

UNFAIR COMPETITION IN TENDER: A CASE STUDY OF DIRECT APPOINTMENT IN PROCUREMENT OF GOODS AND/OR SERVICES BY STATE OWNED ENTERPRISES

APPROVAL PAGE

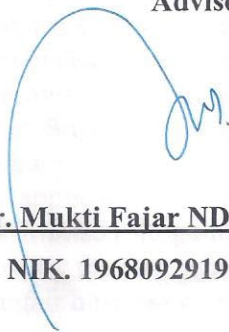
UNFAIR COMPETITION IN TENDER: A CASE STUDY OF DIRECT APPOINTMENT IN PROCUREMENT OF GOODS AND/OR SERVICES BY STATE OWNED ENTERPRISES

Written by:

Reza Fahlevi

NIM. 20140610493

Advisor



Dr. Mukti Fajar ND, S.H., M. Hum.

NIK. 19680929199407 153 019

Endorsed by

Dean of Faculty of Law

Universitas Muhammadiyah Yogyakarta



Dr. Trisno Raharjo, S.H., M. Hum

NIK. 19710409199702 153 028

UNFAIR COMPETITION IN TENDER: A CASE STUDY OF DIRECT APPOINTMENT IN PROCUREMENT OF GOODS AND/OR SERVICES BY STATE OWNED ENTERPRISES

Written by:

Reza Fahlevi

(20140610493)

Fakultas Hukum, Universitas Muhammadiyah Yogyakarta,
Ring Road Barat, Tamantirto, Kasihan, Yogyakarta, 55183, Indonesia

Phone: 082323892347 email: rezafahlevy28@gmail.com

ABSTRACT

Direct appointment is one method in the procurement of goods and/or services which is commonly used by State Owned Enterprises. This research aimed to analyze the provision on the direct appointment by State Owned Enterprises in procurement of goods and/or services. The types of this research is normative legal research by analyzing the secondary data resources descriptively and qualitatively. The direct appointment by the State-Owned Enterprises is regulated in the Ministry Regulation of State Owned Enterprises No. PER-05/MBU/2008 *juncto* Ministry Regulation of State Owned Enterprises No. PER-15/MBU/2012 on General Guidance for Implementation of Procurement of Goods and/or Services State-Owned Enterprises. It is found that there are differences on the direct appointment by government and the direct appointment by State Owned Enterprises. The differences lied on the process and the principles. Unfortunately, that provision is contrary to the Law No. 5 of 1999 on Prohibition of Monopoly Practice and Unfair Business Competition, especially Article 19 letter d on discrimination and 22 on conspiracy. On that case, the legal principle of *Lex Superior derogat Legi Inferior* is applied. So, the application of Law No. 5 of 1999 as the higher regulation has to be prioritized. Besides, the Ministry Regulation of State Owned Enterprises No. PER-05/MBU/2008 was not mandated by the Law which explicitly explain that formulation of such regulation is not based on the unfair business competition.

Keywords: direct appointment, state owned enterprises, business competition

A. BACKGROUND

In the effort to realize people economic prosperity, the government has duty to allocate, regulate, and manage all of the resources and all of the production factors which exist in the state. Therefore, the state establishes enterprise which is known as State Owned Enterprises,¹ in which the enterprises have function to manage all of the resources and production factors which exist in the state, for economic prosperity of the people.

The procurement in the state-owned enterprise can done through several methods, one of them that need to be discussed is the direct appointment. The State-Owned Enterprises is allowed to conduct direct appointment in procurement of goods and/or services in its scope emerge a question whether the State-Owned Enterprises conduct direct appointment the providers in the procurement of goods and/or services violate the provision in Article 19 letter d and also Article 22 of Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition. The direct appointment gives the impact in the procurement of goods and/or services where that matter will remove the essential of the business competition in giving the offer of goods and/or services needed in the procurement of goods and/or services by the State-Owned Enterprises.

B. RESEARCH PROBLEMS

1. How is the regulation on the direct appointment to the state-owned enterprise in the procurement of goods and/or services by the government?
2. How is the legal status of direct appointment by state owned enterprise in the procurement of goods and/or services against the business competition law?

