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FAIR COMPETITION AND ABUSE OF DOMINANT POSITION: HOW
MARKET LEADER CAN BE ABUSIVE IN THE RELEVANT MARKET?

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ABSTRACT

Market leader is business actor who has the potential to abuse the dominant position. Through a high percentage of sales, market leader has a large pen in related market, thus the dominant position abuse is prone to occur. In order to that abuse does not occur and is detrimental to the consumer, the Business Competition Supervisory Commission applies pre-notification procedure for business actor to conduct merger, acquisition, and consolidation. The purpose of this study is to provide legal protection which is carried out by the Business Competition Supervisory Commission to market leader who has the potential to carry out unfair business competition. This protection is related to the effort to prevent consumer loss which caused by market leader who abuse the dominant position. The Business Competition Supervisory Commission made the regulation number 13 of 2010 and the Government Regulation Number 57 of 2010 as a merger review guideline related to merger, consolidation and acquisition. The formation of these articles was a preventive measure to anticipate the abuse of dominant position by market leader in Indonesia.

INTRODUCTION

Market leader is as a brand, product or firm that has the largest percentages of total sales revenue (the market share) of a market. A market leader often dominates its competitors in customer loyalty, distribution coverage, image, perceived value, price profit and promotional spending (Treacy and Wiersema, 2007). Market leader is a brand, product or company that has the highest sales percentage of the total profit gained in a market. Market Leader usually dominates its competitors with customer loyalty, product marketing reach, product overview, profit, and promotion. This dominance is obtained from

product differentiation, which is the creation of a different product from other products that have been circulated to attract consumer (Griffin, 1995).

Basically, the behavior of every business actor tends to be able to dominate the market in order to achieve maximum profit, but the way business actor to dominate the market should be studied more deeply based on the business competition law. The business actor dominates the market in a fair and reasonable way or the business actor dominates the market in prohibited ways. If business actor becomes a market leader that is achieved in a reasonable way, for example by differentiating product, creating product with good quality and maintaining the quality of the goods produced, thus it can attract consumers' interests, then the business actor does not use methods that are contrary to business competition law.

Indonesian law does not provide a legal basis for regulating or guaranteeing prices for any product (Prihandono and Relig, 2019). However, various kinds of regulation which regulate the economic activities and the work of developing and enforcing these rules are in the hands of the government. At the global level, economic law carries the greater quality considering its scope and the economic actor who involved (Niyobuhungiro, 2019). Economic law is the branch of law that regulates the public economic relationship among the government, its economic administrative institution, economic organization and their citizen.

In Indonesia as a democratic country, one of the democracy forms in the economy is to require equal opportunity for the citizen to be involved in the process of production and marketing of goods or services in a fair business climate. Thus, the behavior of business actors is not offhanded to be allowed except for it regulated in business competition law through the Law number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition (UU number 5 of 1999). The establishment of Law number 5 of 1999 is based on that there has not comprehensive and adequate legal rule to regulate business competition law in Indonesia. Thus, the condition that occurred before the existence of Law number 5 of 1999 is often found business actor who is confused to determine the steps in regulating and managing their business activities by thinking that whether the business activity which is carried out will disrupt and adversely affect the business activity carried out by other business actors (Kagramanto, 2012).

Consumer as the party who is the most disadvantaged if the business actor use fraudulent ways to win the competition. Consumer will not have the choice to buy goods or services that sold in the market because there is only one business actor producing these goods. In this condition, it can be said that business actor has conducted monopolistic practice that is defined by the concentration of economic power. According to article 1 number 2 of Law number 5 of 1999 monopolistic practice is the concentration of economic power by one or more business actors which cause the domination of the production and/ or marketing of certain goods and/ or services so as to cause unfair business competition and it can harm the public interest. With this economic concentration, business actor dominates the production and/ or marketing of goods or services (Lubis, 2009).

