

The Implementation of the Decision of Kpu In Relation to the Objection of Business Actors Due to Tender Conspiracy Case

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Abstract

This thesis discusses the Commission's Decision No. 02 / KPPU-L / 2008 in a set of sanctions to change the treaty clause, namely: First, Do sanctions related change agreement has a clause in accordance with Article 47 paragraph (2) letter a of Law No. 5 of 1999, second, the consideration of the Business Competition Supervisory Commission Council to impose sanctions in the form of a clause to change the agreement. Third, how the implementation of the decisions related to the execution of the Commission. The results of the study to see that re-negotiate is not a form of administrative action of cancellation of the agreement. Cancellation of the agreement in question is the agreement null and void which resulted in the agreement never existed., This thesis discusses the Commission's Decision No. 02 / KPPU-L / 2008 in a set of sanctions to change the treaty clause, namely: First, Do sanctions related change agreement has a clause in accordance with Article 47 paragraph (2) letter a of Law No. 5 of 1999, second, the consideration of the Business Competition Supervisory Commission Council to impose sanctions in the form of a clause to change the agreement. Third, how the implementation of the decisions related to the execution of the Commission. In this study the authors describe and analyze associated with sanction in Case Decision No. 02 / KPPU-L / 2008 in the form of re-negotiate with the administrative action concerning the determination of the cancellation of the agreement as provided for in Article 47 paragraph (2) a and linked also with the objective requirements contained in Article 1320 of the Civil Code. The results of the study to see that re-negotiate is not a form of administrative action of cancellation of the agreement. Cancellation of the agreement in question is the agreement null and void which resulted in the agreement never existed.

Keywords: Conpiration Case, KPPU, Procedure.

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INTRODUCTION

Pancasila and the 1945 Constitution are the constitutional foundation of the Indonesian nation and State. The purpose of economic development in accordance with the contents of the Pancasila and the 1945 Constitution is to create a just and prosperous society. Contained in Article 33 of the 1945 Constitution the basis of economic democracy is stated, where the prosperity of the people is a priority, not the prosperity of individuals. Therefore, the economy is structured as a joint venture based on family business. Economic democracy is the basis of the economy. The branches of production which are important for the state and which govern the lives of many people must be controlled by the state. In other words, companies that

do not control the lives of many people, may be in the hands of individuals^[1].

Law Number 5 of 1999 also regulates formal matters in the settlement of business competition cases in the Business Competition Supervisory Commission (KPPU) as well as granting the authority to the KPPU to conduct examination, prosecution, consultation, hear and decide on cases. In addition, the KPPU is the body in charge of overseeing the implementation of Law Number 5 of 1999 and makes KPPU authorized to conduct examination of business actors, witnesses and other parties, both because of reports and checking on initiatives from KPPU. The procedure for handling cases starting from how a case becomes a business competition case and being investigated by the KPPU

¹ Sumantoro, *Economic Law*, Universitas Indonesia Press, Jakarta, 2008, p. 263.

until the KPPU's decision. The procedural law used in the case of business competition in KPPU is determined directly by the KPPU based on the authority granted by Law Number 5 of 1999 Article 35 letter f, namely Commission Regulation Number 1 of 2019 concerning Procedures for Handling Monopolistic Practices and Business Competition Cases Not Healthy. After the KPPU issues a decision, the law also provides an alternative for business actors subject to the decision. There are three possibilities for the KPPU's decision, namely: the business actor accepts the KPPU's decision voluntarily, rejects the KPPU's decision and the business actor does not submit an objection but refuses to carry out the KPPU's decision^[2].

Considering the KPPU's decision, there is an opportunity to file an objection through the District Court as stipulated in Article 44 of Law Number 5 Year 1999, namely business actors can submit objection efforts through the District Court in the place of business of the said businessperson at the latest 14 (fourteen) days after the business actor receives notification of the KPPU's decision. The objection is submitted through the Registrar of the relevant district court in accordance with the procedure for registering a civil case by providing a copy of the objection to the KPPU.

