CHAPTER II

LITERATURE REVIEW

A. State Owned Enterprisess

State Owned Enterprises was established as an implementation of the state's obligation to give prosperity to its people. Building a strong economic structure, through fair and ethical business, is one way to achieve that welfare. Because it is not possible to directly run a business, then State Owned Enterprises is an option by placing capital of state in it. [7]

According to Article 1 point 1 of Law No.19 of 2003 on state Owned Enterprises, Owned Enterprises is defined as a company that owned by state. The general definition of State Owned Enterprises means an entity, the capital of which is in part or in whole owned by the state through direct participation that is derived from the state's separated assets. Stated owned enterprise is one of the economic actors in the national economic system, besides private business entity and corporation. State Owned Enterprises comes from contribution in Indonesian Economy which has role to produce many goods and/or servicesin order to achieve the people welfare. State Owned Enterprises has many factors such as agriculture sector, plantation forestry, finance, manufacturing, transportation, mining, electricity, telecommunication, trade and construction.

[7] Marshias Mereapul Ginting *et al*, "Pengecualian Praktek Monopoli yang Dilakukan Oleh Bumn Sesuai Pasal 51 UU No.5 Tahun 1999", *Transparency Journal of Economic Law*, Vol. II No. 2, (June, 2013), ISSN 2337-800X, p. 4.

The basis of the establishment of State Owned Enterprises is Article 33 of 1945 Constitution which mentions:

1. The economy is structured as a joint effort based on the principle of kinship.
2. Production branches that are important for the state and which affect the livelihood of the people are controlled by the state.
3. Earth and water and the natural resources contained in there are controlled by the state and used for the greatest prosperity of the people.
4. The national economy is organized on the basis of economic democracy with the principles of togetherness, efficiency, justice, sustainability, environmental insight, independence and by maintaining a balance of progress and national economic unity.

According to Article 9 of Law No. 9 of 2003, the types of State Owned Enterprises is divided into two, they are:

1. Public Limited Liability Company

   State Owned Enterprises in the form of a limited liability company whose capital is divided into shares wholly or at least 51% (fifty-one percent) of shares owned by the Republic of Indonesia whose main purpose is to pursue profit. And also, to increase the value of the company and provide goods and/or services of high quality and strong competitiveness.

2. Public Company (*Perum*)

State-owned enterprises are wholly owned by the state and not divided into shares, which aims for general benefit in the form of providing goods and / or services of high quality and pursuing profit based on company management principles. The nature of business of public company is more to the public servicesbut still expected to generate profits for business continuity.

B. The Procurement of Goods and/or Services

According to Indra Bastian, the procurement of goods and or services is the acquiring of goods, service, and company work by certain way and time, which result the best value for the company.[8] In addition, according to Marbun, procurement of goods and/or services is an effort to get the wanted goods and/or servicesbased on the logic and systematic thinking following the prevailing norms and ethics based on the basic procurement method and process.[9]

Based on the above definitions, it can be concluded that the procurement of goods and/or servicesis an activity to obtain or realize the wanted goods and/or servicesbased on the prevailing law by the certain method and time and implemented by the parties who have ability in conducting the procurement process.

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[8] Indra Bastian, 2010, *Akuntansi Sektor Publik, suatu pengantar (PSASP)*, 3rd edition, Jakarta, Erlangga, p. 263.
[9] Rocky Marbun, 2010, *Tanya Jawab Seputar Pengadaan Barang/Jasa Pemerintahan*, Jakarta, Visi Media, p. 35.

Article 33 paragraph (4) of 1945 Constitution stated that "national economy is implemented based on the economy democracy by the principle of togetherness, efficiency, fair, sustainable, environmentally friendly, independent, and by maintaining the balance of development and unity of national. Clearly in the Article 33 of 1945 Constitution contain a thought of economic democracy where the democracy has characteristic that the process of realizing done by all of the member of society for the interest of entire society and must serve to the welfare of entire society. [10]

One of the implementations is the issuance of President Regulation No. 54 of 2010 on the procurement of Goods/Service of Government. That president regulation should be implemented appropriately and in accordance with Article 33 of 1945 Constitution. The principle of procurement of goods and/or servicesby government which has been regulated is based on the principle of economic democracy, in order to realize the independence of nation, efficiency of state finance, maintain the balance and the unity of national economy.

