ON PROPOSAL TO REGULATE ABUSE OF SUPERIOR BARGAINING POSITION: LESSONS FROM OTHER JURISDICTIONS

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Abstract
The latest version of the draft bill regarding Law on the Prohibition of Monopolistic Practices and Unfair Business Competition has added new arrangements about the abuse of a superior bargaining position. The new law proposal which is intended to amend existing Indonesian competition law (Law Number 5 Year 1999) stipulates that any business actor is prohibited from abuse its superior bargaining position within a partnership agreement with other less dominant entities. Under Law Number 20 Year 2008 on Micro, Small and Medium Enterprises, a partnership agreement means any agreement made between micro, small and medium enterprises and large enterprises like state or privately owned national businesses, joint ventures and foreign businesses that conduct economic activities in Indonesia. Such a condition makes many antitrust experts or economists question the relevancy of regulating abuse of superior bargaining position under competition law. However, several jurisdictions –Japan, Korea, Taiwan, France, and Germany- have regulated the abuse of superior bargaining position under their national competition laws.

Keywords: E-Court, E-Litigation, and Supreme Court Regulation.

Abstrak

Kata Kunci: posisi tawar, penyalahgunaan, kemitraan, perjanjian tidak adil.
I. INTRODUCTION

One of the main points of amendment proposal of Law Number 5 Year 1999 on Prohibition of Monopoly Practices and Unfair Business Competition is about the new article proposal regarding abuse of superior bargaining position. Unlike the provision on abuse of dominant position which has been stipulated under Law Number 5 Year 1999, the concept of abuse of superior bargaining position in the new draft bill of Indonesian competition law does not discuss about the market dominance of business actor but rather it regulates the use of power which owned by a more dominant (superior) party in an agreement with a less dominant counterpart. So, unlike the provision of dominant position, the main goal of abuse of superior bargaining position provision is to regulate conduct by powerful firms but it does not require the establishment of monopoly power or market dominance which usually shown by the high percentage of market share.¹

Specifically, the new draft bill prohibits any abuse which conducted by parties (business entities) having the superior bargaining position to their counterparts that assumed do not have the privilege of such bargaining in the partnership agreement (perjanjian kemitraan). Under Law Number 20 Year 2008 on Micro, Small and Medium Enterprises, a partnership agreement means any agreement made between micro, small and medium enterprises and large enterprises like state or privately owned national business, joint ventures and foreign business that conduct economic activities in Indonesia.² So it is clear that the article proposal aims to protect the interests of micro, small and medium enterprises from abusive behaviour conducted by large enterprises during the implementation of the partnership agreement.

The special wording of ‘partnership agreement’ in the article proposal makes Indonesian competition law will have something distinctive compared with similar provisions in other jurisdictions. The unique –yet controversial- nature of abuse of superior bargaining position provision that does not need the establishment of market dominance makes it only can be found under few competition law jurisdictions namely Japan, Korea, Taiwan, France, and Germany hitherto. However, like Japanese competition law, the focus of abuse of superior bargaining position provision is broadly stipulated to protect inferior parties’ interests against its superior counterparts.

II. THE CONCEPT OF ABUSE OF SUPERIOR BARGAINING POSITION IN COMPETITION LAW

2.1. Abuse of Dominant Position v. Abuse of Superior Bargaining Position

As firstly has been introduced over a hundred years ago in the United States, to date the competition law regimes all over the world put the concept of ‘dominance’ as central importance to make an early detection whether there is any violation of competition law or not. One of the working definitions of dominance can be found in United Brands case which defines dominance relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an

appreciable extent independently of its competitor, customers and ultimately of its consumer.3

In economics, dominance is mostly associated with the concept of market power. A (dominant) firm is likely to enjoy market power if it relatively has a high level of market shares compared with its competitors. Market power also can be established through coordination between several firms in an oligopolistic market. Such privilege can easily lead to abuse of dominant position conducted by the dominant firm(s) like charges prices significantly above competitive levels or restrict output significantly below competitive levels for a sustained period.4 Although it is important in the first place to decide whether a firm enjoys high market shares or not, sometimes a firm can also exercise its market power although it does not have relatively high market shares5 which usually shown by a high percentage of its total selling or assets compared with its competitors. Sometimes the firm can still abuse its power to its loyal consumer without having a dominant position in the relevant market if the goods or services offered are relatively inelastic. Hence, competition law has developed two adding principals other than market shares or market structure to assess whether there is any abuse of dominant position by investigating the level of profits obtained by the firms and how the firms conduct their dominance ex-post.6

The abuse of a dominant position is specified in article 25 Law Number 5 Year 1999:

(1) A business actor shall be prohibited to use a dominant position either directly or indirectly too:
   a. determine the trade conditions to prevent and/or restrain consumers from obtaining competitive goods and/or services, either in the point of view of price and/or quality, or
   b. limit markets and technological development or;
   c. obstruct another business actor who may become a competitor from entering the relevant market.