Business actor who can conduct monopolistic practice is business actor who monopolizing the market. According to article 1 number 1 of Law number 5 of 1999 defines a monopoly is the domination 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. Thus, it can be concluded that the market control exceeds 50% for one type of goods or services it produces. Monopoly has close relation with business actor occupying dominant position and the business actor who occupies dominant position in the market can also be said to be market leader.

Dominant position is actually not a problem if it is not misused (Singh, 2014). For example, the form of dominant position abuse which owned by market leader is by selling shares owned by business actor who become issuer in the capital market with the high prices. Issuer is a party that conducts public offering in order to solicit the funds for company business activity or company business development. Business actor obtains the funds by selling shares to the public (Nasarudin, 2014). The main goal of these business actors is to obtain the funds from the people as the capital for their business development. The sale of high stock price is due to the good access had by the market leader. If the offer of shares with the high price is accepted by the people, then the basic capital of the business actor will increase and make it difficult for other business actors to enter the related market. Thus, the market leader indirectly dominates the market. In all market structure condition as mentioned, market domination is the ultimate goal of business actors. However, in a perfectly competitive market condition it will be very difficult to find business actor who have profit margin that is far different from other business actors because in a perfect competitive market, business actors have almost the same economic resources and market control capabilities.

Based on the description above, it appears that the market leader has the potential to abuse the dominant position. Therefore, the legal protection that can be carried out by the *Komisi Pengawas Persaingan Usaha/ KPPU* (Business Competition Supervisory Commission) to the market leaders needs to be known. This protection is related to the effort to prevent consumer losses which is caused by unfair business competition.

RESEARCH METHOD

This study used the type of doctrinal law research. Through doctrinal research, it could be obtained a systematic explanation regarding the legal rule which regulated business competition by analyzing the relationship between these legal rules. The approach used in this study was the statute approach, case approach, historical approach, comparative approach, and conceptual approach. The method used to collect primary and secondary legal materials was through literature study. The author collected several legal materials, both primary and secondary legal materials that related to the issue, then, the legal materials are selected first before being elaborated and examined. These legal materials will then be associated with the applicable legal provision. Legal materials were

classified and arranged systematically in accordance with the formulation of the problem to make it easier when used to discuss the main issues.

RESULTS AND DISCUSSION

The Business Competition Supervisory Commission must be able to take several preventive measures, so that more business actors did not violate the regulation in the business competition law. Preventive step that could be taken by the Business Competition Supervisory Commission was to make the regulation on the Business Competition Supervisory Commission. Some of these were the Business Competition Supervisory Commission regulation number 07 of 2009 concerning the Guidelines for Multiple Position in accordance with the Article 26 and Business Competition Supervisory Commission Regulation number 06 of 2010 concerning the Dominant Position Abuse. It was not only by making regulation, the Business Competition Supervisory Commission could also provide education, thus business actor could be more careful in developing their business and supervised the action taken by business actor as long as the action was assessed by the Business Competition Supervisory Commission, it had the possibility of creating unfair competition.

3.1 Preventive Measures for Merging, Consolidation and Acquisition

Based on Article 29 of Law number 5 of 1999, Article 5 and Article 10 of the Government Regulation Number 57 of 2010 the supervision conducted by Business Competition Supervisory Commission towards Merger, Consolidation and acquisition was divided into two forms, namely:

Pre-Evaluation (Consultation);

Supervision by pre-evaluation way based on the attachment to Regulation of the Business Competition Supervisory Commission number 2 of 2013 defined consultation as follows:

- Consultation was a request for advice, guidance and or written opinion which submitted by business actor to the Commission over the planning of merger, consolidation or acquisition before the merger, consolidation or acquisition was legally effective. Therefore, through a consultation process, the Business Competition Supervisory Commission provided transparency to business actor and had the authority to assess the merger action that would be taken by business actor whether or not the merger action could be carried out by considering the impact that would occur.
- The Commission encouraged business actors to conduct consultation in order to minimize the risk of loss that may be suffered by business actor due to their Merger, Consolidation and Acquisition which may result in monopolistic practice and/ or unfair business competition in the future which would be canceled by Business Competition Supervisory Commission. If the business actor has voluntarily conducted consultation, the Business Competition Supervisory Commission would not change the assessment of the notification.