The President Regulation No. 54 of 2010 on the Procurement of Goods and/or Service has undergone four times amendment, that is by the President Regulation No. 25 of 2011, President Regulation No. 70 of 2012, President Regulation No. 172 of 2014. Based on the Article 1 of President Regulation No. 54 of 2010 on the Procurement of Goods and/or Service of Government, the procurement of goods/services of government is procurement of goods/services

[10] Binoto Nadapdap, 2009, *Hukum Acara Persaingan Usaha*, Jakarta, Jala Permata Aksara, p. 6.

of ministry/institution/local institution which funded by the National State Budget or Local State Budget where the process since the identification of need until the handover of result.

In the procurement of goods or services in the scope of State Owned Enterprises, there are 2 (two) sources of funds to procure the goods and/or service, namely:

1. Using funding sources from Indonesian State Budget / Regional Government Budget

   Where if the procurement of goods and / or services using funds from the Indonesian State Budget / Regional Government Budget then in the procurement process should be deferred to the Presidential Regulation No. 54 of 2010 on the procurement of government goods and/or services.

2. Not using funding sources from Indonesian State Budget / Regional Government Budget

   Where if the procurement of goods and / or services does not use funds from Indonesian State Budget / Regional Government Budget then in the process of procurement of goods and/or services shall subject to Ministerial Regulation No. 05 of 2008 on General Guidelines for the Implementation of Procurement of Goods and/or Services of State-Owned Enterprisess.

According to Presidential Regulation No. 54 of 2010 concerning Procurement of Government Goods / Services is an activity to obtain Goods / Services by Ministry / Institution / Work Unit of Regional Devices / other Institutions whose process starts from planning of needs until completion of all activities to obtain Goods / Services,[11] while based on the regulation of the Minister of State Owned Enterprisess No. 05 / MBU / 2008 on General Guidelines of the Procurement of Goods and/or Services of State Owned Enterprisess, the definition of Procurement of Goods and/or Services is the procurement of goods and/or services conducted by State Owned Enterprisess whose financing does not use funds directly from Indonesian State Budget / Regional Government Budget.[12]

According to Presidential Regulation No. 54 of 2010, the principles contained in the procurement process of goods and/or services namely:

1. Efficient

   Efficient procurement is measured against how much effort is made to obtain goods / services with specifications that have been set.

2. Effective

   The effectiveness of procurement is measured how far goods / services that have been obtained from the procurement process can reach the specified specifications.

[11] Article 1 point 1 of President Regulation No. 54 of 2010 on Procurement of Goods and/or Services of Government

[12] Article 1 point 1 of Minsitry of State Owned Enterprises Regulation No. PER-05/MBU/2008

3. Transparent

   How the Procurement process of Goods / Services can be widely known. The point is that all forms of information related to the procurement process of goods / services can be obtained and easily accessible by the general public.

4. Opened

   Opened means that the procurement of goods/services can be joined by all provider of goods/services which fulfilled the certain criteria based on clear provision and procedures.

5. Compete

   Each Provider / Service Provider is able to demonstrate fair competition to obtain a willing tender by improving the quality and each item that will be provided by them.

6. Fair / non-discriminatory

   Give equal treatment to all prospective Providers / Suppliers and not lead to the provision of benefits to certain parties.

7. Accountable

   Must be in accordance with the rules and provisions related to Procurement of Goods / Services so it can be accounted for.

C. Direct Appointment in the Procurement of Goods and/or Services

Essentially, procurement of goods and/or services is effort of party of user to obtain or realize the goods and/or services that wanted, by using certain

method and process in order to get agreed price, time, and other agreements.[13] Generally the direct appointment in the procurement of goods and/or services is regulated by the President Regulation No. 54 of 2010 on the Procurement of Goods and/or Services State Owned Enterprises which already amended four times and lately amended by President Regulation No. 4 of 2015.

According to Article 1 point 31 of the President Regulation No. 54 of 2010, Direct Appointment is a method of selecting the goods and/or services Provider by appointing directly 1 (one) provider of the goods and/or services. In order to conduct the procurement of goods and/or services by this method, there is several conditions that have to be met. The conditions are contained in Article 38 paragraph (4) of President Regulation No. 54 of 2010 on Procurement of Goods and/or Services Government.

