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The Urgency of Law Enforcement Regarding The Existence of Subsidiaries as a Form of Avoidance of Laws Prohibiting Monopoly Practices and Unfair Business Competition

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Abstract: This research analyzes the legal position of subsidiaries in the context of Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition. The main focus of the research is to identify legal loopholes in subsidiary regulations that can be exploited for monopolistic practices and unfair business competition, as well as formulating legal remedies to address them. The research uses a normative juridical method with a case study approach to Lion Group Airlines. The results show that the regulation of group companies, which is still based on the 2007 Company Law with a single company approach, has created legal loopholes that allow monopolistic practices through subsidiaries. This is evident in the Lion Group Airlines case, where discriminatory practices occurred through exclusive agreements between the parent company and its subsidiaries, which harmed other business actors. To address these issues, several legal measures are needed, including: (1) prohibiting manipulation of company organs through corporate actions, (2) establishing a special supervisory body, (3) prohibiting market manipulation through subsidiaries, (4) implementing reversed burden of proof for negative market impacts, and (5) nullifying agreements that result in unfair competition. This research recommends the need for revision of Law No. 5 of 1999 to regulate more comprehensively about monopolistic practices through subsidiaries and strengthen supervision of corporate actions.

Keyword: Subsidiaries, Monopolistic Practices, Business Competition, Supervision, Legal Remedies.

INTRODUCTION

Many of our lives are greatly influenced by the corporate world, especially in the form of companies. We can note that large companies have made a very large positive contribution to the development of industry and trade in their respective countries and in other countries. These companies also provide employment opportunities to millions of people, provide

services and goods, improve people's welfare and improve infrastructure. If the corporate influence is positive, then of course we don't need to worry about this influence. However, we must not be careless, every company is competing to seek profits in accordance with their achievement targets so that not only are there a few companies that can make a positive contribution to development and people's lives, but it turns out that many companies are making big profits by carrying out various business activities that harming society in ways that violate the law.

Large companies influence prices and thereby influence the rate of inflation, the quality of goods, and the unemployment rate. They can manipulate public opinion through the use of mass media and they clearly influence the environment. Their behavior influences and can even endanger the democratic process through illegal political contributions.

Rapid global economic development has also brought various innovations in business strategies and corporate structures. One of the phenomena that has emerged and is of concern in the realm of business competition law is the existence of subsidiaries or what is hereinafter referred to as subsidiary companies, including the principles of separate entity and limited liability. In Article 3 of the Limited Liability Company Law, which states:

1. Shareholders of the Company are not personally responsible for agreements made on behalf of the Company and are not responsible for losses to the Company in excess of the shares they own.
2. The provisions as intended in paragraph (1) do not apply if:
 - a) The Company's requirements as a legal entity have not been or are not fulfilled.
 - b) The shareholder concerned, whether directly or indirectly, in bad faith, uses the Company for personal interests.
 - c) The shareholder concerned is involved in an unlawful act committed by the Company.
 - d) The shareholders concerned either directly or indirectly unlawfully use the Company's assets, which results in the Company's assets being insufficient to pay off the Company's debts.

In Indonesia, as the country with the largest economy in Southeast Asia, the existence of subsidiaries gives rise to various legal implications, especially in the context of enforcing Law Number 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition. Subsidiaries in this case are business entities which are useful as a way of controlling and monopolizing the market and do not even have real business activities or significant assets, but have valid legal status. The existence of this type of company is often associated with various purposes, ranging from tax planning to corporate restructuring. However, in the context of business competition law, there are concerns that subsidiaries could be used as instruments to circumvent the Law Prohibiting Monopolistic Practices and Unfair Business Competition.

Law Number 5 of 1999 has the noble aim of maintaining a healthy business competition climate in Indonesia. Article 3 of the Law explicitly states its aim is to safeguard public interests and increase national economic efficiency. However, the complexity of subsidiary structures creates new challenges in the implementation and enforcement of these laws.

