

JOB CREATION LAW: WHAT'S THE NEXT CHANGE IN INDONESIAN BUSINESS COMPETITION LAW?

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Abstract

Law Number 11 of 2020 concerning Job Creation amended 79 laws, including Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition. Far from being comprehensive, the Job Creation Law amended the law enforcement system regarding the business competition that had been in place for over twenty years. With a normative method, this research aims to discuss the legal implications of the effectuation of the Job Creation Law regarding the enforcement of the law concerning business competition. This research reveals that Law 11/2020 could lead to a better legal certainty and adequacy of law enforcement concerning business competition in Indonesia in the time to come.

Keywords: omnibus law, enforcement of the law, business competition, legal certainty, adequacy.

Introduction

On 20 October 2019, President Joko Widodo, popularly known as President Jokowi, in his inauguration speech for his second term of office, declared 5 (five) work priorities,¹ One of which is simplifying bureaucratic procedures and investment in job creation. This program

¹ State *Secretariat* of the *Republic* of Indonesia, "Pidato Masa Awal Jabatan Presiden Joko Widodo sebagai Presiden Republik Indonesia Masa Jabatan 2019-2024", (30 Oct 2019), <https://www.presidentri.go.id/transkrip/pidato-masa-awal-jabatan-presiden-joko-widodo-sebagai-presiden-republik-indonesia-masa-jabatan-2019-2024/>, accessed 18 April 2021.

may consider the adoption of Law concerning Job Creation and Law concerning Empowerment of Micro-Small-Medium Enterprises, each of which is regulated under omnibus law that revises several laws simultaneously.²

The academic draft and the bill on job creation were submitted to the House of Representatives on 12 February 2020,³ It was passed into Law in the 7th Plenary Session of the House of Representatives in the first sitting period of 2020-2021 on 5 October 2020.⁴ The Government passed and stipulated this bill as Law Number 11 of 2020 concerning Job Creation.⁵ ("UU 11/2020") on 2 November 2020.

Law 11/2020 comprises several provisions of 79 laws into 11 clusters, one of which deals with the imposition of sanctions.⁶ Those were adjusted to present conditions where the imposition of administrative law has been ineffective and seems incapable of stimulating government administrative improvement. On the other hand, imprisonment has not been an effective approach since it only makes jails more overloaded with inmates following the violation of administrative law. Law 11/2020 implements administrative measures as sanctions and civil procedure over criminal procedure and sanctions.⁷ The shift in this approach also applied to sanctions as referred to in Law Number 5/1999.⁸

² Louis Massicotte, "Omnibus Bills in Theory and Practice", *Canadian Parliamentary Review* vol. 36, no. 1 (2013), pp. 13-17.

³ **Kementerian Koordinator Bidang Perekonomian Republik Indonesia**, "Pemerintah Resmi Ajukan RUU Cipta Kerja ke DPR", (12 Feb 2020), <https://www.ekon.go.id/info-sektoral/15/2/berita-pemerintah-resmi-ajukan-ruu-cipta-kerja-ke-dpr>, accessed 18 April 2021.

⁴ Dewan Perwakilan Rakyat Republik Indonesia, "Paripurna DPR Sahkan RUU Cipta Kerja menjadi UU", (5 Oct 2020), <https://www.dpr.go.id/berita/detail/id/30332/t/Paripurna+DPR+Sahkan+RUU+Cipta+Kerja+menjadi+UU> accessed 18 April 2021.

⁵ Law of the Republic of Indonesia Number 11 of 2020 on Job Creation (State Gazette of the Republic of Indonesia of 2020 Number 245, Addendum to State Gazette of the Republic of Indonesia Number 6573)

⁶ **Kementerian Koordinator Bidang Perekonomian Republik Indonesia**, "Naskah Akademik RUU tentang Cipta Kerja", (20 Nov 2020), <https://uu-ciptakerja.go.id/naskah-akademis-ruu-tentang-cipta-kerja/>, p.127-131, accessed 18 April 2021.

⁷ Ibid, p. 121.

⁸ Law Number 5 the Year 1999 Concerning the Prohibition of Monopolistic Practices and Unfair Business Competition (State Gazette of the Republic of

This paper is intended to discuss the impacts of the effectuation of Law 11/2020 on the enforcement of business competition law based on a normative method.⁹ and the study of the secondary materials obtained from statutory, conceptual,¹⁰ And comparative approaches.¹¹

Significance of Amendments to Law 5/1999

Overall, Law 5/1999 works accordingly. Based on the data published online on Business Competition Supervisory Commission (henceforth KPPU)¹² Website, since its first case from 2000¹³ by 2019, KPPU has delivered judgments for 351 cases.¹⁴ Several reported parties went to courts for appeal. The data issued by KPPU indicates there had been 205 decisions challenged in the District Courts up to 2020.¹⁵ Of the total decisions challenged, 60% of the decisions were reinforced by the District Courts.¹⁶

From the data, almost the majority of the decisions were challenged at the highest instance of court. Up to 2020, there had been 204 decisions of the District Courts challenged at the highest instance of court.¹⁷ Of this figure, 51% of the Supreme Court decisions strengthened the decisions passed by KPPU, and 21% were canceled, and the rest is still at the highest instance.¹⁸ As seen by the KPPU, these

Indonesia of 1999 Number 33, Addendum to State Gazette of the Republic of Indonesia Number 3817) henceforth “UU 5/1999”.

⁹ Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat*, (Jakarta: PT Raja Grafindo Persada, 2003), p. 13.

¹⁰ Amiruddin and H. Zainal Asikin, *Pengantar Metode Penelitian Hukum* (Jakarta: PT Raja Grafindo Persada, 2006), p. 118.

