

CHAPTER I

INTRODUCTION

1.1. Background

In the era of globalization of the 20th Century, Indonesia's economic status has been viewed by other countries in the world as one of the country in Asia with a highly prospectful economical status. This is due to the capability of Indonesia having a market potential which is large and demanding for business actors around the world. Looking at Indonesia's 1945 Constitution, Article 33 explained that the national economy is managed through the principle of sencerity, where the important aspects of production of Indonesia is in the hands of the country, and the national economy is to be carried out based on economic democracy with the principles of togetherness, efficient fairness, environmental, independence and the principle of maintaining stability for the developement and unity of the economy.

The competitive atmosphere is an absolute thing for developing countries such as Indonesia in its process to pursue an efficient economy. This is shown through how business actors in the market are competing each other to gain consumers and to sell products and/or services based on the price decided for the consumers. However, even though the climate developement of market competition is in its drastic changing stage, it could be seen that the climate of

business competition both inside and outside of Indonesia has not been in accordance to the principle of a healthy business competition.¹

Generally, people will carry out business practices for the purpose to gain benefits of profit to pursue a well-being lifestyle and for the sake to fulfill everyday needs by being a business man. This will eventually cause a business competition amongst other business actors. Therefore, it is a common thing for business competition to happen in the market, where business competition is a *conditio sine qua non* (absolute requirement) in an economical market of a country.²

With the condition of economic development caused by business actors, there will be an effect of industrialization in a country. This industrialization happens when there is a competitive market filled with business competitors as stakeholders competing with each other to gain more consumers, through the process of an efficient production development, and the adding of new kinds of products to a business' product portfolio to provide a wider range of product differentiation.³

Even though competition in the market grows by nature, regulations are needed to regulate and control the *status quo* of an economy, because a nation's economy must be supported by a system that will act as a tool of prevention towards unfair/unhealthy economic practices. The prohibition of monopoly and unfair business practices in general is much needed to ensure a country's

Susanti Adi Nugroho, *Pengaturan Hukum Persaingan Usaha di Indonesia*. (Jakarta:2001), page.1

² *Ibid.*, page.2

³ Thee kian wie, "aspek-aspek ekonomi yang perlu diperhatikan dalam impleentasi UU no.5 tahun 1999", Volume.7, (Jakarta: 2001), page.60

economic status without any obstacles, and to support the realistic condition of business actors in carrying out business practices with positive values and impacts. An unfair business competition, generally will cause:

1. Decrease in the rate of competitiveness of a market
2. The presence of monopolistic practice and dominant power of only certain business actors
3. Potential of consumer exploitation through the price arrangement of product and/ or services⁴

Therefore, the role of rules and regulations is crucial, where it holds the power to regulate business competition in a country. Naturally, the presence of business competition law has a purpose to optimize a positive and negative business competition, and also to empower business actors to be efficient in competing with other business actors. The existence of business competition law is important and strategic to create a healthy competitive atmosphere. In Indonesia, Law Number 5 Year 1999 regarding Prohibition of Monopolistic Practice and Unfair Business Competition is a lawful source which regulates substance regarding antimonopolistic regulations and unfair business competition that is relevant to each other.⁵

Law Number 5 Year 1999 regarding prohibition of Monopolistic Practice and Unfair Business Competition acts as an important instrument to empower the creation of efficient economy and an atmosphere of business chances for all

⁴ Hikmahanto Juwana, “ Sekilas tentang Hukum Persaingan dan UU no.5 tahun 1999, Jurnal Magister Hukum Tahun 1999, page.32

⁵ Susanti Adi Nugroho, Pengaturan Hukum Persaingan Usaha di Indonesia. (Jakarta:2001), page.4

business actors, where Law Number 5 Year 1999 is much needed to be upheld in order to pursue the concept of Law as a Tool to Encourage Economic Efficiency.⁶ The purpose and meaning of Law Number 5 Year 1999 to protect the climate and business chances of business actors could be seen in Article 3 of Law Number 5 Year 1999, where it is stated that:⁷

1. To maintain the public importance and to increase the efficiency of a nation's economy as one of the ways to increase the well-fare of the society
2. To create a conducive business climate through a healthy regulated business competition, which will ensure the certainty and business opportunities for all big business actors, medium size business actors and small business actors
3. To prevent a monopolistic practice and/or unfair business competition caused by business actors.
4. To create an effective and efficiency in business practices.

