

**RECENT DEVELOPMENT:****The development of competition law in Indonesia****Dr. Syamsul Ma'arif¹****History of Indonesian Competition Law**

For many decades the outlook of Indonesian economy is characterized by dominant state intervention through government and state owned enterprises. Competition is very limited in the market place, while private parties continuously seeking for business protection. Business were growing but not as result of their competitiveness but rather than because special treatment acquired from the government.

The Asian economic turmoil in 1998 have changed the Indonesian outlook dramatically ever since in every dimension. In the economics sector, profound understanding in creating strong market economy surfacing and gain its momentum in the adoption of Law No 5 of 1999 Concerning Prohibition of Monopolistic Practices and Unfair Business Competition as the primary source of Indonesian Competition Law.

Accordingly, the Indonesian Competition Law is aimed to protect the operability of the proper market economy and foster the small and medium enterprises development. Ultimately, it aspires to increase the national economy efficiency as one of the effort to increase the people welfare.

The Significance of Competition Law

Indonesian experience has showcased the necessity of the operability of market economy as the basic foundation of a sound economy. Unlike perfect competition market which only true in the textbook, monopoly market does exist everywhere and pervasive in Indonesian market. Due to that monopolistic structure, Indonesian economy collapsed when the crisis hit the region in 1998. Big businesses went out of market, mass laid off took place everywhere, social unrest heated and eventually erupted in the Jakarta massive burning by unsatisfied angry protesters resulted in chaotic situation.

¹ Justice, Supreme Court, Republic of Indonesia. Paper submitted to ALA 10th Conference, Hanoi, Vietnam, 16 October 2009



The cost to restore social order and economy was both enormous and a painful process. Had Indonesia have the sound economy nurtured by the fair competition, it would have the ability to deal with the crisis without causing significant damages. The competition law thus is perceived as an initial step to formulate market economy. Protectionism was curtailed, market liberalization was introduced, monopoly was abolished, and all abusive conduct was demolished. Clearly, the existence of competition law in Indonesia is crucial to safeguard the market transition from centralized to market economy.

In addition, the application of competition law is also important to protect consumer welfare and to achieve most efficient allocation of resources. Dominant position tends to use its market power to impede its competitor from entering the market or to force them out from the market. The dominant player then, without any competitive pressure, will be able to raise the price or reduce the output and thus impose the loss for the consumer. Hence, competition law plays an important role to prevent dominant player to abuse its market power and therefore enhance consumer welfare as well as allocative efficiency.

The Scope of Indonesian Competition Law

The Law No 5 of 1999 contains of provisions regarding substantive law, procedural law, and the establishment of an independent competition authority, namely Komisi Pengawas Persaingan Usaha (KPPU), to enforce the law.

The substantive aspect of the law covers three categories of trade practices, i.e., prohibited agreements, prohibited conducts, and dominant position. They are closely aligned with international principles and best practices in competition law as promoted in UNCTAD Model Law on Competition and International Competition Network (ICN), a network consist of competition authority around the world. In international forum, competition law can be divided into rules on cartel, abuse of dominant position, and merger control. Provisions of which are covered in the Law No 5 of 1999.

As adopted in many countries the law no. 5 classifies violations into two types, namely per se illegal and rule of reason. Violation in per se illegal is fulfilled when the conduct is proved to be happened. While in the rule of reason, the conduct alone is not sufficient to say the law is violated. The anti-competitive effects of the conduct is also necessary to prove, therefore the conduct which does not create anti-competitive effects is considered not violating the law.

The procedural aspect in Law No 5 bestows authority for court to review judgment of the violation of the law rendered by the KPPU. The District Court may uphold or reverse the KPPU decision. The Court's decision can be appealed directly to the Supreme Court, bypassing the Regional High Court (PT), the second instance of the court. The Law No 5 of 1999 has a strict schedule for the court to review the KPPU's decision, both for District Court as well as for the Supreme Court. The Law No 5 of 1999 carefully limited the amount of time expended in enforcing the competition law, considering the nature of the business which is very time sensitive.

