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KOMPETISIA
Newsletter on Indonesian
competition law and policy

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Foreword

Experiences showed bid-rigging in public procurement as the major case faced by competition authority nor other judicative institutions in Indonesia, such as the prosecutor office and the anti corruption commission. This confirms that collusion and corruption still occurs notwithstanding that there are numerous regulations and institutions that oversee it. As the years in competition law enforcement in Indonesia flows, collusion in major cities is reduced, although still can be originate massively in the regional level. The condition is showed by decisions stipulated by KPPU in this month which involved bid-rigging in the rural areas, namely Bengkulu, Tegal, Sanggau, and Batam. This will bring its own challenge to the competition agency, especially for Indonesia which consists of more than 13,000 islands, in internalizing sound of fair competition value in all economic aspects. Please enjoy it!

Workshop for District Court Judges in Bengkulu

In order to create harmonization amongst competition law enforcer, KPPU has initiated a workshop for district court judges in Bengkulu on 23-24 July 2008. The workshop, which established within cooperation between KPPU and Indonesian Supreme Court, was participated by most of district court and higher court judges of Bengkulu and its surrounding. Presented at the workshop is KPPU's Commissioner (Dr. Anna Maria Tri Anggraini), Supreme Court Judge (Dr. Susanti Adi Nugroho), and Indonesian competition law expert (Dr. Andi Fahmi Lubis). During the workshop, KPPU described the establishment of Indonesian competition law and its scope as well as several cases handled by KPPU, continued with an explanation by the Supreme Court on objection process of KPPU's decision. Dr. Andi Fahmi Lubis was concentrated on the economic of competition law. This workshop was part of series of workshop by KPPU for the judges in order to share knowledge to create better implementation of Indonesian competition law.

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Road Construction Work in Cilacap was not Proved to Violated Competition Law

Five construction companies was not proved to breached Article 22 of Indonesian competition law by colluding to fix a winner in the road construction work procurement in Cilacap. The companies are namely PT Melista Karya, PT Mulia Karya, PT Adhya Bumi Graha Niaga, PT Bangun Cipta Kontraktor, and PT Karya Bisa.

In the decision stipulated in 3 July 2008, KPPU's Commission Council found several evidences to conclude the collusion as follows:

1. there is marital relationship between PT Melista Karya and PT Mulia Karya, but can not be defines as a cross ownership due to different management they had;
2. the similarity in documents was based on Presidential Decree on Public Procurement;
3. format on cost analysis used in formulating bid offer was based on available format received from Ministry of Public Works which transformed into a guidance by the region;
4. there were no facts that showed long-term leasing agreement between PT Adhya Bumi Graha Niaga, PT Bangun Cipta Kontraktor, and PT Karya Bisa with PT Mulia Karya that be considered as form of cooperation in determining PT Melista Karya as the bid winner.

Based on these conclusions, the Commission Council decided that the alleged parties was not proved to violate the Law No. 5/1999.

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Bid-rigging in Power Plant

...the similarity of bid document (format and arrangement) as one of the evidence to this horizontal collusion...

KPPU found eleven of thirteen business actors guilty in bid-rigging in procurement and installment of O2 Analyzer System, O2, CO2/O2 and Opacity Measurement in Belawan Power Plant, North Sumatera (subsidiary of Indonesian Power Plant). Other business actors did not found guilty in breaching the competition law.

In accordance to series of examination by KPPU, Commission Council found the similarity of bid document (format and arrangement) as one of the evidence to this horizontal collusion. Notwithstanding that KPPU also found an interlocking directorate or cross ownership by certain alleged party in several (five) bid participants. This was valued to affect the result of entire bid process in the procurement, because it was impossible for a person that has ownership in several companies that did not aware of the operational activities of each companies. This indication was proved by the same margin amongst their bid offer (prices), which is Rp 2,145,277.20. Furthermore, bid committee's ignorant in reviewing at the bid documents was not a misfortune.

Therefore based on those facts, KPPU's Commission Council (in July 31, 2008) decided that the alleged parties was guilty for bid rigging and banned these alleged parties to enter other procurement in Indonesian Power Plant and its subsidiary for one year, effective since its jurisprudence.

Bid-rigging in Procurement of Building's Extension

...false competition by the alleged parties can be categorized as an action to influence the bid process...

KPPU found several business actors to conduct a bid rigging in the procurement of building's extension for Tax Office in Batam. KPPU recorded three alleged parties in this case, namely PT. Uniteknindo Inti Sarana, PT Tunggal Jaya Santika, and the Bid Committee. The Bid Committee was found not involved in the collusion.

Based on report submitted by a business actor and the examination process, KPPU found that activity by PT. Uniteknindo Inti Sarana and PT. Tunggal Jaya Santika in submitting their work in preparing bid offer document to the same third party was categorized as an intention to create false competition and unfair practices. Although there were no evidence on direct interaction to fix the price offer between two alleged parties to win certain business actor, the activity still can affect the objectivity of bid result. Therefore, KPPU's Commission Council viewed that the false competition by the alleged parties can be categorized as an action to influence the bid process and indirectly create a horizontal collusion.

