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HARMONIZATION OF CROSS-BORDER CARTEL IN THE ASEAN ECONOMIC COMMUNITY

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ABSTRACT

The Association of Southeast Asian Nations (ASEAN) is an intergovernmental organization that has agreed to form the ASEAN Economic Community (AEC). The AEC will transform ASEAN into a single market and production base. Focus on the free trade sector for goods, services, investment, skilled labor, and capital flows. Cartel practices can grow and develop in this situation, where a group of business actors from two or more countries can control the price and quantity of goods or services. The purpose of this study is to find out and understand ASEAN cross-border cartel control, as well as provide an overview of how ASEAN member countries harmonize the competition law products relating to cross-border cartels. The type of research method is normative, which is the legal research to find the truth of coherence whether the problem discussed is under the norms, principles, and the rule of law. Applied analysis is carried out to find solutions to the problems posed and related to comparative analysis to make comparisons. The research results show that ASEAN does not currently have binding laws regarding cross-border cartels. Each ASEAN member country has its business competition law. When cross-border cartel practices in ASEAN occur, effective harmonization of cross-border cartel regulation is needed to oversee anti-competitive activities in the ASEAN region.

INTRODUCTION

The ASEAN Economic Community (AEC) was born in 2003. The representatives of 10 state heads signed the Declaration of ASEAN Concord II which is a form of the statement that ASEAN is a forum for regional integration that is mutually beneficial among its member countries. ASEAN Member States (ASEAN Member States / AMSs) have committed to build and expand economic integrity. Share key responsibilities in strengthening economic, social, and security stability in the ASEAN region. Indonesia passed the

Investment Law and the demands of the ASEAN Economic Community in 2016 and in line with the president's program to make investors and the Indonesian people more active in realizing economic independence (Abrianto et al., No date)

This Declaration of ASEAN Concord II has three main pillars, namely, the ASEAN Security Community (ASC) as a security forum between member countries, the ASEAN Economic Community (AEC) as an integrated economic entity in Southeast Asia, and the ASEAN Socio-Cultural Community (AScC) as a form of social stability and culture in the ASEAN region. It is hoped that with the formation of this organization in the future ASEAN can be more unified by setting three main pillars that have been approved.

The AEC is a major step for AMSs to strengthen regional trade and collaborate, but this is not without challenges. The single market which is the main objective of the formation of the AEC has a very large tendency to shape regional problems, especially regarding issues that are closely related to business competition. The ASEAN Regional Guidelines on Competition Policy (ASEAN RGCP) was adopted in 2010 to form an umbrella for business competition law between AMSs to have synergetic regulations. (Claassen and Gerbrandy, 2018) say competition law remains focused on competition which increases economic welfare or is reformed to allow socially beneficial collaborative actions.

This guideline is also a preventive form to avoid legal uncertainty that is formed from disputes related to business competition in Southeast Asia. This is only a guideline, it is not an essential legal policy. AMSs are not required to adopt the ASEAN RGCP into their competition law system, but only as an example that the guidelines are an ideal form of legal regulation on competition to be applied in Southeast Asia. Also, this has an impact on the misalignment of competition policies among member countries.

AMSs seem to have their own ideals that are applied to competition law products, of course, this is not the wrong thing, but with the AEC where member countries must have an integrated and unlimited market. Differences in competition law products will lead to conflict and legal uncertainty when problems arise, there will be differences in competition arrangements that cause legal consequences in one country and another. This will certainly be confusing.

The impact of the AEC single market is that domestic companies will compete with other companies on a regional scale. Goods entering and leaving between member countries will have small obstacles, even without obstacles. The flow of goods and services will become easier. This will provide an advantage for business people both domestically and abroad in ASEAN. In terms of domestic business actors, business actors will have the opportunity to enter the regional scale and will be more motivated to produce products that can compete in Southeast Asia. Foreign business actors will also have a large profit as well, the existence of a single market will enable business actors to enter every domestic market in ASEAN.

The single market which is the goal of the AEC will form a relevant market in the Southeast Asian region which results in the birth of an oligopoly market structure. Large companies and businesses that occupy important sectors and not many competing business actors will have a great opportunity to set prices to get the maximum profit. Besides, business actors in the oligopoly market will also have a great opportunity to make agreements with other large business actors to control prices and regulate the amount of production to generate large profits for business actors in the agreement.

