




Indonesia Competition Commission (ICC) Role in Upholding Economic Democracy in Indonesia

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Abstract. Since the establishment of the Indonesia Competition Commission (ICC) in 1999, its existence has still not effectively upheld economic democracy, especially regarding unfair business competition. Based on the five principles of Pancasila, one principle that is very important to receive attention at this time is "Social justice for all Indonesian people". In the context of economic democracy, Law No. 5 in 1999 was promulgated as an aspiration from the 1998 reform. This law was the answer to conglomeration. ICC, as a state auxiliary organ, is given a number of authorities. ICC receives reports from the public and or from business actors regarding allegations of monopolistic practices and or unfair business competition. However, behind this authority, the ICC has yet to be supported by an adequate secretariat. Large business actors still dominate the Indonesian economy and will still be dominated by a handful of actors with capital and technological capabilities. Some fundamental issues after the 1998 reform, including bureaucratic reform, banking restructuring, and the decentralization agenda, with the hope of equal welfare distribution throughout the country. However, it has created new problems with the increasing number of regional heads committing corruption. Likewise, in an economic democracy, the role of cooperatives, State Enterprises and Village-Owned State Enterprises has not become the leading actor in the development of economic democracy and even tends to strengthen the role of the private sector with unlimited capital accumulation and leads to indications of unfair business competition. Therefore, it is necessary to conduct research on strengthening the Business Competition Supervisory Commission as a form of legal protection and economic democracy in Indonesia, in which an analysis will be produced on the role of the ICC in upholding economic democracy in Indonesia.

Keywords: Business Competition, Economic Democracy, Indonesia Competition Commission (ICC), Legal Protection.

1. Introduction

Since the establishment of the Indonesia Competition Commission (ICC, also known as KPPU) in 1999, its existence up until now has not been felt in upholding economic democracy, particularly in cases of unfair business competition. Based on the five principles of Pancasila, one that deserves special attention now is "Social justice for all Indonesians." [1] Meanwhile, the divinity in the form of freedom to worship, humanity as the basis of international relations, unity manifested in nationalism, and

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democracy in the form of political democracy, all of which are included in Pancasila's first through fourth principles, have made substantial progress. However, the fifth principle, concerned with social welfare, lags far behind.[2]

Likewise, the Preamble to the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) also contains the Pancasila principles. In reality, it is only in this last principle that the word "achieve" appears, which serves as a form of reinforcement. The passage reads, "*and by achieving social justice for all the people of Indonesia*". According to Soekarno, the fourth Pancasila principle embodies political democracy, while the fifth principle represents economic democracy. The two must go hand in hand because otherwise, there will be inequality, which Bung Karno, Son of the Dawn, was concerned about from the beginning.

The post-amendment Constitutional mandate provides an even firmer foundation for economic democracy in Indonesia. This is reflected in Article 33 of the 1945 Constitution of the Republic of Indonesia: "The national economy is organized based on economic democracy with the principles of togetherness, fair efficiency, environmental awareness, independence, and maintaining a balance of progress and national economic unity." Further legal provisions govern this article's implementation.

In the context of economic democracy, Law Number 5 of 1999 was promulgated as an aspiration for the 1998 reform.[3] This regulation was enacted in response to conglomeration, namely the New Order era that lasted three decades during the era of President Soeharto. ICC, as a state auxiliary organ, is given several authorities, including the following:[4] To evaluate agreements that could lead to monopolistic practices and/or unfair business competition; to evaluate business activities and/or acts of business players that could lead to monopolistic practices and/or unfair business competition. Determine whether or not there is an abuse of a dominating position that may result in monopolistic activities and/or unfair business competition; take appropriate action in accordance with the Commission's powers; suggestions and views on government policies concerning monopolistic practices and/or unfair commercial competition Prepare recommendations and/or publications in connection with this law; Provide the President and the House of Representatives with regular updates on the Commission's work.

