

A Juridical Review on the Enforcement of Criminal Law to the Violations of Tender Conspiracy Practices in the Procurement of Government Goods/Services in Health Sector



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ABSTRACT: Due to the demand for health care services that is getting higher, making business actors engaged in the provision of health services/facilities also seek to further improve the services they have to meet market demand. Hospitals and health clinics are increasingly diverse in offering health services to potential consumers. So that people as consumers also have a variety of choices to fulfill their needs for health services. The health sector is one of the programs that has a fairly large budget item at this time, namely the health equipment procurement program. The large budget allocation from the government opens up opportunities to be misused if there is no strict supervision from the stakeholders themselves or from other institutions. The health budget that should be used to build public health is actually used to enrich oneself and others which can result in poor service and quality of public health. Meanwhile, one of the basic problems related to business competition in Indonesia is the process of procurement of government goods/services. In the process of procuring government goods and services, some believe that there are still many practices of conspiracy to determine the winner in a tender. This clearly contradicts the principles and mechanisms that have been regulated in Presidential Regulation No. 12 of 2021 concerning Government Procurement of Goods/Services and Law No. 5 of 1999 concerning Government Procurement. KPPU was formed based on the mandate of Law Number 5 of 1999. The purpose of this paper is to examine the extent to which the limitations and powers of the KPPU are related to the handling of cases of tender conspiracy which have implications for criminal acts.

KEYWORDS: Unfair Business Competition; Tender Conspiracy; Criminal sanctions; KPPU's involvement.

I. INTRODUCTION

A. Background

Public health has an important role in to improve the quality of human resources, reduce poverty, and develop economy. The Human Development Index puts health as one main component of measurements in addition to education and income.¹

Community health development is essentially a part of national development to increase awareness, willingness, and ability to live healthy for everyone in realizing the highest degree of public health² as investment for the development of the socially and economically productive human resources. The general condition of Indonesian public health is influenced by environmental factors, behaviors, and health services. Meanwhile, health services consist of several components, including the availability and quality of health service facilities, medicines, and supplies, workers, financing, and management.

Indonesia, a country with a total population of 271,349,889 people,³ has recently placed public health development as one important priority in government programs. Health development is one effort of all Indonesian potentials made by the community, private sector, and government.

This effort is a concrete step to realize one country's objective based on the Fourth Paragraph of Preamble of the 1945 Constitution of the Republic of Indonesia, that is, to protect the Indonesian entire nation and homeland.⁴

¹ Badan Pusat Statistik [Statistics Indonesia], *Indeks Pembangunan Manusia 2020 [Human Development Index 2020]*, Jakarta: BPS [Statistics Indonesia], 2021, p. 6.

² Lampiran Kepmenkes RI No: 374/Menkes/SK/V/2009 tentang Sistem Kesehatan Nasional, huruf b [Enclosure of Health Ministry of the Republic of Indonesia Decision No. 374/Menkes/SK/V/2009 on National Health System, Letter b]

³ Badan Pusat Statistik [Statistics Indonesia], *Hasil Sensus Penduduk 2020 [Population Census Result 2020]*, Jakarta: BPS [Statistics Indonesia], 2021, p. 10.

⁴ Yohanes Suhardin, (July-September 2012), *Peranan Negara Dan Hukum Dalam Memberantas Kemiskinan Dengan Mewujudkan Kesejahteraan Umum [The Role of State and Law in Reducing Poverty by Realizing General Prosperity]*, *Jurnal Hukum dan Pembangunan [Journal of Law and Development]*, Vol. (___), No. 3, p. 303.

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In addition, this effort is also a constitutional mandate based on Article 28H paragraph (1) of the 1945 Constitution of the Republic of Indonesia stipulating that everyone has the right to live in prosperity both physically and spiritually, to have a place to live, a good and healthy living environment, as well as the right to obtain health services.⁵

One program which recently has an adequately large budget is the procurement of medical devices. This large budget allocation from the government opens opportunities to be misused if there is no strict supervision either from stakeholders or other institutions.⁶ The health budget which should actually be utilized to build the public health is used to enrich oneself and others resulting in poor service and quality of public health.

Health sector should not only be viewed from the aspect of health service, but also as a highly profitable business opportunity. Thus, health sector is considered adequately vulnerable and potentially results in fraud and violation to business competitions. The higher the demand for health services and medicines as well as personal health, the higher the potential of profits competitively gained by the business actors.