Based on these facts, KPPU's Commission Council (in 31 July 2008) decided that the alleged parties was guilty for breached Article 22 on Bid Rigging, and therefore, obliged them to pay fine with amount of Rp 25,000,000 and banned them to enter other procurement in Batam City for one year. Moreover, KPPU also advised the Head of Batam Tax Office to impose an administrative sanction to its Bid Committee.

Bid-rigging in the Procurement of Construction and Maintenance of Sanggau Highway

KPPU, in 17 July 2008, decided several alleged parties to breached Article 22 on Bid Rigging in the procurement of construction and maintenance of Sanggau Highway in West Kalimantan. This procurement was organized by Public Work Office in Sanggau (West Kalimantan).

Based on its examination, KPPU's Commission Council concluded that:

1. the Bid Committee strictly passed the alleged party (PT. Rajawali Sakti Kalbar) as the bid winner of Tayan Beliau's package, even though its shares is owned by the same person who owned PT. Mitra Konstruksi Kalbar, a runner-up for the same package, and have similarity on format and arrangement of bid documents. Notwithstanding the same typing mistakes in their documents. Under which condition, KPPU decided the Bid Committee has breached the Article 22 on Bid Rigging and decided to impose sanction to PT. Rajawali Sakti Kalbar to pay fine with amount of Rp. 500,000,000.
2. The Bid Committee strictly passes the alleged party (PT. Jungkat) in qualification process and proposed PT. Jungkat as the candidate winner for Entikong package. KPPU's Commission Council decided to impose fine to PT. Jungkat with amount of Rp. 400,000,000.
3. The Bid Committee won PT. Sebukit Indah Mempawah for Segole package, eventhough its qualification's documents was incomplete, and has the same format, organization, and typing mistakes in its bid offer documents with other bid participants. Hence, KPPU decided to impose fine to PT. Sebukit Indah Mempawah with amount of Rp 400,000,000.
4. KPPU also found a cross-ownership and interlocking directorate within the bid participants, thus considering Article 26 and 27 that prohibited business actors to have an interlocking directorate and cross ownership in the same relevant market, thus Commission Council decided this to be an intention to create a false competition amongst bid participants. Therefore, in its decision, KPPU imposed fined to the affiliated alleged parties with amount of Rp 400,000,000 – Rp 500,000,000.
5. PT. Rajawali Sakti Kalbar, PT.Jungkat, PT. Purna Sarana, PT. Megah Megah Megah, PT. Rafi Karya, PT. Sebukit Indah Mempawah, and PT. Lawang Kuari have conducted document adjustment (proved by the same format, organization, and typing mistakes between their documents), hence also being impose fine that range between Rp 200,000,000 – Rp 300,000,000.

Considering the commission's task in Article 35 paragraph "e", Law No. 5/1999, Commission Council recommended KPPU to give an advice and recommendation to the Regent of Sanggau to give sanction to their Bid Committees that failed to conduct their task in a fair manner. KPPU also shall recommended Indonesian Financial and Development Auditing Body to initiate an investigation/audit to the project.

KPPU also found a cross-ownership and interlocking directorate within the bid participants...

Upcoming international events

The 4th APEC Training Course on Competition Policy, November 5-7, 2008, Sanur Paradise Plaza Hotel & Suites, Bali, Indonesia

Discriminatory Practice and Bid Rigging in Medical Device

Discriminatory practice is hosted by PT Setio Harto by only provided original brochures needed for the bid requirement to CV Guna Alkes...

Several alleged business actors was proved to breach article 19 (d) on discriminatory practice and article 22 on bid rigging of the Law No. 5/1999 in the procurement of medical devices by a regional hospital in Tegal. This case was involving several business actors, namely CV Guna Alkes, PT Agung Mulya Utama, PT Inti Medika Sejahtera, PT Setio Harto, and the Bid Committee.

Discriminatory practice is hosted by PT Setio Harto by only provided original brochures needed for the bid requirement to CV Guna Alkes, meanwhile only gave a copy to other business actors, thus will decrease merit point on other business actors. Collusive bidding occurs between CV Guna Alkes, PT Inti Medika Sejahtera, and PT Agung Mulya Utama in term of adjustment and similarity of document's format and similarity on bid offer. Collusion also occurs between CV Guna Alkes, PT Inti Medika Sejahtera, PT Agung Mulya Utama, PT Setio Harto, and the Bid Committee in term of by determining endoscope requirement in term of reference that generated to certain brand (Olympus) which only can be provided by PT Setio Harto. Moreover, original brochures was valued with 100% remark in the requirement, thus will give tremendous advantage to CV Guna Alkes.

Before come to its decision, KPPU's Commission Council considered several conditions, which PT Setio Harto as a sole distributor of Olympus's endoscope has discriminate bid participants; that PT Setio Harto only gave legalized certificate to collusive business actors and did not provide it to other bid participants; that valuation by the Bid Committee was not intended to win certain winner, but merely to follow circular letter from Health Office of Central Java.

Based on theses facts and considerations, the Commission Council (on 3 July 2008) decided that PT Setio Harto has proved to violate Article 19 (d) and therefore obliged to pay fine with amount of Rp 100,000,000 to the State. Other alleged business actors were proved to violate Article 22 of Indonesian competition law and therefore banned to enter any procurement host by the Tegal regional hospital for one year. The Bid Committee was not proving to violate any articles in the Law.

