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Empirical study: the urgency of extraterritorial principles in business competition law in Indonesia

Chandra Setiawan*), Fennieka Kristianto, Perina Amelia, Dania Sabrina, Andryan Maju Kevin Martin Purba, Kezia Sharon Christabella, Nadya Nadya, Reygita Yusiani
President University, Bekasi, Indonesia

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ABSTRACT

Today's fast-paced economy makes business transactions seamless and seamless. Transactions are no longer only local, but also spread across countries. The economic system in this modern era 'obliges' a country to be able to properly apply business competition law. One of the functions of business competition law is as a means of controlling the abuse of economic power by business actors by preventing monopolistic practices and unfair business competition. Meanwhile, in Law no. 5/1999, the ICC has no extraterritorial powers. The research method used in this research is normative juridical by making Law No. 5 Year 1999 as the object of study.

Corresponding Author:

Chandra Setiawan,
President University
Email: chandra@president.ac.id

Introduction

In the last few decades, globalization has become a familiar and inevitable phenomenon. Various new discoveries have also contributed to the acceleration of world globalization, not only in the cultural aspect but also in the economic aspect. Economic globalization occurs due to increased activity and integration of cross-border trade (Zaroni, 2015). This has brought Indonesia to an integrated, dynamic, and complex international economy.

In the economic field, business competition has become commonplace, even if it is not always considered a bad thing as long as it has a positive impact. Healthy business competition is expected to provide a stimulus for productivity and innovation which will ultimately have an impact on people's welfare and national economic growth (Usman, 2013). However, in the midst of rapidly growing international business activities, the boundaries between countries have faded. So that it brings its own consequences for each country in maintaining the domestic business competition ecosystem and consumer protection within its territory.

In addition, relations between foreign business actors are only limited by regulations that have been ratified in international agreements, such as the General Agreement on Tariffs and Trade (GATT) or the World Trade Organization (WTO) (Amalya, 2020). This means that in the midst of the opening of the free market, there is an expansion of the subject of business competition law which is complex and interdisciplinary and the absence of an international regulation that underlies and binds the policy on the application of business competition law.

In addition, according to Sitompul as quoted from Sabrina (2020), the merger, consolidation, and share acquisition activities that occur do not always only involve domestic business actors, but may also involve foreign business actors and can result in monopolistic practices and unfair business competition.

Responding to these implications, countries in the world apply the laws of their respective countries regarding foreign business actors. In Indonesia, the Indonesia Competition Commission (ICC) as law enforcer in implementing business competition law itself has set limits for business actors who are the object of Law No. 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition. This is regulated in Article 1 number 5, namely "A business actor is any individual or business entity, whether in the form of a legal entity or not a legal entity that is established and domiciled or carries out activities within the jurisdiction of the Republic of Indonesia, either alone or jointly. through agreements, carry out various business activities in the economic field."

According to Huzaini (2017), the interpretation of the business actor has a limited scope, especially for business actors domiciled outside the territory of Indonesia, where anti-competitive practices will have an impact on the Indonesian market and economy. This is different from the Business Competition Laws of other countries, such as America, Europe, Australia, and other Asian countries, such as Singapore, Japan, and South Korea whose legal subjects are not limited to business actors who are domiciled in their territorial areas, but also apply for business actors abroad that have an impact on the country's economy (Toha, 2019).

For example, United States antitrust laws can examine business actors regardless of jurisdiction. This will certainly harm Indonesia because it can be tried by other countries but not vice versa, Indonesia cannot prosecute foreign business actors if they violate business competition regulations in Indonesia. Furthermore, cases related to this have occurred in Indonesia when referring to several existing cases (Amalya, 2020), and from those cases, the author stated that the ICC is not authorized to carry out investigations because the companies that conspired were not established under Indonesian law and did not operate directly in Indonesia. In addition, the authors explain that Law Number 5 of 1999 does not specifically regulate the relationship between parent companies or dominant shareholders in the form of foreign business entities and companies operating directly in Indonesia.

