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CIRCUMSTANTIAL EVIDENCE AND UNFAIR BUSINESS COMPETITION PRACTICE: IS A LAW REFORM NECESSARY?

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Abstract
The use of circumstantial evidence in unfair business competition case investigations are regulated institutionally by the Commission for the Supervision of Business Competition. However, due to the absence of regulation as a basis of its use in the Commercial Court and the Supreme Court, this practice remains questionable. This article aims to analyse the issue regarding the use of circumstantial evidence in the Commercial Court and the Supreme Court in order to evaluate the urgency of a law reform to the existing competition law in Indonesia. This research, a socio-legal research method was conducted by collecting secondary data from several sources. Based on the research, it was found that there are several issues on the practice, including (1) the absence of a law regarding the use of circumstantial evidence may result in a legal certainty; (2) different views regarding the practice result in inconsistencies in law enforcement; (3) this practice contradicts the principle of the due process model which is adopted in Indonesia. A law that is constructed systematically is necessary to ensure the legal certainty of those who are trying to seek for justice, particularly related to the enforcement of competition law.
Keywords: Competition Law, Evidences Law Reform, Unfair Business Competition.

I. INTRODUCTION

Business competition holds a crucial position in the economy. The Organization for Economic Co-operation and Development (OECD) describes competition as:

> *"A situation in a market in which firms or sellers independently strive for the patronage of buyers in order to achieve a particular business objective, e.g. profits, sales and/or market share. Competition in this context is often equated with rivalry. Competitive rivalry between firms can occur when there are two firms or many firms. This rivalry may take place in terms of price, quality, service or combinations of these and other factors, which customers may value. Competition is viewed as an important process by which firms are forced to become efficient and offer greater choice of products and services at lower prices. It gives rise to increased consumer welfare and allocative efficiency. It includes the concept of "dynamic efficiency" by which firms engage in innovation and foster technological change and progress."*

The elements of a country's economy, including trade and industry, grow and develop in line with the movement of business competition. Business competition encourages reforms that might have not only good, but also bad impacts on the economy, hence the importance of business competition regulations. Law plays an important role in regulating social life in all its aspects: social, political, cultural life and economy (Fadhilah, 2019). With limited economic resources and unlimited

demand or need for economic resources, it is important for a law or regulation to exist in order to prevent conflicts between the people fighting over these economic resources. Law can prohibit these conflicts from occurring in the midst of society (Zaini, 2012).

Prior to the regulation on business competition, business and economic practices tended to be monopolistic and influenced by the relationship, either directly or indirectly, between decision makers and business actors. In order to achieve people's welfare, equal participation of the community in the economy, from production to distribution of goods and/or services in a healthy, efficient and effective business climate is very importan (Mantili et al., 2016). In this case, the existence of a competition law becomes crucial.

In Indonesia, Law Number 5 of 1999 Concerning Prohibition of Monopolistic Practices and Unfair Business Competition (hereinafter will be referred to as Law 5/1999) acts as a main reference and regulation regarding business competition. It was established to achieve several objectives: (1) to safeguard the interests of the public and to improve national economic efficiency as one of the efforts to improve the people's welfare; (2) to create a conducive business climate through the stipulation of fair business competition in order to ensure the certainty of equal business opportunities for large, middle- as well as small-scale business actors in Indonesia; (3) to prevent monopolistic practices and or unfair business competition that may be committed by business actors; and (4) the creation of effectiveness and efficiency in business activities.

In general, Law 5/1999 consists of 6 (six) regulatory sections including prohibited agreements, prohibited activities, dominant positions, the Commission for the Supervision of Business Competition (known as Komisi Pengawas Persaingan Usaha or KPPU in Indonesia), law enforcement and other related provisions. Law 5/1999 defines unfair business competition as competition among business actors in conducting activities for the production and or marketing of goods and or services in an unfair or unlawful or anti-competition manner. It also categorizes business activities that would be considered as unfair business practices. Law 5/1999 distinguishes three categories of restrictions: (1) restricted agreements, which are regulated in Article 4 to Article 16; (2) restricted conducts, which are regulated in Article 17 to Article 24; and (3) abuse of dominant position, which are regulated in Article 25 to Article 29 (Pasaribu, 2016).