Due to a high demand for health care services, the business actors engaged in the provision of health services/facilities also further improve their services to meet the market demands. Hospitals and health clinics have recently offered various health services to the potential consumers. Thus, public as consumers also have various choices to fulfill their needs for health services.

Based on Law No. 36 Year 2009 on Health, the government has guaranteed the rights of community to fulfill their health needs. In principle, people's rights are guaranteed by the government to obtain health services from health service facilities to realize the highest degree of health. One health service provider facility is generally demanded by the people is hospital. Hospital is a health service institution providing complete individual health services for inpatient, outpatient, and emergency services.⁷

Hospital is one health facility providing health services to public which has a strategic role in accelerating the development of public health level. Therefore, hospital is required to provide quality services in accordance with the established standards and can reach all community levels.

To operate properly and provide optimal services for public, hospital is required to always have complete equipment using the latest technology as supporting facilities. This is in line with government regulation on minimum service standards for hospital.⁸

The regulated minimum service standards, require each hospital to have a minimum service which must be provided by the hospital for public. In Chapter III letter A of the Ministry of Health Regulation No. 129 Year 2008, there are 21 service types to be provided by hospitals:

Emergency services	Clinical pathology laboratory services	Waste management
Outpatient services	Medical rehabilitation services	Management administration services
Inpatient services	Pharmacy services	Ambulance/hearse services
Surgical services	Nutrition services	Funeral services
Delivery and perinatology services	Blood transfusion services	Laundry services
Intensive services	Services for poor families	Maintenance services for hospital facilities
Radiology services	Medical record services	Infectious Control Prevention

⁵M. Aris Munandar, Audyna Mayasari Muin, Hijrah Adhyanti Mirzana, *Telaah Ketentuan Pidana Kekarantinaan Kesehatan Berdasarkan Undang-Undang Nomor 6 Tahun 2018 Bagi Kesehatan Notaris Dan Masyarakat Era Pandemi Covid-19 [A Study on the Provisions of Health Quarantine Criminal Cases Based on Law No. 6 Year 2018 for the Health of Public Notaries and Communities during the Covid-19 Pandemic]*, *Jurnal Hukum dan Kenotariatan [Journal of Law and Notary]*, (February 2021), vol. 5, no. 1, pp. 80-81.

⁶Dwi Ari Wibawa, *Memahami Praktik-Praktik yang Memicu Tindak Pidana dalam Pengadaan Barang dan Jasa Pemerintah [Understanding Practices triggering criminal actions in the procurement of government goods and services]*, <http://www.bppk.kemenkeu.go.id/publikasi/artikel/147-artikel-anggaran-dan-perbendaharaan/20096-memahami-praktik-praktik-yang-memicu-tindakpidana-dalam-pengadaan-barang-dan-jasa-pemerintah>, accessed on 26 August 2021 at 4.43 p.m. of Western Indonesian Zone.

⁷Republik Indonesia, Undang - Undang tentang Rumah Sakit, UU No. 44 Tahun 2009, LN. 2009/ No. 153, TLN NO. 5072 [Republic of Indonesia, Law on Hospital, Law No. 44 Year 2009, LN, 2009/No.153, TLN NO. 5072].

⁸Kementerian Kesehatan, Peraturan Menteri Kesehatan Nomor 129 Tahun 2008 tentang Standar Pelayanan Minimal Rumah Sakit [Ministry of Health, Minister of Health Regulation No. 129 Year 2008 on Minimum Service Standards for Hospital].

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The hospital's needs to meet these supporting facilities result in more attractive business opportunities for providers/suppliers of goods and services to complete those in government-owned health services, such as Regional Public Hospital or Public Health Center, so that those health services should make the procurement of the related goods and services.

The procurement of goods and services is an effort made by the government as the user of goods and services to obtain the desired goods/services. At this point, there is an opportunity to make a conspiracy. The form of conspiracy can be between providers and procurement officials of goods and services as well as between the providers of goods and services themselves.