¹¹ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana Prenada Media Group, 2005), p. 93-95

¹² Komisi Pengawas Persaingan Usaha, “Daftar Putusan KPPU” <http://putusan.kppu.go.id/simper/menu/>, accessed 18 April 2021

¹³ Komisi Pengawas Persaingan Usaha, *Putusan Nomor 01/KPPU-L/2000* on 20 April 2001 perihal Persekongkolan Tender di PT Caltex Pasific Indonesia.

¹⁴ Harry Agustanto, “Hukum dan Kebijakan Persaingan Usaha Indonesia akan di bawa ke Mana?”, in *Dua Dekade Penegakan Hukum Persaingan: Perdebatan dan Isu yang Belum terselesaikan*, eds by Kodrat Wibowo and Chandra Setiawan (Jakarta: Komisi Pengawas Persaingan Usaha, 2021), pp. 7-8.

¹⁵ *Ibid*

¹⁶ *Ibid*

¹⁷ *Ibid*

¹⁸ *Ibid*

figures indicate improvements/evidentiary measures in dealing with cases over monopolistic practices/ unfair business competition.¹⁹

However, it is a long way to go since some norms, and their implementation still needs amending for the effectiveness of Law 5/1999. Most entrepreneurs believe Law 5/1999 interrupts business investment since its implementation seems unfair, does not provide legal certainty, and are fewer pro-entrepreneurs.²⁰

Some practitioners also believe that several norms outlined in Law 5/1999 were loose without any firm theoretical principles.²¹ For example, the illegal *per se rule* approach for several articles is deemed inappropriate because it is irrelevant to the practices going on in some other countries.²² On the other hand, Law 5/1999 strictly bans practices like exclusive dealing, dominant position, and cross-ownership. In contrast, those practices are banned under the *rule of reason* in several countries since business practices performed by dominant actors do not always trigger adverse effects in competition.

Several articles in Law 5/1999 are found impractical. For example, law 5/1999 authorized the KPPU as a state representative to enforce public law and ensure public order²³ to impose compensation as a sanction in the civil matter, but its imposition has not been in place at all.

Furthermore, evidentiary standards have been the attention of several practitioners. In general, most practitioners believe that KPPU adopted the concept of indirect evidence commonly used by most countries, but this concept is not governed by Law 5/1999. They argue that the involvement of indirect evidence in business competition cases is required, but the OECD implies that this concept is applicable in

¹⁹ *Ibid*

²⁰ Farid Nasution, “*Quo Vadis 20 Tahun Hukum Persaingan Usaha*” in *Dua Dekade Penegakan Hukum Persaingan: Perdebatan dan Isu yang Belum terselesaikan*, eds by Kodrat Wibowo and Chandra Setiawan (Jakarta: Komisi Pengawas Persaingan Usaha, 2021), p. 43.

²¹ *Ibid*

²² *Ibid*, p. 45

²³ For other critical views, see., *Ibid*. p. 46-50

cartel-related cases.²⁴ Although the court strengthens this position,²⁵ some practitioners still go against the application of indirect evidence in dominant position cases not related to cartels.²⁶

As elaborated by Constitutional Court, KPPU in state administration in Indonesia serves as a state auxiliary organ in connection to President.²⁷ However, this position is still seen with disdain since the KPPU is believed to have multi-functionality, but simultaneously, it is also seen as common.²⁸ KPPU plays a role in passing judgment and as an enquirer. With this role, the KPPU needs to be strictly governed to avert any abuse of authority.²⁹

The author argues that the prohibition of some business practices, as referred to in Law 5/1999, to some extent, is not congruent with best practices applied in some countries. For example, territorial cartels, production cartels, or conspiracy of tenders, under the scope of best practices in most countries, are prohibited under *per se rule*, while Law 5/1999 prohibits those activities under the *rule of reason*. That is, Law 5/1999 is more tolerant or lenient since this principle seems to suggest that the cartel is not prohibited, recalling that it does not have any negative effects on competition.

Practically, KPPU implements the categories of prohibition in a flexible way because the rule-of-reason standard is used in some cases.³⁰

²⁴ Organization For Economic Co-Operation and Development, "Prosecuting Cartels without Direct Evidence of Agreement: Policy Roundtables, 2006", <https://www.oecd.org/daf/competition/prosecutionandlawenforcement/37391162.pdf> accessed 10 May 2021.

²⁵ See., the decision over cross-ownership (Group Temasek). In this case, KPPU implemented indirect evidence regarding which decision is reinforced at cassation appeal and judicial review

²⁶ Farid Nasution, *op.cit.* p. 50

²⁷ It can be simply understood that KPPU is a state institution that serves as a state auxiliary organ whose existence is aimed to assist the underlying tasks of the state. KPPU is responsible to the President. This responsibility to the President also indicates that the functionality of the KPPU as a state auxiliary organ also represents part of the primary state institution in executive scope." See. Constitutional Court, Decision Number 85/PUU-XIV/2016 on 18 September 2017, p. 192.

²⁸ Other institutions like OJK and Bappebti are also authorized to deliver decisions other than other functions as regulators, investigators, and enquirers.

²⁹ Farid Nasution, *op.cit.* p. 53.

³⁰ Article 15 paragraph (2) of Law 5/1999 bans exclusive dealing *per se rule*. However, in several decisions, KPPU enforces the standard of the rule of reason. See Business Competition Supervisory Commission, Decision Number 06/KPPU-

This practice, the author opines, is acceptable since this tends to escalate the prohibition and not to reduce it, meaning that it adequately underlies the consideration, ensuring that enterprising activities that are under review pose negative impacts to competition or consumers.