(2) A business actor shall have a dominant position referred to in paragraph (1) if:
   a. one business actor or a group of business actors control 50% (fifty percent) or more of the market share of a certain type of goods or services, or
   b. two or three business actors or a group of business actors controls 75% (seventy-five percent) or more of the market share of a certain type of goods or services.7

The structure of article 25 of Law Number 5 Year 1999 implies that it is read reversely from article 25 (2) before continuing to article 25 (1). As read in the

5 In the Alcoa case, for example, Judge Hand suggested a three-tiered approach: a firm with a 30% market share does not have market (monopoly) power; a firm with a 60% share may have such power, and a firm with 90% share does have market power; cited from Stephen Ross. (1993). Principle of Antitrust Law, (New York (US): The Foundation Press, Inc) p. 39.
6 Ibid, p. 36 - 38.
abovementioned provisions, the proxy which becomes the gate to enter the investigation of abuse of dominant position practices under the Indonesian Competition Law is the determination of market share owned by a firm or a group of firms. The high percentage of market share as stipulated in article 25 (2) is the main threshold before entering further investigation. Afterward, the competition authority, in Indonesia called as The Commission of Supervision of Business Competition or simply as KPPU (Komisi Pengawas Persaingan Usaha), can investigate whether any violations restrictively stipulated under article 25 (1) which has been conducted by a dominant firm or group of firms.

In their second decision after the establishment, -Indomarco case (2000)-KPPU did not make further investigation of defendant’s violation of abuse of dominant position as stipulated in article 25 (1) after it was found that defendant did not have market share as high as 50% as a single firm nor it had market share as high as 75% as a member of group firms. However in Carrefour decision (2005), KPPU used broader interpretation to define a dominant position as stipulated under article 1.4 of Law Number 5 Year 1999:

Dominant position shall be a situation in which a business actor has no significant competitor in the relevant market concerning the market share controlled, or a business actor has the highest position amongst its competitor in the relevant market concerning financial capacity to supplies or sales, and the ability to influence supply or demand of certain goods or services.

KPPU declared Carrefour did not have the dominant position in relevant market of retail business without considered the percentage of market share owned by Carrefour but rather KPPU saw Carrefour’s capability to use minus margin strategy for its suppliers was also used by Carrefour’s competitors to make sure their supplier did not discriminate the prices of supplied goods. Such a resemblance of conduct was enough for KPPU to declare Carrefour was getting fierce competition from its competitors that could also use a similar strategy like Carrefour.

The concept of abuse of superior bargaining position has a significantly different approach compared with the abuse of dominant position regarding the focus to be investigated by the competition authority to decide whether there is any violation or not. The abuse of dominant position deals with the measurement of a relevant market that is competition authority must investigate where market performance fails to deliver expected benefits caused by the exercise of market power owned by a dominant firm or a group of firms. Many competition law jurisdictions then make the market efficiency consideration as the single important thing to be investigated. The loss which resulted from the abuse of dominant position conduct then not only suffered by competitors but also by consumers in such a relevant market. Moreover, the approach of competition law has changed drastically since, in the mid-1970s, the Chicago school scholars have attacked the classic Structure-Conduct-Performance (SCP) approach by Harvard scholars and asserted that the enhancement of allocative efficiency is the only proper purpose of antitrust law. In this new paradigm, the market might be dominated only by a few firms and has high concentration (‘S’ or

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9 Carrefour Decision (2005), KPPU’s Decision No. 02/KPPU-L/2005.
10 Knud Hansen, et.al., Op.Cit., p. 34.
‘structure’ consideration in SCP approach) yet conceives abusive practices of firm to its competitors (‘C’ or ‘conduct’ consideration) but as long as the market can allocate resources to the consumers who value them the most (‘P or ‘performance’ consideration) then there is no need for competent authority to take the condition as harmful because market must be considered works efficiently.

