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**THE POSITION AND AUTHORITY OF THE BUSINESS
COMPETITION SUPERVISORY COMMISSION (KPPU) IN
SUPERVISING BUSINESS COMPETITION IN INDONESIA**

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Abstract: *This article reviews the KPPU's position as an institution in the constitutional system of the Republic of Indonesia and examines in more depth the concept of strengthening the KPPU's authority in supervising and enforcing business competition law in Indonesia. Institutional status is very important because the KPPU is expected to be able to work together quickly in accordance with the mandate of the law. No. 5 of 1999. Strengthening the commission must be followed by increasing the effectiveness of the commission's function so that it is not only a provider of recommendations; and organize its relations with other state institutions to emphasize the ideals of a rule of law as well as the modern principle of separation of power and the basic concept of mutual control-mutual balance.*

Keywords: *Competition of Law ; KPPU, Authority, Supervisi*

INTRODUCTION

Competition in business law in Indonesia is regulated in Law Number 5 of 199, aimed not only at guaranteeing the widest possible freedom of action for business actors, but also at determining the dividing line between the exercise of freedom of business actors and including that freedom (paradox of freedom).¹

Competition in business law must also pay attention to the public interest of the wider community. The public interest can simply be defined as consumer welfare with the parameters being the achievement of increased quality, availability and choice of goods on the market.

F.M. Scherer, along with economists, points out the benefits of competition for both efficiency and consumer welfare, but recognizes that various competition policy-making authorities have chosen or have been mandated to make consumer welfare their primary goal.

In order for business competition law to maintain harmony of interests between

business actors and society, business competition law must be able to maintain the effectiveness of business competition.

This is worth paying attention to because often business competition policies actually threaten competition with regulations that hinder business competition. Other business competition threats also come from the business actors themselves who deliberately carry out business strategies that inhibit competition.

The problems facing the business world are inefficiency and instability in the business world climate. We need order equal economic and business opportunities and protection public from economic crimes. A very complex issue in law enforcement of Law no. 5 of 1999 has implications for the ineffective implementation of the duties and powers of the Business Competition Supervisory Commission (KPPU).

KPPU was formed by the government based on Presidential Decree No. 75 of 1999. In essence, KPPU is *primus inter pares*, the main institution from a collection of similar institutions that handles business competition.

In enforcing business competition law and resolving alleged violations of monopolistic practices and unfair business competition, the KPPU acts as a complementary state institution (state auxiliary organ) that is independent of government influence.

In practice, KPPU is a quasi judicial institution because KPPU has the same authority as the judiciary, one of which is the authority to issue decisions and decisions. KPPU has the same authority as other judicial institutions. This authority includes investigative authority, enforcement authority, and litigating authority.

At first glance, if you read the UU. No. 5 of 1999 it will be seen that KPPU has such great authority. The KPPU has the task of making guidelines, and has the authority to carry out research, investigations, investigations, prosecutions, up to making decisions and imposing sanctions. The KPPU's authority is regulated in Article 36 of Law no. 5 of 1999 there are limitations that cannot be implemented by the KPPU.

ANALYSIS AND DISCUSSIONS

KPPU in the Constitutional System of the Republic of Indonesia

KPPU is an institution that was formed after reform. There are two reasons for the formation of the KPPU, namely philosophical and sociological reasons for the establishment of the KPPU institution.

The philosophical reason is that in supervising the implementation of a rule of law, an institution that has authority from the state is needed that is able to act independently.

Sociological reasons are believed to be due to the low level of court trust in examining and adjudicating a case, as well as the burden of court cases which are already very large in number so that it is very difficult to handle them optimally within a limited period of time. Another reason the business world requires fast resolution and a confidential inspection process. Therefore, a special institution is needed consisting of people who are experts in the fields of law and economics..²

² Prayoga, Ayudha D, et al, *Op. Cit*, hlm 128.



KPPU was established as an institution that specifically supervises business actors in carrying out their business activities so that they do not engage in monopolistic practices or unfair business competition. Article 30 paragraph (1) Law no. 5 of 1999 stipulates that 'to supervise the implementation of this law a Business Competition Supervisory Commission was established'. In this case the KPPU acts as a quasi-judicial institution.

The establishment of KPPU is expected to be able to resolve cases of business competition law violations more quickly, efficiently and effectively, in accordance with its principles and objectives. However, the institutional status of the KPPU in the constitutional context is still being questioned even though it has been established for 18 years.

