

EXTRATERRITORIAL APPLICABILITY OF INDONESIA BUSINESS COMPETITION LAW AS AN EFFORTS DEALING ASEAN SINGLE MARKET*

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Abstract

General legal principle, a legislation of a country applies only for acts committed in the territories concerned. This principle, to the field of competition has not felt right, because economic activity not only occur between the businesses in the country, but also with businesses that are abroad. Therefore, there is a need for competition law of a country can be enforced in ekstraterritorial. The problem, Law Number 5 of 1999 adheres to the principle of territoriality does not adhere to the principle of extraterritoriality. In this study, the method used is the literature research. The study found that the principle of extraterritoriality adopted by various developed countries and some countries in Asia. The study also found that there is an urgent need that the Indonesian competition law applies to companies abroad, especially in 2015 will force the ASEAN single market.

Keywords: ekstraterritorial, competition law, business actors

Abstrak

Prinsip hukum umum, suatu peraturan perundang-undangan suatu negara berlaku hanya untuk perbuatan yang dilakukan dalam wilayah negara yang bersangkutan. Prinsip ini, untuk bidang persaingan usaha dirasakan sudah tidak tepat, karena aktivitas ekonomi tidak hanya terjadi antara para pelaku usaha di dalam negeri, tetapi juga dengan pelaku usaha yang berada dan melakukan aktivitas di luar negeri. Oleh karena itu, terdapat kebutuhan agar UU Persaingan Usaha suatu negara dapat diberlakukan secara ekstraterritorial. Permasalahannya UU No. 5 tahun 1999 menganut prinsip teritorialitas dan tidak menganut prinsip ekstraterritorial. Dalam penelitian ini, metode yang digunakan adalah penelitian kepustakaan. Penelitian menemukan bahwa prinsip ekstraterritorial dianut berbagai negara maju dan beberapa negara di Asia. Penelitian juga menemukan terdapat kebutuhan yang sangat mendesak agar UU Persaingan Usaha Indonesia berlaku terhadap perusahaan di luar negeri, apalagi tahun 2015 akan berlaku pasar tunggal Asean.

Kata kunci: ekstraterritorial, hukum persaingan usaha, pelaku usaha

Preface

Our country, it is still relatively new to the Business Competition Law, which since the enactment of Regulation No. 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Competition or Business Competition Law. Therefore, there are still many problems of competition between businesses that need to get a more in-depth study. One is regarding the applicability of Regulation No. 5 of 1999 on the Prohi-

tion of Monopolistic Practices and Unfair Business Competition, to businesses who are abroad.

Economic and trade activity at this moment is a transnational activity even global nature aimed at improving the welfare of the world by opening markets for goods, services and capital from abroad.¹ Openness of a country's market will cause a reduction in trade barriers and will increase competition between domestic producers with the entry of goods and services

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¹ Kevin C. Kennedy, "Symposium: Global Trade Issues in the New Millennium, Foreign Direct Investment and Com-

petition Policy at The World Trade Organization", *George Washington International Law Review*, 2001, Washington DC: George Washington University, page 2

from abroad.² After the economic crisis in 1997, Indonesia opened its market to foreign investors for a variety of goods and services, including retail industries.³ The influx of investors, goods and services from abroad, in addition to bringing the advantages of course have a negative effect. Therefore, we need to prepare ourselves to be able to win the competition. One very important factor is the existence of legislation which can be a reference and ensure equal and fair treatment for all businesses. A legislation or laws of a country basically only applies to acts committed within the territory of the country concerned. The territoriality principle, be a problem in the enforcement of laws relating to the business activities of transnational and global in nature, hence its business actors coming from various countries. Business Competition Law in Indonesia contains two articles relating to businesses that are and come abroad. *First*, Article 1 paragraph 5, which states that the definition of an entrepreneur is any individual or entity, whether a legal entity or not a legal entity established and domiciled or conducting activities within the jurisdiction of the Republic of Indonesia, either individually or collectively by agreement, conducting various business activities in the field of economics. *Second*, Article 16 of Law No. 5 of 1999 which states that businesses are prohibited from making agreements with other parties abroad.