On the other hand, the abuse of a superior bargaining position does not use the relevant market condition as its most important consideration rather it deals with an agreement as to the sole consideration. Ideally, an agreement shall reflect an equal position of the parties. Such ideal assumed only can be reached if the parties share similar bargaining power before entering the agreement. Nevertheless, we cannot hide from the fact that sometimes the parties in an agreement possess unequal bargaining power; for instance, the parties come from different business scale. Such inequality of bargaining power that can significantly contribute to the coercion practices conducted by a party that has more superior bargaining power. The coercion can lead to the condition where a less superior party lost its freedom to decide or perform clauses of the agreement. Therefore, the concept of ‘contract inequality’ is the single important factor to define in the context of abuse of superior bargaining position provision.

The inequality of bargaining power in an agreement has long been debated in the matter of contract law study. The law of contract is concerned with matters of procedural fairness. The procedural fairness means the formalities which must be contained in the making of the contract legally enforceable in the matters of offer and acceptance, consideration and mutual intent of parties to be bound. In the Indonesian private law, such formalities are called ‘syarat sah perjanjian’ (validity of an agreement) and stipulated under Article 1320 Indonesian Civil Code. To be valid, under the Indonesian Civil Code, an agreement shall fulfill four conditions:

1. the consent of those who bind themselves;
2. the capability of the parties to agree;
3. a particular object;
4. a lawful case.

The inequality of bargaining power does not deal with procedural fairness but rather it deals with the more difficult and much-debated thing to be measured: substantive fairness. The controversial nature of substantive fairness comes from the notion that the court can only intervene and examine the procedural fairness whilst the fairness of the terms (substantive) of the agreement is a matter for parties to decide not the courts. The court's intervention in terms of the agreement may harm the fundamental tenet of freedom of contract. Several scholars and judges hold the opinion that the substantive fairness shall be settled by parties while composing terms of the agreement. The findings of the unfairness of the terms while agreement being performed by a party must be set aside by the court because the court must assume such party has agreed on every clause of the agreement from the very beginning although she knew such terms would bring her into unequal position compared with her counterpart. Professor Collins, The Law of Contract (4th edn, Butterworths, 2003), pp. 270, has stated:

A system of contract law committed to freedom of contract must reject controls over the fairness of contracts. No matter the purchaser has paid and excessive price or the seller received a gross undervalue, the principle of freedom to

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13 Article 1320 of the Indonesian Civil Code (Kitab Undang-undang Hukum Perdata).  
select the terms must prohibit intervention designed to redress the balance of obligations.\textsuperscript{15}

However, the case law has changed the court view on substantive fairness. Several decisions have made fairness of the terms of agreements as considerations. In \textit{The Medina} (1876), the plaintiffs sought to take advantage of the imminent danger in which the master of a vessel and some pilgrims found themselves. Their vessel had been wrecked and they were huddled on a rock, awaiting rescue. The plaintiffs declined to rescue the pilgrims unless they were paid £ 4,000. The defendants, not having any other alternative had promised to pay the sum. When the plaintiffs sued to recover the promised amount, the court declined to order the defendants to pay and, instead, relegated the plaintiffs to a claim for £ 1,800. In \textit{Cresswell v. Potter} (1978), the plaintiff sued her former spouse because the defendant sold the former matrimonial home and made a profit of £ 1,400 on the sale. The plaintiff sought to set aside the release on the ground it was exercised in circumstances which amounted to unfair dealing. Her claim was successful. She established that she was 'poor' in the sense that she was a member of 'the lower-income group' and ignorant which for this purpose meant 'less highly educated'. The court decided that the sale was a considerable undervalue and that the plaintiff had not received any independent advice. The court also considered the defendant was unable to prove that the transaction was fair, just and reasonable. Moreover, in \textit{Alec Lobb (Garages) Ltd. v. Total Oil (Great Britain)} (1985), the court stated that 'the courts would only interfere in the exceptional case where as a matter of common fairness it was not right that the strong should be allowed to push the weak to the wall.\textsuperscript{16}