C. OBJECTIVES AND BENEFIT OF RESEARCH

The objectives of this research are as follows:

¹ Andy M, 2012 “Peran BUMN dalam Sistem Perekonomian Indonesia (Ekonomi Kerakyatan)” http://web.unair.ac.id/admin/file/f_19997_sei11.pdf, accessed on 20 October 2017 at 11.02

1. To analyze the regulation on the direct appointment to the state-owned enterprise in the procurement of goods and/or services by the government.
2. To analyze the legal status of direct appointment by state owned enterprise in the procurement of goods and/or services against the business competition law whether it is contrary to the business competition law or not.

The benefits are as follows:

1. Theoretical benefit which is giving detail and clear information on the direct appointment by State Owned Enterprises in the procurement of goods and/or services reviewed from the general procedure of procurement of goods and/or services and the perspective of business competition law.
2. Practical Benefit as the reference in the relevant field of study and give clear information to public society about direct appointment by State Owned Enterprises in the procurement of goods and/or services.

D. LITERATURE REVIEW

1. State Owned Enterprises

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.

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 services in order to achieve the people welfare.

2. 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.² In addition, according to Marbun, procurement of goods and/or services is an effort to get the wanted goods and/or services based on the logic and systematic thinking following the prevailing norms and ethics based on the basic procurement method and process.

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

3. 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.³ 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.

4. Unfair Business Competition

² Indra Bastian, 2010, *Akuntansi Sektor Publik, suatu pengantar (PSASP)*, 3rd edition, Jakarta, Erlangga, p. 263.

³ 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.

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.⁴ While 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.”⁵

5. Rule of Reason and *Perse Illegal*

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.⁶ 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.⁷

E. RESEARCH METHOD

⁴ A Pratama Aditya dan Andini T Nirmala, 2002, *Kamus Besar Bahasa Indonesia*, Surabaya, Prima Media, p. 382

⁵ 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

⁶ Andi Fahmi Lubis *et al*, 2009, *Hukum Persaingan Usaha Antara Teks Dan Konteks*, Jakarta, ROV Creative Media, p. 55.

⁷ 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.

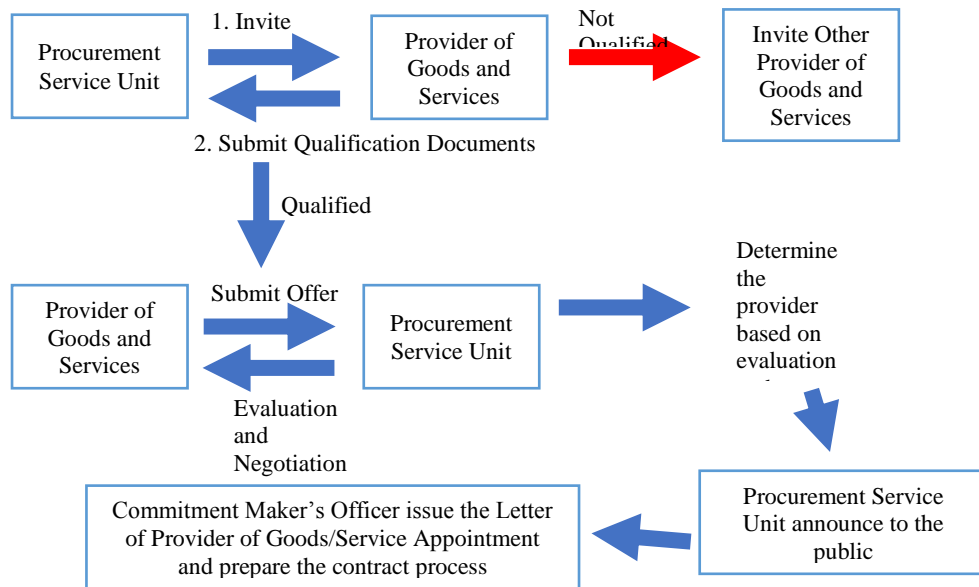
The type of this research is a normative legal research which means the research is conducted based on the existing library materials. This research also used statute approach and case approach. The main data used in this research are legal materials which consist of primary legal materials, secondary legal materials, tertiary legal materials, as well as the non-legal materials which support the analysis in this research, they are such as the statistic, infographic, table, and other non-legal documents. Those data were collected through the library research. Then the data is analyzed through prescriptive and qualitative analysis to determine whether the direct appointment as a method of procurement of goods and/or services in the state-owned enterprise is violating the business competition law or not.

