



## LEGAL OVERVIEW ON THE GOODS AND SERVICES PROCUREMENT PROCESS IN ELECTRICAL STATE- OWNED ENTERPRISE (BUMN) GROUP COMPANY FROM THE PERSPECTIVE OF BUSINESS COMPETITION LAW

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### Abstract

PLN is a State-Owned Enterprise (BUMN) in the form of a limited liability company which carries out business activities in providing electricity for the needs of the people in Indonesia. PLN is a Holding Company in the PLN Group, which consists of several Subholdings, Subsidiaries and Affiliated Companies under PLN. To be able to provide electricity reliably, PLN certainly cannot be separated from the process of procuring goods and services. This research, will take an overview of the process of procuring goods and services within the PLN Group as one of BUMN Group Companies, and study whether the provisions for procurement of goods/services within the PLN Group has fulfilled the principles of fair business competition. The research method used is a normative legal research method using a constitutional approach and a conceptual approach. The results of this research indicate that the provisions related to the process of procuring goods and services in the BUMN Group Company, especially the PLN Group, do not fully comply with the principles of the fair business competition, especially those related to the permissibility of Direct Appointments to PLN Subsidiaries/Affiliated Companies without going through an open and competitive tender process. For this reason, the Government needs to enact statutory regulations that specifically regulate Group Companies, apart from the general provisions contained in the "Company Law" and the "UU BUMN", because of the existence and business processes of BUMN Group Companies, especially those related to procurement of goods and services, as there is a high risk of violating laws and regulations related to the unfair business competition.

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## I. INTRODUCTION

Electricity is one of the most important and crucial branches of production for a country. Not only to support economic growth, infrastructure development and move the wheels of production, but also to improve community welfare. Electrical power has become a primary need that concerns the livelihoods of many people and is needed by all levels of society.

Article 33 paragraph (2) of the 1945 Constitution of the Republic of Indonesia ("1945 Constitution") states that "Production branches which are important for the state and which affect the lives of many people, are controlled by the state." Until now, the supply of electricity in Indonesia is still controlled by the state, which is carried out by the central government and regional governments in accordance with the norms, standards, procedures and criteria set by the central government. Meanwhile, the implementation of electricity supply efforts by the central government and regional governments in accordance with their authority is carried out by State-Owned Enterprises and Regional-Owned Enterprises. State-Owned Enterprises or "Badan Usaha Milik Negara", hereinafter referred to as BUMN, are business entities whose capital is wholly or largely owned by the state (Indonesian central government) through direct participation originating from separated state assets, one of the main objectives of which is to provide public benefits for the livelihoods of many people, one of which is electricity.

If we talk about BUMN that run electricity businesses in Indonesia, the first one that comes to our mind would be "PT Perusahaan Listrik Negara (Persero)", or better known by the abbreviation "PLN". PLN is a BUMN in the form of a limited liability company, whose shares are wholly owned by the government of the Republic of Indonesia, which has the aims and objectives of carrying out the business of providing electricity for the public interest in adequate quantity and quality as well as generating profits and carrying out government assignments in the electricity sector in order to support development by applying the principles of limited liability companies. It cannot be denied that PLN is the largest and main electricity supply company in Indonesia as an extension of the state in meeting electricity needs for development and community welfare needs.

To ensure the availability of a reliable (continuously available) and sufficient (not lacking and able to be distributed evenly) electricity supply, PLN certainly needs a capable electricity infrastructure, including all equipment and supporting services. This need causes PLN to be inseparable from goods and services procurement activities, whether carried out directly by PLN itself or carried out through the process of selecting goods and services providers, which is also known as "tenders". The process of procuring goods and services through tenders is an important aspect of business competition. Tender process starts from the process of planning the need for goods/services, preparing a budget plan ("RAB"), determining the terms and specifications of goods/services, determining the criteria for potential providers of goods/services, the selection process for providers of goods/services, negotiations, to determining the winner of the tender.

Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition ("Business Competition Law") prohibits unhealthy business competition in the tender process, namely in the form of bid rigging. As regulated in Article 22 which reads "Business owners are prohibited from conspiring with other parties to organize and/or determine the winner of a tender so that it can result in unfair business competition."

The tender process should be carried out in accordance with the principles, including openness (transparency), non-discrimination, as well as effectiveness and efficiency. Openness means that the procurement process is carried out by providing broad and clear information to all potential participants who have the potential to take part in the tender process without exception. Prospective participants must also be treated fairly at every stage, so that there is no non-discriminatory treatment. With a fair, transparent and balanced tender process, it is hoped that appropriate and measurable goods and/or services will be obtained according to the country's development needs (Anggraini, 2013: 447).

However, there are provisions in the Regulation of the Minister of BUMN Number PER-08/MBU/12/2019 concerning General Guidelines for Implementing the Procurement of Goods and Services for State-Owned Enterprises ("Permen BUMN concerning Procurement of Goods/Services") which requires BUMN to synergize with fellow BUMN, Subsidiaries or Affiliated Companies of BUMN in the process of procuring goods and services. These provisions cause BUMNs in general to prioritize synergies with BUMN Subsidiaries/Affiliated Companies in the tender process within the BUMN environment, without opening up opportunities for other prospective providers who have the potential to take part in the tender process.