From this, it can be seen that Law No. 5 of 1999 has limited interpretation regarding 'business actors'. The author's team sees that making previous case law decisions is not a solution in resolving extraterritorial principles problem that may occur again in the future given the increasingly rapid development of economic globalization. Thus, through a scientific review entitled "Empirical Study: The Urgency of Extraterritorial Principles in Business Competition Law in Indonesia", the writing team tries to discuss the urgency of enforcing extraterritorial principles in business competition law by looking at the laws and cases of other countries as a reference. Further explanation related to this research will be answered through the following problem formulation: (1) What is the urgency of enforcing the extraterritorial principle as an extension of the ICC's authority in Indonesian business competition law? (2) What is the role of ICC in relation to the enforcement of extraterritorial principles in cases of violations that occur? (3) How do other countries implement the extraterritorial principle?

The purpose of this research is expected to: 1) Answering the urgency of enforcing the extraterritorial principle as the expansion of the ICC's authority in the Indonesian business competition law; 2) Reviewing the role of ICC in relation to the enforcement of extraterritorial principles in cases of violations that occur; 3) Reviewing the legal provisions of other countries in implementing the extraterritorial principle.

Method

The research method is the one that is employed and the one that is most scientifically justifiable. It is meticulous, systematic, organized, valid, and verified in order to discover the truth of a problem by employing specific techniques that have been proven to be valid so that answers and explanations can be found. facts and specific phenomena seen in particular fields of knowledge. (Munir Fuady: 2018).

Type of Research

The type of research used in this paper is normative juridical. Juridical normative research is research conducted by examining library materials or secondary data.

Source of Data

The data used in this research is secondary data. The secondary data used are: a) Primary legal materials, i.e. laws and regulations related to the problems discussed in this thesis, are: 1) Law No. 5 Year 1999 concerning on Prohibition of Monopolistic Practices and Fraudulent Business Competition; 2) Law No. 11 Year 2020 concerning on Job Creation; 3) Law No. 19 Year 2016 concerning the Revise on Law No. 11 Year 2008 concerning Information and Electronic Transactions.

Results and Discussions

Competition Law Enforcement in Indonesia

In Indonesia, the necessity for a national competition law was addressed in the 1980s in response to significant economic reforms. At that time, Indonesia began to welcome foreign investment and opened its doors to globalization. The notion of a thorough competition policy was then advanced. Furthermore, in 1997–1998 the global crisis also presented challenges for Indonesia. Concentrated industries' vulnerable economic structures have weakened the foundation of our protracted and orderly growth. The failure of "the big" was due to a lack of a competitive atmosphere. Before 1999, the competition rules were in place for a long time. For instance, Article 382 of the Civil Law states that anyone who engages in unfair conduct expands their business, company, or other endeavors with the intent to harm the public, or with the intent to harm their competitors or the competitors of another party due to unfair competition, is subject to a maximum sentence of one year and four months in prison or a fine of nine hundred rupiah. However, this law doesn't come with comprehensive regulations on business competition, as it's only "criminal". Thus, Law No. 5 Year 1999 Concerning the Prohibition of Monopolistic Practices and Unfair Business Competition introduces a comprehensive business competition law.

Like all other laws, competition law was developed to protect specific ideals (Zimmer, 2012). Although competition law has never had a single unified policy goal, competition authorities now generally agree that upholding consumer welfare as the criterion for antitrust enforcement is crucial (Bailey et al., 2015; Pittman, 2007). Moreover, in the modern economic system, as it is today, the application of competition law business is a must for every state (Abdul, 2010). Thus, in Indonesia, the institution that is primarily in charge of supervising the implementation of Law No. 5 Year 1999 is the Indonesian Competition Commission (ICC).

According to Articles 35, 36, and 47, Law No. 5 Year 1999, The ICC is an independent institution that also has legal authority to carry out examinations or investigations, assess alleged violations, decide on cases, impose administrative sanctions according to law, and provide recommendations or suggestions and views on government practices. ICC, a quasi-judicial authority tasked with regulating competition legislation, is an auxiliary organ within the Indonesian state's structure (Jentera Law Journal, 2006). The Commission for the Supervision of Business Competition (the ICC), which is in charge of enforcing Law No. 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition (Law No. 5/1999), has the authority to develop implementing regulations and guidelines, as well as a wide range of restrictive contracts or inappropriate behavior, such as mergers and acquisitions, which can sometimes result in monopolistic practices or unfair business competition.

