Interview with Kurnia Toha, Chairman, Indonesian Commission for the Supervision of Business Competition

Editor’s Note: Kurnia Toha was named Chairman of the Indonesian Commission for the Supervision of Business Competition (KPPU) in 2018. After earning a law degree in Indonesia, he obtained advanced law degrees at the University of Washington School of Law. He has been a law professor at several educational institutions, and had key roles in the drafting of the Indonesian competition law and its recent amendments. He was interviewed for The Antitrust Source on March 28, by Hugh Hollman.

THE ANTITRUST SOURCE: Chairman Toha, thank you for being here with us today. You were appointed to the KPPU in May last year, along with nine other Commissioners, and then appointed as Chairman for the period 2018–2020.

KURNIA TOHA: Yes, that’s correct.

ANTITRUST SOURCE: What is most important for you to accomplish during your term?

KURNIA TOHA: Actually, before I became a Commissioner, I was an associate professor in faculty of law of the University of Indonesia, responsible for the antitrust law subject for the undergraduate and graduate school.

When I was working as a professor, I found a lot of criticism directed to KPPU, especially on the law enforcement and case handling procedure. So I think it’s very important to change the current law and its implementing regulation in order to bring it in line with the principle of due process of law and to enhance KPPU’s enforcement effort.

Another important point to change is the law itself because in Law Number 5 of 1999, there are some articles that are not in line with international practice and that also obstruct KPPU’s ability to handle cases.

In 2004, KPPU assigned me to prepare the draft amendment of the law. But nothing happened at that time. Later on, in 2014, I was assigned by KPPU, for the second time, to prepare the draft amendment. Those amendments are now still being discussed in the Parliament.

ANTITRUST SOURCE: When you say you were assigned, I understand you were Chairman of the Preparatory Team for the Amendment of Law Number 5 Year 1999 in 2014. And when you became Chairman of the KPPU in 2018, did you then propose a number of changes to the Indonesian Competition Law?

KURNIA TOHA: Yes.

ANTITRUST SOURCE: From your perspective, what are the most important required changes?
KURNIA TOHA: First is about extraterritoriality. As far as I know, this idea was previously rejected by the government and the Parliament. So maybe it will not change, but we still have time to discuss this.

ANTITRUST SOURCE: You actually wrote an article on extraterritoriality back in 2007, entitled, “Extraterritorial Applicability of Indonesia Business Competition Law as an Efforts Dealing ASEAN Single Market.” In that article, I think you had a particular concern that local businesses could be hurt by the free market, as I understand you said foreign companies are not subject to the Indonesian competition law.

KURNIA TOHA: Yes, that’s right.

ANTITRUST SOURCE: Accordingly, you suggested that the law should be amended to subject foreign companies to the Indonesian authority?

KURNIA TOHA: Yes, yes.

Another subject that is very important is the shifting of post-merger notification to pre-merger notification. And also to increase the administrative fines.

ANTITRUST SOURCE: As you said, the Indonesian competition law is a post-closing jurisdiction. And there is a requirement to notify within 30 days of the closing of the transaction.

KURNIA TOHA: Yes, that’s correct. We plan to move towards pre-merger notification. And, fortunately, this is already agreed by the government and also by the Parliament.

ANTITRUST SOURCE: What do you think the timing is for those changes?

KURNIA TOHA: The last time we had a discussion in the hearing with the Parliament and the government was in January. At the time, I was very optimistic that this law would be enacted in January or February. But suddenly, the hearing stopped. So the Parliament scheduled it to come before a hearing after the election. There will be elections on the 17th of April. So, hopefully, in the third week of April we will have another hearing. We are still optimistic that this amendment will be finished and will be enacted this year.

ANTITRUST SOURCE: We’ll watch that space in hopeful anticipation. Earlier, we also started speaking about some of the possible changes to the Indonesian competition law. What other goals do you have in mind for your term as Chairman of the KPPU?

KURNIA TOHA: We would like to focus our effort on cases that have the greatest impact on society, and usually these kinds of cases are derived from ex officio investigations. Thus, it is also important for us to improve our market studies, which findings could lead to ex officio investigations. Hopefully, we can find initiatives, or cases, that really affect the economy or the people.

