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HEARING ON OLIGOPOLY MARKETS

-- Note by Indonesia --

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More documents related to this discussion can be found at www.oecd.org/daf/competition/oligopoly-markets.htm.

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INDONESIA

1. Oligopoly in Indonesia's Competition Law

1. Indonesia is a country of which apply Continental European legal system as its main proceeding. This legal system defines by its unique and codified provisions, which systematically elaborate by the Judge belief. The legal system causes all provision related to oligopoly in the competition law (Law No. 5/1999) applies rule of reason approach. It means that under rule of reason, a fact finder must consider circumstances surrounding the case to define whether an infringement or activity sufficiently limit competition, and thus, prosecuting party shall provide the impact of such infringement, or actual loss on competition, and not limited to whether such violation is unjustly executed or against the law.

2. Oligopoly rules by article 4 of the competition law. It says that,

“Enterprise is prohibited to create agreement with other enterprise to jointly control the production and or marketing of goods and or services, which will cause monopoly practice and or unfair business competition (Article 4.1)”

3. Moreover, the following article (4.2) says that,

“Enterprise can be suspected or considered having jointly control the production and or marketing of goods and or services, when two or three enterprises or group of enterprise control over 75% market share of a certain type of good or service”

4. Therefore, the scope of prohibited agreement by Article 4 consist of joint agreements that between enterprises. Moreover, an agreement as Article 1.7 is an activity by one or more enterprises to engage with one or more other enterprises with any name, neither written nor unwritten. However, not all agreement contains a deal of controlling production and or marketing of goods and or services can be resulted on the ability of enterprises to control price and supply or quality level, to obtain supernormal profits. An agreement with such ability is those having a collective dominant position. Thus, to prove the existence of oligopolistic practice, which may result to unfair business competition, one must meet two requirements. First is necessary condition, where two or three enterprises or group of enterprise control over 75% market share. Second is sufficient condition, where the activity should result on monopoly practice or unfair business competition.

5. Forms of joint activity or agreement in controlling production and or marketing of good and or service which fall under Article 4 are (i) price fixing agreement, (ii) production/distribution restrictive agreement, (iii) market allocation agreement, and (iv) barrier to entry. In detail, articles related to oligopoly consist of price fixing (Article 5), price discrimination (Article 6), unreasonable low (market) price (Article 7), market allocation (Article 9), trust (Article 12), cartel/price control (Article 11), market power (Article 19), dominant position (Article 25), and interlocking directorate (Article 26).

2. Oligopolistic Industries in Indonesia

6. Indonesian industrial structure is very concentrated and leads to oligopolistic market. Industrial associations tend to promote such concentrated market and damage the industry itself. In some cartel cases, cartel was facilitated by association, for instance, car tire cartel decided by KPPU in early 2015, was facilitated by an association of tire manufacturers. Business association, in fact, has many positive benefits, especially in assessing challenges, opportunities, and ethics in business development. These tasks should not breach any applicable regulation. In addition to the existence of business association, the oligopolistic market also forms by high economic barriers surrounding the industry. It may come from high set-up (sunk) cost or regulatory cost.

7. Telecommunication is known as one of the capital-intensive industries. Cellular industry has been experiencing robust growth in Indonesia for the last 15 years. Number of subscribers is increasing for years. With 230 million inhabitants, Indonesian penetration for cellular phone reach 91.7%, a bit lower compare to Singapore who obtains maximum 100% teledensity. However, in-term of number subscriber, Indonesia recorded as country with the fourth highest subscribers in Asia, following South Korea, China, and Japan.

8. Indonesian cellular market is dominated by three large operators, namely Telkomsel, Indosat, and Excelcomindo. Telkomsel has the highest market share, with more than 50% share, and reach more than 95% Indonesian population. Telkomsel also has formal cooperation with 15 countries including, Singapore, Malaysia, Taiwan, Australia, Germany, France, Italia, Greek, Japan, and Swedish¹.