As the main regulation regarding business competition, Law 5/1999 should be able to provide legal certainty for anybody, especially those who are directly involved on the matters regulated therein. In the events of dispute, Law 5/1999 regulates valid instruments of evidence that could be used in investigations by Commission for the Supervision of Business Competition. Said instruments include: (1) witness testimonies; (2) expert testimonies; (3) letters and or documents; (4) information; (5) statement by business actors.

However, Law 5/1999 does not provide a clear definition on what could be considered as a witness testimony, an expert testimony, letter and or document, information, or statement by business actors, neither in the main text nor the elucidation. Unfortunately, in practice, it is not quite rare for an investigation ending up being empty-handed due to the lack of solid proof that is in accordance with instruments of evidence regulated by Law 5/1999. It would be significantly easier for investigators to prove the acts of unfair business practice when written agreements by business actors are present, but that is barely ever the case. In committing unfair business practices, business actors tend to find loopholes and find ways to avoid being caught. Therefore, the Commission for the Supervision of Business Competition needs to explore other methods and one of them being the use of circumstantial evidence, which becomes a polemic.

Black's Law Dictionary defines circumstantial evidence as "Evidence based on inference and not on personal knowledge or observation" (Garner & Black, 2004). The use of circumstantial evidence is widely practiced not only in Indonesia, but also in other countries in the world. It is used by almost every country with a competition law. However, the procedure of circumstantial evidence use differs each country. For example, in Malaysia, circumstantial evidence cannot be used on its own and must be supported by evidence. Meanwhile, in Czech Republic, circumstantial evidence may be used as the only evidence in investigating a case (Antoni, 2014). Information that are used as circumstantial evidence in unfair business competition case investigations could be in the form of

hand-written notes, correspondence and emails among competitors, business notes or negotiation notes, witnesses, call logs, etc (Antoni, 2014).

In practice, investigators often use a combination of circumstantial evidence and direct evidence, or circumstantial evidence alone. It is very rare for investigators to use direct evidence alone to prove alleged unfair business practices, but the circumstantial evidence could be used to analyse the credibility of direct evidence. There are different views regarding the use of circumstantial evidence. On the one hand, the use of circumstantial evidence is considered important in order to maintain fair and healthy competition between business actors, but on the other hand it is considered invalid because of the limitation regarding evidences according to Law 5/1999. This creates a polemic regarding the use of circumstantial evidence.

Commission for the Supervision of Business Competition responded to this polemic by making Commission Regulation Number 1 Year 2019 regarding Guideline on Procedures for Case Handling (hereinafter will be referred to as Commission Regulation 1/2019). In the regulation, the Commission for the Supervision of Business Competition defines information as acts, incidents or circumstances, which due to their similarity, either with one another, or with agreements and/or activities prohibited and/or the abuse of dominant position pursuant to the provisions of the Law, indicate that an agreement and/or activity prohibited and/or the abuse of dominant position has taken place and who the perpetrator is. This information could be may be in the form of economic evidence and/or proof of communication the truth of which is believed by the Commission Panel. In specific, an economic evidence can be defined as the use of the arguments of the economics supported by quantitative and/or qualitative data analysis methods as well as expert analysis results, all of which aimed at strengthening the alleged monopolistic practice and/or unfair business competition, meanwhile the proof of communication can be defined as the utilization of data and/or documents indicating the existence of an exchange of information between the parties alleged to commit a monopolistic practice and/or unfair business competition.

A new problem arises when one unfair business competition case is transferred from the Commission for the Supervision of Business Competition to Commercial Court, which happens in the cases that one party files an objection to the decision of the commission. As an internal regulation, Commission Regulation 1/2019, including its provisions on information as circumstantial evidence, does not apply in any other institution, including the Commercial Court, nor could it be applied in the Supreme Court.

Despite its wide use on a practical level, the legality of circumstantial evidence' use for investigations by the Commission for the Supervision of Business Competition remains questionable. This is due to the absence of its regulation in the prevailing laws. This article aims to analyse the necessity of a law reform on this matter in hopes to answer the questions regarding the legality of the use of circumstantial evidence in unfair business practice cases in Indonesia.

