

**CASE STUDY OF BUSINESS COMPETITION SUPERVISORY
COMMISSION DECISION NO. 22/KPPU-I/2016 ABOUT EXCLUSIVE
DEALING AND MARKET CONTROL BY PT. TIRTA INVESTAMA**

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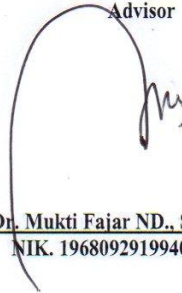
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CASE STUDY OF BUSINESS COMPETITION SUPERVISORY
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DEALING AND MARKET CONTROL BY PT. TIRTA INVESTAMA**

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ABSTRACT

Business competition in the business world is already a natural thing for business people. But, there are deviant businesses who are dishonest, hinder other businesses, etc. Therefore, the Government has enacted Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition to prevent and minimize unfair competition in businesses. The author conducts research on cases of unfair business competition at PT. Tirta Investama. This case began with the case of PT. Tirta Fresindo Jaya against PT. Tirta Investama. Indeed, KPPU has done an investigation this case. Based on KPPU's decision No. 22/KPPU-I/2016 PT. Tirta Investama and PT. Balina Agung Perkasa committed a violation of an exclusive dealing as stipulated in article 15 paragraph 3 letter b and market control contained in article 19 letter a and b of Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Competition and imposed a sanctions of Rp 20.13 billion. In this case study, the author also conducted a research on the mechanism for handling business competition cases by KPPU against PT. Tirta Investama. This research is a normative legal research/ library research and uses qualitative descriptive data analysis. This approach uses a case approach. In this case using two approaches, namely per se illegal and rule of reason. The law, this law is based on how the law must be applied, and KPPU has been appropriate in handling this case based on various considerations, legal facts and applicable provisions.

Keywords: business competition, aqua case, unfair business competition

A. BACKGROUND

More development in the business world, the greater the businesses opportunity is to do the competition. Competition is one of the activities that can cause positive impact if the businesses is done rightfully and honestly.¹ But, the competition can causes the negative impact if done fraudulently and cause disadvantage other parties/ other businesses.² Discussing the business competition that occurs between businesses, we need to know such as prohibited agreements and prohibited activities that have been regulated in Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition.³ Prohibited activities such as monopoly, conspiracy, monopsony, etc. This prohibited activity is basically an agreement between businesses, both on the same level and different levels. And prohibited agreements such as trust, kartel, oligopoly, oligopsony, exclusive dealing, price fixing agreement, price discrimination agreement, etc.

B. RESEARCH PROBLEM

1. How is the Mechanism for Handling Cases of Unfair Business Competition PT. Tirta Investama by KPPU?
2. What are the Legal Considerations of KPPU's Decisions No. 22/KPPU-I/2016 concerning Exclusive Dealing and Market control by PT. Tirta Investama?

C. OBJECTIVE OF RESEARCH

1. To Know the Mechanism for Handling Cases of Unfair Business Competition PT. Tirta Investama by KPPU
2. To Know the Legal Considerations of KPPU's Decisions No. 22/KPPU-I/2016 concerning Exclusive Dealing and Market control by PT. Tirta Investama

D. BENEFIT OF RESEARCH

¹ Abdulkadir Muhammad, 2002, *Hukum Perusahaan Indonesia*, Bandung; Citra Aditya, page 285.

² Irna Nurhayati, "Kajian Hukum Persaingan Usaha: Kartel Antara Teori dan Praktik", *Jurnal Hukum Bisnis*, vol. 30, no. 02 (2011), ISSN: 2443-0994, page 12.

³ Ridwan Khairandy, 2009, *Perseroan Terbatas: Doktrin, Peraturan Perundang-undangan dan Yurisprudensi*, Yogyakarta: Total Media, page 279.

Theoretically, the authors hope that through this research can provide a better understanding of unfair business competition in Indonesia and a better solution to overcome the problem of unfair business competition supervised by the Business Competition Supervisory Commission (KPPU) based on Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition.

Practically, the authors hope that through this research can prevent unfair business competition conducted by businesses in Indonesia supervised/ controlled by the Business Competition Supervisory Commission (KPPU) based on Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition.

E. LITERATURE REVIEW

1. 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.⁴ 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.⁵ 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.⁶

a) 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

⁴ 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

⁵ Rachmadi Usman, 2013, *Hukum Persaingan Usaha di Indonesia*, Jakarta: Sinar Grafika, page 335.

