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# The Human Right to a Fair Trial in Competition Law Enforcement Procedures: A Rising Issue in Indonesian Experiences

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**Abstract:** The Indonesian Competition Supervisory Commission (ICSC) has the authority to investigate, prosecute, adjudicate, decide, and impose sanctions on business actors for violating Indonesian competition law. It also has the authority to establish procedural laws for the competition law enforcement procedures within its institution. This single role raises various issues in the current context, including the right to a fair trial and checks and balances. This article seeks to define the position of human rights, particularly the right to a fair trial, in competition law enforcement procedures. The result is that competition law enforcement procedures are subordinate to human rights, so they must be exercised in compliance with human rights standards, particularly the right to a fair trial. Based on the experience in Indonesia, this study finds that the ICSC's single role is incompatible with human rights commitments in fair competition law enforcement procedures. As an alternative solution, this article encourages a modification and adjustment based on human rights commitments and checks and balances mechanism by limiting one of the ICSC's authorities and broadening the interference of the Supreme Court in enforcing Indonesian competition law at the ICSC level.

**Keywords:** competition law; competition law enforcement procedures; human rights; the right to a fair trial; the Indonesian Competition Supervisory Commission



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## 1. Introduction

The interaction of human rights and competition is starting to be developed in law discussions, although it is still rare to find (Weber 2013, pp. 1–2). One of those interactions is in the context of the procedure of competition law enforcement (De Schutter 2010, pp. 1, 6; Lianos and Darr 2019, p. 4; Weber 2013, pp. 1–2). Joshua and Alex have identified that competition law enforcement using the standard of proof in civil cases tends to be conducted without considering human rights (Yeung and Yeung 2021, p. 336). Stephen Crosswell also showed that since 2008, the practice of the Court of Final Appeal in Hong Kong had required the procedure of competition law enforcement to consider thoroughly the respect for human rights (Crosswell 2021, p. 1). This indicates that, as Vincent Smith emphasized in his study in Europe, there is an issue of state compliance in respecting human rights and due process of law in competition law enforcement procedures (Smith 2017, p. 345).

These studies, among other things, inspired this study. In addition, although competition law generally covers administrative sanctions, if the imposition is not carried out properly and in compliance with legal provisions, there is a potential for human rights violations. For instance, the imposition of a fantastic amount of fines without a proper assessment of losses is likely to interfere with the enjoyment of the right to property (Gabriel and Silviu 2019, pp. 17–25). In another example, the Indonesian Competition Supervisory Commission (ICSC) once applied a sanction that banned business actors who were proven to have committed a tender conspiracy from participating in tenders for a certain period of time (ICSC 2019b). This potentially interferes with the enjoyment of the right to work. With such potential, competition law sanctions are generally enforceable and deterrent.

Therefore, competition law enforcement procedures should be subject to strict standards (Wils 2003, p. 201).

Critical questions have been raised in this regard. For instance, to what extent can the need for effective and efficient law enforcement be balanced with enforcement procedures that are compatible with respect for human rights? To what extent can the competition authority investigating and imposing sanctions in competition law enforcement achieve a “fair equilibrium” between the exercise of public power and respect for human rights that the investigated parties should enjoy? If the law and the competition authorities do not respect human rights, particularly the right to a fair trial in the enforcement procedures, then the issue of justice is challenged. Additionally, under Indonesian competition law (*Law No.5/1999 1999*), the ICSC is the competition authority mandated not only as an investigator but also as a prosecutor and adjudicator in competition law cases, including the imposition of administrative sanctions.

Such procedural regulations have the potential to threaten respect for human rights in the context of due process. Therefore, such procedural regulation requires the adoption of the independence and impartiality doctrine. The remaining question is how, for instance, such impartiality is manifested by a competition authority that exercises a single role, from conducting investigations to deciding on the unlawful act and imposing sanctions on business actors found to have committed violations of the competition law, as practiced in Indonesia. In the European Union, the European Convention on Human Rights (ECHR) plays an important role in inspiring the interpretation of these principles.

This study, interestingly, identifies the use of human-rights-based claims in the context of competition law enforcement procedures in the ICSC. In the case of the anti-competitive agreement between PT Pelabuhan Indonesia II and PT Multi Terima, for instance, both parties argued that the investigation process conducted by ICSC investigators was contrary to “respect for the principles of due process of law, the presumption of innocence, and *audi alteram partem*,” which resulted in “human rights violations” (ICSC 2015, p. 13). In another case, the investigated business actor also argued that the ICSC investigator report was “formally flawed and void because, besides violating the law, it also has the potential to violate the human rights of the reported party” (ICSC 2020, p. 226).

The use of human-rights-based claims by business actors to challenge competition law enforcement in the ICSC also strengthens the relevance of this research. In addition, in Indonesia, no previous research has examined human rights aspects in competition law enforcement procedures. Therefore, this article focuses on analyzing human rights aspects, particularly the right to a fair trial, in competition law enforcement procedures in the ICSC based on Indonesian experiences. Specifically, the discussion section encompasses the illustration of competition cases. The reported business actor in these cases used human-rights-based claim to escape from Indonesian competition law enforcement. Over these cases, the ICSC had established its decision.

The discussion in this article is structured in three sections. A normative review of the right to a fair trial in competition law enforcement procedures begins the section, followed by an elaboration on the issue of the right to a fair trial in the practice of competition law enforcement procedures in Indonesia. The final section of this article contains an abstraction on the human rights aspect of competition law enforcement procedures, which analyzes the position of human rights in competition law enforcement procedures and the modalities needed for Indonesia to ensure maximum respect for the right to a fair trial in the future.

## **2. The Right to a Fair Trial in the Competition Law Enforcement Procedure: A Normative Aspect**

The crucial question that needs to be answered beforehand is whether human rights, particularly the right to a fair trial, are relevant to be discussed in the context of competition law enforcement or not, given that the subject of competition law includes not only individuals but also corporations and/or other business entities. In this case, the naturalistic approach to human rights, including the Universal Declaration of Human

Rights (UDHR), posits that human rights are only recognized to be inherent in individuals and not in corporations and/or other business entities (Alford 2010; Beitz 2009; Cruft et al. 2015; Griffin 2008; Morsink 2009; Wellmen 2011).

