

The Application of Extraterritoriality Principle in ASEAN Economic Community Era: Challenge and Feasibility

Dr. jur. Udin Silalahi, SH., LL.M¹

Abstract

Most of the ASEAN member states (AMSs) have their own competition law, with the exception of Cambodia. Competition is clearly an important aspect of ASEAN's vision of regional economic integration. Competition law ensures that all entities do their business activities in every country of AMSs. Every undertaking shall not harm the competition, but in fact, an undertaking could harm the competition in the domestic market through cross-border anticompetitive practices. The question is whether cross-border anticompetitive practices occur in the ASEAN region and whether national competition law can be applied to foreign companies with domiciles abroad. There is no ASEAN regulation about this issue because there is no specific law that regulates cross-border anticompetitive practices. In the AEC era, there is a possibility of cross-border anticompetitive practices. This article discusses and elaborates on the challenge and feasibility of the application of extraterritorial jurisdiction in the ASEAN region and how it should be applied by national competition authorities in the ASEAN region

Keywords: Extraterritorial jurisdiction; Competition law; ASEAN Economic Community; Indonesian competition law; Singapore Competition Act

1. Introduction

In the era of a global economy, the increase in the number of multinational corporations doing business across borders and on a global scale, the ease of modern travel between states, the globalization of banking and stock exchanges, technological developments such as the internet, and the emergence of transnational criminal enterprises and activities have combined to encourage states to exercise jurisdiction beyond their territorial boundaries. Problems and issues arise when the scope of companies' activities are no longer tied to their location. In terms of the ASEAN region, all ASEAN member states (AMSs) agreed that the economies of AMSs have been integrated as a single market in the ASEAN region, which is called the ASEAN Economic Community (AEC). The AEC is the realization of the region's end goal of economic integration. It is asserted in Article 1 of the ASEAN Charter that not only should a single market to be developed in the ASEAN region but also the implementation of the ASEAN single market should be under the culture of competition (Silalahi, 2017, p. 118). This means that fair competition in the ASEAN region must be assured, but unfortunately, there is no ASEAN competition law to protect competition in the region, as in the European Union. The ASEAN Regional Guidelines on Competition Policy (ARGCP) has been developed; this is not intended to be a full or binding legal instrument, but it serves generally as a general framework guide for the ASEAN countries (Silalahi & Parluhutan, 2017, p. 220). Almost all ASEAN countries, except Cambodia, have enacted their own competition laws.

However, all the competition laws of the AMSs are designed to protect and sustain fair competition in their own domestic markets. Competition law ensures every entity conducts its business activities in every country of ASEAN member states. The objective of national competition law is to promote and protect the competition in respective states. Every entity shall not harm the competition, but it shall do its business in a fair way and not go against the competition law.

¹ Assitant Professor of Law, Faculty of Law Universitas Pelita Harapan, Lippo Village Tangerang 15811, Indonesia Email: udin.silalahi@uph.edu

If any entity violates a national competition law, then the competition authority will apply its national competition law to restore fair competition in the relevant market. Generally, national competition law applies only to the entities that harm the domestic market.

However, in terms of ASEAN economic integration, an entity could engage in cross-border anticompetitive practices that will be harmful and affect the competition in the domestic market and in another AMSs. These types of cross-border anticompetitive practices are quite similar to those in purely domestic cases. Cross-border anticompetitive practices are added to regional dimensions of anticompetitive behavior, such as international cartels, mergers and acquisitions with international spillovers.

The question is whether cross-border anticompetitive practices occur in the ASEAN region and whether national competition law can be applied to foreign companies that domicile outside of the domestic market. It is unclear how a national competition authority can reach the business actors that domicile outside of the domestic market and that have distorted or harmed the domestic market. Could national competition authorities impose national competition law on entities that domicile outside of their home country? All of these issues will be discussed and elaborated in this paper, which takes an extraterritorial jurisdiction approach. The Singapore Competition Act has already regulated the provision of extraterritorial jurisdiction, while Indonesian Competition Law (“ICL”) Number 5 of 1999 has not regulated extraterritorial jurisdiction explicitly, but KPPU had already implemented it in the Temasek case and Astro Television case. This illustrates why the extraterritorial application of national competition laws is assuming progressively greater importance.

