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The Principle of Fair Business Competition in SOE Monopoly

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Abstract

This research was conducted based on the monopoly regulation and/or the activity center by SOE (State-Owned Enterprises) which is regulated in Article 51 of Law Number 5 of 1999 about Prohibition of Monopolistic Practices and Unfair Business Competition. According to the BCSC (Business Competition Supervisory Commission) regulation Number 3 of 2010, the implementation of SOE monopoly must be done by regarding the principles of fair business competition. Meanwhile, monopoly and principles of fair business competition have an opposite concept so in its implementation gives rise to different interpretations among business actors. This research used statutory approach, conceptual approach, and comparative approach. The purpose of this research is to find the principles that must be implemented in SOE monopoly so it can find the suitability between SOE monopoly arrangement in Article 51 of Law Number 5 of 1999 and the principles of fair business competition.

Keywords: The Principle of Legal Certainty, Monopoly, SOE (State-Owned Enterprises), Principles of Fair Business Competition.

Background

Economic activity is an activity that consists of process of producing to the process of distributing goods and or services from producers, intermediaries to consumers. The process of production to distribution also involves business competition between business actors. Basically, competition in the business world is an absolute requirement (*condition sine qua non*) for the implementation of a market economy.¹ According to economics, the most ideal market that can increase a country's economic growth is a competitive market.² Business competition is one thing that is unavoidable in the economic world. Business competition is a process in which business actors are forced to become efficient companies by providing a choice of products and services at lower prices.³

¹ Johnny Ibrahim. *Hukum Persaingan Usaha, Filosofi, Teori, dan Implikasi Penerapannya di Indonesia*. (Jakarta: Bayumedia, 2007), p. 40.

² *Ibid.*

³ Andi Fahmi Lubis. *Hukum Persaingan Usaha antara Teks dan Konteks*. (Surabaya: Universitas Airlangga, 2009), p. 2

Healthy competition is believed to be the best way to utilize existing resources optimally to meet the needs of the community.⁴ Competition can play a role in promoting fairness because fair price competition increases choice for both buyers and sellers.⁵ In addition, competition allows market forces to spread, thereby expanding business opportunities and providing opportunities for the development and improvement of entrepreneurship which will become the main capital for the country's economic development.⁶ However, business actors sometimes carry out their business activities by carrying out unfair business competition, one of which is monopoly.

Law Number 5 of 1999 provides the understanding that monopoly is the control of a business actor or group of business actors over the production and/or sale of goods and/or the use of certain services.⁷ Whereas monopoly practice is the concentration of economic power by one or more business actors which leads to control of production and or marketing of certain goods and or services so as to create unfair business competition and may harm the public interest.⁸ Article 17 further regulates monopoly. The article explains that business actors are prohibited from exercising control over the production and/or sale of goods and/or services that may give rise to monopolistic practices and/or unfair business competition and business actors should be suspected of or deemed to have exercised control over the production and/or sale of goods and/or services. or services in the following circumstances: there are no substitutes for the relevant goods or services; or cause other business actors to be unable to compete commercially for the same goods and/or services; or a business actor or a group of business actors controls more than 50% (fifty percent) of the market share of a particular good or service.⁹

However, Article 51 of Law Number 5 of 1999 regulates that monopoly and/or concentration of activities related to the production and or marketing of goods and or services that affect the livelihood of many people as well as production branches that are important for the state are regulated by law and organized by State-Owned Enterprises.¹⁰ This article is an exception from Law Number 5 of 1999 as a form of implementation of Article 33 of the 1945 Constitution of the Republic of Indonesia. Even though SOEs have been granted exceptions to carry out monopoly and or concentration of activities on production branches that concern the livelihood of the people, it will however, its implementation must still observe the principle of fair business competition as regulated in BCSC's Regulation Number 3 of 2010 concerning Guidelines for Implementing the Provisions of Article 51 of Law Number 5 of 1999.

The concept of monopoly itself comes from the Greek, namely "*monos*", which means one or alone, and "*polein*" which means to sell or seller. Etymologically monopoly can be interpreted that monopoly is a condition that only one seller provides certain goods and services. When only one commercial participant has sole control over the supply of goods and services in the market, and thus has exclusive control over pricing, a monopoly is formed.¹¹ In addition, an industry has a monopoly structure if there is only one producer or seller without direct or indirect competitors, both real and potential. The resulting product has no close substitute. In

⁴ Johnny Ibrahim. 2007. *Op. Cit.*, p. 102.

