



FAIR COMPETITION THROUGH PRICE AGREEMENT BETWEEN BUSINESSMEN ASSOCIATED IN ASEAN ECONOMIC COMMUNITY

Azizah

Faculty of Law, Islamic University Ogan Komering Ilir, Kayuagung, South Sumatera

ABSTRACT

Fair competition is one of the keys to succeed for the fair market economic system. Through price fixing agreements between businessmen in the ASEAN countries, it will cause the market equilibrium with no ignoring the interests of businessmen and the people. Based on these issues, then the legal problems, are namely: 1) How are the health competition between businessmen in the ASEAN economic community. 2) How should the setting of price agreements between businessmen in the ASEAN economic community. This paper is a study of hermeneutics using normative approach, philosophy of law, sociology of law, comparative law and political law. The study concluded that: 1) The attempts setting of fair competition between businesses in the ASEAN economic community that need to be applied in the form of agreement, 2) In its development, price fixing agreements between businessmen that are members of the ASEAN economic community still balance with the interests of the public as consumers.

Key Words: unfair competition, price agreements, businessmen communities, the aec

1. Introductions

Economic activity is an activity that can not be separated from human life, even economic activity has existed since humans know the culture. Economic activity is an important pillar in the dynamics of human life, because human beings have always had a good life needs a primary, secondary or tertiary, and the more complex human needs will also increase the economic activities¹.

In economic activity, is inseparable from the competition between businesses, where it is a requirement for the implementation of market economy, especially in an era of global

¹ Azizah, *The Equilibrium Principle in Competition Law: The Meaning and Functioning of the Equilibrium Principle in The Decisions of The Supervisory Commission Competition about Pricing Agreements Based Approach to Market Structure*, (Ph.D Thesis, Sriwijaya University, South Sumatera, 2014), p.6.

*Corresponding author.

E-mail address: aazizah895@gmail.com

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demand free market economic system, so that competition among businesses will be more open. Sometimes the competition is fair competition, but can also occur entrepreneurs in order to gain maximum profit doing unfair competition².

Fair competition is one of the keys to success for the fair market economic system. In the implementation, it is manifested in two ways, namely, through the enforcement of competition law and through competition policy conducive to the development of economic sectors³.

AEC is formed as an economic area where one of the pillars of his can create high competition, which requires a policy that includes competition policy and consumer protection, so as to create economic growth balanced integrated into the global economy, with no prejudice to the interests of businesses and consumer protection.

For comparison, in Indonesia there are examples of cases pricing agreements. For example: Decision on case number 08 / KPP-1/2005; South Jakarta District Court Decision number 01 / KPPU2006 / PN. Jak-Sel; Supreme Court Decision No. 03 K / KPPU / 2006 on Sugar Import Services Delivery Survey, that PT. Surveyor Indonesia (Persero) and PT Superintending Company of Indonesia (Persero) has been agreed to or entered into a Memorandum of Understanding to form KSO for the verification or technical surveillance of import of sugar. verdict Case Number 10 / KPPU-L / 2005 concerning Cartel Trading Salt to North Sumatra; the Commission's Decision No. 25 / KPPU-L / 2009; Central Jakarta District Court Decision No. 02 / KPPU / 2010 / PN-Jak-Pus; Supreme Court Decision No. 613K / PDT.SUS / 2011 Pricing Fuel Surcharge.

Noting from the normative side, this paper focuses its efforts on setting healthy competition between businesses in the ASEAN economic community and the need for regulation that balances price fixing agreements between businessmen standing with the public as consumers.

2. Literature Review

Rawls argues that the free market is basically in line with the same freedom and equality of opportunities fair. Furthermore, Rawls's theory of distributive justice stated that the market gives freedom, and equal opportunities for all economic actors. Freedom is a value and

² Azizah, *The Equilibrium Principle in Competition Law: The Meaning and Functioning of the Equilibrium Principle in The Decisions of The Supervisory Commission Competition about Pricing Agreements Based Approach to Market Structure*, (Ph.D Thesis, Sriwijaya University, South Sumatera, 2014), p. 6-7.

