CHAPTER IV

FINDING AND ANALYSIS

A. The Mechanism for Handling Cases of Unfair Business Competition PT. Tirta Investama by KPPU

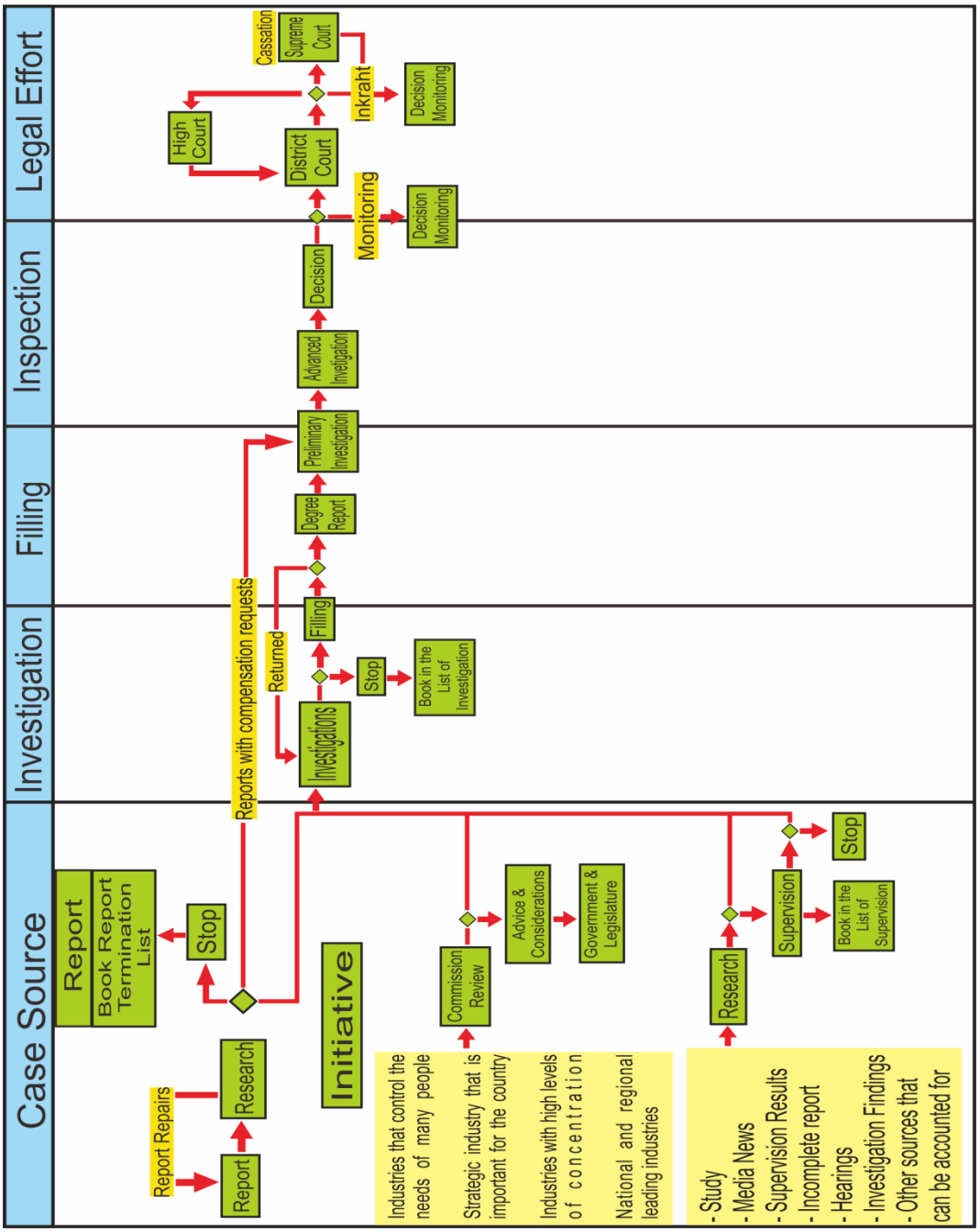
Since the Law on Prohibition of Monopolistic Practices and Unfair Business Competition does not regulate in detail the procedures for reporting as well as the settlement of cases of monopolistic practices and unfair business competition, KPPU has made its own procedure for submitting reports to the KPPU secretariat.[1] In order for the implementation of the task to run smoothly, properly and correctly, the KPPU issues Decree No. 05/KPPU/Kep/IX/2000 on Procedures for Submission of Reports for Handling Alleged Violations of Law No. 5 of 1999. Then it was refined with No. Commission Regulation 1 of 2006 on Procedures for Handling Cases. At present the regulation has been revised into No. Commission Regulation. 1 of 2010. [2]

In carrying out case handling in business competition, the legal basis used is the KPPU Regulation No. 1 of 2010 on Procedures for Handling Cases. In handling the case of business competition, KPPU must be based on the prevailing regulations so that cases can be resolved through legal channels that are good and right. If it is found during the process of handling the case,

[1] Article 38 Act No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition.

[2] Alum Simbolon, "Kedudukan Hukum Komisi Pengawas Persaingan Usaha Melaksanakan Wewenang Penegakan Hukum Persaingan Usaha", *Mimbar Hukum* vol. 24 No. 3 (2012), ISSN: 2443-0994, page 530.

KPPU has made a mistake or has not followed the applicable regulations, it can have a negative impact on KPPU or other parties. In handling cases the KPPU must be neutral. The following is a scheme of the procedure for Case Handling Procedures at KPPU:[3]



Taken from http://www.kppu.go.id/id/penegakan-hukum/skema/ accessed on Thursday, Agustus 2, 2018, 19.00 WIB.