Looking at the purpose and meaning of Article 3, this article has a purpose which is multi-objective, where it shows that the law of business competition is to create efficiency in the market economy for the purpose of increasing the welfare of the society, to prevent the act of monopolistic practice, to regulate a healthy and free business competition, and also to provide a penalties and sanctions for prohibitions.⁸

⁶ Susanti Adi Nugroho, *Pengaturan Hukum Persaingan Usaha di Indonesia*. (Jakarta:2001), page.2

⁷ *Ibid.*, page.4

⁸ *Ibid.*, page.5

In accordance to the purpose, Law Number 5 Year 1999 regarding Prohibition of Monopolistic Practice and Unfair Business Competition holds a hope in ensuring an ideal economic system for Indonesia, that contains guided friendly market, where this system embraces the freedom and openness for the market to be under control by the government as the market supervisor. If Indonesia has an economic system that is stable and has a conducive business competitive business climate, Indonesia will be viewed as a country that is capable to be invested in, where investors will invest their capital in Indonesia. When a country's economical development increases, the needs of the society will be fulfilled, thus it will reach a peaceful society or *adagium*.⁹

In order to fulfill the purpose of Law Number 5 Year 1999, law enforcers, and supervisors are needed from an institution. This institution is called KPPU (*Komisi Pengawas Persaingan Usaha*). In Article 30 of Law Number 5 Year 1999, it is stated that the KPPU (Commission of Business Competition) is formed to supervise the enforcement of the business competition law. KPPU acts an independent institution that is separated from the influence of authoritative power of the government and other parties.¹⁰ Carrying forward to Article 34 verse 1¹¹, Law Number 5 Year 1999 also stated that KPPU acts as the formed organization that has the obligation and function given by the decision of the President.

In the context of business competition, it was regulated through President Decision Number 80 Year 2008, that the formation and existence of KPPU is to

⁹ Rachmadi Usman, *Hukum Persaingan Usaha di Indonesia*, (Jakarta:Gramedia Pustaka 2004), page.32-33

¹⁰ Article 30 of Law Number 5 Year 1999 regarding Prohibition on Monopolistic Practice and Unfair Business Competition

¹¹ *Ibid.*

solve business competition disputes based on Law Number 5 Year 1999, which should be done in a fast, efficient and effective manner based on the principles and purposes.¹²

The KPPU has the right to supervise and enforce business competition law, where this institution moves in the sector of preliminary investigation, investigation stage, prosecution stage, and trial stage. It acts as an important law enforcer to solve business competition disputes which has a multifunction role, where the authority of it covers the executive, judicative, legislative and consultative branch of law. To carry out its functions, KPPU has an overlapping role, where its existence could act as an investigator, prosecutor, decision maker and a consultant. However, this does not prohibit the authority of other institutions such as the police.

The prosecutor and the court system generally have the right to supervise, and enforce the law in the area of business competition. KPPU will enforce the prohibition of competition law in the first place, then it will coordinate with the investigator from the police department to be processed onwards to the court. This will happen when business actors are not satisfied and is not willing to accept the decision made by the KPPU.¹³ A specialized institution in the field of business competition is needed to prevent the overstacking of cases in the court, and also to have a controlling system of business competition cases which needed

¹² Rachmadi Usman, *Hukum Persaingan Usaha di Indonesia*, (Jakarta:Gramedia Pustaka 2004), page.46

¹³ *Ibid.*, page.46

specialized people who are expertise in the field of business and to protect the market mechanism in the context of business competition.¹⁴

Regarding the substance of Law Number 5 Year 1999, according to Article 1 verse 6, it is stated that unfair business competition is a competition between business actors who carries out production and / or the distribution of good and/ or services in a unfair and dishonest manner / not in accordance to the law/ causes unfair business conditions.¹⁵ Law Number 5 Year 1999 categorizes several prohibition of business competition into prohibitions originated by contract. Contract itself, according to *Kamus Besar Bahasa Indonesia* is an agreement that is written or verbal, which is made by two or more parties, where each parties agreed to abide and fulfill the content of the agreement.¹⁶ On the other hand, according to Article 1 verse 7 of Law Number 5 Year 1999, agreement is an act of one or more business actors to tie themselves to one or more business actors either through writing or non-writing form.¹⁷ A prohibited agreement that will cause unfair business competition is to be categorized as follow:¹⁸

1. Oligopoly (Article 4 of Law Number 5 Year 1999)
2. Price Fixing (Article 5 of Law Number 5 Year 1999)
3. Market Division (Article 9 of Law Number 5 Year 1999)
4. Boycott (Article 10 of Law Number 5 Year 1999)
5. Cartel (Article 11 of Law Number 5 Year 1999)

¹⁴ *Ibid.*, page.45

¹⁵ Hermansyah. Pokok-Pokok Hukum Persaingan Usaha di Indonesia, (Jakarta:2008), page.4

¹⁶ Kamus Besar Bahasa Indonesia, < <http://kbbi.web.id/perjanjian>> accessed on: 12 April 2017

¹⁷ Article 30 of Law Number 5 Year 1999 regarding Prohibition on Monopolistic Practice and Unfair Business Competition