⁶ Suyud Margono, 2009, *Hukum Anti Monopoli*, Jakarta, Sinar Grafika, page 98.

services to 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

b) Tying Agreement

Tying Agreement can occur because the businesses/ companies enter into an agreement with other businesses/ 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).¹⁰

c) 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.¹¹ This is one of improvidence that should not have happened.

2. Market Control

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

¹¹ Susanti Adi Nugroho, *Op.Cit.* page 217.

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:

- a) Refusing and or blocking certain businesses from conducting the same business activities in the relevant market (Article 19 letter a);
- b) Blocking the consumer or customer of a competing business actor from conducting business relations with the competing business actor (Article 19 letter b);
- c) 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 businesses to get it will often be contrary to applicable law. Market Control is usually carried out by businesses who have market power¹² 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.¹³

Although market power provides benefits for companies, this causes losses to the economy and social, namely the existence of social costs that

¹² *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.

¹³ Arie Siswanto, 2002, *Hukum Persaingan Usaha*, Jakarta: Ghalia Indonesia, page 89.

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.¹⁴ 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:¹⁵

- a) Sell loss
- b) Through the practice of fraudulently setting production costs
- c) Price competition

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:¹⁶

- a) 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*.
- b) Refuse consumers is blocking the consumer from other businesses (competitors) from doing or continuing business relations with the competitor's business.
- c) Limitation of product distribution. Limiting the circulation or sale of goods and services in the relevant market.
- d) Discrimination against certain businesses who are competitors.
- e) 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.

¹⁴ Tresna P. Soemardi, "Efisiensi Dan Pelaksanaan Hukum Persaingan Usaha", *Jurnal Persaingan Usaha* Edisi 3 (Juli,2010), ISSN:2087-0353, page 115.

¹⁵ Andi Fahmi Lubis, et al, *Loc.Cit.* page 139.

¹⁶ Mustafa K. Rokan, 2010, *Hukum Persaingan Usaha*, Jakarta: Rajawali Pers, page 151.

- f) 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.

3. Tirta Investama Company

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. Tirto 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.¹⁷

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 Investama company to 70% which previously was only 40%. In the end, Danone became the majority shareholder of Aqua Group.¹⁸

4. Balina Agung Perkasa Company

¹⁷ 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

¹⁸ 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

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. 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.¹⁹

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.²⁰

5. 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.²¹ 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 Minerale, Kopiko 780, Q

¹⁹ 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

²⁰ 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

²¹ 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

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.²²

6. 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.

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 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.²³ 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

²² 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

²³ 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.

obstacles are influencing, interfering with, or even inhibiting other businessEs in the competition process.²⁴

7. Case Position

This problem began when retailers in Jabetabek 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.

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 Outlet²⁵ (SO) become Wholesaler²⁶ (retail).²⁷

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

²⁴ 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.

²⁵ "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.

²⁶ 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.

²⁷ "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.

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.²⁸

F. RESEARCH METHOD

This research is normative legal research, that is research that reviewing the case study.²⁹ The type of data is the secondary data which consist of primary legal materials, secondary legal materials, and tertiary legal materials. The data were collected through library research.³⁰ Then the data use the case study approach and descriptively qualitatively to explain the action of PT. Tirta Investama and PT. Balina Agung Perkasa in conducting exclusive dealing and market control in the bottled mineral water market.