Picture 1.1 Scheme for Handling Case in KPPU

The stages of handling cases in the practice of case settlement by KPPU are as follows:[4]

1. Research and Clarification of Reports

   Research and Clarification[5] is carried out by the Commission through the KPPU secretariat. To obtain clarity and completeness regarding alleged violations, the Commission Secretariat conducts research on reports and/ or requests clarification from the complainant and / or other parties. Research and clarification of reports is carried out no later than 60 (sixty) working days and can be extended for a maximum of 30 (thirty) working days. The results of the research and clarification are outlined in the Draft Report on Alleged Violations.

2. Filing

   The Secretary of the Commission conducted a filing[6] on the resume of the report or resume monitoring carried out to assess whether or not a examination was appropriate. To conduct research the Commission Secretariat reviews the clarity and completeness of

[4] Rilda Murniati, *Penyelesaian Perkara Pelanggaran Hukum Persaingan Usaha oleh KPPU*, Dalam buku *Hukum Bangun Teori dan Telaah dalam Implementasi*, (Bandar Lampung: Universitas Lampung, 2009), page 448.

[5] Research is an activity carried out by a work unit that handles monitoring of businesses to get initial evidence in the initiative case. Clarification is an activity carried out by a work unit that handles reports to obtain preliminary evidence in a report case. Article 1 Paragraphs (3) and (4) Perkom No. 1 of 2010.

[6] Filing is a series of activities carried out by the work unit that handles Filing and handling of cases to re-examine the Report on Investigation Results in order to prepare a Draft Report on Alleged Violations to be carried out a Reporting Report. Article 1 Sub-article (7) Perkom No. 1 of 2010.

the resume report or resume monitoring. The results of filing are stated in the form of reports of alleged violations. The Commission Secretariat submits reports on alleged violations to the commission for a examination. Filing of resume reports and resume monitoring is carried out no later than 30 (thirty) working days.

3. Examination

Examination[7] is carried out by the Commission Secretariat in a examination meeting attended by the Chairperson of the Commission and a number of Commission Members who fulfill the quorum. The title meeting is reported to be carried out to explain reports of alleged violations committed by the reported party in a examination and based on the explanation the commission assesses whether or not a preliminary examination of the alleged violation is appropriate. A report is held no later than 14 (fourteen) days after filing to be determined whether or not it is appropriate for the preliminary examination process.[8]

4. Preliminary Investigation

Preliminary investigation[9] is carried out by the preliminary investigation team consist of at least 3 (three) members of the Commission. In conducting preliminary investigations the

[7] Examination is an explanation of the Draft Report on the Alleged Violation submitted by the work unit that handles Filing and handling cases at the Commission Meeting. Article 1 Paragraph (20) Perkom No. 1 of 2010.
[8] Rilda Murniati, *Op.Cit*, page 457.
[9] Preliminary Investigation is a series of activities carried out by the Commission Assembly against reports of alleged violations to conclude that it is necessary or not necessary to carry out Advanced Examination. Article 1 Paragraph (8) Perkom No. 1 of 2010.

inspection team is assisted by the Commission Secretariat. The purpose of the preliminary investigation is to obtain recognition of the reported and or sufficient initial evidence of the occurrence of the violation.[10] The period of preliminary investigation is conducted for thirty days from the date of the letter stipulating the commencement of the preliminary investigation as stipulated in Article 39 Paragraph (1) of Law No. 5 of 1999.

5. Advanced Investigation

   Advanced Investigation [11] [is] carried out by advanced investigation team, assisted by the Commission Secretariat. The purpose of the advanced investigation is to obtain sufficient evidence of the existence of a violation. Evidence is considered sufficient if at least two supporting instruments are found. The forms of evidence are direct or indirect.[12] The period of further investigation is 60 days after the expiration of the preliminary investigation, and can be extended for a maximum of 30 days as stipulated in Article 43 of Law No. 5 of 1999.

6. Commission Assembly Session

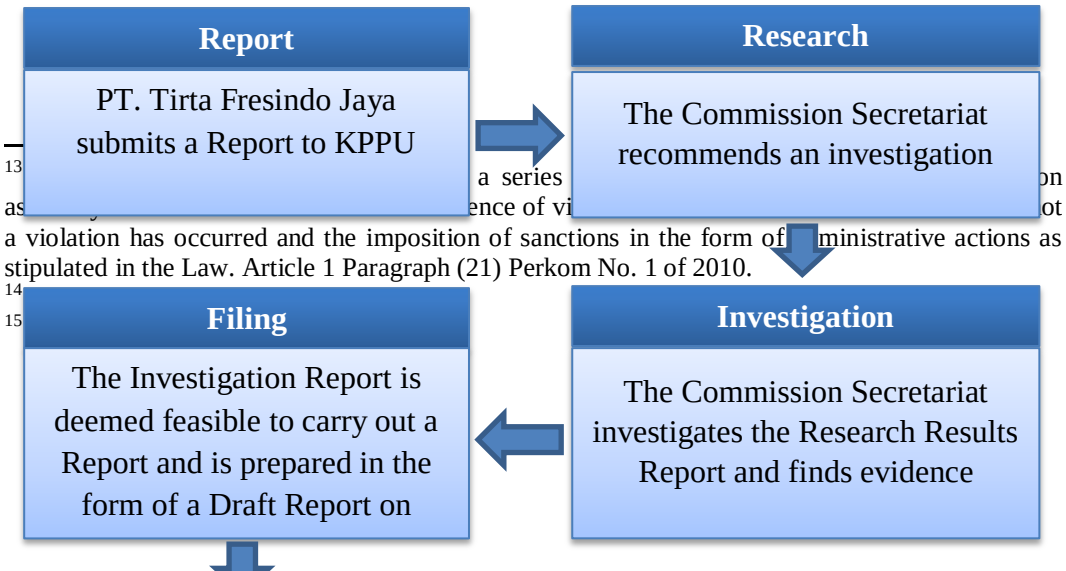
[10] Binoto Nadapdap, 2009, *Hukum Acara Persaingan Usaha,* Jakarta: Jala Permata Aksara, 2009, page 42.
[11] Advanced Investigation is a series of examinations and/ or investigations carried out by a Advanced Investigation Team regarding alleged violations to conclude and or no evidence of violations. Article 1 Paragraph (8) Perkom No. 1 of 2010.
[12] Binoto Nadapdap. *Loc.Cit*. page 46.

