

LEGAL ASPECTS OF BUSINESS COMPETITION IN THE PROCUREMENT OF COVID-19 VACCINE BY BIO FARMA LTD

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ABSTRACT

The purpose of this research is to analyze the exclusion of monopoly by State Owned Enterprises (BUMN) based on the provisions of business competition law in the procurement of the Covid-19 vaccine by Bio Farma (Persero) Ltd. Indonesia is being hit by the Covid-19 outbreak. This condition has had a negative impact in various fields. To overcome this, one of the government's efforts is to bring in vaccines to prevent the spread, and the procurement of vaccines is given to Bio Farma Ltd. There are indications of monopoly actions in the procurement of Covid-19 vaccines by Bio Farma Ltd. This research uses the approach statute approach and conceptual approach. The technique of tracing legal materials uses field study techniques and document studies (library research), as well as study analysis is using qualitative analysis. The results of the research and the discussion show that the procurement process for the Covid-19 vaccine is strictly regulated by the government. Even the quantity, procurement, and distribution are coordinated by the government in this case through the assignment of SOEs (BUMN) as regulated in Presidential Regulation Number 99 of 2020 as amended by Presidential Regulation Number 14 of 2021. The results of the study show that the actions taken by SOEs (BUMN) in this case Bio Farma (Persero) Ltd in procuring the Covid-19 vaccine is included in the excluded monopoly category, because it meets the elements of the provisions in Article 50 paragraph a. Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition.

Key Words: business competition; procurement of covid-19 vaccine; bio farma ltd.

INTRODUCTION

Today the whole world has been faced with various health problems that are getting bigger and more complex, one of which is the problem of the epidemiological transition. Epidemiological transitions or changes in disease patterns are conditions where there are changes in disease patterns, where currently infectious diseases are still not well resolved, but on the other hand, non-communicable diseases continue to increase such as Corona Virus (Covid-19) (Coyne, 2020).

The Covid-19 outbreak/pandemic has been designated by the World Health Organization (WHO) as a global pandemic and the Government has also designated a non-natural disaster Covid-19 as a national disaster. The government realizes that in the context of dealing with the Covid-19 outbreak/pandemic and maintaining public health, vaccines are needed. Vaccines are the result of biotechnology from viruses. Biotechnology is defined as the use of living organisms to create products, or the use of living organisms to make or change substances. Vaccines are human self-defense weapons against diseases caused by the virus. By injecting vaccines into the human body, the immune system is stimulated, this is one way to reduce mortality from a deadly disease outbreak (Widjaja, 2020).

The process of procuring the Covid-19 vaccine is strictly regulated by the government with the aim of keeping the vaccination process properly supervised. The Minister of State-Owned Enterprises said that control of vaccines coming to Indonesia or produced only by the government is an effort by the government to ensure that vaccinations are carried out in a measurable and well-targeted manner (Azka, 2020). Even from the number, type and procurement, to distribution, it is determined by the government as regulated in Presidential Regulation Number 99 of 2020 concerning Vaccine Procurement and Vaccination Implementation in the context of combating the 2019 Corona Virus Disease Pandemic as amended by Presidential Regulation Number 14 of 2021. In Presidential Regulation 99 of 2020, the determination of the type, quantity, purchase price, and procurement of the Covid-19 vaccine is consolidated under the Minister of Health. However, problems arise because in the implementation of the Covid-19 vaccine procurement there are indications of monopolistic practices by state-owned enterprises (BUMN) in this case Bio Farma (Persero) Ltd. Based on Presidential Regulation 99 of 2020 and its derivative regulations, namely Minister of Health Regulation Number 28 of 2020 concerning the Implementation of Vaccine Procurement in the context of combating the Corona Virus Disease 2019 (Covid-19) Pandemic as amended by Minister of Health Regulation Number 79 of 2020 (Permenkes 28 of 2020) and

Regulation of the Minister of Health Number 10 of 2021 concerning the Implementation of Vaccination in the Context of Combating the Corona Virus Disease 2019 (Covid-19) Pandemic, the procurement and distribution of the Covid-19 vaccine is strictly regulated by the government by involving Bio Farma (Persero) Ltd.

