

## **HARMONIZATION OF THE AVIATION SECTOR WITHIN PRESIDENT JOKOWI'S MARITIME POLICY: A WAY TO PROMOTE PIONEER FLIGHTS**

**Ridha Aditya Nugraha**

\* German Aviation Research Society

Korespondensi: [ridha.aditya.nugraha@gmail.com](mailto:ridha.aditya.nugraha@gmail.com) / [r.a.nugraha@umail.leidenuniv.nl](mailto:r.a.nugraha@umail.leidenuniv.nl).

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### **Abstract**

*As the biggest archipelagic state in the world, the Indonesian government has been aware of the importance of both air and sea transportation in connecting the remote islands with the main islands and thus developing the economy. However, it could not be denied that for many years the country had been trapped within a transportation policy favoring land over the aviation and maritime sectors. It thus came as a relief when the current government announced a pro-maritime transportation policy as their main priority. While this pivot is certainly welcome, it still fails to address the other 'life line' of the Indonesian geographic periphery, namely aviation. Currently airlines serve pioneer or isolated routes to these areas which are not financially viable, meaning they are flying at a 'loss'. To compensate this, state subsidies are granted to these airlines. One of the main concerns therefore, is that there must not be an overlap between airline and ship routes so that subsidies can be concentrated to maximize coverage of the remote islands. Harmonization between the aviation and maritime sectors must be translated within a legal framework. Learning from the European Union is one of the best options so far considering their successful law making and effective implementation within its member states to avoid overlapping between airlines and other transportation modes. Furthermore, failure to present subsidies under Public Service Obligation to develop the aviation, not only maritime, sectors shall mean a nightmare for the country's dream to become a maritime axis in ASEAN.*

*Keywords: aviation, economy, law harmonization, maritime, pioneer flights, subsidies*

### **Abstrak**

*Sebagai negara kepulauan terbesar di dunia, Pemerintah Indonesia telah menyadari pentingnya baik moda transportasi udara maupun laut guna menghubungkan pulau-pulau terpencil dengan pulau utama yang ujungnya akan berpengaruh terhadap peningkatan ekonomi. Akan tetapi, tidak dapat dipungkiri bahwa negara ini telah terperangkap dengan berbagai kebijakan*

*publik yang mengutamakan moda transportasi darat ketimbang udara dan laut untuk waktu yang lama. Adalah suatu pencerahan ketika rezim saat ini memprioritaskan kebijakan yang mendukung moda transportasi laut. Ketika perubahan poros ini disambut baik, sayangnya moda transportasi udara yang turut berperan penting dalam menyambung kehidupan rakyat Indonesia masih terlupakan. Dewasa ini maskapai penerbangan yang menerbangi rute-rute perintis tidak memperoleh keuntungan, atau dengan kata lain mereka terbang untuk merugi. Guna menutup kerugian tersebut, subsidi dikucurkan kepada maskapai-maskapai tersebut. Satu hal yang harus diperhatikan baik-baik adalah tidak boleh terjadi tumpang tindih untuk setiap subsidi rute-rute perintis antara maskapai penerbangan dengan perusahaan pelayaran agar dapat menjangkau pulau-pulau terpencil secara maksimal. Harmonisasi antara sektor penerbangan dan maritim harus direalisasikan melalui hukum positif. Belajar dari Uni Eropa adalah salah satu opsi terbaik saat ini mengingat kesuksesan mereka dalam merancang dan mengimplementasikan peraturan-peraturannya secara efektif guna menghindari tumpang tindih antara moda transportasi udara, laut, dan darat. Selanjutnya, kegagalan untuk memperkenalkan subsidi berdasarkan konsep Public Service Obligation guna mengembangkan sektor aviasi maupun maritim berarti mimpi buruk guna mewujudkan cita-cita Indonesia sebagai poros maritim di ASEAN.*

*Kata kunci: aviasi, ekonomi, harmonisasi hukum, maritim, penerbangan perintis, subsidi*

## **I. Introduction**

As an archipelagic state, the Indonesian government has been aware of the importance of air transportation since its independence in 1945. With a current population of more than 237 million people living on more than 10.000 islands, air transportation plays a significant role connecting the main islands and remote islands, and thus in developing the economy.<sup>1</sup>

