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GEOGRAPHIC MARKET DEFINITION

-- Note by Indonesia --

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More documents related to this discussion can be found at ww.oecd.org/daf/competition/geographic-market-definition.htm

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-- INDONESIA --

1. Introduction

1. Market definition has long been a core element of competition policy. Market shares and concentration are the two most commonly used indicators in competition policy enforcement to establish the likelihood of anticompetitive concerns, and market definition is an essential first step before these indicators can be calculated.

2. Similar to other practice of competition law worldwide, the initial step to analyze competition case using Indonesian competition law, Law No. 5/1999 regarding Prohibition of Monopoly Practices and Unfair Business Competition, generally started by defining the relevant market. Relevant market under Law No. 5/1999 divided into two different aspects namely product market and geographical market. However this paper will solely highlight geographical market under Law No. 5/1999 and the practice of defining geographical market in Indonesia.

2. Concept on geographic market

3. The relevant geographic market is defined under Article 1 point 10 Law No. 5/1999 which stipulated that:

> "Relevant market is a market related to the range or certain marketing area of the entrepreneurs for the same kind or type of goods and/or services or substitutes of the said goods and/or services"

4. The definition of relevant market above is emphasizing on the horizontal context that define the position of the business actor and its competitor. Based on the definition, relevant market is divided into two categories, product market and geographical market. Product market is related with similarity of the product or the substitution level meanwhile geographical market is related with the range of certain product's marketing area.

3. Factors considered in defining geographical market

5. Geographical market is a territory where any business actors able to increase their price without attracting new entrance or without losing significant number of consumers who switch to other supplier outside the territory due to the increasing price. Based on this definition, it is necessary to define the product availability within certain area to know the geographical market of the product[1].

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1 Guideline of Article 1 Point 10 Law No 5/1999 regarding Defining Relevant Market. KPPU/ 3009, page 10

6. In defining geographical market Indonesian Commission for Supervision of Business Competition (Commission) will considers and analyzes some factors that may influence the availability of product being investigated within certain area. Those considerations are[2]:

a) *Company Policy*: Company's policy is one of direct determinant of geographical market. The company's management decision will critically determine the availability of the product in certain region or area. The decision is the part of the marketing strategic that the company has. Therefore the marketing strategy will gives information regarding geographical width and scope of the product which can be used to analyze geographical market.

b) *Cost and Length of Transportation*: Cost and length of transportation can directly influence the availability of the product in certain area. The high transportation cost and the length of transportation time, will give difficulties to business actor in extending its marketing area. Thus, market coverage in that situation will be relatively limited to existing production or marketing area. On the other hand, when cost and time of transportation is relatively insignificant, there are some incentives for business actors to expand the market which will lead to wider marketing area.

c) *Trade Barriers*: Trade barrier whether it is tariff or non-tariff barriers can be indication in determining geographical market. Trade tariff will increase the product price within the area that will decrease the customer willingness to buy so that the supply will be decreased. The decrease of the supply will limit geographical scope of the analyzed product. The regulation regarding health protection and security such as license and product certification can also become tools to analyze geographical market. Regulation or policy that restricts the distribution or the inter-region trading also has similar impact with previous regulations. Those policy will limit the geographical scope of the product which is the similar impact that brought by trade barrier.

d) *Price Correlation*: Price correlation can be used when defining geographical border of certain product cannot be easily done. In this case, the calculation of geographical market can be conducted by identifying whether the increasing price of a product in certain region is substantially able to influence the price of the same product at another region. When so, then those both locations exist in similar market. On the contrary, when there is significant price difference and uncorrelated price fluctuation in the areas subjected to investigation, then it can be concluded that those areas is in different geographical market. Analyzing price correlation itself can be done by various statistical tools such as price correlations, Granger causality tests, co-integration and stationary tests, and econometric models of price responses and co-movements across regions based on natural experiments. These tests will need comprehensive data of certain product's price movement within certain period that can be derived from the accounting report of the companies being subject of investigation, marketing agencies and statistical bureau.

4. Indonesian case regarding defining geographical market

7. This section will try to summarize method used in defining geographical market in abuse of dominant position and in merger case.