Extraterritorial Principles

Extraterritorial is the circumstance in which a state has the power to exercise its domestic legal system and jurisdiction over a person or legal entity residing outside of its borders through a variety of law enforcement organizations and judicial institutions (Mitchell, 2001; Zerk, 2010). Extraterritorial jurisdiction is essentially a situation in which the state has control over its territory through its authority. However, there are a few exceptions where a country can apply its jurisdiction in another country, with some limitations. Extraterritoriality was first introduced in the world of business competition law in the United States, where it took the form of an "effects doctrine" in antitrust law at the time. According to this doctrine, all anti-competition actors in the United States of America aren't exempt from the provisions of business competition law that apply in the United States or to persons residing in the United States of America if it can be demonstrated that they have an impact, such as monopolistic practices in their jurisdictions, whether by accidental or intentional.

The legal system that opposes this one is based on the territoriality principle, which states that a nation has the authority to enact and enforce laws only concerning legal entities within its territorial jurisdiction. Thus, the territoriality principle was adopted by the ICC in enforcing Law No. 5 of 1999 in Indonesia. This creates a problem in that the ICC is not permitted to investigate, confront, and punish a foreign business actor who violates Indonesian competition law unless the foreign business actor has a subsidiary governed by Indonesian law, and the jurisdiction can only be exercised towards the subsidiary. The Very Large Crude Carrier (VLCC) case, the Temasek case, and the Astro case are three instances where the ICC has been asked to determine whether Law No. 5/1999 applies to legal entities governed by foreign laws. Thus, the emergence of a series of cases decided by the ICC using the extraterritorial principle is an indication of the urgency to implement the extraterritorial principle into the expansion of the jurisdiction of the business competition law.

The VLCC lawsuit was when the issue about the extraterritorial implementation of law no. 5 of 1999 first surfaced. In that case, the ICC found that Frontline Ltd., Goldman Sachs Pte, PT Equinox, and PT Pertamina (Persero) had conspired with the latter in order to sell a VLCC's tanker ship to Frontline Ltd. Even though both businesses were foreign corporations, the ICC still penalized Frontline and Goldman Sachs for their

participation in a Pertamina tender in Indonesia and that their participation in a tender collusion cost the state finance up to USD 54 million.

Moreover, If the foreign business actors are not on Indonesian soil when the anti-competitive agreement or action happens, the matter becomes more challenging. In the Temasek case, the ICC was required to respond to this query. In that case, it was claimed that the Singapore-based Temasek Group broke Article 27 alphabet a of Law No. 5 Year 1999 by holding cross-shareholding interests in both PT Telkomsel and PT Indosat, which had an anti-competitive impact on Indonesia's telecommunications sector. Arguing ICC's statement, Temasek mentioned that ICC doesn't have any right and jurisdiction to punish them, as they are not enforced under Indonesian law, and didn't conduct any business activities in Indonesia. However, just like how ICC solved the Astro case, ICC "borrowed" the theory of the "Single Economic Entity" from EU competition law to refute such claims. According to this philosophy, parent and subsidiary companies might be regarded as a single economic unit if the parent has "decisive influence" over the subsidiary's decisions. The ICC declared that Temasek was guilty based on that justification.

The Urgency of Enforcing The Extraterritorial Principle as An Extension of The ICC's Authority in Indonesia Business Competition Law

The fast-paced economy at this time makes business transactions seamless and borderless. Transactions are no longer only local, but have also spread across countries. These cross-border transactions have a significant impact on people's lives. People are free to make their choices according to the variety available in the market.

The economic system in this modern era 'obliges' a country to be able to apply business competition law properly. One of the functions of business competition law is as a means of control against the abuse of economic power by business actors by preventing monopolistic practices and unfair business competition.

ICC's jurisdiction in implementing and enforcing business competition law in the Anti-Monopoly Law is within the territory of the Republic of Indonesia, which is described in Article 1 point 5 of the Anti-Monopoly Law stating that the object of ICC's supervision and enforcement includes: "Every individual or company, whether in the form of a legal entity or not or carrying out its action within the jurisdiction of the Republic of Indonesia either alone or jointly through agreements, conducting various business action in the economic field."

Basically, a sovereign state has full authority in its respective territory to exercise its jurisdiction over all persons, objects, and legal events. (Sefriani, 2018). In addition, the meaning of jurisdiction can also be understood as an authority to make a law, force the law to apply in a country, and enforce the law through state courts.

