

CHAPTER II

LITERATURE REVIEW

A. Exclusive Dealing

Exclusive Dealing are an agreement between a businesses in the case of the production of goods and/ or services or the distribution of goods and/ or services.¹ In this case, the businesses as a producer competes with other producers in the same market regarding the product. However, there is strong competition among distributors.² In general, businesses can choose/ manage their own parties who become suppliers, sellers, buyers in accordance with existing needs and systems that apply in a market.³

This Exclusive Dealing also has the purpose, namely in order to exercise control over other businesses vertically which is often referred to as Vertical Control. Clearly, an exclusive dealing can indeed disadvantage other businesses because it prevents/ inhibits other businesses from entering the same market. Exclusive dealing are also detrimental to the consumer, because the businesses are obstructed/ hindered in offering/ marketing goods and/ services, then consumers have no choice to determine the goods and/ services to be purchased/ used.⁴

¹ KPPU Republik Indonesia, 2011, “Draft Pedoman Pelaksanaan Pasal 15 UU No. 5 Tahun 1999 Tentang Larangan Praktik Monopoli dan Persaingan Usaha Tidak Sehat”, taken from <http://www.kppu.go.id/id/blog/2011/06/draft-pedoman-pasal-15-tentang-perjanjian-tertutup/> accessed on Tuesday, November 21st 2017, 15.45

² Rachmadi Usman, *Op.cit*, page 335.

³ Suyud Margono, *Op.cit*, page 98.

⁴ Regulation of the Business Competition Supervisory Commission No. 5 of 2011 on Guidance of Article 15 about Exclusive Dealing in Law No. 5 of 1999.

Actually in the exclusive dealing, the businesses may accept a competition with another businesses as a producer in the case of goods produced in the same market (interbrand competition). But, the next business competition occurs between distributors (intrabrand competition).⁵ Seen from the negative side of the exclusive dealing, the businesses gets a very big chance from the result of the exclusive dealing, such as the businesses can dominate the market, if the businesses owns dominant position in a market, then automatically businesses can also control the market or we can call it market control (Article 19 of Law No. 5 of 1999) easily without any competition from other businesses. This is indeed very profitable for businesses who make exclusive dealing, but other businesses who have business in the same market is very disadvantaged because it is hampered and even prevented from entering the market.⁶

Exclusive Dealing regulated in Article 15 Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition can be divided into three (3) kinds, namely;

1. Exclusive Distribution Agreement

Exclusive Distribution Agreement is an agreement between businesses with specific requirements, that the party who gets the product in the form of goods and/ or services must supply or will not re-supply products in the form of goods and/ or services to

⁵ Rachmadi Usman, *Loc. Cit.* 335

⁶ Arie siswanto, 2004, *Hukum Persaingan Usaha*, Cet.2, Bogor: Ghalia Indonesia, page 155.

certain parties/ places.⁷ Exclusive Distribution Agreement is done by companies/ businesses who have a company in charge of distributing products that have been produced.⁸ This is done by businesses/ companies in order to avoid competition at the distributor level. Businesses/ manufacturers make an agreement to the distributor to divide the region of supply of goods and divide the consumer so as not to competition at the distributor level in a market and to keep the price of distributed goods and/ or services stable.⁹

In this case it can be disadvantageous for other businesses because they do not get distributors for goods that have been in production or because they do not get materials to produce goods. On the other hand there are advantages with the existence of Exclusive Dealing for manufacturers and distributors, namely materials for guaranteed production, goods must be marketed by the distributor, cost reduction.¹⁰

2. Tying Agreement

Tying Agreement can occur because the businesses/ companies enter into an agreement with other businesses/

⁷ Article 15 paragraph 1 of Law No. 5 of 1999 (cek format)

⁸ Agus Raif, 2011, "Organisasi Manufaktur Pada Perindustrian", taken from https://www.kompasiana.com/agusraif10/organisasi-manufaktur-pada-perindustrian_550dea5fa33311b22dba7e74 accessed on Wednesday, November 22nd 2017, 16.12

⁹ Susanti Adi Nugroho, 2012, *Hukum Persaingan Usaha di Indonesia Dalam Teori dan Praktik Serta Penerapan Hukumnya*, Jakarta: Kencana, page 214.

