

CURING THE NATION IN THE AGE OF COVID-19: RELIANCE ON PROCUREMENT EXEMPTION POLICY IN INDONESIA?

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Abstract - This paper analyzes Indonesia's health sector procurement exemption policy during the Covid-19 pandemic. To respond to the current COVID-19 pandemic, it has been recognized that collaboration between competitors is necessary. However, it is also known that some collaborations will infringe on competition law if it is not handled with care. In Indonesia, the Government takes a further step by identifying necessary cooperation and excluding such cooperation from competition law enforcement based on public interest, in one instance for those within the health sector supply chain. Applying a procurement exemption policy means to line aside competition law for competitors, others within the supply chain, and various consumer groups. However, the immunity policy does not mean it will not create risks.

Keywords: competition law, procurement exemption, Indonesia

INTRODUCTION

Healthcare procurement has been at the forefront of the initial reaction to the COVID-19 pandemic.¹ Public procurement and supply chain management have rarely been so prominent in the public eye and political debate.² To mitigate the outbreak, the Indonesian Government has responded to the health crisis by endorsing procurement to spur economic recovery. Initially, the Government released a Presidential Regulation on Public Procurement of COVID-19 Vaccines and Vaccination. One of its functions is to ensure that competition laws are kept in the way of legitimate measures to protect public health and support the provision of essential goods and services.³ Following the Presidential Regulation, on November 9, 2020, the Indonesian Competition Commission (ICC) issued Commission Regulation No.3 of 2020 to assess antitrust issues related to business cooperation to respond to the urgency of the COVID-19 outbreak.⁴ As with other competition agencies, the ICC signals a willingness to tolerate agreements that might harm competition but may be necessary to deal with the disruption caused by the pandemic.⁵

The temporary relaxation of the competition law provision allows monopoly by Indonesia state-owned company (SOE) to provide Covid-19 vaccines and vaccination through direct appointment.⁶ The procurement of the COVID-19 vaccines, according to the regulation, includes the provision of vaccines, supporting equipment and logistics required, and vaccine distribution to the

¹Albert Sanchez-Graells, *Procurement and Commissioning during COVID-19: reflections and (early) lessons*, 71 NORTHERN IRELAND LEGAL QUARTERLY (2020), 524.

²Albert Sanchez-Graells, *Procurement in the time of COVID-19*, 71 NORTHERN IRELAND LEGAL QUARTERLY (2020).

³Presidential Regulation on Public Procurement of COVID-19 Vaccines and Vaccination.

⁴The Indonesian Competition Commission Regulation No.3 of 2020.

⁵Australia Competition Authority, *The Australian Competition Authority authorizes oil companies to cooperate to secure fuel supplies during the COVID-19 pandemic*, E-COMPETITIONS BULLETIN (2020); Okeoghene Odudu, *Feeding the nation in times of crisis: the relaxation of competition law in the United Kingdom*, 19 COMPETITION LAW JOURNAL (2020); Hrishav Kumar & Anish Gupta, *The Indian Competition Authority authorises companies to collaborate and enter into agreements to share information to enhance the efficiency of production, supply, distribution, storage, acquisition during the COVID-19 crisis*, E-COMPETITIONS BULLETIN (2020).

⁶Presidential Regulation No.3 of 2020 regarding Vaccine Procurement. Later the Presidential Regulation was amended by the Regulation of the President of the Republic of Indonesia No. 14 Year 2021.

point of delivery set by Indonesia of Minister of Health.⁷ The exemptions and exceptions drive substantial changes in consumer demand patterns, placing enormous pressure on those who supply essential goods and services. It is feared that the immunity policy will create corruption risks in the health sector by simplification of procurement rules.⁸

Antitrust immunity or competition law exemptions are exceptions to prohibiting monopolistic practices and anticompetitive practices for business actors with specific criteria.⁹ In general, antitrust immunity is designed to sacrifice competition and consumer welfare to solve national issues of an emergency or to accelerate the production of goods and/or services needed by the community.¹⁰

The COVID-19 crisis is a threat to health and an unprecedented disruption of market commerce.¹¹ It is essential to ensure that consumer supply continues as competitively as possible during this crisis and that initial consideration is given to competitive market conditions for the post-crisis period. The consequences of a sizeable drop in demand and the impending wave of bankruptcies will,¹² In the long run, it significantly disrupts or at least compromises conditions of effective competition and consumer welfare in markets.¹³

Given that the emergency conditions in Indonesia have been met, then antitrust immunity and exemptions such as that attempted during an economic crisis,¹⁴ Temporary exemptions for information sharing, pricing and geographical-based collusion can temporarily incentivize local corporations to collaborate to build a national vaccine industry.

However, how should exemptions be applied in times of crisis such as Covid-19? The paper aims to analyze the Indonesian Government's exemption policy, particularly on procuring healthcare and vaccines. Furthermore, this paper contributes to the existing debates about the consequences of the immunity policy during Covid-19 on competition law enforcement in Indonesia.

It is essential to know that not all infringing behaviours are prohibited, as an exemption recognized by law may apply to prevent the prohibition from taking effect. Therefore, business actors who enter into an agreement that violates competition law may proceed with the agreement if it meets the criteria by which the prohibition is set aside are made out. The competition authorities convince those who violate competition laws in the public interest that the ban will be waived to restore the economy.¹⁵ Excluding anticompetitive behaviour from competition law, even temporarily, is not without risk.¹⁶ Lessons from past crises show that competition law relaxation would be counterproductive.¹⁷

1. The Rationale Of Exemption: Extreme Emergency

The term extreme emergency could be the starting point to set aside competition law to allow business competitors to collaborate to let public buyers get what they need from the free market. The Indonesian government views the impact of the Covid-19 pandemic as an emergency that has implications for the procurement of vaccines because one of the identifications need that

⁷Indonesia Cabinet Secretariat of Indonesia, *Government Issues Presidential Regulation on COVID-19 Vaccines, Vaccination(2020)*, available at <https://setkab.go.id/en/govt-issues-presidential-regulation-on-covid-19-vaccines-vaccination/>.