The provisions of Regulation No. 5, 1999 shows that the Business Competition Law applies to limited territorial Indonesia alone. The conditions for business competition law has been outdated. Provisions of business competition law in various countries including provisions in neighboring countries such as Singapore, and Thailand have set the applicability of Competition Law extraterritorial them.

Research Problem

The problems in this study: *first*: whether the provisions of Indonesian business competition law applies to businesses that are outside the territory of Indonesia; *secondly*, how business competition law of other countries regulate the issue of extraterritorial; *third*, how important is the legal enforceability of the Indonesian competition for entrepreneurs who are abroad?

Research Methods

Research which carried out is kind of normative legal research or study is to examine the literature of library materials in the form of books, articles and court decisions. This research is aimed, first of all to find the facts (fact finding) how the implementation of Regulation No. 5 in 1999 for 15 years, especially regarding the applicability of Indonesian Business Competition Law against existing businesses abroad. Then, intended to find problems in the enforcement of business competition law for this (problem finding) and ultimately to find a solution to overcome these problems.⁴

Discussion

Economic and trade activity has long been a cross-country activities. At this time, the world is undergoing a fundamental change, coupled with the development of information technology, computer with high speed internet, which changed the market of goods and services.⁵ In this era of globalization, it is virtually no longer state barriers in costs and goods traffic. With the opening of the market, the role of business competition law is essential to ensure healthy competition, and gives the freedom to companies to innovate, produce and sell goods.⁶ In other hand, the law of a state which is basically only apply to persons who reside and conduct activities within a country. Regulation no. 5,

² Diana Yosewa, "Peranan Pesaing Asing Dalam Persaingan Pada Pasar Industri Manufaktur Domestik", *Jurnal Persaingan Usaha*, 1st edition, 2009, Jakarta: Komisi Pengawas Persaingan Usaha, page 41.

³ M. Udin Silalahi, "Persaingan di Industri Ritel Ditinjau dari Aspek Hukum Persaingan Usaha", *Jurnal Hukum Bisnis*, Vo. 27, No. 1, 2008, Jakarta: Yayasan Pengembangan Hukum Bisnis, page 5.

⁴ Soerjono Soekanto, 2010, *Pengantar Penelitian Hukum*, Cet. 3, Jakarta: UI Press, page 44 -45

⁵ Harvard Law Review Association, "Antitrust and Information Age: Section 2 Monopolization Analyses in the New Economy", 114 *Harvard law Review*. 165, 2001, Cambridge MA: Harvard Law School, page 3.

⁶ Herbert Hovenkamp, "Standards Ownership and Competition Policy", *Boston College Law Review*, January, 2007, Boston: Boston College Law School, page, 1-2.

1999 in Article 1 point 5 in essence states that are the subject of the Indonesian business competition laws is limited to businesses that conduct their activities in Indonesia. The provisions of Regulation No. 5 in 1999 that embraces the doctrine of territorial, causing problems in the competition between businesses and law enforcement for violations of the Business Competition Law in Indonesia. Regulation no. 5 in 1999 has been in force for 15 years. During this period, there are only two cases relating to businesses established and doing activities outside the territory of Indonesia, which is handled by the Business Competition Supervisory Commission.

Extraterritorial issues in Indonesian Business Competition Law first appeared in VLCC cases where Frontline Ltd. reported as a statutory body established under the laws of Bermuda, located in Norway and the management center in New York, USA. In this case Frontline reported to have colluded in the tender sale of VLCC owned by Pertamina. Although Frontline not be in Indonesia and not doing business in Indonesia, but it blamed been doing collusive tendering through PT. Equinos Shipping Company. KPPU decision was later confirmed by the Supreme Court Decision No. 04K/KPPU/2005. In this decision, Equinos expressed only as an arm of Frontline, so it is considered as one company under the principle of the single economic entity.⁷ This principle of the single economic entity, in addition to used to sue the subsidiary and the parent of company as one company, but can also be a reason for the absence of collusion between the parent company with subsidiaries as a whole, so that there can be no collusion on itself.

