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RECONSTRUCTION OF BUSINESS COMPETITION LAW POLICY AGAINST WELL-MEANING PERPETRATORS IN CARTEL CASES: A SUBSTANTIVE JUSTICE AND PROPORTIONALITY APPROACH

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Abstract

Law enforcement against cartel practices in Indonesia continues to face challenges in upholding substantive justice. The prevailing per se illegal approach tends to treat all business actors involved in a cartel structure equally, without considering their intent, position, or degree of involvement. This results in disproportionate sanctions being imposed on business actors who lack malicious intent or who are merely performing administrative functions. This study aims to analyze the form of legal protection for good-faith business actors involved in cartel cases and to formulate the direction of a more just and proportional competition law policy. The research employs a normative juridical approach, using literature review, analysis of statutory regulations, decisions from the Indonesian Business Competition Supervisory Commission (KPPU), and comparative studies with other jurisdictions. The findings reveal the necessity of distinguishing between principal and passive actors, applying a tiered liability system, and providing legal defenses based on intent and actual contribution. This reconstruction is expected to enhance the legitimacy of competition law enforcement and foster a fair and balanced business climate.

Keywords: Cartel, competition law, legal protection, good faith, substantive justice, legal reconstruction, tiered liability.

INTRODUCTION

Healthy business competition is the main foundation in the democratic economic system embraced by Indonesia (Santoso & Mustaqim, 2023; Tahar & Prasetyawati, 2019; Wahjuni, 2019). To create a competitive and fair business climate, the government issued Law Number 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition (Shahrullah & Cokro, 2020; Sulistyoko, 2014). One of the main prohibitions in the law is cartel practices—that is, conspiracies between business actors to set prices, limit production, or divide market areas. This practice is considered detrimental to consumers because it inhibits the market mechanism reasonably and eliminates the choice of price and quality of goods and services. (Dionesius & Hadi, 2019; Rafika & Dewi Restu, 2019; Suradiyanto & Pratiwie, 2020)

Based on data from the Business Competition Supervisory Commission (ICC), from 2017 to 2024, there were more than 40 rulings related to cartel practices, with the food, transportation, and construction sectors being the most dominant. Although the number of cases is increasing, business actors are often not treated proportionately. In many ICC rulings, all parties involved in the cartel structure are subject to the same sanctions, regardless of their intentions, strategic positions, or direct involvement in illegal decisionmaking. An overly rigid legal approach like this can cause injustice and create fear among the business world, especially for perpetrators who actually have no intention of breaking the law.

The urgency of this study arises from the imbalance between strict law enforcement against cartels and protection for business actors who are not actively involved or have malicious intentions (mens rea). (Stephan, 2023) In some cases, business actors only carry out company policies or receive administrative instructions without a full understanding of the legal impact. When such perpetrators are still subject to sanctions equivalent to the initiators or leaders of the cartel, the principle of substantive justice has been ignored.

Furthermore, the legal approach to business competition in Indonesia tends to be per se illegal, where the existence of an agreement between business actors is automatically considered unlawful without considering the motive, context, or economic consequences (Primandhika Made Prasasta & Artha I Gede, 2019; Rohendi, 2018; Trisna Dewi, 2021). This is in contrast to the rule of reason approach adopted in many countries such as the United States and the European Union, where competition authorities first evaluate the concrete impact of such agreements on markets and consumers. (Khoo & Soh, 2020) This comparison is important to show that the Indonesian legal system needs to open up space for differentiation and protection for good-faith entrepreneurs.

The research gap that this study seeks to answer is that there is no adequate regulation to distinguish legal treatment between the main actors of the cartel and passive or administrative business actors. The literature on competition law in Indonesia tends to focus on institutional strengthening of ICC and optimizing sanctions, without further exploring the principles of legal protection for business actors who do not have a central role in violations. This creates a loophole that impacts the protection of the rights of small and medium-sized business actors who may be dragged into a cartel structure without the capacity to resist.