Post-evaluation (Notification)

Post-evaluation supervision was the supervision which conducted after the Merger, Consolidation and Acquisition. This meant, after the business actor has conducted merger, consolidation or acquisition shares, then, the company resulting from the Merger, Consolidation and Acquisition must notify the Commission.

Merger Requirements

Based on the article 5 of the Government Regulation Number 57 of 2010, it was explained that business actor conducting merger, consolidation and acquisition which caused the value of assets/ sales exceeded a certain amount. It must be notified in writing to the commission no later than 30 days since the date that has been effectively applicable legally in merger, consolidation and the acquisition. The specific amount as referred to in the Government Regulation was asset value of IDR 2,500,000,000,000.00 (two trillion five hundred billion rupiah) and the sales value of IDR 5,000,000,000,000.00 (five trillion rupiah). Based on the article above, it could be concluded that the merger notification requirement was to meet the value limit; merger, consolidation, and acquisition among non-affiliated companies; merger, consolidation and acquisition on a Joint Venture (JV) company.

Preventive Measures for Multiple Position Action

One of the behaviors that could lead to monopolistic practice and unfair business competition was multiple position. Therefore, the Business Competition Supervisory Commission issued Business Competition Supervisory Commission Regulation number 7 of 2009 concerning Multiple Position Guidelines in accordance with the Article 26 of Law number 5 of 1999 concerning the Prohibition of Monopolistic Practice and Unfair Business Competition with the aim that business actor knew the meaning and the limit of multiple position, so it was expected that business actor could adjust to the guidelines so as not to violate and inhibit business competition as regulated in Law number 5 of 1999.

It could be concluded that the multiple position which was prohibited by Law number 5 of 1999 was multiple position which formed a special relationship both horizontally or vertically and conglomerate.

Multiple position was one of the ways that was often taken by business actor to be able to make their business activity bigger because by holding multiple position at company in the same related market, it could make business actors regulated the price, supply, allocation, and divided the market, thus this created a negative competitive climate for the joint decision which made by the director. Another possibility that may arise was that business actor could fix the resale

price and coordinate among the companies that involved, so it reduced intra-brand competition.

Therefore, Business Competition Supervisory Commission would also conduct the effective supervision as an effort to prevent business actor from becoming market leader in the following matters:

1. The structure and organization of company which involved in multiple position especially for the company that has a mechanistic organizational system in which it has a centralized decision-making system, thus it increased the role of director and commissioner.
2. The structure and organization of company which involved in organic multiple position was the company that has a decentralized decision-making system up to the middle-lower management level, thus it reduced the role of director and commissioner.
3. Various practices that could hamper fair business competition due to the special relationship among related companies such as the family relationship and/ or other parties that have broad relationship.

Preventive Measures for Cross Shareholding

The action that may result in unfair competition as referred to in Article 27 of Law Number 5 of 1999 was the majority shareholding in several companies or the establishment of several companies that had the same business activity in the same related market if such action causing the creation of dominant position. The main element that became Business Competition Supervisory Regulation's guideline for determining cross shareholding was the existence of control element that caused a dominant position. If the main element was not fulfilled, the majority shareholding and the establishment of several companies that had the same business activity was not prohibited by Law Number 5 of 1999 (Attachment of Business Competition Supervisory Regulation Number 7 of 2011).

The Business Competition Supervisory Commission was formed to supervise the implementation of Law number 5 of 1999 in which one of its tasks was to make the guidelines and/ or publications relating to the Law, thus the Commission issued the Regulation of the Business Competition Supervisory Commission Number 7 of 2011 concerning the Guidelines for Article 27 (cross shareholding) Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practice and Unfair Business Competition as the guideline for business actor.