ANTITRUST SOURCE: Are you focusing on any particular sectors at the moment?

KURNIA TOHA: Yes. We have some industries that we’ll focus on in five years. Those industries are

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the food industry, health and education industry, transportation and logistics and digital economy, oil and energy, finance and banking, and also property.

ANTITRUST SOURCE: You held a workshop in December 2018 during which you did a competition assessment that focused on government procurement.

KURNIA TOHA: That was a competition checklist. We tried to have a program not only for the central government but also for the regional governments to have their regulations in line with the principle of fair competition and to ensure due process of law.

ANTITRUST SOURCE: Were you applying the OECD competition assessment toolkit?

KURNIA TOHA: We formulated our competition checklist based on the OECD checklist. But now we learned some more, and made it in accord with the conditions in Indonesia. But mainly, this was based on the OECD competition checklist.

ANTITRUST SOURCE: The Supreme Court of the Republic of Indonesia¹ rejected an appeal filed by the KPPU because of the lack of due process of law. At the time, the KPPU responded that they plan to remedy the procedural system accordingly. Was this case what you had in mind when you were referencing the need to bring the Indonesian law into conformity with due process?

KURNIA TOHA: Yes, actually, when I was an academician, I criticized the KPPU because I thought the procedural law is not in line with the due process of law. So, honestly speaking, I made that opinion, not based on that case, but based on my knowledge about the due process of law because I’ve also been teaching criminal law, criminal procedure law for almost 20 years.

ANTITRUST SOURCE: What particular areas do you think need improving when it comes to due process?

KURNIA TOHA: We already have a new procedural law, KPPU Regulation Number One of 2019. So under the previous regulation, the Commissioners had input from the beginning of the case. From the initial process, when the investigator had an investigation, the Commissioners were always there. Afterward, the Commissioners decide whether a case could proceed to the hearing process or not. We changed it. In this revised procedure, the Commissioners will only be involved in the Hearing Process. This is to make sure that our case handling procedure is aligned with due process of law.

ANTITRUST SOURCE: These changes then are designed to ensure that the Commissioner is more impartial in making decisions by not being involved in the initial investigation?

KURNIA TOHA: Yes, independent, more independent. We are already asking our investigators to work more professionally—so we don’t have a feeling of just dismissing the case at the preliminary stage. And the previous regulation, in our opinion, is not in line with due process of law. For

¹ Decision No. 1106 K/Pdt-Sus-KPPU/2017.
example, when we bring in a top executive as a witness, the witness brought their assistant, and if the top executive does not understand the question, then they asked the assistant.

Based on the new regulation, we will only have witnesses that really are the ones who know the facts and heard it by themselves or had input in the case. So it's not because the witness is the president of the company that he may be a witness. And also if the company representatives or their attorneys do not show up, we will cancel the hearing. In the past, from my own experience in the hearing process, sometimes the company representatives or their attorney just didn’t show up. But in the future, that will not happen anymore.

**ANTITRUST SOURCE:** And will these due process procedures apply to cartel offenses?

**KURNIA TOHA:** All the cases.

**ANTITRUST SOURCE:** I referenced the December workshop in an earlier question. Another aspect that was discussed at the workshop was the need to protect domestic business from foreign businesses. Do you think this reflects a move towards protectionism in Indonesia?

**KURNIA TOHA:** No, we don’t mean it as a form of protectionism because both the foreign companies and domestic companies will be treated in the same manner.

**ANTITRUST SOURCE:** Actually, we are concerned about the increased cross-border cases that involved multinational companies and or foreign companies, and also competition violations being conducted by foreign companies that affect the Indonesian market. We hope that the KPPU can investigate and can handle these cases.

**ANTITRUST SOURCE:** From what I’ve been reading about the KPPU, it is very active in the M&A area, having received 74 merger notifications last year. Do you foresee that with your proposed changes to the Indonesian competition law more companies will need to notify?

