KPPU must consider the following matters<sup>8</sup>: 1. Are there any signs of a reduction in the production of goods and or services or whether there is an increase in prices? If not, then the business actors' actions are not against the competition law. 2. Is the act naked, or is it ancillary? If the collaboration is naked, it will be against the law. 3. That the cartel has market power. If a cartel has sufficient market power, then they have the power to abuse this power. However, if there is no market power, it is unlikely that the cartel will influence the market. 4. There is strong evidence that cartels generate appreciable efficiency, thus exceeding the resulting losses. If it does not bring efficiency, the cartel only causes losses. 5. There is a reasonable necessity. This means that the actions of the cartel actors are indeed necessary for common sense. In other words, to achieve competitive advantages, the cartel's actions need to be carried out, and

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<sup>5</sup> Suhasril and Mohammad Taufik Makarao, *Op. Cit* (Note 2), p. 60.

<sup>6</sup> *Ibid*, p. 59.

<sup>7</sup> *Ibid*, p. 59.

<sup>8</sup> Andi Fahmi Lubis, et. al, *Op Cit.*, p. 111.

there is no other way or alternative that business actors should think about. 6. They are balancing tests. After the other factors mentioned above have been examined, it is necessary to measure the profits obtained through the cartel and the resulting losses. If the profits obtained are greater than the resulting losses, then the actions or actions of business actors can be justified.

### **Recent Development of Indonesian Competition Law**

Indonesian Competition Law Number 5 of 1999 has been amended in Law on Job Creation which takes the form of omnibus law. The amendment took only a small part in the Ease of Doing Business cluster. Law No. 11 of 2020 concerning Job Creation was an ambitious project to reform economic law in Indonesia, using an omnibus approach.

The amendment was remarkable in this Job Creation Law but focuses more on procedural steps and administrative sanctions. The minimum limit for administrative sanction stands still at Rp.1.000.000.000 (one billion Rupiahs), but there is no maximum limit presently. Previously the maximum limit was Rp.25.000.000.000 (twenty-five billion Rupiahs). KPPU can impose a larger amount on the business actor. This new regulation would cause many business actors to think twice before violating KPPU's verdict. When it does not enforce the KPPU verdict and does not submit any appeal, KPPU will submit its verdict to Police. It is a criminal case with a possible sentence amounting to Rp.100.000.000.000 (one hundred billion Rupiahs) or 6 months imprisonment. The criminal nature (stated in Article 48) of the previous Competition Law is omitted in the Job Creation Law, but Article 49 on additional criminal sanction remains<sup>9</sup>.

The procedure of appeal when a KPPU verdict is challenged also changes significantly. The appeal must be submitted to the Commercial Court instead of District Court. This may shed some light because Commercial Court judges are more competent in business practices.

Though this Law on Job Creation has amended Law Number 5 of 1999, the amendment of Competition Law is still in the pipeline of the National Legislation Program. Some provisions are still to be revised, such as the leniency program and pre-notification in mergers, consolidations, and acquisitions. However, there is no sign that the state will allow cartel relaxation in the new draft. Remarkably, in early November last year, KPPU published Regulation Number 3 of 2020 regarding Anti-Trust Relaxation, which will be discussed in the following chapter.

### **KPPU Regulation No. 3 of 2020 on Relaxation of Legal Enforcement of Monopoly Practices Unfair Business Practices and Monitoring of Partnership Implementation to Support the National Economic Recovery**

Under this new regulation, benefits offered from the following relaxation for business actors are procurement using State Budget or Regional Budget to fulfil medical needs<sup>10</sup>, approval of an

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<sup>9</sup> Article 49 of Law No. 5 of 1999 rules additional criminal sanctions, comprising: revocation of business license; or prohibition on business actors who have been proven to have violated against this law to occupy the position of directors or commissioners a minimum of 2 (two) years and a maximum of 5 (five) years; or cessation of certain activities or actions that cause the occurrence of loss to the other party).