ICC receives reports from the public and/or from business actors regarding allegations of monopolistic practices and/or unfair business competition;[5] conduct research on suspected business activities and/or actions of business actors that could result in monopolistic practices and/or unfair business competition; investigate and/or examine cases of alleged monopolistic practices and/or unfair business competition reported by the public or by business actors or discovered by the Commission as a result of its research; concluding the findings of investigations and/or inspections into the presence or absence of monopolistic practices and/or unfair business competition; summoning business actors suspected of violating the provisions of this law; summoning and presenting witnesses, expert witnesses, and anyone deemed to have knowledge of violations of the provisions of this law; Request investigators' assistance in presenting business actors, witnesses, expert witnesses, or any other individual referred to in numbers 5 and 6 who is unwilling to comply with the

Commission's summons; Inquire with government agencies about investigations and/or inspections of business actors who breach the terms of this law. Obtain, investigate, and/or inspect letters, documents, or other evidence; Determine whether there is any loss on the part of other business actors or the general public; Notify business actors suspected of engaging in monopolistic practices and/or unfair business competition of the Commission's decision;[6] Imposing sanctions in the form of administrative action on business actors who violate the provisions of this law.[7]

However, behind this authority, the ICC still needs to be supported by an adequate secretariat.[8] According to Article 34, "For the smooth implementation of its duties, the Commission is assisted by the secretariat." Then Article 34 paragraph (4) of the LPMPUTS Law specifies, "Provisions regarding the organizational structure, duties, functions of the secretariat and working groups are further regulated by a Commission decision." As a constitutional step, ICC employees submitted a material review to the Constitutional Court regarding the absence of a secretariat at the level of Secretary-General to support the role and duties of the ICC.[9] However, the Constitutional Court decided, *"For the smooth implementation of its duties, the Commission is assisted by the secretariat."* Then Article 34 paragraph (4) of the LPMPUTS Law states, *"Provisions regarding the organizational structure, duties, functions of the secretariat and working groups are further regulated by a Commission decision"*.

Huge business actors continue to dominate the Indonesian economy, which will remain dominated by a handful of actors with capital and technological capabilities.[10] On the other hand, small and medium-sized business actors can only hope for capital support and increased human resources to compete nationally and globally.[11] Where is economic justice, and how is our Pancasila economic democracy going? Is all of this in line with the hopes expressed by the founding fathers in the preamble to the 1945 Constitution of the Republic of Indonesia? Regarding the Constitution, the Republic of Indonesia's economy can be divided into private corporations, cooperatives, and agencies—state-owned Enterprises. Of course, the fundamental issue is how the state regulates the economy and business entities and how prosperity will be created for society in compliance with the constitutional mandate.

2. Problems

This research is written to solve the problem: How is the role of the ICC in upholding economic democracy in Indonesia to strengthen the Business Competition Supervisory Commission as a form of legal protection and economic democracy in Indonesia?

3. Method

A qualitative approach with a sociological juridical analysis approach will be employed as the research method. The qualitative approach is supposed to be a

systematic effort in legal research, comprising norms and methodologies, for researchers to explore a socio-juridical phenomenon in the pursuit of truth and knowledge. Meanwhile, the analytical approach technique uses a sociological juridical approach. This research approach investigates the legal views and behavior of people (humans and legal entities) and society, as well as the efficiency of positive legislation enactment in society. This study's requirements are more descriptive.

4. Discussion

Strengthening an institution must be viewed from various aspects, including pre-existing, existing conditions and hopes or expected outcomes through optimal performance in carrying out the authority granted by statutory regulations and public trust.[12] ICC, as an institution, is a state auxiliary body in the executive domain[13] but is given duties and authority similar to the judiciary (quasi-judicial) in enforcing business competition law. Strengthening the ICC, at the very least, encompasses structural strengthening, capacity strengthening, reputational or recognition strengthening, as well as synergy and consolidation between institutions to achieve society's goals and expectations for the greater good of upholding economic democracy and promoting people's welfare with social justice.[14]

This discussion will elaborate on the role and strengthening of the ICC. It will start from where the ICC must be strengthened and end with the need for coordination and integrative steps in enforcing business competition. This is because business competition is a multidisciplinary and cross-sectoral field of study in ministries or institutions.[15]

4.1 The Role of the ICC in Upholding Economic Democracy

To analyze the role of ICC, we utilize the SWOT analysis theory. According to Pearce and Robinson, SWOT is an abbreviation of internal strengths and weaknesses as well as opportunities and threats in the environment the institution or institution faces. Related to strengths, weaknesses, opportunities and challenges can be elaborated as follows:

Weaknesses that still need to be addressed include the existence of the ICC since 1998, two decades since its establishment. We believe said times should have been enough to review its role or work, weaknesses and advantages, and how to see opportunities and threats. The first step in SWOT analysis is identifying the weaknesses and threats. The weakness is that, based on the decision of the Constitutional Court, the ICC is not an institution that carries out its duties as a first-level judicial institution. ICC is an institution tasked with supervising the implementation of Law 5/1999. However, the ICC remains an administrative institution within state administrative law rather than a judicial institution. ICC lacks investigative authority;[16] it needs to be equipped with a secretary general, and ICC is not supported by permanent human resources such as public civil employees (ASN). Likewise, the budget is small compared to the authority given by law to the ICC.[17]

Strength, the ICC was born based on law, namely Law No. 5 of 1998, the Job Creation Law or Law Number 20 of 2021 has been promulgated, specifically related to resolving disputes or objections to ICC decisions submitted to the Commercial Court. The investment world supports the business competition law. The enactment of Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition (UU 5/1999) for more than two decades has given rise to quite a lot of controversy in the business world. On the one hand, it cannot be denied that business competition law is essential to guarantee the efficient allocation of resources and consumer welfare [18] so that they always get the best goods and services due to healthy competition. The power of the ICC based on Law 5/1999 gives the ICC the authority to examine, prosecute, and decide cases. The multifunctional authority should be balanced with guarantees for the rights of the reported or business actors being investigated, including business actors who submit objections to ICC decisions in court.

The opportunities from ICC are tremendous, with a large market size, dynamic economic activities and government services in procuring goods and services, including the ICC's area of authority.[7] On the other hand, threats emerge from issues related to virtual marketplaces and how foreign business actors become business actors in Indonesia through affiliated companies. Other laws concerning business competition exist, such as the Law on BUMN and MSMEs.

The threat is that Law 5/1999 does not yet regulate guarantees for the rights of reported parties, such as the right to be examined fairly, objectively and transparently. The reported party has yet to be free to submit evidence at the ICC and court levels. The enactment of the Job Creation Law provides new challenges for commercial courts to handle business competition cases.

In Indonesia, business competition law is a *conditio sine qua non* for the operation of market mechanisms. Before Law Number 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition, there was unhealthy business competition in Indonesia through monopolies and oligarchic market forces. This is proven by the concentration of economic power in certain individuals or groups through monopoly or other unfair competition practices. The concentration of economic power in certain groups is due to the proximity of these entrepreneurs to the authorities, specifically the government. This weakens Indonesia's economic resilience, and entrepreneurs cannot compete and lack the entrepreneurial spirit to help lift the Indonesian economy.[19]

Achieving Economic Democracy requires various strategies and policies through laws, regulations, and institutions to implement the concept of economic democracy. Indonesia, as a country that adheres to Pancasila economic democracy, of course, must be based on the principles outlined in Pancasila. The Pancasila economy must be based on divinity, humanity, unity, deliberation and representation and aims to achieve social justice for all Indonesians. In realizing social justice, the Indonesian economy must be oriented toward the interests of the majority and society in general and not dominated by a particular group. Business competition law instruments must be implemented following their authority and role and even optimized by strengthening the ICC as an institution that enforces business competition law.

The consolidation of economic democracy has been echoed in a legal instrument related to business competition and economic democracy. The characteristic that is not economic democracy is "monopoly that is detrimental to society." This proves that the spirit of business competition has existed for a long time in Indonesian life. As lower regulations, the Law and other lower regulations must exist as a sequence of legal systems. Even if it is not the only effort, the law has a strategic position to make what is desired a reality. Therefore, discussing the ICC's role becomes important and strategic in realizing economic democracy based on Pancasila and the 1945 Constitution of the Republic of Indonesia.

As per the data released by the ICC, several ICC decisions have been recapitulated over the last twenty years.