As one of the largest BUMN in Indonesia operating in the electricity sector, PLN has a total of 11 Subholdings and/or Subsidiaries (consisting of 4 Subholdings and 7 Subsidiaries), which support PLN's performance and services, and are combined into a PLN Group Company or known as the "PLN Group", where PLN acts as the parent company or Holding Company. Each of the Subholdings and Subsidiary Companies within the PLN Group has different business activities, from electricity generation businesses (PLN Indonesia Power and PLN Nusantara Power), primary energy management (PLN Energi Primer Indonesia), operation & maintenance services (PLN Tarakan and PLN Haleyora Power), integrated electricity supply within the business area (PLN Batam), consultancy and construction services (PLN Enjiniring), to telecommunications services and Beyond kWh (PLN ICON Plus). Each of the PLN's Subholdings and/or Subsidiaries also has another Subsidiary Companies under it (PLN Affiliated Company) with various other business activities (more details can be seen on the web page of each PLN Subholding/Subsidiary). The diversity of business fields of each company in the PLN Group makes it easier for PLN to synergize with its Subholing/Subsidiary/Affiliated Companies in procuring certain goods or services according to PLN's needs.

In this research, it will be studied the process of procuring goods and services within the BUMN Group Company, especially PLN as the Holding Company within the PLN Group Company (PLN Group), as well as assessing whether the process of procuring goods and services within the PLN Group is in accordance with the principles of healthy business competition.

## II. RESEARCH METHODS

The research method used in this paper is normative legal research through literature study with a statutory approach and a conceptual approach, with qualitative descriptive analysis techniques by interpreting the legal materials obtained to describe the legal truth as it is and then drawing conclusions.

Meanwhile, the legal materials in this research consist of primary legal materials in the form of Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, Law Number 19 of 2003 concerning BUMN, Law Number 40 of 2007 concerning Limited Liability Companies, Law Number 30 of 2009 concerning Electricity, Regulation of the Minister of BUMN Number PER-08/MBU12/2019 concerning General Guidelines for Implementing the Procurement of BUMN Goods and Services, as well as Regulation of the Business Competition Supervisory Commission ("KPPU") Number 3 of 2023 concerning Guidelines for the Prohibition of Tender Rigging. Then secondary legal materials in the form of books and legal journals relating to the problem being researched and tertiary legal materials in the form of legal dictionaries, mass media (print and electronic) and other information from the internet.

## III. RESEARCH RESULTS AND EXPLANATIONS

### 3.1. Regulations Regarding Group Companies in Indonesia

Although in practice there are many companies in Indonesia that form Group Companies, to date, there are no statutory regulations in Indonesia that specifically regulate Group Companies. Provisions regarding the relationship between a parent company (Holding Company) and Subholding/Subsidiary Companies still refer to Law Number 40 of 2007 concerning Limited Liability Companies ("Company Law"), although it is not specifically stated. Article 125 of the Company Law gives legitimacy to a company to own shares or take over shares in another company which results in the transfer of "control" over that one company to the company that takes over the shares. So it can be said that the control holder in a Group Company (generally) is the majority shareholder (Pratama et al, 2020: 50). The Company Law itself still recognizes the legal entity status of each company, both the company that takes over or owns the majority shares ("Parent Company") and the company whose shares are taken over or is majority owned ("Subsidiary Company") as separate legal subjects, each of which has its own legal identity with separate legal rights and obligations (Hopt, 2015: 9-10). The Company Law does not provide juridical recognition of the status of a Group Company legal entity or regulations regarding the limitations or authority of a Holding Company in a Group Company. This then creates a contradiction with the business reality of the Group Company which is characterized by control over the Subsidiaries by the Holding Company.

In a single company, applies the principle of separate legal entity or independent legal entity and limited liability or limited responsibility of shareholders (Jayusman & Setianingrum, 2023: 136).

The Separate Legal Entity principle means that the company and its shareholders are separate legal subjects. If the shareholders are legal entities or companies, then each company is a separate legal entity. Meanwhile, the principle of limited liability means that shareholders are only responsible for the number of shares they own in a company. This principle is accommodated in Article 3 paragraph (1) of the Company Law which states that "Company shareholders 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". The principle of limited liability is then further clarified in the Explanation section of the Company Law Article 3 paragraph (1) which states that "The provisions in this paragraph emphasize the characteristics of the Company that shareholders are only responsible for the deposit for all the shares they own and do not include their personal assets." The principle of separate legal entity is the dividing line between shareholders and the company itself. Meanwhile, the principle of limited liability protects shareholders from liability to a company that exceeds the value of the shares owned by the shareholder.

From this explanation, it can be understood that the principles of separate legal entity and limited liability adopted by the Company Law are actually more aimed at single companies, and do not accommodate legal relationships that arise within a Group Company where the Holding Company has control over the company under it like a parent to their children, either without or with actual control (Benhur, 2023). The application of the limited liability principle in a Group Company has the risk of creating a "legal vacuum" due to the Holding Company's opportunistic attitude towards its Subsidiaries. The control exercised by the Holding Company "seemed to" gives it the right to direct the policy direction of other companies within the Group Company, but when problems occur, the Holding Company is not responsible for the legal actions of the Subsidiaries. Likewise, vice versa (Jayusman & Setianingrum, 2023: 136).

In general, the construction of a Group Company is differentiated between Contractual Group Companies and *De Facto* Group Companies. Contractual Group Companies are formed based on a contract between the Parent Company (Holding Company) and Subsidiaries, while *De Facto* Group Companies are formed based on a unilateral declaration by the Parent Company (Holding Company) (Hopt, 2015). Ownership of majority shares in a company (more than ½ of the total number of shares or a minimum of 50% + 1) in another company results in the birth of a legal relationship between parent and subsidiary companies, where the Holding Company can exercise its voting rights at the General Meeting of Shareholders (or "RUPS" in Indonesia) of Subsidiaries, appoint members of the Board of Directors and/or Board of Commissioners of Subsidiaries, or exercise control over Subsidiaries. Majority share ownership in business practices is also closely related to economic interests in controlling the market (Pratama et al, 2020: 131). This of course cannot be separated from the desire to dominate business and control various types of business in one hand and at the same time

is the main factor in the emergence of monopolistic practices and unhealthy business competition which can harm other parties (Jayusman & Setianingrum, 2023: 131).