⁸Vladyslav Teremetskyi, et al., *Corruption and strengthening anti-corruption efforts in healthcare during the pandemic of Covid-19*, MEDICO-LEGAL JOURNAL (2020).

⁹Bruce H Kobayashi & Joshua D Wright, *Antitrust Exemptions and Immunities in the Digital Economy*, 30 THE GLOBAL ANTITRUST INSTITUTE REPORT ON THE DIGITAL ECONOMY (2020).

¹⁰Id. at.

¹¹Naveen Donthu & Anders Gustafsson, *Effects of COVID-19 on business and research*, 117 JOURNAL OF BUSINESS RESEARCH (2020).284.

¹²Id. at., 285.

¹³Kobayashi & Wright, THE GLOBAL ANTITRUST INSTITUTE REPORT ON THE DIGITAL ECONOMY, (2020).

¹⁴Global Forum on Competition: Crisis Cartels. No. DAF/COMP/GF(2011)11(2011).

¹⁵Ivana Rakić, *Competition law in the age of COVID-19*, 68 АНАЛИ ПРАВНОГ ФАКУЛТЕТА У БЕОГРАДУ (2020).

¹⁶Id. at., 32.

¹⁷During the 2008-2009 global economic crisis, governments worldwide took different approaches and became aware that competition law relaxation does not promote economic recovery. See OECD. 2011., 44-47.

are considered to have a significant impact on prevention and can minimize the spread of Covid-19 is through vaccines.¹⁸

However, questions arise from the starting point to deactivate competition regulation first, whether this is the most proper approach during the crisis. Second, how long will the exemption policy deactivate competition law be applied under emergency circumstances? Ultimately, is exempted procurement in the health sector crucial to cure the nation?

Generally, competition regulations are not relaxed in times of crisis, even for extreme emergencies, for the sake of public interest. Competition authorities would still apply competition regulations, regardless of various calls for immunity policy during the downturn.¹⁹

In response to the crisis, also called the Great Lockdown,²⁰ various competition authorities around the world announced that competition would still apply during the global health threat,²¹ despite the consequences of various calls for the relaxation of competition law during the outbreak.²² The message was clear and firm. Specific steps must be carried out to avoid violating competition law as they manage this pressing global pandemic; the business actors are still forbidden from restricting competition by agreement or other forms and by abuse of dominance or anticompetitive mergers. Announcements moreover confirm these undertakings of the competition authorities that they will be increasingly vigilant against possible harmful anticompetitive behaviours during the COVID-19 outbreak. These authorities also emphasized that they would not hesitate to enforce their laws negatively nor allow anticompetitive behaviours to be justified based on the economic crisis.²³

In Brazil, the Administrative Council for Economic Defence (CADE) has launched proceedings into whether healthcare sector companies have been increasing prices and profits illegally in an abusive manner in the free market. Following consultation with CADE representatives, Brazil's senate has passed a law which includes amendments made to competition law to prevent enforcement against below-cost pricing for goods and services until October 30, 2020, or it can be extended until the outbreak ends.²⁴

During the outbreak, the Canada Competition Bureau (CCB) also applied similar rigid rules toward competition law violations. Collaboration among competing firms also may take various

¹⁸Lailatul Mufidah & Kukuh Tejomurti, *A Legal Analysis of the Implementation of Vaccine Procurement in Managing the Coronavirus Disease 19 (Covid-19)*, XX UPH LAW REVIEW (2021)., 276.

¹⁹Rakić, АНАЛИ ПРАВНОГ ФАКУЛТЕТА У БЕОГРАДУ, (2020)., 28.

²⁰Gita Gopinath, *The great lockdown: Worst economic downturn since the great depression*, 14 IMF BLOG (2020). Also see World Economic Outlook, April 2020 : The Great Lockdown. No. WEOEA2020001, pt. 177 (2020).

²¹EU, *Antitrust: Joint Statement by the European Competition Network (ECN) on Application of Competition law during the Corona Crisis*(2020), available at https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf. Also see ASEAN, *Joint Statement by the Asean Experts Group on Competition (Aegc) In Response to the Coronavirus Disease (Covid-19) Pandemic*(June 11, 2020), available at <https://eng.kppu.go.id/joint-statement-by-the-asean-experts-group-on-competition-aegc-in-response-to-the-coronavirus-disease-covid-19-pandemic/>.

²²UK supermarkets requested a relaxation of the rules again to allow them to cooperate on deliveries in remote areas and to ensure supplies if shops were forced to close down because of the pandemic. See UK Government, *Press release: Supermarkets to Join Forces to Feed the Nation*(March 19, 2020), available at <https://www.gov.uk/government/news/supermarkets-to-join-forces-to-feed-the-nation>.

²³Portuguese Competition Authority (AdC) sent a clear signal to suppliers, distributors, and resellers from any sector that it remains particularly vigilant in detecting infringements during the outbreak, including price fixing or market sharing. See AdC Press Release at Autoridade da Concorrenca, *Press release 03/2020: AdC Assures Vigilance of Anticompetitive Practices that Exploit Current Situation*(2020), available at http://www.concorrenca.pt/vEN/News_Events/Comunicados/Pages/PressRelease_202003.aspx. Hong Kong Competition Commission (HKCC) reiterated that all businesses are reminded to stay vigilant during the procurement process and strengthen their defence against potential anticompetitive conduct. Available at HKCC Hongkong Competition Commission, *Competition Commission reminds businesses participating in anti-epidemic subsidy programmes to adhere to the Competition Ordinance*(May 8, 2020), available at https://www.compcomm.hk/en/media/press/files/EN_PR_Govt_fund_20200508.pdf.