With the indications of monopolistic action for the Covid-19 vaccine, especially in terms of procurement, it is feared to eliminate competition and even indicate the occurrence of monopolistic practices in the procurement of these health products. An industry is said to have a monopoly structure if there is only one producer or seller (single firm) without direct and indirect competitors, both real and potential. The company has no competitors because of the barriers (barrier to entry) for other companies to enter the industry in question (Rokan, 2010). Competition is a general term that can be used for all existing resources.

With the competition, businessmen are forced to produce quality products. Efficiently managed companies will gain large profits and continue to exist, otherwise inefficient companies will experience defeat in business competition, as a logical consequence of perfect competition is the creation of competitive prices and good quality goods, as well as various choices. of a product or service (Usman, 2013).

In daily life, every economic actor who enters the market will go through a competitive process where producers try to calculate ways to improve the quality and service in an effort to win markets and consumers. When this condition can be achieved, the producer or businessman will try to maintain this condition at least to remain an incumbent with a certain market share in the relevant market. The dilemma that occurs is when there is a businessman who succeeds in becoming a monopolist in the market which causes the producer or businessman to be inefficient and able to increase the barriers to entry for their competitors. When this condition occurs, the effect is an ineffective use of resources and can even result in a distorted market (Zihaningrum & Kholil, 2016).

Based on the description above, there is a norm in the law that temporarily prohibits the practice of granting a monopoly on the procurement of Covid-19 vaccine by Bio Farma (Persero) Ltd, so it is necessary to analyze whether this monopoly action can be classified as an exception regulated in the competition regulations, namely Article 51 Law no. 5 of 1999 which reads as follows: "Monopolies and or concentration of activities related to the production and or marketing of goods and or services that affect the livelihood of many people as well as production branches that are important to the state are regulated by law and organized by business entities. State-owned and/or agency or institution established or appointed by the Government."

Regarding the above description, the theory used relating to the state in business competition law is the State Action Doctrine. This theory allows for the right of immunity and exception from competition law in certain circumstances. The exception is given to acts or actions taken by the government to carry out certain activities (Lubis, 2009).

This theory, known in the United States, stems from the decision of the United States Supreme Court in the case of *Parker vs. Brown* in 1943 in response to efforts to impose competition law rules on businesses or activities carried out by governments that were previously unimaginable when the United States enacted the Sherman Act of 1890. The United States Supreme Court held that this doctrine was in accordance with the wishes of Congress that the purpose of the Act was Business Competition is to protect competition but without limiting the authority of the State. This theory was later expanded by allowing the granting of a wider exception status to business entities formed by the government which were not even fully government-established entities. This theory is proven to provide many benefits to the government as long as this status is used in accordance with its objectives, especially from an efficiency approach at the national level (Nurhayati, 2011).

Judge Lewis Powel of the United States Supreme Court stated that an action can be categorized as a State Action Doctrine if it meets at least two criteria (Fuady, 2003): (1) Regulations that except an action from the provisions of the Business Competition Law and are indeed in

accordance with the intent of the regulation are made (clearly articulated and affirmatively expressed as state policy); (2) Activities that are excepted from the provisions of the Business Competition Law are actively supervised by the government in order to really accommodate the public interest and the livelihood of the people (actively supervised by the state itself).

Based on the search conducted, previous research related to "Legal Aspects of Business Competition in the Procurement of Covid 19 Vaccines by Bio Farma (Persero) Ltd" has never been carried out. However, to show the novelty in this research, several researches related to monopolistic actions by SOEs will be presented, one of which is research conducted by Marhias Mereapul Ginting (Ginting, 2013), which discusses that the provisions for exceptions to monopolistic practices carried out by SOEs as referred to in Article 51 Law No. 5 of 1999 provides limitations that monopoly and or concentration of activities related to the production and or marketing of goods and or services that affect the livelihood of many people as well as production branches that are important for the state carried out by SOEs can only be carried out after being regulated in the form of a law that clearly states the objectives of monopoly and or concentration of activities as well as state control and supervision mechanisms in the implementation of monopoly and or unfair business competition and BUMN will still be the object of Law no. 5 of 1999 so that if in the implementation of its monopoly rights, SOEs are proven to have abused their monopoly power to the detriment of society, the Business Competition Supervisory Commission will take action against them. Commission Regulation No. 3 of 2010 concerning Guidelines for Article 51 of Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition, as implementation guidelines and guidelines, to avoid abuse of monopoly position by SOEs to lead to monopolistic practices and unfair business competition, as in PLN (Persero) Ltd which was given the right to monopolize the distribution of electricity to the public.

