

CHAPTER II

LITERATURE REVIEW

A. Overview of Business Competition

In this era, economic activity becomes more intense and extensive. It should be recognized that economic activity cannot be separated from the competition among businesses, and thus it is a requirement for the implementation of a market economy, so that competition among businesses will be more open.

Competition is a necessity in improving production efficiency, market transparency and comparable profit. According to the legal aspects, the competition is right, therefore, not to be destroyed by others. Regulated in order to run properly, competition law as the right need to be protected. Sometimes, business competition is a fair competition, but it often also occurs among businesses in order to get maximum profit against unfair competition.¹⁴

1. Fair Business Competition

In the implementation, business competition applied several principles, namely:

a. Principle of Honesty and not Against the Law

¹⁴ Osgar S. Matompo, 2015, *Hakikat Hukum Sistem Persaingan Usaha yang Sehat, Kompetitif, dan Berkeadilan*, Yogyakarta, Genta Publishin, p. 96.

Fair Business competition is a competition among service providers which is conducted based on the law. If the principle of fair business competition has been realized, then creating a business climate can support the growth and development of service providers who are increasingly qualified and able to compete. Law No. 5 of 1999 also explains the form of forbidden acts for every business that is in article 22 and article 23. And the forbidden acts are also confirmed in article 55 of Government Regulation No. 29 of 2000.

b. The Principle of Transparency

The principle of transparency means the availability of information that can be accessed by the service providers, thus providing an opportunity for service providers to compete. Law No. 5 of 1999 article 38 paragraph (1) provides a space for communities to participate in monitoring the orderly implementation of fair competition.

c. The Principle of Fair

This principle relates to the principle of equity before the law, egalitarian principles or the principle of non-discrimination, namely granting equal treatment face to all potential service providers and do not lead to give advantages to certain parties for whatever reasons.

d. The Principle of Proportionality Competition

Free competition which is marked with the legal system of the market economy has a positive impact for efficiency of businesses in carrying out its activities. But in fact, the company has a strong capital, the arbitrary create trade barriers, raising prices, or limiting the production of goods and services.

This would bring harm to the other businesses, especially for small and medium businesses as well as micro enterprises, as well as consumers. If a competition functions properly, it allows market participants to perform autonomously in the field of their business and specification of each business and can define actions depending on the business without any interference or influence on other businesses. So it depends on the market mechanism proportionality. Finally, the more stringent competition would result in professionalism in more competitive business competition accountably and fairly.¹⁵

2. Unfair Business Competition

Law No. 5 of 1999 was formulated in understanding unfair business competition as well as in Article 1 paragraph 6 as follows:

“Unfair business competition is Competition among businesses in carry out activities of production and or marketing of goods and or

¹⁵ Osgar S. Matompo, *Op. Cit*, p. 91-98.

services in a way dishonestly or unlawful or anti-competition.”¹⁶ Another term of unfair business competition is dishonest business practices. So, unfair business competition is a competition conducted by among businesses which is dishonest or against the law or anti-competition. Business actors in this context conduct dishonest competition, against the law, or actions undertaken to inhibit competition.

Dishonest business practices can be defined as any behavior that is not in accordance with good faith. These actions include against the law, therefore dishonest business practices are prohibited, and it can be deadly real competition or harm the company’s competitors unreasonably or unfair and can also harm consumers.¹⁷

a. Kinds of Unfair Business Competition

A violation of unfair business competition can be divided into agreements that are prohibited, prohibited activities, and the dominant position. Every form of this violation has its characteristics.¹⁸

1) Prohibited Agreements

¹⁶ Article 1 point 6 of the Act No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition.

¹⁷ Rachmadi Usman, 2013, *Hukum Persaingan Usaha di Indonesia*, Jakarta, Sinar Grafika, p. 88.

¹⁸ Devi Meyliana Savitri Kumalasari, 2013, *Hukum Persaingan Usaha Studi Konsep Pembuktian terhadap Perjanjian Penetapan Harga dalam Persaingan Usaha*, Malang, Setara Press, p. 17.

Law No. 5 of 1999 contain 11 kinds of agreement that are prohibited and include “monopoly practices” to be made by businesses to other businesses, as set out in Article 4 to Article 16.