²⁴CADE Press Release CADE, *Press Release - cadeados*(June, 2020), available at https://www.gov.br/produtividade-e-comercio-exterior/pt-r/images/REPOSITORIO/secex/decom/Resumos_pareceres/191029a_Pressa_Releasea_Cadeados.x.pdf/view.

forms and pursue different objectives. The collaboration may be lawful or unlawful.²⁵ The Bureau remains vigilant against potentially harmful anticompetitive conduct by those seeking to take advantage of consumers and businesses in the current situation, such as collusive agreements between rivals, including price fixing to set charges. It is committed to reasonable and principled enforcement of Canada's competition laws.²⁶

The CCB has published an announcement recognizing that the outbreak may call for the rapid establishment of business cooperation and collaborations of limited duration and scope to ensure the supply chain of products and services. The competition authority also has stated that where business actors act in good faith to implement such limited measures, it will generally refrain from taking enforcement action. The authority has also established a specific task force to provide guidance and render rapid assessments. The CCB reaffirms that it will not take a tolerance approach to companies abusing this relaxation policy.²⁷

The covid-19 crisis has urged countries to take rapid and effective means to pursue economic recovery and consumer welfare. The actions taken by countries are such as giving state support and giving coordination or collaboration permission among competing firms. These actions are government intervention.²⁸

With the coming into effect of the latest Decision, all law enforcement activities, which include assessment of notifications, partnership supervision, handling of business competition cases, examination of delayed mergers notification, examination of partnership cases, and hearings of the Commission Panel, are conducted again. The ICC restates to carry out harsh law enforcement against business actors that caused excessive prices and scarcity by taking advantage of the pandemic situation.²⁹ The ICC keeps an eye on the health sector,³⁰ Advocating for the Government so that economic recovery policies could align with the principles of business competition, monitoring the potential for unfair business competition on basic needs, medical devices, and energy, and simplifying the merger notifications, acquisition, consolidation and asset takeover transactions.³¹

The deactivation of competition regulation due to extreme emergencies could not have been put more clearly than in South Africa (SA), European Union (EU), and the United Kingdom (UK). The Minister of Trade, Industry, and Competition in South Africa has issued temporary exemptions. On March 19, 2020, the COVID-19 Block Exemption for the Healthcare Sector Regulations was announced.³² The exemption would ensure that private and public healthcare services cooperate and provide the necessary care the citizens require without fear of falling foul of the Competition Act. However, any cooperation should not be expanded to the communication and agreements

²⁵OECD, *Co-operation between Competitors in the Time of COVID-19*, OECD(2020), available at <https://www.oecd.org/competition/Co-operation-between-competitors-in-the-time-of-COVID-19.pdf>., 4.

²⁶CCB Canada Competition Bureau, *Statement from the Commissioner of Competition regarding enforcement during the COVID-19 coronavirus situation*(2020), available at <https://www.canada.ca/en/competition-bureau/news/2020/03/statement-from-the-commissioner-of-competition-regarding-enforcement-during-the-covid-19-coronavirus-situation.html>.

²⁷Id. at.26

²⁸Deborah Platt Majoras, *State intervention: A state of displaced competition*, 13 GEO. MASON L. REV. (2004)., 1175.

²⁹KPPU, *KPPU Tetap Melakukan Upaya Penegakan Hukum Selama Masa Pandemi Covid-19*(July 24, 2020), available at <https://kppu.go.id/blog/2020/07/kppu-tetap-melakukan-upaya-penegakan-hukum-selama-masa-pandemi-covid-19/>.

³⁰KPPU, *ICC Follows Up Information of The State-Owned Enterprises Minister on The Alleged Medical Device 'Mafia'*(April 27, 2020), available at <https://eng.kppu.go.id/icc-follows-up-information-of-the-state-owned-enterprises-minister-on-the-alleged-medical-device-mafia/>. Also see KPPU, *ICC Conducts Initiative Study Against Alleged Violations of Rapid Test Services to Diagnose Covid-19 Committed By Hospitals*(April 27, 2020), available at <https://eng.kppu.go.id/icc-conducts-initiative-study-against-alleged-violations-of-rapid-test-services-to-diagnose-covid-19-committed-by-hospitals/>.

³¹KPPU, *ICC Conducts Initiative Study Against Alleged Violations of Rapid Test Services to Diagnose Covid-19 Committed By Hospitals*. April 27, 2020.

³²SA South Africa Government, *Government Gazette Staatskoerant: Covid-19 Block Exemption For The Healthcare Sector*, 2020(March 19, 2020), available at https://www.gov.za/sites/default/files/gcis_document/202003/4311419-3dti.pdf.

regarding prices charged to the price-fixing, and cooperation would solely occur at the request of and in coordination with the Department of Health.³³

On March 19, 2020, SA government issued the Consumer and Customer Protection and National Disaster Management Regulations and Directions.³⁴ These regulations would apply to excessive pricing by dominant firms. The regulations suggested that there would be scrutiny of material increases in prices of certain goods and/or services, particularly if such increase in price does not correspond to, or is not equivalent to, the increase in the cost of providing the concerned good and/or service; or in case the increase inflates the net margin or mark-up on that good and/or service above the average margin or mark-up of that good or service in the three months prior to March 1 2020. A variety of products are included in the said list, such as toilet paper, surgical masks, baby formula, private medical services related to testing and treatment of COVID-19, etc.³⁵

Later, on March 23, 2020, SA Trade Minister issued the COVID-19 Block Exemption for the Banking Sector. The exemption has been designed to allow commercial banks to develop common approaches to debt relief and other necessary measures during the crisis. However, it is specified that the cooperation should not extend to communication and agreements regarding prices, such as price-fixing. The exemption covers payment systems and debtor and credit management.³⁶