In answering this question, the logic of the doctrine of methodological individualism is adopted. Based on this logic, all collective behaviors and actions, including those regarding the actions of corporations and/or other business entities, can be adequately explained as derivatives of individual actions (Fisse 2019, p. 285; Gustavo de Jesus Perez Duran 2020, p. 628; Kampourakis 2020, p. 1413). This doctrine focuses strictly on the individual and puts the individual as the relevant and most foundational unit of analysis of collective life (Megiddo 2019, p. 220; Romano 2017, p. 6). At the same time, every competition law enforcement, including its procedure, involving corporations and/or other business entities will certainly impact every individual behind those entities. At a certain level, it also impacts the enjoyment of the human rights. It is therefore relevant to discuss the human rights aspect in competition law enforcement.

The right to a fair trial is the topic of this article. This right is one of the human rights legitimized through various legal documents (Bhandari 2013, p. 166; Šimonis 2019, p. 47). At the international level, Article 14 of the International Covenant on Civil and Political Rights (ICCPR) is often referred to as its basis (Hill 2016, pp. 448, 454; Stone 2021, pp. 280–86). This article inspires the recognition of the right in regional treaties, such as the European Convention on Human Rights (adopted in 1950) (Clooney and Webb 2020, p. 7; Pressdee 2022, p. 46), the American Convention on Human Rights (adopted in 1969), the African Charter on Human and Peoples' Rights (adopted in 1981), the Arab Charter on Human Rights (adopted in 2004), and the ASEAN Human Rights Declaration (adopted in 2012) (Clooney and Webb 2020, p. 7).

The right to a fair trial concerns the enjoyment of human rights in the adjudication process, including the investigation, trial, decision making, and execution of the decision (Mampilly 2020, p. 40; Šimonis 2019, p. 47). Its importance rests in the context of a person being accused of violating the law, and certain sanctions may be imposed on the person (Petr 2014, p. 25). The right ensures that an accused person obtains justice in a fair manner (Bhandari 2013, p. 167). In another sense, the right protects an accused person from unlawful and arbitrary limitation or deprivation of rights (Didace 2020, p. 56).

The right to a fair trial consists of interrelated and interdependent components of the right. This means that the right is an umbrella for various human rights in the adjudication process. Clooney and Webb, for instance, argue that the right includes thirteen component rights, including the right to equality before the court, the right to be heard by competent, independent, and impartial judges and courts, the right to the presumption of innocence, and the right to object and obtain a remedy (Clooney and Webb 2020, pp. 7–8; Possi 2017, pp. 321–34). The discussion of these rights as components of the right to a fair trial was also elaborated by Mindaugas Šimonis (Šimonis 2019, p. 47). On another note, Julia Sherman discussed the right to a fair trial in the context of the right to an interpreter in court (Sherman 2017).

In Indonesia, a specific reference to the “right to a fair trial” also cannot be found in the 1945 Constitution of the Republic of Indonesia (1945 Constitution of Indonesia 2002). However, this does not mean that the Constitution does not recognize the right, since it guarantees everyone’s right to equal treatment before the law (Art.28D para (1) of the 1945 Constitution of Indonesia 2002), a right that becomes a component of the right to a fair trial. Even in Law No. 39/1999 on Human Rights (Law No.39/1999 1999), there is no specific provision on the right to a fair trial, but the right is formulated as the “right to justice,” which consists of at least eight component rights. These include the right to obtain justice without discrimination, the right to file petitions, trials, and lawsuits in criminal, civil, and administrative cases, the right to be tried through a free and impartial judicial process (Art.17 of the Law No.39/1999 1999), the right to the presumption of innocence (Art.18 para (1) of the Law No.39/1999 1999), the right to be prosecuted under established law (Art.18 para (2) of the Law No.39/1999 1999), the right to legal aid (Art.18 para (4) of the

*Law No.39/1999 1999*), the right not to be prosecuted twice for the same crime (Art.18 para (5) of the *Law No.39/1999 1999*), including the right not to be criminally punished for failure to fulfill obligations in debt agreements (Art.19 para (2) of the *Law No.39/1999 1999*).

We can understand that one of the components of the right to a fair trial in human rights instruments is the right to be adjudicated by a competent, independent, and impartial adjudicator (Art.14 para (1) of the *ICCPR 1976*; Art. 10 of the *UDHR 1948*; Slater et al. 2009, p. 121). In the human rights framework, this right is classified as an absolute right; therefore, it is not possible to exercise derogation from it (*The Human Rights Committee on ICCPR 2007*, para. 19). The guarantee also applies to all forms of trials, including criminal, civil (*The Human Rights Committee on ICCPR 2007*, para. 9), and competition (Teleki 2021, p. 1). In the context of Indonesian competition law, the urgency of the right to a fair trial, particularly the right to be examined by an independent and impartial adjudication body, was identified, among others, through the cartel case involving PT Charoen Pokphand Indonesia, PT Japfa Comfeed Indonesia, PT Malindo Feedmill, Tbk. et al. In this case, one of the investigated parties expressed the hope that their trial would apply the presumption of innocence “to protect the human rights of individuals” from a “partial and one-sided trial process” (ICSC 2016, p. 238). In addition, the Organisation for Economic Co-operation and Development (OECD), through a recommendation on transparency and procedural fairness in competition law enforcement, also recognized that “competition law enforcement . . . includes effective rules, impartial and independent institutions” (OECD 2022, p. 5).