9. There are three reasons why telecommunication is best set oligopolistic. The first reason is economic scale and service coverage. It means that to invest in this industry, one has put their high investment in facility, while they have to sell their product/service around the price offered by the incumbent. The second reason is the high fixed and sunk cost. Start-up cost is expensive, and the investor may suffer due to the initial cost. The third reason is the provision on essential facilities. This is important when a new entrant have to lease the existing network (by interconnection) to support their activities.

3. Proving Coordinated Conduct in the Decision and Remedy on Oligopoly

10. When proving oligopoly, one should mind that not all agreement contain a deal to control production and or marketing of good/service which affect its ability to assess the market power for a supernormal profit. This kind of agreement will effective when enterprises in an oligopolistic market form a collective dominance. Thus, the most avoided agreement is an agreement that involves two or three enterprises or group of enterprise with collective dominance of 75%. The enterprises should be a competitor in the same market thereof. This puts a condition of which, defining the two or three enterprises or group of enterprise are competitors, is the crucial element of prove. The other element is to seek whether this agreement aims at controlling production and or marketing of good/service that lead to unfair competition. Since it is a rule of reason article, assessing the impact of such agreement is also an important burden of prove.

11. To have clearer picture of how KPPU proves the coordinate conduct by the oligopolist, below are some of the examples.

¹ <http://www.datacon.co.id/Telekomunikasi-2011Industri.html>

3.1 Case No. 16/KPPU-L/2007 on Cellular Operators (Text Message Service' Cartel)

12. KPPU conducted an examination on nine cellular operators in Indonesia for fixing price of the off-net text message (between operators) from 2004 to 1 April 2008. The nine operators were PT Excelkomindo Pratama,Tbk , PT Telekomunikasi Selular, PT Indosat,Tbk , PT Telkom,Tbk , PT Hutchison CP Telecommunication, PT Bakrie Telecom, PT Mobile-8 Telecom,Tbk , PT Smart Telecom, dan PT Natrindo Telepon Seluler. During 2004-2007, mobile telecommunication industry embraced by new entrances, but market price for off-net text message is remained at IDR 250-350/text. During such period, KPPU found some price fixing clauses on text message in an interconnection cooperation agreement between operators (below) to not being applied a price lower than IDR 250.

Price Fixing Clauses on Text Message in the Interconnection Cooperation Agreement

Operator	XL	Telkomsel	Indosat	Telkom	Hutchison	Bakrie	Mobile-8	Smart	NTS	STI
XL	-	-	-	-	√ (2005)	√ (2004)	√ (2003)	√ (2006)	√ (2001)	-
Telkomsel	-	-	-	√ (2002)	-	√ (2004)	-	√ (2007)	√ (2001)	-
Indosat	-	-	-	-	-	-	-	-	-	-
Telkom	-	√ (2002)	-	-	-	-	-	-	-	-
Hutchison	√ (2005)	-	-	-	-	-	-	-	-	-
Bakrie	√ (2004)	√ (2004)	-	-	-	-	-	-	-	-
Mobile-8	√ (2003)	-	-	-	-	-	-	-	-	-
Smart	√ (2006)	√ (2007)	-	-	-	-	-	-	-	-
NTS	√ (2001)	√ (2001)	-	-	-	-	-	-	-	-
STI	-	-	-	-	-	-	-	-	-	-

13. KPPU was then able to identified losses by consumer as an effect of such agreement. It calculated from comparison of cartel prices and competitive price for text message. It estimated that, the base price for the text message was IDR 70-100/text, and consumer loss for off-net text message can be accounted for IDR 2.8 trillion. The contribution of each operator is as follow.

