

**THE OBJECTIVITY OF THE BUSINESS COMPETITION SUPERVISORY
COMMISSION IN DECIDING BUSINESS COMPETITION CASES IN INDONESIA**

Rifqon Khairazi

University of Indonesia, Depok

Email: rifqon.khairazi@ui.ac.id

ABSTRACT : This study discusses the commission board's objectivity in a trial while deciding a business court case. This study aims to identify the commission board and investigators' authority in a courthouse, and the fact that they are in the same institution as well as the concern. This study uses a type of normative research through a statutory approach and a conceptual approach. This research's data source is obtained by tracing statutory regulations, especially those related to business competition. The research shows a relationship that can affect The Indonesian Competition Commission (ICC) decision regarding the extent of authority that ICC has, as contained in the provisions of Article 36 of Law No. 5/1999. This obscurity can provide legal loopholes that have potentially offer a wide range of unlawful authority for ICC. Therefore, the Government has to amend the current regulation

Keywords: The Indonesian Competition Commission (ICC); Antitrust Law; Business Competition

INTRODUCTION

The development of the business world across the globe is an essential matter in the national economy's growth. Various sectors of business activities compete to get a place and become the choice of consumers. In essence, this development cannot be separated from competition between business actors to get the maximum profit. Thus, for this competition and considering the large role of business actors in economic growth, it is necessary to carry out balanced supervision and regulation.

The Government as state administrator is obliged to maintain the business climate in order to remain conducive and run well so that business actors can compete fairly and do not use fraudulent methods, conspire with other business actors or other unjustified methods, which in turn will disrupt the business climate and destabilizing the market system. Therefore, the Government must be "involved" in making regulations or policies on business competition policies and taking action against unscrupulous business actors who commit fraud. Legislation in business competition is regulated in Law No. 5 of 1999 concerning the Anti Monopoly

Practice and Unfair Business Competition (Competition Law). As held in the Competition Law, the institution with authority to conduct supervision is The Indonesian Competition Commission (ICC).

The Indonesian Competition Commission is an independent institution that has the authority to supervise business competition and impose sanctions independent of the Government and other parties' influence. ICC's authority as business competition and monopoly supervisory agency is contained in Article 36 of the Anti-Monopoly Law. Based on these provisions, the ICC can be considered to have great authority and tends to be excessive.

As an independent institution, its authority counts from regulatory, administrative, and semi-judicial functions at the same time (Asshiddiqie 2008). Based on that authority, ICC carries out its role to resolve and decide unfair business competition and monopoly. In its practice, ICC has decided not only administrative but even criminal sanctions. Also, ICC in Decision No. 06/KPPU-I/2005 in a tender case, ICC sentenced the reported P.T. Waskita Karya to pay a fine of Rp. 2,500,000,000.00 (two billion five hundred million rupiahs).

PROBLEM

Rooted from the extent of the ICC's authority in business competition cases, it is essential to carry out further research on the polemic of ICC's authority in resolving cases in the field of business competition. Whereas the provisions of article 36 can position ICC on an equal basis with a judicial body that has the authority to decide a case. Hence, it can potentially be abusive in handling future business competition cases. Thus, the research questions that arise in this study are:

1. To what extent the Indonesian Competition Commission panel authority in resolving business competition cases in Indonesia compare to Antitrust Law in the US?
2. How could the Indonesian Competition Commission authority lead to abusive power?

RESEARCH METHODS

This type of research used in this paper is normative legal research with Statue Approach and Conceptual Approach. Sources and types of legal materials in this paper refer to primary legal materials in the form of applicable laws and regulations related to business competition, namely Law No. 5 of 1999 concerning Anti-Monopoly Practice and Unfair Business Competition. Secondary legal materials in the form of books and journals related to research material, the Anti-Monopoly Business Law Series by Ahmad Yani, Aspects of Indonesian Business Competition Law (Prohibited Agreements, Prohibited Business Actions, and Prohibited Dominant Positions) by Marwah M. Diah. As well as the use of tertiary legal materials, in the form of a legal dictionary, such as Black's Law Dictionary.

