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Indonesia's Experience with its First Anti-Monopoly Law

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Abstract

This paper describes the historical origin of Indonesia's First Competition Law, which was enacted on 5 March 1999. The paper argues that a proper competition policy includes both: (1) market-opening or competition-promoting policies that enhance competition in national and local markets and (2) a competition law (sometimes referred to as an anti-monopoly or anti-trust law). The paper offers several critical notes on the Competition Law and argues that three major issues need to be taken into account in a future revision of the Law to ensure a consistent approach to the Law, namely:

1. *Clarity in the definition of the goals of the Competition Law;*
2. *Universal application of the Law to all business actors;*
3. *Clear division between market share and anti-competitive business conduct.*

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1. HISTORICAL ORIGIN OF INDONESIA'S ANTI-MONOPOLY LAW[1]

Indonesia's first anti-monopoly law (officially entitled the Law concerning the Prohibition of Monopolistic Practices and Unfair Business Competition) was promulgated on 5 March 1999, and became effective on 5 September 2000. It was hoped that through the enactment of this law, fair competition between business actors and an efficient market economy could be achieved. The implementation of the law was entrusted to the Supervisory Commission on Business Competition (KPPU), which was established by Presidential Decree on 8 July 1999. On 7 June 2000, eleven Commission members were appointed by Presidential Decree and endorsed by the Indonesian parliament. At present, however, the Commission consists of only ten members, as one of the members was appointed as a Cabinet Minister in the government of President Megawati in 2001.

The anti-monopoly law originated in the first Memorandum of Economic and Financial Policies (MEFP) or Letter of Intent (LoI) in November 1997, in which the Indonesian government described the policies that it intended to implement in the context of its request for financial assistance from the IMF. These policies included a strategy of structural reforms, aimed at transforming Indonesia's 'high-cost economy' into one which would be more open, competitive and efficient. To achieve this transformation, the strategy called for foreign trade and investment to be further liberalized, domestic activities to be further deregulated, and the privatization program accelerated (IMF I).

In the Supplementary Memorandum of Economic sand Financial Policies signed in April 1998 the Indonesian government committed itself to improve **competitive conditions** in a number of specific markets as part of its economic restructuring program. To enhance the overall efficiency of markets, the government also committed itself to write and implement an anti-monopoly law to establish guidelines for fair business practices and to avoid anti-competitive behavior. As a first step, the government committed itself to implement by September 1998 the necessary regulations establishing guidelines and clear procedures and mechanisms for mergers, acquisitions, and exit which would facilitate efficient corporate restructuring while safeguarding against anti-competitive or predatory behavior. The government also committed itself to complete a broader draft law by December 1998 (IMF III).

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In August 1998 the German and Indonesian governments signed an agreement under which the German government would support the drafting process and implementation of an anti-monopoly law in Indonesia. German support consisted of direct consultations by several top-ranking German experts on competition law and the organization of a series of seminars to familiarize the general public with the objectives and contents of an anti-monopoly law (Siahaan, 2002: xix). Operational support was coordinated by the German Technical Assistance Agency GTZ (*Gesellschaft fuer Technische Zusammenarbeit*), which in cooperation with other donors, including USAID, CIDA, Ausaid, and the World Bank, provided financial support and technical assistance to the Indonesian government for the drafting of the law in accordance with European and UNCTAD (United Nations Conference for Trade and Development) standards (Hegemer, 2002: xii). However, in drafting the law, Professor Wolfgang Kartte, coordinator of the German experts, stressed two important points, namely that, first, the anti-monopoly law must be a creation of the Indonesian people themselves in order to inculcate them with a feeling of ownership of this law; and, second, that the implementation of the law would require much time and patience, as it would require an overall change of attitudes and understanding on the part of society as a whole (Siahaan, 2002: xix – xx). Serious problems could occur if Indonesian culture and prevailing economic ideas and reality were not taken into account in the implementation and enforcement of the anti-monopoly law.

2. THE PERVASIVENESS OF POLICY-GENERATED BARRIERS TO DOMESTIC COMPETITION

After the end of the oil boom era in 1982, the Indonesian government introduced a wide-ranging deregulation and structural adjustment program aimed at promoting a more efficient and competitive private sector, including foreign investors, which could replace the state-dominated oil sector as the major engine of economic growth and the major source of export revenues. The program included measures to restore macroeconomic stability as well as deregulation of the highly protectionist trade regime to reduce its strong anti-export bias and of restrictive foreign investment schemes to attract more foreign direct investment (FDI), particularly export-oriented FDI.