Thus Nicholas Bamforth identifies four factors that are consistently taken into account by the courts on measuring substantive fairness, namely, (i) special or serious disadvantage or disability, (ii) actual or constructive fraud, (iii) lack of independent advice, and (iv) disadvantageous terms.\textsuperscript{17} Besides, David Capper identifies three factors namely, (i) relational inequality, (ii) transactional imbalance, and (iii) unconscionable conduct.\textsuperscript{18}

\section*{2.2. The Model of Abuse of Superior Bargaining Position Provisions: Lessons from Other Jurisdictions}

It is clear in the case of abuse of dominant position that the main element of the offense is regarding the ability of a firm or a group of firms to make other firms or consumers worse off by exercising their market power. When we discuss abuse of superior bargaining position the consideration of market power owned by a firm is not important and no need to be considered anymore. The main task of legislation on abuse of superior bargaining position is to define clearly whether some actions can be deemed as the elements of abuse of superior bargaining position offenses. To complete such a task, we need to learn how several jurisdictions regulate the notion of abuse of superior bargaining position in their competition laws and how their court decided whether there was any violation of examined cases or not.

\textsuperscript{15} Ibid.
\textsuperscript{16} Ibid, p. 686.
If market power which reflected by high percentage of market shares, high market concentration or other conditions in the scope of relevant market are no need to be considered then to find any offense regarding abuse of superior bargaining position practice the competition authority needs to move on from relevant market-related thresholds and be more focused to the clauses in the agreement or the performance of such clauses. Thus, we need to know about *raison d’être* to regulate something which does not have an actual impact on market competition. This part will briefly explain how several jurisdictions regulate provision on abuse of superior bargaining position and why several jurisdictions decided to enter abuse of superior bargaining position provision inside their national competition law and why other jurisdictions did not do the similar things.

During the 2008 International Competition Network (ICN) annual conference in Kyoto, Japan, several competition authorities from thirty-two national jurisdictions gathered to report their countries’ views regarding abuse of superior bargaining position provisions under their jurisdictions. The reports are still important to make legal comparison studies on the implementation of abuse of superior bargaining position globally:

a. seven jurisdictions had specific legal provisions on abuse of superior bargaining positions. From those seven, only three were regulated such provision under their national competition laws (Germany, Japan, South Korea) and the rest used non-competition provisions such as contract law, tort law, consumer protection law to accommodate the provision;

b. two jurisdictions (Indonesia and Latvia);

c. twenty-four jurisdictions did not have any legal provisions on such matters.

The reports show us that abuse of superior bargaining position provision does not place as important as other competition law's provisions like abuse of dominant position, price-fixing, cartel or tying practice which the majority of jurisdictions regulate such things under their national competition laws. Those jurisdictions against abuse of superior bargaining positions provisions still made use of the market power threshold as the main important thing to be considered to decide any practice has a significant impact on competition.

For example, Turkey’s agency, on their report, stated that “the abuse of superior bargaining position does not distort competition in the (retail) market seriously because these companies seem to lack a significant degree of market power. If this situation changes and the retail companies become dominant, then the Competition Board could scrutinize their activities upon on their initiative and/or through complaints filed with it.”

Russian agency’s explanation has an analogue view with Turkey stated: "only company (s) with substantial degree of market power can effectively exploit vertically integrated upstream and downstream trade partners and, therefore, general behavior legal provisions for (abuse of) market-dominant firms suffice."

The other reason why there are jurisdictions which against abuse of superior bargaining position provision is because abuse of superior bargaining position viewed can be harmful to efficient bargaining between contracting parties. Moreover, the competition law viewed as never designed on interfering contractual disputes between

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20 *Ibid*, p. 11
party. If such a thing happened, therefore, the main goal of competition law has been narrowed.

For example, the United Kingdom stated that "UK contract and competition law will not intervene to correct the terms of bargains. Abuse of dominant position law in the UK is geared primarily to prevent exclusionary conduct, rather than protecting undertakings in weaker economic positions from those with superior economic bargaining positions." 21

Meanwhile representative from the United States responded more extensively in economic point of view "the objectives of US antitrust laws in general, and Section 2 of the Sherman Act in particular, is the protection of competition and consumer welfare and thus US antitrust laws is not concerned with particular outcomes of contractual negotiations between parties unless such terms would have the effect of harming the competitive process and thereby reduce consumer welfare. Concerning contracts between parties at different levels of the manufacturing-distribution chain (that is, between non-competitors), it is highly unlikely that particular provisions of such contracts will have anticompetitive effects. To the contrary, contracts between parties at different levels of the manufacturing-distribution chain are likely to reflect an efficient allocation of risks and duties among the parties US antitrust law would not interfere in the bargain struck between two contracting parties, absent of showing of substantial competitive harm (rather than harm to specific competitors or non-competitors)." 22