DISCUSSION

The Indonesian Competition Commission Authority on Business Competition Disputes

The institution with authority to enforce business competition law and enforce Law No. 5 of 1999 in Indonesia is The Indonesian Competition Commission (ICC). The legal basis for the formation of ICC is contained in Article 30 paragraph (1), stated that: To supervise the implementation of this Law a Business Competition Supervisory Commission is formed, hereinafter referred to as the Commission. As an Independent institution, ICC has been designated by Law No. 5 of 1999 as the board responsible for overseeing and enforcing the implementation of the Law. The current ICC was formed based on the Decree of the President of the Republic of Indonesia No. 75 of 1999.

In principle, the enforcement of business competition law can carry out by the police, prosecutors, and the courts. In this case, a court is officially established by the state for the settlement of cases. However, for business competition law, the dispute resolution at the first level is not resolved by/in the Court, but ICC. The reason to put forward is that business competition law requires experts in business in order to maintain market mechanisms. Institutions that enforce business competition law must consist of people who are not only experienced with the legal backgrounds, but also economics and business qualifications. These criteria are essential, considering that business competition is closely related to economy and business (Prayoga 2000).

In supporting the achievement of fair competition among business actors, the role of ICC is substantial. ICC's duties stipulated in the formulation of Article 35 of the Competition Law, which includes:

The duties of the Commission shall include the following:

- a. assess agreements that may result in monopolistic practices and or unfair business competition as set forth in Article 4 up to and including Article 16;
- b. assess business activities and or actions of business actors which may cause monopolistic practices and or unfair business competition as stipulated in Article 17 up to and including Article 24;
- c. assess the existence or absence of the abuse of dominant position which may cause monopolistic practices and or unfair business competition as set forth in Article 25 up to and including Article 28;
- d. undertake actions in accordance with the Commission's authority as set forth in Article 36;
- e. provide advice and opinion concerning Government policies related to monopolistic practices and or unfair business competition;
- f. prepare guidelines and or publications related to this Law;
- g. submit periodic reports on the results of the Commission's work to the President and the People's Legislative Assembly.

Furthermore, in carrying out these tasks, based on the provisions of Article 36 Law No. 5 of 1999 ICC provided by the following authorities:

- a. receive reports from the public and or business actors regarding allegations of the existence of monopolistic practices and or unfair business competition;
- b. conduct research concerning allegations of the existence of business activities and or actions of business actors which may cause monopolistic practices and or unfair business competition;
- c. conduct investigation and or examination of allegations of cases of monopolistic practices and or unfair business competition reported by the public or by business actors or discovered by the Commission as a result of its research;
- d. make conclusions regarding the results of its investigation and or examination as to whether or not there are any monopolistic practices and or unfair business competition;
- e. summon business actors alleged of having violated the provisions of this Law;
- f. summon and present witnesses, expert witnesses, and any persons deemed to have knowledge about the violation of the provisions of this Law;
- g. seek the assistance of investigators to present business actors, witnesses, expert witnesses, or any persons as intended in sub-articles e and f, who are not prepared to appear in response to the Commission's summons;
- h. request the statement of Government institutions related to the investigation and or examination of business actors who have violated the provisions of this Law;
- i. obtain, examine and or assess letters, documents or other instruments of evidence for the purpose of investigation and or examination;
- j. determine and stipulate the existence or non-existence of losses suffered by other business actors or society;
- k. notify the business actors alleged of having engaged in monopolistic practices and or unfair business competition about the Commission's decisions;
- l. impose administrative sanctions on business actors violating the provisions of this Law.

