DOMINANT POSITION ABUSE BY PT. FORISA NUSAPERSADA AS A MARKET LEADER

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Received: 25/06/2022; Reviewed: 13/09/2022; Accepted: 24/11/2022.

DOI: https://doi.org/10.24815/kanun.v24i3.26606

ABSTRACT

Mastery of a dominant position is allowed as long as it is achieved in one's own capacity and in an equitable manner. In practice, to succeed in gaining market dominance, business actors frequently employ unjust techniques. This study applies a statutory approach and a case approach to ascertain how Indonesian business competition law regulates the limitations of dominant positions and to analyze indications of abuse of the dominant position by PT. Forisa Nusapersada as contained in KPPU's Decision Number: 14/KPPU-L/2015 which continues until the cassation as decided in Supreme Court Decision Number: 1106 K/Pdt.Sus-KPPU/2017. The limitation of the dominant position in Indonesia is contained in Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition. In the case of PT. Forisa Nusapersada, there are different indications of abuse of the dominant position which have led to different decisions between the KPPU and the Supreme Court.

Keyword: Dominant position; competition law; dominant position abuse

INTRODUCTION

In the business environment, competition is something natural. Business competition is a process that forces business actors to become more efficient by offering a wider range of goods and services at lower prices (Anang Triyono, 2010). Business people compete in order to gain a dominant position in the market. Mastery of a dominant position is allowed as long as it is achieved with the capacity of the business actor and in a healthy way. In practice, in order to become a major player in the market, entrepreneurs often use dirty methods. The market for business competition tends to suffer from a variety of anti-competitive actions that call for the concentration of economic power and bar other business actors from entering the market (Nina Herlina, 2018). Thus, in the business competition law of each country, it is necessary to make arrangements regarding the limitation of dominant positions to maintain fair business competition.

According to Article 33 of the 1945 Constitution, the national economy is not allowed to run freely, but rather requires intervention from the government, which regulates the rules of the game through statutory regulations (Mansur Armin Bin Ali, 2017). The state is given the authority to regulate its economy. State intervention is hoped to prevent monopolies, and provides fair business opportunities, and freedom in selling and purchasing products (Tri Utomo Wiganarto, Asenar, & Elisatris Gultom, 2021). In Indonesia, the provision of business competition law is generally contained in Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition promulgated on March 5, 1999, and effective since September 5, 2000. The law's articles 4 to 24 outline business conduct that could lead to monopolistic practices and unfair business competition. Articles 25 to 29 regulate the misuse of the dominant position. Articles 30 to 36 describe the institution authorized to implement business competition law. Articles 38 to 46 regulate the procedure for handling cases, and Articles 47 to 49 regulate administrative sanctions. In order to monitor commercial actors as they engage in their commercial activities, the Business Competition Supervisory Commission (Komisi Pengawas Persaingan Usaha) (later called KPPU)) was created. KPPU is permitted to carry out research, investigation, or examination, summon business actors and impose administrative sanctions for violations of Law Number 5 of 1999. The term "market leader" refers to a company that controls the majority of the market share in a particular industry and can frequently use its dominance to influence the competitive marketplace and market behavior (Will Kenton, 2021). A market leader usually has the biggest market share or the highest revenue in a relevant market. The term "relevant market" itself refers to a market associated with a particular marketing area or range used by commercial actors to sell the same, similar, or alternative goods and services (Safrina & Susiana, 2013). To reveal the misuse of dominant position by market leaders, in KPPU Regulations Number 6 of 2010 concerning Guidelines for the Implementation of Article 25 concerning Abuse of Dominant Position Based on Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, KPPU takes a three-step approach, including interpretation of market share, an examination that it is true that business actors are market leaders in their market share, and proof of abuse in reaching that position. Steps taken by KPPU are to provide legal protection for consumers from fraudulent actions by business actors or monopolistic practices and unfair business competition by business actors against consumers (Joshua Anggelito Paparang, 2019).

Law Number 5 of 1999 describes some behaviors that are not allowed in order to maintain fair business competition, such as prohibited agreement, an action that is not allowed, and a dominant position. Conforming to Article 1 paragraph (4), The term "dominant position" refers to the situation in which a trading entrepreneur has no significant competitors in his market share or occupies the top rank between his rivals in the relevant market due to his fiscal strength, access to supply or sales, and capacity to meet demand or supply for specific goods or services. Furthermore, paragraph (2) explains an entrepreneur with a dominant position is one or a group of businesspeople who dominate 50% (fifty percent) or more of a market share or two or three people or groups of businesspeople who dominate 75% (seventy five percent) or more of a market share.