F. FINDING AND ANALYSIS

1. Regulation on the Direct Appointment to the State-Owned Enterprises in the Procurement of Goods and/or Service

The direct appointment as one method to conduct the procurement of goods and/or service. The direct appointment is regulated in President Regulation No. 54 of 2010 because it is the part of the procurement of goods and/or services. According to that such regulation of goods and/or services using the direct appointment method can be explained through the following chart:

Figure 1. Direct appointment of Goods and/or Service by the Government



Source: President Regulation No. 54 of 2010 and its amendment (arranged by author)

Based on the above figure, we can see that the direct appointment is started by inviting one of the provider of goods and/or services with qualification process to that such provider of goods and/or services. If the qualification document of goods and/or services does not pass the qualification, the procurement has to be done by inviting the other provider of goods and/or services. In terms of direct appointment, it cannot neglect the offer where if there is no deal between the procurement unit service with the provider of goods and/or services, the procurement unit service has to invite the other providers to conduct the offer until the procurement unit service finds deal of price and specification of goods and/or services.

Direct appointment to 1 (one) of provider goods/construction work/other services can be done in terms of:⁸

1. Certain condition; and/or
2. Special goods procurement / special construction work / other special services.

Based on the above explanation, of course the procurement of goods / services with direct appointment cannot be immediately done, because there are conditions that must be met. Procurement of goods or services using direct

⁸ Article 38 of President Regulation No. 54 of 2010

appointment method must be based on legal reasons as set forth in Article 38 paragraph (4) of President Regulation No. 54 of 2010.

The procurement of goods and/or services of government should be based following principles:⁹

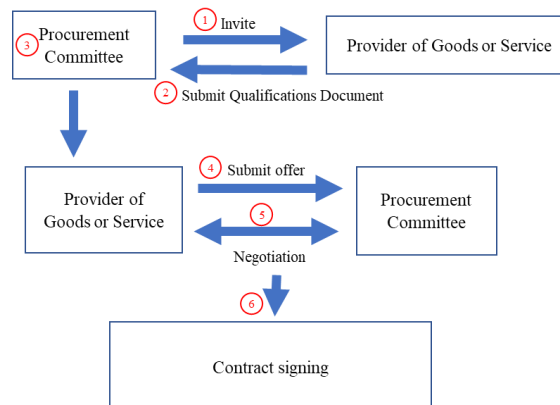
1. Efficient;
2. Effective;
3. Transparent;
4. Opened;
5. Competitive;
6. Fair/not discriminative;
7. Accountable.

Regarding to the procurement of goods and/or services in the environment of State Owned Enterprises, it did not have significant differences with the procurement of goods and/or services in the environment of government. In the procurement of goods and/or services in the environment of State Owned Enterprises, Ministry of State Owned Enterprises has issued Ministry of State Owned Enterprises Regulation No. 5 of 2008 on the Procurement of Goods and/or Services of State Owned Enterprises.

According to the Article 5 paragraph (2) of the above regulation, the direct appointment is the procurement of goods and/or services which done by appointing one provider of goods and/or services or through beauty contest. The process of direct appointment based on the above regulation can be explained by the following figure:

Figure 2. Direct Appointment in State Owned Enterprises

⁹ Article 5 of President Regulation No. 54 of 2010 on Procurement of Goods and/or Service



Source: State Owned Enterprises Ministry Regulation No. 5 of 2008 *juncto* Ministry of State Owned Enterprises Regulation No. 15 of 2012 on General Guidance of Procurement of Goods and/or Services by State Owned Enterprises

The direct appointment by State Owned Enterprises is only able to be done if fulfill minimum 1 (one) of the following requirements:¹⁰

1. The goods and/or services which are needed for the main performance of company and the existence cannot be postponed (business critical asset);
2. The intended goods and/or services provider are the only one (specific goods);
3. Knowledge intensive goods and/or services where to use and maintain that product need the continuity of knowledge of Goods and/or Services Providers;
4. If the implementation of Procurement of Goods and/or Services by using the method as referred to in Article 5 paragraph (2) letters a and b has been done twice but the bidder or direct election does not meet the criteria, or no party will participate in the auction or direct election, even if the provisions and the conditions have met fairness;
5. Goods and services owned by intellectual property rights holders (IPR) or those who have warranty from the Original Equipment Manufacture;

¹⁰ Article 9 of State Owned Enterprises Ministry Regulation No. PER- 5/MBU/2008 *juncto* State Owned Enterprises Ministry Regulation No. PER- 15/MBU/2012 on the General Guidance of Implementation of Goods and/or Services Procurement