Legal remedy against KPPU's decision is one of the legal remedies available and can be submitted by business actors and is the right of every business actor who does not accept the KPPU's decision. With regard to the remedies filed by the business actor against the KPPU's decision, the objection examination stage is an opportunity for the objector (business actor) to declare that he has not violated Law Number 5 of 1999 as decided by the KPPU^[3].

However, the objection efforts are not in the procedural law in Indonesia. Legal remedy is an effort given by law to a person or legal entity in certain cases against a judge's decision ^[4]. In civil procedural law based on the regulation of the Herzien Inlandsch Reglement (HIR) there are two types of legal remedies, namely ordinary legal remedies and extraordinary legal remedies. In principle, this legal effort suspends execution. The exception is that if the verdict is handed down with the provision that it can be implemented first (Article 180 paragraph (1) HIR), then despite the usual efforts being put forward, the execution will continue.

²Andi Fahmi Lubis, *et, all, The Law of Business Competition Between Text and Context*, ROV Creative Media, Jakarta, 2009, page. 417.

³ Binoto Nadapdap, *Business Competition Procedure Law*, cet.1, Jala Permata Aksara, Jakarta, 2009, page. 86.

⁴ Retnowulan Susanto dan Iskandar Oeripkartawinata, *Civil Law in Theory and Practice*, Mandar Maju, Bandung, 1997, p. 1.

Unlike the extraordinary legal remedies, regarding this matter the principle does not suspend execution. This extraordinary legal remedy includes a third-party resistance against the executor's confiscation and review ^[5]. Thus, the procedural law in force in Indonesia is not known about the objection efforts.

Instead of the lack of guidance in the implementation of the objection mechanism submitted and the time constraints as specified in Article 44 paragraph (1) of Law Number 5 of 1999, this has led to different interpretations between one district court and one court other, even though the principal cases faced are the same and all stem from the KPPU's decision^[6]. Regardless to these problems, on July 18, 2005 the Supreme Court of the Republic of Indonesia issued Supreme Court Regulation Number 3 of 2005 concerning Procedures for Filing Legal Objections Against KPPU's Decisions. This regulation also emphasized that in the examination of objection efforts carried out using civil procedural law unless otherwise stipulated by the regulation. Objection here is defined in Article 1 paragraph (1) as a legal remedy for business actors who do not accept the KPPU's decision.

Collusion conspiracy can be divided into three types, namely horizontal collusion, vertical collusion, and horizontal and vertical joint collusion. Horizontal conspiracy is a conspiracy that occurs between business actors or providers of goods and services with fellow business actors or providers of goods and services. Vertical collusion is collusion that occurs between one or several business actors or providers of goods and services with the tender committee or auction committee or users of goods and services or the owner or employer. Horizontal and vertical joint collusion is collusion between the tender committee or the auction committee or users of goods and services or the owner or employer and business actors or providers of goods and services^[7].

In fact, there are many conspiracy actions in tenders that result in unfair business competition. One of them is about the tender conspiracy of the Yogyakarta Mandala Krida Stadium project which resulted in KPPU Decision Number 10/ KPPU-I/ 2017. The Business Competition Supervisory Commission (KPPU) decided that there was a practice of conspiracy in the construction of the Yogyakarta Mandala Krida Stadium in the 2016-2017 fiscal year. The KPPU's decision with case Number 10/ KPPU-I/ 2017 is related to the alleged violation of Article 22 of Law Number 5

⁵*Ibid*

⁶ Susanti Adi Nugroho, "Examination of Business Competition Case ", in Abdul Hakim G. Nusantara, et.al. ed., *Business Competition Litigation*, CFISEL, Tangerang, 2010, page. 178.

⁷*Ibid*, page. 151

of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition.

