

## CHAPTER TWO

### LITERATURE REVIEW

#### A. The Business Competition

The business competition is an often term appear in various literature that renders the law aspects of business competition.<sup>1</sup> The competition comes from English term which means the competition itself or competing activities. Competition is resistance and or attempts one or more persons to be more superior to others with the same purpose.<sup>2</sup> So, there are competition elements, as follows:<sup>3</sup>

1. There are two or more parties involved in an effort to surpass each other;
2. There is the will among them to achieve the same goal.

While in the dictionary of management, competition is the efforts of 2 (two) parties/more of company that each is engaged “obtaining orders” with offer price/conditions that most profitable. This competition can consist of some price cutting form, advertising/promotion, variation and quality, packaging, design and market segmentation.<sup>4</sup> Every performer economy/trade also always wished to be a winner among the entrepreneurs. Certainly, every

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<sup>1</sup> Basu Swastha dan Ibnu Sukotjo W., 2002, *Pengantar Bisnis Modern*, (Pengantar Ekonomi Perusahaan Modern), Yogyakarta, Liberty, Pg. 22.

<sup>2</sup> Poerwadarminta W.J.S., 1976, “Kamus Umum Bahasa Indonesia”, (Jakarta: PN Balai Pustaka), Pg. 849.

<sup>3</sup> Arie Siswanto, 2004, *Hukum Persaingan Usaha*, 2<sup>nd</sup> Edition, Bogor, Ghalia Indonesia, Pg. 13.

<sup>4</sup> B.N Maribun, *Kamus Manajemen*, (Jakarta: PT. Pustaka Sinar Harapan, 2003), Pg. 276.

entrepreneur wanted to be the first/dominant role and wanted to control the market.<sup>5</sup>

According to Thomas J. Anderson, competition can occur in various fields. Competition in economics is one of the most important forms of competition among so much competition between humans, groups of people, or even nations. One form of competition in economic matter is business competition which simply can be defined as a competition among the vendors in grabbing buyers and market share.<sup>6</sup>

The business competition also can be found in the Law No. 5/1999 as stated that the business competition is the competition between the business subject in running production activities and or goods marketing and services.<sup>7</sup> Promulgation of Law No. 5/1999 intended as a tool of social control and tool of social engineering. As tools of social control, the Law No. 5/1999 trying to maintain public interest and prevent monopoly practice and/or unfairness business competition.<sup>8</sup> The Law No. 5/1999 is the implementation of business competition law's political efforts in Indonesia. The politics of business competition law in Indonesia basically depends on the political will of the

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<sup>5</sup> Al Araf Assadallah Marzuki, "Urgensi Putusan Sela Berkaitan Dengan Harta Kekayaan Pelaku Usaha Dalam Hukum Acara Persaingan Usaha Di Indonesia", *Jurnal Panorama Hukum*, II (June, 2017), 88.

<sup>6</sup> *Op. Cit.* Pg. 13-14.

<sup>7</sup> .R.I. *Undang-Undang Nomor 5 Tahun 1999*, tentang "Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat", Art. 1.

<sup>8</sup> Zuhro Puspitasari, "Rekonsepsi Pengecualian Monopoli Yang Diselenggarakan Oleh Badan Usaha Milik Negara Dalam Hukum Pesaingan Usaha Di Indonesia", *Jurnal Panorama Hukum*, II (December, 2017), 228.

House of Representatives (*DPR*) members as the legislature along with the Government as the Executive in making laws.<sup>9</sup> On the business world principle, the quest to get more profit is the reasonable behavior, as long as that behavior does not give rise monopoly practice and unfairness business competition.<sup>10</sup> Abdulkadir Muhammad stated that in the world of business, competition is one action form that can bring profit or loss. When the competition is done honestly, it will not harm any party.<sup>11</sup>

In the world of business competition is known as competition dynamics which means the competition changes that occurs on the company in compete for customers within certain period. So, every company should pay attention to the dynamics and they can follow the competition in order to obtain no defeat in market competition.<sup>12</sup> The competition is a stimulant factor to promote the company by creating products quality through the new discoveries and techniques in running advanced company. This competition called as fairness competition which appreciated by the law. Business competition is divided into 2 (two), namely fairness business competition and unfairness business competition, as follows:

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<sup>9</sup> Muhammad Fajar Hidayat, "Politik Hukum Persaingan Usaha Di Indonesia", *Jurnal Cahaya Keadilan*, V (October, 2013), 100.

