Case Studies from Indonesia in Competition Policy & Enforcement

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I. Introduction/Background:

- Each country has a different background, both political and historical, when incorporating competition law into its legal system. Some countries were forced during the economic crisis as part of the bail out program, while others enacted voluntarily based on the need to enter global competition and change to a market economy;

- During the era of economic transition, many developing countries introduced competition law as a tool to improve development and welfare, and to signal participation in global market competition. Competition Law, along with many other laws, has been introduced and practiced and enforced;

- Indonesia was influenced by several factors and unique experiences. Early efforts to adopt the law failed at the legislative level, despite realization of the consequences and effect to the Indonesian economy and business during that time. Several reasons behind the adoption of Law on Prohibition of Monopolistic Practice and Unfair Business Competition (Law No.5 year 1999) were: IMF Letter of Intent, intention to ban monopolistic practices & conglomerate problems, protection of state-owned companies, companies' bankruptcy etc;

- In 1999, it was the 1st time initiated by the House of Representative (DPR) – prepared and passed rapidly, during the drafting process received much assistance from various foreign government funding agencies;

II. Problems and challenges

- Political economy

- Indonesia signed WTO Agreement, joined the AFTA, and, like many other Asian countries, decided to move to a market economy, which means we should be ready to enter global market competition. Earlier, instruction to provide clearer competition policy was stated explicitly in State Policy Framework of the Economic Development on the National Enterprises;

- In the early stage of Law No.5/1999 enforcement, the policy was still not translated well in government industrial or competition policy. The responses showed government inconsistency, for example: regulating or provide protection for certain industries, special treatment for state-owned enterprises. The condition was exacerbated by bureaucracy inefficiency, law enforcement problems, regional autonomy, which allows local government to issue regulations that may conflict with competition policy at national level. *See William E. Kovacic, Designing and Implementing Competition and Consumer Protection Reforms in Transitional Economies: Perspectives from Mongolia, Nepal, Ukraine and Zimbabwe, 44 Depaul Law Review, 1995.*

- Earlier, many understood that Law No.5/1999 targeted big business or conglomerate, while still assuring more business opportunities. Many business practices that took place during the 30 years of New Order regime had the effect of destroying competition culture through protection, cronyism, and corruption in doing business; this has likely changed in the last 10 years;

- Best example can be seen in airlines industry, which consumers now enjoy, although we can see consequences of a more competitive airline industry affecting other businesses such as land transportation (buses), ship, trains, hotels, workshops etc. Overall, however, consumers do enjoy direct result of competition. Recent consequences of tough competition in airline industry is that there were 2 airlines companies that were driven out of the market, and the industry now is in the process of restructuring;

- Other example: government allowing open and modern retail competition benefiting consumers. But to some extent, effects of open market and competition in some regions has triggered the closing of traditional retailers/traditional market. This development also has been under close scrutiny by government policy and Competition Commission;

- Industrial policy and competition policy:

- It is known also that many of the past problems have been triggered by the protection of the State Owned Enterprises (SOE), which have enjoyed government protection and privileges. Special treatment have caused many SOEs to be unable to compete with the private sector, especially with foreign investments. Our past experience also shown the government extends special treatment to few conglomerate groups that controlled strategic industries;

- *Prof. Eleanor Fox from Fordham University NY, in Memorandum to the Indonesian Policy Makers and Other Parties Concerned with a Competition Law for Indonesia, (not publish) 1999*, reminded that in the past the Indonesian government strongly controlled its market by choosing to protect certain industry and created barriers to entry which resulted in an oligopolistic market. This practice caused high economic cost, inefficiency and made business unfamiliar with competition;

- After the economic crisis, the Government seemed unable to prioritize whether to liberalize the market immediately or implement gradual privatization. Still no clear policy whether to focus on the agriculture business or industrial sector, especially when it comes to setting up the choice of up stream or downstream business (for example in palm oil industry);

- One of the inconsistent policies in telecommunication industry was tested in Temasek case which has decided by the KPPU (Competition Commission) in 2007. The case begin when government in 2002 allow to proceed with divestiture and sold its shares to foreign investors which allow them to own shares in several telecommunication companies. Telecommunication is a strategic industry and became essential for majority Indonesians and later becoming more competitive. However there was lack of government study to support its policy. KPPU enforced Law. No 5 and found and proved in their decision that cross shares ownership is a violation of Law No.5/1999 and decided that Temasek had to sell some of its shares to non-affiliated companies. The case ended in dramatic way when Temasek left Indonesia and sold its entire shares to Qatar Telcom. Temasek submitted last effort through an appeal to the Supreme Court but was reversed. With that final decision, the case ended quietly and the fine was finally paid by the Reported Party in 2010;