Due to its significant market share, the business has the ability to outperform rivals by influencing the market price of its products (Herman and K. Hansen, 2001). With this market power, the dominant company can act or determine strategy without being influenced by competitors (Philipus M. Hadjon, 2007). Mastery of a dominant position is actually allowed because it can stimulate other competing business actors in the relevant market of the same type, but if it is achieved by its capacity in a reasonable and justified way (Andi Fahmi Lubis dkk, 2017). Legal strategies, such as business efficiency and product innovation, can help business actors gain a dominant position. To achieve a dominant position in a market, entrepreneurs must increase their financial stability, sales access, and capacity to meet demand or supply for their products or services. As a result, not all business owners can succeed as market leaders.

The definition of misuse of dominant position is not actually explained in Law Number 5 of 1999. However, the form of limitation or prohibition of deviation from the dominant position by trade actors who occupy dominant positions is well regulated. Article 25 paragraph (1) explains the forms of the prohibition against certain parties who have a dominant position. It is forbidden for businessmen to establish different sales conditions using their dominant position that prevents consumers from obtaining similar or competitive products, in terms of cost or quality, in an effort to impede market expansion and technology, as well as to prevent potential competitors from entering similar markets.

One of the cases with indications of abuse of the dominant position is contained in KPPU's Decision Number: 14/KPPU-L/2015 which continues until the cassation as decided in Supreme Court Decision Number: 1106 K/Pdt.Sus-KPPU/2017 concerning Program Pop Ice Program The Real Ice Blender conducted by PT. Forisa Nusapersada. The company is a business that manufactures and sells packaged beverages in powder form under the Pop Ice brand. On December 29, 2014, the company held the "Pop Ice The Real Ice Blender" as stated in the Pop Ice Display Contract Agreement. Under the contract, participating retailers are required not to sell or display products from competitors. Stalls and beverage shops in the market will receive prizes if the conditions specified in the program are met. The participating beverage shops then signed a contract to display Pop Ice which included a willingness to sell none of the competitors' products, only Pop Ice products. PT. Forisa Nusapersada's strategy triggered allegations of unfair business competition and abuse of their dominant position.

This study aims to ascertain how Indonesian business competition law regulates the limitations of dominant positions and to analyze indications of abuse of the dominant position by PT. Forisa Nusapersada as contained in KPPU's Decision Number: 14/KPPU-L/2015 which continues until the cassation as decided in Supreme Court Decision Number: 1106 K/Pdt.Sus-KPPU/2017.

RESEARCH METHOD

This research is part of normative legal research, which views the law as a standard in order to address the formulation of the problem. The strategies used are a case approach and a statutory approach. All laws and regulations pertaining to legal issues are examined as part of the legal approach (Peter Mahmud Marzuki, 2011). The case approach seeks to examine legal rules that are applied in legal practice. The case studied is KPPU's Decision Number: 14/KPPU-L/2015 which continues until the cassation as decided in Supreme Court Decision Number: 1106 K/Pdt.Sus-KPPU/2017. Normative legal research uses secondary data or literature (Mukti Fajar & Yulianto Achmad, 2010).

The primary materials used include the 1945 Constitution, Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition as amended by Law Number 11 of 2020 concerning Job Creation, Government Regulation Number 57 of 2010 concerning Merger or Consolidation of Business Entities and Acquisition of Company Shares Which Can Lead to Monopolistic Practices and Unfair Business Competition, and Regulation of the Commission for the Supervision of Business Competition (KPPU's regulation) Number 6 of 2010 concerning Guidelines for Implementation of Article 25 concerning Abuse of Dominant Position. Books, journals, and articles serve as the secondary legal materials.