These prohibited agreements should be regarded as monopolistic practices and or unfair business competition. If the prohibited agreements are still done by the businesses, it means that the agreement will be null and void or has never exist, because the object of the agreement are prohibited by the law. From the article 4 to article 16 of this Act, there are some agreements that are prohibited, ie oligopoly (Article 4), pricing (Article 5), price and discounts discriminate (articles 6 to 8), the distribution of territory (Article 9), boycott (article 10), the cartel (article 11), trust (article 12), oligopsony (article 13), intergarsi vertical (article 14), exclusive agreements (article 15), agreements with foreign countries (article 16).

2) Prohibited Activities

Article 17 to article 24 of this law explains that there are various forms of activities that are prohibited for businesses, namely the monopoly (Article 17), monopsony (article 18), market domination (article 19), dumping (article

20), manipulation costs of production (article 21), conspiracy (article 22).¹⁹

3) Dominant Position

Dominant position as described in Article 1 paragraph 4 of Law No. 5 of 1999 states that:

“Dominant position is a situation where an entrepreneur does not have any significant competitor in the relevant market with regard to the market share being controlled, or the entrepreneur is in the highest position among its competitors in the relevant market with regard to the financial capability, ability to demand of certain goods or services.”

From above definition, it can be concluded that every business has the possibility to control the dominant market or position which puts businesses in a higher position than the other competitors.

More explanation about Article 25 paragraph (2) of this Act states that a business actor or a group of businesses are considered to have a “dominant position” if:²⁰

¹⁹ Rachmadi Usman, 2004, *Hukum Persaingan Usaha di Indonesia*, Jakarta, Gramedia Pustaka Utama, p. 40-82.

²⁰ Article 25 paragraph 2 of the Act No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition.

- a) A business actor or a group of business actors controls 50% (fifty percent) of the market segment or a certain types of goods or services; or
- b) Two or three businesses or a group of business actors control 75% (seventy five percent) or market segment of a certain type of goods or services.

From the article, it can be concluded that if a business actor or group of actors have an effort to fulfill one of them, then they are so called “dominant position”.

B. Telecommunication Businesses

One of industry that is growing today is the Telecommunications industry. Indonesia started the era of deregulation. One of the most important discussion is that the private sector can be invited and allowed to provide telecommunications services. Some private companies take this opportunity to cooperate with PT. Telekomunikasi Indonesia in a joint venture to establish and provide a fixed telephone network and mobile telephone network. The impact of the government's policy is to accelerate the growth of the telephone network.

Law No. 36 of 1999 on Telecommunications which was originally a Bill of Convergence Telematics was converted into a Telecommunications Bill. What is meant by convergence is a combination of telecommunications services, information technology, and broadcasting

which was originally separated into a single entity in order to obtain the added value of the service.

Nowadays people actually have enjoyed the convergence service. Internet can be accessed from the telecommunication devices, radio broadcast, and TV can be enjoyed through the mobile Internet and information technology devices. Underlying reasons why Law No. 36 of 1999 should be amended are:

1. With the development of convergence technology, the legislation which is clear and detail should be made so that all parties understand their rights and obligations, especially the rules of fair competition in the era of convergence that can be implemented with sufficient legal certainty from the government.
2. The need to accompany the emergence of new businesses in Indonesia which has a different character from the previous business actors in the convergent industry, these business people were previously in industry sectors such as: telecommunication, broadcasting, or information technology.

In general, there are 3 stages of telematic convergence:

1. Convergence on the service, which is now enjoyed by the public;
2. Convergence of networks, now doing the process of the network convergence of Information Technology and Telecommunication as practiced by PT. Telekomunikasi Indonesia by replacing copper with

fiber optic cables at speeds up to 100 Mbps, so that later Telkom will be able to serve customers starting from voice, data, video and internet in a very high quality;

3. Convergence in the utilization of limited resources, namely the frequency and numbering.

Generally, the types of competition that will happen in the era of convergence are:

1. Competition fare, unfair competition would happen if businesses do mergers and acquisitions, both among sector and inter sector;
2. Reject the interconnection and reject of sharing infrastructure with the reason that the capacity is not sufficient;
3. *Bundling*, potentially as a way to disguise a cross subsidy both cross subsidies inter sector and among the sectors. Therefore, in the era of convergence, the consumer protection should be the main focus in order to have fair competition.²¹

With the implementation of convergence services, at least every business must fulfill their rights and obligations in order to minimize the occurrence of unfair competition in the future. The rights and obligations of businesses actors are described in Law No. 8 of 1999 on consumer protection.