- Temasek exposed a lesson learned that, with the Competition Law enforcement, companies/foreign investors should increase their awareness that there can be practices prohibited by the Indonesian Antimonopoly Law which were never regulated before;. *Herberth Smith, Emerging Markets, Legal Issues facing multinationals, 2008)- …The Temasek case highlights a fear of the antimonopoly law being applied unfairly, and specifically being used to put pressure on foreign investors……;*

- Law No.5/1999 also exposes some questions not only in the articles of the law but also in regulating exemptions such as in Article 50 for certain conduct, agreements and business actor and Article 51 which applied for State Owned Enterprises, means to include what effectively is known as state action exemption - permitting monopoly if it is stipulated by the law or activities carried out by SOEs or institution formed or appointed by the government;

- Exemptions are not yet clearly defined and as a response to clarify the exemptions (tendency shows that many parties involved in a case try to use exemption as an escape clause) KPPU has issued a number of guidelines to assist public (and the Commission itself) to interpret the law as well as harmonization when enforcing it. Guidelines are critical when public, lawyers, business and the Commission are likely to have different interpretation on the articles of the law. This has sometimes presented arguments in cases when various parties found multple interpretations of the law;

- In some cases the guideline itself was not applied consistently by the Commission – *see Fuel Surcharge Case, dissenting opinion by Commissioner Tri Anggraini due to inconsistent methodology on calculating the fine and damages as stated under Article 47 to impose compensation for damages;*

- Law enforcements (Commission and the Court):

- Law No.5/1999 has certainly introduced a new approach to doing business in Indonesia. The nature of Competition Law and complexity of its contents are two effects that stakeholders must confront. A literal reading of articles of the law shows many rule of reason approaches in the law has shown and created ambiguity in terms of interpretations both by the business as well as the Commission;

- Law No.5/1999 itself posses multiple purposes which have caused confusion in understanding the primary objective of enforcing the law such as: safeguard the interests of the public and to improve national economic efficiency as one of the efforts to improve the people's welfare, ensure the certainty of equal business opportunities for large, medium, and small-scale business actors, To prevent monopolistic practices and unfair business competition and to create effectiveness and efficiency in business activities;

- The introduction of the unique Commission under Indonesian legal system posed another dilemma. Law No.5 stipulated multifunction of the Commission duties – Article 35 (a quiet controversial article which provide the Commission with a broad range of functions). Authorities – Article 36 (receives complaints, investigation, notice, decides and delivering sanctions) – poses multiple jurisdiction over due process of law);

- At the law enforcement dealing with the Court where it plays an important role with response in the appeal and execution of the KPPU verdict. In the early enforcement in 2000, when the appeal to the Commission decisions came to the court, only a few judges had been familiarized with what competition law is all about, and yet, final decisions came from their chambers;

- Judges were sufficiently exposed to the economic aspect of the lawm which in turn may cause some problems. Legal and economic frameworks have different approaches plus understanding competition policy becoming another challenge for the law enforcers. These facts were common to be found in developing countries with its economic transition. *See: Eleanor Fox, Equality, Discrimination and Competition Law: Lessons from and for South Africa and Indonesia, Harvard International Law Journal, Volume 41, 2000, page 579;*

- With all of this irregularities, Law No.5/1999 has been enforced for 10 years with over 160 decisions (unofficial data from KPPU) plus thousands of complaint/reports received by KPPU. Many KPPU decisions were appealed to the District Court and to the Supreme Court but with lack of confirmation on the final execution. After 10 years of enforcement, some questions remain open: Has competition policy and industrial policy become more clear and improved? Has business behavior changed appropriately and become responsive to more competitive market? Has market becoming more competitive? Have consumers enjoyed positive impact of competition thus improve welfare? What kind of progress or development come are we now in?:

- Where are we and what issues are we dealing with now?