In recent years, monopolistic practices and unfair business competition have become increasingly widespread in Indonesia. Many large companies use subsidiaries as a means to circumvent applicable laws and regulations. This can cause harm to consumers, competitors and the country's economy as a whole.

Some potential misuse of subsidiaries in the context of business competition includes:

1. Formation of hidden cartels through a network of subsidiaries that are difficult to trace.
2. Monopoly practices through undetected market control due to the use of various subsidiaries.

3. Avoidance of the obligation to report mergers and acquisitions which should be regulated in the Business Competition Supervisory Commission Regulation.
4. Manipulation of the ownership structure to avoid cross-ownership provisions prohibited in law.

Article 1 number 1 Law no. 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition states that "Monopoly practices and unfair business competition are all forms of business activities that can hamper or hinder healthy and reasonable business competition." Article 2 also states that "Everyone is prohibited from carrying out monopolistic practices and unfair business competition".

However, in practice, many companies still use subsidiaries as a means to avoid applicable laws and regulations, including the Law Prohibiting Monopoly Practices and Unfair Business Competition. This can cause harm to consumers, competitors and the country's economy as a whole.

The Business Competition Supervisory Commission (KPPU) as an institution mandated to supervise the implementation of Law no. 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition is responsible for the supervision and enforcement of business competition law in Indonesia, has made various efforts to overcome monopolistic practices and unfair business competition but still faces significant challenges in identifying and taking action against violations involving children company. This complexity is compounded by the cross-border nature of many subsidiaries requiring international coordination in law enforcement. Several changes to the mechanism in law enforcement regarding business competition prohibitions in accordance with the Job Creation Law.

In this case, changing the method of law enforcement against monopolies has been made difficult considering that appeals from KPPU decisions can only be submitted to the Commercial Court, whereas previously they could be submitted to the District Court. We need to remember that the Commercial Courts in Indonesia are very limited, namely 5 courts spread across Indonesia. Commerce is all aspects that relate to trade and have commercial value, meaning that if you apply this term to Indonesian legislation, it means that all substances originating from the wetboek van koophandel (WvK) or the Commercial Law Book and its derivatives should be included in the court's competence. commerce. Several weaknesses in law enforcement in the business world in Indonesia also pose serious challenges in enforcing the law against subsidiaries.

In addition, developments in technology and the digital economy add new dimensions to the use of subsidiaries. Digital and fintech platforms operating across jurisdictions make it increasingly difficult to monitor and enforce business competition laws. Therefore, a comprehensive legal analysis is needed to understand the position of subsidiaries within the business competition legal framework in Indonesia. This analysis should include juridical aspects, comparisons with other jurisdictions, as well as economic and public policy considerations. The results of the analysis are expected to provide a basis for improving regulations and law enforcement practices in facing the challenges posed by the existence of subsidiaries in the context of business competition.

Based on the background stated, the author formulates several problems. First, what is the legal position of subsidiaries in Law Number 5 of 1999 concerning Prohibition of Monopoly Practices and Unfair Business Competition? Second, what legal efforts can be taken to eradicate the existence of subsidiaries so that they do not circumvent the prohibition on monopoly practices and unfair business competition? By studying and analyzing these questions, it will be possible to better understand the urgency of law enforcement regarding the existence of subsidiaries as a form of evasion of the law prohibiting monopoly practices and unfair business competition.

METHOD

Legal research is a scientific activity based on certain methods, systematics and thinking which aims to study one or several particular legal phenomena by analyzing them. Because of this, it is also necessary to conduct in-depth examinations of legislation, legal theories and also collect legal data from leading legal scholars and experienced legal practitioners in their respective fields.