To provide a clear and structured exposition of the research theme, this article is divided into the following sections. Whereas the first section explains the background of the research and goals, the second part elaborates on the concept of extraterritoriality in competition law. The third section elaborates the application of extraterritoriality in Indonesia, even though the Indonesian Competition Law (“ICL”) Number 5/1999 does not regulate the extraterritoriality principle explicitly and in Singapore, according to the Singapore Competition Act is as a prominent AMSs. The fourth section discusses the feasibility of implementing extraterritoriality in the ASEAN region. Finally, the fifth section concludes and reemphasizes the importance of the extraterritoriality principle in competition laws in ASEAN countries.

2. The Extraterritoriality Principle in Competition Law

Broadly speaking, extraterritoriality originates from the international law praxis (Wallace, 2002, p. 1042). According to *Kamminga*, the concepts of ‘extraterritoriality’ and ‘extraterritorial jurisdiction’ refer to the following notions:

“competence of a State to make, apply and enforce rules of conduct in respect of persons, property or events beyond its territory. Such competence may be exercised by way of prescription, adjudication or enforcement” (Kamminga, 2012).

According to *Meesen*, extraterritoriality would be applicable if an effective and significant connection between the regulating state and the activity of fact to be regulated’ (Meesen, 1996, p. 90). Historically, the rationale of the extraterritoriality principle is to overcome jurisdictional barriers, namely, territoriality and nationality. According to Joyner, the nationality jurisdiction “... allows a State to prescribe laws that bind its nationals, regardless of where the national is or where the offense occurs (Joyner, 2005, p. 150).

According to *Wish and Bailey*, with respect to competition law, territoriality jurisdiction has a decisive role. Accordingly, the territoriality jurisdiction covers the following: First, subjective territoriality, which refers to a violation originating in a country’s territory, but this would be addressed in other countries. Second, objective territoriality, which refers to an offense originating in another country, but this would be addressed, at least partially, within a country’s territory (Wish & Bailey, 2015, p. 520).

Martyniszyn, an EU competition law scholar, argues that objective extraterritoriality (objective jurisdiction) is profoundly important for the implementation of competition laws (antitrust law) (Martyniszyn, 2017, p. 478-479). This objective jurisdiction covers competition (antitrust) violations, which occur abroad but have anticompetitive effects on the domestic (internal) markets of countries, which exert the jurisdiction (Martyniszyn, 2017, p. 478). With regard to the application of the extraterritoriality principle, this research takes into account two mainstream examples of competition law: First, the US antitrust law and second, the European Union’s (EU) competition law.

In the United States (US), the application of the extraterritoriality of US antitrust laws was founded upon the “effects doctrine”. First, in the *Alcoa* case, the US Court (2nd Circuit) argued the following:

“Any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders, which has consequences within its borders, which State reprehends; and these liabilities other States will ordinarily recognize.” (Ezrachi, 2016, p. 627). Subsequently, in the *Hartford Fire* case, the *US Supreme Court* judged that antitrust laws apply ‘to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States [citations omitted]’. Under this ‘effects doctrine’, the US Competition Authority can exert its jurisdiction based upon a so-called “Direct, substantial and reasonably foreseeable” effects within the US territory (Zanettin, 2002, p. 11).

Regarding the application of the extraterritoriality principle in European competition law, there has been an evolution from the “Single Economic Entity (SEE)” doctrine to the “implementation” doctrine and lately to the “immediate, substantial and foreseeable effect” doctrine (Behrens, 2016, p. 9).

In EU competition law, by means of the “SEE” doctrine, the EU Competition Office (Commission) can extend its jurisdiction to companies (undertakings) located outside the EU territory by treating a holding company (parent and subsidiaries) as a single economic entity and thus to attribute the anticompetitive actions of an undertaking located outside the EU to other members of the holding company based within the EU territory (Behrens, p. 9).

