THE ROLE OF KPPU IN PROTECTING RETAIL BUSINESS AND TRADITIONAL MARKET IN INDONESIA DURING THE ERA OF MARKET LIBERALIZATION

Oleh:
WASIS SUSETIO
Fakultas Hukum Universitas INDONUSA Esa Unggul, Jakarta
Jl. Arjuna Utara Tol Tomang Kebun Jeruk Jakarta 11510
wasis.susetio@indonusa.ac.id

ABSTRACT

Nowadays, The Indonesian government has actively carried out liberalization within economic sector. Started since The 1997 financial crisis and the insistence of the IMF that a number of policy reforms be introduced created a dramatic change in the regulatory environment in Indonesia. The government urged Parliament to pass the Bill of Investment Law, and convinced them that the new law will attract foreign investor to cultivate their capital in Indonesia. The law number 25/2007 at last issued and prevailed for any business players in Indonesia regardless the original of Business Company come from. Nevertheless, many people, in particular, small business players worry about the impact of such rules which is clearing away and impact to their business or jobs. On the contrary, that phenomenon has actually shown a better condition of economic and lifestyle that makes people enjoy hygiene and leisure sphere of mall, supermarket, and department stores that nice and clean. But, anyhow, it evokes anxiousness and distrustful around the business people who think those modern marketplaces will become a threat for traditional market existence.

Keywords: *Protecting, Retail Business and Traditional Market, In Indonesia*

Introduction

In the era of globalization, every country has been preparing or even ready yet to heading for market liberalization. As we know, the globalization lead to a new economic order and also influence social, legal, and cultural change globally, including in Indonesia. In this paper, I distress about the regulation on the protecting of small medium business facing on market liberalization, particularly, in the retail or consumer business, such as traditional market against modern consumer goods business tycoon which nowadays spread out in the big cities in Indonesia.

Nowadays, The Indonesian government has actively carried out liberalization within economic sector. This policy was set up due to the global economic climate that boost out the world to implement a mainstream of open economic system, including in retail business. One of the consequences is nowadays in Indonesia there are more than 10 famous worldwide brands of retail business, such as Mark & Spencer, Sogo, Carrefour, Seibu, Metro, Food Lion, etc.

Such condition will be more acomodated by the new investment law, when just recently, on April, 26th 2007, the Indonesian Government enacted the new law so called UU Number 25 year 2007 about investment which more adopt many international provisions on investment. This law carries out the principle of global rules of investment measures (TRIMS), such as fairness treatment, non tariff barrier, non discrimination, capital repatriation, and

open market system. Due to such instruments, the Indonesian government has revised the prior law (The Law number 1 year 1967 about foreign Investment and The Law number 7 year 1969 about domestic Investment) become a single law (The Law Number 25 year 2005), which did not differ between foreign and domestic investor in the terms of handling, except the form of company of foreign investor which should be under Indonesian corporate law

The new law was issued due to the declining number of investors since monetary crisis in Indonesia by 1998. The figure of such situation had been stated by Prof. Erman Rajaguguk who said that "The Indonesian development practitioners clearly identified a poor implementation of the foreign investment law as one of the causes of drastic decline of foreign investment. They also knew that improvement through law in regard to the application procedure and investment incentive is needed if substantial foreign capital influx is to be assured, and if Indonesia wishes to be a significant competitor against other developing countries. Recent research indicates that Indonesia is in the last position within ASEAN in terms of being a most favorable host country. Vis-à-vis all other countries in the world, including developed countries, Indonesia ranks 35 out of 45 countries. Clearly, a serious reform is needed"

Therefore, the government urged Parliament to pass the Bill of Investment Law, and convinced them that the new law will attract foreign investor to cultivate their capital in Indonesia. According to The Government, a new policy must be executed to solve the on going monetary crisis. The government believes that if Indonesia follows the International rule on global economic and law, by applying international investment principles, Indonesia will be assisted by international business community.

Problem

Many people, in particular, small business players worry about the impact of such rules which is clearing away and impact to their business or jobs. It is understandable, due to the pass experience that there was no law enforcement could protect them against a big companies, although the law number 1 year 1967 (a prior law) had a strict rule in protecting national interest by implementing closed system of Negative Investment list (very limited sector could be permitted for investor). By implements the law number 25/2007, small medium enterprise will be facing head to head on big or foreign companies, therefore it is needed some protection mechanisme to carry out the principles of fair trade.

