

CHAPTER II

LITERATURE REVIEW

A. Monopoly and Cartel Practice

The definition of monopoly in general is any business agent that becomes sole seller of a particular product and service, and in its market there is no substitute product. According Pass and Bryan Lowes, the emergence of the monopoly is fostered by the barriers to enter other markets. Article 1 paragraph 1 of Law No. 5 Year 1999 mentions that monopoly is the control over the production and marketing of goods and or on certain services by one business actor or a group of business actors.¹

Law No. 5 of 1999 prohibits monopoly by the rule of reason which means that the monopoly will be prohibited if the monopoly destroys the competition significantly and with the consideration of such monopoly will lead to the practice of monopoly.² Anti-monopoly Law No. 5/1999 gives meaning to monopoly as a control over production and / or to monopoly as a control over the production and or marketing of certain goods and services by one business actor or a group of business actors. While the meaning of monopolistic practice in Article 1 paragraph 2 of the Antimonopoly Act is a concentration of economic power by one or more business actors.

¹ Andi Fahmi Lubis, Ana Maria Tri Anggreani, etc, *Hukum Persaingan Usaha Antara teks dan Konteks*, Jakarta : Komisi Pengawas Persaingan Usaha, 2009, p.128.

² *Ibid.*

Monopoly results in the control of production and or marketing of certain goods and or services resulting in an unfair business competition and may harm the public interest.³

Cartel is one of the strategies among businesses to be able to influence prices by adjusting the amount of their production. They assume if they were in the market reduced production while demand for their products in the fixed market, will result in the rise in prices to a higher level, and if in the abundant product market, it will have an impact on the decline in the market price of their products. Therefore, businesses are trying to form a horizontal cooperation to determine the price and quantity of production of goods or services.⁴

Based on Article 11 of Law No. 5 of 1999 governing the prohibition of cartels, it is found that;

"Businesses are prohibited from making agreements with rival actors who intend to influence prices by adjusting production and or marketing of goods or services, which may result in monopolistic practices and or unfair competition."⁵

³ Andi Fahmi Lubis, Anna Maria Tri Anggraini, etc., Op. Cit., p. 132.

⁴ *Ibid.*

⁵ Article 11 of Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition.

B. Beef Import Regulation and Supervision of Import Beef Government in Indonesia

According to the regulation of Ministry of Trade Republic of Indonesia about provisions on export and import of animals and animal products in Article 7 Paragraph 2, types of animals and animal products are restricted to their imports as contained in annex II and annex III which form an integral part of the Ministerial Regulation and according to Article 8 that the Import of Animal and Animal Products as contained in Attachment II and Attachment III This Ministry Regulation can only be done by State Owned Enterprises (BUMN), and Regional Owned Enterprises (BUMD).⁶

As it is known that Customs duties at Port of conduct supervision or inspection of imported goods and collect import duty and other import levies. Customs position in carrying out its duties is at the country gate. All import and export goods under the supervision of Customs In some Customs committees also oversee the fulfillment of import requirements, in the sense that import clearance from relevant agencies must be attached to Customs notification documents, and beef is also supervised by imports in compliance with import requirements. In the case of beef imports, customs authorities are tasked with investigating the correctness of Customs notices submitted by importers, examining licenses (import licenses from relevant

⁶ The explanation of article 7 and 8 of Minister of Trade of the Republic of Indonesia Regulation, available at <http://www.kemendag.go.id/files/regulasi/2016/08/15/59m-dagper82016-id-1472021028.pdf>, accessed on September 7th, 2017 at 21.25 pm.

agencies, in this case a letter from the Ministry of Trade), and payment of import duties, The Director General of Customs and Excise does not interfere with the import licensing business but only keeps the import of beef done by meeting the requirements.⁷

C. Kinds of Unfair Competition

1. Prohibited Agreements by Law No. 5 of 1999

a. Understanding and Agreement Types

Antimonopoly Law is the prohibition of certain agreements that are considered to give rise to monopoly and unfair competition. Regarding what is meant by the word covenant has been strictly regulated in Article 1 paragraph 7 Antimonopoly Law which states that “ the agreement is an act of one or rely more business actors for binding themselves to one or more other business actors in whatever name, whether written or not writing ⁸”. With the definition of the agreement formulated by Law No. 5 of 1999, it is known that Law No. 5 of 1999 to formulate that a deal could be in the form of written or unwritten, both approved for use as evidence in the case of business competition. Previously

⁷ Ahmad Dimiyati, “ Impor daging Sapi: Sejauh Mana Keterlibatan Bea Dan Cukai” available at http://www.bppk.kemenkeu.go.id/images/file/pusb/ Artikel/2013_Impor_Daging_Sapi.pdf, 2013, accessed on September 7th, 2017 at 21.31 pm.