Commission Assembly Session [13] is carried out immediately after the advanced investigation team delivered the results of the investigation. To settle a case, the Commission conducted an assembly session. The commission assembly shall consist of at least 3 (three) members of the Commission, led by a Chairperson concurrently a member and 2 (two) members of the Assembly. Membership of the Assembly consists of at least 1 (one) member of the Commission handling the case in a Advanced Investigation.[14]

7. Decision

Based on Article 54 of Perkom No. 1 of 2006, the Commission Assembly decides whether or not the case has occurred based on an assessment of the results of a follow-up examination and or documents or other evidence included in it including the opinion or defense of the reported party. The Commission's decision is read no later than 30 days from the end of the follow-up period.[15]

The procedures for handling cases of unfair business competition PT. Tirta Investama by KPPU is carried out as follows:



13 a series on as ence of vi ot a violation has occurred and the imposition of sanctions in the form of ministrative actions as stipulated in the Law. Article 1 Paragraph (21) Perkom No. 1 of 2010.

14

15

Starting from the Report submitted by PT. Tirta Fresindo Jaya to KPPU. The report was responded to by the KPPU and then conducted a study about the alleged violation of Article 15 paragraph 3 letter b and article 19 letter a and b of Law No. 5 of 1999 conducted by PT. Tirta Investma and PT. Balina Agung Perkasa in a product of AMDK. Based on the Research Results Report, the Commission Secretariat recommends an investigation. In the investigation process, the Commission Secretariat found sufficient, clear, and

empty evidence regarding the alleged violation of Article 15 paragraph 3 letter b and article 19 letter a and b of Law No. 5 of 1999 conducted by PT. Tirta Investma and PT. Balina Agung Perkasa. Based on the Report on the Results of the Investigation, it is deemed feasible to carry out a Report and compiled in the form of a Draft Report on Alleged Violations. The draft Report on Allegations of Violations agreed upon at the Commission Meeting then became a Report on Alleged Violations. Chairperson of the Commission issues No. Commission Determination 60/KPPU/Pen/XII/2016 dated 29 December 2017 concerning Preliminary Investigation Case No. 22/KPPU-I/2016.

During the Preliminary Investigation process attended by the Investigator Team, Reported Party I (PT. Tirta Investama), and Reported Party II (PT. Balina Agung Perkasa) until the Commission Council finally prepared the Preliminary Investigation Results Report submitted to the Commission Meeting. Based on the Preliminary Investigation Report, the Commission's Meeting decided to carry out Advanced Investigation on Case No. 22/KPPU-I/2016. Subsequently based on the Decision of the Commission Meeting, the Commission issued the Decree of the Commission No. 21/KPPU/Pen/IV/2017 dated June 20, 2017 concerning Advanced Investigation of Case No. 22/KPPU-I/2016. During the Advanced Investigation process, the Commission Assembly examined the evidence from the Investigator, Reported Party I and Reported Party II. After the Advanced Investigation, the Commission Council has sufficient evidence and

assessment to take a decision, this has been through the process of the Commission Assembly Consultation. And in the end, the Commission Council has issued KPPU's decision No. 22/KPPU-I/2016. KPPU Decision No. 22/KPPU-I/2016 mentions PT. Tirta Investama as a producer of Aqua Amd and PT. Balina Agung Perkasa as a distributor of amdk aqua has violated Article 15 paragraph 3 letter b and article 19 letters a and b of Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition.

Based on the discussion above the mechanism of handling case of unfair business competition of PT. Tirta Investama by KPPU is in accordance with the applicable regulations, namely Commission Regulation No. 1 of 2010. This can be seen from the Report, Research, Investigation, Filing, Reporting, Preliminary Investigation, Advanced Investigation and Decisions that are appropriate.

B. Legal Considerations KPPU Decisions No. 22/KPPU-I/2016 concerning Cases of Exclusive Dealing and Market Control by PT. Tirta Investama

PT. Tirta Investama (producer of Aqua) and PT. Balina Agung Perkasa (distributor of Aqua) is considered to have violated Article 15 paragraph 3 letter b concerning a Exclusive Dealing which reads, as follows; "Businesses are prohibited from making agreements regarding certain prices or discounted prices on goods and/ or services, which contain requirements that a business actor who receives goods and/ or services from a supplier

business actor: will not buy the same or similar goods and/ or services from other businesses who are competitors of suppliers businesses".

And also Article 19 letters a and b concerning Market Control which reads, as follows; "Businesses are prohibited from carrying out one or several activities, either alone or with other businesses, which can result in monopolistic practices and/ or unfair business competition in the form of:

a. Refuse and/ or prevent certain businesses from conducting the same business activities in the relevant market
b. Or shut down the business of its competitors in the relevant market so that it can result in monopolistic practices and/ or unfair business competition."

Regarding the Exclusive Dealing, raises the question of why it is included in the prohibited agreement. According to the Civil Code Article 1313, Agreement is an act in which one or more persons bind themselves with one or more other persons. From this event, there arises a legal relationship between two parties called engagement where there are rights and obligations of each party. Agreement is the source of engagement.