¹⁰ Andi Fahmi Lubis, et al, 2009, *Hukum Persaingan Usaha Antara Teks dan Konteks*, Jakarta: Creative Media, page 118.

companies that are at different levels with a certain condition/ specific requirements. The terms are in the form of leasing and/ or sale of goods and/ or services (tying product) that will be done if the lessee/ buyer will also rent/ buy other products (tied product).¹¹

Based on Law No. 5 of 1999, Tying Agreement is one form of prohibited agreement, because if it continues to do can result in the expansion of monopoly power by businesses on goods and/ or services that are first marketed/ sold (tying product) to the goods and/ or services for which the consumer must purchase the goods and/ or services (tied product).¹²

The purpose of tying agreement, as follows:

- a. To increase incomes by a monopoly on goods and/ or services;
- b. To make it difficult for other businesses to enter the market.

If the consumer does not understand the practice of tying agreement by the business actor, then when the consumer buys an item and then gets additional goods, the consumer will assume if he/ she gets the bonus of the purchased item. However, the actual fact is not like that. The price paid of a good is the price of both goods received by the consumer. Consumers will find it difficult

¹¹ Rachmadi Usman, *Op.cit.* page 341.

¹² Susanti Adi Nugroho, *Op.Cit.* page 215.

and confused because they do not know the original price of the goods purchased.¹³

3. Vertical Agreement on Discount

The occurrence of Vertical Agreement on Discount is because the businesses wants to get a discount from the purchased goods and must meet certain requirements. In other words, businesses who want to buy an item have to buy other goods from the businesses or do not buy the same/ similar goods from other businesses that then become the competitor.¹⁴ This is one of improvidence that should not have happened.

Vertical Agreement on Discount is an exclusive dealing regulated in Article 15 paragraph 3 of Law No. 5 of 1999 with formulated Per Se Illegal.¹⁵ So if the businesses/ companies enter into an agreement such as Vertical Agreement on Discount, then the businesses/ companies can already be subject to sanctions on the agreement without having to wait for the consequence of the exclusive dealing in the form of Vertical Agreement on Discount.¹⁶ The consequence of this agreement is that businesses lose the right to choose goods freely, and also disadvantageous

¹³ Andi Fahmi Lubis, et al, *Op.Cit.* page 121.

¹⁴ Susanti Adi Nugroho, *Op.Cit.* page 217.

¹⁵ Per Se Illegal adalah suatu perbuatan yang secara bersifat dilarang atau illegal. Sehingga perbuatan itu dengan sendirinya telah melanggar ketentuan yang sudah diatur, jika perbuatan tersebut telah memenuhi rumusan dalam undang-undang persaingan usaha tanpa ada suatu pembuktian. Alun Simbolon, "Pendekatan yang Dilakukan Komisi Pengawas Persaingan Usaha Menentukan Pelanggaran dalam Hukum Persaingan Usaha", *Jurnal Hukum IUS QUIA IUSTUM* vol. 2 No. 20 (April,2013), ISSN: 0854-8498, pages 192-193.

¹⁶ Susanti Adi Nugroho, *Op.Cit.* page 218.

businesses who do not intend to purchase undesirable/ unneeded goods.¹⁷

B. Market Control

The Prohibition of Monopolistic Practices and Unfair Business Competition Law regulates activities that are prohibited and not permitted to be carried out by businesses, the activities carried out can cause monopolistic practices and unfair business competition. One of these activities is, Market Control regulated in Article 19 Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition.

According to Article 19 Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition prohibited market control activities are those which include:

1. Refusing and or blocking certain businesses from conducting the same business activities in the relevant market (Article 19 letter a);
2. Blocking the consumer or customer of a competing business actor from conducting business relations with the competing business actor (Article 19 letter b);
3. Limiting the circulation of materials or sales of goods and or services to the relevant market (Article 19 letter c);

The desire of all businesses is to become the market leader, because it will have a greater level of profit for businesses. Actions taken by a

¹⁷ Andi Fahmi Lubis, et al, *Op.Cit.* page 123.

businesses to get it will often be contrary to applicable law. Market Control is usually carried out by businesses who have market power¹⁸ in the market. Through market control, it is certain that the profits will be very large. To dominate the market, businesses can do anything including fraudulent practices that harm other parties. Market control activities that are prohibited result in unfair business competition.¹⁹

