E-ISSN: 2962-2816 | P-ISSN: 2747-1985
JOURNAL OF LAW, POLITIC AND HUMANITIES (JLPH)
https://dinastires.org/JLPH dinasti.info@gmail.com +62 811 7404 455
DOI: https://doi.org/10.38035/jlph.v4i4
Received: 6 Jenu 2024, **Revised:** 11 June 2024, **Publish:** 12 June 2024

Job Creation Law: A New Perspective for Business Actualization of Business Competition and Its Link to Corruption

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Abstract: This research aims to find out how the criminal law on business competition applies after Law Number 6 of 2023 and find out how the actualization of business actors in unfair business competition is related to the potential for Corruption Crimes. This research uses a normative juridical method through a statutory approach and a conceptual approach. The results of this research are that Law Number 6 of 2023 eliminates the criminal threat of business competition in Law Number 5 of 1999, where this effort is limited to decriminalization without anything else behind it. Then, it was also found that the elimination of the criminal threat of business competition in Law Number 6 of 2023 does not necessarily eliminate the criminal threat of business competition behavior absolutely, it is still possible that there is a threat of criminal acts of corruption which is indicated by unfair business competition. This needs to get the attention of business actors, so in this case the importance of considering the principles of business judgment rules in determining business policies is emphasized in order to avoid this threat.

Keyword: Business Competition Law, Decriminalization, Corruption.

INTRODUCTION

The sustainability of the Indonesian economy has been guaranteed by the 1945 Constitution of the Republic of Indonesia (Constitution of the Republic of Indonesia). Regarding the national economy, it is regulated broadly in Chapter The principle of kinship illustrates the relationship between elements of society, where each has a role and function to achieve one goal, namely shared prosperity (Kansil & Kansil, 2003). Not only that, Article 33 paragraph (4) of the 1945 Constitution of the Republic of Indonesia also mandates that the national economy be carried out on the basis of economic democracy which upholds the principles of togetherness, fair efficiency, sustainability, environmental awareness, independence, and by maintaining a balance of progress and national economic unity.

Contrary to the spirit of Article 33 of the Constitution of the Republic of Indonesia as explained above, the existence of unfair business competition and monopolistic practices is an indicator of a concentration or centralization of economic power controlled by only a few parties (Sirait, 2011). The control of economic power by a handful of business actors, either

directly or indirectly, will have an impact on various parties, including fellow business actors, as well as the community (in relation to people's purchasing ability for certain goods) (Sirait, 2011). So to answer this problem, Law Number 5 of 1999 concerning Prohibition of Monopoly Practices and Unfair Business Competition (Law 5/1999) was introduced in Indonesia. The principles of this law are in harmony with Article 33 of the 1945 Constitution of the Republic of Indonesia which has been explained previously, which can be seen in Article 2 of Law 5/1999 which reads: "*Indonesian entrepreneurs in carrying out their business activities are based on economic democracy by paying attention to the balance between the interests of entrepreneurs and the public interest*."

Meanwhile, Law 5/1999 has substance consisting of eleven chapters, where in Chapter VIII regarding sanctions, it also regulates basic criminal sanctions and additional criminal sanctions. This indicates that every norm in the article that contains prohibited acts is categorized as a criminal offense because of the main criminal sanctions and additional criminal sanctions. Specifics regarding the main criminal sanctions in Law 5/1999 are regulated in Article 48 with a maximum fine of IDR 100.000.000.000,00 (One hundred billion Rupiah) or replaced by a maximum imprisonment of six months (Lubis et al., 2017). Meanwhile, additional criminal sanctions are regulated in Article 49 which include: 1) revocation of business permits; or b) prohibition on business actors who have been proven to have violated this law from holding the position of director or commissioner for at least 2 (two) years; or c) cessation of certain activities or actions that cause losses to other parties.

Over time, Law 5/1999 underwent changes with the enactment of Law Number 6 of 2023 concerning the Determination of Government Regulations in Lieu of Law Number 2 of 2022 concerning Job Creation into Law (Law 6/2023). So Law 5/1999 has also undergone changes in Law 6/2023. Amendments to Law 5/1999 are included in the Ease of Doing Business Cluster Law 6/2023 that: "*To make it easier for Business Actors to invest, this Government Regulation in Lieu of Law amends, deletes or establishes new arrangements for several provisions regulated in: Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition (State Gazette of the Republic of Indonesia of 1999 Number 33, Supplement to State Gazette of the Republic of Indonesia Number 3817)*."