To answer this challenge, the Indonesian government has established Garuda Indonesia and Merpati Nusantara as their flag carriers. Today being one of the most well-known flag carriers, Garuda Indonesia flew for the first time in 1949 and officially became a state-owned company a year later.<sup>2</sup> Since that time the airline has served both domestic and international routes. To ensure the remote islands and isolated regions are not left behind, the government established Merpati Nusantara in 1962.<sup>3</sup> Unlike Garuda Indonesia which became the representative of Indonesia at the international stage, the

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<sup>1</sup> Organization for Economic Co-operation and Development, Report No. DAF/COMP/WD(2014)70 dated 28 May 2014 as presented at the 121st meeting of OCED Competition Committee on 19 June 2014, p. 3.

<sup>2</sup> Garuda Indonesia, <<https://www.garuda-indonesia.com/id/en/corporate-partners/company-profile/about/index.page?>>, accessed 13 July 2016.

<sup>3</sup> Chappy Hakim, *Believe It or Not: Dunia Penerbangan Indonesia*, (Jakarta: Penerbit Buku Kompas, 2014), p. 22.

latter is focused on linking remote regions and islands with the provincial capitals. Thus since the beginning both flag carriers were established with different objectives.

In terms of flights between Indonesian islands, both flag carriers, especially Merpati Nusantara, have not flown these routes much in the past. It is ironic that the main challenge in performing their duties actually came from the Indonesian government itself, whose policies used to favor land over the aviation and maritime sectors. As a result, economically speaking Java Island has become far more developed, consequently creating an imbalance with the other large islands, and all the more so with the small and isolated islands. Thus a land oriented policy in a country where 75% of its territory is water, and definitely 100% airspace, means abandoning the country's periphery that leads to an imbalance in development between the Indonesian main islands, especially Java, and the thousands of remote islands.

It came as a relief when the government announced a pro-maritime policy in 2014.<sup>4</sup> A sea toll concept is being designed to integrate and lower costs of current national logistic distributions by promoting the usage of ships and creating main sea lanes.<sup>5</sup> Under the so-called "Pendulum Nusantara" concept, there will be five main sea ports as a regional hub to surrounding regions and remote islands, which are Belawan-Jakarta-Surabaya-Makassar-Sorong.<sup>6</sup> This situation obviously shows the urgency for safe and reliable sea transportation services.

The success of implementing this concept shall positively impact, either directly or indirectly, the economic development of the peripheral islands. Hopefully the word "scarcity", especially for oil or other energy resources, will be a worn out word in the future. Even though there is still difficult work that must be done by the Indonesian government, at least the pivot has been shifted to a pro-maritime transportation policy. However, in the meantime, the government has seemingly still failed to address the aviation transportation sector.

## **II. The Indonesian Aviation and Maritime Sectors: Is There Any Place Left for Them?**

### **1. Current Developments within the Aviation Sector**

There were seventeen commercial scheduled airlines serving domestic routes as of 2014, which besides Garuda Indonesia, are all

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<sup>4</sup>Fathiyah Dahrul, *Para Menteri Mulai Siapkan 'Tol Laut' Jokowi*, <<http://www.cnnindonesia.com/ekonomi/20141029093416-92-8626/para-menteri-mulai-siapkan-tol-laut-jokowi/>>, accessed 13 July 2016.

<sup>5</sup>Bayu Prakoso, Irfaan T.R, and Widyandita G, *Mahasiswa Teknik Kelautan ITB Gelar Diskusi Rencana Tol Laut Indonesia*, <<http://www.itb.ac.id/news/4682.xhtml>>, accessed 13 July 2016.

<sup>6</sup> PT. Bahana Securities, Special Report "Indonesia Port Corporation" on 1 December 2014.

privately owned.<sup>7</sup> An irony is that Merpati Nusantara, as the flag carrier with a duty to fly pioneer routes, already ceased operation due to bankruptcy with an estimated total debt of US\$ 559 million in early 2014.<sup>8</sup> So far attempts to bring the airline back into operation have not been successful, mainly because of the huge amount of debt. The loss of Merpati Nusantara has caused an awakening in the maritime sector to a difficult situation where they need to fill in the gap, namely the numerous abandoned pioneer routes left by the airline.