The Commission applied this doctrine first in the *Imperial Chemical Industries Ltd. (ICI) v Commission* (“Dyestuffs”). Subsequently, in the Dyestuffs’ case’s appeal phase, the European Court of Justice (ECJ) argued that, in terms of its application, the SEE Doctrine is subject to 2 (two) requirements: First, the presence of at least one of the holding’s members undertaking in the EU territory. Second, the existence of a ‘Single Economic Entity’.

In this case, the Commission imposed antitrust fines against ICI Ltd, a British chemical company, due to violations against the EC Cartel law in the European market. ICI Ltd, as the parent (holding) company, refuted the Commission’s decision, arguing that the Commission did not have jurisdiction over ICI Ltd. However, the Commission countered that ICI Ltd. had instructed its subsidiary companies, located in EU, to carry out cartels on price in the EU market. Furthermore, the Commission found that the price cartels had anticompetitive effects on the EU market, regardless of whether the parent (holding) company was registered in the United Kingdom (UK). In the appeal proceedings, the European Court of Justice (ECJ) posed the argument that the Commission had jurisdiction over the parent company, ICI Ltd, based upon the ‘SEE Doctrine’ (Jones and Sufirin, 2016, 134).

Furthermore, the European competition law’s precedent developed into the “implementation doctrine”. In *Ahlström Osakeyhtiö and others v Commission of the European Communities (Woodpulp)*, the ECJ invoked EU competition laws to cartels that were formed abroad (outside the EU), but the cartels were implemented within the EU (Behrens, p. 9). Interestingly, the ECJ clearly distinguished the “formation” and “implementation” of cartels in the *Woodpulp* case and reads as follows:

“(16) It should be observed that an infringement of 85 [now Article 101 TFEU], such as the conduct of an agreement which has had the effect of restricting competition within the [internal] market, consists of conduct made up of two elements, the formation of the agreement, decisions or concerted practice and the implementation thereof. If the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement, decision of concerted practice 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.”

“(18) Accordingly, the [EU’s] jurisdiction to apply competition rules to such conduct is covered by the territoriality principle as universally recognized in public international law.” (Ezrachi, 2016, p. 627). Whereas EU competition law does not directly adopt the “effects doctrine”, the ECJ later adopted the “immediate, substantial and foreseeable effect” doctrine or the “qualified effects” doctrine to apply the extraterritoriality principle. In the *Gencor* case, the General Court (GC) affirmed the Commission’s decision to block mergers abroad. The GC argued that the proposed mergers would have “immediate, substantial and foreseeable (anticompetitive) effects” on the EU domestic market (Case T 102/96, *Gencor Ltd v Commission*). Subsequently, in the *Intel* case, the GC followed *Gencor’s* approach by introducing the “qualified (immediate, substantial and foreseeable) anticompetitive effects” doctrine (Behrens 2016, p. 9).

3. The Application of the Extraterritoriality Principle in Indonesia and Singapore

In the Indonesian competition law praxis, the extraterritoriality principle has been applied both by the Cartel Office (official) and the courts (judicial). The KPPU, as the Indonesian Cartel Office, has employed this principle in two landmark cases, namely, the Temasek Telecom and Astro Television cases (KPPU Decision Number 07/KPPU-L/2007).

In the Temasek Telecom case, the KPPU's indictment was based primarily on the violation of Article 27 (a) ICL Number 5/1999 concerning cross-ownership. The KPPU invoked Article 27 (a) against Temasek Holdings (Pte) Ltd., a Singapore based state-owned enterprise (SOE), because of its cross-ownership both in Indosat (Tbk.) and Telkomsel (Tbk.). Article 27 (a) ICL Number 5/1999 reads, as follows:

“Business actors shall be prohibited from owning majority shares in several companies of the same type conducting business activities in the same field in the same relevant market, or from establishing several companies with the same business activities in the same relevant market, if such ownership causes:

- a. one business actor or a group of business actors to control more than 50% (fifty percent) of the market share of a certain type of goods or services;
- b. two or three business actors or a group of business actors to control more than 75% (seventy-five per cent) of the market share of a certain type of goods or services.”