While successive trade reforms from the mid-1980s through 1996 led to greater import competition, restrictions on domestic competition and trade were pervasive in the 1980s and first half of the 1990s, thus hobbling the growth of progressive, efficiency-seeking enterprises (Iqbal, 2002: 98). These restrictive regulations and restraints on domestic

competition and trade were introduced by central and regional governments, and sometimes by officially sanctioned trade and industry associations (World Bank, 1995: 45). Naturally, these regulations and restrictions increased the costs of doing business in Indonesia, (leading to complaints about Indonesia's 'high-cost economy'), and reduced efficiency and limited economic opportunities, including for small- and medium-scale enterprises (SMEs).

The various restrictive regulations and restraints on domestic competition and trade took many forms, including marketing controls, entry and exit controls, price controls, exclusive licensing, public sector dominance in certain activities, sanctioning of cartels, ad hoc instruments in favor of well-connected firms in certain industries, and controls and 'taxes' on intra-country trade (Iqbal, 2002: 98; World Bank, 1995: 45).

The data in **Table 1** shows a sample of the variety and scope of the various restrictions imposed on various sectors before the Asian economic crisis of 1997/98.

Table 1

Restrictions on domestic competition before 1997

Type of restriction	Sectors affected by restrictions
Cartels	Cement, glass, plywood, paper
Price controls	Cement, sugar, rice, autos
Entry and exit controls	Plywood, autos
Exclusive licensing	Clove marketing, wheat flour milling
Public sector dominance	Steel, fertilizer

Source: Iqbal, 2002, Table 6, p. 99

These policy-generated barriers to domestic competition reflected a myriad of objectives. Some commodities were designated as 'essential', and therefore their distribution was deemed too important to be left to the market (e.g. cement, fertilizer). In the cement and fertilizer industries regulation of domestic distribution was accompanied by a significant state presence (i.e. large presence of state-owned enterprises, or SOEs) in production. For other products restrictions on domestic competition were used along with restrictions on international trade to promote infant industries or to promote revenue in processing activities (e.g. wheat flour, soymeal). For other products, such as plywood, the restrictions were used as instruments to enhance Indonesia's power in world markets. In other cases, the objective was to increase local revenue by imposing controls on domestic competition (World Bank, 1995: 46).

Aside from granting exclusive licensing to one company (e.g. clove marketing) and the prevalence of cartels with controls on prices, outputs, entry and exit, which were enforced through trade and industry associations, ad hoc interventions by the government in favor of large or well-connected business groups became increasingly blatant during the late Suharto era. These interventions took the form of government equity participation in large commercial projects with one favored group or another, the provision of special credits, preferential treatment in the procurement of SOEs, or the outright granting of exclusive licenses to produce, import, and sell in certain regions (Iqbal, 2002: 99-100).

The pervasiveness of the above policy-generated barriers to domestic competition may in part be explained by the historical distrust of market forces which Indonesia's national leaders have had since the Dutch colonial period. In their view these market forces had only benefited the colonial rulers and foreign businessmen at the expense of the welfare of the Indonesian population. For this reason, Indonesian governments have felt the need to regulate market forces through various restrictions and controls since independence.

However, in a more realistic view, these government interventions, specifically policy-generated barriers to domestic competition, can be interpreted as the means to deliberately generate and capture rents. In fact, these regulations and restrictions were introduced precisely because of their potential to generate great benefits for both the bureaucrats who administer them and the firms favored by them (McLeod, 2000: 147).

Since the early years of the 'New Order' era, President Suharto realized the effectiveness of private sector monopoly privileges for generating rents for his family, favored generals, senior government officials, and business cronies (McLeod, 2000: 148). For instance, well-connected private firms were awarded contracts by government departments and SOEs without any open bidding or competition with other firms. Well-connected firms also enjoyed ready access to state bank or even central bank loans at highly subsidized interest rates. Moreover, they were often not required to repay these loans if their investments turned out to be unprofitable (McLeod, 2000: 148).

One of the most blatant examples of preferential treatment involved the granting of monopsony and monopoly rights to BPPC, a consortium headed by Suharto's youngest son, which was given sole buyer rights to purchase cloves and then sell these at inflated prices to clove cigarette firms. Another blatant example of preferential treatment was Suharto's youngest sons' so-called 'national car' project, which was exempted from the payment of luxury taxes and import duties on imported parts and components, which other car assemblers had to pay.

