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AN OVERVIEW OF INDONESIA'S ANTIMONOPOLY LAW

HIKMAHANTO JUWANA *

I. HISTORICAL BACKGROUND

March 5, 1999, is an important date in the history of competition law and policy in Indonesia. It was on this day that Indonesia enacted Law Number 5 of 1999 Concerning the Prohibition of Monopolistic Practices and Unfair Business Competition (Law No. 5).¹ With its enactment, Indonesia joined the many countries around the world with antimonopoly laws.

Law No. 5 contains specific and comprehensive rules governing competition between business actors. Prior to the promulgation of Law No. 5, legal provisions governing competition in Indonesia were scattered throughout numerous laws. For example, Article 382*bis* of the Indonesian Criminal Code contains provisions governing unfair competition,² and the Basic Law of Industry No. 5 of 1984 contains regulations intended to promote competition.³ Additionally, businesses often cited Article 1365 of

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1. Undang-Undang Republik Indonesia Nomor 5 Tahun 1999 Tentang Larangan Praktek Monopoli Dan Persaingan Tidak Sehat [Law of the Republic of Indonesia, No. 5 of 1999, Concerning the Prohibition of Monopolistic Practices and Unfair Business Competition], 33 LEMBARAN NAGARA [STATE GAZETTE] (1999) [hereinafter Law No. 5 of 1999]. A version in English is available at http://english.pbc.or.id/data/uu_monopoli_%28english%29.pdf (last visited Apr. 4, 2002) and a version in Bahasa Indonesia is available at <http://www.geocities.com/Athens/Ithaca1955/unfair/uu599.html> (last visited Mar. 5, 2002).

2. Article 382 *bis* of the Criminal Code states:

Whomsoever engages in an act of deception to mislead the public or a certain individual with the purpose of establishing or prospering his/her merchandise or his/her own company or the property of another person, will be sentenced for unfair competition, with imprisonment for a maximum of one year and four months or a fine of Rp. 13,500 if such an act might give rise to his/her own competition or the competition of any other person.

KITAB UNDANG-UNDANG HUKUM PIDANA SERTA KOMENTAR-KOMENTARNYA LENGKAP PASAL DEMI PASAL [CRIMINAL CODE WITH COMPREHENSIVE COMMENTARY] art. 382*bis* (1976) [hereinafter CRIMINAL CODE].

3. Article 7 states that “[t]he Government shall regulate, guide and develop industries in order to: . . . (2) develop fair and healthy competition and prevent unhealthy competition . . .” Law of the Republic of Indonesia, No. 5 of 1984, Law Concerning Industrial Affairs, 22 LEMBARAN NAGARA [STATE GAZETTE] art. 7 (1984).

the Civil Code as a basis for recovering damages suffered as a result of unfair competition from competitors.⁴

The desire to have a comprehensive antimonopoly law in Indonesia dates back to 1990. Many scholars, political parties, non-governmental organizations, and even certain government institutions discussed and proposed developing an antimonopoly law. In fact, the Indonesian Democratic Party (Partai Demokrasi Indonesia or PDI) went so far as to produce a draft antimonopoly law.⁵ Similarly, the Indonesian Department of Trade, in cooperation with the Faculty of Law of the University of Indonesia, produced a draft law entitled "Healthy Business Competition."⁶ Unfortunately, the political elite did not seriously consider these proposals because they believed the present political and economic environment was not conducive to such an initiative and, subsequently, that there was insufficient political commitment to pursuing the eradication of monopolistic practices. On the contrary, the government actively allowed and encouraged various industry monopolies to flourish.

The proposal to introduce an antimonopoly law gained momentum when the government signed a Letter of Intent (LOI) with the International Monetary Fund (IMF) on July 29, 1998.⁷ Under the terms of the LOI, the Indonesian government promised to submit a draft antimonopoly law to the Indonesian House of Representatives no later than December 1998. The government at this point became serious about introducing an antimonopoly law, which was due in part to the public demand for an end to monopolistic practices. In addition, the government viewed the law as a means of taming the public outcry to end corruption, collusion, and cronyism.