The second case which apply Indonesian Business Competition Law against established company, domiciled and conducting business outside of the Republic of Indonesia is the case No. 07/KPPU-L/ 2007 or usually known as Temasek case. In this case that became party and

residing abroad are eight companies located in Singapore and the companies that are in Mauritius, namely; Temasek Holdings Pte. Ltd., Singapore, Singapore Technologies Telemedia Pte. Ltd., Singapore, STT Communications Ltd, Singapore, Asia Mobile Holdings Pte. Ltd., Singapore, Asia Mobile Holdings Pte. Ltd., Singapore, Indonesian Communication Limited, Mauritius, Indonesian Communication Pte. Ltd., Singapore, Singapore Telecommunications Ltd., Singapore, and Singapore Telecom Mobile Pte., Singapore. Temasek Group through its subsidiary, STT has a stake of 41.94% stake in PT. Indosat, and through SingTel has a 35% stake in PT. Telkomsel. Temasek group by the Business Competition Supervisory Commission later found guilty of violating Article 27 letter a for doing cross-ownership to Telkomsel and Indosat, resulting in anti-competitive impact in the industry of mobile telecommunications services in Indonesia. Temasek also declared in violation of Article 17 paragraph (1) for implementing interconnection barriers and maintain high prices, causing anti-competitive effects. Temasek group argues that the Commission lacked the authority to Temasek Group since it was founded not by Indonesian law and does not conduct its activities in Indonesia.

KPPU argues that the Commission is authorized to conduct examination of Temasek Group with reasons, including; that Temasek Group is a business entity that meets the elements of any person or entity as defined in Article 1 paragraph 5 of Regulation No. 5, 1999, which is based on the principle of "single economic entity doctrine" which basically stated that a business pelau is an economic unit.⁸ An economic unit may consist of several companies or legal entities.⁹ Some companies, expressed as a single economic unit if the relationship is the parent company with subsidiaries in which the parent company has a great influence (decisive influence) against other companies.¹⁰ Under this doctrine a single economic entity, KPPU through Decision No. De-

⁷ Milton Handler, "Reforming The Antitrust Law", *Columbia Law Review*, November 1982, New York: Columbia Law School, page 82.

⁸ Keoghene Odudu and David Bailey, "Single Economic Entity Doctrine in EU Competition Law", *Common Market*

Law Review, Vol. 51, 2014, Leiden: Kluwer Law International, page 1721.

⁹ *Ibid*, page 1722

¹⁰ Aiste Mickonyte, "Join Liability of Parent Companies in EU Competition Law", *Journal of European Competition*

cision No 07/KPPU-L/2007 states Temasek Group has violated the Business Competition Law of Indonesia. Furthermore, we examine the applicability of Business Competition Law extraterritorially in various countries, such as; US, EU, and some Asian countries, such as; South Korea, People Republic of China, Singapore and Thailand.

America was the first country to impose Antitrust Law extraterritorially. The applicability of the American Antitrust Law against overseas businesses generate different views of experts in American Antitrust Law. This is because the sentence in the Sherman act was considered too general, so some have argued that the real focus is domestic Antitrust Law. Others are found in the first sherman act is also intended for overseas activities.¹¹ Controversy regarding the enforceability of US Antitrust Law for acts committed abroad for the first time appeared in the case of the American Banana Co. V United Fruit Co. In 1909, the court dismissed the suit on the United Fruit Co., which is considered to influence the government of Costa Rica's banana plants seized from Defendant, thus inhibiting the plaintiff company to enter the banana market. In 1945, in the case of US v Aluminum Co. of America, the court held that US courts have jurisdiction to acts committed abroad, if the act was intended and has a significant impact on American trade.¹² US court ruling in the case of American Needle, Inc. v. National Football League in 2009. In this case the National Football League sued for violating the antitrust laws because the National Football League and Team is a unit of the entity on the grounds they have one interest and agreement they agreed like company.¹³ Further stated that because the team can only serve as a source of strength economy when collectively producing NFL football, they