The 9th Inter-Governmental Group (IGE) of Expert on Competition Law and Policy

Competition Law and Consumer Policies Branch of the United Nations Conference on Trade and Development (UNCTAD) provides competition authorities from developing countries and economies in transition with a development-focused intergovernmental forum for addressing practical competition law and policy issues. Every year, UNCTAD hosts the Intergovernmental Group of Experts (IGE) on Competition Law and Policy for consultations on competition issues of common concern to member States and informal exchange of experiences and best practices, including a Voluntary Peer Review of Competition Law and Policy. This meeting also fined ways of improving worldwide co-operation on competition policy implementation and enhancing convergence through dialogue.

In the Ad Hoc Expert Group (AHEG) meeting and the last IGE, the 9th IGE, held on 15-18 July 2008, Indonesia (especially KPPU) was represented by its Chairman and Executive Director to share knowledge on the needs of concern for abuse of dominant position in developing country, creation of equal playing field for small medium enterprise, and legal action toward implementation of Indonesian competition law.

The Ad Hoc Expert Group (AHEG) on the Role of Competition Law and Policy in Promoting Growth and Development (held on 15 July 2008) was aimed for precise competition policy implementation in enhancing economic growth and development of UNCTAD member, especially developing country. In her remarks, UNCTAD Deputy Secretary General reveal that the Accra Accord as the final document for UNCTAD Conference in Ghana (21-25 April 2008), stressed competition issue as an important element in trade and development concept in developing country. The success will rely on harmonization between development policy and competition policy strategy. It was also identified several challenges faced by developing countries, such as institutional and financial mechanism, attracting foreign investor and mobilizing domestic investor, creation of partnership between government and private companies. To overcome these, it recommended several strategies by government, one of which is by aligning competition policy toward market oriented approach, effective formulation and implementation of competition law, and clear legal sanction on any violation.

In first session on competition policy and economic growth, there were several main issues that highlighted in the session. First are growth, development, and their convergence into competition policy which able to provide legal protection for respective society, for example, through establishment of antitrust law that lay foundation on coherence, market integration, and consumer. Second are the needs for empowerment, law reform, and competition policy that capable to stimulate economic growth. In this circumstance, the role of developed countries not only needed to support the creation of sustainable growth but also an equitable growth. Third are the needs for political will by developed countries to support economic development policy and development of developing countries, especially through amendment of antitrust law in developed countries which mostly prioritized protection for certain cartel network than global society welfare.

In the second session on "should developing countries worry about abuse of dominance?" there were several important issues that rose during discussion. First is condition where competition cases based on abuse of dominance principle was mostly faced by competition authority through the world, especially developing countries. Second is the need for implementation of legal framework for abuse of dominance, especially to guard fair competition and hope that IGE meeting can support formulation of competition policy research in its member countries. In the session, Indonesia as one of the Panelist, stressed that element for abuse of dominance is one of the element to be considered in formulating competition law and regulation principle in Indonesia, as mentioned by article 25 of the Law No. 5/1999. In this regard, Indonesia inquiry an effective implementation of the regulations, especially to create fairer market and give protection effectively to the consumer, as well as an equal playing field for small-medium enterprises. Indonesia also submitted her written contribution in this topic.

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...Indonesia express her appreciation to member countries in considering Indonesia to be peer reviewed in the forthcoming IGE meeting in July 2009...

In the third session on "what role can Intellectual Property Rights (IPR) play in promoting competition and development", there were several main issues to be considered. First was the IPR is the key to the creation of comprehensive development. In this regard, developing countries were advised to formulate competition law regulation which considered the IPR. Second was, in implementing the neither IPR nor physical property rights, exclusion principle shall be implemented to exclude others from exploiting a non physical asset. Third was, the IPR is needed to rise business value and support economic growth and development of developing countries.

Other relevant issues were also being discussed in the meeting. First was the empowerment of competency to the society and national competition agency in implementing competition law/regulation. Second was the independency and accountability of competition agency. Third was the voluntary peer review on competition law and policy implementation of Costa Rica. And the last one was the formulation of UNCTAD agenda in competition to develop capacity and technical cooperation in developing countries for 2009-2010.

Furthermore in the 9th Inter-Governmental Group (IGE) meeting, especially in the general statement session, Indonesia shared her thought in several competition cases handled by KPPU, namely case on cross ownership by several cellular service providers and a cartel case. KPPU also revealed case on Singapore's investment company which caused unfair business competition between cellular service providers, thus resulted unfairness to the consumer. Meanwhile in cartel case, KPPU decided that there was an interconnection agreement between six cellular service providers that has significant impact on high price for short messaging service. It also recalled other issued faced by the government, especially in energy, oil price, transition investment policy to an open market, and foreign direct investment policy in attracting foreign investor. In this opportunity, Indonesia expected UNCTAD to support implementation of technical cooperation and research on abovementioned issues, as well as continuous training program for judges and professional that involved with competition law enforcement.