In the Structure-Conduct-Performance (SCP) Analysis, the KPPU opined that the cross-ownership in the Indosat and Telkomsel case led to a dominant market position and parallel pricing in the Indonesian telecommunication (cellular) market. Later, the KPPU found that there were cartels on prices of M2F cellular tariff by Indosat and Telkomsel. Through corporate restructuring (divestment), Temasek (Pte.) Ltd. could acquire share ownerships in 41,94% of Indosat Tbk. and 35% in Telkomsel Tbk (Purnomo, 2018).

Referring to European competition law and US antitrust law, cross-ownership could serve as the primary argument for the application of the extraterritoriality principle (KPPU Decision Number 07/KPPU-L/2007). Put differently, cross-ownership serves as the main legal basis for applying the “SEE Doctrine”. For the application of the “SEE” Doctrine, the EU competition law requires that cross-ownership will have a “decisive influence” on the corporate decisions and/or actions of an acquired undertaking. Similarly, UK competition law requires that cross-ownership will have “material influence”. Whereas the elaboration of “decisive” and “material” influences depends on several parameters, both the EU and UK competition laws distinguish between “positive corporate control” (*de jure*) and “negative corporate control” (*de facto*).

In the Temasek Telecom case, the KPPU was of the opinion that Temasek (Pte.) Ltd, together with Indosat and Telkomsel, were subject to the “SEE Doctrine” (KPPU Decision Number 07/KPPU-L/2007). Accordingly, the KPPU inspected several parameters to assess the “decisive influences” of Temasek (Pte.) Ltd. over Indosat and Telkomsel. Afterwards, the KPPU convincingly argued that Temasek (Pte.) Ltd., had exerted “material influences” over Indosat and Telkomsel, which led to price cartels in the Indonesian telecommunication (cellular) market. Consequently, the KPPU could invoke the provisions of ICL Number 5/1999 due to the price cartels against Temasek (Pte.) Ltd. based on the extraterritoriality principle (KPPU Decision Number 07/KPPU-L/2007).

Afterwards, the Indonesian Supreme Court (MARI) affirmed the KPPU's decision in its final and binding decision (Putusan MARI) Number 496K/2008. Hence, MARI acknowledged the application of the SEE Doctrine to invoke the extraterritoriality principle (Supreme Court Decision Number 496K/2008).

Subsequently, in the Astro Television case, the KPPU asserted that there had been a violation of Article 16 ICL Number 5/1999 by Astro All Asia Networks, Plc (AAAN) because of the agreement between AAAN and ESPN Star Sports (ESS) (KPPU Decision Number 03/KPPU-L/2008).

Article 16 ICL Number 5/1999 stipulates the following:

“Business actors shall be prohibited from entering into agreements with other parties overseas setting forth conditions which may cause monopolistic practices and or unfair business competition.”

Article 16, which laid the foundation of Part 10 (ten) on agreements with foreign parties, refers mainly to Article 1 para. (7) ICL Number 5/1999. Article 1 para (7) rules out the following:

“Agreement shall be the act of one or more business actors to bind themselves with one or more other business actors under any name, either in writing or in non written form.”

Whereas Article 16 is self-explanatory, it can be reasonably concluded that the ICL Number 5/1999 embraces the principle of extraterritoriality. Further, agreements under the abovementioned Article 16 include joint venture agreements and international business contracts (Gozali, 2009, p. 67-72).