<sup>10</sup> Article 5 KPPU Regulation No. 3 of 2020.

agreement, activity, and the use of dominant position to handle Covid-19 and/or to increase the economic ability of a business<sup>11</sup>, extension of the deadline to submit the mandatory post-closing notification to the KPPU from 30 to 60 business days as of the effective date<sup>12</sup>; and extension of the period of written warning in the partnership monitoring procedure from 14 to 30 business days<sup>13</sup>. Procurement using State Budget or Regional Budget may be conducted merely to fulfil medical needs or provide supporting facilities to handle Covid-19, e.g., the procurement of medicine, vaccine, construction of emergency hospitals, the appointment of hotels or buildings for isolation, and other medical needs and supporting facilities to handle Covid-19; and distribute social assistance and social safety net from the government to the public<sup>14</sup>. The interesting thing is seen in the transitional provision, which states that the regulation also provides that the more favourable provisions will apply, if there are differences between the new regulation and other KPPU regulations, provided that the matter is still ongoing and has not entered into the preliminary examination stage<sup>15</sup>.

Though this Regulation seems to answer the Covid-19 pandemic, there must be more detailed provisions than the present Regulation. The most beneficial provision for general business sectors (out of health industries that benefitted from Article 5) in article 6, which allows the submission of a plan of an agreement, activity, and the use of a dominant position to handle Covid-19 and to increase the economic ability of a business. A relaxation proposal may be submitted to the Commission, which may issue approval under certain conditions or reject any submission in writing. However, from the perspective of business actors, this provision is unfavourable. The good faith of business actors may even be mistreated, which may open another possibility. Non-approval may end up in being alleged business actors. A risk that any business actors will not buy.

### **Covid-19 Pandemic in Indonesia**

In Covid-19 Pandemic, many business sectors find this situation hard to cope with. Almost every business sector, unless health-related sectors, are decreasing in this pandemic. Hotels, tourism, MICE (meeting, incentive, conference, and exhibition), airlines, bars and restaurants, movies and entertainment, sport-related business, and automotive are the most directly affected businesses. Consumer electronics and even Micro, Small and Medium Enterprises are not free from the Covid-19 Pandemic impact. According to McKinsey's research, despite those decreasing businesses, some bases survive and even on up trends in this pandemic, namely groceries, household supplies, personal care products, and entertainment at home. However, most businesses are affected by diminishing trends.

Based on Yamada Consultant Surveys on 159 Japanese corporations investing in foreign direct investment in Indonesia, when asked about how much influence the new Corona pandemic (global epidemic) had on their basis of Indonesia, 64.1% answered "very affected", and 34.0% answered,

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<sup>11</sup> Article 6 KPPU Regulation No. 3 of 2020.

<sup>12</sup> Article 7 KPPU Regulation No. 3 of 2020.

<sup>13</sup> Article 8 KPPU Regulation No. 3 of 2020.

<sup>14</sup> Article 5 KPPU Regulation No. 3 of 2020.

<sup>15</sup> Article 10 KPPU Regulation No. 3 of 2020.

"slightly affected". Meanwhile, "No effect" was 1.9%<sup>16</sup>. 68.6% of those 159 companies answered that they did not consider merger and acquisition, 16.4% answered that they would think it was like before the pandemic, and 1.9% said they were actively considering a merger. Specific considerations include "creating new business opportunities with local partner companies through alliances and joint ventures," "new business and acquisitions with an emphasis on technology," and "reviewing relationships with joint ventures"<sup>17</sup>.

The survey gave us representative figures on the recent condition of foreign investment in Indonesia. It is even stated that if the situation is not improved shortly, ten of those companies will quit investing in Indonesia<sup>18</sup>. From my perspective, obviously that the market has tried struggling to defeat this pandemic alone. They may need to cooperate to survive this terrible condition. If the government has no certain solution to this problem, it is expected not to be contradictory to any possible solutions conducted creatively by business actors. KPPU, as a quasi-judicial body, is also expected to have an open perspective because we all have a common enemy, economic recession.

