ARTICLES

THE DEVELOPMENT AND CHALLENGES OF INDONESIAN ANTIMONOPOLY POLICY:
LESSONS LEARNED FROM JAPANESE EXPERIENCE

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Table of Contents

Introduction

1. A Sketchy History and Legal Frameworks of Antimonopoly Policy in Indonesia

1 - 1 Prior to Asian economic Crisis

1 - 2 The Momentum: Establishing Antimonopoly Policy

1 - 3 Legal Frameworks and Enforcement Body

1 Japanese Antimonopoly Policy: changes and continuity

2-1 History and development

2-2 The Structure, Substantive Rules, and Japan Fair Trade Commission (JFTC)

3. The Features, Future Challenges, and Lesson Learned

3-1 The Features and Challenges

3-2 Japanese Antimonopoly Policy Characters

3-3 Valuable Lessons from Japanese Experience

Conclusion

INTRODUCTION

Before the financial crisis in 1997, Indonesia was believed to be a potential country for its phenomenal economic growth and economic miracle, it was considered as one of the promising countries in Southeast Asia. Indonesia was generally perceived as having a great potential economic future as well as a fascinating market for other producer countries. However, Indonesia's rapid economic growth was criticized by some as having been built upon the government's over-active role. This condition is considered to be over-regulation of business whether big or small, the ownership of giant state enterprises, and the support of the crony capitalism. These policies were found in government-granted import and trading monopolies and favored access to government contract and State bank credit. It is often stated that economic development during this period was heavily affected by corruption and rent seeking behavior[1].

To end the economic crisis Indonesian enacted Law No.5 Year 1999 about Concerning the Prohibition of Monopolistic Practices and Unfair Business Competition. The KPPU as a commission on supervision of business competition, which is responsible for enforcing and defining the substance of sanctions and penalties for violations of the law, was also established. This policy then became a significant movement in increasing national and international competition.

During the enactment and development there are many critiques and problems toward this policy. Hence it is necessary for Indonesia to learn from its own experiences by considering various factors such as the economic system, the legal and political structures, which will improve the implementation[2]. Besides that, Indonesia should also consider the experience of implementing Antimonopoly law from other countries, especially a country which is having strong economic partnership with Indonesia. In this paper, the experience of Japan and its antimonopoly act is chosen for several reasons: the Japanese antimonopoly was enacted in Japan in 1947. When comparing with the competition laws of the world, it was a very early phenomenon. However, like Indonesia, in the beginning antimonopoly policy in Japan did not function smoothly, there were many obstacles faced by Japan in enforcement competition law and policy in the earlier stage of its establishment. Although the Japanese antimonopoly was modeled after the American antitrust law, it changed uniquely according to its major amendments and developments of case law.

The other reason is that Japan and Indonesia has more than 50 years partnership[3] particularly in economic sectors, Japan is a country considered as one of the biggest investors in Indonesia, and very influencing in Indonesia business environment.

1. A SKETCHY HISTORY OF ANTIMONOPOLY IN INDONESIA

1 - 1 Prior to Asian Economic Crisis

In the past, several Indonesian regulations have attempted to promote fair business competition. It can be seen in the provision appeared in several laws, such as Article 382 of the Indonesian Criminal Code, article 1365 of the Civil Code, and other regulation. In spite of this, the provision could provide protection to business persons only if the unfair competition in question is caused as a result of a deceptive act. This provision was clearly inadequate, since unfair competition, activities such as market restrictions, and collusions were not necessarily conducted through deception, thus it can be said that the application of the provision was limited.

The unlawful action in Indonesia was not clearly defined, and so its application is very extensive. Even worse, the judges thought that it was not necessary to have a standard definition. As a result, the application of provisions regarding unlawful activities on business competition was very limited and rested solely on the judges' discretion when a case arises. This clearly presented problems for business persons intending to plan their activities in advance[4].

The other regulations are Law Number 5 of 1984 on Industry, and article 7 and 104 of Law Number 1 of 1995 on Companies, all of which limit the possibility of monopolistic practices through mergers. However, it turned out that these stipulations were so universal and simple, that they were ineffective to restrict business player from practicing unfair trade.[5]

In the mid-1980s the idea of formulating a comprehensive policy regarding business competition eventually appeared, but it was soon abandoned and forgotten. Although a lot of efforts were made by the government for the purpose of drafting the business competition law, little was actually achieved. In 1992, the research division of Indonesian Democratic Party (PDI), one of big parties in Indonesia, prepared a draft bill entitled *Simulation of Economic Competition Law*, but for various reasons the government did not take the bill into consideration[6].

