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# **INSTITUTION OF INSTITUTIONAL COMMISSION REGULATION OF BUSINESS COMPETITION IN LAW NUMBER 5 OF 1999 CONCERNING PROHIBITION OF MONOPOLY PRACTICE AND BUSINESS COMPETITIVENESS NOT HEALTHY**

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## **Abstract:**

While the efforts of the Government of Indonesia itself to establish a business, competition law has started since the 1970s. Various bills and academic texts were raised at the time, but it was only in 1998 when the economic crisis hit Indonesia, under pressure from the International Monetary Fund, talks on the formation of the law were seriously carried out, and only in 1999 was finally enacted. The birth of this law was motivated by (1) the business competition system in the new order with a pattern of power that prioritized groups and their cronies so that they could benefit from the monopoly market system, (2) Mandate of Article 33 of the 1945 Constitution, about economic democracy and (3) in anticipation of the impact of the economic crisis in Indonesia in 1998. This research was conducted in order to explore the actual evidence regarding the weaknesses and emptiness of the law in Law No. 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition and their impact, and the establishment of the Business Competition Supervisory Commission (KPPU) as a legal institution that functions as an institution that controls community behavior in the economic field based on Article 33 Paragraph (4) of the 1945 Constitution and business world practices in accordance with the objectives and applicable legal norms. This research uses normative legal research, the emphasis is on literature study with legal research focused on studying the application of the rules legal norms or norms in positive law. The focus of the discussion is on a juridical study of the position of the KPPU Institution in the Indonesian constitutional system. The approach

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method is the content analysis method, to describe the material legal events or other legal products, in order to facilitate interpretation in the discussion. From the results of this study, it is hoped that the facts that Law No. 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition, which is currently in force can be proven to be true that there are still weaknesses and legal vacuum so that the law has not been able to meet the demands.

**Keywords:**

KPPU's Institution, Prohibition Of Monopolistic Practices, Unfair Business Competition System

## Introduction

The history of Indonesia's economic development shows that there is a business competition climate in Indonesia during the New Order regime which was not as expected by the community, where so far Indonesia has built its economy, but without giving adequate attention to the creation of a healthy competition market structure (Agus Maulana, 2000). Law No. 5/1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition is a new step for Indonesia for the purpose of resolving problems in the economic field, especially concerning business competition. This Law, helps to realize the provisions in Article 33 of the 1945 Constitution which is explicitly said, that the national economy is organized based on economic democracy. This means that, everything related to the economy, such as: the economic system, the goals achieved, economic development, policies and programs, all must be based on economic democracy (Hermansyah, 2008).

The birth of the antitrust law was motivated by (1) the business competition system in the New Order era which was characterized by power which concerned groups and their cronies to benefit from the monopoly market system (Yayasan Pengembangan Hukum Bisnis, 2002), (2) Mandate of Article 33 of the Basic Law RI of 1945, concerning economic democracy (Hermansyah, 2008), and (3) in anticipation of the impact of the economic crisis in Indonesia in 1998. The existence of the Institution of the Business Competition Supervisory Commission (KPPU) as a legal institution that functions as an institution that controls people's behavior in the economic field in accordance with Article purpose 33 Paragraph (4) of the 1945 Constitution and the practice of the business world in accordance with the objectives and norms that have been formulated in applicable law (Soekanto, 1999). Establishment of the Business Competition Supervisory Commission based on philosophical and sociological considerations, namely that in overseeing the implementation of a legal rule requires an institution that has the authority of the state. With the authority originating from the State (government and people), it is hoped that this institution can carry out its duties and functions to the best of its ability and be able to carry out their functions independently (Ayunda, 1999).

Business competition law is one of the main legal instruments in the market economy, because through good business competition law, the government of a country can create healthy business competition protection. The positive effects of fair business competition can encourage manufacturing companies to increase their competitiveness with greater investment in industrial technology, but for companies that are inefficient and uncompetitive, and not responsive to consumer needs, will naturally (Thee, 2004) out of competition. Accordingly, fair business competition will force businesses to become more efficient and offer more choices of products and services to the public at lower prices. Events in new industrial countries in Asia

such as in South Korea and in Taiwan can be an example that fair business competition forces businesses to improve the efficiency and quality of their products with innovation.