The effectiveness of the implementation of a decision in this case KPPU Decision Number 10/KPPU-I/ 2017 is inseparable from law enforcement which is a series of processes to describe values, ideas and ideals which are abstract enough to become legal objectives. Forms of business competition occur in almost all lines of life, including in the field of procurement of goods and services for sports activities. Although many cases have been processed and decided by the KPPU, the implementation has not been effective enough. Likewise, several cases that were filed with objections through the district court were eventually canceled and declared not proven to be in violation, due to the different paradigm of KPPU's judges and commissioners in addressing the case. This is what then causes business competition law enforcement to cause legal uncertainty for the parties.

Statement of the Problem

How is the process and procedure for KPPU case resolution in relation to the request for objection to the KPPU Decision?

RESEARCH METHOD

This type of study was a normative juridical with the nature of this research is analytical descriptive. This study applied a statute approach and a conceptual approach. The conceptual approach refers to legal principles. These principles can be found in the views of scholars or legal doctrines. The concept of law can also be found in the law. In this study, the effectiveness of the implementation of KPPU decisions in the settlement of business competition cases was examined. Thus, to be able to understand the concept, the researcher can identify it using Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition. The type of data used in this study was secondary data, i.e. a number of data or facts or information used by someone indirectly and obtained through library materials, consisting of literature, documents, applicable laws and regulations, journals, theories and other written sources that are relevant and relevant to the problem under study.

DISCUSSION

Procurement of goods or services on the project of a company or government agency often goes through a tender process. This is intended by the tender organizer to get the price of goods or services as cheap as possible, but with the best quality possible. The main objective of the tender can be achieved if the process is fair and healthy so that the winner is truly determined by the offer (price and quality of the goods or services submitted). The reverse consequence could have happened if in the tender process there was a conspiracy. In practice, such conspiracies are suspected

to occur in Indonesia. Recorded until 2018 since the establishment of the Business Competition Supervisory Commission (KPPU) has received 376 reports regarding tender conspiracy. Of the many reports, only 54 have been handled. Thus, almost two-thirds of the cases that entered the KPPU were tender conspiracy cases.

Tender collusion (collosive tendering or bid rigging) results in unfair competition. In addition, it is detrimental to the tender implementation committee and the tender participants in good faith. Therefore, tenders are often acts or activities that can result in unfair business competition.

In essence, the implementation of tenders must fulfill the principles of justice, openness and non-discrimination. In addition, tenders must pay attention to matters that are not contrary to the principle of fair business competition. First, tenders are not discriminatory in nature, can be fulfilled by all prospective tender participants with the same competence. Second, tenders are not directed at certain business actors with certain technical qualifications and specifications. Third, the tender does not require the qualifications and technical specifications of certain products. Fourth, tenders must be open, transparent and announced in the mass media within a sufficient period of time. Therefore, tenders must be conducted openly to the public with broad announcements through print media and official notice boards for public lighting and where possible through electronic media, so that the wider business community who are interested and meet qualifications can follow suit.

There is no definite definition of bid rigging. Under law number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, Bid Rigging is regulated in article 22, as follows: Business actors are prohibited from conspiring with other parties to regulate and determine the winner of the tender so that it can lead to unfair business competition. From the provisions of article 22 it can be seen that the elements of tender conspiracy are (i) the existence of two or more business actors; (ii) conspiracy; (iii) there is a goal to regulate and/ or determine the winning bidder (MMPT); and (iv) resulting in unfair business competition.

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determine the winning bidder (MMPT); and (iv) resulting in unfair business competition.

Although Article 22 of the Business Competition Law prohibits bid rigging, the confusion in the implementation of tenders triggers the parties involved or interested parties to submit objections to the decision (winner) of the tender. Such conditions encourage business actors to report fraud or violations in the process of determining tender winners to KPPU. Because the tendency that occurs in the tender process is to accommodate the interests of certain parties and produce decisions that are detrimental to the parties in the tender process. Accommodation of interest can manifest in the form of corrupt or bribery practices, nepotism or cronyism which gives privileges to certain parties to win the tender process.