Following the above regulation, the COVID-19 Block Exemption for the Hotel Industry was implemented and started effective March 27, 2020. The latest scheme exempts certain agreements, including cost reductions, price coordination concerning persons placed under quarantine, and exchanging information concerning cost and availability.³⁷

In assessing state aid, the European Commission undertakes a "balancing test" that considers the economic principles of the EU.³⁸ This test involves the identification of the (i) objective of the aid (what is the market failure it is meant to address), (ii) ensuring that the policy measure is well targeted, the most appropriate instrument to achieve that goal (incentive effect) and proportional, and then (iii) a balancing of the positive impact of the measure and the expected competition distortions.³⁹ Pharmaceutical manufacturers to co-ordinate on the "cross-supply of API(s) (active pharmaceutical ingredients), possibly including intermediates, and jointly identifying where to switch production best", as well as on the need to "rebalance and adapt capacity utilization, production and supply" of essential medicines for the treatment of the COVID-19 infections.⁴⁰

On April 8, 2020, European Commission (EC) published a Temporary Framework Communication that provides antitrust guidance to enable companies to form collaborations in responding to the extreme situations related to the current coronavirus outbreak. The response also includes supplying essential products and services, notably medicines and medical equipment.⁴¹ The European Commissioner for Health and Food Safety has also put forward specific Guidelines to optimize the supply and availability of medicines during the coronavirus outbreak.⁴²

³³Id. at.32

³⁴SA South Africa Government, *Competition Act: Regulations and directions: Consumer and customer protection during Coronavirus COVID-19 lockdown(2020)*, available at <https://www.gov.za/documents/competition-act-regulations-consumer-and-customer-protection-and-national-disaster#>.

³⁵Id. at.34.

³⁶SA South Africa Government, *Competition Act: Regulations: Coronavirus Covid-19 Block Exemption for the Banking Sector(2020)*, available at <https://www.gov.za/documents/competition-act-coronavirus-covid-19-block-exemption-banking-sector-23-mar-2020-0000>.

³⁷ SA South Africa Government, *Government Notices: Covid -19 Block Exemption For The Hotel Industry, 2020(March 27, 2020)*, available at https://www.gov.za/sites/default/files/gcis_document/202003/43175rg11069gon422.pdf.

³⁸EC, *Comfort letter: coordination in the pharmaceutical industry to increase production and to improve supply of urgently needed critical hospital medicines to treat COVID-19 patients(2020)*, available at https://ec.europa.eu/competition/antitrust/medicines_for_europe_comfort_letter.pdf.

³⁹Id. at.38

⁴⁰Id. at.38

⁴¹European Commission, EC, *Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak(April 8, 2020)*, available at

Following the EC Temporary Framework Communication, the Commission also published a Comfort Letter dated April 29, 2020, to Medicines for Europe concerning a specific cooperation project that aimed at preventing situations of shortages of COVID-19 medicines.⁴³ Furthermore, the European Commission also published a Joint European Roadmap towards lifting COVID-19 containment measures. The Commission envisages business actors' cooperation related to equipment and medicines supply may and would be essential to lift confinement measures.⁴⁴ It stated: "Ensuring sufficient supplies of equipment and medicines for enabling the lifting of confinement measures may require a higher than customarily allowed degree of cooperation between firms, including competitors, in some ecosystems.

The Commission will provide competition law guidance and comfort for cooperation between firms to overcome shortages of goods and services required to enable the gradual de-escalation from containment measures. The Commission and the National Competition Authorities will, via the European Competition Network (ECN), also ensure a coherent application of this guidance in their respective enforcement actions.⁴⁵

On April 22, 2020, the European Commission announced that it intended to adopt an exceptional derogation from the general EU competition rules for the milk, flowers, and potato sectors as part of a package of measures to support the agri-food sector during the COVID-19 outbreak.⁴⁶ The Commission considers that it would be appropriate to allow milk, flower, and potato sectors to collectively adopt measures to stabilize the market, stating that the milk sector would be allowed to plan milk production collectively. The flower and potato sectors could withdraw products from the market. Storage by private operators would also be permitted. It was indicated that such exceptional agreements and decisions would only be applicable for six months.

In the UK, on March 19, 2020, the Government stated that it would be adopting legislation to temporarily relax the UK competition law policy to the extent that applied to retailers.⁴⁷ By way of another legislation,⁴⁸ on March 27 2020 the Competition Act 1998 (Groceries) (Coronavirus) (Public Policy Exclusion Order) 2020 was released, temporarily relaxing the application of UK competition law to National Health Service (NHS) bodies and other independent providers of health services to the NHS.⁴⁹

Further, on March 19, 2020, the Competition and Markets Authority (CMA) responded to the announcement from the UK government,⁵⁰ Making the following reassurance: "The CMA has no intention of taking competition law enforcement against cooperation between businesses or

https://ec.europa.eu/info/sites/info/files/framework_communication_antitrust_issues_related_to_cooperation_between_competitors_in_covid-19.pdf.

⁴² European Commission, EC, *Communication from the Commission Guidelines on the optimal and rational supply of medicines to avoid shortages during the COVID-19 outbreak 2020/C 116 I/01(2020)*, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.CI.2020.116.01.0001.01.ENG&toc=OJ:C:2020:116I:TOC>.

⁴³EC, Comfort letter: coordination in the pharmaceutical industry to increase production and to improve supply of urgently needed critical hospital medicines to treat COVID-19 patients. 2020.

⁴⁴ European Commission, EC, *Communication - A European roadmap to lifting coronavirus containment measures(2020)*, available at https://ec.europa.eu/info/files/communication-european-roadmap-lifting-coronavirus-containment-measures_en.

