

Challenges of the Business Competition Supervisory Commission Competency in the Implementation of an Exclusive Dealing Agreement

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ABSTRACT

The Business Competition Supervisory Commissions (KPPU) has competencies to mediate and monitor various disputes in the business competition realm in Indonesia as well as to superintend the application of exclusive dealing agreements. Moreover, KPPU is an independent force and has the necessary authority to ensure open-mindedness in business as stipulated in the Prohibition of Monopolistic Practices and Unfair Business Competition Law (Law No 5 Year 1999). It is considered by many that any corporate entity that practices unhealthy competition in economic terms is a cartel, using methods such as exclusive dealing agreements. The application of the exclusive dealing agreements in the drinking water industry are forms of poor competitiveness utilized by businesses to achieve monopoly. This paper aims to examine the law enforcement challenges for business competitions, primarily in Indonesia's bottled water industry; the roles of KPPU in said industry; the provision of the Anti-monopoly laws; and what effect the KPPU had so far in the sector to solve the problems.

Keywords: *Exclusive Dealing Agreement, Monopolistic Practices and Unfair Business Competition, Adjudication at Administrative Court.*

I. INTRODUCTION

In the current era of globalization and rapid economic progress, Indonesia is still unable to provide the need for clean water. Only private companies offer the infrastructure requirements to provide the facility for clean and safe drinking water. Safe drinking water means that you can drink from the tap. Currently, most people in the community go through the troubling process of boiling the water obtained from their own independent underground water pumps. Without regarding the facts on the problem, water utility company PDAM has set the goal to produce and distribute drinking water for the community. They have yet to be able to deliver their promise. Yet, because of the increasing population combined with other external environmental factors, the need for clean and healthy drinking water packed in bottles has turned into a promising business prospect.

The Association of Indonesian Producers of Bottled Drinking Water (Aspadin) data showed that the market for bottled water (excluding refills) grows by 11% per year. In 2013, the market was estimated to have reached 15 billion liters. The data shows that the bottled water market does not only have lucrative prospects but also the high dependence on bottled water products.

The competition in the bottled water industry is relatively healthy as there are more than 700 manufacturers with various brands competing for the market, which is still very broad with a high level of competition but relatively low business barriers. The number of bottled drinking water (BDW) companies has formed a perfectly competitive market. A competitive market as defined by Karen (2013) "there are many buyers and sellers of the same goods or services ... and no one's practices have a noticeable effect on prices". [1] The large number of sellers naturally creates a lot of competition, be it fair-mindedness or unfair business competition. One or several companies that have a monopoly over a product can certainly determine the price of a product at will because the market mechanism is no longer working. Moreover, BDW is a primary product, meaning that it is certain they will reap maximum profits.

Anti-competitive behaviour must be prohibited because unfair trade practices have been proven to cause harm to the people.[2] In connection with the prohibition of illicit trading practices, Posner mentions that there are three political reasons why monopolistic practices are undesirable. First, that monopolies transfer wealth from consumers to shareholders of monopolistic companies,

namely a distribution of wealth that takes place from the poor to the rich.[3]

Law No 5 Year 1999 define “agreement” as not only those in written form but also as an act that eliminates competition, restricts production restrictions, and increases prices.

Based on its research and examination, KPPU has alleged *PT Tirta Investama* and *PT Balina Agung Perkasa* of violating Law No 5 Year 1999 or so called the business competition law. The case began with reports from retail and retail traders to the KPPU office in September 2016. The traders admitted that *PT Tirta Investama* had prevented them from selling the 'Le Minerale' product produced by *PT Tirta Fresindo Jaya*. One of the clauses in the retail agreement states that if a trader sells *Le Minerale* products, their status will be lowered from Star Outlet (SO) to Wholesaler (retail). *PT Tirta Fresindo Jaya* responded with an open *subpoena* against *PT Tirta Investama* in the newspaper. The Business Competition Authority then responded to this *subpoena*.

PT. Tirta Investama produces BDW with the trademark *Aqua*. The *Aqua* brand uses advertising publications in all media for its advertisements, ranging from television, radio, newspaper to magazines with its blue *Aqua* logo and slogan. They find out about their target market by evaluating and comparing the identified groups (focus group). They then select one or several of them as candidates with the greatest potential. Marketing techniques are then designed in such a way that gives the best results in sales, besides creating maximum value for the consumer.