During this session, it was also summarized several ideas from other countries. First were the developing countries (Pakistan, Ukraine, and Mexico) who stressed the importance for independency of a national competition agency, especially in the creation of fair and conducive competition environment. It was also recommended the need for competition law institution which consists of experts on economic and trade law, with competition law as their expertise. Second were the developed countries (USA and Europe) which highlighted the importance of voluntary peer review for developing countries in increasing their competency. Finally, the country delegates were agreed upon "Agreed Conclusion" as a final document for the IGE. This document recommended that the next meeting shall consider concession of public monopoly and competition law, the advantage of competition and industrial policy in promoting economic development, and voluntary peer review on implementation of competition law and policy in Indonesia. Along with the Accra Accord which recommended UNCTAD Secretariat to support cooperation amongst UNCTAD member countries in competition law and policy, either regionally nor internationally.

Touch upon the conclusion, Indonesia express her appreciation to member countries in considering Indonesia to be peer reviewed in the forthcoming IGE meeting in July 2009. Indonesia believed this review will bring positive input to development of Indonesian competition law and policy. The peer review, besides aimed to increase the quality or affectivity of competition law and policy implementation, but also to increase cooperation between policy makers in Indonesia. Indonesia also describes her active participation in the ASEAN Expert Group on Competition (AEGC) which formulation based on ASEAN Economic Blue Print to create an ASEAN Market Economy in 2015. It was also expected that UNCTAD Secretariat can contribute for this regional cooperation.

Technology innovations, especially in telecommunication and information have an immense influence towards globalization flow in industrial and trade sectors. Intellectual Property (IP) Rights is one of issues in legal area with strong relations to trade, industry and investment, or overall, to the business. As IP Rights lies in business scope, there is a linkage between IP Rights and Competition Policy. This linkage can also be found in their individual goals, yet, they are actually complementing each other. In some cases, IP Rights Law and Business Competition Law have something in common. For instance, on innovation, IP Rights Law treat an innovation shall be protected since it offers the benefits the consumers. On the other hand, Business Competition Law emphasis the importance of creation of competition spirit in order to encourage innovations. New innovations will invite another new innovation that in turn, will become consumers' advantages. However, towards the implementation, these two laws may contradict one to another. They have different perspective on conceptual perceived. The problem is started when the exclusive rights are implemented with no limitations, as it does not aim on protecting the innovations but is more on dominating the market.

In this presentation, I would like to discuss several points, namely: regulations related to the exercise of IP Rights Law and its implementation, the advocacy on competition value in IP Rights Law application and problems faced by Indonesia as well as recommendation in international cooperation and future UNCTAD agenda.

Principles and Implementation

While it is still relatively new, Indonesia has already stipulated a set of regulations on IP Rights and Competition. IP Rights are covered in several laws, namely, Law No. 30 year 2000 regarding trade secret, effective since 20 December 2000; Law No. 31 year 2000 regarding industrial designs, effective since 20 December 2000; Law No 32 year 2000 regarding lay out designs of integrated circuits, effective since 20 December 2000; Law No 14 year 2001 regarding patents, effective since 1 August 2001; Law No 15 year 2001 regarding marks, effective since 1 August 2001; and Law No 19 year 2002 regarding copyright, effective since 29 July 2002.

Business Competition is regulated under the Law No. 5 year 1999 concerning prohibition of monopolistic practices and unfair business competition, effective since 5 March 2000. These two laws are complementing each other. Law No. 19 year 2002 Article 47 (1) stated that every agreement on IP Rights shall not accommodate any provisions that might produce unfair business competition, as regulated by existing laws and regulations. On the other hand, in business competition law, Law No. 5 year 1999 Article 50 (b) treats agreements on IP Rights such as licenses, patent, trademarks, copyrights, industrial product design, integrated electronic circuit and trade secrets as well as agreements related to franchise, as exceptions. The facts on the point 7 above basically show that these two laws may be implemented parallels. IP Rights Law still put a high regard on healthy competition on every IP Rights application, and Business Competition Law shows a great respect on Exclusive Rights in IP Laws, as an appreciation on invention and intellectual products.

As previously discussed, the law of business competition is relatively new in Indonesia. Thus, it still requires socialization in order to improve people awareness on the importance of competition. In Indonesia, competition author-

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ity, KPPU, has been dealing with hundreds of cases, yet, none of the cases have a direct relation to IP Rights application. KPPU views that the distributed non-licensed products of IP Rights holder is a form of an unfair business competition practice. However, KPPU also views the exercise of IP Rights may cause unfair business competition, too. For instance, IP Rights holder rejects License Application (refuse to license) without submitting legitimate reasons.

One of the cases handled by KPPU was the plan from TV paid- provider program, ESPN & Starsport, to terminate transmission programs permit (for 6 channels) for some paid-TV stations in Indonesia and offer exclusive transmission permit to one particular station...

One of the cases handled by KPPU was the plan from TV paid- provider program, ESPN & Starsport, to terminate transmission programs permit (for 6 channels) for some paid-TV stations in Indonesia and offer exclusive transmission permit to one particular station. KPPU in the opinion of that if this plan keeps going, then, this policy is against the Law No. 5 year 1999, since in the relevant market, there are already several qualified competitors who are ready to sell those programs in the spirit of competition. ESPN & Starsport were finally agreed to cancel the so-called exclusive license plan.