Since the enactment of Law No. 5 of 1999, ICC has numerous powers as any other judicial institution. This authority includes investigating, enforcing, and litigating authority (Rai Mantili 2016). In carrying out the duties and powers granted by Law No.5 of 1999, and following the provisions of Article 36 above, ICC could take several legal actions, such as receiving reports from the public or business actors regarding allegations of unfair business practices. Even without notice or report, ICC can still carry out investigations by first investigating the allegations of unfair business activities. Furthermore, with the provisions of Article 36 Paragraph (l), ICC may impose sanctions as administrative measures against business actors proven to have committed unfair business activities.

The Competition Law did not mention ICC as a court institution at all. The duties and authorities are also not related to the task of official judicial bodies. Nevertheless, theoretically,

ICC remains a semi-judicial or quasi-judicial institution. Suppose it is related to Montesquieu's 'trias politica' theory. In that case, the ICC can more accurately be seen as an institution with mixed functions, not only the executive but also the judiciary. As a quasi-judicial institution, the types of cases handled by the ICC not only concern civil business matters but also relate to state administrative law and even criminal Law. Each of these is regulated according to different law fields, but for practical interests need to be integrated into a single case handling system through the Indonesian Competition Commission (ICC) (Assidhiqqie 2009).

As a semi-judicial or quasi-judicial institution, in the form of administrative measures and legal sanctions, can impose sanctions on parties who violate Law No. 5 of 1999 as stipulated in Chapter VIII Article 47, Article 48, and Article 49. Administrative sanctions are: (a) the annulment of agreements, (b) order to stop vertical integration, (c) order to cease activities, (d) order to cease abuse of dominant position, (e) annulment of mergers or consolidations of business entities and acquisition of shares, (f) determination of compensation payments, and (g) imposition of penalties. Meanwhile, the criminal provisions are determined to consist of the main criminal as stipulated in Article 48 and additional penalties as stipulated in Article 49 in the form of (a) revocation of business licenses, (b) prohibition of holding positions of directors or commissioners within a certain time limit, and (c) termination of activities or actions causing losses to other parties.

By these ICC authorities, it can be said that ICC has excessive jurisdiction. It can be seen from the functions of the 3 different law enforcement agencies. ICC based on Article 36, can receive reports, conducts research, investigations, and examinations. Also, ICC is capable of imposing sanctions in the form of administrative actions against business actors.

Hence, ICC's authority has the potential to be misused; abuse of power is vulnerable to being carried out by stakeholders in this business competition institution. Especially in Court, as commissions and investigators are one in the same institution, they share a similar interest in suing business competition actors. Thus, the potential for new problems to arise is possible given the absence of balance and excessive exercise of authority by ICC.

Competition Law in the U.S. Antitrust Law

The United States is one of the countries that has initiated regulations related to Business Competition in the first place. The United States itself has two Institutions that specifically oversee all matters on Business Competition, namely the United States Department of Justice (USDOJ-AD) and The Federal Trade Commission (FTC). Both are subject to the Competition Law consisting of The Sherman Act (1890) and The Clayton Act (1914).

Lamaj Jonida argues that: The Sherman Act is famous for its conciseness and completeness of its rules, which can regulate "public interest" or "public choice". This means that the public interest is more emphasis on controlling monopolies, introducing more competition into the economy, and reaffirming the value of individual consumers compared to large conglomerate firms. Related to the view of "public choice" shows that legislators use The Sherman Act to defend themselves in the office (Jonida 2017). The Sherman Act regulates monopoly issues, monopoly trials, unreasonable contract agreements, and price-fixing (Shenefield 2017). The Clayton Antitrust Act is an amendment passed by the U.S. Congress in 1914 that provides further classification and substance in complementing the Sherman Act 1890 on price discrimination, pricing, and unfair business practices (Shenefield 2017).

Both laws authorize the Federal Trade Commission (FTC) and the Antitrust Division of the U.S. Department of Justice (DOJ) as a board that resolves business competition matters.