The purpose of this study is to examine the need to reconstruct Indonesia's business competition law policy in order to provide fair protection for good-faith entrepreneurs who engage in inactive cartel practices. This research also aims to develop a differentiating model between the main actors of the cartel and passive actors, so that law enforcement does not lose its sense of justice. The scientific contribution of this research is to provide a juridical-conceptual basis for the renewal of business competition policies that are more balanced between strict enforcement of the main actors and the protection of business actors who do not knowingly violate the law. Thus, this research is expected to help encourage the creation of legal certainty, a healthy business climate, and protection of well-meaning entrepreneurs.

METHOD

This research uses a normative juridical approach, which is an approach that examines law as a norm or rule that lives in the system of laws and regulations. (Diantha, 2017; Yanova et al., 2023) This approach was chosen because the problems studied focused on the normative aspects of business competition law, particularly related to legal protection for business actors in cartel practices.

The data source used is secondary data, which consists of primary legal materials in the form of laws and regulations such as Law Number 5 of 1999, decisions of the Business Competition Supervisory Commission (ICC), as well as secondary legal materials such as legal literature, scientific journals, and other relevant academic studies. In addition, tertiary legal materials such as legal dictionaries and legal encyclopedias are also used as a complement to conceptual analysis.

The technique of collecting legal materials is carried out through library research, by tracing legal documents and academic sources related to cartels, the principles of justice, and the responsibility structure of business actors. All data were analyzed qualitatively using the deductive legal reasoning method, which is to draw conclusions from general norms to concrete cases to formulate a concept of fair legal reconstruction for good-faith business actors.

Additional approaches used in this study include conceptual approaches, to understand the principles of justice, mens rea, and legal protection; as well as a comparative approach, to see how other countries regulate the distinction between the main actors and passive actors in cartel cases.

RESULT AND DISCUSSION

Legal Protection for Good Faith Entrepreneurs in Cartel Practices

Law enforcement against cartel practices in Indonesia currently does not adequately accommodate the differences in the intentions and degrees of involvement of business actors. (Antoni, 2019) The provisions in Law No. 5 of 1999 use a strict liability and per se illegal approach, which focuses on the existence of agreements between business actors without considering the elements of malicious intent (mens rea) and the structural position of the actors in the business organization. (Adeffian & Apriani, 2023; Primandhika Made Prasasta & Artha I Gede, 2019) This makes it difficult for entrepreneurs who do not have the intention to violate the law to obtain proper protection.

According to Gustav Radbruch's view, the law should not be based solely on certainty, but should also contain elements of justice and utility. (Nurlindah et al., 2019; Soeikromo, 2017) If business actors who do not have bad faith are treated equally with the main actors of the cartel, then the law not only loses its fair nature, but also weakens its social legitimacy. Legal protection for employers in good faith must be placed within the framework of substantive justice, which is justice that pays attention to the context, motive, and consequences of an action. (Griffith, 2005)

Uniform legal treatment of all perpetrators is contrary to the principle of proportionality in administrative and criminal law. In the doctrine of criminal law, liability is built on the basis of two main elements: actus reus (deed) and mens rea (intention). (Jimmy Tawalujan, 2021; Syukur, 2015) If one of these elements is not met, then it is not worthy of severe sanctions. Adopting this principle in business competition law will provide protection for business actors who are involved unknowingly, or because of subordinate positions in the company's organization.

On the other hand, the unclear norms regarding the defense space for passive actors are also an important factor why legal protection has not run optimally. The absence of an explicit clause in Law No. 5 of 1999 regarding a good-faith defense mechanism causes the entire process to depend on ICC's internal interpretation. This creates an imbalance in position between small business actors and large companies that have strong legal tools. This is where there is a need for normative arrangements that open up space to prove intentions and roles as a basis for mitigating legal liability.