The long-term effects of COVID-19 on our society and the economy are still unclear. It may very well be that the crisis could last for a longer period and lead to a significant decrease in the demand in some of the affected industries. The companies operating in these markets may be faced with substantial over-capacities. It might be permissible and even advisable to form a so-called crisis cartel or cartel relaxation. The aim of a crisis cartel is the coordinated reduction of over-capacities to help maintain ample competition on the market while preserving its diversity. Such measures were employed during the oil-price shocks at the beginning of the 1980s<sup>19</sup>.

Article 27, paragraph 2 of the Indonesian 1945 Constitution states that every citizen shall have the right to work and earn a humane livelihood<sup>20</sup>. Article 33, paragraph 4 also states that (4) The organisation of the national economy shall be conducted based on economic democracy, upholding the principles of togetherness, efficiency with justice, continuity, environmental perspective, self-sufficiency, and keeping a balance in the progress and unity of the national economy. These articles show that the Indonesian government shall uphold the principle of togetherness in applying the right to earn a humane livelihood, including running a business in Indonesia by upholding the principle of togetherness.

Indonesia is very familiar with the term togetherness. Indonesian communal culture is always manifested in terms of *gotong royong*. Bung Karno, Indonesia's first president and Pancasila founding father, once even said that Pancasila could be concluded in one term: the principle of *going royong*. *Gotong royong*, in literal meaning, is mutual assistance or collaboration. *Gotong Royong* is seen as an obligation of an individual towards society. The idea of *gotong royong* is sharing of

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<sup>16</sup> Johnson Simanjuntak (ed), "Japanese Company Survey, 10 Japanese Companies Will Leave Indonesia ", November 2020, <https://www.tribunnews.com/internasional/2020/11/05/survei-perusahaan-jepang-10-perusahaan-jepang-akan-ke-luar-dari-indonesia>, [accessed 17/11/2020].

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> Steger Jens (et.al), "Covid-19 Pandemic and Competition Law: Survive Covid-19 Form of a Cartel?", March 2020, <https://www.simmons-simmons.com/en/publications/ck7w2gttu1tv80943rokuxl00/the-pandemic-and-competition-law>, [accessed 17/11/2020].

<sup>20</sup> 1945 Indonesian Constitution.

burdens between the member of the community<sup>21</sup>. The idea of collaboration in this pandemic is both acceptable for Indonesians and the world's millennials generation.

Business actors' preference to cooperate than compete in this pandemic has appeared somehow. In Indonesia, Burger King Indonesia followed its holding to advertise people to buy McDonald (and Flip Burger, Carl's Junior, Wendy's, Klinger Burger, KFC, CFC, Domino's Pizza, Bakso Boedjangan, Sate Khas Senayan, Hokben J. Co, Ta Wan, Sederhana, Warteg, or any other independent restaurant). This advertisement was meant to increase people's awareness that many restaurants are in the condition of skating on thin ice, including Burger King. Counters to this ad have been published by Luberger, a local burger restaurant, offering a 10% discount for people who purchased food in another restaurant (including Burger King) on the same day. Unequivocally, Luberger's advertisement says that "Inspiring! In this pandemic, let's collaborate, not compete!" It is the spirit of collaboration here. Further discussion on each sector will be unnecessary due to obvious tendencies. Preventing for more negative effects to come, collaboration in terms of cartel relaxation is not a bad idea at all.

### **Gotong Royong (Collaboration) Principle**

Former Minister of Communication and Information, Rudiantara, mentioned that Pancasila is still relevant in this digital age because its collaboration (*gotong royong*) is its essence<sup>22</sup>. The same article recalls Soekarno's speech in the BPUPKI Session:

*"Five principles (Pancasila), I can squeeze it so that there are only 3 left: socio-nationalism, socio-democratic, and divinity. If you like the symbols of those three, take these three. But perhaps not all gentlemen are pleased with this Trisila (three principles) and ask for one, only one basis? All right, I made it one; I collected it again into one. What is that one? Collaboration (gotong royong), " said Soekarno.*

People call the millennial economy the sharing economy, similar to the spirit of collaboration. Indonesian's communal principal collaboration (*gotong royong*) is no longer Indonesia's exclusive culture. Generation Y, who rules over the middle to top positions in the professional world, has infused<sup>1</sup> this value in their daily work, which creates new business rules. This influence does not stop as new business rules in pandemic situations but in normal situations. This pandemic will be defeated only by collaboration.