One interesting aspect of Law No. 5 is that, in contrast to other Indonesian laws, Law No. 5 is the result of the Indonesian Parliament's inaugural exercise of its right to initiate the drafting of the law, despite the fact that the Indonesian government already had prepared its own draft. However, when Indonesian government officials met with Parliament

4. Article 1365 of the Civil Code states: "Each act that is unlawful and causes loss to other parties shall obligate the person causing such loss by their fault to compensate for such loss." *INDON. CIVIL CODE* art. 1365.

5. The Department of Research and Development of the Indonesian Democratic Party proposed the draft in 1995.

6. This cooperation took place from 1993 to 1994.

7. Letter of Intent and Memorandum of Economic and Financial Policies of the Government of Indonesia to the International Monetary Fund (July 29, 1998), *available at* <http://www.imf.org/external/np/loi/072998.htm> (last visited Mar. 11, 2002).

members to discuss the draft law, they agreed to use the Parliament's proposal as the working draft.⁸

II. LAW NO. 5

Law No. 5 is composed of eleven chapters and fifty-three articles. Although enacted on March 5, 1999, it became effective one year later, on March 5, 2000.⁹ The government gave businesses an additional six months after enactment (until September 2000) to review their past actions and ensure that future conduct complied with Law No. 5.¹⁰

A. *The Prohibition Principles in Law No. 5*

Law No. 5 prohibits business practices that unfairly restrict competition. The law prohibits practices based solely on market structure and market shares, although it contains some provisions that initially appear to prohibit certain market structures and shares. These provisions are found in Articles 4(2),¹¹ 13(2),¹² and 17(2)(c),¹³ and they mention specific market share percentages. If read carefully, however, the market share percentages serve only as a triggering event for the presumption that business actors may be violating Law No. 5. If this presumption is rebutted successfully, the government then must prove that an actual violation occurred.

The provisions in Law No. 5 that incorporate market share percentages likely reflect a compromise between the government and the Indonesian

8. This draft law was promulgated in accordance with Article 21(1) of the Indonesian Constitution before being amended. The Parliament's *Prolegnas* team from the Economic and Finance Division (EKKU) and the Industry and Development Division (INBANG) prepared it in four months. It was named the "Draft Law on the Prohibition of Monopolistic Practices" without including the term "Unfair Competition."

9. See Law No. 5 of 1999 art. 53 (Indon.)

10. See *id.* art. 52(2).

11. Article 4(2) states: "[A]ny entrepreneur can be suspected or considered as jointly controlling production and/or the marketing of good and/or services . . . if two or three entrepreneurs or groups of entrepreneurs own more than 75% (seventy-five percent) of the market share of one type of certain goods or services." *Id.* art. 4(2) (emphasis added).

12. Article 13(2) states: "Entrepreneurs can be suspected or considered as jointly controlling the buying or receiving of supplies . . . if two or three entrepreneurs or groups of entrepreneurs control more than 75% (seventy-five percent) of the market share of one type of certain goods or services." *Id.* art. 13(2) (emphasis added).

13. Article 17(2)(c) states: "Entrepreneurs can be suspected or considered as jointly controlling production and/or marketing . . . if one entrepreneur or one group of entrepreneurs controls more than 50% (fifty percent) of the market share of one type of certain goods or services." *Id.* art. 17(2)(c) (emphasis added).

Parliament. As is evident from an early draft of Law No. 5, the Parliament initially wanted to use market structure and market share as the basis for finding a violation:

Every business actor shall be prohibited from conducting one or several businesses with its competitor, either individually or jointly, which . . . takes control of the production and/or distribution and/or marketing of goods and/or services in an amount *that exceeds 30% of the national market share*.¹⁴

This provision clearly differs from Article 4(2) of Law No. 5, which states:

Any entrepreneur can be suspected or considered as jointly controlling production and/or the marketing of goods and/or services . . . if two or three entrepreneurs or groups of entrepreneurs own more than 75% (seventy-five percent) of the market share of one type of certain goods or services.¹⁵

Article 4(2) clearly does not prohibit business actors from exceeding certain market shares, nor does it provide that exceeding 75% of the market share alone is sufficient to constitute a violation.

