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ROUNDTABLE ON CONCESSIONS

Contribution from the Indonesia

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ROUNDTABLE ON CONCESSIONS

1. Introduction

1. The granting of concession is an important issue in the development of the infrastructure sector. In the perspective of business competition, there are at least two important aspects of the granting of concession. The first aspect is the concession granting process through solicited and competitive bidding, and or unsolicited bidding or direct appointment through negotiation. The second one is the implementation of concession, especially in relation to the limitation and anticipation of potential abuse of monopolistic position caused by such concession.

2. This paper is intended to elaborate on both issues of competition in relation to the granting of concession in Indonesian context.

2. Regulatory System

3. Since the end of 1990s until the reform era, the use of concession concept in the management of economic sectors in Indonesia, especially in public sectors categorised as natural monopoly industry, was very limited. The industrial management pattern in almost all of those economic sectors was implemented by the Government through state enterprises, such as toll road, electricity, telecommunication, seaport and potable water industries.

4. Regulations on the management of concession in each sector may be different from one another. Several sectors, such as potable water and seaport, cannot be fully managed by private parties. However, private parties may be involved in cooperation with state/regional government-owned enterprises, which usually take the form of joint operation. This practice is applied in the management of seaport and potable water industries.

5. In other sectors, however, there are regulations encouraging private companies to obtain full concession for managing public infrastructure through full ownership or joint venture with state owned enterprise. This can be found, for example, in telecommunication and toll road sectors.

6. Prior to the reform era, the planning of various infrastructure developments (including by way of the granting of concessions) was conducted by BAPPENAS, as the development planning authority at the national level. Whereas the approval and allocation process was mostly delegated to the relevant technical ministries. Therefore, despite the coordination at the planning level, the implementation was sectoral in nature. In many cases, the granting of concession was often used as a facility for collusion by certain parties having the access to the authority to obtain concession in those sectors. As the result, concessions could not fully achieve the designated objectives. This was indicated by the poor performance of several sectors which management was delegated to concessionaires.

7. Learning from this condition, several regulations have been revised to promote transparency and accountability in the management of economic activities especially those related to the public sector. This includes the enactment of competition law through Law No. 5 Year 1999. Based on such law, concession granting process must be conducted in an open, transparent and competitive manner. In order to further ensure a more objective and competitive concession granting process, the government issued special Presidential Decree regulating procedures for the government procurement of goods and services. Especially for infrastructure projects (mainly the large-scale ones), the government has also issued Presidential Regulation No. 67 Year 2005 regulating procedures for government cooperation with business entities in the development of infrastructure. In general, the objective of such Presidential Regulation is to

accelerate the development of infrastructure and improve government cooperation with business entities. The Presidential Regulation stipulates the planning of the infrastructure development by a special inter-ministerial committee, scheme and procedures for government partnership with the private sector in the development of infrastructure (through agreement and or license granting scheme) as implementing guidelines for public-private sector partnership projects. The scope of the aforementioned Presidential Regulation includes all infrastructure sectors, namely transportation, roads, irrigation, drinking water, waste water, telecommunications, electricity as well as oil and gas. In the mean time, the regulation of such procedures includes, among other things, partnership, due diligence, risk management, government support, competitive procurement, unsolicited project and tariff adjustment activities. Based on such Presidential Regulation, infrastructure projects will be planned by a special committee (KKPPI = Coordinating Committee for Infrastructure Project Development) the operation of which will be subsequently run by the chairman of the head of the related agency/department. The aforementioned Presidential Regulation also regulates cooperation procedures between the government and business entities, including therein the selection of private sector partner through a transparent and competitive tender/bid. Therefore, although not specifically regulating the granting of concession, upon the establishment of such Presidential Regulation, planning, supervision, construction implementation and infrastructure development functions involving the role of private sector are currently conducted at the central government level through a special committee the membership of which constitutes the representatives of several related departments.

3. Allocation of Concession

8. As explained, prior to the reform era, the process of the granting of concession was mostly in the form of picking the winner, especially through direct negotiation. Meanwhile, a transparent tender/bid process for the granting of concession (in the form of agreement or license approval) was relatively rare. Even if conducted, in general a transparent tender process was limited to large-scale projects and only involve a relatively limited number of companies. In short, the process of the granting of concession prior to the reform era was still far from being the form of competitive, open and transparent tender.

9. Upon the coming into effect of Law No. 5 Year 1999 regarding Prohibition against Monopolistic Practices and Unfair Business Competition, competition law officially comes into effect fully and is cross-sectoral in nature. Accordingly, all stages and procedures for the selection of cooperation with private sector partners (through the granting of concession) must be conducted through a transparent and non-discriminative process. Based on such law, the Commission for the Supervision of Business Competition (KPPU) as a competition supervision authority has two main functions, namely law enforcement towards business actors and the submission of recommendations to the government. Therefore, in the context of the granting of concession to private business entities, the KPPU has a full authority to enforce law upon business actors, if the indication of anticompetitive conduct is found in such concession granting process. The KPPU may also play a role to further ensure a transparent and fair concession granting process through the submission of recommendations to the government, especially with regard to various regulations on the granting of concession that are deemed not in line with the principles of fair business competition.