In the United States, the USDOJ-AD is led by an Assistant Attorney General (AAG) elected by the President and confirmed by the Senate. Any prosecution carried out by each department is a severe one because price-fixing and related offenses such as bid-rigging are serious crimes, and full constitutional protection applies. Criminal enforcement tools, such as search warrants and electronic surveillance, are frequently used.

The U.S. The Department of Justice has the authority to carry out investigations under the Sherman Act with a prior report or take direct action without prior notification. However, if we look at the Clayton Act provisions, USDOJ in conducting an investigation first gets a report. In addition, the FTC also has the same authority as the USDOJ in conducting investigations, as stipulated in Article 5 of the FTC Act (Ginsburg 2005). In contrast to ICC in Indonesia, the FTC has several bureaus, namely the Bureau of Consumer Protection, the Bureau of Competition, and the Economic Bureau.

The Bureau of Competition strives to prevent anti-competitive mergers and other anti-competitive business practices in the market. By enforcing antitrust laws, the Bureau promotes competition and protects consumers' freedom to choose goods and services on the open market at prices and quality suited to their needs; The Bureau of Consumer Protection protects consumers from unfair practices, fraudulent acts, or fraud. The Bureau enforces various consumer protection laws enforced by Congress, as well as trade regulation issued by the Commission. Its actions include company-wide and industry-wide investigations, federal and administrative court litigation, regulatory processes, and consumer and business education. The Bureau contributes to the Commission's ongoing efforts to inform Congress and other government entities of the impact action can have on consumers; The Bureau of Economics helps the FTC evaluate its actions on economic impact. To do so, the Bureau provides financial

analysis and support for the investigation and creation of antitrust and consumer protection regulations. It also analyzes the effects of government regulation on competition and consumers. It provides Congress, the Executive Branch, and the public with an economic analysis of market processes related to antitrust, consumer protection, and regulation.

The FTC stated the authority to interpret and enforce competition law provisions, including the Clayton Act, Robinson-Patman Act, Unfair Trade Practices Act. But not the Sherman Act, whose implementation remains the exclusive authority of federal courts. Where in the Sherman Act also regulates the provision of criminal sanctions in the form of fines and imprisonment.

In-depth views, there are similarities between Law No. 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition with the Antitrust Law in the United States. In general, Law No. 5 of 1999 contains six parts of the regulation consisting of: Prohibited Agreements, Prohibited Activities, Dominant Position, the Commission for the Supervision of Business Competition, Law Enforcement, and other provisions. The goal to make laws regarding the prohibition of monopolistic practices and unfair business competition, as done by developed countries with highly developed corporate societies, such as the United States as stated above, is to maintain the continuity of competition.

In initiating every investigation, both the DOJ and the FTC are equally on the same level. Before filing a lawsuit. When deciding whether to sue or not, the two institutions can first summon and ask for an explanation from the business actor regarding the case in which the agency can dispute this explanation. On this occasion, the business actor and his attorney can also explain that most relieve them.

The next phase is the prosecution stage. Both legal institutions have the option of implementing the Sherman Act criminal code according to the per se system. Not infrequently, they also apply criminal rules beyond what is contained in the Sherman Act.

Suppose in the end, the case contains a serious criminal element. Law enforcement agencies can involve enforcement agencies outside of business competition, such as the FBI or other institutions that have expertise in the field of investigation. Hence, it can initiate the arrest process. The next stage is the District Court trial, where law enforcement agencies try to convince the judge and jury. During a trial as usual were a series of witnesses, expert witnesses, important documents, and business actors accompanied by their legal counsel are presented (Shenefield 2017).

Thus, the main focus of differentiating ICC and FTC's authority is the scope of their authorities. ICC only has the authority to enforce business competition law, while FTC has other powers,

namely protecting consumer rights. Another difference between the FTC and ICC in Indonesia is that the FTC in carrying out investigations related to organization, business, practice, and management of companies can conduct searches, while in Indonesia, ICC does not have independent authority to conduct searches. Court decisions are final unless the same matter will be reviewed by the Supreme Court (Sapitri 2015).