In the United States, competition law (Antitrust Law) is likened to the Magna Carta for freedom of business. Where economic freedom and the system of business freedom are equalized with the importance of the Bill of Rights that protects Human Rights in the United States (Fox & Sullivan, 1989). In this regard, competition law can serve as a tool to control the abuse of economic power by preventing monopolistic practices, punishing cartels, and also protects competition. The World Bank recognizes that the implementation of business competition laws in countries that are in the process of transitioning to an open market economy and world trade system, is an arduous task and must be applied with caution, and Indonesia is included in the condition of the group. Law No. 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition, in Indonesia systematically has a fairly good influence on climate change trying to be healthier than in the previous period, the effect of which can make the community and business actors gradually trust the intentions both governments who wish to create a healthy and conducive business climate, as a guarantee to present a fair business opportunity for all the people of Indonesia, without exception of large or small-scale business. However, in practice it turns out that the anti-monopoly law which has been enacted since 1999 has not been perfect, namely there are still a number of things that cause a legal vacuum, which has not been able to meet the legal needs as expected by the people of the Indonesian nation.

### **Problem Statement**

Based on the above research background, the legal issues that will be reviewed and given answers by the authors of the research results are as follows:

1. What is the position of the Institutional Supervision Commission for Business Competition in the constitutional system in Indonesia?
2. How is the KPPU's authority to supervise business competition based on Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices for Business Competition No What is the KPPU's authority to supervise business competition based on Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices from Unfair Business Competition?

### **Problem Objectives**

The research objectives are as follows:

1. To find out and obtain information on the pact from the results of research on the status of the institutional position of the Business Competition Supervisory Commission in the constitutional system in Indonesia.
2. To find out the pact information from the results of research on the existence of the institution of the Business Competition Supervisory Commission in supervising business competition based on Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition.

## Research Methodology

The research method is the right way to do things while the research itself is an activity to search, record, formulate and analyze and compile reports (Cholid Narbuko & Abu Achmadi, 1997). The following section elaborates the types of reseach, approach method and data types.

### *Types of research*

In this study, the author will use normative legal research, the emphasis of which is on library research, namely legal research that is focused on examining the application of legal norms or norms in positive law. in the Indonesian constitutional system and the effectiveness of the KPPU's authority in carrying out its supervisory function based on Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition.

### *Approach Method*

The method of approach in this research will use the content analysis method, namely by describing a legal event or legal product in detail to facilitate interpretation in the discussion. Content analysis method approach, consists of two perspectives, namely:

1).Juridical review, is an analysis with approaches from various aspects to determine the positive and negative aspects of a legal product with the use of secondary data, namely legal products.

2).Juridical analysis, is an analysis with approaches from various aspects to find out the positive and negative aspects of a legal product by focusing on the use of primary data sourced from intellectuals and lower levels of society as well as secondary data (Amirudin & Zainal Asikin, 2004).

The use of juridical review method focuses on the use of library data or secondary data in the form of primary, secondary and tertiary legal materials. The use of this approach is based on the consideration that the problem under study is about laws and regulations, namely the relationship between one regulation and another and its relation to implementation in the midst of society.

### *Data Type*

The type of data used in this study is secondary data. In this secondary data include official documents, books, research results in the form of reports, and so on (Amirudin & Zainal Asikin, 2004). Data sekunder date are:

1). Primary legal materials (Morris & Ibrahim, 1994) are sourced from laws and other legal products.

2) Secondary legal material, sourced from legal journals, scientific works, books relating to the position and supervision of the Business Competition Supervisory Commission, mass media, or websites containing content that is in accordance with the scope of research, dictionaries, encyclopedias, and so on.

## Discussion

The enactment of Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, is an anti-climatic of various Government efforts to regulate competition between business actors and prohibition of monopolistic practices. The twists and

turns of the establishment of business competition law have actually begun since the 1970s, with the emergence of several draft laws and academic texts, however only in 1998, sticking back to the surface, after the insistence of the International Monetary Fund (IMF) As a result, discussions on establishing the business competition law were conducted more intensely and seriously, until finally in 1999 it was successfully enacted. The birth of this law was motivated by (1) the business competition system in the New Order era which was characterized by power that concerned groups and their cronies so that they could benefit from the monopoly market system (Yayasan Pengembangan Hukum Bisnis , 2002), (2) the mandate of Article 33 of the 1945 Constitution of the Republic of Indonesia in 1945, about economic democracy (Hermansyah , 2008) and (3) in anticipation of the impact of the economic crisis in Indonesia in 1998 (Rachmadi, 2013).

