Experience on Indonesia's Competition Law: Challenges Confronting the Enforcement of the Law

Hikmahanto Juwana*

March 5, 1999, is an important date in the history of competition law and policy in Indonesia. It was on this day that Indonesia enacted Law Number 5 of 1999 Concerning the Prohibition of Monopolistic Practices and Unfair Business Competition (Law No. 5). With its enactment, Indonesia joined the many countries around the world with antimonopoly laws.

My speech intends to describe the obstacles in enforcing Law No. 5 in its 4 years or so history. The basic argument of my paper is the enforcement of the Law has not been in accordance with what is expected since Indonesia’s specific monopolies still exist. The main cause of the obstacles lies in the different perspectives and purposes.

There are various purposes of Law No. 5 when it was drafted and, later on, promulgated. The purposes of Law No. 5 is heavily dependent on the perspectives of those who forge the Law to be enacted. Basically the perspectives can be distinguished from those coming from inside and outside Indonesia.

The internal perspective to enact Law No. 5 was the public demand to end Government-sanctioned monopolies. The nature of monopoly practices in Indonesia is different from those of developed countries. Most monopolies in Indonesia have not been the result of unfair competition between firms, which is referred to as industrial monopoly. Rather, they have been the result of the Government’s intervention in the market. This can be distinguished in three types of monopoly practices.

The first type of monopoly practice has been for the Government to grant economic privileges to firms that have close ties with high-ranking Government officials. The second type resulted from State owned enterprises (SOEs) monopolizing various lines of business on the ground of the Constitution. The third type of monopoly practice is firms involved in a sort of ‘price fixing’ as government frequently asked their association to give input on tariffs.

In addition, anti-competitive practice that has been prevailing in Indonesia is bid rigging and sub-contracting, mostly on Government projects. The most common bid rigging is when firms are bidding by using dummy companies under the knowledge and ‘approval’ of Government official who is responsible in the tender process. Meanwhile sub-contracting occurred when firms, usually owned by families and cronies of high-ranking Government official, win certain tendered-Government project, then sub-contract it to other firms.

The most pervasive monopoly practice has been Government-sanctioned monopolies. This is carried out when individuals occupying high Government position issue

---

* Professor of Law, University of Indonesia, Jakarta. Hikmahanto Juwana received his LL.B. from University of Indonesia (1987), LL.M. from Keio University (1992) and Ph.D. from University of Nottingham (1997).
legislation or decrees sanctioning firms to monopolize certain businesses. The legislation and decrees gave firms their privileged positions.

As a result, the market practically had been closed to most Indonesians who did not enjoy close ties with high-ranking Government officials. Access to the market, at that time, meant having acquaintance with high-ranking Government officials or entering relationships with firms who had special connections.

Although Law No.5 intended to end Indonesia’s specific monopolies, unfortunately, substantively Law No. 5 did not deal to address this issue.

There are only two articles that deal with Government-sanctioned monopolies. The first is Article 51, which in short provides that monopolies granted by Government to SOEs or firms must be based on a legislation in form of a Law. Legislation in the form of a Law for granting monopolies will give opportunity for public debate as Parliament is involved in passage of a Law. The second article is article 35 (e) concerning the KPPU’s task to provide recommendations and comments on Government policy that has a bearing on monopoly practice and unfair competition.

In addition, there is an article that deals with anti-competitive behavior in the form of bid rigging as stipulated under article 22, which have been frequently employed by KPPU when examining and deciding a case.

If the public demand to end Government-sanctioned monopolies is the purpose of the Law, Law No. 5 should have stipulated more provisions on issues, such as, what to do with past legislation granting monopolies, how to deal with firms that had Government-sanctioned monopolies, what are the exit provisions of firms that were previously granted monopolies, KPPU is given responsibility of reviewing past legislation granting monopolies, how to end monopolies granted by local governments and how to anticipate their re-occurrence, and what happens if recommendations by KPPU are not followed by Government.