D. Unfair Business Competition

In the Dictionary of the Indonesian Language of the Language Center, the word competition comes from the basic word "competitiveness" which means to race or (overcoming, formerly preceding) or attempting to pay attention to the benefits of each of the individuals or legal entities in the field of trade, production and so forth.[14]

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[13] Gatot Nursetyo, "Analisis Pengadaan Barang Dan Jasa Konsultansi (Studi Kasus : Proyek Pemerintah)", *Jurnal Teknik Sipil dan Arsitektur,* Vol. 8 No. 12 A (December, 2010), ISSN 0852-2561. pp. 2-4.

[14] A Pratama Aditya dan Andini T Nirmala, 2002, Kamus Besar Bahasa Indonesia, Surabaya, Prima Media, p. 382

According to the black Law Dictionary, the competition is "contest of two rivals, the effort of two or more parties, acting independently to secure the business of a third party by the effort of the most favorable term: also, the relations between different buyers or different sellers which result from this effort. It is the struggle between rivals for same trade at the same time; the act of seeking or endeavoring to gain what another is endeavoring to gain at the same time the term implies the idea of endeavoring by two or more to obtain the same object or result."[15]

The issuance of Law No. 5 of 1999 was very influenced by the "Antitrust Law of United States" either substantial or terminology that used in that Law. So in order to have deep understand on the Law No. 5 of 1999 we have to study the antitrust Law of United States.[16] With the entry into force of the Law No. 5 of 1999 on the Prohibition of Monopoly Practice and Unfair Business Competition and the establishment of Business Competition Supervisory Commission as the institution that have duty to supervise the implementation of that law, it give hope to the society regarding to the existence of the government effort to stop any kinds of monopoly practices and the Unfair business competition that is

[15] Ayub Permada Wiyaya, 2015, "*Pengadaan Barang Dan/Atau Jasa Melalui Penunjukan Langsung Pada Badan Usaha Milik Negara (Bumn) Berdasarkan Undang Undang Nomor 5 Tahun 1999 Tentang Praktek Monopoli Dan Persaingan Tidak Sehat (Studi Kasus Penunjukan Langsung Oleh Pertamina)",* Yogyakarta, Universitas Gadjah Mada, p. 21

[16] Ibal Albanna, 2010, "Penerapan Pendekatan Rule of Reason Terhadap Bentuk Persekongkolan Tender Dalam Perkara Penjualan 2 (dua) Unit Kapal Tangker VLCC PT. Pertamina", http://lib.ui.ac.id/file?file=digital/128798-T%2026658-Penerapan%20pendekatan-Pendahuluan.pdf accessed on 5 November 2017 at 15. 32

happened in Indonesia, so in future it will create an effectivity in the business activity.

Based on Law No. 5 of 1999 on the Prohibition of Monopoly Practice and Unfair Business Competition, the aims of the issuance of this law are:

1. Maintain the general interest and improve the efficiency of national economy as one of the efforts to increase the people prosperity;
2. Create the conducive business climate through the regulation on the fair business competition so it will guarantee the certainty of the same business chance for the big, intermediate and small business actors;
3. Prevent the monopoly practice and/or unfair business competition that caused by the business actors; and
4. Create the effectivity and efficiency in the business activities.

For maintaining the competitive market from the influence of the agreement and conspiracy which tend to reduce and/or remove the competition, the main awareness from this law of business competition are promoting competition and enforce the consumer sovereignty.

Mohamad Ali Helalat defines unfair competition as a term which may be applied generally to all dishonest or fraudulent rivalries in trade and commerce.[17] Then, Article 1 point 6 of Law No. 5 of 1999 on The Prohibition of Monopoly

[17] Mohamad Ali Helalat and Murad Ali Al-Tarawneh, "Cases of Unfair Competition under the Unfair Competition and Trade Secrets Law and the Jordanian Judiciary", *International Journal of Business and Social Science*, Vol. 6 No. 11, (November 2015), e-ISSN 2219-6021, https://ijbssnet.com/journals/Vol_6_No_11_November_2015/8.pdf, pp. 63-64 accessed on May 5th, 2018 at 14.00

Practices and Unfair Business Competition states that unfair business competition shall be competition among business actors in conducting activities for the production and/or marketing of goods and/or services in an unfair or unlawful manner impeding competition. In short, we can say any business activities for the production and/or marketing of goods and/or services which are done unfairly or unlawfully or obstruct the business competition.

