

Analysis of Abuse of Dominant Position through Secret Agreements by PT. Forisa Nusapersada

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KEYWORDS	ABSTRACT
Competition Law; Monopolistic Activities; Dominant Position; Exclusive Agreement	The regulation in Law Number 5 Year 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition broadly addresses prohibited agreements, activities, and dominant positions. This study uses a normative juridical research method with the aim of analyzing the closed agreements made by PT Forisa Nusapersada based on Law No. 5 of 1999, Commission Regulation No. 3 of 2009, and Commission Regulation No. 6 of 2010. The research specifically focuses on the abuse of the dominant position through the "Pop Ice The Real Ice Blender" program, which is alleged to have limited market competition and harmed consumer choice. The findings indicate that PT Forisa Nusapersada's actions constitute an abuse of its dominant position, as it used its market share of 90.09% to 92.16% to monopolize the market by limiting competitors' ability to sell similar products and forcing retailers to display Pop Ice products exclusively. This violation is supported by the findings in KPPU Decision Number 14/KPPU-L/2015, which continued until the Supreme Court Decision Number: 1106 K/Pdt.Sus-KPPU/2017. The research concludes that such strategies violate the provisions of Article 25 paragraph (1) of Law No. 5 of 1999 by unfairly restricting market access and consumer choice, thus undermining fair competition.

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Introduction

In the business world, competition is something natural. Business competition is a process that forces business actors to be more efficient by offering more goods and services at lower prices (Anang Triyono, 2010 in Gunawan, 2022). Business actors compete to obtain a dominant position in the market. The acquisition of a dominant position is allowed as long as it is achieved with the capabilities possessed by business actors and in a fair manner. In practice, in order to become a major player in the market, business actors often use dirty methods. The business competition

market tends to be infested with various anti-business competition actions that seek to concentrate economic power and prevent other business actors from entering the market (Herlina, 2018). Thus, in business competition law in every country, it is necessary to regulate the limitation of dominant position in order to maintain fair business competition.

In Indonesia, the provisions of business competition law are generally contained in Law Number 5 Year 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition, which was enacted on March 5, 1999, and came into force on September 5, 2000. Articles 4 to 24 of the law outline business conduct that may result in monopolistic practices and unfair business competition. Articles 25 to 29 regulate the abuse of the dominant position. Articles 30 to 36 describe the institutions authorized to implement competition law. Articles 38 through 46 regulate the procedures for handling cases, and Articles 47 through 49 regulate administrative sanctions. To supervise business actors in carrying out their business activities, the Business Competition Supervisory Commission (KPPU) was established. KPPU is authorized to conduct research, investigation, or examination, summon business actors, and impose administrative sanctions for violations of Law Number 5 Year 1999. What is meant by "market leader" is a company that controls most of the market share in a particular industry and can often use its dominance to influence market competition and market behavior (Will Kenton, 2021).

Law Number 5 Year 1999 describes several behaviors that are not allowed in order to maintain fair business competition, such as prohibited agreements, impermissible actions, and dominant position. In accordance with Article 1 paragraph (4), what is meant by "dominant position" is a situation where a trading business actor has no significant competitors in its market share or is ranked top among its competitors in the relevant market due to its fiscal strength, access to supply or sales, and ability to fulfill demand or supply for certain goods or services. Furthermore, paragraph (2) explains that a business actor with a dominant position is one person or group of business actors controlling 50% (fifty percent) or more of the market share or two or three persons or groups of business actors controlling 75% (seventy-five percent) or more of the market share

Because they have a large market share, these businesses have the ability to outperform their competitors by influencing the market price of their products (Herman & K. Hansen, 2001). With such market power, dominant companies can act or determine strategies without being influenced by competitors (Philipus M. Hadjon, 2007). The dominant position is actually allowed because it can stimulate other competing business actors in the relevant market of the same kind, but if it is achieved with its capacity reasonably and can be accounted for (Prananingtyas et al., 2017). Legitimate strategies, such as business efficiency and product innovation, can help business actors to obtain a dominant position. To obtain a dominant position in a market, entrepreneurs must improve their financial stability, access to sales, and capacity to meet demand or supply for their products or services. As a result, not all businesses can successfully become market leaders.