In addition to the provision of large amounts of subsidized credit and protection against imports, policy-generated barriers to domestic competition led to the rise of large, well-connected conglomerates under the patronage of President Suharto. Despite widespread anger about the rise of favored conglomerates and serious misgivings among economic policy-makers about the pernicious effects of these policy-generated barriers to domestic competition on economic efficiency, the number of these barriers increased during the early 1990s as the Suharto regime grew increasingly corrupt. There were, to be sure, some weak attempts to improve domestic competition, amongst others by the Coordinating Ministry for Economic Affairs which sponsored, with the support of USAID, several seminars on the virtues of healthy domestic competition. These efforts were, however, unsuccessful due to lack of political support by the President.

The above account of the proliferation of policy-generated barriers to domestic competition during the late Suharto era provides important background information for the enactment of the anti-monopoly law in March 1999. In fact, even before the agreement with the IMF required the Indonesian government to dismantle the various policy-generated barriers to domestic competition and enact an anti-monopoly law, a small constituency of economic policy-makers had become increasingly concerned about the micro-economic distortions caused by the proliferation of policy-generated barriers to domestic competition. However, when President Suharto was still in power, they were not in a position to oppose, let alone reverse these policies. This constituency included a number of private businessmen who had not received preferential treatment during the Suharto era, and who were therefore strongly in favor of a competition law which would 'level the playing field' for business actors.

One important lesson drawn from the Asian economic crisis was that the lack of domestic competition had imposed large economic costs on Indonesian society. High concentration of product and service markets gave rise to market power, resulting in inferior products and fewer choices which hurt consumers, particularly the poorest who could least afford to purchase expensive alternatives. Over time ownership concentration also tended to increase, thereby enabling a few large firms and powerful, well-connected family groups to engage in rent-harvesting activities and wield their political power to influence government policy in their favor. Under these circumstances accountability and transparency in business decisions was non-existent. Opportunities for widespread participation in the economy, including for small- and medium-scale enterprises, was limited due to preferential treatment to a few favored firms and various barriers to entry (Baird, 2000: 2-3).

3. COMPETITION POLICY IN INDONESIA

It is important to bear in mind that competition policy involves more than just enacting and implementing an anti-monopoly law. In fact, competition policy encompasses **all** government policies that promote competition among producers (Lloyd, 2000: 1). Competition policy can also be defined as encompassing all government policies that preserve and protect competition among independent buyers and sellers in relatively unregulated markets (Boner & Krueger, 1991: 1).

An appropriate competition policy includes both **(1)** market-opening or competition-promoting policies that enhance competition in national and local markets (e.g. deregulation policies in general, including liberalization of trade and foreign investment policies, deregulation of previously regulated industries, and privatization of SOEs); and **(2)** a competition law (sometimes referred to as anti-trust or anti-monopoly law) designed to prevent anti-competitive business practices by firms (Khemani & Dutz, 1996) and, in the view of the author, unwarranted government intervention in the marketplace.

In the broad context of competition policy, an anti-monopoly law is one component of competition policy, but it is the last resort, the method of enforcing competition when other policies have not been successful or effective in making markets more competitive (Lloyd, 2000: 1). Thus, an anti-monopoly law can be an important source of support to competition policy by providing a framework for judging anti-competitive business practices by firms. However, in practice an anti-monopoly law is limited in its scope and should **not** be viewed as a substitute for on-going efforts to deregulate and liberalize an economy (Ahmed, 2000: 1–2).

Similar to broader competition policy, the primary objectives of an anti-monopoly law are to maintain and encourage competition as a means to promote economic efficiency and to maximize consumer welfare. To achieve this, the law should focus on the actual or potential business conduct of firms in a given market, and **not** on the absolute or relative size of firms or the structure of an industry. This requires competition authorities to assess whether a firm (or group of firms) exercises (exercise) market power by engaging in business practices which substantially lessens or prevent competition, rather than penalize large firm size or industry concentration (Khemani, 2000: 7).

As the primary objective of an anti-monopoly law is to maintain and encourage competition, objectives like 'control of economic power' or 'protection of small enterprises' are generally viewed as inconsistent with market efficiency, and therefore not compatible with the primary

objectives of such laws. This is important to bear in mind, as these laws are designed to **protect the competitive process**, and not competitors, whether small or large (Ahmed, 2000: 2).

