RULE OF REASON AND PER SE ILLEGAL APPROACHES IN ENFORCING THE BUSINESS COMPETITION LAW

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ABSTRACT

This article aimed to find out and to give solution to the application of rule of reason and per se illegal approaches in solving the case of monopoly infringement and unfair business competition. This study was a doctrinal research with evaluative research form. The analysis used was deductive logic one. Per se illegal approach used by *KPPU* in making decision was based on deliberation and focused more on business behavior than on market situation. This rule of reason approach was an approach constructed based on an assumption that the high sale concentration in the presence of certain agreement between some business performers tend to result in substantial economic efficiency. Essentially, this rule of reason approach considered its economic benefit more than imposed restriction (prohibition). Standard rule of reason allows for the consideration of competitive factors and the determination of the feasibility of trading constraint. The recommendation of research was that: The use per se illegal and/or rule of reason in KPPU's verdict should build on the objective of the development of Law Number5 of 1999, particularly the provision of Article 3, thereby can realize conducive business climate in the certainty of equal business opportunity for large, medium, and small scale employers, and the achievement of effective and efficient business activity. The application of per se illegal or rule of reason approaches in KPPU's verdict was possible through the use of two approaches all at once, recalling very extreme difference of per se illegal and the rule of reason, and furthermore, most KPPU's decision put its position between the two perspectives.

Keywords : Per Se Illegal, the Rule of Reason, Monopoly, Unfair Business Competition

A. INTRODUCTION

Entering the 1990 decade, Indonesia was faced with free trade demand including the establishment of AFTA (ASEAN Free Trade Agreement), GATT (General Agreement on Tariffs and Trade), WTO (World Trade Organization) and APEC (Asia Pacific Economic Cooperation) and etc, resulting in globalization in economic sector highly affecting the world trade

with higher trading competition level (Adi Sulistiyono, 2005: 2). The competition in business realm is a condition sine qua non for the organization of market economy. Competition is divided into fair competition and unfair competition. Unfair competition can put out the competition, and then results in monopoly, meaning the mastery of more than 50% of marketplace over certain commodity by one or an affiliation of companies (Business Law Editorial, 2002: 4).

Economic economy is getting more competitive recently, in which business performers attempt to be productive and existent dealing with trade and business, generating unethical business behavior among the mischievous employers taking any attempts of putting out their rival's business activity, among others, through monopoly practice and unfair business competition.

Law Number 5 of 1999 On the Prohibition of Monopoly Practice and Unfair Business competition has been enacted to realize a healthy business climate thereby ensuring the certainty of equal business opportunity for large-, medium-, and small- scale employers.

Shortly, the objectives of Law Number 5 of 1999 (Sutan Remy Sjahdeni, 2002: 9) are included in the Article 3: a) to maintain the public interest and to improve the national economy efficiency as the attempt of improving public welfare; b) to realize a healthy business climate thereby ensuring the certainty of equal business opportunity for large-, medium-, and small- scale employers; and c) to prevent monopoly practice and/or unfair business competition generated by the business performers; and d) to create the effectiveness and the efficiency of business activity.

As a positive law, business competition law, Law Number 5 of 1999, has included the governing substance from institutional aspect to implementation procedure. Nevertheless, this law has conceptual weakness, for example, Article 3 of Law Number5 of 1999 is elusive literally as it mixes objective and approach. The efficiency of business activity is an objective, while a fair business climate is an approach.

In business realm, there is business ethic becoming the code of conduct, however the power encouraging the compliance with such the ethic lies on morality often defeated by other interests that are considered as more significant. In contrast to ethic driven more by morality of law, it is encouraged with more concrete impulse in the form of sanction, so that the ability of compelling others to comply with law is not only morality but also sanction (Kwik Kian Gie, 1995: 10).

Basic values becoming the parameter of business ethics are the employers' code of conduct in running their business. Do they take profit from consumers through fair, transparent, and ethic business competition. The deeds belonging to unethical conduct are: giving incorrect information about raw material, characteristic and quality of a product; hiding the company's property to avoid/to reduce tax; and performing unfair competition and tender conspiracy.