Based on the provisions of this article, it can be seen that changes to the substance of Law 5/1999 are regulated in Article 118 of Law 6/2023, where there are six articles of Law 5/1999 that have been changed and/or deleted, specifically Article 44 to Article 49 of Law 5/1999. 1999.

Reflecting on the facts above, the amendments to Law 5/1999 in Law 6/2023 also include articles regarding criminal provisions regulated in Article 48 and Article 49 of Law 5/1999. It is known that the amendments to these two articles revoke most of the criminal threats previously regulated in Law 5/1999, this means that Law 6/2023 gives rise to a decriminalization of business competition crimes (Tektona, 2022). However, eliminating criminal threats here does not mean eliminating crimes in the field of business competition absolutely, but rather transferring criminal sanctions to Law Number 1 of 1946 concerning Criminal Law Regulations (Criminal Code), to be precise in Article 382 bis of the Criminal Code regarding fraudulent acts (Habib et. al., 2023).

The abolition of criminal provisions (especially regarding fines) in Law 6/2023 seems to be a breath of fresh air for business actors. However, this criminal fine is essentially related to administrative sanctions, the imposition of which falls under the absolute authority of the Business Competition Supervisory Commission (KPPU). Apart from that, it is important to remember that crime by corporations often occurs in the form of financial manipulation, accounting fraud, cartels (one of the prohibitions in business competition), bribery and environmental destruction (Prasetyo et al., 2023). So, in the case

of the abolition of criminal provisions on business competition, there are still many criminal possibilities that could potentially be carried out by business actors.

The elimination of criminal business competition in Law 6/2023 does not absolutely eliminate criminal penalties for business actors who carry out monopolistic practices and unfair business competition. Criminal sanctions for corruption can still be active if unhealthy business competition practices result in state losses because they involve the State Revenue and Expenditure Budget (APBN) and Regional Revenue and Expenditure Budget (APBD) and other state budgets. The delegation of cases to the Corruption Eradication Commission (KPK) can be carried out by the KPPU, where later the KPPU's findings can be used as indicators of corruption that can be used in investigations by the KPK. In the future, policies related to Company organs which are then detrimental to the Company itself will also be reviewed using doctrine business judgement rule.

Based on the background above, the author formulates several problem formulations which will be the focus of the discussion in this paper, including: 1) How is the applicability of criminal provisions of business competition apply after the enactment of Law 6/2023?; 2) How is The Actualization of Business Actors regarding Monopoly Practices and Unfair Business Competition in Relation to the Potential Threat of Corruption Crimes?

METHOD

The type of research used in this research is normative juridical with a reform orientation. Research was carried out by reviewing library materials in the form of secondary data as the object of study. The approach in this research uses a statutory regulation approach (statute approach) which is carried out by reviewing statutory regulations by paying attention to the structure of norms in the form of a sequence or hierarchy of statutory regulations, as well as the existence of norms in a specific or general statutory regulation (Diantha,2016). Apart from that, the author in this case also uses a conceptual approach (conceptual approach) by looking at aspects of the legal concepts behind solving problems, as well as examining the values contained in the norming of a regulation.

RESULTS AND DISCUSSION

Applicability of Criminal Provisions of Business Competition Apply After The Enactment of Law 6/2023

Law 5/1999 regulates several norms that contain prohibitions for business actors, whether in the form of prohibited agreements, prohibited acts, or the use of a dominant position. The entire prohibition is an unlawful act which can be seen from Article 4 to Article 29 of Law 5/1999. All violations of this article carry a basic criminal threat as regulated in Article 48 of Law 5/1999 (Atmaja, 2022). Not only the basic punishment, there are also additional criminal threats contained in Article 49 of Law 5/1999. So in this case, it can be said that every violation of an act prohibited in Law 5/1999 is a criminal act.

