

Unclassified**English - Or. English****12 November 2020****DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Global Forum on Competition****USING MARKET STUDIES TO TACKLE EMERGING COMPETITION
ISSUES – Contribution from Indonesia****- Session IV -**

10 December 2020

This contribution is submitted by Indonesia under Session IV of the Global Forum on Competition to be held on 7-10 December 2020.

More documentation related to this discussion can be found at: oe.cd/mktcomp.

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JT03468325

Using Market Studies to Tackle Emerging Competition Issues

- Contribution from Indonesia -

1. Government Policies that Affect Market Structures

1. Competition in markets may be affected by various government policies or public policies, and competition sometimes is distorted as a result of various government policies that give rise to the establishment of oligopoly markets. The limited number of companies existing in oligopoly markets has caused new companies to have difficulties to enter such industry (barriers to entry).

2. In addition to oligopoly markets, there are also monopoly markets in Indonesia wherein one of the establishment factors of monopoly markets in Indonesia is the assignment of State-Owned Enterprises (SOEs) in certain sectors by the government. SOEs are business entities the entirety or most of their capital is owned by the state through direct participation deriving from the separated state assets.¹

3. The purpose of the establishment of SOEs is not merely to earn profits, but also to endeavor to contribute to the development of the economy of the Indonesian nation the objective of which is for the sake of the enhancement of people's welfare.²

4. An example of case that was once handled by ICC in respect of a government policy is Case No. 09/KPPUI/2018 regarding Alleged Violation of Article 11 of Law Number 5 Year 1999 in the Trade of Industrial Salt for Miscellaneous Foods in Indonesia which identifies that the salt industry policy has considerably distorted the functioning of fair business competition in this industry.

5. This case had its origin in the conditions in the onset of 2015, when the food and beverage industries had difficulty in obtaining industrial salts for miscellaneous foods. Importers through the Indonesian Salt User Industry Association (AIPGI) spurred the Government to immediately set the quota of salt imports, because the supply of imported salts had begun to run low. Various meetings facilitated by AIPGI were held by the Reported Parties in order to obtain an import allocation. Based on such meetings, the Reported Parties agreed to propose the allocation of import quotas to be submitted to the Ministry of Industry and the Ministry of Trade.³

6. The Commission came to the conclusion that said action was a production arrangement effort, especially, in the form of the division of allocated quotas for the import of industrial salts for various foods for the Reported Parties. The following are the conclusions of the said case:

¹ Republic of Indonesia, Law of the Republic of Indonesia Number 19 Year 2003 State-Owned Enterprises Article 1 sub-article 1.

² Putu Samawati, *Monopoli Bumn Dalam Perspektif Hukum Persaingan Usaha (Monopoly of SOEs in the Perspective of Competition Law)*, Malang: Tunggal Mandiri, 2018, page.15.

³ Siaran Pers (Press Release) No. 18/KPPU-PR/VII/2019, *Dugaan Kartel Tidak Terbukti dalam Perdagangan Garam Industri (Alleged Cartel is Not Proven in the Industrial Salt Trade)*. 2019.

1. Whereas the scarcity of imported salts in the first semester of 2015 was due to the delayed issuance of import permits that had just been issued in the second semester of 2015, namely on July 7, 2015;
2. Whereas there was an unwritten agreement among the Reported Parties setting the total amount of the quotas of imports of industrial salts for miscellaneous foods and the division of allocations of import quotas for each party involved in a series of concerted actions of business actors that commit themselves to one another under a written agreement;
3. Whereas it was proven that a production arrangement in the form of the setting of the amount of the quotas of imports of industrial salts for miscellaneous foods had taken place in 2015 in the amount of 397,208 tons based on the Recommendation of the Result of Meeting of Minds dated May 27, 2015 with regard to the National Salt Self-Sufficiency Coordination Meeting, which was followed up with a letter of AIPGI and approved in the import recommendation by the Ministry Industry;
4. Whereas the need for the quotas based on the list of consumers which serves as an attachment to the import application submitted to the Ministry of Industry was not through a real and accurate calculation, because it was proven as not in accordance with the realization thereof; and
5. Whereas a significant price increase jointly conducted by the reported parties was not proven, so that monopolistic practices and or unfair business competition did not take place as a result of the production arrangement committed by the Reported Parties.

