



## Challenges of implementing anti-monopoly and unfair competition law in creating market efficiency in Indonesia

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### Abstract

This paper is written to determine the effect of fair business competition policy on the Indonesian national economy. The approach method used in this research is the sociolegal approach. This method is a normative juridical study with the primary material used is the Law of the Republic of Indonesia Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition. The findings show that the Business Competition Supervisory Commission in enforcing anti-monopoly law and unfair business competition has not fully independence or independence due to inhibiting factors, especially those of an institutional nature arising from the provisions of laws and regulations.

**Keywords:** anti-monopoly, unfair business competition, Indonesia competition commission (ICC), Indonesia

### Introduction

Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition (Anti-Monopoly Law) is the basis of business competition policy in Indonesia. The Anti-Monopoly Law has a unique regulatory system in addressing business competition and small business relations. Competition policies and laws in Indonesia favor MSMEs. All actions of MSME actors are exempted by Article 50 letter h of Law Number 5 Year 1999. This Law also prohibits large business actors from using their market power to discourage other business actors (including MSMEs) or from engaging in other harmful practices. One of the objectives of this Law is to guarantee equal business opportunities for every business actor. The problems in this study are what are the implications of these exceptions for small business actors, potential violations committed by MSME actors in terms of business competition, and how to supervise MSME players in other countries. Ningsih (2019) [8] shows that exceptions to small business actors must not be absolute or absolute, it must still be supervised by related institutions. Exceptions do not guarantee that small business actors do not cheat or misbehave in competing. This exception has positive implications, namely an increase in the number of MSME players and a negative implication, namely that MSMEs do not want to become big business actors. UMKM players have the potential to commit violations in terms of business competition such as price fixing, boycotts, zoning, agreements with foreign parties, and closed agreements. Thailand is a country that can be used as an example in the development and supervision of MSMEs. Thailand has an MSME development system, namely one *tamboon* one product. Thailand has several institutions for MSMEs such as the Office of Small and Medium Enterprises Promotion (OSMEP), Institute for Small and Medium Enterprises Development (ISMED), Competition Commission, and special banks for MSMEs, as well as central and local governments (Ningsih, 2019) [8].

According to Widjaja & Gunadi (2021) [17], there are two benefits of business competition in order to be healthy (fair

competition). First from a legal standpoint, namely by running a proper business and not violating regulations. Second, from an economic point of view, there is equal distribution of income and a good business climate is created (Darmayoni & Yusa, 2018) [1]. In fact, competition is not always carried out positively, it is not uncommon for business actors to carry out unhealthy economic practices. So that a regulation is needed to regulate the prohibition of monopoly and unfair business competition so that freedom of competition in the economy can be guaranteed without hindrance. Based on this background, the formulation of the problem in this study is about the application of economic efficiency and justice in connection with the implementation of the prohibition on vertical integration in Indonesia as stipulated in the Monopoly and Unfair Business Competition Law. The next discussion is regarding the role of the Competition Supervisory Commission in preventing monopoly and unfair business competition. This study uses a normative juridical approach. The primary material used is the Law of the Republic of Indonesia Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition.

### Economic Efficiency and Justice

Wahjono & Marina (2009) [16] stated that people's welfare can only be obtained through the freedom of society in choosing products produced by the cheapest producers with the best quality with the best customer service and perfect delivery. Thus, producers are required to improve themselves to be efficient and for that it is not easy. Some producers choose to look for shortcuts to achieve economic principles, namely achieving maximum profits with ease. One of those conveniences is monopoly. In a free economy monopoly is one of the causes of market failure, therefore it is absolutely necessary to prevent it. In Indonesia, the anti-monopoly policy has been promulgated in Law no. 5 of 1999. This law has the same breath as the Amendment to the 1945 Constitution Article 33 paragraph 4 that the national economy is organized based on economic democracy with the principle of togetherness, which is

