



Cartel Agreement in Business Competition Law Perspective

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Abstract

Business competition is actually a business between business actors, where the government does not need to interfere, but in order to create rules of the game in business competition, the government needs to intervene to protect consumers. Because if this is not done, there is a possibility that there will be collusion (collusion) between business actors which will lead to economic efficiency, which in the end is the consumer who will pay the expense of buying goods or services with inadequate price and quality. One of the effects of globalization is the free market. The domestic market has new challenges to compete with other sellers from abroad. The sellers who come usually come from developed countries where competition has long been practiced is a cartel. Business actors who are members of various associations in the discussion of amendments to Law No. 5 of 1999, also has a concept of revision of the Law. Amendments to Law No. 5 of 1999 is considered to only accommodate the interests of one party, namely the Business Competition Supervisory Commission (KPPU). Business actors are subject to the law, among others. Objections submitted include amendments to fines for violating Law No. 5 of 1999 a maximum of 30% of turnover.

Keywords: *Business Competition; Cartel; Cartel Impact; Weak Law Enforcement of KPPU*

Introduction

For the implementation of Law No. 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition (Law No. 5 of 1999) a commission was formed. This stance is based on Article 34 of Law No. 5 of 1999 which instructs that the formation of the organizational structure, duties and functions of the commission shall be determined by a presidential decree. This commission was then formed based on the Presidential Decree No. 75 of 1999 and it is named the Business Competition Supervisory Commission or KPPU. Therefore, the enforcement of business competition law is under the authority of KPPU. The Business Competition Supervisory Commission has the power to investigate, examine and decide cases and try alleged monopolistic practices and unfair

business trials.¹ With the authority of the Business Competition Supervisory Commission, examine and decide on allegations of monopoly and unfair business competition. The Business Competition Supervisory Commission is a commission that carries out and covers executive and judicial functions that refer to and are based on the legal system in force in the Republic of Indonesia. In the context of State administration, KPPU is a state auxiliary organ that has the authority based on Law No. 5 of 1999 to enforce business competition law.²

In simple terms, the auxiliary organs of the State are state institutions that are formed outside the constitution and are institutions that help carry out the tasks of the main State institutions (executive, legislative and judiciary) which are often referred to as state institutions controlled by independent (quasi).³ The role of independent institutions is important as a responsive effort for countries shifting from authoritarianism to democracy.⁴

The above matters as regulated in the provisions of Article 36 letter e of Law No. 5 of 1999 that the authority of the commission to summon business actors who are suspected of violating the provisions of this law and Article 36 letter f of Law No. 5 of 1999, the commission has the authority to summon and present witnesses, expert witnesses, and anyone deemed aware of violations of the provisions of this law. If the business actor violates this provision (it is reported), KPPU will submit it to the investigator to carry out an investigation in accordance with the provisions in Article 41 paragraph (3). Based on the explanation of Article 41 paragraph (3) of Law No. 5 of 1999 which was conveyed by the Commission to investigators to carry out investigations was not only an act or criminal act as referred to in paragraph (2), but also covered the corners of the problem being investigated and examined by the Commission.⁵

Cartel cases can be turned into criminal cases and fully submitted to the police to carry out the next process in accordance with laws and regulations. The next role is as regulated in Article 44 paragraph (5) of Law No. 5 of 1999 that "The decision of the Commission as referred to in Article 43 paragraph (4) is sufficient initial evidence for investigators to carry out an investigation.

This of course refers to the provisions of Article 43 paragraph (4) that the decisions referred to are decisions that have permanent legal force at the KPPU level and are not filed with objections or appealed, this refers to the provisions of Article 44 paragraph (4) that KPPU will file violations against the implementation of the KPPU decision by business actors and did not raise objections and did not comply with the KPPU decision. What should be followed up by investigators (Polri) is the KPPU's decision containing a criminal element.⁶

UU No. 5 of 1999 cannot be implemented optimally so that KPPU often experiences difficulties and obstacles in the law enforcement process. This is due to the large number of business actors and witnesses who are not cooperative, which hinders the process of investigating cases. Another obstacle faced by the Business Competition Supervisory Commission is that the reported party does not want to submit documents or evidence requested in the examination process, whereas in handling cartel cases, complete facts and evidence are required so that the decision can provide legal certainty.

¹ Irna Irmalina Daud, 'Evaluasi Terhadap Fungsi Dan Kedudukan Komisi Pengawas Persaingan Usaha (KPPU)', *Jurnal Kebijakan Ekonomi*, 2006.

² 'Kedudukan Hukum Komisi Pengawas Persaingan Usaha Melaksanakan Wewenang Penegakan Hukum Persaingan Usaha', *Mimbar Hukum*, 2013 <<https://doi.org/10.22146/jmh.16123>>.