The term conspiracy appeared in Law No. 5 Year 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competitions regulated in Article 1 number 8, mentioning that: "A conspiracy or business conspiracy is a form of cooperation made by business actors with others intended to control the related markets for the benefits of the conspiring business actors".⁹

The conspiracy prohibition has a very specific meaning in business competition policy since conspiracy can also create barriers in all business competitions due to the anti-monopoly law possibly caused by an agreement.¹⁰

In addition, the impact of such a conspiracy cannot be denied, result in actions possibly causing losses for the related state, and lead to the domains of corruption crimes. Corruption itself has also understood as unlawful actions made to enrich oneself or others or corporations possibly harming the state finances or economy.¹¹

Based on Law no. 31 Year 1999 in conjunction with Law No. 20 Year 2001, corruption is formulated into 30 corruption forms/types which can be grouped into 7:¹²

1. State financial loss.
2. Bribe
3. Gratification
4. Embezzlement when in power
5. Blackmail
6. Cheating
7. Conflict of interest in procurement

The commonly occurring tender conspiracy is full of gratification, bribery, blackmailing, embezzlement when in power, and extortion which can lead to conflicts of interest. If not well handled, this will bias the neutrality of those in power in their decision making. In the end, these practices can result in state losses. Thus, tender conspiracy is considered as the prohibited action when referring to the Anti-Monopoly Law and one activity highly monitored by KPPU in order not to practice them in the related field.

In fact, bid rigging conspiracy in the procurement of government goods and services still becomes a part which is most affected by the Corruption, Collusion, and Nepotism seriously resulting in a negative impact on society and national economy. Conspiracy occurring between one or several business actors as well as tender or auction committee can be made starting from planning the procurement of goods and services by determining the required qualifications and technical specifications leading to a certain brand and preventing the other business actors to participate in the related tender. Thus, competitions to obtain offers with the most favorable prices and good quality specifications for goods/services never happen. Furthermore, the procurement of goods and services packaging should be implemented by considering efficiency and effectiveness aspects, yet many tenders are practically arranged for the benefits of Corruption, Collusion, and Nepotism activities.

The government then considers that it is necessary to to regulate norms, principles, methods and processes for the procurement of goods and services. Thus, a Presidential Decree No. 80 Year 2003 on Guidelines for the Procurement of Government Goods/Services has been made and undergone several changes until the President Regulation Number 12 Year 2021 was issued.

Regulations on the procurement of government goods and services have been amended several times and currently implemented using an electronic system (e-procurement). However, various kinds of deviations as well as Corruption, Collusion and Nepotism practices still occur with various modifications.

The form of Corruption, Collusion and Nepotism in the procurement of government goods and services can be indicated by the existence of conspiracy in the implementation of tenders for the procurement of goods and services made between business

⁹Purnama Aditya, *Tinjauan Yuridis Tentang Persekongkolan Tender: Menurut UU No. 5 tahun 1999 [Judicial Review on Tender Conspiracy: According to Law No. 5 Year 1999]*, Jakarta: 2014, p. 2

¹⁰Hansen Knud, *Undang-Undang No. 5 Tahun 1999: Undang-undang Larangan Praktek Monopoli dan Persaingan Tidak Sehat [Law No. 5 Year 1999 on Prohibition toward Monopoly Practices and Unhealthy Competitions]*, Jakarta: PT. Tema Baru, 2002, p. 309.

¹¹Republik Indonesia, *Undang-undang No. 31 Tahun 1999 tentang Pemberantasan Tindak Pidana Korupsi [The Republic of Indonesia, Law No. 31 Year 1999 on Eradication of Coorruption criminal actions]*, LN 1999, TLN No. 3874, Article. 2 point 1.

¹²KPK RI [Corruption Eradication Commission of the Republic of Indonesia], *Dasar Hukum Tentang Korupsi Terkait Sektor Bisnis [Legal Principles related to Business Sectors]*, Jakarta: Direktorat Pendidikan dan Pelayanan Masyarakat Kedeputusan Bidang Pencegahan [Directorate of Education and Public Service for the Deputy of Prevention Section], 2016, p. 21.

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actors themselves as well as between business actors with the procurement (tender) committee by arranging the tender/procurement winners. The conspiracy practices related to certain tenders can result in unfair auction/tender processes and disadvantaging the tender committee or bidders with good intentions, and even lead to unfair business competitions.¹³

Based on Law No. 31 Year 1999 amended by Law Number 20 Year 2001 on Corruption Eradication, corruption is defined as an act unreasonably or illegally performed by public officials to enrich themselves or others with the following elements:

1. Against the law;
2. Abusing power;
3. Enrich self or others;
4. Disadvantaging the State.

Based on legal perspective, the definition of corruption is emphasized more on actions harming the State, individuals or groups. Thus, when carelessly or intentionally not implementing good corporate governance, the parties may harm public interests (state finances) and therefore, tender conspiracy is categorized into a criminal act with the sanctions not only in the form of fine but also imprisonment.