In terms of business competition, collaboration is deemed affirmative to a certain extent. When the extent is exceeded, the offensive cartel occurs. In this pandemic situation, the defensive cartel is acceptable if it does not impair other business actors' interests or public interest. Most of us will fully understand that cartel in this situation was not made for predatory aiming but surviving intention instead. Therefore, nobody intends to perform cartel in this kind of situation (except for

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<sup>21</sup> Siska Nelson, Indonesian *Gotong Royong* (Mutual Assistance): Traditional Communal Work for the Community, (without year), <https://nflrc.hawaii.edu/pebbles/prototype/doc/165/>, [accessed 17/11/2020].

<sup>22</sup> Rudiantara, "Pancasila Powers due to the value of mutual cooperation", October 2019, [https://kominfo.go.id/content/detail/21867/kesaktian-pancasila-karena-nilai-gotong-royong/0/berita\\_satker](https://kominfo.go.id/content/detail/21867/kesaktian-pancasila-karena-nilai-gotong-royong/0/berita_satker), [accessed 17/11/2020].

the increasing businesses, as discussed abovementioned). From the psychological side, survival is a human instinct, particularly in this emergency.

This pandemic has run for around two years, which has made many businesses very close to collapse. If the government does not interfere in concrete ways of surviving mode, the situation would be even more random. Naturally, survival is predestined for all humanity. Therefore, certainty and clarity of anti-trust relaxation as a survival mode are inevitable in this Covid-19 pandemic.

### **Cartel Relaxation in Many Countries**

Cartel relaxation is known in several jurisdictions as anti-trust immunity (USA), block exemption (European Union), authorisation (Singapore) and Dispensation in some other jurisdictions. This refers to a business actor's conduct, which is deemed cartel and included as anti-competitive conduct in a normal situation, but in certain conditions may be waived and considered legal. Farid Nasution defined anti-trust immunity as immunity granted by competent authority to business actors for agreements between competitors conflicting with the competition law. It is only valid for a certain period but can be extended upon further assessment<sup>23</sup>.

In America, this anti-trust immunity firstly was introduced in *Parker v. Brown*, 317 U.S. 341 (1943); state and municipal authorities are immune from federal antitrust lawsuits for actions taken under a clearly expressed state policy that, when legislated, had foreseeable anticompetitive effects<sup>24</sup>. This doctrine can also provide immunity to non-state actors if a two-pronged requirement is met: (1) there must be a clearly articulated policy to displace competition, and (2) there must be active supervision by the state of the policy or activity<sup>25</sup>. In Indonesia, such relaxation was introduced in the first place by the enactment of Article 51 of Law No. 5 of 1999 regarding Prohibition on Monopoly Practices and Unfair Business Practices, which allows monopoly and centralisation of activities related to the production and marketing of goods and services which control the needs of people in general and production branches vital to the state shall be regulated under the law and shall be performed by the State-Owned Companies and entities or institutions established or appointed by the Government. This was a different concept from what we called cartel relaxation. Yet, anti-trust immunity is more to the exemption to antitrust law as it is regulated in the USA. This article does not use the said terminology but refers to cartel relaxation, which is more specific. In its development, anti-trust immunity includes alliances as an exemption, particularly on airlines.

