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LEGAL CERTAINTY OF THE CASE DECISION BY INDONESIAN COMPETITION LAW AUTHORITY

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ABSTRACT

The Business Competition Supervisory Commission uses the *decision head sentences* (prefix) in its decision related to violation of article Law No. 03 K/KPPU/2002. The *decision head sentence* has been used in a decision since the pre-independence era, but the use is limitative because it can only be used by the judicial institution. The appearance of the *decision head sentences* on the decision made by the Business Competition Supervisory Commission is stated as an action that exceeds its authority in the Law No. 5 of 1999 concerning the prohibition of monopolistic practice and unfair business competition. This study aims to determine the juridical consequences towards the existence of the *decision head sentences* in the decision which is issued by the Business Competition Supervisory Commission. In addition, this study also aims to determine the legal certainty and the power of execution on using *decision head sentences* in the decision of the Business Competition Supervisory Commission. The Business Competition Supervisory Commission which has the role as a state auxiliary organ does not have the authority to use the *decision head sentences* in its decision because of the Law No. 5 of 1999. In that article, the Business Competition Supervisory Commission only has the basis for existence, duty and authority. The Business Competition Supervisory Commission does not have sources of authority such as attribution, mandate, or delegation, thus the use of the *decision head sentences* in the KPPU's Decision exceeds the authority which was given. Therefore, the decision of the Business Competition Supervisory Commission is declared null and void by law.

INTRODUCTION

In Indonesia, the *decision head sentences* have been used since the pre-independence era. The use of *decision head sentences* is very limitative which means its use can only be stated on certain documents, one of which is the decision of the judicial institution. Besides being used within District Court Decision, the *decision head sentences* is also used in several documents such as *grosse* deed of debt recognition, *grosse* Confiscated Mortgage, Arbitration Decision, Certificate of Mortgage Rights, Certificate of Fiduciary Guarantee, and Special Court Decision such as Tax Court Decision, Child Court, Commercial Court, Human Rights Court, Corruption Court and Industrial Relations Court. Basically, the *decision head sentences* shows the object of the responsible person for the decision (Moeliono and Wulandari, 2015).

Indonesian law does not provide the legal basis for regulating or guaranteeing prices for any product (Prihandono and Relig, 2019). However, various kinds of regulation which regulate economic activities and the work of developing and enforcing these regulations are in the hands of the government. At the global level, economic law carries the greater quality considering its scope and the economic actor who involved (Niyobuhungiro, 2019). Economic law is the branch of law that regulates the public economic relationship among the government, its economic administrative institution, economic organization and their citizen.

One of the institutions that handles the law and economy in Indonesia is *Komisi Pengawas Persaingan Usaha/ KPPU* (the Business Competition Supervisory Commission). The institution is a commission which has the duty to enforcing business competition law (Simbolon, 2019). This institution is an independent state auxiliary organ and is under the judicial authority, thus there is no superior and subordinate position inside. The Business Competition Supervisory Commission does not have judicial function that is regulated in article 24 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. In Law No. 5 of 1999 which is the basis for the establishment of the Business Competition Supervisory Commission, does not regulate the authority of the Business Competition Supervisory Commission to use the *decision head sentences*.

After being formed as the institution that given the authority by article 5 of 1999 to supervise and carry out the legal enforcement in the field of business competition, the Business Competition Supervisory Commission has the right to make decision towards business actor who carried out unfair competition. However, in practice the Business Competition Supervisory Commission has not been able to execute. Unimplemented execution indicates that there are still many problems in implementing the execution of the Business Competition Supervisory Commission, both normatively and practically (Resi, 2013).

The procedure for handling cases by the Business Competition Supervisory Commission itself is regulated in the Article 38 to Article 46 which listed in Chapter VII of Law No. 5 of 1999. This procedure is further regulated more completely in Decision of the Business Competition Supervisory Commission Number 05/KPPU/Kep/IX/2000 concerning Procedure for Submitting Report

and Handling the Alleged Violation of Law No. 5 of 1999. The issuance of Business Competition Supervisory Commission's Decision shows that the Business Competition Supervisory Commission can also play a role as a self-regulatory body, namely the provisions which made by the Business Competition Supervisory Commission are binding wide community (Asshiddiqie and Republik, 2008).