However, in this case, *Aqua* was found to have taken an action to affect business competition, which violates applicable laws and regulations. These actions can be proven by KPPU's success in collecting evidence of violations committed by the *Aqua* producer, which was suspected of conducting exclusive dealing by controlling the market. In fact, investors found evidence of an email between *PT Tirta Investama* and *PT Balina Agung Jaya* titled "Star Outlet (SO) Degradation to Wholesaler". The move seems to be an attempt to hinder other business players in the BDW business, causing distributors and agents to get a price 3 percent higher than the initial price.

Law No 5 Year 1999 itself aims to correct various actions of economic actors who dominate the market. A highly dominating entity often abuses its power for personal interest to benefit business players. Essentially, the principle of economic actors is profit-oriented that aims to seek as much profit as possible.[4]

1.1. Related Work

Law No 5 Year 1999 serves as a regulator for future competitive misconduct between businesses and their

industries. Furthermore, the increasing market concentration is usually caused by business competitions. In this case, we can see that the closed agreement (exclusive dealing) is a form of unfair business competition. The obstacles caused by vertical business competitions among the industry also cannot be broken in order to prevent monopolization. An agreement between the manufacturer (producer) and distributor(retailers) clearly mentioned that the distributors are only permitted and forced to sell certain brands with certain types of goods. This paper then further examines how the business competition law is being enforced in the bottled water sector as a case study along with the role of KPPU as an independent institution.

1.2. Our Contribution

In this journal, the authors provide a detailed understanding for the reader with hopes that in the co-development of science in the field of law, the journal would open doors for future research about similar circumstances. In addition, for the journal to function in the field of law, we hope that the readers can simply learn from the existing situation, both for those in the legal and non - legal sectors.

2. BACKGROUND

2.1. Probabilistic Automata

Using the background as starting point, the author identifies various discussion points and problems, including:

1. To what extent is the authority of the business competition supervisory commission in terms of the authority to examine, adjudicate, and decide on violations of business competition and monopoly?
2. To what extent is KPPU's authority in identifying evidence, and in this case, does the verdict match the phrase *pro justitia*?

2.2. Purpose and Use

2.2.1. Research Objectives

To find out more about the aforementioned case, specifically on the KPPU's authority in examining the case in terms of its form of violations, backed with a theoretical approach related to the Case Number: 806 K/Pdt.Sus-KPPU/2019.

2.2.2. Research Uses

- a. To examine the decision, starting from the violations to the theoretical approach related to case Number: 806 K/Pdt.Sus-KPPU/2019.
- b. To develop the understanding of the business competition law, especially on closed agreements (exclusive dealing).

3. METHOD

Normative legal research method is scientific research that is based on methods, systems, and the author's contemplation in order to study an existing or an ongoing legal issue or phenomenon.[5] This is done by analysing, discussing, and then linking it with the basics, including the law that regulates it alongside its legal principles. The next step is a further examination of relevant legal facts to form a solution for the problem at hand.

4. ANALYSIS OF ISSUES

The author analyses. Article 35 and Article 36 of Law No 5 Year 1999, which states that the KPPU's duty, among others, is to assess agreements that may result in monopolistic practices and unfair business competition as regulated in Articles 4 to 16 in Law No 5 Year 1999.[6] Its duties also include assessing business activities and/or actions of business players that may result in monopolistic practices and unfair business competition as stipulated in Article 17 to Article 24 in the law.

Meanwhile, the Presidential Decree No. 75/1999 on the KPPU classifies the commission's duties and authorities that conduct an assessment of the agreement, business activities, the presence or absence of abuse dominant position that may result in the practice monopoly and/or inequitable business competition. [7] To support these tasks, KPPU has the authority to enforce Law No 5 Year 1999 by adjudicating against violations of the law. The main Role of KPPU is an administrative court.