From the definition of corruption mentioned in Article 2 and Article 3 of Law Number 31 Year 1999, the losses are emphasized on the state finances. Thus, it is appropriate if tender conspiracy is categorized into "Corruption".

Based on the mandate of Law Number 5 Year 1999 on Prohibition of Monopoly Practices and Unfair Business Competitions, Indonesia has already owned an institution functioning to supervise business actors in operating their business activities without performing monopolistic practices and or unfair business competitions.¹⁴

From 2000 to 2020, tender conspiracy or violation cases against Article 22 of Law Number 5 Year 1999, still became the largest cases handled by the Business Competition Supervisory Commission (known as *KPPU*) as many as 245 cases.¹⁵

In the process of handling those cases, *KPPU* had the authority to make investigative actions performed by *KPPU* investigators by collecting data and information including summoning parties engaged in the related cases. During the investigation processes, the unexpected data and facts appeared and surprised the investigators as leading to the domains of criminal law.

One case handled by *KPPU* related to the alleged tender conspiracy was related to the procurement of medical, health and family planning equipment at Embung Fatimah Regional Public Hospital (RSUD) Batam for the Fiscal Year of 2011. In that case, *KPPU* Assembly decided that it was legally and convincingly proven that there was a violation to Article 22 of Law No. 5 Year 1999 on the Prohibition of Monopoly Practices and Unfair Business Competitions. The decision also provided recommendations to the Police and Attorney to make preliminary and then followed by full investigations to the alleged corruption crimes committed by the reported party in tender for the procurement of medical, health and family planning equipment at Embung Fatimah Hospital, Batam in the Fiscal Year of 2011.

This problem started from a plan made by the Embung Fatimah Hospital related to the procurement of medical, health and family planning equipment using the Regional Expenditure in the fiscal year of 2011. After the auction was announced, PT Masmo Masjaya as the Reported Party I planned to cooperate with PT Sangga Cipta Perwita as the Reported Party II and PT Trigels Indonesia as the Reported Party III to win the auction. All activities related to the auction made by those three parties were designed and made in such a way that later the winner of the auction was the Reported Party I. The Reported Party I also gave commissions to the Reported Party II and Reported Party III as the accompanying companies, in order to create conditions as if there was a fair competition during the bidding process.

During the procurement implementation processes, the facts showed some violations, such as cooperation between those three companies participating in the auction to win one of those three parties, manipulated invoices made by the Reported Party I as the auction winner, and supervisory made related to the receipt of goods violating the precautionary principle, and eventually resulting in 100% disbursement of budget to the partner of the procurement committee even though the jobs from the partner had not been completely finished. Thus, the actions made by the reported parties have disadvantaged the state finances up to IDR 5,604,815,696, - (five billion six hundred four million eight hundred fifteen thousand six hundred and ninety-six rupiahs).

If these conspiracy practices are continuously made, even though there is a regulating legal basis, they will negatively impact both business actors and the state as well as inhibit the reinforcement of business competition law.

¹³Adam Khafi Ferdinand, Sunarto DM, Maya Shafira, *Penegakan Hukum Dalam Pengadaan Barang Dan Jasa Pemerintah Oleh Komisi Pengawas Persaingan Usaha (KPPU) Dan Komisi Pemberantasan Korupsi (KPK) [Law Enforcement in the Procurement of Government goods and services made by the Business Competition Supervisory Commission (KPPU) and Corruption Eradication, Commission (KPK)]*, *Jurnal FH Unila [Journal of Law Faculty, Unila]*, volume 4 number 2, (July-December 2020): 111-128.

¹⁴*Undang-undang No. 5 Tahun 1999 Tentang Larangan Monopoli dan Persaingan Usaha Tidak Sehat Indonesia*, (Republik Indonesia) [Law No. 5 Year 1999 on Prohibition of Monopoly and Unhealthy Business Competitions in Indonesia], LN 1999, TLN No. 3874, Article 1 Point 18.

¹⁵<http://putusan.kppu.go.id/>, accessed on 20 August 2021, at 9.35 p.m. of Western Indonesian Zone

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Based on the above backgrounds, the authors were interested in conducting research entitled: A juridical review on criminal law enforcement to the violations of tender conspiracy practices in the procurement of government goods/services in health sector to provide a clear understanding and knowledge for the readers on the implementation of criminal law enforcement in handling the occurring tender conspiracy cases.