One of the cases that indicated abuse of dominant position was contained in KPPU Decision Number: 14/KPPU-L/2015, which continued until cassation as decided in the Decision of the Supreme Court Number: 1106 K/Pdt.Sus- KPPU/2017 regarding the Pop Ice Program The Real Ice Blender Program conducted by PT Forisa Nusapersada. The company is a business entity that

produces and sells packaged drinks in powder form under the Pop Ice brand. On December 29, 2014, the company has organized the "Pop Ice The Real Ice Blender" program as stated in the Pop Ice Display Contract Agreement. In the contract, participating retailers are required not to sell or display products from competitors. Beverage kiosks and stores in the market will receive prizes if they meet the conditions specified in the program. Participating beverage stores then signed a contract to display Pop Ice, which included a willingness not to sell any competing products at all, only Pop Ice products. PT Forisa Nusapersada's strategy triggered allegations of unfair business competition and abuse of their dominant position.

This research aims to find out how Indonesian competition law regulates the limitation of dominant position and analyze the indication of abuse of dominant position by PT Forisa Nusapersada as stated in KPPU Decision Number: 14/KPPU-L/2015 which continues until cassation as decided in the Supreme Court Decision Number: 1106 K/Pdt.Sus-KPPU/2017.

Material and Method

This research is part of normative legal research, namely research that views the law as a standard in order to answer the formulation of the problem. The strategy used is a case approach and a statutory approach. All laws and regulations related to legal issues are studied as part of the legal approach (Marzuki, 2022). The case approach seeks to examine the legal rules that apply in legal practice. The case studied is the KPPU Decision Number: 14/KPPU-L/2015 which continues until cassation as decided in the Supreme Court Decision Number: 1106 K/Pdt.Sus-KPPU/2017. Normative legal research uses secondary data or literature (Mukti Fajar & Yulianto Achmad, 2010). Primary legal materials used are the 1945 Constitution, Law Number 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition as amended by Law Number 11 of 2020 on Job Creation, Government Regulation Number 57 of 2010 on Merger or Consolidation of Business Entities and Acquisition of Company Shares that May Result in the Occurrence of Monopolistic Practices and Unfair Business Competition, and Regulation of the Business Competition Supervisory Commission (KPPU Regulation) Number 6 of 2010 on Guidelines for the Implementation of Article 25 on Abuse of Dominant Position. Secondary legal materials used are books, journals, and articles.

Results and Discussion

Restrictions on Dominant Position in Trade Transactions According to Law Number 5 Year 1999

Business actors compete for dominant positions. Market share, consumers, and prices are some aspects of business competition that must be won (Fadhilah, 2019). Competition to obtain a dominant position in business must be healthy. Healthy business competition has several characteristics. Prices of goods and services are determined by supply and demand, not by business actors acting alone. Second, the products and services produced are the same. Business actors are also free to enter and exit the market. Fourth, information on consumer preferences, income, production costs, and technology is available to businesses and consumers (Yanuarsih, 2018).

Restrictions on dominant position in business competition law in Indonesia are regulated in Article 25 paragraph (1) of Law Number 5 Year 1999, which states that business actors are prohibited from using their dominant position to create business conditions that prevent consumers from obtaining competitively priced and high-quality goods or services, limit market and technological development, or prevent other business actors from participating in the market. Some other provisions related to the limitation of dominant position in the Law are Article 26 on concurrent positions of directors or commissioners in two companies that have the same or related market shares that allow monopolistic practices or unfair business competition to occur, Article 27 on cross-share ownership, and Articles 28 and 29 on mergers, consolidations, and takeovers of business entities.

1. Creating business conditions that prevent consumers from obtaining goods or services at competitive prices and high-quality

Abuse of a dominant position by setting terms of trade may occur between suppliers and buyers. Dominant buyers can set the terms of agreement with suppliers, such as requiring them not to provide goods to competing businesses. Otherwise, the buyer will reduce or stop supply (Rasyida, 2021). In the relationship with the buyer, the seller, i.e., the dominant business actor, may determine the terms of trade so that the buyer does not purchase goods from competing business actors.

The impact of terms of trade is to reduce consumer choice to obtain similar competing products at the same or more affordable price or with the same or higher quality. Another result is the elimination of competitors from the market because they have no supply or buyers. Suppliers end up complying with the terms of trade because the dominant firm has a large market share, so its purchases outnumber those of its competitors.

