

The Urgency of Establishing a Business Competition Court in Indonesia

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Research Article

The Urgency of Establishing a Business Competition Court in Indonesia

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Faculty of Law, Universitas Wijaya Putra, Raya Benowo Road No. 1-3, City of Surabaya, East Java**Abstract.**

Fair law enforcement in handling the business competition complications in Indonesia is essential to promote a conducive business competition climate and to ensure the enforcement of Law Number 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition. The legal system in the business competition court in Indonesia cannot be separated from the role of KPPU as an institution with the function of regulating and monitoring competition behavior. KPPU, in the context of law enforcement on business competition complications, has the authority to conduct an investigation and adjudicate on the competition disputes in a judicial institution organized by KPPU. Analyzing the authority of KPPU starting from the process of an investigation until the adjudication to business competition cases is a matter that needs to be studied in the corridor of its independence. KPPU's authority in conducting the investigation and the adjudication needs to be studied more specifically, especially in its function to ensure a sense of justice and impartiality for business actors as the accused parties in a dispute. This study aims to assess the urgency of establishing a business competition court in Indonesia. For this reason, the research methods used were the statutory approach and the conceptual approach. This research has a potential significance to be used as the material in making the amendment for the competition law in Indonesia to urge the Government and Judiciary to form an independent business competition court.

Keywords: Business competition; competition law; KPPU

1. KPPU's Position in Indonesia Business Competition Law

The legal structure of KPPU in the perspective of Business Competition Law, apart from being evident in its authority in Law Number 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition, is also reflected in KPPU Regulations[1]. The regulation mentioned is KPPU Regulation Number 1 of 2019 on the Procedures for Handling Cases of Monopolistic Practices and Unfair Business Competition. Based on KPPU Regulation Number 1 of 2019 Chapter IV on the Commission Council Sessions, trial procedures shall be regulated by the Commission Council. The Commission Council itself is regulated in Article 1 number (18) of the KPPU Regulation Number 1 of 2019, which states: "Council consisting of at least 3 (three) commission members who are tasked with examining and deciding cases" [1].

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Referring to Article 1 number (18) of KPPU Regulation Number 1 of 2019 prior, trials in business competition cases are examined and decided by the commissioners in the KPPU institution. Furthermore, in business competition law, there are “Investigators” and “investigator prosecutors”. The legal concepts of the two investigators as stipulated in Article 1 number (23) and (24) KPPU Regulation Number 1 of 201 are as follows: *Article 1 number (23)* “investigators are commission employees assigned by the Commission to carry out clarification, research, and investigation activities.” *Article 1 number (24)* “investigator prosecutors are commission employees assigned by the Commission to carry out filing activities or read the Report on Alleged Violations at the Preliminary Examination, submit evidence, present witnesses, and convey conclusions at the follow-up examination”[2].

The position of investigators and investigator prosecutor is also part of the internal affairs of KPPU. [3]Therefore, the positions of the investigator, investigator prosecutor, and the Commission Council can be described as follows:



Figure 1: Therefore the positions.

2. Independence of Business Competition Courts in Indonesia

The position of a legal institution in principle cannot be separated from the legal system which consists of three components according to Lawrence M. Friedman, they are: (1) Structure, the entire existing legal institutions and their apparatus, including, among others, the police and their officers, the prosecutor’s office and their prosecutors, the courts with their judges, and so on; (2) Substance, the entire legal rules, legal norms, and legal principles, both written and unwritten, including court decisions; (3) Legal culture, opinions, beliefs, habits, ways of thinking, and ways of acting, both from law enforcers and from members of the community, law and various phenomena related to law[4].

According to the component of the legal structure by Lawrence Friedman, law enforcement institutions are also separate from one another. Of course, the legal

structure works together with the principles of justice (Fundamental Principle of Judiciary), which contains two principles, “independence” and “impartiality”. The essence of “independence” and “impartiality” is as follows: (1) *Independence is: “Judiciary is independent from other branches of government. It is essential requirement for a fair, consistent and neutral administration of justice.”* It means that the judiciary is called independent when the judiciary is independent of other branches of government institutions. This independence is required to achieve an administration of justice that is fair, consistent, and neutral. (2) *Impartiality is: “Principle that judges required to be unbiased and to not favour either side in a case, judging based on objective criteria”*[4].