Consumer Loss Based on Portion of Operator's Market Share (in Billion rupiah)

Tahun	Telkomsel	XL	M-8	Telkom	Bakrie	SMART	TOTAL
2004	311,8	53,4	2,6	12,2	5,8		385,8
2005	446,3	62,4	10,2	30,6	7,8		557,4
2006	615,5	93,7	15,9	59,3	17,5		801,9
2007	819,4	136,4	23,6	71,2	31,8	0,1	1.082,5
Total	2.193,1	346,0	52,3	173,3	62,9	0,1	2.827,7

14. Therefore based on applicable facts, KPPU decided that PT Excelkomindo Pratama, Tbk., PT Telekomunikasi Selular, PT Telekomunikasi Indonesia, Tbk., PT Bakrie Telecom, PT Mobile-8 Telecom, Tbk., and PT Smart Telecom were proved to breach Article 5 of the competition law and imposed administrative fine of IDR 25 billion to XL and Telkomsel, IDR 18 billion to Telkom, IDR 5 billion to Mobile-8, and IDR 4 billion to Bakrie Telecom.

3.2 *Case No. 07/KPPU-L/2007 on Temasek (Interlocking Directorate Case)*

15. This is a case on interlocking directorate done by Temasek Group, where its affiliation, Telkomsel, may perform barrier through interconnection, price leadership, and excessive pricing due to their cross-ownership with Temasek Group on Telkomsel and Indosat. Telkomsel was a market leader in Indonesian cellular market back in 2006 with equivalent share of 55.6%, while Indosat owned 26.28% share. It means that both enterprises jointly control more than 80% share of Indonesian market.

16. This ownership applied network development policy in Indosat, by limiting its ability to compete through reduction of base transceiver station (BTS) development that served as the backbone of cellular industry. By limiting the ability of Indosat, Telkomsel able to gain its tremendous market share. Documents showed that the relative price change of Indosat and XL, did not budged the price of Telkomsel. However it was worked on the opposite. Price changes by Telkomsel were followed by the both, which indicated that Telkomsel has the ultimate market power in affecting the price of text message. Thus, higher benefit is reflected by its earnings (before interest, tax, depreciation, and amortization).

17. To prove the consumer loss on this case, KPPU put several methods like price comparison with other jurisdictions, price to interconnection ratio, expert assessment, and financial ratio analysis (specifically on return on equity and return on capital employed).

4. Challenges

18. From both figures, we can highlight several challenges in dealing with oligopolistic cases. The first challenge is the difficulty in obtaining information on market share, and statistic on production, distribution, and earnings of each enterprise. This is may result from weak database by the government and authority of KPPU in obtaining such information.

19. In dealing with oligopoly, KPPU has to rely on circumstantial evidences to prove the impact of such agreement on the related market, notwithstanding that most of Judges was less aware of the economic evidences. It did put massive blow to our litigation, since almost half of the objection annulled by the court. Workshop for judges was the only way for KPPU to introduce newer approaches in competition law enforcement to the judiciary. It is expected that all judges in more than 400 regions can recognize the way of competition law proceeding.

20. In cartel cases, since Article 5 (on price fixing) is per se, while Article 9 (market allocation) and Article 11 (cartel) are rule of reasons, even-tough KPPU is able to find the agreement, we still have to prove the impact of such agreement to the relevant market. At this point, the use of economic evidence in proving the violation is necessary.

21. Another issue is the threshold for oligopoly. The law put 75% market share threshold by two or three enterprises as oligopoly. In practice, it is not easy to prove the, since not too many sectors in Indonesia were controlled solely by two or three enterprises.

5. Remedies in Oligopoly

22. There are no specific remedies dedicated to the oligopolist. The remedies commonly use provision by Article 47 of the competition law. It consists of directive, structural, and punitive remedies as follows:

- cancellation of an agreement;
- order to stop the restrictive activities;
- order to stop the abuse of dominant position;
- cancellation of merger and acquisition;
- damage payment; and
- administrative fine from IDR 1 billion to IDR 25 billion.
- Such remedies applied mostly by KPPU on any violation by the oligopolist.

6. Conclusion

23. There are still challenges in dealing with oligopoly in Indonesia, but the way of triumph over it is keep progressing. One of which is intense advocacy and dialogue with the Judges and other law enforcer in competition law (like public prosecutor and police). The amendment of competition law undergoes at the legislative level to improve the authority of competition commission (KPPU) in obtaining hard evidences in any infringement, including by the oligopolist.