B. Research Problems

1. How is the enforcement of criminal law related to the allegedly occurring tender conspiracy cases based on the provisions of Indonesian legislation?
2. How to optimize the role of *KPPU* in law enforcement related to the allegedly occurring tender conspiracy cases which have the criminal implications?

II. RESEARCH METHODS

This study is classified into normative legal research or known as library research method with a normative juridical approach, legal research conducted by examining library materials consisting of primary, secondary, and tertiary legal materials.¹⁶ Normative research is conducted with a problem-based approach in the form of a statutory and conceptual approach. The normative legal research method focuses on library based, reading and analysis of the primary and secondary materials.¹⁷

The statutory approach was conducted by examining laws and regulations related to the legal issues under study,¹⁸ especially Law Number 5 Year 1999 on Prohibition of Monopoly Practices and Unfair Business Competitions, Law Number 1 Year 2009 on Aviation, Regulation of the Minister of Transportation Number PM 185 Year 2015 on Service Standards for Economy Class Passengers Scheduled in a Domestic Commercial Air Transport.

The data sources used in this normative legal research were the secondary data consisting of 3 legal material sources:¹⁹

1. Primary legal materials

Primary legal materials are binding legal materials consisting of statutory regulations, jurisprudence, and others. The primary legal materials used in this research were laws and regulations related to the prohibition of monopoly practices and unfair business competitions for business actors as well as *KPPU* authority to supervise business competitions which consisted of:

- a. Law Number 5 Year 1999 on Prohibition of Monopoly Practices and Unfair Business Competitions;
- b. Law Number 31 Year 1999 on Corruption Eradication;
- c. Law Number 20 Year 2001 on Amendment to Law No. 31 Year 1999 on Eradication of Corruption Criminal Action;
- d. Law - Law Number 36 Year 2009 on Health;
- e. Law Number 44 Year 2009 on Hospital;
- f. Decree of the President of the Republic of Indonesia Number 75 Year 1999 on Business Competition Supervisory Commission (*KPPU*);
- g. President Regulation Number 54 Year 2010 on Guidelines for the Procurement of Government Goods/Services;
- h. Minister of Health Regulation No. 129 Year 2008 on Hospital Minimum Service Standards;
- i. *KPPU* Regulation Number 2 Year 2010 on Guidelines for Article 22 of Law No. 5 Year 1999 on Prohibition of Tender Conspiracy;

2. Secondary legal materials

The secondary legal material sources were legal materials providing explanations related to the primary legal materials.²⁰

In this study, the secondary law materials included:

- a. legal books, papers and journals related to the problems under study;
- b. The results of research and seminars on anti-monopoly law and unfair business competition.
- c. Online data.

3. Tertiary legal materials

The Tertiary Legal Material sources were non-legal materials supporting the primary and secondary legal material sources as well as legal materials providing explanations for both primary and secondary legal materials. In this study, the tertiary material sources used included the Ministry of National Education, The Indonesian Great Dictionary, Balai Pustaka, Jakarta: 2002.

¹⁶ Soerjono Soekanto, *Pengantar Penelitian Hukum [Introduction to Legal Research]*, Jakarta: UI Press, 1986, p. 42.

¹⁷ Johnny Ibrahim, *Teori dan Metodologi Penelitian Hukum Normatif [Theory and Methodology of Normative Legal Research]*, Malang: Bayumedia, 2006, p. 46.

¹⁸ Peter M., *Penelitian Hukum [Legal Research]*, Jakarta : Kencana Prenada Media Group, 2013, p. 133.

¹⁹ Faculty of Law Universitas Pembangunan Nasional Veteran Jakarta, *Ibid*, p. 4

²⁰ *Ibid*.

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III. DISCUSSION

A. The Role of Business Competition Supervisory Commission (*KPPU*)

To realize the sustainability of Law Number 5 Year 1999, an institution is required to supervise business actors in performing their business activities. Healthy business competition is one key to succeed in a fair market economic system. This can be realized through the enforcement of business competition laws and policies regarding the conducive business competitions to the economic development. These two aspects must work together to create a healthy business competition climate in the state economy, so that the government through the President Decree Number 75 Year 1999 established the Business Competition Supervisory Commission (*KPPU*).²¹ Regulations related to *KPPU* status, authority and duties have been regulated in chapter IV Article 30 to Article 37 of Law Number 5 of 1999.²²

As a supervisory agency, *KPPU* is an independent institution apart from the influence and power of government and other parties.²³ The main task of *KPPU* is to enforce the law on business competition as regulated in Law Number 5 Year 1999.

