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PARTNERSHIP AGREEMENT BY DOMINANT POSSESSION
UNDERTAKINGS: LEGAL PROTECTION OF MICRO, SMALL, AND
MEDIUM-SIZED ENTERPRISES

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ABSTRACT

Micro, Small, and Medium-sized Enterprise is the economic sector that can absorb the largest workforce in Indonesia. MSMEs must be empowered and developed to improve competitiveness. To develop businesses owned by large and small business actors, both of them make a partnership agreement. The purpose of this research is to develop and improve a mutually beneficial bargaining position for the parties in a partnership and to create a healthy business competition. It also aims to protect business actors in the perspective of business competition law so that in the market structure, there is no economic concentration by certain business groups and control of business partners. This research was conducted using a statute approach, an approach that uses legislation or regulations related to business competition law as well as those related to patterns of partnership between large business and MSME actors. Case approach was applied to conduct an analysis in accordance with the legal facts that exist to complement and describe the unfair business competition in the community. The results show there is an imbalance in the agreement that causes a loss to one of the parties. There are behaviors that can result in unfair business competition, such as abuse of bargaining position and unilateral price determination beyond normalcy. Indonesian laws regulate policies so that MSMEs can be treated fairly and receive legal protection in the event of abuse.

INTRODUCTION

Micro, small, and medium-sized enterprises (MSMEs) have an important role in development and economic growth. MSMEs have encouraged developing countries and developed countries to continue striving to develop their businesses. In Indonesia, MSMEs are used as a source of economic or income

growth (Tambunan, 2009). It can be proven during the economic crisis that occurred in Indonesia. A number of large-scale businesses did not develop and even stopped their activities. The conditions experienced by large businesses were inversely proportional to the micro, small, and medium-sized business sectors, which have been proven to be more resilient in dealing with economic crises (Hafsah, 2004).

MSMEs experience marketing constraints. One of which is limited access to information about market opportunities in the business world (Tambunan, 2009). Often market access is closed to MSME entrepreneurs because of large groups of entrepreneurs. Large businesses can gain more profits and have large capital in running their businesses. Big entrepreneurs have a power to compete in the market. This competition has an influence on the authorities, namely the government that makes a regulation. This situation is difficult to accept for MSME entrepreneurs to advance.

Competition policy is highly relevant for all companies in any economy. Although it is unlikely that micro, small, and medium-sized enterprises (MSMEs) have sufficient market power to limit competition through the abuse of power, they may still face prosecution if they are involved in boycotting competitors or suppliers, price fixing, limiting output, and other monopolistic agreements. (Zhang and Lu, 2013).

According to Sudaryanto and Wijayanti (Sudaryanto and Wijayanti, 2013), MSMEs are the economic sector that can absorb the largest workforce in Indonesia. Aware of the economic importance of SMEs, the Malaysian government was strengthened especially in the internationalization of SMEs. One of the preparations for liberalization is exploring opportunities for market access abroad through partnerships (Kheng, Jani and Yusof, 2018). MSMEs must be empowered and developed to improve competitiveness. The empowerment of MSMEs in the midst of globalization and high competition must make MSMEs able to encounter global challenges. Efforts that can be carried out include increasing product and service innovations, developing human resources and technology, and expanding marketing areas. Those are necessary to improve the selling value of MSMEs, especially in order to compete with foreign products that are increasingly flooding the industrial and manufacturing centers in Indonesia.

The development of MSMEs through the business empowerment approach needs to pay attention to social and cultural aspects. In the social aspect, there are interactions among MSME actors that bring a good impact because interactions occur between MSME business actors (Abidin, 2015). In the cultural aspect, MSME actors conform to the life of a community in which individuals or groups of people behave to realize the cultural values in each region by remembering that small and medium businesses in general grow directly from the community (Hafsah, 2004).

The existence of social and cultural aspects of the development and empowerment of MSMEs can be synergized with industries or large entrepreneurs through partnership patterns. Basically, a partnership is a

mutually beneficial activity with various forms of cooperation in dealing with and strengthening each other, namely by conducting partnerships. Large businesses will gain benefits, such as skills, while small businesses will gain benefit, such as more ease to sell their goods (Ibrahim, 2006).