There are some agreements and activities that are prohibited in the Law No. 5 of 1999 on The Prohibition of Monopoly Practices and Unfair Business Competition which could lead to monopoly practice and unfair business competition. Article 1 (7) of Law No. 5 of 1999 states that agreement shall be the act of one or more business actors to bind themselves with one or more other business actors under any name, either in writing or in non-written form.

The prohibited agreements which lead into monopoly practice and unfair business competition contained in Chapter III of Law No. 5 of 1999, are:

1. Oligopoly

   Oligopoly can be defined as a market model of the imperfect competition type, assuming the existence of only a few companies in a sector or industry, from which at least some have a significant market share and can therefore affect the production prices in the market.[18] According to Article 4 of Law No. 5 of 1999 state that:

[18] Lucie Severova, et al. "Oligopoly competition in the market with food products." *Agricultural Economics* (2011), DOI 10.17221/52/2012-AGRICECON, https://www.agriculturejournals.cz/web/agricecon.htm?volume=59&firstPage=81&type=publishedArticle, p. 580, accessed on May 5th, 2018 at 15.17

a. Business actors shall be prohibited from entering into agreements with other business actors for jointly controlling the production and or marketing of goods and or services which may potentially cause the occurrence of monopolistic practices and or unfair business competition.
b. Business actors shall be reasonably suspected or deemed to be jointly involved in the control of the production and or marketing of goods and or services, as intended in paragraph (1), if 2 (two) or 3 (three) business actors or a group of business actors' control more than 75% (seventy-five per cent) of the market share of a certain type of goods or services.

From the above Article, we know that the oligopoly which is prohibited is the oligopoly which can cause the unfair business competition. The indicator to proof whether there is oligopoly contained in paragraph (2) of that Article, that is if 2 (two) or 3 (three) business actors or business actors group conduct an agreement which that matter can cause the domination of market share more than 75%.

According to Ayudha D. Prayoga, he stated that the oligopoly agreement is prohibited if it causes the loss on the competition, so it is not per se illegal. This is very interesting because the prohibition of oligopoly only placed in the prohibited agreement, which can narrow

the scope of that prohibition, considering that the limitation of the agreement meaning.[19]

2. Price Fixing

The price fixing agreement is regulated in Article 5 to Article 8 of Law No. 5 of 1999 on the Prohibition of Monopoly Practice and Unfair Business Competition. Article 5 mentions that Business actors shall be prohibited from entering into agreements with their business competitors to the price of certain goods and or services which must be paid by consumers or customers in the same relevant market.

3. Dividing Area

In Article 9 of Law No. 5 of 1999 stated that:

> "Business actor is prohibited to make agreement with other competitor which is aimed to divide the marketing area against the goods and/or service, so it causes the practice of monopoly and or the unfair business competition."

Based on the above article, what is meant by the agreement of area division is that if the content of agreement of area division is purposed to divide the marketing area or the market allocation against a product of goods and/or services, where that agreement can cause the monopoly practice and/or unfair business competition.[20]

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[19] Rachmadi Usman, 2004, *Hukum Persaingan Usaha Di Indonesia*, Jakarta, Gramedia Pustaka Utama, p. 43

[20] Rachmadi Usman*, op.cit*., pp. 51-52

This agreement was prohibited because the division of area it can remove the competition among the business actors. The competitors can make deal to not produce certain products or leave certain areas to reach the economic scale and specialist. In other words, the bigger efficiency will be achieved. But, this efficiency actually can be achieved with the existence of the agreement among the competitors.[21]

4. Boycott

Boycott is a horizontal agreement between the competitor business actors to refuse the business relationship with other business actor. In Article 10 of Law No. 5 of 1999 said:

a. The business actor is prohibited to make agreement with the competitors which could block the other business actor to conduct the same business, either for the purpose of domestic market or overseas market.
b. The business actor is prohibited to make agreement with the competitors, to refuse the selling of every goods and/or services from the other business actors so that actions:
    1) Cause loss or alleged will cause loss the other business actors; or
    2) Limiting the other business actor in selling or buying every goods and or services from that such market.

5. Cartel

[21] Rachmadi Usman, *Ibid.*

The prohibition of cartel is regulated in Article 11 of Law No. 5 of 1999 which stated the business actor is prohibited to make agreement with other competitor business actors in order to influence the price by regulating the production and or marketing of a goods that can cause the impact of monopoly practice or unfair business competition.