The criminal threats contained in Law 5/1999 have more or less shortcomings in terms of legal application. This is because only the judiciary has the authority to regulate and implement this matter, This is considering the limited authority of investigators as regulated in Law 5/1999. There are only at least two investigative powers regulated in Article 41 paragraph (1) and Article 44 paragraph (4) of Law 5/1999, namely: a) the authority to carry out investigations for business actors who are not cooperative during the inspection, and b) the authority to carry out investigations against business actors who do not have good intentions to implement KPPU decisions. This then makes the criminal threats in Law 5/1999 appear less mature and effective.

Law 6/2023 is the first law to amend Law 5/1999, amending the criminal provisions in Article 48 of Law 5/1999, and removing the additional criminal threat provisions regulated

in Article 49 of Law 5/1999. Changes to Article 48 and Article 49 of Law 5/1999 through Law 6/2023 can be seen in the following table description:

Table 1. Comparison of criminal threats to business competition in Law 5/1999 and Law 6/2023

Law 5/1999	Law 6/2023
Article 48: "Violations of the provisions of Article 4, Article 9 to Article 14, Article 16 to Article 19, Article 25, Article 27 and Article 28 are punishable by a fine of at least 25,000,000,000.00 (twenty-five billion rupiah) and as high as -a maximum of IDR 100.000.000.000,00 (one hundred billion rupiah), or imprisonment in lieu of a fine for a maximum of 6 (six) months. Violations of the provisions of Articles 5 to Article 8, Article 15, Articles 20 to Article 24, and Article 26 of this Law are punishable by a fine of a minimum of 5,000,000,000.00 (five billion rupiah) and a maximum of IDR 25.000.000.000,00 (twenty five billion rupiah), or imprisonment in lieu of a fine for a maximum of 5 (five) months. Violation of the provisions of Article 41 of this Law is punishable by a fine of a minimum of 1,000,000,000.00 (one billion rupiah) and a maximum of Rp. 5.000.000.000,00 (five billion rupiah), or imprisonment in lieu of a fine for a maximum of 3 (three months."	Article 48: "Violation of the provisions of Article 4l of this Law is punishable by a fine of a maximum of IDR 5.000.000.000,00 (five billion rupiah) or imprisonment of a maximum of 1 (one) year as a substitute for a fine." Notes: Article 48 paragraph (1) and paragraph (2) of Law 5/1999 are deleted by Law 6/2023. This can be interpreted as meaning that all acts prohibited in Law 5/1999 are no longer criminal acts. The only act that is still categorized as a criminal act is the act of a business actor who is not cooperative in the inspection as regulated in Article 41 of Law 5/1999.
Article 49: "By referring to the provisions of Article 10 of the Criminal Code, additional penalties as regulated in Article 48 can be imposed in the form of: revocation of business license; or prohibition on business actors who have been proven to have violated this law from holding the position of director or commissioner for a minimum of 2 (two) years and a maximum of 5 (five) years; or cessation of certain activities or actions that cause losses to other parties."	Article 49: Article 49 is deleted. Notes: There is no longer an additional criminal threat for business actors who carry out monopolistic practices and unfair business competition.

Regarding the elimination of the criminal threat of business competition in Law 6/2023 as explained above, it is also necessary to review the academic text to be able to find out what is behind the legislators in eliminating the criminal threat of monopolistic practices and unfair business competition as regulated in Article 48 and Article 49 Law 5/1999. As for the academic text of the Draft Job Creation Law, the reason for making changes to the two articles is to avoid overlapping regulations in the Criminal Code, and the imposition of administrative sanctions has become the authority of the KPPU. In this case, the article in the Criminal Code referred to in the academic text is not given a clear reference. However, if we look further, norms in the Criminal Code that are related to business competition can be seen in Article 382 bis of the Criminal Code which regulates fraudulent acts in the business world. The provisions of Article 382 bis of the Criminal Code read: "*Any person who, in order to obtain, carry on or expand the results of a trade or company belonging to himself or another person, commits a fraudulent act to mislead the general public or a particular person, is threatened, if the act can cause harm to his or another person's concurrencies, due to competition. cheating, with a maximum imprisonment of one year and four months or a maximum fine of thirteen thousand five hundred rupiah*."