²¹ Dayu Padmara Rengganis, 2013, *Hukum Persaingan Usaha Perangkat Telekomunikasi dan Pemberlakuan Persetujuan ACFTA*, Bandung, PT. ALUMNI, p. 57-66.

1. The rights of businesses based on Article 6, are as follows:
 - a. The right to receive of payment based on the agreement on the conditions and the exchange of goods and or services traded.
 - b. The right to get legal protection of customer actions bad faith.
 - c. The right to appropriate self-defense in finishing the legal settlements of consumer disputes.
 - d. The right to rehabilitate the reputation if it is legally proved that consumer loss is not caused by the goods or services traded.
 - e. The rights set out in the provisions of other legislation.

2. The obligations of businesses based on Article 7, are as follows:
 - a. A good faith in conducting business activities.
 - b. Providing accurate information, clear and honest about the condition and guarantee of goods or services and explain the use, repair, and maintenance.
 - c. Treating or serve customers properly and honestly and no discriminatory.
 - d. Ensure the quality of goods or services produced and or traded under the provisions of the quality standards of goods and or services.
 - e. Provide customer an opportunity to test and or try the goods or services as well as a certain guarantees and or warranties on goods manufactured and or traded.

- f. Provide compensation, restitution, and or replacement for any losses due to the use, handling, and use of goods and or services traded.
- g. Provide compensation, redress and or substitution if the goods and or services received or used do not accord with the agreement.²²

C. Indihome Triple Play

Today, the internet could be categorized as one of the basic needs of Indonesian people, and in line with the development of technology, the internet connection increase rapidly. Then, Telkom eventually make changes to its Internet service by replacing speedy to Indihome Triple Play, using fiber optic network.

As an update, Indihome Triple Play also offer packages that are more perfect than speedy. Indihome Triple Play offer triple play services consisting of Internet on Fiber or High Speed Internet, Interactive TV (Cable TV use) and Phone (home telephone), along with some additional features such as Indihome Triple Play view, Melon, to Trend Micro Security.

1. Fiber Internet Service

Internet services using fiber optic fiber from Telkom, which has the advantage of fast internet is stable, reliable, and advanced. Fiber

²² Happy Susanto, 2008, *Hak-hak Konsumen Jika Dirugikan*, Jakarta, VisiMedia, p. 35-36.

optic used is claimed to transfer data up to hundreds of Mbps and greater resistance in any weather conditions, and has the most advanced and latest technology, in the delivery of data used in fixed broadband services.²³ Fast Internet service using optical fiber from Telkom Indonesia, has the advantage:²⁴

a. Fast Internet

Fiber optics is able to transfer data (bandwidth) to hundreds of Mbps (much faster than coaxial cable or copper).

b. Stable Internet

Speed optical fiber is much more stable than coax or copper at the time of sharing (internet access simultaneously).

c. Reliable Internet

Fiber optics is more resistant to any weather condition such as lightning strikes and electromagnetic interference than coaxial cable or copper. So that computer is more secure.

d. Advanced Internet

Fiber optics is the newest technology and advanced data used in fixed broadband services.

²³ Anang Panca, 2016, "Harga Paket Indihome di Yogyakarta", available at <http://harga.web.id/harga-paket-indihome-di-yogyakarta.info>, accessed on Thursday, December 22nd, 2016 at 8.30 am.

²⁴ Anonymous, "Produk Indihome", available at <https://jobtrenurtika.wordpress.com/produk-indihome/>, accessed on Thursday, December 22nd, 2016 at 8.46 am.

2. Usee TV

Usee TV is the first Interactive TV service in Indonesia. Pay TV services provide new experiences, not only watching TV, but also able to control as director. In addition to providing a quality impression, Usee TV also provides a variety of features that no other cable service provides, such as pause and rewind TV, video on demand, video recorder and others. In addition, it can select more freely premium channels up to 69 channels plus 16 channels of choice, Usee TV, Cable TV service is exciting and complete.

3. Phone

Home telephone is a telephone communication services with advantages of less call cost and clear sound quality. Home Telephone Indihome Triple Play Fiber package offer free calling 1000 minutes of local or long distance per month or 17 hours per month that can be used both for local and long distance freely without limit how many minutes are used for local or how many minutes of long distance with a total use of 1000 minutes per month.

Indihome Triple Play Package Price

The Price of Indihome Triple Play is not fixed, the price can be renewed on every month.