The institutional status prevents the KPPU from developing into an effective state institution. KPPU is not a main state institution, or what is usually called a supporting or auxiliary institution. Article 1 Paragraph (2) Presidential Decree no. 75 of 1999 stipulates that the KPPU is a non-structural institution that is independent of the influence and power of the government and other parties. Salah satu ciri yang melekat pada lembaga negara independen adalah, lembaga yang berhak mengatur dirinya sendiri atau dikenal dengan istilah *self regulatory bodies*.

The authority to regulate itself by issuing a product, such as decisions, regulations, and so on. An independent state institution must of course have the authority to regulate itself in order to avoid the dependency of this state institution on other institutions.

Not all state institutions are independent institutions. As revealed by William F. Fox Jr., that a state commission is independent if it is expressly stated by congress in the relevant commission law, or if the president is restricted from not freely deciding (discretionary decision) to dismiss the chairman of the commission.

KPPU's independence is strictly determined Article 30 Paragraph (2) of Law no. 5 of 1999 which stipulates that the Commission is an independent institution that is free from the influence and power of the government and other parties. In addition, the president also cannot appoint and dismiss KPPU members without a solid basis, because they must first obtain approval from the DPR, the role of the president can only submit proposals..

Apart from the President's intervention, Funk and Seamond added that the independent nature of state institutions is also reflected in this:³

- 1) Collective leadership, not a leader;
- 2) The leadership is not controlled or the majority comes from a certain political party;
- 3) The tenure of the commission leaders does not expire simultaneously, but alternates (staggered terms).

From the indicators mentioned by Funk and Seamond, the first indicator is fulfilled, the leadership at KPPU is a collegial collective. The second indicator can also be fulfilled because even though the election is carried out by the DPR, the DPR only has the authority to select candidates who have been proposed by the President after a series of selections for KPPU members have been carried out. The third

³ Funk dan Seamon, dikutip Denny Indrayana, *Ibid*, hlm 70.



indicator has not been implemented, because all leaders were appointed simultaneously at the beginning of formation and dismissed when their term of office was over.

KPPU is an auxiliary state institution that is independent, but does not directly eliminate the authority of the main state institution in supervising business actors in relation to the law. No. 5 of 1999. Knapp and Many in their study found that the existence of auxiliary state institutions such as the KPPU is a development in administrative autonomy and is a separate part of the three branches of power proposed by Montesquieu or what is usually called the fourth branch of the government⁴

This is because the function of the auxiliary state institution is felt to be different from the three branches of power, so there must be a new branch of power that can accommodate the function of the auxiliary state institution.

The existence of the obligation to make accountability to the President raises doubts regarding the independence of the KPPU's implementation of its duties. However, this cannot be used as a justification that KPPU is not independent, because it still has to be proven in practice when carrying out its duties. In addition, efforts to maintain the independence of KPPU members in carrying out their duties have been carried out with preventive steps as stated in one of the KPPU membership requirements, namely not being affiliated with a business entity and a particular political party. When handling cases as well, KPPU members are prohibited from having blood relations or kinship to the third degree with one of the parties in the case and having an interest in the case concerned.⁵

Providing accountability to the President also illustrates that the KPPU's function as an auxiliary state institution is part of the main state institution of executive power, namely the Presidential institution. This can also be seen based on the financing of KPPU activities at the beginning of its formation using part of the budget allocation of the Ministry of Industry and Trade.

KPPU also has the task of advocating for policies, providing suggestions and considerations to the government. These advocacy efforts aim to increase policy makers' understanding of the importance of internalizing the values and principles of healthy business competition in the public policy making process.

Another thing that shows that the KPPU's function is only an inseparable part of the executive branch of power is that, although the KPPU also has quasi-judicial authority, this authority does not necessarily mean that the KPPU has authority that exceeds the authority of other executive institutions, because the KPPU's authority is to decide and impose sanctions. limited to administrative sanctions. The KPPU's independence in carrying out its duties does not make the KPPU an independent institution without relying on any main state institution.

⁴ Many, Yves, dan Andrew Knapp, *Government and Politic in Western Europe: Britain, France, Italy, Germany*, 3rd edition, Oxford university Press, 1998, 489-489, 281.

⁵ Prayoga, Ayudha D, et al, *Op. Cit*, hlm 162.