The legal relationship between parent and subsidiary companies in the construction of a Group Company can be caused by the following things:

a. Parent Company Majority Ownership of Subsidiary Shares

The Holding Company's ownership of a significant amount/majority of Subsidiary shares gives the Holding Company the authority to act as a central leader who controls the Subsidiaries as one management unit.

b. General Meeting of Shareholders (RUPS)

The Parent Company has the authority to control Subsidiaries through the Subsidiary's RUPS mechanism. At the RUPS of the Subsidiary the Parent Company can determine strategic matters that can support the achievement of the Group Company's objectives as one economic entity, including through determining the company's long-term targets in the form of a strategic plan. This basic policy of the Parent Company must then be followed by all Subsidiaries in preparing long-term plans for each Subsidiary.

c. Placement of members of the Board of Directors and/or Board of Commissioners of Subsidiaries

Through ownership of shares in the Subsidiary, the Parent Company has the authority to appoint members of the board of directors and/or board of commissioners of the Parent Company to serve as directors or commissioners of the Subsidiary. The assignment of Parent Company personnel to Subsidiaries is a form of indirect control over the Subsidiary's operational activities.

Returning to the context of the PLN Group, PLN, which acts as a Holding Company and majority shareholder in its Subholding and Subsidiaries, has actual control within the PLN Group. This majority share ownership places PLN as the central leader (Holding Company) which controls its Subholdings/Subsidiaries as one management unit. PLN also has the authority to control Subholding/Subsidiaries through the RUPS.

As previously mentioned regarding the PLN Group Company which consists of PLN as the parent company (Holding Company) and PLN's Subholding/Subsidiary/Affiliated Companies as "member companies" or part of the PLN Group, it can actually be understood that each company within PLN Group is a company that is a separate legal entity. The PLN Group itself is not actually a juridically recognized entity, but only an economic entity united by PLN as a *BUMN Holding* in the electricity sector. Each PLN Subholding/Subsidiary/Affiliated Company within the PLN Group has its own Articles of Association, its own composition of Directors, its own line of business, including its own internal regulations in the process of procuring goods and services. However, with PLN's

position as a Holding Company which has control over its Subholdings/Subsidiaries, often the Subholdings/Subsidiaries are in a vertical position (top-down) with PLN at the top (central leadership). Almost all policies that apply at PLN must also be applied at Subholdings/Subsidiaries, including the Electricity Supply Business Plan (RUPTL), Company Long Term Plan (RJPP) and Subholding/Subsidiary Company Budget Work Plan (RKAP) must be adjusted to PLN's RUPTL and must obtain approval from PLN through the Subholding/Subsidiary's RUPS. So Subholdings/Subsidiaries sometimes do not have the freedom to determine the direction of their company policy without approval from PLN. This actually violates the principle of separate legal entity in limited liability company law. However, PLN as the majority shareholder of its Subholding/Subsidiaries and Holding Companies within the PLN Group, holds control to determine the policy direction and strategic plans of the PLN Group as a unit by prioritizing synergies inside the PLN Group and synergies among PLN Subsidiaries/Affiliated Companies.

The legal vacuum that specifically regulates the legal entity status of a Group Company and the boundaries that regulate it, has led to the emergence of vertical integration or a top-down position within the Group Company and the absence of limits on the authority of the Holding Company within the Group Company, including the PLN Group. The current arrangements in the Company Law only accommodate the form of single companies and do not yet provide legal recognition or regulation for Group Companies.

### **3.2. Procurement of Goods and Services in Relation to Business Competition Law**

The legal instruments for Business Competition in Indonesia currently in force still refer to the Business Competition Law, namely Law Number 5 of 1999 concerning Prohibition of Monopoly Practices and Unfair Business Competition ("Business Competition Law"). The Business Competition Law sets out the basic rules that prohibit business practices that can hamper fair business competition, including monopolistic practices, prohibited agreements, prohibited activities, dominant positions and collusion. The Business Competition Law adheres to the principles of economic democracy, taking into account the balance between the interests of business owners and the public interest.

The process of procuring goods and services, also known as "tender", is an important aspect of business competition, because it involves providing opportunities for all parties, in this case prospective providers of goods and services, to be able to participate fairly, openly and non-discriminatively, so that it will provide results in the procurement of goods and services that suit the needs of business owners, with the best quality and the most efficient prices. Tender collusion or tender rigging can give rise to unhealthy business competition which is contrary to the purpose of holding the tender/procurement process, namely to provide equal opportunities to business owners to be able to offer goods and services at competitive prices and quality (Simbolon, 2018: 42). There are many different forms and opportunities of tender rigging, which can occur through agreements

between business owners, between job owners or between the two parties, and can occur at every stage of the Tender process, starting from planning to making requirements by the Tender implementer or committee, adjustments to tender documents between Tender participants, to the announcement of the Tender winner (Anggraini, 2009: 101). Therefore, the Business Competition Law regulates the prohibition of business owners from conspiring with other parties to organize and/or determine the winner of a tender process so that it can result in unfair business competition, as regulated in Article 22 of the Business Competition Law, which states that "Business owners are prohibited from conspiring with other parties to arrange or determine the winner of a tender so that it can result in unfair business competition."

