Development in Competition Law and Policy
(Indonesia Progress) *

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I. Introduction:

Since March 5, 1999 the Government of Indonesia has enacted The Law No. 5 of 1999 concerning Prohibition of Monopolistic Practice and Unfair Business Competition and it took into effect on September 5, 2000.

The objectives of the Indonesian Law No. 5 of 1999 shall be focus on:

- 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.

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II. Substantive Aspects of The Law No. 5 of 1999:

The substantive aspects of The Law No. 5 of 1999 govern prohibited agreements, prohibited activities, and abuse of dominant position.

Agreements that are prohibited include oligopoly, price fixing, price discrimination, predatory pricing, resale price maintenance, market division, group boycotts, cartels, trusts, oligopsony, vertical integration, exclusive dealing concerning re-supply, tying, reciprocal dealing, exclusive dealing, and agreements with foreign parties that may result in monopolistic practices and unfair business competition.

Activities that are prohibited include monopoly, monopsony, market control, predatory pricing, determining production and other costs, conspiracy to rig bids, obtaining competitor’s business secrets, and impeding production and marketing of competitors’ products.

The Law No. 5 of 1999 also prohibits abuse of dominant position, interlocking boards of directors, cross-share holding, and mergers, consolidation, & acquisition that may result in monopolistic practices or unfair business competition.

Provisions on mergers, consolidations, and acquisition have not been implemented because the regulations required by the act have not been formulated yet. The Law No. 5 of 1999 requires that prohibitions concerning mergers and acquisitions will go into effect only after implementing regulations have been issued.

The Law No. 5 of 1999 prohibits business practices that may result in monopolistic practices and unfair business competition. To help determine which practices are illegal, The Law No. 5 of 1999 contains presumptions based on market structure. Certain practices which might be legal in an un-concentrated market are likely to determined to be illegal in a concentrated market where it is easier
for business firms to exercise market power. For example, business actors are presumed to be acting as part of an oligopoly if 2 (two) or 3 (three) businesses control more than 75% (seventy five percent) of the market for a product or service (article 4). The same presumption exists that business actors, who have high market shares, are acting in concert if their actions involve oligopsony or enhance a dominant position (articles 13 and 25). A business actor is presumed to have monopoly or monopsony power if the actor controls more than 50% (fifty percent) of a market (articles 17 and 18). In addition, a business actor is presumed to be violating the prohibition of cross-share holding when the actor owns a majority of the shares of companies that control 50% of a relevant market, or a group of actors own a majority of shares in companies controlling 75% of a relevant market (article 27).

The Law No. 5 of 1999 provides exemptions. Activities and agreements exempted from Law No. 5 of 1999 include, among others, agreements intended to implement applicable laws and regulations, agreements relating to intellectual property rights, standard setting, joint ventures for research and development, international agreements ratified by the government, export agreements, activities of small-scale enterprises, and activities of cooperatives aimed at serving their members.

The Law No. 5 of 1999 also governs activities connected with the production or marketing of goods or services that control the lives of people in general. They might be exempted from the application of Law No. 5 of 1999 with two conditions: first, there must be an act (passed by the law maker (DPR) establishing that those products are public products and, second, the activities are carried out by a company or an actor appointed by the government. The company can be state-owned company or other institutions.
III. Law Enforcement:

To supervise the execution of the law, based on Chapter VI, Articles 30 to 37 of The Law No. 5 of 1999, The Commission for The Supervision of Business Competition (Komisi Pengawas Persaingan Usaha / KPPU) was formed. As an independent organization, The Commission also supervises business actors in conducting their business activities so that they do not conduct monopolistic practices and unfair business competition. In executing the duties, The Commission is free from the influence of the government and other parties. It shall be responsible to the President of the Republic of Indonesia and the people of Indonesia through the Parliament (DPR – House of Representative).

The Commission has functions as follows:

- quasi as legislative: shall make its regulations, operational procedures, manual, guidelines, etc. for operating the tasks and authorities
- quasi as executive: shall execute The Law No. 5 of 1999 and its regulations that has been made.
- quasi as yudicative: shall impose sanction in the form of administrative sanctions to the business actor who is violating provisions in The Law No. 5 of 1999.
- providing suggestions and consideration on government policies regarding monopolistic practices and or unfair business competition.