G. FINDING ANALYSIS

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

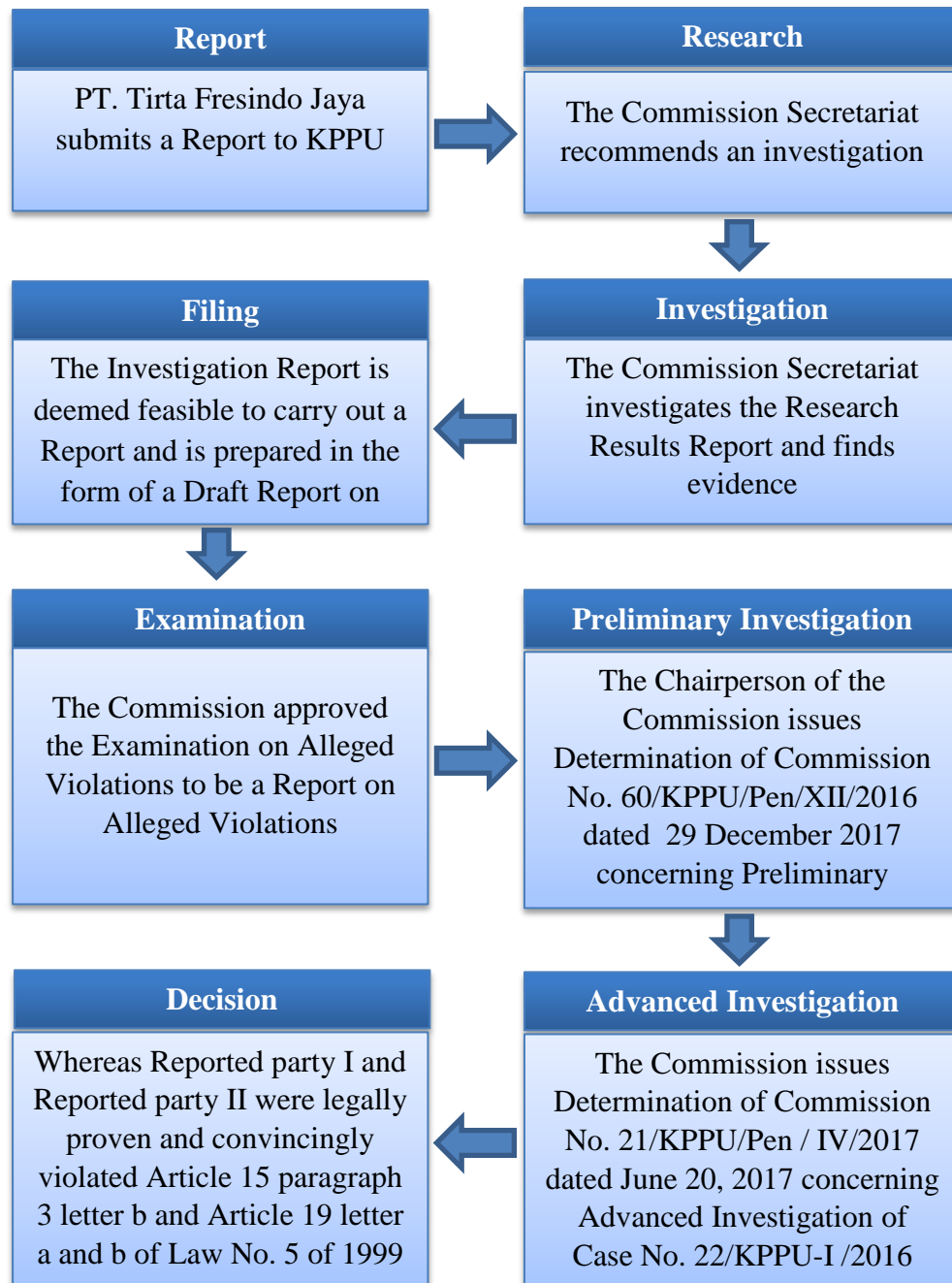
In carrying out case handling in business competition, the legal basis used is the KPPU Regulation No. 1 of 2010 on Procedures for Handling Cases. In handling the case of business competition, KPPU must be based on the prevailing regulations so that cases can be resolved through legal channels that are good and right. If it is found during the process of handling the case, KPPU has made a mistake or has not followed the applicable regulations, it can have a negative impact on KPPU or other parties. In

²⁸ 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.

²⁹ Soerjono Soekamto, Sri Mumudji, 2006, *Penelitian Hukum Normatif Suatu Tinjauan Singkat*, Jakarta, Raja Grafindo Persada, page 23.

³⁰ Soerjono Soekamto, Sri Mumudji, 2009, *Penelitian Hukum Normatif Suatu Tinjauan Singkat*, Jakarta, PT Raja Grafindo Persada, page 44.

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



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.

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

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.³¹ 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:

³¹ Lina Jamilah, "Asas Kebebasan Berkontrak dalam Perjanjian Standar Baku", *Syiar Hukum* vol. XIII No. 1 (Maret-Agustus,2012), ISSN: 2549-6751, page 229.

- a. Must fulfill the requirements as a contract;
- b. Not prohibited by law;
- c. Does not conflict with prevailing habits;
- d. 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;³²

- a. Do it dishonestly/ cheating;
- b. Against the law;
- c. 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.³³ 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.³⁴

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

³² 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 and/ or marketing of goods and/ or services carried out in an honest or unlawful manner or inhibiting business competition.

