

Equal Opportunities between SOEs and Private Companies

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A. Introduction

State-Owned Enterprises (SOEs) in Indonesia has a strategic and primary role in order to provide welfare for the society in the national economics context. This is absolutely not a simple honor to the SOEs, but essentially an enormous task to undergo. In conducting its business activities, SOEs, like other enterprises, are borne creating profit or value to the corporation while performing public service obligation simultaneously.

However, to attain the Justice and Equal Society as mandated by the Indonesian Constitution 1945, the government divides Indonesian SOEs into two types, namely Perum and Persero. Perum is abbreviated of Perusahaan Umum (General Enterprise) and Persero is derived from Perseroan (Enterprise). Perum is a sort of state vehicle to provide products and services which are at public welfare domain. This entity characterized by a specific format by which its entire ownership is belongs to the state with a full liability. Meanwhile, Persero is in the form of Perseroan Terbatas (PT) or a limited liability company, by which the ownership might be shared with other parties depending the enterprise status; closed company or open company or even listed company.

This paper will not give portion to discuss the Perum form as it has been clear for us that it bears specific tasks to perform the state obligation which closely-related with public welfare matters. Nevertheless, it will be interesting to explore further the state's commitment to the business sector on state intervention to the sector and market through its SOEs and a regulator as well. Once the state enters the sector and its market as one of business players, the state should maintain its good governance, i.e. fairness, to make available conducive climate of competition for all business actors.

This paper presents perspective from a non-government body, though NCG is a body established by a Ministry Decree. In line with one of NCG objectives, to propose alternative, inputs, critics and other positive initiatives, this paper will also analyze the problem and recommendation by using economic law approach. *First*, circumstance in the existing climate of fair business competition will be showed briefly. *Second*, the economic law perspective in analyzing the circumstances will be in turn to discuss. *Third*, a map of neutral competition governance will be displayed. *Finally*, we noted that our discussion through this valuable and enlighten Network has brought us to a certain level where the progress of GCG in SOEs explored and developed. On the other hand, the implementation and enforcement of GCG in SOEs (by using the OECD guidelines) as well as its development is much depending on

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government's political law of each country. Hence, as a final point, it might be interesting to question political law matters as the last key to start, restarts, and continues a national program related to GCG in SOEs as well as providing equal opportunities to all business players in Indonesia.

1. Modern Welfare State

Basically, the main objective of a state is to provide welfare for its citizen. In the context of welfare state, the state has a list of obligation to fulfill the citizen's rights. Those, among others, are health, water supply, food, electricity, education, housing, job and employment, and culture and religion. However, it has been realized that the government has limited sources to making those products and services available to the public. Hence, the Elucidation of the IC 1945 integrated with the Constitution opens opportunities to private sectors to join and assist the government obligation in creating products and services to complete public "cradle-to-grave" needs. Thus, the government and private sectors work on the sort of welfare projects in the same sectors. This situation creates a new style of capitalism by which it engages with social welfare matters. As Sanford Levinson quoted that, "Capitalism encourages competition and risk-taking behavior" with victory going to those who are the beneficiaries of both their talents and the sheer luck of market vagaries. In turn, however, "misfortune and failure can lead to harsh consequences," for "there are few market mechanisms to mitigate the consequences of accident, illness, ageing, and vicissitudes of industrial society."²

We noted that one of proper functions of the state is, "the facilitation of decisions made by autonomous individuals, coupled with prevention of the use of force or fraud by insufficiently socialized individuals and provisions of a "common defense" against foreign enemies."³ Therefore, in modern welfare state, the state must put its hands to intervene the circumstances so as to stick to the mandate of IC 1945 or even to prevent economic chaos. Beveridge Report affirmed that, "Intervention of State in any aspect of social life as well as economic activities aims to make available: income distribution of society, social welfare from the cradle to the grave, opportunities for employment, monitoring of wages and salary, business activities in education sector."⁴ The state intervention is employed through its regulation and SOEs.

2. The Vision of Indonesian Constitution 1945

The concept of modern welfare state has been characterized the Preamble of the Indonesian Constitution 1945 (IC 1945). The adoption of the concept in the main objective of Indonesia as a state was formulated in the classic wording of "justice and equal society." The Preamble was

²*Id.*

³ Sanford Levinson, *The Welfare State*, in Dennis Patterson, *A Companion to Philosophy of Law and Legal Theory*, Blackwell Publishers, p. 553.