Although market power provides benefits for companies, this causes losses to the economy and social, namely the existence of social costs that arise or dead weight loss due to market power owned by a company. Because the price is set above the marginal cost, the price becomes higher and the quantity becomes less than the competitive market. Then one of the objectives of Law No. 5 of 1999 is to create efficiency in the social economy.²⁰ The form of market control which is prohibited in Law No. 5 of 1999 can occur in the form of selling goods or services by:²¹

1. Sell loss
2. Through the practice of fraudulently setting production costs
3. Price competition

¹⁸ *market power* yaitu pelaku usaha yang dapat menguasai pasar sehingga dapat menentukan harga barang dan jasa yang di pasar yang bersangkutan. Dengan kriteria penguasaan pasar tersebut tidak harus 100%, penguasaan sebesar 50% atau 75% sudah dapat dikatakan mempunyai market power. Andi Fahmi Lubis, et al, *Op.Cit.* page 139.

¹⁹ Arie Siswanto, 2002, *Hukum Persaingan Usaha*, Jakarta: Ghalia Indonesia, page 89.

²⁰ Tresna P. Soemardi, "Efisiensi Dan Pelaksanaan Hukum Persaingan Usaha", *Jurnal Persaingan Usaha* Edisi 3 (Juli,2010), ISSN:2087-0353, page 115.

²¹ Andi Fahmi Lubis, et al, *Loc.Cit.* page 139.

Market control activities that are prohibited are when the refuse or hinder certain businesses from carrying out the same business activities.

Refuse or hinder certain businesses can be classified as follows:²²

1. Refuse competitor (*refusal to deal*). Refuse or hinder certain businesses (competitors) in terms of doing the same business in the relevant market. One way that is often used to get rid of competitors is to implement a strategy *refusal to deal*.
2. Refuse consumers is blocking the consumer from other businesses (competitors) from doing or continuing business relations with the competitor's business.
3. Limitation of product distribution. Limiting the circulation or sale of goods and services in the relevant market.
4. Discrimination against certain businesses who are competitors.
5. Conducting predatory pricing. Supply of products by selling loss, namely by setting a very low price with the intention of eliminating or shutting down its competitors' businesses because they are no longer able to compete.
6. Costing fraudulently. Conduct fraud or manipulate in setting production costs and other costs which are components of product prices so that they are lower than the actual price.

C. Tirta Investama Company

²² Mustafa K. Rokan, 2010, *Hukum Persaingan Usaha*, Jakarta: Rajawali Pers, page 151.

Aqua (trademark) is one of the bottled drinking water (AMDK) that has been well known by the people of Indonesia. Golden Mississippi company founded by the deceased Mr. Tirta Utomo was the first company to produce bottled drinking water (AMDK) in 1973 which is in Bekasi, Indonesia. In ancient times, Aqua packed with glass bottles with the size 950 ml at a price of Rp 75.00. Being the pioneer of bottled drinking water and the biggest sales in Indonesia, Aqua is well known to the public. Over time and growing, Aqua made a change in the form of a 220 ml PET (Polyethylene Terephthalate) bottles.²³

Golden Mississippi company under the auspices of Tirta Investama company (the parent company from the Aqua Group's production units) as a manufacturer joined the DANONE Group in 1998. This has become a strategic way to improve the quality of aqua and aqua products into Indonesia's largest bottled drinking water producer (AMDK) and Danone has acquisition of Golden Mississippi company. Since then, aqua products use Danone-Aqua label. Since 1998, AMDK Aqua has been owned by a multinational company in the field of food and beverage, DANONE Group originating from France. This is a combination of Golden Mississippi company and Danone. Then Danone increased the ownership of Tirta

²³ Danone Aqua, 2011, "Nilai Luhur Perjalanan Aqua Dari Tahun ke Tahun", taken from http://www.aqua.com/tentang_aqua/nilai-luhur accessed on Sunday, November 12nd 2017, 19:03

Investama company to 70% which previously was only 40%. In the end, Danone became the majority shareholder of Aqua Group.²⁴

Aqua that is very popular by the community has been in production in different regions with different ownership. In total there are 14 factories producing bottled drinking water (AMDK) Aqua, namely;²⁵

1. 10 Factories with ownership of Tirta Investama company
2. 3 Factories with ownership of AQUA Golden Mississippi company
3. 1 Factory with ownership of Tirta Sibyakindo company

As one of the companies in the field of bottled drinking water industry (AMDK), Tirta Investama company which is located in Klaten still pay attention and keep aqua production process, so that aqua remain a favorite of society and maintained water quality for the health of Indonesian people.²⁶

D. Balina Agung Perkasa Company

Before changing its name to PT. Balina Agung Perkasa on August 1, 1997, used to be called PT. Tirta Pari Unggul which is a small agent. Then Tirta Pari Unggul company was bought by Mr. Hendrik Pangadian. At the beginning of PT. Balina Agung Perkasa (BAP) only has 6 units of vehicles, 1 depot, and the number of employees is still 15 people. Previously sales turnover PT. Balina Agung Perkasa is only 70,000 gallons per month.