The first element, competence, requires an adjudicator with integrity. Every adjudicator must be a qualified and knowledgeable individual. Institutionally, a competent adjudication institution must be able to produce an independent binding decision for the parties, a decision that cannot be interfered with by any third party, and this autonomy is based on the law (Clooney and Webb 2020, pp. 76–77). The second element, independence, relates to the adjudication body as an institution that is independent from the intervention of other powers and institutions (*The Human Rights Committee on ICCPR 2007*, para. 18–19). The third element, impartiality, can be understood through two definitions. The CCPR Committee first determines that an impartial adjudicator ensures that the judgment is not influenced by any state of personal bias or prejudice, nor does it act inappropriately in favor of one party to the disadvantage of another. Second, the adjudication body must make a clear indication of its impartiality (*The Human Rights Committee on ICCPR 2007*, para. 21). Based on European practice, the first aspect is identical to the subjective dimension of impartiality, and the second aspect is identical to the objective dimension of impartiality (Sutrisno et al. 2022, pp. 95–96; Zeitune 2007, p. 28).

The OECD provides a specific guidance for those rights components in the context of competition law enforcement. To ensure that law enforcement is independent and impartial, the OECD mandates that accountable and independent public authorities should exercise competition law enforcement. Any interpretation in the competition law enforcement must rest on legal and economic arguments within the framework of fair competition. Competition authorities should also (a) give proper consideration to all relevant information and evidence they obtain, (b) have clear and transparent rules to prevent, identify, and address any conflicts of interest in enforcement, and (c) have sufficient human resources, financial resources, and adequate mechanisms with expertise in competition law, economics, or other relevant disciplines, including human rights, to be able to exercise their duties effectively. In addition, the competition authority may develop cooperation with various parties to implement effective enforcement (OECD 2022, p. 6).

The aforementioned OECD guideline urges serious attention to be paid to the competition law enforcement procedure, particularly for countries that integrate the investigation, adjudication, and decision-making processes into one competition authority (Wise 2005, p. 62), as implemented in Indonesia by the ICSC. Merging all “judicial” powers in one institution raises questions on the compatibility of competition law enforcement, including its process, with human rights guarantees (Slater et al. 2009, p. 97). More precisely, this



relates to the implementation of the competition authority's obligation to respect the right to a fair trial (Šimonis 2019, p. 47).

The obligation to respect the right to a fair trial, particularly the right to be tried by a competent, independent, and impartial tribunal, is a negative obligation within the framework of human rights law. This means that competition authorities must be aware that everyone has and enjoys this right optimally. Competition authorities are obliged not to interfere with their enjoyment of the right. Competition law enforcement, which is incompetent, interfered with by other powers and institutions, and partial, is a form of a violation against this obligation.

### **3. The Right to a Fair Trial in the Practice of Competition Law Enforcement in Indonesia: A Rising Issue in the Procedural Aspect**

The competition authority mandated by Indonesian law to enforce competition law in Indonesia is the ICSC. The ICSC is an independent state body whose authority is independent of the influence and control of the other parties. Its powers encompass the process of investigation, adjudication, and decision making, including the imposition of competition law sanctions on business actors (Art.36 of the [Law No.5/1999 1999](#)). However, ICSC decisions are not final and binding automatically. Indonesian competition policy allows business actors to file objections against ICSC decisions through the Commercial Court and cassation to the Supreme Court. The cassation legal effort is the final process in objecting to the ICSC decision. In this context, there is no opportunity to step on an extraordinary legal effort, such as a judicial review ([The Indonesian Supreme Court 2021](#)).

The competition law enforcement at ICSC can be initiated based on written reports from the public, both individuals and legal entities, or institutional initiatives from ICSC related to an alleged monopolistic practice and/or unfair competition (Art.2, 3, and 4 of [ICSC 2019a](#)). If it comes from a public report, ICSC will conduct a clarification process first to assess the administrative sufficiency of the report, the validity of the identity of the complainant and the reported party, the accuracy of the address of the witnesses, the suitability of the alleged violation with the article violated and the evidence from the complainant, and to assess the absolute competence of the ICSC. If the initiative comes from the ICSC institutionally, ICSC will conduct a validation and analysis of the initiative, including the process of identification of business actors and related parties, relevant markets, and construction of anti-competitive practices. In the validation and analysis process, ICSC also ensures the suitability of its absolute competence, the validity of the description of data and/or information on the alleged violation, the clarity of the alleged article violated, and the availability of at least one piece of evidence. This process will result in a conclusion on whether the case needs to be advanced to the investigation stage.

The ICSC conducts an investigation based on the results of previous clarification or research result. ICSC's Investigators conduct investigations to obtain sufficient evidence, clarity, and comprehensiveness of the allegations. In an investigation, the Investigator may invite and bring the complainant, reported party, witnesses, and/or experts to obtain information. The Investigator is also authorized to collect letters and/or documents related to the case, obtain data related to the reported party's assets and turnover, conduct a local inspection, and/or analyze the statements, letters, and/or documents as well as the results of the local inspection. Therefore, the Investigator has an obligation to make and sign the Minutes of the Investigation (Art.17 [ICSC 2019a](#)).

The ICSC's Investigator is obliged to make a summons in exercising its authority to verify the complainant, reported party, witnesses, and/or experts. In addition to the identity of the ICSC and the summoned party, this letter needs to be complemented with the reason for the summons, the place of the hearing, and the time of the hearing. The ICSC must ensure that this letter has been received by the summoned party at least three days before the hearing time (Art.18 of [ICSC 2019a](#)). The complainant, reported party, witnesses, and/or experts who receive this letter must attend, provide information, and sign the Minutes of Investigation (Art.19 of [ICSC 2019a](#)). The results of the investigation

that were assessed for clarity and completeness are formulated in the Investigation Report, which contains at least the identity of the reported party, a description of the provisions of the law allegedly violated, and the availability of at least two pieces of evidence (Art.21 of ICSC 2019a).

The qualified investigation report will be proceeded to the filing and/or case handling process. In this process, the ICSC will conduct a feasibility assessment of the previous investigation report. If this report is considered to be feasible and has gone through the reporting process, then the Investigator will proceed with the drafting of the Alleged Violation Report (AVR) document, which elaborates on the violated provisions of the law, evidence, and analysis of the proof of the elements of the article allegedly violated (Art.26 of ICSC 2019a). Then, the ICSC will determine the initial examination and appoint a three-person Commission Assembly to adjudicate the case, whose determination is legitimized through an ICSC Decree (Art.27 of ICSC 2019a).