In terms of compensation taken as a sanction, prior to the effectuation of Law 5/1999, the authority to impose compensation as a sanction was only held by a court. According to Law 5/1999, the KPPU is authorized to impose some sanctions, including compensation.³¹ As in many countries, they are imposing compensation can be varied, where imposition can be given by a court or following a lawsuit filed by the person concerned according to the decision of KPPU, or commonly known as “*follow-on case*” or “*stand-alone case*”.

In the system of “*follow-on case*”, the decision passed by the KPPU must hold permanent legal force, and with this decision, the parties concerned could file a lawsuit for compensation to court. However, the lawsuit for compensation could also be done following a *stand-alone case*. In this case, the parties concerned could file a lawsuit to court for compensation without having to go through the KPPU (private enforcement). In the second approach, petitioners have to prove two matters regarding the violation of provisions concerning business competition and the losses caused by the businesses run by the defendants before the court.³² It is, however, implausible to take a *stand-alone* lawsuit for compensation since all allegations of material violations must be submitted to KPPU, and the lawsuit filed by the applicants is also through the KPPU.³³

L/2004 on 2 March 2005 concerning Program Geser Kompetitor Betray ABC. Decision Number 5/KPPU-I/2014 on 11 November 2014 concerning Rekanan Asuransi untuk Debitur KPR PT Bank Rakyat Indonesia (Persero), Tbk., *Decision* Nomor 31/KPPU-I/2019 on 25 February 2021 concerning Pelumas Sepeda Motor Honda. Also, Article 27 UU 5/1999 strictly bans *cross-ownership*, but in its practice, the KPPU Decision enforces the standard *rule of reason*, although Article 27 of Law 5/1999 does not include the clause *rule of reason*. See. Komisi Pengawas Persaingan Usaha, *Putusan*, Nomor 7/KPPU-L/2007 on 19 November 2007 concerning Monopolistic Practices and Cross Ownership of Temasek Group.

³¹ Article 47 paragraph (2) letter f.

³² About compensation in business competition, see., <https://www.internationalcompetitionnetwork.org>, ICN., Development of Private Enforcement of Competition Law in ICN Jurisdiction, Cartel Working Group 2019, accessed 5 July 2021

³³ Article 38 paragraph (1) and paragraph (2)

Some questions are raised regarding where a change may lead to. If a change has to take place, will it refer to “*follow-on case*” or “*stand-alone case*” at courts or “*follow-on*” case at KPPU like what is currently in place? The author sees this quandary as simply a matter of the choice of mechanism, and none is superior to another. One principle that should underlie the change, if there is any: a comprehensive study on the mechanism of the distribution of compensation in case of the condition where a lawsuit in a class action on behalf of consumers. This mechanism has not been established in either civil code or business competition law.

The author agrees that there should be amendments to Law 5/1999 since several provisions regarding this matter are still debatable. Unlike in countries with their common law, all that change will not reach its finale with mere courts. Indonesia has its civil law, meaning that Law Number 5/1999 is changeable through amendments.

Amendments to Law 5/1999

1. Amendments

Petition for amendments to Law 5/1999 has been listed in National Legislation since 2017.³⁴ To respond to the need for these amendments as elaborated above, Law 5/1999 needs adjusting to the challenge brought by modern transactions in the digital economic market and global trades. Digital transactions are fast-moving and transboundary. A concept like “relevant market” has to be reviewed, and crossed border transactions probably need addition or clarification. The digital economic era requires KPPU as a law enforcer to re-formulate the analysis standard and the standard of proof currently used.³⁵ Unfortunately, the proposal of the amendments to Law 5/1999 had to

³⁴ Dewan Perwakilan Rakyat Indonesia, “Program Legislasi Nasional Prioritas: Prolegnas 2015-2019”, <https://www.dpr.go.id/uu/prolegnas> accessed 18 April 2021.

³⁵ Some suggestions for amendments, see, inter alia, Asosiasi Pengusaha Indonesia, “Policy Brief Amandemen UU No. 5/1999”, <https://apindo.or.id/id/press/read/policy-brief-amandemen-uu-no-51999> accessed 10 May 2021. Also see MG Noviarizal Fernandez, “Hipmi Minta Amandemen UU Persaingan Usaha”, <https://ekonomi.bisnis.com/read/20151029/12/486877/hipmi-minta-amandemen-uu-persaingan-usaha>, accessed on 10 May 2021; Leo, “Banyak Kalangan Desak agar UU No. 5/1999 Segera Direvisi”, <https://www.hukumonline.com/berita/baca/hol9813/banyak-kalangan-desakagar-uu-no51999-segera-direvisi/#kirim-tanggapan> accessed 10 May 2021.

be omitted from the national legislation 2020, leading to unclear agenda of the amendments.³⁶

2. Amendments to Law 5/1999 according to Law 11/2020

Since the promulgation, the substantive matter of Law 5/1999 has not experienced any significant change, and the definition of “other parties” is the only amendment in Article 22, 23, and 24 of Law 55/1999 under Supreme Court Decision Number 85/PUU-XIV/2016.³⁷ In the Decision, the Constitutional Court interprets the term “other parties” as business persons. This Decision required KPPU to change the Guideline of Article 22 of Law 5/1999.³⁸

It is necessary to differentiate between tender in goods/services procurement and tender in non-government sectors or private companies. The author views that, in terms of the tender in government projects, the tender committee is not categorized as “other parties” since its members involve civil servants, not those as business persons *in casu* as the tender participants. From the data published online on the KPPU website, the tender conspiracy in government projects often involves both horizontal and vertical aspects, and it seemingly suggests that the information from the tender committee deserves attention. However, since it is not categorized as “other parties” as intended in Constitutional Court Decision, it is, then, more appropriate if the tender committee responsible for the government projects should be positioned as “also reported” not as “reported party”. In such a conspiracy involving horizontal and vertical dimensions in the procurement of goods and services in a non-government scope but purely performed by business persons including state-owned enterprises (BUMN), the tender committee can be positioned as a ‘reported’ along with other tender participants since such a position is usually taken by the business persons performing the tender.