Talking about the reasons for changes to Article 48 and Article 49 of Law 5/1999 as explained above, questions will arise regarding the suitability of the reasons explained in the Academic Text of the Job Creation Law. If indeed the amendment to Article 48 and the revocation of Article 49 of Law 5/1999 by Law 6/2023 is due to avoiding overlap with Article 382 bis of the Criminal Code, then it is necessary to compare the formulation of norms contained in each article in Law 5/1999 and the Criminal Code. . In this regard, it should be noted that from the perspective of the form of norms, there are two types of legal norms, namely single legal norms and paired legal norms (Gazali, 2022). One single legal norm is a legal norm that can stand individually or alone (Tirtamulia, 2016). Meanwhile, paired legal norms are legal norms that cannot stand alone, so they consist of two norms, namely primary legal norms and secondary legal norms. Primary legal norms are norms that contain an order, while secondary norms contain sanctions for violations of primary norms.

Based on the explanation above, it is known that Article 48 and Article 49 of Law 5/1999 and Article 382 bis of the Criminal Code have differences in the form of the norm. Article 48 and Article 49 of Law 5/1999 are a form of secondary norm which contains sanctions for violations of other articles which regulate prohibitions for business actors within the scope of business competition, which means it is a pair norm. Meanwhile, Article 382 bis of the Criminal Code is a single norm which regulates orders as well as sanctions for those who violate it. So, based on this explanation, it is not appropriate if the Academic Text on the Job Creation Law states that the amendment to Article 48 and the revocation of Article 49 of Law 5/1999 is motivated by avoiding the creation of an overlap with the provisions of Article 382 bis of the Criminal Code. This is because there is a relationship of responsibility for actions (attribution) between primary legal norms and secondary legal norms (Amin et.a al., 2023), Where this concept is attached to Article 48 and Article 49 of Law 5/1999 in relation to other articles in Law 5/1999 which contain prohibitions on business actors (primary legal norms), so that they cannot be separated from each other.

Based on this, the fraudulent acts regulated in Article 382 bis of the Criminal Code are not directly related to competition between one business actor and another as regulated in Law 5/1999, so that in this case it is impossible for this article to replace the criminal offenses regulated in Law 5/1999. Moreover, the characteristics of the elements of Article 382 bis of the Criminal Code will not be easy to deal with all forms of unfair business competition (Amrullah, 2006). So, normatively, it can be understood that the lifting of the threat of criminal business competition in Law 6/2023 is limited to an effort to decriminalize monopolistic practices and unfair business competition as regulated in Law 5/1999.

Actualization of Business Actors regarding Monopoly Practices and Unfair Business Competition in Relation to the Potential Threat of Corruption Crimes

Contrary to the discussion regarding the elimination of criminal threats to business competition in Law 5/1999 through Law 6/2023 as explained above, it turns out that there are still criminal threats awaiting business actors, which is indicated by monopolistic practices and unfair business competition. The criminal threat in question is the threat of criminal acts of corruption as regulated in Law Number 31 of 1999 concerning the Eradication of Corruption Crimes. Specifically in this case, it is related to unfair business competition practices in the form of bid rigging. Meanwhile, law enforcement against tender rigging which then results in criminal acts of corruption will involve two institutions, namely the KPPU and the KPK (Ferdianand et.al., 2020).

Conspiracy can be interpreted as an agreement that will result in behavior that tends to adapt to each other (concerted action) between business actors (Rusli, 2021). Tender rigging is an act that is prohibited from being carried out by business actors as regulated in Article 22 of Law 5/1999. The scope of Article 22 includes a prohibition on business actors colluding

with other parties with the aim of determining a tender winner. There are three types of tender conspiracy based on the subjects involved, namely (Simbolon, 2016):

1. Horizontal Conspiracy, namely conspiracy that occurs between business actors and fellow business actors;
2. Vertical Conspiracy, namely conspiracy that occurs between business actors and the tender committee or auction committee;
3. Horizontal Vertical (Combined) Conspiracy, namely conspiracy that occurs between business actors (there are two business actors) and the tender committee or auction committee.

