PalArch's Journal of Archaeology of Egypt / Egyptology

THE CONCEPT OF BUSINESS COMPETITION AGREEMENTS

M. Faisal Arifuddin[1], *Ria Setyawati*[2]

[1,2]Department of Civil Law, Faculty of Law, Universitas Airlangga.

*Corresponding Author: [2]ria.setyawati@fh.unair.ac.id

M. Faisal Arifuddin, Ria Setyawati. The Concept Of Business Competition Agreements-- Palarch's Journal Of Archaeology Of Egypt/Egyptology 17(3), 1997-2004. ISSN 1567-214x

Keywords: Agreement, Business Competition, Juridical

ABSTRACT

Agreement is an important thing to do in the field of business competition. Benchmarks of the validity of an agreement become important when business actors enter into an agreement that is not in accordance with the rules contained in the Law. The purpose of this study first, to determine the suitability of the concept of agreement in business competition law with the concept of law. Second, the implementation of agreements in practice in the field of business competition is related to the legal concept of an absolute agreement based on evidence. Normative research methods are used to find the rule of law, as well as legal doctrines in order to deal with the legal issues at hand. Approach the problem through law and conceptual. Sources of primary and secondary legal materials. The material collected is then analyzed to answer the formulation of the problem raised, and provide conclusions. The results of the study show that business actors argue that there is no agreement between them if there is no element of "agreement" between business actors which is a legal condition of agreement in Burgerlijk Wetboek (BW). In this case KPPU as a law enforcement agency can ensnare business actors. KPPU can ensnare actors based on various types of evidence, such as direct evidence (hard evidence) and indirect evidence (circumstantial evidence, as well as by sharing the kinds of approaches possessed by KPPU such as the application of the concept of concerted practice.

INTRODUCTION

The business world has an important role in a country's economic growth. Economic growth is a measure of the country's progress. Countries that have rapid economic growth will also be increasingly competitive at the global level. The existence of the business world encourages business actors to compete with other business actors. Business actors compete or compete to improve the products and services produced. Various kinds of innovations are carried out to give satisfaction to consumers. Technological developments also influence the process of buying and selling transactions (Utama et al., No date)

There are two kinds of business competition, namely fair competition and unfair competition. Fair competition is a market or industrial structure in which there are many sellers and buyers, and every seller or buyer cannot influence the situation in the market. Unfair business competition is competition between business actors in carrying out production and or marketing activities of goods or services which are carried out in a way that is not honest, against the law, and inhibits business competition.

The law has an important role in dealing with problems that arise as a result of Unfair Business Competition. Recalling during the 32 years of the New Order government, Indonesia did not yet have a business competition law, so the regulation on business competition was only sporadically regulated in various regulations (Kagramanto, 2012). This resulted in several businesses that were allegedly full of dishonest, manipulative, monopolistic business competition and not far from corruption, collusion, nepotism (KKN) between entrepreneurs and business actors.

Efforts to create perfect competition still have obstacles in some existing rules. Local Private Entities as regulated further by the Law on Regional Government (Abrianto et al., No date). There are no rules or court decisions that can prevent cheating. On March 5, 1999 by the Government of the Republic of Indonesia, finally issued legislation regarding the Prohibition of Monopolistic Practices and Unfair Business Competition, namely Law Number 5 of 1999, hereinafter referred to as Law No.5 of 1999. It is expected to provide guarantees legal certainty, and encourage accelerated economic development in an effort to improve public welfare.

The purpose of making Law No. 5 of 1999 stated in Article 3 of the Act, among others (a) safeguarding the public interest and increasing national economic efficiency as an effort to improve people's welfare; (b) creating a conducive business climate through the regulation of fair business competition so as to ensure the certainty of equal business opportunities for large businesses, medium business actors, and small business actors; (c) prevent monopolistic practices and or unfair business competition arising from business actors, and (d) the creation of effectiveness and efficiency in business activities.

Law No.5 of 1999 was formulated by the Commission. This formation was based on Article 34 of Law Number 5 Year 1999 which instructed that the formation of the organizational structure, duties and functions of the commission be determined through a Presidential Decree (Keppres). This commission was then formed based on Presidential Decree Number 75 of 1999 and named the Business Competition Supervision Commission (KPPU) (Bunyamin and Meyliana, 2013). KPPU as an independent institution can be said that KPPU has a very large authority which includes the authority possessed by the judiciary. This authority includes investigations, prosecutions, consultations, hearings, hearings and decide cases.