KPPU Advocacy towards the Exercise of IP Rights

To overcome problems regarding the exercise of IP, currently KPPU is still doing the analysis on various advocacy models and practices, to ensure that IP Rights implementation are still within competition spirit. These models are expected to function as a bridge of those two laws or policies, which allows KPPU to bring out the synergy. Discussions are also being held by KPPU and related IP Rights authorities or Patent Offices, in this case, Directorate General of Intellectual Property Rights, Department of Justice and Human Rights, Republic of Indonesia, especially on IP Rights issues agenda in competition fora in international level. Discussions held were aiming on the harmonization of these two legal areas. So far, the advocacies were made over case-by-case or issue-by-issue discussions. In this event, Indonesia will fully observe and consistently learn models applied and developed by other countries in dealing with IP Rights problems in business competition area. In this workshop held by UNCTAD, we have a strong wish to gain various inputs that will enable us to formulate a better advocacy model.

Issues & Problems

As a developing country, Indonesia is still enthusiastic in creating stimulus for economic growth by introducing series of policies. Policies being developed are among others, the effectiveness of these two regimes that produce positive stimulant for innovations and economic growth. The two regimes are competition regime and IP Rights regime. Indonesian economy fallen apart during the monetary crisis showed the weak foundation of Indonesian economy. This may be related to the improper policies and the reduced competition values. Protections, discriminations, improper subsidies have developed anti-competition culture which at the end of the day even weakened business competitions in Indonesia. This weak business competition developed the awareness on the importance of business competition law in Indonesia. This was also an embryo for the two regimes, namely competition regime and IP rights regime. It is indeed not an easy thing to implement those two, and Indonesia is still facing various problems on that, up to this moment.

For IP Rights application, as a developing country, Indonesia is still dealing with its people minimum comprehension on IP Rights. Indonesian people are still of the opinion, that IP Rights are the rights of advanced countries, as inventions and innovations are dominantly

made by people from developed countries. It still needs time and efforts to convince the public, that IP Rights is actually a need. Appreciation on one's creation is indeed an important thing. Like any other developing countries, unemployment and public work force are crucial. Non-licensed products in Indonesia created a dilemma. On one side, piracy can not be accepted at any reasons. Yet, on the other hand, piracies have created jobs. Comprehensive approach is needed in dealing with this dilemmatic problem. We also understood that people buying power in developing countries is still relatively low. This is also another factor resisted IP Rights implementation in Indonesia. The limited buying power often encourages people to buy non-licensed products as they are much cheaper. In Indonesia, price disparity has a great influence towards one's consumption decision, without taking quality and legality of the products.

As in the IP Rights implementation, most of Indonesian people still believe that competition law also belongs only to developed countries. People view that competition law was made in order to create market access and therefore, it only benefits developed countries, as they would become more freely in penetrating the market. Competitiveness also restricted the implementation of competition law in Indonesia. Developing countries have lower competitiveness and therefore they tend to be more prudent towards this competition law. This is basically a wrong perception. Indonesia is also obliged to enforce competition law to improve its domestic competitiveness. The enforcement of competition law and IP Rights law in Indonesia still requires a thorough socialization of the laws. People are still unable to distinguish which ones are infringements of competition law and IP Rights law.

Strengthening International Cooperation and Proposed Agenda for UNCTAD

To enable us to formulate the rightist model to synchronize IP Rights Law and Competition Law, it is requested and recommended to the UNCTAD to facilitate activities on IP Rights discussion, that includes among others: Research, Seminars and Workshops; International Meetings on the linkage between business competition and IP Rights applications; UNCTAD is expected to initiate disseminations and publications on Competition; Policy and IP Rights; to provide trainings aiming on improving the understanding on IP Rights; implementation towards Competition Policies; and to provide technical assistance in terms of Residential Advisor from UNCTAD to IP Rights agency who will deal with internalization of competition values into IP Rights policies.

Final Words

Indonesia has and will always put its utmost for these two areas, IP Rights Law and Business Competition Law, to be implemented parallels and effectively. Indonesia will keep up with the development of IP Rights Law and Competition Law enforcement in many countries and will take part in various activities to improve the understanding of IP Rights Law and Competition Law.

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Indonesian Perspective on Abuse of Dominance

Presentation by Chairman of KPPU for the UNCTAD Ad-hoc Expert Group on the Role of Competition Law and Policy in Promoting Growth and Development , 15 July 2008

Introduction

Regardless of the peculiarities of the socio-economic background in the respective competition law system, it appears that there are common understandings of what competition law should serve. The competition law seeks to sustain the operability of an economic system in which the allocation of resources is determined solely by supply and demand in free market and is not directed by government regulation.

In the economical context, the prime aim of the competition law is to achieve efficiency and that competitive markets will achieve the most efficient allocation of resources as well as to protect and enhance consumer welfare. Notwithstanding thereof, historical background of the competition law in each countries has created distinctive nuance as demonstrated in unique features of how competition law differs from country to country.

...the foremost important role for Indonesian competition law is not the economics goals commonly served by many competition law systems which placed in the third and the last aim aspired to achieve by the law...