B. Per Se Illegality and the Rule of Reason in Law No. 5

Similar to many jurisdictions, Law No. 5 uses both the concept of per se illegality and the rule of reason to determine possible violations. As a general rule, provisions requiring rule of reason analysis culminate with the words “may result in monopolistic practices and/or unfair competition.” Syamsul Maarif goes so far as to categorize price fixing, price discrimination, boycotts, tie-in sales, conspiracy to obstruct production, and the abuse of a market dominant position as per se illegal.¹⁶ However, future decisions by both the Komisi Pengawas Persaingan Usaha (KPPU) (translated, the “Commission for the Supervision of Business Competition”), which is empowered to enforce Law No. 5, and the courts will show clearly which provisions will require the rule of

14. Indonesian Parliament, Draft Law on the Prohibition of Monopolistic Practices art. 20(a) (1999) (Indon.) (emphasis added) (on file with author).

15. Law No. 5 of 1999 art. 4(2) (Indon.).

16. See SYAMSUL MAARIF, ENFORCEMENT OF COMPETITION LAW AND ENSURING ITS TRANSPARENCY IN INDONESIA 165 (Inst. of Developing Economies, Tokyo, 2001).

reason analysis to determine a violation and which provisions will require the more summary per se treatment.

C. Prohibitions in Law No. 5

Under Law No. 5 there are three categories of prohibitions: prohibited contracts, prohibited activities, and a prohibition against the abuse of a market dominant position.

1. Prohibited Contracts

Law No. 5 prohibits contracts that have the purpose or effect of oligopoly, price fixing, dividing territory, boycotting, cartelization, trust, oligopsony, vertical integration, or exclusive dealing, as well as contracts with foreign parties that may result in monopolistic practices or unfair business competition.

Law No. 5 defines a “contract” as “an action by one or more entrepreneurs to bind themselves with one or more other entrepreneurs under any name, either made in writing or not.”¹⁷ This definition parallels the definition commonly found in contract law, but in contrast to competition law, it fails to emphasize the importance of concerted action. This failure is due primarily to a lack of understanding on the part of the drafters.

First, Law No. 5 prohibits contracts that may create an oligopoly. Article 4(1) states that entrepreneurs may not contract with other entrepreneurs to gain joint control over the production and/or marketing of goods and services if the contract causes monopolistic practices and/or unfair business competition. “If two or three entrepreneurs or groups of entrepreneurs own more than 75% (seventy-five percent) of the market share of one type of certain goods or services,” then any one of the entrepreneurs is considered to have joint control.¹⁸

Second, Law No. 5 prohibits contracts between entrepreneurs that have the effect of price fixing, or forming certain agreed upon prices. There are four prohibited types of price fixing. First, entrepreneurs are prohibited from directly fixing prices of their goods or services.¹⁹ Second,

17. Law No. 5 of 1999 art. 1(7) (Indon.).

18. *Id.* art. 4(2).

19. The prohibition against this type of price fixing is in Article 5, which states that “[e]ntrepreneurs are prohibited from making any contract with other business competitors in order to fix prices on certain goods and/or services to be borne by the consumers or clients in the same relevant market.” *Id.* art. 5(1).

entrepreneurs are prohibited from fixing prices that may result in price discrimination.²⁰ Third, entrepreneurs are prohibited from fixing the prices of goods or services below a certain market price that may result in unfair competition.²¹ Finally, entrepreneurs are prohibited from fixing prices on resale at a higher price than the original purchase price.²²

Third, Law No. 5 prohibits contracts that seek to allocate the market between entrepreneurs. Article 9 provides that entrepreneurs legally may not agree to divide or allocate the market because such a division may result in monopolistic practices or unfair competition.²³