In the attempt of enforcing business competition, Komisi Pengawas Persaingan Usaha (thereafter called KPPU, Business Competition Overseeing Commission) established to oversee this law implementation plays an important part. As the institution responsible for this duty, KPPU serves, among others (Article 35-36 of Law Number5 of 1999), to assess the agreement that can result in monopoly practice and unfair competition, assess the business performers' activities in contradiction with this law, assessing whether or not there is dominant position abuse, and giving recommendation to government in making business policy, and etc.

For the provisions of business competition to be complied with by business performers, many approaches are taken to the enforcement of competition law. Those approaches are employed carefully recalling that business is so far considered as sensitive to legislation's "intervention". Repressive criminal law approach with severe sanction threat against the infringement of competition provision, for example, can result in the business performers running its business strategy non-discretionarily because of the worry that the measure to be taken breaks the provision of competition that

can be imposed with severe sanction (Syamsul Maarif, 2002: 48). Therefore, in solving business infringement, some approaches have been taken so far in order to enforce the business competition law on the one hand and to protect the business performers on the other hand (Arie Siswanto, 2002: 57).

The approach patterns used in the attempt of enforcing competition law, among others, are administrative, civil, criminal; Per Se illegal and Rule of Reason (R.S. Khemani and DM Shapiro, 1996: 51), and preventive and repressive approaches. Viewed from the characteristics of business competition law in Indonesia so far, the rationales used to solve the business infringement/business competition case are "Rule Of Reason", and "Per Se Illegal".

The "Rule Of Reason" approach is the one intended to evaluate the corollary of certain business agreement or activity in order to determine whether the agreement or activity inhibits or supports the competition. Meanwhile, Per se illegal approach is the one stating that every certain business agreement or activity is illegal without further authentication over the effect generated by it. The activity considered as per se illegal usually includes collusive pricing over certain product, and the regulation of selling price (A.M.Tri Anggraini, 2003 : 39). Both per se illegal and rule of reason approaches are applied to find out whether or not certain action of business behavior breaks the provision of Law Number 5 of 1999.

Culture/approach used so far in enforcing business competition law is generally based more on the application of legislation dogmatically (per se illegal), in which generally, KPPU still refers to only the provisions existing in the enacted legislation in making decision. Meanwhile, the application of Law Number 5 of 1999 is largely based on the rule of reason principle, the law application considering the reasons of an action or a deed conducted by business performers (A.M. Tri Anggreini, 2003: 40).

The two approaches have extreme difference in the terms of word inclusion, for example, the perception of per se illegal method use is stated in prohibited term, without causal clause, while the use should be the rule of

reason method (Tri Anggraini, 2005: 6-7). It is noteworthy that these two approaches used by KPPU have same objectives, to find out how to make the business performers' action not inhibiting the competition, thereby resulting in the loss of efficiency that in turn leading to the loss among the consumers. It can be seen from some KPPU's verdicts including KPPU Verdict Number 07/KPPU-1/2001 On the procurement of imported kereman (dry lot fattening) cow fledgling, KPPU verdict Number 05/KPPU-1/2002 On Theatre Monopoly by Studi 21 Group, and KPPU Verdict Number 05/KPPU-1/2003 On AC-Express Bus Ticket Pricing.

B. PROBLEM STATEMENT

Considering the elaboration above, this article will discuss the rationales used by KPPU in applying Per se Illegal or Rule of Reason principles to resolving monopoly infringement and unfair business competition cases.

C. RESEARCH METHODS

This study was a normative or doctrinal law research with evaluative research form. Analysis was conducted based on deductive logic. The approach used was statute approach. The type of data employed were primary one including primary, secondary and tertiary law materials, while the data source derived from legislation and court verdict, library study, documentary materials, scientific works and other written sources.

D. RESEARCH RESULT AND DISCUSSION

1. The Application of Per Se Ilegal Approach

KPPU (Business Competition Overseeing Commission) has applied per se illegal approach to verdict number 07/KPPU-LI/2001 On procurement of imported kereman (dry lot fattening) cow fledgling, in which there was tended conspiracy (article 22) between *Koperasi Pribumi Indonesia (KOPI)* and Chairperson of East Java's Animal Husbandry

Service; thus, although *KOPI* did not qualify the RKS (Work Plan and Requirements) it remained to win the auction. *KPPU* decided that *KOPI* has broken the provision of Article 22 of Law Number 5 of 1999 explicitly mentioning as follows :

> ” Business performers are prohibited to conspire with other parties to organize or to determine the winner of tender thereby resulting in unfair competition”.