²⁴ Doni Nurdiansyah, 2016, "Kisah Menarik Dibalik Berdirinya Aqua", taken from <http://www.serupedia.com/2016/06/kisah-menarik-dibalik-berdirinya-aqua.html> accessed on Sunday, November 12nd 2017, 21:15

²⁵ Kaskus, 2013, "Sejarah Berdirinya Aqua", taken from <https://www.kaskus.co.id/thread/5129388a1b76086a4900000d/sejarah-berdirinya-aqua/> accessed on Sunday, November 12nd 2017, 19:35

²⁶ Arif Sugianto, 2015, "Company Profile PT Aqua Golden Missisipi (PT Danone Aqua)", taken from <https://addresslengkap.blogspot.co.id/2015/09/company-profile-pt-aqua-golden.html> accessed on Sunday, November 12nd 2017, 22:06

Currently PT. Balina Agung Perkasa is one of the aqua distributors with the largest sales turnover nationally reaching more than 6 million gallons per month.²⁷

PT. Balina Agung Perkasa is a distributor company engaged in the field of drinking water in packaging (AMDK) labeled Danone Aqua. PT. Balina Agung Perkasa focus on delivery of products originating from warehouse and sent to outlets/ consumers. Currently consumers of PT. Balina Agung Perkasa has reached 60,000 from various types of businesses such as housing, hotels, industry, restaurants, offices, etc. To simplify and accelerate the distribution process, PT. Balina Agung Perkasa also has branches to serve consumers.²⁸

E. Tirta Fresindo Jaya Company

PT. Tirta Fresindo Jaya was established on April 09, 2012, engaged in the production of food and beverages in packaging (Fast Moving Consumer Goods) which is under the auspices of Mayora Group.²⁹ Excellent product of PT. Tirta Fresindo Jaya is bottled drinking water (AMDK) of Pucuk Harum Tea and until now has become a market leader in Bottled Tea products in packaging. As time passes and continues to innovate in bottled drinking water products, PT. Tirta Fresindo Jaya managed to create new products such as Le

²⁷ PT Balina Agung Perkasa, 2011, “Sejarah PT Balina Agung Perkasa”, taken from <http://www.balina.co.id/index.php/about-bap/our-profile.html> accessed on Monday, November 13rd 2017, 18.59

²⁸ PT Balina Agung Perkasa, 2011, “Company Profile PT Balina Agung Perkasa”, taken from <http://www.balina.co.id/index.php/about-bap/25-company-profile/46-welcome-to-bap.html> accessed on Monday, November 13rd 2017, 19.00

²⁹ Mayora, “Mayora At A Glance” taken from <https://www.mayora.com/about-us/mayora-at-a-glance/> accessed on Sunday, November 12nd 2017, 20.54

Minerale, Kopiko 78o, Q Guava, and Kopikap. PT. Tirta Fresindo Jaya has established a factory to develop its production in various cities in Indonesia such as Bogor, Tangerang, Bali, Makassar, Palembang and has subsidiaries built in Thailand, but the central company remains in Indonesia.³⁰

F. Per Se Illegal and Rule of Reason Approach

Business competition law, aims to protect the interests of businesses from market control and anti-competition businesses, so that a fair and efficient business competition can be created in carrying out economic activities, while also aiming to protect the public interest. These objectives must be reflected in the regulation of business competition laws. Regarding this matter, both through a structural and behavioral approach, the regulation regarding business competition is determined through two characteristics of the prohibition norm approach, namely the prohibition on per se illegal and prohibition which is rule of reason. Both the per se illegal and rule of reason approaches have long been applied in determining whether an act is hindering competition or not.

