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Muhammad Rifky Wicaksono

Gadjah Mada University, Indonesia, muhammad.rifky.w@gmail.com

Kusuma Raditya

Gadjah Mada University, Indonesia

Laurensia Andrini

Gadjah Mada University, Indonesia

Muhammad Hawin

Gadjah Mada University, Indonesia

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IMPLEMENTING THE EXTRATERRITORIALITY PRINCIPLE TO STRENGTHEN COMPETITION LAW ENFORCEMENT IN INDONESIA IN THE AEC ERA: A COMPARATIVE STUDY

Muhammad Rifky Wicaksono*, Kusuma Raditya*, Laurensia Andriani*,
Muhammad Hawin*, Paripurna Sugarda*, Herliana*, Hariyanto*

*Gadjah Mada University

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Corresponding author's email: muhammad.rifky.w@gmail.com

Abstract

The regional economic integration that ensues from the ASEAN Economy Community will not only provide its members with boundless opportunities for economic growth, but also with unprecedented challenges. The demands of a more interconnected regional economy will require the Indonesian government, as guardians of the competitive process in the Indonesian market, to protect it from anticompetitive conduct occurring both within and outside of its borders. However, there is a major gap since Indonesia's current competition law does not provide the KPPU with the jurisdiction to investigate, prosecute, or punish violations committed by business actors located outside of Indonesia's territory. Thus, this paper examines the implementation of the extraterritoriality principle to enable the KPPU and Indonesian courts to exercise jurisdiction over foreign business actors who violate Indonesia's competition law from abroad. This paper employs a comparative approach to analyze the development of the extraterritoriality principle in the US's, EU's, Singapore's, and Malaysia's competition laws. This article concludes by determining how the extraterritoriality principle should be implemented to strengthen Indonesia's competition law enforcement.

Keywords: competition law, extraterritoriality principle, comparative legal research

Abstrak

Integrasi ekonomi regional yang terjadi melalui Masyarakat Ekonomi ASEAN akan memberikan para negara anggotanya tidak hanya kesempatan untuk pertumbuhan ekonomi yang besar, namun tantangan yang besar pula. Ekonomi regional yang semakin saling terhubung ini akan menuntut pemerintah Indonesia, sebagai penjaga proses persaingan dalam pasar Indonesia, untuk melindunginya dari perbuatan anti persaingan yang berasal baik dari dalam maupun dari luar wilayahnya. Sementara, ada ketidakselarasan karena rezim hukum persaingan usaha yang sekarang berlaku di Indonesia tidak memberikan wewenang kepada KPPU untuk menginvestigasi, menindak maupun menghukum pelanggaran yang dilakukan oleh pelaku usaha yang beradadiluar wilayah Indonesia. Oleh karena itu, makalah ini mengkaji penerapan asas ekstra teritorialitas untuk memungkinkan KPPU dan Pengadilan Indonesia untuk memiliki yurisdiksi terhadap pelaku usaha asing yang melanggar hukum persaingan usaha Indonesia dari luar negeri. Makalah ini akan menggunakan pendekatan komparatif untuk menganalisa perkembangan asas ekstra teritorialitas pada hukum persaingan Amerika Serikat, Uni Eropa, Singapura dan Malaysia. Makalah ini akan ditutup dengan menyimpulkan bagaimana asas ekstra teritorialitas sebaiknya diterapkan untuk memperkuat penegakan hukum persaingan usaha di Indonesia.

Kata kunci: hukum persaingan usaha, asas ekstra teritorialitas, penelitian hukum komparatif

I. INTRODUCTION

By the end of 2015, the Member States of ASEAN entered a new historic phase in their economic and trade development. This is because at the 27th ASEAN Summit, the ten ASEAN countries agreed to increase economic integration in the ASEAN region through an economic cooperation called the “*ASEAN Economic Community*” (AEC).¹ This economic integration through the AEC reflects the Member States’ collective effort to reduce the existing trade barriers between them, such as tariffs (duties imposed on imported goods/services), quotas (quantitative restrictions imposed on imported goods/services) and non-tariff barriers (other trade restrictions not in the form of duties, such as licensing requirements).²

In pursuit of that goal, the ASEAN Member States formulated five main pillars for the AEC in the “*AEC Blueprint 2025*” that they will strive to accomplish by the year 2025: “(i) *A Highly Integrated and Cohesive Economy*; (ii) *A Competitive, Innovative, and Dynamic ASEAN*; (iii) *Enhanced Connectivity and Sectoral Cooperation*; (iv) *A Resilient, Inclusive, People-Oriented, and People-Centered ASEAN*; and (v) *A Global ASEAN*.”³

This economic integration entails significant consequences, especially for trade and business activities in the ASEAN region. The most obvious among them is that competition between business entities will no longer be constrained by State borders. Rather, business entities will become trans-national in nature due to the reduction of trade barriers between the ASEAN nations. From the perspective of competition law, this also means that the relevant markets for business entities would no longer be limited to domestic markets; instead, it is highly likely that an entity’s relevant market could encompass more than one country in the ASEAN region. Therefore, the more a business entity expands its activities in the ASEAN region, the more likely it is that their business decisions and policies in one country could result in anticompetitive effects in another country.

With that in mind, the question that policy makers and competition law experts in Indonesia must answer is this: Is our competition law regime ready to face the challenges that may come from the AEC, especially from preventing anti-competitive actions that may arise from business entities located outside of Indonesia? Unfortunately, with the existing legal norms in Indonesia’s current competition law legislation,⁴ the answer is that we are not ready.

Why is this so? This is because normatively, the Commission for the Supervision of Business Competition’s (KPPU) scope of jurisdiction only encompasses anticompetitive actions that are conducted by business entities operating within Indonesia’s territory. This is evident in the way in which Law No.5 of 1999 defines the term “business actors”—as entities which are “*established and domiciled or who conduct activities within the jurisdiction of the state of the Republic of Indonesia*.”⁵ This narrow definition significantly impedes the KPPU’s enforcement efforts because

¹ ASEAN Secretariat, “ASEAN Economic Community”, <https://asean.org/asean-economic-community/>, accessed on 25 October 2018.

² Runckel, Christopher W., “Asia Opportunities: Asean Economic Community (AEC) in 2015”, http://www.business-in-asia.com/asia/asean_economic_community.html accessed on 25 October 2018.

³ supra (n 1).

⁴ Indonesia, *Undang-Undang tentang Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat (Law regarding the Prohibition of Monopolistic Practices and Unfair Business Competition)*, UU No. 5 Tahun 1999.

⁵ *Ibid*, Art. 1(5).

the KPPU does not currently have the authority to investigate or prosecute foreign business actors located outside of Indonesia who commit anticompetitive actions, even when such actions cause adverse effects to the Indonesian economy.

When we relate this information to the economic integration of AEC, it is necessary for Indonesia to consider expanding the scope of the KPPU's jurisdiction so that it will be able to protect Indonesia's economy from the anticompetitive actions of foreign business actors. What we can learn from other states who are members of an economic community is that this can be done by incorporating the principle of extraterritoriality into the competition law regime. For instance, following the economic and political integration of the European Union, the European Court of Justice (**ECJ**) incorporated the extraterritoriality principle into EU competition law since 1972 through the *Dyestuffs* case.⁶

Indonesia has taken some positive steps in this direction, as we can see in the draft bill for the amendment to Law No. 5 of 1999 ("**Antimonopoly Bill**").⁷The Antimonopoly Bill expands the scope of the KPPU's jurisdiction so that it can enforce Indonesia's competition law with business actors located abroad. This is based on the re-formulation of the "business actors" definition, which now includes those entities who conduct economic activities "*inside as well as outside of the territory of the Republic of Indonesia, which has an effect on the Indonesian economy.*"⁸ Unfortunately, however, the elucidation of the phrase "*which has an effect*" as a condition for the application of the extraterritoriality principle is nowhere to be found in the Antimonopoly Bill.

This issue must be investigated further, because based on the existing literature, there are several variations to the implementation of the extraterritoriality principle. This situation has worsened due to the fact that ASEAN does not have any law binding its member states to implement such a principle. Therefore, this research will conduct a comparative study of the application of the extraterritoriality principle in the US, EU, and other ASEAN jurisdictions in order to find the right approach for Indonesia.