The next driving force to enact of Law No. 5 was Government’s dire need of public support. The Habibie administration as successor of the Soeharto administration in 1998 was struggling to gain support from the public amid his image as follower and crown prince of Soeharto. Public atmosphere at the time was that everything having to do with Soeharto should be put aside. These include Government-sanctioned monopolies previously granted to Soeharto’s families and cronies. The Habibie administration saw a chance of gaining public support with the passing of Law No.5. Here, Law No. 5 was not enacted to address monopoly practices plaguing the Indonesian economy; rather it was used for political purposes.

Accordingly, Law No.5 was enacted for three reasons. First, it was intended to appease the public by responding to its demand. Second, it was intended to show the Habibie administration had no hesitancy to take harsh measures against families and cronies of Soeharto. Third, it showed the strong will of the Government to rectify past mistakes.

The indication that Law No. 5 was used to gain public support can easily be seen from the first part of its formal name, which is “Prohibition of Monopoly Practices.” The
‘Prohibition of Monopoly Practices’ is expected to catch public’s attention on the seriousness of government in ending monopoly practices.

The external influence for enacting Law No. 5 came from the IMF. The government had no choice but to pass the Law or face the consequences from not receiving loan disbursements. Delay in loan disbursements could have had serious effects on the economy and foreign investors’ confidence. All of these would result in further deterioration of Indonesia’s economy.

The question is why was the IMF keen to push Indonesia to adopt the Competition Law? Is it because they want to see Indonesia’s economy efficient and growing again?

Making Indonesia’s economy become efficient and to once again grow may be true, however that is not the only purpose. There are other purposes, which unfortunately are not in open. One possibility would be Indonesia is seen as potential market for foreign firms. However, as discussed earlier, the market is closed. One way to open the Indonesian market is by introducing the Competition Law.

Assuming such possibility is true, the market may not be open, as discussed earlier, due to the substance of Law No. 5 being insufficient in dealing with Indonesia’s monopoly practices. The IMF may not be aware of this as its only concern is with the Competition Law in its generic term is being passed. It may not realize the real cause of Indonesia’s market being closed.

Another reason is due to globalization. Globalization has been referred as one of the reasons to introduce the Law. Under the banner of globalization, Indonesia wanted to have Competition Law that is not different from those in developed countries. A one size fits all approach was used rather than addressing local anti-competitive behavior. In addition the drafters were also hesitant when drafting provisions that would be markedly different from the international standard of Competition Law.

In sum, the enactment of Law No. 5 have missed addressing monopoly practices in Indonesia. This has been confirmed by one study that found Law No. 5 was not designed for eradicating monopoly practices as generally found in Indonesia.

Now let me turn to the issue on why Law No. 5 has not been effective. Having law that meets the international standard in developing countries does not mean the behavior of the society will instantly change in accordance with such law. Indonesia has been encountering problems with its legal transplants, including Competition Law. There are, at least four, major problems encountered.

Firstly, legislation is drafted not for the right reason, namely, to address social issues faced by the society. Law is written for other purposes, such as for the sake of wanting to have a legal system like the developed countries or meeting demands from international pressure.

Second, the problem owes to the fact that when drafting legislation the drafter sometimes lacks understanding of the intricacies of the issues. Understanding the intricacies is important since at the implementation stage the law enforcement
agencies will rely mostly on what is written in the provisions. Thus, inaccuracy in translating concepts and policies to provisions will result in inconsistency between what is intended and what is implemented.

In addition, the inaccuracy problem has been added to by another problem, namely, legal drafters in Indonesia have the habit of translating, instead of making reference to, other countries’ legislation. Translating provisions, although that will result in the legislation, neglects the local conditions. To make things worse, drafters also followed advise from foreign experts as it was given without any serious attempt to adapt the advise to Indonesian context.