II. RESEARCH METHOD

In this research, a socio-legal research method was conducted by collecting secondary data from several sources, such as relevant publications from various institutions (Commission for the Supervision of Business Competition, District Courts, Commercial Courts, the Supreme Court, etc.), previous researches on unfair business competition, generally applicable theories in business competition law in Indonesia and other countries, as well as other data which were analyzed using the qualitative research method. Besides, the authors reviewed related laws and regulations, especially ones that are related to business competition in general and unfair business competition in particular. From the data that has been collected and analyzed qualitatively, the authors tried to evaluate the validity of the use of circumstantial evidence in the examination conducted by the Commercial Court on objections to the Commission for the Supervision of Business Competition's Decision and the importance of a reform to the Law of the Republic of Indonesia Number 5 Year 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition in order to ensure legal certainty.

III. RESULTS AND DISCUSSION

1. Legal Certainty and Legal Positivism

Legal certainty is a widely known principle which was introduced by Gustav Radbruch in his book "*einführung in die rechtswissenschaften*". It is closely relevant to a wide range of legal matters as it acts as an indicator of the supremacy of law in a country, alongside with justice and utility (Ishaq, 2014). Legal certainty provides the protection for those seeking for justice and ensures order in society.

Legal certainty exists in a law that is created and arranged in a systematic manner (Suryaningsi, 2018). In other words, unless it is in a written form and made by the institution authorized to make it, a law cannot ensure certainty to anybody. It is important to keep in mind that judges, in their capacity to enforce the law, do not have the authority to create a binding law out of nothing at all (Suryaningsi, 2018). Ideally, judges can only determine and interpret regulations within the limits of their authority and not beyond it. It is also important to note that The 1945 State Constitution of the Republic of Indonesia, specifically in Article 28D ensures the right of a legal certainty. This also means that in the regions of law where a legal certainty is not ensured, and then a reform of law must be done in order to enforce the constitutional rights of the citizen.

There is a close relationship between legal certainty and legal positivism, where law in a positivistic point of view requires an order and certainty to make sure that the legal system runs properly and smoothly. This applies to the context of the problem being discussed in this article. The use of circumstantial evidence in unfair business competition cases being investigated in the Commercial Court or Supreme Court, while practiced widely, remains questionable. One can inquire on whether this practice could ensure legal certainty. In a positivistic point of view, it is clearly not the case. In that case, another question arises: regarding this matter, how urgent is a law reform?

2. The Necessity of a Law Reform Regarding the Use of Circumstantial Evidence in Indonesia's Competition Law

There are different views regarding the use of circumstantial evidence. On the one hand, the use of circumstantial evidence is considered important in order to maintain fair and healthy competition between business actors, but on the other hand it is considered invalid because of the limitation regarding evidences according to Law 5/1999. In 2010, a discussion on this matter was held in an examination of Commission for the Supervision of Business Competition's Decision Number 25/KPPU-I/2009 (Implementation of Fuel Surcharge in the Domestic Aviation Service Industry) held by the Postgraduate Program of Faculty of Law, University of Indonesia. In the decision, Commission for the Supervision of Business Competition accused 9 airlines of violating Article 5 of Law 5/1999, and convicted them to multiple sanctions including fines and a large value of compensation. These sanctions are considered by many to not only to interfere with the airlines' business development, but also to be harmful the national economy. Regarding the use of circumstantial evidence, Prof. Ningrum Natasya Sirait, Professor of the Faculty of Law, University of North Sumatra, stated that the evidence used by Commission for the Supervision of Business Competition as a basis in making its decision was very weak and could be considered unfair, and even unacceptable on an academic context. She believed that ideally, Commission for the Supervision of Business Competition should be referring to valid evidences in making the decision, but in this case, they merely used statistical methods using incomplete data and their own assumptions instead.

Although Commission for the Supervision of Business Competition has provided a clear position for circumstantial evidence, the existing polemic related to this matter has not been solved yet. This is due to the fact that Commission Regulation 1/2019 only applies within the scope of an institution, which is Commission for the Supervision of Business Competition, so the validity of its use on the cases when business actors file an objection to the Commission's decision to the Commercial Court and Supreme Court has yet to be addressed.

As a part of the Supreme Court, the Commercial Court refers to civil procedural law as regulated on *Herziene Inlandsch Reglement* (HIR). The HIR provides a clear limitation on instruments that could be used as evidence during investigations:

(1) documents;
(2) witnesses;
(3) presuppositions;

(4) confessions;
(5) oaths.