It can be seen that *KOPI* conducted a journey along with those related in the auction of Animal Husbandry’s cost burden, before it was stated as the winner of tender. Substantive justification in this per se illegal approach is based on fact or assumption that the behavior is prohibited because it may harm other competitors and/or consumers. In this case, the significant adverse effect of behavior should be taken into account and the loss should be dependent on the prohibited activity.

KPPU also made decision using per se illegal approach in the case Number 07/KPPU-LI/2001 On AC-Express Bus Ticket Pricing considered as harming the consumers. In this case, *KPPU* found prior evidence of infringement over the Article 5 of Law Number5 of 1999 On Pricing in which the Reported putatively made an agreement through *DPD Organda DKI Jakarta* (the representative of Road Transportation Organization for DKI Jakarta), changing the tariff of AC-express city bus from IDR 2500 to IDR 3000.

From the result of investigation, *KPPU* concluded that the determination of city bus tariff, as included in the *DPD Organda* DKI Jakarta’s Decree Number Skep -115/DPD/IX/2001 On the Adjustment of AC-Express City Bus Public Transportation Tariff in DKI Jakarta area is the pricing as intended in Article 5 of Law Number5 of 1999. This decree is based on the Governor’s Letter Number 2640/1.811.33/2001 On Transportation Tariff Adjustment, made the legal rationale by the provider of transportation service to make tariff agreement. The provision of Article 5 of Law Number5 of 1999 mentions explicitly that :

(1) Business performers are prohibited to make agreement with their rival to determine price over a product and or service to be paid by consumers or to break the same corresponding market.

(2) The provision as mentioned in clause (1) does not apply to :

a. An agreement made in joint venture; or

b. An agreement based on the enacted law.

This *KPPU's* verdict shows that the application of per se illegal approach in the infringement against Article 5 of Law Number 5 of 1999 does not focuses on the economic effect or juridical justification such as the improvement of producer competitiveness, business efficiency or substantial profit for consumers. However, per se illegal approach in this decision focuses more on the existence of business performers' behavior. *KPPU*, in this case, focuses the authentication on the existence of agreement, that is, whether or not the competitors' conspiracy is done in the field, so that the conspiracy/agreement is prohibited. However, in all verdicts concerning the infringement of Article 5 of Law Number 5 of 1999 above *KPPU* imposed administrative sanction rather than the fine sanction as governed in the provision of Article 47 letter g of Law Number 5 of 1999, so that it will putatively not prevent the business performers from repeating the deed.

2. The Application of Rule of Reason Approach

The application of rule of reason approach is contained in *KPPU's* decision Number 05/KPPU–L/2002. This case involves the suspects affiliated with Group 21: *PT. Camila Internusa Film* (1st suspect), *PT. Satrya Perkasa Esthetika Film* (2nd suspect), and *PT. Nusantara Sejahtera Raya* (3rd suspect). Those reporting in their letter dated on July 5, 2002 stated that in principle, the suspects are assumed to perform monopoly practice and dominant position abuse in distributing movies from major companies given by MPAA/Motion Picture Association of America (the distributor of Hollywood movies: 21 Century Fox, Universal Studio,

Warner Bross, Buena Vista International Touch Town and Columbia Tri Star). In addition, they are assumed to master majority shares in similar industry, so that they are assumed to break the provision of Articles 17, 25, and 27 of Law Number 5 of 1999, respectively.

The Commission's examination included product market, the distribution of movies from major companies and geographic market involving Studio 21 distributed in Jakarta, Bogor, Depok,Tangerang, Bekasi (Jabodetabek) and other big cities such as Surabaya, Semarang, Bandung, Medan, Denpasar and Makasar. In this case, *KPPU* decides that the suspects (1^{st} and 2^{nd} suspects) are considered as preventing the consumers from acquiring the movie show service by means of unfair competition or limiting market or inhibiting other theater business performers potentially becoming their competitors.