The adjudication by the Commission Assembly, both an initial and advanced process, is performed to assess whether there has been a violation of the competition law (Art.30 para (6) of ICSC 2019a). The Commission Assembly will first summon the reported party properly to attend the initial adjudication process (Art.29 para (2) of ICSC 2019a). The significance of the phrase “properly” here is that the summons, at the very least, in addition to containing the complete identities of the parties also needs to be complemented with the reason for the summons, a description of the location of the hearing, and a description of the time of the hearing (Art.31 para (1) of ICSC 2019a). The ICSC needs to ensure that the reported party has received the summons at least three days before the initial adjudication time. If the reported party is not present for this summons, the Commission Assembly will make another proper summons at most two times (Art.30 para (3) and (4) of ICSC 2019a). However, the initial adjudication process may be performed without the presence of the reported party as long as the Commission Assembly has properly summoned the reported party three times (Art.30 para (4) of ICSC 2019a). The initial adjudication itself is attended by at least one member of the Commission Assembly. Its proceedings are recorded in the Minutes of the Hearing signed by the Commission Assembly and the Registrar.

In the adjudication process, the Commission Assembly declares that the proceedings are open and transparent to the public. This initial process is called an initial adjudication. In this case, the investigator will deliver the alleged AVR, and the reported party has the right to respond to the AVR by submitting evidence (Art.32 of ICSC 2019a). In this process, the Commission Assembly provides an opportunity for the reported party to make behavioral changes based on the type of violation, the time of the violation, and the damage caused. If the reported party agrees to the behavioral changes, then the reported party’s commitment will be written in a Behavior Change Integrity Pact signed by the reported party (Directorate for Financial and Enterprise Affairs Competition Committee 2016a, 2016b; Art.34 of ICSC 2019a).

The adjudication process can be continued to the advanced process when all reported parties acknowledge and accept the AVR and state that they will not submit evidence to challenge the report (Art.37 of ICSC 2019a). In the advanced process, which is also open and transparent to the public, the investigator and the reported party have the opportunity to articulate their arguments with the support of witness testimonies, experts, letters and/or documents, other clues, as well as testimonies from the business actors themselves. After each party has delivered its arguments, further proceedings are continued with the submission of conclusions of the trial results by both parties (Art.41 of ICSC 2019a). Then, the Commission Assembly will engage in a closed deliberation to assess, analyze, conclude, and decide the case based on the evidence regarding whether there is a competition law violation. The result of this deliberation is written in the ICSC’s Decision (Art.60 of ICSC 2019a). The ICSC’s Decision is to be read in an open and transparent proceeding to the public (Art.62 of ICSC 2019a).

In practice, human-rights-based claims against competition law enforcement procedures at the ICSC level are identified to be raised. In the market control case conducted

by PT Lion Mentari, PT Batik Air Indonesia, and PT Lion Express, human-rights-based claims were submitted by the business actors because the AVR document prepared by the ICSC's Investigator did not contain "the source of the case . . . whether the source of the case comes from the public report, or comes from the initiative of the ICSC" (ICSC 2021b, p. 24). The absence of this information is taken into consideration by the business actors as a violation of the principle of due process of law and the rights of business actors in the adjudication process, such as the right to information transparency and the right to be treated equally before the law (ICSC 2021b, p. 24). Unfortunately, these claims were not addressed at all by the Commission Assembly that adjudicated the case.

Based on the ICSC regulation, the source of the case is indeed not a mandatory subject matter in an AVR document (Art.26 para (2) of ICSC 2019a). However, human-rights-based claims raised by reported business actors are a fact, which must be addressed by the Commission Assembly, so that the procedures for enforcing competition law are clear and respect the right to a fair trial.

The same situation was also identified in the case of market control by PT Garuda Indonesia (Persero), Tbk. In this case, the business actor argued that the ICSC's action in continuing the report from the public to the Initial Adjudication process was contrary to the ICSC's legal obligations because the report had been withdrawn by the complainant, so "there is no basis for the ICSC to continue the adjudication" (ICSC 2021a, pp. 115–116). Therefore, the business actor considers that the ICSC "has violated the human rights to justice and legal certainty . . . which have been regulated and guaranteed in legal provisions" (ICSC 2021a, p. 116). In raising this claim, the business actor directly cited the Constitution's guarantee of every person's right to "guarantees, protection, and certainty of a just law and equal treatment before the law" (Art.28D para (4) of the *1945 Constitution of Indonesia 2002*) and the Human Rights Law's norm of every person's right to "obtain justice . . . and be tried through a free and impartial judicial process" (Art.17 of the *Law No.39/1999 1999*).

The Commission Assembly responded to the challenge by considering the matter "from formal aspects." In its consideration, the Commission Assembly stated that "the basis of the case handling . . . is not a report as mentioned" by the business actor, which was only received by the ICSC in May 2019, "but a report received (by the ICSC) . . . in March 2019" (ICSC 2021a, pp. 219–20). Therefore, the Commission Assembly concluded that the revocation of the report as mentioned by the business actor was irrelevant and that the handling of the case was in accordance with the provisions of the law (ICSC 2021a, p. 220). The Commission Assembly did not seem to respond to the human-rights-based claims submitted by the business actors, despite having directly quoted the provisions of the (*1945 Constitution of Indonesia 2002*) and the Human Rights Law.

Based on the Commission Assembly's response, first, the Commission Assembly appears to confirm that the revocation of a report by the public removes the ICSC's legal standing in adjudicating a competition law case, even though the ICSC regulations do not specifically regulate the aspect of revocation of a report and its legal consequences for the case adjudication process (ICSC 2019a). Second, an anomaly is identified. The Commission Assembly simplifies its argument by stating that the report used as the basis for case handling is not the report mentioned by the business actor. The Commission Assembly did not provide any actual and logical evidence, particularly regarding the report that was received in March 2019. In this case, the ICSC is obliged to keep the identity of the complainant confidential (Art.4 para (2) of ICSC 2019a), but the Commission Assembly is obliged to present logical evidence indicating the existence of a specific report in March 2019 without having to show the identity of the complainants, something that the Commission Assembly did not show in its considerations. The Commission Assembly has used irrational argumentation. As a result, we can raise a question, among other things, "Is it true that the ICSC received a report in March 2019?" Finally, a violation of the right to a fair trial could occur.