<sup>10</sup> Rai Mantili *et al.*, "Problematika Penegakan Hukum Persaingan Usaha Di Indonesia Dalam Rangka Menciptakan Kepastian Hukum", *PJIH*, III (November, 2014), 117.

<sup>11</sup> Abdulkadir Muhammad, 2002, *Hukum Perusahaan Indonesia*, Bandung, PT. Citra Aditya Bakti, Pg. 285.

<sup>12</sup> Stefanus Ngebi, "Pertanggungjawaban Pengurus Koperasi Dalam Pengembangan Jasa Keuangan Guna Menghadapi Persaingan Bisnis: Koordinasi Antar Manager Dengan Pengurus Dalam Mensejahterakan Anggota", Pg. 17-18.

## 1. Fairness Business Competition

According to Arie Siswanto, the definitions of fairness business competition are:<sup>13</sup>

- a. The competitiveness of its business subjects are not concentrated on a certain party and centralized on some party only, but it running according to a fairness market mechanism that is all business subjects have the same rights and duties in economic matter.
- b. Fairness business competition is when there is a form of agreement that is not harm unilaterally to other parties that are not involved in the agreement.
- c. Fairness business competition is in their activities and there is no control over the production of goods and services from both markets.
- d. Fairness business competition is the competition in the economic matter that is should fair, honest, and in accordance with the law and economic agreements also economic activities that do not harm the other party with how to control and the centrality of economic force on the perpetrators of certain business.

According to Abdulkadir Muhammad, there are elements of the business competition that can be described as follows:<sup>14</sup>

- a. Some of entrepreneurs (business subjects);

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<sup>13</sup> Arie Siswanto, 2002, *Hukum Persaingan Usaha*, 1<sup>st</sup> Edition, Jakarta, Ghalia Indonesia, Pg. 17.

<sup>14</sup> Abdul Kadir Muhammad, 1999, *Hukum Perusahaan Indonesia*, 1<sup>st</sup> Edition, Bandung, PT. Citra Aditya Bakti, Pg. 310.

- b. In the same sector;
- c. Along with the running of the company (business activities);
- d. In the same marketing area;
- e. Each party tried hard to exceed the other;
- f. In order to gain maximum advantage.

According to Abdulkadir Muhammad, business competition can be seen by the economic that give benefits, such as:<sup>15</sup>

- a. It produces quality products through new discoveries and business management advanced multi-purpose.
- b. It streamlines distribution flows because of the good and quickly services.
- c. It gives benefit for the company because of the trust of the society in the quality products.

Based on explanation above, when need a good competition between each other business subject and bring benefits, the competition must be done in fairness ways.

## 2. Unfairness Business Competition

Uncontrolled business competition will foster the occurrence of monopoly practices as a system which is contrary with the business

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<sup>15</sup> *Ibid.* Pg. 256.

competition principles itself.<sup>16</sup> Unfairness business competition and monopoly practice is prohibited because it can lead the market distortion.<sup>17</sup> The market becomes unbalanced and in it turn, prices are no longer controlled by the laws of the market but rather determined by a group of people that rule the market forces.<sup>18</sup> Based on Article 1 number 6 of Law No.5/1999, unfairness business competition is the competition between businesses subject in running the production activities and goods marketing and services which is done with the dishonest way or against the law or impede the business competition.

Based on Article 1 number 2 of Law No.5/1999, unfairness business competition is forbidden because of the activities that can bring centrality of economic forces that caused production mastered and goods marketing also certain services that can be harmful the public interest and can cause the existence of monopolistic practices. So, Unfairness business competition is competition that is conducted unrealistically, broke the law, and harm its competitors.<sup>19</sup>

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<sup>16</sup> Mashur Malaka, "Praktek Monopoli Dan Persaingan Usaha", *Jurnal Al-'Adl*, VII (July, 2014), 40.