Indonesian competition law was promulgated in March 5, 1999 under the name Law No 5 of 1999 Concerning Prohibition on Monopolistic Practices and Unfair Business Competition ("Law No 5/1999"). Law No.5/1999 owed its birth to may factors at that time but especially due to the Asian monetary crisis in 1997 which severely injured many businesses in Indonesia.
The crisis resembled a blessing a disguise for many Indonesian because Indonesia both politically and economically entered into new era since then. In the economic sector, Indonesia entered into new paradigm from centered-planned economic to market liberalization, from the domination of State Owned Enterprise to private participation. This short background of competition law in Indonesia hopefully will provide wider perspective to understand the role and goals of Indonesian competition law.

In its recitals, the Law No 5/1999 recognize the equal opportunities to every citizen to participate in a production process and marketing of goods and/or services, in a healthy, effective and efficient business climate, so that the economic growth and proper working of the market economy can be promoted. Accordingly, this law is aimed to protect the operability of the proper market economy, a concept which was far from reality in Indonesia beforehand. Further, the aim of the law is explicitly illustrated in Article 3 Law No 5/1999, they are:

- safeguarding the public interest and increasing the national economy efficiency as one of the efforts to increase the people welfare;
- establishing a conducive business climate through the arrangement of fair business competition thus guaranteeing the certainty of equal business opportunities for large, middle, and small business actors in Indonesia.
- preventing monopolistic practices and unfair business competition caused by business actors.
- the creation of effectiveness and efficiency in business activities.

By observing those four aims stated in the Law, we can see that the foremost important role for Indonesian competition law is not the economics goals commonly served by many competition law systems which placed in the third and the last aim aspired to achieve by the law. The law primary aspire to safeguard public interest, to increase national economic efficiency and to increase the people welfare that came as first aim stated in the law.

As the second aim is probably unfamiliar for neither US Anti-Trust Law nor EC Competition Law, it is well accepted in other jurisdiction as in Japan Competition Law. This is reinstated the unique features of competition law from country to country depends on the historical background of the birth of respective competition law and the role expected to play from each competition law in national context.

In light of those aims, Law No 5/1999 recognizes the concept of dominant position in its provisions. However, the Law No 5/1999 introduces two concepts on how to determine a business actor conceivably has dominant position in the market. Article 1 no. 4 Law No 5/1999 provides definition of dominant position as follows:

"Dominant position shall be a situation in

which business actor has no significant competitor in the relevant market with regard to the market share controlled, or business actor has the highest position amongst its competitors in the relevant market in relation to financial capacity to supplies or sales, and the ability to influence supply or demand of certain goods or services."

In other provision, Article 25 paragraph (2) Law No 5/1999 provides definition of dominant position as follows:
"Business actor shall hold dominant position as referred to in paragraph 1 if:
one business actor or a group of business actors holds 50 % or more of the market share of a given product or service; or
two or three business actors or groups of business actors hold 75 % or more of the market share of a given product or service."

The first provision provides wider definition qualitative-like of dominant position whereas the latter set up the quantitative-like market share threshold of a business actor. This ambiguity may be observed as legal uncertainty by business actors to determine whether they have dominant position or not in the market. Nonetheless, the KPPU accepts it as flexible approach in establishing dominant position held by business actors. In this regards, the 50% or 75% of market share do not serve as the sole legal basis for establishing dominant position and therefore enable KPPU to control abusive conducts by business actors who has lower market share than the threshold.

Law No 5/1999 goes further to elaborate the form of abuse by dominant business actors as stipulated in Article 25 paragraph (1) Law No 5/1999 as follows:
"Business actor shall be prohibited to use a dominant position, either directly or indirectly, to:

- determine trade conditions with the purpose of preventing and/or restraining consumers from obtaining competing product or service, in respect of either price or quality; or
- limit market and technological development; or
- hinder potential competitor from entering the relevant market"

It is important to emphasize that Law No 5/1999 also catches abusive conducts other than those described in Article 25 paragraph (1) under different title, such as resale price maintenance (Article 8) market partitioning (Article 15(1)), tying-in sale (Article 15(2)), single branding (Article 15(3)), monopsony (Article 18), refusal to deal (Article 19), predatory pricing (Article 21) etc.
This is to say that KPPU applies the concept of abuse of dominance in broad sense notwithstanding some limitations of the law in order to ensure that competition is fair and consumer is protected.

The significance of rules in abuse of dominance for Indonesian Economics

KPPU fully understands the crucial application of rules in abusive dominance in relation to the Indonesian present economic growth and development based on the following reasons:

1. Indonesian Open Market of Economy

   Despite the centralized economy architecture in the past, Indonesia has always been opening its market for global player. The first foreign direct investment took place in 1967 following the promulgation of Foreign Investments Law. Since then, foreign direct investment has flowed into Indonesia and took part in shaping Indonesian economics outlook.

   It is important to note that many multinational companies also operate in Indonesia and, to some extent, impose competitive pressure toward local business actors. Nevertheless, there is a managerial, technological, and most of all capital discrepancy between those MNC and local business actors and therefore create a propensity of abusive conducts. This is not to say that KPPU deploys protectionism policy toward national business actors which contrary to WTO principles rather than KPPU expects all business actors, regardless of the nationality, compete in fair manner and subject to the Law. Therefore rules on abusive of dominance is a necessity considering the Indonesian open market.