Regarding bid rigging in the procurement of government goods and services, the KPPU has a limited role from the perspective of the actors involved. In accordance with the provisions of Article 36 of Law 5/1999, KPPU only has administrative authority (Nazari, 2023), and this authority only applies to business actors. So in this case, the KPPU's authority to take action against tender collusion can only apply to business actors, whereas if there is vertical and combined conspiracy, the KPPU cannot enforce the law against the tender committee as a state administrator. However, based on Chapter V of the Business Competition Supervisory Commission Regulation Number 2 of 2022 concerning Guidelines for Article 22 of Law Number 5 of 1999 concerning Prohibition of Conspiracy in Tenders (as has been revoked by the Business Competition Supervisory Commission Regulation Number 1 of 2023 concerning Revocation of the Competition Supervisory Commission Regulation Business Number 2 of 2010 concerning Guidelines for Article 22 of Law Number 5 of 1999 concerning Prohibition of Conspiracy in Tender, but there are no new KPPU regulations that regulate it), then the KPPU can convey information about cases involving state officials as tender committees to the authorized institutions , one of which is the KPK.

Meanwhile, the procurement of government goods and services involves state finances, such as the APBN, APBD and other state budgets (Kahfi et al., 20230). So, in the event that there is bid rigging in the process of procuring government goods and services which causes state losses, the Corruption Eradication Commission (KPK) has the authority to enforce the law against it. The Corruption Eradication Commission's authority in this case is to carry out law enforcement against alleged violations of Article 2, Article 3, and Article 15 of Law Number 31 of 1999 concerning the Eradication of Corruption Crimes, then Article 7, Article 11, Article 12 of Law Number 20 of 1999. 2001 concerning Amendments to Law Number 31 of 1999 concerning Eradication of Corruption Crimes. All of these articles of course also contain criminal threats, both imprisonment and fines.

The delegation of cases from the KPPU to the KPK is supported by cooperation between the two institutions. The cooperation between KPPU and KPK in this case is contained in the form of a Memorandum of Understanding (MoU) which was first signed in 2006, and was last renewed through a Memorandum of Understanding between KPK and KPPU Number: 57 of 2020. The Memorandum of Understanding was created with the aim of increasing cooperation and coordination between the Corruption Eradication Commission and KPPU in efforts to eradicate corruption and enforce the law against monopolistic practices and unfair business competition. The Memorandum of Understanding also covers several scopes, namely:

1. Prevention of Corruption Crimes;
2. Exchange of Information and/or Data;
3. Implementation of Education and Training;
4. Implementation of Studies and Research;
5. Resource Persons and Experts; And
6. Other scopes are in accordance with the agreement of the Parties.

Based on the broad scope of the Memorandum of Understanding between the Corruption Eradication Commission and the Corruption Eradication Committee, this can

facilitate prosecution of suspected Corruption Crimes which are indicated through monopolistic practices and unfair business competition. This is especially related to one of the scopes mentioned above, namely the Information and/or Data Exchange section, where this is then confirmed through Article 4 paragraph (1) of the Memorandum of Understanding which states that the KPK and KPPU can make mutual requests for information. and/or data related to the implementation of their respective duties and authorities in accordance with statutory regulations. So in this case, it is possible for the KPPU to exchange information with the Corruption Eradication Committee in the event that a case it is examining contains indications of a Corruption Crime, and vice versa.

Apart from the elimination of the criminal threat of business competition in Law 5/1999 through Law 6/2023, the potential criminal threat of corruption which is indicated by the existence of monopolistic practices and unhealthy business competition as explained above certainly needs to be a concern for business actors. Considering that monopolistic practices and unfair business competition are closely related to the company's business decisions (especially in this case the decisions of the board of directors), it is also necessary to examine the doctrine business judgement rule. Doctrine business judgement rule is a legal doctrine which teaches that a decision of the company's directors cannot be contested by anyone, even if it turns out that the decision is wrong and/or detrimental to the company (Fuady, 2014). However, this can only happen if several conditions have been fulfilled, including:

1. That the decision of the directors does not conflict with the law;
2. The board of directors' decision was made in good faith;
3. The dikeksi decision was made with the right aim;
4. The directors' decision has a rational basis;
5. The directors' decisions were made with the principle of prudence;
6. The board of directors' decision was the best step for the company.

