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A LEGAL ANALYSIS: PRICE FIXING AGREEMENT BY PHARMACEUTICAL COMPANY IN INDONESIA

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ABSTRACT

The competition among business actors in the business world spurs them to keep innovating. Therefore, the competition atmosphere becomes unhealthy, especially in the price-fixing process. This research studied the action of pharmacies selling drugs exceeding the Highest Retail Price and violate the Law of the Republic of Indonesia Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition. This study also explained the legal remedies for those who incurred losses due to the pharmaceutical company network selling drugs over the Highest Retail Prices or HET. The law prohibits price-fixing agreements because it would eliminate price competitions for products sold or marketed and affect consumers' benefits that should be received by consumers instead of received by the producers and sellers. Therefore, in the law of business competition, price-fixing agreements are considered illegal per se. In the efforts to protect society, organizations and regulations are established to process the violations of price-fixing agreements.

INTRODUCTION

Drugs are the most required essential needs for those who suffer from diseases. They also function to support the immune system strength for the sufferers. However, drug prices in Indonesia are relatively higher compared to other countries. One of the causes is the increasing number of foreign companies and investors establishing pharmaceutical companies in Indonesia. This condition also indicates the existence of fraud, such as collusion, and business marketing between the sellers and doctors, and the high prices of materials for producing drugs. These situations enable business actors to end up with the unfair competition.

The unfair competition is related to the price-fixing agreement. In the Law of Business Competition, the price-fixing agreement is prohibited as it would harm the fair competition atmospheres. This agreement could eliminate fair competition among business actors in that market area as the price is far higher than the price that can be reached through fair competition, resulting people would suffer losses directly or indirectly (Rachmadi, 2013). Unfair competitions provide impacts on drug price determination, including Price Discrimination Agreement and Predatory Pricing (Kagramanto, L. Budi, 2008). The discrimination practices allow consumers to be discriminated against and cause business actors to lose the competition due to the lower prices they offer (Kagramanto, L. Budi, 2009).

The large variety of drug prices creates people's confusion and hesitation to obtain the drugs needed. As a result, the term of the Highest Retail Price or HET is initiated. There are two types of Resale Price Maintenance, i.e., Maximum Price Fixing and Minimum Resale Price Maintenance. In February 2006, the Indonesian Health Minister issued two policies regarding the attachment of the Highest Retail Prices on drug labels, i.e., the Decree of the Minister of Health Number 069/Menkes/SK/II/2006 concerning the Attachment of Highest Retail Prices on Drug Labels and The Decree of the Minister of Health Number 068/Menkes/SK/II/2006 concerning the Guidelines for Implementing Generic Names on Drug Labels. The attachment of Highest Retail Prices is applied to both non-prescription drugs and ethical drugs. The ethical drugs are those that can be purchased under the doctor's prescription. Based on The Decree of the Minister of Health Number 069/Menkes/SK/II/2006, the Highest Retail Prices written on drug labels are the net price of pharmacy plus 10% of value-added tax plus 25% of drugstore margin (The Ministry of Health, 2006).

People should be aware of the HET as each person has the right to be protected as consumers. Besides, to support business competition to be fairer and transparent, it needs to determine the drug prices marketed. Even though the Highest Retail Prices have been regulated by The Decree of the Minister of Health Number 069/Menkes/SK/II/2006, it is still frequently found the drug prices higher than the Highest Retail Prices in the pharmaceutical company network in Surabaya (Jawa Pos, 2015). Those drugstores offer drugs with relatively more expensive than the Highest Retail Prices listed on the drug labels.

Drug factories and Major Pharmaceutical Suppliers are allowed to increase the distribution costs with a maximum of 5 % for regional I and II, maximum of 10 % for regional III, and maximum of 20% for regional IV. Meanwhile, Surabaya is included in regional I with a maximum of 5 % distribution costs (Indonesian Pharmacist Association, 2010). The drugstores which sell drugs at higher prices than the Highest Retail Prices are mostly the drugstores with some branches and 24 hours service. Hence, those drugstores are suspected of conducting a price-fixing agreement.

This research investigated the drugstores that sold drugs with the prices higher than

the Highest Retail Price based on the Law of the Republic of Indonesia Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition. This research also aim to explain the legal remedies for those that incurred losses due to the pharmaceutical company network selling drugs at higher prices than the Highest Retail Prices.