RESEARCH OUTCOME AND DISCUSSION

1) Limitation of Dominant Position in Trading Transactions According to Law Number 5 of 1999

People in business are contesting for a dominant position. Market share, consumers, and price are a few of the aspects of business competition that must be seized (Meita Fadhilah, 2019). Competition for a dominant position in business must be healthy. Fair business competition possesses a number of traits. The prices of goods and services are determined by supply and demand, not by business actors acting alone. Second, similar products and services are produced. Business players are also free to enter and exit the market. Fourth, information about consumer preferences, income, production costs, and technology is available to business actors and consumers (Susi Yanuarsih, 2018).

Unfair business competition is defined in Article 1 point 6 of Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition as business competition that is conducted dishonestly, in violation of the law, or interferes with other businesses' ability to compete. To be able to assess whether a dominant position is obtained by unfair competition, it can be seen by looking at whether the dominant position limitation stipulated in Law Number 5 of 1999 was violated by the said business actor. Restrictions on the dominant position in business competition law in Indonesia are regulated in Article 25 paragraph (1) of Law Number 5 of 1999, namely business actors are prohibited from using their dominant position to create business conditions that hinder consumers from obtaining competitively priced and high-quality goods or services, limiting markets and technology development, or preventing other business actors from participating in the market. Several other provisions related to the limitation of dominant positions in such Law are Article 26 concerning the concurrent positions of directors or commissioners in two companies that have similar or related market shares which allow monopolistic practices or unfair business competition, Article 27 concerning cross-ownership of shares, and Articles 28 and 29 concerning merger, consolidation, and acquisition of business entities.

1.1) Creating business conditions that hinder consumers from obtaining competitively priced and high-quality goods or services

Abuse of a dominant position by setting trading terms can occur between suppliers and buyers. The dominant buyer can establish points of agreement with suppliers, such as mandating that they refrain from providing goods to rival business actors. Otherwise, the buyer will reduce or stop supply (Dina Rasyida, 2021). In the relationship with the buyer, the seller, namely the dominant business actor, can determine the terms of trade so that the buyer does not buy goods from competing business actors.

The impact of terms of trade is to reduce the consumer's choice to obtain similar competitors' products at the same or more affordable prices or with the same or higher quality. Another consequence is to remove competitors from the market because they have no supply or buyers. Suppliers finally comply with the terms of trade because the dominant company has a large market share so that the number of purchases outperforms its competitors.

1.2) Limiting market and technology development

Restricting market and technology development is an action that hinders trade transactions and product development in the relevant market (Dalinama Telaumbanua, 2012). Technological developments are the exclusive rights of the inventors (patents). However, market restrictions and technology development can also be considered an abuse of the dominant position when the dominant company that already holds a patent on the technology refuses to license it to another company. Only the exclusive technology of the dominant firm is capable of producing a good and has no substitute. These technological limitations also hinder research and development, which can lead to a low ability to innovate products and services in the future.

1.3) Blocking potential competitors from entering the relevant market

Abuse of a dominant position can be interpreted as unfair use of market entry barriers by commercial actors. For instance, abusing your dominant position by raising the costs of the competitors or raising rivals' costs. Dominant trading companies have access to efficient supplies for their manufacture. The potential rival's production costs will be greater than the dominating commercial actor if the dominant actor unfairly denies potential competitors access to low-cost sources of supply, leaving only the potential competitors with more expensive sources. If a prospective rival enters the relevant market, the incentive for new competitors will be lessened as a result.

Another form of abuse of dominance is the reduction or limitation of production levels that do not match supply and demand in the market. The production capacity that is intentionally made is not sufficient to meet the needs of consumers in the market causing output with high prices. By raising prices and regulating production, these actions directly inflict a loss for consumers. If a prospective rival enters the pertinent market, the dominant actor will boost supply and temporarily lower prices. Lower prices and a sudden increase in supply will deter potential competitors from entering the market.

1.4) Concurrent Position and Majority Share

Several other provisions pertaining to the limitation of dominant positions in the law are Article 26 and Article 27 concerning the concurrent position and majority share. Dual positions are actually not prohibited. A director or commissioner is not allowed to hold the same position in another company if both are in the same market share, interrelated in a sector of production activity, both dominate the market share, monopoly market behavior and unfair business competition cause and ownership share majority (Maryanto, 2017).