Fourth, Law No. 5 prohibits contracts that have the effect of boycotting other entrepreneurs so that they are unable to enter into the relevant market. Article 10(1) states that entrepreneurs are prohibited from contracting with their competitors to hamper other entrepreneurs from engaging in the same business, either in domestic or international markets.²⁴ In addition, Article 10(2) prohibits entrepreneurs from contracting with their competitors to refuse to sell goods or services of other entrepreneurs that either will result in losses/damage to the other entrepreneurs or restrict the ability of other businesses to sell or buy goods or services in the relevant market.²⁵

Fifth, Law No. 5 prohibits contracts that form cartels. Article 11 prohibits entrepreneurs from contracting with their competitors in order to influence prices by fixing production and/or marketing if the result is either unfair competition or monopolistic activity.²⁶

Sixth, Law No. 5 prohibits trust contracts where multiple enterprises combine under the guise of a holding company to jointly control the production or marketing of goods or services, if the end result is either monopolistic activity or unfair competition.²⁷

20. The prohibition against this type of price fixing is in Article 6, which states that “[e]ntrepreneurs are prohibited from making contracts which cause buyers to pay a different price from the price that must be paid by other buyers for the same type of goods and/or services.” *Id.* art. 6.

21. The prohibition against this type of price fixing is in Article 7, which states that “[e]ntrepreneurs are prohibited from making any contract with other business competitors in order to fix the price below the market price, which can cause unfair business competition.” *Id.* art. 7.

22. The prohibition against this type of price fixing is in Article 8, which states that “[e]ntrepreneurs are prohibited from making any contract with other entrepreneurs which sets the condition that the receivers of the goods and/or services are not to resell or resupply the goods and/or services they receive, under a price lower than the price agreed upon, thus causing unfair business competition.” *Id.* art. 8.

23. *Id.* art. 9.

24. *Id.* art. 10(1).

25. *Id.* art. 10(2).

26. *Id.* art. 11.

27. *Id.* art. 12.

Seventh, Law No. 5 prohibits contracts that form oligopsonies. Article 13 prohibits entrepreneurs from contracting with other entrepreneurs to jointly control the buying or receiving of supplies in order to control prices.²⁸ In addition, there is a rebuttable presumption of a violation if two or more entrepreneurs control more than 75% of the market share of a given type of product or service.²⁹

Eighth, Law No. 5 prohibits contracts that control the production of products belonging to a direct or indirect vertically integrated production chain of goods or services if the end result causes “unfair competition and/or damages to the public.”³⁰

Ninth, Law No. 5 prohibits entrepreneurs from entering into three types of closed contracts. First and foremost, entrepreneurs may not contract to prevent the parties receiving the goods or services from either resupplying or not resupplying those goods or services to certain designated parties.³¹ Second, entrepreneurs may not contract to require the receiving parties to purchase the goods or services from the supplying party under specific forced terms.³² Third, entrepreneurs may not form exclusive price contracts that contain stipulated terms that require the receiving parties to either purchase or not purchase from the supplying company the same or similar goods from competitors of the supplier.³³

Lastly, Indonesian entrepreneurs may not contract with international parties if the contract results in monopolistic practices or unfair competition.³⁴

2. *Prohibited Activities*

Law No. 5 prohibits monopoly, monopsony, market dominance, and conspiracy. However, unlike prohibited contracts, prohibited activities can apply to a single entrepreneur.

The first prohibited activity, under Article 17, is one that results in an entrepreneur having monopoly power through unfair competition.³⁵ In addition, there is a rebuttable presumption of the existence of a monopoly if: (1) there are no reasonable substitutes for the goods or services; (2)

28. *Id.* art. 13(1).

29. *Id.* art. 13(2).

30. *Id.* art. 14.

31. *Id.* art. 15(1).

32. *Id.* art. 15(2).

33. *Id.* art. 15(3).

34. *Id.* art. 16.