The cartel practice can grow and develop in this situation, where in the future business actors in this agreement will be able to control a large regional market. This is what later underlies the tendency for the practice of cross-border cartels, which incidentally can be done by business actors between member countries to control the single ASEAN market. This study discusses the unlimited regional markets formed by the AEC. The possibility of business actors to play in the AEC single market is huge, especially the cartel behavior that will be related to the business sector which can be said to have a large impact on the community because there are not many business actors in that field.

If this cross-border cartel practice occurs, of course, it will harm domestic consumers of the affected country. If the community is disadvantaged, this will be contrary to the objectives of the AEC itself which should be oriented and focused on the community. ASEAN itself does not yet have a strategic controlling that has to be implemented and binding. Each member country has its competition law so that it will cause problems when the practice of cross-border cartels occurs.

Based on the description above, the main problem is how the arrangement/control of cross-border cartels in ASEAN countries and the harmonization of cross-border cartel arrangements/controls in ASEAN. The purpose of this study is to find out and understand cross-border cartel arrangements/controls in ASEAN member countries. Give an overview of how ASEAN member countries should harmonize the regulation of competition law products, especially those relating to cross-border cartels.

METHOD

This type of research is normative, which is the legal research to find the truth of coherence whether the issues discussed are under norms, principles, and legal rules (Marzuki, 2011). The type of approach used is the statute approach. The statutory approach means understanding the hierarchy, and the principles of the statutory regulations related to this study (Marzuki, 2011). This approach will also look at the form of laws and regulations, then examine the material content, and also study the philosophical ontological basis and legis ratio from the birth of the law (Marzuki, Law and Revision, 2005). A comparative approach is also carried out by comparing laws in one country with other countries, as well as comparing the laws in several countries that regulate these problems (Marzuki, Law and Revision, 2005). It aims to obtain similarities and differences between the legal products studied.

Conceptual approach. This approach will focus on views and doctrines in law, and refer to legal principles (Marzuki, Law and Revision, 2005). This approach is important because the understanding of the views and doctrines that develop in the science of law can be a platform for building legal arguments when resolving the legal issues at hand. Views and doctrines will clarify ideas by providing legal understandings, legal concepts, and legal principles that are relevant to the problem. The case approach, this approach will focus on the ratio decidendi, the legal reasons used by the judge to arrive at his decision (Marzuki, Law and Revision, 2005). This approach will provide an overview of cases related to cartels and business competition that have been decided so that they can be used as a reference in the discussion of the proposed questions.

Sources of legal material used in this study are primary legal materials, secondary legal materials, and non-legal materials. Primary legal material is authoritative and constitutes legal material in the form of laws and regulations along with the content material (Marzuki, Law and Revision, 2005). Secondary legal materials consist of legal books, including undergraduate and postgraduate theses, legal dissertations, legal journals, written interviews, legal dialogues, legal seminars, and all legal references obtained from print and electronic media relevant to this research (Marzuki, Law and Revision, 2005). Non-legal material in the form of non-legal books, non-legal research, articles, and non-legal journals that have relevance to the research topic. Results of oral interviews, non-legal dialogues, non-law seminars, and lectures.

RESULTS AND DISCUSSION

Cross Country Border Cartels Control in ASEAN Member Countries

The cartel is called a syndicate, which means a written agreement between several manufacturing companies and others of the same type to control various things, such as territories, prices, and marketing. The definition of a cartel according to the Merriam-Webster Dictionary is "a written agreement between intelligent nations; and a combination of independent commercial or industrial enterprises designed to limit competition or fix prices. ”In ancient times the cartel was first introduced as a coalition or cooperative arrangement between political parties intended to promote shared interests in the German state in 1887. The cartel then developed into a term that describes an agreement made by a company to limit competition in the market.

A cartel is intended as an agreement formed by two or more companies that sell goods or services to increase profits among companies carried out by regulating supply and manipulating prices. An agreement formed in a cartel can be in the form of an agreement on the price of goods/services or the number of goods produced by the company. Goods or services traded in a cartel are usually goods or services that have a fixed selling power to facilitate the projected profitability.

