Disgorgement in Indonesian Competition Law: A Comparative Approach Following the Job Creation Law Enactment

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ABSTRACT

On November 2, 2020, the Indonesian Government enacted Law No. 11 the Year 2020 on the Job Creation Law. This Job Creation Law amend article 47 of Law No. 5 the Year 1999 on the Anti-Monopoly and Unfair Competition concerning administrative sanction to the violator of the unfair competition law, which among others is fine. On February 2, 2021, the Government issued Government Regulation No. 44 the Year 2021 on the Execution of Anti-Monopoly and Unfair Competition. One of the ideas for the order of the fine is by using an "illegal profit" scheme. Some countries like China, Turkey, Croatia, and Spain are also familiar with an almost-nearly relevant "disgorgement." This study aims to discuss disgorgement regulation in the competition law in Indonesia and some other countries. This research is normative and comparative. The data in this research is secondary data consisting of primary, secondary, and tertiary legal sources. The data collection method was carried out through a document study. All qualitative data were analysed descriptively to conclude deductively. This study concludes that disgorgement in several countries has a different concept. Disgorgement is the imposition of sanctions to return several benefits obtained from violating a legal rule –in the context of this research is the Law of anti-unfair business competition. In Indonesia, the concept of disgorgement has been applicable in the new imposition of the administrative-fine method under Government Regulation No. 44 the Year 2021 concerning the Execution of Anti-Monopoly and Unfair Competition. Disgorgement is a new concept known in Indonesia that aims more at recovery than creating a deterrent effect.

Keywords: *Disgorgement; Sanction; Unfair Competition*

1. INTRODUCTION

The development of the state economy is one of the Indonesian Government's efforts to improve national development and people's welfare as mandated by Article 33 paragraph (4) of the 1945 Constitution. This article implies that everyone has the same opportunity to participate in economic activities, including carrying out business activities in a healthy, reasonable, effective, and efficient business climate. This article is the basis for issuing Law Number 5, the Year 1999, concerning the Prohibition of Monopolistic Practices and Unfair Business Competition. This Law was promulgated on March 5, 1999, and comes into force 1 (one) year from the date of promulgation; thus, currently, the Law is more than 20 years old.

In 2017, the Indonesian Competition Commission (hereinafter referred to as KPPU (Komisi Pengawas Persaingan Usaha) released a total value of fines and compensation of close to IDR 2.07 trillion, resulting in 348 cases for 17 years. The total value of fines and compensation is not yet proportional to the number of cases handled by KPPU. This fact shows that the dispute over the unfair business competition in Indonesia is high [1].

One of the determining factors for achieving the objectives of business competition law is the sanctions given to violators. The sanctions are expected to provide a deterrent effect both to recidivists and those who commit violations. Under Law Number 5 the Year 1999 (prior to the recent amendment), sanctions are regulated in CHAPTER VIII, which regulates 2 (two) types of sanctions: administrative sanctions and penal sanctions. The administrative sanction in article 47 paragraph (2) letter g mentions the imposition of a fine of Rp minimum. 1,000,000,000.00 (one billion rupiahs) and a maximum

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of Rp. 25,000,000,000 (twenty-five billion rupiah). These sanctions are considered relatively light in number, not comparable to business actors' benefits [2].

The illustration of the incomparability of sanctions with these benefits can be seen in the case of the cartel practice of 110 - 125 cc scooter prices by PT Yamaha Indonesia Motor Manufacturing (PT YIMM) and PT Astra Honda Motor (PT AHM). In this case, KPPU imposes a maximum fine of IDR 25,000,000,000 (twenty-five billion rupiahs) against PT YIMM and a low amount of IDR 22,500,000,000 (twenty-two billion five hundred million rupiahs) against PT AHM. According to Nurfaik, taking into account the sales data released by the Indonesian Motorcycle Industry Association (AISI), PT YIMM was able to get IDR 21,000,000,000,000 (twenty-one trillion rupiahs) from scooter sales alone, while PT AHM capable of earning IDR 68,000,000,000,000 (sixty-eight trillion rupiahs) [3].

In the Bill of the Law on Monopolistic Practices and Unfair Business Competition, the provisions regarding sanctions are about to be amended as the imposition of a fine of at least 5% (five percent) and a maximum of 30% (thirty percent) of the sales value of the offending Business Actor during the violation period. The House of Representatives proposed the bill on December 17, 2019 [4]. Regarding these sanctions, Nurfaik thought that they could provide a deterrent effect compared to the sanctions currently regulated in Law Number 5 of 1999 [3].