The author uses data that includes Primary Data sources which are legal materials that can be binding in nature, which consist of laws and regulations related to the Prohibition of Monopoly Practices and Unfair Business Competition. Secondary Data Sources are legal materials that explain primary legal materials, including books related to the legality of subsidiaries in Indonesia. Tertiary sources are legal materials whose materials are obtained to clarify an issue or a term found in primary and secondary legal materials, which consist of legal dictionaries, language dictionaries and written documents. Legal materials that have been obtained, inventoried and identified are to be used as material in analyzing the problems in this writing. Identification of legal materials, both primary and secondary, must be carried out critically, logically and systematically in accordance with the legal order or rules that apply in this legal research method or in writing this journal so that it complies with the applicable code of ethics.

RESULTS AND DISCUSSION

Legal Position of Subsidiaries in Law Number 5 of 1999 concerning Prohibition of Monopoly Practices and Unfair Business Competition.

Subsidiaries generally take the form of Limited Liability Companies. A company is a legal entity which is a capital association, established based on an agreement, carrying out business activities with authorized capital which is entirely divided into shares and meets the requirements stipulated in this law and its implementing regulations. The company must have aims and objectives as well as business activities that do not conflict with the provisions of laws and regulations, public order and/or morality. This means that whatever the type of business, the company must not carry out activities that violate statutory regulations. In addition, for companies that run their businesses in the natural resources sector, these companies have social and environmental responsibility obligations. Companies that carry out business activities in the field and/or related to natural resources are obliged to carry out social and environmental responsibilities.

In order to increase productivity and profits, companies must make breakthrough efforts so that sustainability can be maintained, namely through investment in business development or more often known as company expansion. Expansion is a manifestation of the desire to maintain the company's existence over a long period of time. Companies are not founded with the intention of stopping after making temporary profits. Expansion is carried out to provide growth for the company. Expansion is enlarging a company either by establishing a new business with new products or products that already exist in other places or also increasing production of goods that have been produced. Companies that want to maintain their survival must be sensitive to existing opportunities and threats. This is intended as part of efforts to achieve a better company life by meeting consumer needs.

A group company is an arrangement of companies that remain legally independent and which form one economic unit led by a parent company. Group companies can be arranged vertically and horizontally. Group companies arranged vertically can be said to exist if the companies involved in that arrangement are links in a chain of companies that carry out a production process. These companies each carry out a continuation of another company's business, for example the first company starts from raw materials, continues to another company to process it into semi-finished materials, continues again to another company to

become the final production for consumers and the marketing is carried out by another company. All related companies are one unit in the group company. Group companies arranged horizontally are companies that each operate in very diverse business fields. Companies that are arranged in a related way do not only handle certain production in the sense of one particular type but also various types of production, for example agricultural production, industry, trade, hotel transportation services, banking and insurance. So, there is business diversification and is often known as a conglomerate.

However, strange phenomena often occur, namely the formation of many subsidiary companies which have the same activity. For example, in a group company there are 7 subsidiary companies that carry out the same activities, as is the case in the plantation, mining and other industries, where all subsidiary companies have the same business activities, namely production or so on. This is also an effort to dominate the market in certain commodities.

The law does not specifically regulate this group of companies. From the term group, it can be interpreted that there are several members in the group. The BW Civil Code regulates civil partnerships whose members consist of people who have the same goal of making a profit, with the obligation of each to include something, whether in the form of capital, money, goods, energy or expertise, all of which are intended for the purpose of earn profits and share these profits with its members. Likewise, from the word group, it can be described that in a group company there are several members, namely several companies who have the same goal of advancing their company and gaining profits, the results of which will also be enjoyed by the companies that are members. Thus, this group company can also be described as a civil partnership. If a civil partnership has several members, whereas in a group company the members are several companies. In this case, group companies can occur due to several things, including:

- 1) A company that is already large and developing then forms several companies.
- 2) Companies taken over, merged and merged. This is regulated in the Company Law, which regulates mergers, consolidations and takeovers or mergers, consolidations and acquisitions, the possibility of which could result in the main group company being taken over. This corporate action results in ownership or aspects of its management being controlled by the company that received the merger or the parent company.
- 3) Takeover due to transition, for example due to purchase. In legal entity companies, there can be inter-company purchases of several companies, or someone buying several companies for companies that are not legal entities or controlling capital in several companies. Naturally, this will happen to group companies.
- 4) Fourth, it can also occur due to cooperation between several companies, each of which operates in related business fields or has the same interests.