Graph 1. Development of the Number of Cases Handled by ICC (Source from ICC)



Based on this graph, the ICC has decided on several cases from 2000 to 2019. In particular, in 2008, it decided 47 points and then until 2019, it experienced a slowdown or decline to 23 in 2019. On the other hand, the applicants suing at the ICC filed an objection request against the decision that was handed down. The applicants took legal efforts through appeal, cassation and judicial review. At the appeal level, there were 112 wins and 77 losses; the rest were not decided. Meanwhile, at the cassation level, the ICC won 105, lost 42 and 57 cases have yet to be determined. Meanwhile, at the reconsideration level, 32 won, lost 5 and 19 cases have yet to be decided.

The ICC's authority in supervising partnerships is based on the legal basis of several laws and regulations, including Law Number 20 of 2008 concerning Micro, Small and Medium Enterprises, which states that the implementation of partnerships is supervised in an orderly and regular manner by institutions established and tasked with supervising business competition as stated in regulated in statutory regulations. Government Regulation Number 17 of 2013 concerning the Implementation of Law Number 20 of 2008 states that partnerships are supervised orderly and regularly by established institutions and tasked with managing business competition as regulated in statutory regulations.

Furthermore, Government Regulation Number 17 of 2013 concerning the Implementation of Law Number 20 of 2008 concerning MSMEs in Article 31 mandates the ICC to supervise the implementation of partnerships under the provisions of applicable laws and regulations. Apart from that, Article 32 states the authority of the ICC to impose administrative sanctions on the implementation of partnerships. Commission Regulation Number 4 of 2019 concerning Procedures for Supervising and Handling Partnership Cases in Article 2 states that the Commission supervises partnerships carried out by Micro Enterprises, Small Enterprises, Medium Enterprises with Large Enterprises and/or carried out by Micro Enterprises and Small Enterprises with Medium Enterprises.

In supervising Partnerships, the ICC has authority from Law Number 20 of 2008. Based on Article 1, Paragraph 13 of Law Number 20 of 2008, Partnership means cooperation in business relationships, directly or indirectly, based on mutual need and trust, strengthening and profitable involving Micro, Small and Medium Enterprises with Large Enterprises. Based on Article 26 of Law Number 20 of 2008 in conjunction with Article 11 Government Regulation Number 17 of 2013, the partnership is implemented with the following pattern: core-plasma; subcontracting; franchise; general trading; distribution and agency; and other forms of partnership such as profit sharing, operational cooperation, joint ventures, and outsourcing.

Based on Article 34 Paragraph 1 of Law Number 20 of 2008, in conjunction with Article 29 Paragraph 4 Government Regulation Number 17 of 2013, states that the Partnership Agreement is a written agreement which contains provisions as a minimum: business activities, the rights and obligations of each party; a form of development; and the dispute resolution period. When entering into a partnership agreement, the principle of equality and balanced legal position between the two parties entering into the partnership agreement must be prioritized. Apart from that, the partnership agreement must fulfil the basic principles of independence of Micro, Small and Medium Enterprises and not create dependency of Micro, Small and Medium Enterprises on Large Enterprises. To monitor the implementation of the Partnership as regulated in Article 34 of Law Number 20 of 2008, the Minister can establish national and regional business coordination institutions. This is also reinforced by Article 31 Government Regulation Number 17 of 2017, which states that in carrying out partnership supervision, ICC coordinates with related agencies.

SWOT analysis related to the role of the ICC in upholding economic democracy can be explained as follows: Weaknesses that are still being faced include: The ICC has been established since 1998, so two decades have been enough to review its role or work as well as its weaknesses and advantages as well as how to see opportunities with threats. The first step in SWOT analysis is identifying the weaknesses and threats.

The weakness is that based on the decision of the Constitutional Court, the ICC is not an institution that carries out its duties as a first-level judicial institution. ICC is an institution tasked with supervising the implementation of Law 5/1999. However, the ICC remains an administrative institution within state administrative law rather than a judicial institution. ICC does not have investigative authority, must be equipped with a secretary general, and is not supported by permanent human

resources such as ASN. Likewise, the budget is small compared to the authority given by law to the ICC.