In the Indonesian constitutional system, *KPPU* is a supporting state institution (State Auxiliary Organ) authorized to enforce business competition law as stipulated in Law Number 5 Year 1999. State Auxiliary Organ is a state institution established outside the 1945 Constitution which has the function to assist the duties implementation of independent state institutions or commonly referred to as main state institutions. The State Auxiliary Organ was born as the state has goals to achieve. Thus, the state must have and perform certain functions. Therefore, a state needs complementary state apparatus, known as the supporting state institutions to achieve certain functions. *KPPU* is a supporting state institution (State Auxiliary Organ) authorized to enforce business competition law as stipulated in Law Number 5 Year 1999.²⁴

KPPU was formed to ensure a conducive business climate, leading to the existence of fair business competition as well as to create efficient and effective business activities.²⁵ In practice, there are state institutions in Indonesia formed based on constitution, laws, and president regulations. Each certainly depends on the position of regulation in accordance with the applicable laws and regulations. Therefore, the state institutions formed based on laws are called statutory organs, while those only formed based on president regulations of course have lower legal treatment both in status and degree.²⁶ The supporting institutions are commonly formed in power branch sectors, such as executive and judiciary functioning as a supervisory agency or taking over several authorities of the main state institutions in the same sector.²⁷

In performing duties, *KPPU* is responsible to the President. This is a reasonable provision because *KPPU* is assigned to perform a part of government's duties. In this case, the highest power belongs to the President. Although *KPPU* should be responsible to the President, its independence is not inhibited due to the involvement of House of Representatives (*DPR*) participating in determining and controlling the appointment and dismissal of *KPPU* members.²⁸ *KPPU* was formed to well supervise business actors in performing their business activities and remaining in their corridors (not performing the prohibited actions, agreements, or abuse of dominant positions possibly resulting in monopoly practices and/or unfair business competitions positively leading to a competitive and conducive business competition climate).²⁹ *KPPU* in performing its function as a supervisory agency in implementing Law Number 5 Year 1999 has the duties and authorities to perform as regulated in Article 35 and Article 36 of Law Number 5 Year 1999. The Article 35 letter f has stipulated that:

"*KPPU* has the authority to well arrange guidelines or all forms of publications related to Law Number 5 Year 1999."

²¹Erti Renti Maharaini, "Hukum Acara Persaingan Usaha"[Procedural Law on Business Competition], (<https://sekartrisakti.wordpress.com/2011/05/14/hukum-acara-persaingan-usaha>) accessed on 19 August 2019.

²²As amended with PERPRES No. 80 Tahun 2008 tentang Perubahan Atas Keputusan Presiden Nomor 75 Tahun 1999 Tentang Komisi Pengawas Persaingan Usaha [President Regulation No. 80 Year 2008 on Amandement on President Decree No. 75 Year 1999 on Business Competition Supervisory Commission]

²³T.R. Silalahi, 'Kompetensi Komisi Pengawas Persaingan Usaha (*KPPU*) Dalam Menanggulangi Praktek Monopoli Dan Persaingan Usaha Tidak Sehat'[Competencies of Business Competition Supervisory Commission (*KPPU*) in handling Monopoly Practices and unhealthy Business Competitions] (Universitas Airlangga 2002)

²⁴L. Budi Kagramanto, 'Implementasi UU No 5 Tahun 1999 oleh *KPPU*' [Implementation of Law No, 5 Year 1999 by *KPPU*] (2007) Jurnal Ilmu Hukum Yustisia [Yustisia Journal of Law Sciences]. p. 2.

²⁵Andy Fahmi Lubis, Anna Maria Tri Anggraini, Kurnia Toha, Budi L. Kagramanto, Hukum Persaingan Usaha Antara Teks dan Konteks (Komisi Pengawas Persaingan Usaha 2009) [Business Competition Law: between Text and Context (Business Competition Supervisory Commission)]. p. ix.

²⁶Patralis Akbar, Lembaga-lembaga Negara Menurut UUD NRI Tahun 1945 [State Institutions based on the 1945 Constitution of the Republic of Indonesia] (Sinar Grafika 2002). p. 10.

²⁷*Ibid.* pp. 312-313.

²⁸*Ibid.* p.331.

²⁹Rachmadi Usman, Hukum Persaingan Usaha di Indonesia [Business Competition Law in Indonesia] (PT. Gramedia Pustaka Utama 2010). pp. 355-356.