Such group companies are arranged vertically, that is, if the companies involved in that arrangement are links in the chain of companies carrying out the production process. For example, one company produces goods as raw materials for production, while another company processes the raw materials and produces them into finished goods and the other company is a marketing company. However, it can also occur between several companies, each of which operates in various or different business fields. Such group companies are arranged horizontally. For example, in the fields of trade, industry, transportation, insurance, banking, goods production and others, so they are known as conglomerates.

The relationship between the parent company and subsidiaries is as follows:

- 1) Capitalized by the holding, so that the subsidiary is truly under the holding's capital or under capitalized.
- 2) In a state of under capitalization, the subsidiary is in a state where its economic and corporate existence is not independent.

- 3) The subsidiary solely plays a role and functions as a representative (agent) conducting the holding business.
- 4) The principle of limited liability of the parent company as shareholder of the subsidiary company is related to the shareholder not being responsible for losses of the PT beyond the shares they own.

However, this principle of responsibility will be removed, and the parent company will be responsible for the subsidiary's legal problems if:

The parent company also signs agreements made by subsidiaries with third party subsidiaries;

- 1) The parent company acts as a corporate guarantee for the subsidiary's agreement with creditors;
- 2) The parent company commits an unlawful act that results in losses for third parties from the subsidiary company.

The parent company's responsibility for the legal actions of its subsidiaries is a reproach that can be used to enforce the law regarding practices of evading business competition laws carried out through subsidiaries, so that law enforcement against the parent company and subsidiary companies can be carried out if monopolistic practices are proven to have been carried out. However, the practice of using subsidiaries as a practice to avoid business competition laws carried out in order to dominate the market cannot be legally enforced. This happens because there are no regulations that prohibit this. The legal status of a subsidiary company is the same as that of a company in general in the Company Law so that the use of a group company or subsidiary company in the same activities is legally valid.

This is because the laws and regulations in Indonesia, especially the 2007 Company Law, do not specifically and in depth explain the construction of group companies or subsidiaries. However, it provides mechanisms that have implications for the formation of a business using the group company model as regulated in Chapter VII of the 2007 PT UUPT as previously reviewed. There are several prohibitions regarding group companies in Indonesia. We can find this in Article 7 paragraph (5) of the 2007 Company Law which states that "After the Company obtains legal entity status and the shareholders become less than 2 (two) people, within a maximum period of 6 (six) months starting from that situation. The shareholder concerned is obliged to transfer some of his shares to another person or the Company issues new shares to another person."

The legal relationship between parent and subsidiary companies in group company construction is due to the following things:

Parent company ownership of subsidiary shares

1. GMS (General Meeting of Shareholders).
2. Placement of members of the Board of Directors and/or Board of Commissioners of subsidiary companies.
3. Legal Relations Through Voting Rights Agreements.
4. Legal Relations Through Contracts/Agreements.

Subsidiary companies are designed to fully support the interests of group companies through management domination by the parent company. The relationship between parent and subsidiary companies is caused by the following things:

1. More than 50% (fifty percent) of the shares are owned by the parent company.
2. More than 50% (fifty percent) of the votes in the GMS are controlled by the parent company.
and or
3. Control over the running of the company, the appointment and dismissal of Directors and Commissioners is greatly influenced by the parent company.

In this case, the legal relationship that arises between the parent company and its subsidiaries originates from contractual relationships. What is meant by contractual here is that

a subsidiary company has the right to carry out personal engagements with other parties, as long as the legal action taken does not exceed the limits in the company's articles of association.