Article 26 Law Number 5 of 1999, explains that a person cannot simultaneously hold the title of director or commissioner in another company operating in the same or related relevant market. Multiple positions can also be measured by how big the market share or majority share is. Majority share ownership is proven if it controls above 50% of the market share for a business actor or monopoly and more than 75% for two or more groups of business actors or oligopolists. The dual position of directors or commissioners allows similar behavior to occur in the relevant market and acts as one business actor thereby eliminating competition in similar markets (I.G.N Adnyana, 2013). In addition, as the owner of the majority share, there is a possibility for business actors to abuse their voting rights through the General Meeting of Shareholders (GMS).

1.5) Merger, Consolidation, and Acquisition

Articles 28 and 29 of Law Number 5 of 1999 provide that merger, consolidation, and takeover of a company are prohibited if with the intent to dominate the market in a way that allows monopoly market behavior or unfair business competition. Article 1 paragraph (1) of the Government Regulation Number 57 of 2010 concerning Merger or Consolidation of Business Entities and Acquisition of Company Shares Which Can Result in Monopolistic Practices and Unfair Business Competition, defines a merger as a legal action by one or more companies to integrate to another corporation, resulting in the legal transfer of assets and liabilities of the combined entity to the beneficiary entity and the status of the combined company automatically ends by law. So, a merger is when another company is absorbed by another company and the company being taken over ceases to exist legally (Sautan Remi Sjahdeini, 2000). Article 1 paragraph (2), consolidation is two or more business entities that form a new business legal entity that obtains wealth and debt or capital from the merging company, and then the status of each merged company is completed by law. Article 1 paragraph (3), the acquisition is a legal action taken by a person or company to take over shares in a company, resulting in the transfer of ownership of that company. The negative impacts that can arise from the three legal actions above include creating or increasing the level of market concentration which can lead to higher product prices and increased market power, which can threaten small businesses (Sautan Remi Sjahdeini, 2000).

2) Dominant Position Abuse by PT. Forisa Nusapersada

To determine the abuse of the dominant position, there are several factors must be considered. Firstly, the relevant market share must be defined. Secondly, calculate the size of the market share held by dominant business actors. Thirdly, identify practices that can stifle competition and investigate their overall impact on a market.

Article 19 points a and b of the Law Number 5 of 1999 states that "Business actors are prohibited from carrying out one or more activities, either alone or with other business actors, which may result in monopolistic practices and or unfair business competition in the form of:

a. refusing and or preventing certain business actors from carrying out the same business activities in the relevant market; or
b. prevent the consumers or customers of their competing business actors from engaging in business relations with their competing business actors; or…"

Based on the facts obtained, PT Forisa Nusapersada distributes to three regions, namely Western Indonesia, Eastern Indonesia, and the entire Jabodetabek (Jakarta, Bogor, Depok, Tangerang, Bekasi). PT Forisa Nusapersada then made a marketing plan entitled "The Real Ice Blender Pop Ice Program" which was proven based on the Pop Ice Display Contract Agreement.

1. POP ICE Display Contract Agreement

forisa

SURAT PERJANJIAN KONTRAK DISPLAY POP ICE

Nama Kios Minuman : ANI
Nama Pemilik Kios Minuman : KIOS ANI
Alamat Kios Minuman :
No Telp / Hp :
Periode : 14 JANUARI s/d 14 APRIL 2015
Jumlah varian terdisplay saat ini :
Jumlah target display varian saat program :

Dengan ini bersedia mengikuti Program " DISPLAY POP ICE " dengan peraturan sebagai berikut :
1. Bersedia mendisplay produk POP ICE secara exclusive sesuai target yang sudah disepakati
2. Tidak Menjual produk kompetitor sejenis Pop Ice (S'Café, Camelo, Milk Juss dan lainnya)
3. Display di lakukan sesuai ketentuan dan selama periode kontrak berlangsung 3 (tiga) bulan.
4. Kompensasi Display :
Bulan Pertama : 1 bal Pop Ice Coklat
Bulan Kedua : 2 Kaos Pop Ice
Bulan Ketiga : Blender Phillips
5. Hadiah diatas diberikan setiap akhir bulan setelah tim Forisa melakukan verifikasi pemenuhan syarat point no 1 dan poin no 2 di Kios
6. Verifikasi pemenuhan syarat akan dilakukan setiap minggu oleh tim internal Forisa
7. Apabila Peserta tidak memenuhi syarat untuk bulan 1, maka peserta tidak mendapatkan hadiah untuk bulan 1 tetapi masih memiliki kesempatan mendapatkan hadiah di bulan kedua apabila syarat point 1 dan 2 di bulan kedua terpenuhi
6. Ketentuan diatas mutlak dan tidak dapat diganggu gugat