⁴ Ibrahim, *The Prospect of SOEs and Public Interest* (Prospek BUMN dan Kepentingan Umum), Citra Aditya Bakti, Bandung-Indonesia, 1997, p. 8. In 1942, the "Social Insurance and Allied Services" in UK was created by Sir William Beveridge who was a member of UK Parlement. He said that in order to aid those who were in need of help, or in poverty. Beveridge also worked as a volunteer for the poor, and set up national insurance. He stated that, "All people of working age should pay a weekly national insurance contribution. In return, benefits would be paid to people who were sick, unemployed, retired or widowed."

also influenced by several philosophical thoughts; one of them came from the Utilitarianism taught by Jeremy Bentham. “The great happiness for the greatest number” had inspired the founding fathers to formulate landmark and energizing starting points in meaningful paragraphs of the Preamble.

To accommodate the bottom-lines in the Preamble, Article 33 (2) of The IC 945 stipulates that, *“Branches of production which are important for the state as well as influencing the needs of public at large are authorized by state.”* Consequently, a list of facilitations as well as infrastructures which are public interest-related must be provided by the state. In term of achieving such intention, the government as a state organ has limited capacity to perform all those kind of public interest-related. Hence, government shares its “obligation” with private sectors, yet, to safeguard and ensure that private sectors’ concerns are along the lines of the state’s main purpose, intervention of the state is the priority alternative.

3. Competitive Neutrality

Once the state opens opportunities to private parties as described above, competition will be the very possible circumstance resulted from that kind of policy. The more players in a sector, the more competitive circumstance created. Competitive situation is believed as important factor in national economy. In one side, business actors and consumers interests are fulfilled. From the side of business actors, the competition generates good and positive mechanism to encourage better quality of products and services as well as create lower price for the consumer. In addition, competition improves better performance of companies by which promote creativities and innovations of any new aspects. From the consumers’ side, they get a wider range of high quality products and services in a lower price. On the other side, there is dilemma in treating SOEs in order to persuade fair competition between all business players.

The dilemma emanated from the state obligation through its government as regulator, to create climate that positive and conducive for business. Although the state also joins the playing field through its ownership in SOEs, the government should ensure that fair business competition implemented and enforced to all players. The state must exercise clear and distinctive governance in term of its ownership in SOEs and its function as a regulator. Therefore, it will not be a trigger creating ambiguity or double standard on the making of policy and relevant rule of laws.

As for the competitive neutrality that should be conducted by the government, nevertheless, in the context of Indonesia, there are some aspects to consider. The most is regarding the main objective of state to achieve the so-called “justice and equal society” as explained previously. To facilitate the overarching goal, government divides SOEs in two types: Perum and Persero. Perum bears purely public service obligation as well as create profit, in certain degree, based on corporate management and governance principle. Meanwhile, Persero mainly aim to create profit like other common corporations.

Based on Law No. 19/2003 on SOE, the form of Perum is fully-owned by the state and the state ownership is not divided into shares, as its main purpose is to fulfill public interest.⁵ The Persero is in the form of Limited Liability Company (LLC) and its ownership is divided into shares which might be fully-owned or minimum 51% owned by the state, with main purpose of creating profit. Hence, Persero should comply with Law No. 40/2007 on Limited Liability Company because of its form is LLC. Thus, Persero is similar with other private companies which in the form of LLC as well.

With the purpose of being more focus on the matter of competitive neutrality, it would be fair if only include Persero and other private companies in the form of LLC and exclude the other forms of corporation available in Indonesia.⁶

The landmark legitimate of SOEs existence is specified in the dictum of Law No. 19/2003: “*SOE is one of business actors in the national economic activities based on economic democracy*” and “*SOE plays important role in order to attain welfare to the society*” (justice and equal society). The national economy of Indonesia based upon principles as laid down in the IC 1945, Article 33 (4): “*The national economic is organized based upon economic democracy with principles: togetherness, efficient by justice, sustainable, environmental, independency, and preserving the balance of development and national economic integration*”. These principles are accommodated in the SOE Law,

The principles are governance-sound. However, some impediments as identified in the Report on the Observance of Standard and Codes (ROSC) 2009 of Indonesia can also be found in corporations in the form of Persero. Those kinds of weaknesses were commonly derived from a sort of mindset that position of Directors as well as Commissioners in a SOE is a politic position. It is widely known that SOEs in Indonesia has strong relationship with politic parties. In consequence, it is complicated for the government to enforce a sound competitive climate.