2. Market Restrictions and Technology Development

Market and technology development restrictions are actions that hinder trade transactions and product development in the relevant market (Dalinama Telaumbanua, 2012). Technology development is the exclusive right of the inventor (patent). However, market restriction and technology development can also be considered as abuse of a dominant position when a dominant firm that already holds a patent on the technology refuses to license it to other firms. Only the exclusive technology of the dominant firm is capable of producing a good and has no substitute. These technological limitations also hamper research and development, which may lead to a lower ability to innovate products and services in the future.

3. Discourage Potential Competitors From Entering the Relevant Market

Abuse of a dominant position can be defined as the use of unfair market entry barriers by a business actor. For example, abuse of a dominant position by raising competitors' costs or raising competitors' costs. A dominant commercial enterprise has access to an efficient supply for its manufacturing. A potential competitor's cost of production will be greater than that of the dominant commercial actor if the dominant actor unfairly denies the potential competitor access to low-cost

sources of supply, leaving the potential competitor with only more expensive sources. If a prospective competitor enters the relevant market, incentives for new competitors will be reduced as a result.

Another form of abuse of dominance is the reduction or limitation of production levels that are inconsistent with supply and demand in the market. Production capacity is deliberately made insufficient to meet the needs of consumers in the market which leads to high-priced output. By raising prices and regulating production, these actions directly cause harm to consumers. If a prospective competitor enters the relevant market, the dominant actor will temporarily increase supply and lower prices. The lower price and sudden increase in supply will deter potential competitors from entering the market.

4. Mergers, Consolidations, and Acquisitions

Articles 28 and 29 of Law Number 5 Year 1999 stipulate that mergers, consolidations, and acquisitions of a company are prohibited if they are with the intention to control a market that allows monopolistic market behavior or unfair business competition to occur. Article 1 paragraph (1) of Government Regulation Number 57 Year 2010 on Merger or Consolidation of Business Entities and Acquisition of Company Shares that May Result in the Occurrence of Monopolistic Practices and Unfair Business Competition, defines merger as a legal action taken by one or more companies to merge into another company, which results in the legal transfer of assets and liabilities of the merged business entity to the receiving business entity and the status of the merged company ends by itself by operation of law. Thus, a merger is where another company is absorbed by another company and the company that is taken over ends by operation of law (Sautan Remi Sjahdeini, 2000). Article 1 paragraph (2), consolidation is two or more business entities forming a new business legal entity that acquires the assets and debts or capital of the merging company, and subsequently the status of each of the merging companies is perfected by law. Article 1 paragraph (3), acquisition is a legal action carried out by a person or company to take over shares in a company, resulting in the transfer of ownership of the company. impacts The negative that can arise from the three legal actions above include the creation or increase in the level of market concentration that can result in higher product prices and increased market power, which can threaten small businesses (Sautan Remi Sjahdeini, 2000).

Abuse of Dominant Position by PT Forisa Nusapersada

To determine the existence of abuse of a dominant position, there are several factors that must be considered. First, determining the relevant market share. Second, calculating the size of the market share owned by the dominant business actor. Third, identify practices that may inhibit competition and investigate their overall impact on a market. Article 19 letters a and b of Law Number 5 Year 1999 states that "Business actors are prohibited from conducting one or several activities, either alone or together with other business actors, which may result in monopolistic practices and or unfair business competition in the form of:

- a. Refusing and or obstructing certain business actors to conduct the same business activities

in the relevant market; or

- b. Discourage consumers or customers of its competing business actors from conducting business relations with its competing business actors; or..."

Based on the facts obtained, PT Forisa Nusapersada distributes to three regions, namely Western Indonesia, Eastern Indonesia, and all of Jabodetabek (Jakarta, Bogor, Depok, Tangerang, and Bekasi). PT Forisa Nusapersada then created a marketing plan called "Pop Ice The Real Ice Blender Program" which is evidenced by the Pop Ice Display Contract Agreement.

Participating beverage stores then signed a contract to display Pop Ice in which they agreed not to sell any competing products, only Pop Ice products. They will then receive a reward if these conditions are met. The program offered by PT Forisa Nusapersada has an impact on the marketing of similar products produced by PT Karniel Pacific Indonesia and PT Karunia Alam Segar. As a result of the implementation of the marketing strategy with the instrument "Pop Ice The Real Ice Blender Program", a monopoly was created, so that the sales volume of PT. Forisa Nusapersada's products increased so that it controlled most of the market share.