⁵ Philip Areeda. *Hukum Antitrust Amerika dalam: Ceramah-ceramah tentang Hukum Amerika Serikat (Talks on American Law)*, oleh Harold J.Nreman (editor), terjemahan Gregory Churchill. (Jakarta: Tatanusa, 1996), p. 166.

⁶ Normin S. Pakpahan. *Pokok-pokok Pikiran tentang Hukum Persaingan Usaha*. (Jakarta: Kantor Menko Ekuwasbang, 1994), p. 2.

⁷ See Article 1 point 1 of Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition.

⁸ See Article 1 point 2 of Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition.

⁹ See Article 17 paragraphs (1) and (2) of Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition.

¹⁰ See Article 51 of Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition.

¹¹ Suyud Margono. *Hukum Anti Monopoli*. (Jakarta:Sinar Grafika, 2009), p. 6.

addition, in industries with monopoly structures there are barriers to entry for other producers to enter the industry.¹²

Meanwhile, the principle of fair business competition itself is not clearly regulated in Law Number 5 of 1999. Law Number 5 of 1999 provides the understanding that unfair business competition is competition between business actors in carrying out production and or marketing activities of goods and services or services performed in a dishonest or unlawful manner or hinder business competition.¹³ When this definition is interpreted *a contrario*, fair business competition is competition between business actors in carrying out production and/or marketing activities of goods and/or services that are carried out honestly or in accordance with the law, or competition that does not hinder business competition.

Based on the description above, there is a discrepancy between Article 51 of Law Number 5 of 1999 and BCSC's Regulation Number 3 of 2010. When a business sector has been monopolized by one business actor, the business field has an obstacle for other business actors to enter into the same business competition. This will lead to unfair business competition. Although SOEs are granted an exception to monopolize based on the principle of fair business competition, the concept of monopoly is not in line with the principle of fair business competition. Further regulation on the implementation of Article 51 of Law Number 5 of 1999 is very necessary and the principles that must be implemented by SOE in monopoly also need to be determined with certainty so that the implementation of a SOE monopoly can provide legal certainty for business actors. This is because SOEs can still be reported as violating Article 17 of Law Number 5 of 1999.

An example of its case was in The State Gas Company (SGC) in North Sumatra which was reported to the Business Competition Supervisory Commission (BCSC) for violating Article 17 while SGC's status at that time was a SOE that had the authority to monopolize gas in the area. The case was later decided by BCSC in BCSC's Decision Number 09/KPPU-L/2016 and SGC was declared to have violated Article 17 of Law Number 5 of 1999.¹⁴ However, at the level of appeal and cassation, the Panel of Judges decided in Decision Number 02/Pdt.Sus. KPPU/2017/PN.Jkt.Brt and Decision Number 511 K/Pdt.Sus-KPPU/2018 that PGN does not violate Article 17 of Law Number 5 of 1999¹⁵ but carries out statutory orders and is included in the exception to Article 50 letter a of the Law -Law Number 5 of 1999.¹⁶

So there are legal issues that can be discussed in this study, namely: is the monopoly of SOE as regulated in Article 51 of Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition does not conflict with the principles of fair business competition?

Research Method

This research used doctrinal law research. Doctrinal legal research (doctrinal research) aims to provide a detailed explanation that systematically explains the legal rules that govern certain legal fields, analyzes the relationship between one legal rule and another, and explains parts that are difficult to understand, and also include predictions about the future development of a particular rule of law.¹⁷ This method was used to analyze and study the rules, norms, or laws and regulations related to monopoly and fair business competition. There are 3 (three) approaches used, namely: First, the statutory approach is carried out by examining all laws and regulations related to the legal issues raised,¹⁸ especially positive law in Indonesia which regulates

¹² Andi Fahmi Lubis et.al. 2009, *Op. Cit*, p. 47-48.

¹³ See Article 1 point 6 of Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition

¹⁴ <https://nasional.kontan.co.id/news/terbukti-monopoli-di-medan-pgn-didenda-rp-992-m>, accessed on June 14, 2021

¹⁵ <https://www.cnbcindonesia.com/news/20180202203513-4-3418/menang-banding-pgn-bebas-tuduhan-monopoli-gas-di-medan>, accessed on June 14, 2021

¹⁶ See Article 50 letter a of Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition.