To implement the business competition and anti-monopoly laws, the Business Competition Supervisory Commission (KPPU) was established as a legal institution that functions as an institution that controls people's behavior in the economic field in accordance with Article 33 Paragraph (4) of the 1945 Constitution and business practices in accordance with the objectives and norms that have been formulated in applicable law (Soekanto, 1999). Establishment of the Business Competition Supervisory Commission based on philosophical and sociological considerations. The basic philosophical and sociological reasons for the formation of the KPPU are that in overseeing the implementation of a legal rule an institution which is authorized by the state is needed. With the authority that comes from the State (government and people), it is hoped that this institution can carry out its duties and functions as well as possible and be able to act independently (Ayunda, 1999).

In the next phase, according to Maria Vagliasindi's (2001) study, it was concluded that the effective implementation of business competition law was a difficult task, which required high knowledge and expertise. Particularly for countries that are in the initial economic structure of the transition from protection to liberalization, which usually occurs in developing countries such as Indonesia, the implementation of the Act becomes a tougher task than the implementation of competition law in developed countries. The barriers to entry that arise are from high market concentration, government control and ownership, and administrative barriers, all of which are high in transition economies (Maria, 2004), and according to other expert observations namely Luis Tineo the implementation of competition law will also be inseparable from political and social pressures (Tineo, 2000). Besides that business competition case is also a legal case which is quite complicated in handling compared to handling other legal cases. So it really needs the support of the analysis of economists in the verification process. According to Kwoka and White (1989) the role of economists in almost every case of business competition matters is so important.

In the implementation of fair business competition law in Indonesia, several issues arise regarding the weaknesses and legal vacuum in the law, so that it becomes an obstacle that impedes the effectiveness and efficiency of the implementation of the tasks and functions of the Commission as an Independent State Agency in the implementation of supervision and enforcement of business competition law. and anti- monopli. One of the weaknesses and legal vacuum in the law which is the focus of the problems examined and studied and discussed in this study is about the institutional position of KPPU in the constitutional system of the Republic of Indonesia as follows.



***Legal Void regarding the Status of the Institutional Position of KPPU in the Indonesian Regulatory System***

Article 33 of the 1945 Constitution mandates that the Indonesian economy is based on the principle of economic democracy, prosperity for all people, the earth, water and natural resources contained in the earth are intended for the greatest prosperity of the people. The conception is the direction of the State's goal in implementing economic democracy must avoid unhealthy competition and centralization of economic power in one particular group, in various forms of monopoly that can adversely affect the economic interests of the community and conflict with the concept of social justice (Margono, 2009) for all Indonesian people. Law Number 5 of 1999 Penjelasan Umum Undang-undang concerning Prohibition of Monopolistic Practices and Unfair Business Competition, enacted with the intent and purpose of enforcing the law in order to provide fair protection for each business actor in order to create fair business competition, and as a guarantee of legal certainty to further pushing the acceleration of national economic development in an effort to improve general welfare, apparently could not work effectively.

At this time the KPPU has not been able to carry out its functions properly, this is due to the institutional status of the KPPU which is not clearly and clearly regulated as a state institution in the law. The emergence of problems in the KPPU's institutional status was due to the existence of thoughts on a complete constitutional system by parties who made four changes to the 1945 Constitution of the Republic of Indonesia, namely the "groundwets" that could cause the Indonesian constitutional system to change substantially. Therefore, it must be formulated and interpreted as a whole with a far-sighted future in harmony with the Indonesian constitutional system, because it is important to realize the constitutional system as in current conditions. The formation of new state institutions after reforms such as the KPPU or other State commissions which are included as supporting State institutions seems as if left unchecked, resulting in overlapping authority between new state institutions and existing institutions, which often becomes an obstacle to the effectiveness and efficiency of task implementation. and the authority of these new institutions (M Sidik, 2019). As a result of the foregoing KPPU as an institution mandated to oversee and enforce business competition law, whose role is very important in carrying out business competition law in a fair and authoritative and independent manner, its institutional position is questioned by the public because it is not mentioned in the law as a state institution. Yet as it is understood that the substance of the law in legislation that is fair and guarantees certainty in law enforcement efforts is a prerequisite for achieving goals (Friedman, 1984).