Analyze

The law number 25/2007 at last issued and prevailed for any business players in Indonesia regardless the original of Business Company come from. On the other hand, the new law implements the loosen system to broaden sector and coverage of business, including small business sectors. As a result, people become skeptic in responding the new law; they believe many small companies will be gradually eliminated in the global business competition. In fact, The open gate policy is regarded with the whole concept of a new policy in the Investment

policy of Indonesia. Like just other Asian countries which thrust their economic sector by adopting liberalization, Indonesia has the same reason to do that, as Charles Himawan said "To encourage domestic and foreign investors to invest in Indonesia, especially in the big cities, a variety policies and regulations have been issued by government and also local government" (Charles Himawan, 1980). These are the most characteristics of these policies and regulations:

1. Foreign investors are allowed to run territory industries such as: department stores and supermarket in the new area
2. A free trade zones will be established
3. Foreign investors people may establish financial institutions such as banks, financial companies and insurance companies
4. The central government has granted more decision-making power to local government and regulated it by law (The Law number 32 year 2004 about The autonomy of Local Government) to encourage business investors in suburb region

The government said that decision to open the retail business in Indonesia has been considered thoroughly, especially between the President regulation on the traditional market, stores, and modern marketplaces, and the President Regulation number 77 year 2007 about Negative investment list.

However, data of the Indonesian Statistic Bureau (ISB) on the comparison of traditional market and modern marketplaces, showed that fast growing modern market places have exceeded traditional markets. According to the local company owned by the Jakarta government, the growth of modern marketplaces by 1995 was ten times of traditional market. Also in Surabaya, the second largest city in Indonesia, the number of traditional markets had been shrinking from 81 to be less than 20 traditional market in 2005, succeeded by modern marketplaces which is growing very fast.

On the contrary, that phenomenon has actually shown a better condition of economic and lifestyle that makes people enjoy hygiene and leisure sphere of mall, supermarket, and department stores that nice and clean. But, anyhow, it evokes anxiousness and distrustful around the business people who think those modern marketplaces will become a threat for traditional market existence. They convince sooner or later, small enterprises will be shoved aside by big companies or giant owner equity. As reported by ISB, in 2006, the modern marketplaces and other big retail business were soaring up in its growth over 70% compare to 1996 which was only 21,4% throughout the country, meanwhile the traditional marketplaces only grew steadily around 30% in certain areas, especially, in suburbs.

Unfair competition and regulation to protect its practices

Theoretically, in the global competition, the small business are able to take advantages of global situation to be a worldwide small business class through collaboration and business network. By making synergic cooperation with foreign or big national companies, the small business will be able to thrust their capital, market, skill, etc. Hence, this cooperation will improve their capability in global

competition. In fact, many small companies have been taken over by big companies, and the latter took advantage from small business in term of product knowledge, labor cost and other cost.

Started since The 1997 financial crisis and the insistence of the IMF that a number of policy reforms be introduced created a dramatic change in the regulatory environment in Indonesia. The IMF bail out package of $46 billion was extensive and covered reforms in many areas including reduction in some export taxes; elimination of Bulog and the clove monopoly; liberalization of imports of many agricultural commodities including wheat, soybeans and sugar; reduction in import tariffs; removal of trade monopolies in cement, rattan and plywood; removal of local content requirements for automobiles; removal of restrictions on FDI and enforcement of extensive macroeconomic targets.

Furthermore, the IMF required Indonesia to pass laws that ensure fair competition. This eventually led to the enactment of Law No. 5 of 1999 Concerning the Prohibition of Monopolistic Practices and Unhealthy/Unfair Business Competition (popularly know as the Competition Law or the Law) in 5 March,1999. The general purpose of the Law is similar to competition laws in other countries. It prohibits/prevents monopolistic practices and restricts mergers or acquisitions that increase market concentration as well as prohibiting exploitation by firms with market control. As with most competition laws the letter of the law is subject to interpretation. In the Indonesian case the objectives of the Law are loosely written to allow a variety of different interpretations.

Market dominance. The general objectives of the Law are spelled out in article 3 of the legislation. It aims to improve economic efficiency and people's welfare, regulating the business climate to ensure competition in order to maintain equal opportunities for small, medium and large business firms, to prevent unhealthy business competition practices and finally to encourage effectiveness and efficiency in business practices through fostering competition and best business practices.

This article contains several different provisions and has been subject to several different interpretations. As a result the basic thrust of the Law, which should be to maintain and promote competition as a means to achieving economic efficiency, has been lost. For example, (Thee, 2002) argues that a different interpretation of the provision to "maintain equal opportunities for small, medium and large business firms" could suggest market segmentation and protection of the rights of different sized firms when the spirit of the Law is to ensure competitive markets no matter how large firms are.