³⁶ Haryanti Puspa Sari, “16 RUU Resmi Ditarik dari Prolegnas Prioritas, Salah Satunya RUU PKS”, <https://nasional.kompas.com/read/2020/07/02/15540101/16-ruu-resmi-ditarik-dari-prolegnas-prioritas-salah-satunya-ruu-pks?page=all>, accessed 18 April 2021

³⁷ Constitutional Court *Decision* Nomor 85/PUU-XIV/2016 on 18 September 2017.

³⁸ Regulation of the Commission for the Supervision of Business Competition of the Republic of Indonesia Number 2 of 2010 concerning Guideline of Article 22 of the Law Number 5 of 1999 on Prohibition of Conspiracy in *Tender*.

Following the Constitutional Court Decision, another amendment to Law 5/1999 also took place, as mentioned in Law 11/2020. Although no substantive aspect was changed, let alone the legal system as highlighted by Friedman,³⁹ this amendment surely affects the enforcement of competition law in the future.

a. Amendments to Absolute Judicial Authority

Law Number 11/2020 has amended the provision concerning the authority to review the Decisions of KPPU. This amendment was set forth in Article 118, in which 5 (five) articles in Law 5/1999, including Article 44, 45, 47, 48, and Article 49, were amended. The phrase “District Court” in Article 44 paragraph (2) was altered to “Commercial Court”. This change also altered the absolute authority to review from the District Court to Commercial Court.⁴⁰

This phrase alteration to “Commercial Court” also applies to the phrase “District Court” as mentioned in Article 45 paragraph (1), paragraph (2), and paragraph (3) of Law 5/1999, but it does not amend the provision of Article 46 of Law 5/1999.

Since no amendment was given to Article 46 of Law 5/1999, the KPPU Decision holding permanent legal force and not appealed against is put forward for execution to a District Court in the area of domicile of the reported business person that is sanctioned according to the Decision of KPPU. No specific details on the grounds for review are delegated because, in the academic draft, the bill does not have any *ratio legis* of the transition of right to review from the district courts to commercial courts.

This shift of authority to review from the district courts to commercial courts is deemed appropriate since, in terms of the

³⁹ Lawrence M. Friedman, *The Legal System; A Social Science Perspective* (New York: Russel Sage Foundation, 1975), p. 12

⁴⁰ Supreme Court issued provisions regarding the transition of authority to adjudicate based on Circular Letter of Supreme Court (SEMA) 1/2021 on 2 February 2021 stating: 1) District Courts must no longer receive any appeals against the decisions of KPPU starting from 2 February 2021; 2) District Courts receiving appeals against KPPU decisions before 2 February 2021, must proceed with the appeal and trial of the cases; 3) commercial courts, as authorized by law, are required to receive, investigate, and try cases of appeals against the decisions of KPPU from 2 February 2021; 4) unless stated otherwise in Law 11/2020, the procedure of receiving appeals against the decision of KPPU by commercial courts is performed according to Supreme Court Regulation 3/2019 and guidelines.

substantive aspect, business competition-related issues are laden with analyses, economic, and business considerations. When this is the case, commercial courts have their expertise over district courts. This power delegation to commercial courts is also in line with the best practices in most countries where business or commercial-related cases are tried in special or commercial courts.⁴¹

This transfer of power to Commercial Courts is also expected to put back the trust of the society in courts and to build people's understanding that economic and business cases must be tried by the judges highly qualified in expertise in commercial-related matters and business competition.

In terms of the management of the resources in KPPU, this transfer of authority to review appeals to commercial courts is deemed better and effective, for it is restricted to only 5 (five) commercial courts compared to when it was dealt with by the district courts whose number could even reach hundreds. In Germany, for example, an appeal against a court decision of competition authority called *Bundeskartellamt*.⁴² Could only be proposed to one institution called *Oberlandesgericht* (High Court) in Düsseldorf.⁴³ This procedure is considered easier in terms of the aspect of management of human resources capacity.

However, the shortcomings of such a transition may be related to *access to justice*. Those reported for this case will probably have to spend a large amount of money to get their cases at a commercial court settled, while the courts are only available in five cities, including Central Jakarta, Semarang, Surabaya, Makassar, and Medan. For people running big businesses, this shift of authority should present no significant obstacle for those concerned to appeal because they can afford to settle the cases at courts located far from their domicile, but it does not apply to those with small businesses since this authority shift also means that

⁴¹ European Commission Directorate-General for Competition, "Study On Judges' Training Needs In The Field Of European Competition Law" *Final Report*, Publications Office of the European Union, Luxembourg, 2016

⁴² See. https://www.bundeskartellamt.de/EN/AboutUs/aboutus_node.html accessed on 20 April 2021.

⁴³ German Act Against Competition, Article 63(2). See also https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Merkblaetter/ICN_Anti_Cartel_Enforcement_Template_Germany.pdf?blob=publicationFile&v=5 accessed on 20 April 2021.

they have to spend more effort and money to come to another city or province where the court is available.

This issue emerges simply because Law 11/2020 does not mention any definition of “commercial court”, and this situation has made the commercial court refer to special and general courts as governed in the provision of Article 27 paragraph (1) of Law 48/2009 concerning Judicial Power (“Law 48/2009”).

Commercial Court was first established following Government Regulations in Lieu of Law Number 1 of 1998 concerning Amendments to Law concerning Bankruptcy.⁴⁴ (henceforth Perpu 1/1988). Article 281 paragraph (1) and paragraph (2) Perpu 1/1988 implies that a commercial court was first founded in the District Court of Central Jakarta and the other four commercial courts in the District Court of Ujung Pandang, Medan, Surabaya, and Semarang followed under Presidential Decree of Indonesia Number 97 of 1999⁴⁵ in line with the growth of the need and human resources.

