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Good Corporate Governance and Tender Conspiracy in Perceptions of Business Competition in Indonesia

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Abstract:
The prohibition of conspiring in determining the winner of a tender is regulated in Article 22 of Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition. The essence of Article 22 of Law No. 5 of 1999 contains the intent, that business actors are prohibited from entering into agreements that result in Tender Conspiracy. It implies that the content that is contrary to Good Corporate Governance is very strong. The engagement as regulated in Article 1338 of the KHPdt has guaranteed freedom of contract which has become the inherent principle in the context of civil law. This principle means that anyone can enter into an agreement, whether it has been or has not been regulated in the Act (Article 1338 of the Criminal Code). The agreement that has been made between the parties applies as a law that binds the makers. Tender Conspiracy is basically an agreement between business actors/tender participants. However, tender conspiracy causes losses to certain parties other than the conspiring parties. others to regulate and or determine the winner of the tender so that it may result in unfair business competition. The clause in Article 22 of Law No. 5 of 1999 contains the stelsel Rule of Reason. The freedom of contact as regulated in Article 1338 of the KHUPdt here deals with the prohibition of engaging in an engagement which contains conspiracy as regulated in Article 22 of Law Number 5 of 1999 and also with Article 1320 concerning the conditions for a valid agreement, namely agreement, skill, a certain thing, a lawful cause. Tender conspiracy is the basic principle of violating the principles of good corporate governance.

Keywords: Tender Conspiracy, Good Corporate Governance.

1. INRODUCTION

II. Reseacrh Question.

Does a Tender Conspiracy violate the principles of fair business competition and antimonopoly..

III. Research Methods .

Research on " Tender Conspiracy in the perspective of business competition law " is a normative or doctrinal research, which aims to obtain primary legal materials or positive laws that are used to develop theories and answer existing problems, by critically evaluating the rule of law, doctrine, concepts and legislation in accordance with its context. Judging from its nature , this research includes exploratory research and descriptive research. Judging from the form , this research is a diagnostic study and perspective research.

III. Introduction.

Article 22 of Law Number 5 of 1999 tender conspiracy or tender conspiracy is an obstacle to competition which is often considered very serious if the results of the tender announcement benefit one of the participants taking part, the tender implicitly contains competition restrictions, the nuances of violating the principles of Good Corporate Governance are very feel. In some countries things like

this are considered very serious because these actions are usually detrimental to the state in a broad sense. Collusive tenders are basically anti-competitive because they violate the real purpose of tenders, namely to obtain goods or services at the most favorable prices and conditions. Most countries are considered illegal even countries that do not have laws restricting business activities although there are often special laws regarding tenders. Most countries use stricter provisions for collusive tenders than for other horizontal agreements, because of the fraudulent aspect and especially the detrimental impact on regional and state expenditures.

Agreement between insiders is the beginning of a forbidden conspiracy. The prohibition of Tender Conspiracy is regulated in Article 22 of Law Number 5 of 1999, which stipulates that business actors are prohibited from conspiring with other parties to regulate and or determine the winner of a tender so that it can result in unfair business competition. Judging from the clause in the article, namely "which results in unfair business competition" that the act of tender conspiracy is categorized as the Rule of Reason, meaning that the Business Competition Supervisory Commission, hereinafter abbreviated as KPPU, must prove that the consequences of the conspiracy are detrimental or not, so that the act violates or not. the sanction is the termination of the act and compensation, without any threat of imprisonment (see Articles 22,23,24 of Law No.5 Th.1999).

Stelsel or the per se illegal approach as well as the rule of reason have long been applied to assess whether a certain action by a business actor violates Law no. 5 of 1999. The rule of reason approach is the approach used by the business competition authority to evaluate the consequences of a particular agreement or business activity in order to determine whether the agreement or activity is hindering or supporting competition. On the other hand, the per se illegal approach states that every agreement or certain business activity is illegal without further proof of the impact caused by the agreement or business activity. The two approaches that have extreme differences are also used in Law no. 5 of 1999, this can be seen from the provisions of its articles, namely the inclusion of the words "which can cause" and / or "suspected". These words imply the need for more in-depth research, whether an action can lead to monopolistic practices that inhibit competition. Meanwhile, the application of the per se illegal approach is usually used in articles that state the term “forbidden”, without the clause “which may result in” A tacit agreement or agreement, of course, is always present in the practice of conspiracy, in order to avoid examination by the Business Competition Supervisory Commission (KPPU). In this case, KPPU must work extra hard to realize unfair business competition law enforcement, so what steps are taken by KPPU in overcoming the law enforcement of Tender Conspiracy.

IV. Tender Conspiracy in Fair Competition.

Law 5 of 1999, using both the perse-illegal approach and the rule of reason, has long been applied in determining whether an act hinders competition. During the quarter-century of the Sherman Act in effect from the 1890s, federal courts in the United States have taken three different forms of analysis to determine whether, for example, a horizontal agreement violates Section 1 of the Sherman Act. The three models, firstly, were put forward by Judge Rufus Peckam, namely by distinguishing all agreements that directly inhibit trade are considered illegal, and conversely, all agreements that do not directly inhibit trade are considered legal. The first model is known as the per se illegal approach. Second, put forward by Judge William Howard Taft, stated that congressional accusations regarding restraint of trade contained in the Federal

Anti-Trust Act have the same meaning as the common law concept. Ancillary restraints are a legitimate goal (lawful purpose), and need to be achieved by lawful means, as well as other obstacles as illegal. Third, judge Louis Brandesis retracted the rule of reason in the previous Supreme Court decision, by allowing the judges to review all the facts surrounding a particular agreement, then determine their own conclusions, whether an agreement is supportive or detrimental to competition.