⁴⁵European commission, *Communication from the Commission Guidance from the European Commission on using the public procurement framework in the emergency situation related to the COVID-19 crisis 2020/C 108 I/01(2020)*, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020XC0401%2805%29>.

⁴⁶EC, *Coronavirus: Commission announces exceptional measures to support the agri-food sector(2020)*, available at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_722.

⁴⁷UK Government. March 19, 2020.

⁴⁸Government UK, *The Competition Act 1998 (Health Services for Patients in England) (Coronavirus) (Public Policy Exclusion) Order 2020(2020)*, available at <https://www.legislation.gov.uk/uksi/2020/368/contents/made>.

⁴⁹Odudu, *COMPETITION LAW JOURNAL*, (2020)., at 73.

⁵⁰ UK Government, *Government UK, COVID-19: CMA approach to essential business cooperation(2020)*, available at https://www.gov.uk/government/news/covid-19-cma-approach-to-essential-business-cooperation?utm_source=64a0c8cf-3303-43b5-bac3-de3b83b8fb7d&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate.

rationing of products to the extent that this is necessary to protect consumers - for example, by ensuring the security of supplies."

However, the CMA added that it would give zero tolerance to unscrupulous businesses that exploit the present downturn as a cover for non-essential collusion between competitors. The CMA further announced the launch of a COVID-19 task force which would primarily watch out for such collusive behaviours.⁵¹ Furthermore, on March 20, 2020, the CMA published an open letter addressing the businesses in the pharmaceutical and food and drink sectors.⁵² The letter alerted companies to refrain from taking advantage of the current situation by charging unreasonably high prices for essential goods such as daily and medical supplies or making misleading claims about the goods' efficacy.⁵³

2. Relaxation Policy: Supporting The National Economic Recovery

Although late, Indonesia issued extraordinary regulations to protect competition from anticompetitive practices between the firms in the free market.⁵⁴ Law enforcement activities conducted by the ICC have recommenced as of April 7, 2020, by issuing Letter of Decision Number 12/KPPU/Kep.1/IV/2020 regarding Case Handling in Disease Outbreak Disaster Emergency Conditions posed by Corona Virus in Indonesia.⁵⁵

On November 9, 2020, the Commission Regulation 3/2020, which the Chairman of ICC signed, contains rules regarding the relaxation of law enforcement to support the national economic recovery program and the implementation of Law Number 2 Year 2020, as well as to support the performance of the duties of the Committee for Handling COVID-19 and National Economic Recovery. The rules aim to protect, maintain, and improve the economic capacity of business actors in running their businesses. The relaxation includes:⁵⁶

- a. relaxation of law enforcement on the implementation of procurement of goods and/or services using the State Revenue and Expenditure Budget or the Regional Revenue and Expenditure Budget;
- b. relaxation of law enforcement on planned agreements, activities, and/or use of a dominant position aimed at handling COVID-19 and/or increasing the economic capacity of business actors in running their business; And
- c. relaxation of 2 (two) periods of business actor obligations, namely regarding the obligation to submit notifications of mergers and acquisitions and the obligation to submit responses to Written Reprimands in the implementation of partnerships.

The outbreak of the COVID-19 pandemic since early 2020 has affected almost all business sectors in Indonesia, which resulted in an economic slowdown. The Government of Indonesia made various efforts to respond to this problem by issuing structured and measurable policies, especially in anticipating the spread of the virus through establishing the National Disaster Management Agency (BNPB) regarding disaster emergency status from 29 February to 29 May 2020.

In line with the Government's policy, the ICC has temporarily suspended competition law enforcement. The ICC also issued a policy to stop notifying and evaluating mergers and acquisitions

⁵¹ UK Government, Government UK, *CMA launches COVID-19 taskforce(2020)*, available at https://www.gov.uk/government/news/cma-launches-covid-19-taskforce?utm_source=99a4cddc-813a-43ed-989c-b5072e864fdc&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate.

⁵²UK Government, Government UK, *Coronavirus (COVID-19): CMA open letter to pharmaceutical and food and drink industries(2020)*, available at <https://www.gov.uk/government/publications/covid-19-cma-open-letter-to-pharmaceutical-and-food-and-drink-industries>.

⁵³Id. at.

⁵⁴Letter of Decision Number 12/KPPU/Kep.1/IV/2020 regarding Case Handling in Disease Outbreak Disaster Emergency Conditions. The Decision has revoked and declared the invalidity of Letter of Decision Number 11/KPPU/Kep.1/III/2020 regarding the Amendment to Decision of the Indonesia Competition Commission Number 10/KPPU/Kep.1/III/2020 regarding the Suspension of Law Enforcement Activities within the Secretariat of Indonesia Competition Commission. KPPU, *ICC's Law Enforcement Activities to be Conducted Electronically in the Midst of Covid-19*(April 7, 2020), available at <https://eng.kppu.go.id/kppus-law-enforcement-activities-to-be-conducted-electronically-in-the-midst-of-covid-19/>.

⁵⁵Id. at.

⁵⁶The relaxation on competition enforcement has been revoked through the issuance of Regulation No.2 of 2022 and all the relaxation measures will no longer be applicable as of 1 May 2022.

so that this period is not considered in calculating the effective date of notifications and the evaluation period of mergers and acquisitions transactions. However, the law enforcement process shall continue during the pandemic. Therefore, the ICC issued Regulation No. 1 of 2020 concerning Electronic Case Handling on April 6, 2020. After the regulation was issued, the law enforcement process was again carried out by relying on the precautionary principle and avoiding face-to-face meetings. The method of notification and assessment of mergers and acquisitions that were not previously considered in calculating the effective date is re-calculated.