<sup>17</sup> Azhari Akmal Tarigan, "Praktek Monopoli Dan Persaingan Usaha Tidak Sehat Dalam Perspektif Hukum Ekonomi Dan Hukum Islam", *Jurnal Mercatoria*, IX (June, 2016), 57.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Loc. Cit.*

## **B. The Scope of the Unfairness Business Competition**

According to Munir Fuady, unfairness business competition is a competition between business subjects in running the production activities and goods marketing or services that are not doing in honest ways against the law or obstruct the business competition.<sup>20</sup> The prohibition of monopolistic practices regulated in Law No.5/1999 about The Prohibition of The Monopolistic Practice and Unfairness Business Competition, which aims to prevent monopolistic practices and unfairness business competition caused by business subject. Based on the Law No.5/1999, there are 3 (three) activities raise the unfairness business competition. The types of activities, such as:

### **1. The Prohibited Agreements**

Rachmadi Usman stated that the prohibited agreement is a written or oral agreement to bind each other one or more business subjects and obey what is agreed in the agreement where the contents of its agreement breaking the law that has been set by the government.<sup>21</sup> Referred to Article 1 paragraph 7 of Law No. 5/1999, stated that agreement is an action of one or more business subject attempt to tie them to one or more others with any name, both written and unwritten. The agreement forms which prohibited in Law No. 5/1999, such as:

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<sup>20</sup> Munir Fuady, 2005, *Hukum Pailit: Dalam Teori Dan Praktek*, Bandung, PT Citra Aditya Bakti, Pg. 213.

<sup>21</sup> Rachmadi Usman, 2000, *Hukum Persaingan Usaha di Indonesia*, Jakarta, PT Gramedia Pustaka Utama, Pg. 37.

a. The oligopoly agreement

The agreement of two or more business subjects for mastering production and or goods marketing and or services may result the monopolistic practice and unfairness business competition.<sup>22</sup>

b. The pricing agreement

The agreement of two or more business subjects for: setting the price (except in joint ventures or based on legislation); price discrimination; make a price below the market price; or prohibit the resale price that is lower than the price set.<sup>23</sup>

c. The zoning agreement

The agreement of two or more business subjects to setting market area or market allocation. So, it can lead the monopolistic practice and unfairness business competition.<sup>24</sup>

d. The boycott

The agreement of two or more business subjects to deter the other businesses subject to do the same business or refuse to sell the product to other businesses subject.<sup>25</sup>

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<sup>22</sup> *Ibid.* Art. 4.

<sup>23</sup> *Ibid.* Art. 5-8.

<sup>24</sup> *Ibid.* Art. 9.

<sup>25</sup> *Ibid.* Art. 10.



e. Cartel

The agreement of two or more business subjects to influence prices by setting production which can lead to monopolistic practice and unfairness business competition.<sup>26</sup>

f. Trust

The agreement of two or more business subjects to form the combined company by keeping the continuity of each company in order to control the production and or marketing. So, it can lead monopolistic practice and unfairness business competition.<sup>27</sup>

g. Oligopsony

The agreement of two or more business subjects to dominate the supply relating to control the prices that can lead monopolistic practice and unfairness business competition.<sup>28</sup>

h. Vertical integration

The agreement of two or more business subjects is dominate a series of sustainable production which can lead unfairness business competition and detrimental to society.<sup>29</sup>

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<sup>26</sup> *Ibid.* Art. 11.

<sup>27</sup> *Ibid.* Art. 12.

<sup>28</sup> *Ibid.* Art. 13.

<sup>29</sup> *Ibid.* Art. 14.

i. Closed agreement

The agreement of two or more business subjects that contains the condition that the supply recipient will only supply or will not supply that product to others; must be willing to buy other products from the supplier; or about pricing or discounts will be accepted when it is willing to buy the others product or not buy the same products from others.<sup>30</sup>

j. The agreement with the foreign party

Agreements with overseas business subject which can lead monopolistic practice and unfairness business competition.<sup>31</sup>

2. Prohibited Activities

According to Ahmad Yani and Gunawan Widjaja, prohibited activities are conducted by the unilateral legal activities that have been done by one business subject or groups of business subject without the relevance of the legal relationship directly with the business subject or other business groups.<sup>32</sup> The prohibited activities also can be found in Law No.5/1999, such as:

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<sup>30</sup> *Ibid.* Art. 15.

<sup>31</sup> *Ibid.* Art. 16.