The provisions in Article 22 of the Business Competition Law are then further regulated in the Business Competition Supervisory Commission (KPPU) Regulation Number 2 of 2010 concerning Guidelines for Article 22 of Law Number 5 of 1999 concerning Prohibition of Conspiracy in Tenders. KPPU Regulation Number 2 of 2010 was then revoked and replaced with KPPU Regulation Number 3 of 2023 concerning Guidelines for the Prohibition of Tender Rigging, which will hereinafter be referred to as "KPPU Regulations". One of the scopes of this KPPU Regulation is tenders held within BUMN or on government assignments. Forms of tender conspiracy regulated in this KPPU Regulation include horizontal conspiracy, vertical conspiracy, horizontal and vertical conspiracy, and also conspiracy in other forms.

Based on the Elucidation of Article 22 of the Business Competition Law, the definition of a tender is an offer to submit a price to purchase a job, to procure goods or to provide services. This was then reinforced in the Constitutional Court Decision Number 85/PUU-XIV/2016 (hereinafter referred to as "MK Decision No. 85/PUU-XIV/2016"). The definition of tender includes an offer to submit a price for:

- a. Contracting or carrying out work;
- b. Providing goods and/or services;
- c. Buying goods and/or services; and
- d. Selling goods and/or services.

Then based on Presidential Regulation Number 12 of 2021 concerning Amendments to Presidential Regulation Number 16 of 2018 concerning Procurement of Government Goods/Services, Tender is defined as a selection method to obtain providers of goods/construction work/other services.

After Constitutional Court Decision no. 85/PUU-XIV/2016, Article 22 of the Business Competition Law has changed to read as follows:

“Business actors are prohibited from conspiring with other business actors and/or parties related to other business actors to organize and/or determine tender winners so that it can result in unfair business competition.”



Based on these provisions, all parties related to the tender conspiracy are all parties involved in the conspiracy, namely business owners, competitor business owners, procurement working groups, facilitators, vendors, manufactures, guarantors, distributors, officials, individuals, notaries, producers, State Civil Servants (ASN), work owners, including parties who have access to the electronic procurement system. Conspiracy in a tender process can be carried out openly or secretly through the act of adjusting bids before they are submitted, or creating false competition, or agreeing and/or facilitating, or providing exclusive opportunities, or not refusing to take an action even though they know that the action is being carried out for the purpose of arrange in order to win certain tender participants.

Conspiracy in a tender process can be carried out openly or secretly through the act of adjusting bids before they are submitted or creating false competition, or agreeing and/or facilitating, or providing exclusive opportunities, or not refusing to take an action even though they know that the action is being carried out in order to let certain participant wins the tender. Conspiracy in tender process can not only be carried out between business actors (fellow tender participants), but can also be carried out by business owners and other parties, for example with the procurement committee, or a mixture of both methods (Usman, 2013: 98).

Thus, tender conspiracy can be divided into 4 (four) types, namely horizontal conspiracy, vertical conspiracy, a combination of vertical and horizontal conspiracy, and conspiracy in other forms, with the following explanation:

a. Horizontal Conspiracy

Conspiracy that occurs between business owners or providers of goods and services and fellow business owners or providers of goods and services to their competitors. This type of conspiracy can be categorized as a conspiracy by creating false competition between tender participants.

b. Vertical Conspiracy

Conspiracy that occurs between one or several business actors or providers of goods and services with the tender committee or auction committee or users of goods and services or owners or employers. This type of conspiracy can occur in the form where the tender committee or auction committee or user of goods and services or owner or employer collaborates with one or several tender participants.

c. Mix of Horizontal and Vertical Conspiracy

Conspiracy between the tender committee or auction committee or users of goods and services or owners or employers with other business owners or providers of goods and services. This type of conspiracy can involve two or three parties involved in the tender

process. One form of this type of conspiracy is a fictitious tender, where both the tender committee, job provider, and business actor carry out the tender process only administratively and in a closed manner.

d. Other Type of Conspiracy

Conspiracy involving one or more other parties including parties who do not participate in the tender process who function as scenario organizers/funders/liaisons/brokers and/or other roles to organize and/or determine the tender winner.

If we refer to the types of tender conspiracy as mentioned above, the form of conspiracy that is most likely to occur within a Group Company is Vertical Conspiracy, where the Holding Company is the Business Owner carrying out the process of procuring goods/services or users of goods/services, working together with its subsidiaries as providers of goods/services or tender participants.

Based on the Attachment to KPPU Regulation Number 3 of 2023, indications of Tender collusion based on KPPU Regulations are conditions that have the potential to create unfair business competition or hinder business competition, including if:

- a. The tender is not open and transparent, not widely announced, cannot be accessed, the time limit is narrow, resulting in business actors who are interested and meet the qualifications not being able to participate;
- b. Tenders are discriminative and cannot be participated in by all business actors with the same competence;
- c. Tenders with technical or brand requirements and specifications that are aimed at certain business actors thereby preventing other business actors from participating;
- d. Corporate associations, corporate associations can be used as a legitimate pro-competitive mechanism for their members to promote standards, innovation and competition. On the other hand, when it is changed to illegal and anti-competitive purposes, the association can be used by Business Actors to meet and discuss ways and methods to achieve and implement a Tender Rigging Agreement;
- e. Recurring procurement; etc.

Some of the indications of Tender Conspiracy mentioned above are very risky for a Holding Company within the Group of Companies it controls, including within the BUMN Group Company. The Holding Company, which is generally the majority shareholder of the Subsidiaries within the Group Company, can set the Group Company's long-term strategic plan as a framework that must be followed by the Subsidiaries. The strategic plan is then derivated to an annual work plan and programs that will be implemented in that year, including plans related to the procurement of goods and services needed to implement these programs.