¹⁷ Dyah Ochtorina Susanti dan A'an Efendi. *Penelitian Hukum (Legal Research)*. (Jakarta: Sinar Grafika, 2014), p. 11.

¹⁸ *Ibid.*, p. 136.

monopolies and fair business competition. Second, a conceptual approach that needs to refer to the legal principles found in the views of legal scholars or legal doctrines,¹⁹ such as using journals or books that discuss the principles of fair business competition. Third, the comparative approach is carried out by comparing the laws of a country with the laws of one or more other countries on the same matter,²⁰ so that the state of Germany was used in this study to compare the regulation of monopoly and business competition in Indonesia with the regulation in Germany.

Discussion

Competition in business is seen as a continuous process of competition between sellers for potential customers by emphasizing strategies that involve pricing, product differentiation, advertising, services, research and development, technological change, and all activities designed to secure sales and ultimately profits for the business organization.²¹ Competition consists of elements including, several business actors; in the same or similar line of business, jointly running the company; within the same area; each trying to outdo the other; and to maximize profits.²²

In a market structure, it is known that there is a perfect competition and an imperfect competition. Perfect competition is based on several assumptions, namely that all producers offer the same product. There are a large number of companies that supply the product and these companies have no influence on market prices, and there are no barriers to entry and exit for companies and perfect information for firms and buyers in the market.²³ While imperfect competition is a condition when economic resources are allocated incorrectly and some waste and inefficiency occurs. Big companies, location advantages, price discrimination, product differentiation, binding sales, promotional advertising, collusion, and competition that depend on the market are not perfectly competitive markets. Such companies are said to have monopoly power. Such markets may require government antitrust regulations to make them more competitive and more socially efficient.²⁴

The principles of fair business competition must be based on non-discriminatory, comprehensive, transparent, and accountable values as discussed according to PECC (The Pacific Economic Cooperation Council).²⁵ The implementation of business activities as a form of economic implementation in Indonesia cannot be separated from the principle of fair business competition. This is a manifestation of the implementation of democracy in Indonesia. There are elements that must be applied, one of which is the principle of fair business competition. Thus, the principle of fair business competition is an absolute thing to be applied in business activities.²⁶ However, the regulation of the principle of fair business competition in Indonesia is still unclear because Law Number 5 of 1999 only provides the definition of unfair business competition in Article 1 point 6. So that the principle of fair business competition can only be interpreted as competition between business actors carried out by in an honest manner, not against the law and not hindering competition in carrying out production and or marketing activities of goods and or services.

The implementation of the principle of fair business competition is also applied to the exception of the monopoly that is carried out by SOEs on production branches that concern the livelihood of the people and are important for the state. The application of this principle is a provision of BCSC's Regulation No. 3 of 2010

¹⁹ *Ibid.*, p. 115.

²⁰ Peter Mahmud Marzuki. *Edisi Revisi Penelitian Hukum*. (Jakarta: Prenadamedia Group, 2005), p. 135.

²¹ Dominick T. Armento. *Antitrust and Monopoly (Anatomy of a Policy Failure)*. (Canada: John Wiley & Sons, 1982), p.14

²² Cita Yustisia Serfiyani. *Tesis: Analisis Persaingan Usaha di Bidang Importasi dan Distribusi Film dalam Menumbuhkembangkan Perfilman Nasional*. (Jember: Program Studi Magister Ilmu Hukum Universitas Jember, 2013), p. 62.

²³ Moritz Lorenz. *An Introduction to EU Competition Law*. (Cambridge: Cambridge University Press, 2013), p. 5-6.

²⁴ Dominick T. Armento. *Op. Cit.*, p. 18.

²⁵ Tim Centre for Strategic and International Studies. *Peta Jalan Menuju Pengarusutamaan Persaingan Usaha (Menuju Kebijakan Ekonomi yang Mengintegrasikan Prinsip Persaingan)*. (Yogyakarta: Kanisius, 2016), p. 13-14.