In international practice, intention- and role-based approaches have been implemented in various jurisdictions. In the United States, the rule of reason approach is used to measure whether an agreement actually results in a loss to competition or is limited to efficient business cooperation. (Ahmad, 2017) In Japan and South Korea, the principle of leniency is used not only to encourage cartel disclosure, but also as a protection mechanism for passive actors or parties who cooperate fully with the investigation. (Choi & Hahn, 2014; Weber Waller, 2016) Indonesia needs to adopt similar principles so that the law is not only repressive, but also restorative and educational. Thus, legal protection for good-faith business actors is not only a matter of sanctions relief policies, but also part of the reform of the competition law paradigm that is more humanistic, fair, and contextual.

Reconstruction of Business Competition Law Policy Towards Business Justice

Legal policies should not be static, but must continue to be adjusted to the dynamics of society and new challenges in the business world. (Mulyono, 2016) The reconstruction of business competition law is an urgent need when the applicable norms are not able to answer the complexity of the problem, such as the absence of a distinction of responsibility between cartel actors who have different intentions and capacities.

First, reconstruction needs to start from the normative aspect. Law No. 5 of 1999 does not provide an explicit space for the classification of perpetrators based on roles and intentions. In fact, in legal practice in the European Union, the concept of undertaking and a single economic unit is known which allows authorities to assess who has decisive influence in the cartel structure. (Bruneckienė et al., 2015) By regulating similar principles in national regulations, Indonesia can distinguish between actors who take the initiative, technical implementers, and those who are unaware of their involvement.

Second, a tiered liability-based approach must be introduced in ICC's practice. It includes the classification of violations into severe, moderate, and mild. The main perpetrators are subject to maximum sanctions, while administrative or passive perpetrators are only subject to reprimands or compliance training obligations. Thus, sanctions serve not only as retaliation, but also as correction and education.

Third, ICC institutions need to be strengthened institutionally and procedurally. The preparation of technical guidelines on proof of intent, mapping the structure of the cartel, and classification of perpetrators must be part of the law enforcement instrument. In addition, it is necessary to establish an internal ethics team to ensure that the commission panel not only prioritizes procedural formalities, but also considers the dimension of substantive justice in each decision.

This reconstruction also touches on the economic-political dimension. Without different legal treatment, small and medium-scale business actors (MSMEs) will remain in a weak position and risk being made victims of the system. They are often ensnared in vertical cooperation contracts with large corporations, which ultimately drags them into a cartel structure with no alternative options. Therefore, the alignment of legal policies against small business actors is a form of protection for the principles of distributive justice and economic democracy.

This reconstruction of legal policy will not only strengthen ICC's credibility, but also signal that the state is present fairly in business and economic affairs. The law should not solely act as a gatekeeper for large economic power, but must be able to protect vulnerable business actors with a proportionate and civilized legal mechanism. With this approach, Indonesia's business competition law will not only become a tool for market control, but also a means of social engineering to create a fair, inclusive, and sustainable business climate.

CONCLUSION

This study concludes that the current enforcement of Law Number 5 of 1999 concerning the prohibition of monopolistic practices and unfair business competition in Indonesia has not fully realized substantive justice, particularly for well-intentioned business actors who are passively involved in cartel structures. The prevailing use of the per se illegal approach tends to generalize all parties involved without assessing their actual role, intent, or contribution, resulting in the imposition of equal sanctions on both active and passive participants. This creates legal injustice and diminishes the legitimacy of the competition law regime. Therefore, it is necessary to reconstruct competition law enforcement by incorporating the principle of proportionality through a differentiated accountability model—distinguishing the responsibilities and sanctions of actors based on their level of involvement. Future legal reforms should include revisions to Law No. 5 of 1999 to accommodate these distinctions, alongside the issuance of technical guidelines by the ICC (KPPU) that allow for intent-based defenses and sanction classifications. Further research is recommended to explore comparative legal frameworks that implement tiered liability in cartel cases, and to support normative development through interdisciplinary studies involving legal theory, corporate governance, and administrative law.