RELAXATION ON PROCUREMENT: AN EXEMPTION DURING THE PANDEMIC

Due to the pandemic, on April 13, 2020, Indonesia Government officially designated COVID-19 as a national disaster. This determination was stated in the Presidential Decree of the Republic of Indonesia No. 12 of 2020 concerning the Determination of Non-Natural Disasters for the Spread of the 2019 Corona Virus Disease (COVID-19) as a National Disaster.⁵⁷ Per March 2021, there were 1,492,002 positive Covid-19 cases in Indonesia, with total death of 40,364 people.⁵⁸

The Indonesian Government is targeting 180 million people (precisely 181,554,465 people) to get the Covid-19 vaccine to form herd immunity against the virus. Thus, Indonesia needs at least 426 million vaccine doses, assuming one person needs two doses.⁵⁹ Currently, the number of populations fully vaccinated is 1.20%; in other words, there are 10.4 million doses given in the first phase of the target population.

Not only hit the health sector, but the pandemic has also significantly impacted Indonesia's economy. To overcome it, several policies have been released to support the economy to bounce back to equilibrium after the turbulence.⁶⁰ Mass vaccination would be the best way to bring economic recovery to Indonesia.⁶¹ To supply a million doses of vaccines in a short time generates public procurement put into consideration as an essential tool.

Learned from the economic crisis in the EU, the role of public procurement is significant to take out a country of crisis after major disturbances in society and administration by promoting competitiveness and growth.⁶² Indonesia took the right path to foster recovery, echoing the earlier guidance published by other competition authorities, such as the EU and Singapore, to apply an exemption policy.⁶³

Through the National Public Procurement Agency (NPPA), the Indonesian Government has issued a policy that allows government agencies to directly award vendors to procure goods and services during a highly urgent situation. This bold and clear policy steer in Indonesia significantly cuts down the length of the process to be implemented within a few days to secure the procurement.

In addition to the concept of exemption under Competition Law No. 5 the Year 1999, it enables the Ministry of Health to make an order excluding the application of the prohibition provided under Competition Law No.5 the Year 1999 based on the compelling reason of public

⁵⁷BNPB, *Presiden Tetapkan COVID-19 Sebagai Bencana Nasional*(April 13, 2020), available at <https://bnpb.go.id/berita/presiden-tetapkan-covid19-sebagai-bencana-nasional>.

⁵⁸Komite Penanganan dan Covid-19 dan Pemulihan Ekonomi Nasional, *Data Vaksinasi COVID-19 (Update per 27 Maret 2021)*(2021), available at <https://covid19.go.id/berita/data-vaksinasi-covid-19-update-27-maret-2021>.

⁵⁹Bernardy Ferdiansyah, *Awasi pengadaan vaksin COVID-19 secara transparan*, ANTARA NEWS, February 8, 2021.

⁶⁰Junanto Herdiawan, *Optimism for Economic Recovery In 2021* Bank Indonesia Press Releases at https://www.bi.go.id/en/publikasi/ruang-media/news-release/Pages/sp_229020.aspx.

⁶¹The Jakarta Post, *Vaccination key to economic recovery: Economist* The Jakarta Post at This article was published in thejakartapost.com with the title "Vaccination key to economic recovery: Economist". Click to read: <https://www.thejakartapost.com/news/2021/03/29/vaccination-key-to-economic-recovery-economist.html>.

⁶²Laura Alexandra Farca & Dacian Dragos, *Resilience in Times Of Pandemic: Is the Public Procurement Legal Framework Fit for Purpose?*, 16 TRANSYLVANIAN REVIEW OF ADMINISTRATIVE SCIENCES (2020)., 61.

⁶³ Competition and Consumer Commission of Singapore (CCCS), Media Release, available at <https://www.cccs.gov.sg/media-and-consultation/newsroom/media-releases/business-collaboration-guidance-note-20-july-20>. Data accessed February 14, 2021.

interest to do so.⁶⁴ Satisfied with the need for coordination in order to withstand the pressure Covid-19 placed on the vaccine and medical supply chain,⁶⁵ In February 2021, the Government issued a Presidential Decree Number 14 of 2021 as an amendment to Presidential Regulation No. 99 of 2020 concerning Vaccines Procurement in the Context of the Corona Virus Pandemic was made along with the ICC Media Release No. 16/KPPU-PR/III/2020.

The Presidential Regulation regulates the procurement of the Covid-19 vaccine by national and foreign business entities. Article 4 paragraph (1) of the Presidential Decree enables three ways of procuring the Covid-19 vaccine: assignment to state-owned enterprises, direct appointment of providing business entities, and/or collaboration with international institutions/agencies.

In addition to allowing direct award, under Article 4 paragraph (2), it is stated that cooperation with international institutions/agencies includes cooperation in the framework of research and development of the Covid-19 vaccine and / or cooperation for the provision of the Covid-19 vaccine and does not include supporting equipment for Covid-19 vaccination. Further, the Presidential Regulation provides 1) Under Article 6 paragraph (1), the Minister of Health is entitled to award a vaccine provider business entity⁶⁶ 2) the Minister of Health under Article 6 paragraph (2) has the right to determine the type and amount of Covid-19 vaccine procurement through the direct appointment of a business entity, and 3) under Article 6 paragraph (3), it is explained that the vaccine provider business entities appointed by the Minister of Health include national business entities or foreign business entities that meet the requirements. The justification for direct awards to national or foreign entities is to promote efficiency and ensure the supply chain of health services and medical needs amid this crisis.