Before proceeding to the analysis, this paper shall further elaborate on three main concepts; namely, the ASEAN Economic Community, the enforcement of Indonesian competition law, and the extraterritoriality principle.

A. ASEAN Economic Community

1. Overview of ASEAN Economic Community

The ASEAN Economic Community (AEC) was established based on Bali Concord II in 2003. This declaration established three pillars of the ASEAN Community; namely, political and security cooperation, economic cooperation, and socio-cultural cooperation.⁹ The purpose of the AEC's establishment is to create a single market and production base, as well as to create complementary opportunities for business.¹⁰ In accomplishing such objectives, the ASEAN countries plan to initiate new mechanisms such as the ASEAN Free Trade Area, the ASEAN Framework Agreement on Services (AFAS), and the ASEAN Investment Area; it also plans to accelerate regional integration in the priority sectors; facilitate movement of business persons, skilled

⁶ Case C-48/69, *Imperial Chemical Industries Limited v. Commission* [1972] E.C.R. 619.

⁷ Indonesia, *Draft Bill for the Amendment of Law No. 5 of 1999* (March 2014 version).

⁸ *Ibid.*, Art. 1(4).

⁹ ASEAN, "Declaration of ASEAN Concord II (Bali Concord II)", https://asean.org/?static_declaration-of-asean-concord-ii-bali-concord-ii, last accessed 20 October 2018.

¹⁰ *Ibid.*

labor, and talents; and strengthen the institutional mechanisms of ASEAN, including the improvement of the existing ASEAN Dispute Settlement Mechanism.¹¹

The economic cooperation among ASEAN countries are to be conducted in the areas of trade in goods, trade in services, investments, intellectual property rights, and capital mobility.¹² The ASEAN Economic Ministers High Level Task Force on Economic Integration published the following initiatives to foster economic integration:¹³

- a. Fast-track integration of 11 priority-sectors;
- b. Faster customs clearance and simplified custom procedures;
- c. Elimination of barriers to trade;
- d. Accelerated implementation of Mutual Recognition Arrangements for key sectors (e.g., electrical and electronic equipment and telecommunications equipment); and
- e. Harmonization of standards and technical regulations.

The countries also agreed to accelerate 11 priority sectors for integration to be coordinated by each member, as follows:

Table 2.1
Priority Integration Sectors¹⁴

No.	Country	Priority Sector
1	Indonesia	Wood-based products; automotive;
2	Malaysia	Rubber-based products; textiles and apparels;
3	Myanmar	Argo-based products; fisheries;
4	Philippines	Electronics;
5	Singapore	e-ASEAN; healthcare;
6	Thailand	Air travel; tourism.

Even though the plan to establish the AEC was created in 2003, it was not until 31 December 2015 that it was formally established. Its establishment was then followed by the AEC Blueprint 2025, which was adopted at the 27th ASEAN Summit in Kuala Lumpur, Malaysia, which is focused on:¹⁵

- a. A highly integrated and cohesive economy;
- b. A competitive, innovative, and dynamic ASEAN;
- c. Enhanced connectivity and sectoral cooperation;
- d. A resilient, inclusive, people-oriented and people-centered ASEAN; and
- e. A global ASEAN.

In 2018, several ASEAN countries made progress. In terms of trade and customs-related documents, five ASEAN countries (Indonesia, Malaysia, Singapore, Thailand, and Vietnam) started to apply the ASEAN Single Window (ASW), where the preferential

¹¹ *Ibid.*

¹² ASEAN, "Recommendation of the High-Level Task Force on ASEAN Economic Integration", https://asean.org/?static_post=recommendations-of-the-high-level-task-force-on-asean-economic-integration, last accessed 20 October 2018.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ ASEAN, *Asean Economic Community (AEC)*, <https://asean.org/wp-content/uploads/2012/05/7c-May-2017-Factsheet-on-AEC.pdf>, retrieved 20 October 2018.

tariff duty can now be granted based on electronic data exchanged through the ASW gateway.¹⁶ While trade-in-goods showed a significant improvement in early 2018, integration into the trade-in-services is still under negotiation. The AFAS has been finalized and is targeted for signing by the ASEAN Economic Ministers later in 2018.¹⁷ Meanwhile, in terms of e-commerce, efforts to intensify the negotiations for an ASEAN Agreement on Electronic Commerce is a targeted priority deliverable in 2017, or at the latest 2018.¹⁸

2. AEC and Competition law

In order to create a competitive ASEAN, the ASEAN Regional Guidelines on Competition Policy was circulated in 2010. This policy is not legally binding to ASEAN member states. It serves as a living reference or set of recommendations for the members. It introduces both competition policy and competition law. The former is expected to increase market competitiveness at the practical level, while the latter provides the market with a set of “rules of the game” meant to protect the competition process itself.¹⁹

The guideline urges the ASEAN member states to have a Competition Regulatory Body and legislation on Competition in place by 2015. This is because not every ASEAN member state had either a regulatory body or competition law back in 2010. Those who already had existing competition laws are encouraged to consider and review the existing legislation on existing regulations for intellectual property rights, fair trading, sectoral rules/regulations, and consumer protection laws.²⁰ The guideline also suggests implementing the competition law in phases. Member states are encouraged to introduce the prohibition of anti-competitive agreements and dominant positions; meanwhile, the prohibition of anti-competitive mergers can be introduced last due to its complexity.²¹

Chapter 5 of the guideline recommends that member states choose to adopt basic legislation containing broad provisions and introduce the implementing regulations later on. It also suggests that the government conduct public hearings before drafting and finally implementing regulations. Most importantly, the guideline suggests that member countries accommodate provisions relating to extra-territorial application of competition law,²² which Indonesia has not yet applied even now.

In 2016, the ASEAN Competition Action Plan or ACAP 2025 was released. The plan translates strategic measures found in the AEC Blueprint, and was established to set out the AEC’s goals in the field of competition law and policy for the period between 2016 and 2025.²³ It provides details on the strategic goals, initiatives, and outcomes on competition policy and law in ASEAN.

It contains five strategic goals, namely:

¹⁶ AEC Monitoring, “Updates on the AEC for November 2017 to June 2018”, AEC Monitoring, <http://aecmonitoring.asean.org/2018/06/30/aec-updates-november-2017-june-2018/>, last accessed 20 October 2018.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ ASEAN, 2010, *ASEAN Regional Guideline on Competition Policy*, The ASEAN Secretariat, Jakarta, p. 3.

²⁰ *Ibid.*, p. 22.

²¹ *Ibid.*, p.23.

²² Chapter 5.1.3.2, *Ibid.*, p.21.

²³ Ong, Burton, ed. *The Regionalisation of Competition Law and Policy Within the ASEAN Economic Community*. Cambridge University Press, 2018, p.26-27.

- a. Establish effective competition regimes in all ASEAN member states;
- b. Strengthen the capacities of competition-related agencies in ASEAN member states to effectively implement Competition Policy and Law (CPL);
- c. Ensure that regional cooperation arrangements on CPL are in place;
- d. Foster a competition-aware ASEAN region; and
- e. Move toward greater harmonization of CPL in ASEAN.

Each goal is further elaborated on and supported by initiatives and outcomes that make the plans more feasible. The ASEAN Experts Group on Competition will oversee the implementation of ACAP 2025 in cooperation with other ASEAN sectoral bodies and relevant stakeholders.²⁴ However, producing an ASEAN competition policy will prove difficult without a clear set of objectives by each member state as well as supranational legal or institutional frameworks. Thus, ACAP 2025 only applies to encourage the development of a regional competition framework and only acts to demonstrate the commitment and interest by the member states who want develop such a framework.²⁵

B. Competition Law Enforcement in Indonesia

1. The Commission for the Supervision of Business Competition

Before Law No. 5/1999 was enacted, the development of competition policy was not a significant objective of the Indonesian Government.²⁶ However, similar to other Asian countries, Indonesia suffered an economic crisis in 1997.²⁷ To resolve this crisis, Indonesia signed a Letter of Intent on July 29, 1998 with the International Monetary Fund in order to receive a rescue loan from the institute.²⁸ The rescue loan carried conditions that among other things required the Indonesian Government to pass laws and regulations to ensure fair competition and consumer protection as well as the governance and enforcement of such laws.²⁹ Subsequently, Law No. 5/1999 was developed with the objective of safeguarding the public interest and improving national economic efficiency³⁰ as well as upholding the rule of law and providing equal protection to every business actor to allow fair business competition.³¹ The formulation of the law was based on the principles set out in the Pancasila as well as the 1945 Constitution; it is based primarily on the principles of economic democracy.³²

Indonesia possesses essentially only one institution to enforce Law No. 5 of 1999; namely, the Commission for the Supervision of Business Competition (**KPPU**), a quasi-judicial institution which was established pursuant to Presidential Decree No.