The definition of partnership based on Law Number 20 of 2008 pertaining to Micro, Small, and Medium-sized Enterprises is as follows: "Partnership is cooperation in business relations, both directly and indirectly, based on the principle of mutual need, trust, support, and benefit involving Micro, Small, and Medium-sized Enterprises and Large Enterprises". Indonesian people should be more active in realizing economic independence by mobilizing strategic sectors of domestic economy (Abrianto *et al.*, no date).

A Partnership Agreement can be established verbally, but it is better if it is in writing. Partnership Agreement (Ibrahim, 2006:29) also means that the parties can agree to carry out the provisions contained in the agreement, except violating provisions. Violating provisions refer to the provisions in the agreement contained in Article 1320 BW that are not fulfilled, such as default. Partnership agreements can be made simple and easy to understand by both parties or in complex circumstances. A partnership agreement is made in writing. It is to avoid default by parties in the future and can be used as legal evidence (Ibrahim, 2006:32).

Policies in business competition are shown to encourage equal business opportunities for large, medium, and small business actors. It is expected to be able to open market access, capital, and technology for MSMEs. This means that MSMEs can no longer be marginalized. In accordance with the objective of enacting Law Number 5 of 1999 pertaining to Monopolistic Practices and Unfair Business Competition, it is made to create a conducive business climate through the regulation of fair business competition, and guarantee the certainty of equal business opportunities for large, medium, and small business actors. It is mentioned in Article 3 (b) of Law Number 5 of 1999 pertaining to Prohibition of Monopolistic Practices and Unhealthy Business Competition (Margono, 2009:34).

Exceptions are provided for small businesses in Law Number 5 of 1999. Prohibitions and sanctions do not apply to business actors in the category of micro, small, and medium-sized enterprises (MSMEs). MSMEs are excluded from Law Number 5 of 1999 is because MSMEs do not have a strong ability to compete with large business actors. This is caused by, among others, the weak capital of MSMEs and very limited ability of human resources. MSMEs do not have the opportunity to discriminate prices, cartels (production and regional prices), closed agreements, and boycotts in carrying out their business (Margono, 2009:35)

In their development based on Law No.20 of 2008, subsequently regulated in Article 31 of Government Regulation No.17 of 2013 pertaining to MSMEs, the Indonesia Competition Commission (ICC) has been given duties and authority to oversee competition. In supervising partnerships, the ICC has additional duties related to partnerships; some of which are not reached by Law Number 5

of 1999, such as abuse of bargaining position. Economic inequality can trigger multidimensional problems in the daily life of the nation (Fatihudin, 2019).

Based on the explanation above, the formulation of the problem to be studied is, first, whether there is an abuse of bargaining position carried out by large business actors against MSMEs in a partnership agreement. Second, what is the form of legal protection for MSME actors who enter into partnership agreements in the perspective of business competition law? The research is aimed to develop and improve a mutually beneficial bargaining position for the parties in a partnership and to create healthy business competition. It also aims to protect business actors in the perspective of business competition law so that in the market structure, there is no economic concentration by certain business groups and control of business partners.

METHOD

The research method used in this paper is normative research, which is conducted based on applicable laws and regulations related to the discussion. There were three applied approaches. The first is a statute approach, an approach that uses legislation or regulations related to business competition law as well as those related to patterns of partnership between large business and MSME actors. Case approach was applied to conduct an analysis in accordance with the legal facts that exist to complement and describe unfair business competition in the community (Mahmud, 2015).

Sources of primary legal materials and secondary legal materials (Mahmud, 2015). The sources of primary legal materials were laws and regulations related to business competition law, such as Law Number 5 of 1999 pertaining to Monopolistic Practices and Unfair Business Competition, Law Number 20 of 2008 pertaining to Micro, Small, and Medium-sized Enterprises, Government Regulation Number 17 of 2013 pertaining to Micro, Small, and Medium-sized Enterprises on the implementation of Law Number 20 of 2008, Law Number 9 of 1995 pertaining to Small Businesses, and Commission Regulation Number 1 of 2015. The secondary legal material were taken from journals, interviews, and electronic data to be further examined based on legal theories and related legal principles.