However, before the Bill on Monopolistic Practices and Unfair Business Competition was passed, on November 2, 2020, the Government enacted Law Number 11 of 2020 concerning Job Creation which amended several provisions in Law Number 5 of 1999 concerning Monopolistic Practices and Unfair Business Competition. Article 118 of Law Number 11 of 2020 amended the provisions of articles 44, 45, 47, and 48 and removed Article 49 in Law Number 5 of 1999. The amendment aims to facilitate business actors in investing, as referred to in article 105 of Law Number 11 of 2020. In the amendment to article 47, the maximum provision for the imposition of a fine of Rp 25,000,000,000 is no longer included. It only regulates the minimum imposition of fines against business actors who violate Law Number 5 the Year 1999. In Article 47 paragraph (3), a new paragraph is added: further provisions regarding the criteria, types, number of fines, and procedures for imposing sanctions shall be regulated in a Government Regulation. The Government Regulation in question is Government Regulation Number 44 of 2021 concerning the Implementation of the Prohibition of Monopolistic Practices and Unfair Business Competition promulgated on February 2, 2021.

Sutrisno Iswantono, former Chairman of the KPPU, previously proposed that business actors who violate Law Number 5 the Year 1999 be imposed with an illegal profit scheme. It is hoped that the Government Regulation regarding the imposition of fines does not contain the maximum amount of the fine, but in formulation, uses the concept of illegal profit [5]. Article 12 (1) of Government Regulation Number 44 of 2021 stipulates that the imposition of fines is based on a percentage of the total net profit or total sales in the relevant market during the period of unfair business competition violations.

One concept of sanctions that approaches illegal profit and is known to provide sanctions in business competition law in several countries such as China, Turkey, Croatia, and Spain is disgorgement [6]. In Indonesia, the Financial Services Authority (FSA) introduced the concept of disgorgement in the capital market sector. In February 2019, FSA issued a regulation bill regarding the Disgorgement and Disgorgement Fund promulgated on December 29, 2020, by issuing FSA Regulation No. 65 /POJK.04/2020 concerning Disgorgement and Disgorgement Fund in the Capital Market.

Disgorgement is defined as "FSA orders to return the profits obtained or losses avoided illegally/against the law by the violators and/or the Party who cause the violation of capital market regulation" [7], [8]. This research discusses on how are disgorgement fines imposed in several countries such as China, Turkey, Croatia, and Spain. Subsequently, this research will discuss on how is the regulation and opportunities for disgorgement fines in Indonesia in the scope of business competition law.

2. METHOD

This research is normative and comparative legal research, which focuses on the study of legislation as primary legal material and is supported by secondary legal material [9]. This study uses a statutory approach, a case approach, and a comparative approach. The statutory and case approaches are carried out to examine regulations and cases related to the prohibition of monopolistic practices and unfair business competition in several countries. The comparative law approach compares disgorgement provisions in business competition law in several countries and Indonesia [10].

Data collection was carried out using literature research related to the research object. The data used is secondary data consisting of primary legal materials, secondary legal materials, and tertiary legal materials. Primary legal materials are Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, Law Number 11 of 2020 concerning Job Creation, Government Regulation Number 44 of 2021 concerning Implementation Prohibition of Monopolistic Practices and Unfair Business Competition and competition law regulations in other countries. Secondary legal materials are legal

materials that explain primary legal materials, namely books, journals, research reports, magazines, articles, and documents related to business competition law and disgorgement. Tertiary legal materials are legal materials that complement primary and secondary legal materials: Black's Law Dictionary, Indonesian Dictionary, and English Dictionary.

This research is descriptive qualitative research. The results will describe the imposition of disgorgement in the context of business competition law in several countries. It will also discuss the opportunities for disgorgement in the context of business competition law in Indonesia.

3. RESULT AND DISCUSSION

3.1. Disgorgement in Other State's Competition Law Regime

According to Black's Law Dictionary, "disgorgement" is defined as "the act of giving up something (such as profits illegally obtained) on-demand or by legal compulsion" [11]. In the case of Jegon v Vivian, Lord Hartley stated, *This Court never allows a man to make a profit by a wrong. However, Lord Cairns' Act, the Court has the power of assessing damages, and therefore it is fairly argued here that this is a case in which damages ought to be reckoned* [6]. Lord Hartley's statement is to emphasizes that a person is not entitled to unauthorized benefits. Therefore, even if he is free from criminal charges or civil lawsuits, these benefits must be returned. In this case, the profit in question is in the form of disgorgement.

In FSA Regulation Bills's explanation regarding Disgorgement and Disgorgement Fund in the capital market sector, it is explained that "*Disgorgement as a remedial action is expected to prevent Parties who commit violations from enjoying the benefits they have illegally obtained, compensate for losses from victims of violations, contain a corrective element, and are expected to provide a deterrent effect*." In some countries such as China, Turkey, Croatia, and Spain, disgorgement is known for the imposition of sanctions to return a number of profits obtained illegally (breaking the Law) or losses that were illegally avoided. The imposition of the disgorgement is considered to be a deterrent effect, even in France, The Monetary and Financial Code regulates a fine of 1.5 M Euros with the provision "which amount may be increased to a figure representing up to ten times the amount of any profit realized and shall never be less than the amount of said profit "which allows the imposition of disgorgement up to 10 (ten) times greater than the amount of profit realized [12].