<sup>32</sup> Ahmad Yani dan Gunawan Widjaja, 1999, *Anti Monopoli*, Jakarta, PT Raja Grafindo Persada, Pg. 31.

a. Monopoly

Business subjects are prohibited to perform production mastering and marketing that can lead monopolistic practice and unfairness business competition.<sup>33</sup>

b. Monopsony

Business subjects are prohibited to admission supply mastering or to be a single buyer that can lead monopolistic practice and unfairness business competition.<sup>34</sup>

c. Mastering the market

Business subjects are prohibited to conduct one or more activities, alone or together that can lead monopolistic practice and unfairness business competition include: blocking other business subjects to do same business; or blocking the consumer to transact with the certain business subjects; or restrict the circulation and products sale; or doing discrimination;<sup>35</sup> doing sell loss to remove competitor;<sup>36</sup> with a fraudulent in setting production costs and other costs.<sup>37</sup>

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<sup>33</sup> *Ibid.* Art. 17.

<sup>34</sup> *Ibid.* Art. 18.

<sup>35</sup> *Ibid.* Art. 19.

<sup>36</sup> *Ibid.* Art. 20.

<sup>37</sup> *Ibid.* Art. 21.

d. Conspiracy

Business subjects are prohibited to conduct collusive tenders;<sup>38</sup> conspiracy to getting the secret of competitor's company;<sup>39</sup> conspiracy to blocking production and or marketing competitors.<sup>40</sup>

3. The Misuse of Dominant Position

According to Article 1 number 4 of Law No.5/1999, dominant position is a situation where the business subject has no competition in the corresponding markets in term of relation with the market share controlled or business subject that has highest position among its competitors in the market concerned in relation with finance ability, the access ability at the supply or sales, and the ability to adjust the supply or demand for goods or certain services. The dominant Position that prohibited by the Law No.5/1999, such as:

a. General dominant position

Business subjects are prohibited to using a dominant position directly or not to establish the trade conditions in order to blocking the consumer; limit the market and technology development; or blocking competitors enter the market concerned.<sup>41</sup>

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<sup>38</sup> *Ibid.* Art. 22.

<sup>39</sup> *Ibid.* Art. 23.

<sup>40</sup> *Ibid.* Art. 24.

<sup>41</sup> *Ibid.* Art. 25.

b. Multi-grade position

Business subjects are prohibited to have multi-grade position of Director/Commissioner in two or more corporations if the other company; be in the same market concerned; or have the connectedness in the areas and types of businesses; jointly controlled market share that can lead monopolistic practice and unfairness business competition.<sup>42</sup>

c. Ownership of majority shares;

Business subjects are prohibited to have majority stake possession in several companies of its kind in lead to one or a group of business subjects controlled more than 50% market share; or two or three business subjects or trade group ruled over 75% market share.<sup>43</sup>

d. The merger, foundries, and take over

Business subjects are prohibited if they lead monopolistic practice and unfairness business competition also there is notification duty when they lead certain assets mastering or certain value mastering.<sup>44</sup>

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<sup>42</sup> *Ibid.* Art. 26.

<sup>43</sup> *Ibid.* Art. 27.

<sup>44</sup> *Ibid.* Art. 28.

## C. Transportation, Public Transportation, Taxi

### 1. Transportation

Transportation has important role in supporting the mobility of the people and vessels. To support those activities a tool to perform the movement of people or goods to reach the destination is needed.<sup>45</sup> The definition as stated by Nasution is defined as the transfer of goods and people from the origin place to destination. So with that activity, there are 3 (three) things, namely there is a load transported, availability of vehicle as transportation, and a way that can be passed. The switching process from the origin place movements where the transportation activity started to destination as transportation activities ended. So, with the existence of goods and human transfer, then transportation is one of the sectors that can support economic activity (*the promoting sector*) and as service provider (*the servicing sector*) for economic development.<sup>46</sup>

Furthermore according to Rustian Kamaluddin, transportation is the transfer of goods and passengers activity from one place to another place. There are elements of transportation, as follows:<sup>47</sup>

- a. People who need;

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<sup>45</sup> Imam Samsudin, "Sistem Pelayanan Pada Angkutan Kota Rute Tetap Dan Rute Bebas Di Kota Palangkaraya", *Jurnal Penelitian Transportasi Darat*, XIX (June, 2017), 133.

<sup>46</sup> Nasution, 1996, *Manajemen Transportasi*, Jakarta, Ghalia Indonesia, Pg. 50.

<sup>47</sup> Rustian Kamaluddin, 2003, *Ekonomi Transportasi*, Jakarta, Ghalia Indonesia, Pg. 3.