The agreement between AAAN and ESPN Star Sports (ESS) stipulated exclusivity in terms of the control and placement of the broadcasting rights for the Barclays Premiere League 2007-2010 to PT. Direct Vision (PTDV), a subsidiary company of AAAN. All Asia Multimedia Networks (AAMN) together with AAAN (“Astro Group”) not only substantially supported PTDV but also had “decisive influence” over PTDV. The KPPU judged this “decisive influence” based on, among other things, the following parameters: (1) the appointment of directors and (2) the share ownerships (KPPU Decision Number 03/KPPU-L/2008). Accordingly, the KPPU’s indictment used the “SEE” Doctrine for the corporate relationship of PTDV and AAAN. In Indonesian competition law, *Hansen* argues that the “SEE” Doctrine would be applicable when the following occurs:

“several independent business entities join into a single economic entity that is independent. These independent business entities are under the joint leadership, showing externally that the parent (holding) undertaking make uniform corporate plan for its subsidiaries.” (KPPU Decision Number 03/KPPU-L/2008).

Afterwards, by means of this “SEE” Doctrine, the KPPU was of the opinion that AAAN and ESS violated Article 16 ICL Number 5/1999 because of the abovementioned anticompetitive agreement. Hence, in the case of Astro Television, the KPPU applied both the “SEE” Doctrine and Article 16’s prohibition to trigger the extraterritoriality principle. Ultimately, the Indonesian Supreme Court (MARI) affirmed the KPPU decision through its Decision Number 255K/PDT SUS/2009 on 28th May 2009.

Based on two decisions of the KPPU, implicitly, the ICL has regulated extraterritorial jurisdiction, namely, in Article 27 regarding share cross-ownership and Article 16 regarding agreement with foreign parties that harmed the domestic market of Indonesian of Law No. 5 of 1999.

Primarily, as regards the extraterritoriality principle, Section 33 (1) of the Singapore Competition Act (“SCA”), stipulates the following: “Notwithstanding that

- (a) an agreement referred to in Section 34 has been entered into outside Singapore;
- (b) any party to such agreement is outside Singapore; ...or
- (g) any other matter, practice or action arising out of such agreement, ...is outside Singapore, and this part shall apply to such party, agreement, abuse of dominant position, anticipated merger or merger if-.such agreement infringes or has infringed the Section 34 prohibition;...” (Nguan, 2015).

Second, whenever undertakings in Singapore develop collusive agreements (cartels) and violate Article 34 (1) SCA, the Singaporean Competition Office would disapply Article 34 (1) SCA. This inapplicability of Article 34(1) SCA takes place if the “SEE” doctrine exists. This “SEE” doctrine would apply to the parent (holding)-subsidiary corporate relationship, provided

“...no real freedom to determine its course of action in the market and, although having a separate legal personality, enjoys no economic independence” (Nguan, 2015). The Singapore Competition Commission has applied extraterritoriality to the cartels of air freight forwarding services from Japan to Singapore. In this case, the Competition Authority stated that there was a violation of the Section 34 Singapore Competition Act. These alleged cartels involved 11 forwarders operating services from Japan to Singapore.

The Singaporean Competition Authority concluded that cartels include agreements between businesses to fix prices, collusive tender, market allocation and the restriction of the production of services.

Subsequently, regarding the application “SEE Doctrine”, the Singaporean Competition Authority stated that there was an antitrust violation based on the extraterritorial principle in the ball bearings case. The Singapore Competition Commission imposed penalties on the Singaporean and Japanese companies due to their involvement in the international cartel of ball bearings manufacturers.

5. Feasibility of Implementing Extraterritoriality in ASEAN Countries

Ten member countries and nine of the ASEAN member states already have national competition laws, namely, Indonesia, Singapore, Malaysia, Thailand, Vietnam, the Philippines, Myanmar, Brunei Darrussalam, and Lao PDR. Cambodia is in the process of enacting its competition law. The fragmented nature of this competition legislation denotes that ASEAN domestic competition laws embody substantially different rules. The actual example of this obstacle is the extraterritoriality principle.

As mentioned above, Singapore includes the provision of extraterritorial jurisdiction in the Singapore Competition Act, and other AMSs have not regulated it in their competition law. Although ICL does not regulate the extraterritoriality principle, the KPPU had already applied it in the case of Temasek Telecom and Astro Television. This means that Indonesia needs to address extraterritoriality in Indonesia. Recently, the draft of the New Indonesian Competition Law 2017 (“RUU Persaingan Usaha”) introduced the application of the extraterritoriality principle. Article 1 (5) of RUU Persaingan Usaha states the following:

“Business actor is every person or business entity, either in the form of a legal or non legal entity, that is incorporated and registered or carries out activities within as well as outside the Republic Indonesia’s territory, which has effects into the Indonesia’s economies, either individually or collectively through an agreement, undertakes variety of activities in an economic sector.”