... the 50% or 75% of market share do not serve as the sole legal basis for establishing dominant position and therefore enable KPPU to control abusive conducts by business actors who has lower market share than the threshold...

2. Transition to Private Participation

As mentioned earlier, the new era has altered the role of government in the market as regulator only rather than as operator to compete with private sector. Therefore the new paradigm calls for more active private participation and minimize the part of state owned enterprises. Since 1998, Indonesia has liberalized several important sectors, inter alia, telecommunication, energy, broadcasting, water supply, and road infrastructure.

More sectors are expected to open in the upcoming years. However, this transition is not easy and many SOE still possess privileges granted in the past and mostly exercise them in abusive manner. KPPU expects the transition evolves gradually therefore along the way ahead, rules on abuse of dominance has to be in place to deter those SOE exercising their power that would harm the consumers as well as small private business actors.

...unlike the KPPU who is mandated to enforce Competition Law, no independent body was established to enforce the provisions of Consumer Protection Law...

3. Weak Consumer Protection

Indonesia is a huge market due to its massive population. In 2006 alone, the total population is amounted to 223 million. Whilst everybody is a consumer, only small part of Indonesian population who is producer. Due to strong inflow of goods and services from abroad and weak national business actors' productivity, it creates Indonesian high level of consumerism particularly to imported goods. Therefore the consumer protection is of most important for Indonesian. Following the promulgation of Competition Law in 1999, the Consumer Protection Law is passed as part of 1998 reformation packages.

However, unlike the KPPU who is mandated to enforce Competition Law, no independent body was established to enforce the provisions of Consumer Protection Law. This situation caused ineffective application of Consumer Protection Law and therefore business practices, in relation to the consumer, have not much changed ever since. As a consequence, abuse of dominance that directly harm consumer can only be captured and enforced by Competition Law. This expectation has placed other important part on rules on abuse of dominance to ensure no consumer is harmed by business actors in the market.

To sum up, restriction and prevention for abuse of dominance position probably is more important in Indonesia rather than in developed countries considering number of factors in preceding section. It plays more vital role to foster national business actors, to accelerate market liberalization, and to protect consumers.

Past Experiences regarding Abuse of Dominance

Since the Competition Law came into force in 2000, there have been several cases penalized by KPPU regarding abuse of dominant position. Some of the abuse was hampering efficiency or harming consumer by limiting choice of product available in the market. Other cases penalized due to conduct that harm small and medium business player despite the consumer's welfare that likely to produce. The rationale of the latter is consistent with the aim of Law No 5/1999 that is to ensure the certainty of equal business opportunities for large, middle, and small business actors.

In Case No 08/KPPU-L/2003 regarding refusal to supply by PriceWaterhouse Coopers Indonesia ("PwC Case"), KPPU found that PwC is guilty by refusing to consent its audit report of a subsidiary to be incorporated into audit report of the parent company audited by smaller accounting firm for unjustifiable reasons. The action has caused the parent company to re-audit its financial report by PwC, with five time higher audit fee, in order to incorporate audit report of its subsidiary.

Due to that conduct, the parent company has suffered much expensive audit fee. However, it is not the main concern of the KPPU decision. The KPPU main concern is the protection of smaller audit firm to do business in the big four market without having any resistance from those big accounting firm to give equal opportunity for entering the market.

KPPU recognized the reputation and the quality of the big four accounting firm, nonetheless with this decision, KPPU urged smaller accounting firm to capture that market and therefore enhance the competition in high rank auditor market in Indonesia. Limited competition in that market has lead to abusive conduct and higher price as demonstrated in the PwC case.

Another case that demonstrates KPPU aspiration to nurture small and medium enterprises is Case No 02/KPPU-L/2005 regarding the abuse of Carrefour Indonesia upon small suppliers ("Carrefour Case"). In this case, KPPU found Carrefour guilty by imposing heavy trading term upon small suppliers whereby big suppliers of Carrefour were not required to do so.

As Carrefour became one the largest player in hypermarket chain in Indonesia, it has generated more buying power than its competitor. All suppliers, big or small are compelled to have their product to be available in the Carrefour's outlet. This condition has facilitated Carrefour to abuse its position by imposing unreasonable trading term but only applicable to small supplier. As big suppliers might retaliate unreasonable trading term by removing their line of products from Carrefour's outlet, small suppliers have no power but to accept those trading terms. KPPU then ordered Carrefour to revoke all the unreasonable clauses in its agreement with small suppliers. In this case, again KPPU has demonstrated its side with small enterprises vis-à-vis big business actor in abuse of dominance case instead of having consumer welfare as the only consideration.

Those two examples case highlighted the rules in abuse of dominance as not only an instrument to achieve efficiency and consumer welfare like in US or EU, but also as a mean to facilitate the development of small and medium enterprises therefore they can grow and enhance competition in the future.

Conclusion

In spite of the economic foundation of the competition law is very common everywhere, different country has different background and goals of its competition law. These differences are substantiated in the way the competition authority exerts its power. KPPU reckons that rules on abuse of dominance much more important for Indonesia rather than in any developed country. As a part of global economy, KPPU believes that considering the level of national business actors at present, rules on abuse of dominance will much of help for Indonesian small and medium enterprises to have a room for development.