Even though new privately owned airlines are established and flying the domestic routes, in general they are not covering the pioneer flights which are considered non-profitable. Obviously this kind of route is not a trunk route, making it less attractive from a commercial perspective. However, there is an obligation for the state to ensure the economic development of these islands through its state-owned airline under the Indonesian Constitution, which led to, and became the basis of, the term “pioneer flights”. The existence of pioneer flights in Indonesia has increased from time to time as a commitment from the government to develop the peripheral economy.

No	Year	Number of Pioneer Routes
1.	2016	209 <sup>9</sup>
2.	2015	217 <sup>10</sup>
3.	2014	170 <sup>11</sup>
4.	2013	138 <sup>12</sup>
5.	2012	132 <sup>13</sup>
6.	2011	132 <sup>14</sup>

<sup>7</sup> Organization for Economic Co-operation and Development, Report No. DAF/COMP/WD(2014)70 dated 28 May 2014 as presented in the 121st meeting of OCED Competition Committee on 19 June 2014, p. 5.

<sup>8</sup>Safri Haliding, *Will Merpati Airline be Just a Memory?*, <<http://www.globalindonesianvoices.com/11797/merpati-airline-bankrupt-grounded/>>, accessed 13July 2016.

<sup>9</sup> Indonesia, Minister of Transportation Decree No. 194 Year 2015 regarding Tariff for Pioneer Routes in 2016, State Gazette No. 2002 Year 2015.

<sup>10</sup>Indonesia, Minister of Transportation Decree No. 73 Year 2015 regarding Tariff for Pioneer Routes in 2015, State Gazette No. 569 Year 2015.

<sup>11</sup>Indonesia, Minister of Transportation Decree No. 14 Year 2014 regarding Tariff for Pioneer Routes in 2014, State Gazette No. 501 Year 2014.

<sup>12</sup>Indonesia, Minister of Transportation Decree No. 87 Year 2013 regarding Tariff for Pioneer Routes in 2013, State Gazette No. 1296 Year 2013.

<sup>13</sup>Indonesia, Minister of Transportation Decree No. 44 Year 2012 regarding Tariff for Pioneer Routes in 2012, State Gazette No. 872 Year 2012.

<sup>14</sup>Indonesia, Minister of Transportation Decree No. 73 Year 2011 regarding Tariff for Pioneer Routes in 2011, State Gazette No. 411 Year 2011.

7. 2010

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*Table 1. Number of Pioneer Routes in Indonesia between 2010-2016*

The existence of these 209 pioneer routes in 2016 were guaranteed by the government, which means airline(s) who win the bid for these routes shall receive proper compensation to prevent the airline(s) from making a loss. The guarantee itself could be in form of the grant of route(s) other than pioneer routes to support the airline's revenue, operational cost support, and/or priority and access to fuel in the remote regions or islands according to a normal market price.<sup>16</sup> These initiatives are aimed at attracting more privately-owned airlines to serve the pioneer routes, thus helping the only remaining state-owned airline, Garuda Indonesia, fulfill its obligation to perform pioneer flights which Merpati Nusantara surrendered in early 2014.<sup>17</sup>

As one of the current implications of this initiative, ASI Pudjiastuti Aviation (also known as Susi Air) is serving 196<sup>18</sup> domestic routes, most of them being pioneer routes, thus excluding the airline from trunk domestic routes. These routes used to be served exclusively by Merpati Nusantara, but now the situation has changed as a result of the liberalization of airlines in Indonesia; followed by the Indonesian Aviation Law in 2009 which contains provisions on pioneer routes where private airline(s) could also join this business.

For example, Susi Air had been granted the Nunukan-Krayan pioneer route in Kalimantan, where the local government will pay US\$ 70 per person as operating aid on this route in 2015, leaving only a US\$ 20 cost for the passenger (the original price is estimated US\$ 90 per person for this route).<sup>19</sup> The airline had also been granted two other pioneer routes with Nunukan as its hub with a total of 526 flights for this year.<sup>20</sup>

As a consequence of local autonomy, all of the operating aid comes from local government state budgets, leaving no room for central

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<sup>15</sup> Indonesia, Minister of Transportation Decree No. 34 Year 2010 regarding Second Revision Towards Minister of Transportation Decree No. 18 Year 2007 regarding Tariff for Pioneer Routes.