To date only three jurisdictions namely Germany, Japan and South Korea that have abuse of superior bargaining position provisions under their national competition laws. Other jurisdictions also adopt such provisions under their law other than competition laws. Austria adopts it under the context of protecting local suppliers in rural areas, France regulates it under their tort liability provisions in commercial code, Italy in a private civil remedy statute and the Slovak Republic regulates it under administrative regulation of retail chains. We will be more focused on jurisdictions that regulate abuse of superior bargaining position specifically under their national competition laws.

Germany regulates abuse of superior bargaining position under section 20 of Act against Restraints of Competition (ARC). Section 20 (1) ARC mentions abuse of superior bargaining position as ‘relative market power’. Under section 20 (1) of ARC "a firm that holds superior bargaining position if small or medium-sized enterprises as suppliers or purchases of certain kind of goods or commercial services depend on this firm in such a way that sufficient and reasonable possibilities of switching to other undertaking do not exist." 23 The central important thing in ARC provisions on abuse of superior bargaining position is the existence of small or medium-sized enterprises as counterparts of relatively superior enterprises on which the small or medium-sized enterprise depended. Moreover, section 20 (3) of ARC may lead us to the understanding that although Germany has abuse of superior bargaining position provision under their national competition law, Germany’s regulators still believe market power is the single important measurement to decide a firm or a group of firms is having superior bargaining position or relative market power. 24 Nevertheless by

21 Ibid, p. 17.
22 Ibid.
23 Section 20 (1) of Germany’s Act against Restraints of Competition; translation provided by the Language Service of the Budeskartellamt in cooperation with Renate Tietjen: http://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html#p0063
24 Section 20 (3) of Germany’s Act against Restraints of Competition stipulates “undertakings with superior market power concerning small and medium-sized competitors may not abuse their market position so impede such competitors directly or indirectly in an unfair manner…”
considering market power Germany's competition authority only duty is to measure a firm relative market power to its small or medium-sized counterpart and does not mean it deals with the percentage of market share or concentration absolutely like cases regarding abuse of dominant position.

The Anti-Monopoly Act (AMA) of Japan regulates abuse of superior bargaining provisions under Article 2(5):

Taking any act specified in one of the following, unjustly in light of the normal business practices by making use of one’s superior bargaining position over the other party:

a. causing the said party in the regular transaction (including a party with whom one intends to have regular transactions newly; the same shall apply in (b) below) to purchase goods or services other than the one on the said transactions;

b. causing the said party in regular transactions to provide for oneself money, services or other economic benefits;

c. refusing to receive goods on transactions from the said party, causing the said party to take back the goods on the transactions after receiving the said goods from the said party, delaying the payments of the transactions to the said party or reducing the amount of the said payment otherwise establishing or changing trade terms or executing transaction in a way disadvantageous to the said party.25

The Japan Free Trade Commission (JFTC) Guidelines state that a superior bargaining position is found (i) where the supplier needs to continue transactions with the retailer, as discontinuing the transaction substantially impedes the supplier’s business and (ii) thus, the supplier finds it difficult to reject the retailer’s request, although it causes substantial disadvantage to the supplier.26 Thus the critical factor to be assessed by JFTC is the degree of dependence shown by the difficulty of suppliers to replace retailers as their counterparts. In Raise and Marunaka cases the degree of dependence was measured concerning the supplier’s regional branches or regional offices. Wakui highlights in the Raise case, the JFTC found that the supplier’s regional branches were selling a large share of products to Raise and regarded this as one of the factors in establishing its superior bargaining position.27

Lastly, the Korean Monopoly Regulation and Fair Trade Act (MRFTA) defines abuse of superior bargaining position as “a firm act of unfairly taking advantage of its superior trade position when dealing with others.”28 Moreover the guidelines of abuse of superior bargaining position state that the abuse of superior bargaining position occurred "if the difference between bargaining positions of transaction parties is large enough to restrict free decision making of one party, and if one party takes advantages of this gap to put another party at a disadvantage, for instance by unilaterally coercing product purchase, or to intervene in other's management, the other’s party spontaneous development basis is undermined and fair transaction order is also disturbed."29