That is, this authority transition was followed by the growing number of commercial courts at least in every provincial capital city, and this is a long-term development recalling that the growing number of the courts also require infrastructure development, including recruitment and a large number of judges to be assigned to the courts and trained. Access to e-litigation can be another option. This is the most plausible solution following the first availability of e-litigation for civil, religious, and state administrative cases at the first instance and appeals all across Indonesia.⁴⁶

In terms of the transfer of authority, Law 11/2020 does not govern this transition. Thus, to ensure that this case handling works as expected, the Head of Supreme Court issued a Circular Letter Number

⁴⁴ Government Regulations in Lieu of Law Number 1 of 1998 concerning Amendments to Law concerning Bankruptcy (State Gazette of the Republic of Indonesia Number 87, Addendum to State Gazette of the Republic of Indonesia Number 3761).

⁴⁵ Presidential Decree of the Republic of Indonesia Number 97 of 1999 concerning Establishment of Commercial Courts in District Courts of Ujung Pandang, Medan, Surabaya, and Semarang (State Gazette of the Republic of Indonesia of 1999 Number 142)

⁴⁶ The Supreme Court of the Republic of Indonesia, Regulation Number 1 of 2019 concerning Administration of Cases and Trials at Courts Electronically (Official Gazette of the Republic of Indonesia of 2019 Number 894).

1 of 2021 concerning Transfer of Authority to review Appeals against Business Competition Supervisory Commission to Commercial Courts.⁴⁷ (“SEMA 1/2021”) stipulating the administrative and trial schemes and transition to Commercial Courts. The principles of the policy are elaborated in the following:

1. District Courts must no longer receive appeals against KPPU decisions starting from 2 February 2021;
2. District Courts with appeals against the KPPU decisions received before 2 February 2021 still have to judge the cases of appeals;
3. Commercial Courts are authorized by law to receive, review, and judge cases of appeals against the decisions of KPPU starting from 2 February 2021;
4. The procedures of receiving appeals against KPPU decisions by Commercial Courts are conducted according to Supreme Court Regulation 3/2019 and its guidelines unless stated otherwise in Law 11/2020.

b. Shifting Period in processing Appeals and Cassation Appeals

Law 11/2020 revoked the provision of Article 45 paragraph (2) of Law 5/1999 governing the 30-day period a court could spend to settle appeals against KPPU decisions. Law 11/2020 also revoked the provision of article 45 paragraph (4) of Law 5/1999 regulating the 30-day period for a Supreme court to process appeals at the highest instance concerning appeals against KPPU decisions. Practitioners deem this thirty-day period to settle an economic-related case too short.⁴⁸

The author sees the shift from a 30-day to 1 (one) year period⁴⁹ as an improvement because it allows judges of both commercial courts and Supreme Court at the highest instance to deliver more thorough scrutiny of the case files. These lengthier proceedings are expected to result in better and more comprehensive court decisions.

⁴⁷ SEMA 1/2021, *loc. Cit.*

⁴⁸ M Dani Pratama Huzaini, “ICLA: Durasi Penanganan Keberatan Putusan KPPU di Pengadilan Negeri Terlalu Cepat”, Hukum Online (4 Sept 2017). <https://www.hukumonline.com/berita/baca/lt59ad419cdc0b5/icla--durasi-penanganan-keberatan-putusan-kppu-di-pengadilan-negeri-terlalu-cepat/>, accessed 25 April 2021

⁴⁹ Article 19 paragraph (3), Government Regulation Number 44 of 2021 concerning Ban on Monopolistic Practices and Unfair Business Competition

On the other hand, this shift could slow down the process at court when it is not responded to accordingly by the court apparatus. “*Justice delayed is justice denied.*”⁵⁰ Is one of the universal principles followed by all courts worldwide. This principle is also implied in Article 2 paragraph (4) of Law 48/2009 elaborating that justice is carried out in its simple, fast, and affordable way, and this principle underlie the restrictions given by the Supreme Court to settle a dispute no longer than five months at the first instance and no longer than three months at the second and highest instance.⁵¹

Apart from the norm stipulated in law 11/2020, Article 19 paragraph (3) of Government Regulation 44/2021 not only govern the length of time to settle a case for not more than 12 days, but this regulation also sets 3 (three) months as the earliest.⁵²

The maximum time needed to settle a dispute is deemed acceptable, but not the earliest one, for three month-period seems implausible, giving an understanding that courts could prolong the cases they deal with, which is not congruent with ‘fast’ as one of the principles to settle a dispute at court.⁵³ The provision in Article 19 paragraph (3) emphasizes that this three-month period is not time-saving since judges cannot delve into the case of appeal filed by a business person before it reaches three months. This matter is hardly justifiable from the perspective of best practices or the theories supporting this period setting.

c. Omission of Minimum Fine

The amount of fine imposed as an administrative sentence by KPPU ranges from IDR. 1,000,000,000 to IDR. 25,000,000,000, as authorized by Article 47 paragraph (2) letter g of Law 5/1999. Law 11/2020 revoked the maximum limit of fine down to the least amount of IDR. 1,000,000,000 (one billion Rupiahs) fine.⁵⁴

⁵⁰ For further information on the adage “justice delayed is justice denied”, read Alessandro Melcarne, *et.al.*, “Is Justice Delayed Justice Denied? An Empirical Approach”, *International Review of Law and Economics*, Vol. 65, March, 2021.

⁵¹ Circular Letter of Supreme Court Number 2 of 2014 concerning Dispute Settlement at Courts of First Instance and Appeal at four Courts.