Figure 3.1

The Price of Indihome Triple Play Deluxe Package

IndiHome Paket Deluxe - Triple Play						
IndiHome FIBER	TELEPON RUMAH	UR TV	MeVIN ^o	ifix	HOOQ	Harga
10 Mbps	Gratis 1000 menit nelpon lokal / interlokal	Interactive TV Channels Essential + IndiKids Lite	Basic	1+2* Bulan Nonton Sepuasnya	2* Bulan Nonton Sepuasnya	Rp. 460.000,- /Bulan

*- Tambahan nonton ifix dan HOOQ sepuasnya bila aktivasi via myIndiHome.
- Harga belum termasuk PPN.

Source: Website Indihome <http://www.indihome.co.id> accessed on
Thursday, December 22nd, 2016 at 10:00 am.

Figure 3.2

The Price of Indihome Triple Play Premium Package

IndiHome Paket Premium - Triple Play						
IndiHome FIBER	TELEPON RUMAH	UR TV	MeVIN ^o	ifix	HOOQ	Harga
20 Mbps	Gratis 1000 menit nelpon lokal / interlokal	Interactive TV Channels Essential + IndiKids Lite + IndiMovie 2	Basic	1+2* Bulan Nonton Sepuasnya	2* Bulan Nonton Sepuasnya	Rp. 630.000,- /Bulan
30 Mbps	Gratis 1000 menit nelpon lokal / interlokal	Interactive TV Channels Essential + IndiKids + IndiMovie 2	Basic	1+2* Bulan Nonton Sepuasnya	2* Bulan Nonton Sepuasnya	Rp. 820.000,- /Bulan
40 Mbps	Gratis 1000 menit nelpon lokal / interlokal	Interactive TV Channels Essential + IndiKids + IndiMovie 2 + IndiMovie 1	Basic	1+2* Bulan Nonton Sepuasnya	2* Bulan Nonton Sepuasnya	Rp. 995.000,- /Bulan
50 Mbps	Gratis 1000 menit nelpon lokal / interlokal	Interactive TV Channels Extra (All Channels**)	Basic	1+2* Bulan Nonton Sepuasnya	2* Bulan Nonton Sepuasnya	Rp. 1.250.000,- /Bulan
100 Mbps	Gratis 1000 menit nelpon lokal / interlokal	Interactive TV Channels Extra (All Channels**)	Basic	1+2* Bulan Nonton Sepuasnya	2* Bulan Nonton Sepuasnya	Rp. 1.750.000,- /Bulan

* Tambahan nonton ifix dan HOOQ sepuasnya bila aktivasi via myIndiHome.
** Tidak termasuk channel DYNASTY dan INDIJAPAN.
- Harga belum termasuk PPN.

Source: Website Indihome <http://www.indihome.co.id> accessed on
Thursday, December 22nd, 2016 at 10:10 am.

D. Commission for the Supervision of Business Competition (KPPU)

Commission for the Supervision of Business Competition (KPPU) is a commission which was formed based on article 30 paragraph (1) of Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition. Article 34 paragraph (1) of Law No. 5 of 1999 stated that establishment, organizational structure, duties and functions of the commission would be established through Presidential Decree No. 75 of 1999.²⁵

1. Status and Position of the Commission

To supervise the implementation of Law No. 5 of 1999, a Commission is established. This formation is based on Article 34 of Law No. 5 of 1999 which instructs that the establishment of the organizational structure, duties and functions of the commission is established by a presidential decree. This commission was formed by Presidential Decree No. 75 of 1999 and was named the Commission for the Supervision of Business Competition (KPPU).

As an independent institution, it can be said that the authority owned by a great commission involve the authorities own by the

²⁵ Rico Andrian Pakpahan, 2014, “Efektivitas Peran Komisi Pengawas Persaingan Usaha (KPPU) dalam Penanganan Kasus Dugaan Kartel terkait Praktik Monopoli dan Persaingan Usaha Tidak Sehat” (Thesis, Magister Ilmu Hukum, Universitas Atma Jaya Yogyakarta), p. 7.

judiciary. These powers include the investigation, prosecution, consultation, examine, prosecute and decide the case.²⁶

The Commission is a special organ that has the double duty both to create order in the business competition and to create and maintain a conducive climate for business competition. Although the Commission has the function to enforcement the law especially the competition law, the Commission is not a judicial institution focusing on business competition. Thus, the Commission is not authorized to impose civil and criminal penalties. The position of Commission is over an administrative agency, so that sanctions are included administrative sanctions.