³³ Ningrum Natasya Sirait, 2004, *Hukum Persaingan Usaha Di Indonesia*, Medan: Perpustakaan Nasional, page 5.

³⁴ Zoelfirman, *Kebebasan Berkontrak Versus Hak Asasi Manusia (Analisis Yuridis Hak Ekonomi, Sosial dan Budaya)*, (Medan, UISU Press, 2003), page 49.

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.

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 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.

a) Analysis of Violations Article 15 paragraph 3 letter b concerning Exclusive Dealing

The Anti-Monopoly Law regulates the prohibition of certain agreements³⁵ 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 1999.³⁶ In this case PT. Tirta

³⁵ 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".

³⁶ 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.

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 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:

- 1) 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.
- 2) 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).
- 3) 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.

- 4) 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 Sulistyio 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.³⁷

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

³⁷ 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.

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.³⁸

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.³⁹ Legal facts are the presence or absence of written and unwritten legal rules governing the facts.⁴⁰ Legal facts are obtained by collecting evidence relating to the occurrence of a dispute before the trial or during the trial process.

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.⁴¹ Legal considerations can be interpreted as an opinion of a judge based on legislation concerning the good and bad effects of a judge's decision.

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

³⁸ 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.

³⁹ Marwan, 2009, *Kamus Hukum*, Surabaya : Reality Publisher, page 202.

⁴⁰ Hamzah Halim, 2015, *Legal Audit & Legal Opinion*, Jakarta: Kencana, page 11.

⁴¹ *Ibid.*, page 410.

compared to other competing products and based on witness testimony, Aqua AMDK sales are greater than the products of other competitors.⁴²

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.

b) 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.⁴³

Theoretically, market domination by a business actor in a market is a monopolistic behavior, that is, a business actor tries to maintain or 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 market⁴⁴ 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;

⁴² 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.

⁴³ 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.

⁴⁴ 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.

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

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

2) 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;

- Conduct exclusive dealing with consumers or business customers of competitors;

- 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:

- The existence of competitors who will be eliminated or eliminated from the relevant market; or
- The existence of a competitors whose role is reduced (the proportion becomes smaller) in the relevant market; or
- There is one or a group of businesses who can impose their will on the relevant market; or
- 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
- Reduced healthy business competition in the relevant market; or
- Reduced consumer choice.⁴⁵

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:

⁴⁵ 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.

- 1) 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.
- 2) 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.
- 3) 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.

- 4) 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.

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.⁴⁶

⁴⁶ 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.

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.

c) 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 United States Supreme Court in 1899 (for per se illegal) and in 1911 (for rules of reason).⁴⁷

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 Wholesaler 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.

⁴⁷ 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.

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 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 Investama 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.

H. CLOSING

1. Conclusion

The conclusion of this research is as follows:

- a) Based on research conducted by the author, the mechanism for handling unfair business competition of PT. Tirta Investama used by KPPU was in accordance with the applicable rules.
- b) Based on the legal considerations of the Commission Council, PT. Tirta Investama as a producer of Aqua Amdk and PT Balina Agung Perkasa as a distributor of Aqua amdk are legally and proven to have violated Article 15 paragraph 3 letter b and article 19 letter a and b Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition. The Commission Assembly has imposed penalties on PT. Tirta Investama amounted to Rp. 13,845,450,000 (Thirteen Billion Eight Hundred and Forty-Five Million Four Hundred and Fifty Thousand Rupiah) and PT. Balina Agung Perkasa fined Rp.6,294,000,000 (Six Billion Two Hundred Ninety Four Million Rupiah). This case use two (2) approaches namely Per Se Illegal and Rule of Reason.

2. Recommendation

- a) Law No. 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition must be carried out properly and honestly so that the conditions of business competition in Indonesia can run well, and there is no unfair business competition among businesses.
- b) KPPU as an independent body must monitor the implementation of Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition. Through its authority, KPPU can become a referee in resolving cases related to the prohibition of monopoly and unfair competition. Through this case, KPPU further improves its performance so that the decision each case competition, it must be carried out by considering any legal provisions that are possible without ignoring the elements of proof, facts and data relating to producing quality decisions and prioritizing justice for all parties. In condition, it must concern and approaches with related cases.

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