The US Department of Justice also discovered several forms of tender conspiracy, among others:

1. Bid Suppression, occurs when a tender participant or prospective tender participant agrees to refrain from the tender process or will withdraw from the tender offer in the hope that the parties that have been determined can win the tender;
2. Complementary Bidding (cover or courtesy bidding), occurs when some participants agree to submit very high bids or submit special requirements that will not be accepted by the work/project owner (the buyer), to deceive or trick the owner of the activity/ project implementing tenders by creating competition that conceals bid prices;
3. Bid Rotation, this form relates to the bid price which is contrary to the complementary bidding, where bidders submit bids but by taking a position as bidder with the lowest price. For example, competitors take part in a contract according to the size of the contract or gather competitors who have the same business capabilities so that the winning bidder can be compromised between competitors because all parties will get looted as winners;
4. Subcontracting, this form is an indicator of tender collusion, where business actors agree not to submit bids by receiving compensation to be a subcontractor for a job or to be a supplier for tender winners.

In Hong Kong, the bid rigging that occurs in the process of procuring goods for the public interest is categorized as a crime. If done in the private sector, the action can still be categorized as legal. In the United States tendering conspiracy cases usually occur in only a few states or certain local markets so handling is not too difficult. As described below:

One of the most recent bid-rigging cases comes out of Florida, Florida v. Saul & Co., which involved bid rigging at a tax certificate auction in Lee County, Florida, in 1998. Several bidders allegedly conspired to allocate

bids during the auction so as to insure that each bidder secured tax-delinquent properties at higher interest rates than would have been obtained had the bidding actually been competitive. The twenty-two companies involved in the alleged conspiracy settled in 2002 for nearly \$800,000. The settlement monies have been used to reimburse those property owners who paid the price-fixed interest rates when they redeemed their tax certificates. Any unclaimed funds were slated for distribution to various Lee County area charities for housing-related programs. This case and others like it are important reminders to companies that engage in competitive bidding of government contracts that they must avoid communications with competitors regarding bidding and pricing. Procurement officials increasingly are trained to spot potential bid rigging conduct and are reporting suspicious conduct to their state attorney general to investigate.

Regulation of the Business Competition Supervisory Commission Number 2 of 2010 concerning Guidelines for Article 22 of Law Number 5 of 1999 provides an explanation of the elements of conspiracy contained in Article 22 of Law Number 5 of 1999, one of which is the elements of other parties which explain that conspiracy always involves more than one actor effort. The understanding of other parties in this matter covers the parties involved, both horizontally and vertically in the tender offer process that undertakes tender conspiracy, both business actors as tender participants or other legal subjects related to the tender. Article 1 paragraph 13 of Article 1 of 2010 states that the Reported Party is a business actor and/ or other party suspected of committing an offense. If linked to Perkom 1/2010 with the Article 22 Guideline, the tender committee has a legal position because the tender committee is another party. Therefore, KPPU's actions in handling tender conspiracy cases involving tender committees and placing the tender committee as Reported Party (other party elements) are appropriate.

The KPPU's authority to prosecute parties outside the 1999 actors regarding the Prohibition of Monopolistic Practices and Unfair Business Competition The Act Number 5 of 1999 is not expressly regulated, but in Perkom 2 of 2010 concerning Guidelines article 22, implicitly explains that against conspiracy involving Employees or Government Officials, then to uphold the implementation of business competition law the Commission recommends that the competent institution take legal action in accordance with applicable laws and regulations, the Commission conducts it by declaring that the "other party" (the tender committee) is found guilty of violating Article 22 of Law No.5/ 1999 without providing administrative sanctions. KPPU can

only impose administrative sanctions on parties related to bid rigging. If "the other party" is a tender committee from an element of the government proven to support the conspiracy, KPPU cannot impose administrative sanctions, but can only provide recommendations to the officials' officials concerned to impose administrative sanctions.