2. Methods used by the Indonesia Competition Commission (ICC/KPPU) other than Law Enforcement Efforts

2.1. Policy Recommendation to Government Policies

7. Other than performing the Law Enforcement duty, Article 35 sub-article e of Law Number 5/1999 mandates that one of the duties of ICC is to give policy recommendations to government policies having the potential to spurring the occurrence of monopolistic practices and/or unfair business competition. This duty constitutes an obligation of ICC that must be fulfilled without being requested by the Government. ICC is obligated to give policy recommendations to the Government if deemed necessary without being requested aimed at boosting the economy through fair business competition by harmonizing government policies.

8. Government policies having the potential to being not in line with the spirit of Law No. 5/1999 need to be assessed first both in the Evaluation of Government Activities and in the Harmonization of Competition Policies. Government policies assessed by ICC include laws and regulations that have been ratified at various government levels, draft laws and regulations that are still in the discussion processes and government policies in the form of decisions, circular letters, calls, and so on.⁴

9. Policy issues analysed may come from public reports, results of researches/studies, monitoring of business actors, discussions with other Ministries/Institutions and initiatives of ICC agreed on in Commission Meetings for further analysis. The preparation of such policy recommendations surely requires an accurate research and analysis process. Based on the studies conducted by ICC, there are three groups of Government policies that are contradictory to the principles of fair business competition, namely⁵:

- Policy groups that give more spaces to business actors possessing dominant position. Such government policies tend to create entry barriers for their rival business actors. Apart from that, abuse of dominant position may easily be conducted because it is protected by the policies.
- Policy groups of the Government that facilitate the emergence of agreements among business actors that are explicitly contradictory to Law No. 5/1999.
- Policy groups that constitute a form of Government intervention in the ongoing market mechanism. This among other things arises in the form of commodity trading systems or regulations that limit the number of players involved.

10. Follow-up activities in analysing policies were conducted through limited discussion forums and hearings with various related parties, inter alia, government agencies (Ministries/Institutions), business actors and other parties as stakeholders of Law No.5/1999. Such discussion activities are needed to hear the opinions of various parties on the substance as proposed in the draft policy policy recommendations. In addition to the above, coordination with stakeholders with regard to the proposed policy policy recommendations which include the essence, urgency, benefits, and consequences that must be faced with the existence of the policies is also needed. In the long run, this will become a form of recommendation from ICC to the government in making competition-related policies so that government policies that are pro fair competition are materialized.

11. The problem that arises then is the status of the policy recommendations of ICC that is not binding in nature, wherein follow-ups to such policy recommendations are left to the government, whether to accommodate them by changing policies so as to be in line with the principles of fair business competition, or to disregard them. If the policy recommendations of ICC submitted to the government are not responded to, either through changes to policies/ regulations or other positive responses without any reasons, then ICC will convey the matter to mass media networks, both print media and electronic media through journalist forums. This is in order to boost the parties concerned so as to at least respond to such policy recommendations.

⁴ The 2008 Report, Menyongsong Babak Baru Implementasi Persaingan Usaha (On the Eve of New Chapter of the Implementation of Competition), page. 30.

⁵ Majalah Kompetisi (Kompetisi Magazine), 14th Edition, 2009, page.6.

2.2. Advocacy Efforts

12. Another method exerted by ICC is business competition advocacy. Advocacy activities are addressed to government agencies (Ministries/Institutions), the public, business actors, stakeholders, and other parties as stakeholders of Law No.5/1999. Advocacy activities conducted are, inter alia, in the form of disseminations, receiving visits of the academic and student circles, giving of consultations to parties requesting the elucidation of the provisions of laws and regulations, public discussions, executive forums, Focus Group Discussions (FGD) or seminars.

13. The advocacy process performed by ICC, among other things, aims to instill fair business competition values and to change the behaviours of business actors. Based on the said objectives, the advocacy process can be conducted in 3 (three) types of period, namely when indications of business competition violations are found, when law enforcement proceedings are carried out, and after the law enforcement proceedings.

14. One example of case handled by ICC using the advocacy method is the digital payment case of a brand named “OVO”.⁶ ICC highlighted the use of OVO as the only means of payment in several shopping centres, parking transactions, and hospitals.