Law Number 40 of 2007 concerning Limited Liability Companies (UU 40/2007) also adheres to the principle of business judgment rule. This is implied in Article 97 paragraphs (1) and (2) Law 40/2007, then in Article 99 paragraph (1) Law 40/2007. Article 97 paragraph (1) and (2) of Law 40/2007 reads: “(1) The Board of Directors is responsible for the management of the Company as intended in Article 92 paragraph (1) . (2) The management as referred to in paragraph (1), must be carried out by every member of the Board of Directors in good faith and full responsibility.” Meanwhile, Article 99 paragraph (1) of UU 40/2007 reads: “Members of the Board of Directors are not authorized to represent the Company if: a. a case occurs in court between the Company and the member of the Board of Directors concerned; or b. The member of the Board of Directors concerned has a conflict of interest with the Company.” So based on this, the concern for business actors in making decisions is that the decision must be based on good faith, the decision must be made with full responsibility, and the decision is aimed solely at the interests of the company.

According to Douglas M Branson, principles business judgement rule has three fundamental characteristics attached to it, namely: a) this principle protects directors from legal proceedings; b) this principle can avoid courts making decisions based on subjectivity, and c) this principle is considered as a legal manifestation of economic policy which is based on freedom and encouragement to take objective and rational risks (Anandya et al., 2023). More than that, principles business judgement rule even consider that directors cannot be held responsible even if they make a mistake in making a decision, or if the decision causes losses, or if there is an error in calculations when making business decisions. Reflecting on this, it is important for business actors to consider the value of principles business judgement as explained previously in terms of making a decision. This is necessary in order to avoid being drawn into cases of monopolistic practices and unfair business competition, which could also be an indication of criminal acts of corruption by corporations.

CONCLUSION

Business competition law in Indonesia, which in this case is represented by Law 5/1999, initially contained criminal threats. This is proven by the existence of Article 48 and Article 49 of Law 5/1999 which contain basic criminal and additional criminal provisions. The existence of these two articles makes all articles containing prohibitions related to business competition a criminal offense. As the world of law developed in Indonesia, there was the first change to Law 5/1999 through Law 6/2023. One of the scopes of Law 5/1999 which was amended by Law 6/2023 is the criminal provisions, where the criminal provisions in Article 48 paragraphs (1) and (2), then Article 49 of Law 5/1999 was deleted by Law 6/2023. The only criminal provisions maintained by Law 6/2023 are for acts regulated in Article 41 of Law 5/1999. The academic text on the Job Creation Law provides reasons for eliminating the business competition crime so that there is no overlap with the provisions in the Criminal Code. The norm in the Criminal Code which has the closest content to business competition is Article 382 bis of the Criminal Code. However, the normative provisions in this article of the Criminal Code are not comparable to the two articles of Law 5/1999 which were amended by Law 6/2023, both in terms of norms and in terms of the content of the norms. Thus, the revocation of Article 48 paragraphs (1) and (2), then Article 49 of Law 5/1999 through Law 6/2023 can be understood as a form of decriminalization within the scope of business competition in Indonesia.

Eliminating the threat of business competition through Law 6/2023 does not merely eliminate criminal threats in the event of monopolistic practices and unfair business competition by business actors. This concerns the potential for alleged criminal acts of corruption which are indicated by monopolistic practices and unfair business competition. In particular, this is very possible to occur in the practice of bid rigging in the procurement of government goods and services, especially if it does not only involve business actors as tender participants, but also involves state administrators as tender committees. Meanwhile, KPPU and KPK have signed a Memorandum of Understanding in 2020 which will make it easier to carry out their respective duties and authorities, especially in terms of exchanging information and related data if both handle related cases that violate the provisions of Law 5/1999 and Law 31/1999 because. Law 20/2001 at once. Based on this, business actors, especially in this case directors, must pay attention to the principle of prudence in determining their business decisions in order to avoid allegations of monopolistic practices and business competition and criminal acts of corruption. This can be done by considering principles business judgement rule which has also been adopted by Law 40/2007. There are basic principles that must be followed by directors in determining their business decisions based on principles business judgement rule, namely that the decision must be based on good faith, must be carried out with full responsibility, and the decision is aimed solely at the interests of the company.

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