The Holding Company will then appoint Subsidiaries within the Group Company to provide the required goods and services, without making wide announcements, with specifications and time

limits that have been arranged in such a way as to result in other business actors (outside the Group Company) who are interested and meet the qualifications cannot take part in the process of procuring goods and services (tender). The "internal" tender process within a Group Company like this is discriminatory, because it cannot be participated in by all business actors with the same competence, because from the start it was planned that for A's goods and services needs, for example, it would be carried out by a Subsidiary Company. A, while B's goods and services requirements will be carried out by Subsidiary B, etc. The Holding Company can force Subsidiaries to follow its policies, including in terms of price setting and market division. Holding Companies can also use their dominant position to set prices higher than market prices. This can harm consumers and other unaffiliated business actors.

As mentioned above, one thing that is also included in the indications of tender conspiracy is "Company Association", which, although the meaning is slightly different from "Group Company", has similarities in terms of cooperation and common interests of several companies. Company Associations can be used as a pro-business competition mechanism for their members if the aim is to improve standards, innovation and competition. However, if the aim of the Company Association is to shorten the process, reduce the quality of goods/services, and be anti-competitive, then the Company Association may be accused of committing tender conspiracy. By the same logic, this also applies within Group Company.

Competitive processes can produce lower prices or better quality and innovation, only when companies compete genuinely (for example, setting terms and conditions honestly and independently). Tender conspiracy can be detrimental if it affects public procurement (Lubis, 2017: 21). Based on the Attachment to KPPU Regulation Number 3 of 2023, it is stated that the impact of Tender Rigging as explained above, if seen from the perspective of the employer (user of goods/services) and the welfare of the community, can be detrimental in the form of, among others:

- a. consumers or employers pay a higher price than the actual price;
- b. the goods or services obtained in terms of quality, quantity, time and value are often lower than those that would be obtained if the tender was conducted openly and pro-business competition;
- c. there are market barriers for potential participants who do not get the opportunity to participate in and win the tender; and
- d. The project value for tenders for procurement of services may be higher due to mark-ups made by the parties involved.

Based on the explanation above, it can be understood that the process of procuring goods/services or tenders is very closely related to business competition. A tender process that is not open, competitive, discriminatory and anti-competitive can cause losses, not only for the business

owners as users of goods/services, but in the context of BUMN, it will also cause losses for society as the end users of goods/services which procured by by BUMN.

### 3.3. BUMN's Goods and Services Procurement

At the time this article was written, the process of procuring goods and services within BUMN was regulated in the Minister of BUMN Regulation Number PER-08/MBU/12/2019 concerning General Guidelines for Implementing the Procurement of Goods and Services for State-Owned Enterprises ("BUMN Minister Regulation regarding Procurement of Goods and Services"). Article 2 of the BUMN Minister Regulation regarding Procurement of Goods and Services states as follows:

“This Minister Regulation ini applies to all procurement of goods and services carried out by BUMN whose funding comes from the BUMN Budget, including funds that come from state capital participation, BUMN funds for the implementation of subsidies/public service obligations (public service obligations)/reimbursed government assignments from funds from the State Revenue and Expenditure Budget/Regional Revenue and Expenditure Budget, and BUMN loans from the Government.”

Meanwhile, the aim of establishing regulations regarding the procurement of BUMN goods and services as regulated in Article 3 of the BUMN Minister Regulation regarding Procurement of Goods and Services is to: produce goods and services of the right quality, quantity, time, cost, location and provider, support the creation of added value in BUMN, increase efficiency, simplify and speed up the decision-making process, increase independence, responsibility and professionalism, realize procurement that produces value for money in a way that is flexible and innovative but remains competitive, transparent, accountable based on good procurement ethics, increasing the use of domestic production, increasing the role of national business actors, and *increasing synergy between BUMN, Subsidiaries and/or BUMN Affiliated Companies*.

The principles that must be applied in the procurement of BUMN goods and services are as follows (Article 4 paragraph (1) of the BUMN Minister Regulation regarding Procurement of Goods and Services:

- a. **Efficient**, means that the procurement of goods and services must be attempted to obtain optimal and best results in the quickest time by using funds and capabilities as optimally as possible in a reasonable manner and not just based on the lowest price. For the procurement of strategic goods and services that have significant value, a total cost of ownership (TCO) approach can be used;
- b. **Effective**, means that the procurement of goods and services must be in accordance with established needs and provide maximum benefits in accordance with the established targets;
- c. **Competitive**, means that the procurement of goods and services must be open to providers of goods and services who meet the requirements and carried out through healthy competition

between providers of goods and services who are equal and meet certain requirements/criteria based on clear and transparent provisions and procedures;

- d. **Transparent**, means all provisions and information regarding the procurement of goods and services, including technical requirements for procurement administration, evaluation procedures, evaluation results, determination of prospective providers of goods and services, are open to participants who are interested in providing goods and services;
- e. **Fair and Reasonable**, means providing equal treatment to all prospective providers of goods and services who meet the requirements;
- f. **Open**, means that the procurement of goods and services can be participated in by all providers of goods and services that meet the requirements; and
- g. **Accountable**, means it must achieve targets and be accountable so as to avoid the potential for abuse and deviation.

The principles mentioned in Article 4 paragraph (1) of the BUMN Minister Regulation is in fact in accordance with the principles of healthy business competition, especially the principles of competitive, transparent, fair and open. These principles are intended to open up as many opportunities as possible for all prospective providers of goods/services who are interested and meet the requirements to be able to participate in the tender process and compete fairly and openly. However, because one of the objectives of the enactment of the BUMN Ministerial Regulation on the Procurement of BUMN Goods/Services is to increase synergy between BUMN, Subsidiaries and/or BUMN Affiliated Companies, then the principles mentioned in Article 4 paragraph (1) above seem to be neglected if it is in the name of "BUMN synergy". As stated in Article 4 paragraph (4) as follows: *"Users of goods and services can create synergies between BUMN/Subsidiaries/BUMN Affiliated Companies."* This provision seems to negate all the basic principles previously mentioned if the provider of goods/services is a fellow BUMN or a Subsidiary/Affiliated Company of a BUMN.