Several articles of the Law spell out the maximum market shares for monopolies, monopsonies, oligopolies and oligopsonies that would trigger action by the commission charged with enforcing the Law, Commission to Monitor Business Competition (the KPPU). Another provision prohibits the acquisition of a competitor's stock if it results in a market share of the firms together that is too large. These two provisions of the law suggest that there is an overarching concern with the size of large firms rather than whether they are involved in unfair business practices. These provisions also

seem to suggest that "Big is bad" based on *prima facia* evidence of the size of firms.

A more realistic objective would be to set market shares as a trigger point for possible investigation of violations of competition rather than as a blanket rule for prohibiting the growth or the establishment of large companies. In a global marketplace a highly efficient firm could have a large share of the domestic market and still be a highly competitively player in international markets.

Protection of small firms. The explicit inclusion of the terms small, medium and large to describe different kinds of business enterprises creates an impression that competition and competition policy will take into special account the nature of the size of enterprise. A predisposition to protect small enterprises is certainly reasonable within the context of Indonesia and other countries. In the United States, antitrust law had a pro small business orientation in the years following WW II. However a shift in emphasis toward ensuring economic efficiency has become more evident in the United States as the forces of globalization have made more markets contestable and the ability of small firms to meet international competition has been eroded (see Fox (2001)). Indonesia would do well to follow a similar strategy in response to globalization.

Protection of market share. Complementary to the general protection of the rights of firms of different sizes under the Law, several articles - 4,13,17,18 - suggest that the objective is to limit the growth of large firms while protecting the market-share of smaller firms Wie (2002).

Furthermore, exemptions from the Law are granted to small–scale businesses and cooperatives. This framing of the Law's provisions implies that there is a concern for protecting some sectors of the business community rather than promoting free competition by guaranteeing a level playing for all firms, no matter what their size.

Horizontal and vertical integration. Horizontal integration is addressed in several articles of the Law, particularly in restrictions in market control and in the restrictions against price fixing, bid rigging, market segmentation/allocation. Vertical integration is more difficult to ascertain, particularly as it pertains to small businesses. In the United States, for example, the small business administration does not explicitly prohibit vertical integration. Vertical integration can facilitate competition by introducing more efficient product distribution yet it can also reduce competition by developing collusive tactics or restricting entry. In the case of industries having close linkages with overseas businesses it is possible that vertical integration can serve to lock out potential competitors.

In any event it is important that Indonesia develop the expertise required to evaluate the various aspects of (particularly) vertical integration. For example, Wie (2002) argues that vertical integration in the engineering goods assembly sector including motor vehicles, diesel engines and other motorized equipment should be analyzed with an open mind. This is particularly true when it is recognized that many of these vertically integrated relationships were undertaken and encouraged by the Department of Industry as part of its industrial deepening strategy. A major objective should be to

examine whether the existing relationships restrict competition by prohibiting the entry of new firms.

Exemptions. Several sectors are exempt from the provisions of the Law. These include intellectual property and small-scale enterprises (SMEs). The justification for this latter exemption is to give SMEs some protection against the predatory actions of large firms as well as to maintain a diverse distribution of firms of different sizes with different skill requirements. On the other hand, Wie (2002) argues that the exemption of small-scale enterprises will not enhance their competitive advantage relative to larger scale enterprises. Rather it could allow SMEs and cooperatives to engage in anti-competitive behavior.

Policy and administrative barriers to competition. There are already a number of existing barriers to competition as a result of past government policy. There are many cartels in existence, including for cement, plywood, paper and fertilizer. There are also price controls on sugar, rice and cement as well as exclusive licensing for clove marketing and wheat flour milling (see Wie (2002)). The Law is silent on the continued existence of these restrictions on competition and there are no stipulations in the Law that prevents the future actions of Government to create new monopolies or other barriers to competition. For example, with the devolution of power to the provinces and local authorities, local governments may put up barriers to competition and trade by introducing preferential government procurement practices or by requiring local content for the production of some products (see Goodpaster and Ray (2000). For example Central Sulawesi government established a private cartel to control shipment of raw rattan (see Bennet et al (1998)) by prohibiting others from trading raw rattan.

To protect any possibility unfair competition, hence the law regulate an institution which involve in enforcing the law that called business competition commission (anti-trust commission) called "Komisi Pengawas Persaingan Usaha" that has authority as follow:

1. To accept complain from business practitioners about presumption of unfair competition or anti-trust practice
2. To carry out scrutinizing or investigating on presumption of unfair business, which is able to be misconduct in business
3. To carry out an investigating on the case of anti-trust by summon up the suspects, witness, experts, or other related people
4. To make inquiries from government regarding the investigation on the suspects
5. To collect, to observe, and to adjust documents or letter, or other evidence in order to support the investigation
6. To decide and to declare whether the anti-trust practice has been done or hasn't been done by suspects
7. To inform the decision of the commission to related business practitioners who suspect commit anti-trust practice
8. To impose sanction to wrong-doing business perpetrator who against the law on anti-trust practice