The provisions regarding extraterritorial business competition have not been regulated in the Anti-Monopoly Law. In fact, with the current economic progress, there is a huge potential for business actors from other countries to commit business competition violations. In the event of such a violation, ICC does not have the authority to conduct an investigation into foreign business actors. If this continues to happen without any changes to the Anti-Monopoly Law, then this will harm business actors and also the Indonesian citizens.

In fact, Indonesia has also implemented extraterritorial principles, through Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Information and Electronic Transactions (hereinafter referred to as Law No. 19 of 2016). Article 2 of Law no. 19 of 2016 states: "This Law applies to every person who commits a legal act as regulated in this Law, both within the jurisdiction of Indonesia and outside the jurisdiction of Indonesia, which has legal consequences in the jurisdiction of Indonesia and/or outside the jurisdiction of Indonesia and is detrimental to the interests of Indonesia." With this, it can be interpreted that the Indonesian government is able to provide regulations with extraterritorial principles in terms of business competition and of course, this means that the extraterritorial principle is not something new in Indonesia.

In short, Article 2 of Law No. 19 Year 2016 also applies to legal actions that are carried out outside Indonesia's territorial jurisdiction by both Indonesian and foreign citizens, including by Indonesian legal entities and foreign legal entities, which subsequently has legal consequences in Indonesia.

Regarding regulations on extraterritorial principles for business competition, it has begun to be applied in other countries, such as in the United States, which is the Sherman Antitrust Act Year 1890. The Sherman Antitrust Act Year 1890 is a federal regulation that forbids activities that restrict trade and interstate competition in the marketplace. The Sherman Antitrust Act of 1890 prohibits any contract, corruption, or collusion of business interests that restricts foreign or interstate commerce. The punishment for violating the Sherman Act can be severe. While most enforcement actions are civil in nature, individuals and businesses that violate them can be seen by the Department of Justice. Criminal prosecutions are usually limited to the offense committed and clear (such as when competitors set prices or bids).

Therefore, it is necessary to make changes to the Anti-Monopoly Law, namely to provide an extension to the interpretation of business actors, so that foreign business actors can also be processed in accordance with Indonesian law if they are proven to have violated business competition. This certainly shows that there are arrangements in accordance with the rapidly changing economy. Thus, national laws and regulations are able to become a legal umbrella for the welfare of the community, especially in terms of business competition. Apart from that, it is also important for the KPPU to pay attention to the stages of execution of court decisions that are inkracht (permanent legal force). This is to provide certainty to business actors who win cases so that they not only win cases but also carry out the execution process. Without the regulations governing this matter, KPPU cannot carry out the execution process in accordance with the decision of the Court.

The Role of ICC in Relation to The Enforcement of Extraterritorial Principles In Cases of Violations that Occur

Indonesian Antitrust Law No. 5 of 1999, particularly in Article 1 number 18 has stated that ICC is an institution established to supervise business actors in carrying out their business activities so as not to engage in monopolistic practices and/or unfair business competition. ICC was formed based on the mandate of Article 30 paragraph (1) Law no. 5 of 1999 which states "to supervise the implementation of this law a Business Competition Supervisory Commission is formed, hereinafter referred to as the Commission". Then in Article 34 paragraph (1) of Law No. 5 Year 1999 stated that "the formation of the Commission and its organizational structure, duties and functions shall be determined by a Presidential Decree". The Government established the ICC through Presidential Decree Number 75 Year 1999 concerning the Business Competition Supervisory Commission with the objective to supervise and enforce the implementation of Law no. 5 of 1999. Furthermore, Article 30 paragraph (2) of Law no. 5 of 1999 states that ICC is an independent institution without any intervention from the Government and other parties. This independence is very necessary considering that ICC is also tasked with deciding cases of violations of Law no. 5 of 1999. However, this does not mean that ICC can carry out its duties according to its own will because ICC has the obligation to provide its accountability to the President.