In short, cartel is an agreement of one business actor with other business actor to remove the competition between both. In other words, cartel is cooperation from the producers of certain product which is purposed to supervise the production, selling, as well as price to conduct monopoly against the commodity or certain industry.

6. Trust

Article 12 of Law No. 1999 stated that the business actor is prohibited to make agreement with other business actor to conduct cooperation by establishing the joint venture or bigger company, by maintaining and preserving the life sustainability of each company or the member company which is aimed to control the production and or the marketing of a goods and or services so it can cause the monopoly practice and or the unfair business competition.

7. Oligopsony

Article 13 of Law No. 5 of 1999 stated that:

a. Business actor is prohibited to make the agreement with other business actor which is aimed to dominate the purchase or acceptance of supply in order to control together the price of

goods and or services in the relevant market, which can cause the monopoly practice and or unfair business competition.

b. Business actor should be suspected or considered dominate the purchase of acceptance of supply as meant in paragraph (1) if 2 (two) or 3 (three) business actors or group of the business actor dominate more than 75% (seventy five percent) of market share of on type of certain goods or services.

Oligopsony is a market structure dominated by a number of consumers who have control over purchases. The market structure has similarities with an oligopoly market structure. It's just that this market structure is concentrated in the input market. Therefore, the distortions induced by collusion between market participants will distort the input market. Oligopsony is one form of anti-competition practice which is quite unique. This is because in oligopsony practice, the victim is a producer or seller, while usually for other forms of anti-competitive practices (such as pricing, price discrimination, and cartel) the victims are consumers.

In oligopsony, consumers make agreements with other consumers in order to jointly acquire purchases or receipts of supply that can ultimately control the price of goods or services on the market. Therefore, oligopsony is a condition where two or more business actors control supply receipts or become sole buyers of goods and / or services within a commodity market.

8. Vertical Integration

Article 14 of Law No. 5 of 1999 stated that the business actors is prohibited to make agreement with the other business actor which is purposed to control the production of a number of products that are included in a series of production of certain goods and/or services where in every series of production is the processing result or advanced process, either in one direct series or indirect series, which can cause the unfair business competition and/or cause loss for the society.

9. Closed Agreement

The prohibition of closed agreement is regulated in Article 15 of Law No. 5 of 1999 which stated that:

a. Business actor is prohibited to make agreement with other business actor loading the requirements that the party who receive the goods and/or services only supply or not supply again that goods and/or services to the certain party and/or services to the certain place.
b. Business actor is prohibited to make agreement with other party which load the requirements that the party who receive a certain goods and/or services must buy the other goods and/or services from the provider.
c. Other business actor is prohibited to make agreement on the price or certain discount on the goods and/or services which

load the requirement that the business actor who receive the goods and/or services from the provider business actor:

1) Must buy the other goods and/or services from the provider business actor.
2) Never buy similar or same type goods and/or services from the other business actor which is the competitor of the provider business actor.

10. Agreement with Foreign Parties

Agreement with foreign parties become prohibited if it can destroy the business competition and conduct the monopoly practice. The prohibition with other foreign party is regulated in Article 16 of Law No. 5 of 1999 which stated that the business actor is prohibited to make agreement with other party in overseas which load the provision which can cause the monopoly practice and or unfair business competition. Based on that article, there is special provision to make agreement with other business actor. The user of this article is in case where a foreign company did not conduct activity in the Indonesia market, but influencing the Indonesia market through the agreement. In other words, Article 16 of this law, cannot be applied in the agreement if the both parties domiciled in abroad, while the impact only affects in Indonesia.

Besides the Law No. 5 of 1999 on Prohibition of Monopoly Practice and Unfair Business Competition prohibit the agreements

which could lead into monopoly practice or unfair business, the Law No. 5 of 1999 is also regulating on the prohibited activities, they are as follow:

1. Monopoly

   Monopoly is the concentration of economic power by one or more business actors resulting in the control of production and or marketing of certain goods and / or services, resulting in unfair business competition and can harm the public interest.[22] Article 1 point 1 of Law No. 5 of 1999 define the monopoly as the control of a production and or marketing of goods and or services on the using of certain service by a business actor or one group of business actors.

2. Monopsony

   Based on the content of Article 18 of Law No. 5 of 1999, it can be said that the monopsony is a condition where a business group dominate the big market share to buy a product, so the single buyer behavior can cause the monopoly practice or unfair business competition and if that single buyer also dominate more than 50% market share of a product or service.