KPPU is a special organization that has a dual task, in addition to creating order in business competition the KPPU also has a role to create and maintain a conducive business competition climate. KPPU has a law enforcement function

specifically in business competition law, however KPPU is not a specialized judicial institution for business competition. KPPU is not authorized to impose sanctions both criminal and civil. KPPU's position is more an administrative institution, so the sanction imposed is an administrative sanction. KPPU's legal status is as an independent institution that is independent of the influence and power of the government and other parties. KPPU in carrying out its duties is responsible to the President (Bunyamin and Meyliana, 2013).

The fact that is happening today is met by many business actors who still violate the written rules contained in Law No. 5 of 1999. It was found several business actors who made agreements with other business actors to bring down other business actors, resulting in unfair competition behavior. In its application, KPPU has not been able to act optimally to ensnare fraudulent business actors due to the concept of agreement in Law No. 5 of 1999 is still less concrete in discussing banned agreements, so it becomes a blemish for unfair business actors.

Companies sometimes feel that they can relinquish these responsibilities by collaborating with other companies, but this is suspected from the perspective of economic interpretation solely of competition law, because conflicting agreements can raise prices and thereby reduce consumer welfare (Claassen and Gerbrandy, 2018).

Based on the background description above, there are problems that can be raised in this study. The first problem formulation is, how is the concept of agreement in the business competition law in accordance with the concept of agreement in the Law. Second, how is the existence of an absolute agreement through the proof carried out by entrepreneurs. The purpose of this study first, to determine the suitability of the concept of agreement in business competition law with the concept of law. Third, the implementation of agreements in practice in the field of business competition related to the concept of the validity of an absolute agreement based on the evidence.

METHOD

This type of research used in this study is normative legal research. Type of normative juridical research is a problem approach that has the intent and purpose to study the applicable laws and regulations, as well as theoretical concept books and then relate them to the issues to be discussed. This study analyzes to find the rule of law, legal principles, and legal doctrines in order to deal with the legal issues faced (Marzuki, 2011).

Approach to the problem through the law (statute approach) is done by examining all laws and regulations relating to the legal issues being handled (Marzuki, 2011). The second approach is the conceptual approach (conceptual approach) which is done by analyzing the understanding through legal concepts and principles relating to the main problems in writing this study (Mahmud, 2015).

The source of primary legal material used is the legislation relating to the problem. Primary materials include (a) the Civil Code (Burgerlijk Wetboek);

(b) Criminal Procedure Code; (c) Law Number 5 of 1999 concerning Monopolistic Practices and Unhealthy Business Competition; (d) Regulation of the Commission for the Supervision of Business Competition Number 01 of 2010 concerning Procedures for Handling Cases; (e) Regulation of the Business Competition Supervisory Commission Number 04 of 2010 Concerning Implementation Guidelines for Article 11 Regarding Cartels; (f) Regulation of the Business Competition Supervisory Commission Number 09 Year 2010 Concerning KPPU Expert Staff; (g) Regulation of the Business Competition Supervisory Commission Number 4 of 2011 concerning Guidelines for Article 5 (Pricing).

Secondary legal material sources include all legal publications that are not official documents. Publications on law include textbooks, legal dictionaries, legal journals, and comments on court decisions (Mahmud, 2015). Literature study which is then continued with collecting legislation both in the form of softcopy and hardcopy. News articles from print and internet media that have relevance or relevance to the issues discussed. The material collected is then analyzed to answer or elaborate the formulation of the problem raised, and provide conclusions.

RESULTS AND DISCUSSION

Conformity between the Concept of Agreement in Business Competition Law (UUNo. 5 of 1999)

The concept of agreement in Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition. Subject of law, in Law No.5 of 1999 are business actors in which business actors in the Act are defined in Article 1 number 5 that can be in the form of individuals and legal entities. Legal subjects are individuals or legal entities capable of carrying out legal actions. The legal subject in Burgerlijk Wetboek (BW) and Law No. 5 of 1999 can be said to have conformity.

The form of the agreement in Law 5 of 1999 is explained in the agreement definition of Article 1 Number 7 in which it states that the agreement in Law No. 5 of 1999 can be either written or unwritten. The agreement in BW can also be stated in two forms, written and unwritten. Furthermore, there is a discrepancy between Law No.5 Year 1999 and BW, which is the legal effect of the agreement, in BW the legal consequences of an agreement are, among others, (a) valid as a law; (b) cannot be withdrawn; (c) implementation in good faith; (d) bind the parties to the agreement; (e) freedom of clause in determining the contents of the agreement.