In order to support the Presidential Regulation, ICC issued Commission Regulation No. 3 of 2020 on the Relaxation of Legal Enforcement of Monopoly Practices and Unfair Business Competition and Monitoring of Partnership Implementation to Support the National Economic Recovery.⁶⁷ Under the ICC Regulation, there are several forms of relaxation provided: relaxation of law enforcement on the implementation of the procurement of goods and / or services using the State Expenditure Budget or the Regional Expenditure Budget; and relaxation of law enforcement on planned agreements, activities and / or using a dominant position aimed at handling COVID-19 and / or increasing the economic capacity of business actors in carrying out their business.⁶⁸

Procurement using the state budget can be done to (a) 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 (b) distribute social assistance and social safety net from the Government to the public.

⁶⁴Competition Law No.5 the Year 1999.

⁶⁵This emergency condition gives authority to the Government to carry out the procurement process through a direct appointment mechanism. See the NPPA Regulation No. 13 of 2018 concerning Procurement of Goods / Services in Emergency Handling.

⁶⁶ Article 6, paragraph (1) was followed up by the Regulation of The Minister of Health of The Republic of Indonesia No. 10 of 2021 concerning the Implementation of Vaccinations in the Control of the 2019 Corona Virus Disease Pandemic (COVID-19). Under the Minister of Health Regulation, the Ministry of Health authorized Bio Farma (a state-owned enterprise) to distribute vaccines nationwide.

⁶⁷ICC Regulation No. 3 of 2020 on the Relaxation of Legal Enforcement of Monopoly Practices and Unfair Business Competition and Monitoring of Partnership Implementation to Support the National Economic Recovery. KPPU, KPPU, *ICC Regulation No. 3 of 2020 on the Relaxation of Legal Enforcement of Monopoly Practices and Unfair Business Competition and Monitoring of Partnership Implementation to Support the National Economic Recovery(2020)*, available at <https://kppu.go.id/wp-content/uploads/2020/11/Peraturan-KPPU-Nomor-3-Tahun-2020.pdf>.

⁶⁸The ICC gives the relaxation for agreements, activities and / or using a dominant position after business actors submit a written request to ICC. Upon such request, ICC will analyze the planned agreement, activities and / or use of a dominant position and decide by 14 (fourteen) days after ICC receives the request. The ICC's decision based on the request may take the form of permitting the implementation of agreements, activities and/or the use of a dominant position, allowed but with certain conditions, or even refused. However, if the ICC has yet to decide within the above period, then the business actor's request is deemed approved by ICC.

Responding to the Presidential Regulation and ICC's rule, the NPPA issued a Circular Letter No.3 in 2020 regarding the Explanation of Public Procurement Implementation for Covid-19 Handling. The Circular Letter came into force on December 15, 2020.⁶⁹ Under the Letter, the NPPA policy requires the regional and central governments to specify the need to stop disease transmission.

The Covid-19 outbreak put Indonesia in an uncertain situation that supposedly required prompt legal solutions in the public procurement sector to ensure the availability of products and/or services in the health sector. Relaxing procurement rules, in the context of extreme urgency, may save lives. However, the remaining question is whether the procurement policies are equipped with a suitable mechanism to weather the Covid-19 crisis.

Considering the high cases of corruption through direct awards in public procurement,⁷⁰ the policy is expected to be accessible to the public. Therefore, the NPPA can assist in supervising the procured vaccines and medical supplies, whether these are suitable to the response efforts, and whether there are any issues clogging supplies. Being able to move swiftly is essential, but the Government needs to act accountably and disclose procurement agreements to the public. Without preserving measures in place, the Covid-19 allocated budget is at risk of inefficiency, fraud, and corruption.⁷¹ The deactivation of procurement regulation on vaccines and medical needs does not mean that all regulations on procurement mechanisms are set aside.⁷² In specific circumstances, the competition law applied during the challenging time.

Mitigating The Risks

Before Covid-19, Indonesia had faced the Avian Influenza outbreak in 2003.⁷³ The Indonesian Government allocated funds for medical equipment procurement, which was significant in handling the outbreak. During the Avian pandemic prevention program, the ex-minister of health was convicted guilty of bribery due to the state-owned holding company's direct appointment in medical supply procurement.⁷⁴ The previous experience sent distressing signs and raised an issue about the good faith of ongoing procurement contracts during an emergency.

Current research by Gallego, Prem, and Vargas shows that the probability of corruption did not improve within public procurement behaviour due to the needs caused by the pandemic.⁷⁵ Instead, the pandemic led to a spending surge by applying larger discretionary anticompetitive procurement

⁶⁹The NPPA Circular Letter No.3 Year 2020 regarding the Explanation of Public Procurement Implementation for Covid-19 Handling. LKPP, *Surat Edaran Kepala LKPP tentang Penegasan Atas Pelaksanaan Pengadaan Barang/Jasa Pada Masa Bencana Nasional Nonalam Penyebaran Corona Virus Disease 2019 (COVID-19)*(December 15, 2020), available at <https://jdih.lkpp.go.id/regulation/surat-edaran-kepala-lkpp/surat-edaran-kepala-lkpp-nomor-32-tahun-2020>.

⁷⁰Teremetskiy, et al., *MEDICO-LEGAL JOURNAL*, (2020), n.8. Also see Jorge A Gallego, et al., *Corruption in the Times of Pandemia*, AVAILABLE AT SSRN 3600572 [HTTPS://PAPERS.SSRN.COM/SOL3/PAPERS.CFM?ABSTRACT_ID=3600572](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3600572) (2020).

⁷¹KPK, *KPK Tetap Kawal Program Vaksinasi* Berita KPK at <https://www.kpk.go.id/id/berita/berita-kpk/2043-kpk-tetap-kawal-program-vaksinasi>. See the corruption through procurement by the state-owned companies in Anja Baum, et al., *Governance and State-Owned Enterprises: How Costly is Corruption?* at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3523126. Research by Emmanuelle Auriol, St'ephane Straub and Thomas Flochel showed a higher risk of corruption in developing countries with weak regulations and legal enforcement. See Emmanuelle Auriol, et al., *Public procurement and rent-seeking: the case of Paraguay*, 77 *WORLD DEVELOPMENT* (2016).