After the end of the oil boom in 1982, the Indonesian government initiated several market-opening and competition-promoting policies to improve economic efficiency and stimulate the development of a more competitive private sector, including foreign investors, which could generate a greater stream of non-oil exports to offset the steep decline in oil exports. These policies included fairly comprehensive and far-reaching deregulation measures, including successive trade reforms to reduce the 'anti-trade bias' of the trade regime, and an increasingly liberal foreign investment scheme to attract more foreign direct investment (FDI), particularly in export-oriented projects.

While the steady deregulation of the trade regime did lead to increased import competition, and the liberalized foreign investment scheme led to the entry of new foreign investors in several fields, including in fields formerly barred to FDI, domestic competition remained hobbled by various restrictions and onerous regulations. Without the Asian economic crisis and the subsequent fall of President Suharto in May 1998, domestic competition might have become increasingly stifled by the proliferation of policy-generated barriers to domestic competition.

As a result of the agreement with the IMF (MEFP), the Indonesian government undertook several measures to enhance competition, including the removal of trade and investment barriers, privatization of SOEs, and dismantling of sectoral monopolies (e.g. Bulog, the Food Logistics Agency, which monopolized important foodstuffs, such as sugar and soybeans). These measures went some way in reducing the market power of cartels and conglomerates (World Bank, 1999: 3-4). However, as these measures were still inadequate to create more competitive markets, the introduction of an anti-monopoly law and its effective implementation and vigorous enforcement were considered critical to increasing competition.

Hal Hill, an Australian economist and keen observer of the Indonesian economy, has argued that an open trade regime would be by far the most effective (and administratively simple) means of combating potential monopoly problems, since almost all agricultural and industrial activities are tradables (Hill, 1999: 4). Even though much of Indonesia's modern sector economy, including manufacturing, is characterized by quite high seller concentration ratios, these high ratios are not necessarily a problem, if these industries are 'contestable', that is if barriers to imports and to new domestic competitors are minimal (Hill, 1999: 5).

In response to Hill's arguments, one could argue that the pro-competitive effects of tariff reductions may be diluted if import supply is not very elastic. This happens when increased demand for imports can only be met at significantly higher prices, or when imports are relatively insensitive to changes in domestic prices (Khemani, 2000: 4). Moreover, trade policy consists of more than just trade policy alone. The Indonesian government could also use other tools to limit import competition, including import quotas, voluntary export restraints (VERs), anti-dumping, and countervailing duties. While a true 'free trade policy' requires that all these import restrictions be removed, in reality this never happens. Moreover, a significant share of economic activities consists of non-tradable goods and services, and is therefore not affected by import liberalization. Hence, a liberal trade regime cannot effectively substitute for an anti-monopoly law (Khemani, 2000: 4-5).

4. INDONESIA'S ANTI-MONOPOLY LAW

a. Contents of the law

Indonesia's anti-monopoly law consists of the ten chapters below:

Chapter 1: General provisions

Chapter 2: Principles and purposes

Chapter 3: Prohibited agreements, including:

- Oligopoly (i.e. agreements to jointly control production or marketing)
- Price fixing (e.g. below-cost pricing, agreement not to sell at lower prices)
- Division of territory (i.e. allocating markets)
- Boycotts
- Cartels
- Trusts (to control production or marketing)
- Oligopsony (i.e. buying cartels)
- Vertical integration (i.e. agreements to control the chain of production)
- Closed agreements (e.g. on condition of tying or exclusive dealing)
- Agreements with foreign parties

Chapter 4: Prohibited activities, including:

- Monopoly (i.e. prohibition to control production or marketing)
- Monopsony (i.e. prohibition to control markets by a sole buyer)
- Market control (i.e. blockage of markets, low prices to eliminate competitors)
- Conspiracy (i.e. bid rigging, business espionage, obstructing competitors)

Chapter 5: Dominant position:

- Interlocking directorate;
- Share ownership (in competitors, if it results in one business actor or a group of business actors controlling 50% or two or three business actors controlling 75% of the market)
- Mergers, consolidation and acquisitions (which could result in monopolistic practices)

Chapter 6: Business Competition Supervisory Commission:

- Status
- Membership
- Duties
- Authority
- Funding

Chapter 7: Case handling procedures

Chapter 8: Sanctions

- Administrative action
- Criminal penalties
- Additional criminal penalties

Chapter 9: Other provisions

- Acts/agreements to implement the existing law
- Agreements concerning intangible property rights
- Agreements concerning technical standards
- Sales representative agreements
- Agreements concerning cooperation in research
- International agreements
- Export agreements
- Small scale business actors
- Cooperation activities which exclusively serve the interests of members

