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CONTRIBUTION FROM INDONESIA

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CARTEL AND MERGER CONTROL

by

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Introduction

This paper firstly explains about the short history of Anti Monopoly and Competition Law No. 5/1999 in Indonesia. For Indonesian business community, this is new issue and during the first year the meaning of provision was misunderstood. Competition culture and practice was formally started after parliament approved the law two years ago. It needs a long time for the country to have such competition law because the old regime did not approve any initiatives and draft proposals in the parliament.

During last twenty years, monopoly practices were initiated by the state and government officials in co-operation with the private sectors. There was clear cut between state domain and private domain which made the business climate full of unfair competition, favouritism, and corporatism. It will never been done again at this time after the law is implemented. The Parliament has just approved the law during the President Habibie’s era after the old regime (President Soeharto) collapsed. The law is new but very potential to promote fair competition practice. Before many initiatives had never been accepted because the government involved in many unfair business practices. It had never been made possible until the authoritarian regime collapsed.

The second is explanation about cartel issue in Indonesian Anti Monopoly and Competition Law. The old regime era was full of unfair business practices, corporatism and crony capitalism. Therefore, cartel practice was commonly happened in business association. Such practice can be identified from the symptoms of price increase and fluctuation in certain period. Consumers has to sacrifice by paying higher price than the usual. The present law is an instrument to demolish such cartels.

The third is an explanation about issues and problems in implementation of merger and acquisition control under Anti Monopoly and Fair Competition Law in Indonesia. The law has stated of prohibition merger and acquisition that result in monopoly practice and or unfair business competition. But further implementation of the provision but be supported by the government regulation. The Commission does not implement this article yet because the government regulation is net finalised yet.

Fourth is an identification of possible international co-operation between Indonesian authority and other authorities in the world. At present the law is critically arranged to be match with other competition law in the world. The law has adopted the most common practice and modern instrument to control merger and acquisition so that such conducts do not create monopoly practice and unfair business competition. The eleventh commissioner has been approved by the parliament and assigned by the President in September 2001.

Anti Monopoly and Competition Law in Indonesia

A debate related with promotion of fair business competition has been started almost fifteen years ago. The Indonesian economy was growing fast during last two decades, but the business practice was very unfair. The state involved too much in decision making process as well as in the business level. It mostly created worse climate which make certain business elite around the president could take much more
opportunity in a large number of businesses.

Almost two decades ago, the need of competition law was already recognised and debated in the public. Kwik Kian Gie from the opposition party of Partai Demokrasi Indonesia (now Minister of Development Planning) and other analysts (including author) had discussed publicly about the need to have competition law. In fact, Kwik Kian Gie was as a member of parliament at that time that proposed a draft of Anti Monopoly Law. But the ruling party did not accepted this draft because of group’s interest reason.

The political power was actually not in hand of the parliament but concentrated in the president office. Soeharto was strong man, the regime was authoritarian and controlling all political parties. This initiative was not made possible because it was contradictory with the interests of the regime and its crony.

At that time, the economy was growing fast, but the business practice was unfair. But the state and authoritarian government had practised collusion widely in almost sectors with business actors, implemented crony capitalism and nepotism. The government had clearly promoted unfair business practices because there was no clear cut between the government roles and business roles. Public domain and private domain were mixed and interchanged each other that make business practices were full of collusion.

Therefore, there was no public room to promote anti monopoly and competition law since the government itself was the significant barrier for such initiatives. It was also difficult drafting the law since the regime was too strong and seemed not to support such legal draft.

The Anti Monopoly and Competition Law was possible to be made after the regime collapse (1998). The new government led by the President Habibie was pushed by the public to reform social, political and economic system. He then started to draft this law in the beginning of 1999 which finally approved by the parliament in September 1999.

From this short history about Anti Monopoly and Competition Law, it is clear that fair competition practice is a new thing in Indonesia. There is no significant experiences in this field and the authority is learning by doing. The institution is being built to develop its capacity and instrument. Therefore, the most important target for the government is to socialise this law that bring new culture of fairness in business competition.

Cartel and Merger

Cartel or horizontal price agreement is widely recognised as the most dangerous monopoly practices in business. Price can be designed together to increase in favour of cartel members, but this practice has bad-negative impacts on consumers and public as a whole. Consumers have to sacrifice by paying higher price than the usual in which the price is competitively determined by the market forces. Production can be controlled with their dominant position which in turn determine higher price as expected by the cartel members. By formal and informal decision, cartel members usually allocate quota in productions and sales to match with its price agreement.

The new Anti Monopoly and Competition Law No. 5/1999 in Indonesia also recognises such practice that is very dangerous for the consumers. Cartel is strictly prohibited as stated in articles 11: “Business actor shall be prohibited to make agreement with their business competitors, with the intention of influencing prices by arranging production and or marketing of a good and or service, which could result in the occurrence of monopolistic practices and or unfair business competition.”

Price determination by market forces is a central issue in business competition. Market is recognised as a spontaneous order or system that allows the producers and consumers or sellers and buyers to interact each other which in turn creating an equilibrium of the best price. This creates benefits for those
two parties involved in the interaction, i.e. normal profit gain for the producers and normal utility gain for the consumers.