Then in Article 5 of the BUMN Minister Regulation regarding Procurement of Goods and Services it is stated that the policies that must be implemented in the process of procuring BUMN Goods/Services include: Improve the quality of consolidative planning and Goods and Services Procurement strategies to optimize value for money, Align procurement objectives with achieving company goals, carry out more transparent procurement of goods and services, competitive and accountable, Prioritize domestic products in accordance with the provisions for utilizing domestic production, Providing opportunities for national and small businesses, Strengthening institutional capacity and Human Resources for Procurement of Goods and Services, Utilizing information technology, and *Providing opportunities for subsidiaries and/or synergies between BUMN/Subsidiaries/BUMN Affiliated Companies*. Like the provisions in Article 4, the provisions of Article 5 also actually regulate policy direction in accordance with the principles of healthy business

competition from letter a to letter g. However, then a provision appeared in letter h which required BUMN to first provide opportunities to subsidiaries or synergies between BUMN.

Regarding the Procedures for Procurement of BUMN Goods/Services, these are as regulated in Article 10 paragraph (2) of the BUMN Minister Regulation regarding Procurement of Goods and Services it consists of:

- a. Public Tender, which is widely announced through the mass media to provide opportunities for Goods and Service Providers who meet the qualifications to take part in the auction;
- b. Limited Tender, which is the procurement of goods and services offered to limited parties with at least 2 bids;
- c. Direct Appointment, which is procurement of goods and services that carried out directly by appointing one goods and services provider or appointment through a beauty contest; or
- d. Direct Procurement, which if direct purchase of goods on the market, thus the value is based on market prices, including e-purchasing.

Then in Article 10 paragraph (3) it is stated that the procedures for procuring goods and services as referred to above are further regulated by the Directors of each BUMN.

Among the methods of procuring goods/services mentioned in Article 10 paragraph (2) of the BUMN Minister Regulation above, the one with the greatest risk of violating the principles of healthy business competition is the Direct Appointment method. Article 13 of the BUMN Minister Regulation states the following:

- (1) Procurement of Goods and Services through Direct Appointment is carried out by directly appointing 1 (one) Goods and Services Provider or appointment through a beauty contest.
- (2) Direct appointment as intended in paragraph (1) can be carried out if at least one of the following requirements is met:
  - a. Goods and services that are needed for the company's main performance and cannot be postponed (business critical assets);
  - b. There is only one Goods and Services Provider who can carry out work according to user requirements or in accordance with the provisions of applicable laws and regulations;
  - c. Goods and Services that are knowledge intensive in nature where to use and maintain the product requires continuity of knowledge from the Goods and Services Provider;
  - d. If the implementation of the procurement of goods and services using tender/general selection or limited tender/limited selection has been carried out 2 (two) times and the required goods and services provider is not obtained or there are no parties who meet the criteria or no party participates in the tender/ selection;
  - e. Goods and services owned by the holder of intellectual property rights (IPR) or which have a guarantee from the Original Equipment Manufacture;

- f. Emergency handling for security, public safety and company strategic assets;
- g. Goods and services which are repeated purchases (repeat orders) as long as the price offered is profitable without sacrificing the quality of the goods and services;
- h. Emergency management due to natural disasters, both local and national (force majeure);
- i. Advanced goods and services which technically constitute a single unit that cannot be broken down from work that has been carried out previously;
- j. **Goods and Services Providers are BUMN, Subsidiaries or Affiliated Companies of BUMN** as long as the quality, price and purpose can be accounted for and the Goods and Services required are products or services in accordance with the business field of the relevant Goods and Services Provider;
- k. Procurement of goods and services in certain quantities and values determined by the Board of Directors by first obtaining approval from the Board of Commissioners; and/or
- l. Consultants who do not plan in advance to face certain problems whose nature of work implementation must be immediate and cannot be postponed.

Based on the provisions above, Direct Appointment is a method of procuring goods/services which is carried out by directly appointing 1 (one) Goods and Services Provider or appointment through a beauty contest. This means that BUMN as users of goods/services can directly appoint 1 (one) provider of goods/services as the winner of the tender without a general announcement or bidding process, so that there is no opportunity for potential providers of goods/services to compete in the procurement of said goods/services.

Direct appointments can be made under certain conditions, as stated in Article 13 paragraph (2) above, for example if the goods/services required are critical and cannot be postponed, or there is only one provider of goods/services who truly has the competence/specifications which is in accordance with the needs of BUMN as users of goods/services, or if a general and limited selection has been carried out but cannot find a winner who meets the needs, etc. So it can be understood that Direct Appointment is actually a process of procuring goods/services under unusual conditions and the goods/services providers selected through the Direct Appointment process are truly reliable providers in their field. However, because the possibility is open for Direct Appointment to Subsidiaries or affiliated companies of BUMN, these qualifications may be ignored.

In Article 13 paragraph (2) letter j, it is stated that Direct Appointments can also be made if the provider of goods and services is a BUMN, Subsidiary or Affiliated Company of a BUMN, as long as the quality, price and purpose can be accounted for and the goods and services required are products or services in accordance with the business field of the relevant goods and services provider. This provision can actually be used as a loophole by BUMN Holding Companies to form many

Subsidiaries with the aim of facilitating the process of procuring goods/services without really focusing on the quality of goods and services. Even though it mentions considerations "as long as the quality, price and purpose can be accounted for", this is still very subjective in nature based on the considerations of the BUMN. Financial and technical justification can be prepared in such a way with adequate data, because it is carried out by the Holding Company for Subsidiaries in its Group Company.