IV. Competition Law and Policy in Progress:

a. Competition Law:

The Commission realized that there are some “hole” in The Law No.5 of 1999 either substantive or procedural aspects which might used by business actors or their lawyers to avoid it or take some gain.
Base on theory, the best way to solve this problem are amending The Law No.5 of 1999, but it is not easy, cause there are other regulation waiting to amend.

Refer to this fact, The Commission has made some effort to solve it, as follows:

- Coordinating with other related law enforcement agency, like Supreme Court, Police, and Prosecutor, to handling business competition cases;
- Developing internal handling cases procedure by using experts either from local or abroad, like ELIPS, GTZ, and JICA;
- Coordinating with media mass to build public opinion about business competition matters;
- Coordinating with Supreme Court to make PERMA (Supreme Court Regulation) concerning Case Handling Procedure in The Court;
- Preparing The Draft of Government Regulation concerning Merger, Consolidation and Acquisition.

b. Competition Policy:

The development of competition policy is an essential component of the required framework that will protect the competitive process and therefore should address the unforeseen and unintended effects of liberalization in the region.

Competition policy, of course, can be viewed in a broad sense to include a host of policies that have an indirect impact on competition such as trade and investment policy, privatization, public ownership, and intellectual property rights.

Base on one of The Commission duties that stated in Article 35 of The Law No.5 of 1999, The Commission was providing
suggestions and consideration on government policies regarding monopolistic practices and or unfair business competition.

In other hand, Government realize that competition policy must be introduced in all economic sector.

The competition policy in Indonesia does exist at many sector level as follows:

- **Oil and Gas – The Law No.22 of 2001:** This Law has opened oil and gas sector to competition market.

- **Telecommunication – The Law No. 36 of 1999:** Implementation of telecommunication that cause monopolistic practices and/or unfair competition is forbidden.

- **Consumer Protection – The Law No.8 of 1999:** This Law contains prohibition of discrimination by producer, and protection for bargaining position of consumer by standard agreement.

- **Construction Services – The Law No. 18 of 1999:** Agreement of construction services has made base on fair competition aspect, and use a fair bid mechanism.

- **Electricity – The Law No.15 of 1985:** Although Indonesia Power (PLN), a public (state owned) business actor, monopolize electricity sector, Government give a license for privat company to provide electricity in certain region that is out of the reach of Indonesia Power.

- Etc.

V. **International cooperation and compliance in anti competitive regulation enforcements.**

The Commission has just promoted 1st ASEAN Conference on Fair Competition Law and Policy in The ASEAN Free Trade Area (AFTA), 5 – 7 March 2003, on the island of Bali.
The Conference was part of The Commission's effort to build International cooperation and compliance in anti competitive regulation enforcements.

Representatives of ASEAN member countries, USA, Japan, Germany, Republic of Korea, ASEAN Secretariat, OECD, World Bank, UNCTAD, GTZ, and other International Organizations attended the Conference.

The objective of this conference is to develop a common understanding among the ASEAN countries that the establishment of compatible competition law are both necessary for economic integration and should be an urgent priority for each of the member governments.

In the concluding session, selected panelist from each session presented their views on the deliberation in the session several issues were emphasized, as follows:

- The conference was very useful and beneficial to the ASEAN member countries to promote market mechanism efficiency. In this regards, all participants were of the view that such a conference should continue be held regularly.

- There is a need for closer cooperation among the competition agency to develop competition law and policy. The panelists also emphasized the importance of technical assistance and capacity building offered to ASEAN member countries to develop and implement their competition law and policy.

- The conference stressed the importance of law enforcement, building competition culture and extending advocacy campaign to increase public awareness on the benefit of competition law and policy for economic growth and development.
There was a clear consensus that sound competitive law and policy promote economic growth and development. There was also a clear consensus that competition policy and trade policy are complementary.

During the conference, there was a lot of concern about the social cost of introducing competitive regime particularly in relations to the survival of Small and Medium Enterprises and the fear of increasing of unemployment in developing countries. To overcome these problems, one of the panelist suggested that there is a need to combine competition law and policy with regulatory reform such as, reducing red tape, decreasing barriers to entry for new enterprises, creating social safety nets, and introducing labor market flexibility.

There was an understanding that competition in domestic market was very important for the companies to become internationally competitive.

Introducing competition into market and getting the benefit of increased economic growth and development is a long process and it should be undertaken with full appreciation of the implication for economic and social goals.

VI. Conclusion:

As a new law and institution, The Law No. 5 of 1999 and The Commission face many challenges. Indonesia must learn from the experiences of other countries.