25 Article 2(5) of the Japanese Anti-Monopoly Act (AMA); translated is taken from Wakui, op.cit., p. 3.
26 JFTC Guidelines; Wakui, op.cit, p. 4.
27 Ibid, p. 5.
28 Korean Monopoly Regulation and Fair Trade Act (MRFTA).
III. THE PROPOSAL TO REGULATE ABUSE OF SUPERIOR BARGAINING POSITION UNDER THE INDONESIAN COMPETITION LAW

The draft bill on Indonesian competition adds new provisions about the abuse of a superior bargaining position. Under this draft bill, it is stipulated:

i. any business actor is prohibited to abuse its superior bargaining position within a partnership agreement with another business actor;

ii. any business actor which violates the abovementioned provision shall be punished with administrative sanctions in the forms of:
   i. the termination of (partnership) agreement;
   ii. the cessation of abuse of dominant practice;
   iii. the cessation of abuse of superior bargaining position practice;
   iv. the imposition of fine at the minimum of 5% and the maximum of 30% counted from violator’s total selling within the period of such violation occurred;
   v. recommendation to the related agency for repealing business license of violator;
   vi. publication of violator under business actors blacklist;
   vii. the cessation of any practice or activity which causes damages to another party.

The new provisions which newly introduced under draft bill accommodate article 36 (2) of Law Number 20 Year 2008 on Micro, Small and Medium Enterprises (MSME Law) that stipulates:

*The implementation of a partnership agreement shall be supervised in an orderly and regular manner by an institution established and serving to supervise business competition as provided for in-laws and regulations.*

Indonesian partnership (agreement) is regulated under Law Number 20 Year 2008 on Micro, Small and Medium Enterprises which means any agreement that made between micro, small and medium enterprises and large enterprises like state or privately owned national business, joint ventures and foreign business that conduct economic activities in Indonesia. Moreover, there are several forms of partnership agreement namely:

a. core-plasma;
b. subcontract;
c. franchise;
d. general trade;
e. distribution and agency; and
f. other forms of partnership such as profit sharing, operational cooperation, joint venture, and outsourcing.

The central thing on Indonesian partnership is the difference of scale between parties in the agreement. One party must be regarded as micro, small or medium enterprise and another party is a large enterprise. The MSME Law classifies business scale thresholds as follow:

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30 Article 36 (3) of MSME Law.
32 Article 26 of MSME Law.
a. the micro-enterprise shall be having maximum net assets of Rp 50 million, exclusive of the land building of their place of business or having maximum annual sales proceeds of Rp 30 million;\(^{33}\)

b. small enterprise shall be having maximum net assets of more than Rp 50 million up to a maximum amount of Rp 500 million, exclusive of land building of their place of business or having maximum annual sales proceeds of more than Rp 30 million up to a maximum amount of Rp 2,250 billion;\(^{34}\)

c. a medium enterprise shall be having maximum net assets of more than Rp 500 million up to a maximum amount of Rp 10 billion, exclusive of the land building of their place of business or having maximum annual sales proceeds of more than Rp 2,250 billion up to a maximum amount of Rp 50 billion.\(^{35}\)

The MSME Law does not specifically stipulate thresholds for large enterprise thus it is assumed enterprises which have thresholds beyond what is regulated for micro, small and medium enterprises above shall be classified as large enterprise.

Although not specifically stipulated under existing Indonesian competition law within certain provisions, the protection of MSME has already become one of the objectives of Indonesian competition law under Law Number 5 Year 1999. The article 3 b of Law Number 5 Year 1999 stipulates that one of the objectives of the law is to create a conducive business climate through healthy business competition, thus securing the equal business opportunity for large, middle and small scale entrepreneurs.\(^{36}\) In practice, KPPU has also implemented such an objective, for example, when examined the Indomarco case (2000).

In *Indomarco*, KPPU's judges decided that modern retailer outlets owned by the defendant have affected the decline of selling of traditional and small retailers (*warung*) located near the defendant’s outlets. Thus KPPU recommended the Indonesian government to legislate regulation regarding stipulations of spatial policy which locate modern retailer outlets not too close to their traditional competitors. Such a decision has become the cornerstone of the implementation of one Indonesian competition law goal which is to protect MSME. Several years after, the government followed up KPPU decision by issuing Presidential Regulation No. 112 of 2007 on The Arrangement and Development of Traditional Market, Mall and Modern Retailer in which orders the provincial government to locate modern retailer outlets and small and traditional retailer outlets not too close in the manner to protect small and traditional from harmful effects caused by free fight competition with their modern and bigger competitors.