The increasing importance of the extraterritoriality principle in ASEAN competition provisions is an undeniable factual condition for the following reasons: (1) Increasing exposure to cross-border cartels and other antitrust violations, such as anticompetitive mergers, which control raw materials and key commodities of great importance to emerging economies. (2) Weak enforcement of competition laws, that is to say, enforcement of competition law violations are currently undertaken by only a small number of jurisdictions, with fines falling short of deterrence. (3) Institutional constraints for enforcing competition laws, such as the inadequacy of resources in jurisdiction to enforce decisions.

Nevertheless, regarding the formal (procedural) aspects of extraterritorial implementation, the ASEAN could keenly consider the following practices: First, the comity principle and second, the bilateral agreement (Yue, 2017, p. 47). According to Xia, comity refers to following notion:

“Comity” refers to the principle that political entities (including states, nations, courts and other public authorities from different jurisdictions) mutually recognize each other’s legislative, executive, and judicial acts. According to this principle, based on the consideration of international relations, the states should reciprocate the decisions.” (Yue, 2017, p. 48). In the antitrust (competition) law praxis, two types of comity exist:

First, positive comity. This refers to a situation:

“where one state actively requests the other state take necessary measures to protect the interests of the former state.” (Yue, 2017, p. 49). However, this type of comity is subject to an obstacle, namely, “the necessity of a lengthy negotiation on balance between the national interests of both parties.”

Second, passive comity; this type of comity exists if the following occurs:

“a more common and traditional in exercise of judicial jurisdiction where courts of one state are required to restrain their jurisdiction in certain cases considering the important interests of other states” (Yue, 2017, p. 49).

On the other hand, to strengthen antitrust enforcement, the competition authorities (the Cartel Office) could make bilateral agreements with other countries. Agreements on international cooperation in competition enforcement help competition authorities work with each other to enforce the law effectively and efficiently, for example, the bilateral antitrust law agreement between Germany and the United States (US) (Yue, 2017, p. 49). This agreement contains some key clauses related to the extraterritoriality principle in antitrust law enforcement, as follows:

First, the stipulation of positive comity. Second, the mutual antitrust law enforcement assistance, whereby Article III prescribes the following:

“*The competition authorities of a Requesting Party may request the competition authorities of a Requested Party to investigate and, if warranted, to remedy anticompetitive activities in accordance with the Requested Party’s competition laws.*” (Yue, 2017, p. 50).

This analysis regarding the feasibility of extraterritoriality principle in the ASEAN encompasses the material (substantive) and formal (procedural) aspects. Whereas at present, there have been divergent competition provisions related to the extraterritoriality principle, the ASEAN member states (AMSs) shall, without delay, harmonize their respective provision on extraterritoriality. The implementation of the extraterritoriality principle in the ASEAN region is inevitable. Every national competition law of AMSs shall regulate the provision of extraterritoriality so that they may ease one another to make a cooperation, especially among competition authorities.

To follow up on this cooperation, the ASEAN Experts Group on Competition (“AEGC”) has established the ASEAN Competition Enforcers’ Network (“ACEN”) to facilitate cooperation on competition cases in the region and to serve as a platform to handle cross-border cases. The aims of the ACEN are to enable a mutual understanding of each other’s enforcement goals and objectives and to encourage information sharing between ASEAN competition authorities. The ACEN will also look into facilitating cooperation on mergers and acquisitions with a cross-border dimension. The establishment of ACEN shows that cooperation between competition authorities is a necessity. Without such cooperation, competition enforcement in the ASEAN region will not be effective. As the KPPU attempt to enforce the ICL on the Temasek Holding Company Ltd. and its subsidiaries abroad, the KPPU has not cooperated with the Competition and Consumer Commission of Singapore (CCCS) to invite the reported undertakings and to obtain evidence from them. In addition to the ACEN, cooperation has been launched into the ASEAN Regional Cooperation Framework (“RCF”). This RCF serves as a set of guidelines for ASEAN member states (“AMS”) seeking to cooperate on competition cases.