In Law Number 40 of 2007 concerning the Company was mentioned 3 ways to have the shares which could be carried out by:

Establish the company:

- a. Taking over or acquiring shares
- b. Purchase of the shares through an exchange.

Towards the three shares acquisition, the Business Competition Supervisory Commission could take preventive measures by:

- a. The Business Competition Supervisory Commission could cooperate with the Ministry of Law and Human Rights as the authorized state institution to issue the company establishment license by referring to the deed of incorporation and the company's articles of association which contained the names of the company's shareholders. Thus, if there was the same name of shareholder in other companies, then the Business Competition Supervisory Commission could investigate or analyze the cross shareholding.
- b. Through the pre-notification procedure which submitted to the Business Competition Supervisory Commission, if the business actor carried out shares acquisition.
- c. Collaborating with IDX to supervise the shares in stock exchanges.

If a business actor was evidently to have shares in another company, the IDX could report to the Business Competition Supervisory Commission to further analyze whether cross-shareholding could cause unfair business competition. To find out whether a majority shareholding by a business actor was prohibited by the Law number 5 of 1999, the Business Competition Supervisory Commission would pay attention to the following matters (Attachment of Regulation of the Business Competition Supervisory Commission Number 7 of 2011):

1. Business actor had the majority shares in two or more companies;
2. The majority shareholding, by paying attention to what was regulated in the company's articles of association, gave the greater authority by controlling over the company;
3. Two or more of these companies were the similar companies;
4. Two or more of these companies conducted business activity in the same related market; and
5. The ownership of business actor in two or more of these companies caused one business actor or one group of business actors dominating 50% market share of goods/ services or dominating 75% market share of goods/ services.

If the five elements above were fulfilled, the Business Competition Supervisory Commission would follow up and analyze whether or not there was the majority shareholding which caused the control and the abuse of dominant position. The action was a form of business competition law enforcement conducted by the Business Competition Supervisory Commission. This was intended in order to the business actor who have cross shareholding did not cause the behaviors of unfair business competition.

CONCLUSION

Market leader had the potential to create unfair competition because business actor who became the market leader had the large market share and market domination. Here, the Business Competition Supervisory Commission had a role to prevent the abuse of dominant position which carried out by market leader. The Business Competition Supervisory Commission made the

regulation Number 13 of 2010 and the Government Regulation Number 57 of 2010 as a merger review guideline related to merger, consolidation and acquisition. The formation of these articles was a preventive measure to anticipate the abuse of dominant position by market leader in Indonesia.

Ethical clearance

This research does not involve any participants, rather it is descriptive study. This research was carried out in accordance with the research principles. This study implemented the basic principle ethics of respect, beneficence, nonmaleficence, and justice.

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Keputusan Presiden nomor 75 tahun 1999 tentang Komisi Pengawas Persaingan Usaha.

Keputusan KPPU nomor 252/KPPU/Kep/ VII/2008 tentang Pedoman Pelaksanaan Ketentuan Pasal 47 Undang- Undang nomor 5 tahun 1999. Peraturan Komisi Pengawas Persaingan Usaha nomor 7 tahun 2011 tentang Pedoman Pasal 27 (pemilikan saham silang) Undang- Undang nomor 5 tahun 1999 tentang Larangan Praktek Monopoli dan Persaingan Usaha tidak Sehat.

Peraturan Komisi Pengawas Persaingan Usaha nomor 2 tahun 2013 tentang Perubahan Ketiga atas Peraturan Komisi Pengawas Persaingan Usaha nomor 13 tahun 2010 tentang Pedoman Pelaksanaan tentang Penggabungan atau Peleburan Badan Usaha dan Pengambilalihan Saham Perusahaan yang Dapat Mengakibatkan Terjadinya Praktek Monopoli dan Persaingan Usaha yang Tidak Sehat.