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The Per Se Illegal Principle and the Rule of Reason in Tender Conspiracy Practices Under the Anti-Monopoly Law and Unfair Business Competition

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Abstract

The purpose of this research is to find out how the Per Se Illegal and Rule of Reason principles can be applied by KPPU in handling cases of bid rigging based on the Anti-Monopoly and Unfair Business Competition Law. The method used is descriptive normative legal research using a statutory approach to regulations related to Article 22 of the Anti-Monopoly and Unfair Business Competition Law. The results of his research are that there are two approaches in dealing with the practice of bid rigging, namely the rule of reason and per illegal cell. The two approaches can be selected alternatively, but can also be used together. The rule of reason approach tries the substance of business actions and their impact on the people's economy, while the per se illegal approach uses a juridical-positivistic approach.

Keywords: *Per Se Illegal; Rules of Reason; Tender Conspiracy;*

Introduction

Business activity is one way for humans to gain profit and income to meet the needs of life. On the basis of meeting the necessities of life to achieve prosperity, many people carry out business activities. One of the prerequisites for modern economic principles is the existence of a fair and fair business competition climate due to monopolistic practices

and unfair competition. In terms of business competition, sometimes business competition is healthy, and it can also be unhealthy[1].

The promulgation of the Anti-Monopoly and Unfair Business Competition Laws is intended to maintain a competitive market from the influence of agreements and conspiracies that tend to eliminate fair business competition, to provide guarantees of legal certainty and equal protection to every business actor in running his business[2].

Article 22 of the Anti-Monopoly and Unfair Business Competition Law prohibits business actors from conspiring with other parties to arrange or determine the winner of a tender which may result in unfair business competition. Conspiracy in tenders can be carried out openly or secretly through adjustment actions, bidding before being entered, or creating pseudo-competition, or agreeing and/or facilitating, or giving exclusive opportunities, or not refusing to take an action even though knowing that the action was carried out to arrange in order to win the parties who want to win the tender[3].

One of the basic problems of business competition in Indonesia is related to the process of government procurement of goods/services. In the process of procuring government goods and services, according to some circles, there are many practices of conspiracy to determine the winner in a tender[4]. This clearly contradicts the principles and mechanisms that have been regulated in Presidential Regulation Number 54 of 2010 concerning Procurement of Government Goods/Services and Law Number 5 of 1999.

In essence, tender conspiracy is an act carried out by both the goods/services provider and the goods/services user to arrange and determine the winner of the tender. Based on the type of tender conspiracy can be divided into 3 (three) types:

1. Horizontal Conspiracy, namely a conspiracy that occurs between business actors or providers of goods/services and their competing business actors or providers of goods and/or services.
2. Vertical Conspiracy, namely a conspiracy that occurs between one or several business actors or providers of goods and/or services and the tender committee or bidding committee or users of goods and services or the owner or employer.
3. Combined Conspiracy Horizontally and Vertically, namely a conspiracy between the tender committee or bidding committee or users of goods/services or owners or employers and fellow business actors/providers of goods and services[5].

Meanwhile in Law Number 5 of 1999, forms of conspiracy that are prohibited and have the potential to cause unfair business competition are in the form of:

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1 Hermansyah, "*Principles of Business Competition Law in Indonesia*" (Jakarta: Kencana, 2008).

2 Arie Siswanto, "*The Law of Business Competition*" (South Jakarta: Ghalia Indonesia Publisher, 2002).

3 Hermansyah, Op.Cit., 43.

4 Jacob Adi Krisanto, "*Legal Breakthrough of KPPU Decisions in Developing Legal Interpretation of Tender Conspiracy*", Journal of Business Law, (2008): 27, http://library.stik-ptik.ac.id/detail?id=45788&location=lokal.

5 Ibid., 72.

1. Conspiracy to determine the tender winner (Article 22)
2. Conspiracy to divulge trade secrets (Article 23)
3. Conspiracy to create trade barriers (Article 24)

In a competitive climate, a tender that aims to obtain a winner must consist of at least 2 (two) or more business actors so that the basic idea of implementing a tender is to obtain the lowest price with the best quality[6]. However, on the other hand, tender conspiracy can also lead to collusive actions aimed at eliminating competition and raising prices.

In the context of business competition law, prohibition norms have two characteristics or approaches used in viewing agreements or activities of business actors, namely prohibitions that are Per Se Illegal and approaches that are Rule of Reason in nature. Prohibitions that are per se are prohibitions that are clear, firm and absolute in order to provide certainty for business actors. Meanwhile, in the rule of reason approach, punishment for actions alleged to have violated competition law must consider the situation and conditions of the case. In other words, the rule of reason requires verification, evaluating the consequences of certain agreements, activities or dominant positions in order to determine whether the agreement or activity inhibits or supports competition[7].