To create fair competition among business players and to preserve public interest as well, the government promulgated Law No. 5/1999 on Prohibition of Anti-Monopoly Practice and Unfair Competition. This Law applies economic democracy principles into market. Empty spaces still remained here and there in that competition law. This might be because of fair competition was a rather new issue in Indonesian business at the beginning of the Law promulgation. As William R. Anderson said that, “Clear objectives were a luxury we seldom enjoyed; ambiguity was our guiding star.”⁷ However, the Law remarked a positive government policy of law regarding competition, although it brought some complex consequences. Among others, every SOEs in the form of Persero cannot avoid complying to this Law No. 5/1999. Government monopoly in telecommunication sector through PT. Telekomunikasi Indonesia Persero, should be distributed

⁵ Article 1 No 4.

⁶ As a sort knowledge of corporation forms in Indonesian legal system, we have several types of corporation as legal entities: Maatschap (association), Firma (small enterprise), Commanditaire Vennotschap (a form between Firma and LLC), Perseroan Terbatas (Limited Liability Company), Koperasi (Cooperation), Badan Usaha Milik Negara (State-Owned Enterprise), PT Terbuka (Open LLC, usually listing company in stock exchange).

⁷ William R. Anderson & Paul Roger III, *Antitrust Law: Policy and Practice*, Matthew Bender, New York-USA, 1985, p. 34.

to other business players who interested playing in the sectors. Privatization was one of alternative solutions. The government also opens the telecommunication sector to private companies. In more a decade, telecommunication has been good evidence in which government conserves competitive neutrality. In the level of enforcement of the competition law, Law No. 5/1999 constituted a special body, namely Komisi Pengawas Persaingan Usaha – KPPU (Watchdog of Business Competition Commission). This Commission has duties, among others, to conduct assessment on contracts which has potential monopoly or unfair competition, to assess business activities as well as business players' action which has potential monopoly and/or unfair competition, and there are five more duties relevant to monopoly and unfair competition.⁸ Powers granted by the competition law to this special body includes receiving complains and reports from the public, conducting investigation, and making decision as well as giving sanctions to the business players who has contravened the competition law.

B. Economic Law Approach on The Level of Playing Field for All Business Actors

The so-called level playing field essentially means an environment in which all companies in a given market must follow the same rules and are given an equal ability to compete,⁹ and therefore everyone is given the same advantages or opportunities.

From legal perspective, creating level playing field is the area of Economic Law, one of law branches. This branch of law derived from the concept of welfare state which was started in European countries, such as Netherlands and France. After the malaise in 1930s, people started to think a new concept replacing the Adam Smith theories. It was thoughts on welfare state by which intervention of state as well as government in the economic life is an unavoidable. To balance regulations and customs based upon capitalistic system, there was a need to create rule of law that concerns to public interest. Hence, this kind of law was exemptions to the private law as engaged by the capitalism. As it prioritizes public interest, it can be categorized into public law. All the public law which exempted from conventional commercial law is now called as Economic Law, or *Social Economich Recht* (Netherlands) or *Droit Economique* (France). For example, when government conducts intervention to a free market system through administrative law, then, this kind of law was known as *droit economique* or economic law in a narrow sense. Meanwhile, Economic Law in a broader sense which was known as *Droit de l'Economique* was born after 1965 involving many aspects of law, not only administrative law, but including constitutional law, civil law, criminal law, and other law branches. In other words, Economic Law comprised by many aspects integrated with a planned development.

Economic Law also is based upon principles: *benefit, kekeluargaan (family atmosphere), non-discrimination, selected discrimination, partnership, transparency, and sustainable development*.¹⁰

⁸ Article 35 Law No. 5/1999.

⁹ http://www.investorwords.com/2783/level_playing_field.html

¹⁰ Sunarjati Hartono and Elly Erawati, *Economic Law*, Parahyangan University, 1993, p. 20.

There are 3 (three) important concerns in Economic Law:

1. Development, an enhancement of self-sustain of national economic;
2. Distribution of welfare (social justice);
3. International interest.