³ Robert Holman, 'Economic Analysis of Law', *Politicka Ekonomie*, 2004 <<https://doi.org/10.18267/j.polek.474>>.

⁴ Tomy Michael, 'RIGHT TO HAVE RIGHTS', *Mimbar Keadilan*, 2017, 106 <<https://doi.org/10.30996/mk.v0i0.2203>>.

⁵ hendra Nurtjahjo, 'Lembaga, Badan, Dan Komisi Negara Independen (State Auxiliary Agencies) Di Indonesia: Tin.Jauan Hukum Tata Negara', *Jurnal Hukum & Pembangunan*, 2017 <<https://doi.org/10.21143/jhp.vol35.no3.1518>>.

⁶ Veri Antoni, 'Penegakan Hukum Atas Perkara Kartel Di Luar Persekongkolan Tender Di Indonesia', *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada*, 2019 <<https://doi.org/10.22146/jmh.37966>>.

Formulation of the Problem

From the background above, there are the following problems:

1. How Market and Cartel Structure According to Law No. 5 of 1999?
2. How is the relationship between business association and cartel prohibition law enforcement?

Research Method

The author uses the normative juridical method, which is a method that is focused on examining the applications, rules or norms of positive law.⁷ The research was conducted by means of library research, namely by collecting and studying data sourced from books, literature, scientific journals, documents of laws and regulations related to the object of research.

Discussion

Understanding Market

The term market has taken on many meanings over the years. In a basic sense, a market is a place where sellers and buyers meet to exchange goods and services. In the past, markets referred to geographic locations, but now markets no longer have geographic boundaries because modern communication has allowed buyers and sellers to enter into transactions without having to meet each other.⁸ In a monopolistic competitive market, there can be as many as perfect competition. However, in contrast to perfectly competitive markets, firms that compete in monopolistic competitive markets have market power by selling products that are differentiated (eg by brand or quality). As long as the conditions for perfect competition are not met, the market is eaten up by imperfect competition. These markets can take a variety of forms, including:

1. Monopoly, where there is only a single supplier in the market.⁹
2. Oligopoly, where there are only a few suppliers in the market with differentiated products and each company has the opportunity to influence the market.¹⁰
3. Monopolistic competition, where there are many sellers in the market but with differentiated products.¹¹
4. Monopsony, where there is only one buyer of goods and services and several sellers in the market. This is the opposite of monopoly.¹²

⁷ Tomy Michael, 'Humanity in the Enforcement of Anti-Corruption Laws', *Jurnal Hukum Bisnis Bonum Commune*, 2.2(2019), 211.

⁸ Rizal Aji Pratama, 'Pengaturan Monopoli Kartel Oleh Pelaku Usaha Dalam Persaingan Usaha Garam : Suatu Kajian Putusan Kppu No. 10/KPPU-L/2005', *Jurnal Ius Constituendum*, 2018 <<https://doi.org/10.26623/jic.v3i2.1041>>.

⁹ Michele Boldrin and David K. Levine, *Against Intellectual Monopoly*, 2008 <<https://doi.org/10.1017/CBO9780511510854>>.

¹⁰ Mark Bagnoli and Susan G. Watts, 'Oligopoly, Disclosure, and Earnings Management', *Accounting Review*, 2010 <<https://doi.org/10.2308/accr.2010.85.4.1191>>.

¹¹ Steven C. Salop, 'Monopolistic Competition with Outside Goods', *The Bell Journal of Economics*, 1979 <<https://doi.org/10.2307/3003323>>.

¹² William M. Boal and Michael R. Ransom, 'Monopsony in the Labor Market', *Journal of Economic Literature*, 1997.

5. Oligopsony, where there are only a few sellers in the market. This is the opposite of oligopoly.¹³
6. Bilateral monopoly, where there is only one seller and one buyer.¹⁴

So that in a modern economy, the market is better understood as an institution that becomes the operating arena for the forces that determine prices.¹⁵ The market structure will be an influential *environment* in which the company is located, so naturally if the *environment* exists, the policy will also exist. *Environment* is not only a market form, but there are also other things, namely, for example, the structure of the government, the form of the state, the social system and so on. If things were different, then the policies would be different.

Market Structure

Fairly and fairly The behavior of sellers and buyers in the market is influenced by the market structure faced by sellers and buyers. The dimensions of the market structure that affect the behavior of sellers and buyers are:¹⁶

1. The number and distribution area of sellers in the market.
2. Type of product whether homogeneous or heterogeneous.
3. The seller's ability to influence the market.
4. Knowledge of the seller and the buyer of the market it faces.
5. Easy or not the company to enter and exit the market.