⁷² KPPU, KPPU, *Siaran Pers KPPU Nomor 22/KPPU-PR/IV/2020: Kppu Lakukan Penelitian Inisiatif Atas Dugaan Pelanggaran Layanan Rapid Test Untuk Diagnosis Covid-19 Oleh Rumah Sakit*(2020), available at https://kppu.go.id/wp-content/uploads/2020/04/Siaran-Pers-No.-22_KPPU-PR_IV_2020.pdf.

⁷³Kementerian Kesehatan, *Kemenkes Umumkan Kasus Flu Burung ke 200*, Kementerian Kesehatan Indonesia(2017), available at <https://www.kemkes.go.id/article/view/17110800005/kemenkes-umumkan-kasus-flu-burung-ke-200.html>.

⁷⁴The Jakarta Post, *Former Indonesian health minister sentenced to four years for accepting bribes*, THE JAKARTA POST, June 6, 2017.

⁷⁵Gallego, et al., AVAILABLE AT SSRN 3600572 [HTTPS://PAPERS.SSRN.COM/SOL3/PAPERS.CFM?ABSTRACT_ID=3600572](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3600572), (2020).

contracts. This massive and fast spending may increase higher risk of corruption through direct awards in medical supply procurement.⁷⁶

Regardless of the extreme emergency as justification for procurement exemption, the apparent issue is that it distorts the competition and consumers. Allowing procurement immunity policy by giving the power to specific competitors to set competitive agreements jointly will tend to increase the prices for medical supplies beyond what they would otherwise be in the presence of competition regulations.⁷⁷

Discovered from other authorities about competition law when crises demanded it,⁷⁸ while the US is the most representative example.⁷⁹ During the Great Depression, the US did not consider the negative side of antitrust immunity on cartel agreements.⁸⁰ The US government adopted an approach to antitrust law that effectively suspended the law allowing cartels in the US industry instead of strengthening antitrust enforcement.⁸¹

Moreover, the US Supreme Court allowed horizontal price fixing during the crisis. It exempted it from competition law, which was considered to have severe anticompetitive effects on the economy and consumers' welfare for specific terms in the future.⁸² The governmental aid on exemption policy and the emerging cartels were believed as the rational reasons behind the delayed economic recovery during the Great Depression,⁸³ which was the best lesson the US ever forgot.⁸⁴

CONCLUSION

Relaxation of competition rules will reduce the disciplining effect of firm rivalry and the selection mechanism between efficient and inefficient firms. Experience from prior crises shows that suspending or relaxing the enforcement of competition law would delay recovery as well as the resumption of growth trends before the crisis.⁸⁵ No matter how well-intentioned antitrust exemptions maybe during the crisis, most threaten to institutionalize anticompetitive conduct. Undeniably, antitrust exemptions are sticky and tricky to get rid of. Therefore, any suggestions for a new exemption policy should be treated with the utmost care. The design of government interventions to deactivate competition regulation in times of crisis requires a complex assessment of alternative policy measures' potential costs and benefits.⁸⁶ State support can distort competition and harm market efficiency if not carefully crafted. Even though 2020 was full of challenges, the ICC remained nimble in adapting to changes, as evidenced by the effective law enforcement process in handling cases, litigation processes, and supervision of partnerships.

⁷⁶Id. at.

⁷⁷John Roberti, et al., *The Role and Relevance of Exemptions and Immunities in U.S. Antitrust Law*, presented at United States Department of Justice Roundtable on Exemptions and Immunities from Antitrust Law at <https://www.justice.gov/atr/page/file/1042806/download>.

⁷⁸Chinese and Taipei up to and including the East Asian Financial Crisis, Japan in the post-war era, and the Republic of Korea in the 1970s and 1980s

⁷⁹The US experienced a crisis during the Great Depression, the aftermath of hurricanes Katrina and Rita in 2015, and the global economic downturn that lasted from 2007 until at least 2009. See OECD, *Global Forum on Competition: Crisis Cartels*. 2011., at 217.

⁸⁰The impact of cartelization, money, and productivity shocks on the international Great Depression. (2013)., 1. Also see Lee E Ohanian, *What-or who-started the great depression?*, 144 JOURNAL OF ECONOMIC THEORY (2009)., 2310-2335.

⁸¹Christine A Varney, *Vigorous antitrust enforcement in this challenging era*, REMARKS PREPARED FOR THE US CHAMBER OF COMMERCE, DEPARTMENT OF JUSTICE (2009)., available at [Vigorous Antitrust Enforcement In This Challenging Era | ATR | Department of Justice](#). Data accessed February 14, 2021.

⁸²Laura Phillips Sawyer, *US Antitrust law and policy in historical perspective*, in OXFORD RESEARCH ENCYCLOPEDIA OF AMERICAN HISTORY (2019)., 11-13.

⁸³Bernard C Beaudreau & Jason E Taylor, *Why did the Roosevelt administration think cartels, higher wages, and shorter workweeks would promote recovery from the great depression?*, 23 THE INDEPENDENT REVIEW (2018)., 91-107.

⁸⁴Carl Shapiro, *Competition Policy in Distressed Industries* (ABA 2009)., 6-12.

⁸⁵Sanchez-Graells, *NORTHERN IRELAND LEGAL QUARTERLY*, (2020)., n. 1, at 524.

⁸⁶Cristina Volpin & Ruben Maximiano, *The Role of Competition Policy in Promoting Economic Recovery*, AVAILABLE AT SSRN 3917877 (2020)., at 17.

ACKNOWLEDGEMENT

We must express our appreciation to the Doctor Christopher Cason for comments on an earlier version of the manuscript, although any errors are our own and should not tarnish the reputations of these esteemed professionals.

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