**KURNIA TOHA:** I don’t think so. Because at this time, we already have voluntary pre-merger notification, and a lot of companies will choose to voluntarily notify us or consult with us even before the transaction takes place, including the foreign companies. They already have such a good practice of pre-merger notification in their home country.

**ANTITRUST SOURCE:** The KPPU has also fined companies for not delivering a notification within the stipulated period, including a fine of IDR 3.75 billion on PT Cipta Multi Prima for the acquisition of PT Darma Henwa Tnk.

**KURNIA TOHA:** Yes.

**ANTITRUST SOURCE:** Can you tell us how those fines were calculated?

**KURNIA TOHA:** Actually, we have our own regulation on administrative fines for overdue merger notification. This regulation stated that the fines for each overdue day are 1 billion Rupiah, provided that the maximum total amount of fines shall not be more than 25 billion Rupiah. But the KPPU’s Council has discretion to reduce the fines should the reported parties be showing their goodwill and cooperation in the enforcement proceedings, and vice versa.
**ANTITRUST SOURCE:** Do you plan on also fining companies once you move to a pre-closing notification system if a party does not notify within a certain period of time of a merger agreement being signed?

**KURNIA TOHA:** Yes, yes. I think so.

**ANTITRUST SOURCE:** I believe that many other jurisdictions like the United States and European Union allow parties to go ahead and notify at their will provided the transaction is not closed before receiving clearance.

**KURNIA TOHA:** And maybe we can apply another doctrine—there is, for example, the single economic entity doctrine. That doctrine and the theory are not originally, from Indonesia. So we adopted it, especially from the U.S.

**ANTITRUST SOURCE:** Which jurisdictions do you look to for possible guidance on competition law?

**KURNIA TOHA:** We learn much from U.S. practice. And before I became a Commissioner, I have been called as expert witness many times. Thus, I learned some doctrines from the U.S. and, of course we also learn from Europe.

**ANTITRUST SOURCE:** Is there any particular area that you look to the U.S. more than Europe?

**KURNIA TOHA:** Yes. In law school, I taught about Indonesian competition law that was promulgated in 1999. I taught that subject since 1998, but in 1998, we didn’t have our own competition law yet. So oftentimes I referred to the Sherman Act and the Clayton Act, and we found a lot of doctrines from the U.S. practice.

**ANTITRUST SOURCE:** We referenced the OECD earlier, and there is also the ICN; do you look to those organizations for guidance as well?

**KURNIA TOHA:** Yes. For example, we take some of OECD’s policy briefs as our references in revising our case handling procedure.

**ANTITRUST SOURCE:** Since KPPU has come into being, the ASEAN Community has become much more significant in the competition area. Please could you explain to us how the KPPU interacts with ASEAN on the application of competition law?

**KURNIA TOHA:** Yes, even before I became a Commissioner, KPPU has had a close cooperation with the ASEAN Member States and, of course, we look forward to strengthening that cooperation. Last year, we signed a Memorandum of Understanding on Enforcement Cooperation with the Competition and Consumer Commission of Singapore. We also formed an ASEAN Competition Enforcers’ Network, or ACEN, with all of the ASEAN Member States. Its Terms of Reference was developed by KPPU.

As the oldest competition authority in ASEAN, KPPU also contributes its knowledge and best practices to the region by conducting staff exchanges with other competition authorities in ASEAN, such as those in Malaysia, Singapore, Philippines, and Cambodia. These staff exchanges
were conducted with the support of the Japan ASEAN Integration Fund technical assistance project for competition authorities in ASEAN, which is managed by KPPU, in cooperation with the Japan Fair Trade Commission.

**ANTITRUST SOURCE:** Please could you describe how that cooperation among other ASEAN countries works in practice?

**KURNIA TOHA:** Yes, formally we have a MOU with Singapore’s CCCS. So we can exchange information and also coordinate and cooperate our enforcement activities with them.

**ANTITRUST SOURCE:** The KPPU recently published a market study on the digital economy in Indonesia. What were the key considerations of the KPPU in preparing that study?