The legal consequences of business competition before an agreement is said to apply as a law does not have to be in the name of a agreement like what is in the legal terms in BW. Agreements are binding only on business actors who make agreements. In Law No.5 of 1999 the legal consequences are more on the imposition of sanctions on business actors who have violated or violated the provisions in Law No.5 of 1999, such as the imposition of administrative sanctions, the imposition of criminal sanctions, and the imposition of civil

sanctions.

The discrepancy between Law No.5 of 1999 and BW there is a matter which becomes a gap for business actors to violate the rules in Law No.5 of 1999 namely regarding the legal terms of the agreement. In Law No. 5 of 1999 does not explicitly regulate the legal conditions of the agreement, referred to as an agreement if it has fulfilled the elements of the agreement definition set out in Article 1 Number 7 of Law No. 5 of 1999, whereas in BW it is stated that a legal agreement is an agreement that has fulfilled the four legal requirements of the agreement set out in Article 1320 to explain that an agreement must fulfill four conditions, namely, "agreed" those who bind themselves, "skills" for making engagement, and "causes" or permissible causes.

The explanation above can be understood between the concept of agreement in BW and Law No.5 of 1999 there are differences, especially regarding the legality requirements of agreements where in BW there must be the word "agreement" while in business competition law there is no need for the word "agreement" to be categorized as an agreement. In addition, the agreement in Law No. 5 of 1999 only regulates agreements made by business actors only, in which the definition of business actors in Law No.5 of 1999 is defined in Article 1 Number 5.

It is different from BW which in the concept of the agreement regulates who makes the agreement. Invalid agreements in BW because they do not meet the requirements of the legal agreement Article 1320, it is still considered an agreement by the KPPU to postulate that the KPPU has several authorities, which authority is regulated in Article 36 of Law No.5 of 1999.

Existence of an Absolute Agreement through Proof

Proof is a very important part in the process of examining a case. Said to be important because proof is a process that determines that a person is in a right or wrong position, breaking the law or not, which can result in imposing sanctions or not. Proof can also be interpreted by a judicial process in order to find the truth so that the decision handed down can fulfill a sense of justice, there are differences in the concept of truth that is sought between criminal and civil cases. In general it is said that in examining criminal cases the judge seeks ultimate truth or material truth, whereas in civil cases formal truth alone is sufficient.

Based on the two concepts of truth, the case of business competition adheres to material truth or formal truth. Material truths that are carried out in business competition cases if the reported business actor does not acknowledge the violations that have been committed in the trial process. The formal truth is that a verdict has been met if the reported business actor recognizes the violations that have been committed before a judicial hearing (Bachelor, 2012).

In the examination conducted by KPPU, it refers to the legislation and technical rules that apply in the commission to the verification. KPPU has a legal approach that is different from the approach taken in the handling of criminal

and civil cases, regarding the evidence used and the issuance of its decision in handling a case made by an inter-businessman (Bunyamin and Meyliana, 2013).

Business competition law recognizes 2 juridical approaches that are used to analyze an act, the act is either an agreement or an activity, has or does not violate antitrust laws, both approaches are per se illegal approach and rule of reason. Both of these approaches are first listed in some supplements to the Sherman Act 1980, which is the US Antimonopoly Law, and were first implemented by the United States Supreme Court in 1899 (for per se illegal) and in 1911 (for rule of reason) in decisions on several antitrust cases. As a pioneer in the field of business competition, the approaches implemented in the US are also implemented.

There is no clear standard that defines the limits of illegal behavior. The threat of antitrust responsibility can only reduce competition between companies, which results in losses in the competition process and, ultimately, consumers. Businesspersons promote sales among other different sellers and usually use the possibility of getting rid of competitors (Topel, 2018).

Likewise with Indonesia. In Law No. 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition the rule of reason approach can be identified through the use of the editorial "which can result" and or "should be suspected." These words imply the need for more in-depth research, whether an action can lead to practice monopoly which is inhibiting competition. The application of the per se illegal approach is usually used in articles that state the term "prohibited", without the clause "which can result". KPPU also applies these two approaches in making decisions on business competition cases.