based on justice and efficiency. In this law, the Indonesia Competition Commission (ICC/*Komisi Pengawas Persaingan Usaha/KPPU*) is mandated to oversee and implement the policy. For comparison, fair business competition policies in several countries will also be reviewed. There have been many attempts by the KPPU, but what is more important is how to educate the public to be literate and sensitive to the problems of fair business competition and to prevent monopolistic practices in Indonesian soil so that sustainable prosperity can be created. Winrekso (2017) <sup>[18]</sup> states that with strong economic laws, unfair competition and monopolistic practices can be eliminated. The global challenge of law number 5 of 1999 concerning the prohibition of monopolistic practices and unfair competition in the free market is very important as legal protection for domestic products and industry and provides legal certainty as well as products from abroad. Domestic products and industries will receive legal certainty in terms of both unfair competition and anticipation of monopoly practices. In the context of economic efficiency and its regulation by policy, Permadi & Sukranatha (2015) <sup>[12]</sup> state that all calculations, judgments and decisions about the implications of competition due to behavior or depending on the size (share) of the market and the form of the relevant market. The application of the rule of reason is the right choice in carrying out an act of investigation. Analysis is needed to determine certain practices that inhibit or encourage competition or if there is a tendency for both, then the court will take the steps with the most beneficial (efficient) effect for the wider community.

In the context of vertical integration as one of the main sources of market control, in particular, vertical integration is stated in Article 14 of Law no. 5 of 1999, which states that business actors are prohibited from entering into agreements with other business actors with the aim of controlling the production of a number of products included in the production series of certain goods and or services, where each series of production is the result of processing or further processing, either in one direct series or indirectly, which may result in unfair business competition and or harm to society.

In their paper, Yokawa, & Kawashima (2009) <sup>[19]</sup> show a relationship between monopolistic practices and market efficiency. Vertical integration by monopolies has become a serious problem under antitrust law. By theoretically analyzing competition policy from an economic perspective, shows the impact of integration on the market and seeks to provide the conditions for determining whether integration will lead to an increase in consumer surplus. In addition, it is shown that monopoly selling will eliminate competitors and increase consumer surplus. In addition, even if monopoly integration does not eliminate efficient competitors, if there are large differences in productivity between firms, market prices will fall and consumer surplus will decrease, and production vice versa (Yokawa, & Yasuo Kawashima, 2009) <sup>[19]</sup>. In this case, Prastowo (2017) <sup>[14]</sup>. states that Business Competition Law is a field of law whose purpose is not limited to protecting the interests of business actors, but also aims to protect the public interest, namely the community. Thus, Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition as the main instrument of Competition Law in Indonesia has a big role which needs to be accompanied by effective and efficient law enforcement

efforts.

### Monopoly and Unfair Competition Practices

Monopolistic practices and unfair business competition can cause disruption to the functioning of the market mechanism properly, thus hindering economic and trade development (Nugroho, 2014) <sup>[9]</sup>. Business Competition Supervisor (KPPU). This is a manifestation of the mandate of Law no. 05/1999 in preventing distortion and unfair business competition in the market, at the initiative of the Indonesian House of Representatives (DPR RI). So the government issued Law No. 05 of 1999 concerning the prohibition of monopolistic practices and unfair business competition (hereinafter referred to as Law No. 05/1999), which is consistent and consequent is expected to lead to a culture of healthy and honest competition so as to encourage increased competitiveness among business actors, the objective of regulating business competition according to Law Number 5 of 1999 is to optimize the creation of fair and fair business competition in a particular market, which encourages the creation of economic democracy which provides equal opportunities for all business actors to participate in the process of producing goods and services to promote a fair market economic growth. In one study, Hamada (2000) <sup>[4]</sup> conducted a surplus analysis using a partial equilibrium analysis on the relationship between the determination of the monopolist's production volume and the divergence of private and social marginal costs (Herianto *et al.*, 2017) <sup>[6]</sup>. In contrast to a fully competitive market, shortages of supply and high prices are practiced in monopoly market. On the other hand, when the firm's private marginal cost deviates from its social marginal cost given the external uneconomic situation, an excess supply occurs.

