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THE JURIDICAL APPROACH IN INDONESIA COMPETITION LAW

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ABSTRACT

Implementation of juridical approach which is per se illegal or rule of reason is not easy to apply in cases of business competition. It can be seen from the violation case of article 27 of Law No. 5 of 1999 regarding the case of Cinema 21 which was decided using the Perse Illegal approach. However, in the same case concerning the cross ownership of the Temasek Group case, the Business Competition Supervisory Commission decides to use the Rule of Reason approach. In order to avoid uncertainty arising from the differences in the use of juridical approach, then this study reviews the juridical accuracy towards the cross ownership in the legal perspective of business competition. After analyzing several aspect considerations, it could be concluded that the Rule of reason approach was more accurate to apply because it could prove the fulfillment of the elements in article 27.

INTRODUCTION

The business world with a mechanism which is full of competition when it is viewed from the economic side is a condition sine qua non for the implementation of market economy and it everlastingly will lead to crime or violation (Mochtar, 2013). Seeing the competition carried out by business actors is getting tougher, causing the values of fair business competition to get greater attention in the Indonesian economic system. The legal enforcement of competition is an economic instrument that is often used to ensure that competition among the business actors can take place fairly and the result can be measured in the form of people's welfare improvement. In order to prevent unfair business competition, the Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition has been established in Indonesia. The Law No. 5 of 1999 is intended to enforce the legal rule and provide equal protection for every business actor. Thus, it can

provide the guarantee of legal certainty to encourage more economic development in an effort to improve the public welfare, as well as the implementation of the 1945 Constitution. One of the actions that can cause unfair competition which is cross ownership or majority share ownership as regulated in article 27 of Law No. 5 of 1999. Provision in the article 27 regulates that a business actor is prohibited from holding majority shares in several similar companies which carry out business activities in the same field and is concerned in the same market or establish several companies which have the same business activities.

The approach which is used towards the provision in the Law No. 5 of 1999 greatly influences the process of examination for the cases involving the provision in the level of examination in *Komisi Pengawas Persaingan Usaha/ KPPU* (Business Competition Supervisory Commission), the level of objection in the District Court, and the level of cassation in the Supreme Court. The consideration of the Business Competition Supervisory Commission Council in its decision for the Cinema 21 case, namely the KPPU Decision Number 05/KPPU-L/2002 uses the Perse Illegal approach in examining the reported involvement in the case against the violation of Article 27 of Law No. 5 of 1999. However, in the decision of the Business Competition Supervisory Commission for the case of Temasek Group Number 07/KPPU-L/2007, the Business Competition Supervisory Commission decides based on the consideration that the approach which should be carried out towards the Article 27 of Law No. 5 of 1999 is the Rule of Reason. The purpose of the preparation and enforcement of competition policies is to maintain the balance between the fulfillment of the fairness principle and the legal certainty principle. However, in practice the use of the perse illegal approach or the rule of reason is not easy to apply to the business competition cases.

In this case, there is the possibility that the same provision can be used one of the two approaches - depending on the condition surrounding the case which is being examined. But on the other hand, the flexibility of using an approach in examining the action of business actors suspected of violating a similar provision in the Law No. 5 of 1999 can cause confusion and uncertainty for business actor who is examined. In an effort to avoid further problems, this study was conducted to avoid the legal uncertainty arising from the difference in the use of juridical approach. This is because legal uncertainty arising from the difference in the use of the approach is feared to lead to the possibility of practice abuse.

RESEARCH METHOD

The type of writing which conducted in this paper was legal research. According to Morris L. Cohen and Kent. C Olsen (in Marzuki, 2017), legal research was a process of finding law that regulated human association activity involving rules applied by the state and comment that explained or analyzed the rules. Peter Mahmud Marzuki formulated the legal research as a process to find the legal rule, legal principles, and legal doctrines in order to answer the legal issues encountered (Marzuki, 2017). The problem approach which would be used to

study this problem which was using the statute approach, conceptual approach and case approach.

Analysis of legal material in writing this article was conducted by analyzing the source of legal material using deductive methods. The sources of legal material which analyzed was the related Law and Regulation and literature as a general matter, then conclusion was drawn specifically, furthermore, it was discussed, arranged, described, interpreted, and reviewed the problem to get an idea regarding the synchronization level of all legal materials and obtained a conclusion as an effort to solve the problem.

DATA AND SOURCE OF THE DATA

There were 2 types of legal material sources used for the preparation of this article, namely primary and secondary legal materials. Primary legal material was an authoritative legal material which had an authority. The primary legal material used consisted of Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, Regulation of the Business Competition Supervisory Commission Number 7 of 2011 concerning Guidelines of Article 27 (Cross-ownership), and other related regulations, as well as several court decisions. Decisions that became the focus of this study included KPPU Decision Number 05/KPPU-L/2002 and KPPU Decision Number 07/KPPU-L/2007. Secondary legal material was a supporting legal material that served to strengthen or adorn the writing of this thesis, for secondary legal material consisted of related legal books or economic books, and legal journals.