The tender conspiracy case involving the Regional Drinking Water Company (PDAM), PT Bangun Cipta Kontraktor, and PT Bangun Tjipta Sarana also illustrates the substantial

issue of the right to a fair trial in competition law enforcement procedures. In this case, one of the business actors, PT Bangun Cipta Kontraktor, argued that the case handling process had violated the provisions of the ICSC regulation because the AVR document from the ICSC's Investigator did not contain the names of witnesses and experts, so it was "formally flawed and void" and "potentially violates the human rights of the parties" (ICSC 2020, p. 226).

The objection to the formal aspects was responded to by the Commission Assembly. Regarding the absence of the identity of a witness in the AVR document, the Commission Assembly considers that the identity of witnesses "is a part of the requirements of the completeness" of the AVR document, which "can be submitted either as an integral part or separately from the AVR document" (ICSC 2020, p. 270). According to the Commission Assembly, the identity of witnesses "submitted separately by the Investigator in the proceeding ... is an inseparable document from" the AVR document. According to the Commission Assembly, the identity of witnesses "submitted separately by the Investigator in the proceeding ... is an inseparable document from" the report document. Therefore, the Commission Assembly concluded that the AVR document prepared by the ICSC's Investigator was sufficiently complete (ICSC 2020, p. 270). The Commission Assembly does not appear to respond to the substance of the claim's potential human rights violations.

The consideration of the Commission Assembly seems unreasonable. This is because the ICSC regulation on the procedures for handling cases of monopolistic practices and unfair competition specifically stipulates that "The AVR ... at least contains: a ... b. identity of witnesses and/or experts" (Art.26 para (2) of ICSC 2019a). The regulation does not provide any explanation on the significance of the phrase "at least," but the phrase indicates the minimum provisions that must be included in the AVR document, including the identity of witnesses (*Law No.13/2022* 2022, p. 80 App.II). Only an emergency justifies any deviation from this requirement, as reflected by the Constitutional Court Judges of the case of judicial review of Article 49 paragraph (9), Article 50 paragraph (9), Article 51 paragraph (2) (*The Indonesian Constitutional Court 2015a*), and Article 157 paragraph (8) of the Law on the Election of Governors, Regents, and Mayors (*The Indonesian Constitutional Court 2015b*). Unfortunately, an emergency did not occur in handling the tender conspiracy case involving Perusahaan Daerah Air Minum (PDAM), PT Bangun Cipta Kontraktor, and PT Bangun Tjipta Sarana. As a requirement, the consequence of the absence of witness identity in the AVR document is that the document may be void and/or rejected. However, the Commission Assembly made an unreasonable interpretation of the integral or separate witness identities from the AVR document. In the end, this action may lead to a violation of the Commission Assembly's obligation to respect the right to a fair trial of business actors.

Based on the three aforementioned cases, human-rights-based arguments, particularly the right to a fair trial, always emerge from the business actors in the context of competition law enforcement procedures. Unfortunately, none of these arguments was responded to by the Commission Assembly. The Commission Assembly has ignored human-rights-based claims in competition law enforcement and its procedures. The Commission Assembly, which is supposed to comply with the procedural law norms of competition law enforcement stipulated in the ICSC regulation, was also found to have disobeyed its procedural law by exercising an extensive and unreasonable interpretation of a definite procedural law norm. This non-compliance thus violates the procedural law, which is equivalent to a violation of the right to a fair trial.

The ignorance of the substance of human rights by the Commission Assembly indicates the ICSC's lack of awareness of human rights aspects in enforcing business competition law. Such practices tend to deepen and widen the traditional gap between human rights law and competition law. The ICSC's non-compliance with procedural law, which is considered to be a concrete guarantee to ensure maximum respect for human rights in the adjudication process, indicates the ICSC's failure to realize its obligation to respect the right to a fair trial. Therefore, the ICSC needs to initiate adequate steps to build a strong awareness of the human rights aspects of competition law enforcement, particularly in the context of



enforcement procedures, and to construct modalities to bridge this awareness with actual practice in the field.

#### 4. Saving Human Rights by Promoting Respect for the Right to a Fair Trial in the Proceedings of Competition Law Enforcement

The ignorance of human-rights-based claims by the Commission Assembly shows the unclear applicability of human rights law in the proceeding of competition cases in Indonesia. This may occur, *inter alia*, because the relationship between human rights law and competition law enforcement procedures has not been adequately defined and understood, particularly in the Indonesian context. Therefore, this section provides an analysis of the linkage variables. This becomes the basis for constructing the modalities needed for Indonesian competition policy to promote respect for the right to a fair trial in competition law enforcement procedures in the future.

Based on the normative substance, law is generally divided into public and private law. This classification is rooted in the Roman law tradition of separating the interests protected by the law, and it is currently known as the theory of interest (Cherednychenko 2007a, pp. 26–27). While public law protects society's public interest, either directly or indirectly, private law protects individual interests. Traditionally, human rights law and its effects are more frequently discussed within the public law framework (Begari 2021; Gorgenyi 2022; Jiao 2017; O'Flaherty 2015; Oster 2015; Sloss and Sandholtz 2019; Trstenjak 2016). In contrast, private law was once considered to be immune from the influence of human rights law (Cherednychenko 2007b). In this regard, there is a notion that human rights law is unable to encompass the private law spectrum.