3. Market Control

   Article 19 of Law No. 5 of 1999 regulate that Market Control. in this article said that business actor is prohibited conduct one or some activities, either alone or together with other business

[22] H.U.Adil Samadani, 2013, *Dasar-Dasar Hukum Bisnis*, Jakarta, Mitra Wacana Media, p. 158.

actor, which can cause monopoly practice and unfair business competition in the form of:

a. Refuse or prevent certain business actor to conduct the same business activity in the relevant market.
b. Prevent consumer or certain consumer of business actor to conduct the business relationship with other competitor business actors.
c. Limit the circulation and selling of goods and/or services in the relevant market.
d. Conduct the discrimination practice against certain business actor.

4. Conspiracy

The definition of conspiracy is contained in Article 1 point 8 of Law No. 5 of 1999 which define the conspiracy as the cooperation done by business actor with other business actor by purpose to dominate the relevant market for the interest of the conspired business actor. Because of that, Law No. 5 of 1999 clearly prohibit every single conspiracy by the business actor with other party which is made in order to obstruct the production and or marketing of a product from the competitor business actor with expectation that the supplied or offered product become less good from the side of quality, quantity, as well as from the side of the determined time that required.

E. Business Competition Supervisory Commission

The definition of the Business Competition Supervisory Commission is independent institution that is established to supervise the implementation of Law No. 5 of 1999 on the Prohibition of Monopoly Practice and Unfair Business Competition. The Business Competition Supervisory Commission is responsible to the President and the Commissioners of the Business Competition Supervisory Commission consist of 7 people, appointed by the President based on the agreement from House of Representatives. Business Competition Supervisory Commission has function as police which has duty to conduct investigation and inquiry against the case on the allegation of monopoly practice and unfair business competition, as well as try that such case.[23]

The Regulation on the prohibition of Monopoly Practice and Unfair Business Competition is regulated in Law No. 5 of 1999. Furthermore, in Article 30 of that law affirmed that in order to conduct the supervision to the implementation of that law, there was establishment of the Business Competition Supervisory Commission. The establishment of this institution has objectives to supervise the implementation of Law No. 5 of 1999. In order to reach that objective, the Law No. 5 of 1999 explain the duties and authorities of Business Competition Supervisory Commission as follows:

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[23] Candra Puspita Dewi & Ketut Sudantra, "Tinjauan Yuridis Terhadap Hambatan Penegakan Hukum Persaingan Usaha Oleh Komisi Pengawas Persaingan Usaha (KPPU)", *Kertha Semaya* Vol. 01 No. 02, (Februari, 2013), E-ISSN 2303-0569, http://id.portalgaruda.org/index.php?ref=browse&mod=viewarticle&article=12421, accessed on May 25th, 2018 at 23.15, p. 3.

The duties of Business Competition Supervisory Commission are as follows:[24]

1. carries out an assessment of an agreement which may result in monopolistic practices and or unfair business competition as regulated in Articles 4 to 16;
2. conduct an assessment of business activities and / or acts of business actors which may result in monopolistic practices and or unfair business competition as regulated in Articles 17 to 24;
3. assess the presence or absence of abuse of dominant position which may result in monopolistic practices and or unfair business competition as regulated in Article 25 to Article 28;
4. take action in accordance with the authorities of the Commission as regulated in Article 36;
5. give advice and consideration to Government policies relating to monopolistic practices and or unfair business competition;
6. prepare guidelines and / or publications related to this Law;
7. give periodic reports of the Commission's work to the President and the House of Representatives.

The authorities of Business Competition Supervisory Commission are as follows:[25]

[24] Article 35 of Law No. 5 of 1999 on Prohibition of Monopoly Practice and Unfair Business Competition.
[25] Duty and Authority Business Competition Supervisory Commission, http://www.kppu.go.id/id/tentang-kppu/tugas-dan-wewenang/ accessed at 27st November 2017 on 14.39 WIB