¹⁸ Hermansyah. Pokok-Pokok Hukum Persaingan Usaha di Indonesia, (Jakarta:2008), page.28-38

6. Trust (Article 12 of Law Number 5 Year 1999)
7. Oligopsoni (Article 13 of Law Number 5 Year 1999)
8. Vertical Intergration (Article 14 of Law Number 5 Year 1999)
9. Agreement with Foreign Parties (Article 16 of Law Number 5 Year 1999)

According to Law Number 5 Year 1999, the law subject in an agreement, which is the business actors is:

“Every person or a legal entity, either in a form of a legal entity or non-legal entity, which is formed and is located in the jurisdiction of Republic of Indonesia, where it acts as solely as one or with another business actors through an agreement carries out business activities in the field of economy.” Relating to an agreement, A subject of law according to Article 1 Verse 5 could be a person or legal entity or non-legal entity both privately own or state owned.”¹⁹

One concrete example of a prohibited agreement by Law Number 5 Year 1999 is price fixing between business actors. Price fixing itself is to be defined as a combination formed for the purpose of and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity.²⁰ In Law Number 5 Year 1999, price fixing is one of the prohibited agreement according to Article 5, which states that business actors are prohibited to make an agreement with other business actors to fix the price for a product/ or services that is to be paid by consumers in the same relevant market.²¹

The analysis on the practice of price fixing which is in the scope of unfair business competition will be based on a case rendered by the KPPU Case

¹⁹ Susanti Adi Nugroho, *Pengaturan Hukum Persaingan Usaha di Indonesia*. (Jakarta:2001), page.113

²⁰ Black Law Dictionary, www.thelawdictionary.org/price-fixing/, accessed on: 5 April 2017

²¹ Article 5 of Law Number 5 Year 1999 regarding Prohibition on Monopolistic Practice and Unfair Business Competition

Number: 04/KPPU-I/2016. This is a case that involves two of the biggest vehicle player in the market share of vehicle industry throughout Indonesia. The case opted by KPPU itself as the prosecutor and two defendant, namely YMI (Yamaha Motor Indonesia) as the Defendant I, and AHM (Astra Honda Motor) as Defendant II.

Initially, there was a suspicion by the KPPU towards defendant I and defendant II regarding the formulating action of price fixing, as a form of cartel. The action between Yamaha Motor Indonesia and Astra Honda Motor is a form of prohibited agreement, which is a prohibition in accordance to Article 5 of Law Number 5 Year 1999, which states that:²²

“Entrepreneurs are prohibited from making any contract with other business competitors in order to fix prices on certain goods and/or services to be borne by the consumers or clients in the same relevant market. “

The agreement of price fixing is implemented in the 110-125cc motorcycles by defendant I and defendant II. The chronology of the price fixing agreement happened from the year 2013 to 2015. Throughout the course of 2013 until November 2014, there were meetings between the President Director of Yamaha Indonesia Motor Mr.Kojima and the President Director of Astra Honda Motor, Toshiyuki Inuma at a golf course.²³ In the year 2013, after both President Director Mr.Kojima and President Director Toshiyuki Inuma had met, Mr.Yukata Terada, as the marketing director of Yamaha Indonesia Motor sent an email

²² Article 5 of Law Number 5 Year 1999 regarding Prohibition on Monopolistic Practice and Unfair Business Competition

²³ KPPU Case Number: 04/KPPU-I/2016, page.13

instructed by President Director Kojima, which had asked the marketing team of Yamaha to follow the structure of the increasing price of Astra Motor Indonesia, starting from January 2014.²⁴

There was another meeting between the President Director of Yamaha Indonesia Motor and Astra Honda Motor at a golf course in January 2014. Mr. Kojima asked Mr. Inuma for the help to increase the price of Honda's motorcycle, in order for Yamaha to follow the increased price. In february 2014, several of the motorcycle Astra Honda Motor's motorcycles' prices were increased. Mr.Kojima, as the President Director of Yamaha then instructed the increase in Yamaha's motorcycle' prices on March 2014. It was said that instruction from Mr.Kojima was passed down to Mr. Terada as the Marketing Director, Mr. Dionisius as the Vice President, and Mr. Sutarya as the Sales Director. As there was an increase of price made by Astra Honda Motor in February, May, July and August 2014, Yamaha Indonesia Motor also increases their 110-125cc motorcycles' price in March, June and September 2014.²⁵

As the KPPU adjudicates the case, the main evidences of this case are the emails, considered as electronic evidences between the stakeholders of Yamaha Indonesia Motor, communicating regarding the action to follow the price of Astra Honda Motor, instrcuted from the higher hierarchy to the other subordinates of Yamaha Indonesia Motor.