Fines and disgorgements refer to the perpetrators of violations. Fines are aimed at the perpetrator's actions, while disgorgement is aimed at the consequences that the perpetrator has obtained through the illegal act [13]. In the United States, disgorgement was initially categorized as a remedy or recovery where the philosophy of remedy was to restore the position of all parties before the occurrence of a violation. The position of the perpetrator that benefits return the illegitimate advantage. Then, based on the Kokesh v SEC case development, disgorgement was determined as a penalty intended as a form of deterrent effect and part of criminal sanctions [7].

Disgorgement in competition law is known in several countries such as China, Turkey, Croatia, and Spain. However, disgorgement regulations or adoption practices differ from country to country. In China, article 20 of the People's Republic of China Anti-Unfair Competition Law provides that, "*Where an operator, in contravention of the provisions of this Law, causes damage to another operator, i.e., the injured party, the infringer shall bear the responsibility for compensating for the damages. Where the losses suffered by the injured operator are difficult to calculate, the number of damages shall be the profit gained by the infringer during the period of infringement through the infringing act. The infringer shall also bear all reasonable costs paid by the injured operator in investigating the acts of unfair competition committed by the operator suspected of infringing the injured operator's lawful rights and interests.*"

This provision regulates that actions that violate the Anti-Unfair Business Competition Law cause losses to other parties. The perpetrator is obliged to be responsible for paying compensation for such losses. If the losses suffered by the other party are difficult to calculate, the amount of compensation is calculated based on the profits that the perpetrator received during the offense. In this case, the disgorgement of profit in the context of business competition law in China can only be used when calculating compensation based on the amount of loss of the aggrieved party is challenging to calculate. In addition, the perpetrator is also required to pay a reasonable fee to the aggrieved party for investigating the violation of unfair business competition [14].

In Turkey, unfair business competition is regulated in articles 54 - 62 of the Turkish Commercial Code. Article 58 provides that, "*Anyone who, through unfair competition, suffers injury as regards his customers, his credit, his professional reputation, his commercial undertaking, or his other economic interests or is exposed to such a danger may demand… d. compensation of damages if there is a fault.*" Then, under article 58, letter e reads, "*The judge may also order the payment of the value of advantages which the defendant might secure through unfair competition, as damages in favor of the plaintiff and accordance with the provision Paragraph (d).”* In this case, the judge may order payment in the amount of profit that the defendant might get through the unfair business competition, as a form of compensation

to the plaintiff and in accordance with the provisions of letter d.

Using the formula "*the judge may also order the payment*" can be considered a form of judge policy to reduce a profit as a form of compensation. Then, the formula "*the value of advantages which the defendants might secure through unfair competition*" is also considered ambiguous. This formula can be interpreted even though the defendant did not get any benefits, but the benefits that might be obtained due to unfair competition can still be claimed [15].

In Croatia, Article 8 paragraph (1) of the Croatian Unfair Competition Act regulates, "*prohibit all agreements between two or more independent undertakings, decisions by associations of undertakings and concerning practices, which have as their objective or effect. the distortion of competition in the relevant market*." The Croatian Competition Agency is empowered to enact measures that can eliminate the detrimental effects of prohibited agreements and other activities that violate competition and impose certain fines in accordance with Croatia's Unfair Competition Law. One of the actions that can be taken is the imposition of fines for administrative violations. The fines are divided into three categories. The first two categories allow the Agency to collect a fine of 1 - 10% of the previous year's net profit, which is calculated according to the official financial statements of the trial parties. The third category relates to monetary fines related to other violations of a business that is not a party to the trial, and this category is not relevant to disgorgement [16].

Based on the description above, the Unfair Business Competition Law authorizes the Agency to take a certain percentage of the profits obtained based on deliberate business competition violations. However, the fines taken by the Agency are assigned to the Government Budget of the Republic of Croatia and not to the injured party. If the fines are not paid voluntarily, the final judgment of the Agency will be carried out by the Croatian tax authorities following the tax collection procedure [16]. Unlike in Spain, article 32 of the Law on Unfair Business Competition in Spain allows victims of unfair business competition to sue for "*benefits obtained by wrongdoers*" in addition to compensation, as long as these benefits can be assessed [17]