<sup>16</sup> Indonesia, Minister of Transportation Decree No. 25 Year 2008 on Performing Air Transportation Sector, art. 58(2).

<sup>17</sup> Ridha Aditya Nugraha, "State Aid for Pioneer Routes under PSO in Indonesia: Against the Tide within ASEAN Open Skies?", LL.M. thesis at International Institute of Air and Space, Universiteit Leiden, 2015, p. 74.

<sup>18</sup> Susi Air, <<http://susi-air.com/profile>>, accessed 13 July 2016.

<sup>19</sup> Dewi Agustina, *Penumpang Susi Air Rute Nunukan-Krayan Hanya Bayar Rp 280 Ribu*, <<http://m.tribunnews.com/regional/2015/03/26/penumpang-susi-air-rute-nunukan-krayan-hanya-bayar-rp-280-ribu>>, accessed 13 July 2016.

<sup>20</sup> Dewi Agustina, *Rp 8 Miliar Anggaran Subsidi Ongkos Angkut ke Krayan*, <<http://m.tribunnews.com/regional/2015/03/26/rp-8-miliar-anggaran-subsidi-ongkos-angkut-ke-krayan>>, accessed 13 July 2016.

government intervention. This situation means the local government could determine and evaluate pioneer routes without any need for approval from Jakarta. With good planning and implementation in the long term, these pioneer flights could benefit both the airline and local people in remote islands and regions.

<b>No.</b>	<b>Segments</b>	<b>2014</b>	<b>2019</b>
1.	Seaports (number of)	278	450
2.	Airports (number of)	237	252
3.	Railways (length)	5,434 km	8,692 km

*Table 2. National Mid-Term Development Plan Target 2014-2019<sup>21</sup>*

This table represents how the Indonesian government is seriously developing the maritime sector, by aiming to increase expenditures around 62% from current numbers. Ironically, this does not happen with the aviation sector where the number only reaches 6%. An amount far less than the construction for railways, in this context representing the land-oriented policy, which is aimed at around 60% of growth.

Interesting to note for the latter, that for the time being, there is a debate on bullet-train (high speed train) development project in Java as it requires large amounts of USD financing at a time of IDR depreciation towards USD.<sup>22</sup> If this project is undertaken, it means less of the state budget or any other kind of fundings could be allocated for the development of airports and seaports; or both sectors infrastructures. More or less this project could become an obstacle to the planned revival of the Indonesian aviation and maritime sectors.

## **2. Legal Standings**

Article 33 of the Constitution of the Republic of Indonesia of 1945 (the “Indonesian Constitution”) guarantees that sectors which are important to the Indonesian people’s prosperity must be controlled by the state. The development of the aviation business today, especially its role in developing the national economy and its importance to connect the main islands with remote islands, means Article 33 of the Indonesian Constitution should be applicable. Following amendments to the Indonesian Constitution, airspace is considered as important as land, water, and natural resources in order to promote the equal welfare of the

<sup>21</sup> PT. Bahana Securities, Equity Research on 9 January 2015.

<sup>22</sup> PT. Bahana Securities, Economic Flash on 1 September 2015.

Indonesian people.<sup>23</sup> Moreover it means airspace has an economic value, which establishes a right of the state to intervene within the domestic flights.

As a further interpretation of this article, pioneer flights between main islands and isolated regions and islands are guaranteed under the Indonesian Constitution. Pioneer flight itself, in general, could be defined as flight to isolated areas or islands.<sup>24</sup> The importance of this kind of flights within Indonesia, as an archipelagic state, have established an obligation which is known as Public Service Obligation (PSO). More or less, this situation also applies to the maritime sector where the state must guarantee the existence of safe and reliable ship voyages to remote islands. The state through its enterprises is held responsible to perform this obligation.<sup>25</sup>

The interpretation of the guarantee itself is generally in a form of subsidy. Capital injections is the most common one which is allocated from the yearly state budget. Usually state-owned airline(s) will receive subsidy easily to ensure them could serve the domestic routes well as a matter of national pride.<sup>26</sup> The Indonesian Competition Law<sup>27</sup> was drafted to balance this situation, namely to protect private-owned airlines by receiving fair treatment with the purpose to stimulate them doing business in the country.