Chapter 10: Transition provisions

b. Critical notes on the law

As Indonesia's first anti-monopoly law which, despite being based on European and UNCTAD standards, was also influenced by Indonesian views on competition and monopolistic practices, it was perhaps inevitable that the law contained several shortcomings. At an International Conference on Competition Policy in Indonesia, sponsored by the World Bank and the Supervisory Commission on Business Competition (KPPU) held in Jakarta on 22 May 2000, several conference participants recommended that future revisions of the law take into account three major points to ensure a consistent approach to the law, namely:

i. Clarity in the definition of the goals of the Anti-Monopoly Law;

ii. Universal application of the law to all business actors; and

iii. Clear division between market share and anti-competitive business conduct (Tineo & Coppola, 2001: 8).

ad i. Anti-Monopoly Law goals

Article 3 of the law states the following four objectives:

a. To preserve the public interest and to improve national economic efficiency as a means to improve the people's welfare;
b. To create a desirable business climate by regulating to ensure healthy business competition in order to maintain equal business opportunities for large, medium and small enterprises;
c. To prevent monopolistic practices and/or unhealthy business competition practices on the part of businesses;
d. To encourage effectiveness and efficiency in business activities.

Some of these four objectives are objectives by themselves, while others are actually a means to achieve certain goals. For instance, to achieve national economic efficiency is an objective in itself (item a), which can be achieved by means of preventing private entrepreneurs from engaging in monopolistic practices or unhealthy business competition practices (item c).

The failure to distinguish between the various goals is problematic, as it could give rise to misinterpretation of the law. More importantly, listing several objectives may render the law less effective since there are trade-offs involved between the various goals (Tineo & Coppola, 2001: 8).

Another problem with the law is that it appears to promote goals other than 'to maintain and encourage market competition'. This is

evident in item b of article 3 which unambiguously states that the law 'ensures healthy business competition in order to maintain equal business opportunities for large, medium and small firms'. This goal obviously reflects another goal than the goal of maintaining and promoting market competition, namely ensuring that small- and medium-scale enterprises (SMEs) are assured of equal business opportunities regardless of their efficiency. One implication of this goal is that each size group of firms is entitled to some arbitrarily determined share of the market; that the existing market share of SMEs should not be allowed to decline, while the existing market share of LEs should not exceed a certain level (Thee, 2000: 386).

To be sure, in some instances countries have permitted other goals to be considered in applying anti-monopoly laws. However, when other goals have been allowed, they are narrowly defined or otherwise protected by strict procedures. For instance, Australia's trade practices act contains an authorization procedure that provides an exemption from the act for conduct if it would result in a net public benefit (Tineo & Coppola, 2001: 8-9).

ad ii. Universal application of the law to all business actors

Article 50 contains several clauses exempting certain activities and agreements from its provisions, including agreements connected with intellectual property rights (article 50a); agreements on technical standardization of goods and services which do not restrict competition (article 50c); agreements on research cooperation to improve the living standards of society at large (article 50e); international agreements which have been ratified by the Indonesian government (article 50f); export-oriented agreements and/or actions which do not distract demand for and/or supply of the domestic market (article 50g); and the **activities of small-scale enterprises (article 50h) and cooperatives (article 50i)**.

The development of viable small enterprises (SEs) and cooperatives has been a major development objective of successive Indonesian governments for economic and social reasons. This has received widespread public support, as during the Suharto era a number of giant conglomerates, mostly owned and controlled by Sino-Indonesian tycoons, developed under the patronage of President Suharto. This in turn gave rise to the perceived gap between 'rich' and 'poor' and/or between the Sino-Indonesian minority and the '*pribumi*' (indigenous) majority. While the conglomerates flourished, the large majority of SEs languished because most government SE policies, including subsidized credit and technical assistance policies, were largely ineffective in fostering the growth of viable SEs.

It is this perceived gap between large and small enterprises which accounts for 'giving the SEs a fair deal' through affirmative action and through legislation, as reflected in Articles 3b, 50h and 50i of the Anti-Monopoly Law. In a more extreme form, large firms were seen as 'bad' business actors who owed their rapid growth to preferential treatment only, while small firms and cooperatives of small '*pribumi*' entrepreneurs were considered to be 'good' business actors whose lack of progress was attributed to discriminatory and/or ineffective promotion policies by the government.