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Thus, *KPPU* has the authority to make a separated procedural law related to the process of handling the cases violating Law Number 5 Year 1999. *KPPU* then issues some legal regulations regulating the legal procedures at *KPPU* as follows:

1. *KPPU* Decision Number 5/Kep/IX/2000 on Procedures for Submitting Reports and Handling the Alleged Violations of Law Number 5 Year 1999,
2. Regulation on Business Competition Supervisory Commission Number 1 Year 2006 on Procedures for Handling Cases at *KPPU* which were later revoked and renewed by Regulation of Business Competition Supervisory Commission Number 1 Year 2019 on Procedures for Handling Monopoly Practices and Unhealthy Business Competitions.

The authorities regulated in Article 36 of Law Number 5 Year 1999 are *KPPU*'s corridor not to subjectively perform the duties. In addition to the related duties, *KPPU* has the authorities regulated in Article 36 of Law Number 5 of 1999 consisting of:

- a. receiving reports from public and or from business actors related to the allegedly occurring monopoly practices and or unhealthy business competitions;
- b. conducting research on the alleged business activities and or actions made by business actors possibly resulting in monopoly practices and or unhealthy business competitions;
- c. performing investigations and or examinations related to the cases of alleged monopoly practices and or unhealthy business competitions reported by public or by business actors or found by the Commission as a result of its research;
- d. concluding the results of investigation and or examination to the presence or absence of monopoly practices and or unhealthy business competitions;
- e. summoning business actors allegedly violating the related law provisions;
- f. summoning and presenting witnesses, expert witnesses, and anyone considered witnessing the violation made against the related law provisions;
- g. requesting the assistance of investigators to present business actors, witnesses, expert witnesses, or anyone as referred to in letter e and letter f, who are not willing to comply with the summons made by the Commission;
- h. requesting information from Government institutions for investigations and or examinations of business actors violating the related law provisions;
- i. obtaining, examining, and or evaluating letters, documents, or other evidence for investigation and or examination;
- j. deciding and determining whether or not loss is experienced by the other business actors or public;
- k. notifying the decision made by the Commission to the alleged business actors performing monopoly practices and or unhealthy business competitions;
- l. imposing sanctions in the form of administrative actions to business actors violating the related law provisions.

Regulation of Business Competition Supervisory Commission Number 1 Year 2019 on Procedures for Handling the Cases related to Monopoly Practices and Unhealthy Business Competitions is the procedural law and guidelines for *KPPU* to perform its authorities mentioned in Article 36 of Law Number 5 Year 1999.

B. *KPPU* in Handling Tender Conspiracy

KPPU in handling tender conspiracy and other cases violating the related law, is based on the complainants made by those reporting the cases, reporting the cases and asking for compensation, and initiatives made by the Commission. If a report in the form of complaint given to *KPPU* allegedly contains indications of actions made by business actors violating the provisions of Article 22, the Commission may take some initiatives to figure out whether or not tender conspiracy actions occurred based on various conspiracy indications frequently occurring in the process of implementing the tender. In addition, the conspiracy forms and behaviors or whether or not there is a conspiracy practice in a tender activity must be proven by conducting an examination by the *KPPU* Assembly or the Examining Team. The indications of a tender conspiracy are as follows:³⁰

- a. conspiracy indication occurred when planning was made;
- b. conspiracy indication occurred when the committee was formed;
- c. conspiracy indication occurred when pre-auction or company pre-qualification was arranged;
- d. conspiracy indication occurred when preparing the requirements to participate in tenders or auctions and when preparing tender or auction documents;
- e. conspiracy indication when announcing the tenders or auctions;
- f. conspiracy indication when taking the tender or tender documents;
- g. conspiracy indication when determining the Self-Estimated Price (*HPS*) or auction basic price;
- h. conspiracy indication occurred when explaining the open house tender or auction;
- i. conspiracy indication when submitting and opening the tender documents or bid boxes/auctions;
- j. conspiracy indication occurred when evaluating and determining the winner of tender or auction;

³⁰ *KPPU*, Pedoman Pasal 22 tentang Larangan Persekongkolan dalam Tender (Jakarta 2010), hlm. 5.

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- k. conspiracy indication when announcing the potential winner;
- l. conspiracy indication when filing a rebuttal;
- m. conspiracy indication when appointing the winner of tender or auction and signing the contract;
- n. conspiracy indication when implementing and evaluating the implementation.