If we refer back to the provisions of Article 4 regarding the principles of procurement of BUMN Goods/Services, direct appointments to Subsidiaries or affiliated companies which are often carried out by Holding Companies are actually contrary to the principles of competitive, transparent, fair and open. However, due to vertical integration between the Holding Company and the companies under it in the Group Company, these principles may be set aside. Vertical integration itself can be defined as the control of several entities involved in the production chain of goods and/or services from upstream to downstream (Rokan, 2010: 117). There are several reasons why business actors (in this case BUMN Holding Companies) practice vertical integration. The reasons include efficiency, safety of raw materials, increasing consumer access, transfer pricing and eliminating competitors (Prasetyowati, Prananingtyas, & Saptono, 2017: 11).

In a BUMN Holding Company, it is very possible for inter-company coordination to occur (or what is usually referred to as BUMN synergy), which although it has good aims to improve company performance, on the other hand, for other business actors, this can be interpreted as a concentration of economic power, which is very potential to have an adverse effect on competition with other business actors (Disyon & Gultom, 2022: 202). This is contradictive with the principles contained in healthy business competition, in particular Article 22 and Article 19 letter d of the Business Competition Law, which results in the closing of opportunities for other business actors to take part in the competition contained in the goods procurement process/ service (Abidin, 2015: vi).

### **3.4. Procurement of Goods and Services within the PLN Group**

Article 10 paragraph (3) of the BUMN Minister Regulation regarding Procurement of Goods and Services states that further procedures for procurement of goods and services are carried out by the Directors of each BUMN. At the time this article was written, procedures for implementing the procurement of goods and services within PLN were regulated based on PLN Board of Directors Regulation Number 0018.P/DIR/2023 concerning Strategic Policy for Procurement of Goods/Services for PT PLN (Persero) and Implementing Regulation Number 0012.E/DIR /2023 concerning Standard Procedures for Procurement of Other Goods/Services ("PLN Regulations regarding Procurement of Goods and Services").

In Implementing Regulation Number 0012.E/DIR/2023 in CHAPTER II numbers 2.2 and 2.3, provisions regarding the process of Procurement of Goods and Services (Tender) at PLN consists of:



a. Procurement Planning Process

Starting from preparing procurement planning documents, qualification documents and List of Limited Providers (DPT), pre-qualification documents, tender documents, Engineering Estimated Prices (HPE), to submitting the planning results and documents to procurement implementing officials (carried out by procurement planning officials).

b. Procurement Implementation Process

Starting from analyzing tender documents, qualification documents, complete permits, feasibility study documents, etc., preparing procurement implementation schedules, making Self Estimated Prices (HPS), assessing the qualifications of goods/services providers, providing procurement explanations (*aanwijzing*), evaluating bidding documents from prospective providers/procurement participants, clarifying and negotiating prices, until announcing the winner (carried out by the procurement implementing official).

Apart from the general procurement process for goods/services as referred to above, Implementing Regulation Number 0012.E/DIR/2023 CHAPTER III point 3.7 also regulates other methods of procurement of goods/services, which consist of e-Purchasing, Direct Procurement, Direct Appointment, Fast Tender and Limited Tender. Regarding Direct Appointments, it is regulated in point 3.7.3.2, which regulates the criteria for Direct Appointments to be carried out, including the following:

- a. Other goods/services that will be provided are specific in nature and can only be implemented with special technology/holders of Intellectual Property Rights (HAKI);
- b. There is only 1 (one) Goods/Services Provider who can carry out work according to the needs of the Goods/Services User;
- c. Procurement of Goods/Other Services to complete constrained work determined by the Board of Directors and is a Government assignment in the context of electricity infrastructure development;
- d. Emergency work for security, public safety and company strategic assets;
- e. Emergency work due to natural disasters both local and national (Force Majeure);
- f. Providing help for natural disasters;
- g. Goods/Services providers are state institutions, state officials, or universities and their affiliates;
- h. Procurement of Goods/Services after re-tendering fails;
- i. Recurring Appointment (Repeat Order);
- j. To carry out technology development projects;
- k. In the context of national capacity building;

- l. Based on considerations that can be accounted for professionally by the relevant Directors/Committee of Directors/Directors to carry out the Procurement of Goods/Services through Direct Appointment;
- m. Maintenance of generating units in the form of a long term service/supply agreement (LTSA), may include procurement of spare parts and/or specific parts directly from the manufacturer/single agent;
- n. Procurement of further Goods/Other Services which are technically a single unit which cannot be broken up from work that has been carried out previously;
- o. Goods/Services Providers are PLN Subsidiaries or PLN Affiliated Companies which have specific business fields with the following objectives:
  - 1) To secure fuel supplies, without eliminating the principles of healthy business competition;
  - 2) To maintain the reliability of the generator, transmission, distribution or information technology system maintenance operations;
  - 3) To secure the supply of electricity;
  - 4) To optimize the use of electricity assets for telecommunications, multimedia and information purposes;
  - 5) To provide engineering services to optimize investment and electricity system operations;
  - 6) To develop primary energy infrastructure in order to meet PLN's generating needs;
  - 7) To secure fuel transportation services; or
  - 8) To secure income.
- p. Goods/Services Providers are BUMN, PLN Subsidiaries/BUMN Subsidiaries or PLN Affiliated Companies/BUMN Affiliated Companies, as long as the goods and/or services in question are products or services of BUMN, PLN Subsidiaries/BUMN Subsidiaries, PLN/Company Affiliated Companies Affiliated with BUMN, and/or small and micro businesses as long as the quality, price and purpose can be accounted for, and is possible in sectoral regulations; or
- q. Goods/Services Providers are business entities/business units whose shares are a minimum of 90% (ninety percent) owned by DP-PLN, IK-PLN or YPK-PLN or a combination of DP-PLN, IK-PLN and YPK-PLN or a combination of DP- PLN, IK-PLN and/or YPK-PLN with PLN Subsidiaries and/or PLN Affiliated Companies, as long as the Goods/Services in question are products or services of said business entities/business units.