²⁴ ASEAN, "AN ASEAN Competition Action Plan", ASEAN, <https://asean.org/storage/2012/05/ACAP-Website-23-December-2016.pdf>, last accessed 21 October 2018.

²⁵ Ong, *Loc. Cit.*

²⁶ Sirait, Ningrum Natasya. "The development and progress of competition law in Indonesia". *The Anti-trust Bulletin* 54, no. 1 (2009), p.19.

²⁷ *Ibid.*

²⁸ Pasaribu, Manaek SM. *Challenges of Indonesian Competition Law and Some Suggestions for Improvement*. No. DP-2016-04. 2016, p.2.

²⁹ Pangestu, Mari, Haryo AswicaHyono, Titak Anas, and Dionisius Ardyanto. "The evolution of competition policy in Indonesia". *Review of Industrial Organization* 21, no. 2 (2002), p.214.

³⁰ Pasaribu, *Op. Cit.*, p.1.

³¹ Elucidation of Law No. 5/1999.

³² *Ibid.*

75/1999³³ as an independent entity under the President responsible for supervising the implementation of Law No. 5 of 1999.³⁴ On the other hand, the District Court and Supreme Court act as a means of remedy for KPPU decisions.³⁵ The District Court has the authority to handle appeals of KPPU decisions and criminal cases that result from the non-execution of a KPPU decision. Meanwhile, the Supreme Court handles cassation of District Court decisions.³⁶

The KPPU is tasked with: (1) Evaluating agreements that may result in monopolistic practices or unfair business competition; (2) Evaluating business activities and/or business actors' behaviors that may result in monopolistic practices or unfair business competition; (3) Evaluating whether there exists a misuse of dominant position that may result in monopolistic practices or unfair business competition; (4) Taking action according to its authority under Article 36; (5) Providing recommendations and considerations for Government policy relating to monopolistic practices or unfair business competition; (6) Compiling guidelines and/or publications relating to Law No. 5 of 1999; and (7) Providing periodic reports of its work results to the President and House of Representatives.³⁷

In implementing the aforementioned tasks, the KPPU has the authority to: (1) Receive reports from the public and/or business actors on allegations of monopoly practices or unfair competition; (2) Conduct research on allegations of business activities that result in monopolistic practices or unfair competition; (3) Conduct investigations and/or examinations into allegations reported by the public or discovered by the KPPU during research or monitoring; (4) Decide on the results of its investigations and/or hearings; (5) Summon business actors that have allegedly violated Law No. 5 of 1999; (6) Summon and invite witnesses, expert witnesses and any persons with knowledge of the violation; (7) Seek assistance from related institutions to invite business actors, witnesses, expert witnesses or persons that are not willing to appear upon invitation; (8) Request information from Government institutions on investigations and/or examinations.³⁸

2. Investigation and Examination by the KPPU

During investigation, the KPPU is prohibited from investigating cases that involve criminal elements.³⁹ Instead, cases with criminal elements are investigated by the police and prosecuted by the public prosecutor in the district court.⁴⁰ The KPPU has the authority to conduct investigations and examinations upon two grounds. The *first* is upon receiving a report. Here investigation is initiated upon a report received from an aggrieved member of the public or business actor as a result of the actions of the reported business actor. The *second* is the KPPU's initiative upon the suspicion

³³ Indonesia, *Putusan President tentang Komisi Pengawas Persaingan Usaha (Presidential Decree on the Commission for the Supervision of Business Competition)*, PP No. 75 Tahun 1999.

³⁴ Hermansyah. *Pokok-pokok Hukum Persaingan Usaha Di Indonesia*. Rawamangun, Jakarta: Kencana-Prenada Media Group, 2008.

³⁵ Rizkiyana, Rikrik. *Competition Law in Indonesia*. Singapore: LexisNexis, 2014.

³⁶ *Ibid.*

³⁷ Indonesia, *Undang-Undang tentang Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat (Law regarding the Prohibition of Monopolistic Practices and Unfair Business Competition)*, UU No. 5 Tahun 1999, ("Law No. 5 of 1999") Article 35.

³⁸ *Ibid.*, Article 36.

³⁹ Juwana, Hikmahanto. "An Overview of Indonesia's Antimonopoly Law". *Wash. U. Global Stud. L. Rev.* 1 (2002): 185.

⁴⁰ *Ibid.*

of any violation of Law No. 5 of 1999.⁴¹In either of these circumstances, the KPPU establishes a panel afterwards for the purpose of investigating and examining the reported business actor.⁴² Examination by the KPPU is divided into two stages. The first stage is preliminary examination. Preliminary examination is conducted upon receiving a report; this stage determines whether the case can proceed to the next stage. The second stage is advanced examination. This stage is conducted whenever the KPPU finds indications of monopoly practices or unfair competition.

C. Extraterritoriality Principle

Andrew D. Mitchell defines extraterritoriality as a condition where a State has the authority to apply its jurisdiction and domestic laws to a person or legal entity located outside of its territory.⁴³The polar opposite of this doctrine is the principle of territoriality, which states that a country only has the authority to create and enforce laws with legal entities situated inside its territorial jurisdiction.⁴⁴ As mentioned, the problem that the KPPU currently faces in enforcing Indonesia's competition law is that, based on a textual interpretation, Law No. 5 of 1999 adopts the principle of territoriality. Thus, normatively speaking, the KPPU is not permitted to investigate, prosecute, or punish a foreign business actor who violates Indonesia's competition law unless they establish a subsidiary that is incorporated under Indonesian law. Even then, KPPU's jurisdiction would cover punishing only the subsidiary.

Interestingly, however, in the development of jurisprudence for competition law cases in Indonesia, there are three cases where the KPPU had to answer the question of whether Law No. 5 of 1999 applies to legal entities established under foreign laws that are domiciled outside of Indonesia :the Very Large Crude Carrier (VLCC)⁴⁵case, the Temasek case,⁴⁶ and the Astro case.⁴⁷

The question on the extraterritorial application of Law No. 5 of 1999 first arose in the VLCC case. In that case, the KPPU decided that PT Equinox together with Goldman Sachs Pte and Frontline Ltd. had colluded with PT Pertamina (Persero) in the sale of VLCC's tanker ship to Frontline Ltd. The question regarding the extraterritorial nature of Indonesia's competition law arose in that case because both Goldman Sachs Pte and Frontline Ltd were business actors established and domiciled outside of Indonesia's territory (Singapore and Bermuda Islands, respectively). Although both companies were foreign entities, the KPPU still punished both Frontline and Goldman Sachs because both business actors were involved in a tender conducted by Pertamina in Indonesia, and their tender collusion resulted in a loss to the State's finances up to as much as USD 54 million.⁴⁸ In the VLCC case, KPPU's *ratio legis* to extend their jurisdiction was based on a simple premise: since the *delict* (tender collusion)⁴⁹ was conducted in Indonesia's territory, then the KPPU has the jurisdiction to prosecute

⁴¹ Lubis, Andi Fahmi, et al. *Hukum Persaingan Usaha Buku Teks*, Indonesia: Komisi Pengawas Persaingan Usaha (KPPU), 2017.

⁴² *Ibid.*

⁴³ Mitchell, Andrew D. "Broadening the Vision of Trade Liberalisation". *World Competition* 24 (2001): 343.

⁴⁴ *Ibid.*

⁴⁵ KPPU. "Decision No. 07/KPPU-L/2004."