RESULTS AND DISCUSSION

Juridical approach consisted of the Per se Illegal approach and the Rule of reason. Per se illegal or rule of reason has long been applied to assess the action of business actors when allegedly violating the Law No. 5 of 1999. The type of behavior which determined per se illegal would only be carried out after the court had sufficient experience of the behavior, namely that the behavior was almost always anti-competitive and almost always never brought social benefits (Hovenkam, 1993). Meanwhile, the rule of reason was the implementation of an approach that lead to the role of the court and the location of discretion in interpreting the law (Wilken *et al.*, 2006).

Per se Illegal

According to Kissane & Benerofe, that an action in business competition regulation was said to be illegal in per se (per se illegal), if:

"... the court has decided clearly that there is anti-competition, in which there is no need for an analysis towards the certain facts of the problem to determine that the action has violated the law." (In Suharsil and M. Taufik Makarao, 1996).

Based on the opinion above, it could be said that the actions which clearly violated the law of business competition could immediately be determined as

illegal. In terms of Per Se Illegal provision, those who accused the other party carried out violation must prove that the action was carried out without requiring the effects or consequences (Davidson, Forsythe and Knowles, 2015). In practice, this regulation was useful, thus business actor was aware of the signs towards prohibited action since the beginning and must be kept away from their business practices in order to avoid the emergence of large potential business risks in the future as the consequences of violating the norms of the prohibition (Usman, 2013). In addition, the implementation of per se illegal also brought benefits, namely, reducing costs (Lubis, 2009), more widely binding the prohibition that depend on evaluating complex market conditions, shortening time (Kagramanto, 2012), and forming legal certainty on legal issues antitrust (Rokan, 2010). On the other hand, the excessive implementation of the per se illegal approach could reach the action that did not harm the consumer and could encourage the competition to become legally wrong (Kagramanto, 2012).

Rule of Reason Approach

Different from the per se illegal approach, the rule of reason considered the reason for the occurrence of customer besides the proof of the plaintiff (Hovenkamp, 2018). The Rule of Reason approach was applied to the actions whose illegality could not be easily to see without analyzing the consequence of the action on competition condition. In its implementation, the rule of reason required consideration towards other factors, such as the background of the action and the business reason behind it (Suhasril and Makarao, 2010). In this approach, if there was objective reason (usually economic reason) that could justify (reasonable) that action, then the action was not a violation of the law or the action was legal. Conversely, if other factors such as the background from the action which carried out, the business reason behind that action and the consequences which was caused in the market and the competition could lead to unfair business competition, then these other factors could not justify the actions taken by the business actor (unreasonable).

The advantage of the rule of reason approach was its implementation that used economic analysis to achieve the efficiency in order to determine the implication of business actors towards the competition, so it accurately determined the efficiency of the business actors action (Rokan, 2010). On the other hand, this approach also had disadvantage, which required longer time, and substantial costs.

The Accuracy of the Juridical Approach

Each legal competition generally has included the action that was classified as per se illegal or rule of reason. However, in practice, the use of these two approaches has not yet obtained the legal certainty. In this study, the characteristics which used as a guideline to determine the accuracy of the juridical approach for article 27 No. 5 of 1999 was presented by Kagramanto.

Several aspects must be considered to determine the right juridical approach in analyzing the action of dominant position abuse related to cross ownership, some of these aspects would be explained as follows:

Linkage with Dominant Position

The definition of dominant position legally is contained in the Article 1 number 4 of Law No. 5 of 1999 which stated that:

"A dominant position is a condition where business actor does not have a significant competitor in the relevant market in relation to the market share domination, or the business actor has the highest position among the competitors in the relevant market in relation to financial ability, the ability to access supply or sale, and the ability to adjust the supply or demand for certain goods or services."

The provision of Article 1 number 4 of Law No. 5 of 1999 regulated the conditions or parameters of dominant position. There were 4 (four) conditions which owned by a business actor as a business actor who had a dominant position, that was, the business actor did not have a significant competitor or the business actor had the higher position compared to the competitors in the relevant market in relation to the market share; financial ability; the ability to access the supply or sales; the ability to adjust the supply or demand for certain goods or services. Based on that, to determine the dominant position, market share was not the only criterion for determining the dominant market position. If reviewing the provision of article 27 of Law No. 5 of 1999 that there was an element of market share domination above 50%, thus the market share element was not the only criterion for determining which business actor has a dominant position. Thus, it needed other parameters that were useful for determining the dominant market position, namely the Rule of reason approach.