35. *Id.* art. 17(1).

other entrepreneurs are unable to compete for the same type of goods or services; or (3) one entrepreneur, or group of entrepreneurs, controls more than 50% of the relevant market share.³⁶

The second prohibited activity is one that results in monopsony. Article 18(1) prohibits entrepreneurs from controlling the receipt of supplies and existing as the sole buyer of goods or services within a relevant market if monopolistic practices or unfair competition will result.³⁷ In addition, Article 18(2) contains a rebuttable presumption of the existence of monopsony if one entrepreneur, or one group of entrepreneurs, controls more than 50% of the relevant market share.³⁸

The third prohibited activity concerns the controlling of markets by entrepreneurs, which they can do in any one of three ways. First, as stated in Article 19, entrepreneurs may not conduct separate or joint business activities that result in monopolistic practices or unfair competition by: (1) preventing others from conducting the same or similar business; (2) preventing the competitor's clients from contacting their competitors; (3) restricting sales or distribution in the relevant market; or (4) discriminating against specific businesses.³⁹ Second, as stated in Article 20, entrepreneurs may not either reduce their profit margin to zero or undersell their competitors with the intention of forcing their competitors out of business.⁴⁰ Third, according to Article 21, entrepreneurs may not cheat in allocating the costs of production and other related expenses for the relevant goods or services.⁴¹

The final prohibited activity concerns conspiracy, of which there are three types. First, entrepreneurs may not conspire in bid rigging for tender offers.⁴² Second, entrepreneurs may not conspire to obtain their competitors' trade secrets.⁴³ Finally, Law No. 5 prohibits conspiracies to impair competitors' production or marketing in order to "reduce the quantity, quality, and . . . punctuality of the goods and/or services . . . in the relevant market."⁴⁴

36. *Id.* art. 17(2).

37. *Id.* art. 18(1).

38. *Id.* art. 18(2).

39. *Id.* art. 19.

40. *Id.* art. 20.

41. *Id.* art. 21.

42. *Id.* art. 22.

43. *Id.* art. 23.

44. *Id.* art. 24.

3. *Prohibition Against the Abuse of a Market Dominant Position*

The prohibition against the abuse of a market dominant position centers on interlocking directorates, share ownership, and mergers, acquisitions, and dissolutions. Law No. 5 holds that entrepreneurs occupy a market dominant position if any one entrepreneur, or one group of entrepreneurs, controls at least 50% of the relevant market share, or if two or three entrepreneurs, or groups of entrepreneurs, control at least 75%.⁴⁵

First, Law No. 5 generally prohibits entrepreneurs from taking direct or indirect advantage of their dominant position by imposing intentionally unfavorable trade terms to prevent consumer access to competitors' products, restricting development, or preventing potential competitors from entering the market.⁴⁶

Second, Law No. 5 prohibits abuses stemming from an individual that serves as the director or commissioner of two companies if the companies are in the same market, produce similar goods or services, or could "jointly control the market share of certain goods and/or services."⁴⁷

Third, entrepreneurs may not hold a majority of the outstanding shares of, or unilaterally establish, multiple firms that conduct the same or similar business activities in the same market if it causes them (or their group) to control at least 50% of the relevant market share. This prohibition also applies if the ownership creates the position where two or three entrepreneurs control at least 75% of the market share.⁴⁸

Finally, Article 28 prohibits entrepreneurs from merging or dissolving companies, or acquiring shares of companies, if doing so would result in monopolistic practices or unfair competition.⁴⁹ Article 28(3), recognizing the vagueness of Article 28(1) and (2), indicates that clarifying provisions to provide additional guidance may be found in unstipulated government regulations. To date, however, the government has not implemented these regulations.⁵⁰

4. *Exemptions*

Law No. 5 provides various exemptions from its scope: (a) contracts implementing pre-existing law; (b) contracts concerning intellectual

45. *Id.* art. 25(2).

46. *Id.* art. 25(1).

47. *Id.* art. 26.

48. *Id.* art. 27(b).

49. *Id.* art. 28(1)-(2).