1-2 The Momentum: Establishing Antimonopoly Policy

When the financial crisis revealed that Indonesia lacked sound policy for determining what constitutes fair and unfair business competition, the government realized that Indonesia also lacked any mechanism for systematically dealing with business actors whose practices go against the principles of free and fair competition[7]. In order to solve the crisis the government of Indonesia signed Letter of

Intent (LOI) as part an International Monetary Fund (IMF) loan-rescue program in January 1998. Among the fifty points outlined in the accompanying Memorandum of Understanding, the Indonesian government undertook a program of government deregulation. The government's plans for deregulation were incorporated in Seven Presidential Degrees, three Government Degrees, and six Presidential Instructions[8]. Part of the IMF-ordered deregulation prohibits the Indonesian government from protecting the "cronies" that cause marked distortions. As part of the commitment stated in the LOI, the Government of Indonesia agreed to enact a law to ensure free and fair business competition, which resulted in the Law Number 5 Years 1999 that came into effect in March 2000. As in other countries with competition laws, Indonesia has adopted the notion that competition law is a means to preserve and maintain a competitive economy that will encourage efficiency and increase consumer welfare.

１-3 Legal Frameworks and Enforcement Body

The current Indonesian antimonopoly regulation stipulates general provisions, principles and objectives, prohibited agreements, prohibited activities, dominant position, business competition supervisory board (KPPU), case handling procedures, sanctions, miscellaneous provisions, transitional provisions, and closing provisions. The general provisions contain the operational definitions used in the law, for example, the definition of monopoly, market, and relevant market, centralization of economic power, agreement, and conspiracy.

The objectives of the law include: safeguarding the public interest; improving the efficiency of the national economy as a means of improving the people's welfare; creating effectiveness and efficiency in business operations; providing equal business opportunities to small, medium and large scale businesses; and preventing monopolistic practices and unfair business practices.

KPPU was officially established by the Presidential Decree No. 75 of 1999, dated July 8, 1999[9], and the commissioners were appointed by the Presidential Decree No. 162/M of 2000, dated June 7, 2000. The Commission consists of eleven members from different backgrounds of expertise appointed to serve for a period of five years[10]. The KPPU is designed to be an independent agency that is free from government control and interference[11]. In order to assure its independent position, commission members are appointed or dismissed by the President upon approval of the House of Representatives and are obliged to make reports to the President and the House of Representatives[12].

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The KPPU has a wide range of duties and authorities, it may investigate alleged violations of the law based on a written complaint or upon its own initiative[13]. Likewise, KPPU has a wide range of

powers, including conducting investigation, evaluating alleged violation, issuing decisions, imposing administrative sanctions, and providing advice and opinion on government policies related to anti-competitive conducts.

In relation to the proceedings, any person who is aware of or is harmed by the violation may submit a written report to the Commission[14]. Based on such report, the Commission is required to conduct a preliminary examination, advanced examination, and to decide whether or not there has been a violation of the law. Concerning sanctions, the Commission has the authority to impose sanctions in the form of administrative measures on business actors violating the provisions of the Law[15]. Administrative measures involve agreement cancellation, instruction to business actors to terminate vertical integration, instruction to halt activities evidently resulting in monopolistic practices and or unfair business competition and or harmful for the community. Administrative measures may also be in the form of instruction to business actors not to abuse dominant position, cancellation of merger or amalgamation of business entities and share acquisition, compensation payment, and imposition of a fine of not less than Rp.1 billion and not more than Rp.25 billion.

2. JAPANESE ANTIMONOPOLY POLICY: CHANGES AND CONTINUITY

2-1 History and Development

In Japan, the aim of the antimonopoly law or "Law Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade" (Law No.54 of 1947) is to promote free and fair competition in market, thus stimulating the creative initiative of entrepreneurs and ensuring the protection of the interests of consumers in general. At the first establishment, this policy was expected to develop and be operated in the same ways as the American antitrust law. However, it turned out incompatible with the real operation of the Japanese economy and difficult economic situation after the Second World War. Consequently, it was revised extensively in 1953 to introduce several exceptions to the prohibition of cartels and allows some collaboration among competitors with regards to such things as researching and developing new technology (R&D) that was banned at the beginning. The development and changes of Japanese antimonopoly can be divided into periods from pre-world war to 2009.

Pre-World War II

In this era, free competition was a new idea in the Japanese business community. After the Meiji restoration of 1868, the basic objectives of the Japanese government and industries were to learn from and reach industrial equality with Western countries. Hence, to achieve these objectives, the Japanese government undertook intensive program of industrial development, such as the steel industry in which nationalized steel mills were launched.