Montesquieu separates the three existing branches of power to avoid arbitrariness despite many assumptions that the theory has never been fully implemented and is no longer relevant. The reality is that there must be some recognized institutions in every nation. [8] Montesquieu's theory is still relevant as a reference in the discussion, considering the KPPU's wide array of authorities. From his statements, it is clear that he wants a clear and firm separation between the judiciary and the executive as well as between the judiciary and the legislature. According to Mangunsong (2007), "court" only refers to criminal and civil courts. It is clear that the judicial power referred to by Montesquieu is the power that has the authority to punish

criminals and decide disputes that arise between individuals. Montesquieu did not include administrative courts, such as the KPPU, in the branch of judicial power.

The authority to decide competition cases and impose administrative sanctions cannot be classified as exercising judicial authority. As a regulator, the KPPU's task is making interpretations of Law No 5 Year 1999 and creating the guidelines. However, the initiatives made by KPPU must not deviate from the Law or Presidential Regulation that governs it. Therefore, the guidelines created by the KPPU to interpret Law No 5 Year 1999 are carried out under the court's supervision. However, there is a problem: are the guidelines made by KPPU in its Commission Regulations a statutory regulation?

Law No. 12/2011 on the Establishment of Legislations has regulated the hierarchy of laws and regulations, which included commission regulations as "other laws and regulations". Article 8 paragraph (2) of Law No.12/2021 explains that laws and regulations such as Commission Regulations are recognized for their existence and have binding legal force as long as they are ordered by higher laws and regulations in the hierarchy or are formed based on an authority. [9]

KPPU seems to have the regulatory authority. This is based on the provisions of Article 35 letter F of the Law No 5 Year 1999. The existing guidelines regulated in the commission's regulations are used as a reference to enforce competition law should there be a disagreement on whether or not an action violates the Articles in Law No 5 Year 1999. Depending on the evaluation, then the decisions would refer to the KPPU's guidelines. In some of its decisions, the KPPU includes what is stipulated in the guidelines for assessing whether or not an action made by a business player violates Law No 5 Year 1999.

KPPU's Examination of business competition cases recognize two types of evidence, namely direct evidence and indirect evidence. [10] These classifications are due to the difficulty of obtaining direct evidence such as witness statements, statements of business players, and letters or documents that prove business competition violations, especially cartels. KPPU's examiners or investigators can use indirect evidence such as communication evidence and economic evidence to indicate that business competition violation has occurred.

Furthermore, the provisions in Article 15 of Law No 5 Year 1999 regulates the exclusive dealing agreement. Civil laws generally regulate agreements as outlined in Article 1313 of the Civil Code, which states that an agreement is an act whereby one or more people bind themselves to one or more people.

Agreements are also regulated in Article 1 Paragraph 7 of Law No. 5 Year 1999. The law defines an agreement as an act of one or more business players to bind themselves to

one or more other business players under any name, either written or in a non-written form. The law also regulates prohibited agreements. The decision of Case No. 22/KPPU-I/2016,[11] which has been confirmed through [12] the decision of the Supreme Court No. 806 K/Pdt.Sus-KPPU/2019, stated that exclusive dealing is prohibited as regulated in Article 15 paragraph (3) of Law No. 5 Year 1999. [12] The article stipulates that business players are prohibited from making agreements on certain prices or discounts on goods and/or services, in which the agreement requires business players to buy other goods and or services from suppliers or prevent them from purchasing the same or similar goods and or services from competitors.

Specifically, Article 15 of Law No. 5/1999, regulates this kind of vertical barrier strategy, specifically for closed agreements. Article 15 paragraph 1 states that: "Business players are prohibited from entering into agreements with other business players that contain requirements that the party receiving goods and/or will only supply or not resupply the said goods and/or services to certain parties and/or at certain places".

5. CONCLUSION

Based on Law No 5 Year 1999, the author draws several conclusions regarding the KPPU's authority to examine, hold trials, and decide on violations of business competition and monopoly:

- a. Receive reports from the public and/or from business players regarding the alleged occurrence of monopolistic practices and/or unfair business competition;
- b. Research allegations of business activities and/or actions of business players that may result in monopolistic practices and/or unfair business competition;
- c. Conduct investigations and or examinations of alleged monopolistic practices and/or unfair business competition reported by the public and business players or found by the Commission as a result of its research.

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