PT Forisa Nusapersada fulfills the elements of violation of Article 25 paragraph (1) of Law Number 5 Year 1999, which stipulates that business actors are prohibited from using their dominant position, either directly or indirectly, to set trade conditions with the aim of preventing and or preventing consumers from obtaining goods and or services that are competitive, both in terms of price and quality, limiting market and technological development or preventing other business actors who are potential competitors from entering the relevant market. PT Forisa Nusapersada's market share was 90.09% to 92.16% between November 2014 and July 2015. In this case, PT Forisa Nusapersada can be classified as a market leader, which controls without strong competitors in similar markets.

From the amount of market share, it can be seen that it fulfills the provisions stipulated in Article 17 paragraph (2) letter c of Law Number 5 Year 1999, namely PT Forisa Nusapersada as one business actor controls more than 50% of the market share. In addition, the Internal Office Memo Number 15/IOM/MKT-DB/XII/2014 also stated that PT Forisa Nusapersada held the Pop Ice The Real Ice Blender program to maintain its market leader. The market leader referred to in this case, namely the dominant position owned by PT Forisa Nusapersada because PT Forisa Nusapersada has a percentage of market share control exceeding 50% as an element in article 17 paragraph (2) letter c and article 25 paragraph (2) letter a of Law Number 5 Year 1999, therefore PT Forisa Nusapersada is said to have a dominant position or monopoly position. It is possible that this program will prevent other companies from entering into the same market as PT Forisa Nusapersada, based on its objectives and plans. In addition, the findings of the investigation conducted by PT. Forisa Nusapersada regarding its competitors' businesses showed that products similar to pop ice products disappeared in certain markets and were replaced by pop ice products. Thus, the actions of PT Forisa Nusapersada can be considered as an abuse of its dominant position through monopolistic practices or activities. Since article 17 of Law Number 5 Year 1999 contains a rule of reason approach, PT. Forisa Nusapersada's actions must be proven before being prohibited.

A Closed Agreement Executed by PT Forisa Nusapersada

Vertical Agreement on Discount or Special Discount is an agreement in which a business actor sets requirements in the form of willingness to buy other products from the business actor and the prohibition of buying the same or similar products from competitors/competitors of the business actor in order to get a discount. The alleged closed agreement made by PT Forisa Nusapersada leads to a *Vertical Agreement on Discount or Special Discount*.

This can be seen in one of the agreements in the form of stipulating the terms stated in the "Pop Ice The Real Ice Blender" contract agreement which regulates the provisions for beverage stalls and market stores not to sell and not display their competitors' products. The program run by PT Forisa Nusapersada has reduced consumer alternatives to obtain products from competing businesses. The program has also discouraged other businesses from entering the market. The competitor, PT Karniel Pacific Indonesia, was established in June 2014 and has just launched a new product called "S'cafe" in November 2014 which was only marketed in December 2014. With the implementation of the "Pop Ice The Real Ice Blender" program by PT implemented Forisa Nusapersada, it is considered to hamper PT Karniel Pacific Indonesia's products to enter the market as a new business actor in Indonesia and PT Karniel Pacific Indonesia has experienced a decline in sales of up to 50% since the program was until July 2015.

Conclusion

Article 25 paragraph (1) of Law Number 5 Year 1999 regulates the restriction of dominant position in business competition law in Indonesia. Business actors are prohibited from using position their dominant to make business policies that may prevent buyers from procuring quality and affordable goods or services, restrict markets and technological innovation, or a combination of both. Other provisions that regulate restrictions on dominant position are Article 26 which regulates concurrent directorships or commissionerships in two companies that have comparable or related market shares, Article 27 which regulates cross-shareholding, and Articles 28 and 29 which regulate mergers, consolidations, and takeovers of business entities.

The case of PT Forisa Nusapersada has different indications of abuse of dominant position, resulting in different decisions between the KPPU and the Supreme Court. KPPU found indications of abuse of dominant position committed by PT Forisa Nusapersada in violation of Article 19 letters a and b and Article 25 paragraph (1) letters a and c of Law Number 5 Year 1999. KPPU has determined that PT Forisa Nusapersada has violated these articles, but the District Court and the Supreme Court decided that PT Forisa Nusapersada has followed the provisions of business competition laws and regulations.

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