The decision making of the Business Competition Supervisory Commission is one of the important sources within the Business Competition Law in Indonesia. The Business Competition Supervisory Commission has issued many decisions on the cases of monopolistic practice and unfair business competition. However, in several Decisions of the Business Competition Supervisory Commission are found several decisions that use the *decision head sentences* "For the Sake of Justice Based on the God Almighty" as the opening sentences of the decision.

The *decision head sentences* was firstly used in the Decision of the Business Competition Supervisory Commission Number 01/KPPU-L/2000 in the case of PT. Caltex Pacific Indonesia which violated the Article 22 of Law No. 5 of 1999 concerning Collusion among fellow bidders which carried out to determine the winner of the tender. Furthermore, the Business Competition Supervisory Commission also re-used the *decision head sentences* until the decision Number 03/KPPU-I/2002 concerning Tender for the sale of shares and bond. This legal uncertainty will have a bad impact since the sentences should only be used by judicial body that has judicial authority. Therefore, the study aims to find out the legal certainty and the execution power. In addition, this study also explores the executorial power of the decision and the underlying laws and regulations.

RESEARCH METHOD

This study used the statute approach and conceptual approach. Statute approach was an approach that was carried out by analyzing all the laws and regulations relating to the legal issues which being handled (Wiratraman, 2019). Meanwhile, the conceptual approach was an approach that was carried out by analyzing the understanding through legal concepts and principles relating to the main problems in writing this study (Marzuki, 2017).

Sources of legal materials used in this study were primary and secondary legal sources. Primary legal sources which used including laws and regulations relating to the issues presented, including civil law, herzien inlands reglement, the Law Number 5 of 1999 concerning the prohibition of monopolistic practice and unfair business competition.

Furthermore, secondary legal sources was obtained from the sources that supported the discussion of issues such as legal text books, magazines, scientific writings, legal journals, articles from the internet, as well as other sources relating to business competition law, the Business Competition Supervisory Commission, judicial procedural law, and judicial power.

RESULTS AND DISCUSSION

Based on its function, institutions in Indonesia were divided into primary institution and auxiliary supporting institution (Asshiddiqie and Republik, 2008). Supporting institution was the institution that helped implementing the duty of executive, judicative and legislative state institutions. These supporting institutions were also referred as self regulatory agencies, independent supervisory bodies, or institutions that carried out mix-function among regulative, administrative, and punishment functions which were usually separated but carried out simultaneously by these new institutions. State auxiliary organ or also known as auxiliary institution was the supporting state institution formed outside the constitution.

The position of the Business Competition Supervisory Commission in Indonesia was as a state auxiliary. The Business Competition Supervisory Commission was an implementing institution or executive institution that carried out supervision. The judicial function of the Business Competition Supervisory Commission appeared in its duties and authority to evaluate the agreements and activities of business actors. The Business Competition Supervisory Commission had the authority to examine and decide upon a business competition case. This could be seen in Article 44 and Article 45 of Law no. 5 of 1999 whose contents related to the justice. The Law no. 5 of 1999 was a basic for the recognition of business competition as an economic pillar within the economic system in Indonesia, it was based on the *Pancasila* and the 1945 Constitution (Lubis, 2009). Basically, the main objective of regulating business competition was to protect the values of fair competition itself in order to improve the welfare of the community. Community welfare was expected to be guaranteed because business actors could produce high-quality goods and/or provide good services at low prices (Fuady, 1999).