The objectivity of the ICC Commission Council in Business Competition Cases

The Business Competition Supervisory Commission is an institution that carries out a semi-judicial or quasi-judicial function. Hence, its members or commissioners have a position as semi-judges or quasi-judges. Thus, the ICC commissioners must act under general/universal principles applicable to judges, including those concerning ethical standards (code of ethics) and code of conduct. Judges today apply the principles known as "The Bangalore Principles of Judicial Conduct" which are recognized worldwide. In the Judicial Conduct, some principles must be adopted by every judge around the world, namely the principles of (i) independence, (ii) impartiality, (iii) integrity, (iv) propriety, (v) equality, (vi) competence, and (vii) diligence. So, these principles above for each judge must also be reflected in every ICC Commissioner's behavior. The Chairperson, Deputy Chairperson, and ICC Members do not violate and must try to prevent themselves from intentionally or unintentionally violating the seven principles of ideal behavior (Assidhiqqie 2009).

Law No. 5 of 1999 does not specify how the business competition supervisory commission decision-making process. The elucidation of Article 43 paragraph 3 of Law No. 5 of 1999 states that the Commission's decision-making is carried out in a panel meeting consisting of at least three members. Commission, in line with this, Article 7 of Presidential Decree No. 75 of 1999 states that to settle a case, the business competition supervisory commission can hold a panel meeting consisting of at least three business competition supervisory commission members where the decision is signed. Accountability to the President is intended to be orderly administrative because ICC uses State Budget and carries out government functions by all assembly members. Thus the settlement or examination of competition law enforcement cases must be carried out in a trial in the form of an assembly, with a minimum of 3 members (Nurjaya 2009).

Article 30 paragraph (2) Law No. 5 of 1999 determines ICC's institutional status as an independent institution is independent of the influence and power of the Government and other parties. Based on Article 31 paragraph (2) of Law No.5 of 1999, the mechanism for filling the positions of ICC Commissioners is carried out through the President's appointment with the House of Representatives' approval. Such a mechanism allows checks and balances between the Government and the Representatives in appointing ICC Commissioners.

The provisions of Article 30 paragraph (3) of Law Number 5 of 1999 determine that ICC is responsible to the President. The President's appointment as the institution for which ICC is responsible does not mean that ICC is a government institution or subordinated to the President. Institutionally KPPU remains an independent and impartial institution in carrying out its duties and authorities (Manan 2004).

The fundamental problem in settlement of ICC Cases is that the ICC Commission Board and Investigators are in the same trial. This can create an imbalance of interests for business actors who are suspected of having violated business competition. It should be, however, the balance is strictly regulated in the laws and regulations. At least being supervised by a special supervisory to ICC institution.

In addition to special institutional supervision of ICC, ICC Commissioners can also carry out surveillance. Based on the provisions in Law No. 5 of 1999 ICC Commissioners have the authority to impose sanctions in the form of ICC decisions. In order to ensure that in making decisions, ICC Commissioners do not commit legal mafia practices and acts of abuse of authority, a supervisory procedure needed to maintain the dignity of the commissioners in carrying out the functions of judicial power. Therefore, according to the author, considering that ICC has been recognized as one of the executors' judicial authority in Indonesia, it is better if the ICC Commissioners' supervision is included in judges' supervision regime, as is the case with judges. Therefore, the Judicial Commission and the Supreme Court have the right to supervise ICC Commissioners' behavior.