Article 1 of Law no. 5 of 1999 states that it defines monopoly as the control over the production and or marketing of goods and/or the use of certain services by one business actor or a group of business actors. Monopolistic practice is defined as the concentration of economic power by one or more business actors which results in the control of the production and or marketing of certain goods and or services so as to create unfair business competition and may be detrimental to the public interest. Concentration of economic power is defined as real control over a relevant market by one or more business actors so as to determine the price of goods and or services. Furthermore, dominant position refers to a situation in which the business actor has no significant competitors in the relevant market in relation to the controlled market share, or the business actor has the highest position among its competitors in the relevant market in terms of financial capacity, ability to access supplies or sales, as well as the ability to adjust the supply or demand for certain goods or services. Finally, unfair business competition is competition between business actors in carrying out activities for the production and or marketing of goods and or services carried out in a dishonest manner or against the law or hindering business competition.

The objectives of the formation of this law are to: a). safeguard the public interest and increasing the efficiency of the national economy as an effort to improve people's welfare; b). create a conducive business climate by regulating healthy business competition so as to ensure certainty of equal business opportunities for large business actors, medium business actors and small business actors; c). prevent monopolistic practices and or unfair business

competition caused by business actors; and d). create effectiveness and efficiency in business activities. Paendong (2017) <sup>[11]</sup> argues that legal protection for business actors in business competition in Indonesia is a form of the implementation of economic democracy which contains the principles of justice, togetherness and justice to encourage the creation of business opportunities for every citizen in an atmosphere of healthy and fair competition so as not to only creates a concentration of economic power in certain business actors, but provides opportunities for business actors equally to be able to advance and develop their business activities.

### **KPPU's Role and Challenges of Anti-Trust Law Implementation**

As an implementation of Law No. 05 of 1999, regarding the prohibition of monopoly and unhealthy business practices, and is part of Law No. 5 of 1999, an institution called KPPU was formed which is independent from the influence and power of the government and other parties and is directly responsible to the President. Based on this explanation, it can be seen that in Islamic economics as an effort to combat and eliminate economic deviant behavior activities, the government intervenes (Herianto *et al.*, 2017) <sup>[6]</sup>.

Article 35 of the Law. No. 5 of 1999 outlines the Commission's duties to include:

- a. Conduct an assessment of agreements that may result in monopolistic practices and or unfair business competition
- b. Conduct an assessment of business activities and or actions of business actors which may result in monopolistic practices and or unfair business competition.
- c. Conduct an assessment of whether or not there is an abuse of a dominant position that may result in monopolistic practices and or unfair business competition.
- d. Take action in accordance with the Commission's authority as stipulated in Article 36;
- e. Provide advice and considerations on Government policies related to monopolistic practices and or unfair business competition;
- f. Prepare guidelines and or publications related to this Law;
- g. Provide regular reports on the work of the Commission to the President and the House of Representatives.

Furthermore, Law Number 5 Year 1999 is to take action in accordance with the authority of the commission as stipulated in Article 36 in particular to take the following actions: a. conduct investigations or examinations of cases of suspected monopolistic practice and or unfair business competition reported by the public or by business actors or found by the commission as a result of its research; b. decide and determine whether or not there is a loss on the part of other business actors or the community; c. Imposing sanctions in the form of administrative actions against business actors who violate the provisions of this law but do not result in execution, considering that KPPU is not a judicial institution.

According to Nurjaya (2009) <sup>[10]</sup>, enforcement of business competition law can be carried out by the police, prosecutors and courts. However, according to Fadhilah (2019) <sup>[2]</sup>, in principle, KPPU is actually a supervisory

agency for the implementation of laws and KPPU is not a law enforcer in the criminal field such as police, prosecutors and judges who have forced attempts to bring suspects to trial. However, the understanding of the formulation of Article 36 of Law Number 5 of 1999 concerning the authority as investigators and investigators exercised by KPPU is a criminal law area, so that it is often used as an excuse that can be the basis for KPPU in seeking and finding material truth, namely whether business actors commit violation of Law Number 5 Year 1999 or not (Mantili *et al.*, 2016) <sup>[7]</sup>.

