

LEGAL ASPECTS OF BUSINESS COMPETITION IN RELATION TO THE MECHANISM OF PREVENTING BANKING INDUSTRY TENDER CONSULTATIONS IN INDONESIA

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Abstract

Everyone wants a decent life for himself and those around him, and the state has the responsibility to provide for the welfare of its people, as stated in the 1945 Constitution. This study aims to examine the role of banking institutions in the welfare of society and support national development in Indonesia. In the 1945 Constitution, Article 33 has stipulated that economic development must achieve social justice for all people through a welfare approach and market mechanisms. The concept of economic democracy emphasizes the importance of the prosperity of society as a whole, and the principle of welfare is also recognized in Pancasila and social welfare laws. However, despite having a strategic role in the welfare of the people and supporting national development, the banking industry in Indonesia is often involved in law violations such as corruption and collusion. These practices can hinder economic growth and equity at the national level. One example of a violation that often occurs is bid rigging in the banking industry, which harms the public interest and violates the principle of fair business competition. This research also highlights the importance of efforts to prevent and take action against these violating practices. These steps are important to ensure the continuity of fair business competition and to build public trust in the government and related institutions. In this context, this study presents an analysis of the efforts that have been made and recommendations for improving law enforcement and preventing corruption in the banking industry.

Keywords: *Banking institutions; tender conspiracy; business competition.*

Abstract

Everyone desires a decent life for themselves and those around them, and the state has a responsibility to ensure the welfare of its people, as stated in the 1945 Constitution. This research aims to examine the role of banking institutions in improving society's well-being and supporting national development in Indonesia. Article 33 of the 1945 Constitution establishes that economic development should achieve social justice for the entire Indonesian population through a welfare-based approach and market mechanisms. The concept of economic democracy emphasizes the importance of overall societal prosperity, and the principles of well-being are also recognized in Pancasila and social welfare laws. However, despite their strategic role in promoting people's welfare and supporting national development, the banking industry in Indonesia often becomes involved in legal violations such as corruption and collusion. These practices can hinder economic growth and equal distribution at the national level. One common violation is collusion in banking industry tenders, which harms public interests and violates the principles of fair competition. This research also highlights the importance of prevention and enforcement efforts against these violations. These measures are crucial to ensure sustainable and healthy business competition and to build public trust in the government and relevant institutions. In this context, the research presents an analysis of existing efforts and provides recommendations to enhance law enforcement and corruption prevention in the banking industry.

Keywords: *Banking institutions, tender collusion, business competition.*

A. INTRODUCTION

Basically competition in the business world is an absolute requirement (*condition not*) for the implementation of a market-oriented economy (*market economy*). The role of law in business competition is for the implementation of a healthy and fair competition (*fair competition*), while preventing the emergence of unhealthy competition (*unfair competition*), because unfair competition will only lead to the death of business competition which in turn will give birth to monopoly. In today's business world, there are actually many agreements and business activities that contain elements that are unfair to those who are economically or socially weaker under the pretext of maintaining fair business competition. However, it cannot be denied that behind the business practices there are various kinds of competition, for example: there is healthy and fair competition, there is unhealthy competition (*unfair competition*), there is even a destructive rivalry (*destructive competition*), such as predatory prices. Of course, anti-competitive behavior such as unfair and destructive business competition can result in economic inefficiency in the form of loss of welfare (*economic welfare*), even resulting in disruption of economic justice in society and the emergence of economic and social consequences that conflict with laws and regulations, order and public interest.¹

Conspiracy is a form of trade cooperation between business actors with the intention of controlling the relevant market for the interests of the conspiring business actors. Conspiracy is often called a conspiracy (conspiracy).²

Tender conspiracy comes from collaboration and terminology, namely conspiracy and tender. What is meant by a tender is an offer to submit the best price to buy or obtain goods and or services, or provide goods and or services, or carry out a job.³ Tender conspiracy (*bid rigging*) is the practice between tender bidders during the bidding process, to carry out work contracts of a general nature, and other projects offered by the government. Or in other words, the tender bidders have agreed to determine which company will receive a tender project at an agreed price as well. Even before the announcement of the tender winner and the contract price, the bidders had agreed on both the winner and the desired price.²