The RCF set out the general objectives, principles, and possible areas of cooperation among ASEAN member states that may be undertaken on a bilateral, multilateral, sub regional or regional approach and on a voluntary basis in relation to the development, application and enforcement of competition laws. Cooperation under the RCF will be founded on mutual respect, transparency, goodwill, flexibility, and the availability of resources. Due to agreements on international cooperation in terms of competition enforcement, competition authorities can work with each other to enforce the law effectively and efficiently. The possibility of the application of extraterritoriality in the ASEAN Economic Community is just if there is a proper justification among the ASEAN member states because a state cannot take measures to enforce its own national laws in the territories of states without their consent. Currently, the application of extraterritorial AEC among AMSs is possible only through comity, cooperation and bilateral agreements among AMSs.

6. Conclusion

Extraterritoriality was first introduced in the international law praxis. Under this principle, a country could exercise its jurisdiction over an offense or violation committed abroad. These jurisdictions comprise prescriptive jurisdictions, curial jurisdictions and enforcement jurisdictions. In the field of competition law (antitrust law), objective territoriality jurisdiction is primarily important to sanction competition law violations that occur in foreign countries. Although the increasing importance of extraterritorial jurisdiction is undenied, the implementation of it in the AEC is still impossible because there is no legal instrument to enforce it in the AEC that must be followed by every AMS. The possibility of the application of extraterritoriality in the ASEAN Economic Community is just if there is a proper justification among the ASEAN member states because a state cannot take measures to enforce its own national laws in the territories of other states without their consent.

The Singapore Competition Act explicitly regulates the extraterritoriality principle in Article 33 (1), while Indonesian Competition Law No. 5 of 1999 implicitly regulates the extraterritoriality principle in Article 16. However, the KPPU applied this principle in the Temasek Telecom and Astro Television cases, first based on the “SEE Doctrine” and second, based on Article 16 ICL Number 5/1999. In judicial practice, the Indonesian Supreme Court (MARI) has affirmed the KPPU decision concerning the application of extraterritoriality in Indonesian competition law as well. Currently, the application of extraterritorial AEC among AMSs is possible only through comity, cooperation and bilateral agreements among AMSs. This explains why it is wise for every single AMS to have a prescriptive provision regarding extraterritorial jurisdiction in every competition law of the AMSs. By doing so, a state can take measures to enforce its own national laws on a territory in another state with the consent of every single AMS. Indonesia inserted the extraterritorial principle in the draft of amendment of Indonesian Competition Law No. 5 of 1999.

References

- Andenas M. and Andersen, C.B. (2011). *Theories and Practice of Harmonisation*, London: Edward Elgards Publisher.
- Behrens, P. (2016). *The Extraterritorial Reach of EU Competition Law Revisited: The effects doctrine before ECJ*. Discussion Paper No. 3/16, Europa-Kolleg, Hamburg, Intitute for European Integration, Hamburg
- Commission for the Supervision of Business Competition of the Republic of Indonesia (KPPU), Law Number 5 Year of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition, 2010.
- Court of Justice of the EU, Case T 102/96, Gencor Ltd v Commission.
<http://curia.europa.eu/juris/liste.jsf?language=en&num=T-102/96>, accessed on 23.02.2018