Law No.5 of 1999 is a new prohibition for the Indonesian economy. Derelugation and privatization, meaning that the abandonment of "statism" from the previous decades has not been able to bring solutions to economic policy problems, especially those experienced by developing countries. This is because an economy that is freed from bureaucratic control alone does not guarantee that "the hand is invisible to the market" - to use Adam Smith's term. The originator of the free market economic theory, Adam Smith, offers a liberalist theory where everyone has the right to pursue personal profits until he can compete and produce a good economic rate. Smith examines various matters including those relating to: 1. Freedom: the right to produce and exchange products, labor, and capital. 2. Self-interest: the right of a person to do his own business and help the self-interest of others. 3. Competition: the right to compete in production and trade and services. Then Adam Smith emphasized the power of the free market in the specialization of production. With production specialization, efficiency in the market will be created and will surely succeed in achieving results that not only pay attention to the interests of market participants, but also to the interests of the wider community. The state should provide a specific framework for reconciling the interests of individual companies participating in the market with the interests of society. One of the main components of the requirements of this framework is an antitrust policy.

Article 22 of Law No. 5 of 1999 covers tender conspiracy, which is an obstacle to competition which is often considered very serious. If the results of the announcement of a tender favor one of the participants taking part, then the tender implicitly contains restrictions on price competition. In some countries things like this are considered very serious because these actions are detrimental to state finances in a broad sense (regions, provinces, groups, communities, universities, hospitals and others), so that the increase in price levels ultimately burdens the community. The United Nation Conference on Trade and Development state (UNCTAD) stated that collusive tenders are basically anti-competitive because they violate the real purpose of tenders, which is to obtain goods or services at the most favorable prices and conditions. Collusive tenders in most countries are considered illegal. Even in countries where there are no laws restricting business activities, there are often special laws regarding tenders. Most countries impose stricter provisions on collusive tenders than for other horizontal agreements, because of the fraudulent aspect and especially the detrimental effect on government spending and state spending.

Conspiracy must be aimed at causing collusive tenders. This becomes all the more important in the case of collusive tenders when competitors agree to influence the outcome of a tender in the interests of either party by bidding or making mock bids (with a coordinated high bid, hoping that contact is given to the bidder who submitted the highest bid). This behavior is usually based on the expectation that the party who does not participate in the tender will get a turn in the next tender based on collusive activities carried out by other cartel members. Collusive tenders usually aim to eliminate price competition and raise

prices. The purpose of all of that is that contracts are awarded to cartel members determined by the cartel, cannot only be achieved if other cartel members do not submit bids or only submit tender offers that are too expensive, so that the tender becomes uncompetitive. According to UNCTAD, collusive tenders exist in various forms, namely agreements to submit identical bids, agreements that determine who submits the cheapest bids, agreements regarding cover bids (volunteer bids that are too expensive), agreements that will not compete with each other in submitting bids. bids, general standard agreements to determine prices or tender conditions, agreements to "squeeze" outside bidders, agreements that previously governed the winning bidder on the basis of rotation, geographic allocation, or customer allocation. These agreements can provide a system of providing compensation for unsuccessful bidders based on a certain percentage of the profits earned by successful participants, to be distributed to unsuccessful participants at the end of a certain period of time. Conspiracy also aims to conduct collusive tenders, if the position who announces a tender can be classified as a business actor who agrees with a potential individual bidder to influence the results of the announcement of the tender for the benefit of the bidder concerned by no longer paying attention to the bids submitted by other bidders, these are elements that exist in acts of corruption or nepotism.

C. Good Corporate Government (GCG) in Tender Conspiracy.

The principles of Good Corporate Government (GCG) that should be carried out by companies or state administrators include:

1. Transparency; To maintain objectivity in running the business, the company must provide material and relevant information in a manner that is easily accessible and understood by stakeholders. Companies must take the initiative to disclose not only issues required by laws and regulations, but also matters that are important for decision making by shareholders, creditors and other stakeholders.
2. Accountability; Companies must be able to account for their performance in a transparent and fair manner. For this reason, the company must be managed properly, measurably and in accordance with the interests of the company while taking into account the interests of shareholders and other stakeholders. Accountability is a necessary prerequisite to achieve sustainable performance.
3.Responsibility; Companies must comply with laws and regulations and carry out their responsibilities to the community and the environment so that long-term business continuity can be maintained and be recognized as a good corporate citizen.
4.Independency; To expedite the implementation of GCG principles, the company must be managed independently so that each organ of the company does not dominate each other and cannot be intervened by other parties.
5. Equality and Fairness; In carrying out its activities, the company must always pay attention to the interests of shareholders and other stakeholders based on the principles of equality and fairness.

Academically, the concept of GCG will continue to evolve in line with the development of the business world itself and this principle became phenomenal after the 1997 crisis. In Indonesia, the concept of GCG was introduced by the International Monetary Fund (IMF) during post-crisis economic recovery. Beginning with a loss to state finances as a result of tender conspiracy/tender collusion with fines as described in Articles 48 and 49 of Law NO. 5 of 1999, the author tries to link the act of tender conspiracy with Corruption Offenses as regulated in Law No. .31 Year 1999 in particular Articles 2 and 3, and Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999, that corruption focuses on

financial losses to the state and the public at large and what should be done by state officials must be in accordance with with the principles of good state administration (Good Corporate Gavernance/GCG), so that it is proper that Tender Conspiracies that harm state finances are categorized as Corruption Offenses with fines and imprisonment.

2. CONCLUSION.

Tender conspiracy has broad implications, including the destruction of a country's economic structure, causing market distortions, harming consumers and competing producers. The prohibition of agreements containing elements of tender conspiracy is certain to violate the principles of Good Corporate Gavernance/GCG whose implementation is as mandated by Law No. 40 of 2007 concerning Limited Liability Companies.

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