Implementation of Indonesian Competition Law

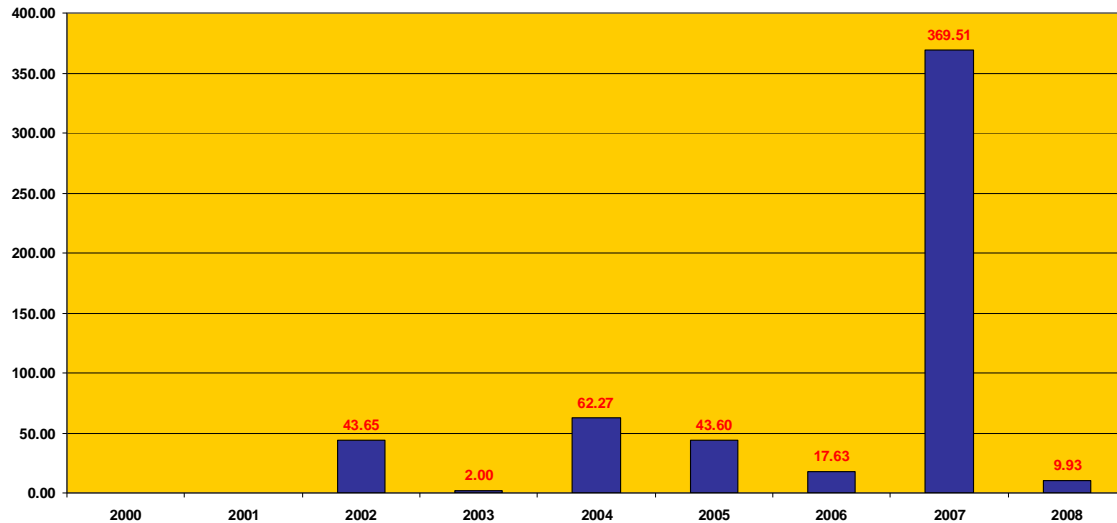
Since the promulgation of Indonesian Competition Law in 1999 which came into force in 2000, KPPU has received 1,074 complaints of allegedly violation of competition law until May 2009. Not all complaints have their merit, 890 (83%) of them were declared obscure and incomplete and therefore dismissed by the KPPU. Only 184 (17%) cases were officially investigated and 142 (13%) of which were decided. The rest, 42 (4%) cases, were stopped by summary judgment due to lack of evidences. The breakdown as follows:

Table 1. Figures of Complaints

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009 (May)	TOTAL
Complaint	7	31	48	58	77	183	139	244	231	56	1074
Dismissed	5	26	40	49	68	160	121	213	163	45	890
Case handled	2	5	8	9	9	23	18	31	68	11	184
Decision	2	4	4	5	7	18	12	27	49	14	142
Summary Judgment	0	1	4	2	2	4	6	4	19	0	42
Objection	0	0	1	3	5	8	3	11	21	0	52

An administrative fine is the most common sanction rendered by KPPU. Another sanctions can vary from an order to stop certain action to declare an agreement as null and void, depends on the type of the violation. Until May 2009, KPPU has imposed administrative fines up to Rp 738,958,324,146 or equivalent with US\$ 67,178,029. The administrative fines per year can be found as follow:

Chart 1. Calculation of Administrative Fines



From all of those KPPU's decision, 52 decisions (36%) of which were appealed to the district court, 7 of which are still in the trial. All appeals most likely ended in the Supreme Court. In the district court, 23 (51%) decisions were in favor of KPPU, while 22 (49%) were in favor of appellant. Of the 45 district court decisions, 42 decisions were appealed to the Supreme Court, 16 of them are still in process. Of the decided cases, 18 (69%) of decisions of the Supreme Court were in favor of KPPU and 8 (31%) of them were in favor of the business players. Those figures reflex that in general, the court endorses KPPU action.

Development in Merger Control

Pre-merger notification program is internationally best practice accepted as it gives more legal certainty for merging party and more effective control for competition agency to prevent monopolistic merger to occur, rather that to strike down company that already amalgamate which cause monopoly in the market.

In line with the practices in many countries on merger control, KPPU on last May this year had just adopted pre-merger notification guidelines, giving more effective control of merger *ex ante* rather than *ex post*.



Within this guideline, merger amounting to certain value may submit its proposed merger to the KPPU in order to get a review on its merger impact. Should KPPU found that merger will likely create monopoly problem, KPPU will oppose the proposed merger. The merging parties have an option either to abandon the proposed merger or to continue to carry on the merger and will eventually face the KPPU on court.

Once the case arrived at the court, it should be ready to assess impact of a proposed merger in prospective manner, rather than looking backward to gather hard evidence as in traditional case the court used to deal with. Indonesia will look forward how the judicial system copes with the pre-merger notification program.

Challenges Ahead

The uniqueness of competition law lays on the blend discipline of law and economics in its analysis. Therefore it requires special knowledge for anybody who will cope with the implementation of competition law. Plenty of investment is needed to train skillful staff at the KPPU as the central role in implementing competition law. At presents, the complaints submitted to KPPU are increasingly growing while the increase of skilled staff at KPPU is rarely effective. The design of human resources requirements in the long terms must be carefully observed considering the dynamic of the competition law.

The challenge for skilled staff is corroborate especially for the court whose job is to review the KPPU decision. As the last recourse of competition law, businesses and consumers will rely solely on the court decision regarding competition law dispute between businesses and the KPPU. With vast island of Indonesia with thousand of district courts who each may try competition case, the diffusion of knowledge and skill in competition law among district court judges is quite challenging. Nevertheless, it is a *conditio sine qua non* and responsibility for the court particularly the supreme court (MA) to broaden the knowledge of the judges.

Had the court slowly equipped their judges with competition law knowledge, businesses confidence on courts will gradually decline and hence will discourage businesses for expansion. Therefore the judges' knowledge and skill in competition law is a must to demonstrate the effective application of competition law that will confer benefit for the greater population.