⁴⁶ KPPU. "Decision No. 07/KPPU-L/2007."

⁴⁷ KPPU. "Decision No. 03/KPPU-L/2008."

⁴⁸ Toha, Kurnia. 'Extraterritorial Applicability of Indonesia Business Competition Law As An Efforts Dealing ASEAN Single Market', *Jurnal Dinamika Hukum* 15 (2015): 3

⁴⁹ Law No. 5 of 1999, Art. 22

and punish the business actors who are guilty of the violation.

The more difficult question occurs if the foreign business actors are not within Indonesia's territory when the anticompetitive agreement or action takes place. This is the question that the KPPU had to answer in the Temasek case. In that case, the Temasek Group (established and located in Singapore) was said to have violated Article 27(a) of Law No. 5 of 1999 because they had a cross-shareholding ownership over the shares of PT Telkomsel and PT Indosat, which caused anticompetitive effects in Indonesia's telecommunications industry. This happened because, through its subsidiary called STT, the Temasek Group owned 41.94% of PT Indosat's shares, while through its subsidiary called Singtel, it owned 35% of PT Telkomsel's shares.

In its objection, Temasek argued that the KPPU did not have the jurisdiction to prosecute and punish Temasek because not only are they not domiciled under Indonesian law, but they also do not conduct any direct business activities in Indonesia. Hence, they argued that they do not fall under the definition of a "business actor" under Article 1(5) of Law No. 5 of 1999. To rebut such arguments, the KPPU "borrowed" the doctrine of the "Single Economic Entity" from EU competition law. Based on this doctrine, a parent company and its subsidiary can be considered a single economic entity if the parent company has "*decisive influence*" over the actions of its subsidiary.⁵⁰ As a consequence, the KPPU held that the foreign business entity "*can be held liable towards the actions of other business actors who are part of a single economic entity [...] hence, Indonesia's competition law can possess extraterritorial jurisdiction in such cases.*"⁵¹ According to that reasoning, the KPPU determined that Temasek was guilty.

Similarly, the principle of extraterritoriality was applied in the case commonly referred to as the Astro Television case.⁵² The case concerned PT Direct Vision (PDTV), a reported party domiciled in Indonesia; Astro All Asia Networks PC (AAN), another reported party domiciled in Malaysia; ESPN STAR Sports (ESS), domiciled in Singapore; and All Asia Multimedia Networks (AAMN), domiciled in the United Arab Emirates.

In this case, the KPPU found that AAN was in violation of Article 16 of Law No. 5/1999, which prohibits business actors from entering into agreements that may cause unfair business competition or monopolistic practices with business actors overseas. The agreement in question was between AAMN and ESS, and contained a clause on the broadcasting distribution of the Barclays Premiere League, and the appointment of a TV operator in Indonesia. The KPPU found that based on the Single Economic Entity Doctrine, the AAMN had conducted its activities in the territory of Indonesia. This was based on the fact that AAMN obtained content, created channels in Indonesian and Malaysian to be supplied to a paid TV operator, and procured decoders supplied to PDTV in Indonesia. It should be emphasized that the Commission disagreed with the initial analysis on the implementation of the Single Economic Entity Doctrine by the investigative team, thus highlighting the urgency of regulating uniform and consistent provisions concerning extraterritoriality under Indonesian competition law.

Having said that, this paper will analyze and outline two things: *first*, how courts in jurisdictions such as the EU, the US, and other ASEAN countries develop and

⁵⁰ Case C-48/69, *Imperial Chemical Industries Limited v. Commission* [1972] E.C.R. 619 (*Dyestuffs*), para. 132; Case C- 6/72, *Europemballage Corporation and Continental Can Company v Commission*, [1973] E.C.R. 219, para. 15; 13 Common Mkt. L.R. 309

⁵¹ KPPU. "Decision No. 07/KPPU-L/2007" p. 126.

⁵² KPPU. "Decision No. 03/KPPU-L/2008."

implement the extraterritoriality principle in their competition law regime; and *second*, what approach should be used in Indonesia's Antimonopoly Bill to implement the extraterritoriality principle to strengthen enforcement of Indonesia's competition law.

III. DEVELOPMENT OF THE EXTRATERRITORIALITY PRINCIPLE IN THE COMPETITION LAW OF DEVELOPED JURISDICTIONS

C. Development of the Extraterritoriality Principle in US Antitrust Law

In explaining the development of the extraterritoriality principle in US Antitrust law, we will first analyze the development of judicial decisions and later follow up with the development of legislations in the US.

The first discussion of the extraterritoriality principle in the US dates back to 1909. In *American Banana Co. v. United Fruits Co.*,⁵³ a suit was brought for alleged conspiracy to monopolize production and exportation of bananas to the US. However, the Judge adopted a restrictive approach by stating that the wrongful acts occurred outside the US, as the legality of the act "*must be determined wholly by the law of the country where the act is done*,"⁵⁴ and that US antitrust law was intended to be "*confined in its operation and effect to the territorial limits*" of the lawmaker.⁵⁵ Such a restrictive approach was soon abandoned in 1927, where in *United States v. Sisal Sales Corp.*,⁵⁶ the Supreme Court held jurisdiction over an alleged conspiracy wherein US companies conspired with Mexican companies to monopolize the import of sisal plants. The court justified this different approach as the act "*brought about forbidden results within the United States*" and that the act was made effective by a US company.⁵⁷

In 1945, in the *United States v. Aluminum Co. of America (Alcoa)*,⁵⁸ the Court introduced a new conceptual test known as the "effects doctrine." Here, the court discussed the issue of violations of the Sherman Act through the execution of an international aluminum cartel from corporations originating in Canada, Germany, and Switzerland. The concept of the "effects doctrine" was introduced, in which, according to Judge Learned Hand, "*any State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders which has consequences within its borders*."⁵⁹ This doctrine not only requires that there are consequences in the US, but also that there is intent to cause such consequences.⁶⁰

However, while this "effects doctrine" was rapidly accepted in the US,⁶¹ the *Alcoa* judgment was criticized by foreign governments and scholars due to its failure to consider potential foreign sovereignty interference and international comity. In *Hilton v. Guyot*,⁶² the US Supreme Court defined international comity as "*the recognition*

⁵³ U.S. Supreme Court, *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, April 26, 1909.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ U.S. Supreme Court, *United States v. Sisal Sales Corporation*, 274 U.S. 268, May 16, 1927.

⁵⁷ *Ibid.*

⁵⁸ U.S. Court of Appeals for the Second Circuit, *United States v. Aluminum Co. of America*, 184 F.2d 416, March 12, 1945.

⁵⁹ See Alford, Roger P. "The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches". *Va. J. Int'l L.* 33 (1992): 1.

⁶⁰ Burr, Scott A. "The Application of US Antitrust Law to Foreign Conduct: Has Hartford Fire Extinguished Considerations of Comity". *U. Pa. J. Int'l Bus. L.* 15 (1994): 221.

⁶¹ See Alford, *Op.Cit.*

⁶² U.S. Supreme Court, *Hilton v. Guyot*, 159 U.S. 113, June 3, 1895.

which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens.”⁶³ This very lack of consideration led to the retaliation by several foreign states in the form of “blocking statutes” to prevent the exercise of jurisdiction by US courts.⁶⁴

Due to these criticisms, the “effects doctrine” was eventually modified into the “jurisdictional rule of reason” by the Court of Appeals in *Timberlane Lumber Co. v. Bank of America*.⁶⁵ Here, Bank of America was alleged to have conspired to keep Timberlane out of the Honduran lumber business.⁶⁶ In assessing whether the US could exert jurisdiction, a three-part test was devised. To determine whether a court could exercise extraterritorial jurisdiction, *first*, the alleged restraint has to have had an actual intended effect on American foreign commerce; *second*, the effect has to have been sufficiently large to present a cognizable injury to the plaintiffs and therefore be a civil violation of the antitrust laws; and *third*, the interests of and links to the US have to have been sufficiently strong *vis-à-vis* those of other nations to justify an assertion of extraterritorial authority.⁶⁷

Yet, despite the attempts to balance these interests through the modified doctrine, criticisms still arose. In *Laker Airways v. Sabena, Belgian World Airlines*, the Court emphasized that the balancing of domestic and foreign interests did not fall under the Court’s authority but rather under the executive branch.⁶⁸ In this case, the US and the United Kingdom faced jurisdictional conflict involving the regulation of air transportation. The Court noted that the modified doctrine carried both practical problems, in which discovery and requests for submissions were requested by political branches, and theoretical problems, where international law does not require one jurisdiction to be more reasonable than the other.⁶⁹ Now, having analyzed the contributions of judicial decision-making, the focus turns to the contributions of legislation from the US.