Legal Efforts That Can Be Taken to End the Existence of Subsidiaries So They Do Not Avoid Business Competition Laws

In determining appropriate legal action to take action against acts of violation of the law, it is necessary to sort or study cases that have occurred in Indonesia. One case example is Lion Group Airlines. The Lion Group Airlines company consists of several subsidiaries, namely PT. Langit Esa Oktagon, PT. Lion Group, PT. Lion Mentari Airlines, PT. Batik Air Indonesia, PT. Wings Abadi, and PT. Lion Express. Based on KPPU Decision Number 07/KPPU-I/2020, PT. Lion Mentari Airlines, PT. Batik Air Indonesia and PT. Lion Express was subject to a sanction of one billion due to legal actions that violated Article 19 letter (d) of the Anti-Monopoly Law. Basically the parent company of PT. Lion Mentari Airlines (Lion Air), PT. Batik Air Indonesia (Batik Air), PT. Wings Abadi (Wings Air), and PT. Lion Express (Lion Parcel) is PT. Langit Esa Oktagon (PT LEO) and PT. Lion Group (PT LG), all of which are members of a Group Company which is often known as "Lion Group Airlines".

As the parent company of PT. Lion Mentari Airlines, PT. Batik Air Indonesia, PT. Wings Abadi and PT. Lion Express shows a unified economic entity and at the same time the subsidiary does not have the independence to determine the direction of company policy because PT LEO and PT. Lion Group is the largest shareholder in Lion Group Airlines, so these two companies can be said to be policy makers for Lion Air, Batik Air, Wings Air and Lion Parcel as subsidiaries, in line with the Co Policy Decider theory, that subsidiaries are tools that used by the Parent Company to realize the policies of the parent Company.

Lion Air, Batik Air, and Wings Air are business entities with business activities in the field of air transportation by providing commercial aviation services and transporting goods and cargo. Meanwhile, Lion Parcel is a business entity that acts as a door to door package and document delivery service company throughout Indonesia. Initially, this case started with a buildup of cargo at Batam's Hang Nadim Airport in the period July-September 2018. Seeing this phenomenon, the KPPU investigator team carried out a series of investigations with the assumption that this was caused by unhealthy competition. The results of the KPPU's investigation found that there was a Cooperation Agreement made by Lion Air, Batik Air and Wings Air, with Lion Parcel. In this cooperation agreement, Lion Air, Batik Air and Wings Air give Lion Parcel exclusivity for the use of a cargo capacity of forty tons per day. And Lion Parcel is given the right to sell the remaining cargo capacity to other parties if Lion Parcel cannot fully fill the available cargo capacity and has the right to issue its own Air Bill of Lading (SMU) for flights from Lion Air, Batik Air and Wings Air when transporting belongings of oneself or another party. This agreement has resulted in discriminatory practices against certain business actors regarding the transportation of goods/cargo by aircraft and at the same time the agreement has closed shipping access for other Consignment Service Companies (PJT).

As we know, the practice of discrimination is a form of market control that is prohibited in the Anti-Monopoly Law. Therefore, the KPPU, in investigating alleged acts of monopoly, must first analyze the determination of the relevant market, whether it is a product market or a geographic market. In casu a quo, the KPPU considers that the product market in this case is scheduled commercial air transportation services to transport goods in the form of packages, cargo and/or post using Lion Air, Batik Air and Wings Air. Meanwhile, the geographic market related to the a quo case includes scheduled commercial air transportation on the Hang Nadim Airport route to Soekarno Hatta Airport, Halim Perdana Kusuma Airport, Juanda Airport and Kualanamu Airport. Although in the end the commission panel stated that the appropriate geographic markets were only Lion Air and Batik Air, whereas Wings Air did not meet the geographic market requirements.