RESEARCH METHOD

This research was a doctrinal and theoretical research. The approaches applied were conceptual, case study, and statute approaches. The sources of legal entities used were primary legal materials and secondary legal materials. The primary legal materials included Indonesian Civil Code, the Law of the Republic of Indonesia Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition, the Decree of the Minister of Health Number 069/Menkes/SK/II/2006 concerning the Attachment of Highest Retail Prices on the drug labels, the Law of the Republic of Indonesia Number 36 of 2009 concerning Health, the Regulation of Business Competition Supervisory Commission/KPPU Number 1 of 2010 concerning the Procedures for Handling Business Competition, and the Regulation of the Supreme Court Number 3 of 2005 concerning the Procedures for Filing legal remedies toward KPPU decisions. Meanwhile, the secondary legal materials included articles, legal journals, legal dictionaries, books, lecture notes, and handouts related to the subject being discussed in this research. This research used relevant laws and regulations, such as legislation, regulations, delegated legislations, and delegated regulations. The primary material collection was carried out by literature studies. The legal materials were analyzed using the deductive method.

RESEARCH FINDINGS AND DISCUSSION

The agreement concept in Law Number 5 of 1999 points the Prohibition of Monopolistic Practices and Unfair Business Competition. Article 1 Number 7 explains that an agreement is an action by one or more business actors to bind themselves with one or more other business actors under any name, either in writing or not. It can be concluded that there are several important points that can be highlighted from the statement above as follows: the agreement is carried out without discussing the goals; the agreement occurs because of an action; the parties contribute in the agreement are business actors; and, the agreement can be created either in written form or others. Law Number 5 of 1999 prohibits business actors from conducting a particular agreement that can cause unfair competition.

An agreement prepared with the contract objects prohibited by Law Number 5 of 1999 is considered null and void and invalid because it is against the law (Rachmadi, 2013). The article states that several articles can be treated as contract objects, such as Article 4, 7, 8, 9, 11, 12, 13, 14, and 16. If the agreement does not result in monopolistic practices and/or unfair business competition, the agreement is valid as it is considered as a rule of reason agreement (Kagramanto, L. Budi, 2008).

Article 5 of Law Number 5 of 1999 regulates price-fixing agreement, which prohibits business actors from establishing an agreement with their competitors in fixing prices for goods or services that consumers must pay in the same relevant market. The relevant market is the certain reachable marketing areas of business actors for the same goods or services or the substitution of said goods/services. In determining the relevance of the relevant market, it is generally carried out using a product sensitivity approach in the running area of product marketing. Besides, the applicable approach is the elasticity of demand approach (Kusumawati, 2007).

This price-fixing agreement also occurred in the associated companies and was carried out in various ways, including through a command from the holding companies to its subsidiaries. In this case, Pharmaceutical Company Network, which provided 24 hours service, was included in a horizontal pricing category. It was caused by the existence of more than one company from the same production level, which determines the product prices at the same level with a higher price than HET, such as 24 hours service drugstores in Surabaya. In this case, the prices of both non-prescription drugs and ethical drugs were regulated in The Decree of the Minister of Health Number 069/Menkes/SK/II/2006 concerning the Attachment of Highest Retail Prices on Drug Labels and the Decree of the Minister of Health Number 068/Menkes/SK/II/2006 concerning Guidelines for Implementing Generic Names on Drug Labels. The Decree of the Minister of Health Number 069/Menkes/SK/II/2006 regulates the determination of Highest Retail Prices, consisting of the net price of pharmacy plus 10% of value-added tax plus 25% of drugstore margin. It indicated that the drugstore 's profit or margin was included in the Highest Retail Prices.

The following table illustrates the price comparison between two large drugstores in Surabaya, providing 24-hour service, Kimia Farma and K24 drugstores, and regular drugstores with no branches and 24 hours service, Okta and Trijaya Abadi drugstores.

Table 1. The Price Comparison of Drug Types in Several Drugstores in Surabaya

Drug types	Highest Retail Price	Kimia Farma	K24	Okta	Trijaya Abadi
FG TROCHES MEIJI	IDR 12,375/10 tablets	IDR 12,800/10 tablets	IDR 12,500/10 tablets	IDR 10,800/10 tablets	IDR 10,500/10 tablets

In the table, the FG Troches Meiji brand is included with the Highest Retail Price of IDR 12,375 for 10 tablets. On Kimia Farma and K-24 drugstores, the price exceeds the Highest Retail Price, while on Okta and Trijaya Abadi drugstores, the prices are below the Highest Retail Price. Based on the observational results obtained, the two drugstores selling their drugs with the price higher than HET were the drugstores with branches and 24-hours service. On the other hand, other drugstores did not exceed the Highest Retail Prices. However, from the data

obtained, it could not be concluded that those drugstores had arranged an agreement as it was not easy to prove regarding it required media, e-commerce, collusion investigations. Moreover, the price-fixing agreement can be either written or not (Sayekti, Cenuk Widiyastrisna, 2008).