Interestingly, however, the notion of private law's immunity from human rights law is weakening as scholars are showing the influence of human rights law on private law. By focusing on experiences in Germany, the Netherlands, and the UK, for instance, Olha Cherednychenko finds that the relationship between human rights and private law can be either a "subordination of private law to fundamental rights" or "complementary between the two" (Cherednychenko 2007b, p. 3). Aharon Barak constructed theoretical models for applying constitutional human rights to private law, including the model of direct application of human rights law to private law and the indirect application model (Barak 1996, pp. 225–26). Cherednychenko and Barak's theoretical construction is further elaborated by Eli Bukspan and Asa Kasher—who strengthen the direct application model and criticize the indirect application model with an emphasis on the current situation of democracy and the social reality of the existence and influence of private actors (Bukspan and Kasher 2019)—and Verica Trstenjak, who presents the idea of "direct and indirect horizontal effect" of human rights on private law (Trstenjak 2016, pp. 7–10). In the Indonesian context, Shidarta, Stijn van Huis, and Eko Riyadi also elaborate on Cherednychenko and Barak's theorization of the relationship between the two in the context of "the way Indonesian Judges approach human rights in private law cases" (Shidarta et al. 2022).

These studies are important. Their presence has successfully removed traditional notions, which put a solid wall between human rights law and private law. Thus, it is relevant to discuss human rights aspects within both the public and private law domains. Limiting the scope of applying human rights law only to public law is no longer relevant today.

The enforcement of Indonesia's competition law covers both public and private law aspects. The public law aspect is reflected, among others, in the use of evidence similar to the Criminal Procedural Law, the use of criminal sanctions, the authority to investigate and prosecute for the ICSC, the application of circumstantial evidence, and the adjudicator assessment mechanism, which applies the principle of beyond reasonable doubt. The Indonesian competition law also emphasizes that its establishment, enactment, and enforcement are intended to protect the "public interest" to "improve the welfare of the people" (Art.3 of the Law No.5/1999 1999). On the other hand, the strong private law nature is captured by the qualifications of the supervised unlawful acts, which relate to the interaction of business actors based on their respective interests in the market. In

this case, the principle of economic democracy, which encourages a balance between the public and individual interests, is a commitment of Indonesian competition law. Referring to scholars' findings on the application of human rights law in public and private law, defining the relationship between competition law enforcement, particularly in the context of enforcement procedures, and the right to a fair trial becomes worthy.

a. The Proceedings of Competition Law Enforcement is Subordinate to the Right

The nature of competition law and its enforcement can be understood from various angles. One of the ways to understand it is by understanding the function of the law in advance (Burchardt 2019, p. 409; Finnis 2011, pp. 6–9). Kenneth Ehrenberg (2016, p. 20) and Dana Burchardt's (2019, p. 410) interpretation of the function of law is adopted in this article. They argue that the function of law can be based on the imagination of the lawmakers concerning the expected effect of law. In understanding the nature of Indonesian competition law enforcement, we restrict the logic to the function of Indonesian competition law based on the expected effect by the lawmakers from the law.

In law literature, one of the legal functions commonly discussed based on the above definition is the law as social control. The main elaboration is traced, among others, to the writings of Roscoe Pound (2006) and Donald Black (2020). Social control itself is understood as the normative aspect of social life, which defines right and wrong behavior and the responses to both. It includes imperatives, prohibitions, punishments, and compensations (Black 2020, pp. 2–5; Pound 2006, p. 18).

Competition law is also understood as a utility, which has the ability to engineer social order in the context of conducting business. In this case, competition law categorizes certain actions as wrong or bad, so that they are unlawful, and other actions become right or good, so that they are lawful. This categorization is intended to ensure a fair and competitive business environment. Joseph Raz emphasized that this is how the law works to harmonize social order (Raz 2009, p. 383).

The social control of Indonesian competition law emphasizes the prohibition norms against monopolistic practices and unfair business competition. Law enforcement is conducted in the context of business actors who are suspected of creating prohibited agreements (Art.4–16 of the *Law No.5/1999 1999*), committing prohibited acts (Art.17–24 of the *Law No.5/1999 1999*), and abusing a dominant position (Art.25–29 of the *Law No.5/1999 1999*). If a business actor is proven legally and convincingly to have violated the prohibition, then administrative sanctions, fines, and/or imprisonment in lieu of fines may be imposed. Once again, these sanctions are applied to protect the public interest and the interests of other business actors within the framework of economic democracy.

We understand the sanctions of Indonesian competition law within the human rights framework. The existence of fines, for instance, is linked to the enjoyment of the right to property for each person because the object of the fine is the property owned and beneficial to each business actor (Gabriel and Silviu 2019). The existence of imprisonment as a substitute for fines is related to the enjoyment of the liberties of each individual. The application of these sanctions by the competition authority will result in the limitation of human rights enjoyment, such as the limitation of the two categories of those mentioned rights.

The limitation of human rights within the framework of human rights law is not justified. However, the justifiability arises from the likelihood of wider harm resulting from the features that rights and freedoms entail. It is important to note that human rights law strictly regulates the mechanism of such limitations. One of its foundational norms is that the limitation of rights cannot be exercised arbitrarily (The Human Rights Committee on ICCPR 2014, para. 8; Art.9 of the *ICCPR 1976*) and must be exercised with due respect for all human rights (The Human Rights Committee on ICCPR 2014, para. 10). This means that the limitation of human rights cannot be exercised by violating other human rights. This is because the nature of human rights is interrelated and interdependent.

Based on the logic of the aforementioned limitation of rights, competition law sanctions cannot thus be applied arbitrarily and remain subject to the commitment of the state, including competition authorities, to respect human rights. In the context of competition

law enforcement procedures, the procedures must comply strictly with established procedural laws and be conducted with respect for, at the very least, the right to a fair trial, including the right of every business actor to be adjudicated by competent, independent, and impartial adjudicators. Moreover, the right to a competent, independent, and impartial adjudication body is classified as one of the civil and political rights under the human rights law, which it is the state's obligation to respect and which must be fully realized, including by the ICSC.