6. Emergency handling for security, community safety, and corporate strategic assets;
7. Goods and services which are repeat orders as long as the offered price is profitable by not sacrificing the quality of goods and/or services;
8. Emergency handling due to natural disasters, both local and national;
9. Advanced goods and/or services that are technically a unit which cannot be separated from work that has been carried out previously;
10. Goods and services providers are State Owned Enterprises, State Owned Enterprises subsidiaries or State-Owned Enterprises affiliated companies, as long as the needed goods and / or services are their own products or services, and throughout quality, price and purpose can be accounted for, and possible in sectoral regulations;
11. Procurement of goods and/or services in a certain amount and value determined by the Board of Directors by first obtaining approval from the Board of Commissioners.

If we look specifically, there is differences between direct appointment by the State-Owned Enterprises and the direct appointment by the government, that is where in the direct appointment by State Owned Enterprises there is no submission of the qualification documents by the providers of goods/ services to the committee of procurement. Of course, if we look from the business competition law perspective, that matter close the other opportunity of other company which run business in the same field to join and compete in the same market.

In addition, in the amendment of the above regulation, State Owned Enterprises Ministry Regulation No. 15 of 2012 has given one requirement which is requirement of the provider of goods/services has to be State Owned Enterprises, State Owned Enterprises subsidiary, or State Owned Enterprises affiliated company as long as the goods/services that procured is the product or services of that State Owned Enterprises, State Owned Enterprises subsidiary, State Owned Enterprises affiliated company, and/or small and

micro business as long the quality, price and the purpose can be accounted for, and possible in sectoral regulations. That provision causes the discrimination against the other business actor which run business in the same field in tender.

Table 1. Differences between Principles of Procurement of Goods and/or Services by Government and by State Owned Enterprises

No.	Principle	Principles of Procurement of Goods and/or Service by Government	Principles of Procurement of Goods and/or Service by State Owned Enterprises
1	Efficiency	✓	✓
2	Effective	✓	✓
3	Competitive	✓	✓
4	Openness	✓	×
5	Transparent	✓	✓
6	Fair and Not Discriminative	✓	✓
7	Accountable	✓	✓

Source: Marisi P. Purba, 2014, *Pengadaan Barang dan Jasa State Owned Enterprises*, Yogyakarta, Graha Ilmu, p. 29 (rearranged)

Regarding the basic principles of procurement of goods by State Owned Enterprises, there is one difference between the principle of procurement of goods and/or services by State Owned Enterprises and the principle of procurement of goods and/or services by the government, where there is no open principle in the procurement of goods by State Owned Enterprises. Open principle means that Procurement of Goods / Services can be followed by all Goods / Services Providers who meet certain requirements / criteria based on clear terms and procedures.¹¹ The absence of open principle indicates that the procurement of goods by State Owned Enterprises can be done in closed manner which will lead to discrimination.

¹¹ Explanation of Article 5 of President Regulation No. 54 of 2010 on Procurement of Goods and/or Services by Government

2. The Legal Status of Direct Appointment by State Owned Enterprises in the Procurement of Goods and/or Service against Business Competition Law

Direct appointment by State Owned Enterprises is regulated in the State-Owned Enterprises Ministry Regulation No. PER-05 / MBU / 2008 concerning General Guidelines for Procurement of Goods and/or Services of State Owned Enterprises that have been amended by the State-Owned Enterprises Ministry Regulation No. PER-15 / MBU / 2012. Based on these regulations there are two things that need to be observed, namely the material aspects and formal aspects of the formation of these rules from the perspective of business competition.¹² Substantially (material), the State-Owned Enterprises Ministry Regulation No. 5 of 2008 is basically contrary to Article 19 letter (d) and Article 22 of Law No. 5 Year 1999.

Article 19 letter (d) states that business actors are prohibited from carrying out one or several activities, either alone or together with other business actors, which can result in monopolistic practices and or unfair business competition in the form of discriminatory practices against certain business actors. The scope of prohibition of activities regulated by Article 19 letter d covers the practice of discrimination carried out individually by business actors and activities carried out jointly with other business actors then any kinds of different treatment for certain business actors can be included in the scope of Article 19 letter d.