²⁶ See Articles 6 and 7 of the MPRS Decree No. XXIII/MPRS/1966, Article 1 and Article 3 of MPR Decree No. XVI/MPR/1998, which is the elaboration of Article 33 of the 1945 about Constitution of the Republic of Indonesia concerning economic democracy.

concerning guidelines for the implementation of Article 51 of Law No. 5 of 1999. So that SOE monopoly activities also require the principle of fair business competition.

According to the Black's Law Dictionary, monopoly is defined as a privilege or peculiar advantage vested in one or more persons or companies, consisting in the exclusive right (or power) to carry on a particular business or trade, manufacture a particular article, or control the sale of the whole supply of a particular commodity. A form of market structure in which one or only a few firms dominate the total sales of a product or service.²⁷ Meanwhile, according to the Second Edition of the Complete Dictionary of Economics written by Christopher Pass and Bryan Lowes, monopoly is a market structure with characteristics, namely, one company and many buyers, which is, a market consisting of a single supplier and selling its products to small buyers who act freely but in large numbers; lack of substitute products, meaning there are no substitute products that are close to the products produced by the monopolist (cross elasticity of demand) is zero; and market entry barriers, namely barriers to entry that are so tight that it is impossible for new firms to enter the relevant market.²⁸

".....monopoly market, in which a single seller has sufficient market power to alter price unilaterally, either by increasing output to drive down price, or by reducing output to raise price. Monopoly, too, is premised on the existence of various structural factors: a single seller occupying the entire market, selling a unique product, with substantial barriers to entry and imperfect market knowledge in the industry."²⁹ Sellers in a monopoly market have power to set the prices, either reducing output to raise prices or increasing output to lower prices. Sellers also dominate the overall market, selling unique products with substantial barriers to entry and imperfect market knowledge in the industry. A monopoly market is a market in which there is only one producer. This is often pointed out by those who question the basis of much competition regulation that the most common situation in which a monopoly arises is one where it is the product of government action (for example, by legal controls that restrict other producers from entering an industry, particularly where the state regulates an industry).³⁰

The definition of monopoly shows that when a business field has been monopolized by one business actor, the other business actors cannot enter into competition in the same business field. This is what is called as an entry barrier for other business actors. However, the barriers to entry can be grouped into technical barriers (technical barriers to entry) and legal barriers (legal barriers to entry).³¹ Technical barriers occur when a company has special abilities and or knowledge that causes the company to produce efficiently. Companies, especially conglomerate groups, also have the ability to control the sources of production factors, including natural resources, human resources, and production locations. While legality barriers occurs when a company is legally granted a monopoly right (legal monopoly). Even though the company does not have the technical capacity, the law gives the company the right to have monopoly power, so the company legally has monopoly power.³²

Legal monopoly is a monopoly that occurs because of the needs in law. Article 33 of the 1945 Constitution of the Republic of Indonesia requires a state monopoly to control the earth, water and natural resources contained therein, as well as production branches that control the livelihoods of many people.³³ So that SOEs as State-Owned Enterprises have the right to conduct business and manage natural resources in a healthy way.³⁴ The

²⁷ Henry Campbell Black. *Black's Law Dictionary* 6th Edition. (St. Paul Minn-USA: West Publishing Co, 1990)

²⁸ Hermansyah. *Pokok-Pokok Hukum Persaingan Usaha di Indonesia*. (Jakarta: Kencana, 2009), p. 39.

²⁹ Niamh Dunne. *Competition Law and Economic Regulation Making and Managing Markets*. (Cambridge: Cambridge University Press, 2015), p. 15.

³⁰ Sandra Marco Colino. *Competition Law of the EU and UK*. (Oxford: Oxford University Press, 2011), p. 9

³¹ Andi Fahmi Lubis et.al. 2009, *Op. Cit*, p. 47-48.

³² *Ibid.*

³³ Johnny Ibrahim. 2009. *Op. Cit.*, p. 40-41.