Evidence consists of two, namely direct evidence (Hard Evidence) and indirect evidence (Circumstansial Evidence). Proof is needed in the development of business competition cases because direct evidence becomes increasingly difficult to find and the existence of competition supervisory institutions has become a factor that is taken into account, so that matters relating to direct evidence have been avoided by business actors, but the use of indirect evidence must still carried out in a proof frame as regulated in Law No. 5 of 1999.

Hard evidence is a proof that can be submitted physically by litigants related to business competition in the trial process. Hard evidence is more recognized by the legal force in the Indonesian legal system compared to indirect evidence (Circumstantial Evidence), besides direct evidence is easier to obtain direct evidence also has tangible and concrete physical forms, direct evidence can also be prove that there is an agreement, a written agreement that clearly explains the material of the agreement made by the business actor who is litigating in the trial process. Hard evidence (hard efficiency) there is agreement and substance of the agreement that has been made by business actors. Direct evidence can be in the form of fax evidence, recorded telephone conversations, electronic mail, video communications, and other tangible evidence.

Indirect evidence (circumstantial evidence) in Indonesia still raises the pros and

cons, especially in the view of the law. Bearing in mind the legal system of law both in the HIR-RBG and in Law no. 5 of 1999 is not known in evidence which explicitly reads indirect evidence or economic evidence. Legal experts in Indonesia see that circumstantial evidence in the cartel case cannot be automatically used in Indonesian law. Especially if the business actor is threatened by paying a fine because a violation of a criminal offense must be proven by a criminal procedure law in accordance with the Criminal Procedure Code.

Definition of indirect evidence (circumstantial evidence) is a means of evidence that does not directly lead to allegations that have been made in an act against the law and states the existence of price fixing agreements and cannot be used directly as proof of the occurrence of a condition / condition that can made allegations for the enforcement of an unwritten agreement. Indirect evidence can be in the form of communication evidence (but does not directly state the agreement), and economic evidence which is the purpose of proving indirect evidence is an effort to rule out the possibility of independent pricing behavior. The form of indirect evidence that is appropriate and consistent with the conditions of competition and collusion cannot be used as evidence that there has been a violation of the agreement that is prohibited in Law No.5 of 1999.

CONCLUSION

The concept of agreement in business competition law has not fully fulfilled the legal requirements of the agreement in BW.UU No.5 of 1999 in Article 1 Number 7 regarding the agreement apparently not complete using the concept of agreement in BW. those who are prohibited can use the pretext of the absence of the agreement itself by using the concept of agreement in the BW. In business competition law the existence of an agreement is not absolutely necessary, it is strengthened by the concept of concerted practice. The concept of concerted practice actually provides an opportunity for KPPU in stating that prior to the agreement of business actors with other business actors, it can already be said as an agreement. An absolute agreement can be proven directly or indirectly.

REFERENCES

Abrianto, B. O. *et al.* (no date) 'Model On Legal Transformation of the Local-Owned Enterprise to Public and/or Private Local Entities towards Climate Investment Boost'.

Bunyamin, H. and Meyliana, M. (2013) 'Learning from Google: Increasing the Quality of Worklife'.

Claassen, R. and Gerbrandy, A. (2018) 'Doing good together: Competition law and the political legitimacy of interfirm cooperation', *Business Ethics Quarterly*. Cambridge University Press, 28(4), pp. 401–425.

Kagramanto, L. B. (2012) *Mengenal hukum persaingan usaha berdasarkan UU no. 5 tahun 1999*. Laros.

Mahmud, M. P. (2015) 'Penelitian Hukum edisi revisi', *Jakarta: Kencana*.

Marzuki, P. M. (2011) 'Penelitian Hukum, Jakarta: Kencana', *Mertokusumo, Sudikno*.

Sarjana, I. M. (2012) 'Prinsip Pembuktian Dalam Hukum Acara Persaingan Usaha'. UNIVERSITAS AIRLANGGA.

Topel, R. H. (2018) 'Contractual Discounts and Competition: Interpreting Unilateral Conduct under Section 2 of the Sherman Act', *International*

Journal of the Economics of Business. Taylor & Francis, 25(1), pp. 131–146.

Utama, A. A. G. S. *et al.* (no date) 'INCREASING THE EXISTENCE OF SMES IN BANYUWANGI DIGITAL COMMERCE THROUGH DESIGNING DECISION SUPPORT SYSTEM (DSS) FOR BANYUWANGI MALL SITE'.