The result of *KPPU's* investigation showed that they do not infringe Article 17 of Law Number5 of 1999 explicitly mentioning as follows :

a. Business performers are prohibited from dominating the production and or marketing of product and or service that can result in monopoly practice and unfair business competition.
b. Business performers are reasonably to be suspected or considered as dominating the production and or the marketing of product and service as mentioned in clause (1) when :
    1) There has been no substitution for the corresponding product and or service; or
    2) It prevents other business performers from entering into similar business and or service; or
    1) One business performer or one group of business performers master more than 50% (fifty percents) of market place for certain product or service type.

In *KPPU's* consideration, despite the domination of MPAA imported movie distribution, it is still less than 50% of all imported

movies in 2001 and 2002. The similar reason was also used to authenticate that the suspect did not infringe the provision of Article 25 On dominant position, stating as follows :

a. Business performers are prohibited from using dominant position either directly or indirectly:
   1) To determine the requirements of trade aiming to prevent and to inhibit the consumers to obtain competitive product and or service, from price and quality aspects; or
   2) To limit market and technology development; or
   3) To inhibit other business performers potentially becoming the competitors in entering into corresponding market.
b. Business performers have dominant position as mentioned in clause (1) when:
   1) One business performers or a group of performers master 50% (fifty percents) or more of marketplace for one certain product and or service; or
   2) Two or three business performers or business performer groups master 75% (seventy five percents) or more of market place for one certain product and or service.

The only accusation proved was the ownership of majority shares in some theater companies in related market, so that the suspect was considered as breaking the Article 27 of Law Number 5 of 1999.

The provision of Article 27 of Law Number 5 of 1999 mentions explicitly as follows :

> ” Business performers are prohibited from owning majority shares in some similar companies conducted business activity in the same area in the same corresponding market, or establishing some companies with the same business activity in the same corresponding market, when the ownership results in:
>
> a. One business performers or a group of performers master 50% (fifty percents) or more of marketplace for one certain product and or service; or

b. Two or three business performers or business performer groups master 75% (seventy five percents) or more of market place for one certain product and or service. ”

The use of rule of reason approach enables KPPU to interpret the law. In this case, KPPU stipulated a standard rule of reason enabling to consider competitive factor and to determine whether or not a trade obstacle is reasonable, meaning to find out whether the obstacle intervenes, affects, or even inhibits the competition process.

E. CLOSSING

I. Conclusion

From the result of research and discussion on the application of per se illegal and/or rule of reason approached used by *KPPU* in the Decision of Business Competition Supervision Commission, including KPPU verdicts Number: 05/KPPU-1/2003, 07/KPPU-I/2001 and 05/KPPU I/2002, the following conclusions can be drawn:

1. Per se illegal approach used by KPPU in making decision is based on deliberation and focuses more on business behavior than on market situation.
2. The rule of reason approach is the approach constructed based on assumption that high selling concentration with the presence of certain agreement between some business performers tend to result in substantial economic efficiency. Essentially, this rule of reason approach considered its economic benefit more than imposed restriction (prohibition). Standard rule of reason allows for the consideration of competitive factors and the determination of the feasibility of trading constraint.

II. Suggestion

The use per se illegal and/or rule of reason in *KPPU's* verdict should build on the objective of the development of Law Number5 of

1999, particularly the provision of Article 3, thereby can realize conducive business climate in the certainty of equal business opportunity for large-, medium, and small- scale employers, and the achievement of effective and efficient business activity.

1. The application of per se illegal or rule of reason approaches in *KPPU's* verdict was possible through the use of two approaches all at once, recalling very extreme difference of per se illegal and the rule of reason, and furthermore, most *KPPU's* decision put its position between the two perspectives.
2. The law enforcers (Police Officers, Public Prosecutors), members of *KPPU* and or the Judge of District Court should have knowledge and understanding on the theories developing in business/economic world and business competitions; this knowledge can be improved by conducting upgrading, education and training periodically, thereby can make just decision for the business performers. In addition to knowledge mastery, the equally important thing is the presence of strong integrity and morale, because without moral integrity criminalization will occur among the business performers.

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