REFERENCES

Adeffian, C., & Apriani, R. (2023). Metode Pendekatan Per Se Illegal And Rule Of Reason Terkait Penegakan Hukum Alternatif Persaingan Usaha Tidak Sehat. Shar-E : Jurnal Kajian Ekonomi Hukum Syariah, 9(2). Https://Doi.Org/10.37567/Shar-E.V9i2.2227

Ahmad, S. D. (2017). Rule Of Reason And Per Se Illegal Approaches In Enforcing The Business Competition Law. Yustisia Jurnal Hukum, 6(3). Https://Doi.Org/10.20961/Yustisia.V6i3.15020

Antoni, V. (2019). Penegakan Hukum Atas Perkara Kartel Di Luar Persekongkolan Tender Di Indonesia. Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada, 31(1). Https://Doi.Org/10.22146/Jmh.37966

Bruneckienė, J., Pekarskienė, I., Guzavičius, A., Palekienė, O., & Šovienė, J. (2015). The Impact Of Cartels On National Economy And Competitiveness: A Lithuanian Case Study. In The Impact Of Cartels On National Economy And Competitiveness: A Lithuanian Case Study. Https://Doi.Org/10.1007/978-3-319-17287-3

Choi, Y. J., & Hahn, K. S. (2014). How Does A Corporate Leniency Program Affect Cartel Stability? Empirical Evidence From Korea. Journal Of Competition Law And Economics, 10(4). Https://Doi.Org/10.1093/Joclec/Nhu026

Diantha, I. M. P. (2017). Metodologi Penelitian Hukum Normatif Dalam Justifikasi Teori Hukum. In Hukum Normatif Dalam Justifikasi Teori Hukum.

Dionesius, D., & Hadi, H. (2019). Upaya Kppu Dalam Mencegah Praktik Kartel Daging Ayam Broiler. Jurnal Privat Law, 7(2). Https://Doi.Org/10.20961/Privat.V7i2.39320

Griffith, S. J. (2005). Good Faith Business Judgment: A Theory Of Rhetoric In Corporate Law Jurisprudence. In Duke Law Journal (Vol. 55, Issue 1).

Jimmy Tawalujan. (2021). Pertanggungjawaban Korporasi Terhadap Korban Kejahatan. Jurnal Rectum: Tinjauan Yuridis Penanganan Tindak Pidana, 3(1).

Khoo, K., & Soh, J. (2020). The Inefficiency Of Quasi–Per Se Rules: Regulating Information Exchange In Eu And U.S. Antitrust Law. American Business Law Journal, 57(1). Https://Doi.Org/10.1111/Ablj.12155

Mulyono, M. (2016). Pancasila Sebagai Orthodoksi Dan Orthopraksis Dalam Kehidupan Berbangsa Dan Bernegara. Humanika, 23(2). Https://Doi.Org/10.14710/Humanika.V23i2.13644

Nurlindah, N., Sugirman, A., & Rosita, R. (2019). Menakar Tujuan Hukum Dibalik Putusan Ma No. 46 P/Hum/2018 Yang Pro Koruptor. Al-Adalah: Jurnal Hukum Dan Politik Islam, 4(2). Https://Doi.Org/10.35673/Ajmpi.V4i2.412

Primandhika Made Prasasta, & Artha I Gede. (2019). Analisis Penerapan Pendekatan Rule Of Reason Dan Per Se Illegal Terhadap Kasus Kartel Di Indonesia. Kertha Semaya, 6(7).

Rafika, S., & Dewi Restu, M. (2019). Upaya Mengatasi Praktik Kartel Di Indonesia Effort To Disclose Cartels In Indonesia. Jurnal Kajian, 24(4).