Strength, the ICC was born based on law, namely Law Number 5 of 1998, the Job Creation Law or Law Number 20 of 2021 has been promulgated, specifically related to resolving disputes or objections to ICC decisions submitted to the Commercial Court. The investment world supports the business competition law. The enactment of Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition (Law 5/1999) for more than two decades has given rise to quite a lot of controversy in the business world. On the one hand, it cannot be denied that business competition law is necessary to guarantee the efficient allocation of resources and consumer welfare so that they always get the best goods and services due to healthy competition. The power of the ICC based on Law 5/1999 gives the ICC the authority to examine, prosecute and decide cases. The multifunctional authority should be balanced with guarantees for the rights of the reported or business actors being investigated, including business actors who submit objections to ICC decisions in court.

The opportunities from ICC are tremendous, with a large market size, dynamic economic activities and government services in procuring goods and services, including the ICC's area of authority. On the other hand, threats arise from problems related to virtual markets and how foreign business actors become business actors in Indonesia by using affiliated companies. Different laws about business competition exist, such as the Law on BUMN and MSMEs.

The threat is that Law 5/1999 does not yet regulate guarantees for the rights of reported parties, such as the right to be examined fairly, objectively and transparently. The reported party has yet to be free to submit evidence at the ICC and court levels. The enactment of the Job Creation Law challenges commercial courts to handle business competition cases. The current big challenge is regulating the digital market, which is getting bigger and becoming a business choice today.

4.2 Business Competition in International Agreement

ICC is vital as the Lead Negotiator for Chapter Competition negotiations in all international trade agreements covering business competition issues.[20] ICC is also included as a member of the permanent negotiating team of the Government of the Republic of Indonesia in the Draft Presidential Regulation of the Republic of Indonesia concerning Amendments to Presidential Regulation Number 82 of 2017 concerning the Negotiating Team for International Trade Agreements, which the Ministry of Law and Human Rights is currently finalizing. In 2020, the ICC is focusing on negotiations on the business competition chapter with the European Union (Indonesia-European Union Comprehensive Economic Partnership Agreement), especially on the issue of regulating subsidies in the services sector, which the European Union proposes to cover in the Subsidies Section.

In conducting negotiations regarding this issue, the Cooperation Section has also undertaken various virtual domestic consultations with relevant Ministries/Institutions. Meanwhile, during free trade agreement negotiations in the region, ICC and related Ministries/Institutions are currently negotiating the inclusion

of consumer protection issues in the business competition chapter of the ASEAN-Australia New Zealand Free Trade Agreement (AANZFTA). The ICC was also asked for input by the Ministry of Transportation for the ASEAN-European Union Comprehensive Agreement on Air Transport (ASEAN-EU CATA) negotiations, especially on articles related to business competition.

Until 2020, ICC has completed negotiations on five international trade agreements, especially on the business competition chapter, namely: Regional Comprehensive Economic Partnership (RCEP), which was signed on November 15, 2020; Indonesia Australia Comprehensive Economic Partnership Agreement (IACEPA), which was signed on March 4, 2019; Indonesia European Free Trade Association (EFTA) Comprehensive Economic Partnership Agreement (IEFTA CEPA), which was signed on December 16, 2018; ASEAN Australia New Zealand Free Trade Agreement (AANZFTA), which was signed on February 27, 2009; Indonesia-Japan Economic Partnership Agreement (IJEPA), which was signed on August 20, 2007.

5. Conclusion

Strengthening the Indonesia Competition Commission (ICC) as a form of economic democracy to strengthen the national economy is essential. Based on the authority possessed by the ICC since the promulgation of Law Number 5 of 1999, which has carried out its authority as a business competition law enforcement agency. The tasks carried out by the ICC have been done in all sectors. However, it has yet to be optimal in some cases and continues to deal with obstacles. The first and foremost is the obstacle to litigation performance. From 2000 to 2019, the ICC decided on many instances, most notably 47 cases in 2008, but thereafter, until 2019, it experienced a slowdown or decline to 23 cases.

The next obstacle is that business competition regulations governed by Law Number 5 of 1999 are no longer relevant to current dynamics and conditions, specifically regarding the market definition. Compared to the present circumstances, the definition when this law was drafted in 1999 is already significantly different, particularly in light of the aggressiveness of the digital market. Some countries have anticipated updating regulations to respond to the needs of trade, commerce, and other economic activities. Aside from that, a budget is required to support the big agenda for reforming business competition law.

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