The criteria in letter o which states that Direct Appointment can be made if the Goods/Services Provider is a PLN Subsidiary or PLN Affiliated Company which has a specific

business field with certain objectives, opens up maximum opportunities for PLN to directly appoint Subholdings, Subsidiaries and Affiliated Companies within the PLN Group in the process of procuring goods/services within PLN, especially in number 8) which states that one of the objectives is to secure PLN's income. PLN as a BUMN in the form of a Limited Liability Company of course one of its aims is to gain profits and secure income, so the aim in letter o number 8) above is a very general aim, and has the potential to be used as a subjective reason by PLN to make Direct Appointments to Subholdings. , PLN Subsidiaries and Affiliated Companies within the PLN Group. Direct appointments can also be made by PLN to all PLN affiliated companies, as mentioned in letters p and q, including business entities/business units whose shares are a minimum of 90% (ninety percent) owned by DP-PLN, IK-PLN or YPK- PLN or a combination of DP-PLN, IK-PLN and YPK- PLN or a combination of DP-PLN, IK-PLN and/or YPK-PLN with PLN Subsidiaries and/or PLN Affiliated Companies, as long as the Goods/Services in question are products or services these business entities/business units.

Direct appointment by PLN of a Holding Company to Subsidiaries and/or Affiliated Companies under it is a form of vertical integration, where PLN uses the power it has to control the process of procuring goods/services to companies within the PLN Group Company, even though it has good intentions for improve company performance, but on the other hand, for other business actors who are not affiliated with PLN, this can be interpreted as a concentration of economic power and can seem to leave no room for other potential providers of goods/services who may have the same (or even more) capacity. to be able to take part in the tender process or procurement of goods/services within PLN.

The PLN Regulation regarding Procurement of Goods and Services basically still provides opportunities for prospective providers of other goods/services outside the PLN Group to participate in the goods/services procurement process within the PLN environment, however there are provisions that provide an opportunity for PLN to be able to make Direct Appointments to Children. Companies and/or PLN Affiliated Companies for reasons of securing income or for certain conditions according to the assessment of the PLN Board of Directors, can be interpreted as PLN's way of prioritizing the selection of providers of goods/services within the PLN Group first, even though there may be potential providers of goods/other services outside PLN that are more competent. As previously explained, a competitive procurement process for goods and services can produce lower prices for goods and services or better quality and innovation, only when companies that have competence in their respective fields can compete genuinely, by setting requirements and honest conditions, an open selection process, and fair selection of winners. Direct appointments to PLN Subsidiaries and/or Affiliated Companies within the PLN Group that have been previously planned are very risky and can be categorized as tender conspiracy, where PLN is the Tender organizer or user of goods/services represented by the Tender Committee or procurement officials, in collaboration with one or several

Tender participants (in this case the companies within the PLN Group), before carrying out the tender process as appropriate.

Direct Appointment to a Subholding/Subsidiary, if it meets the requirements according to the Direct Appointment requirements (which apply to other companies outside the PLN Group), then it is actually legitimate to do so, considering that PLN has indeed carried out objective assessments and considerations to appoint its subsidiary. However, if the Direct Appointment is carried out with prior planning to let a particular Subsidiary/Affiliated Company to win the tender, with criteria and prices that have been specifically adjusted for that Subsidiary/Affiliated Company, then this can be categorized as bid rigging and is a violation of fair business competition.

#### **IV. CONCLUSION**

The process of procuring goods and services in the BUMN environment is based on BUMN Minister Regulation Number Per-08/MBU/12/2019 regarding General Guidelines for Implementing the Procurement of BUMN Goods and Services, in essence it regulates the principles of healthy business competition such as efficient, effective, competitive, transparent, fair, open and accountable. However, the provisions related to BUMN Synergy and the permissibility of the process of procuring goods/services through Direct Appointments to BUMN and BUMN Subsidiaries/Affiliated Companies cause these determined principles to appear to be overridden. This also applies to the procurement of goods and services within the PLN Group, where PLN as the Holding Company can control the companies within the PLN Group to prepare their annual plans (RKAP) according to PLN's long term plans (RUPTL), including planning related to procurement goods/services. PLN Regulation regarding Procurement of Goods and Services also regulates that the procurement of goods/services carried out by PLN Subsidiaries/Affiliated Companies can be carried out through Direct Appointment without going through an open and competitive tender process. This provision is a violation of the principles of healthy business competition and has the potential to be categorized as Tender Conspiracy, which results in the closing of opportunities for other business actors/owners to take part in the competition in the procurement of goods and/or services within PLN.

The government needs to enact statutory regulations that specifically regulate Group Companies, apart from the general provisions contained in the Company Law and BUMN Law, because of the existence and business processes of Group Companies, especially those related to the procurement of goods and services, is very likely to violate laws and regulations related to fair business competition if it is not specifically regulated. The process of procuring goods and services within the BUMN Group Company environment, especially the PLN Group, needs to be monitored more closely, either by the Business Competition Supervisory Commission (KPPU), internal auditors, or other independent parties. Other business actors involved in the process of procuring goods and services within BUMN, especially the PLN Group, need to be given an understanding of healthy

business competition. This can be done through outreach or training about healthy business competition. PLN must continue to prioritize healthy business competition and should not take advantage of its status as a BUMN Holding Company to have a tender conspiracies within PLN Group or carry out the Direct Appointment process to its Subsidiaries/Affiliated Companies without truly accountable justification.

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