³ Hermansyah, *Principles of Competition Law in Indonesia*, (Jakarta: Kencana Prenada Media Group, 2009), p. 15.

one of the most important rights possessed by humans, and is secured by a system of market economy. The market provides an opportunity for self-determination of human beings are free, market economy guarantees the same freedoms and opportunities fair⁴.

According to Smith, the monopoly is the enemy of the free market, inhibiting the expansion of markets and hinder rapid economic growth⁵. Monopoly has a negative effect, among other things: first, the monopoly will lead to higher prices for consumers and make consumers worse circumstances. Second, the monopoly is the enemy of good management, because it avoids the competition. Thus, Smith would like to emphasize that the free market is a mechanism to restore the balance between the interests of producers and consumers, between the interests of traders or businessmen and ordinary people. Balance referred to Smith in this case is the balance of the market⁶. Market equilibrium in this case would be an advantage in a perfectly competitive market.

If in a situation arises agreements and conditions that are not balanced, then these imbalances should be examined from three aspects of the agreement, namely the act, the charge contents of the agreement and its implementation. In a re-negotiation process, the stages that precede the choice of solutions to achieve a balance back, can be recognized on the use of the principle of balance. Renegotiation will emerge as the first choice compared with the use of mediation in the courts. The purpose of the negotiations is to give a concrete content of the new charge against the treaty. In this case the parties have the option to restore the balance by declaring that the legal act invalid, altered and adjusted, or canceled to partially or wholly⁷.

In the perspective of the agreement, the balance is also given emphasis on the bargaining position of the parties must be balanced. In other words, lack of balance positions of the parties, will result in these agreements become unbalanced and allowing political intervention to redress the balance. The balance of bargaining power in question, relating to the determination of the rights and obligations of each party⁸.

Herlien Budiono in "Het Indonesisch voor Evenwichtsbeginsel Contractenrecht: Contractenrecht of Indonesische Beginselen Gescheid". In his analysis discuss that, either the principles of contract law who live in the awareness of Indonesian law (the spirit of mutual cooperation, kinship, pillars, improper, inappropriate and barrel) as reflected in customary law

⁴ John Rawls. *The Justice Theory*, (Yogyakarta: Pustaka Pelajar, 2006), p. 13.

⁵ Mikhael Dua. *The Economics Philosophy*, (Yogyakarta: Kanisius, 2008), p. 53.

⁶ *Ibid.*

⁷ Herlien Budiono, *The Equilibrium Principle for Contract Law Indonesia: Based Contract Law Principles Wigati Indonesia*, (Bandung: Citra Aditya Bakti, 2006), p. 509.

⁸ Agus Yudha Hernoko, *Contract Law: Principle of Proportionality in Commercial Contracts*, (Jakarta: Kencana Prenada Media Group, 2011), p. 78-80.

and the principles of modern law (principle of consensus, the principle of freedom contract) as found in the development of contract law in the Netherlands, which is reflected in legislation, legal practice and jurisprudence, which argued in one principle, namely the principle of balance. Additionally, Herlien examine the principle of the binding force that agreement relied on factors idiil and real. Idiil factor is based on Pancasila and the real factors emerge from positive law and legal practice in Indonesia⁹. Therefore, the unequalilibrium in competition law in particular price fixing agreement, there will be inflicted businesses, payload contents of the agreement, as well as the implementation of the agreement. The position of the parties in question, it will also cause unequalilibrium.

This paper interpret, analyze healthy competition through price fixing agreements are carried out by operators who are members of the AEC, the form of price fixing agreement within the law remains guided so that there is a balance between businesses and consumer protection.