Some of these market dimensions lead to certain types of markets, namely: perfect competition market, monopoly market, monopolistic competition market, oligopoly market. Perhaps it is quite important to discuss the differences in a product that is homogeneous and differentiated (can be differentiated) first before discussing further about each of the above markets. Both of these concepts play an important role for us to be able to distinguish the market faced by sellers or buyers. A product is said to be homogeneous if the products are identical. Therefore, a person will feel indifferent between homogeneous products. There is no difference between products made in factory A or factory B. Consequently, the prices for homogeneous goods should be the same. The market structure as outlined earlier is not what economic theorists mean when they are talking about perfectly competitive markets.¹⁷ In a perfectly competitive market, theoretically the seller cannot determine the price or it is called a *price taker*, where the seller will sell his goods according to the price prevailing in the market.

¹³ V. Bhaskar, Alan Manning, and Ted To, 'Oligopsony and Monopsonistic Competition in Labor Markets', *Journal of Economic Perspectives*, 2002 <<https://doi.org/10.1257/0895330027300>>.

¹⁴ Bhaskar, Manning, and To.

¹⁵ A Purwadi, 'Praktik Persekongkolan Tender Pengadaan Barang Dan Jasa Pemerintah', *Jurnal Hukum Magnum Opus*, 2019 <<https://doi.org/10.30996/jhmo.v2i2.2494>>.

¹⁶ Paul A. Pavlou and David Gefen, 'Building Effective Online Marketplaces with Institution-Based Trust', *Information Systems Research*, 2004 <<https://doi.org/10.1287/isre.1040.0015>>.

¹⁷ Indah Novitasari, 'Selebgram Dikenakan Pajak?', *Jurnal Hukum Bisnis Bonum Commune*, 2020 <<https://doi.org/10.30996/jhbhc.v3i1.3078>>.

The Role of Business Associations in Preventing Cartels

Entrepreneurs who are members of the Indonesian Employers' Association (Apindo), Kadin, HIPMI, basically, urge cooperation between business actors with one another to seek profit, as long as it does not violate state regulations.¹⁸ What is not allowed is if the cooperation is detrimental to other business actors, causing unfair business competition. In general, associations can be divided into three types, the first types are:

- a. Business association, a business association in which players/companies compete in the same market, usually known as trade association/business actor association. These organizations are often defined as non-profit organizations. Benyamin S Kirsh defines a trade association as an organization in which producers or distributors of a commodity or service are based on a common goal of improving service quality, setting development standards and cooperation in formulating solutions to problems. There are two types of business associations, namely vertical business associations, which work patterns that exist at the central and regional levels, this type is more common and horizontal business associations, which work patterns in the same geographical level and from the same industry.
- b. Professional association, an association consisting of individuals of the same profession known as a professional association. The main objective is to set standards for the quality of professional services for its members, for example IDI, IAI. Lastly is an association of specific interests, an association formed due to the mutual interest of its members. An association that is formed with a focus on improving the welfare of its members or providing advocacy to its members, for example a trade union.

Article 11 of Law No. 5 of 1999 states that business actors are prohibited from entering into agreements, with business competitors, which intend to influence prices by regulating the production and or marketing of goods and or services, which may result in monopolistic practices and/or unfair business competition.¹⁹ If we examine the formulation of this Article, what is prohibited is an agreement between competitors that contains arrangements for the production and or marketing of goods and or services aimed at influencing prices, which may result in monopolistic practices and unfair business competition.²⁰ Classically, cartels can be carried out in three ways, namely in terms of prices, production and marketing areas. There are two losses that occur in cartels, namely the occurrence of monopolistic practices by cartel actors so that at a macro level it results in inefficiency in resource allocation as reflected by the emergence of *deadweight losses*. Which was largely due to production restriction policies to keep prices high. Second, from the consumer point of view, they will lose their choice of price, competitive quality, and good after-sales service.

Conclusion

UU No. 5 of 1999 still provides an opportunity for cartel practice because the law is not firm and has very weak binding and execution powers against cartels that occur in a heterogeneous market structure, both perfect competition and imperfect competition. Business associations that are indicated to cause harm to consumers and market players are therefore difficult and complicated to detect. This has led to the emergence of a new problem in the field of business competition because an entrepreneur's action is considered reasonable in the midst of competition between entrepreneurs.

¹⁸ William J Donovan and Bethuel M Webster, 'Rationalization: The Basis of Economic Rapprochement.', *Harvard Business Review*, 1928.

¹⁹ Kurniawan Kurniawan, 'Bukti Tidak Langsung Dalam Penyelesaian Sengketa Kartel', *Jatiswara*, 2019 <<https://doi.org/10.29303/Jatiswara.V34i3.211>>.

²⁰ I Made Sari, 'Persamaan Perlakuan Para Pihak Dalam Beracara Di Kppu Dalam Perspektif Hukum Acara Peradilan Indonesia', *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)*, 2016 <<https://doi.org/10.24843/Jmhu.2016.V05.I02.P12>>.

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