In addition to the concerns about international comity and foreign interference, Judge Hand’s statement also gave rise to disagreements among US Courts about whether the “substantial effect” requirement applied to the US in order to impose liabilities.⁷⁰ These disagreements were eventually addressed through the introduction of the 1982 Foreign Trade Antitrust Improvements Act (**FTAIA**).⁷¹ The FTAIA introduced the test of “*direct, substantial, and reasonably foreseeable effect*” in US trade or commerce for the Sherman Act to apply to foreign nations.⁷²

The requirement of “substantial, direct, and foreseeable effect” has been further qualified by the courts to mean that the effects must occur within a US territory. Furthermore, a foreign plaintiff cannot sue for damages in a US court for

⁶³ *Ibid.*

⁶⁴ See Alford, *Op.Cit.*; Pettit, P. C. F., and C. J. D. Styles. “The International Response to the Extraterritorial Application of United States Antitrust Laws”. *The Business Lawyer* (1982): 697-715.

⁶⁵ U.S. Court of Appeals for the Ninth Circuit, *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 December 27, 1976.

⁶⁶ See Burr, *Op.Cit.*

⁶⁷ *Ibid.*

⁶⁸ U.S. Court of Appeals, *Laker Airways Ltd. V. Sabena, Belgian World Airlines*, 731 F.2d 909, March 6, 1984.

⁶⁹ See Alford, *Op.Cit.*

⁷⁰ See Whish, Richard, and David Bailey. *Competition law*. Oxford University Press, USA, 2015.

⁷¹ FTAIA, section 1-7.

⁷² *Ibid*, section 6a.

harm suffered outside the US. This is evident in *Hoffman-la Roche v. Empagran SA (Empagran)*, where the Court decided that harm suffered outside of the US could not be brought to US courts.⁷³ The *Empagran* case involved a worldwide conspiracy to fix the prices of vitamins. While some of the purchasers affected by the price-fixing cartel were American and some were foreign, the Court focused its attention on foreign purchasers who did not purchase any vitamins in the US and whether it could exercise jurisdiction in those circumstances.⁷⁴ However, the possibility is left open for cases where the harm to foreign states and domestic harm is inseparable.⁷⁵

Regarding the definition of “substantial, direct, and foreseeable effect,” the United States Department of Justice (DOJ) and Federal Trade Commission (FTC) issued guidelines to interpret the FTAIA, titled the *Antitrust Guidelines for International Enforcement and Cooperation*, which contains illustrations and court-defined terms.

Although the Courts have not defined “direct effect,” the FTAIA offers certain instructive examples. For instance, anticompetitive effects such as artificial inflation of prices and artificial limits on volume in the US marketplace were sufficient to fulfill the requirement of “substantial, direct and foreseeable” elements.⁷⁶ However, in *Eurim-Pharm GmbH v. Pfizer Inc*, the court found that worldwide anticompetitive actions with a ripple effect in the US market did not fulfill the “direct effect” element.⁷⁷ Here, the Plaintiff alleged a spillover effect on domestic commerce as a result of alleged worldwide price-fixing and market division agreements.

“Substantial effect” may refer to the size of the affected market and the relative harm of the anticompetitive foreign conduct.⁷⁸ In *Access Telecom, Inc. v. MCI Telecommunications Corp*, the plaintiff, an American telecommunications company, identified substantial effect toward its own and other businesses by characterizing the relevant US export market and the plaintiff’s revenue.⁷⁹ In that case, the plaintiff alleged that the defendant was violating US antitrust laws for restraining the export market for US telephone services to Mexico. The defendant attempted to protect its monopoly over Mexican phone services by disconnecting the lines used by the plaintiff.⁸⁰ Generally, under the FTAIA, jurisdiction would be found where injury was caused to “the market or to competition in general, not merely injury to individuals or individual firms.”⁸¹ However, in cases where the market has a limited number of competitors, an exception exists where injury toward a single company is deemed to cause injury to the entire market.

“Reasonably Foreseeable Effect” has been less explicitly defined by Courts in the

⁷³ U.S. Supreme Court, *F. Hoffman-La Roche Ltd. V. Empagran S. A.*, 544 US 155, June 14, 2004.

⁷⁴ See Bauer, Joseph P. “The Foreign Trade Antitrust Improvements Act: Do We Really Want to Return to American Banana.” *Me. L. Rev.* 65 (2012): 3.

⁷⁵ *Ibid.*

⁷⁶ U.S. District Court, *Ferromin International Trade Corp. v. UCAR International, Inc.*, 153 F Supp. 2d 700, June 15, 2001.

⁷⁷ U.S. District Court for the Southern District of New York, *Eurim-Pharm GmbH v. Pfizer Inc.*, 593 F. Supp. 1102, September 17, 1984.

⁷⁸ See Beckler, Richard W., and Matthew H. Kirtland. “Extraterritorial Application of US Antitrust Law: What Is a Direct, Substantial, and Reasonably Foreseeable Effect under the Foreign Trade Antitrust Improvements Act.” *Tex. Int’l LJ* 38 (2003): 11.

⁷⁹ U.S. United States Court of Appeals for the Fifth Circuit, *Access Telecom v. MCI Telecommunications Corp.*, 197 F.3d 694, 712, December 1, 1999.

⁸⁰ See Beckler, Kirtland, *Op.Cit*

⁸¹ U.S. Court of Appeals for the Ninth Circuit, *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, April 22, 1988.

context of the FTAIA.⁸² However, this element is understood to replace the required element of intent.⁸³ In *Animal Science Prods, Inc. v. China Minmetals Corp.*,⁸⁴ the plaintiff was a domestic purchaser of magnesite who purchased from Chinese producers and exporters alleged to have fixed the price of magnesite exported to and sold in the US. Here, the Appeal Court interpreted the term “reasonably foreseeable” to mean that the adverse effects toward the domestic market were foreseeable to an objectively reasonable person.⁸⁵ Practically, foreign conduct producing substantial effects in the United States is likely to satisfy the reasonable foreseeability requirement.⁸⁶

D. Development of the Extraterritoriality Principle in EU Competition Law

As one of the largest and most active economies in the world, it is unsurprising that the guardians of competition law in the EU have, in recent years, applied their competition law extraterritorially to punish infringing firms located outside of the EU.⁸⁷ What is perhaps surprising is that the ECJ, or the Commission for that matter,⁸⁸ has never explicitly stated that the extraterritoriality principle applies in EU competition law. Even in landmark cases where the ECJ has extended the reach of its jurisdiction to punish non-EU undertakings,⁸⁹ it has never specifically referred to the extraterritoriality principle.

One likely reason behind the Court’s reluctance to explicitly adopt such a position, let alone to recognize the US’s “effects doctrine,” is because during the 1990s, the political elites of Europe fervently criticized the US antitrust authorities’ application of the doctrine, especially when it was used against European companies.⁹⁰ Instead, the Court tactfully used two doctrines to extend its jurisdiction extraterritorially without having to depart from the territoriality principle; namely, the “*single economic entity doctrine*” and the “*implementation doctrine*.”⁹¹

For the two decades since their inception, these two doctrines have proven sufficient for the Court to base its jurisdiction on to find infringements of Article 101 or Article 102 of the Treaty on the Functioning of the European Union (TFEU) against non-EU undertakings.⁹² However, it was only until recently, in 2017,⁹³ that the ECJ

⁸² Dresnick, Jordan A., Kimberley A. Piro, and Israel J. Encinosa. “The United States as Global Cop: Defining the Substantial Effects Test in US Antitrust Enforcement in the Americas and Abroad.” *U. Miami Inter-Am. L. Rev.* 40 (2008): 453.

