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Constitutional Court Decision on the definitions of “other party” and “investigation” under Law No. 5 Year 1999 concerning The Restriction on Monopolistic Practices and Unfair Business Competition

With the ongoing process at the House of Representative to revoke and replace Law No. 5 Year 1999 regarding the restrictions on monopolistic practices and unfair business competition (“Law No. 5/1999”), Law No. 5/1999 has yet again found itself being disputed. This time, it was PT Bandung Raya Indah Lestari (“PT BRIL”), which acted as the Petitioner to bring the Judicial Review against several Articles of Law No. 5/1999, registered under Constitutional Court Decision No. 85/PUU-XIV/2016 (“Decision No. 85/2016”). PT BRIL, in its petition for Judicial Review, argues that:

1. The wording “other party” under Articles 22, 23, and 24 of Law No. 5/1999 has created an uncertainty of law, as it causes ambiguity as to what constitutes a clear definition of “other party”. PT BRIL has the view that the wording “other party” shall be amended and replaced by the wording “other entrepreneur” (pelaku usaha lain), as stated under Article 1 paragraph (8) of Law No. 5/1999, which defined business conspiracy as a form of cooperation between an entrepreneur(s) and other entrepreneur(s), with the intention to control the relevant market in the sole interest of the conspiring entrepreneurs.
2. The wording “investigation” or “examination” under Article 36 paragraphs (c), (d), (h), and (i); and Article 41 paragraphs (1) and (2) of Law No. 5/1999 has brought ambiguity on whether the investigation should be in the spirit of criminal investigation or interpreted as an administrative examination

1) Key decisions

As of the issuance of Decision No. 85/2016, the Constitutional Judge Panel who adjudicate and examine this case grants the Petitioner in partial, with the following decision:

- a) Declare the wording “other party” under Article 22, 23, and 24 of Law No. 5/1999 should be read as “other entrepreneur and/or other party related to the other entrepreneur”.
- b) Declare the wording “investigation” under Article 36 paragraphs (c), (d), (h), and (i); and Article 41 paragraphs (1) and (2) of Law No. 5/1999 should be read as “gathering of evidence as source of the examination”.

2) Implications

The implications due to the issuance of Decision No. 85/2016 are:

a. Broader definition regarding the parties in a conspiracy.

With the issuance of Decision No. 85/2016, the below articles shall be read as follows:

Article 22 of Law No. 5/1999:

“Entrepreneurs are prohibited from conspiring with other entrepreneur and/or other parties related to the other entrepreneur to arrange and/or determine the winner of the tender resulting in the occurrence of unfair business competition.”

Article 23 of Law No. 5/1999

“Entrepreneurs are prohibited from conspiring with other entrepreneur and/or other party related to the other entrepreneur to obtain information of their competitor’s business activities classified as trade secrets resulting in the occurrence of unfair business competition.”

Article 24 of Law No. 5/1999

“Entrepreneurs are prohibited from conspiring with other entrepreneur and/or other party related to the other entrepreneur to restrict production and/or marketing of the goods and/or services of their business competitors, with the intention that the goods and/or services being offered or supplied in the relevant market will be reduced in quantity, quality, or the required punctuality.”

The addition of the wording “and/or other party related to the other entrepreneur” is aimed at giving clarity to the Commission for the Supervision of Business Competition (*Komisi Pengawas Persaingan Usaha* or “KPPU”) in determining the parties that may be investigated or subject to administrative sanctions in a conspiracy, provided that KPPU, in selecting the “other party” which is not an entrepreneur, can prove the existence of relation between such another party and the entrepreneur, or the conspired entrepreneurs.

Unfortunately, Decision No. 85/2016 does not give any further definition on the wording “related”. As it stands now, the definition of “related” has a broad range of meaning from family to business relations. It may even require a direct relation between the other party and the entrepreneur(s) or conspired entrepreneur(s) to be able to conspire for a specific purpose. Hence, the definition of “related” will highly depend on KPPU’s own interpretation.



b. Affirmation on the function of KPPU.

With the issuance of Decision No. 85/2016, the wording “investigation” under Article 36 paragraphs (c), (d), (h), and (i); and Article 41 paragraphs (1) and (2) of Law No. 5/1999, must be interpreted as an action by KPPU to gather sufficient evidence to clarify any report or indication of violation of Law No. 5/1999, for the purpose of imposing administrative sanction. Hence, the investigation by KPPU shall not be defined as investigation of criminal action, as regulated under Law No. 8 year 1981 on Criminal Procedural Law.

The definition of “investigation” under Decision No. 85/2016 will reaffirm the function and status of KPPU as an administrative state institution having the function of State Auxiliary Organ (Lembaga Bantu Negara). This is also in line with the authority to impose administrative sanction granted to KPPU, based on Article 47 of Law No. 5/1999.

Bearing this in mind, it can be interpreted that KPPU shall not be authorized in the imposition of criminal sanction as regulated under Articles 48 and 49 of Law No. 5/1999. However, an exception shall apply in any case involving parties receiving the administrative sanction based on a KPPU Decision, but refuse to implement the decision (provided that the KPPU Decision is final and binding). Such action will be deemed as a criminal action and the KPPU Decision shall be construed as preliminary evidence for the Examiner (*Penyidik*) to conduct the examination process.

In closing, we note that the issuance of Decision No. 85/2016 was welcomed with split opinions of the public and experts. It remains to be seen how KPPU will actually adopt and implement the changes made under Decision No. 85/2016, specifically in dealing with conspiracy and/or cartel cases.

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