50. *Id.* art. 28(3).

property rights, trade secrets, and franchises; (c) contracts on technical standardization that do not restrict competition; (d) contracts that do not require resale or redistribution at a subsequently lower price; (e) research contracts designed to promote or improve the general welfare of Indonesian citizens; (f) government-ratified international contracts; (g) export contracts that do not affect domestic markets; (h) small businesses; and (i) cooperatives that exclusively serve members.⁵¹

5. *Abolishing Indonesia-Specific Monopolies*

In Indonesia, most monopolies are the result of government sponsorship. Laws and regulations passed by the government gave business actors their privileged positions. One notable example is Article 33 of the Indonesian Constitution, which gave many state-owned enterprises (SOEs) monopolies.⁵² Such anticompetitive behavior by the government has prevented other businesses from entering certain markets. Hence, “monopolies” in Indonesia are not the industrial monopolies that Law No. 5 was designed to prevent.

Under Law No. 5, Indonesia-specific monopolies are illegal. Nowhere does it provide business actors or SOEs with special privileges, except as set forth in Article 51:

Monopoly and/or the centralization of activities related to the production and/or marketing of goods and/or services which control the needs of people in general and production branches vital to the state shall be regulated under the law and shall be performed by the State-Owned Companies and/or entities or institutions established or appointed by the Government.⁵³

One reason why such privileges must now be given in the form of a law is to allow public participation through the representatives in Parliament.

51. *Id.* art. 50.

52. Article 33 of the Constitution of Indonesia consists of three paragraphs. Paragraph two states that “[s]ectors of production which are important for the country and affect the life of the people shall be controlled by the state.” Paragraph three states that “[t]he land, the waters and the natural riches contained therein shall be controlled by the State and exploited to the greatest benefit of the people.” UNDANG-UNDANG DASAR NEGARA REPUBLIK INDONESIA [CONSTITUTION] art. 33.

53. Law No. 5 of 1999 art. 51 (Indon.).

6. *Enforcement Agencies*

a. *The KPPU*

Similar to other countries with antimonopoly laws, Law No. 5 established a commission to oversee its implementation, the KPPU.

(1) *Legal Framework*

Chapter IV of Law No. 5 established the KPPU. Presidential Decree No. 75/1999 provides additional provisions governing the KPPU, which reiterate and elaborate upon many of the provisions of Law No. 5.⁵⁴ The KPPU did not begin to function until June 2000 when the President of Indonesia officially appointed its eleven members.⁵⁵

(2) *Duties and Functions*

The duties of the KPPU are laid out in Article 35 as follows: (a) evaluating potentially monopolistic or anticompetitive contracts regulated under Articles 5 through 16; (b) evaluating potentially monopolistic or anticompetitive business practices regulated under Articles 17 through 24; (c) evaluating potential abuses of market dominant positions regulated under Articles 25 through 28; (d) taking appropriate action under its authenticity vested in Article 36; (e) advising on relevant government policy measures; (f) establishing related guidelines in accordance with Law No. 5; and (g) updating both the President and the House of Representatives on any progress or action taken.⁵⁶

The KPPU may only investigate cases that do not involve criminal elements. If monopoly practices or unfair competition possess any level of criminality then it is the responsibility of both the police to investigate and the public prosecutor to prosecute in a district court. However, to date, no court has decided a case with criminal elements. While there was a case

54. See *Republic of Indonesia Presidential Decree No. 75 (1999)* (concerning the KPPU).

55. See *Republic of Indonesia Presidential Decree No. 162/M (2000)* (concerning the Approval of the People's Representative Assembly of the Republic of Indonesia on the Nomination of Candidates to be Members of the KPPU).

56. Law No. 5 of 1999 art. 35 (Indon.).

where the police and the prosecutor invoked Law No. 5,⁵⁷ the district court ultimately decided it did not apply.