In connection with the above description of the tender conspiracy, it is necessary to carry out normative research that examines primary and secondary legal materials regarding the Per Se Illegal Principle and the Rule of Reason in the Practice of Tender Conspiracy based on the Anti-Monopoly Law and Unfair Business Competition.

Method

The type of research used is normative legal research. The normative legal research method or the library legal research method is to use a type of approach by studying the applicable laws and regulations and based on legal literature.

Result *&* Discussion

Unfair business competition can be seen from the way business actors compete with other business actors. For example, in a tender competition, business actors have entered into a business conspiracy with the auction committee to win a tender. So that other business actors do not get the opportunity to win the tender[8].

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6 Ibid., 45.

7 Rachmadi Usman, "*Law of Business Competition in Indonesia*" (Jakarta: Gramedia Pustaka Utama, 2004).

8 Muskibah, "*Prohibition of Conspiracy in Tender Perspective of Law Number 5 Year 1999 Concerning Prohibition of Monopolistic Practices and Unfair Business Competition*". Law Journal. (2013), https://online-journal.unja.ac.id/jimih/article/view/2182

Prohibition of conspiracy is one of the activities that is prohibited in business competition law, namely as stated in Law Number 5 of 1999 as follows:

1. Article 22: "Business actors are prohibited from conspiring with other parties to arrange and or determine the winner of a tender so that it can result in unfair business competition".
2. Article 23: "Business actors are prohibited from conspiring with other parties to obtain information on the business activities of their competitors which are classified as company secrets so that they can result in unfair business competition".
3. Article 24: "Business actors are prohibited from conspiring with other parties to hinder the production and or marketing of goods and or services of their competing business actors with the intention that the goods and or services offered or supplied in the relevant market will be reduced in terms of quantity, quality and timeliness. required".

From the provisions of the aforementioned article, the basis for the prohibition of conspiracy to tender is Article 22 of Law Number 5 of 1999. Meanwhile, the definition of tender is contained in the elucidation of Law Number 5 of 1999, "Tender is an offer to submit a price to buy or obtain goods and or services, or provide goods and or services, or carry out a job".

In practice, the definition of tender is the same as the meaning of auction as stipulated in Presidential Decree Number 54 of 2010, For example, in the method of selecting goods/services providers, this can be done by way of a public auction and a limited auction. Thus the scope of the tender is:

1. An offer to submit the lowest price for a job, such as building or renovating a government building.
2. Bid to submit the lowest price for the procurement of goods, such as supplying the needs of stationery and office supplies in government agencies.
3. Bid to submit the lowest price for providing services such as: cleaning services or financial consulting services in government agencies.
4. Bidding for the highest price such as the bidding or auction sale of unlawful acquisition of government inventory or confiscated goods[9].

Thus the term tender conspiracy is a form of cooperation carried out by two or more business actors in order to win certain bidders. Collaboration is carried out by one or more participants who agree to one particular participant at a lower price, where the other participants make an offer at a price above the price of the company to be won. Agreements like this are contrary to a normal bidding/tendering process, because public offerings are designed to create fairness and guarantee low and efficient prices. Therefore, collusion in tenders is considered to impede the creation of fair competition among business actors who have good intentions in conducting business in the field concerned.

[9] L. Budi Kagramanto, "*Prohibition of Tender Conspiracy from the Perspective of Business Competition Law*", (Heroine: Surabaya, 2007).

In goods and services procurement activities, there are stages that must be passed, namely the stages that begin with determining the need to the stage of payment to the supplier or contractor. Meanwhile, in the various stages that must be passed, there are certain requirements, procedures and standards that must be met, both by the supplier and the employer[10].

In this regard, if we examine further the provisions of Article 22 of Law Number 5 of 1999, it is seen that they are still general in nature and do not provide detailed explanation regarding the implementation of tenders. This article only prohibits collusion in determining and or arranging tender winners without explaining how tender winners are arranged. Therefore, the provisions of this article can be applied depending on 2 elements, namely the existence of the parties involved and making agreements to carry out activities that adjust to each other, and these activities are collusive.