The competition authority's respect for the enjoyment of this right cannot be derogated under any circumstances. In addition to the non-derogable nature of the right ([The Human Rights Committee on ICCPR 2007](#), para. 19), maximum respect is crucial, given that interference with the right will lead to an arbitrary limitation of other rights in the context of competition law enforcement. This means that it will result in violations of other human rights. Ensuring that every business actor enjoys the right to a fair trial optimally in competition law enforcement procedures is an absolute requirement for the application of legitimate competition law sanctions.

The unavailability of justification to derogate from the state's obligation to respect this right indicates that competition law enforcement procedures are subordinated to the right to a fair trial, including to the right of every business actor to be adjudicated by competent, independent, and impartial adjudicators. To recall Cherednychenko, the subordination of the law to human rights makes the right to a fair trial directly affect competition law enforcement procedures. The right to a fair trial determines the validity of competition law enforcement. The implementation of competition law enforcement procedures becomes subject to standards derived from the right to a fair trial ([Cherednychenko 2007a](#), p. 53). To echo Barak, the direct effect of the right to a fair trial in competition law enforcement procedures indicates that the substantive purpose of competition law enforcement procedural law is to protect the dignity and liberty of the investigated business actors ([Barak 1996](#), pp. 227–28).

This article argues that the imposition of competition law sanctions to protect the public interest and the interests of business actors is important to ensure conduciveness and fairness in business. However, it is equally important to ensure that sanctions are imposed through a legitimate mechanism. This can be realized, among others, by respecting the right to a fair trial in competition law enforcement procedures. Respecting this procedural right will save other substantive rights.

#### b. Necessary Modalities in Respecting the Right in the Proceedings of Competition Law Enforcement

Competition law enforcement at the ICSC level displays an integrated character, covering the investigation process through to the imposition of sanctions by the authority. The decisions issued can also be enforced and legally binding, as long as the investigated parties do not launch an appeal to the Commercial Court and cassation to the Supreme Court ([Wils 2003](#), p. 201). Unfortunately, the practice of the single role of the ICSC has raised actual concerns and grievances of the investigated business actors regarding a fair trial, which respects everyone's right to a competent and impartial adjudicator.

This concern is reasonable. The single role of the ICSC, ranging from investigation, prosecution, and decision making, has a strong potential to be incompatible with the spirit of an impartial adjudication process. In this case, impartiality conveys the principle that individuals cannot act as adjudicators in their own cases and are prohibited from presiding over cases where they hold a personal and institutional bias ([Bassett and Perschbacher 2011](#), p. 183; [Maladi 2010](#), p. 7). At the very least, each adjudicator must ensure that there is no personal and financial interest in the case being adjudicated ([Foster 2006](#)), which is impossible to achieve in the single role of the ICSC. In enforcing competition law at the ICSC level, impartiality must not only be done but must also be seen to be done. Moreover, the procedural law for the enforcement of competition law was also established by the ICSC, so it can be seen how powerful the ICSC is in enforcing competition law as an institution.

A business actor who is investigated by the ICSC has clearly expressed the expectation of an impartial judiciary, as shown in the cartel case involving PT Charoen Pokphand Indonesia, PT Japfa Comfeed Indonesia, PT Malindo Feedmill, Tbk. et al. Business actors have also used human rights language in challenging law enforcement procedures that they believe are legally flawed, as seen in other cases elaborated in the previous subsections. We understand the expectations and concerns of business actors as a meaningful grievance.

In these concerns, unfortunately, the ICSC has never responded to the matter of the right to a fair trial raised by business actors. In the context of human rights, the ICSC's ignorance indicates the lack of competence of individuals at the ICSC regarding human rights issues. In fact, in a tender conspiracy case involving the Regional Drinking Water Company (PDAM), PT Bangun Cipta Kontraktor, and PT Bangun Tjipta Sarana, the Commission Assembly made an extensive and unreasonable interpretation of the procedural law, which had been made definitively by its institution. This fact demonstrates that the ICSC has objectively failed to promote its impartiality. The authority to establish procedural laws to conduct law enforcement also threatens the commitment to a checks and balances mechanism in enforcing competition law in the ICSC. In the latter case, the power is not separated and distributed adequately.

Drawing on the challenges that have arisen, this article suggests a modification and adjustment in the competition law enforcement scenario at the ICSC level. The modification and adjustment rely on the principle of checks and balances and the framework of state obligations, including competition authorities, to respect human rights. In this case, we encourage the involvement of the Supreme Court in the competition law enforcement scenario at the ICSC level.

Regarding the involvement of the Supreme Court, the idea for the new scenario of competition law enforcement procedure in Indonesia is as follows. Currently, the issue of human rights and checks and balances is threatened because of the ICSC's enormous power in enforcing competition law. The ICSC is not only authorized to investigate and impose sanctions, but it is also authorized to design the procedural law of law enforcement as an institution. In addition, the Supreme Court and the judicial body beneath it, the Commercial Court, become involved if the investigated business actor files an objection to the ICSC's decision.

In promoting the respect for the right to be adjudicated by an impartial institution, this article encourages the broadening of the role of the Supreme Court as an institution, which designs the procedural law for enforcing competition law at the ICSC level. In addition to the Supreme Court's role as a regulator of the procedural law, the Supreme Court must also complement its legal role with authoritative commentary on articles, which are potentially subject to multiple interpretations. That way, although the ICSC has the authority to conduct investigations, make decisions, and impose sanctions, the rules of the game for these processes are no longer determined solely by the ICSC but rather by the Supreme Court. Therefore, the aspect of checks and balances can be fulfilled adequately.

This idea rests on three arguments. First, in the context of law enforcement, the Supreme Court is one of the two judicial powers in Indonesia whose authority to adjudicate is directly mandated by the Constitution (Art.24 of the [1945 Constitution of Indonesia 2002](#)). This directly places the Supreme Court as an umbrella of the adjudication process in Indonesia. Normatively, the ideal scheme can be driven through the legislative body by amending the Indonesian competition law, since this body represents the people's interest. However, revising the Indonesian competition law by incorporating procedural provisions in its enforcement process presents significant challenges, such as in terms of the length of the political process and time consumption. Therefore, the Supreme Court, an umbrella institution in the adjudication process in Indonesia, is encouraged to formulate and establish the procedural law. Second, the current process of enforcing competition law still involves the Supreme Court and the judicial body beneath it, the Commercial Court. Indonesian competition law determines that ICSC decisions can be appealed to the Commercial Court and cassation to the Supreme Court. When an objection is filed,



the Supreme Court and the judicial bodies beneath it have the authority to strengthen the ICSC's decision or to annul it.