(3) Cases Decided

At present, the KPPU has decided only two cases under Law No. 5. The first case involved Caltex, a multinational oil company operating in Indonesia. The case involved contract terms that Caltex imposed on its contractor, which the KPPU felt discriminated against local contractors.⁵⁸ The second case involved Indomaret, a supermarket chain store which many small businesses accused of forcing them out of the market.⁵⁹

57. The case, involving Indonesia's first cyber crime trial, was held at the Central Jakarta District Court. The defendant was accused of unfairly registering the domain name of a famous competitor in the cosmetics industry. In addition to charges under the Indonesian Criminal Code, the defendant was charged with violating Article 19 and Article 48, Paragraph 1 of Law No. 5. The presiding judge rejected the application of Law No. 5 as being irrelevant. *See* Case No. 1075/PID.B/2001/PN.JKT.PST, 2 JURNAL KEADILAN [JUSTICE JOURNAL] 1, 76-84 (Jakarta Cent. Ct. 2002). The author agrees with the decision of the judge, as Law No. 5 deals primarily with entrepreneurs competing for a share of the market, rather than, as with the case in question, fraudulent use of a competitor's name.

58. The KPPU found Caltex and three pipe processors, Citra, Purna, and Patraindo, guilty of bid rigging in violation of Article 22 of Law No. 5. The violation resulted from a tender offer by Caltex to receive supplies of pipe from the three manufacturers. The KPPU found that Citra, Purna, and Patraindo exchanged prices at a meeting the evening before the bids were opened. The KPPU also held Caltex responsible for failing to exercise adequate prudence in ensuring fair business competition because in setting up the tender process it should have expected from the beginning that collusion would occur. As a consequence of the violation, the KPPU declared the contract between Caltex and Citra, the lowest bidder, to be void and that the entire tender process had to be redone. Caltex accepted the KPPU's verdict and has not appealed to the district court.

59. Indomaret violated, or was alleged to have violated, the following provisions of Law No. 5: Article 1, Paragraph 4, for Indomaret's dominant position controlled market shares based on financial capacity and access to supplies; and Article 1, Paragraph 8, for controlling the market for the benefits of the business entrepreneur involved in the conspiracy, which is prohibited by virtue of Article 22 (conspiracy), Article 25 (dominant position), and Article 15 (prohibition against requiring supplies from certain business enactors). The KPPU determined that Indomaret did not observe the principle of balance in accordance with the principle of economic democracy in promoting healthy competition between the interests of business enactors and public interests, and it therefore ordered Indomaret to cease expansion within traditional markets, in which Indomaret competes directly with small-scale retailers, in the context of ensuring a competitive balance between large-, medium-, and small-scale enterprises.

The KPPU recommended that the Indonesian government immediately complete and effect the implementation of regulations and policies including, but not limited to, policies on location and spatial arrangement, licensing, opening hours, and social environment. The KPPU also recommended that the government immediately guide and empower small- and medium-scale enterprises so as to increase their competitive power to help them compete successfully with larger enterprises. The KPPU declared that it will conduct further studies, monitoring, and investigation based on allegations of monopolistic practices and unfair business competition committed by business enactors vertically related to retailers, including the practices of price discrimination and closed agreements.

III. CHALLENGES AHEAD

There are several challenges facing the successful implementation of Law No. 5. First, there are many different theories about why the government introduced Law No. 5 and what its true purposes are. Some believe that authorities should use Law No. 5 to redistribute assets from large conglomerates to the people of Indonesia. Others believe that the government designed the law to protect small businesses from aggressive competition from larger enterprises. Foreign enterprises may view Law No. 5 as a way to open up Indonesian markets. However, completely boiled down, Article 3 states that the basic objective of Law No. 5 is to safeguard the public interest and improve the efficiency of the national economy in order to better the welfare of the public.⁶⁰

Second, Indonesia's antimonopoly law may become ineffective due to the resistance of many Indonesians who are suspicious of a hidden agenda on the part of the IMF. Many circles within Indonesia questioned why the IMF was involved directly in passing an antimonopoly law in Indonesia when the IMF's role is simply to assist Indonesia with its macroeconomic issues and help Indonesia recover from its economic crisis. The skepticism in various circles in Indonesia stems from the belief that developed members of the IMF pushed for the enactment of the antimonopoly law in order to open up Indonesia's markets, which ultimately would improve home businesses' long term economic interests within Indonesia.⁶¹ A related theory suggests that IMF involvement in the passing of Law No. 5 law stemmed from pressure from lobbying groups within Indonesia that individually lacked the power to change government policies. Theoretically, these groups pressured the IMF to change government

60. Article 3 states:

The objectives of this law are:

- a. to maintain public interest and improve the efficiency of the national economy as one of the means to improve public welfare;
- b. to create a conducive business climate through healthy business competition, thus securing equal business opportunities for large, middle and small-scale entrepreneurs;
- c. to prevent monopolistic practices and/or unfair business competition by the entrepreneurs; and
- d. to create effectiveness and efficiency in business activities.

