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## **Minus Margin Agreements as a Violation of Business in Business Competition in Indonesia**

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***Abstract:***

*The regulation of minus margin in Law Number 5 Year 1999 is explicitly stipulated in Article 19 of Law Number 5 Year 1999. Minus margin is an activity of business actors which in its application may result in monopolistic practices and / or unfair business competition In the market where the business actor is trying.*

*Where the application of minus margin is applied with the aim to keep the selling price of the product at the outlet as the cheapest selling price in the relevant market. So that other business actors cannot determine the price freely.*

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## 1. Introduction

The national economic crisis that hit Indonesia in 1997 has really become a bitter lesson for the Indonesian nation. As a result of the prolonged crisis the Indonesian nation is not only a chance to fall into the biggest debtor country in the world but more than that that the Indonesian economy that has been built tens of years will be devastated.<sup>†</sup> The impact of the economic crisis that originated from the monetary crisis is not only limited to the field of economy alone, but also can lead to the collapse of government legitimacy even worse is the collapse of social life and culture of the nation.<sup>‡</sup>

The collapse of the legitimacy of the success of economic development that has underpinned the New Order for more than 30 years is visible when the burgeoning conditions are increasingly swelled out of foreign debt, the spread of business conglomerates of government officials that all lead to rampant corruption, collusion and nepotism (KKN). Centralization of economic power to certain business actors that are the result of KKN became one of the causes of the destruction of the Indonesian economy.

The term economic economy or economic democracy is actually not a foreign term for Indonesia, written formally in the elucidation of article 33 of the 1945 Constitution. In the popular economic system mandated by Article 33 of the 1945 Constitution, the priority is the prosperity of society is not the prosperity of a person. Search by Sritua Arief found that the term people's economy has been triggered by Bung Hatta in People's Daulat magazine no. 84 dated January 10, 1934.<sup>§</sup>

In the paper implies that people's economy is always a difficult nature, but the people's economic sense is not explicitly explained. People's economy is always in trouble because they have no merchants. It was only in the acceptance speech of Doctor Honoris Causa from Gadjah Mada University on 27 November 1956, Bung Hatta revealed the history of the people's economic suffering, as follows:<sup>\*\*</sup>

*"Unlike the development of society in the western continent, here the feudalism building is not replaced by the organization of capitalism but occupied from above. True to the rationalist principle, which is the bike and the basis of its calculation, the capitalism that comes to Indonesia as an attacker, robber and political ruler does not destroy the existing feudalist*

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<sup>†</sup> Nurcholish Madjid, 2003, "Indonesia Kita", Paramadina, Jakarta, hal. 105

<sup>‡</sup> Kuntowijoyo, 2002, "Esai-esai Budaya dan Politik", Mizan, Bandung, hal. 31

<sup>§</sup> Anggito Abimanyu, 1998 "Pembangunan Ekonomi dan Pemberdayaan Rakyat", PAU-UGM & BPFE, Yogyakarta, hal. 23

<sup>\*\*</sup> Revisond Baswir, A. Tony Prasetyantono, R. Maryatmo, 2000 "Politik Ekonomi Indonesia Baru", Pustaka Pelajar, Yogyakarta, hal. 43

*organization, but uses it as a tool to control the whole community's production power."*

The responsibility of the government is also based on our constitution which does not embrace a liberal free market, but our constitution affirms that what we profess is a social free market as reflected in Article 33 of the 1945 Constitution. It is expressly stated that all related economic activities with the interests of the livelihood of the people shall be controlled by the State.<sup>††</sup>

Monopoly is a market condition that is almost without competition either in terms of quality, quantity or price of a good or service by one business actor.<sup>‡‡</sup> While the cartel is a situation where producers of similar goods or services secretly or explicitly and openly make an agreement on the price of goods or services they produce, including in the case of production supply. Cartels do not always materialize in a formal form where producers of similar goods or services establish joint organizations, such as OPEC.<sup>§§</sup>

But the cartel can also be formed through a tacit price deal, where the agreement has never been firmly and openly acknowledged but the result is very much felt among sellers and buyers in the market. Both monopolies and cartels are a means for producers of goods and services to gain maximum profit.

Considering the monopoly and cartel phenomena occurring in Indonesia, it is necessary to have a Healthy Competition Law that regulates competition between business actors with administrative, civil and criminal sanctions for law enforcement. For a long time the people of Indonesia, especially business people need a law that comprehensively regulates healthy business competition.