Third, drafting legislation to meet the international standard often neglects the supporting legal infrastructure for such legislation to smoothly operate. To write a provision on the establishment of the KPPU, for example, is easy. The challenge, however, lies in its implementation, such as how will the institution be financed, how will the members be recruited, what is the relationship with other governmental agencies, etc. Drafters of Law No. 5 seem to have not given thorough consideration to these issues.

Fourth, having legislation that meets the international standard has been considered as changing society’s values abruptly. The legislation may be seen as unfit for the local society as the society has not been familiar with or does not have a good understanding of the new values embedded in the legislation. In addition, law enforcement can be lenient and compromise due to law enforcer’s sympathy toward this gap issue.

Lack of law enforcement of Law No. 5 has been the cause for firms to not seriously pay attention to the Law’s existence. The law enforcement started from the beginning of Law No. 5 was promulgated.

Even though the Law had provided sufficient time before it took effect, nevertheless when the law was coming to the effect the Government had not shown its readiness to implement the Law. The members of KPPU had only been appointed 3 months after Law No. 5 became effective. KPPU’s supporting infrastructure, such as office, staffs and budget, were not readily available. In addition, many Government officials were unaware of the KPPU’s existence and some confused the KPPU with KPU (Komisi Pemilihan Umum), which is Indonesia’s Electoral Commission.

There are several reasons why the Government was not ready to implement Law No. 5. First, there was a change of Government from Habibie to Wahid administration. Time was needed as new officials had to acquaint themselves with the then-pressing issues. Second, human rights, economic recovery and separatist movement issues have overshadowed the monopoly issue. Third, similar to the other laws made under IMF conditionality, they were passed for the purpose of meeting conditionality, but lack the political will to implement. The Government’s commitment to implement did not last beyond the disbursement of the IMF loan. Lastly, the public had shifted its focus from monopoly to other issues resulting in the absence of public pressure to the Government.
Implementation of Law No. 5 has been difficult, as individuals occupying positions in enforcement agencies have not understood the competition concept well. Enforcement agencies, except the KPPU, were unfamiliar with Competition Law. This has resulted the reluctance of enforcement agencies to deal with substance when confronted with a competition issue. Most cases have been decided on their lack of compliance with procedural matters.

Moreover, since Law No. 5 was also promoted by the IMF, the public has been suspicious when the Law is implemented. This is due to the public’s negative view toward the IMF. Many believe the IMF has been carrying out an international conspiracy against Indonesia, one that wants to open Indonesian market to foreign firms rather than to make Indonesian economy back on its feet.

Another problem when implementing the Law is that the provisions are, as discussed before, not clear enough making them difficult to be understood by individual law enforcer. As a result, the provisions have created confusion.

Furthermore, Law No. 5 has imposed an unrealistic time restriction for a case to be decided. The time restriction was intended by the drafters to be a solution for uncertainty of time when a case is handled by the judiciary. However, it was not a solution but has created further problems, in particular when the KPPU or the Court has to examine complicated cases.

In addition, Law No. 5 has introduced a different kind of rules of procedure, which has created further confusion. To cope with the problem, the Supreme Court in August 2003 issued a decree that provides detailed rules of procedure for handling Competition Law cases. It remains to be seen how effective such rules of procedure will be.

To conclude Law No. 5 was deficient in the drafting stage. The most important point to note is it was not drafted to address the real issue of monopoly practices in Indonesia. This resulted in the Law being insufficient when implemented and, therefore, has not been having the effect as expected by the public.

Nevertheless it is only fair to say that Law No. 5 is still evolving, and may take many more years until the Law functions as expected. There is a lot of work to be done, including work to amend the Law. It is premature and too early to say that Indonesia’s Competition Law has failed.

Let me take this opportunity to encourage the participant in this workshop to openly discuss your country’s experience in implementing the Competition Law. May be through these experiences we come across a solution for our country’s Competition Law. This is where workshops initiated by APEC can be of helpful hand.

Let me close by thanking you for listening. Thank you very much.