The element of parties involved means that tender conspiracy always involves more than one business actor. Other parties here do not have to be business actors, but include parties involved, including parties who are competitors to business actors. Then what is meant by collusive activities is if the competitors agree to influence the outcome of the tender in the interest of one of the parties by not submitting a bid, or if submitting an offer will be made in a quasi (pretend). In this case, business actors who do not participate in the tender will have the opportunity to participate in the next tender based on an agreement that has been arranged with business actors who are members of certain business associations. There are two approaches used by the Business Competition Supervisory Commission (KPPU) in assessing an act of business competition, namely the rule of reason and per se illegal approaches[11]. In simple terms, the rule of reason approach uses a case approach. In this approach, KPPU starts from business actions that have been carried out by business actors and provides an assessment of whether there is an element of unfair business competition or not. Meanwhile, the per se illegal approach is an approach that is based on the law, without having to prove the impact of these business actions on the economy. Generally, activities that are considered per se illegal include collectively fixing a price on a product, as well as fixing a resale price[12].

As is known in Law Number 5 of 1999, to determine whether there are indications of violations of agreements and prohibited activities carried out by business actors in carrying out their business activities, the rule of reason approach is used. The rule of reason approach is used to accommodate actions that are in the gray area between legality and illegality. If actions that are in the gray area have a positive effect on competition,

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[10] Y. Sogar Simamora, "*The Legal Principles of Contracts in Procurement of Goods and Services by the Government"*, (Unair Postgraduate Program, Surabaya, 2005).

[11] Simbolon, Alum, "*The approach taken by the Business Competition Commission to Determine Violations in Business Competition Law*". Law Journal Ius Quia Iustum. (2013), https://journal.uii.ac.id/IUSTUM/article/view/4517.

[12] Lubis et. al., Andi Fahmi, "*The Law of Business Competition Between Text and Context*", (Jakarta: ROV Creative Media, 2009).

then there is a chance to be allowed. This approach seems to be a guarantee for business actors to freely take the business steps they want as long as those steps are reasonable[13].

In other words, the use of the rule of reason approach allows the court to interpret Law Number 5 of 1999, as well as to find out and assess whether there are obstacles in business activities or affecting the competition process. Therefore actions that can be categorized as rule of reason are actions that have fulfilled the requirements that are anti-competitive and detrimental to society. Then to become a plaintiff "must be able to show the existence of anti-competitive consequences, or real harm to competition, and not just say that the act was unfair or against the law"[14].

Meanwhile, another approach that can also be used to indicate that there has been a violation of the provisions of Article 22, can also be used a per se illegal approach. According to **Yahya Harahap**, per se illegal means "unlawful from the start", therefore the act is an act that is "unlawful". In other words, an act itself has violated the provisions that have been regulated, if the act has fulfilled the formulation in the law without any evidence[15].

Therefore, in the context of law enforcement against the prohibition of collusion in tenders, the application of rules that are per se illegal is intended to protect other business actors from actions that are clearly detrimental to competition. Meanwhile, the application of the rule of reason requires the ability to prove a negative impact on society.

To oversee the implementation of Law Number 5 of 1999, the Business Competition Supervisory Commission (KPPU) was formed. The KPPU's duties include evaluating agreements and activities that may result in monopolistic practices and unfair business competition, taking actions in accordance with its authority, providing suggestions and considerations on government policies relating to monopolistic practices and unfair business competition (Article 35).

In handling cases of violations against business competition including violations of the prohibition on tender conspiracy, KPPU is required to give a decision no later than 150 days after the case was filed. This KPPU decision has permanent legal force, if there are no objections filed by the business actor to the District Court. The District Court must render a decision within 30 days of the commencement of the examination. The decision of the District Court can still be appealed to the Supreme Court.

Conclusion

Conspiracy in tenders is an activity that is prohibited and contrary to Article 22 of Law Number 5 of 1999, because such conspiracy can harm other business actors who have

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[13] Lubis et. al., Andi Fahmi, "*The Law of Business Competition Between Text and Context*", (Jakarta: ROV Creative Media, 2009).

[14] Paripurna and M. Hawin, "*Per se Rule and Rule of Reason*", Journal of UGM Legal Forum. (1998), https://jurnal.ug.ac.id/jmh/.

[15] M. Yahya Harahap, "*Some Reviews About Legal Issues*" (II), (Citra Aditya Bakti, Bandung, 1997).

good intentions to run their business. Tender conspiracy practices as regulated in Article 22, can be carried out using two per se illegal and rule of reason approaches. Considering that Law Number 5 of 1999 indicates whether there is a violation of the provisions of Article 22 adhering to the rule of reason approach, it is suggested that changes to these provisions be made by adding a per se illegal approach.

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