Furthermore, considering that Article 19 of the Business Competition Law uses a rule of reason construction, the KPPU is obliged to prove the negative impact resulting from the actions carried out by the Reported Party. In casu a quo, based on the facts revealed at the trial, when the cooperation agreement was effective, one of the affected companies was PT Jasamitra Ekspres Nusantara, which was previously a customer of Lion Air and Batik Air. The company could not access the route as stated in the a quo agreement, so 49,555 kg of cargo shifted to Lion Parcel. According to the Commission Council, the discriminatory practice in the a quo case was not effective because it failed to attract customers from other cargo agents. This is because consumers switch to other airlines, including Garuda and Citilink.

It should be noted that there are special characteristics regarding discriminatory practices in the provisions of Article 19 of the a quo Law, where the injured party is a business actor who collaborates with a discriminatory company, either a supplier or a customer who may not be a competitor of the discriminatory company. Even though consumers did not experience losses, on the other hand there were losses experienced by other companies, namely PT Jasamitra Ekspres Nusantara. Based on the business realities of the Lion Group Airlines group company above, the discriminatory practices that occur cannot be separated from the group company's business strategy. The desire of the parent company Lion Group Airlines to gain large profits by reducing/eliminating its competing companies through controlling its subsidiaries is actually not in line with the objectives of business competition law in Indonesia.

Problems with subsidiaries or the formation of group companies in the Indonesian legal system occur because group company arrangements are still based on the 2007 PT UUPT using a single company approach. This causes legal criticism of Law Number 5 of 1999 concerning Prohibition of Monopoly Practices and Unfair Business Competition. Group company members are juridically independent, but in business reality there is control of subsidiaries by the parent company which shows that there are multiple realities that are in conflict with each other. The emergence of monopolistic practices and unfair business competition can occur through cross-share ownership, discriminatory practices and price fixing through multiple positions.

Through the legal case above, several legal measures can be taken to prevent or take action against efforts to circumvent Law Number 5 of 1999 concerning Prohibition of Monopoly Practices and Unfair Business Competition through subsidiaries, namely Amendments to Law Number 5 of 1999 concerning Prohibition of Monopoly Practices. And Business Competition which contains several things, namely:

1. Prohibition of share ownership by the parent company with the aim of manipulating the Company's organs owned by subsidiaries through acquisition, merger and consolidation of subsidiaries, every corporate action is required to do not monopolize the market by reducing/increasing prices, manipulating supply in the market or using other methods.
2. Must report every corporate action to the KPPU in order to comply with healthy business competition.
3. Establishment of a state agency/institution whose function is to supervise all corporate actions in order to prevent market monopoly through the use of subsidiaries,
4. Prohibition of market manipulation by unreasonably increasing or reducing supply in the market through subsidiaries.
5. Reverse proof of negative impacts on the market by subsidiaries, this is to provide legal protection for the Company.
6. Cancellation by law of any agreement between Companies which results in an increase/reduction in supply in the market which results in unfair competition.

CONCLUSION

The legal position of subsidiaries in Law no. 5 of 1999 still has legal loopholes that can be exploited for monopolistic practices and unfair business competition. This happens because group company arrangements are still based on the 2007 UUPT which uses a single company approach. Group companies can be formed in several ways, namely large companies that form several subsidiaries, the result of takeovers, consolidations and mergers, takeovers due to transition, collaboration between companies in related business fields. Legal relationships between parent and subsidiary companies occur due to share ownership by the parent company, control of the GMS, placement of members of the Board of Directors/Board of Commissioners, voting rights agreements, contractual relationships

Based on the Lion Group Airlines case, it can be seen how monopolistic practices can occur through subsidiaries by providing exclusivity and discrimination against other business actors. To overcome this legal loophole, several legal measures are proposed, namely prohibiting manipulation of company organs through corporate actions, establishing a corporate action monitoring agency, prohibiting market manipulation through subsidiaries, implementing reverse evidence for negative impacts on the market, canceling agreements that result in unfair competition. In this case, changes need to be made to Law no. 5 of 1999 to regulate in more detail monopolistic practices through subsidiaries and provide stricter supervision of corporate actions that have the potential to create unfair business competition.

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