On the other hand, in reality, the task of the KPPU as the mandate of Law Number 5 of 1999 is clearly a State institutional task, so the uncertainty of the institutional position of the KPPU as a state institution, has implications for the instability of the KPPU's institutional and staffing system with the institutional system and national staffing, although in daily practice the KPPU's operational funding comes from the state budget. Even now, KPPU members have not been appointed as state officials so that they have never been sworn in / or sworn in by the President / Supreme Court in accordance with Law Number 5 of 1999 Article 31 paragraph (2), that Commission Members are appointed and dismissed by the President with the approval of the Council People's Representative (DPR).

The KPPU's institutional status which is not clearly stated in Law Number 5 of 1999 has caused obstacles to the commission's best, effective and efficient implementation of its duties. These

obstacles have made it difficult for KPPU to carry out its duties in law enforcement, among others, to obtain the evidence needed to support the judicial process to be carried out. Because of this, in practice so far the evidence obtained by KPPU is still largely dependent on the evidence submitted by the business actor that has been examined, this greatly affects the optimal results of the examination conducted by KPPU. The status of KPPU's institutional position which is not clearly stated in Law Number 5 of 1999 is a big question, when compared to the status of other new supporting state institutions, such as the following:

- 1) Law Number 32 of 2002 concerning Broadcasting explicitly states that the position of the Indonesian Broadcasting Commission (KPI) as a state institution, in Article 1 number 13, is independent with its duties and authority regulated in Article 7 paragraph (2).
- 2) Law Number 30 Year 2002 concerning the Corruption Eradication Commission (KPK), states expressly that its institutional position is as a state institution, in Article 3 which states that the "Corruption Eradication Commission is a state institution that in carrying out its duties and authorities is independent and free from the influence of any power."

### ***Existence of the Commission for the Supervision of Business Competition (KKPU) in Law Enforcement***

Article 30 paragraph (1) of Law Number 5 Year 1999 states that **"to supervise the implementation of this law a Commission for the Supervision of Business Competition is formed, hereinafter referred to as the Commission"**, and in Article 34 paragraph (1) it is stated that **"the formation of the Commission and the composition its organization, duties and functions are determined by Presidential Decree "**. Following up on these provisions, Presidential Decree Number 75 of 1999 concerning the Business Competition Supervisory Commission was published. Noting the intention of Article 30 paragraph (1) of Law Number 5 of 1999, it appears that the purpose of establishing the Business Competition Supervisory Commission is to oversee the implementation of Law Number 5 of 1999, and in this case the institution functions as a judicial power agency.

The Business Competition Supervisory Commission is formed with the main task of being able to handle cases related to violations of business competition law in an efficient, effective and faster manner. The position of the President according to the 1945 Constitution, is as the highest state government organizer under the People's Consultative Assembly, namely as a holder of government power based on the Pancasila and the 1945 Constitution. Based on the provisions of these regulations, the implementation of the duties of the Business Competition Supervisory Commission, is responsible to the President, as stated by Article 30 paragraph (3) of Law Number 5 of 1999 namely that **"the Commission is responsible to the President"**.

The institutional task of the Business Competition Supervisory Commission is regulated in Article 35 of Law Number 5 of 1999, Jo. Article 4 Presidential Decree Number 75 of 1999 as follows, evaluates agreements that may result in monopolistic practices and / or unfair business competition, such as oligopoly agreements, price application, territorial division, boycotts, cartels, trusts, oligopsonies, integration vertical, closed agreements, and agreements with foreign parties; evaluating business activities and / or actions of business actors that may result in monopolistic practices and / or unfair business competition, such as monopolistic activities, monopsony, market control, and conspiracy; and evaluating whether or not there is abuse of a

dominant position that may result in monopolistic practices and / or unfair business competition, due to excessive market domination, dual position, share ownership and merger, consolidation and takeover of business entities or shares.

From the description above it can be said that the main task and function of the Business Competition Supervisory Commission is to conduct an evaluation of agreements, business activities, and abuse of the dominant position by a business actor or group of business actors. If in carrying out its duties the KPPU is aware of a violation of Law Number 5 of 1999, in the form of a business actor or a group of business actors that has entered into a prohibited agreement or performs a prohibited activity or abuses a dominant position, then the KPPU is authorized to impose sanctions in the form of administrative actions with order the cancellation or termination of the said agreement or prohibited business activities, as well as abuse of the dominant position by the business actor or group of business actors.