In Law No. 5 of 1999 there is a prohibited agreement, namely an Exclusive Dealing. An Exclusive Dealing is an agreement between businesses with specific requirements, namely the party who gets the product in the form of goods and/ or services that must supply or will not supply products in the form of goods and/ or services to certain parties. places. The Exclusive Dealing referred to in Law No. 5 of 1999, is a form of agreement referred to

in the Civil Code. Surely a businesses in running this business can make a legal agreement in accordance with the principle of the agreement, one of which is the principle of freedom of contract. In this case what is meant by the principle of freedom of contract is a principle that teaches that the parties in a contract are in principle free to make or not make a contract, as well as their freedom to self-regulate the contents of the contract.[16] In the event that the exclusive dealing, because the agreement inhibits business competition/ competitors and there are fraudulent acts, the agreement is one of the agreements prohibited by Law No. 5 of 1999. Not only are that, in the implementation of freedom of contract limitations are as follows:

1. Must fulfill the requirements as a contract;
2. Not prohibited by law;
3. Does not conflict with prevailing habits;
4. Must be carried out in good faith.

Moreover, it is also limited by decency and public order. There should be no abuse of rights that is used arbitrarily so that it can harm many parties. Although each individual has their own rights, they also need to think about the public interest. Based on the definition of unfair business competition, we can know that there are principles of unfair business competition which become a reference for businesses in carrying out the activities of production and/ or marketing of goods and/ or services within them, as follows;[17]

[16] Lina Jamilah, "Asas Kebebasan Berkontrak dalam Perjanjian Standar Baku", *Syiar Hukum* vol. XIII No. 1 (Maret-Agustus,2012), ISSN: 2549-6751, page 229.

[17] Chapter I General Provisions Article 1 letter f Law No. 5 of 1999 states "unfair business competition is business competition between businesses in carrying out activities of production

1. Do it dishonestly/ cheating;
2. Againts the law;
3. Inhibit business competition/ competitors.

The behavior is clearly prohibited because it violates, whether based on laws, and norms. However, businesses also have the principle of freedom of contract and in carrying out business/ business activities based on economic democracy by taking into account the balance between the interests of businesses and the public interest.[18] Freedom of contract as a principle of agreement and principle law is universal and relates to law as a legal subject or legal subject other than human. The principle of freedom of contract is very closely related to human rights.[19]

Not all laws/ regulations in the order of laws can limit the principle of freedom of contract. The principle of freedom to enter into existence and its enactment is determined and recognized by the statutory regulations which have a statutory level, namely the Civil Code. So only higher levels of law or legislation that have the legal power to limit the principle of freedom of contract.

To prevent the occurrence of monopolistic practices and or unfair business competition, the law prohibits businesses from making certain agreements with other businesses. The ban is a prohibition on the validity of

---

and/ or marketing of goods and/ or services carried out in an honest or unlawful manner or inhibiting business competition.

[18] Ningrum Natasya Sirait, 2004, Hukum Persaingan Usaha Di Indonesia, Medan: Perpustakaan Nasional, page 5.

[19] Zoelfirman, Kebebasan Berkontrak Versus Hak Asasi Manusia (Analisis Yuridis Hak Ekonomi, Sosial dan Budaya), (Medan, UISU Press, 2003), page 49.

the object of the agreement. Thus, it means that every agreement made with an agreement object in the form of matters prohibited by law is null and void, and therefore may not be carried out by businesses who are the subject of the agreement.

The prohibition stipulated in the law is one of the clear limits on the freedom of contracting, so that every agreement made by a business actor as the subject contains prohibited provisions such as a monopoly agreement, oligopoly, price fixing, territorial division, boycott, cartels, trusts, oligopsonies, vertical integration, closed agreements and agreements with foreign parties. Where these agreements can cause monopolistic practices and unfair business competition.[20]

Regarding Market Control as regulated in Article 19 of Law No. 5 of 1999, included in activities that are prohibited. To obtain market control, businesses often take actions that are contrary to the law. This is done by businesses individually or together with other businesses who aim to control a market in question. Of course, business people who successfully control the market will benefit more. However, there are parties who are very disadvantaged, because they will obviously be blocked from entering the relevant market.

Market control regulated in Law No. 5 of 1999 became a prohibited activity because there were elements preventing/ inhibiting competing businesses who would enter the same market. This element is the same as the

[20] Zulfiani, "Kebebasan Berkontrak Perspektif Undang-Undang Nomor 5 Tahun 1999 Tentang Larangan Praktik Monopoli dan Persaingan Usaha Tidak Sehat", *Jurnal Hukum Samudra Keadilan* vol. II No. 2 (Juli-Desember,2016), ISSN: 2615-7845, pages 231-238.

element discussed above. Those who can control the market are business players who have market power, namely businesses who can control the market so that they can determine the price of goods and/ or services in the relevant market.

1. Analysis of Violations Article 15 paragraph 3 letter b concerning Exclusive Dealing

The Anti-Monopoly Law regulates the prohibition of certain agreements[21] which can result in monopoly and/ or unfair business competition. In Act No. 5 of 1999 explains that Article 15 paragraph 3 letter b is one of the prohibited agreements. If the closed agreement has fulfilled the criteria of a violation, then without requiring further verification, the closed agreement automatically meets the criteria for violation of Article 15 of Law No. 5 of 1999.[22] In this case PT. Tirta Investama and PT. Balina Agung Perkasa violates Article 15 paragraph 3 letter b, namely "Agreement on certain prices or discounted prices on goods and/ or services which contain requirements that businesses who receive goods and/ or services from supplier businesses will not buy damages/ or the same or similar services from other businesses who are competitors of the supplier's businesses (this is related to discounted prices)". Based on the explanation, the violations committed by PT. Tirta Investama and PT. Balina Agung Perkasa is a Exclusive Dealing in the

[21] Article 1 number 7 Act No. 5 of 1999 states "Agreement is an activity of one or more businesses to involve themselves with one or more businesses under any name, whether written or unwritten".
[22] Chapter IV of KPPU Regulation No. 5 of 2011 on Implementation Guidelines for Article 15 (Exclusive Dealing) Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition page 22.

Vertical Agreement On Discount category. This is detrimental to many parties such as Star Outlet, Whole Saler, Retailers, and Consumers.