The Economic Democratization Policy

Complete damage of Japan and its industries was seen in Japan at the end of the Second World War. Japan was occupied by the Allied Occupation Forces in which the United State was the leading power. The Occupation Forces promoted reconstruction of the Japanese economy on the basis of economy democracy through the introduction of an "economic democratization policy"[16], which consisted of three major parts:

1. Agricultural land reform
2. Labor legislation
3. The decentralization program and enactment of the Antimonopoly law

The important part of the Economic Democratization Policy at that time was breaking up the zaibatsu and enacting the Antimonopoly law. The zaibatsu exercised incredible power over the entire Japanese economy until the end of the Second World War. The Occupation Forces decided to eliminate the zaibatsu and issued a series of memoranda to the Japanese government ordering that they be dissolved. The Japanese government enacted the Law to eliminate Excessive Concentration of Economic Power and issued a series of decrees. Under this law, many large companies in zaibatsu were split into many small entities. As a result, the decentralization of the Japanese economy was accomplished.

The Origin of Japanese Antimonopoly

The original model of Antimonopoly of Japan is American antitrust law that is the Sherman Act, the Clayton Act, and the Federal Commission Trade Acts, which gave several unique characteristics to the Japanese Antimonopoly legislative when compared with present legislation. It was a strong piece of legislation in several ways: the law (1) applied a per se illegal standard for cartels, (2) imposed strict control over mergers and acquisition, (3) prohibited unreasonable disparity in terms of economic power among enterprises, and (4) severely limited exemptions. Incidentally this legislation created the Japan Fair Trade Commission (JFTC) to enforce the statute.

The policy was strictly enforced for the first few years of its enactment because the overwhelming power of the Occupation Forces. From around 1950, however, enforcement was quite suddenly lessened as a result of the Truman Doctrine[17] and the Korean War.[18]Then United States policy changed from discouraging Japan's recovery as a major economic power to rebuilding Japan into a heavily industrialized country that is able to function as a protection against communism.

The 1953 Amendment

In 1953 the Japanese antimonopoly was amended, and major provisions of the act were reduced. The amendment consists of: Firtsly, the *per se* prohibition of cartels was changed to the prohibition of cartels if they substantially restraint competition contrary to the public interest. *Secondly*, the strict regulation of mergers and acquisitions was also relaxed. *Thirdly,* the prohibition of undue gaps in economic power among enterprises was eliminated. *Fourth,* cartels during economic depression and those for rationalization were exempted from the prohibition under defined conditions. *Fifth*, resale price maintenance was also conditionally exempted. *Finally,* the provisions dealing with unfair business practice were amended.

Besides, the liberalization of capital transaction took place around this period. This was accomplished through the relaxation and essential elimination of the Foreign Investment Law. When this law was fully enforced, international agreements involving technology licensing were closely analyzed, and if the provisions of an agreement were considered to constitute an unfair business practice, the obligatory government approval under this law would not be granted unless the offending provisions were deleted[19].

The Oil Crisis and the 1977 Amendment

The oil crisis in 1977 brought new era in the enforcement, hidden cartels, created by the petroleum industry with the purpose of fixing price, were discovered and public protest developed concerning the price manipulations of private industry. A task force was organized by the JFTC to study the possibility of an amendment, and certain proposals were made with the aim of making the law more effective against economic concentration. The government took up the issue, and amendment was made in 1977[20].

There are three major changes of the amendment[21]; first one was the incorporation of a provision to control monopolistic conditions in the market. Secondly, the administrative fine, may be imposed when price cartel fixed prices by collusion. The JFTC is empowered to order the participants in the cartels to pay an administrative fine in order to deprive such participants of excess profit

resulting from the cartel. The last is the price reporting system. When in an oligopolistic market, major companies raise price simultaneously, the JFTC can order such companies to provide the JFTC with reasons justifying the price increase.

2005 Amendment

In 2005, the regulation was amended to make enforcement of the Act more effective, purposed primarily to strengthen the regulation of cartels. As a result the scale of the power given to the JFTC is said to be the most in the Japanese Antitrust law history. Due to the amendment, the antitrust regulations of cartels have become significantly stricter, and the JFTC was given the power to exercise its authority to concentrate effort on cartels much more aggressively.

Regarding these amendments, three reforms in particular should be noted. The first, the JFTC is now able to exercise compulsory measure to investigate possible antitrust violation for which criminal sanction is imposed. The second, the amount of surcharge applicable to cartels has been increased. And the last, the Leniency Program has been introduced.

2009 Amendment

The newest revision of antimonopoly law was made in 2009, and it came into effect on January 2010, to follow up on major revision in 2009 and to reinforce the existing surcharge rules[22].The main features of the most recent amendment are: the scope of violations subject to surcharges has been expanded to include exclusionary types of private monopolization and the abuse of dominant bargaining position. *Furthermore*, surcharges will also be applicable to sales at unjustly low prices, discriminatory pricing, concerted refusal to trade, and restriction of resale price on and after the second offense of the same type of infringement within a ten-year period.