It is this perception of the 'neglect' of SEs and cooperatives which may have persuaded those who drafted the Anti-Monopoly Law that additional support of SEs and cooperatives was needed, and that exempting SEs and cooperatives from the Law's provisions would in some way contribute to their development. However, this is doubtful, as anti-competitive behavior has not only been displayed by dominant large firms, but also by well-connected SEs and cooperatives against other SEs and cooperatives, mostly at the local level. The best way to protect these SEs and cooperatives against the abuse of market power by dominant large firms or by other SEs or cooperatives is by consistently and forcefully acting against anti-competitive behavior by all market players regardless of size. Exempting SEs and cooperatives from the provisions of the Competition Law will not give them any significant competitive advantage over large firms. All that might be achieved would be to give a green light to SEs and cooperatives to engage in anti-competitive behavior at the expense of their peers (Thee, 2002: 339).

While there may be some room for exceptions to efficiency goals, these exceptions must be subject to strict economic tests, namely that exemption from the provisions of the law should result in net public benefit. Otherwise, and *as a general rule,* an anti-monopoly law should be applicable *in all circumstances* and to *all parties*, implying that no party should be allowed to be outside the reach of the law (Tineo & Coppola, 2001: 9).

It should be noted that consideration of equity over efficiency is by no means unique to Indonesia, as this is also evident in Korea's Competition Law. In successive versions of Korea's Competition Law, more direct quantity measures and bans on the establishment of holding companies have been used to limit the concentration by large business groups rather than rely on policies to enhance competitiveness by vigorous market competition (Kang, 2003: 38-9).

Ad iii. Clear division between market share and anti-competitive business conduct

In enforcing the law, international best practice advises that the Supervisory Commission for Business Competition (KPPU) should approach businesses with a focus on their behavior based on the *actual exercise of market power*. This implies that the Commission should not concern itself with the mere holding of a position of dominance or monopoly because a large market share does not necessarily indicate anti-competitive business practices (Tineo & Coppola, 2001: 10).

Although many competition laws in other countries contain conduct as well as structural provisions regarding business activity (Khemanui & Dutz, 1996), most are primarily concerned with business conduct or practices rather than with market structures. However, a look at Indonesia's Anti-Monopoly Law shows that it fails to make a distinction between anti-competitive business conduct on the one hand and undesirable market structures on the other (Tineo & Coppola, 2001: 10). Although the law clearly identifies various types of anti-competitive business conduct under the heading of prohibited agreements (chapter III), such as price fixing (chapter III, part two), market allocation (chapter III, part three), boycotting (chapter III, part four) and cartels (chapter 5, part five), the same chapter III also bans certain market structures, such as oligopoly, specifically if two or three business actors control over 75 percent of the market share of a particular good or service (part one, article 4.2), and oligopsony , specifically if two or three business actors control over 75 percent of the market share of a particular good or service (part seven, article 13.2).

In chapter IV on prohibited activities, part one on monopoly contains a provision that prohibits a business actor or a group of business actors from controlling over 50 percent of the market share of a particular good or service (article 17.2.c). Similarly, part two of this chapter on monopsony contains a provision, which prohibits a business actor or a group of business actors acting as a single buyer from controlling over 50 percent of the market share of a particular good or service (article 18.2).

The absence of a clear distinction between anti-competitive business conduct and certain market structures is a major shortcoming of the law, falling short of international best practice standards. Hence, this lack of distinction may impede, rather than promote, free competition (Tineo & Coppola, 2001: 10).

5. NEGLECT OF POLICY-GENERATED BARRIERS TO COMPETITION

Another shortcoming of the law is that it is only concerned with the anti-competitive practices of private business. However, in view of the proliferation of policy-generated barriers to domestic competition and trade during the Suharto era, it is curious that the law does not contain any provisions prohibiting central and or regional governments from introducing new barriers to domestic competition. This neglect is particularly surprising since the general explanatory notes to the law state that "in the past the development of the private sector was adversely affected by erroneous government policies that caused market distortions". The explanatory notes further state that "businessmen close to the power elite received excessive preferential treatment which led to social disparities. The rise of conglomerates and a small group of powerful businessmen who were not imbued with a true entrepreneurial spirit was one of the factors which rendered the country's economic resilience vulnerable and uncompetitive".