RESULTS AND DISCUSSION

Bargaining Position as Unhealthy Business Competition Behavior

Bargaining Position is a form of injustice where there is one party that has the power to exploit its position to gain an unfair advantage from another party who has a weak bargaining position (Hutabarat, 2010). Bargaining Position is mentioned in Law No. 20 of 2008 pertaining to Micro, Small, and Medium-sized Enterprises, which explains that the bargaining position in conducting business cooperation with other parties should be commensurate so that it is mutually beneficial.

With the presence of competition, there is a need for legal rules governing business competition in order to prevent anti-competitive business competition

practices. The law governing business competition is Law Number 5 of 1999 pertaining to Prohibition of Monopolistic Practices and Unfair Business Competition. In Law No. Number 5 of 1999, the three categories of prohibited actions are (1) prohibited agreements, (2) prohibited activities, and (3) dominant position (Siswanto, 2002).

Law No. 5 of 1999 also conveys categories of prohibited agreements, actions that may not be carried out by business actors to make certain agreements with other business actors. The prohibition is a prohibition on the validity of the object of the agreement which is prohibited by law and can be detrimental. Any agreements made with the object of the agreement in the form of things that are prohibited by law are null and void. The agreements that are prohibited are regulated in Chapter III of Law No. 5 of 1999, which includes several forms of prohibited agreements, namely monopoly and oligopoly (Siswanto, 2002).

Prohibited activities are regulated in Law No. 5 of 1999, which determines four prohibited activities. The prohibited activities consist of monopoly, monopsony, market control, and conspiracy. Monopoly, which is regulated in article 17 of Law No. 5 of 1999, is an activity that is the subject of a prohibition contained in Law No. 5 of 1999. Monopolistic practice is the concentration of economic power by one or more business actors, which results in the control of production and or marketing of certain goods or services that can lead to unfair business competition and harm the public interest.

Monopsony is regulated in Article 18 of Law No. 5 of 1999. It is the situation when a business group controls a large market share to buy a product, so there is a single buyer, which will lead to monopolistic practices and unfair business competition. It also occurs when the single buyer controls more than 50% of the market share of a type of product or service. Market control is regulated in article 19 to article 24 of Law No 5 of 1999. In market control, the party controlling the market is the party that has market power, namely businesses that can dominate the market so that they can determine the price of goods or services in the relevant market.

Market control, which is prohibited by Law No. 5 of 1999, can occur in the sales of goods and or services by way of, (a) undercutting (predatory pricing) with the intention to drive out competitors; (b) fixing production costs fraudulently and other costs that are components of the price of goods; and (c) executing price war and price competition.

Conspiracy is regulated in article 22 of Law No. 5 of 1999. It is a collaboration involving two or more business actors who jointly take actions against the law. The act of conspiracy mentioned in article 1 paragraph 8 of Law No. 5 of 1999 is "a form of cooperation carried out by business actors with other business actors with the intention to control the relevant market" (Siswanto, 2002).

The regulation of abuse of bargaining position in Law No. 5 of 1999 pertaining to Monopolistic Practices and Unfair Business Competition does not regulate the presence of abuse of bargaining position, which is a form of unfair business competition behavior. The bargaining position occurs because of the

cooperation between business actors. Such cooperation can be mutually beneficial and provide equivalent positions for the parties. On the other hand, many things happen to business actors who conduct cooperation; there is a behavior that causes unfair business competition, namely the abuse of bargaining position.

A bargaining position in an agreement made by business actors will create competition. One form of competition is competition in the economic field. The form of competition in economics is business competition, with the competition of competing business actors, for example, in seizing buyers and market share. The competition gives more advantages compare to non-competition. There are positive and negative aspects of the competition.

The negative effect is the abuse of bargaining position. A business actor with an inferior bargaining power position will incur losses and not be able to develop its market share. This leads to the dependency of the inferior party to the party with a superior bargaining position.

Law No. 5 of 1999 does not regulate the abuse of bargaining power position. Yet, in the abuse of bargaining power position, there are elements of unfair business competition as part of Law No.5 of 1999. The elements of unfair business competition mentioned are namely price-fixing, market control, and abuse of a dominant market position.