⁵² Government Regulation 44/2021, *op.cit.*, Article 19 paragraph (3).

⁵³ Law 48/2009, *op.cit.*, Article 2 paragraph (4).

⁵⁴ Law 11/2020, *op.cit.* Article 118 point 3.

Previously, the provisions of Law 5/1999 set the IDR 25,000,000,000 as the highest amount of fine to be imposed by the KPPU.⁵⁵ This revocation gives authority to the KPPU to impose a fine equal to the impacts arising from the violation committed by giant businesses. In Europe, for example, European Commission imposed a fine on Google as much as IDR 73 trillion in 2018.⁵⁶ The highest fine in history was also imposed by the Federal Trade Commission on Facebook for as much as IDR 70 trillion.⁵⁷

All these huge amounts of fines are considered relevant, as they could deter those irresponsible business persons following the violation of Law 5/1999. To set the fine in a more measurable scheme, the Government Regulation 44/2021 also sets some guidelines, suggesting that fine should be imposed based on the following measures:

- a. The fine should be equal to the violations or losses arising from them committed by business persons;
- b. The fine should not cease the business activities but should be able to stop similar violations or other kinds. With the sustainability of the enterprises, economic activities are expected to keep running and contributing economic benefits to society through job vacancies, the availability of goods and services, and economic growth;
- c. The fine should be supported by detailed and concrete measures according to valid and measurable data.⁵⁸

Imposition of fine should also follow the following provisions:

- a. The highest fine should not exceed 50% of the total profits gained by businesses in relevant markets for as long as the violation of Law remains effective;⁵⁹ or

⁵⁵ Article 47 paragraph (2) letter g, UU 5/1999, *op.cit.*

⁵⁶ European Commission, "Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine", https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581 accessed on 28 April 2021

⁵⁷ Federal Trade Commission, "FTC Imposes \$5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook", <https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions> accessed on 28 April 2021.

⁵⁸ Government Regulation 44/2021, *op.cit.*, Elaboration of Article 5 paragraph (1).

⁵⁹ *Ibid.* Elaboration of Article 12 paragraph (1). "in terms of net profits set as a standard of calculation obtained from a violation of law, it is necessary that the

- b. The highest fine should not exceed 10% of the total sales of products in relevant markets for as long as the violation of law remains effective.⁶⁰

The impositions in point a or b are optional and cases are submitted to KPPU.⁶¹ What is important to be highlighted is the amount of fine imposed based on:⁶²

- a. Negative impacts arising from violations;
- b. Duration a violation remains;
- c. Alleviating factors;
- d. Aggravating factors; and/or
- e. Business person's capability to pay.

From the perspective of legal certainty, the provision of Article 12 paragraph (1) of Government Regulation 44/2021 is deemed positive since it will not impose any fine exceeding 50% of net profits or 10% of the total sales. To ensure that this standard is well implemented, straight guidelines of the reference of the two options above are required to set the range between 00% and 50% of profits or 00% and 10% of total sales.

d. Omission of Criminal Sanctions

Article 48 and 49 of Law 5/1999 governs primary and additional sanctions for violations of material provisions. These provisions, however, were revoked by Law 11/2020, with the consideration that investors will not be left in doubt to start their businesses in Indonesia. Criminal sanctions, not only regulated in Law Number 5/1999, were

Commission pay attention to the facts regarding the activities conducted by business people, the conditions of relevant markets, and the period of the violation. The net profits are obtained by the business persons after deducted by tax and levies, and they also constitute fixed costs directly linked to related business activities complying with Legislation.

⁶⁰ *Ibid*, “in terms of the sale values set as a standard of calculation regarding a violation of law, the Commission is required to pay attention to the facts regarding the activities conducted by business persons, the conditions of related markets, and the time period of the violation. The sale values are set based on the values before tax or levies directly related to the sales of goods/services in related markets.”

⁶¹ *Ibid*, “principally, these two are optional, and their case by case implementation is under the responsibility of the Commission.

⁶² *Ibid*, Article 14

revoked from several laws, replaced by fines as administrative measures and civil sanctions.⁶³

The revocation of Article 48 and 49 of Law 5/1999 principally clarifies the cluster of Law 5/1999 as not categorized into criminal law. The omission of criminal sanctions imposed on the violations of material provisions has put the enforcement of Law 5/1999 in a proportional and effective state because it does not have to take unnecessary *in casu* articles of criminal sanctions that are impractical to enforce.

For twenty years, none of the business persons violating Law 5/1999 has been given criminal sanctions according to Article 48 and 49 of Law 5/1999. As a party with legal standing to report cases to enquirers, KPPU never delegated any cases to the hands of the enquirers regarding the violations of Law Number 5/1999.⁶⁴

In other words, the imposition of administrative measures has been proven effective to reduce monopolistic practices. The author shares the same thought about the omission of criminal sanctions, either the primary or additional ones over the violations of material provisions of Law 5/1999 since these sanctions are deemed not operational. In addition to its public aspect, other aspects such as economics, business, civil aspect, and administration are dominant over the criminal aspect, and, thus, criminal sanctions imposed on the violations of material provisions are considered unreasonable.

The amendments as in Law 11/2020 regarding criminal sanctions are also deemed proportional since they tend to keep and even to aggravate the criminal sanctions for uncooperative business persons who tend to obstruct justice at KPPU, in which they often refuse to be investigated and to give information, impeding the investigation process.