The verification process within the examination which carried out by the Business Competition Supervisory Commission was no different from the verification within the judicial process in general. When it was seen from its function, the Business Competition Supervisory Commission could be classified into the State Administrative Court environment. But when it was seen from the field of disputes handled by the Business Competition Supervisory Commission, this commission could also be categorized within the General Courts environment. The Law no. 5 of 1999 did not mention the Business Competition Supervisory Commission as a court institution. Nonetheless, the Business Competition Supervisory Commission theoretically remained a semi-judicial or quasi-judicial institution. If related to the Montesquieu's trias politica theory, the Business Competition Supervisory Commission could be seen as a mix-function institution, not only executive, but also judicative. Even, as a quasi-judicial institution, the type of cases handled by the Business Competition Supervisory Commission did not only concern about civil business matters, but also related to the state administrative law and even criminal law, in which each of them was regulated according to different legal fields. The Business Competition Supervisory Commission was also equipped with the authority to examine outside the court, searched and even in certain cases could also confiscate and seize, as was usually carried out by the

police or by the prosecutor. Therefore, the scope of duties and authority of the Business Competition Supervisory Commission could cover a wide range of legal fields, that was not only covering the legal field of business (civil), but also the legal field of state administrative and even the legal field of criminal.

In carrying out its duties, the Business Competition Supervisory Commission distinguished between the administrative process such as receipt of reports and examination process which could also be distinguished between in-court examination and out-court examination (Sapitri, 2015). Out-court process could be considered as administrative process, while in-court examination could be seen as judicial process that must comply to the principles of legal procedure that guaranteed the independence, neutrality or impartiality, integrity and personality balance (integrity) proportionality, professionalism, equality, courtesy, trustworthiness, and so on. Such in the court, every trial must be open to the public, and within the trial, all the parties who involved must also be given an equal opportunity to maintain and defend their interest (*audi et alteram partem*). On the other hand, case administration matters, including those related to the police actions such as confiscation, searching, and so on, must be carried out carefully based on the official orders stipulated in open trials. Implementation was also carried out by authorized officials under the responsibility of the commissioner, not merely by the administrative employees (Asshiddiqie and Republik, 2008).

In Law No. 5 of 1999 the duty and authority of the Business Competition Supervisory Commission were regulated in articles 35 and 36, in the Revision of Law No. 5 of 1999 the duty and authority of the Business Competition Supervisory Commission were regulated in more detail in accordance with the four functions of the Business Competition Supervisory Commission in Article 35 of the Law Draft Revision No. 5 of 1999, namely:

1. Prevention and supervision towards the occurrence of monopolistic practice and unfair business competition;
2. Legal enforcement towards the prohibition of monopolistic practice and unfair business competition;
3. An assessment upon the planning of merger or consolidation of business entity, acquisition of shares, acquisition of assets or the establishment of joint venture that could cause monopolistic practice and unfair business competition; and
4. Providing advice and consideration to the Government policy relating to monopolistic practice and unfair business competition.

The authority of the Business Competition Supervisory Commission according to the function of prevention and supervision towards the occurrence of monopolistic practice and unfair business competition was mentioned in Article 36 of the Law Draft Revision No. 5 of 1999, namely:

1. Conducting assessment and monitoring to the business actor or group of business actors who dominate the market shares in certain amount that have the potential to cause monopolistic practice and unfair business competition;
2. Requesting and obtaining the data and information regarding industrial structure and industrial performance from government agencies and/ or business actors;
3. Establishing the system of reporting on the industrial performance and/ or business actor that was monitored;
4. Conducting research regarding business activity and/ or the action of business actor that have the potential to cause monopolistic practice and/ or unfair business competition;
5. Organizing socialization and dissemination related to the values of fair business competition;
6. Collaborating with state institution and related institution both at domestic and overseas in the context of preventing monopolistic practice and unfair business competition.