KPPU as an institution mandated to uphold fair business competition in Indonesia has very limited capacity to create a conducive business competition climate, if it is not supported by other government parties, especially regulators in the economic sector. KPPU often provides suggestions and considerations for policies/regulations in various sectors, in order to maintain opportunities for healthy competition. However, these suggestions and considerations are often not accommodated by the government, so that many regulations still have negative consequences for business competition in this sector.

Based on the type and administrative function, independent state commissions can be divided into three types, namely first, regulatory and supervisory bodies; second, the public service supervisory body, and; third, bodies involved in productive activities. The function of regulating and supervising is only at the national or federal government level, so that in the United States it is also called the headless fourth branch of the government.⁶

Independent state commissions are different from ordinary state commissions. According to Michale R Asimov, ordinary state commissions were only part of the executive, and did not have a very important role.⁷ This opinion is in line with the definition of Misiroglu which says that an independent state commission in the United States is a federal state agency that does not belong to the executive branch of power, and therefore is not under the control of the president.⁸

Asimov added that what is meant by independent is closely related to the dismissal of commission members which can only be carried out based on the reasons stipulated in the law establishing the relevant commission, not as usual with ordinary state commissions which can be dismissed at any time by the president, because it is clear is part of the executive.⁹

Authority of the Business Competition Supervisory Commission (KPPU)

The KPPU's authority is basically clearly defined in Article 36 of Law no. 5 of 1999. KPPU is an independent institution that is independent from the influence and power of the government and other parties and is responsible to the President as regulated in Article 30 of Law no. 5 of 1999.

KPPU has duties and is accompanied by authorities to carry out these duties. This rather general description of duties is then classified in Article 35 into seven areas of duties.¹⁰

The duties of the Commission in Article 5 of Presidential Decree No. 75 of 1999

⁶ Yves Meny dan Andrew Knapp, *Government and Politics in Western Europe*; Britain, France, Italy, germany, 3rd edition 1998, hlm 280.

⁷ Michael R Asimov, *Administrative Law*, 2002, hlm 2.

⁸ Gina Misiroglu, *The Handy Politics Answer Book*, 2003, hlm 326.

⁹ Michael R Asimov, *op.cit*, hlm 20.

¹⁰ Selain dalam Pasal 35 UU No. 5 Tahun 1999, Tugas KPPU juga tercantum dalam Pasal 4 Keppres No. 75 Tahun 1999 tentang Komisi Pengawas Persaingan Usaha.

include:

- a) Conduct an assessment of agreements that could result in monopolistic practices and/or unfair business competition as regulated in Articles 4 to 16;
- b) Conduct an assessment of business activities and/or actions of business actors which could result in monopolistic practices and/or unfair business competition as regulated in Articles 17 to 24;
- c) Carry out an assessment of whether or not there is abuse of a dominant position which could result in monopolistic practices and/or unfair business competition as regulated in Articles 25 to 28;
- d) Take action in accordance with the Commission's authority as regulated in Article 36;
- e) Providing advice and considerations on Government policies relating to monopolistic practices and/or unfair business competition;
- f) Prepare guidelines and/or publications related to this law;
- g) Provide regular reports on the results of the Commission's work to the President and the House of Representatives.

If referring to the theory of state functions put forward by Montesquieu, then KPPU's powers can be grouped into three main authorities, namely, first, authority as a regulator (legislature); secondly, the authority as the executor of the law (executive) and; third, the authority to decide administrative cases.

To carry out the task, in Article 36 of Law no. 5 of 1999, KPPU is given the following powers::

- a. Receive reports from the public and/or from business actors regarding alleged monopolistic practices and/or unfair business competition;
- b. Conduct research on suspected business activities and/or actions of business actors that could result in monopolistic practices and/or unfair business competition;
- c. Conduct investigations and/or examinations into cases of alleged monopolistic practices and/or unfair business competition reported by the public or by business actors or reported by the public or by business actors or discovered by the Commission as a result of its research;
- d. Concluding the results of investigations and/or examinations regarding the presence or absence of monopolistic practices and/or unfair business competition;
- e. Summon business actors who are suspected of having violated the provisions of this law;
- f. Summon and present witnesses, expert witnesses, and anyone deemed to have knowledge of violations of the provisions of this law;
- g. Request assistance from investigators to present business actors, witnesses, expert witnesses, or any person as referred to in letters e and f, who are not willing to comply with the commission's summons;
- h. Request information from government agencies in connection with investigations and/or inspections of business actors who violate the



provisions of this law;

- i. Obtain, examine, and/or assess letters, documents or other evidence for investigation and/or examination;
- j. Decide and determine whether or not there is any loss on the part of other business actors or the public;
- k. Notify the Commission's decision to business actors suspected of carrying out monopolistic practices and/or unfair business competition;
- l. Imposing sanctions in the form of administrative action on business actors who violate the provisions of this law.