In addition, Anna Maria Tri Anggraini (Anggraini, 2010) argues that Article 51 of Law Number 5/1999 implies the understanding that the implementation of a monopoly and/or

concentration of activities by the state on activities related to the production and or marketing of goods and/or services that affect the livelihood of the people, as well as production branches that are important to the state are organized by State-Owned Enterprises (BUMN) and/or agencies or institutions established or appointed by the government. This provision can be interpreted that monopoly is not always prohibited, even in certain cases monopoly by the state in the strategic industrial sector is excluded by a law. Furthermore, Muhammad Insa Ansari (Ansari, 2017) shows that state control of postal activities changes according to the economic system adopted by the ruling government. In the old order, state control over postal activities was very dominant, even the Postal Service, Telegram and Telephone had the authority to carry out a monopoly. During the New Order era, the state's control over the postal sector began to decrease, even during the Reformation era, the state's control over the postal sector was only a regulator. However, during the reformation era, there were a number of state obligations carried out by SOEs in the form of public service obligations to organize posts in remote areas.

RESEARCH METHODS

The research used is normative legal research, namely research used to analyze the law which is seen as patterned community behavior in people's lives who always interact and relate to social aspects. The first step of this research is based on primary data sourced from available information. Furthermore, secondary data is used in the form of legal materials, which include statutory documents, official documents, books, jurisprudence related to research. This research uses the approach: statute approach, as well as conceptual approach, case approach. The technique of tracing legal materials uses field research and document studies (library research), as well as analysis studies using qualitative analysis.

DISCUSSIONS AND ANALYSIS OF RESULTS

1) The legitimacy of granting a monopoly to SOEs

Article 33 paragraph (2) of the 1945 Constitution stipulates that the production branches which are important for the state and affect the livelihood of the people are controlled by the state. There are three elements contained in Article 33 paragraph (2), namely production branches that are important to the state, production branches that control the livelihood of many people and the existence of control by the state.

Furthermore, what is meant by production branches that are important to the state are "strategic production activities related to justice, security and national stability that provide welfare for all people". Meanwhile, the branches of production that control the livelihood of many people are "the production of vital goods and services such as water, energy and public transportation" and the production of goods and services that are vital for human life within a certain period of time.

The formulation of the article means that the principle of popular sovereignty has the consequence that the authority to choose the economic system to be implemented is not by the state, but by the people. Sukarno called this principle Economic Democracy. The government has a task to implement the system established by the people as stated in the constitution. This is meant that the economic system run by the State can bring the welfare of the people, as agreed by the founders of this nation that Indonesia is a welfare state (Bachelor, 2014). So that the economic system to be built in Indonesia is Economic Democracy. Economic democracy is the principles of economic life that prioritize the prosperity of the community, not the prosperity of individuals, towards achieving social welfare for all Indonesian people. The provisions in Article 33 paragraph (2) of the 1945 Constitution also have the consequence that the private sector is not allowed to manage and control an important production branch and control the livelihoods of many people, unless it has received a mandate from the state based on a legal product. Because economic sovereignty is in the hands of the people, the mandate must be in the form of a law.

The government intervention in monopoly and oligopoly markets aims to influence prices, the quantity produced, and the distribution of income from economic activities. The intervention is carried out in two ways, namely: regulation and anti-monopoly law. However, in order to the fair competition occurs, government intervention is required in the market. The intervention is expected to prevent monopolies, ensure equal opportunities in business and healthy competition, and freedom in selling and buying products based on the principle of efficiency (Akyuwen, 2017).