Collusion was carried out through coordination resulting in agreement, including a higher price agreement exceeding the price obtained through a mechanism in competitions, the quantity determination agreement that was lower than the quantity in a competitive situation, and market sharing agreement. In this case, the prices of drugs sold by 24-hour drugstores exceeded the Highest Retail Prices; consequently, they were suspected of conducting a price-fixing agreement more than HET to gain higher profit.

The price-fixing agreement is considered illegal per se. Illegal per se is one of the approaches employed to assess whether an agreement or activity carried out by business actors has violated the Law Number 5 of 1999. Article 5 of Law Number 5 of 1999 regulates the illegal per se activities and agreements, therefore, they do not require further investigation or further impacts resulted from the price-fixing agreement (Sirait, Ningrum Natasya, 2010). Price-fixing prohibition does not apply to an agreement created in a joint venture and an agreement based on applicable laws (Kagramanto, L. Budi, 2009).

Price-fixing agreements provided several negative impacts on business competition, including the loss of competition between business actors engaged in the agreement due to the existence of price-fixing agreement higher than the price obtained through the mechanism of fair competition, the existence of agreement to set certain quantity to be lower than the quantity in a competitive situation, and the existence of sharing market agreement between business actors under the agreement.

Price-fixing could cause the loss of innovations because the selling price of an item sold by business actors under the agreement might be very high compared to the fair price or a balanced market price. Consequently, it could lead to un-applicable market laws, which is formed from the existence of supply and demand (Sayekti, Cenuk Widiyastrisna, 2008).

The Decree of the Ministry of Health Number 069/Menkes/SK/II/2006 concerning the Attachment of Highest Retail Price on drug labels is one of the government's efforts in fulfilling its roles and responsibilities as the regulator. However, it could be a problem if the price regulation and control is carried out with elementary and unstructured methods, and only emphasizes on price limitation aspect.

The regulation and control of the price emphasizing on price limitation aspect could provide negative impacts. The impact cycle started with the existence of price controls emphasizing on price limitation aspect, resulting in the decrease of pharmaceutical companies' incomes. The income decrease could reduce R&D

investment, slow down the efforts of new drug discovery, cut the access to new drugs, which consequently could affect health care programs.

Price-fixing is carried out by pharmaceutical companies for the drug group of IB and LPG, known as branded generic drugs. The content of this drug is a generic type or LPG with the same price as the Innovator Brand or IB. Several regulations issued by the government tends to intervene in price limitation, for instance, the prices of generic branded drugs should not be three times higher than the prices of generic drugs. On the other hand, the government found difficulties to regulate and control the prices of IB drugs if price limitation was applied because the market logic would work as: if IB prices were limited to gain profit, the pharmaceutical industries for Foreign Investment Company would not sell the drugs with lower prices, as a result, people would experience difficulties in obtaining drugs. Besides, it might result in fatal effects for the IB drugs that had not generic substitution yet. LPG drugs experienced the same cases as IB drugs. If the price set by the government was below the production costs, the pharmaceutical companies of State-Owned Enterprises would not produce generic drugs.

The policy regulations contained in the Decree of Ministry of Health Number 069/Menkes/SK/II/2006 substantially required drug manufacturers to put the Highest Retail Price on drug labels and on the smallest packaging unit either on non-prescription drugs or ethical drugs. It must be written in a large size using bright color and permanent ink on the visible part.

The government authority in regulating drug prices was considered low because over thousands of drug types marketed, the government only had the authority to regulate the price of drugs included in the National Essential Medicines List or known as “NEML” updated once each two years. From 232 types of generic drugs in Indonesia, there were only 153 types of drugs listed in NEML, so the prices were determined by the market mechanism along with non-prescription drugs, branded generic drugs, and patented drugs. The government regulation concerning the attachment of HET was related to the Health Laws, specifically on the Government Regulation Number 72 of 1998 concerning the Safeguarding of Pharmaceutical Products and Medical Devices, especially on chapter VII concerning Affixing and Advertising. This matter was concluded from the term “at least” written on the sign affixing information and pharmaceutical inventory information. Although there was no obligation to attach the Highest Retail Price on drug packaging or pharmaceutical supplies in the regulation, the term "at least" caused the flexibility of labeling rules and could be added. It concluded that the government had the authority to require business actors to include additional information needed in drug packaging in the form of the generic drug name or the Highest Retail Price.