Per se illegal and rule of reason approaches are applied to assess whether certain actions of businesses violate business competition laws. A per se illegal approach is any particular business agreement or activity as illegal, without further verification of the impact of the agreement or business activity. Activities that are considered as per se illegal include collusive pricing of certain products, as well as setting the resale price. Whereas the

³⁰ Lilik Sugirahayu, 2017, "PT Tirta Fresindo Jaya", taken from <https://www.scribd.com/document/355892076/PT-Tirta-Fresindo-Jaya> accessed on Monday, November 13rd 2017, 16.47

rule of reason approach is an approach used by business competition authorities to make evaluations of the consequences of certain business agreements or activities, in order to determine whether an agreement or activity is inhibiting or supporting competition.³¹ In this case, the Supreme Court of the United States has established a standard rule of reason that allows the court to consider competitive factors and determine whether or not a trade barrier is appropriate. This aims to find out the obstacles are influencing, interfering with, or even inhibiting other businesses in the competition process.³²

Each of these approaches has advantages and disadvantages that can be a thought to apply one approach to the actions of businesses suspected of violating the Anti-Monopoly Law. The advantage of using the Per se Illegal approach is ease and clarity in the administrative process, has a broader binding force (self-enforcing) than the restrictions that depend on the evaluation of the influence of market conditions. Then the use of Per se illegal can shorten the process to a certain degree in the implementation of the law. Whereas the weakness of Per se illegal is that excessive application of the Per se Illegal approach can impede inter-company agreements that do not endanger or even support competition (overinclusion).³³ The advantage of the Rule of Reason is to use economic analysis to achieve efficiency in order to

³¹ Muskibah, "Larangan Persekongkolan Dalam Tender Perspektif Undang-Undang Nomor 5 Tahun 1999 Tentang Larangan Praktek Monopoli Dan Persaingan Usaha Tidak Sehat", *Jurnal Ilmu Hukum* vol. 6 No. 7 (2013), ISSN: 1907-6681, page 59.

³² A.M. Tri Anggraini, "Penerapan Pendekatan Rule of Reason dan Per Se Illegal Dalam Hukum Persaingan", *Jurnal Hukum Bisnis* vol. 24 No. 2 (2005), ISSN: 0852/ 4912, pages 5-12.

³³ Supianto, "Pendekatan *Per Se Illegal* dan *Rule of Reason* Dalam Hukum Persaingan Usaha Di Indonesia", *Jurnal Rechtsens* vol. 2 No. 1 (Juni,2013), ISSN: 2622-1802, pages 51-52.

ascertain whether an action by a business actor has implications for competition. On the other hand there is a weakness of the Rule of Reason, namely to achieve a rational decision, it requires knowledge of economic theory and complex economic data, but judges and judges do not necessarily have the ability to understand that knowledge.³⁴

A competition law regulation model that does not expressly state the concept of an illegal per se or rule of reason approach, has imposed a responsibility that is not easy for business competition authority to be able to properly start from determining the reference as a measure that must be used in assessing an anti competition, until finally making a conclusion whether an act that is anti-competitive is determined by an illegal per se approach or rule of reason. Therefore, to be able to determine whether an act or an agreement that is prohibited has violated the provisions of business competition, the law uses a per se illegal approach and rule of reason as evidence.³⁵

In some cases of competition, both approaches to the nature of the ban are not easy to implement. Competition authority institutions must have a common perception of the meaning that states an action is declared absolutely infringing or can be decided after looking at the argument of rationalist reasons for an action. And based on experience in other countries, especially in the United States, judgments based on per se illegal in reality can change to rule of reason or vice versa, to find out whether an act of a business actor

³⁴ Robert H. Bork, "The Rule of Reason and the Per Se Concept: Price Fixing and Market Division", *The Yale Law Journal*, No. 5 Vol.74, (April, 1965), ISSN 0044-0094, page 781.

³⁵ Elyta Ras Ginting, 2001, *Hukum Anti Monopoli Indonesia, Analisis dan Pebandingan UU No. 5 Tahun 1999*, Bandung: Citra Aditya Bakti, page 27.

inhibits or encourages competition. The difference in approach is basically influenced by the balance of decency, justice, efficiency, legal certainty, and benefits for the community.