The exception rule in Law Number 5 of 1999 in Article 50 states:

What is excluded from the provisions of this law are:

- a. actions and or agreements aimed at implementing the applicable laws and regulations; or
- b. agreements relating to intellectual property rights such as licenses, patents, trademarks, copyrights, industrial product designs, integrated electronic circuits, and trade secrets, as well as agreements relating to franchises; or
- c. agreement on the determination of technical standards of goods and or services products that do not curb and or hinder competition; or
- d. an agreement within the framework of an agency whose contents do not contain provisions to resupply goods and or services at a lower price than the agreed price; or
- e. research cooperation agreements for the improvement or improvement of the standard of living of the wider community; or
- f. international treaties that have been ratified by the Government of the Republic of Indonesia; or
- g. agreements and or actions aimed at exports that do not interfere with the needs and or supply of the domestic market; or
- h. businessman belonging to small businesses; or
- i. cooperative business activities that specifically aim to serve its members.

In addition, Exceptions in Competition Law may also be granted for reasons of protection to a particular industry or businessman deemed to still require protection. The government needs to provide protection on the grounds that this industry has not been able to face competition due to businessman, such as limited capital, not being able to be efficient, distribution constraints, lack of innovation so that it will not be able to survive in the market. The types of businessmen that fall into this category are cooperatives and small and medium-sized businesses that are included in small home industry businesses on a simple scale. While the provision of protection to certain types of businessmen are generally not only given based on ability, but also by looking at their number in

the national economy, whether the number is significant or the majority in a market or not. (Anggraini, 2013).

To supervise the implementation of the provisions of Law no. 5 of 1999, based on the provisions of Article 30 paragraph (1), it is also determined the establishment of the Business Competition Supervisory Commission (KPPU) by Presidential Decree Number 75 of 1999 concerning the Business Competition Supervisory Commission. Law No. 5 of 1999 regulates several provisions, including those relating to: (a) prohibited agreements; (b) prohibited activities; (3) dominant position; and (4) sanctions against violators of the regulated provisions.

This is related to one of the authorities of the KPPU in Article 35 (f) of Law No. 5 of 1999 is to issue which contains how to assess and how the KPPU interprets the contents of the article of Law No. 5 of 1999 KPPU not only supervises legal supervision but also ensure supervision of what is regulated in the articles of Law No. 5 of 1999.

In understanding this article, it is necessary to pay attention to what law is meant because at the level of applicable legislation, the position of the law is equal (Article 7 paragraph (1) of Law No. 12 of 2011 concerning the Establishment of Legislation as already stated in Article 7 paragraph (1) of Law No. amended by Law Number 15 of 2019). So it is necessary to further examine the meaning of the contents of this article which states what laws can exclude Law No. 5 of 1999. The law is coercive and generally applicable to the public so that it requires higher regulations or laws to exclude enforceability or clearly stated what and who is excluded in the regulation of the enactment of the law. In Law No. 5 of 1999 there is an exception agreement which is stated in Article 50 letter a "implementing the applicable laws and regulations" so that the meaning is broad and Article 5 paragraph (2) which is only based on the law.

Article 50 letter a is a provision that is "exceptions" or "liberations" which is intended to avoid conflicts between various policies that contradict each other but are equally needed in the national economy. This provision also often arises because dynamic economic conditions require

the Government to set exceptions aimed at balancing the control of the production sector which controls the livelihood of the people and providing protection to small-scale entrepreneurs. The provision of special treatment for production branches that control the livelihood of the people to be controlled by the state is expressly regulated in Article 33 paragraph (2) and paragraph (3) of the 1945 Constitution of the Republic of Indonesia. The provisions in Article 33 paragraph (2), and (3) are in line with those stipulated in Article 51 of Law no. 5 of 1999 (Puspaningrum, 2013).

Exceptions based on Article 51 of Law Number 5 of 1999, Article 51 of Law No. 5 of 1999, states that:

Monopolies and or concentration of activities related to the production and or marketing of goods and or services that affect the livelihood of the people as well as production branches that are important to the state are regulated by law and organized by State-Owned Enterprises and/or agencies or institutions that formed or appointed by the Government.

In implementing the mentioned article, KPPU makes Guidelines on the Implementation of Article 51 of Law Number 5 of 1999. The provisions of Article 51 as referred to above can be described and explained in several elements, namely:

a. Monopoly

In Article 1 number Law Number 5 of 1999, the definition of monopoly: "Control over the production and or marketing of goods and or the use of certain services by one businessman or a group of businessmen".