³⁴ See Article 6 of the Decree of the People's Consultative Assembly of the Republic of Indonesia Number XVI/MPR/1998 concerning Economic Politics in the Context of Economic Democracy.

involvement of SOEs in managing natural resources as stated in Article 33 of the 1945 Constitution of the Republic of Indonesia is a form of the role of the state as a welfare state. Welfare state comes from the idea of Jeremy Bentham which stated that the greatest happiness for the people is the responsibility of the government and the government guarantees this. The term "utility" is often used by Jeremy Bentham to explain the concept of happiness or well-being based on the principles of utilitarianism. This principle states that something good is something that causes the widest possible happiness, otherwise something bad is something that causes pain. Therefore, the government must take action to increase the happiness of the people as much as possible by reforming the law, the role of the constitution, and developing social policies.³⁵

The term "controlled by the state" can be found in Article 33 of the 1945 Constitution of the Republic of Indonesia. It means that the state has the right to formulate regulations to facilitate the economy, regulations that prohibit oppression by people with capital against weak people. In addition, according to Bung Hatta, the Government will achieve as much production as possible with the help of borrowed capital from outside. However, if this method cannot be applied, foreign investors need to be given the opportunity to invest in Indonesia according to the requirements set by the government.³⁶

The granting of monopoly rights to SOEs is a manifestation of the state's role in terms of "controlling" production branches that concern the livelihoods of many people by establishing a regulation that regulates business competition as stipulated in Law Number 5 of 1999 and the existence of an exception for SOE which regulated in Article 51 of Law Number 5 of 1999. In addition, the government also regulates related to SOE that the exclusion of SOEs monopoly is a special task delegated to SOE from the Government to carry out public benefit functions.³⁷ SOEs are prioritized to organize monopoly and/or concentration of production and/or marketing activities of goods and/or services by the state on activities related to the production and/or marketing of goods and/or services that affect the livelihood of many people as well as production branches that are important country.³⁸

However, the problem lies in the principle of fair business competition which must be applied by SOEs in their monopoly activities. Problems arise when a SOE monopoly creates entry barriers for other business actors in certain business fields, but the regulations require SOE to implement the principle of fair business competition, where fair business competition does not allow any entry barriers for other business actors. This creates legal uncertainty because SOE as the holder of legal monopoly rights can still be reported and sentenced for violating the monopoly provisions in Article 17 of Law Number 5 of 1999. This indicates that the government needs to establish a special regulation that regulates the monopoly of SOEs and establishes the principles that SOEs need to apply in carrying out their monopoly activities.

The SGC case that was mentioned in the introduction shows that there is uncertainty for business actors, especially SOEs in exercising their monopoly rights because SOEs are required to do monopoly but still pay attention to fair competition. In the BCSC's decision Number 09/KPPU-L/2016, SGC was found guilty of violating Article 17 of Law Number 5 of 1999 for abusing its position to set an unreasonable price for gas products distributed to consumers. SOEs are considered to be able to use their privileges to obtain the maximum profit without considering the capabilities of their consumers, which do not reflect the state as a welfare state, in other words, SOEs are considered not to apply the principle of fair business competition. However, at the level of appeal and cassation, the BCSC's decision was annulled because according to the Panel of Judges the price fixing activity by SGC was an order of law, namely Article 50 letter a, which is an

³⁵ Elviandri, Khuzdaifah Dimyati, dan Absori, *Quo Vadis Negara Kesejahteraan: Meneguhkan Ideologi Welfare State Negara Hukum Kesejahteraan Indonesia*. Jurnal Mimbar Hukum Vol. 31, No. 2, Juni 2019, p. 255.

³⁶ A.M. Tri Anggraini. *Aspek Monopoli atas Cabang Produksi yang Menguasai Hajat Hidup Orang Banyak Berdasarkan Hukum Persaingan Usaha*. Jurnal Hukum Prioris, Vol. 2, No. 4, Februari 2010, p. 206.

³⁷ See Article 66 paragraph (1) of Law Number 19 of 2003 concerning State-Owned Enterprises.

³⁸ Andi Fahmi Lubis et.al. *Edisi Kedua Hukum Persaingan Usaha Buku Teks*. (Jakarta: KPPU, 2017), p. 371.

exception to Law Number 5 of 1999. The existence of such a case requires special attention from government, especially on regulations relating to SOE monopoly.

As with the regulation of business competition in Germany, Germany has several special regulations related to business competition which include the Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen/GWB), Act against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb/UWG) and the Treaty on the Functioning of the European Union which applies to Germany as a member of the European Union.