3. Research Method

The consistency with the issues studied, the legal research is classified in the study of hermeneutics. Hermeneutic approach to the problem of legal research refers to the understanding of the layers of legal science, as described by H.Ph. Visser't Hooft, that consists of a layer of law philosophy of law, legal theory and jurisprudence, which includes practical legal science and other legal sciences¹⁰.

Some approaches that are relevant for use in an attempt to understand and explain more fully the legal issues to be studied further in the study of hermeneutics, namely: a normative approach, the comparative approach legal, sociological approach, the philosophical approach of law and political law. The results of the analysis of legal materials normative-prescriptive, then diinteraksikan with the fact societal empirical-descriptive (have) analyzed using the methods of hermeneutics law (legal hermeneutic method) are presented in the form of qualitative descriptive, which is a procedure for qualitative analyzes that produce descriptive data-analytical, that "what is stated by the informant in written or verbal and real behavior, studied as a whole". So that would be obtained conclusions¹¹.

⁹ Herlien Budiono, *op.cit.*, p. 1-14.

¹⁰ Philipus M. Hadjon and Tatiek Sri Djatmiati, *Legal Argumentation/Legal Opinion): Steps of Legal Problem Solving dan Legal Opinion Drafting*, (Yogyakarta: Gadjah Mada University Press, 2005), p. 10.

¹¹ Soerjono Soekanto and Sri Mamudji, *Normative Legal Research a Brief Overview*, (Jakarta: PT. Raja Grafindo Persada, 2001), p. 250.

4. Result and Discussion.

A. The issue of Unfair Business Competition Comparison

The Sherman Act was passed in 1890 the United States Congress as a reaction against the business practices castrating competition (anti-competitive practices). Enactment of the Sherman Act is to address the widespread cartelization (cartelization) and monopolization (monopolization) in the American economy. Furthermore, there Clayton Act 1905, which prohibits the abuse of monopolistic positions. The provisions of the Criminal Law. Employers who abuse their monopolistic position, then the company may be forced to break up into several units, and entrepreneurs are liable to imprisonment¹². Things are arranged in the Sherman Act may be expressed as follows: The Sherman Act Provides:

- a. *Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal*
- b. *The Act also provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony".*
- c. *The Act put responsibility upon government, attorneys and district courts to pursue and investigate trusts, companies, and organizations suspected of violating the Act.*

Based on the Article 2 of the Sherman Antitrust Act above, note that:

"in evaluating this claim in regard to price fixing charges, several responses must be considered. No price is intrinsically reasonable, except by reference to its determination in a competitive market. Price serve to allocate resources and production, and price fixing distorts this market process. Courts are unable to measure marginal cost on which a theoretically reasonable price would be based. Price reasonableness is an ever changing concept responsive to market and cost conditions. What is reasonable one day may not be the next. To prevent abuse of the reasonableness defense, then, courts would have to supervise business pricing daily. Not only does this seem undesirable from the business manager's view point, but it is also beyond judicial competence. Finally, price fixing agreements concentrate market

¹² Adam Rainer, Samuel Siahaan and A.M. Tri Anggraini, *Competition and the Market Economy in Indonesia*, (Indonesia Friedrich Naumann Stiftung, 2006), p. 46.

*power and impair the competitive process. Unless the arrangement fulfills on overriding need, its effect is to destroy independent values worth preserving*¹³.

Assessment of Competition Law in Asia, Japan certainly can not be abandoned. Countries which have economic power in the world number two has Law Competition since 1947, called the Japan Anti Monopoly Act (JAMA / AMA). The existence of AMA are meant as a way to restore the condition of the Japanese economy after the defeat in World War II. In principle, the AMA has three (3) basic prohibition, namely: (1) Private monopolization. (2) Cartel or Unreasonable Restraint of Trade (URT). (3) Unfair Trade Practises (UTP).