The cartel in business competition law is categorized as a prohibited agreement. A prohibited agreement has two forms, namely a vertical agreement and a horizontal agreement. A vertical agreement is an agreement formed by business actors who are at different levels of business or supply chain. The agreement

formed by the producer business actor with the retailer business actor for certain goods or services is one example of a vertical agreement. Conversely, horizontal agreements are agreements made by business actors who are at the same level in a market. A cartel is a form of the horizontal agreement because it is carried out by business actors with competitors in the same level of business.

The cartel will have a positive impact on the members involved but is likely to have a detrimental effect on the market. The losses incurred by the cartel are related to social welfare arising from rising prices and reducing production volumes. A good market is a market that is created from demand and supply. This supply and demand mechanism will form high or low prices. Cartel carried out by the company in the market will cause supply to decrease even though demand is very high so that in the end consumers have no choice but to buy goods at prices that have been manipulated by cartel members.

Countries have now begun to open up domestic markets to compete in foreign markets. International competition is inevitable because the country certainly wants to compete and win the global market. Similar to domestic businesses, the purpose of the business formed is to get the maximum profit. The domestic market has provided sufficient profit for business continuity from business actors, even without any connection to foreign markets. The nature of the business is always trying to develop and expand the scope of the sales market. A thriving business is a good thing because healthy competition requires businesses to always innovate and be creative in the production and types of goods or services traded.

Business actors who do not want to contribute to the fair competition will use shortcuts to get profits in their business. The cartel becomes a means to control prices and production agreed with business competitors. The cartel formed will cause healthy competition to be negative and harm the market situation and consumer welfare. If it is associated with foreign markets, the cartel which was originally an anti-domestic competitive activity will turn into a transnational anti-competitive action that harms certain countries. It violates pricing because its value must be based on market prices (Anna, Mannan, and Srirahayu, 2019).

This type of cartel will then refer to the term cross-border cartel which is a form of cartel action carried out by business actors in a particular country which then harms other countries outside its borders. Cross-border according to Oxford Dictionary is defined as "Passing, occurring, or performed across a border between two countries." [35] This term can be interpreted as something that occurs across the boundary between the two countries. In a broader sense according to the Cambridge Dictionary, cross-border can be interpreted as an activity that occurs between different countries or involves people from different countries. If related to legal practice, cross-border can be understood as something that occurs beyond the jurisdiction of one country, related to other countries.

Cross-border cartels have almost the same meaning as cartels in general. The area covered by a cartel is a domestic area where the business actors carrying out the cartel originate, but for cross-border cartels, the area of cartel action will be interpreted not only to be in one jurisdiction but also to be related to the

jurisdiction of other countries. Cross-border cartels can be understood as anti-competitive activities carried out by business actors originating from a country, or business actors from several different countries, to control the amount of production and prices so that they can affect markets outside the country of the country where the business actors originate.

The types of cartels across national borders are no different from cartels carried out within national borders. The only thing that distinguishes is the existence of an international dimension of cartel behavior that occurs (Gasparikova, 2008). The practice of cross-border cartels can have a detrimental effect on state relations involved in cartels and countries affected by cartel activities, this can disrupt healthy competition in the global market and kill competitiveness of business competitors who are not incorporated in the cartel.

Up to now, there are no cross-country cartel cases that have been tried in court within ASEAN. In the EU in 2015 a verdict was issued in the case of a cross-border cartel (Case C-352/13-CDC) which is a multinational cartel case related to Cartel Damage Claims (CDC) against cartels by six Hydrogen Peroxide companies (hereinafter referred to as with CDC HydrogenPeroxide).

Harmonization of Cross-border Cartel Control in ASEAN

Harmonization of business arrangements/control in ASEAN means providing solutions and smart steps in finding the solutions needed. The best way to do this is to provide a comparison between ASEAN and EU, so that ASEAN can learn from experiences and arrangements in the EU that are more complex and binding. The background of ASEAN to EU comparison is that ASEAN has very similar characteristics to the EU when viewed from the scope and activities carried out. The EU is a role model because of its success in regulating EMSs into a legal system owned by the EU. EU has harmonious and binding regulations, especially in the field of business competition, while ASEAN does not. ASEAN will not be able to become a supranational institution like the EU. (Wong-Ervin, 2014) It is important for Courts in Europe to consider the principles of proportionality and equality.