Establishment of Law No. 5 of 1999 concerning Monopolies and Unfair Business Competition is a strong foundation for creating an economy that is efficient and free from all kinds of distortions. Especially when the current economic crisis is the momentum to restructure the economy from an economic system with a monopoly-oligopoly and protective market structure towards a market-friendly economic system.⁴

Business competition allows the market to appreciate the good performance of business actors, while bad performance is subject to sanctions. Thus, business competition encourages the activities of business actors, allows new business actors to enter the market, and efficiency activities of business actors can be increased, this can result in increased productivity of capital and labor, reduce production costs, and improve the competitiveness of business actors. Business competition also guarantees cost savings that will be passed on to consumers (business competition results in lower overall prices, although in certain markets prices can also rise due to reallocation of resources to production in other markets), and consumers also benefit in terms of quantity, quality, and a greater variety of products.⁵

In the business world, competition must be seen as a positive thing. In the Theory of Economics perfect competition is an ideal market condition. There are at least four underlying assumptions for perfect competition to occur in a particular market. First, business actors cannot unilaterally determine the price of products or services. As for what determines the price is the market based on the equilibrium of supply and demand. Both goods and services produced by business actors have the freedom to enter or leave the market. *perfect homogeneity* "The three business actors have the freedom to enter or leave the market" *perfect mobility of resource* and Fourth consumers and market participants have perfect information about things. Even though in real life it is difficult to find a market based on a perfect competition mechanism, competition is considered as an essential thing in a market economy. Because in real situations what often happens is imperfect competition. Imperfect competition consists of monopolistic competition and oligopoly.⁶

For example, the practice of bid rigging in the process of procuring goods and services at one of the regional government-owned banks (BUMD). The conspiracy is based on personal closeness by the employer (*bowheer*) with bidders. At the time before the holding of the process of meeting between the employer and the bidders (*clue*), the employer abuses his authority (*undue influence*) by having determined one of the bidders as the winner, even though the administration and evaluation processes have not been carried out. Thus, these things often become an obstacle for a banking institution, especially state/regional owned enterprises (BUMN/D) to obtain quality goods/services that meet the needs of the company. Furthermore, this abuse of authority often results in the criminalization of company officials who are not

1 Nugroho, S.A. Business Competition Law in Indonesia. Jakarta: PT. Citra Aditya Bakti, 2015.

2 Kamal, M. Business Competition Law: (Theory and Practice in Indonesia). Jakarta: Rajawali Press, 2010.

3 Commission Psupervising Business Competition. "Draft Guidelines Concerning Prohibition of Tender Conspiracy Based on Law No. 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition." KPPU Journal 25, no. 5 (2004): 11.

4 Galuh Puspaningrum. Business Competition Law: Agreements and Activities Prohibited Under Indonesian Business Competition Law. Yogyakarta: Aswaja Pressindo, 2013, 45.

5 Margono, S. Anti-Monopoly Law. Jakarta: Sinar Graphics, 2009, 29.

6 Wibowo, D., & Sinaga, H. Law of Business Competition Procedures. Jakarta: Raja Grafindo Persada, 2005, 81.

involved in the tender conspiracy in standard operating procedures (SOP) officials/high-ranking officials of the company are responsible for implementing tenders in accordance with applicable legal provisions.

In the process, the Tender Offer Conspiracy uses several methods that can harm a fair competition process. First, there is the "Pressure on supply" method (*bid suppression*), in which one or more bidders agree not to compete or withdraw previously submitted bids. This aims to provide an opportunity for other bidders to win the auction without fair competition. Next, there is the "Complementary offers" method (*complementary bidding*), where several bidders make a deal to determine who will win the bid. The determined winner will disclose the planned price to the other bidders, so that they can bid at a higher price. Otherwise, the determined winner will order other bidders to submit bids at predetermined prices, so that bids from potential winners are lower than other competitors. This action creates the illusion of fair competition among the bidders, when in fact the winner has already been determined. The next method is "Bid Turning" or *Bid rotation*, in which one of the bidders agrees to return as the lower bidder. In this scenario, other bidders will compete with each other with increasingly higher bids before it is finally the bidder's turn to win the tender. As such, this method deceives bidders by making bids appear more competitive than they really are. Finally, there is the "Market Sharing" method (*Market division*), where tender offers are made by dividing the market into specific geographical areas or customers. Bidders plan ahead so that if there is a contract in a certain area, they already know a predetermined winner. With this market division, competition is actually eliminated and bidding is only done to fulfill formalities. These methods make Tender Offer Conspiracy a practice detrimental to fair competition. By using these techniques, the parties involved in the tender can manipulate the results of the auction according to their interests, while ignoring the principles of fair competition and harming other parties who should have a fair chance to win the tender.⁷