By those authorities, KPPU has capability to protect small medium business in doing business or

making agreement with foreign investors, on the other hand, the investors also will be secure to make a deal with small medium business practitioners. The Law No. 5/1999 regulates about two kind of anti-trust activities, The first is about forbidden agreement between business practices, such as:

1. Oligopoly;
2. pricing decision;
3. zoning market;
4. boycott;
5. cartel;
6. trust;
7. oligopsoni;
8. vertical integrated;
9. secrecy agreement

The second is related to wrong doing or misconduct in business practices, such as :

1. Monopoly;
2. monopsoni;
3. conspirator;
4. market control;
5. dominant position;
6. double position;
7. cross ownership;

Obviously, the law describes in detail of the meaning of those forbidden business, so that KPPU also can monitor and control any business circumstances around small and medium scale of business. If any business misconduct happened and damaged or inflicted a financial of small medium business company, it can be filed to the KPPU. If the case have been proved that the big company is guilty, hence The KPPU has authority to impose the sanction. There are two kind of sanction are: administration sanction (article 47) and criminal sanction (article 48 and 49).

Conclusions

The new law was issued due to the declining number of investors since monetary crisis in Indonesia by 1998. The law number 25/2007 at last issued and prevailed for any business players in Indonesia regardless the original of Business Company come from. International Monetery Fund (IMF) required Indonesia to pass laws that ensure fair competition. This eventually led to the enactment of Law No. 5 of 1999 Concerning the Prohibition of Monopolistic Practices and Unhealthy/ Unfair Business Competition (popularly know as the Competition Law or the Law) in 5 March,1999. The general purpose of the Law is similar to competition laws in other countries. It prohibits/prevents monopolistic practices and restricts mergers or acquisitions that increase market concentration as well as prohibiting exploitation by firms with market control. Several articles of the Law spell out the maximum market shares for monopolies, monopsonies, oligopolies and oligopsonies that would trigger action by the commission charged with enforcing the Law, Commission to Monitor Business Competition (the KPPU). KPPU has capability to protect small medium business in doing business or making agreement with foreign investors, on the other hand, the investors also will be secure to make a deal with small medium business practitioners. Now, we just can hope, a business world in Indonesia will be better than today.

Reference

Biro Pusat Statistik, "Jurnal Tahunan", BPS Press, Jakarta, 2006.

Himawan, Charles, *"The Foreign Investment Process In Indonesia",* Gunung Agung, Jakarta, 1980.

Hill, Hal, *"Indonesia's Microeconomic policy Challenges: Industry Policy, Competition Policy and Small-Medium Enterprises" The Indonesian Quarterly.* 1999

International Institute for Management Development, *"The World Competitiveness Scoreboard in IMD World Competitiveness Yearbook",* International Institute for Management Development, Lausanne, 2005.

Khemani, R.S. *"The Importance of Competition Law Policy in Fostering Economic Growth"* paper presented at World Bank, ADB, USAID, Aus AID International Conference on Competition Policy and Economic Adjustment, Jakarta, 2000.

Kunchoro, Mudrajad. *"Study on Domestic Regulatory Constraints to Labor-Intensive Manufactured Exports,"* paper presented at 6th IRSA International Conference "Regional Development in Transition: Governance, Public Services and Ecotourism" Yogyakarta, 2004.

Loughlin, Coleen, S. Marks, A. Shauki, N. Sirait. *"Report on Competition Policy in Indonesia, Study funded by the Economic Law and Improved Procurement Systems Project (ELIPS) USAID-Government of Indonesia",* USAID Project No. 0497 0372.

Maarif, Syamsul. *"Some Challenges to the Enforcement of the Competition Law in Indonesia," Gadjah Mada International Journal of Business*, 2004.

Pangestu, Mari, H. Aswicahuyono, T.Anas, D. Ardyanto, *"The Evolution of Competition Policy in Indonesia," Review of Industrial Organization,* 2002**.**

Rajaguguk, Erman, "Hukum Investasi dan Permasalahannya", Airlangga, Surabaya, 2005.

Thee Kian We. *"Competition Policy in Indonesia and the new Anti-Monopoly and Fair Competition Law," Bulletin of Indonesian Economic Studies,* 2002.

Undang-undang Nomor 5 Tahun 1999 Tentang Persaingan Usaha Tidak Sehat

Wignaraja, Ganeshan, *"Benchmarking competitiveness: a first look at the MECI in Wignaraja",* Ganeshan editor *Competiveness Strategy in Developing Countries,* Routledge, 2003.

World Economic Forum, "*Global Competitivenes",* 2005.