Based on the violation of Article 15 paragraph 3 letter b conducted by PT. Tirta Investama (Reported I) and PT. Balina Agung Perkasa (Reported II) has fulfilled the following elements:

a. That the Reported party II has a cooperative relationship with the Reported party I in terms of the Reported Party I product marketing. PT. Balina Agung Perkasa has a position as distributor of amdk Aqua PT. Tirta Investama. PT. Balina Agung Perkasa has the duty to market amdk aqua to every Star Outlet (SO), Wholesaler, and Retailer. With the existence of this cooperative relationship, According to the Commission Assembly between PT. Tirta Investama and PT. Balina Agung Perkasa is bound to an exclusive agreement to market the product from the Reported Party I only. This can have a negative impact on other manufacturers because it will be difficult to get distributors who will market these products.
b. That the Reported Party I was found guilty. This is because the Reported Party I sets the distributor price and sets a recommendation for the selling price of the product set to the Sub-Distributor (Start Outlet, Whole Saler, Retailer).
c. Whereas Reported Party I and Reported Party II were proven guilty based on evidence, that the behavior of the reported

parties in the implementation of degradation and the threat of degradation for the sub-distributors. Such actions can be categorized as agreements relating to prices or discounted prices because the position of the business actor in the Sub-Distributor section determines the price level obtained by the business actor supplied.

d. Based on evidence related to the behavior of Reported Party I and Reported Party II in the implementation of degradation and the threat of degradation for Sub-Distributors. This action was proven by the conditions for Sub-Distributors to receive goods from competing businesses. If a Sub-Distributor business actor continues to receive goods produced by a competing business actor, he will get a sanction from the Reported Party in the form of degradation which results in the purchase price of the goods obtained.

In the trial some evidence was found. One proof of communication carried out by PT. Tirta Investama employees named Sulistyo Pramono in his capacity as a Key Account Executive (KAE) to Denny Lasut as Senior Sales Manager on May 17, 2016 and M. Lutfi as a Depo PT. Tirta Investama Karawang was found using the company's personal email. Previously, the KPPU Investigation Team found e-mails made by company employees PT. Tirta Investama and PT. Balina Agung Perkasa

related to the degradation of Star Outlet from the PT. Tirta Investama, producer of Aqua.[23]

Then, regarding proof of violations committed by PT. Tirta Investama, KPPU Investigator Team, Helmi Nurjamil said that it was strongly suspected that PT. Tirta Investama and PT. Balina Agung Perkasa had committed violations based on a number of evidence collected. One strong proof is the existence of e-mail communication between PT. Tirta Investama and PT. Balina Agung Perkasa which contains the great agents not to sell bottled water products manufactured by PT. Tirta Fresindo Jaya, if there are traders who continue to sell products from PT. Tirta Fresindo Jaya then the sales status will be reduced to Whole Seller. Traders were forced to sign a letter of willingness not to sell Le Minerale products. Even the traders who refused/ disagreed with the agreement, the sales status was immediately lowered.[24]

Legal facts that form the basis of an exclusive dealing by PT. Tirta Investama and PT. Balina Agung Perkasa with PT. Tirta Fresindo Jaya. Legal facts are descriptions of matters that cause disputes.[25] Legal facts are the presence or absence of written and unwritten legal rules governing the

[23] 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 on Saturday, May 12 2018, 14.00 WIB.

[24] Widian Vebrianto. RMOL.CO. 2017. "KPPU Pegang Dua Alata Bukti Aqua Lakukan Monopoli Dagang". Taken from http://ekbis.rmol.co/read/2017/05/19/291970/KPPU-Pegang-Dua-Alat-Bukti-Aqua-Lakukan-Monopoli-Dagang- accessed on Friday, April 13, 2018, 11.00 WIB.

[25] Marwan, 2009, *Kamus Hukum*, Surabaya : Reality Publisher, page 202.

facts.[26] Legal facts are obtained by collecting evidence relating to the occurrence of a dispute before the trial or during the trial process.

In civil procedural law, judges are not justified in taking decisions without proof. The key is rejected or granted a claim, based on evidence that comes from the facts submitted by the parties. Proof can only be established based on the support of facts. Facts that are assessed and taken into account are submitted during the trial process.[27] In this case the legal facts that can be found are:

a. Written Evidence
    1) Receipt of reports regarding allegations of monopolistic practices and unfair business competition in packaged drinking water products in the Greater Jakarta area by the Business Competition Supervisory Commission of traders and sellers.
    2) The object in this case is a product of PT. Tirta Investama branded Aqua, marketed by PT. Balina Agung Perkasa with PT. Fresindo Jaya branded Le Mineral.
    3) Deed of establishment stating that PT. Tirta Investama is a Legal Entity.
    4) Deed of establishment stating that PT. Balina Agung Perkasa is a Legal Entity.

[26] Hamzah Halim, 2015, *Legal Audit & Legal Opinion*, Jakarta: Kencana, page 11.
[27] Yahya Harahap, 2015, *Hukum Acara Perdata*, Jakarta : Sinar Grafika, page 500.