⁸Arus Akbar Silodae,Wirawan B. Ilyas, *Pokok-pokok Hukum Bisnis*, Jakarta: Salemba Empat, 2011, p. 155.

unwritten agreements are generally considered not as strong as evidence in court, because the civil procedural law is applicable at the time that more emphasis and consider written evidence and authentic as strong evidence.⁹

The agreement can be divided into horizontal and vertical agreements;

1) Horizontal agreement

According to the initial understanding of the theory of competition, horizontal barriers competition is agreement in advance of businesses factual the same relevant market, aimed at blocking competition¹⁰.

2) Vertical Agreement

This kind of vertical agreements are agreements made between businesses at different stages of production and distribution process. The agreement, for example is made between manufacturers, wholesalers, and retailers.

b. Prohibited Agreements

Chapter 3 Article 4 to Article 16 regulates certain agreements that are prohibited by Law No. 5 of 1999 specific agreement which

⁹ Andi Fahmi Lubis, Ana Maria Tri Anggreani, etc, *Hukum Persaingan Usaha Antara teks dan Konteks*, Jakarta : Komisi Pengawas Persaingan Usaha, 2009, p.86.

¹⁰ Suyud Margono, *Hukum Anti Monopoli*, Jakarta: Sinar Grafika, 2009, p. 83.

is considered to give rise to a monopoly and unfair competition, among others: ¹¹

1) Oligopoly

Banned agreement is in the form of oligopoly. Definition of an oligopoly by the Antimonopoly Law Article 4 paragraph (1) and (2) are as follows:

- a) Perpetrators shall be prohibited from making agreements with other businesses queried together in controlling the production or marketing of goods or services which may result in monopolistic practices or unfair competition.
- b) Business actor is suspected or considered jointly controlling the production or marketing of goods, or services, referred to in letter a, if two (2) or three (3) business actor or a group of business actors control more of 75% market share of a particular type of goods or services. It can be concluded that the oligopoly is a monopoly by some businessmen (monopoly by a few).

2) Price Fixing

¹¹ Susanti Adi Nugroho, *Hukum Persaingan Usaha di Indonesia Dalam Teori dan Praktik Serta Penerapan Hukumnya*, Jakarta: Kencana Prenada Media Group, 2012, p. 111.

Price fixing agreements prohibition contained in Article 5 of the Antimonopoly Law. What is meant by the prohibition of price fixing are business people prohibited from making agreements with business competitors to set prices on goods or services or to be paid by the consumer or the customer on the same relevant market. Price fixing agreement prohibited because pricing will jointly lead the market that cannot be the legal validity of the price in the form of demand and supply.

3) Regional Division

Sharing agreement also prohibited trade area by the Anti-Monopoly Law, which through Article 9 of the Anti-Monopoly Law states:

"Businesses are prohibited from making agreements with business competitors that aim to divide the area of marketing or market allocation of goods or services that may result in monopolistic practices and or unfair business competition".¹²

In order to apply the prohibition to businesses that enter into agreements zoning, must meet the following elements:

- a) He made an agreement (either be vertical or horizontal);

¹² Suyud Margono, *Hukum Anti Monopoli*, Jakarta: Sinar Grafika, 2009, p. 90.

- b) The agreement was made with the businesses of competitors;
 - c) The goal is to divide the division or allocation of market share;
 - d) It can result in monopolistic practices and unfair business competition.
- 4) Boycott

One form of the agreement which is prohibited by the Anti-Monopoly Law is boycott agreement. Boycott agreement namely:

- a) Perpetrators shall be prohibited from making agreements with business competitors, which can prohibit other businesses to put the same effort, both for the purpose and overseas markets.
- b) Offender is prohibited to make treaties actors competitors, to refuse to sell any goods or services from other businesses so that such actions:
 - i. Adverse or may be expected to harm other businesses
 - ii. Limiting other businesses sell or buy any goods or services from the relevant market.

Boycotts as set out in article 10 of Law No. 5, 1999 is sufficient to cover access to the inputs needed by other competitors.