**KURNIA TOHA:** The digital economy is one of our priorities. However, we don’t have specific guidance yet, but we already have our market studies on the digital economy in Indonesia. Of course, the digital economy is now rapidly changing, and we should learn about that. And, of course, we would also like to know what businesses think about this sector.

**ANTITRUST SOURCE:** Do you also look into matters of data privacy?

**KURNIA TOHA:** Yes, of course.

**ANTITRUST SOURCE:** And have you also considered whether innovation might be an aspect that you would evaluate?

**KURNIA TOHA:** Of course, as innovation is one of the goals of competition, and innovation could have a great impact on peoples’ welfare.

**ANTITRUST SOURCE:** Are there any other areas of the Indonesian economy that you think you will be focusing on particularly, like you did with the digital economy report?

**KURNIA TOHA:** I said that we have several sectors that are our priorities. So now we are focusing our efforts in the food sector and also looking at the partnership between large companies with medium, small, and micro companies.

**ANTITRUST SOURCE:** What are your concerns with those partnerships?

**KURNIA TOHA:** In 2008, KPPU was mandated with a new authority through Law No. 20 Year 2008 regarding Micro, Small, and Medium Enterprises, or MSMEs. Such authority includes supervision of partnerships between MSMEs and large companies. With such authority, KPPU may inspect business contracts between the companies to avoid abuse of market dominance by large companies. One of the examples is partnership in agriculture sector, which is the partnership between large agriculture companies with the farmers. So with the farmer, we address the partnership between the agriculture company with a small company or with the farmer.

**ANTITRUST SOURCE:** Are you investigating informal partnerships or formal collaborations like joint ventures?
KURNIA TOHA: Not a joint venture, actually. But if they have a contract or agreement, we will monitor and evaluate whether the large company has certain abusive arrangements towards the medium/small/micro company.

ANTITRUST SOURCE: Are you primarily concerned about so-called superior bargaining positions as it is described in Japan?

KURNIA TOHA: Yes, that’s correct.

ANTITRUST SOURCE: And are you looking to Japan for guidance?

KURNIA TOHA: Actually, we are still preparing the guidelines. We are referring to some countries that have such authority.

ANTITRUST SOURCE: And how does that compare to dominance? Are you looking at this through a dominance framework, or are you looking at it as an abuse of superior bargaining?

KURNIA TOHA: So, in these partnerships we evaluate their agreement from a competition perspective, and also consider the superior bargaining position.

ANTITRUST SOURCE: Is there anything else that you would like to share with our readers about your experiences or objectives as Chairman of the KPPU?

KURNIA TOHA: Yes. At this time, the amendment of the Indonesian Competition Law is still under final discussion in the Parliament. Should the amendment be approved within this year, we will need a lot of best practices from advanced competition authorities, including the FTC and DOJ, in formulating the implementing regulations or guidelines.

ANTITRUST SOURCE: Do you think you have the resources internally to implement the anticipated changes to the law?

KURNIA TOHA: At this time, we are also in the process of reorganization, in order to improve the performance of each bureau in KPPU.

 ANTITRUST SOURCE: You’ve been involved with the KPPU from its very beginning. All these years later, are you pleased with how far the KPPU has come?

KURNIA TOHA: Actually, since I became a Commissioner, I see problems that I didn’t think about before! So I hope that I can make positive changes in KPPU and make KPPU the leading competition authority in ASEAN. Hopefully, with the new law, we will have significant improvement in our enforcement authorities. We are also expecting to have our budget increased next year.

ANTITRUST SOURCE: With those additional resources, where would you focus your efforts?

KURNIA TOHA: Currently, we only have 87 investigators to cover 34 provinces in Indonesia. Indonesia has almost 1 million companies, compared with our limited human resources and
budget, the workload is beyond imagination. Additionally, we should also supervise the partnership between large and micro/small/medium companies.

ANTITRUST SOURCE: Chairman Toha, thank you for sharing your vision of the future for Indonesian competition law and the KPPU. I am sure our readers will appreciate learning about the imminent change to the law and your priorities for your tenure as Chairman. Thank you again for your time.