Competition law is made to maintain such fair competition which gives wide participation for both producers and consumers or buyers and seller. Any conducts and practices that disturb that competition will be identified as anti fair competition. This is also applicable for the Anti Monopoly and Fair Competition Law in Indonesia.

Cartel does not allow market forces to function because cartel members (especially with dominant position) can determine price (usually higher than usual) to get extra or super normal profits. This cartel practice will automatically increase few producers’ profits at the cost of the consumers’ interest.

Main point of this practice is arrangement in quantity of production and marketing together with the systematic intention to influence price for the benefit of cartel participants. As a consequence, the agreement will directly restrict the market competition and will deprive the opposite side of market. The consumers can not choose freely the price that is usually arranged by the market forces in a spontaneous process.

The law (article 11) covers the prohibition of cartel practice in production and sales. But in practice for implementation of the law, the meaning of cartel can be expanded into purchasing activities as long as it influences the price and recognised as misconduct in competition.

The law also states that the cartel members are identified as competitors each other. Therefore, the application of this provision has three elements: (a) the participants must be business actors, (b) they must be in competition with each other, and (c) they must conclude an agreement.

Anti Monopoly and Competition Law No. 5/1999 also prohibits practice of price fixing. Article 5 states that: “Business actors shall be prohibited to make agreements with their business competitors to fix the price of certain good and or services which are to be paid by consumers or customers in the same relevant market (paragraph 1). The provision as referred go in paragraph 1 of this article shall not be applicable to the following: (a) an agreement made in a joint venture; or (b) an agreement based on prevailing laws (paragraph 2).”

This article is clear, prohibiting the practice of horizontal price agreement. Price fixing is usually done together through horizontal price agreement between the competitors. This practice will also create negative impacts on consumers.

As also exist in other anti monopoly law, merger act is also controlled by the Anti Monopoly and Competition Law in Indonesia. This practice potentially increase the dominant position of the company which in turn increase the market structure and potential to have misconduct in fair competition. The law limit the market share up to more than 50 percent of market structure for one company (or one group of company) and 75 percent of market structure for two and more companies (or two and more groups of companies).

Article 29 stated that: “Business actor shall be prohibited to conduct mergers or consolidations of business entities that could result in the occurrence of monopolistic practices and or unfair business competition (paragraph 1). Business actor shall be prohibited to conduct the acquisition of share in other companies if such action may result in the occurrence of monopolistic practices and or unfair business competition (paragraph 2).

The is a legal instrument to control merger and acquisition as stated in the article 28 above. This article is related with merger control in article 11 in which the law also deal with prevention of tendency in corporate concentration. This is intended to make the law more effective not only controlling cartel agreement, but also managing a conduct to hold dominant position in the market.

The law also instructs the government to stipulate more detail government regulation so that merger and acquisition control can be made. However, until now the government as well as the
Commission (Commission for Business Competition) has never finalise such regulation. Therefore, the Commission does not implemented this article yet.

“Further provision regarding the prohibition of mergers or consolidation of business entities as referred to in paragraph 2 and provision concerning the acquisition of shares in other companies as referred to in paragraph 2 shall be stipulated in a government regulation (article 29, paragraph 3).”

International Co-operation

Competition culture and practice in Indonesia is very new since the law was just approved by the parliament two years ago. Approval of the law by the Parliament was only last September 1999, but was not directly implemented as the legal foundation of business competition. The government gave 18 months for adjustment given to business sectors.

It means that adjustment period took one and half years after approval. The law has just started to be effective since March 2001. This also means that the Commission can implement this provision to control structure and conduct business sector only less than one year.

The Commission is currently focusing on institutional development to strengthen the organisation and its supporting system. Procedure and system are being developed to process cases. The Commission is focusing its works on socialisation, at the same time the cases are also being handled as ordered by the law. However, the supporting government regulation as stipulated by the law to control merger and acquisition is not finished yet.

So far, the Commission has finished two cases, i.e. collusion or unfair bidding practice in Caltex Pacific Indonesia and one case of modern retail business that was reported depriving the small traditional retailers. These two cases had been finalised in 2001, about one year after the commission started to function. At present, the commission received at least 40 cases and handle at least nine of them.

For the two first cases, the Commission has given a penalty to the bidders involved in that bidding collusion by cancelling the decision of the winner. Procurement for steel pipe had to be stopped and bidding must be processed again based on the points decided by the commission.

For the second case, the Commission recommended to limit the expansion of modern retail market directly in front of or near traditional markets. The Commission also provided recommendation to the local government to arrange city planning that give an opportunity to the small and informal traditional retail to survive. The informal sector is a significant part of the economic system and a real social phenomena in the cities that create a large number of employment.

That was actually the very short experiences of the commission in implementing the Anti Monopoly and Competition Law in Indonesia. It is therefore difficult to answer further experiences of international co-operation in cartel and or merger cases. Indonesian Commission for Anti Monopoly and Competition Law has no experience yet in seeking and or obtaining co-operation since it has just started. However, the chances to have co-operation is widely opened since many countries in the world has implemented anti monopoly law, competition law, cartel law, etc.