A number of other revisions have also been made in the surcharge system. These include the imposition of higher surcharge rates on businesses that have played a leading role in cartels and bid-riggings; joint application for leniency by multiple numbers of enterprises belonging to the same corporate group; increase in the number of enterprises that can apply for leniency in a single infringement case; and extension of the statute of limitations for the issuance of surcharge payment orders[23].

2-2 The Structure, Substantive Rules, and Japan Fair Trade Commission (JFTC)

Generally, Japanese antimonopoly law prohibits a business from: preventing free and fair competition by consulting with other entrepreneurs (the cartel regulation), unjustly maintaining its

monopolistic position or excluding other competitors (the monopoly regulation), Distorting competition by using any of the sixteen types of unfair trade practices (the Unfair trade regulation), Beside that the substantive rules about market concentration (the merger regulation) is also provided.

The conduct dealt with by the cartel regulation provisions is described as `unreasonable restraint of trade` which means to mutually restrict business activities by making cooperative decision concerning sales price, sales volume, consolidating of manufacturing facilities, and restriction of business partners among competitors, thereby substantially restricting competition in any field of trade. Unreasonable restraint of trade includes conduct such as `bid rigging`, `price cartelization`, `market segmentation cartelization`, transaction term cartelization`, `supply restriction cartelization`, `trading partner restriction cartelization`, and others.

The conduct set out in the monopoly regulation is called `private monopolization`, which means that entrepreneurs exclude or control the business activities or other entrepreneurs, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade. Specifically, this means any conduct by an company with large market share that seek to exclude the participation of new entrants or restrain the business activities of other competitors by using unjust means (in many cases, but not limited to, any means that violate the act) in order to maintain market share.

Further, the enforcement body or Japan fair trade commission (JFTC) was initially instituted in 1947 as an administrative agency of the central government set up in order to fulfill the objectives of Japanese antimonopoly. JFTC's characteristic is an independent administrative commission. Due to its role as the basic controller on economic activity, the principle needs to be implemented in a continuous and consistent manner under the control of a neutral and fair agency without any political influence. That is why, unlike other administrative agencies, JFTC exercises its power independently without the direction/supervision of a higher organ of government. This function is performed not by ad hoc appointment, but rather by a commission because the application of antimonopoly policy as the basic rules on economic activity must be prudently examined.

Regarding administrative procedures, after preliminary investigation, if the JFTC find a reasonable ground, it may initiate a formal investigation. After a formal investigation, if the JFTC does not find a violation, it closes the case. On the other hand, if the JFTC find a violation, it issues an elimination orders and/or a surcharge order after having provided the respondent with an opportunity to submit its opinion, etc. and initiate formal hearings upon the filling of the written request when these

orders are objected to by the firm. If the JFTC finds that a violation exists at the end of formal proceedings, the JFTC issues the formal decision ordering the respondent firm to take corrective measures.

If dissatisfied with the judgment of the JFTC, the relevant parties may file litigation at the Tokyo High Court that has exclusive jurisdiction in seeking the revocation of the judgment of JFTC. The relevant parties may plead to introduce new evidence, mentioned that there are reasonable grounds. The relevant parties may also file an appeal against the Tokyo High Court with the Supreme Court for its review.

3. THE FEATURES, FUTURE CHALLENGES, AND LESSONS LEARNED

3-1 The Features and Challenges of Indonesian Antimonopoly Law

Article 3 of Indonesian antimonopoly regulation cites four items as the purposes of the law, but no unifying concept free and fair competition at least explicitly,there are many ambiguous provisions. The vagueness of these provisions has raised various criticisms and comments. This article contains several different provisions and has been subject to several different interpretations. As a result the basic thrust of the article that is maintaining and promoting competition as a means to achieving economic efficiency, has been lost. Many argue 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 antimonopoly is to ensure competitive markets no matter how large firms are.

In addition, several articles spell out the maximum market shares for monopolies, monopsonies, oligopolies and oligopsonies that would trigger action by the Commission. 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 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.

There are many specific provisions on prohibited agreements in Indonesian antimonopoly law: In total, 12 provisions prohibit 16 specific types of agreements including horizontal ones and vertical ones[24]. Among those 16 types, 7 types such as one regarding horizontal price fixing agreement are provided for as per se illegal and 9 types such as minimum resale price maintenance agreement as rule of reason.[25]

Furthermore, independent enforcement agency which is the sole enforcement agency of

Indonesian competition law and policy was instituted. It is a so called "independent administrative commission". It is free from the government and other party's influence and authority and is responsible to the president (article 30). The term of office of any member is 5 years (article 31). The Commission is assisted by a secretariat (article 34). One of the causes for the termination of the membership is "dismissal".[26]The President has the power to appoint and dismiss all the members of KPPU, including a chairperson and a deputy chairperson. Therefore, KPPU may not be completely free from the influence of the President.