It means that judges, in principle, must not take sides with the interests of one of the parties and must be able to judge objectively. In the respect of the Fundamental Principles of Judiciary, the legal structure of the Business Competition Court in Indonesia does not reflect independence and impartiality. The discourse of establishing a special and independent business competition court had been raised before in the case of transferring business competition disputes to the jurisdiction of the commercial court. The Commercial Court as a special court has jurisdiction that only focuses on a single issue, which is the legal matters relating to the business or economic sector. The selection of the topic of the dispute must be done by considering that the general courts with the already heavy workload will experience difficulties in examining and resolving business disputes which are quite complex and rarely occur in court[6]. [7] To be able to transfer competition disputes to the jurisdiction of the commercial court, the analytical criteria must be i.e. *ratione personae*, *ratione material*, and have special characteristics. In detail, the use of the analytical framework is as follows:

2.1. Ratione Personae

This criterion is used to determine the subject of business competition law that can dispute in the commercial court. Business actors in Law Number 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition are defined as: *“an individual person or a company, in the form of a legal or nonlegal entity established and domiciled or engaged in activities within the legal territory of the Republic of Indonesia, conducting various kinds of business activities in economic sector through contracts, both individually or collectively.”*

Based on this definition, business actors cover a very broad scope of business competition, and can include: (1) an individual person; (2) a company in the form of the legal entity i.e. a Limited Liability Company (PT); (3) a company in the form of the

nonlegal entity i.e. Firm, CV, and Civil Society. (4) furthermore, these business actors carry out business activities in the economic sector which may include the activities of producing and distributing goods and/or services, either as sellers or buyers of goods and/or services. Therefore, these criteria are met.

2.2. Ratione Materiae

Business or economic activity is carried out continuously to gain profit with its own risks. Therefore, business actors included in these criteria must be proven to have conducted monopoly and/or unfair business competition in their attempt at reducing these risks within the scope of their business to make maximum profit for their own interests in a way that is dishonest or illegal. Thus, from the perspective of *ratione materiae*, business competition disputes are conducted by business actors within the scope of the business, both goods and services business, both related to the production process as producers, distribution as distributors, and consumption in the interests of the general public and consumers, as well as meeting these criteria.

2.3. A special character of business competition disputes

In the recent direction of development, the cases with high economic factors become a determining factor in considering a case. Meanwhile, the judges in general do not have sufficient knowledge regarding economic knowledge. Therefore, due to the opportunity for expansion from the existing special courts, it can be an alternative to transfer the jurisdiction of examining cases of objections to the KPPU's decision to the commercial court.

3. Implications of Business Competition Procedure Law on Adjudication of Competition Cases

The non-independent position of KPPU in the law of business competition procedure starting from clarification, research, investigation, prosecution to adjudication in court which are carried out by organs within the KPPU institution greatly affects legal products in the form of KPPU's adjudication. This can be seen through the KPPU's 2019 Annual Report, in one of its tables on "*List of Cases adjudicated and Their Status in 2019*". [9] It was reported that there were a total of 33 cases of KPPU from 2017 to 2019. [9] From these 33 cases, KPPU decided that the business actors (Reported Party) were proven

to “Violate the Law No. 5 of 1999”, in other words, there was not a single business competition case handled by the KPPU which adjudicated that business actors were proven to not violate the Law Number 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Competition.

Therefore, the Business Competition Procedure Law places KPPU as a superbody institution, whose authority covers clarification, research, investigation, prosecution to adjudication in court. This procedure is contrary to the independent and can result in law enforcement not running fairly and impartially. This is in line with Budi Kagramanto's view on the functions, powers, and duties of the KPPU.¹The authority possessed by the KPPU includes the executive, judicial, legislative, and consultative areas. These powers mean that the KPPU has functions that resemble consultative, judicial, legislative and executive institutions.¹This is why KPPU is often said to have overlapping powers because it acts as an investigator, examiner, inspector, prosecutor, adjudicator, or consultative. It can be said that KPPU has an authority similar to a consultative institution because one of the KPPU's duties is to provide advice and considerations to the Government in matters relating to monopolistic practices and or unfair business competition (Article 35 letter (e) of Law Number 5 of 1999) [8].

In this case, the KPPU indirectly plays a role in the formation of government policies, especially to avoid contra competitive policies that are often unintentionally taken by the government. The authority of the KPPU which is considered to resemble a judiciary institution means that it has the authority to carry out investigative functions and to adjudicate, even impose administrative sanctions on cases it investigates. KPPU also has the authority to interpret the provisions of Law no. 5 of 1999, and use it as the basis of arguments for the enforcement of competition law in Indonesia. Regarding the authority of KPPU as an institution that carries out its function as a quasi-judiciary, it can be found in Article 36 of Law Number 5 of 1999, which has a fairly broad scope, starting from receiving reports, conducting research, investigating, examining, and adjudicating. Thus the KPPU as a quasi-judicial carries out its duties as an investigator, examiner, inspector as well as to adjudicate the suspected violation of Law no. 5 of 1999 [10]. With such broad judicial powers, KPPU is demanded to be more independent and transparent, whereby the entire process is carried out based on fair procedural law by upholding the principle of equality before the law. To maintain the independence of business competition courts in Indonesia, an independent business competition court must be formed immediately so that in the future KPPU is an institution that has the authority to carry out investigations to prosecution [9].

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