⁸³ Sowell, Robert D. “New Decisions Highlight Old Misgivings: A Reassessment of the Foreign Trade Antitrust Improvements Act Following Minn-Chem.” *Fla. L. Rev.* 66 (2014): 511.

⁸⁴ U.S. Court of Appeals for the Third Circuit, *Animal Science Products, Inc v. China Minmetals*, 654 F.3d 462, 17 August 2011.

⁸⁵ See Bauer, *Op.Cit*

⁸⁶ See Dresnick, Piro, and Encinosa, *Op.Cit*

⁸⁷ Daujotas, Rimantas. “Extraterritorial Application of Competition Law: different angles–Same Conclusion.” (2011).

⁸⁸ EU Commission, “Report on Competition Policy 2008”, http://ec.europa.eu/competition/publications/annual_report/2008/en.pdf, accessed on 1 November 2018

⁸⁹ Case C-48/69, *Imperial Chemical Industries Limited v. Commission* [1972] E.C.R. 619 (*Dyestuffs*), para. 132; Case C- 6/72, *Europemballage Corporation and Continental Can Company v Commission*, [1973] E.C.R. 219, para. 15; Joined cases 6 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents Corp. v. E.C. Commission*, [1974] 13 Common Mkt. L.R. 309.

⁹⁰ Friedberg, James J. “The convergence of law in an Era of Political Integration: The wood pulp case and the Alcoa effects doctrine.” *U. Pitt. L. Rev.* 52 (1990): 289.

⁹¹ Ezrachi, Ariel. *EU competition law: an analytical guide to the leading cases*. Bloomsbury Publishing, 2018.

⁹² Whish, Bailey, *Op.Cit*, p. 526

⁹³ Case C-413/14 P, *Intel v Commission*, EU:C:2017:632 (*Intel*).

finally expressly dealt with the extraterritorial application of EU law and specifically with the application of the “*qualified effects doctrine*” under EU competition law. Hence, the following analysis will be divided into three corresponding sub-parts to discuss each of the aforementioned doctrines; namely, the single economic entity doctrine, the implementation doctrine, and the qualified effects doctrine.

1. Single Economic Entity Doctrine

The ECJ first used the single economic entity doctrine to impute liability to non-EU undertakings in the *Dyestuffs* case.⁹⁴ In that case, three non-EU dyestuffs manufacturers were found to have engaged in a price fixing cartel to increase the worldwide prices of dyestuffs. The cartel parties (Geigy, Sandoz, and ICI) were located outside of EU; however, they had subsidiaries who sold their products in the EU. The question in that case was whether the overseas parent companies were liable for infringement of EU competition law, considering that the parent companies and their subsidiaries had separate legal personalities. The Court looked beyond the facade of separate legal personalities and held that a subsidiary’s separate legal personality was not enough to exclude its parent companies from liability.⁹⁵ In fact, parent companies are liable for the anticompetitive actions of its subsidiaries where the subsidiary “*does not decide independently upon its own conduct on the market, but carries out [...] the instructions given to it by the parent company.*”⁹⁶ In such a situation, notwithstanding their separate legal personalities, the parent company and its subsidiaries are, in fact, acting as a “single economic entity.”⁹⁷

The Court subsequently held that the crucial issue in determining the existence of a single economic entity depends on whether the parent company exercises “*decisive influence*” over its subsidiary.⁹⁸ In assessing the issue of decisive influence, the Court considered the “*economic, organizational and legal links*” between the parent company and the subsidiary.⁹⁹ Moreover, if the parent company owns all the shares in the subsidiary, then this creates a rebuttable presumption that the parent company does exercise decisive influence over the subsidiary.¹⁰⁰ Hence, in the *Dyestuffs* case, the Court finally held that the three parent companies were liable for violating Article 101 TFEU, since they were able to exercise decisive influence over the selling prices set by their subsidiaries.¹⁰¹

2. Implementation Doctrine

Although the single economic entity doctrine allowed the Court to significantly extend the reach of their jurisdiction to non-EU undertakings through their subsidiaries, the doctrine is still limited. One obvious limitation is when none of the undertakings involved in the anticompetitive activity has an established subsidiary in the EU. This was the issue that the ECJ had to deal with in the *Wood Pulp I* case.¹⁰² In that case, the Court had to decide whether the Commission could exercise jurisdiction

⁹⁴ Case C-48/69, *Imperial Chemical Industries Limited v. Commission* [1972] E.C.R. 619 (*Dyestuffs*).

⁹⁵ *Dyestuffs*, para. 132.

⁹⁶ *Ibid*, para. 133.

⁹⁷ Whish, Bailey, *Op.Cit.*, p. 527.

⁹⁸ *Dyestuffs*, para. 136-140.

⁹⁹ Case C-628/10 P, *Alliance One International v Commission* EU:C:2012:479 (*Alliance One*).

¹⁰⁰ *Ibid*, paras 46-47

¹⁰¹ *Dyestuffs*, para. 136-140

¹⁰² Cases 114/85 et al *Ahlstrom Oy v Commission* [1988] ECR 5193 (“*Woodpulp I*”).

over wood pulp producers who had no subsidiaries or branches in the EU.¹⁰³ The Commission initially held that they had jurisdiction over the undertakings due to the anticompetitive effects that the concerted practice caused in the EU market.¹⁰⁴ On appeal, the ECJ agreed with the Commission, but used a different reasoning to justify their jurisdiction over the undertakings: “if the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement [...] was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions. The decisive factor is therefore the place where it is implemented.”¹⁰⁵ Hence, the Court found reason to establish jurisdiction because the pricing agreement was “implemented” in the EU; it was immaterial whether they had recourse to subsidiaries, agents, sub-agents or branches to affect their sales in the EU.¹⁰⁶

The implementation doctrine and the *Woodpulp* case have been cited by the Commission to expand its jurisdiction extraterritorially in a number of subsequent cases, including the *Amino Acids* case, where it fined US, Japanese and Korean companies for engaging in a cartel for amino acids.¹⁰⁷ However, the doctrine was also criticized by some commentators, because after the *Woodpulp* case, the threshold for the application of the doctrine had been lowered so that even the “mere sale” of goods in the EU would be deemed sufficient to satisfy the threshold.¹⁰⁸ This risked contradicting established principles in private international law such as “it does not constitute a sufficiently close and relevant link with the regulating State that is compelling enough to justify jurisdiction on its part.”¹⁰⁹ Nonetheless, when it comes to business competition, the predominant means of that competition is through the sale of goods or services. Indeed, when we consider some of the most harmful violations of competition law, such as price fixing cartels, it is indubitable that the first market that the cartel will harm will be the market where such cartelized goods are sold. In this respect, it does not seem unreasonable that the threshold for implementation, and as a result jurisdiction, could include the “mere sale” of goods.

3. Qualified Effects Doctrine

Despite being criticized for the breadth of its application, a closer look at the implementation doctrine reveals that there are still a number of anticompetitive activities that do not fall under its reach. The most obvious examples are conducts which are characterized by an unlawful omission, such as a boycott or refusal to deal.¹¹⁰ In such cases, it could not be argued that the undertakings are “implementing” anticompetitive agreement or conduct because the undertakings are not actively engaged in an economic activity; rather it is their refusal to conduct such activities that is the source of the violation. The problem with this situation is that it is possible that those same omissions could result in anticompetitive effects within the market.

¹⁰³ *Ibid.*

¹⁰⁴ Whish, Bailey, *Op.Cit.*, p. 528

¹⁰⁵ *Woodpulp*, para. 16

¹⁰⁶ *Ibid.*, para. 17.

¹⁰⁷ Whish, Bailey, *Op.Cit.*, p. 528

¹⁰⁸ Van Gerven, Walter. “EC Jurisdiction in Antitrust Matter: The Wood Pulp Judgment.” In *Annual Proceedings of the Fordham Corporate Law Institute International Antitrust Law and Policy Conference*, pp. 451-467. 1990.

¹⁰⁹ *Ibid.*

¹¹⁰ Prete, Luca. “On Implementation and Effects: The Recent Case-law on the Territorial (or Extraterritorial?) Application of EU Competition Rules.” *Journal of European Competition Law & Practice* 9, no. 8 (2018): 487-495.