G. Case Position

This problem began when retailers in Jabotabek reported complaints to KPPU in September 2016. Traders complained about threats from PT. Tirta Investama as the bottled mineral water (AMDK) aqua producer is in collaboration with their distributors, PT. Balina Agung Perkasa. Threats will be lowered if traders sell Le Minerale (AMDK) drinking water products produced by the PT. Tirta Fresindo Jaya (Mayora Group). This is stated in the agreement agreed upon by the traders.

Agreement is an act by which one or more persons bind himself to one or more other people. There are legal requirements according to Article 1320 of the Civil Code in making the agreement, as follows:³⁶

1. Agree those who bind themselves
2. Ability to make an agreement
3. A certain thing
4. A lawful reason

So it can be concluded that the agreement is a legal act that gives rise to a bond between one party and another.³⁷ All agreements made legally apply as laws for those who make them. Agreements that have been agreed upon jointly by one party with another party, must be done properly and each

³⁶ Pasal 1320 KUH Perdata

³⁷ Rosdalina Bukido, "Urgensi Perjanjian Dalam Hubungan Keperdataan", *Jurnal Ilmiah Al-Syirah* vol. 7 No. 2 (Juni,2009), ISSN: 1693-4202, page 3.

party that has agreed must fulfill the rights and obligations. If between one party and another party has found an agreement, and one of the parties has broken the agreement or one of the parties does not fulfill the rights and obligations, then the act is called default. As a consequence of the default, it must provide compensation including costs incurred in connection with the implementation of the agreement.³⁸ Article 1243 of the Civil Code states that the replacement costs, damages and interest for non-fulfillment of an engagement started obliged, if the debtor, although it has been declared negligent, still fail to meet the tie, or if something should be given or perpetration may only be given or done in time that exceeds the prescribed time limit.

In this case, PT. Tirta Investama in collaboration with PT. Balina Agung Perkasa made an agreement with the traders. Based on the description above, the agreement made is a guarantee that traders do not sell Le Minerale products produced by PT. Tirta Fresindo Jaya. The agreement states, if the traders sell Le Minerale products, their status will be lowered from the original Star Outlet³⁹ (SO) become Wholesaler⁴⁰ (retail).⁴¹

³⁸ Pasal 1338 KUH Perdata

³⁹ “*Star Outlet* is a very large wholesaler. Star Outlet stores get goods from Distributors at special prices.” Taken from <http://st284470.sitekno.com/article/4143/mengenali-jenis-outlet.html> accessed on Tuesday, May 15, 2018, 11.00 WIB.

⁴⁰ *Wholesaler* is an intermediary who sells to another intermediary, usually a retailer. Wholesaler is known as wholesaler or wholesaler. Holy Icu Yunarto, 2006, *Business Concepts Implementation Series in sales and distribution management*, Jakarta: Gramedia, page 40.

⁴¹ “retail sales or known as retail are trading business activities (sales of goods or services) that are directly distributed to end consumers to be used as personal, family or household needs not for resale. Retailers are intermediaries in the marketing channel system, where retailers get goods from producers and/ or wholesalers who then sell them to end consumers.” Taken from <http://www.dosenpendidikan.com/penjualan-eceran-ritel-pengertian-tujuan-fungsi-jenis/> accessed Tuesday, May 15 2018, 11.30 WIB.

With the report and based on the findings in the field, PT. Tirta Fresindo Jaya as the producer of Le Minerale sent a summons against PT. Tirta Investama on October 1, 2016 through its legal counsel Suryanto Simalango Patria. The subpoena was in the form of Jakarta regional newspapers. This is done in addition to complaints from retail and retail traders in the Karawang region also because if this is left alone and protracted it will cause a decrease in sales of Le Minerale. It could even have a negative impact on the company, namely that there will be a closure of the Le Minerale amdk manufacturing plant in the Greater Jakarta area.

Reports submitted by PT. Tirta Fresindo Jaya to the Business Competition Supervisory Commission (KPPU) were then responded. KPPU then carried out a follow-up process in investigating the summons carried out by PT. Tirta Fresindo Jaya against PT. Tirta Investama and PT. Balina Agung Perkasa.⁴²

Article 40 of the Business Competition Law stipulates that, the KPPU conducts inspection as an official task of providing evidence, namely testimony of witnesses and expert witnesses, information from other businesses and other letters and/ or documents. The KPPU in the investigation focused its attention on business documents, which had a specific evidentiary power. Instructions / suggestions can always advance the investigation, whether it can be used as evidence that must be determined on