ASEAN cannot be used as an institution like the EU, so strategic steps must be given as a solution to fill the vacuum of legal harmony of a dispute, especially related to business competition. One solution that can be done at this time is to apply the principle of community that is well known in international law. The doctrine of the community first developed in the Netherlands at the end of the 17th century. This doctrine was at that time developed to provide a middle ground between the sovereignty of a country's territory and the interests of international trade (Yntema, 1966).

Ulrik Huber who is one of the figures who pioneered the doctrine of comity gives the understanding that comity is "Exempla, quibus utemur, ad juris privati species maxime quidem pertinebunt, sed judicium de illis unice juris publici rationibus constat, & exinde definiri debent" (Yntema, 1966). Ulrik Huber explained that community is an example that should be used as a principle in the category of private law but the treatment given rests exclusively on the

principles of public law and must be determined by applicable regulations. This definition of Ulrik Huber can be interpreted more briefly as the communium gentium (civility of the nation) which is a justification for applying foreign law in a country.

Comity is a legal principle whereby a political entity, such as the state or court of jurisdiction, recognizes the legislative, executive, and judiciary actions of other jurisdictions. The idea underlying this is a country will later have to respect decisions made by courts from other countries. Comity has two forms, namely Positive Comity and Negative Comity. Positive comity means that countries that feel disadvantaged can make requests to other countries (Cooper and Law, 2001). If a cross-border cartel occurs, the country affected by the cartel's actions may apply to the country where the business offender originated. This request can even be submitted before a country is truly harmed, the tendency for losses to be obtained is sufficient to apply the principle of positive comity.

Positive comity is a reliable solution as an alternative to cross-border cartel dispute resolution, but its effectiveness is very limited. Positive comity is only effective if the infringing violation does not only occur in the country that made the request but also has the potential to harm the country of origin of the anti-competitive action. This is because if the violation which is called detrimental to another country turns out not to be a violation in the country of origin, the country as long as they have no reason to follow up on the request.

The negative comity, on the other hand, is if another country refrains from applying its laws related to the actions of business actors if the application of the law is contrary to the law of business competition in other countries. The negative comity is more related to all actions taken by a country to enforce the law by considering that these actions will not harm other countries.

The hard law approach is also an effective solution to punish business actors who carry out cross-border cartel actions. This approach contains extraterritorial elements, where although the business competition law owned by the two disputing countries does not have the same legal standards or definitions of business actors, the existence of this agreement constitutes an equalization and is binding for the countries contained in the agreement. The uncertainty about which state jurisdiction can apply business competition law for anti-competitive cases is answered by the existence of this bilateral agreement.

AMSs on the other hand, at this time no one has agreed to form a bilateral agreement, even though there is an opportunity to do so. The absence of a bilateral agreement can be caused by the existence of other interests held by each AMSs above the common interest. Mukti (2019: 247) said fair business competition in the ASEAN single market, it is very important that all countries have Competition laws. These regulations are made in each country by referring to guidelines that have been formulated at the ASEAN level to create legal harmonization. Strategies so that harmonization of cross-border cartel arrangements in ASEAN can be implemented, political barriers, and profit and loss must be immediately eliminated by AMSs. Based on good faith from the

AMSs themselves. If each AMSs is dedicated to jointly providing strategic steps to form a harmonized arrangement in ASEAN, even though it does not have a legal umbrella like that of the EU, harmonization of cartel arrangements across national borders can still be carried out using the options discussed.

CONCLUSION

The regulation of cross-border cartels in AMSs is marked by the existence of extraterritorial elements in the definition of business competition law subjects. Cross-border cartels have a great tendency to occur in the face of the AEC. The harmonization of cartel regulations in ASEAN becomes an urgency so that when cartel activities across national borders occur, there is no confusion about which legal products or state jurisdiction will be used to resolve the case. ASEAN as an intergovernmental organization will not be able to become a supranational institution as in the EU. ASEAN cannot form a product of the law. The business competition which has a supremacy nature towards AMSs. For this, AMSs need to take strategic steps so that harmonization of cartel regulations across national borders in ASEAN can be formed. The way that can be done is by applying the principle of community and bilateral agreements.

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