15. The status of this case was then raised to be a pre-investigation of alleged behavior of exclusive dealing with regard to the parking payment system involving OVO and Sky Parking Utama. As the pre-investigation of the case progressed, the ICC side conducted advocacy with the OVO side through intense discussions. As a result of such advocacy efforts, there has been a behaviour change shown by OVO.

2.3. Market Studies

16. The other method used by ICC is Market Study. Market study can be conducted based on the results of the monitoring of certain industries/sectors, wherein the monitoring is conducted in order to find clarity and completeness of whether or not there are indications of unfair business competition. Monitoring may also be conducted when ICC witnesses fluctuating symptoms taking place in certain industries, such as indications of price discrimination or merger and acquisition transactions that bring about market structures to change. The subjects of the monitoring may derive from the results of inputs or discussions held with stakeholders or from public reports, wherein ICC must first clarify such various information to ensure if the reports are truly accurate.

17. The results of the monitoring of sectors that have indications of unfair business competition will then be reported to the Commission Meeting to be decided whether such indications need delving into or not. If decided that they need to be delved deeply into, then a comprehensive market study will be conducted.

18. The subject of market study may also be determined based on the consideration whether the industry controls the lives of many people or not, such as, for example strategic industries, industries with a high concentration level or national or regional signature industries.

19. In conducting a market study, ICC sometimes establishes cooperation with research institutions or universities, this is due to the lack of Human Resources (HR) owned by ICC and as an effort to build a comprehensive information system, especially with regard to the statistical data in the field. However, the frailty dealt with when establishing cooperation with third parties is that the outputs generated are sometimes not as expected, consequently, ICC still needs to complement the results of the market study.

20. In cases where the results of market study show a strong indication of the occurrence of unfair business competition, then the results of such market study can be used as a basis for commencing an initiative case.

3. Advantages and Disadvantages of Market Study Method

3.1. Advantages of Market Study Method

21. The use of Market Study Method may describe the real conditions in the market such as market structures, prices, concentration levels, and number of business actors. Such method may also show a comprehensive and two-way (reciprocal) Structure-Conduct-Performance (SCP) relationship. The duration of the use of this method is indefinite so as to enable a preparation of a market study of certain sectors that takes a relatively long time.

22. The results of market study may serve as a source of initiative case in an effort to enforce competition law and as a basis for the giving of policy recommendations to the government and market study may also serve as a reference in assessing mergers and acquisitions in certain sectors.

3.2. Disadvantages of Market Study Method

23. In conducting a market study, specific data are often needed, meanwhile the availability of such data is not always adequate. This certainly can affect the conclusions generated from the said market study.

24. Take for example the difficulty faced by ICC in preparing a market study regarding the digital economy sector due to the limited data available, such as, data of user transactions. The available data in this sector are still general in nature, namely merely in the form of data of users who access without being equipped with a description of the number of transactions conducted, meanwhile business actors in that sector are not cooperative, either and they often refuse to provide data. This data may actually be analyzed by conducting calculations based on the existing traffic analyses, however the limited Human Resources at ICC makes it impossible to do considering that the daily access to the existing transactions could amount to millions.

25. In order to cope with the above impediments, ICC uses a proxy approach, wherein market structures are assessed based on the estimated transaction values in each company based on the basis of the platform/site category. The transaction values are then estimated using the number of website visits converted to a conversion rate.

26. The other solution taken by ICC in surmounting such data limitation is by establishing close cooperation with ministries/agencies as well as stakeholders who have supporting data in various sectors. In addition to the above, ICC also engages external parties in the preparation of market study, including in providing data, namely experts or researchers from the relevant sectors.

4. Conclusions

27. Market study constitutes a method that has been effectively proven in analysing a sector in a comprehensive fashion, but the results of market study sometimes may differ from one another in accordance with the availability of data and the quality of analysis. Therefore, it is essential for the authorities to have guidelines or references in conducting market studies so that the market studies conducted have the same standards.

28. The results of market studies conducted by the authorities may be utilized to serve as data archives or references in analysing certain industrial sectors in the subsequent years. The results may also be used as references in case handling for various sectoral cases.