HET provision that limited pharmacy margins could reduce their competitive behaviors, which could certainly affect the service quality provided. However, this action could not always be justified because the net price of pharmacy, as the indicator on HET determination, had varying values of margins on each drug listed

in the net price of pharmacy, ranging from 10%-70% for certain drugs. This condition enabled the drugstores' retailers to sell drugs at the higher or lower prices than the the net price of pharmacy regulated. The Decree of Minister of Health Number 069/Menkes/SK/II/2006 was in line and not against the regulations in the Law Number 5 of 1999 because the policies to include HET on drug labels regulated by the Health Ministry aims to ease people to find out the price of drugs needed. In addition, there were no rules or policies that contradicted or were prohibited in Law Number 5 of 1999.

A commission, based on Article 34 of Law Number 5 of 1999, was formed to control the implementation of Law Number 5 of 1999, which provided instruction that the formation of organizational structures, duties, and functions of the commission were determined by Presidential Decree. Then, the commission was formed based on Presidential Decree Number 75 of 1999. The commission was then named as Business Competition Supervisory Commission/*Komisi Pengawas Persaingan Usaha* or KPPU (Kagramanto, L. Budi, 2009). KPPU is not the only institution authorized to handle monopoly and business competition cases, the District Court and the Supreme Court also have the authority to settle these cases. The KPPU authorities are stated in Article 38 paragraph (1) and (2) of Law Number 5 of 1999, including investigating, prosecuting, consulting, examining, adjudicating, and deciding cases.

In this case, the reporting parties are divided into two categories, i.e., those who know that violations have occurred or reasonably are suspected on the Law Number 5 of 1999 and those who are harmed by the violations of Law Number 5 of 1999. The identities of reporting parties will be confidentially guaranteed by Article 38 Paragraph 3 of Law Number 5 of 1999. The procedures for processing violations are in line with the Regulation of Business Competition Supervisory Commission Number 1 of 2010 Article 11 concerning the Procedures for Handling Cases. The articles included are Article 11 Paragraph (2), Article 14 Paragraph 2, Article 14 Paragraph 3, Article 12 Paragraph 2, 3, 5, 6, and Article 13. The clarification results, as referred to in Article 12 Paragraph (5), consist of the report of study results, as referred to in Article 18, the report of investigation results, as referred to in Article 33 Paragraph (4), or the report of supervision results, as referred to in Article 27 Paragraph (3). The investigations for the types of loss statements, as referred to in Article 11 Paragraph (4) are not conducted, so the loss statements that have been approved in the Commission Meetings are then examined with the preliminary examination.

There are three possibilities in KPPU's decisions as follows: firstly, business actors shall accept the KPPU decisions and voluntarily implement penalties imposed by KPPU, if the business actors do not perform legal remedies to file an objection within 30 days, so there will be a permanent legal force and fiat execution. Secondly, business actors reject the KPPU's decision and subsequently submit objections to the district court within 14 days. Thirdly, if the business actors do not submit an objection but do not intend to perform KPPU's decision within 30 days, the KPPU would submit the decisions to the investigators to conduct an

investigation under the applicable provisions. In this case, the KPPU's decisions would be considered as sufficient preliminary evidence for the investigators to continue the investigation. If a drugstore or pharmaceutical company is found violating the provisions in the Law Number 5 of 1999, the reporting parties or business competitors who feel aggrieved could submit a report to the KPPU. After the KPPU has completed the report with sufficient evidence, the report can be processed to the trial stage on the KPPU. Services and agreements in pharmacy have complex systems such as general introduction, health care systems, pharmaceutical practices, and pharmacy education, stereotypes and misunderstandings, evaluations for health care, or education units (Kawaguchi-Suzuki et al, 2019).

CONCLUSIONS, IMPLICATIONS AND LIMITATIONS OF RESEARCH

Prove price-fixing agreements between business actors is not a simple matter because price-fixing agreements can be either in written form or not. Based on the data collection obtained from the field, two drugstores are suspected of performing price-fixing agreement to sell drugs at prices exceeding the Highest Retail Price or the supposed maximum retail price. If the price-fixing agreement is discovered clearly, it can be considered as the violation of Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business. The procedures for handling these cases are regulated on the Regulation of Business Competition Supervisory Commission Number 1 of 2010, particularly in Article 11 concerning Procedures for Handling Cases. To sum up, there is a legal remedy for the party that experiences loss due to price-fixing agreements

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