The duties and functions carried out by KPPU are in the form of a number of authorities, as stipulated in details in Article 36 and Article 47 of Law Number 5 Year 1999, that is not only authorized to receive reports from the public and / or business actors regarding alleged monopolistic practices and / or unfair business competition, but proactively carrying out their duties and functions to carry out research, investigation and / or examination and summarize the results. Then if the results of research, investigation and / or examination are found to be a violation of business competition law, the KPPU has the authority to summon business actors, and present witnesses, ask for help from investigators, request information from government agencies, request, examine and assess documents and / or tools. other evidence of violation of law, and decide on a case, determine the decision on a case and impose sanctions for administrative action. However, in carrying out these tasks and functions up to now it has not been able to be carried out quickly, effectively and efficiently, due to the institutional status of the KPPU which is not explicitly determined as a state institution in Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition as the main legal provisions governing the existence and existence of institutional Supervision and Business Competition institutions.

Weaknesses and legal vacuum in Law Number 5 Year 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, others are about the importance of expanding the definition of business actors in order to be able to reach business actors domiciled outside the legal territory of Indonesia (extraterritoriality), where the business operations of these business actors have an impact on market stability and the Indonesian economy, as follows:

- (a) The definition of business actors in Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, which only includes domestic business actors needs to be expanded, because it becomes an obstacle in law enforcement of business competition, to business actors domiciled outside the jurisdiction of Indonesia (extraterritoriality), because there is no strict regulation in the law, to be accessible, even though the business operations of these business actors have an impact on the stability of the Indonesian market and economy. The extraterritoriality of business competition law enforcement is a real and urgent need for the Indonesian economy, which is now increasingly integrated with the global economic system.



- (b) Extraterritoriality is an expansion of the scope of jurisdiction in the area of business competition law in its laws and regulations, in order to reach business actors domiciled outside Indonesia, which in their business activities have resulted in adverse legal impacts on anti-unfair business competition which is detrimental market and economy in Indonesia. The United States has long applied extraterritoriality, for example its case The United States Court has sentenced the Canadian-based oil company, Imperial Oil, to divest its shares in Standard Oil because the monopoly case carried out by Standard Oil through the construction of its trust is considered to endanger the US economy (Standard Oil Co. of New Jersey v. United States, 1911). The European Union also applies the principle of extraterritoriality, which can be seen in a case, five Japanese companies that produce Gas Insulated Switchgear (GIS) are proven to have carried out cartel practices together with several companies in Europe with one of them doing market divisions in Europe (Sato, 2019).
- (c) Whereas in Law Number 5 Year 1999 Extraterritoriality has not been clearly stated except as intended in Article 16 which states that domestic business actors are prohibited from making agreements with other parties abroad which result in monopolistic practices and / or unfair business competition.

### Suggestions

From the whole description and discussion on the research material above, the author suggests the need for Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition to be amended immediately by including the following matters:

- (1) To state in the law the result of the amendment that the Business Competition Supervisory Commission is a State Institution in the Indonesian constitutional system to increase the existence of KPPU's institutions with all the legal implications.
- (2) In order for the definition of business actors to be expanded and emphasized by including the principle of extraterritoriality to reach law enforcement to business actors outside the jurisdiction of Indonesia whose business activities have an impact on the Indonesian market and economy, it can be reached by enforcement of applicable business competition law.

### Conclusion

Based on the above description the conclusion is as follows:

- (a) The legal vacuum regarding the KPPU's institutional status must be followed up by expressly stipulating in the new law that KPPU is a state institution.
- (b) Weaknesses in the institutional existence of the Commission for the Supervision of Business Competition (KKPU) in law enforcement, due to the weakness of Law Number 5 of 1999 must be improved in accordance with the principles and objectives and the principle of Extraterritoriality must be stated clearly and firmly in the amendments to Law Number 5 of 1999 so that the definition of business actors, including business actors outside the jurisdiction of Indonesia whose business activities have an impact on the Indonesian market and economy, can be reached by the enforcement of applicable business competition law.

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