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COMPETITION ISSUES IN LINER SHIPPING

-- Indonesia --

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More documents related to this discussion can be found at: <http://www.oecd.org/daf/competition/competition-issues-in-liner-shipping.htm>

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-- Indonesia --

1. Liner shipping and concentration of liner shipping industry market in Indonesia

1. With globalization, liner shipping has significantly affected container port development strategies in Indonesia. As the world largest archipelagic country with more than 17,000 islands, the existence of sea transportation plays a more important role as the engine of growth, trade, and development. Ports in Indonesia currently are regulated by virtue of Law Number 17 Year 2008 regarding Shipping (hereinafter referred to as Law Number 17 Year 2008) and Government Regulation Number 61 Year 2009 regarding Harbor Affairs.

2. In accordance with the Indonesian harbor affairs order, at the moment the management of harbor affairs is divided into 4 (four) regions as managed by PT. Pelabuhan Indonesia (hereinafter referred to as PT. Pelindo) I – IV. The main ports are among other things the Port of Tanjung Priok (Jakarta), the Port of Tanjung Perak (Surabaya), the Port of Belawan (Medan), and the Port of Soekarno Hatta (Makassar).

3. The administration of harbor affairs services implemented by PT. Pelindo is based on the mandate of the government given to PT. Pelindo as a State-Owned Enterprise by virtue of Article 26 of Law No. 21 Year 1992 regarding Shipping which reads “The administration of commercial ports shall be conducted by the government and the implementation thereof may be delegated to State-Owned Enterprises,” in conjunction with Article 13 paragraph (6) of Government Regulation No. 69 Year 2001 regarding Harbor Affairs mentioning the types of provision of harbor affairs services by such State-Owned Enterprises.

4. Consequently, State-Owned Enterprises, in this regard PT. Pelindo financially has the duty and role as operator of harbor affairs provision needed to support uninterrupted process of flow of goods for national and international trade. However, in its practice, these right and role are also distributed to the public or the private sector in the shape of cooperation of operation on various service chains being their management right. Some of this outsourcing pattern is separate from the holding as terminal operator practice at Tanjung Perak, some in the shape of privatization (joint venture) such as PT. TPS, PT. JICT, and PT. BJTI with status as subsidiaries of PT. Pelindo.

5. The Port of Tanjung Priok is the largest port in the western part of Java wherein the demand for cargoes is the largest in Indonesia. However, the capacity of the port is limited physically. For example the capacity of the terminal is estimated 3,000,000 TEUs per year. Most of exports and imports move through the Indonesian seas delivered through the Port of Singapore especially cargoes coming from North Sumatra. As previously recorded, most of the trade through seas from/to Indonesia is in the form of/to Asian countries, Intra Asia services still dominate and play a more important role in the management of liner shipping networks. Asian European liner shipping services (namely MISC, Hapag, and P & O Nedlloyd) use the Port of Tanjung Priok directly. However, the Transpacific services still use the Port of Singapore as a hub port and are distributed by the feeding services to the Indonesian ports.¹

6. There are five dominant operators for container traffic at the Port of Tanjung Priok, namely PT. Pelindo II of Tanjung Priok Branch, PT. Jakarta International Container Terminal (JICT), PT. Multi Terminal Indonesia (MTI), PT. Terminal Petikemas Koja, and PT. Graha Segara, all of which are the subsidiaries of PT. PELINDO II with various share composition variants. Based on the aspect of type of services, JICT focuses on serving international container traffic (both exports and imports to and from Tanjung Priok), while Koja is much more dominated by domestic container traffic as compared to international traffic.

7. In the meantime, MTI and Tanjung Priok Branch, other than being orientated to domestic market, they relatively also serve containerization services of other cargoes such as general cargo, dry-bulk, and liquid-bulk. Meanwhile, there are three dominant operators for container traffic at the Port of Tanjung Perak region, namely PT. Pelindo II of Tanjung Perak Branch, PT. Terminal Petikemas Surabaya (TPS), and PT. Berlian Jasa Terminal Indonesia (BJTI). The three companies constitute branches and subsidiaries of PT. PELINDO III with various share variants.

8. Based on the aspect of type of services, like JICT in Jakarta, TPS focuses on serving international container traffic (both exports and imports to and from Tanjung Priok), while the container traffic served by BJTI is much more dominated by domestic container traffic as compared to international traffic. In the meantime, Jamrud and Mirah at Tanjung Perak Branches undergo similar empirical condition like those in Tanjung Priok such as MTI and Graha Segara, other than being orientated to domestic market, they relatively also serve containerization services of other cargoes such as general cargo, dry-bulk, and liquid-bulk.

9. In general, container traffic in Makassar more dominantly is at Makassar Container Terminal area with a portion of approximately 68% and is followed by the Makassar Branch Port with the remaining portion of 32%. In terms of its pattern, like Tanjung Priok and Tanjung Perak, it seems that Makassar also has a systematic market arrangement system between international cargo and national or domestic cargo. International container in Makassar is handled by Terminal Petikemas Makassar (TPM), while domestic container traffic is handled by container terminal owned by the Makassar Branch Terminal.²

2. Supervision of Business Competition and Challenges in Line Shipping Industry

10. Shipping lines have other activities such as cargo or transportation terminal. Ports also have to do with land transportation so as to reach end users. There are 4 types of business competition among port business actors:

1. Among port service providers;
2. Obtaining consumers;
3. Competition among different terminals.
(there can be several terminals in 1 port).