- Government always becomes the center of attention when it comes to competition as well industrial policy. After 10 years of enforcement, it has not been easy to change the mindset of the officials to understand how competition works, what market economy and competition are all about and how they work in the Indonesian economy. Often, government became the cause of the problems in their policy. With local autonomy, regional government issued many local regulations which at the end added to artificial barriers. The Commission played important role in terms of providing suggestions and consideration on Government policy related to monopolistic practices and/or business competition, *see Article 35 (e).* However, it turned out that mostly the consultation was not binding and lack of power to enforced;

- In the past 10 years, few SOEs have been under KPPU scrutiny and have been called for consultation because of its policy. Not surprisingly, many of them involved in violation of Article 22 of tender collusion (for example: Pertamina case, when selling vessel was found guilty and Commission imposed maximum fine of penalty including large sum of damages paid to the Government) (this is a Commission initiative case and was not based on any complaints/Reported Party);

- There are several Guidelines have been issued by the Commission which covers: Cartel, Tender, Exemptions for Intellectual Property Rights, Agency, Relevant Market, Cartel, Abuse of Dominant Position, Cross shareholder ownership, Fine Calculation including exemptions which applied to certain business or type of SOEs;. see as well ongoing arguments raised by lawyers referring to procedural law on whether Commission Guidelines should be treated as binding source of law for competition cases. *See Article 35 (g) Commission is allowed to set up guidelines and/or publication related to this law.* Under Indonesian hierarchy source of law, Guidelines are not included as source of the law. Nevertheless, Guidelines have been applied and have gradually gained public trust;

- One of the regulations which has been expected for a long time was Government Regulation as instructed under Article 29 Law No.5/1999 to set up merger and acquisition regulation. KPPU responded earlier and issued its own Commission Regulation No.1/2009. Although it was an unusual scenario, but the Government later issued Government Regulation No.57/2010 with the tendency to follow what the Competition Commission has set up earlier. The enforcement of this regulation has not been tested. The regulation has required institution coordination with stock exchange body, KPPU and or Bank of Indonesia. Inefficiency bureaucracy and legal certainty have been a long grievance exposed by the business, some have complained because the unclear procedure presented numerous regulations one must follow in case of proposing merger and or acquisition;

- The latest enforcement highlights include the 4 cartel cases which involved big industries such as: pharmaceutical, cooking oil, cement and airline fuel surcharge. Cement case was dismissed and 8 cement companies were acquitted. Pharmaceutical, Airline Fuel Surcharge and Palm Oil decision have been reversed at the District Court level and the 3 cases now are pending at the Supreme Court;

- Several interesting issues which are now being debated among scholars, the Commission, the Court and the business. Cartel is considered to be a classic or difficult case to prove since there have been not been any written agreement explicitly found referring to the cartel. With the 3 cases at the court for appeal, evidence (indirect evidence) were critical. In some examination (*amicus curiae*), experts have reminded the Commission that transplanting or adopting foreign approach are acceptable as long as they apply the approach consistently, for example by referring to OECD document, Prosecuting Cartels without Direct Evidence of Agreement, Policy Brief June edition 2007: c*ircumstantial evidence can be difficult to interpret, however. Economic evidence especially can be ambiguous, consistent with either concerted or independent action. The better practice is to consider circumstantial evidence in a case as a whole, giving it cumulative effect, rather than on an item-by-item basis, and to subject economic evidence to careful economic analysis*."*It is important to note that conduct described as facilitating practices is not necessarily unlawful. But where a competition authority has found other circumstantial evidence pointing to the existence of a cartel agreement, the existence of facilitating practices can be an important complement;*

- What has caused reversal reaction to the new approach was because the Commission seemed to enforce inconsistently directions from the OECD documents and merely applied the raw evidence gathered from the facts such as association meetings and or price parallelism. *European Court of Justice had reminded on price parallelism that: "Parallel pricing behaviour in an oligopoly producing homogenous good would not in iself be sufficient evidence of a concerted practice. Thus parallel action explicable in term of barometric price leadership would not be sufficient evidence of concerted practice"*. "The courts have gone on to hold that even obviously interdependent parallel pricing alone does not infer conspiracy absent certain plus factors," or "the additional facts or factors required to be proved as a prerequisite to finding that parallel action amounts to a conspiracy";

- Therefore what has been missing substantially in applying the new approach is that in trying the new approach for cartel case, the Commission has to applied it consistently and should not be adopting the approach partially to the Indonesian context;