5) Cartel

Economic Law Dictionary defines cartel as a "conspiracy or association between some manufacturers of similar products in order to regulate production, pricing, and sales, as well as to gain a monopoly position". Thus, the cartel is one form of monopoly, where some businesses (producers) come together to control the production, determine the price or region of the marketing goods or services so that among them no more competition. Prohibition of cartel agreements set out in Article 11UU Antitrust which states that:

"Businesses are prohibited from making agreements with business competitors who intend to influence prices by adjusting production and or marketing of goods or alone, which may result in monopolistic practices or unfair competition."¹³

Cartel agreements is one of the agreements that often occur in monopoly practice. In simple terms cartel is an agreement of the businesses with business competitors to eliminate

¹³ Arus Akbar Silondae, Wirawan B. Ilyas, *Pokok-Pokok Hukum Bisnis*, Jakarta: Salemba Empat, 2011, p. 160.

competition both of them. With other words, the cartel (cartel) is a cooperative of producers of certain products which aims to oversee the production of sales, as well as the price for doing monopoly against community or certain industry.

6) Trust

Businesses are prohibited making an agreement with the other business to cooperate to form a joint greater company, by keeping and maintaining the viability of their respective companies or its member. Which aims to control the production and or marketing of goods or services, so that result in monopolistic practices and or unfair business competition?¹⁴

7) Oligopsony

¹⁴ R.Murjiyanto, SH., KN., *Pengantar Hukum Dagang Aspek-Aspek Hukum Perusahaan Dan Larangan Praktek Monopoli*, Yogyakarta: Liberty Yogyakarta, 2002, p. 54.

One of the agreement that prohibited by law Antitrust is an agreement that is oligopsony. Understanding oligopsony is the opposite of an oligopoly.

In Article 13 of Law No. 5 of 1999 is:

- a) Business prohibited making agreements with other businesses that aims to jointly master the purchase or receipt of supply in order to control the price of the goods or services in the relevant market, which may result in monopolistic practices and unfair business competition.
- b) Business actors suspected or deemed jointly controlled purchase or acceptance of the supply referred to in paragraph (1) of this section if two or three Business men or business group operators control more than 75% market share of one kind or certain goods or services.

Thus, according to the Anti-Monopoly Law which resulted oligopsony agreement prohibited if, or at least have fulfilled the follow the elements¹⁵:

- i. The existence of an agreement;

¹⁵ Suyud Margono, *Hukum Anti Monopoli*, Jakarta: Sinar Grafika, 2009, p. 96.

- ii. The agreement was made with other businesses;
- iii. The agreement made by two or three business actors or groups of business men for master purchase or acceptance of the supply of goods and services;
- iv. Market domination is determined more than 75%;
- v. Interest rates in the market so that the agreement can be controlled;
- vi. He made an agreement that market prices can be controlled;
- vii. The treaty resulted in monopolistic practices and unfair business competition.

8) Vertical Integration

Vertical integration is an agreement between businesses that aims to control a number of production which included in the series production of certain goods or services to which each series of production is the result of processing or further processing, both in a series of direct and indirect, which may result in business competition unhealthy or harmful to society.

9) Covered Agreements

In Article 15 of Law No. 5 of 1999 Shrimp determined that:¹⁶

- a) Businessmen prohibited making an agreements with other businesses that make it a requirement that the recipient of goods and services will only supply or not to supply the goods or services back to certain parties and or in certain places.
- b) Business men prohibited making an agreements with other parties that making a requirements parties who receive goods or a particular course must be willing to buy goods or services from businesses suppliers.
- c) Business men prohibited making an agreements on specific prices or discounts on goods or services, which make it a requirement that businesses that receive goods or services from businesses suppliers.

10) Agreements with Foreign Parties

One form of prohibited agreements stipulated in Law No. 5 of 1999, among other agreements with foreign parties.

¹⁶ R.Murjiyanto, *Pengantar Hukum Dagang Aspek-Aspek Hukum Perusahaan Dan Larangan Praktek Monopoli*, Yogyakarta: Liberty Yogyakarta, 2002, p. 55.

Actually there is no prohibition to conclude agreements with foreign countries, and it has become an everyday business practice. Agreements prohibited if the result in monopolistic practices and unfair business competition. This is stated in Article 16 of Law No. 5 1999 that businesses are prohibited from making agreements with other parties abroad that make provisions which may result in monopolistic practices and unfair business competition. From chapter 16 it can be concluded that agreements with foreign parties is prohibited is made businesses with the agreement makes provisions for unusual or may create monopolistic practices and unfair business competition.

c. Cartel

1) Understanding Cartel

Based on Article 11 of Law No. 5 of 1999 governing the prohibition of cartels is determined that:

"Businesses are prohibited from making agreements with rival actors who intend to influence prices by adjusting production and or marketing of goods or services, which

may result in monopolistic practices and or unfair competition."