The *Indomarco* case shows the implementation of competition law protection for MSME. A similar case has never appeared after *Indomarco* under KPPU's examination. Most of the cases related to abusive behavior have been settled with provisions on abuse of dominant position or monopolization practices under Law Number 5 Year 1999. Such condition leads to the biggest task for the regulator to propose new provisions on abuse of superior bargaining position that is about the determination of thresholds needed to conduct a preliminary investigation. It is can be said that Law Number 5 Year 1999 can use thresholds in MSME Law but there are at least two things to consider before.

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33 Art 6 (1) of MSME Law.
34 Art 6 (2) of MSME Law.
35 Art 6 (3) of MSME Law.
36 Article 3 b of Law Number 5 Year 1999.
First, the proposal to regulate abuse of superior bargaining position only for partnership agreement which stipulated under MSME Law narrows the goal of such provision. The regulator must realize that abuse of a superior bargaining position can also happen in an agreement between two same scale enterprises (i.e. between large enterprises in the form of limited liability companies). The thresholds must be widened to look up also other things than scale measurements under MSME Law. The regulator can use other thresholds to conduct a preliminary investigation which has been generally used for abusive or monopolization conduct such as total selling, total assets or market shares but in a relative way to compare counterparts equipoise in an agreement without looking whether such thresholds can lead to the dominant position in the relevant market or not.

Lastly, the regulator also needs to consider that actually, under the Indonesian legal system there is another path that can be taken besides competition law to make sure there will be protection for MSMEs in an agreement with their superior counterparts. Such legal protection can be found in the Indonesian Civil Code. As have mentioned earlier, an agreement shall fulfil four conditions in article 1320 Indonesian Civil Code. These conditions are regarded as formalities or procedural fairness that must be fulfilled to reach the validity of the contract.

The Indonesian Civil Code protects a less superior party for not being treated abusively by the more superior counterpart. It is stipulated under article 1323 Indonesian Civil Code:

Duress against individual who has agreed, shall forms grounds for nullification of the agreement, notwithstanding that it was committed by a third party, who was not a party to the said agreement.

Based on judges’ considerations in several decisions, “duress” (dwang) is classified as such:

- determination of agreement clauses only by one party;
- agreement clauses are being made in the manners of ignoring obligations of one –superior- party;
- inequality of rights and obligations;
- the agreement is being made by one party to make other party does not have any other choice other than obeys the agreement;
- one party has a better psychological position compared with the other party.\(^{37}\)

In Supreme Court Decision No. 2845 K/SIP/1982, the plaintiff was a debtor of the defendant. For his loan, the plaintiff encumbered a plot of land and a house to the defendant. Because the plaintiff still could not pay in full of his loan although the payment period had elapsed, the defendant forced the plaintiff to make a statement that he would not use his right to buy back the encumbered properties. The defendant then made a transfer of title in the land agency to make encumbered goods that firstly owned by the plaintiff changed to his ownership. The Supreme Court judges decided the agreement as invalid because the defendant had exercised his superior economic condition. The plaintiff did not have any other choice to have his plot of land and the house was taken by the defendant because he also could not fully pay his loan.

In other decision, Judges from South Jakarta District Court had decided the agreement between the plaintiff and defendant as invalid because the defendant had forced the plaintiff to sign an agreement to encumber his properties because he failed

to pay his loan to the plaintiff. The security agreement was made in the time the plaintiff spent his time in jail as a convicted criminal. The Judges decided such a condition made the plaintiff in the worse off state of mind compared with the defendant thus the defendant could make duress to the plaintiff.  

IV. CONCLUSION

The new proposal of Indonesian Competition Law draft bill to stipulate provision regarding abuse of superior bargaining position needs to consider these things before effectively applicable:

a. the regulator must widen the thresholds other than stipulate under MSME Law because the violation can also occur not in a partnership agreement;

b. if only the Indonesian Competition Law will not add a new provision on abuse superior bargaining position, the Indonesian Civil Code also has protection for the less superior party from potential duress conducted by the more superior party in an agreement.

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