5) Form of Star Outlet Customer Socialization distributed jointly or individually by the Reported Party I and Reported Party II. The form contains a ban on the sale of Le Mineral Bottled Drinking Water products and if there is a violator, it will receive the consequences of a price reduction.
6) Document of distribution system for bottled drinking water products for mineral water of Reported Party I and Reported Party II which uses two distribution patterns, namely distribution to market through modern markets through independent depots and using distributor services to the public market.
7) The contract of the distributor agreement between the Reported Party I and the distributors is one of the Reported Party II.
8) Pricelist documents or reference price lists containing Reported Party I sets the selling price of the product to the Reported Party II with the new Aqua price adjustment letter sent by the Reported Party I to the Reported Party II on December 21, 2015.
9) Documents regarding customer categories based on PT. Balina Agung Perkasa.

b. Witness Evidence

1) According to witness statements from Jabodetabek traders, there were violations committed by PT. Tirta Invesatama and PT. Balina Agung Perkasa towards PT. Tirta Fresindo Jaya regarding the prohibition of sales of bottled drinking water products, namely Le Mineral, which is found in stores.
2) According to witness Sulistyo Pramono's statement as the Reported Party I who is a Key Account Executive (KAE) regarding the decline in status from Star Outlet to a Wholesaler to the Chun-chun store agreed upon by Didin Sirajuddin and Sulistyo Pramono because the Chun-chun store has sold competitor products namely Le Mineral.
3) According to the Star Outlet traders, there were threats made by PT. Tirta Investama together with PT. Balina Agung Perkasa against the seller by threatening to lower the level from Star Outlet (SO) to a Wholesaler (WS).
4) According to witness testimony from Yatim Agus Prasetyo, there was a sign of document evidence, namely the Star Outlet Customer Socialization Form conducted by Reported Party I and Reported Party II jointly or individually.
5) According to the statement of the Reported Party I and the Reported Party II the electronic evidence obtained is not a personal act because it uses the facilities of the company and every time period is reported to the company.

6) According to the witnesses of the Reported Party I, there was a person of PT. Tirta Investama placed at PT. Balina Agung Perkasa precisely in the area of the sales manager, DR, and KAE which numbered 10 people.
7) According to the Reported Party I, there was an agreement between PT. Tirta Investama with PT. Balina Agung Perkasa is a distributor agreement.
8) According to the testimony of expert witnesses, the legal expert Prahasto explained that PT. Tirta Investama and PT. Balina Agung Perkasa does not make buying and selling breaks due to a distributor agreement.
9) According to the testimony of expert witnesses, legal expert Siti Anisah explained the sale and purchase of broken up.
10) According to the testimony of the expert witness, the business law expert Siti Nindyo explained the agreement which contained the characteristics of the agency agreement.

Furthermore, based on the legal facts described above, the author examined whether the facts have fulfilled the requirements as a basis for legal consideration for the panel to decide cases. According to the Indonesian Dictionary, consideration is an opinion about good and bad. Whereas the law is a law or regulation to regulate community life.[28] Legal

[28] *Ibid*., page 410.

considerations can be interpreted as an opinion of a judge based on legislation concerning the good and bad effects of a judge's decision.

Theory Article 15, namely if the Case Handling Procedure has been carried out correctly and according to the rules, and is sufficiently proven and appropriate that the closed agreement has met the criteria, then without requiring further proof, a closed agreement must be declared to have fulfilled the Article 15 violation criteria. is the principle of Per Se Illegal;

a. An exclusive dealing must cover substantially the trading volume or have the potential to do so. Based on article 4, the measure used is if the result of this closed agreement, the entrepreneur has a share of 10% or more. Based on AC Nielsen's survey data on KPPU's decision No. 22/KPPU-I/2016, proved that Aqua AMDK has the largest market share compared to other competing products.
b. An exclusive dealing are carried out by businesses who have market power, and these strengths can increase due to the closed agreement strategy. The size of market power is in accordance with article 4, which has a market share of 10% or more.
c. In the tying agreement, the product tied in a sale must be different from the main product.
d. Businesses who do tying agreements must have significant market power so that they can force buyers to buy tied products.

The size of market power is in accordance with article 4, which has a market share of 10% or more.

Based on AC Nielsen's survey data on KPPU's decision No. 22/ KPPU-I/2016, it is proven that Aqua AMDK has the largest market share compared to other competing products and based on witness testimony, Aqua AMDK sales are greater than the products of other competitors.[29]

Based on the above explanation, it is true and proven that there is a violation of Article 15 paragraph 3 letter b, which is an Exclusive Distribution Agreement that is conducted between PT. Tirta Investama and PT. Balina Agung Perkasa.

2. Analysis of Violations Article 19 letters a and b concerning Market Control

The facts that occur in the business world in Indonesia are the many practices of unfair business competition. Businesses justify any means to gain profit and great power in a market. As happened in this case, the other one is market control. PT. Tirta Investama and PT. Balina Agung Perkasa works together to control the amdk market and hinder other businesses engaged in the same field.[30]

Theoretically, market domination by a business actor in a market is a monopolistic behavior, that is, a business actor tries to maintain or

[29] Chapter IV of KPPU Regulation No. 5 of 2011 on Implementation Guidelines for Article 15 Exclusive Dealing Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition.

[30] Wahyu Retno Dwi Sari, "Kartel: Upaya Damai untuk Meredam Konfrontasi dalam Persaingan Usaha", *Jurnal Persaingan Usaha*, Edisi 1, Komisi Pengawas Persaingan Usaha, Jakarta (2009), page 192.

enhance a monopoly position or dominant position owned by a business actor who has the power to control strategic elements in a market. What is meant by strategic elements in a relevant market[31] are price, total output, level of service, quality, and distribution.

Law No. 5 of 1999 explains that Article 19 letters a and b are one of the prohibited activities. Relating to violations committed by PT. Tirta Investama and PT. Balina Agung Perksaa for article 19 letters a and b, it is necessary to explain as follows;

a. Refusing or Preventing Businesses from Conducting same Business Activities in the Related Market (Article 19 letter a of Law No. 5 of 1999) which reads "reject and/ or prevent certain businesses from conducting the same business activities in the relevant market".