Legal Protection for MSMEs in the Partnership Agreements with Large Business Actors in the Perspective of Business Competition Law

Micro, Small, and Medium-sized Enterprises (MSMEs) encounter many obstacles due to limited working capital and investment as well as the difficulties in marketing, distribution, procurement of raw materials, and other inputs. The limited workforce with high expertise, technological capabilities, transportation costs, insufficient communication, and high costs due to complex administrative and bureaucratic procedures, especially in managing business licenses (Tambunan, 2009:75).

The main issue is the limited capital financing and difficulties in marketing. In encountering the limited capital, MSME actors apply for a bank loan, yet in the application process, there are some required documents such as Tax Identification Number (NPWP). On the other hand, to get the NPWP, a business actor has to do the financial reports. As a result, only a few business actors want to apply for a bank loan to increase their capital. Moreover, the complexity of the administration process causes difficulties in getting a bank loan.

In general, MSMEs marketing does not have resources to search, develop, or expand the market, so in this case, MSMEs depend on their partners, such as large business actors. To encourage equal business opportunities among the large companies and MSME actors, access to capital markets and technologies for MSMEs is essential. MSMEs should no longer be marginalized and discriminated against compared to big companies (Tambunan, 2009:75).

MSMEs authorize partnership through a partnership agreement with large business actors in the effort of expanding their business. Large business actors have more capital and power in market share and business development. However, large business actors often undertake the abuse of partnership agreement, which can result in losses for MSME actors. The abuse of partnership agreement leads to an unbalanced position, which means the inability of MSMEs to compete independently and still dependent on the large business actors. Due to the unbalanced position that causes unfair business competition, the government is obliged to provide legal protection and certainty.

Settlement agreements are outrageously harsh on SMEs, exceeding penalties required by law, and preventing the use and litigation of various statutory provisions designed to protect businesses from liability. These changes will encourage SMEs to enter the international market and protect SMEs from the costs of investigations and settlement penalties that endanger business actors' financial condition (Laudone, 2016).

The legal protection of MSMEs in partnership agreements is based on Law no. 5 of 1999. Law No. 5 of 1999 pertaining to Prohibition of Antimonopoly and Unfair Business Competition article 3 point b states to create a conducive business climate through healthy business competition, thus securing the equal business opportunity for large-, middle- and small-scale business actors. However, article 3 point b does not explicitly mention legal protection. This article not only implicitly ensure the business opportunity for the business actors but also guarantee legal protection (Sari and Sari, 2015).

Government Regulation No. 17 of 2013 is about the legal protection of MSMEs in partnership agreements. MSMEs encounter many obstacles so that MSMEs cannot compete to develop their businesses in the business climate. Thus, MSMEs do partnerships with big business actors. In conducting the business, the partnership agreement often creates an imbalance that results in losses for either party. Partnership cooperation conducted by MSMEs with big business actors, which makes MSMEs are in a weak position compared to large businesses that have power.

Legal Protection of MSMEs in partnership agreements is based on Commission Regulation No. 1 of 2015. ICC oversees partnerships so that there are competitive business policies that encourage the creation of equal struggle opportunities between micro-, small-, and medium-sized enterprise actors, which is expected to open the market access, capital, and technology for MSMEs. MSMEs should no longer be marginalized and discriminated against compared to large entrepreneurs. Commission Regulation No. 1 of 2015 indirectly provides legal protection from the perspective of competition law for MSME actors who engage in partnership activities.

CONCLUSION

Government Regulation No. 17 of 2013 regarding the implementation of Law No. 20 of 2008 pertaining to MSMEs provides benefits for the MSME actors, such as giving legal protection for MSMEs. Government Regulation No. 17 article 30 assigns ICC to monitor partnership between large companies and

MSMEs. The purpose of partnership monitoring is to prevent the unfair practices of large companies in partnership activities. ICC enacted Commission Regulation No. 1 of 2015 regarding the Procedures for Supervision of Partnership Implementation to administer the Partnership Activities Supervision. This regulation provides legal protection from the perspective of competition law for MSME actors who engage in partnership activities.

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