This law had been enacted in 2009 where nine airlines including the two flag carriers, Garuda Indonesia and Merpati Nusantara, were sentenced to pay a huge fine in regards to price fixing.<sup>28</sup> This is a fresh wind in terms of promoting private-owned airlines to become the state's main partner for flying the pioneer routes, thus fulfilling the needs which the government could not provide alone.

It must be noticed that subsidy is not currently regulated within the Indonesian Competition Law, thus leaving this issue within a grey area.<sup>29</sup> Fortunately, so far there has not been any case on subsidy for airlines which means the pioneer flights are still safe. There is an urgency for more detailed provisions to secure the granting of subsidy for airlines flying pioneer routes within the current legal framework.

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<sup>23</sup> Harmanto Edy Djatmiko, *Bisnis Penerbangan: Menyongsong Era Baru*, (Jakarta: PT Elex Media Komputindo, 2003), p. 46.

<sup>24</sup>Indonesia, Law No. 1 Year 2009 regarding Aviation, State Gazette No. 1 Year 2008, Additional State Gazette No. 4956, art. 1(18).

<sup>25</sup>Indonesia, Law No. 19 Year 2003 regarding State-Owned Company, State Gazette No. 70 Year 2003, art. 2(1).

<sup>26</sup> Magnus Schmauch, *EU Law on State Aid to Airlines: Law, Economics, and Policy*, (Berlin: Lextion Publisher, 2012), p. 13.

<sup>27</sup>Indonesia, Law No. 5 Year 1999 regarding Prohibition of Monopolistic Practices and Unfair Business Competition, State Gazette No. 33 Year 1999.

<sup>28</sup> The Indonesian Commission for Supervision of Business Competition, Verdict No. 25/KPPU-I/2009 regarding Fuel Surcharge in Indonesian Domestic Airline Industry.

<sup>29</sup>Ridha Aditya Nugraha, *op.cit.*,p. 78.

### 3. Implementation of Cabotage: True Protection or Disaster?

The original word of “cabotage” is derived from the Spanish word “cabo” which means navigation near the coast without losing sight of it.<sup>30</sup> This term was first used in maritime navigation, especially in France, which had more than two hundred seaports open to all foreign vessels in the 16<sup>th</sup> century.<sup>31</sup> The situation dramatically changed when foreign vessels were banned from performing cabotage on economic grounds in 1791.<sup>32</sup>

Since the beginning of the 20th century, the term “cabotage” has also been applied in the aviation sector. Many states had tried to protect their own national territory, including their colonies, by prohibiting any cabotage flight exercised by those other than its nationals within each state territory due to national security and economic interests at that time. This means the maritime concept has been incorporated into air law.<sup>33</sup> This situation has been termed “cabotage” by scholars in reference to the former maritime situation. Bin Cheng defined cabotage as:

*“a provision that applies to air transport between any two points in the same political unit, that is to say, in the territory of a State as the term is used in air law.”*<sup>34</sup>

According to Nicolas M. Matte, which expressed the same principle as Bin Cheng, cabotage is about every activity that includes commercial transportation of people, goods, or mail within one country.<sup>35</sup> These definitions are still up to date and are seemingly considered favourable enough to be implemented by many governments into their national laws.

In practice within the aviation world, the cabotage principle introduces the 8<sup>th</sup> and 9<sup>th</sup> Freedoms of the Air. The former is the right to carry traffic between two points in a foreign territory, while carriage is linked with a third or fourth freedom traffic right.<sup>36</sup> For example Garuda Indonesia flies from Tokyo to Osaka, where both of the cities are located in Japan, and ends its journey in Jakarta as the flag carrier’s home base. While the latter is the right to carry traffic between two points in a foreign territory, which carriage is not linked with third or fourth freedom

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<sup>30</sup> Pablo Mendes de Leon, *Cabotage in Air Transport Regulation*, (Dordrecht: Martinus Nijhoff, 1992), p. 17.

<sup>31</sup> *Ibid.*, p. 1.

<sup>32</sup> *Ibid.*, p. 1.