Recently, the German Federal Cartel Office has approved the German Football League's ("DFL") marketing model for the transmission rights of the Bundesliga and Bundesliga 2 matches from the 2021/22 season onwards<sup>26</sup>. DFL's marketing model is based on the joint sale of media rights of individual football matches. Such joint sale, principally, constitutes an anti-competitive

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<sup>23</sup> *Ibid.*

<sup>24</sup> Legal Information Institute, "State Action Anti-Trust Immunity", (without year), [https://www.law.cornell.edu/wex/state\\_action\\_antitrust\\_immunity](https://www.law.cornell.edu/wex/state_action_antitrust_immunity), [accessed 17/11/2020].

<sup>25</sup> *Ibid.*

<sup>26</sup> Nissen, Morten and Kuipers, Pauline. "German Federal Minister of Economic Affairs is considering relaxation of cartel rules at the time of COVID-19". April 2020. <https://www.lexology.com/library/detail.aspx?g=98d03dd3-3680-4e31-9458-31d42415be16> [accessed 17/11/2020].

agreement. Joint selling of media rights by a central association provides many advantages for consumers, such as the simplified organisation of the league matches, the timely coverage of highlights and the provision of high-quality league-related products, e.g., the “conference” coverage of Saturday matches played at the same time. On 1 April 2020, Australia authorisationrization on exemption of 5 telecommunication operators to share their information, data, and strategy to cope with network congestion, but price-fixing is not allowed<sup>27</sup>. Many countries have applied this block ex (the so-calledemption anti-trust immunity) reported by Latham and Watkins LLP, on 5 October 2020, concerning the Impact of Covid-19: New Exemption Under Anti Trusts Law.

### **Cartel Relaxation in Indonesia**

Before the promulgation of KPPU Regulation No. 3 of 2020, Assegaf Hamzah and Partners, a prominent law firm in Jakarta, Indonesia, a member of the Rajah & Tann network, held a webinar on 27 May 2020 regarding Cartel and Collaboration: Competition Law during the Covid-19 and New Normal, where Mr Kurnia Toha, the Chairman of the Indonesia Competition Commission (KPPU) participated as one of the panellists. In the discussion, according to Mr. Kurnia Toha, key takeaways on any collaborative business measures, particularly those taken during this pandemic<sup>28</sup>: (1) Despite the absence of any regulations and guidelines on antitrust immunity or cooperation between businesses outside the merger control’s scope, the Chairman of KPPU expressed his support for businesses considering collaborative measures that may be beneficial to the country and aid the government in dealing with the current health and economic crisis; (2) The measures taken must have justifiable economic and legal reasons that may outweigh the potential adverse effects of the collaboration (3) Businesses seeking guidance are welcome to consult with the KPPU on their proposed collaboration, (4) Businesses are advised to come fully prepared with a comprehensive analysis of the proposed collaboration, including its potential public benefits and impacts before reaching out to the KPPU; and (5) If the KPPU deems that there are sufficient and justifiable reasons, it is committed to being supportive and will issue a “comfort letter” for the proposed arrangement.

Aforementioned, KPPU’s unprecedented measure was appreciated by business actors. However, the context of the above mentioned is merely in the pandemic period, which means there will be no chance for this cartel relaxation to be applied in a normal situation. As discussed beforehand, this cartel relaxation has been applied in many countries, even in normal situations, in Germany, France, Italy, the United Kingdom, the USA, India, China, Australia, and New Zealand<sup>29</sup>.

Farid Nasution, in the webinar, proposed that the assessment conducted by KPPU as an Indonesian competition authority may consider<sup>30</sup> the firms involved in the parameters of the collaboration, including its proposed scope and duration. The KPPU is also advised to assess whether

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<sup>27</sup> ACCC, “Interim authorisation decision”, March 2020, [https://www.accc.gov.au/system/files/public-registers/documents/Interim%20Authorisation%20Decision%20-%2031.03.20%20-%20PR%20-%20AA1000483%20NBN\\_0.pdf](https://www.accc.gov.au/system/files/public-registers/documents/Interim%20Authorisation%20Decision%20-%2031.03.20%20-%20PR%20-%20AA1000483%20NBN_0.pdf), accessed [17/11/2020].