The omission of a prohibition on policy-generated barriers to domestic competition is also worrisome because of the devolution of central government authority to local governments in early 2001. With the advent of regional autonomy several local governments have, like during the late Suharto era, put up new barriers to domestic competition and trade, including the creation of local monopolies and monopsonies, reservation of local markets to in-region parties and other forms of restriction on business entry, tax barriers to inter-regional trade, discrimination in local government procurement in favor of local suppliers and contractors, provision of local benefits (e.g. provision of subsidies) not provided to outsiders (i.e.non-residents), and requirements that commodities harvested within the region should also be processed or partly processed within the region before being shipped out (Goodpaster & Ray, 2000).

Despite the agreement between the IMF and the Indonesian government in January 1998, which allowed for the abolition of the various restrictions on domestic competition and trade at the national level, provincial and district (sub-provincial) governments have continued or introduced new barriers to competition at the local level. For this reason a future revision of the law will have to include policy-generated barriers to domestic competition at the national and local government levels as a major prohibited activity.

6. THE BUSINESS COMPETITION SUPERVISORY COMMISSION

In his paper arguing against the usefulness of an Anti-Monopoly Law for Indonesia, Professor Hill of the Australian National University expressed doubts about the usefulness of an anti-trust agency. These were based on the consideration that it would be expensive to operate (both in terms of direct operating costs and those related to business compliance); it would overload and divert high-level judicial and bureaucratic resources from much more pressing needs; it almost certainly could be circumvented; and to the extent that their operations are complex and the decrees unworkable, it could become yet another source of serious corruption, as businesses adopted a 'pragmatic' approach to the problem (Hill, 1999: 5).

Despite the misgivings of Professor Hill, the Business Competition Supervisory Commission began in 2001 to discharge its duties in a conscientious way. For instance, in mid-2001 the Commission ordered the firm Indomarco Prismatama, operator of the Indomaret mini-market retail chain, to cease its expansion into locations where there were a large number of small, traditional retailers. The basis of the Commission's decision was chapter II, article 2 of the law, which stipulates that "business activities of a business actor in Indonesia shall be based on economic democracy, with consideration to the equilibrium of a business actor's interests and public interests" (Bisnis Indonesia daily, 5 July 2001).

According to a member of the Commission, in making this decision the Commission was well aware that Indomaret had not engaged in anti-competitive business practices. However, mindful of strong public sentiment in favor of protecting small, traditional entrepreneurs and the provision in chapter II, article 2 that business activities of any business actor had to based on 'economic democracy', the Commission advised Indomaret to invite the small, traditional retailers operating in the vicinity of an Indomaret shop to reserve a certain part of the shop for these small retailers, where they could exhibit and sell their wares. This solution proved to be satisfactory to both Indomaret and local small retailers who were able to exhibit their wares in a more attractive way in a better and cleaner environment. In fact, by including small retailers in their operations, Indomaret has been able to continue to grow and expand its operations.

7. CONCLUSION

The above example of one of the Commission's decisions shows the difficulty of rigorously applying the major objective of an anti-monopoly law in a country where sharp economic and social disparities exist

between 'big' and 'small' businessmen. When these economic disparities coincide with ethnic identities, the potential for social and political upheaval is real.

In this respect it is useful to recall the wise advice of Professor Wolfgang Kartte, Coordinator of the German team of experts, who warned that the law must be a creation of the Indonesian people to imbue a sense of ownership over the law. As the relatively speedy enactment of the law is viewed by certain circles as 'imposed by the IMF', many Indonesians do not yet feel a sense of ownership of it. Professor Kartte also warned that the implementation of the law would require time and patience, as it entails a change in attitudes and understanding among various groups in society.

As the anti-monopoly law has only been in effect for about four years, patience is indeed required before the law can be strictly implemented according to its major objectives, namely protecting and encouraging market competition, or emphasizing the competitive process over competitors. Over time more vigorous advocacy of the merits of market competition will enable the public to better understand the real objectives of the law, making vigorous implementation more feasible. Over time, too, the implementation of the law will reveal its deficiencies, providing the opportunity to revise and improve it.

In the meantime, however, single-minded implementation of the law without taking into account existing economic and social realities might endanger the prospect of generating wide public support for the law and the activities of the Business Competition Supervisory Commission. Wide public support for the Commission and public knowledge of the Commission's activities might also protect the Commission from the real danger of being corrupted and co-opted by vested interests.

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