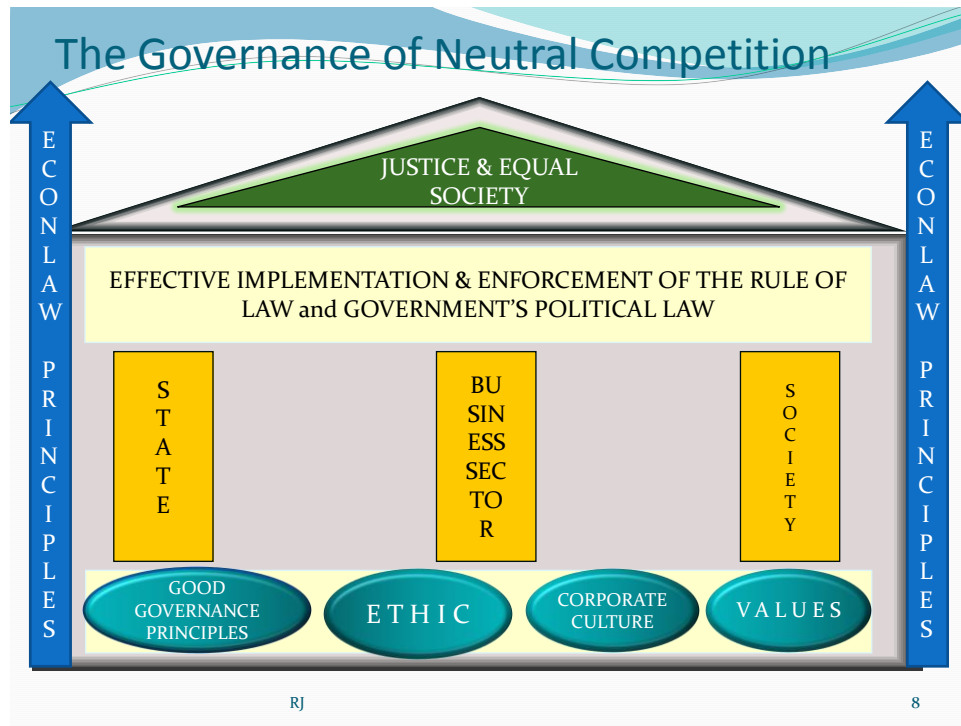
In terms of creating level playing field for all business actors, Economic Law approach may be an alternative. As the state intervention in business sectors conducted through regulation, for this reason, the regulation should be designed appropriately by accommodating aspects juridical, sociological, and philosophical. Economic law approach involves features of multi-discipliner, transnational, and futuristic. Law as a tool of social engineering, as mentioned by Roscoe Pound, will not be effective if the law created in an isolation atmosphere. The creation of law related to the national economic interest must entail other related disciplines as well. Furthermore, in the context of globalization which also has meaning of liberalization of trade, thought on going beyond national aspects must be utilized. In addition, to anticipate the rapid of information and technology, considering an outlook for about five or ten years ahead will construct a more stable legal and economic system. Those approaches build legal certainty that very urgent for all business actors. Other beneficial results would be the effective implementation and enforcement of law that reflect good governance. Legal aspects is indeed merely a hemisphere of governance, we still have some more good governance aspects to work out. However, regulatory or mandatory driven is often useful as a starting point.

In term of modern business, legal certainty is imperative. It is like good fertilizer for conducive business climate. If the regulation provides equal opportunities to all business players, the government is creating the desired climate that comforts all parties. Persero will be pushed to craft efficiency, reformation of its institution, implement good corporate governance, which all in turns build strong competitive advantage. Likewise, private companies will have equal opportunities to enter the sector which was monopolized by SOEs. Moreover, the government will receive positive feedbacks, particularly in the national economic growth, increasing state income though tax payment, as well as contribution of the business players onto efficient business climate. Additionally, the public will obtain the best quality of products and services as well as innovation at the lowest price.

In conclusion, the role of government as regulator in economic activities through relevant rule of law creates:

1. Legal certainty to all business actors in doing business;
2. Legal protection to all parties, not only the business players, but also consumers;
3. Special protection to domestic business qualified as small and micro business;
4. Safeguard to public interest and potential unfair business practices;
5. Preservation of the environment;
6. Distribution of income and encourages macro economic development.

C. The Governance of Neutral Competition



D. Government's Political Law

Law and politics is like two sides of a coin. This reflects how close their relationship in the existence of a state. Law is often a political decision. It means that law is a regulation of distribution or allocation of sources in the context of conducting and governing a state. By knowing the government political law, it gives us views as to whether the law creates benefit to the society or makes the law even distance from the social facts.

Therefore, in order to form positive political law for national economic, government needs to consider the following continues efforts:

1. Shifting paradigm
2. Continuous improvement in the national reformation
3. Keep in the orientation of the best interest of stakeholders as a whole
4. Eliminating the conflict of interest
5. 'Clear and distinct' governance
6. Strong motivation in the implementation and enforcement: continues campaign and improvement
7. Harmonization between government's policy and competition law >>> law as the commando.

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