The KPPU's authority as mentioned above is quite broad and could give rise to the potential for overlapping authority with other institutions or abuse of authority by the KPPU itself. If you observe carefully, the KPPU's authority to carry out its duties and powers has limitations.

In carrying out these duties, the KPPU cannot carry out its duties and authority as fully as those of the main state institutions. As a regulator, the KPPU is indeed given the task of making interpretations of the business competition law, and also making guidelines, but the interpretations and guidelines made by the KPPU must not deviate from the Law or Presidential Regulations that are above it. Apart from that, the guidelines created by the KPPU to interpret the Antimonopoly Law are carried out under the supervision of the court.

1) Authority as Regulator

As a regulator, KPPU is given the task of interpreting Law no. 5 of 1999, and also makes guidelines, but the interpretation and guidelines made by the KPPU cannot deviate from the Law or presidential regulations that are above it based on the legal hierarchy.

In carrying out its duties, KPPU cannot fully carry out its duties and authorities as those of the main state institutions. In addition, the guidelines made by KPPU to interpret Law no. 5 of 1999 carried out under the supervision of the court.

In exercising authority related to regulations, basically the KPPU only has the task of making guidelines and publications related to competition law. This cannot be used as legitimacy that the KPPU has regulatory authority. Guidelines issued in the form of Commission Regulations do not have binding force as a statutory regulation, so that the KPPU cannot include the Commission Regulations it makes as a legal basis for punishing business actors.

In terms of deciding and imposing sanctions, the KPPU only has the authority to impose administrative sanctions as regulated in Article 47 Paragraph (1), for matters relating to criminal sanctions, the KPPU must delegate the case to the authorized institutions, namely the Police, Prosecutor's Office and Court. Country. Apart from that, the KPPU's decision also does not have executorial power, so to be able to have executorial power the KPPU must first request a decision from the District Court.

Based on the facts, it is clear that the existence of the KPPU as an auxiliary state institution cannot negate the role of ~~492~~ main state institution in supervising the implementation of the law. No. 5 of 1999, the KPPU was actually formed to assist the



performance of the main state institutions which do not only handle business competition matters. Apart from that, the existence of the KPPU is only an inseparable part of the executive branch of power. Even though the KPPU also has quasi-judicial authority, this authority does not necessarily mean that the KPPU has authority that exceeds the authority of other judicial institutions. The KPPU's authority to decide and impose sanctions is limited to administrative sanctions and fines. The authority to impose administrative sanctions cannot necessarily be said to be judicial authority.

2. Authority to Perform Administrative and Competition Law Enforcement Functions.

In carrying out its administrative functions and as a business competition law enforcer, the KPPU has the authority to receive reports from the public and/or from business actors regarding alleged monopolistic practices and/or unfair business competition. Apart from public reports, the KPPU also has the authority to conduct research on allegations of business activities and/or business actors that could result in monopolistic practices and/or unfair business competition. Based on reports provided by the public and research conducted by the KPPU itself, the KPPU conducted investigations and/or examinations into cases of alleged monopolistic practices and/or unfair business competition.

The results of the investigation then conclude whether or not there are monopolistic practices and/or unfair business competition. In the investigation process, the KPPU can summon business actors, summon and present witnesses, expert witnesses, and anyone deemed to have knowledge of violations of the provisions of the Law. No. 5 of 1999. Summons issued by the KPPU to related parties do not have coercive power, so these parties may not attend or refuse to attend the summons made by the KPPU.

In order to avoid parties who do not comply with the KPPU's summons, the KPPU may request the assistance of investigators to bring business actors, witnesses, expert witnesses, or any person to be willing to comply with the KPPU's summons. Apart from that, KPPU can also request information from government agencies in relation to investigations and/or examinations of business actors who violate the provisions of Law no. 5 of 1999.

In addition to strengthening the results of its investigations and examinations, the KPPU has the authority to obtain, examine and or evaluate letters, documents or other evidence, but this authority is not accompanied by the authority to make coercive efforts to obtain data or evidence that can corroborate the investigation process.