Third, from a human rights perspective, the Supreme Court has an obligation to protect human rights. In the context of this article, these rights include at least the right to a fair trial, in particular, the right to be adjudicated by competent, independent, and impartial judicial institutions, the right to property, and the fundamental liberties of individuals. To protect these rights, the Supreme Court exercises its authority in two dimensions. Firstly, in the prevention dimension, the Supreme Court is obliged to prevent violations of human rights both by state institutions and third parties during the enforcement of competition law. Secondly, in the remedy dimension, the Supreme Court has the opportunity to provide an effective remedy for rights violated in a competition law enforcement process. While the power of the Supreme Court in designing procedures for enforcing competition law that the ICSC must obey is a manifestation of the Supreme Court's obligation to prevent human rights violations in the law enforcement procedure at the ICSC level, the authority of the Supreme Court and the Commercial Court to review the ICSC's decision fulfills the remedy dimension as part of an attempt to protect human rights.

The strengthening of this prevention measure is necessary, considering the fact that the courts, both the Supreme Court and the Commercial Court, have not given adequate attention to the aspect of the right to a fair trial in the enforcement of competition law at the ICSC. This is reflected, among others, in the cartel case involving PT Charoen Pokphand Indonesia, PT Japfa Comfeed Indonesia, PT Malin-do Feedmill, Tbk. et al., where the concerns of business actors regarding the right to a fair trial in the law enforcement procedure at the ICSC, especially the right to an impartial and independent trial, were not only disregarded by the Commission Assembly but also seemed to be excluded by the Supreme Court and the Commercial Court when the ICSC Decision was challenged in court. In this case, the business actors no longer invoked the right to a fair trial when appealing the ICSC Decision. However, in another case, namely the case of PT Garuda Indonesia, PT Sriwijaya Air, et.al. vs. the ICSC, the reported business actors in this case did use the human-rights-based claim to challenge the ICSC Decision in court. Unfortunately, both the Commercial Court and the Supreme Court neglected the claim.

This indicates that the competition law enforcement in Indonesia still focuses on the substance of the act/agreement prohibited by the competition law. Although the ICSC's decision can still be tested in independent judicial institutions, the Commercial Court and the Supreme Court, a situation arises whereby the courts still understand and interpret the enforcement of competition law to be restricted on the substantive provisions in the competition law. The recent cases show that the emphasis on human rights aspects, especially the right to a fair trial in the ICSC's law enforcement procedure, has not received a significant consideration.

In drafting the regulations regarding the whole procedures for enforcing competition law at the ICSC level, some aspects must be considered by the Supreme Court. The procedural regulation should prioritize the protection of human rights as its foundational basis, which is derived from the protection of public interest and business actors. The regulation must transparently demonstrate the absence of conflict of interest in competition law enforcement procedures at the ICSC level. Reflecting on the rise in human-rights-based claims from business actors and the ignorance of the ICSC, the regulation should provide an opportunity for the ICSC to cooperate with the National Commission on Human Rights to address any human rights issues raised in the process at the ICSC level.

Indeed, broadening the involvement of the Supreme Court in enforcing competition law and balancing the interests of the parties in the process does not guarantee equal opportunities for every party to win a competition case at the ICSC level. However, the fulfillment of the checks and balances mechanism and optimal respect for the right to a fair trial can provide and promote equal opportunities for every party in the competition law enforcement scenario.

## 5. Concluding Remarks

The role of the ICSC in enforcing Indonesian competition law has resulted in enormous power for the competition authority. The ICSC owns the power to design the rules of the game in enforcing competition law, investigate, make decisions, and impose sanctions. At the practical level, this centralized authority raises a human rights issue, particularly regarding the right to a fair trial for business actors. This study found that business actors have clearly expressed their concerns about violations of the right to a fair trial in competition law enforcement procedures, particularly at the ICSC. A component of this right is the right to be adjudicated by a competent, independent, and impartial authority. Every state actor, including the ICSC, must respect this right by ensuring, among other things, that its law enforcement procedures are impartial subjectively and objectively. The failure of the ICSC to be impartial, including the failure to show its impartiality, indicates a violation of the obligation to respect the right. In this context, business actors have used the human right to a fair trial language to defend themselves from enforcement proceedings, which potentially violate the right to a fair trial at the ICSC. We also found that in a case, the impartiality of the ICSC needs to be more credible, as the Commission Assembly has made extensive and unreasonable interpretations of the strict and clear provisions of procedural law in competition law enforcement.

This study underlines that competition law enforcement procedures are subordinate to the right to a fair trial, including the right of every business actor to be adjudicated by a competent, independent, and impartial adjudication body. Therefore, competition law enforcement procedures must be subject to the standards provided by the right. Unfortunately, this study finds that the current scenario of competition law enforcement procedures in Indonesia is incompatible with the spirit of respect by the state, particularly the competition authority, for the right to a fair trial, especially the right to be adjudicated by an impartial adjudication body. Therefore, this article proposes a modification and adjustment to Indonesia's competition law enforcement procedure scenario.

The modification and adjustment are implemented by broadening the authority of the Supreme Court in the context of competition law enforcement. This article suggests that the Supreme Court should be promoted as an institution, which has the authority to design the procedural law for enforcing competition law at the ICSC. Regarding this procedure, the Supreme Court should also provide an authoritative interpretation of articles with the potential for multiple interpretations, so that the ICSC's opportunity to interpret the procedural law is narrowed in the context of competition law enforcement procedures. The involvement of the Supreme Court will strengthen the checks and balances mechanism and promote respect for the right to a fair trial for every business actor.

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