In this case, the court is a place for settlement of cases officially established by the state, but for business competition law, dispute resolution at the first level is not resolved by the court. The reason that can be put forward is because business competition law requires specialist people who have a background and/or understand the ins and outs of business in order to maintain market mechanisms. Institutions that enforce business competition law must consist of people who are not only with legal backgrounds, but also economics and business. This is very necessary considering that business competition is closely related to economy and business (Prayoga, 2000) <sup>[15]</sup>. In the context of vertical integration, specifically in Indonesia, Law No. 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition regulates agreements vertical integration which may result in unfair business competition. Prasetyowati *et al.*, (2017) <sup>[13]</sup> show that there are factors that encourage business actors to carry out vertical integration, and the effect of vertical integration in directing business actors to have a dominant position in the market. Vertical integration can be further categorized as one of the business strategies, this strategy is carried out where business actors run several businesses in the same direction as their supply chain. In more detail, Widjaja & Gunadi (2021) <sup>[17]</sup> explained that there are many backgrounds and business considerations why business actors carry out vertical integration activities. One of the triggers that makes this is done by many business actors is because there are many advantages or benefits that can be obtained by business actors by carrying out vertical integration such as efficiency achieved by reducing transportation costs and shortening the time for completion of a product so that the costs incurred by business actors automatic can be pressed.

In this context, efforts to prevent vertical integration for the purpose of controlling the market are carried out by KPPU. Here, business competition is unfair with the aim of controlling market share by means of fraud which can harm many people, due to business mergers and can be canceled by law because it contradicts the elements of the agreement in article 1320 and article 1338 of the civil law code (Darmayoni & Yusa, 2018) <sup>[1]</sup>. However, the findings of Hayati (2004) <sup>[5]</sup> show that the Business Competition Supervisory Commission in enforcing anti-monopoly law and unfair business competition has not fully had the independence or independence as referred to in article 30 paragraph (2) of Law Number 5 Year 1999 due to the existence of inhibiting factors, especially those of an institutional nature arising from the provisions of laws and regulations. Furthermore, Farela (2007) <sup>[3]</sup> stated that there are several obstacles in implementing legal protection for suppliers. First, the KPPU's decision has no executorial seizure capacity. This is because the enforcement of

business competition law is under the authority of KPPU. However, this does not mean that there are no other institutions that have the authority to handle monopoly and business competition cases. The District Court (PN) and the Supreme Court (MA) are also empowered to settle the case. Second, many KPPU's decisions are in the form of lack of enforcement power, thirdly, there is no comprehensive regulation on marketing. Furthermore, the obstacle is the lack of cohesiveness of suppliers so that retail companies still have more bargaining power compared to suppliers in conducting their business. In general, the Commission's limitation is limited in that KPPU basically does not have extraterritorial authority in enforcing business competition law and is not clearly regulated in Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition. The extraterritorial principle is the principle whereby a state has the authority to apply the laws of a State in a territory that is not the territory of the state. The authority to enforce business competition law that occurs outside the jurisdiction of Indonesia (in an extraterritorial framework) is not the KPPU's concern as long as it does not affect the conditions of business competition in Indonesia (Fadhilah, 2019) [2].

### Conclusion

With strong economic laws, unfair competition and monopolistic practices can be eliminated. The global challenge of law number 5 of 1999 concerning the prohibition of monopolistic practices and unfair competition in the free market is very important as legal protection for domestic products and industries and provides legal certainty as well as products from abroad. Domestic products and industries will receive legal certainty in terms of both unfair competition and anticipation of monopolistic practices.

However, the Business Competition Supervisory Commission in enforcing anti-monopoly law and unfair business competition has not yet fully had independence or independence. Article 30 paragraph (2) of Law Number 5 Year 1999 states that a commission is an independent institution that is independent from the influence and power of the Government and other parties as referred to in Article 30 paragraph (2) due to inhibiting factors, especially factors that are institutional arising from the provisions of the statutory regulations. As an implication, it is necessary to improve the Law on Anti-Monopolistic Practices because there are many problems that arise in practice, including the definition of business actors, notification of mergers, and overlapping sanctions. Other issues are regarding the unclear procedural law regarding the filing of objections and appeals to the authority of the institution in carrying out the functions of investigation, prosecution, and at the same time as a court in one place.

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