............., 14 JANUARI 2015

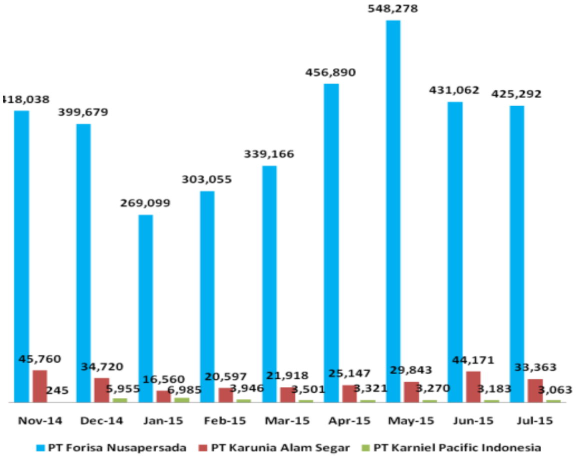
Dibuat Oleh,	Menyetujui	
	ERWIN	
Nama Jelas Pemilik	ASPS Forisa	ASPM Forisa

0823 - 8103-1004 (Supervisor)

source: KPPU's Decision Number: 14/KPPU-L/2015 p. 21

The participating beverage shops then signed a contract to display Pop Ice which included a willingness to sell none of the competitors' products, only Pop Ice products. They will then receive a reward if these conditions are met. The program offered by PT. Forisa Nusapersada had an impact on the marketing of similar products produced by PT. Karniel Pacific Indonesia and PT. Karunia Alam Segar. As a result of the implementation of the marketing strategy with the instrument "Pop Ice The Real Ice Blender Program", then it created a monopoly, increasing the sales volume of PT. Forisa's products so that it controlled most of the market share.

1. Sales Volume Development (November 2014-July 2015)



source: KPPU's Decision Number: 14/KPPU-L/2015 p. 171

PT. Forisa Nusapersada complies with the elements of violation Article 25 paragraph (1) letters a and c of Law Number 5 of 1999, which provides that business actors are prohibited from using their dominant position either directly or indirectly to establish trading conditions with the aim of preventing and or hindering consumers from obtaining competitive goods and or services, both in terms of price and quality, to limit market and technology development or to hinder other business actors who have the potential to become competitors to enter the relevant market. PT. Forisa Nusapersada's market share was 90.09% to 92.16% between November 2014 and July 2015. In this case, PT. Forisa Nusapersada can be classified as a market leader, ruling without strong competitors in similar markets.

2. Market Share (Sales in Cartons)

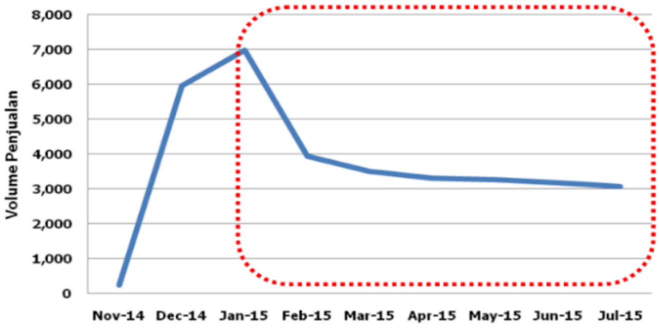
	PT. Forisa Nusapersada (POP ICE)		PT. Karniel Pacific (S'Cafe)		PT. Karunia Alam Segar (Milkjuss)		total volume 3 perusahaan/bulan	
	Volume	Share	Volume	Share	Volume	Share	Volume	Share
Nop-14	418.038	90,09%	245	0,05%	45.760	9,86%	464.043	100%
Des-14	399.679	90,76%	5.955	1,35%	34.720	7,88%	440.354	100%
Jan-15	269.099	91,95%	6.985	2,39%	16.560	5,66%	292.644	100%
Feb-15	303.055	92,51%	3.946	1,20%	20.597	6,29%	327.598	100%
Mar-15	339.166	93,03%	3.501	0,96%	21.918	6,01%	364.585	100%
Apr-15	456.890	94,13%	3.321	0,68%	25.147	5,18%	485.358	100%
Mei-15	548.278	94,30%	3.270	0,56%	29.843	5,13%	581.391	100%
Jun-15	431.062	90,10%	3.183	0,67%	44.171	9,23%	478.416	100%
Jul-15	425.292	92,11%	3.063	0,66%	33.363	7,23%	461.718	100%
Nov14 -Jul 15	3.590.559	92,16%	33.469	0.86%	272.080	6.98%	3.896.108	100%