Linkage of Article 27 and Article 25

Implementation of the provision regarding cross ownership in Article 27 of Law No. 5 of 1999 could not be examined partially, but must be comprehensive and holistic. As the consideration in applying the approach, it must pay attention to the linkage of Article 27 of Law No.5 of 1999 with other provision in the Law No.5 of 1999 that had similarities or conformity, the relation to this matter with the provision of Article 25 of Law No.5 1999 concerning the dominant position in general, where in the Law No.5 of 1999, article 27 was included in the Chapter concerning Dominant Position. Regarding this matter, then it could be obtained the linkage with the provisions of Article 25 of Law No. 5 of 1999 which regulated the dominant position in general. Article 25 paragraph (1) of Law Number 5 of 1999 regulated that: financial ability; the ability to access the supply or sales; the ability to adjust the supply or demand for certain goods or services. Based on that, to determine the dominant position, market share was not the only criterion for determining the dominant market position. If reviewing the provision of article 27 of Law No. 5 of 1999 that there was an

element of market share domination above 50%, thus the market share element was not the only criterion for determining which business actor has a dominant position. Thus, it needed other parameters that were useful for determining the dominant market position, namely the Rule of reason approach.

Linkage of Article 27 and Article 28

Implementation of the provision regarding cross ownership in Article 27 of Law No. 5 of 1999 could not be examined partially, but must be comprehensive and holistic. As the consideration in applying the approach, it must pay attention to the linkage of Article 27 of Law No.5 of 1999 with other provision in the Law No.5 of 1999 that had similarities or conformity, the relation to this matter with the provision of Article 25 of Law No.5 1999 concerning the dominant position in general, where in the Law No.5 of 1999, article 27 was included in the Chapter concerning Dominant Position. Regarding this matter, then it could be obtained the linkage with the provisions of Article 25 of Law No. 5 of 1999 which regulated the dominant position in general.

The provision of Article 27 of Law No. 5 of 1999 relating to the Article 28 of Law No. 5 of 1999 concerning cross-ownership was carried out by a merger or acquisition or establishment of several companies which had the same business activity which was carried out by consolidation of companies as regulated in Article 28 paragraph (1) and (2). Regarding this matter, it could be said that Article 27 was a lex specialis to the Article 28, therefore, the requirements in the provision of Article 28 stated that there was the element "resulting in monopolistic practices and or unfair business competition" should also be applied to special regulation in this case in the Article 27, thus the meaningful and consistent results could be achieved by the system. Based on the article 27, cross ownership and the establishment of several similar companies which had the impact on the ownership of dominant position was regulated using the Per Se Illegal approach, however the acquisition of shares which had the impact on the cross ownership was not prohibited by Article 28 paragraph (2) and the action of corporate consolidation had an impact on the establishment of several similar companies which then caused the ownership of dominant position was also not prohibited by Article 28 paragraph (1) because it used the Rule of reason approach, thus it was an inconsistency.

In order to create the ideal and consistent condition, there must be the conformity between the Article 27 of Law No. 5 of 1999 and the Article 28 of Law No. 5 of 1999. The formulation of Article 27 which was a specific regulation, so that the more general regulation in Article 28 that was not regulated in Article 27 should also be applied to the implementation of Article 27, namely regarding prohibition that caused monopolistic practices and or unfair business competition. Thus, it was more appropriate if article 27 of Law No. 5 of 1999 used the Rule of Reason approach.

Unfulfillment the Essence of Per Se Illegal

In the principle, there were two conditions in carrying out the Per Se Illegal approach. First, it must be aimed more at "business behavior" rather than the market situation. Second, there was the quick and easy identification regarding the types of practices or restrictions of prohibited behavior. Article 27 of Law No. 5 of 1999 was a provision which regulated the cross ownership and related to a dominant position in the market, thus it was more related to the market situation rather than business behavior. The next reason was that there could not be carried out the quick and easy identification towards the action of cross ownership which caused the domination of the market share above 50% as the form of prohibited behavior. Therefore, the condition regulating in article 27 of Law No. 5 of 1999 was not in line with the requirements of the Per Se Illegal approach. The use of the rule of reason was more appropriate because many trade restrictions that have been determined by per se illegal did not make sense (Velde, 1973).

Based on the aspects explained above, it could be concluded that to determine the right juridical approach in analyzing the abuse of dominant positions related to cross ownership was the Rule of reason approach. The rule of reason approach was deemed more accurate to apply. By using the Rule of reason approach in Article 27 of Law No. 5 of 1999, beside to prove the fulfillment of the Article 27 elements, the Business Competition Supervisory Commission must also prove the ownership of a dominant position which caused by cross ownership in monopolistic practices or unfair business competition.

CONCLUSION

Based on the explanation above, it could be obtained the result that although there were no standard provisions related to the implementation of per se illegal or rule of reason for handling the cases that were snared by Law no. 5 of 1999, but a case must obtain the legal accuracy. In the research that used case study towards the cinema 21 and the Tamasek group, it appeared that the rule of law approach was more appropriate. Through the rule of reason approach, it not only proved the fulfillment of the elements in article 27, but also must indicate the proof of ownership of the dominant position.

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