Rohendi, A. (2018). Praktik Bisnis Yang Dilarang Dalam Hukum Persaingan Di Indonesia (Prohibited Business Practices In Competition Law In Indonesia). Ssrn Electronic Journal. Https://Doi.Org/10.2139/Ssrn.2750209

Santoso, P., & Mustaqim, D. Al. (2023). Analisis Hukum Kepemilikan Terhadap Big Data Dan Essential Facility Dalam Perspektif Hukum Persaingan Usaha Di Indonesia. Jihj: Jurnal Ilmu Hukum Justitia, 1(1).

Shahrullah, R. S., & Cokro, H. H. (2020). Penegakan Hukum Bagi Pedagang Usaha Mikro, Kecil Dan Menengah Terhadap Para Pelaku Usaha Monopoli. Journal Of Law And Policy Transformation, 5(2). Https://Doi.Org/10.37253/Jlpt.V5i2.1391

Soeikromo, D. (2017). Kepastian Hukum Pemenuhan Hak Kreditor Dalam Eksekusi Objek Jaminan Hak Tanggungan Melalui Parate Eksekusi. De Lega Lata: Jurnal Ilmu Hukum, 1(1).

Stephan, A. (2023). The Cartel Trial: Issues Of Dishonesty And Jury Nullification. Journal Of Competition Law And Economics, 19(2). Https://Doi.Org/10.1093/Joclec/Nhad005

Sulistyoko, A. (2014). Implementasi Teori Monopoli Richard A. Posner Terhadap Undang-Undang Nomor 5 Tahun 1999 Tentang Larangan Praktik Monopoli Dan Persaingan Usaha Tidak Sehat. At-Taradhi, 5(1). Https://Doi.Org/10.18592/Taradhi.V5i1.75

Suradiyanto, S., & Pratiwie, D. W. (2020). Perlindungan Hukum Persaingan Usaha Terhadap Indikasi Persekongkolan Tender Jack Up Drilling Rig Services Antara Husky-Cnooc Madura Limited Dengan Pt Cosl Indo (Analisis Putusan Kppu No. 03/Kppu-L/2016). Yuriska : Jurnal Ilmiah Hukum, 12(1). Https://Doi.Org/10.24903/Yrs.V12i1.824

Syukur, K. A. (2015). Pembuktian Unsur Niat Dikaitkan Dengan Unsur Mens Rea Dalam Tindak Pidana Korupsi. Jurnal Ilmiah Galuh Justisi, 3(2). Https://Doi.Org/10.25157/Jigj.V3i2.420

Tahar, A. M., & Prasetyawati, S. E. (2019). Kajian Harmonisasi Hukum Persaingan Tiga Negara Anggota Asean Berdasarkan The Asean Regional Guidelines On Competition Policy. Cepalo, 2(1). Https://Doi.Org/10.25041/Cepalo.V2no1.1758

Trisna Dewi, N. M. (2021). Perlindungan Hukum Hak Merek Dalam Persaingan Pasar Bebas Di Indonesia. Jurnal Komunitas Yustisia, 4(2). Https://Doi.Org/10.23887/Jatayu.V4i2.38092

Wahjuni, M. S. (2019). Urgensi Perubahan Uu Nomor 5 Tahun 1999 Dalam Rangka Harmonisasi Hukum Persaingan Usaha Di Asean. Jurnal Muara Ilmu Sosial, Humaniora, Dan Seni, 3(1). Https://Doi.Org/10.24912/Jmishumsen.V3i1.3457

Weber Waller, S. (2016). Book Review: Anti-Cartel Enforcement In A Contemporary Age: Leniency Religion , Edited By Caron Beaton-Wells & Christopher Tran. (Hart Publishing Ltd., 2015) . World Competition, 39(Issue 1). Https://Doi.Org/10.54648/Woco2016014

Yanova, M. Hendri, Komarudin, P., & Hadi, H. (2023). Metode Penelitian Hukum: Analisis Problematika Hukum Dengan Metode Penelitian Normatif Dan Empiris. Badamai Law Journal Magister Hukum Universitas Lambung Mangkurat, 8(2).