The commission status is to control the implementations of Law No. 5 of 1999. Its legal status is as an independent agency of government regardless from the influence of other parties. The members of the Commission in carrying out those duties are responsible to the President.²⁷

Law No. 5 of 1999 explains that the duties and authority of Commission for the Supervision of Business Competition (KPPU) are as follows:

²⁶ Devi Meyliana Savitri Kumalasari, *Op. Cit.*, p. 31.

²⁷ Devi Meyliana Savitri Kumalasari, *Op. Cit.*, p. 32.

2. The Duties of Commission for the Supervision of Business Competition (KPPU)

The duties of Commission for the Supervision of Business Competition (KPPU) based on Article 35 Law No. 5 of 1999:

- a. Assessing the agreements which may result in monopolistic practices and or unfair competition as set out in Article 4 to Article 16;
- b. Assessing the business activities and or the actions of business actors which may result in monopolistic practices and or unfair competition as set out in Article 17 to Article 24;
- c. Assessing the presence or absence of abuse of a dominant position which may result in monopolistic practices and or unfair competition as regulated in Article 25 to Article 28;
- d. Taking measure in accordance with the authority of the Commission based on Article 36;
- e. Providing recommendation and consideration of the Government policies related to monopolistic practices and or unfair competition;
- f. Compiling the guidelines and or publications related to this Act;
- g. Providing periodical reports on the results of its work to the President and the House of Representatives.

3. The Authorities of Commission for the Supervision of Business Competition (KPPU)

Based on article 36 Law No. 5 of 1999, the authorities of Commission for the Supervision of Business Competition (KPPU), are:

- a. Receiving a report from the public or from businesses regarding allegation of monopolistic practices and or unfair competition;
- b. Assessing on allegation of business activities and the action of business actors which may result in monopolistic practices and or unfair competition;
- c. Conducting an investigation or examination of cases of allegation monopolistic practices and or unfair competition reported by the public or by businesses or found by the Commission as a result of his research;
- d. Concluding the results of their investigation or examination of the presence or absence of monopolistic practices and or unfair competition;
- e. Calling businesses on the allegation to have committed a violation of the provisions of this law;
- f. Calling and presenting witnesses, expert witnesses, and anyone who is knowing violation of the provisions of this law;
- g. Asking for help from investigators to present businesses, witnesses, expert witnesses, or any person referred to point e and f, which is not willing to fulfill the summons of the Commission;

- h. Requesting information from the government agency in connection to the investigation or examination to businesses which violate the provisions of this law;
 - i. Getting, researching, and or assessing the letters, documents, or other evidence to an investigation or examination;
 - j. Deciding and setting the presence or absence of harm to other businesses or the public;
 - k. Informing the Commission's decision to businesses suspected monopolistic practices and or unfair competition;
 - l. Giving the sanctions in the form of administrative measures to businesses that violate the provisions of this Act.
4. The Functions of Commission for the Supervision of Business Competition (KPPU)

To supervise the implementation of laws required the existence of an institution that obtains authority from the State. This authority was expected that the institution can run the duties and functions and also doing independently act. Commission is stated in Article 30 paragraph (1) of Law No. 5 1999 that specifies: “To supervise the implementation of this law, the Commission for the Supervision of Business Competition (KPPU) then which is called is commission is established”. The mandate of the legislation has been implemented through Presidential Decree of the Republic of Indonesia No. 75 of

1999 on the Commission for the Supervision of Business Competition (KPPU) which was set on July 8, 1999, now it has been modified by Presidential Regulation No. 80 of 2008 regarding the amendment of Presidential Decree No. 75 of 1999 on the Commission for the Supervision of Business Competition (KPPU).

Similar to the commissions that exist in some countries, the Commission is an independent institution and free from the influence and power of the government and any parties (Article 30 paragraph (2) of Law No. 5 of 1999). On that basis, the Commission is directly responsible to the president as the head of the executive (Article 30 paragraph (3) of Law No. 5 of 1999).

In accordance with the development of State institutions in Indonesia, the Commission is one that is relatively new commission which functions as judiciary. In general, the equipment of State in the form of staff auxiliaries or independent bodies, arises from:

- a. The existence of state duties increasingly complex which require sufficient independence.
- b. An effort of empowerment to the duties of state institutions that already exist by forming a new specific institution.²⁸

²⁸ I Made Sarjana, 2014, *Prinsip Pembuktian dalam Hukum Acara Persaingan Usaha*, Sidoarjo, Zifatama, p. 33-34.