Of these powers, there is not a single paragraph or article which states that the KPPU can execute its decisions, based on Article 46 Paragraph (2) of Law No. 5 of 1999. Therefore, for the decision of the Commission which there were no objections submitted by the parties, the first order of execution was requested by the District Court.

In addition, if one looks closely, the KPPU actually cannot forcibly summon the parties deemed to have an interest in a business activity allegedly carried out by monopolistic practices or unfair business competition, so the KPPU must ask for the assistance of investigators to bring these parties, whether they are parties directly involved as well as witnesses and expert witnesses.³⁾ Kewenangan sebagai Pemutus Perkara Persaingan Usaha

Based on Article 24 Paragraph (2) of the 1945 Constitution, Judicial Power is only exercised by the Supreme Court, the Constitutional Court, and other court institutions under the Supreme Court. Meanwhile, KPPU, which is not under either of the two judicial institutions, has special authority to examine and decide on business competition cases administratively.

In terms of deciding business competition cases, KPPU cannot easily make decisions. The decision is only limited to the imposition of sanctions in the form of administrative actions. Administrative actions can only take the form of:¹¹

- a. Determination of the cancellation of the agreement as intended in Article 4 to Article 13, Article 14, Article 15 and Article 16; and or
- b. Orders to business actors to stop vertical integration as intended in Article 14; and or
- c. Orders to business actors to stop abuse of dominant positions; and or
- d. Determination of cancellation of merger or consolidation of business entities and share takeover as intended in Article 28; and or;
- e. Determination of payment of compensation; and or;
- f. Imposition of fines as low as Rp. 1,000,000,000.00 (one billion rupiah) and a maximum of Rp. 25,000,000.00 (twenty five billion rupiah).

From the provisions of these articles it is clear that the Commission Council's authority to impose sanctions is very limited. First, these sanctions are only administrative sanctions. And secondly, the administrative sanctions are limited to what is stated in Article 47 Paragraph (2) of the Law. No. 5 of 1999. Apart from the sanctions regulated in this article, the Commission Council cannot impose other sanctions on business actors.

With the authority to decide cases and impose sanctions on violators of the law. No. 5 of 1999, the authority to interpret laws belongs to the Commission Council. This interpretation is limited to articles where the regulation is not very clear, however, for articles which have provided an explanation of the contents of the article and have provided a limitative explanation of what is meant in the said article, the Commission Council does not need to interpret differently from what has been stated. is in the explanation of the article.

CONCLUSION

The KPPU's institutional status is unclear and it is not included in the State Civil Apparatus (ASN) category, even though the KPPU carries out statutory duties. UU no. 5 of 1999 regulates the secretariat with commission regulations only, so this has not yet entered the ASN. Therefore Law no. 5 of 1999 needs to be amended in terms of confirming the status of KPPU as a state institution,

In supervising business competition, the KKPU should have a strong legal basis, which is even stated in the constitution. The role and authority of the KKPU needs to be strengthened, especially in the prevention aspect of integrating or harmonizing competition policies with other policies. The KPPU's priority efforts in the future are to encourage market reform with a focus on three agendas, namely: first, regulatory review to amend all laws, presidential regulations, regulations, governor's regulations, district/perwali regulations, and regional regulations so that they are in line with the

¹¹ Pasal 47 Ayat (2) Undang-Undang No. 5 tahun 1999.

principles of healthy business competition; second, market structure reform by encouraging the birth of new business actors in strategic sectors; and third, behavior change through mental revolution.¹²

Amendment to the Law. No. 5 of 1999 is very necessary in strengthening the position and authority of the KPPU regarding the implementation and policy of business competition as well as institutional strengthening. Institutional status is very important because the KPPU is expected to be able to work together quickly in accordance with the mandate of the law. No. 5 of 1999. Strengthening the commission must be followed by increasing the effectiveness of the commission's function so that it is not only a provider of recommendations; and organize its relations with other state institutions to emphasize the ideals of the rule of law as well as the modern principle of separation of power and the basic concept of mutual control-mutual balance.¹³

¹² CSIS, *Peta Jalan Pengarusutamaan Persaingan Usaha: Menuju Kebijakan Ekonomi yang Mengintegrasikan Prinsip Persaingan*, PT. Kanisius, Yogyakarta, 2016, hlm 10.

¹³ Denny Indrayana, *Reformasi Hukum Ketatausahaan, Negara antara Ada dan Tiada*, Penerbit Buku Kompas, Jakarta, 2008, hlm. 266.

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