<sup>28</sup> HMBC Rikrik Rizkiyana and Farid Fauzi Nasution, “Is There A Room For Cartel and Collaboration in the New Normal?”, June 2020, <https://id.rajahtannasia.com/media/3955/ahpclientupdate-10june2020.pdf>, [accessed 17/11/2020]

<sup>29</sup> Farid Fauzi Nasution, *Loc Cit.*

<sup>30</sup> Farid Fauzi Nasution, *Loc Cit.*

the public benefit from the conduct outweighs the detriment of competition and how the collaboration is intended to achieve a certain objective in the public interest that can be beneficial from economic, sectoral, and legal perspectives. Finally, KPPU is suggested to see why the collaboration is necessary to meet this objective and whether there is no other way to achieve the objective other than such collaboration. These suggestions are valuable in drafting the future implementation provision to KPPU Regulation No. 3 of 2020.

This proposal will be a supportive contribution corresponding to the New KPPU Regulation No. 3 of 2020. And the best thing about this proposal, these tests are applicable in both the Covid-19 pandemic and afterwards. Although it is obvious that the present KPPU Regulation is merely applicable during pandemic times, defensive cartels may also occur in normal recourse. As mentioned abovementioned, defensive cartels are surviving mode, or in essence, there is no intention to infringe Indonesian antitrust law.

Precisely with the test described above, this will reinforce that collaboration can be done during a pandemic and in normal times. Suppose collaboration is only carried out during a pandemic. In that case, it may be interpreted that the KPPU's view of the business actor is negative because it considers impossible for collaboration to be carried out fairly, except during a pandemic. When students started to study Competition Law, all knew that there was a pro-competitive agreement and an anti-competitive agreement. Collaboration might be a pro-competition agreement. However, the possibility of cartel relaxation in the new bill has not appeared yet<sup>31</sup>, though this trust immunity is mentioned in the review of Chapters V and VI of UNCTAD's Model Law on Competition Law<sup>32</sup>. Hopefully, the enactment of the KPPU Regulation will support that collaboration may be included in the next Amendment of Law No. 5 of 1999, which shall be ruled merely to a certain degree.

## CLOSING REMARKS

Apart from the brilliant test delivered by Farid Nasution on the assessment of cartel relaxation, the rule of reason test on cartels discussed earlier has been a very good starting point to assess whether a cartel is anti-competitive. Eventually, this will lead to whether cartel relaxation is feasible or vice versa.

Though KPPU has promulgated Regulation No. 3 of 2020 on the Relaxation of Legal Enforcement of Monopoly Practices and Unfair Business Practices and Monitoring of Partnership Implementation to Support the National Economic Recovery, the Regulation requires further detailing. If not, there will be a risk for any business actor who submits to this rule, and it's highly

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<sup>31</sup>Cartel relaxation is not mentioned in Bill of Law No. \_\_\_\_ Year \_\_\_\_ concerning Prohibition on Monopoly Practices and Unfair Business Practices, <http://www.dpr.go.id/doksileg/proses2/RJ2-20161111-041211-1939.pdf>, [accessed 18/11/2020].

<sup>32</sup>"If a collaboration creates a new function or business, or performs an old function better, then it usually has pro-competitive effects. However, competition concerns arise where a joint venture serves to create or enhance market power, entails overly restrictive ancillary agreements or is an unnecessary vehicle by which to achieve the desired objectives (that is to say less anti-competitive means is available). In such circumstances, a joint venture may harm competition and might even be used to disguise collusive activities such as price fixing or market division", cited from United Nation Conference on Trade and Development, "Review of Chapter V and VI of Model Law on Competition, May 2018, [https://unctad.org/system/files/official-document/ciclp10\\_en.pdf](https://unctad.org/system/files/official-document/ciclp10_en.pdf), [accessed 18/11/2020].

unfavourable from a business actor's perspective. A clearer implementing regulation or guidelines, or even further ruling of this cartel relaxation in the coming amendment of Law No. 5 of 1999 is anticipated.

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