<sup>33</sup> I. H. Ph. Diederiks-Verschoor, *An Introduction to Air Law*, (Deventer: Kluwer Law and Taxation Publishers, 1991), p. 18.

<sup>34</sup> Bin Cheng, *The Law of International Air Transport*, (London: Stevens and Sons Limited, 1962), p. 314.

<sup>35</sup> Nicolas M. Matte, *Traité de Droit Aérien-Aéronautique*, (1980), p. 173.

<sup>36</sup> International Civil Aviation Organization, *Freedoms of the Air*, <<http://www.icao.int/Pages/freedomsAir.aspx>>, accessed 13 July 2016.



carriage.<sup>37</sup> For example Garuda Indonesia flies from Manila to Tacloban and *vice versa* where both of the cities are located in the Philippines.

Obviously the prohibition of cabotage shall protect each state's own nationals, in this case protecting its business entities from having to compete with foreign competitors thus maintaining the market share. This situation happens in Indonesia where cabotage is prohibited,<sup>38</sup> both within the aviation and maritime sectors; at least on the trunk routes. Speaking of pioneer flights and the sake of marginal people, if the state cannot fulfill the demands to provide public services, it raises an important question: shall cabotage be allowed or shall national pride prevent it from happening, even though the people living in remote islands and regions have begged for a reliable transportation during the last decades?

### **III. Future Challenges for the Aviation and Maritime Sectors**

#### **1. Absence of Harmonization of Laws: What Are the Implications?**

Unfortunately there is no provision within the Indonesian Aviation Law<sup>39</sup> and the Indonesian Maritime Law<sup>40</sup> stating explicitly that the aviation and maritime sectors shall work together to reach and develop the pioneer islands. This condition means the potential of a policy clash with the rise of both these sectors. The policy clash itself could be interpreted as an overlapping of granting subsidies to both airlines and shipping companies serving the same pioneer routes. Considering the current situation where not all of the remote islands are covered properly, every amount of the state budget for subsidy must be well allocated.

No doubt the government is obliged to try its best to avoid this overlapping situation from happening considering the limited state budget. Drafting a new minister (of transportation) decree to harmonize these sectors is considered as the most realistic method, since a minister decree within the Indonesian legal system is the ground for implementing law, namely the Indonesian Aviation Law and the Indonesian Maritime Law. The idea to draft a new law, which means a higher level than a minister decree, could be put as an alternative, but would take a longer time due to complicated political negotiations in the Indonesian House.

The conditions above have led to an ineffective implementation of the current government policy to revive both aviation and maritime sectors. Due to the scattered legal framework at the time being, the

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<sup>37</sup>*Ibid.*

<sup>38</sup>The Indonesian Ministry of Transportation, *Pemerintah: Jangan Ganggu Asas Cabotage*, <<http://dephub.go.id/welcome/readPost/pemerintah-jangan-ganggu-asas-cabotage-61451>>, accessed 13 July 2016.

<sup>39</sup>Indonesia, Law No. 1 Year 2009 regarding Aviation, State Gazette No. 1 Year 2008, Additional State Gazette No. 4956.

<sup>40</sup>Indonesia, Law No. 32 Year 2014 regarding Maritime, State Gazette No. 294 Year 2014, Additional State Gazette No. 5603.

government could not maximize the policy benefit for the Indonesian people living in the remote islands. Such a waste of energy and momentum, especially with the government's lack of awareness of this legal issue.

Hopefully the new harmonized legal framework shall lengthen the duration of the grant of subsidy to airline, from one year up to three or five years. This is important for the airline to secure their income and plan their business expansion within pioneer flight segment. The current Indonesian Minister of Transportation is on the same page with this view; where he has delivered his opinion favouring multi years subsidies for airline(s) serving pioneer routes in April 2015.<sup>41</sup> Unfortunately, a year has passed and there is not any indication the plan shall be implemented in the near future.

## **2. Urgency for a Legal Framework Concerning Subsidy for Pioneer Routes: A Strong Stance for Diplomatic Negotiations**

Having the Indonesian Competition Law in force since 2000, the establishment of a legal framework which clearly regulates subsidy for airline and shipping companies is needed and overdue. Its existence shall strengthen the special position of subsidy for pioneer routes within the current competition legal regime, thus excluding them from normal business treatment due its importance in developing the national economy.