The impacts of the tender conspiracy include loss of fair business competition, high costs but low quality of goods, the market becomes closed (creating *entry barrier* for other potential business actors), the market becomes concentrated, which can lead to inefficiencies.⁸

As is known in Law Number 5 of 1999, to determine whether there are indications of violations of agreements and prohibited activities carried out by business actors in carrying out their business activities, using the approach *rule of reason*. Approach *rule of reason*, is used to accommodate actions that are in the gray area between legality and illegality. If actions that are in the gray area have a positive effect on competition, then there is a chance to be allowed. This approach seems to be a guarantee for business actors to freely take the business steps they want as long as those steps are reasonable.⁹ Besides that, other approaches that can also be used to indicate that there has been a violation of the provisions of Article 22, can also be used *itself illegal*. *Per se illegal* which means "unlawful from the start", therefore the act is an act that is "unlawful".¹⁰ In the context of law enforcement against the prohibition of collusion in tenders, the application of rules that are *itself illegal* intended to protect other business actors from acts that are clearly detrimental to competition. While implementation *rule of reason* requires the ability to prove a negative impact on society.

To oversee the implementation of Law Number 5 of 1999, the Business Competition Supervisory Commission (KPPU) was formed. The KPPU's duties include evaluating agreements and activities that may result in monopolistic practices and unfair business competition, taking actions in accordance with its authority, providing suggestions and considerations on government policies related to monopolistic practices and unfair business competition (Article 35).¹¹

The purpose of writing this article is to understand the consequences that may occur as a result of collusion in the process of procuring goods and services in the Indonesian banking sector and to identify and analyze preventive measures that can be taken to prevent collusion in the procurement of goods and services in the industry. Indonesian banking.

B. RESEARCH METHODS

Article This study uses a type of normative legal research, with a normative juridical research approach. The normative juridical research method is library law research which is carried out by researching and studying library materials and secondary data. The data obtained later analyzed using deductive logic through qualitative normative analysis methods. The analysis of legal materials was carried out using a systematic interpretation model.

C. DISCUSSION

The existence of law in the community is basically a means to be able to create peace and order in the community, so that in the relationship between fellow members of the community one with the other can take care of each other's interests.

7 Sutrisno, I. "The Philosophy Behind the Issuance of Law Number 5 of 1999." In Proceedings: Series of Limited Workshop on Bankruptcy Law and Other Business Law Wawman: Law Number 5 Year 1999 and KPPU, edited by Emmy Yuhassarie, 6. Jakarta: Center for Legal Studies and the Supreme Court. 1999

8 Pardede, S. "Business Competition Law: Implementation of Duties and Authorities of KPPU RI in Supervising the Activities of the Business Business World." KPPU's Dialogue Meeting with Business Actors, 2004

9 Siswanto, A. Business Competition Law. Jakarta: Ghalia Indonesia, 2004, 67.

10 Please, M. Yahya. Civil Procedure Code: An Introduction. Jakarta: Sinar Graphics, 2013, 155.

11 Sihombing, R. "Legal Protection of the Interests of Tender Participants in the Perspective of State Administrative Law." Journal of State Administrative Law 6, no. 1 (2018): 54-67.

One of the purposes and benefits of the law itself is none other than to present protection for human interests in the form of norms or methods. This is in line with the opinion of Sudikno Mertokusumo who states that law as a set of rules or methods contains content that is general and normative, general because it applies to everyone, and normative because it determines what can and cannot be done, as well as determining how to implement compliance on the method.