Treaty on the Functioning of the European Union Part Three: Union Policies and Internal Actions - Title VII: Common Rules on Competition, Taxation and Approximation of Laws provides an arrangement that prohibits agreements between two or more independent market participants that limit competition. These provisions include horizontal agreements (between actual or potential competitors operating at the same supply chain level) and vertical agreements (between companies operating at different levels, i.e. agreements between producers and their distributors).³⁹ However, there is an exception to the provisions of paragraph 1 namely agreements, association decisions, and joint practices that contribute to increasing the production or distribution of goods or to promote technical or economic progress, while enabling consumers to get a fair share of the profits generated and which do not eliminate product competition concerned.⁴⁰ Meanwhile, Article 102 of the treaty prohibits companies holding dominant positions in certain markets from abusing that position, for example by charging unfair prices, by limiting production, or by refusing to innovate that harms consumers.⁴¹

However, the treaty also regulates State Aid. A company that receives support from the government will gain an advantage that its competitors will not have. In general, treaties prohibit special support for certain companies but when it is necessary to do so for the sake of economic development it can be done. Thus, this arrangement regarding state aid, which can also be said to be an exception, by The European Commission must be ensured in accordance with the rules of the European Union. State aid is defined as a benefit in any form which is given selectively to the efforts of national public authorities. Therefore, subsidies to individuals or public acts that are open to all companies are not covered by this prohibition and do not constitute state aid (for example including general tax acts or labor laws).⁴²

Meanwhile, the regulation of business competition in Germany is regulated in the Act against Restraints of Competition. The regulation stipulates that Germany prohibits inter-company agreements, corporate association decisions and joint practices that cause the effect of preventing, restricting and distorting competition.⁴³ Exceptions are also made to the rule that agreements between companies, decisions by associations of companies or joint practices contribute to increasing the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the benefits generated, and which do not.) impose on the enterprises concerned with restrictions which are not necessary for the attainment of these objectives, or 2) provide the possibility for such undertakings to eliminate competition in respect of most of the products concerned shall be exempt from the prohibition of Article 1.⁴⁴

Then Article 19 regulates that abuse of dominant position by one or more businesses is prohibited and abuse occurs especially if the dominant company is a supplier or buyer of certain types of commercial goods or

³⁹ See Article 101 Treaty on the Functioning of the European Union Part Three: Union Policies And Internal Actions - Title VII: Common Rules On Competition, Taxation And Approximation of Laws.

⁴⁰ Ibid.

⁴¹ See Article 102 Treaty on the Functioning of the European Union Part Three: Union Policies And Internal Actions - Title VII: Common Rules On Competition, Taxation And Approximation of Laws.

⁴² https://ec.europa.eu/competition/state_aid/overview/index_en.html, accessed on June 14, 2021

⁴³ See Article 1 of the Act against Restraints of Competition.

⁴⁴ See Article 2 of the Act against Restraints of Competition.

services.⁴⁵ However, Chapter 5 Article 28 regulates specific provisions for certain economic sectors, that Article 1, namely agreements between businesses, decisions by associations of business actors and joint practices that have the aim or effect of preventing, restricting or distorting competition is prohibited will not apply to agreements between agriculture producers or for agreements and decisions of agricultural producers' associations and federations of associations and agreements to maintain the selling price of agricultural products.⁴⁶ Article 29 also regulates that business actors as owners of dominant positions in the supply of electricity or gas pipelines (public utility companies) are prohibited from abusing their position by demanding unreasonable fees.⁴⁷

Meanwhile, in a section 3 of the Act against Unfair Competition states that unfair trade practices are illegal. Commercial practices that target consumers in a manner that is inconsistent with professional diligence and can distort economic behavior materially are considered unfair. Injustice will occur if someone violates the provisions of the legislation which is also intended to regulate market behavior for the benefit of market participants and the violation of the law is considered sufficiently detrimental to the interests of consumers, other market participants, and competitors.⁴⁸

Based on the regulations in force in Germany, the regulation of business competition in Indonesia and Germany has similarities where all forms of agreements made by business actors with the aim or impact of preventing, limiting and distorting competition are prohibited. However, these agreements are not prohibited when the agreement is made to increase production or distribution to improve the economy and consumers can get fair benefits. Similar to Indonesia which stipulates that production branches that concern the livelihood of many people and are important for the state are monopolized by SOEs, Germany itself provides regulation that certain sectors such as agriculture, electricity and gas can be controlled by a certain company. However, the settings of the two countries have differences. Indonesia regulates that this SOE monopoly is carried out with due regard to the principles of fair business competition, while there are no laws and regulations that provide further explanation as to what the principles of fair business competition are. Meanwhile, in Germany, it provides an arrangement for parties who have a dominant position in certain business sectors not to determine or demand unreasonable costs in their business activities. So that Indonesia should make a regulation that further regulates the principles of SOE monopoly and things that SOEs should not do in carrying out their monopoly activities.