Regarding the court system, legal enforcement of decision by KPPU is an issue that is still being reviewed. KPPU encountered resistance from the business and other legal enforcers who are unfamiliar with the regulation[27]. This is mainly due to KPPU broad authority, which includes investigation, adjudication and sanctions to the Reported Party who have proved violating the law[28]. KPPU can impose administrative sanctions against the violators[29] and may seek criminal penalties for certain violations as stipulated under Article 48. Through various debates, prosecutors and police have raised questions concerning criminal sanctions on their role as part of the enforcement process. At present the Court and KPPU concluded that the role of the police and or prosecutors may involve in the process if KPPU found that there is criminal violation exists[30]. The principle seems concrete but the execution process or procedure remains unclear. Several substantive and procedural issues have been challenged during the enforcement process. Debates continued when reported party challenged KPPU sanctions as authorized by the law. Appeal may be brought to the District Court by the Reported Party or when KPPU or the Reported Party decided to challenge District Court verdict to the Supreme Court (*kasasi)*. The procedure applies HIR (*Herzien Indonesische Reglement*)[31] as the formal ground for procedure.[32]

Several sectors are exempt from the provision of law. Many argue that it has broad exemption provisions such as mentioned art.5 (2). Those exceptions include intellectual property and small-scale enterprise (SMEs). The justification for this exemption is to give SMEs some protection against the predatory actions of large firms as well as to maintain a diverse distribution of firm of different sizes with different skill requirements. On the contrary, some argue that the exemption of small scale enterprises will not enhance their competition advantage relative to larger scale enterprises[33].

There is a dynamic tension between protection of intellectual property and the enforcement of competition. Protection of intellectual property protects and preserves the incentives for innovation since firms are more likely to innovate if they are protected from free riders. On the other hand,

continued protection can lead to the development of monopolistic power if these rights are not flexible enough to respond to new innovations and ideas. In the case of Indonesia much of the protection of intellectual property involves infringement of the rights of foreign firms.

In addition, another challenge is a very strict procedural time constraints on KPPU (art. 43 (1) and (2)). The Commission shall be obligated to complete further investigations within a maximum period of 60 (sixty) days counted from the date of investigation as referred to under article 39, Paragraph (1). If it is deemed necessary, the period of investigation as referred to under Paragraph (1) the process may be extended at the longest within a period of 30 (thirty) days. The District Court must make a decision within a period of 30 (thirty) days counted from the date the objection begins to be examined, and article 45(4) The Supreme Court must make a decision within a period of 30 (thirty) days counted from the date the cassation petition is received.

3-2 The Features of the Japanese Antimonopoly Act

Logical consistency while keeping elasticity is considered one of the characteristic of Japanese antimonopoly arrangement[34]. This characteristic can be seen in unifying concept “Free and Fair Competition” under the article 1. The regulation also sets 6 broad patterns of conducts as a framework of unfair trade practices. They are: unjust discrimination, unjust pricing, unjust customer inducement and transaction coercion, unjust binding terms dealing, abuse of trade dominance, and unjust trade hindrance and internal disturbance of a company.

The Japanese antimonopoly act provides that unfair trade practices shall be such conducts as JFTC designates as unfair trade practices out of the conducts which meet the above two requirements. Therefore, what are unfair trade practices are determined by JFTC's designation. In order to regulate unfair trade practices effectively in a specific area, two special laws have been enacted. One is Subcontract Law and another is Premiums and Representations Law.

The regulation of “trade dominance"[35] abuse can be categorized as unique. Trade dominance is where one transacting party is dominant over other transacting party, while market dominance is where one or a group of entrepreneurs is dominating over a relevant market. Trade dominance situation is found in a continuous trade relationship such as subcontract, supplying goods to a large retailer, newspaper publisher vs. newspaper retail distributor.

Regarding the independent enforcement agency, JFTC is the sole enforcement agency of Japanese competition law. All of commissioners are appointed by the prime minister with the assent of the Diet. JFTC has a strong independence of functions. Even Prime Minister can’t instruct JFTC. It has

also heavy protection of status[36]. JFTC has a wide range of powers. It has investigative power, adjudicative power, enactment power, policy making power, advocacy power and research power on competition law and policy[37]. In addition, General Secretariat is attached to JFTC[38]. It is the source of expertise and efficiency in competition policy.