3.2. Disgorgement In Indonesian Competition Law Following the Enactment of The 2020 Job Creation Law

In Indonesia, it is possible to adopt the concept of disgorgement in determining the imposition of fines against violators of anti-monopoly regulations and unfair business competition. The administrative action sanctions that previously contained a maximum provision of IDR 25,000,000,000, which may be considered unbalanced with the profits obtained by business actors, have been eliminated. As in Law Number 11 of 2020 concerning Job Creation, the latest regulation regulates only the minimum limit for the imposition of a fine of IDR 1,000,000,000. It is possible to consider the disgorgement within the unfair business competition field as administrative action fines as stipulated in article 47 paragraph (3) of Law Number 5 of 1999 in article 118 of Law Number 11 of 2020 concerning Job Creation. Further provisions regarding the criteria, types, number of fines, and procedures for the imposition of such sanctions are regulated in Government Regulation Number 44 of 2021 concerning the Implementation of the Prohibition of Monopolistic Practices and Unfair Business Competition.

Article 6 of Government Regulation Number 44 of 2021 states that the Commission has the authority to impose administrative action sanctions on perpetrators who violate business competition provisions. The administrative action takes the form of seven kinds of actions: (1) determination of the cancellation of the agreement; (2) orders to business actors to stop vertical integration; (3) orders to business actors to stop activities proven to have caused monopolistic practices, causing unfair business competition, and/or detrimental to society; (4) orders to business actors to stop the abuse of dominant position; (5) determination of cancellation of the merger or consolidation of business entities and acquisition of shares; (6) determination of compensation payments; and/or (7) imposition of a fine of at least one billion rupiahs by taking into account the provisions concerning the amount of the fine.

The further rules of the number of fines in administrative actions is regulated in Article 12 of Government Regulation Number 44 of 2021. The imposition of these fines is carried out based on the following provisions: *(a) a maximum of 50% (fifty percent) of the net profits obtained by Business Actors in Markets that are Concerned, during the period of violation of the Law; or (b) a maximum of 10% (ten percent) of the total sales in the relevant market, during the period the violation of the Law occurred*. Based on the two bases for determining the fine amount, the sentence "at most 50% of net profit ..." and the sentence "*at most 10% of total sales ...*" are considered to be accommodation for the concept of disgorgement. In the elucidation of Article 12 paragraph (1) of Government Regulation Number 44 of 2021, it is explained that the period of violation, which is one of the parameters for determining the imposition of fines, is determined based on the number of years in which the violation occurred. If it is less than six months, it is calculated as ½ year, while if it is more than six months but not more than one year, it is calculated as a full year.

Based on the provisions of Article 13, the administrative action of imposing fines by the KPPU, which has obtained permanent and binding legal force, is the state barrier and is deposited in the state treasury as non-tax state revenue. Suppose the reported party who is obliged to pay a number of fines imposed by KPPU does not pay such fines. In that case, KPPU shall coordinate with government agencies authorized in the affairs of state receivables and/or law enforcement officials in accordance with the provisions of laws and regulations. The provisions governing state receivables are regulated in Law No. 49 Prp. 1960 concerning the State Receivables Affairs Committee. Article 14 stipulates that the imposition of fines based on the profit value or the sale value creates an obligation for the business competition violator to hand over an amount of profit or an amount of sale value obtained illegally by violating the provisions of Law. Furthermore, the determination of the amount of the fine is based on: (1) the negative impact caused by the violation; (2) the duration of time the violation occurred; (3) mitigating factors; (4) burdensome factors; and/or the ability of business actors to pay.

4. CONCLUSION

Based on Government Regulation Number 44 of 2021 concerning the Implementation of the Prohibition of Monopolistic Practices and Unfair Business Competition, especially in article 12 paragraph (1), Indonesia has accommodated the concept of disgorgement in the imposition of fines as an administrative action. The Business Competition Supervisory Commission (KPPU) may impose an administrative fine against business actors who violate the provisions of the Law on business competition based on a maximum of 50% (fifty percent) of the net profits obtained by Business Actors in Markets that are Concerned, during the period of violation of the Law; or a maximum of 10% (ten percent) of the total sales in the relevant market, during the period the violation of the Law occurres. Indonesia is relatively new in regulating the concept of disgorgement. Furthermore, disgorgement arrangements in Indonesia are classified as the imposition of fines as part of administrative measures whose primary purpose is to recover offenders' risks and not provide a deterrent effect.

Since the imposition of administrative fines on business actors who violate the provisions of the Law based on the profit value or the sale value from the violation results is relatively new, its implementation needs the attention of various parties. For KPPU, the determination of the imposition of fines for violators needs to pay attention to the facts of business actors and market conditions as much as possible in order to realize effectiveness and efficiency in business competition. For academics, further studies can be carried out regarding disgorgement's effectiveness and technique of imposing disgorgement by looking at the best practices that have ever existed.

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