10. Following the issuance of Presidential Regulation No.67 Year 2005, cooperation between the Government and its private partners, especially for infrastructures projects, must go through a fair, open, transparent and competitive tenders (or auctions for permit/license granting). The form and model of such cooperation must be based on the mutual benefit principle, with responsibility and mutual support among the relevant parties. In general, there are various reform efforts for the above regulation in accordance with the spirit and objective of Law No.5 year 1999 namely creating a healthy business climate for the achievement of national efficiency and guaranteeing the principle of fair and just business opportunities for all business actors.

4. Implementation of Concession

11. Basically, the granting of concession rights although through a competitive bidding process is still defined as delegation of a monopoly right to a certain business actor. Under such condition, regulations are needed for prevention of abuse of monopoly position in the form of excessive pricing and or other anti competitive behaviours that are detrimental to consumers. To anticipate the above, provisions on pricing policy, coverage regulation and minimum service quality standard are needed. Such various regulations can be set forth in a cooperation agreement (as one of the sub clauses) so that the engagement of business actors as the holders of concession rights will be clearer. Supervision on the potential anticompetitive behaviours may also be conducted through mechanism other than agreements such as through formal regulation (such as presidential decree and/or ministerial decree) and also through business competition law. For the context of Indonesia, implementation of general and cross-sectoral competition law enables KPPU as the business competition authority to perform its legal enforcing function on business enactors as the holder of concession rights, if there is indication of competition law violation by the a party¹.

12. In particular, the Presidential Decree No.67 Year 2005 contains provisions which must be included in cooperation agreements between the Government and its private partners. Some points that have the substances of business competition such as determination of tariffs (prices), the right and obligations of the parties (including allocation of risks), service performance standard, sanctions and supervision mechanism on private partners must be stipulated in such agreements. Therefore, the inclusion of those points can serve as a "tool" to anticipate various anticompetitive behaviours especially by private partners as the holders of concession rights.

13. However, special regulations on regulatory and supervisory function have not yet been included in the presidential decree. Hence, regulatory/supervisory function must still be referred to sectoral policies or regulations. For the case of Drinking Water Provision, the regulatory function is performed by BPP SPAM (Regulatory and Supervisory Body for Drinking Water Management System, pursuant to Government Regulation No.16 year 2005 concerning Provision of Drinking Water System). The same is the case for the telecommunication sector where the regulatory function is performed by BRTI (Regulatory Body for Telecommunication, pursuant to Decree of the Minister of Transportation No.31 2003). Therefore, supervision on the implementation of concession right will also be automatically sectoral in nature which will be performed by each regulatory body. Based on the ICN scheme or model concerning the cooperation between sectoral regulatory body and business competition supervision authority, the coverage of the sectoral regulatory body should be in general economic-technical specific to that sector, while the aspect of business competition will fully become the duty and responsibility of the business supervision authority. Hence, the issue of coordination between the regulatory body and business competition supervision authority is an important issue that needs further discussion with respect to the granting of sectoral concession right.

14. Based on the development in the conceded sector, there is a different result between one sector to another. This is greatly dependent on several factors among other things the condition of business environment of the conceded sector, the bidding process and some other factors. In general, the granting process of concession rights and business permits without competitive process have resulted in an imbalanced terms or agreement, especially as it gives more advantages to private partners, for example too broader delegation of authority to the private partner and disproportional allocation of risk (more risk on the government). In some cases, such problem leads to low performance of the conceded sectors.

1. JICT (Jakarta International Container Terminal) case (No.4/KPPU-I/2003): KPPU found that there has been an abuse of monopoly power by the company holding concession right at the seaport sector as a terminal operator. The KPPU decision obtained final legal enforcement (*inkraacht*) by Supreme Court.

Ironically, although the performance is low the government often cannot do much on the matter, considering the nature of the cooperation agreement that does give much room for the government or the public, as a result of unfavourable making process of the agreement. Under such condition, the best option available to the government is making legal adjustment/revision to the cooperation agreement by giving priority on the interest of the public.

15. This is seen for example in the harbour sector, which until today still serves as the source of inefficiency due to its very low performance. The investment of infrastructures is also not realised as promised by the concession holders. The output of concession implementation today is the increasingly high price without relative improvement in services. The same is the case in the drinking water sector. Until today, the performance is far from satisfying. This is reflected for example from the very limited improvement in the leakage restoration in the drinking water industry, which until today reaches almost 49%.

16. Different is the case in the telecommunication sector. The concession granted to a number of business actors to operate in this sector has been utilised by business actors to penetrate the market and to compete with other existing business actors. The condition of this telecommunication sector is different from other sectors, where in this sector monopoly tendency has started to fade in line with the increasingly varied telecommunication facility alternatives. Concession holders in the telecommunication sector (especially for frequency spectrum) have supported increasingly strict competition with existing (incumbent) business actors. The results are very positive, where telephone use teledensity continuously increases, tariff tends to decrease, and quality and service continuously increase.

5. Lessons Learned

17. Learning from the experience of concession process, in order to keep the concession achieving its purposes, it is required some arrangement directing the following:

- Concession should be granted through transparent, competitive and accountable process and is kept away from collusive process.
- Concession agreement must be made specific and clear, using measured indicators so that the reward and punishment measures can be performed properly.
- Concession planning and implementation must minimize the potential misuse of dominant position, inter-competition behaviour, especially by concession-holding companies.
- It is required cooperation and coordination between business competition authorities and sector regulatory bodies, in order to guarantee the achievement of concession granting purposes technically and economically, and to maintain fair business competition climate.