Clearly, it would be highly detrimental to competition if such harmful business practices escaped antitrust scrutiny merely because the undertakings' actions were not considered "implemented." This was precisely the conundrum the ECJ had to deal with in the *Intel* case.

In its long-awaited decision, the ECJ finally addressed the issue of the extraterritorial application of EU competition law in the *Intel* judgment of 6 September 2017,¹¹¹ including the burning question of whether EU law applies the "effects doctrine." The case concerned two agreements between Intel and Lenovo, which formed part of Intel's global strategy to foreclose its only rival, AMD, from the x86 CPU market. The first agreement concerned a financial incentive for Lenovo to delay the launch of two AMD-equipped products on the worldwide market. The second agreement involved Intel's rebate program conditioned upon the exclusive purchase of Intel CPUs for Lenovo's laptops. The jurisdictional issue that arose in the case was based on the fact that the agreements were concluded between a US (Intel) and a Chinese company (Lenovo). Together, they regulated the sales of goods produced and sold outside of the EU, to be later assembled into computers manufactured in China.¹¹² Furthermore, the agreement foreclosed another US company (AMD) from selling its products into the Chinese market. Based on these facts, Intel argued that the Commission did not have jurisdiction because the agreements were neither implemented in the EU nor did they have any effects in the EU market.

To address these jurisdictional questions, the Court first held that the qualified effects doctrine does apply in EU law, because it "*pursues the same objective [as the implementation doctrine], namely preventing conduct which, while not adopted within the EU, has anticompetitive effects liable to have an impact on the EU market.*"¹¹³ Thus, regarding the standing of the two doctrines, the Court stated that both the implementation and the qualified effects doctrines were valid, and that they are alternative in nature.¹¹⁴ Furthermore, the Court confirmed that the qualified effects doctrine allows for the extraterritorial application of EU competition law when the conduct has "*foreseeable, immediate and substantial effects*" on the market.¹¹⁵

In applying these criteria to the facts, the Court noted that when assessing the nature of the effects, it was necessary to consider the conduct "*viewed as a whole,*"¹¹⁶ and not merely to look at each element of the conduct separately. The Court cautioned that the consequence of doing the latter "*would lead to an artificial fragmentation of comprehensive anticompetitive conduct, capable of affecting the market structure within the EEA, into a collection of separate forms of conduct which might escape the European Union's jurisdiction.*"¹¹⁷ In other words, the qualified effects doctrine requires a comprehensive analysis on the conduct viewed holistically.

In the *Intel* case, the determinative factor for the Court in assessing the qualified effects test was on the fact that each of Intel's agreements formed part of a larger strategy aimed at ensuring that none of Lenovo's products would be equipped with AMD CPUs on the global market, including the EU.¹¹⁸ The Court found that such a strategy had immediate and substantial effects on the European market. Furthermore,

¹¹¹ Case C-413/14 P, *Intel v Commission*, EU:C:2017:632 ("*Intel*").

¹¹² Prete, *Op. Cit.*, p. 6.

¹¹³ *Intel*, para 45.

¹¹⁴ *Ibid*, paras 40-47.

¹¹⁵ *Ibid*, para 49.

¹¹⁶ *Ibid*, para 56

¹¹⁷ *Ibid*, para 57

¹¹⁸ *Ibid*, para 55

the Court clarified that “it is sufficient to take account of the probable effects of conduct on competition in order for the foreseeability criterion to be satisfied.”¹¹⁹ In conclusion, the Court found the qualified effects to be satisfied, and hence it had jurisdiction over the case.

The ECJ’s decision in the *Intel* case marked a significant and important development to the application of the extraterritoriality principle in EU competition law for two reasons. First, the decision made it absolutely clear that EU competition law does embrace the qualified effects doctrine. In this regard, the Court has finally aligned the EU’s extraterritorial application of its competition rules with that of many other States who apply the “effects doctrine,” most notably the US.¹²⁰ Secondly, the judgment has provided guidance as to the criteria of the qualified effects doctrine, namely that it must be “foreseeable, immediate and substantial.”¹²¹ As noted by one commentator, “the Court’s ruling should, in principle, enhance the coherence, clarity and predictability of the system of public enforcement of EU competition rules.”¹²²

E. Development of the Extraterritoriality Principle in the Competition Law of other ASEAN Countries

1. Singapore

Singapore had already had its Competition Act since 2004. Since then, the competition law in Singapore developed very rapidly. In less than three years, it managed to establish policy and legislative foundations and a regulatory agency under the Ministry of Trade and Industry.¹²³ In 2005, the Competition Commission of Singapore (CCS) was established. Its main function is to generate policy statements which supplement the Competition Act. On 1 January 2006, the provisions on the prohibition of anti-competitive agreements and dominant position went into effect. Meanwhile, the merger control provisions were expected to be applicable within the following 12 months.¹²⁴

Stipulations on the extraterritoriality principle are already regulated in the Competition Act. Section 33 (1) extends the applicability of Singapore’s competition laws to agreements entered into or conduct engaged in outside Singapore or by parties who are outside Singapore.¹²⁵ The CCS has the duty to determine whether such agreement or conduct affects the competition in Singapore. If it does, the commission may also take action upon the infringing parties. Ong mentioned that a special feature of Singapore’s Competition Act is the explicit mention of the extraterritoriality principle. Meanwhile, some other jurisdictions hide behind subtle terminologies such as *single economic entity*, *implementation*, or *effects doctrines*.¹²⁶

Furthermore, section 47 of the Competition Act applies the extra-territoriality principle to the abuse of dominant position because Section 47(3) mentions that

¹¹⁹ *Ibid*, para 51

¹²⁰ Prete, *Op. Cit.*, p. 6

¹²¹ *Ibid*, para 49

¹²² Prete, *Op. Cit.*, p. 7

¹²³ Ong, Burton. “Origins, Objectives and Structure of Competition Law in Singapore, The.” *World Competition* 29 (2006): 269.

¹²⁴ *Ibid*.

¹²⁵ Section 33 (1), Singapore Competition Act 2004.

¹²⁶ Burton Ong, *Op. Cit.*

dominant position means a dominant position within Singapore or elsewhere.¹²⁷ This means that a foreign firm that has a dominant position, even if not in Singapore, is at risk of violating Section 47 of Singapore's Competition Act provided that it abuses its dominant position either through its conduct in Singapore or through conduct whose adverse impact affects the competition in Singapore.¹²⁸

The exercise of the territoriality principle can be found in the *Ball Bearings* case; this was the first international cartel case the CCS dealt with. The case involved four Japanese bearings manufacturers and their Singapore subsidiaries. The Japanese companies are competitors in producing ball bearings. It was later discovered that the parent companies discussed and agreed on sales prices on the bearings and sold them to aftermarket customers in Singapore in order to maintain their individual market share and protect their individual profits and sales. The CCS found that the companies' agreement amounted to price fixing and exchange of strategic information. For that reason, the four Japanese companies and their subsidiaries were held to be jointly and severally liable for having infringed on Section 34 of Singapore's Competition Act.¹²⁹

2. Malaysia

Malaysia introduced both The Competition Act and The Competition Commission Act in 2010. The former came into force on 1 January 2011, while the latter came into force on 1 January 2012. These acts basically prohibit 1) agreements which have the object or effect of significantly preventing, restricting, or distorting competition in Malaysia; and 2) conduct which amounts to abuse of a dominant position in the Malaysian market.¹³⁰ Section 3 of the Malaysian Competition Act implicitly acknowledges the extraterritorial principle as it mentions that the competition law applies to any commercial activity both within and outside Malaysia.¹³¹ It further explains that the law shall be applicable to commercial activity conducted outside Malaysia that has an effect in Malaysia's market.¹³²

There is a similarity between Malaysia's and Singapore's Competition Act regarding the extraterritoriality principle. Both countries not only exercise jurisdiction toward anti-competitive agreements and conducts within their territories, but also toward those conducted outside their territories, which may bring adverse impact to the competitive atmosphere of each country. To this date, there have been no cases showing the application of the extraterritoriality principle in Malaysia.