Based on these indications and definitions contained in Article 22 of the related law, *KPPU* in proving the tender conspiracy actions must be able to find evidence to meet those tender conspiracy elements. If *KPPU* can ensure that there is a tender conspiracy based on the available indications and evidence, based on the related law, the tender conspiracy actions made can be subject to the administrative sanctions as mentioned in Article 47 and criminal sanctions in Article 48. The administrative sanctions mentioned in Article 47 of the related law are in the form of: a. orders to business actors to stop activities proven leading to monopoly practices and or those causing unhealthy business competitions or disadvantaging public; b. compensation payment determination; c. minimum fine imposition of IDR 1,000,000,000, -

C. The Role of *KPPU* in Handling Tender Conspiracy Crimes

Based on the duties and authorities regulated in this related law, business actors proven violating the related law provisions, may be imposed on the administrative sanctions (both in the form of administrative fines and administrative actions) and recommended by *KPPU* to the other institutions related to the ongoing case handled. Based on this authority, *KPPU* can only impose the administrative sanctions. Meanwhile, to the business actors proven violating the criminal provisions, *KPPU* can only recommend and report the related business actors to the Law Enforcement Apparatus (*APH*), such as Police, Corruption Eradication Commission (*KPK*), and Attorney to separately investigate the case previously handled by *KPPU*. *KPPU* can recommend and report the related cases when the *KPPU* investigation team has examined various kinds of evidence and found tender conspiracy indications classified into the prohibited actions. *KPPU* can also report the related cases to the other relevant institutions if indications of criminal actions, such as corruption criminal actions in a business competition case investigated by a team of investigators. The data and facts found by *KPPU* investigators or those revealed during the investigation process can serve as sufficient preliminary evidence. *APH* can use the evidence found to suspect a criminal act and then be followed by investigation.³¹ This is in line with the opinion made by Yahya Harahap stating that sufficient initial evidence can at least refer to the standards of at least two pieces of evidence as referred to in the provisions of Article 183 and Article 184 of the Criminal Procedure Code.

For Embung Fatimah Hospital Batam, *KPPU* had recommended and delegated the case to the Police, Attorney, and Court to continue the processes.

IV. CONCLUSION AND RECOMMENDATION

A. Conclusion

Based on the description of analysis and previous discussion, it can be concluded as follows:

1. *KPPU* is a special commission with double duties not only to supervise business competition but also create and maintain a conducive business competition climate. In its relationship with the enforcement of criminal law against the alleged tender conspiracy, *KPPU* has the authority to settle the alleged tender conspiracy cases. However, in performing its authority, *KPPU* was only limited to impose the administrative sanctions on business actors. *KPPU* had no authority to impose sanctions on the other involved parties. Although there were indications of criminal actions, *KPPU* had no authority to perform further investigations.
2. *KPPU* can only provide recommendations to the other law enforcement officers, such as Police, Attorney, and Corruption Eradication Commission (*KPK*) if there were indications of criminal actions made related to the tender conspiracy cases under investigation. According to the authors' opinion, the process of handling the alleged corruption criminal action cases based on the recommendation made by *KPPU* to *APH* should be prioritized. If *KPPU* had issued a recommendation, it means that *KPPU* adequately had initial evidences to bring the case to a full investigation level. The other option was giving the authority to conduct a "*Pro Justicia*" investigation due to the indications of the handled criminal action cases.

B. Recommendation

Based on the above conclusions, the authors gave some recommendations as follows:

1. *KPPU* function as a business competition law enforcement agency should be unavoidably strengthened due to the rapid development of the recent business world. *KPPU* function can be strengthened by amending Law No. 5 Year 1999 to extend *KPPU* authority in investigating activities related to the indications of corruption cases, without changing *KPPU* into a "super body" institution.

³¹Chandra M. Hamzah, *Penjelasan Hukum tentang Bukti Permulaan yang Cukup* [Legal Explanation on Adequate Initial Evidence], Jakarta: PSHK, 2014, pp.

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2. The Synergy between *KPPU* and other *APH*, such as Police, attorney, and Corruption Eradication Commission (*KPK*) in handling the criminal cases originating from *KPPU* recommendations can be started by making a memorandum of understanding among the related institutions in handling the criminal cases recommended by *KPPU*. Thus, *KPPU* recommendation related to the indications of criminal actions, especially related to tender conspiracy-based corruption cases handled by *KPPU*, not only becomes a meaningless recommendation.

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