According to Sudikno Mertokusumo, that law aims to achieve order in society so that it is hoped that human interests will be protected to achieve its goals and is tasked with dividing rights and obligations between individuals in society, dividing authority and prioritizing solving legal problems and maintaining legal certainty.

The conclusion from the foregoing is that legal protection in the narrow sense is something that is given to legal subjects in the form of legal instruments, both preventive and repressive in nature, as well as in written and unwritten forms. In other words, legal protection can be interpreted as an illustration of the function of law, namely peace for all human interests in society so as to create harmony and balance in people's lives. Meanwhile, legal protection in a broad sense is not only given to all living things and all God's creations and is used together in the framework of a just and peaceful life. Quoting the opinion of Philipus M. Hadjon who divides the form of legal protection into 2 (two) forms, among others:

1. Preventive legal protection

This legal protection provides an opportunity for the people to submit objections (*inspraak*) to their opinions before a government decision gets a definitive form. Thus, this legal protection aims to prevent disputes from occurring and is of great significance for government actions based on freedom of action. And the existence of this preventive legal protection encourages the government to be careful in making decisions related to the *freies ermessen* principle, and the people can raise objections or be asked for their opinion regarding the planned decision.

2. Repressive legal protection

This repressive legal protection functions as a means of solving problems when the matter becomes a dispute.

The law plays an important role in ensuring healthy and fair business competition and preventing unfair competition which can lead to the emergence of monopoly. Business competition conducted in an unlawful manner can be seen from the way business actors compete with other business actors by violating the provisions of the applicable laws and regulations.

There are several ways that can be used to conspire in tenders, such as putting pressure on bids (*bid suppression*), in which one or more bidders agree to refrain from participating in competition or withdraw bids that have been previously submitted. In addition, there are also bidding strategies that complement each other (*complementary bidding*) where several bidders work together to determine who will win the bid. Bid Turnover or Tender Gathering (*Bid Rotation*) is a bidding pattern in which one of the bidders agrees to return as the lower bidder. Meanwhile, the market division strategy is a tender bidding pattern which consists of several ways to win tenders through market division.

Tender conspiracy has been identified as a practice that is detrimental to fair business competition. Several analyzes that are relevant in relation to this case include:

1. Violation of the Principles of Business Competition: Legal experts are of the opinion that bid rigging violates the principle of fair business competition, where bidders should compete fairly and transparently to win contracts. When there is collusion between bidders, it is detrimental to fair competition and reduces opportunities for other bidders to compete fairly.
2. Impact of Inefficient Spending: Collusive practices in tenders can result in inefficient spending as bid prices can be illegally influenced. When bidders work together to fix prices, this can result in unreasonable or exorbitant prices, which in turn hurt the government or the bidding entity, as well as society in general.
3. Restricting Access to Legitimate Competitors: Collusion in tenders can also prevent access for legitimate competitors to participate in tenders. When several bidders collude, they can arrange ways so that only they can win the tender, while other competitors are excluded or do not have the same opportunity to compete. This can be detrimental to fair competition and hinder the participation of potential competitors.
4. Detriment to Community Interests: Legal experts are also of the opinion that collusion in tenders can harm the interests of society in general. When there is collusion, public funds that should be used for better projects or services can be wasted or used inefficiently. This practice can also result in limited public access to better choices, as well as detrimental to fair competition in the market.

In conclusion, legal experts consider bid rigging as a practice that is detrimental to fair business competition, because it violates the principle of fair competition, can result in inefficient spending, limits access for legitimate competitors, and is detrimental to the interests of society in general. Therefore, firm legal action and prevention of collusion in the procurement of government goods or services is necessary to maintain integrity and transparency in the tender process and encourage healthy and fair competition in the market.

The legal aspect of business competition itself in the banking sector is very important in maintaining the sustainability of the banking industry in Indonesia. Healthy and fair competition between banking companies can encourage innovation and improve the quality of services provided to consumers. However, there is a possibility of bid rigging that could undermine fair competition in the banking industry.