These three fundamental prohibition has become a framework for understanding the AMA, resulting in the implementation, the parties will be easier to use as a reference¹⁴. There are important changes, including the Fair Trade Commission (FTC), which had rarely apply criminal sanctions for violations of the cartel, so that companies that perform cartels often repeat his actions back for sanctions that are not meaningful. The first change: applying administrative sanctions such as fines, second: the alleged violations were carried out by using the approach of market structure, when a company has a market share of 50% or if more than two companies by 75%, then the penalty can be the solution for the company into a company with a market share small. Third: FTC Japan introduced a price reporting system, Japanese FTC can do a prohibition on cartel agreements along the cartel could be proven directly or indirectly¹⁵. Therefore, the Japanese FTC has set firmly on the analysis of market structure approach that can be used to resolve cases alleged to have violated the monopoly.

B. The Issue Of Fair Competition.

AEC is currently not yet have a union role on which the arrangement of business competition. Later on, however, AEC should have a union role of business competition, such as the EU. But of course it takes time union role and commitment together to accommodate and adapt aturang competition already in force in the respective ASEAN countries. Healthy competition is not enough just national, but also regional (ASEAN). Encouraging economic policy of open competitive without the supervision of the activities of their own business competition means letting open markets and open up great opportunities monopoly. Besides,

¹³ Ernest Gellhorn and William E. Kovacic, *Antitrust and Economics in an nutshell*. (USA: West Publishing Co., 1994), p. 179.

¹⁴ Sholihatun Kiptiyah, *How to Set the cartel in the State Sakura: A Knowledge, Journal of Competition*, (KPPU-RI: 12th Edition, 2008), p. 18.

¹⁵ Susanti Adi Nugroho, *Competition Law in Indonesia: In Theory and Practice and Application of Law*, (Jakarta: Kencana Prenada Media Group, 2012), p. 77-78.

there is no special commission in ASEAN which oversees competition between businesses to prevent unfair competition and monopoly. Almost all ASEAN countries already have specific rules on competition law. But in terms of content and institutional structures, different relative. Its structure as an independent agency, such as Indonesia and Malaysia. (Journal kompetisi Edition 42 in 2013).

C. The Development Pricing Agreement which Equilibrium Principle

Van Dale in Herlien Budiono, interpret balanced as the state of burden sharing on both sides are in equilibrium. In the context of the balance, understood as a state of silence or the alignment of the various styles that worked and did not even dominate the other, or because no one other master elements¹⁶.

Furthermore, according to Herlien, the principle of balance can dtinjau of the ethical and juridical. As an ethical principle, the principle of equilibrium roots in the balance of customary law, which is a recognition of the equality of the individual standing with the community in a common life. The balance of spiritual in character or soul, refers to the understanding of the absence of turbulence psychiatric anymore, and has achieved a rapprochement or harmony between the desire and ability of man consciously embodied in an action that result really desired or targeted on ly pursued an improvement in the lives This means that the word "equal" on the one hand is limited by the will (which is raised by a favorable judgment or circumstances). On the other hand, the belief in the ability to realize the desired outcome or result. Within the constraints of the two sides (the will and confidence of the parties), it was reached a balance in a positive sense. As a juridical principle, the equilibrium principle underlying agreement between the parties, can be raised attachment juridical decent or fair. The search for these criteria, should begin by sorting out facts or conditions that gave rise to legal bond will be assessed and tested regarding the juridical attachment based on the equilibrium principal¹⁷. Therefore, the equilibrium in question has a holding capacity of the entrepreneurs and the position of the public as consumers.

¹⁶ Van Dale, *Groot Woordenboek der Nederlandse Taal*, (Utrecht/Antwerpen: Tiende Druk, 1982), p. 651.

¹⁷ Herlien Budiono, *op.cit*, p. 304-307.

5. Conclusions

- a. The efforts setting of fair competition between businesses in the ASEAN economic community, need to be applied in the form of the agreement.
- b. In its development, price fixing agreements between businesses that are members of the ASEAN economic community remains to balance the interests of society as konsumen. The otherside, indispensable union rule that applies to businesses within the scope of the ASEAN countries, so that businesses will feel protected by law.

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