Currently the idea of a more integrated competition law among Association of South East Asian Nations (ASEAN) member states has arisen. Within the aviation and maritime context, it is time for the Indonesian government to take the initiative of securing subsidy for pioneer routes as one of the main characteristics of ASEAN. Starting from having special national legislation (*lex specialis*), this initiative must be followed by diplomatic steps at the ASEAN level. An intense effort to convince the other ASEAN member states that flights and ship voyages to remote islands are really important for the Indonesian people must be made, so that granting of subsidies as national policy could not be challenged.<sup>42</sup>

The steps above are really important if an ASEAN competition law is drafted in the future. Failure to present and win the 'battle' on subsidies under PSO to develop the aviation and maritime sectors shall mean a nightmare for the country's dream of becoming a maritime axis in ASEAN and the world. This is a moment to 'preserve' and promote the Indonesian characteristic, which are pioneer flights and voyages.

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<sup>41</sup> The Indonesian Ministry of Transportation, 2015, *Kemenhub Buka 65 Rute Penerbangan Perintis*, < <http://hubud.dephub.go.id/index.php?id/news/detail/2488>>, accessed 14 July 2016.

<sup>42</sup>Ridha Aditya Nugraha, *op.cit.*, p. 93.

### **3. Learning from the European Union**

PSO in the European Union is guaranteed under Treaty on the Functioning of the European Union (TFEU), specifically Regulation (EC) No. 1008/2008<sup>43</sup> in regards to the airline business. Article 107 paragraph (3) TFEU contains a number of exceptions to the prohibition of state aid (also known as “subsidy”). One of the exceptions is to promote economic development of certain areas in the EU, which becomes the legal basis for subsidy to airlines and also other transportation modes. Any grant of subsidies for this reason shall not be considered as an infringement of the existing EU competition legal framework.

The EU Commission together with the Court of Justice of the European Union (CJEU) become the guardians to make sure the implementation of a PSO concept and that the granting of subsidy is on the right path. Numerous case laws and commission decisions, such as the famous Charleroi Case<sup>44</sup> and Commission Decision on PSO to Sardinia Island<sup>45</sup>, have proven the effectiveness of their guardian role.

The application of PSO has served an important role connecting peripheral and remote areas in the EU, where more than 250 PSO routes had been awarded by November 2009.<sup>46</sup> Currently it is France who appears to have been awarded the greatest number of PSO routes, which mainly connect its capital with remoter regions by aircraft.<sup>47</sup> Another example was PSO for flights between Dublin and Donegal (a remote region in Ireland), which was being subsidized around 38% of the cost starting in 2002.<sup>48</sup> These are the examples that subsidy for airlines serving the EU's remote areas is living in harmony with the tight EU competition legal regime.

High speed rail, which represent land transportation, is an interesting issue where its development is considered as a partner of the aviation sector in the EU. According to the current legal framework<sup>49</sup>, there will be no grant of subsidy to an airline which serves remote routes if a high speed train already connects them. Even though there is currently no high speed trains in Indonesia, considering the current railways in Java, this could be the starting point to establish a new legal framework to avoid an overlap between train and aircraft to reach the remote regions of the island.

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<sup>43</sup>European Union, Regulation (EC) No. 1008/2008 of 24 September 2008 on common rules for the operation of air services in the Community, OJ 2008 L 293/3.

<sup>44</sup> Case T-196/04, *Ryanair v Commission* [2008] ECR II-3643.

<sup>45</sup>European Union, Commission Decision 2007/332/EC of 23 April 2007 on public service obligations on certain routes to and from Sardinia under Article 4 of Council Regulation (EEC) No. 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes, OJ 2007 C 1712.

<sup>46</sup> Magnus Schmauch, *op.cit.*, p. 263.

<sup>47</sup>*Ibid.*

<sup>48</sup>*Ibid.*, p. 264.

<sup>49</sup>European Union, Guidelines on State aid to airports and airlines, OJ 2014 C 99/03.

Furthermore, this model could be developed for the air and sea transportation modes where an establishment of a new definition of 'high speed boat' could help to solve the puzzle, especially for the sake of people in the Riau Islands and eastern Indonesia.