Article 48 paragraph (3) of Law 5/1999 is amended into: "A violation of the Provision in Article 41 of Law is subject to the

⁶³ Kementerian Koordinator Bidang Perekonomian Republik Indonesia, "Naskah Akademik..." *op.cit.*, p. 216

⁶⁴ Article 44 paragraph (4) of Law 5/1999. This article principally delegates authority to KPPU to leave their decisions in the hand of enquirers if business persons reported fail to comply with the decision over the violations of material provisions for more than 30 days since the decision holds permanent legal force.

imposition of fine as much as IDR. 5,000,000,000 (five billion Rupiahs) or jail sentence up to one year to replace fine.”⁶⁵

The author believes that lawmaker policy is just right to be implemented to underpin the effectiveness of enquiries and investigation into violations. The enforcement of the law concerning business competition according to Law 5/1999 indicates some shortcomings, in which the KPPU is not shielded with authority to seize written statements or documents as evidence at the venue where the business is operating (dawn raid). Unlike OJK and Finance Ministry, for example, KPPU does not have its own enquirers as intended in Criminal Code Procedure.⁶⁶ Without any supports of criminal sanctions imposed on uncooperative parties, investigation and enquiries at KPPU will not be optimally and effectively performed.

Conclusion

Generally, amendments to law 5/1999 into Law 11/2020 give positive effects to the enforcement of the law concerning business competition in the time to come due to several reasons. Firstly, the amendments set certainty in the enforcement of sanctions imposed on violations. Unless violators are cooperative with enquiries and investigation, business persons proven to have violated the material provisions of Law 5/1999 will not end up with criminal sanctions. With these amendments, entrepreneurs are expected not to doubt to set their businesses in Indonesia. Secondly, these amendments are also expected to provide legal certainty and promote transparency especially in the imposition of the administrative measure or fine. Although the maximum amount of fine is omitted, this amount must not exceed 50% of profits or 19% of the total sales as long as a violation remains. Thirdly, these amendments also promote more adequate law enforcement since the review of appeals against the KPPU decisions

⁶⁵ Article 48 paragraph (3) of Law 5/1999 asserted: “violations of the provision of Article 41 of law are subject to the minimum fine of IDR 1,000,000,000 (one billion rupiahs) and the maximum fine of 5,000,000,000 (five billion rupiahs), or a jail sentence to replace the fine of up to 3 (three) months.

⁶⁶ Article 1 point 1 of Law of the Republic of Indonesia Number 8 of 1981 on the Code of Criminal Procedure states: “An enquirer is a police of the Republic of Indonesia or an official as a civil servant of particular field authorized by the Law to conduct an enquiry”

are in the hands of the judges of commercial courts who are deemed to have expertise in economics and business. The revocation of a 30-day period of review by commercial courts also allows more time for judges to delve into the case files more thoroughly. However, it should take the whole aspects of legal substance, legal structure, the continuous measures of advocacy taken by stakeholders to change cultural aspects and mindset (legal culture) that are protective and collusive to fairer competition to embody the legal purposes of business competition.

References

Book

- Amiruddin and H. Zainal Asikin, *Pengantar Metode Penelitian Hukum* (Jakarta: PT Raja Grafindo Persada, 2006).
- Farid Nasution, “*Quo Vadis 20 Tahun Hukum Persaingan Usaha*” in *Dua Dekade Penegakan Hukum Persaingan: Perdebatan dan Isu yang Belum Terselesaikan*, eds by Kodrat Wibowo and Chandra Setiawan (Jakarta: Komisi Pengawas Persaingan Usaha, 2021).
- Harry Agustanto, “Hukum dan Kebijakan Persaingan Usaha Indonesia akan di bawa ke Mana?”, in *Dua Dekade Penegakan Hukum Persaingan: Perdebatan dan Isu yang Belum Terselesaikan*, eds by Kodrat Wibowo and Chandra Setiawan (Jakarta: Komisi Pengawas Persaingan Usaha, 2021)
- Lawrence M. Friedman, *The Legal System; A Social Science Perspective* (New York: Russel Sage Foundation, 1975)
- Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana Prenada Media Group, 2005).
- Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat*, (Jakarta: PT Raja Grafindo Persada, 2003).

Journal

- Alessandro Melcarne, *et.al.*, “Is Justice Delayed Justice Denied? An Empirical Approach”, *International Review of Law and Economics*, Vol. 65, March, 2021.
- Louis Massicotte, “Omnibus Bills in Theory and Practice”, *Canadian Parliamentary Review* vol. 36, no. 1 (2013)

Report

- European Commission Directorate-General for Competition, “Study On Judges’ Training Needs In The Field Of European

Competition Law” *Final Report*, Publications Office of the European Union, Luxembourg, 2016

World Wide Web

Asosiasi Pengusaha Indonesia, “Policy Brief Amandemen UU No. 5/1999”, [https:// apindo.or.id/id/press/read/policy-brief-amandemen-uu-no-51999](https://apindo.or.id/id/press/read/policy-brief-amandemen-uu-no-51999) accessed on 10 May 2021.

Dewan Perwakilan Rakyat Indonesia, “Program Legislasi Nasional Prioritas: Prolegnas 2015-2019”, <https://www.dpr.go.id/uu/prolegnas> accessed on 18 April 2021.

Dewan Perwakilan Rakyat Republik Indonesia, “Paripurna DPR Sahkan RUU Cipta Kerja menjadi UU”, <https://www.dpr.go.id/berita/detail/id/30332/t/Paripurna+DPR+Sahkan+RUU+ Cipta+Kerja+menjadi+UU> accessed on 18 April 2021.

European Commission, “Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine”, https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581 accessed on 28 April 2021

Federal Trade Commission, “FTC Imposes \$5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook”, <https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions> accessed on 28 April 2021.