ICC acts as an alternative for dispute resolution outside the court so it is called quasi-judicial. Judging from the number of cases and decisions made by the ICC since the promulgation of Law No. 5/1999, it can be seen that the ICC has obtained recognition regarding its role in enforcing antitrust laws and unfair business competition. In the settlement of business competition cases, especially those involving foreign business actors, ICC bases its decisions on the objective of improving the non-competitive business competition climate in Indonesia. Regarding the ICC's decision, there are 3 possibilities, namely: 1) Business actors accept the ICC's decision and voluntarily implement the sanctions imposed by the ICC. If they file a lawsuit within the legal deadline for filing an objection, offenders are presumed to have accepted the ICC's ruling. By not submitting an objection, the ICC's decision will have permanent legal force and for that decision, a fiat for execution is requested to the District Court; 2) Business actors reject the ICC's decision and then file an objection to the PN. In this case, business actors who do not agree with the decision handed down by ICC, business actors have the option of legal effort to file an objection to the District Court; 3) Business actors did not file an objection, but refused to implement the ICC's decision. In that case, the ICC will submit the decision to the investigator to conduct an investigation in accordance with the applicable provisions.

The ICC's decisions can also include orders for business actors to stop any actions or operation or plan that are proven to violate Law No. 5 Year 1999, while also imposing sanctions on the business actors involved, so that the existence and decisions of the ICC can direct every business actor to always comply with the rules of the game in carrying out their business activities. Of course, this demonstrates that the decisions made reflect the norms contained in the process of enforcing business competition law. However, because of the ambiguity of the rules governing the application of extraterritoriality, there will always be counterarguments claiming that the ICC is not authorized to investigate groups of foreign business actors because they were not established under Indonesian law and do not conduct their operations in Indonesia.

According to Article 36 paragraph (6), ICC has the authority to decide and determine whether or not there is a loss on the part of other business actors or the community; additionally, according to Article 36 paragraph (7), ICC has the authority to issue decisions to business actors suspected of engaging in monopolistic practices and unfair business competition. The existence of this provision claims that the ICC has the power to apply business competition law, but it is not stated clearly whether the law can be enforced in an extraterritorial framework or not.

Similarly, there is no clear and specific clause on extraterritoriality in business competition law enforcement in the Regulation of the Supreme Court of the Republic of Indonesia No. 03 Year 2005 concerning Procedures for Filing Objections to ICC's Decisions and the ICC's Regulation Number 1 Year 2010 concerning Procedures

for Handling Cases. As a result, the jurisdiction of the ICC's duties and authorities is limited to the Republic of Indonesia's territory.

The shareholders of Indonesian firms cannot be associated with the conduct of conducting business activities in Indonesia, according to the ICC as a competent authority in overseeing business players in carrying out their business activities. Additionally, according to ICC, the debate between single economic entity and separate legal entity is a different matter, where single economic entity is an economic doctrine while separate legal entity is a doctrine in corporate law. The company is stated to be an independent entity in business competition law, but this does not mean that it is free to move on its own, but rather that it is controlled. As a result, a single economic entity has a broader meaning than a distinct legal entity. The ICC's point of view is reflected in several cases involving business competition that have been decided by the ICC. Since its inception in 2000, the ICC has issued seven decisions against foreign business entities that are not established, are not domiciled in Indonesia, and do not have a branch or representative office in Indonesia. In the 1973 case of Europemballage and Continental Can v. Commission, the European Commission applied this doctrine, which was eventually strengthened by the European Court of Justice and then became jurisprudence for business competition cases. The ICC applies this doctrine by drawing on lessons learned from the European Union. It should also be noted that, unlike a common law country, Indonesia is bound by written laws and regulations (positive law) made by the legislative body rather than precedent or previous court decisions. As a result, the declaration that Indonesia upholds extraterritoriality in business competition law is not always based on this decision.

With a weak legal basis regarding the scope of legal subjects in Law No. 5 Year 1999 will certainly have an effect on the execution of its decision, even though there has been a decision that has permanent legal force declaring foreign business actors as parties proven to have violated the rules related to business competition. It must be realized that court decisions in Indonesia are only valid and have the power of execution in Indonesian jurisdictions. So that without a firm legal basis, execution may encounter obstacles. Of course, in the enforcement of business competition law, this is something that needs to be improved because the purpose of the proceedings in court for the plaintiff is not only to win the plaintiff but also to hope that the court's decision will be implemented. The ICC in the Temasek case took a long time to execute the decision. The execution process is highly dependent on Temasek's good faith in this regard to fulfill its obligations. ICC only relies on persuasive means to urge Temasek to implement the Supreme Court's decision, for instance through reporting in the mass media, not through a legal mechanism.