- b. Items needed;
- c. The vehicle as the appliance;
- d. The road and terminal as transportation infrastructure;
- e. The organization (transportation management).

Transportation is a basis for economic development, society development and industrial growth. With the existence of transportation caused specialization or work distribution based on expertise in accordance with the cultural, tradition and the nation culture. Needs of transportation depends on the function of personal place utility.<sup>48</sup> The transportation system that safely and efficiently assessed very valuable in the city life, these are not only affecting the quality of road users but also have a direct influence on the economic growth and the economic acceleration.<sup>49</sup> The definition of transportation has been set by the Government to fulfill these ideas through the Law No.22/2009<sup>50</sup> and The Regulation of Minister of Transportation No.26/2017<sup>51</sup> stated that the transportation is the of people and/or goods movement from one place to another by vehicle in the road traffic.

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<sup>48</sup> *Ibid.*

<sup>49</sup> Andjar Prasetyo, "Efisiensi Ekonomi Pemasangan Audio Annoucer Area Traffic Control System (ATCS) Di Kota Malang", *Jurnal Penelitian Transportasi Darat*, XIX (June, 2017), 83.

<sup>50</sup> .R.I. *Undang-Undang Nomor 22 Tahun 2009*, tentang "Lalu Lintas dan Angkutan Jalan", Art. 1.

<sup>51</sup> Kementerian Perhubungan, *Peraturan Menteri Perhubungan tentang Penyelenggaraan Angkutan Orang Dengan Kendaraan Bermotor Umum Tidak Dalam Trayek*, Permenhub No. 26/2017, Art. 1.

## 2. Public Transportation

Warpani Suwardjoko stated that transportation is basically to move people and or goods from one place to another. It purposes to help people or people groups reach out various places needed or send goods from its origin place to its destination.<sup>52</sup> In addition, the purposes of public transportation is to provide a secure, comfortable and cheap. These for society that their mobility more increased related to running their activities.<sup>53</sup> The process can be done by using transportation in the form of vehicle.

Meanwhile, the passenger public transportation is passenger transportation by public vehicles that is done with rent or pays system. Passenger public transportation is including city bus, minibus, train, water transportation, and air transport.<sup>54</sup> Passenger public transportation using public vehicles and carried out with rent or pays system. In the case of mass transportation, transportation costs become burden arrears. So, public transportation system becomes more efficient because the cost is cheaper.<sup>55</sup>

Based on Article 1 number 10 of Law No.22/2009 and Article 1 number 2 of The Regulation of Minister of Transportation

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<sup>52</sup> P. Suwardjoko Warpani, 2002, *Pengelolaan Lalu Lintas dan Angkutan Jalan*, Bandung, Penerbit ITB. Pg. 39.

<sup>53</sup> *Ibid.* Pg. 41.

<sup>54</sup> Suwardjoko Warpani, 1990, *Merencanakan Sistem Perangkutan*, Bandung, Penerbit ITB, Pg. 170.

<sup>55</sup> *Op. Cit.* Pg. 38.



No.26/2017, general motor vehicle is every vehicle used for goods and/or people transportation with fee payments. Furthermore based on Article 1 number 3 of The Regulation of Minister of Transportation No. 26/2017, public transportation or referred to as people transportation by public motor vehicle which is not in the road is transportation served with general passenger car or public bus car in urban areas and/or specific areas or from a place to another. It has the origin place and destination but does not have a path and fixed time.

### 3. Taxi

Article 152 of Law No. 22/2009 stated that taxi must be used in urban area. This urban area can be located in the city, in the region, beyond the town or district, in one area of the province and urban areas beyond the boundaries of the province. In the Article 1 number 16 of The Regulation of Minister of Transportation No. 26/2017, conventional taxi, categorized as taxi transportation or referred to the transportation using taxi, is transportation using the general passenger car that is given special sign and equipped with ergometer that serve passenger from door to door with its operations in urban areas.

Then, in Article 1 number 17 of The Regulation of Minister of Transportation No 26/2017, online taxi service is categorized as special rent

transportation. It refers to the transportation with a particular destination. It is public transportation which does not have specific route by using general passenger car or public bus for any other purpose than taxi service, tourism, and in certain areas among others pick-up transportation, employees transportation, settlement transportation, carter transportation, and special rent transportation.