   Certain businesses fall into the category of potential businesses (potential competitors) who are candidates for direct competition from businesses holding monopoly positions or dominant positions. Actions that are included in "rejecting and/ or obstructing" are actions taken by a businesses (carried out independently or together with other businesses) that already exist in the relevant market both directly and indirectly addressed to certain businesses who resulting in the emergence

[31] Law No. 5 of 1999 Article 1 number 10 of the Related Market is defined as a market that is related to a certain range or marketing area by a businesses for the same or similar goods and / or services or substitution of such goods and services.

of entry barriers faced by certain businesses. Increased entry barriers can mean, but are not limited to:

1) Closed access to enter the market;
2) the costs borne by certain businesses to enter the market increase;
3) access to certain businesses to suppliers (upstream) and/ or consumers (downstream) becomes hampered.

b. Refusing or Preventing Businesses from Conducting the Same Business Activity in the Related Market (Article 19 letter b of Act No. 5 of 1999) which reads "Preventing the customers or business customers of their competitors from engaging in business relations with their competitors".

Actions that are included in preventing consumers or customers of business competitors from conducting business relations with business competitors are as follows;

1) Conduct exclusive dealing with consumers or business customers of competitors;
2) Conduct negative campaigns regarding competing businesses aimed at consumers or customers of the competing businesses.

Market Control activities carried out by businesses to prevent entry of competing businesses can have a negative

impact. The impact on business competition that can be caused by violation of Article 19 of Law No. 5 of 1999, including but not limited to these matters:

1) The existence of competitors who will be eliminated or eliminated from the relevant market; or
2) The existence of a competitors whose role is reduced (the proportion becomes smaller) in the relevant market; or
3) There is one or a group of businesses who can impose their will on the relevant market; or
4) The creation of competition barriers in the form of barriers to entering the relevant market or obstacles to developing the market in the relevant market; or
5) Reduced healthy business competition in the relevant market; or
6) Reduced consumer choice.[32]

If the market control has fulfilled the criteria of a violation, then the Commission Assembly requires further proof of the impact caused by the violation.

Based on the violation of article 19 letters a and b conducted by PT. Tirta Investama (Reported I) and PT. Balina Agung Perkasa (Reported II) has fulfilled the following elements:

[32] Chapter IV Implementation Guidelines Article 19 (Market Control) Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition pages 14-20.

a. That the Reported Party II has a cooperative relationship with the Reported Party I in terms of the Reported Party I product marketing. PT. Balina Agung Perkasa has a position as distributor of amdk Aqua PT. Tirta Investama. PT. Balina Agung Perkasa has the duty to market amdk aqua to every Star Outlet (SO), Wholesaler, and Retailer. With the existence of this cooperative relationship, According to the Commission Assembly between PT. Tirta Investama and PT. Balina Agung Perkasa is bound to an exclusive agreement to market the product from the Reported Party I only. This can have a bad impact on other manufacturers because it will be difficult to get a distributor who will market the product.
b. Whereas the Reported Party I has determined the Reported Party II as a distributor whose task is to market the products produced by the Reported Party I to the Retail Store within the designated area. The Reported Party I and Reported Party II have been proven to jointly conduct business activities to market goods produced by the Reported Party I.
c. Based on the assessment of the Commission Council on evidence, it has been proven that there is a behavior of Reported Party I and Reported Party II against Retail Stores/ Wholesaler, Star Outlets not to sell Le Minerale products. One proof that strengthens the reason for the Commission Assembly is the

existence of a letter of agreement that must be agreed/ signed by the Retail Store not to sell other products. And retail stores get consequences if they still sell other products, then the status will be lowered or will get a different discount. The existence of an element of deterring other businesses, this resulted in losses for the PT. Tirta Fresindo Jaya.

d. That based on article 1 number 6 of Law No. 5 of 1999, unfair business competition is defined as competition between businesses in carrying out activities of production and/ or marketing of goods or services carried out in an unfair manner or against law or inhibiting business competition. Based on the assessment of the Commission Council, the reported party has impeded the opportunities of other businesses and/ or consumers that have the effect of unfair business competition. This is categorized as an obstacle to business competition.

Then regarding proof of violations committed by PT. Tirta Investama. In this case the legal facts that can be found are:

a. Written Evidence

1) Receipt of reports regarding allegations of monopolistic practices and unfair business competition in packaged drinking water products in the Greater Jakarta area by the Business Competition Supervisory Commission of traders and sellers.

2) The object in this case is a product of PT. Tirta Investama branded Aqua, marketed by PT. Balina Agung Perkasa with PT. Fresindo Jaya branded Le Mineral.
3) Deed of establishment stating that PT. Tirta Investama is a Legal Entity.
4) Deed of establishment stating that PT. Balina Agung Perkasa is a Legal Entity.
5) AC Nielsen Survey Data sourced from PT. Tirta Investama held from January 2015 to May 2017 with SPS 600 ML products for the Jakarta survey area, which shows that Aqua has the largest market share compared to other products.

AC Nielsen Survey Data sourced from PT. Tirta Fresindo Jaya which was held from January 2015 to December 2016 with SPS 600 ML products for the Jakarta survey area, which showed that Aqua had the largest market share compared to other products.

b. Witness Evidence

1) According to Sunaryo as Sabar Subur shop owner, Werdana Tanzil as Chandra shop owner, Yapet Elisur Taebenu as Pulomas Jaya shop owner, Parasian Sihite as Berkah shop owner, Orphan Agus Prasetyo as Chun-chun shop owner, Edi Sopati as shop owner Nouval, Irwan as the owner of the Sinar Jaya shop, Julie as the owner of the Yania shop, and Handi as the owner of the Sumber Jaya shop. From the testimony of

witnesses, proves that Aqua is the most sold product and is sold faster than other products.

2) According to PT. Tirta Fresindo Jaya with the actions taken by PT. Tirta Investama and PT. Balina Agung Perkasa closed the opportunity for Le Mineral to compete fairly in the relevant market so that it was detrimental to Le Mineral due to the unavailability of Le Mineral on the market which resulted in a decrease in revenue supported by survey data.