also have the right to collectively licensing of intellectual property rights.¹⁴

Enforceability European Union Competition Law ekstraterritorialy based on Article 81 and 82 EC, it can be seen from the development of the doctrine of *keberlakuan 3 EC jurisdiction* against foreign companies established abroad are growing in law cases, as follows. *First*, in the case of *Imperial Chemical Industries Ltd v Commission* called *Dyestuffs Case Law (Case 48/69)*, the European Court of Justice (ECJ) stated that the separation of the legal personality of the subsidiary with the parent company does not eliminate the possibility of the parent company responsibility for the child's behavior company. *Second, the Implementation Doctrine*, developed in the case of *A. Ahlstrom OSAKEYHTIO and others v Commission* [1988] E.C.R 5193 called *Woodpulp Case Law*. According to this doctrine, the ECJ has authority to examine violations of Article 81 and 82 were carried out by foreign entrepreneurs who are abroad throughout the agreement, decision or the business practices implemented in the EC. *Third, the Effects Doctrine*, based on the notion that the jurisdiction of the EC applies to foreign entrepreneurs who are abroad that agreement or activities that do have disastrous economic effects felt by the EC.

Law which regulate governing the Competition in South Korea is Monopoly Regulation and Fair Trade Act (MRFTA) 1980 which was amended in 2004 and 2009. Article 2-2 states that MRFTA apply to the activities of foreign companies which resulted in the potential to lead, and anti-competitive impact of the Korean domestic market. Enforcement of Business Competition Law in extraterritorial Korea was first performed on March 20, 2002, where the Korean Fair Trade Commission (KFTC) sentenced force command additional duty of 11.242 Million Won to six Gra-

& Practice, 2012, Vol 1, Oxford: Oxford University Press, page 38-39.

¹¹ Harvard Law Review Association, "Foreign Party Suits and The US Antitrust Laws", *Harvard Law Review*, May, 2001, Cambridge MA: Harvard Law School, page 2-3

¹² John Byron Sandage, "Forum Non Conveniens and the Extraterritorial Application of United State Antitrust Law", *Yale Law Journal*, June 1985, Connecticut: Yale Law Journal company, page 2

¹³ Gabriel Feldman, "The Puzzling Persistence of the Single Entity Argument for Sport Leagues: American Needle and the Supreme Court's Opportunity to Reject A Flowed Defence", *Wisconsin Law Review*, 21 Desember 2009, Wisconsin: Wisconsin Law School, page 838

¹⁴ Stepen V. Bomse, "Threading the American Needle, Is There Still Room for a Unitary Action Doctrine in Antitrust Cases Involving Joint Ventures?", *The Competition Policy International Antitrust Journal*, 2010, Boston MA: Competition Policy International, page 5.

phite Electrode Company Manufacture originating from the US, Germans and Japanese for participating the Cartel of Graphite Electrodes.¹⁵

Peoples Republic of China's Anti-Monopoly Law (AML) in 2007, also arranged through the extraterritorial applicability of Article 2 of AML in 2007, which basically states that the Anti-Monopoly Law applies to actions outside the territory of China that took effect the loss or limitation of competition in the area of China.^{16,18}

Arrangements regarding extraterritorial in Singapore Competition Law stipulated in the Competition Act of 2004 Section 33 Subsection (1), in the article said that the Competition Act applies to the agreement, the parties to the agreement, the company abused its dominant position, merger, the parties to the merger and Other practices that are outside Singapore. This shows that the Competition Act of Singapore provides a setting that allows widely *Competition Commission of Singapore (CCS) or other regulatory authority* to enforce the law against foreign investors who enter into agreements, abuse of dominant position and mergers in violation of the Competition Act of 2004. Furthermore, a single economic entity with regard to anti-competitive agreement is that it can be used as a defense to remove the parent company and the parent company subsidiary or agent of Article 34 of the Competition Act.¹⁷

Thailand regulate business competition in the Trade Competition Act, 1999. Thailand's Competition Law is domestic-oriented since the beginning intended to be applicable to the practice of unfair competition made in Thailand or impact to the Thai market.