Based on this description, the monopoly activities of SOE as regulated by Article 51 of Law Number 5 of 1999 do not conflict with the principle of fair business competition. Although the perfect competition model in the market structure emphasizes the absence of entry barriers for other business actors and also remembers Article 1 point 6 of Law Number 5 of 1999 provides an understanding related to unfair business competition which if interpreted in a contrario, namely fair business competition is competition carried out between business actors in carrying out production and or marketing activities of goods and or services carried out in an honest manner, not against the law and not hampering business competition, but the SOE monopoly itself is included in the monopoly allowed by law (legal monopoly). Even though this monopoly creates a barrier to entry for other business actors to enter the same competition and hinders business competition.

Although basically the regulation related to the principle of fair business competition has not been specifically regulated in a statutory regulation so that it creates legal uncertainty, so that the SOE monopoly can create healthy business competition, the SOE must have full responsibility in carrying out its monopoly activities and still pay attention to welfare consumers by: a) setting a fair price of goods and or services in accordance

⁴⁵ See Article 19 of the Act against Restraints of Competition.

⁴⁶ See Article 28 of the Act against Restraints of Competition.

⁴⁷ See Article 29 of the Act against Restraints of Competition.

⁴⁸ Rogier W. de Vrey. *Towards a European Unfair Competition Law, A Clash Between Legal Families*. (Leiden/Boston: Martinus Nijhoff Publisher, 2006), p.169.

with the ability of consumers; b) responsible for all consumer losses caused by negligence of the company, for example: by including a clause related to compensation in the agreement; c) prepare everything to anticipate the occurrence of things that are not desirable that can harm consumers; d) providing the best possible service to consumers as a form of implementing the objectives of SOE: e) providing opportunities for other business actors to manage business fields monopolized by SOE through mergers.

Closing

A. Conclusions

Based on the description described above, it can be concluded that:

1. SOE monopoly activities regulated by Article 51 of Law Number 5 of 1999 do not conflict with the principle of fair business competition. Fair business competition is competition that is carried out between business actors in carrying out production and or marketing activities of goods and or services carried out in an honest manner, not against the law and not hampering business competition. While the SOE monopoly itself, although it causes a barrier to entry for other business actors to enter the same competition and hinders business competition, SOE has been given special rights or is allowed by law to carry out a monopoly (legal monopoly). In order for a SOE monopoly to create fair business competition, SOEs carry out their monopoly activities with full responsibility and still pay attention to the welfare of the people by: a) setting reasonable prices for goods and or services in accordance with the capabilities of consumers; b) responsible for all consumer losses caused by negligence of the company, for example: by including a clause related to compensation in the agreement; c) prepare everything to anticipate the occurrence of things that are not desirable; d) provide the best possible service to consumers; e) provide opportunities for other business actors to manage business fields monopolized by SOE through mergers.
2. The government needs to change the term monopoly used in the provisions of Article 51 of Law Number 5 of 1999 with the term dominant business behavior for certain sectors because the monopoly concept itself creates competition barriers and this does not reflect the principle of fair business competition. The formation of a Government Regulation is also needed to regulate the duties and authorities of BUMN as the dominant business actor, what types and fields of business can be controlled by BUMN, the principles that must be applied in carrying out their business, things that should not be done in business activities. its business and the sanctions applied when SOEs violate these provisions.

B. Suggestions

1. The House of Representatives together with the Government in making changes to Law Number 5 Year 1999 need to review more regarding the principles of fair business competition and the principles that must be applied in the dominant business behavior of SOEs so that they can be included in the Bill.
2. To the President, it is necessary to stipulate a Government Regulation that regulates the dominant business behavior of SOEs in particular which regulates the duties and authorities of SOEs as dominant business actors, what types and fields of business can be controlled by SOEs, the principles that must be applied in conduct their business, things that should not be done in their business activities as well as sanctions applied when BUMN violates these provisions.