CATATAN:1 KARTON = 5 BAL,1 BAL=5 RENCENG,1 RENCENG=10 SACHET

source: KPPU's Decision Number: 14/KPPU-L/2015 p. 75

The "Pop Ice The Real Ice Blender" strategy is contained in a contract agreement that stipulates conditions for beverage stalls and market shops not to sell and not to display the products of their competitors. This program is run by PT. Forisa Nusapersada has reduced consumer alternatives to get products from competing business actors. The program also deters other entrepreneurs from entering the market. Its competitor, PT. Karniel Pacific Indonesia was founded in June 2014 and just launched a new product called “S'cafe" in November 2014 which was only marketed in December 2014. With the implementation of the “Pop Ice The Real Ice Blender” by PT. Forisa Persada, it is considered hindering PT. Karniel Pacific Indonesia's products from entering the market as a new business actor in Indonesia and PT. Karniel Pacific Indonesia has experienced a decline in sales of up to 50% starting from the program run until July 2015 as shown in the data below:

4. Decrease in S'Cafe Sales Volume



source: KPPU's Decision Number: 14/KPPU-L/2015, p. 86

Then the KPPU Commission Council determined, among other things, that PT. Forisa Nusapersada is proven to have violated Article 19 letters a and b as well as Article 25 paragraph (1) letters a and c of Law Number 5 of 1999 are sentenced to pay a number of fines, and ordered the termination of "The Real Ice Pop Ice Program Blender" and pull out Internal Office Memo Number: 15/IOM/MKTDB/XII/2014 December 29, 2014.

PT. Forisa Nusapersada then filed an objection to the Tangerang District Court and it was granted on December 8, 2016, hence the KPPU's decision was annulled. Furthermore, KPPU filed an appeal but it was rejected. The Supreme Court in Decision Number 1106 K/Pdt.Sus-KPPU/2017 considered that Pop Ice did not have a dominant position. According to the Food and Drug Administration (BPOM), the number of domestically registered products is 1,096, 395 foreign products, or a total of 1,491 (1096 plus 395. With a total of 1,491), if the market share is divided equally, Pop Ice's market share is 0.067 % (100% divided by 1,491). These data are supported by AC Nielsen statistics that the actual value is only 0.1% and 0.2% for volume. Meanwhile, the dominant position according to Article 25 paragraph (2) is equal to or more than 50%. Regarding the clauses of the Pop Ice Display Contract Agreement, PT. Forisa Nusapersada prohibits selling or displaying competitors' products. In fact, it has contracted out space in a retail store hence it is its right as a tenant to prohibit similar competitors from displaying their products using that space. In the end, the Supreme Court decided that the company has not abused its dominant position in its business competition.

CONCLUSION

Article 25 paragraph (1) of Law Number 5 of 1999 determines restrictions on the dominant position in business competition law in Indonesia. Business actors are forbidden from using their dominant position to create a business policy to prevent buyers from procuring cost-effective and high-quality goods or services, restricting markets and technology innovation, or any combination of these. Other clauses pertaining to the restriction of dominant positions are Article 26 regulating concurrent director or commissioner positions in two businesses with comparable or related market shares, Article 27 regulating cross-ownership of shares, and Articles 28 and 29 regulating merger, consolidation, and acquisition of business entities.

PT. Forisa Nusapersada's case has different indications of the abuse of the dominant position which has led to different decisions between the KPPU and the Supreme Court. The KPPU found indications of abuse of the dominant position by PT. Forisa Nusapersada which violated Articles 19 letters a and b and 25 paragraph (1) letters a and c of Law Number 5 of 1999. The KPPU has determined that PT. Forisa Nusapersada had violated these articles, however, the District Court and the Supreme Court decided that PT. Forisa Nusapersada has been following the rules of business competition.

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