No doubt the Indonesian government should learn from the EU comprehensive legal framework which integrate maritime, aviation, and land transportation, to set up an effective regulation system guarding this mission. This step could be considered as the best option and also the most realistic one so far considering the EU success story.

#### **4. Guarding the Outermost Islands from Territorial Dispute**

Scheduled pioneer flights shall play an important role protecting the Indonesian territory, especially preventing the outermost islands being disputed by another country. On paper, a scheduled flight to one island means a recognition towards the Indonesian sovereignty. The presence of airport, or at least airfield, with Indonesian flag could be translated into the Indonesian government's effective control towards the island. In the case of very small islands which are uninhabited or not permanently inhabited like Sipadan and Ligitan Islands, an effective control shall mean something important;<sup>50</sup> namely when territorial dispute occurs before the International Court of Justice (ICJ).

Even though flying the pioneer routes, especially to the outermost islands, are not commercially visible, there is another ground why the pioneer flights must be held. This measure could prevent another Sipadan-Ligitan case from happening. Following to the recent ICJ decision on the Philippines-China dispute on South China Sea, Indonesia must act fast to secure its territory, namely Natuna Islands. Operating pioneer flights from Riau Islands and West Kalimantan to numerous points in Natuna shall become the best measure so far.

At this stage, despite local autonomy is in command, Jakarta should take the initiative pushing those local governments to ensure the pioneer flights are taking place effectively considering the nation sovereignty is at stake. Finally, the (costly) pioneer flights also bring political message to the world: integration of the Indonesian territory is unquestionable.

#### **IV. Concluding Remarks**

The rise of the Indonesian maritime sector is a new chapter in the economic development of remote islands. As an implication, a pro-transportation maritime policy has become the main priority at the moment. However, the government fails to address the other 'life line' of the Indonesian geographic periphery, namely aviation. Considering its importance and

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<sup>50</sup>International Court of Justice, Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia) Judgement of 17 December 2002, p. 684.

capability of connecting remote islands and areas, the aviation sector should be considered as important as the maritime sector. Cooperation between aviation and maritime transportation shall become the ideal situation. A comprehensive legal framework harmonizing these sectors must be enacted.

It must be highlighted that pioneer flight, which is a unique characteristic of Indonesian air transportation, does not bring any or much profit. Translated into commercial terms, flying pioneer route means doing business at a loss. The presence of Article 33 of the Indonesian Constitution, which guarantees the welfare of people in the remote islands, is the answer for this issue. This article becomes the ground for subsidy for airlines, and also shipping companies, serving pioneer routes.

Within the aviation sector, the grant of subsidy is aimed at attracting participations of private-owned airlines, especially after the bankruptcy of Merpati Nusantara. So far, not much have responded; which Susi Air could be considered as the only one. In the last six years, the number of pioneer routes has increased rapidly from 118 to 209 routes (or around 77%).

Potential legal issues are waiting for the Indonesian pioneer flight. From the national level, the absence of an integrated legal framework means scattered policies from the aviation and maritime transportation sector lead to an ineffective result. Overlap between both sectors to serve the same point could be one of the obvious examples. The latter situation should be prevented considering the limited budget, aircraft, and ships that Indonesia has. Furthermore, cabotage is not welcome in Indonesia, thus closing the option to cooperate with foreign airlines or shipping companies to serve some pioneer routes within a certain period.

At the ASEAN level, a dream to have an integrated competition law could become a nightmare for subsidization of airlines and shipping companies serving pioneer routes; more over the country's goal to become a maritime axis. Consequently, diplomatic steps towards the other ASEAN member states to address the importance of pioneer flights in Indonesia must be started immediately.

Ultimately, learning from the EU is considered as the best option. Taking into consideration its successful drafting of legal framework which integrates all transportation modes to reach and develop remote regions, followed by its successful legal enforcement and supervision, leave no doubt that this is the most obvious example to follow. Not to be forgotten, guaranteeing pioneer flights to the Indonesian outermost islands means preventing and guarding the islands from having territorial dispute(s) with the neighbouring countries; or in other words, effectively defending the Indonesian sovereignty.

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