References

Book, Journal, Thesis

- A.M. Tri Anggraini. *Aspek Monopoli atas Cabang Produksi yang Menguasai Hajat Hidup Orang Banyak Berdasarkan Hukum Persaingan Usaha*, Jurnal Hukum Prioris, Vol. 2, No. 4, Februari 2010
- Andi Fahmi Lubis. 2009. *Hukum Persaingan Usaha antara Teks dan Konteks*. Surabaya: Universitas Airlangga
- Andi Fahmi Lubis et.al. 2017. *Edisi Kedua Hukum Persaingan Usaha Buku Teks*. Jakarta: KPPU
- Cita Yustisia Serfiyani. 2013. *Analisis Persaingan Usaha di Bidang Importasi dan Distribusi Film dalam Menumbuhkembangkan Perfilman Nasional*. Jember: Program Studi Magister Ilmu Hukum Universitas Jember
- Dominick T. Armento. 1982. *Antitrust and Monopoly (Anatomy of a Policy Failure)*. Canada: John Wiley & Sons
- Dyah Ochtorina Susanti dan A'an Efendi. 2014. *Penelitian Hukum (Legal Research)*. Jakarta: Sinar Grafika
- Elviandri, Khuzdaifah Dimyati, dan Absori, *Quo Vadis Negara Kesejahteraan: Meneguhkan Ideologi Welfare State Negara Hukum Kesejahteraan Indonesia*, Jurnal Mimbar Hukum Vol. 31, No. 2, Juni 2019
- Henry Campbell Black. 1990. *Black's Law Dictionary, 6th Edition*. St. Paul Minn-USA: West Publishing Co
- Hermansyah. 2009. *Pokok-Pokok Hukum Persaingan Usaha di Indonesia*. Jakarta: Kencana
- Johnny Ibrahim. 2007. *Hukum Persaingan Usaha, Filosofi, Teori, dan Implikasi Penerapannya diIndonesia*. Jakarta: Bayumedia
- Moritz Lorenz. 2013. *An Introduction to EU Competition Law*. Cambridge: Cambridge University Press
- Niamh Dunne. 2015. *Competition Law and Economic Regulation Making and Managing Markets*. Cambridge: Cambridge University Press
- Normin S. Pakpahan. 1994. Pokok-pokok Pikiran tentang Hukum Persaingan Usaha. Jakarta: Kantor Menko Ekuwasbang
- Peter Mahmud Marzuki. 2005. *Edisi Revisi, Penelitian Hukum*. Jakarta: Prenadamedia Group
- Philip Areeda. 1996. *Hukum Antitrust Amerika dalam: Ceramah-ceramah tentang Hukum Amerika Serikat (Talks on American Law)*, oleh Harold J.Nreman (editor), terjemahan Gregory Churchill. Jakarta: Tatanusa
- Rogier W. de Vrey. 2006. *Towards a European Unfair Competition Law, A Clash Between Legal Families*. Leiden/Boston: Martinus Nijhoff Publisher
- Sandra Marco Colino. 2011. *Competition Law of the EU and UK*. Oxford: Oxford University Press
- Suyud Margono. 2009. *Hukum Anti Monopoli*. Jakarta:Sinar Grafika

Tim Centre for Strategic and International Studies. 2016. *Peta Jalan Menuju Pengarusutamaan Persaingan Usaha (Menuju Kebijakan Ekonomi yang Mengintegrasikan Prinsip Persaingan)*. Yogyakarta: Kanisius

Legislations

1945 Constitution of the Republic of Indonesia

Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business

Law Number 19 of 2003 concerning State-Owned Enterprises.

MPRS Decree No. XXIII/MPRS/1966 concerning Renewal of the Policy on Economic, Financial and Development Foundations

MPR Decree No. XVI/MPR/1998 concerning Economic Politics in the Context of Economic Democracy

Treaty on the Functioning of the European Union

Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen/GWB)

Act against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb/UWG)

Internets

<https://nasional.kontan.co.id/news/terbukti-monopoli-di-medan-pgn-didenda-rp-992-m>

<https://www.cnbcindonesia.com/news/20180202203513-4-3418/menang-banding-pgn-bebas-tuduhan-monopoli-gas-di-medan>

https://ec.europa.eu/competition/state_aid/overview/index_en.html