The authority of the Business Competition Supervisory Commission according to the assessment function upon the planning of merger or consolidation of business entity, acquisition of shares, acquisition of assets or the establishment of joint venture that may cause monopolistic practice and unfair business competition was explained in Article 38 of the Law Draft Revision No. 5 of 1999. The Business Competition Supervisory Commission's authority based on these function was:

1. Conducting assessment upon the planning of merger or consolidation of business entity, acquisition of shares, acquisition of assets or the establishment of joint venture;
2. Requesting and obtaining the data and information to the business actor and/ or related institution regarding the assets value or the sales value of the company that would carry out merger or consolidation of business entity, acquisition of shares, acquisition of assets or the establishment of joint ventures;
3. Establishing the system and the procedure for reporting towards the planning of merger or consolidation of business entity, acquisition of shares, acquisition of assets or the establishment of joint ventures;
4. Refusing the planning of merger or consolidation of business entity, acquisition of shares, acquisition of assets or the establishment of joint ventures if the results of assessment caused monopolistic practice and unfair business competition.

In carrying out the function of providing advice and consideration to the Government policy, Article 39 of the Law Draft Revision No. 5 of 1999 stated that the Business Competition Supervisory Commission was authorized to:

1. Studying the government policy related to monopolistic practice and unfair business competition;

2. Requesting the data and information from related institution or related party regarding government policy which related to monopolistic practice and unfair business competition; and
3. Providing advice and consideration towards Government policy relating to monopolistic practice and unfair business competition.

Finally, the authority of the Business Competition Supervisory Commission performed the function of monopolistic practice enforcement and unfair business competition in article 35 of Law no. 5 of 1999.

Based on the explanation regarding that authority, the Business Competition Supervisory Commission did not function as the judicial institution which regulated in the article 24 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. The Law No. 5 of 1999 which was the basis for the establishment of Business Competition Supervisory Commission regulated that this institution was not authorized to use the *decision head sentences* (Asshiddiqie, 2017).

The Business Competition Supervisory Commission as an institution which given the authority by the Law No. 5 of 1999 to supervise and carry out the legal enforcement in the field of business competition law was indeed entitled to give the head decision of business actor or unfair business activity. However, in the practice there were several decisions of the Business Competition Supervisory Commission that used the *decision head sentences*. The consequence of Business Competition Supervisory Commission's decision that used the *decision head sentences* was the annulment of the decision by the law because the institution has exceeded the limit of its authority. Furthermore, the decision could not be carried out because it was considered to have never existed.

The procedure for taking out the decision of Business Competition Supervisory Commission and its legal remedy after the Decision of the Supreme Court of the Republic of Indonesia Number 03 K/KPPU/2002 still applied in accordance with Article 43 to Article 46 of Law No. 5 of 1999. Article 46 paragraph (1) of Law no. 5 of 1999 stated that the Decision of Business Competition Supervisory Commission, which no longer used the *decision head sentences*, was declared to have permanent legal force if there was no objection submitted as regulated in Article 44 paragraph (2) and Article 45 of Law No. 5 of 1999. In executing the Decision of the Business Competition Supervisory Commission, the Commission submitted an application for the establishment of the execution upon the decision that has been examined to the District Court which was at the place of business actor as regulated in Supreme Court Regulation of the Republic of Indonesia Number 03 of 2005 concerning the Procedure for Submitting Legal Remedy Against the Decision of the Business Competition Supervisory Commission.

CONCLUSION

The Business Competition Supervisory Commission which had the role as a state auxiliary organ did not have the authority to use the *decision head sentences*. It was based on the Law No. 5 of 1999 as the basis for the existence,

duty and authority of the institution. In the Law No. 5 of 1999, there were no sources of authority such as the attribution, mandate, or delegation or in other words the use of the *decision head sentences* in the Decision of the Business Competition Supervisory Commission exceeded the authority which given. Thus, the Decision of the Business Competition Supervisory Commission was declared null and void by the law and was considered to never exist. The decision of the Business Competition Supervisory Commission which did not use the *decision head sentences* has been in accordance with the authority which given by the Law No. 5 of 1999, thus, no objection was submitted and has had the permanent legal force. Furthermore, the decision made by the Business Competition Supervisory Commission was required to execute the decision.

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