Law No. 5 of 1999 art. 3 (Indon.).

61. Notable Indonesian economist Faisal Basri wrote: "[W]e need to be aware that the agents of globalization are not free of evil and destructive motives. They are not angels free of exploitative practices. The factors that have triggered this globalization are themselves the result of politically motivated decision-making." See FAISAL BASRI, *THE ROLE OF LAW AND COMPETITION POLICY IN FOSTERING ECONOMIC RECOVERY IN INDONESIA* 4 (Inst. of Developing Economies, Tokyo, 2001).

policies, which ultimately would help Indonesian businesses obtain government-designated monopolies.

Third, to be effective, the Indonesian people, the business community and, most importantly, the individuals enforcing the law (i.e. judges, prosecutors and lawyers) must completely understand Law No. 5. Currently, the socialization process that would ensure that the public understands Law No. 5 is in the introductory stages. Understanding Law No. 5 is incredibly important for both the people of Indonesia and its enforcement agencies. The people must understand that with Law No. 5 the legal culture of Indonesia has changed from doing business by way of cooperation to doing business by way of competition. This is a relatively new concept for Indonesia because, like most Asian countries, the prevailing value is to promote cooperation rather than competition. Cooperation is an inherent aspect of agrarian societies like Indonesia. However, businesses must change any remaining emphasis on cooperation because the political leaders of Indonesia have determined that Indonesia now is an industrial country. As an industrial country, Indonesia therefore must institutionalize an economic legal infrastructure, including competition law. Since Law No. 5 is inconsistent with prevailing social values, society must shift its values to align itself with the law. The socialization process therefore is a critical issue that Indonesia must address before it can enforce Law No. 5 sanctions against violators. In addition to the importance of popular understanding, enforcement agencies that play a vital role in the effectiveness of Law No. 5 must thoroughly comprehend its provisions. Although members of the KPPU may possess a good understanding of the law, a case on appeal may be decided by a judge who lacks the same substantive understanding. As a result, the judges' lack of knowledge may deny the parties the justice they seek.

An understanding of general economics is important to understand and handle cases invoking Law No. 5. Indonesia differs from the United States because in Indonesia the faculty of law is more of an academic institution than a professional school. High school students immediately can join a faculty of law without first possessing a college degree. Hence, those who want to specialize in competition law must struggle with general economics studies. This situation is made worse by the fact that many of the students choose to study the law based on a dislike of economics and math. In addition, many lawyers and judges understand the law only as it appears on its face and do not delve into the relevant underlying substance or meaning.

Fourth, there must be effective law enforcement, which will depend greatly on the KPPU. However, currently there are various problems

surrounding the KPPU, including a lack of: (1) funding; (2) public recognition; (3) an effective infrastructure; and (4) staffing. Unless the KPPU is given the support necessary to function properly, it will become an ineffective agent of enforcement.

IV. CONCLUSION

Indonesia now has both an antimonopoly law and an independent enforcement agency. However, this does not guarantee the instant eradication of monopolistic practices and unfair business competition. The effectiveness of Law No. 5 will depend greatly on how seriously the law is enforced and how readily society accepts its scope and effects. While Law No. 5 is by no means perfect, it nevertheless has the present potential to serve very useful purposes. However, given greater experience and time, it almost certainly will be improved.

Today Law No. 5 is merely a small dot in the corner of a large blank canvas. However, with wise leadership from the KPPU, support from both the Indonesian government and Parliament, and the will of the people and businesses to see the law succeed, the future embodiment of competition law and policy in Indonesia will emerge from its present foundation.