As in transitional economy, Indonesia still faces a lot challenges to liberalize its market and in this regards, KPPU believes that rules on abuse of dominance will take important part to make it happen.

In light of weak consumer protection in country with the large number of consumers as Indonesia, KPPU expects that rules on abuse of dominance can also be of significance to deter consumer harm in the market.

As a part of global economy, KPPU believes that considering the level of national business actors at present, rules on abuse of dominance will much of help for Indonesian small and medium enterprises to have a room for development...

KPPU and the Second AEGC Meeting

This participation was actively attended in term of KPPU's role improvement in developing competition policy at level of ASEAN region, primary through KPPU membership in ASEAN Expert group on Competition (AEGC). In the second meeting, there were two main activities namely outreach program AEGC with the Office of Fair Trading (OFT), and the AEGC official meeting. These activities were conducted from 30 July – August 1, 2008.

In this meaningful event, KPPU had sent delegations who were headed by Prof. Tresna P. Soemardi (Vice Chairman of KPPU), Mr. Taufik Ahmad (Director of Competition Policy), Mr. Bapak Mohammad Reza (Head Division of Litigation and Decision Monitoring), and Mr. Deswin Nur (Head Division of Inter-Institutional Cooperation). These events took place in two venues namely Hotel Marriot Singapore (Orchad Road) and Hotel Grand Park Plaza Royal (Colement Street).

The AEGC Dialogue with Mr. Philip Collins was conducted on July 30, 2008 focused on information exchange and sharing experience among AEGC member and Chairman of UK-OFT...

The meeting was leaded by Singapore as the Chairman of AEGC, facilitated by ASEAN Secretariat, and attended by several institutions related to business competition in ASEAN member countries, namely Indonesia, Laos PDR, Myanmar, the Philippines, Thailand, Singapore, and Vietnam.

Outreach Program (July 30, 2008)

The outreach program consisted of two session activities arranged by the Competition Commission of Singapore (CCS), the distinguished speaker series lecture and AEGC dialogue with Mr. Philip Collins (Chairman of UK OFT).

The Distinguished Speaker Series Lecture was carried out on July 30, 2008 which was a program outreach arranged by CCS to improve society awareness on the benefit of competition policy. The program was delivered by Mr. Philip Collins, Chairman of United Kingdom Office of Fair Trading (UK-OFT). In his lecture, Chairman Collins explained some legal issues and competition policy related to role and public institution's power (included civil and criminal legal enforcer), education and advocacy, priority formulation and work evaluation in UK-OFT, relationship between public law enforcer and private actions, effort in facilitating complain, effect of pro and anti-competition on unilateral effect, and benefit of cooperation, coordination and international meeting.

The AEGC Dialogue with Mr. Philip Collins was conducted on July 30, 2008 focused on information exchange and sharing experience among AEGC member and Chairman of UK-OFT. In his presentation, Chairman Collins emphasized on OFT mission, independency, and determination of priority agenda in OFT, allocation of human resources, evaluation and capacity improvement.

Firstly was regarding the OFT. OFT was business competition institution established since 1973. But, modern business competition law was just implemented in UK on March 1, 2000 related to endorsement of Competition Act 1998, and continued with Enterprise Act 2002 on June 1, 2003. Implementation of competition law in European Union itself conducted since May 1, 2004. With mission to create good market for consumers, OFT was a combination institution between business competition and consumer protection institutions.

Secondly was regarding independency. For OFT, independency was important factor for implementing effective competition law. Effective in OFT's case, defined as capacity of competition institution to determine and carry out the agenda independently. It meant that free from political and government intervene, government could be negotiated to apply fair business competition, and government might be as intervene subject in short term or other policy issues, mainly in difficult economic condition. Based on the experience, government influence on business competition had been eliminated in the last eight years.

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Independency itself was not merely in isolated meanings, because competition institution must have cooperation with the stakeholder, included political and government influence. Considering their interest, business institution had to aware the agenda, reason why they choose the action, what they will do with the action taken, and benefit of the action taken for consumers and economic as a whole.

Thirdly was regarding determination of priority agenda. Business institution must be able to determine their agenda themselves and not regulated by other parties, whether for business actors and consumer group or government. OFT also had experienced the same problem in determining agenda, they was controlled by problem determined by government and agreement notification and report by business actors. Currently, agreement notification through Competition Act 1998 had been deleted. Concerning the report OFT carried out clean sweep by closing cases in last several years. Nowadays, OFT use Preliminary Investigation Unit to filter the reports.

The 2nd AEGC Meeting, July 30 – August 1, 2008

In the AEGC meeting, several important issues were discussed namely announcement on some information regarding notes of the Third Meeting of the ASEAN SEOM for the Thirty-Ninth ASEAN AEM (June 10-12, 2008) and the Fourteenth ASEAN ASEM Retreat (May 2-3, 2008), information on ASEAN Economic Community Scorecard on Competition Policy, work plan of AEGC WG on Capacity Building, work plan AEGC WG on Regional Guideline, work plan of AEGC WG on Handbook, work plan of AEGC, information on result of AEGC Training (July 28-29, 2008), some information on ASEAN cooperation and other international organization, and discussion of ACFC continuation.

Business institution must be able to determine their agenda themselves and not regulated by other parties, whether for business actors and consumer group or government...

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