As much as 18 guidelines in addition to 13 on unfair trade practices have been issued in order to increase transparency, clarity and foreseeing ability of law and to promote self- compliance. The Japanese antimonopoly law also has several categories of corrective measures against violations: administrative measures (they are elimination measure order by JFTC[39] and surcharge payment order by JFTC against price cartel, volume cartel, market share cartel, customer restriction cartel and control type private monopolization[40]. Also criminal measures that imprisonment up to 3 years against natural persons, criminal fine up to 500 million yen against entrepreneurs and up to 5 million yen against natural persons regarding certain gross violations such as cartels[41] and the private enforcement measures that including damage suits, injunction suits (against unfair trade practices)[42].

In Japan the alleged entrepreneur who are dissatisfied with an elimination measure order or surcharge payment order may request a hearing proceeding on the case. This hearing proceeding is very similar to court proceeding. It is the full trial on the matters of fact and law. The alleged entrepreneur has full opportunity to submit assertions and evidences and to carry out cross examinations of witnesses with assistance of his attorney. The hearing proceeding is held under triangle structure consisting of investigator, alleged entrepreneur and trial examiner.

Additionally, concerning centralized court review system, an entrepreneur who complaints against JFTC's decision issued at the final stage of the hearing proceeding may bring a suit requesting cancellation of such decision to Tokyo High Court. The reason for this jurisdiction is for having unified court decision on competition law cases. Such court review is not a de novo trial but an examination of whether or not JFTC’s decision is based on “substantial evidences”, where substantial evidences have been interpreted to be those evidences based on which a reasonable person reaches the same conclusion[43].

3-3 Valuable Lesson from Japanese Experience

From the two characteristic above for Indonesian and Japanese antimonopoly policy, this section will discuss lessons which may be learned from the Japanese experience. The following are the result of my consideration:

Introduction of unifying concept " Free and Fair Competition ": This concept is very useful to have the interpretation and enforcement of the competition law focus on the right targets while keeping coordination and integrity. Four items as the objective is cited in Indonesian antimonopoly law but no unifying concept "Free and Fair Competition". The mentioned four purposes may sometimes conflict with other[44]. The importance of promoting free and fair competition has been increasing under progress of economic globalization. National economy which can prosper under globalization can be fostered only through promotion of domestic active free and fair competition. So, the present objectives may be interpreted or preferably amended by changing the items order and inserting the new item "to promote free and fair competition".

Clarification of the definition of "monopolistic practices" is necessary because it plays an important role. It works as the standard to determine the illegality of 13 types out of 31 types of prohibited conducts in total. The problem of antimonopoly arrangement in Indonesia is that people find difficulty to understand what is prohibited in practice. The related provisions to monopolistic practices are defined in the article 1. Therefore, it seems necessary to clarify definition of monopolistic practices by reasonable interpretation or preferably by amendment of the law.

Definition or clarification of unfair business competition also important because it works as the standard to determine the illegality of 20 types out of 31 types of prohibited conduct in total. The problem is that the present definition of unfair business competition is too simple. Only a few clues to the patterns of conduct and degree of restraint of competition can be drawn from the definition[45]. Enrichment of the definition of "unfair business competition" is considered essential for the development of antimonopoly law. In practice KPPU can attain purposes mentioned above by utilizing its guideline issuing authority. Introduction of unfair business competition designation system by KPPU will increase elasticity and quickness to cope with the rapidly changing economic conditions and business actors conducts. Such system will provide KPPU with the measures to meet the sense of local justice, thereby to get support for competition law and policy from consumers and SMEs.

There are many dilemmas regarding to exemption. As a result, it seems necessary to have them reviewed and more finetuned. Otherwise most of the effect of the policy may be lost. What conduct, in what manner and for what purpose is exempted and the case where exemption is denied or cancelled should be prescribed. Where the exemption is based on the existing laws, the relevant article of such law should be clearly stipulated.

As mentioned above, KPPU is obligated to complete a follow-up investigation within 90 days. The district court must make a decision within 30 days from the commencement of the hearing, and the

Supreme Court must make a decision within 30 days from the time the appeal is received. This mentioned time constraints are too strict to follow for a very difficult and complicated case[46]. If it is interpreted as binding one in a sense that the procedure is null and void when this time constraint is not kept (for example, KPPU can't issue a decision when it can't complete the follow-up investigation within 90 days.), the practical effects of such time constraint may strengthen the tendency that only easy cases are eliminated while difficult and complicated cases are left untouched. Hence, better choice may be by amendment to set more reasonable and practical endeavor targets such as 6 months for KPPU follow-up investigations and 3 months for local court and the Supreme Court decisions.

Also introduction of centralized court review system is critically important because the concept of “Free and Fair Competition” is new in Indonesian judicature and it needs expertise to deliver a reasonable decision on competition law violation cases. Under the circumstances, one of the measures to attain reasonable and unified court decisions on appeal cases against KPPU's decisions may be introduction of centralized court review system. In Japan, an entrepreneur who complaints against JFTC's decision issued at the final stage of the hearing proceeding may bring a suit requesting cancellation of such decision to Tokyo High Court.