In relation to the process of handling cases and executions, assistance in the form of bilateral or multilateral agreements with other countries related to the enforcement of business competition law is also required. It is hoped that the agreement with other countries will make the confiscation of reported assets easier to implement. Currently, ICC must compile its own list of reported assets domiciled abroad. Because the examination process has a time limit, this international agreement allows the confiscation of reported assets to be carried out efficiently. Furthermore, it is possible to collaborate with the execution process of decisions that can be enforced more actively and easily.

Implementation of Extraterritorial Principles in Several Countries

Several nations, including the United States, have utilized the extraterritorial principle in the context of business interests. The United States antitrust law, the Sherman Act 1890, is a vivid example of the application of extraterritorial jurisdiction. In that provision, it stipulates that all conspiracy, agreement, and conspiracy in limiting business in the field of trade, both domestically and abroad, which tries to carry out a monopoly is a violation and is contrary to the Sherman Act. In addition, the United States has also implemented effect doctrine through US antitrust legislation. Even the effect doctrine has been applied in several cases in the United States involving business actors in other countries. In 1945, US courts ruled that Canadian companies had harmed competition and that the US had the right to exercise extraterritorial jurisdiction because it was governed by the effect doctrine in that country. Under US antitrust law, these Canadian companies were held liable for the policy of selecting the goods they marketed in the US.

Another example of a claim for the application of extraterritorial jurisdiction is in the case of the Industrial Development Corporation as the plaintiff who filed a lawsuit against Mitsui & Co in the Texas District Court in 1979. The defendant has been suspected of conspiring with other companies to remove the plaintiff from the logging business in Kalimantan. In addition, the plaintiff also stated that the defendant had exercised price control, monopolized and harmed US domestic and foreign trade. In the lawsuit, the Texas District Court later won Mitsui & Co on the basis that the actions of the Indonesian Government through the Directorate General & Forestry which had refused to grant Concession Rights were actions recognized by the United States.

In addition to the United States, in Indian law, through The Competition Act 2002, the extraterritorial principle has been imposed, after the case of foreign cartels and the fixing of export prices to India and cannot

limit it. According to Article 32 of The Competition Act, the Commission may look into transactions, abuses of dominant position, or a combination of actions that take place outside of India or a party or company outside of India if they have a sufficiently significant negative impact on competition inside of India.

According to the argumentation process in making decisions on cases involving foreign business actors related to business competition law enforcement, what is most needed is the expansion of jurisdiction so that the laws and regulations of business competition law can also apply to business actors residing in other countries. In addition, it is necessary to accommodate agreements with the doctrine of securities in order for them to be able to ensnare actions that are taken outside of Indonesian territory but have an adverse effect on the Indonesian market and the nation's ability to achieve its economic development goals. In order to clearly define the range of business players who function as holding corporations for Indonesian companies, Law No. 5 of 1999 must be completed. It can be noted that the interpretation of a business actor has been enlarged to include the following in the draft Law No. 5 of 1999: "Business actor is any individual or business entity, whether in the form of a legal entity or not a legal entity established and domiciled or conducting activities either in within and outside the jurisdiction of the Republic of Indonesia that has an impact on the Indonesian economy, either individually or jointly through agreements, conducting various business activities in the economic field." The draft law improvement that has been prepared since 2014 has been included in the 2020-2024 National Legislation Program. With the implementation of transactions and trade that continues and cannot be stopped, the potential for violations of business competition law continues to haunt so that the completion of the ratification of the said draft law should be a priority.

Conclusions

In the economic field, business competition has become commonplace, although it is not always considered bad as long as it has a positive impact. Healthy business competition is expected to provide a stimulus for productivity and innovation which will ultimately have an impact on people's welfare and national economic growth. However, based on the above explanation, it is necessary to revise Law no. 5 Year 1999 specifically to expand business actors so that they can reach business actors who carry out anti-competitive activities that have an impact in Indonesia. In addition, the extraterritorial principle will be more effectively applied if there is cooperation between countries both bilaterally and multilaterally to support and enforce anti-competitive behavior, at least at the ASEAN level. Therefore, developments in the business world indicate the need for adjustments to legal arrangements in order to accommodate needs and safeguard national interests.

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