11. There are several competition models in managing competition among other things inter-port competition model, intra-port model, and intra-terminal model. Port basically constitutes a natural monopoly industry. This characteristic arises because the number of ports basically is very limited, even one is enough for a certain hinterland. In addition to the above, harbor affairs industry is a capital-intensive industry, since infrastructure investment needed is so huge. Article 51 of Law Number 5 Year 1999 regarding Prohibition of Monopolistic Practices and Unfair Business Competition (hereinafter referred to as Business Competition Law) regulates that monopoly and or concentration of activities relating to production and or marketing of goods and or services that control the necessities of life of many people as well as production branches that are important to the state shall be provided for in a law and shall be administered by State-Owned Enterprises and or entities or institutions established or designated by the government shall be exempted by this Law. However, in its reality, businesses of State-Owned Enterprises are also supervised if relating to pricing, tender, and other businesses done by business actors as provided for in Articles 5 and 11 of Business Competition Law.

12. Commission for the Supervision of Business Competition (an institution that was provided with authority through Law Number 5 Year 1999 to supervise business competition in Indonesia, hereinafter referred to as KPPU) once pre-investigated an alleged unfair business competition in setting the terminal handling charge (THC) at the port. KPPU alleged that there was an unfair game among THC managing companies so that the THC in Indonesia is categorized as the highest in Asia. KPPU also established a special team to pre-investigate whether there was a violation or not being committed by THC managing companies. KPPU alleged there was a conspiracy and had obtained a preliminary indication of the existence of agreement among the companies. However, unfortunately KPPU had yet to manage to obtain written documents of such agreement. This constitutes a proof to corroborate the evidence that a cartel practice has taken place in setting the THC. This point is regulated in Articles 5 and 11 of Business Competition Law that read as follows:

Article 5

(1) "Business actors shall be prohibited from drawing up an agreement with business actors being their competitors to set the price of certain goods and or services that must be paid by consumers or customers in the same relevant market.

(2) Provisions as intended in paragraph (1) shall not be applicable to:

a. An agreement that is drawn up in a joint venture;

b. An agreement that is based on the applicable law.

Article 11

"Business actors shall be prohibited from drawing up an agreement with business actors being their competitors intended to influence the price by arranging production and or marketing of certain goods and or services that may result in monopolistic practices and or unfair business competition."

13. A very high tariff has adequately indicated that there is a cartel in the form of pricing. Business actors in setting the price should have adequately referred to the basic tariff set by the government by virtue of Regulation of the Ministry of Transport Number 302/3/18-PHB regarding the Implementation of THC, CHC, and Surcharge at Ports. This is enough to serve as a reference for business actors in setting the THC.

14. Difficulty in the substantiation of the existence of pricing has been caused by the necessity for the availability of written evidence in accordance with regulation regarding valid evidence in Indonesia. The substantiation of cartel still has the nature of rule of reason. In the meantime, cartel cooperation itself can be conducted in two forms, namely explicit agreement or collusion and implicit collusion. Implicit collusion agreement is difficult to substantiate. KPPU itself was not provided with the authority to coerce or search business actors. Consequently, challenge in substantiating a cartel will be difficult.

15. Another challenge in the supervision of liner shipping industry is government regulation itself that exactly causes unfair business competition. The engagement of PT. Pelindo in the development of Indonesian harbor affairs as a result of provisions of laws and regulations that all commercial ports existing in Indonesia other than those managed by the Government, the management thereof must be under PT. Pelindo or must be managed by Indonesian Legal Entities cooperating with PT. Pelindo. This rule totally closes port management model that does not engage PT. Pelindo. Opportunity for the occurrence of violation of Competition Law is so huge among other things with regard to various regulations concerning container terminals for ocean going destinations. This takes place so easily because the ownership of all operator terminals is in the hand of PT. Pelindo II. Some abuses in detail arise among other things in the form of:

- *Price cartel.* Based on the ownership of shares in all companies that operate container terminals at Tanjung Priok, price arrangement is so easy to take place. It is very likely that a competitive tariff does not take place. If it does, the nature is pseudo and not significant considering that all will eventually become the performance of PT. Pelindo II.
- *Market regulation.* It is very likely that business actors will regulate market to their heart's content, considering that consumers do not have other options when mooring at the Port of Tanjung Priok.

3. Conclusions

16. There are still a lot of challenges facing the liner shipping industry sector in Indonesia, such as service improvement, tariff reform, and improvement of related port sectors. This industry also needs to be overseen since it is prone to business activities aimed at harming consumers. Even though there is still a challenge in terms of oversight, but KPPU keeps on trying to develop. One of the things it does is intense advocacy and dialogs with judges, other law enforcers in business competition law (such as public prosecutors and the police) as well as related authorities. Amendment to business competition law has been at legislative level to strengthen the authority of the Commission for the Supervision of Business Competition (KPPU) in obtaining evidence in any violation whatsoever, including by liner shipping companies.