- Court of Justice of the EU, Case 48-69, *Imperial Chemical Industries Ltd. v Commission*, 14.07.1972
- Dewan Perwakilan Rakyat (DPR-RI), *Prohibition of Monopolistic Practices and Unfair Business Competition* (in Indonesian), <http://www.dpr.go.id/doksileg/proses2/RJ2-20161111-041211-1939.pdf>, accessed 23 February, 2018
- Ezrachi, A. (2016). *EU Competition Law: An Analytical Guide to the Leading Cases*. Oxford: Bloomsbury Publishing.
- Jones, A. and Sufrin, B. (2016). *EU Competition Law: Cases and Materials, 7th Edition*. Oxford: OUP.
- Gozali, C. (2019). "Perjanjian Pelaku Usaha dengan Pihak Luar Negeri yang Bertentangan dengan Undang Undang Nomor 5 Tahun 1999 tentang Larangan Praktik Monopolidan Persaingan Usaha Tidak Sehat. Skripsi Fakultas Hukum Universitas Indonesia.
- Joyner, C.C. (2005). *International Law in the 21st Century: Rules for Global Governance*. Maryland: Rowman & Littlefield.
- Kamminga, M.T. (2012). "Extraterritoriality" in R. Wolfrum (Ed.) *Max Planck Encyclopedia of Public International Law*. Oxford: OUP.
- KPPU Decision Number 07/KPPU-L/2007.
- KPPU Decision Number 03/KPPU-L/2008.
- Lianos, I and Geradin, D. (2013). *Handbook on European Competition Law: Enforcement and Procedure*. London: Edward Elgar Publishing.
- Meessen, K.M. (1996). *Extraterritorial Jurisdiction in Theory and Practice* [contains Edited of a Symposium in Dresden, 8-10. Oktober 1993] Hague: Martinus Nijhoff Publishers.
- Martyniszyn, Marek. (2017). "Japanese Approaches to Extraterritoriality in Competition Law" *International and Comparative Law Quarterly* Vol.66, July 2017.
- Nguan, L.J. "Competition Law in Singapore Points of Interest", The Singapore Competition Commission, 2018. Annual CPD Day 2015. <https://www.ccs.gov.sg/>, accessed 22 February, 2018.
- Purnomo, R. (2010). "Persaingan di Pasar Telekomunikasi Selular: Analisa Alternatif Kasus Temasek" Canberra. Report of the Task Force on Extraterritorial Jurisdiction, p. 45 at <https://documents.law.yale.edu/sites/default/files/Task%20Force%20on%20Extraterritorial%20Jurisdiction%20-%20Report%20.pdf> accessed on 15 February 2018
- Ryngaert, C. *Jurisdiction in International Law*. Oxford: OUP, 2015.
- Shiau, D and Chen, E "ASEAN Developments in Merger Control" *Journal of European Competition Law and Practice*, Oxford, 2014.
- Silalahi, M.U. (2014). "Accelerating the Development of ASEAN Competition Culture" *UPH Law Review* Vol. XII (2).
- Silalahi, Udin. (2017). The Harmonization of ASEAN Competition Laws towards ASEAN Economic Integration, *Journal of East Asia and International Law*, Vol. 10 Number 1
- Silalahi, Udin & Parluhutan, Dian. (2017). The Necessity of ASEAN Competition Law: Rethinking. *Hasanuddin Law Review*, 3 (3)
- Supreme Court Decision Number 496/K/2008, <http://putusan.mahkamahagung.go.id/putusan/0d6d4b593e419fe86e93b86e2770caaf>, accessed 25 February, 2018.
- Wallace, C.D. (2002). *The Multinational Enterprise and Legal Control: Host State Sovereignty in an Era of Economic Globalization*. Hague, Martinus Nijhoff Publisher.
- Whish, R. and Bailey, D. (2015). *Competition Law 8th Edition*. Oxford: OUP.
- Yue, Xia. (2017). "Assessing Extraterritorial Application of EU Competition Law" LLM Thesis, Ghent University, Belgium. Zanettin, B. (2002). *Cooperation Between Antitrust Agencies at the International Level*. Oxford: Hart Publishing.

Footnotes:

ASEAN Establishes Competition Enforcers' Network, Regional Cooperation Framework, and Virtual Research Centre, <https://www.asean-competition.org/read-news-asean-establishes-competition-enforcers-network-regional-cooperation-framework-and-virtual-research-centre> accessed 3 May, 2019.