⁴² M. Taufikul Basari. Kabar 24. 2017. "Persaingan Usaha Tidak Sehat: Asal Mula Kasus Aqua vs. Le Minerale". Taken from <http://kabar24.bisnis.com/read/20170711/16/670224/persaingan-usaha-tidak-sehat-asal-mula-kasus-aqua-vs.-le-minerale> accessed Thursday, May 10 2018, 19.00 WIB.

a case by case basis. If there are written instructions, the instructions are in accordance with the contents including the category of letters or documents.⁴³

Document evidence, records and/ or testimonies that reinforce the existence of driving factors for unfair competition according to indicators can be used as evidence. Businesses and witnesses can provide documents to strengthen their position/ information. Every document submitted will be received by KPPU. The KPPU Assembly will then provide an assessment of the document. Documents of businesses are deemed to have an objective nature, therefore in the case of monopoly and business competition, documents of businesses have special evidentiary power. Data guidance is used as evidence as long as the instructions have conformity with other instructions or in accordance with actions or agreements that are allegedly violating the Business Competition Law. A clue that is obtained in written form, the strength of the evidence is categorized together with the power of proof of a letter or document. The use of evidence evidence in monopoly cases and business competition cannot be generalized, but is determined on a case by case.

In the research case, PT Tirta Investama as the reported party I and PT Balina Agung Perkasa as reported party II violated layered articles in Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition Article 15 paragraph 3 letter b, article 19 letters a and b. In the second session on July 10, 2017 was the first follow-up hearing after the

⁴³ Knud Hansen, et all., 2002, Undang-Undang larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat, Jakarta: Katalis Publishing Media Services, page 365.

status was increased in early June. In this session the Commission called a witness from Le Minerale as the reporter. The Le Mineral party presents people who have been authorized by the director of PT. The Niagatama Semesta Inbisco, Carol Mario Sampouw as National Sales Manager.⁴⁴

In that statement, Le Minerale said that there was a decrease in sales market share due to the agreement between Aqua and BAP. Market share is the percentage of industry sales volume/ value of the sale or purchase of certain goods or services controlled by a business actor in the relevant market within a certain time. The market share can measure how much the sales portion in the market or how much the sales portion of a product needs. Market share is useful for measuring the position of a company in an industry competition. If a company has a high market share it shows the strength of the company in an atmosphere of competition in the relevant market. If the market share is higher or the company's sales are higher, the higher the company's revenue becomes an important factor in the profit calculation. A company's market share can be achieved through, distribution and, customers are given innovative products, or a product that has high quality.⁴⁵

In the trial some evidence was found. One of them is evidence of communication carried out by employees of PT. Tirta Investama namely Sulistyo Pramono in her capacity as a Key Account Executive (KAE) to

⁴⁴ Aprillia Ika. Kompas. 2017. "Sidang Dugaan Monopoli Aqua vs Le Minerale, Siapa akan Menang ?" Taken from <https://ekonomi.kompas.com/read/2017/07/11/090000526/sidang.dugaan.monopo%20li.aqua.vs.le.minerale.siapa.akan.menang> accessed on Friday, May 11, 2018, 10.00 WIB

⁴⁵ Rusindiyanto, "Prediksi Pangsa Pasar Produk Deterjen Merek Rinso Dengan Metode Markov Chain Guna Menentukan Strategi Pemasaran", *Jurnal Tekmapro* Vol. 66, No. 3, (July, 1999), ISSN: 1907-5146, page 5.

Denny Lasut as Senior Sales Manager on May 17, 2016 and to M. Lutfi as Depo PT. Tirta Investama Karawang uses the company's personal email. Previously, the Investigator Commission of the Business Competition Supervisory Commission (KPPU) found e-mail evidence made by employees of PT. Tirta Investama and PT. Balina Agung Perkasa related to Star Outlet's degradation of stores.⁴⁶

⁴⁶ Choirul Arifin. Tribunnews. 2017. "Perang Dagang VS Le Minerale, KPPU: Produsen Aqua Terbukti Jalankan Persaingan Bisnis Tidak Sehat". Taken from <http://www.tribunnews.com/bisnis/2017/12/19/kppu-perang-dagang-vs-le-minerale-produsen-aqua-terbukti-jalankan-persaingan-bisnis-tidak-sehat> accessed Saturday, May 12, 2018, 14.00 WIB.