Then, Article 22 of Law No. 5 Year 1999 states that "Business actors are prohibited from conspiring with other parties to regulate and / or determine the tender winner so that it can lead to unfair business competition." The article considers the existence of tender conspiracy depends on two conditions, namely the parties must participate and agree on collusion activities together.

¹² Anna Maria Tri Anggraini, "Sinergi BUMN dalam Pengadaan Barang dan/atau Jasa dalam Persepektif Persaingan Usaha", *Mimbar Hukum Vol. 25, No. 3 (October, 2013)*, ISSN 0852-100X, p. 449-451

Participants as intended in Article 22 in terms of "third parties" are parties who do not have to be competitors of the first party and do not need to be business actors. This understanding has a broad impact, so it rises the interpretation that the ban on conspiracy is not only horizontal (between bidders) but also vertically (between the committee and the bidders).

Furthermore, there are 3 (three) kinds of tender conspiracy, they are:¹³

1. Tender conspiracy horizontally

This conspiracy occurs between business actors and fellow business actors by creating false competition among bidders.

2. Tender conspiracy vertically

This conspiracy occurs between one or several business actors with the tender committee or the owner or employer.

3. Vertical and horizontal tender conspiracy

It is a conspiracy between the tender committee or the owner of the work with the business actor involving two or three parties related to the tender process. This form of conspiracy is a fictitious tender, whereby both the bidding committee of the employer, and the business actor conducts the tender process only administratively and is closed.

Thus, the direct appointment above is categorized as a form of vertical conspiracy, meaning a conspiracy facilitated by the committee / tender implementer to win one of the tender participants without going through standard procedures that must be carried out based on the principle of fair business competition.

Procurement of goods and/or services is a market that should be competed to obtain competitive and efficient goods or services. The direct appointment in the procurement by State Owned Enterprises is violating the provision of

¹³ Article 22 concerning Prohibition of Collusion in the Tender of Law No. 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition.

Article 19 letter d and Article 22 of Law No. 5 of 1999 which cause negative impact because it can bring the adverse consequences, among others:¹⁴

1. Create barrier to entry for other bidders who are more likely to win because both the goods / services offered are far better than the winning bidder determined from the conspiracy;
2. Cause losses to the State because government procurement of goods / services uses government budgets;
3. Cause immaterial losses, namely reduced market confidence, especially the public who know about the existence of the tender to the credibility of the government or government officials as the tender organizer (tender committee)

In Article 50 letter a of the Business Competition Law there are exceptions to the stipulation of the provisions of the Business Competition Law, namely actions and or agreements that aim to implement the prevailing laws and regulations. If we look at the State-Owned Enterprises Ministry Regulation No. 5 of 2008 from the formal aspect, the regulation was formed by the Ministry of State Owned Enterprises based on:

1. Law No. 40 of 2007 on Limited Liability Company;
2. Law No. 19 of 2003 on State Owned Enterprises;
3. Government Regulation No. 41 of 2003 on Delegation of Position, Duties and Authority of the Minister of Finance in Corporate Companies (*Persero*) Public Companies (*Perum*), and Company Services (*Perjan*) to the State Minister of State-Owned Enterprises
4. President Regulation No. 45 of 2005 on Establishment, Supervision and Dissolution Management, State-Owned Enterprises

Furthermore, Ministerial Regulation No. 15 of 2012 which was formed based on higher regulations such as Government Regulation No. 41 of 2003

¹⁴Apectriyas Zihaningrum & Munawar Kholil, "Penegakan Hukum Persekongkolan Tender Berdasarkan Undang-Undang Nomor 5 Tahun 1999 Tentang Larangan Praktik Monopoli Dan Persaingan Usaha Tidak Sehat", *Privat Law*, Vol. IV, (January, 2016), ISSN 2337-4640, p. 111.

and Government Regulation No. 45 of 2005 etc. which was became the reference for the Regulation of the Minister of State Owned Enterprises No. 15 of 2012 did not explicitly mention the granting of authority that was not based on principle fair business competition. Considering there is a conflict or contradictory regulation between the State Owned Enterprises Ministerial Regulation No. PER-15 / MBU / 2012 with Law No. 5 of 1999 it can apply the legal principle of *lex superior derogat legi inferiori*, which means that if there is a conflict or contradiction between high and low legislation then the high one must take precedence.¹⁵

In connection with the procurement system of goods / services within the State Owned Enterprises, the system of procurement of goods / services in the State Owned Enterprises environment is not categorized as excluded by Article 51 of Law No. 5 Year 1999.¹⁶ This is due to the fact that the procurement of goods / services does not include strategic industrial fields that require the Act as a basis for regulation, for example in the fields of mining, water resources, electricity, public transportation, plantations, ports, telecommunications, and so on.