Indonesia has already adopted such special court system as commercial court, which deals with commercial cases including bankruptcy and a decision of which is appealed directly to the Supreme Court[47]. Besides, publication of court decisions will bring good effects such as effective accumulation of enforcement experiences, increase of clarity on what prohibited, as a material for research on better enforcement and better law, and finally, it will prevent the corruption.

Conclusion

In market economy, antimonopoly policy plays important role for economic developments well as economic growth, and especially for Indonesia, which is still struggling to overcome its economic and political condition. However, when a regulation of one country has too many purposes or even conflicting purposes, the law is not as effective as it could be. Various interpretations lead to inconsistency in the enforcement or the application.

Although Indonesian competition law has many provisions that could lead to various interpretations and approaches, this is only the beginning of the process to understand the new concept of competing with the support of the legal tools. The commission, judges, and prosecutors face pressure to try to interpret the law, sometimes conflicting goals of fairness, economic efficiency, and protecting

of small-medium business, as apparent in their decisions.

Other major obstacles encountered are the ambiguities, the question of the procedural law including the standard of review towards KPPU decisions that are brought to the court through appeal process. The Commission and the law enforcers will have to learn from the process by strengthening this knowledge, which in the long run will be reflected in their decisions.

There would be certainly an open alternative to amend the law in the future; however, amendment is not the ultimate way for the improvement. Developing a good understanding of the concept of competition, economic efficiency and consumer welfare would have to go along with the improvement of the procedural law and the ability of the law enforcers. Thus, the experience of Japan and its development of competition law and policy such as the clear definition in the provisions and the procedures can be great lessons for Indonesia.

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[1]KPPU press release, *Potret Persaingan Usaha di Indonesia Merajut Benang Kusut Antara Moral, Perilaku dan Carut Marutnya Kebijakan*, Dec.2001,2.

[2]Ross C Singleton, *Competition Policy for Developing Countries: A long run, entry based approach,* Contemporary Economic Policy, Huntington Beach, April 1997, page 1

[3] Ministry of Foreign Affair of Japan, Japan-Indonesia Economic Partnership Agreement, http://www.mofa.go.jp/policy/economy/fta/indonesia.html, Retrieved July 5, 2010.

[4]Agus Brotosusilo*, Pokok-pokok Bahasa pada RUU Persaingan Usaha*, presented in the Economic and Legal Dialogue with the theme: Urgency of the Law's Role in Facing the Economic Policies

[5]Hikmahanto Juwana, *An overview of Indonesia`s Antimonopoly Law*, Washington University Global Studies Law Review, 2001.

[6]The political elite did not seriously respect the proposal because they believed the current political and economic environment was not conducive, then, there was insufficient political commitment to pursuing the eradication of monopolistic practice.

[7]Achmad Shauki, *Competition Problem in Indonesia*, Paper presented at FEUI Seminar (Sumbangan Pemikiran FEUI pada Reformasi dan Pemilihan Ekonomi), Nov.1998.

[8]The Presidential Degrees are Keppres No 20/1998, that revoked the special facilities conferred on the National Car project "Mobnas", Keppres No. 15/1998 that revoked Bulog's monopoly over agricultural products except for rice, and Keppres No.21/1998 that abundant Badan Penyanggah Pemasaran cengkeh (BPPC), Harian suara Merdeka, Reformasi Ekonomi Dimulai, 1998.

[9]Presidential Decree No. 75Years 1999

[10]Presidential Decree No. 162Years 2000

[11]Article. 30 of Indonesian Antimonopoly Law

[12]Article. 31of Indonesian Antimonopoly Law

[13]Markus Meier, *Introduction to Competition Law & Policy, and Indonesia's Competition Law & Business Competition Commission*, paper presented to the Supreme Court of the Republic of Indonesia, Jakarta 14, Sept. 6-7, 2001.

[14]Article 38 of Indonesian Antimonopoly Law

[15]Article 47 paragraph (1) of Indonesian Antimonopoly Law

[16]Mitsuo Matsushita, 1990, p.2

[17]That is a policy set out by U.S. President Herry. S. Truman in 1947, stating that U.S. would support Greece and Turkey with economic and military aid to avoid their failing into the Soviet sphere.

[18]Akira Inoue, *Japanese Antitrust Law Manual, Law, Cases and Interpretation of Japanese Antimonopoly Act*, Kluwer Law International. 2007, p.3

[19]Akira Inoue,p.3.