1. receive reports from the people and / or from business actors on the alleged occurrence of monopolistic practices and or unfair business competition;
2. conduct research on the alleged existence of business activities and or actions of business actors which may result in monopolistic practices and or unfair business competition;
3. conduct investigations and or investigations into alleged cases of monopolistic practices and or unfair business competition reported by the people or by business actors or found by the Commission as a result of its research;
4. concludes the results of the investigation and/or examination of the presence or absence of monopolistic practices and or unfair business competition;
5. summon alleged business actor who violate the provisions of this law;
6. summon and present witnesses, expert witnesses, and any person who considered aware the violations of the provisions of this law;
7. ask the assistance of the investigator to present the business actor, witnesses, expert witnesses, or any person referred to in letter e and letter f who are unwilling to comply with the Commission's;
8. request information from Government agencies in relation to the investigation and / or examination of business actors in violation of the provisions of this law;
9. obtain, examine, and or appraise letters, documents, or other evidence

for investigation and or examination;

10. decide and determine whether there is a loss on the part of other business actors or the public or not;
11. notifying the Commission's decision to any business actor suspected of monopolistic practices and or unfair business competition;
12. impose sanctions in the form of administrative measures to business actors that violate the provisions of this Act.

F. Rule of Reason and *Perse Illegal* Approach

Rule of Reason and Perse Illegal Approach has been applied to assess whether a certain action of business actor violate the Antimonopoly Law. The rule of reason is an approach used by Business Competition Supervisory Commission to make evaluation regarding the impact of agreement or certain business activity in order to determine whether the agreement or that such activity are inhibiting or supporting competition.[26] The application of the rule of reason, among others, can be seen from the sound of the provisions of the Act No. 5 of 1999 which states the word "can result" and / or "reasonably suspected". In this context it shows deep research whether an action cause monopoly which make losses in competition.[27]

The application of the rule of reason approach must go through a verification procedure that begins with determining the relevant market

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[26] Andi Fahmi Lubis *et al*, 2009, *Hukum Persaingan Usaha Antara Teks Dan Konteks,* Jakarta, ROV Creative Media, p. 55.

[27] Anna Maria Tri Anggraini, 2003, *Larangan Praktek Monopoli dan Persaingan Tidak Sehat Perse Illegal atau Rule of Reason*, Jakarta, Fakultas Hukum Universitas Indonesia, p.8.

definition. All calculations, judgments and decisions about the implications of competition due to behavior or depending on the size (market share) of the market and related market forms (the relevant market).[28] Conversely, the per se illegal approach is to declare any particular business agreement or activity as illegal, without further proving the impact of the agreement or business activity. Activities that are considered as per se illegal usually include collusive pricing of certain products, as well as setting the resale price.[29]

Prohibitions which has characteristic of *perse illegal* are clear, firm, and absolute prohibition in order to give certainty to the business actors. This prohibition is strict and absolute due to behavior that is very likely to damage competition so there is no need to prove the consequences of such actions. Strictly, the *perse illegal* approach see the behavior or actions taken is against the law.[30] *perse illegal* is an approach that is specifically and more focused on the behavior of business actors without considering too much wider economic and social interests.[31] Therefore, in this approach the reporting business actor does not need to prove the impact of an agreement made by a competing business actor. The proof is required whether the questioned agreement or business activity has actually carried out by a competing business actor.

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[28] Ida Bagus Kade, Benol Permadi, & A.A Ketut Sukranatha, "Konsep Rule of Reason Untuk Mengetahui Praktek Monopoli", *Kertha Semaya,* Vol. 3 No. 3, (May, 2015), E-ISSN 2303-0569, http://id.portalgaruda.org/index.php?ref=browse&mod=viewarticle&article=327140, accessed on May 26th, 2018, 01.30, p. 4.
[29] Andi Fahmi Lubis *et al*, *loc cit.*
[30] Mustafa Kamal Rokan, 2012, *Hukum Persaingan Usaha Teori dan Prakteknya di Indonesia*, Jakarta, RajaGrafindo Persada, p. 72.
[31] Anna Maria Tri Anggraini, *op cit*, p. 7.

We can see in Law No. 5 of 1999, there are several articles that can be identified using *per se illegal* or rule of reason approaches. For example, Article 5 of the Law states that business actors are prohibited from making agreements with business competitors to determine prices for goods and/or services that must be paid by consumers or customers in the same relevant market. In this article there is no phrase "can lead" or "predictable" so that the article can be classified into a *perse illegal* approach. So, if we identify using the presence or absence of phrases “that can result” or “predictable” so the articles which classified in the *perse illegal* approach are Article 5, 6, 15, 24, 25, and 27, so besides those articles, they are classified in the rule of reason approach.