- The argument whether indirect evidence should be treated not merely as lead evidence but as evidence per se still hase not yet reached conclusion and is still waiting from the Supreme Court pending decision whether it will becoming a jurisprudence for next cartel case;

- Actually, transplanting or adopting legal substance from different legal system is fairly common for young competition regime enforcement. Previously this has been practiced by the Commission in earlier case, such in Temasek decision, where the Commission adopted and introduced the "single entity doctrine" from European Commission decision and decided on "extraterritorial jurisdiction" of the Indonesian Antimonopoly law enforcement which also covers foreign legal or business entity who are doing business in Indonesia;

- In prosecuting cartel cases, the role of trade association has become another center of attention. Trade association has been a long time partner to the Indonesian government without restriction to its role. Hence, in the 4 cartel cases, the Commission has been severely accused the role of trade association without looking at the existing law and the government role in instructing the trade association to gather information and conduct meetings. The Commission has even included liquidation of the trade/business association as part of its decision considering that its role is pivotal in facilitating the cartel consensus among its members. Trade association could not treated as business player, therefore the Commission was not able to punish them with fine. With no Guidelines available yet on how to regulate trade association behavior, the need of such document now is critical to regulate hundreds of trade association existed in Indonesia;

- The amount of fine that KPPU submitted in its decision law plus consumer loss also became very significant. Some industries extend their concerns over this current approach taken by KPPU. Will the sanction be able to provide sufficient deterrent effect for business? Is this the right way to change the business behavior? Or even have the Commission have been able to calculate the exact consumer loss fairly or are they merely trying to become populist institution?

- Law No.5/1999 and the Commission as the main player in Antimonopoly Law enforcement in Indonesia are now facing its review. With over 80 cases decided and thousands of complaints received all over from Indonesia both in Jakarta and through its regional office, it is not easy to measure the effect of Antimonopoly law to the Indonesian economy and to the consumer welfare as a whole. As a huge country with 220 M population almost every region in Indonesia poses different character in economy activities and ventures;

III. Lesson learnt

- After nearly 11 years of enforcement since 1999, it is certainly not easy to measure the relation between enforcement of Competition Law and the country's economy improvement and how the law especially affected the consumer welfare in Indonesia (refer to objectives of Law No.5/1999). However the Indonesian stakeholders who are greatly affected in couple of areas through enforcement of competition law are:

a. the government: competition and industrial policy;

b. the business: changing of behavior and certainty in doing business;

c. the people/consumers: consumer choices and consumer welfare;

- The effect of Antimonopoly Law in Indonesia has been addressed by foreign scholar such as *Eleanor Fox, Indonesia's Law No.5/1999: "A Substantive Analysis of the Law Against Monopolistic Practices and Unfair Business Competition and of the Place of the Law in World Competition System" paper presented on Seminar Investasi dan Kebijakan Persaingan, 11 January 2002;*

- The market economy required the Indonesian economy to be more competitive and efficient, and this can be achieved and well guarded through competition law and competition policy which supported by consistent enforcement. This is to understand that robust enforcement of Antimonopoly Law in Indonesia should not walk alone only by the Commission but should be in line with the Court's willingness to understand the new cases coming to their bench;

- Over the past 11 years the Commission has constructed significant decisions which are believed to influence Indonesian business behavior. Although there is no evidence yet whether behavior change was due to deterrent effect by KPPU decisions, but the introduction and enforcement of the law has certainly bring some new approach to the business as well as increasing awareness that has changed the pattern of doing business in Indonesia to become more competitive;

- Government may take longer effort to adapt to the new approach in managing the economy with more competitive strategy which can be reflected to the performance of most of the state owned companies – significant removal of monopoly rights and practices in various government business. Nevertheless, significant awareness are growing on the existence of Law No.5/1999;

- The Law No.5/1999 certainly introduced a new era and approach in the Indonesian economy. Although it is not yet possible to prove scientifically, it appears to have changed the approach to business in Indonesia;

- Indonesia still has a long way to go and has participated in learning from different jurisdiction on how to enforce its Antimonopoly law. Joining ICN, continuing socialization, providing advice to government, issuing guidelines are some of the sustainable agenda items for the Commission as the front runner of the enforcement. In the years ahead, the enforcement of Antimonopoly Law should becoming a correct tool to provide consumer welfare as one of the goals/objectives of Law No.5/1999;

- At the moment, the Commissioners are at close to the end of the their term and the selection process for recruiting new Commissioners is in progress;

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