As previously discussed as an effort to prevent bid rigging, the Indonesian government has issued several rules and regulations. One of these rules is Law no. 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition. This law prohibits business practices that harm business competition and cause harm to consumers. In addition to this law, the Indonesian government also has a Business Competition Supervisory Commission (KPPU) whose task is to monitor and take action against acts of unfair business competition, including tender conspiracy actions in the banking industry. KPPU has the authority to impose sanctions on companies that commit acts of unfair business competition, such as fines and orders to stop these practices.

However, even though there have been rules and regulations issued by the Indonesian government, there are still challenges in implementing the mechanism for preventing bid rigging in the banking industry. Some of these challenges include the lack of awareness and understanding of banking companies on the importance of fair business competition, as well as the lack of evidence and information that can be used to prove the existence of a tender conspiracy.

To overcome this challenge, the Indonesian government can increase outreach and education regarding the importance of fair business competition to banking companies. In addition, the government can also strengthen oversight and prosecution of tender conspiracy actions by increasing the capability and capacity of KPPU in gathering evidence and information related to acts of unfair business competition.

Overall, the legal aspect of business competition is important in maintaining healthy and fair competition in the banking industry in Indonesia. With the existence of an effective bid rigging prevention mechanism, it is hoped that the banking industry can develop properly and provide quality services to consumers.

D. CONCLUSION

Conspiracy in tenders is an act that is detrimental to competition, so that it can ignore the real objective of a tender, namely obtaining goods or services at the most favorable price and conditions. Collusion in tenders can result in loss of fair competition, high costs with low quality of goods or services, markets that become closed and concentrated causing inefficiency.

The law regarding business competition has become a topic that is increasingly being discussed after the enactment of Law no. 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition. The law also contains provisions regarding sanctions given in the event of a violation. There are three types of sanctions regulated in the law, namely administrative action sanctions, principal punishment, and additional punishment. The institution responsible for imposing sanctions on administrative actions is the Business Competition Supervisory Commission (KPPU), while the principal and additional penalties are administered by another institution, namely the judiciary.

BIBLIOGRAPHY

- [1]. Galuh Puspaningrum. *Business Competition Law: Agreements and Activities Prohibited Under Indonesian Business Competition Law*. Yogyakarta: Aswaja Pressindo, 2013, 45.
- [2]. Please, M. Yahya. *Civil Procedure Code: An Introduction*. Jakarta: Sinar Graphics, 2013, 155.
- [3]. Kamal, M. *Business Competition Law: (Theory and Practice in Indonesia)*. Jakarta: Rajawali Press, 2010.
- [4]. Commission for the Supervision of Business Competition. "Draft Guidelines Concerning Prohibition of Tender Conspiracy Based on Law No. 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition." *KPPU Journal* 25, no. 5 (2004): 11.
- [5]. Margono, S. *Anti-Monopoly Law*. Jakarta: Sinar Graphics, 2009, 29.
- [6]. Nugroho, S.A. *Business Competition Law in Indonesia*. Jakarta: PT. Citra Aditya Bakti, 2015.
- [7]. Pardede, S. "Business Competition Law: Implementation of Duties and Authorities of KPPU RI in Supervising the Activities of the Business Business World." *KPPU's Dialogue Meeting with Business Actors*, 2004.
- [8]. Sihombing, R. "Legal Protection of the Interests of Tender Participants in the Perspective of State Administrative Law." *Journal of State Administrative Law* 6, no. 1 (2018): 54-67.
- [9]. Siswanto, A. *Business Competition Law*. Jakarta: Ghalia Indonesia, 2004, 67.
- [10]. Sutrisno, I. "The Philosophy Behind the Issuance of Law Number 5 of 1999." In *Proceedings: Series Workshop Limited Bankruptcy Law and Other Business Law Wawman: Law Number 5 of 1999 and KPPU*, edited by Emmy Yuhassarie, 6. Jakarta: Center for Legal Studies and the Supreme Court, 1999.
- [11]. Wibowo, D., & Sinaga, H. *Law of Business Competition Procedures*. Jakarta: Raja Grafindo Persada, 2005, 81.