Haryanti Puspa Sari, 16 RUU Resmi Ditarik dari Prolegnas Prioritas, Salah Satunya RUU PKS”, <https://nasional.kompas.com/read/2020/07/02/15540101/16-ruu-resmi-ditarik-dari-prolegnas-prioritas-salah-satunya-ruu-pks?page=all>. Accessed on 18 April 2021

[https://www.bundeskartellamt.de/ SharedDocs/ Publikation/ EN/ Merkblaetter/ ICN Anti Cartel Enforcement Template Germany.pdf?blob=publicationFile&v=5](https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Merkblaetter/ICN_Anti_Cartel_Enforcement_Template_Germany.pdf?blob=publicationFile&v=5) accessed on 20 April 2021.

<https://www.internationalcompetitionnetwork.org/>, ICN., Development of Private Enforcement of Competition Law In ICN Jurisdiction, Cartel Working Group 2019, accessed on 5 July 2021

- Kementerian Koordinator Bidang Perekonomian Republik Indonesia, "Pemerintah Resmi Ajukan RUU Cipta Kerja ke DPR", <https://www.ekon.go.id/info-sektoral/15/2/berita-pemerintah-resmi-ajukan-ruu-cipta-kerja-ke-dpr> accessed on 18 April 2021.
- Kementerian Koordinator Bidang Perekonomian Republik Indonesia, "Naskah Akademik RUU tentang Cipta Kerja", p.127-131, <https://uu-ciptakerja.go.id/naskah-akademis-ruu-tentang-cipta-kerja/> accessed on 18 April 2021.
- Komisi Pengawas Persaingan Usaha, "Daftar Putusan KPPU" <http://putusan.kppu.go.id/simper/menu/> accessed on 18 April 2021
- Leo, "Banyak Kalangan Desak agar UU No. 5/1999 Segera Direvisi", <https://www.hukumonline.com/berita/baca/hol9813/banyak-kalangan-desakagar-uu-no51999-segera-direvisi/#kirimtanggapan> accessed on 10 May 2021.
- M Dani Pratama Huzaini, "ICLA: Durasi Penanganan Keberatan Putusan KPPU di Pengadilan Negeri Terlalu Cepat", Hukum Online, <https://www.hukumonline.com/berita/baca/lt59ad419cdc0b5/icla--durasi-penanganan-keberatan-putusan-kppu-di-pengadilan-negeri-terlalu-cepat/> accessed on 25 April 2021
- MG Noviarizal Fernandez, "Hipmi Minta Amandemen UU Persaingan Usaha", <https://ekonomi.bisnis.com/read/20151029/12/486877/hipmi-minta-amandemen-uu-persaingan-usaha>, accessed on 10 May 2021
- Organisation For Economic Co-Operation And Development, "Prosecuting Cartels without Direct Evidence of Agreement: Policy Roundtables, 2006", <https://www.oecd.org/daf/competition/prosecutionandlawenforcement/37391162.pdf> accessed on 10 May 2021
- State Secretariat of the Republic of Indonesia, "Pidato Masa Awal Jabatan Presiden Joko Widodo sebagai Presiden Republik Indonesia Masa Jabatan 2019-2024", <https://www.presidenri.go.id/transkrip/pidato-masa-awal-jabatan-presiden-joko-widodo-sebagai-presiden-republik-indonesia-masa-jabatan-2019-2024/> accessed on 18 April 2021.

Legal Products

International Law

The 10th amendment to the German Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen – "GWB")

National Law

Law of the Republic of Indonesia Number 48 of 2009 on Judicial Power

Law of the Republic of Indonesia Number 8 of 1981 on the Code of Criminal Procedure

Law of the Republic of Indonesia Number 11 of 2020 on Job Creation

Law of the Republic of Indonesia Number 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition

Government Regulations in Lieu of Law Number 1 of 1998 concerning Amendments to Law concerning Bankruptcy

Government Regulation Number 44 of 2021 concerning Ban on Monopolistic Practices and Unfair Business Competition

Presidential Decree of the Republic of Indonesia Number 97 of 1999 concerning Establishment of Commercial Courts in District Courts of Ujung Pandang, Medan, Surabaya, and Semarang (State Gazette of the Republic of Indonesia of 1999 Number 142)

Regulation of the Supreme Court of the Republic of Indonesia Number 1 of 2019 concerning Administration of Cases and Trials at Courts Electronically, (Official Gazette of the Republic of Indonesia of 2019 Number 894).

Circular Letter of the Chief Justice of the Supreme Court of the Republic of Indonesia Number 1 of 2021 on Transfer of Objection Examination on Decision of Indonesia Competition Commission.

Circular Letter of Supreme Court Number 2 of 2014 concerning Dispute Settlement at Courts of First Instance and Appeal at four Courts.

Regulation of the Commission for the Supervision of Business Competition of the Republic of Indonesia Number 2 of 2010 concerning Guideline of Article 22 of the Law Number 5 of 1999 on Prohibition of Conspiracy in Tender.

Court Decisions

Constitutional Court Decision Number 85/PUU-XIV/2016 on 18 September 2017

Decision of the Business Competition Supervisory Commission Number 5/KPPU-I/2014 on 11 November 2014 concerning Rekanan Asuransi Untuk Debitur KPR PT Bank Rakyat Indonesia (Persero), Tbk.

Decision of the Business Competition Supervisory Commission Number 31/KPPU-I/2019 on 25 February 2021 concerning Pelumas Sepeda Motor Honda.

Decision of the Business Competition Supervisory Commission Number 7/KPPU-L/2007 concerning Monopolistic Practices and Cross Ownership of Temasek Group.

Decision of the Business Competition Supervisory Commission Number 06/KPPU-L/2004 concerning Program Geser Kompetitor Betray ABC on 2 March 2005.

Decision of the Business Competition Supervisory Commission Number 01/KPPU-L/2000 concerning Conspiracy of Tender in PT Caltex Pacific Indonesia on 20 April 2001.