The Business Competition Law is a legal instrument that determines how competition must be conducted. In addition, the Business Competition Law is intended to avoid the exploitation of consumers by certain business actors and to support the market economy system.

The Business Competition Law does not provide a definition of the definition of business competition but rather regulates the definition of unfair business competition. Article 1 number 6 of the Law on Business Competition provides the definition of unfair business competition is competition between business actors in carrying out production and or marketing activities of goods and or services carried out in a way that is not honest or against the law or inhibits business competition. Based on the definition, it is obtained that the competition between business actors in carrying out their activities is carried out in a way that is not honest or against the law, the implication would be to hamper fair business competition. Competition is an inherent characteristic of human life, but in economic terms it does not require economic power to be in one hand which is detrimental to the other party.

Prohibition of fraudulent bidding is done since it can cause unfair competition that is contrary to the purpose of the tender, namely to provide equal opportunities for businesses to offer quality competitive prices. The purpose of the tender is to provide equal opportunities for all bidders, therefore, to produce the lowest possible auction prices with maximum results. Each business actor participating in the tender has the same position and with this the conspiracy in the tender will have a negative impact on business competition, since in the tender the parties involved in the conspiracy arrange for certain tender participants to win the tender. Whereas, the determination of the tender winner must go through a process based on a procedure in which the winner cannot be regulated and must be in accordance with the tender rules. The state will suffer losses when there is price manipulation in the tender for development activities as well as the procurement of goods and services originating from the State Budget (APBN) and Regional Budget (APBD) funds.

Conspiracy must be carried out by two or more parties that aim to carry out actions/ activities together with a criminal behavior or against the law, so it is said that there are 2 (two) elements of conspiracy, namely a. the existence of two or more parties jointly carrying out certain acts, and b. Acts that are conspired constitute

acts that are against or violate the law. 15 The definition of conspiracy or conspiracy based on the Business Competition Law is regulated in Article 1 number 8, which is a form of cooperation carried out by business actors with other business actors with a view to controlling the relevant market for the interests of business actors who abetting Conspiracy or conspiracy in competition law is included in the agreement category. However, the form of conspiracy activities/ actions sometimes do not have to be proven by an agreement, however, it can be in the form of other activities that are not possible in an agreement.

Generally, the formulation of the articles contained in the Business Competition Law is to use a formulation based on the Rule of Reason approach and the Per Se Illegal approach. The Rule of Reason is to state that an act allegedly violates competition law, then law enforcement must consider the circumstances surrounding the case to determine whether the act restricts competition improperly, and for that it requires that law enforcement must be able to show anti-competitive consequences, or real loss to competition. Whereas, *Per Se Illegal* is the formulation of an article regarding certain acts which are prohibited to be carried out, where the said acts have been proven to be carried out and can be processed legally without having to show the actual consequences or losses against competition.

Article 22 of the Business Competition Law which is formulated in a rule of reason, so that consequently the business actor is allowed to conspire with other parties to regulate or determine the winner of the tender as long as it does not result in unfair business competition. The use of the rule of reason by the court, before determining whether the action is illegal or not, it is necessary to consider the background factors of the action, the business reasons behind the action, and the position of the perpetrators of actions in certain industries. As a result of tender conspiracy can arise from the side of the employer, the government and other business actors:

1. The employer (the project giver) will pay a higher price for the work; Bagi pemberi kerja (pemberi proyek) akan membayar harga hasil pekerjaan lebih mahal;
2. For the government, the value of the project for tender for procurement of services is higher as a result of markups carried out by those who conspired. If this is done in a Government project whose funding is through the State Revenue and Expenditure Budget, then the conspiracy has the potential to cause high economic costs and the potential for corruption;
3. For employers or the government often the goods or services obtained have a lower quality, quantity, time and value than if the tender was conducted honestly;