Administrative sanction were implemented both for Yamaha Indonesia Motor as defendant I and Astra Honda Motor as defendant II, where Yamaha

²⁴ *Ibid.*, page.13

²⁵ *Ibid.*, page.17

Motors Indonesia was sanctioned for Rp 25billion, and Astra Honda Indonesia was sanctioned as much as Rp 22,5billion.²⁶

The initial purpose for the interest towards analyzing KPPU Case Number: 04/KPPU-I/2016, is that firstly this is a very recent case, which thus hold several different interesting substantial issue regarding circumstantial evidences which is rarely heard around the other surrounding cases of KPPU regarding unfair business practices. In this case, the evidences which are used by KPPU to adjudicate is still to be questioned regarding the uncertainty, with oppositions from both the defendants stating that the evidence is not a legitimate and sufficient evidence.

Therefore, it will be knowledgable to analyze this case and know whether or not the evidences used by KPPU could be use to declare that it is a part of the supportive instrument for the price fixing, as the casual effect of the unfair business competition.

Secondly there was a disrutive action carried out by the defendant, whereas both were actually insisting of having a price fixing agreement. Therefore, it will be interesting through an analytical measurement, to know the motives of both defendant in this case. Lastly, the conglomeration of businesses in Indonesia happened at the pre and post reformation era, the analysis of this case will bring the knowledge to take extensive measures in preventing future unfair business competitions and knowing the standards of proof in knowing whether or not there is an unfair business competition of price fixing.

²⁶ *Ibid.*, page.418

1.2 Formulation of Issues

According to the background information given above, there are several formulating issue which are:

1. Whether or not the practice of price fixing which causes unfair business practices carried out has been fulfilled in the KPPU case number: 04/KPPU-I/2016 as in accordance to the prevailing laws and regulations on price fixing?

1.3 Purpose of Thesis

Based on the several explanations above the purpose of this thesis is to answer the formulating issues, which includes:

1. To analyze and explain the decision based on KPPU Decision Number: 04/KPPU-I/2016 regarding the practice of price fixing in the distribution of motorbike product in Indonesia.

1.4 Merits of Thesis

1.4.1 Theoretical aspect:

From the law theory aspect, this thesis has a function to become a knowledgeable source of information in order to develop the knowledge of law in Indonesia, especially to develop the knowledge regarding price fixing practices as a form of unfair business competition.

This thesis will also be useful to criticize towards the adjudication of cases regarding price fixing practices in Indonesia. It will also be beneficial as a material to understand the characteristic of price fixing practices and its effects

towards the nation's economy, where the society in general can appreciate and contribute towards the lawful system of unfair business practices.

1.4.2 Practical Aspect:

In its practical aspect, it is hoped so that the thesis will be useful to deliver a greater knowledge and understanding regarding the prohibition of price fixing practice, in order for the society in general to be cautious and understand the procedural action to handle this kind of unfair business practice as a preventive measure to avoid it. Adding to that, it is important to know that KPPU thus indeed is an institution which will have authority over all kinds of cases regarding business practices.

1.5 Systematic Writing

To complete the analysis of this thesis, the writing orders will be divided into chapters which will be shown below:

CHAPTER I : INTRODUCTION

This chapter will introduce the background foundational problem for this thesis which is regarding unfair business competition, several formulating issues, purpose of this thesis, benefits of this thesis and the systematic writings.

CHAPTER II : LITERATURE REVIEWS

This chapter will go over the main theories that is relevant to business competition. It will explain several different concepts of business competitions based on Law Number 5 1999 regarding Prohibition of Monopolistic Practices and Unfair Business Practices, and also the effects of price fixing practice. In this

chapter, the theories will be explained through the commentaries of experts regarding business competition and its implementation in Indonesia.

CHAPTER III : RESEARCH METHODOLOGY

The third chapter of this thesis will be showing the method of thesis approaches, the kinds of approaches and the procedure in obtaining the research, and the technique of this research. It will be shown through a normative and qualitative research by finding the laws and commentaries from experts regarding unfair business practice. It will also show the analytical procedure and technique that will be used to analyze the case on price fixing based on KPPU Case Number: 04/KPPU-I/2016.

CHAPTER IV : ANALYSIS AND DISCUSSION

This chapter will show the analytical work regarding the position of the case and the analysis of the case regarding the prohibition of Article 5 of Law Number 5 Year 1999 in the KPPU Case Number: 04/KPPU-I/2016 regarding price fixing practice in the industry of motorcycle.

CHAPTER V : CONCLUSION AND SUGGESTION

The fifth chapter will be a closing upon the conclusion of the legal research in the thesis and the suggestion from the Author based on the issue of price fixing in relation to the KPPU case Number: 04/KPPU-I/2016 on regarding price fixing practice in the industry of motorcycle.