The Article 22 states that business actors are prohibited from conspiring with other parties to regulate and or determine the winner of the tender so that it can lead to unfair business competition. These decisions include, among others, several state-owned enterprises that conducted direct appointments in the field of procurement of goods/services, such as PT PERTAMINA direct appointed Landor to make new logo for PERTAMINA¹⁷, PT PLN (Central)

¹⁵ Ferry Irawan Febriansyah, "Konsep Pembentukan Peraturan Perundang-Undangan di Indonesia", *PERSPEKTIF*, Vol. XXI No. 3 (September, 2016), E-ISSN 2406-7385, <http://jurnal-perspektif.org/index.php/perspektif/article/view/586> accessed on 20 April 2018 at 17.05

¹⁶ Anna Maria Tri Anggraini, *op cit*, p. 458

¹⁷ Business Competition Supervisory Commission Case Decision No. 02/KPPU-L/2006 on Direct Appointment in the Project of Pertamina New Logo, dated 13 September 2006.

and Disjaya direct appointed PT Netway Utama in the field of procurement of CIS RISI¹⁸ and selling of two VLCC tanker ship of PT PERTAMINA¹⁹.

In these three cases, Business Competition Supervisory Commission uses the rule of reason approach which in the decision dropped by Business Competition Supervisory Commission based on the violation of Article 19 letter d and Article 22. The use of the rule of reason approach to decide those cases are correct based on two reasons. Firstly, that is the use of written sentences that “which can result in monopolistic practices and/or unfair business competition” refers to the rule of reason approach. Secondly, the impact caused by direct appointment of certain companies based on the provisions of State Owned Enterprises No. 5 of 2008 Regulation prohibits other business actors who provide the same goods/services to enter the market (barrier to entry) and competitive prices of the highest quality will not be realized.

Based on the explanation above, direct appointment in practice is contrary to the Business Competition Law. From the aspect of material, direct appointment is violating the Article 19 letter d and Article 22 of Law No. 5 of 1999. The direct appointment that held by State Owned Enterprises is form of unfair business competition practice that are discrimination and conspiracy. The direct appointment by State Owned Enterprises cause the barriers to entry which become the main reason that it is included in unfair business competition. So, based on the rule of reason approach, the direct appointment by State Owned Enterprises is proved that it causes the barriers to entry. So, this is one of forms of unfair business competition practice.

G. CLOSING

1. Conclusion

¹⁸ Business Competition Supervisory Commission Case Decision No. 03/KPPU-L/2006 on Direct Appointment in the Project of CIS-RISI PLN, dated 27 September 2006.

¹⁹ Business Competition Supervisory Commission Case Decision No. No. 07/KPPU-L/2004 KPPU on Selling Tender of Two Unit Tanker of Pertamina

- a. There are several differences in the provisions of the government procurement regulations of goods and/or services and the provision of goods and/or services by State Owned Enterprises regarding direct appointment. The difference is clearly seen in the direct appointment process by State Owned Enterprises because there is no qualification process for the invited service providers and there is no openness principle which requires the procurement of goods and/or service to be followed by all goods and/or service providers which pass the qualification.
- b. Based on the explanation above, it can be concluded that direct appointment by State Owned Enterprises based on State Owned Enterprises Ministerial Regulation No. 5/MBU/2008 in conjunction with State Owned Enterprises Regulation No. 15/MBU/2012 contradicts Article 19 letter d and Article 22 of Law No. 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition. Direct appointment is included in the form of vertical conspiracy, it means a conspiracy facilitated by the tender committee to make win one of the tender participants without going through standard procedures that must be carried out based on the principle of fair business competition. Both of these articles have the same effect, namely the barrier to entry, but the prohibited aspects are different where Article 22 prohibits conspiracy activities and Article 19 letter d prohibits discrimination caused by the conspiracy. Moreover, the regulations that become the basis of direct appointment cannot override the application of the Business Competition Law, this is due to the State Owned Enterprises Minister Regulation No. 5 /MBU/2008 in conjunction with State Owned Enterprises Regulation No. 15/MBU/2012 and Ministerial Circular No. SE-03/MBU.S/2009 which became the basis for direct appointment as the implementation of the synergy of State Owned Enterprises is not a regulation established to

implement the provisions of the law. Thus, the exclusion requirement for the application of the Business Competition Law is not fulfilled.