4. For other business actors, who have qualifications as potential tender participants, will experience obstacles to obtain opportunities to participate in tenders and win tenders

The legal consequences of sanctions against violations of Article 22 of the Business Competition Law are:

1. KPPU has the authority to impose administrative sanctions on business actors violating the provisions of Article 22, in the form of: a. orders to business actors to stop activities that are proven to cause monopolistic practices and/ or cause unfair business competition and/ or harm the community; and/ or b. determination of compensation payment (Article 47 paragraph (2) letter f); and/ or c. imposition of fines as low as Rp. 1,000,000,000.00 (one billion rupiah) and as high as Rp. 25,000,000,000.00 (twenty-five billion rupiah) (Article 47 of the Business Competition Law);
2. For violations of article 22 may also be subject to a basic criminal sentence:
 - a. criminal fines as low as Rp. 5,000,000,000.00 (five billion rupiah) and as high as Rp. 25,000,000,000.00 (twenty-five billion rupiah),
 - b. or imprisonment in lieu of a fine for up to 5 (five) months,
 - c. criminal fines as low as Rp. 1,000,000,000.00 (one billion rupiah) and a maximum of Rp. 5,000,000,000.00 (five billion rupiah),
 - d. or imprisonment in lieu of a fine for a maximum of 3 (three) months (Article 48 paragraph (3)), in the case of a business actor and/ or refusing to submit the required evidence in an investigation and/ or examination or refusing to be examined, refusing to provide the necessary information in the investigation and/ or examination, or hinder the process of investigation and/ or examination as referred to in article 41 paragraph (1) and (2) (Article 48 of the Business Competition Law);

KPPU has the authority to carry out investigative authority, law enforcement authority, and the authority to adjudicate. In carrying out its duties to oversee the implementation of the Business Competition Law, KPPU has the authority to conduct investigations and examinations of business actors, witnesses or other parties either because of a report (Article 39 of the Business Competition Law) or conduct an examination based on KPPU's own initiative (Article 40 of the Business Competition Law), against business actors suspected of monopolistic practices and unfair business competition. Examination on the basis of a report is an examination carried out because of a report from a disadvantaged community or on the basis of a report from a business actor who is disadvantaged by the reported business actor's actions. After receiving the report, the KPPU determines the commission council that will be tasked with examining and investigating reported business actors. In carrying out

their duties, the commission assembly is assisted by commission staff. To find out whether the examination carried out by the Commission due to a report or on the initiative of the Commission, can be seen from the case number. For cases based on the report the case number is Case number / KPPU-L (report)/ Year.

Examination on the basis of initiative is an examination conducted on the basis of the initiative of the KPPU itself due to allegations or indications of violations of Law No. 5 of 1999. For cases based on the initiatives of the KPPU the numbers are as follows: Case number/ KPPU-I (Initiative)/ Year. In examining the initiative, the KPPU will first form a Commission Council to examine business actors and witnesses. In carrying out this task, the board of commissioners is assisted by commission staff. Furthermore, the commission council set a schedule for commencement of hearings.

Closing

Conspiracy in tendering activities is an unfair business competition practice, because business actors who are supposed to compete in bidding activities make certain agreements to win one of the bidders in the tender. Most of the tender conspiracy cases (both for the procurement and sale of goods and or services) have been decided by KPPU by using the rule of reason approach. Acts of conspiring are actions which are categorized as acts of dishonesty, against the law and hampering unfair business competition. There are quite a lot of cases related to violations of Article 22 of the Business Competition Law entering the KPPU, namely 57% for the period 2015 to 2018 and relating to the procurement of goods and services.

The rule of reason approach for tender conspiracy cases should be abandoned and replaced with an illegal per se approach, so that the KPPU does not have to prove in detail up to the consequences.

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