In examining business actors' objections to the Commission for the Supervision of Business Competition's decision, the commercial court judges are bound by the provisions of HIR, including provisions on evidence instruments. Therefore, Commission Regulation 1/2019 cannot be used as a legal basis for the use of circumstantial evidence in the examination of objections to the Commission for the Supervision of Business Competition's decision in unfair business competition cases in the Commercial Court. The same applies to the examination of these cases at the Supreme Court.

Business actors, as regulated in Article 44 of Law 5/1999 which has been amended through Law Number 11 of 2020 on Job Creation, have the right to appeal to the Commercial Court by no later than 14 (fourteen) days after receiving notification of the aforementioned decision. The absence of regulation at the level of national law regarding the use of circumstantial evidence can potentially cause a legal uncertainty, especially for business actors with the intention to make objections to the Commission for the Supervision of Business Competition's decision to the Commercial Court. The choice to make objections by business actors is pretty common in Indonesia. Based on the Commission for the Supervision of Business Competition's annual reports, throughout 2019, objection for 17 (seventeen) decisions were being examinated at District Courts and 5 (five) cases were being examinated in the cassation phase in the Supreme Court. Furthermore, in 2020, objection for 2 (two) decisions were being examinated at District Courts and 15 cases were being examinated in the cassation phase in the Supreme Court (Komisi Pengawas Persaingan Usaha, 2019). These numbers do not include completed examinations in District Courts or the Supreme Court.

Another problem with the use of circumstantial evidence in an examination of an objection to the decision of Commission for the Supervision of Business Competition, both in Commercial Court and Supreme Court is it tends to be inconsistent. This this is due to the pros and cons of the use of circumstantial evidence itself, which reflect through court decisions made by each judge. The contradicting point of view against the use of circumstantial evidence is reflected in the case in the Commission for the Supervision of Business Competition's Decision Number 024/KP-PU-I/2009 concerning Oil Cartel Case, at the District Court level through Decision Number 03/KPPU1/2010/PN.JKT.PST, which annulled the Commission for the Supervision of Business Competition's decision on the grounds that the circumstantial evidence used in the Steel Cartel and Paulo Airlines case could not be used as a source of law, since it was not based on Indonesian law (Huda, 2020). The Supreme Court upheld this decision through Decision Number 582.K/PDT.SUS/2011, since Law 5/1999 does not explicitly regulate the use of circumstantial evidence (Huda, 2020). Inconsistencies in law enforcement could also be considered as a violation of the right of equality before the law, as stipulated in the constitution.

The use of circumstantial evidence in the examination of unfair business competition cases in the Commercial Court and the Supreme Court also contradicts the principle of the due process model which is adopted in Indonesia (Sahabuddin, 2014). The essence of this principle is law enforcement that does not violate the provisions of another law. In other words, the due process model prohibits the enforcement of one law by violating the provisions of other laws, even though the reason is that the violation is necessary for a law to be enforced.

As long as there is no legal basis for the use of circumstantial evidence in Commercial Court or the Supreme Court, there will be no legal certainty for business actors or any citizen who seeks for justice, especially in the cases relating to unfair business competition. Based on that, the author considers that there is urgency for a law which regulates the use of circumstantial evidence and therefore, a law reform is necessary.

IV. CONCLUSION

Based on the discussion, some conclusions can be made: (1) In Indonesia, Evidence for unfair business competition cases is regulated in several laws and regulations, including Law Number 5 of 1999 Concerning Prohibition of Monopolistic Practices and Unfair Business Competition (Law 5/1999) and Commission Regulation Number 1 Year 2019 regarding Guideline on Procedures for Case Handling (Commission Regulation 1/2019). Commission Regulation 1/2019 provides a further

explanation on what types of "information" can be considered as evidence, which includes economic evidences and communication evidences.

However, Commission Regulation 1/2019 only applies in the scope of an institution, which is the Commission for the Supervision of Business Competition itself. Therefore, it is not applicable for examinations of objection to Commission for the Supervision of Business Competition's decision on unfair business competition cases in Commercial Court and Supreme Court. This research shows that there is an urgency of a reform to the competition law in Indonesia. This is a necessary step not only in ensuring the legal certainty for those seeking for justice regarding unfair business competition cases, but also ensuring a competitive business climate in Indonesia.

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