2. Recommendation

- a. State Owned Enterprises ministers should review more deeply in making regulations regarding procurement of goods and/or services in detail and comprehensively by considering the principles of business competition considering that there are many cases of discrimination and conspiracy entered the Business Competition Supervisory Commission in the procurement of goods and/or services.
- b. The government should revoke and redesign the procurement regulations for goods and/or services in the State-Owned Enterprises environment related to direct appointment in accordance with the principles of fair business competition and coordinate with other State ministries and institutions (including Business Competition Supervisory Commission) in drafting regulations related to procurement methods and services by State Owned Enterprises.

BIBLIOGRAPHY

Books and Journals

- Andi Fahmi Lubis *et al*, 2009, *Hukum Persaingan Usaha Antara Teks Dan Konteks*, Jakarta, ROV Creative Media.
- Anna Maria Tri Anggraini, 2003, *Larangan Praktek Monopoli dan Persaingan Tidak Sehat Perse Illegal atau Rule of Reason*, Jakarta, Fakultas Hukum Universitas Indonesia.
- Anna Maria Tri Anggraini, "Sinergi State Owned Enterprises dalam Pengadaan Barang dan/atau Jasa dalam Persepektif Persaingan Usaha", *Mimbar Hukum*, Vol. 25, No. 3 (October, 2013), ISSN 0852-100X.
- Apectriyas Zihaningrum & Munawar Kholil, "Penegakan Hukum Persekongkolan Tender Berdasarkan Undang-Undang Nomor 5 Tahun 1999 Tentang Larangan Praktik Monopoli Dan Persaingan Usaha Tidak Sehat", *Privat Law*, Vol. IV, (January, 2016), ISSN 2337-4640.
- 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.
- Ferry Irawan Febriansyah, "Konsep Pembentukan Peraturan Perundang-Undangan di Indonesia", *PERSPEKTIF*, Vol. XXI No. 3 (September, 2016), E-ISSN 2406-7385, <http://jurnal-perspektif.org/index.php/perspektif/article/view/586> accessed on 20 April 2018 at 17.05.
- Galuh Puspaningrum, *Hukum Persaingan Usaha: Perjanjian dan Kegiatan yang Dilarang dalam Hukum Persaingan Usaha di Indonesia*, Aswaja Pressindo, Yogyakarta, 2013.
- 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.
- 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.
- Indra Bastian, 2010, *Akuntansi Sektor Publik, suatu pengantar (PSASP)*, 3rd edition, Jakarta, Erlangga,.
- 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>, accessed on May 5th, 2018 at 15.17.

Nur Fadjrih Asyik, "Political-Economy Accounting Perspective: Landasan Baru Pemberdayaan State Owned Enterprises", *InFestasi*, Vol. 6 No. 1, (2010), ISSN 0216-9517.

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.

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, accessed on May 5th, 2018 at 14.00

Peter Mahmud Marzuki, 2010, *Penelitian Hukum*, Jakarta, Kencana.

Soerjono Soekarto and Sri Mamudji, 2001, *Penelitian Hukum Normative Suatu Tinjauan Singkat*, Jakarta, Raja Grafindo Persada.

Internet

A Pratama Aditya dan Andini T Nirmala, 2002, *Kamus Besar Bahasa Indonesia*, Surabaya, Prima Media.

Andy M, 2012 "Peran State Owned Enterprises dalam Sistem Perekonomian Indonesia (Ekonomi Kerakyatan)" http://web.unair.ac.id/admin/file/f_19997_sei11.pdf, accessed on 20 October 2017 at 11.02.

Ezra Monica Saragih, "Analisis Efektivitas Undang-Undang Nomor 5 Tahun 1999 tentang Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat Terhadap Pembatasan Praktek Kartel di Indonesia", 2015, Yogyakarta, Universitas Atma Jaya, <http://e-journal.uajy.ac.id/9244/1/JURNALHK10977.pdf> accessed on 22 November 2017 at 12.37.

Togar Tanjung, "Persaingan Usaha dan Peran Pemerintah", <http://law.ui.ac.id/v3/persaingan-usaha-dan-peran-negara/> accessed on October 25th, 2017