The cartel agreements are one of the agreements that frequent act of monopoly. Thus, the cartel is one form of monopoly in which some businesses or manufacturers who legally and economically each one stands alone, united to control the production, determine the price, and marketing territory or goods and services, so that between them there is no more competition. Cartels are usually initiated by trade associations with its members.

Black Law Dictionary defines that the cartel is:

"A combination of producers of any product joined together to control its production, sale, and price, so as to obtain a monopoly and restrict competition in any particular industry or commodity. Such exist primarily in Europe, being the agreement of companies or sections of companies having common interest, designed to prevent extreme or unfair competition and allocate markets, and to promote the interchange of knowledge the resulting from scientific and technical research, exchange of patent rights, and standardization of product ".¹⁷

Cartels can be done through three ways; prices, production and marketing areas. Losses that may occur in the cartel are two kinds, namely:

- a) The occurrence of monopolistic practices by the actors at the macro cartel that lead to an inefficient allocation of resources,

¹⁷Hendry Campbell, *Black's Laws Dictionary*, St Paul Minn West Publishing Co., 1990, p. 215.

resulting in deadweight loss or the weight lost is usually caused by wisdom restrictions on production by the monopolist to keep prices high.

- b) In terms of consumers, it will lose the option to price competitive quality and good after-sales serv.

Cartels can be defined narrowly or broadly. In a narrow sense, cartel is a group of companies that is supposed to compete, but they actually agree with one another to "set price" to benefit the monopolist". As in a broad sense, covering cartel agreements among competitors to divide markets, allocate customers and set prices. The most general cartel type is commonly made by the seller is price fixing agreements, bid rigging tenders, sharing agreements area (market) or costumers and agreement restriction output. The most frequent among buyers are price fixing agreements, the allocation agreement, and the tender offer.

2) Elements of Cartel

The element cartel among others are:¹⁸

- a) The existence of an agreement;

¹⁸ Referensi Penting Hukum dan Politik GRESNEWS, " Aturan Hukum Kartel", available at <http://www.gresnews.com/berita/tips/2256198-aturan-aturan-hukum-kartel/0/> accessed on Thursday 17th November 2017, at 23.18 pm.

- b) The agreement made with entrepreneurs competitors;
 - c) The goal is to influence prices;
 - d) Action to influence prices is done by regulating the production and or marketing of goods or services;
 - e) That action can cause the occurred of monopoly practice
- 3) Initially occurrence indicators Cartel

The Commission made an early indicator to identify cartel within the guidelines of Article 11 about Cartel. In theory, there are several structural and behavioral factors as an early indicator in identifying the existence of a cartel in certain business sectors¹⁹. The followings are efforts of the KPPU to make effort in finding evidence of cartel through indication of economic analysis methods.

Some of these are as follows:²⁰

Structural factors

- a) The concentration level and the number of enterprises

¹⁹ Komisi Pengawas Persaingan Usaha, ” Draft Pedoman Kartel”, available at http://www.kppu.go.id/docs/Pedoman/draft_pedoman_kartel.pdf accessed at 18th November 2016, at 15.35 WIB

²⁰ *Pengaturan Kartel Dan Contoh Kasus, Peraturan Komisi Pengawas Persaingan Usaha No. 4 Tahun 2010 Tentang Pedoman Pasal 11 tentang Kartel dari UU No. 5 Tahun 1999*, p. 20.

- b) Size of company
- c) Product homogeneity
- d) Multi-market contacts
- e) Inventory and product capacity
- f) Linkage ownership
- g) Ease of market entry
- h) Characters request: regularity, elasticity, and changes
- i) Bargaining power of buyers (buyer power).

Cartels can be detected by looking at the behavior of businesses that copy information and transparency among them. Usually business people trying to keep things secret to a company's success in getting buyer / consumer, the cartel, however, does not require the certain way to get the consumers. Therefore the absence of real competition between businesses make businesses feel safe going to profit from the company. The role of the association can be used as a media behalf association but in which there is exchange of information and the transparency of prices, production quantities and marketing .The action by Commission for Supervision of Business Competition is infringing the provisions of Law No. 5,

Year 1999 can be compared by their meetings on behalf of the trade association.

2. Prohibited Activities

The activities prohibited in Act No. 5 of 1999 on Prohibition of Monopolistic practices and unfair business competition, include:²¹

- 1) Activity of mastery or production and marketing of goods or services (monopoly).
- 2) Activities which control the supply or acceptance into buyers stump of the goods or services in the relevant market (monopsony).

3. Dominant Position

The definition of a dominant position in Article 1 (4) of Law No. 5 1999 is a situation where businesses do not have a competitor which means in the relevant market in terms of market share held or businesses that have highest position among its competitors in the relevant market in terms of financial capability, the ability to access on the supply or sale as well as the ability to adjust the supply of or demand for particular goods or services.