[20]Akira Inoue, p.4

[21]Mitsuo Matsushita, 1990, p.5

[22]Nishimura and Asahi, *The Amendment of Antimonopoly of Japan- Changes in Merger Control*, American Lawyer Media, Inc. 2010. http://www.jurists.co.jp/en/publication/tractate/article_8777.html. Retrieve on June 15, 2010.

[23]Kazuhiko Takeshima, *Importance of Competition Law and Policy- Japan's Experience over 60 years' Development of the Antimonopoly Act*, 2009.www.jftc.go.jp/eacpf/06/6_05_03.pdf. Retrieve on July 2*, 2010.*

[24]Those Articles are: article 5, article 6, article 7, article 8, article 9, article 10, article 11, article 12, article 13, article 14, article 15, and article 16.

[25]Ningrum Natasya Sirait, *Indonesia`s Experience with Its Competition Law and Challenges Ahead*, ASLI Inaugural Conference, p.471.

[26]Article 33 f of Indonesian Antimonopoly Law

[27]KPPU Press Release, Merajut Benang Kusut Antara Moral, Perilaku dan Carut Marutnya Kebijakan, December 2001, p 6.

[28]Kompas Daily, *Komisi Pengawas Persaingan Usaha BukanPeradilan?,*30 April 2005, an article by Amir Syamsudin, prominentlawyer in Business Law, practicing lawyer in Indonesia.

[29]Article 47 of Indonesian Antimonopoly Law

[30]Law No.5/1999, Article 48. By referring to Article 10 Criminal Code (*Kitab Undang-undang Hukum Pidana)* on the criminal cases as regulated in Article 48 of Law Number 5, there shall be additional sentences applied in the form of: revoking the company's operational permit, and prohibiting the business actor from serving as a KPPUer or Directors for a minimum of two years and a maximum of five years in any companies. See also Article 49, Law No.5/1999. The penalty for criminal violations include fines between a minimum of 25 Billion Rupiah and a maximum of 100 Billion Rupiah, or prison sentences up to six months, if the party decides to refuse to pay the penalty and prefers to comply by accepting a prison sentence. In accordance with Article 41 of the law, where a party refuses to cooperate with the investigative process, refuses to submit evidence, or otherwise impedes the investigative process, the KPPU then would be allowed to impose a minimum penalty of 1 Billion Rupiah and a maximum of 5 Billion Rupiah, or a prison sentence of 3 months where the party refuse to accept the ruling

[31]R. Kwantjik Saleh, *Hukum Acara Perdata,* Ghalia Indonesia, 1981, page 14. *Herzien Indonesische Reglement* (HIR) used as guidance for Civil Procedural law in the Court. Civil Procedure Law covers from Article 115 to Article 245 under Chapter IX, "The Court Competency in Civil Law Cases."

[32]Ayudha Prayoga et al., *Persaingan Usaha dan Hukum yang Mengaturnya di Indonesia,* Partnership for Business Competition, 2001, p. 129.

[33]Thee KianWie, Competition Policy in Indonesia and the New Antimonopoly and Fair Competition Law, Indonesian Institute of Science (LIPI), 2002, p.338

[34]Masano Nakagawa, *Challenges of Indonesian Competition law and some suggestion for improvement*. The University of Oxford Centre for Competition Law and Policy, 2006, p.4-7

[35]Akira Inoue, .p.80

[36]Article 27, article 27-2,article 28, article 29, article 30, and article 31 of Japanese Antimonopoly Act.

[37]Article 41, article 42, article 43, article 44, article 47, article 49, article 52, article 55, and article 56 of Japanese Antimonopoly Act

[38]Article 35 of Japanese Antimonopoly Act

[39]Article 7 (1 and 2), article 8-2 (1, 2, and 3), article 17-2, article 20 (1), article 21 (2), and article 49 of Japanese Antimonopoly Act.

[40]Article 7-2 (1 and 2), article 8-3, and article 50 of Japanese Antimonopoly Act

[41]Article 89, article 90, article 91, and article 95 of Japanese Antimonopoly Act.

[42]Article 24, article 25, and article 26 of Japanese Antimonopoly Act,

[43]Article 80,article 85, and article 86 of Japanese Antimonopoly Act. Recently the central court review system was mitigated.

[44]Ningrum Natasya Sirait, p. 468

[45]Wolfgang Kartte et al., Undang-Undang No.5 tahun 1999, Jakarta Katalis, 2002, p. 67

[46]Hikmahanto Juwana, *Experience on Indonesia's Competition Law : Challenges Confronting the Enforcement*, Key Note Speech produced at the 5th APEC Training Program on Competition Policy, Yogyakarta, Indonesia, Dec. 6, 2004 ,p.5

[47]University of Indonesia ed., Indonesian Legal System, 2005, p. 61-62.