This paper can not evaluate any successes and failures of the Commission in seeking or obtaining co-operation with other international authorities since there is no real experience in such co-operation. The experience is too short and Indonesia has just started to implement this anti monopoly and competition law. However, there is already legal foundation to have co-operation with other countries since Indonesia opening the economy as well as implementing democratisation in economic fields and other fields.

In the future we expect to have a real co-operation with other authority in competition field because the law has also give a chance to handle cases or investigation together. Cases which involve
other parties in foreign countries can be investigated by the Commission. Such cases need a formal co-operation with other authority in foreign countries. “Business actor shall be prohibited to make agreement with other party abroad that contain provision that could result in the occurrence of monopolistic practices and or unfair business competition (article 16).”

If other countries request to have co-operation in cartel and merger control, the Commission is ready and very open to work together. In term of cartel issue, the Commission is handling cases related with the report from the public about cartel cases in a doc (day old chicks) business, production and marketing. Legal instrument as well as investigator are almost ready to joint together in special case, like cartel practice.

**Conclusion**

The law of Anti Monopoly and Competition No. 5/1999 is new. The road to promote fair competition practice had taken a long time that never been possible during the era of the old authoritarian regime. It had been made possible to be drafted, discussed and approved by the parliament after the authoritarian regime collapsed. The old regime was full of unfair business practices, corporatism and crony capitalism. Therefore, cartel practice was commonly happened in business association. The law has also stated of prohibition merger and acquisition that result in monopoly practice and or unfair business competition. But the Commission does not implement this article yet because the government regulation that support this article is not finalised yet.

Finally, it is possible now for international co-operation between Indonesian authority and other authorities in the world since Indonesia has also a modern legal instrument to control cartel and merger. The law and the commissioner has been approved by the parliament and assigned by the President in September 2001. The 11 members are active to take their roles in controlling cartel and merger practices.
ANSWER OF ANNEX A

QUESTIONNAIRE TO INVITEES ON INTERNATIONAL CO-OPERATION IN CARTEL AND MERGER INVESTIGATIONS

1. No formal cooperation agreement between KPPU Republic of Indonesia and any foreign country or competition agency relating to competition investigations or cases.

2. The Law of Republic of Indonesia Number 5 of 1999 Concerning The Prohibition of Monopolistic Practices and Unfair Business Competition, part ten, article number 16 as follow:

   Part Ten
   Agreement with Foreign Parties

   Article 16

   Business actor shall be prohibited to make agreements with other party abroad that contain provisions that could result in the occurrence of monopolistic practices and/or unfair business competition.

Cartels

3. KPPU until now do not issue any requests to a foreign competition agency for information or assistance in an investigation or case involving a hard-core cartel.

4. –

5. No requests from a foreign competition agency so far received by KPPU.

6. –

7. We have one case on cartel on tariff by airways association in Indonesia (INACA). Information of flight costs structure of supplies and services provided abroad (e.g. aircraft rentals, maintenance fees etc.) would be useful to judge the conduct of this cartel.

Mergers

8. No merger is reviewed by KPPU up till now.

9. –

10. –

11. –
ANSWERS OF ANNEX B

1. We have received technical assistances from World Bank, Bundeskartelarm (GTZ project, Rep. of Germany), ELLIPS (USAID) and Japan FTC (JICA Projects). The assistances including advisory, staff training, studies, training of related external bodies, conferences or seminars on competition and dissemination of Indonesia competition policies and many others.

2. The most useful topics for Indonesia are competition policies in relation with Indonesia competition’s laws and investigation techniques of competition cases. In this early stage, no topics are not useful or least useful for KPPU.
   - The most useful assistances are continues advisory and training, series of seminars/conferences and design and publish of publication materials. These kinds of assistances strengthen KPPU and related bodies capabilities on facing competition cases.
   - Regional events give a broader viewpoint of every topics being covered. In the borderless world, we will knowledge the competition cases interrelating among the regional countries.
   - Besides knowledge of competition law and policy, KPPU requires investigative report and analysis skill, information system knowledge and supports. From our opinion, the rank should be:
     - Detail knowledge of our actual legal, institutional and economic systems.
     - Experience working in a competition authority
     - Knowledge of competition law and policy systems in different parts of the world
     - Experience in providing assistance to transition or developing economies.
   - Yes, the answer depends on the topic being covered. In many occasion, local consultants give more clear assistances than foreigners do.
   - Most of the assistances we received are one-off events (almost 90 percent).
   - Approximately 50 –50.

3. The lack of coordination has happened once or twice. It happened when person in execution not in favor of or refuse to comply the agreed schedule or activities.

4. Our economy’s greatest need in terms of competition law and policy assistance is implementing a competition law against abuses of dominance by unnatural monopolies and tender conspiracy or cartels.
   Establishing procedures and guidelines, training staff, regular advisory, information/data base management system, are the most valuable assistance for KPPU.

5. Our comment:
   - Institutional development is one of our concerns in the near future. KPPU has an obligation to confirm its contribution in Indonesia economic recovery. Supports from foreign competition agencies are surely required.