Theory Article 19 is based on Law No. 5 of 1999 does not prohibit if a business actor has a monopoly position or dominant position, but as long as the position is obtained from fair competition. However, if a businesses utilizes this position to reduce or eliminate competitive pressure from competing businesses (real competitors/ existing competitors and potential competitor competitors), then the businesses is declared to have misused the monopoly position (abuse of monopoly).[33] This is clearly contrary to the principle of business competition in competition law because it is anti-competitive and can have a negative impact on the market. The negative impact caused is the choice of consumers is limited (due to reduced competing businesses), the price to be paid increases, and the decline in social welfare.

The position of monopoly or dominant position owned by businesses can be indicated from the control of the relevant market share

[33] The power of monopoly and monopolistic practices are closely related to monopoly, as regulated in KPPU Guidelines No. 11 of 2011 on Guidelines for Article 17.

and/ or the presence of significant entry barriers. Mastery of market share shows the ability of businesses towards the overall sales in the market which are also filled by competitors. The level of market share is shown in percentage figures and can be used to determine guidelines or determine the marketing success standards of a company in comparing its position with its competitors in the relevant market.

The ability of a company to control the percentage in the market (market share) is market control can be seen from the following elements, namely:

a. The dominant market share raises the notion of the emergence of power as a monopolist. UU no. 5 1999 Article 25 paragraph (2) provides a clear definition of dominant position based on market share, namely: if a businesses has a dominant position as referred to in paragraph (1) if: a). one businesses or one group of businesses controls 50% (fifty percent) or more of the market share of a certain type of goods or services; or b). two or three businesses or groups of businesses control 75% (seventy five percent) or more market share of one type of certain goods or services.
b. The ability to extend market control by setting prices above the market average price for a relatively long period of time and pricing is not disrupted by the emergence of new competitors to the relevant market.

Market control activities are related to ownership of dominant positions and significant market share (above 50%) in the relevant market. Market control will be difficult to achieve if businesses, either alone or jointly, do not have a high percentage of market share in the relevant market. As an illustration, it is difficult to imagine a business actor, either alone or jointly having a market share of only 10% (ten percent) can influence the pricing, or production or other aspects of the relevant market. But on the other hand, one business actor who has a 50% (fifty percent) market share in the duapoli market (there are only two sellers) is also not necessarily individually capable of controlling the relevant market.[34]

Based on the explanation above, it is true and proven that there is a violation to the Article 19 letter a and b which is the Market Control conducted between PT. Tirta Investama and PT. Balina Agung Perkasa.

3. The Approach Used by The KPPU in Case

There are two approaches in the case of unfair business competition of PT. Tirta Investama: per se illegal and rule of reason. Both of these approaches have been applied to assess whether the actions of businesses violate the Antimonopoly Law or not. Both approaches were first listed as supplements to the Sherman Act 1980. This was the first Antimonopoly act in the United States and was first implemented by the

[34] Chapter IV on Implementation Guidelines for Article 19 on Market Control Law Number 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition.

United States Supreme Court in 1899 (for per se illegal) and in 1911 (for rules of reason).[35]

In this case, the author reviews the actions taken by PT. Tirta Investama together with PT. Balina Agung Perkasa based on Decision Case No. 22/KPPU-I/2016, KPPU uses the Per se Illegal approach. This can be seen from the evidence of email communication between employees of PT. Tirta Investama with PT. Balina Agung Perkasa regarding the degradation actions of Star Outlet stores that still sell competing products. Every Star Outlet store that still sells competing products will get the consequences of decreasing the status of Star Outlet (SO) to Wholesaller and impacting the purchase / pickup price of the goods. Traders are also forced to sign an agreement / Star Outlet Customer Socialization Form complete with owner's name and telephone number. There is a prohibition not to buy products from competitors (Le Minerale) carried out jointly by the Reported Party I and Reported Party II against the traders / shop owners in the form of agreement / Form Star Outlet Customer Socialization and the sanctions given in the form of a decrease in store status are the main elements that are fulfilled that PT. Tirta Investama and PT. Balina Agung Perkasa violates Article 15. Paragraph 3 letter b.

In this case, the author reviews the activities carried out by PT. Tirta Investama together with PT. Balina Agung Perkasa based on

[35] Hukum Online.com, "Pentingnya prinsip per se dan rule of reason di UU Persaingan Usaha", Taken from http://www.hukumonline.com/klinik/detail/lt4b94e6b8746a9/pentingnya-prinsip-per-se-dan-rule-of-reason-di-uu-persaingan-usaha accessed on Wednesday, May 30 2018, 15.00 WIB.

Decision Case No. 22 / KPPU-I / 2016, KPPU uses the Rule of Reason approach. This can be seen from dishonest actions that are detrimental to competitors in obtaining consumers, it is a concrete action from the reported party which is included as anti-competitive actions carried out jointly with the aim of inhibiting/ hindering the competitor's growth in the form of threats and/ or ban on traders/ Star Outlet store owners not to sell other products. This action also harmed the reporting party (PT. Tirta Fresindo Jaya) because the product that Le Minerale was not available at the store, PT. Tirta Fresindo Jaya does not have the opportunity to market Le Minerale products and the reported party has closed the opportunity for PT. Tirta Fresindo Jaya to compete healthy in the market.

Based on the explanation above, in the case of unfair business competition PT. Tirta Investama and PT. Balina Agung Perkasa uses two (2) approaches, namely the Illegal Approach to Article 15 paragraph 3 letter b and the Rule of Reason Approach in article 19 letters a and b.

Then, we can conclude that based on the analysis of the three (3)points above, the legal considerations of the Commission Assembly are in accordance with the existing theories and facts. Actions made by PT. Tirta Invetama and PT. Balina Agung Perkasa proved to violate the principles of business competition, laws and regulations, norms, and Islamic law, even though there are principles of freedom of contract and elements of violations of article 15 paragraph 3 letter b and article 19 letter

a and b as a whole has been fulfilled. In this case there are two (2) approaches used, namely Per Se Illegal and Rule of Reason.