With the current Law, ICC tends to be a super body. ICC has various powers ranging from investigating to deciding a case. The debate regarding the ICC's authority, which is deemed too large, has made the public question ICC's position. Furthermore, compared to the settlement of competition cases in the United States, the legal basis that guides competition law enforcement is based on the Sherman Act, Clayton Act, and the Federal Trade Commission Act. Procedure for proceedings in the United States, is first to determine what type of case it is. Handling of cases could be either through the FTC or the DOJ. Whereas in Indonesia, all anti-competition cases are the ICC's authority, then if there is an objection, the authority is transferred to the Court. This mechanism shows how the ICC's authority can take over several functions of other law enforcement agencies, leading to the failure to resolve business competition cases in Indonesia fairly. Indeed, even though ICC has broad powers in the end, it is still limited, namely in terms of execution of decisions. ICC can examine, investigate, summon parties, and make a decision, but ICC has no authority to execute it. Execution of the decisions requires fiat court execution. From a criminal perspective, even though the ICC has broad authority to conduct investigations, the results of the ICC examination are only sufficient as initial evidence for investigators.

CONCLUSION

The wide range of authorities possessed by ICC makes it an institution with enormous powers. Looking at several provisions in Law No. 5 of 1999 which give such broad powers to ICC, range from investigation to decision making. Compared with the regulations that apply in the United States, this authority has substantial differences leading to fair business competition trial. The legal basis that guides the enforcement of competition law in America is the Sherman Act, Clayton Act, and the Federal Trade Commission Act. In procedural, in the United States, the types of cases are to be first determined.

Furthermore, case handling is carried out either through the FTC or the DOJ. Meanwhile, in Indonesia, all antitrust cases are the authority of the ICC, then if there is an objection, the authority is transferred to the Court. Based on these powers, it is necessary to supervise the ICC Commissioners to avoid judicial mafia and avoid abuse of power. Including supervision through the ICC special supervisory institution and under the control of judges through the Judicial Commission and the Supreme Court is an alternative solution to maintaining the dignity of ICC Commissioners.

REFERENCES

- Asshiddiqie, Jimly. 2008. *Pokok-Pokok Hukum Tata Negara Indonesia Pasca Reformasi*. Jakarta: Gramedia.
- Assidhiqqie, Jimly. 2009. "Fungsi Campuran KPPU Sebagai Lembaga Quasi Peradilan." Seminar Penegakan Ketentuan Hukum Persaingan Perihal Tender. Jakarta: Djokosoetono Research Center.
- Ginsburg, Douglas H. 2005. "Comparing Antitrust Enforcement in The United States and Europe ." *Journal of Competition Law and Economics* 427-439.
- Jonida, Lamaj. 2017. *The Evolution of Antitrust Law in USA* . *European Scientific Journal*.
- Manan, Bagir. 2004. *Hukum Positif Indonesia: Suatu Kajian Teoritik*. Yogyakarta: FH UII Press.
- Nurjaya, I Ketut Karmi. 2009. "Peranan KPPU dalam Menegakkan Undang-Undang Nomor 5 Tahun 1999 Tentang Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat." *Jurnal Dinamika Hukum* Vol. 9 No. 1. 83-90.
- Prayoga, Ayudha D. 2000. *Persaingan Usaha dan Hukum yang Mengaturnya di Indonesia*. Jakarta: Proyek Elips.
- Rai Mantili, Hazar Kusmayanti, Anita Afriana. 2016. "Problematika Penegakan hkum Persaingan Usaha di Indonesia dalam Rangka Menciptakan Kepastian Hukum." *Padajaran Jurnal Ilmu Hukum* Volume 3 Nomor 1 116-132.
- Sapitri, Baiq Ervinna. 2015. "Kewenangan Komisi Pengawas Persaingan Usaha (KPPU) dalam Penanganan Perkara Persaingan Usaha (Studi Perbandingan di Indonesia

Rifqon Khairazi: *The Objectivity of The Business Competition Supervisory Commission in...*

Dengan Negara-Negara Common Law System) ." Jurnal IUS, Volume III Nomor 7
139-158.

Shenefield, John H. 2017. *The Antitrust Laws A Primer Fourth Edition*. The AEI Press.