Although in general the Business Competition Law Thailand is domestically oriented, but

there is one article that there are elements of extraterritorial namely Section 28. Based on this Section 28 of regulate that consumers and end users must be given the opportunity to buy products and services directly from business actors outside the State Thailand.

ASEAN free market has been launched at the 13rd ASEAN Summit, in November 2007. Ahmad Bayhaqi, researchers of LPEM UI, expressly says that the realization of the ASEAN free market in 2015 will make a lot of domestic manufacturers suffer, because it is not ready to face competition with producers and businesses originating from ASEAN countries, especially Singapore.¹⁸ ASEAN free market in 2015, on the one hand will provide benefits to consumers considering many choices of goods and services and get low prices. Viewed from the side of the producers, especially large manufacturers, ASEAN single market will expand the market. But for small businesses if not prepared properly, so it will not be harmed by the presence of the single market. We also have to be prepared that businesses often meet and end up with a conspiracy. In a global economic perspective, this conspiracy include not only domestically, but also abroad.¹⁹

Seeing the consequences of the application of the above free market and its relation to the readiness of Business Competition Law, the perceived unfair and contradict with the aim of Competition Law who wish to maintain fairness,²⁰ if the Indonesian business people can be tried in other countries, while businessmen from these countries are not can be checked in Indonesia even though they violate the provisions of Law No. 5 of 1999. Therefore, it is important to change the Law No. 5 of 1999 and one of them

¹⁵ Sigong Law, P.C., General Description of Korean Competition Laws, available at website <http://www.korea-law.com/sub/information/boardView.asp?brdId=42&mode=view&brdId=>, accessed on 12th December 2013.

¹⁶ Philip Monaghan, Competing for Jurisdiction The Extraterritorial Application of Competition Law, available at website <http://www.asiancompetitionforum.org/docman/4th-annual-asean-competition-law-conference-2008>, last accessed 12 Desember 2013.

¹⁷ Kala Anandarajah, "Competition Law", *Singapore Academy of Law Annual Review*, 2012, Singapore: Academy Publishing, page, 174.

¹⁸ LPEM Fakultas Ekonomi UI, *Pasar bebas ASEAN 2015 sulit diterapkan*, Jakarta: Antara News, Thursday, 24th August 2006.

¹⁹ Florian Becker, "The Case of Export Cartel Exemptions: Between Competition and Protectionism", *Journal of Competition and Economic*, Vol 3, No. 1, March 2007, Oxford: Oxford University Press, page 98.

²⁰ Charles E. Mueller, "Antitrust Overview: Laissez Faire, Monopoly, And Global Income Inequality: Law, Economics, History, and Politics of Antitrust", *Antitrust Law & Economic Review*, 1997, Chicago: University of Chicago Law School, page 2-3.

by adding provisions on the extraterritorial applicability Indonesian Business Competition Law.

Closing

Summary

Regulation no. 5 of 1999 only requires that only businesses that perform activities in the Indonesian region that can be checked in Indonesia. Through jurisprudence by applying the teachings of a single business entity, then the Business Competition Supervisory Commission and Indonesian courts can examine and prosecute businesses residing and doing activities outside Indonesia.

Principles of Business Competition Law enforceability of a country extraterritorially has become a universal principle, it means adopted by almost all of Competition Law in various countries, both American, European Community, South Korea, China and includes ASEAN countries such as Singapore and Thailand. With immediate implementation of the Asean Single Market, it is important to immediately change Law No. 5 of 1999 about Prohibition of Monopolistic Practices and Unfair Competition by adding provisions on the extraterritorial applicability.

Suggestions

Law Amendment No 5 of 1999 is an urgency matter that should be done, where's one of that sunstasion about implement regulation of Indonesian business competition law is extraterritorially. A change should also be done in the Law No. 5 of 1999, as of the applicable procedural law, no direct evidence, and various provisions of other legislation that may cause our business operators are not able to compete.

Indonesian legal experts, especially business competition law also need to learn and understand the competition laws of other countries, especially from ASEAN countries, so that we can understand in the event of unfair competition conducted by entrepreneurs from the countries concerned.

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