2 Ibid page 14-15

4.1 Summary Case Number: 06/2004 - Abuse of dominant position in Indonesian battery industry

8. Producer A is the dominant position holder in Indonesian battery market. Within March to June 2004, producer A established a marketing strategy called "Kick the Competitor' where Producer A arranged a contract with the stores that stipulated some agreements as follows:

9. For every store that agreed to display battery from Producer A, the stores will get 2% discounts. The stores that agreed to not sell battery from Producer B starting March 2004, will get extra 2% discount from producer A. In this case, Commission analyzed two relevant market i.e. product and geographic market.

10. In analysing geographic market, Commission found some information as follows:

- The witness testified that discount program occurred throughout Indonesia except for Sumatera region.
- Actual sales pattern of the Producer A showed marketing pattern, which divides its marketing area into Banten, DKI Jakarta, West Java, Central Java, East Java, Bali, Sulawesi and Kalimantan area.
- Commission's investigation showed that similar program was not found in the territory of Kalimantan and Sulawesi but can be found in Java and Bali.

11. Based on those facts, Commission concludes that the geographical market in this case is Java and Bali area.

4.2 Summary Case No. 28/2015 on Notification on acquisition of Lafarge Sa's stock by Holcim Ltd (Holcim Ag)

12. Holcim Ltd. (Holcim) is a joint stock company which is established under Swiss Law. Holcim is a global producer for mortar, gravel, ready-mix concrete, asphalt and grey mortar and other related product. Holcim Ltd has some associate company in Indonesia namely: PT Holcim Indonesia Tbk, PT Holcim Beton, PT Pendawa Lestari Perkasa, and PT Readymix Concrete Indonesia. In September 2015, Holcim notify the Commission regarding its intention to undertake Lafarge SA ("Lafarge").

13. Lafarge SA is a company established under France law. Lafarge SA has associated company in Indonesia namely PT Lafarge Cement Indonesia, which is located at Lhok Nga, Aceh Province, Republic of Indonesia. In defining the geographical market, Commission analyzed the operational area of Holcim and Lafarge SA. Holcim Ltd marketing area are specifically within Sumatera Region, Riau Islands, Mainland Riau, Jambi, South Sumatera, Bangka Belitung, Bengkulu, Lampung, Jakarta, West Java, Central Java, Yogyakarta, East Java, West Kalimantan, Central Kalimantan, South Kalimantan, East Kalimantan and South Sulawesi. Lafarge SA operation is mainly within Sumatera Island, specifically Aceh, North Sumatera, Riau and Riau Islands.

14. The Commission found that Lafarge SA and Holcim Ltd has overlapping marketing area at Dumai region including Riau – Pekanbaru, and Batam region including Batam and Riau Islands. Both companies have silo/packing plant at Belawan – Lhoksemauwe Region including small part of East Aceh and North Sumatera. Belawan – Lhoksemauwe has close distance to North Sumatera and in Belawan – Lhoksemauwe area, Commission find the evidence of small scale marketing of grey mortar. Therefore Belawan- Lhoksemauwe and North Sumatera is considered as the same geographical market.

15. Based on the findings, Commission concludes that the geographical market for this merger case is North Sumatera, Mainland Riau and Riau Islands.

5. Defining geographical market in ecommerce and global market

16. Defining geographical market in this recent time is much harder due to the vast development of e-commerce and global trading. Globalisation and e-commerce make modern commerce more seamless, so that defining the boundaries of a geographic market becomes increasingly difficult.

17. The Internet has no borders, and in a sense, it is everywhere, yet nowhere all at once. A person in New York and a person in Hawaii can both be on the same Web site, at the same time, without leaving the comfort of their living rooms. Yet the Internet is not a physical place. This unique feature of the Internet presents an interesting question as to how courts will define the geographic market in which Internet companies operate for purposes of antitrust analyzes[3].

18. Up to this moment KPPU hasn't had any case related with e-commerce and global trading. Therefore the discussion in this chapter will be derived from some journals that analyzed the method in defining geographical market for e-commerce and global trading case.

19. Internet creates competitive advantages that make it a strong competitor against traditional business. By allowing consumers and business to do business at all hours, from any location and without leaving their homes, the Internet is convenient. Ease of purchase, speedy comparison shopping and home delivery are other notable advantages the internet brings that make it strong competitor for traditional stores. However experts believe that the internet will never eliminate traditional business due to the fact that economic and educational barriers inhibit some consumers from accessing internet markets. Furthermore there are inherent risks of fraud and consumers loss associated with the internet that do not exist in the traditional trading context[4]. Therefore in certain case, defining e-commerce geographical market will still need to consider the traditional aspect.