Based on this definition, monopoly basically describes a condition of control of businessman over certain goods and or services that can be achieved without having to carry out or result in monopolistic practices and or unfair business competition.

b. Activity Center

The element of concentration of activities in Article 51 of Law Number 5 of 1999 can be defined as the concentration of economic power as referred to in Article 1 number 3 of Law Number 5 of 1999, namely: "Real control over a relevant market by one or more businessmen so that it can determine the price goods and or services."

Based on this definition, the centralization of activities basically describes a state of real control over a relevant market which is reflected in its ability to determine prices that can be achieved by one or more businessmen without having to engage in or result in monopolistic practices and or unfair business competition.

Considering the description of the understanding of the elements mentioned above, both monopoly and concentration of activities are not activities prohibited by Law Number 5 of 1999 and can be carried out or achieved by one or more businessmen while still taking into account the principles of fair business competition. However, observing Article 51 of Law Number 5 of 1999, this article is closely related to Article 33 of the 1945 Constitution.

In addition, based on the State Action Doctrinal Theory, it is possible to have immunity rights and exceptions from business competition law in certain circumstances. The exception is given to acts or actions taken by the government to carry out certain activities (Lubis 2009).

Based on the reference to the Indonesian economic system described above, ideally there will be three main businessmen in the Indonesian economy, namely: First, State-Owned Enterprises (BUMN) as bodies representing the state in realizing the mandate of the Constitution to manage and utilize natural resources for the prosperity of all Indonesian people. BUMN is an economic institution that will handle production branches that are important for the state and control the lives of many people.

Second, cooperatives will handle the small and medium business sector, especially the traditional trade sector (retail traders), agriculture, home industry and the like.

Third, the private sector will handle business sectors that have not been handled by SOEs and Cooperatives, such as industries with high technology and capital intensive, including the service business sector which ideally does not include BUMN and Cooperatives such as insurance, banking, transportation, telecommunications.

Seeing from the formulation of Article 51 and referring to the Guidelines for the Implementation of Article 51 of Law Number 5 of 1999, there are three industries who are justified in conducting monopolies, namely BUMN, bodies or institutions formed by the government, agencies or institutions appointed by the government. In fact, the most frequently mandated to carry out a monopoly are BUMN. Perhaps this is because BUMN is a business entity whose capital, either wholly or partially, directly obtains capital participation from separated state assets. Until now, several production branches are still controlled by the state through BUMN, such as Pertamina and PLN.

2) Legal Aspects of Business Competition in Covid 19 Vaccine Procurement Activities by Bio Farma (Persero) Ltd

As previously explained, Article 50 letter (a) states “Actions that are excluded from Law no. 5 of 1999 based on Article 50 (a) is an act and or agreement aimed at implementing the applicable laws and regulations.”

From the article above, there are several elements, namely: (1) Elements of “The existence of an act and or the existence of an agreement”; (2) Elements of “Aims to Implement”; (3) Elements of “Legislation”.

Then when an analysis is carried out on Government policies related to the formulation of exceptions according to Article 50 Letter a of Law no. 5 of 1999, then in Article 8 paragraph (1) of Law Number 12 of 2011, the types of regulations that are classified in statutory regulations, also include regulations issued by: the Minister; Body; Institutions, or equivalent commissions established by law or by the government on the orders of the law.

The act and or agreement aims to implement the applicable laws and regulations, but must remain on the principle that the applicable laws and regulations implemented are of a higher or

equal hierarchy. Legislation that is lower than the law is also possible to get exceptions as long as it gets express delegation from the law.

Based on the above elements, related to the procurement of Covid-19 vaccine by Bio Farma (Persero) Ltd, it can be analyzed as follows: First, the element of “the existence of an act and or an agreement”. Where there is a Covid-19 Vaccine procurement activity by Bio Farma (Persero) Ltd, therefore this element is fulfilled.

Second, elements of “Aims to Implement”. So, from here the author argues that the "aimed at implementing" element is fulfilled based on the first element. Because Bio Farma (Persero) Ltd carries out what is the government's instructions/orders (in this case through Presidential Regulations and Minister of Health Regulations). It just needs to be seen whether the government's instructions/orders can be categorized as statutory regulations.