D. Legal approach of Business Competition

In the setting of competition, the business applied approach *Per Se Illegal* and *Rule Of Reason* in competition law. Approach *per se illegal* and

²¹ Suyud Margono, *Hukum Anti Monopoli*, Jakarta: Sinar Grafika, 2009, p. 105-106.

rule of reason have been established to assess whether a particular action of businesses in violation of the Antimonopoly Law or no. Rule of reason approach is an approach used by competition authorities agency effort to make an evaluation of the impact the agreement or certain business activities, in order to determine whether a treaty or certain business activities are inhibit or promote competition. The *per se illegal* approach is expressed every treaty or certain business activities as illegal, without further evidence of the impact of the stablished agreement or business activities. Activities that are considered as *per se illegal* typically includes collusive pricing on certain products, as well as setting the resale price²².

E. The Role of Commission for the Supervision of Business Competition (KPPU)

1. Definition of The Commission for The Supervision of Business

Competition (KPPU).

Law No.5 of 1999 on the prohibition of monopolistic practices and unfair business competition has mandated the establishment of a supervisory committee which will have the authority to supervise the implementation of the provisions of this law. In article 30 until article 37 of law no. 5 of 1999 explicitly explains the establishment of independent commission with the name of the commission for the supervision of

²² Andi Fahmi Lubis, Ana Maria Tri Anggreani, etc, *Hukum Persaingan Usaha Antara teks dan Konteks*, Jakarta : Komisi Pengawas Persaingan Usaha, 2009, p. 55.

business competition, commission for supervision of business competition was officially established by decree of the president of the Republic of Indonesia number 75 of 1999. The legal reason of this establishment is based on article 34 of law no. 5 of 1999 that instructed the establishment of the organizational structure, duties and functions of the Commission set through presidential decree²³.

2. Duties and Authority of The Commission for The Supervision of Business Competition

The task of the commission for the supervision of business competition has been regulated in detail in article 35 of law no. 5 of 1999, which is repeated in article 4 of Presidential Decree no. 75 of 1999. Commission for supervision of business competition has several tasks that include:

- a. Conduct an assessment of the agreement which may result in monopolistic practices and unfair business competition²⁴.
- b. Assessing the business activities and / or actions of businesses that may result in monopolistic practices and / or unfair business competition.²⁵

²³ Prof Hikmahanto Juwana, *Peran Lembaga Peradilan Dalam Menangani Perkara Persaingan Usaha*, Jakarta: Partnership for Business Competition (PBC), 2003, p. 01.

²⁴ Law No. 5 of 1999, Article 4-6.

²⁵ Law No. 5 of 1999, Article 17-24.

- c. Evaluate the existence or absence of abuse of a dominant position which may result in monopolistic practices that can causes the occurred of monopolistic practices and / or unfair business competition.²⁶
- d. Take action in accordance with the authority of the commission.²⁷
- e. Provide advice and opinion concerning Government policies related to monopolistic practices and / or unfair business competition.
- f. Develop guidelines and / or publications relating to Act No. 5, 1999
- g. Provide regular reports on the work of the commission to the president and the House of Representatives.

In its position as Supervisory implementation of Law No. 5 In 1999, the Act gives special powers to the Commission that includes:²⁸

- a. Receive reports from the public and from businesses men about the alleged monopolistic practices and unfair business competition;

²⁶ Law No. 5 of 1999, Article 25-28.

²⁷ Law No. 5 of 1999, Article 36.

²⁸ *Ibid*, p. 26.

- b. Conduct research on the alleged existence of business activities and actions businesses that may result in monopolistic practices and goes without unhealthy competition;
- c. Investigate or examine cases alleged monopolistic practices and unfair business competition reported by the public or by businesses were found by the Commission as result of research;
- d. Conclude the investigation or examination of the presence or absence of monopolistic practices and unfair business competition;
- e. Call the perpetrators that needed and alleged to have committed a violation of this legislation provisions;
- f. Call and produce witnesses, expert witnesses and any person referred to letters e and f, which is not willing meet the call commission;
- g. Request information from government agencies in connection with the investigation or examination to businesses which violate the provisions of this law;
- h. Get, research, and or rate letters, documents or other evidence to an inquiry or investigation;
- i. Decide and establish the absence of harm to other businesses or the public;

- j. Notify the Commission's decision to businesses suspected monopolistic practices and or unfair business competition;
- k. Impose sanctions in the form of administrative measures to offenders who violate the provisions of this Act.