20. Experts divided two kind of geographical market for e commerce. They are[5]:

- *Where the products compete within Internet itself*: Where all competition takes place within the internet, the geographic market is the internet itself. Examples of this product are chat service, web advertisements, pop-up advertisements, SPAM etc. Though it sounds illogical it is a simple inquiry. In this respect, the Internet would seem to satisfy a geographic-market definition. However, there are two problems with this approach. First, defining the geographic market as the Internet raises the glaring issue that the Internet is not a geographic location, and courts have always required that the geographic market be defined by geography in cases alleging an unlawful monopoly (Kagan).

- *Where Internet Competes with Traditional Sellers:* Where traditional seller compete with internet sellers it is easier to conclude that the geographical market is national or global market because it is sure to capture all internet sellers. However this approach ignores the importance of demand side actors to geographic market definition.

3 Kagan, Jared. Bricks, Mortar, And Google: Defining The Relevant Antitrust Market For Internet-Based Companies. New York Law School Law Review. Volume 55 | 2010/11

4 Eblen, Charles Carson. Defining The Geographical Market in Modern Commerce : The Effect of Globalization and E-Commerce on Tampa Electric and Its Progeny. Baylor Law Review Vol 56:1. 2004.

5 Eblen. Ibid page 79-81

21. Internet technology is not available to all consumers and some consumers prefer traditional sellers therefore internet competitors do not exert equal competitive pressure across all geographic and demographic area. Therefore the court should not simply expand the geographic market where internet competition present but rather they should calculate the traditional geographic market first and add the effect of Internet competition proportionally.

22. Therefore, geographical market in this case is likely face two kind of potential dangers, if the court doesn't do a thorough and careful calculation. Those potential dangers are[6]:

- Expanding the geographic market definition in order to encompass internet sellers, thereby capturing distant traditional seller that exert no competitive pressure in the relevant market

- Assuming Internet sellers exert equal competitive pressure in all geographic markets in which they compete when in fact not all consumers use internet to buy the product.

23. In order to avoid these potential dangers, competition authority should first defining the geographical market of traditional stores than adding in the effects that internet competition excerpt proportionally according to use and data.

6. Obstacles face by competition authority in defining geographical market

24. Commission still faces some obstacles in defining geographical market whether it is geographical market in general case, merger case or e-commerce and global trading case. The main obstacle is the availability of data. As explain in previous chapter, defining geographical market need some data to be analyzed, especially price data of the subjected product and its suspected competitor. Other data that will be needed is the movement of customers caused by the shift of the price. Commission may derive the data from the business actors involved in the case or statistical bureau. However since Commissions still hasn't had a right to seize the data from reported parties, Commission will highly dependent to the data given by the parties. This condition can lead into misleading data since the defendant has ulterior motives to give false data in order to be cleared from the acquisition. To use data from statistical bureau also has its disadvantage since the data from the bureau normally has two year time lag. Therefore the data will not describe the actual condition at the moment of case handling.

25. The high level of difficulties in defining geographical market for e-commerce and global trading case and the Commission lack of experiences dealing this type of case. As explain before that there are two potential dangers which are likely to occur in defining geographical market in e-commerce case if the Commission doesn't do the correct analysis. These potential dangers occur due to the complexity of e-commerce market nature where geographical border is hard to define and which consists of different characteristic of suppliers and consumers in the market. To analyze the geographical market of this case, Commission will need vast data of products prices, customer's preference in the method of shopping, customer's movement due to the shift of the price products etc., which is hard to fulfil as explained.

26. This problem is multiplied due to the fact that Indonesian Competition Commission hasn't meet and analyze this kind of case up to this moment. In other words the Commission hasn't had any experiences regarding this matter.

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6 Eblen. Ibid page 82

27. In order to conquer these obstacles, some steps that need to be taken by Commission are as follows:

- Strengthening the Commission by amended the Law No. 5/1999 so that the Commission will gain rights to confiscate any necessary data.
- Strengthening the Data and Information Unit so that Commission will not solely rely on the data from business actors, statistical bureau and any other parties.
- Strengthening the cooperation with other competition agencies in order to share experiences regarding defining geographical market especially in e-commerce and global trade cases.

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