Third, elements of “Legislation”. The definition of this statutory regulation is very firmly regulated in Law no. 15 of 2019 concerning Amendments to Law Number 12 of 2011 concerning the Establishment of Legislation. In Article 1 number 2 of Law no. 15 of 1999 it is stated that statutory regulations are written regulations that contain legally binding norms in general and are formed or determined by state institutions or authorized officials through procedures stipulated in laws and regulations.

Based on Presidential Decree 99 of 2020, the parties that can procure vaccines are BUMN, direct appointment of supplying business entities or cooperation with international institutions/agencies (article 4 paragraph 1). However, in article 5 paragraph 1 it is stated that the SOE that gets the assignment is Bio Farma (Persero) Ltd which is carried out by the Minister of Health and can involve Bio Farma (Persero) Ltd subsidiaries, namely Kimia Farma Tbk Ltd and Indonesia Farma Tbk Ltd.

From the description above, it is clear that the instructions/orders were issued through Presidential Regulation 99 of 2020. Where Presidential Regulation 99 of 2020 is included in the

legislation. In addition, regarding the implementation of the provisions of Article 50 letter (a), KPPU has issued Guidelines No. 253/KPPU/Kep/VII/2008 concerning Guidelines for the Implementation of Provisions of Article 50 letter (a). In this regulation, it is emphasized about the types of actions or activities and what agreements can be excluded. Basically, the economy is carried out by various types of businessmen with different abilities. In addition, there are also various sectoral regulations related to other regulations, even these regulations have existed long before Law no. 5 of 1999 was promulgated. If there is a law that requires a businessman to take an action or carry out an agreement, then the action or agreement will be excluded.

The guidelines stipulate those actions in this case are analogous to activities as regulated in Articles 17 to 24 of Law No. 5 of 1999. If they are carrying out the act based on the authority of the law or from the legislation that expressly receives delegation from the law -Invite. Legislative regulations that are used as the basis for businessmen to carry out actions and or agreements, for example in the form of a Ministerial Regulation, but if the Ministerial Regulation is stipulated by direct delegation from the Act, then the act and or agreement even though the consequences are not in line with the provisions of the Law No. 5 of 1999, the businessman concerned can not be subject to legal sanctions. On the other hand, if the material of the legislation under the Act is contrary to Law no. 5 of 1999, it cannot be translated as an exception as regulated in Article 50 letter a of Law No. 5 of 1999.

Then there are also doctrines that apply in the Business Competition Law, namely: that an instruction issued based on the regulation of a government agency is an exception from the application of the Business Competition Law, some exceptions to the application of business competition law are as follows (Puspaningrum, 2013): (a) There are instructions or orders from the Constitution; (b) There are instructions or orders from laws or other legislation; (c) Instructions or arrangements under the regulations of an administrative body."

CONCLUSIONS

The process of procuring the Covid-19 vaccine is strictly regulated by the government. Even the number, procurement, and distribution are coordinated by the government in this case through SOEs as regulated in Presidential Regulation Number 99 of 2020 concerning Vaccine Procurement and Vaccination Implementation in the Context of Combating the 2019 Corona Virus Disease Pandemic in article 5 paragraph 1 it is stated that the SOEs that get the assignment are Bio Farma (Persero) Ltd conducted by the Minister of Health and may involve Bio Farma (Persero) Ltd subsidiaries, namely Kimia Farma Tbk Ltd and Indonesia Farma Tbk Ltd. In Perpres 99 of 2020 itself, it consolidates everything under the Ministry of Health, both decisions on vaccine types, distribution and prices. So the distribution of vaccines to PT Bio Farma does not violate Law 5 of 1999 (the essence of this sentence) because it includes a direct mandate by laws and regulations as regulated in Presidential Regulation Number 99 of 2020 concerning Vaccine Procurement and Vaccination Implementation in the Context of Combating the 2019 Corona Virus Disease Pandemic.

Although the distribution of vaccines to Bio Farma Ltd does not violate Law 5 of 1999, in the logic of this monopoly state, it must ensure the welfare of its people, especially in this case the fulfillment of the right to health. However, it needs to be underlined that this monopoly is not allowed to obstruct the efforts to fulfill people's needs. This precious goal of prospering the people should not turn into the trouble for the people and even make the people miserable.

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