IV. FINDING THE BEST IMPLEMENTATION OF THE EXTRATERRITORIALITY PRINCIPLE TO STRENGTHEN ENFORCEMENT OF INDONESIA'S COMPETITION LAW

¹²⁷ Section 47 (3), Singapore Competition Act 2004.

¹²⁸ Ong, *Op.Cit.*

¹²⁹ Competition Commission Singapore, "CCS Imposes Penalties on Ball Bearings Manufacturers Involved in International Cartel," *Competition Commission Singapore*, Media Release, 27 May 2014.

¹³⁰ Global Compliance News, "Antitrust and Competition Laws in Malaysia," <https://globalcompliance-news.com/antitrust-and-competition-laws-in-malaysia/>, last accessed 26 October 2018.

¹³¹ Section 3 (1), Competition Act 2010 of Malaysia.

¹³² Section 3 (2), *Ibid.*

When considering which interpretation of the extraterritoriality principle is best suited for Indonesia's competition law, the first and most important thing to do is to be faithful to the verbatim wording used in the Antimonopoly Bill. Accordingly, it must be reiterated that the Antimonopoly Bill uses the phrase "*which has an effect on the Indonesian economy*" ("*yang mempunyaidampakterhadap perekonomian Indonesia*" in Indonesian)¹³³ as a basis for extending the law's jurisdiction extraterritorially. Based on this wording, it could be reasonably ascertained that the drafters of the Antimonopoly Bill had intended for Indonesia's new law to adopt the "effects doctrine," as the word "effect" ("*dampak*" in Indonesian) was precisely used to broaden the definition of "business actors" under Article 1(4) of the Bill.

Thus, for the purposes of this discussion, there is no need to consider the single economic entity or the implementation doctrine further because they are outside the scope of the effects doctrine. Furthermore, it could also be argued that if Indonesia does adopt the effects doctrine, then the two other doctrines would be superfluous, since any situation that could be defined under these two doctrines would automatically fall within the scope of the effects doctrine.¹³⁴ For example, if the anticompetitive conduct involved an Indonesian subsidiary of a foreign company, then it would necessarily affect the Indonesian market since both are participants in the market. Also, if the anticompetitive conduct was implemented in Indonesia, then it would undoubtedly cause anticompetitive effects on the Indonesian economy as the conduct directly harms competitors and consumers in the Indonesian market.

The question that must then be answered is: which version should be used to interpret the effects doctrine for Indonesia's Antimonopoly Bill? The US effects doctrine or the EU's qualified effects doctrine? After analyzing the development of each doctrine in depth, the authors have come to conclude that whichever interpretation is used to base Indonesia's implementation of the effects doctrine, it would in most cases lead to the same result. The reason is that if we look carefully at the criteria for the US's original effects doctrine and the EU's qualified effects doctrine, we can see that they are substantively almost identical to one another. The US uses the test of "*direct, substantial, and reasonably foreseeable effect*,"¹³⁵ while the EU uses the condition of "*foreseeable, immediate and substantial effects*."¹³⁶ When compared side by side, the resemblance is striking: the US test of "direct" parallels the EU test of "immediate," while the tests of "substantial" and "foreseeable" are retained in the EU test. Hence, whichever interpretation is used, it would ultimately lead to the conclusion that the effect must be qualified by those three characteristics: direct/substantial, immediate, and foreseeable.

Despite these similarities, however, it is still necessary to determine the best interpretation for Indonesia's competition regime. This is because when a legal system adopts a legal principle or doctrine from another jurisdiction through legal transplant, then it also necessarily adopts the surrounding existing norms to interpret such principle or doctrine. In the context of Indonesia's competition law, one of the most pertinent examples to illustrate this fact is the transplant of the "per se" and "rule of reason" doctrine to assess the illegality of conduct.¹³⁷ Since these doctrines originate from US antitrust law, whenever the KPPU or the Court need to apply these doctrines in assessing a case, then it is inevitable that they would refer to US case laws

¹³³ Bill, Art. 1(4)

¹³⁴ Prete, *Op. Cit.*, p. 7

¹³⁵ FTAlA, section 6a

¹³⁶ *Intel*, para 49

¹³⁷ Rizkiyana *Op. Cit.*, pp. 59-62

in order to understand how the doctrine should be applied. In fact, even the KPPU Guidelines refer to US case laws whenever they attempt to categorize conduct as a *per se* or *rule of reason* violation.¹³⁸

It is therefore important to adopt a doctrine where the surrounding body of existing norms for interpreting the doctrine are sufficiently clear and consistent. Bearing this in mind, the authors conclude that the best interpretation of the effects doctrine that should be used in the Antimonopoly Bill is the US's original effects doctrine. This is because the surrounding norms that exist in the US to interpret the criteria of "direct, immediate, and reasonably foreseeable," are much clearer than those in the EU's qualified effects doctrine.

This is evident from the fact that there are existing norms in both US case law and legislation which further clarify how each of the three criteria should be interpreted.¹³⁹ Meanwhile, since the ECJ has only recently explicitly adopted the qualified effects doctrine, there aren't enough supporting norms that can help further interpret the meaning of each criteria. In fact, some scholars have expressed concerns over the Court's *Intel* decision with regard to their analysis of the qualified effects doctrine because "*as far as the application of the implementation and qualified effects tests are concerned, the judgment is somewhat less clear.*"¹⁴⁰ Perhaps in the future when there are cases that require the ECJ to answer difficult questions on the extraterritoriality of EU competition law, then the Court may well give a better explanation for the implementation of the qualified effects doctrine. However, as of now, the US's development of case law and legislation provides the most satisfactory guidelines on the implementation of the effects doctrine.

V. CONCLUSION

With the dawn of the AEC, Indonesia is entering a new chapter in the development of its economy. The demands of a more interconnected regional economy require not only Indonesia's businesses to be ready to face competitive challenges; but it also requires the Indonesian government to act as guardians of the competitive process in the Indonesian market to protect it from anticompetitive conduct both within and outside of its borders. In this respect, we can see that some of our neighbors are already one step ahead, as Singapore and Malaysia have both applied the extraterritoriality principle to their respective competition acts. Indonesia, on the other hand, needs to swiftly amend its competition law because the territoriality doctrine that is contained in Law No. 5 of 1999 significantly hampers the KPPU's efforts to enforce the law against foreign anticompetitive conduct.

It is therefore important for Indonesia to move forward and to expand the jurisdictional scope of its competition law extraterritorially. From the wording of Article 1(4) of the Antimonopoly Bill, it is clear that legislators intend to adopt the effects approach. However, what is still unclear is how the term "effect" (*dampak* in Indonesian) should be interpreted. This is where taking inspiration from the US approach would be useful, as their most recent developments have further qualified the effects doctrine with the criteria of "*direct, substantial, and reasonably foreseeable.*" If these criteria are not met, then the US Courts and competition authorities cannot

¹³⁸ See KPPU Guidelines No. 5 of 2011 regarding the Guidelines for Article 5 of Law No. 5 of 1999

¹³⁹ US DOJ and FTC, "Antitrust Guidelines for International Enforcement and Cooperation", <https://www.justice.gov/atr/internationalguidelines/download>, accessed on 6 November 2018

¹⁴⁰ Prete, *Op. Cit.*, p. 7

exercise jurisdiction in order to conform with the principles of international comity. It would be wise for Indonesia's legislators to take inspiration from this approach in order to create greater clarity for the application of the extraterritoriality principle in Indonesia.

The most critical recommendation is for the government to integrate the qualifications of the US's approach to the effects doctrine into the Antimonopoly Bill. This can be done by either inserting the qualifications directly in the wording of Article 1(4) of the Antimonopoly Bill, or by including an explanation inside the elucidation to the article. This is important to ensure certainty in the interpretation of the doctrine. The risks of not qualifying the degree of "effect" would be to have too broad of an interpretation. In which case, valuable taxpayer money and resources might be used to prosecute foreign conduct which may not otherwise have a significant effect on the Indonesian economy, and which in turn may strain political relations with the State in which the foreign business actor is located. The qualifications of "*direct, substantial, and reasonably foreseeable*" (*langsung, segera dan mendatang* in Indonesian) would provide the most balanced approach.

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