Especially with the emergence of unhealthy trading practices especially because the authorities often provide protection or privileges to business people.<sup>\*\*\*</sup> Besides being a national demand, the Anti Monopoly Law is also a demand or requirement of juridical signs in the business relationship between nations. From the side of national needs, it is clear that our cultural base (constitutional principle) and our constitutional (economic democracy) are indeed rejecting monopolistic practices that harm the people.

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<sup>††</sup> Normin S. Pakpahan, 1997, *Jurnal Hukum Bisnis Volume 1*, Yayasan Pengembangan Hukum Bisnis, Jakarta

<sup>‡‡</sup> Agus Maulana MSM, 1995, "Pengantar Mikro Ekonomi Jilid 2", Binarupa Aksara, Jakarta, hal. 31.

<sup>§§</sup> Munir Fuady, 1999, "Hukum Anti Monopoli Menyongsong Era Persaingan Sehat", PT. Ditra Aditya Bakti, Bandung, hal. 16.

<sup>\*\*\*</sup> Muladi, 1998, "Menyongsong Keberadaan UU Persaingan Sehat di Indonesia", *Newsletters Nomor 34 Tahun IX, YPPH, Jakarta, hal. 35*

The presence of Law no. 5/1999 as a tool of social control and a tool of social engineering brings a positive impact with the creation of an undistorted market, thereby creating greater business opportunities for business actors thereby forcing business actors to be more innovative in creating and marketing their products.<sup>†††</sup> Besides binding the business actors, Law no. 5/1999 also binds the government not to issue regulations that provide facilities and privileges to certain business actors that are monopolistic. The law is also expected to increase the trust of the international community towards Indonesia, so it is important to invest in Indonesia because of the guarantee to compete in a healthy way.

The existing monopoly practice always controls the market share absolutely so that other parties have no chance to participate. The validity of the natural law of survival of the fittest, making the monopoly will always be there, then we can do is eliminate the effect because on the other side of the big companies can also have a positive impact on the economic growth of a country.<sup>‡‡‡</sup>

Law no. 5 of 1999 has six parts of arrangements concerning Prohibited Agreements, Prohibited Activities, Dominant Positions, Business Competition Supervisory Commission, Law Enforcement, and Other Provisions. The law on the prohibition of monopolistic practices and unfair business competition in its law enforcement mandates the Business Competition Supervisory Commission (KPPU) as set forth in Chapter VI article 30-46 of the Act. KPPU in this case as a representative of the government to conduct supervision as well as provide administrative and criminal sanctions for business actors who violate the principles of healthy business.

Business Competition Supervisory Commission (KPPU) established through Presidential Decree (Keppres) no. 75 of 1999, precisely on July 8, 1999 is an independent institution which means that KPPU is free from the influence and authority of the government, even if directly responsible to the President.

In the handling of business competition law enforcement cases must be resolved at the level of the Business Competition Supervisory Commission with limited only to administrative sanctions, which are expected to be efficient in enforcing competition law in Indonesia.

## 2. Formulation of Problem

Based on the description in the background above, the authors found several issues to be discussed in the writing of this scientific paper, namely "How about the regulation of minus margin in the Anti-Monopoly Law in Indonesia?"

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<sup>†††</sup> Ayudha D. Prayoga, 2000, "*Persaingan Usaha dan Hukum yang mengaturnya di Indonesia*", ELIPS, Jakarta, hal. 52

<sup>‡‡‡</sup> Sumantoro, 1986, "*Hukum Ekonomi*", UI Press, Jakarta

## **2.1 The Development of Business Competition in Trade in Indonesia**

Article 33 paragraph (1), (2) and (3) of the 1945 Constitution. Elucidation of article 33 states that "in article 33 the basis of economic democracy, production is done by all, for all under the leadership or possession of the members of society, the prosperity of society is preferred, not the prosperity of a person". Furthermore it is said that "The earth and water and the natural wealth contained in the earth are the subjects of the people's prosperity, which must be controlled by the State and used for the greatest prosperity of the people".

Thus, in fact, Article 33 of the 1945 Constitution and its explanation prohibits the possession of natural resources in the hands of individuals. In other words, monopoly, oligopoly and cartel practices in the field of natural resource management are contrary to the principle of article 33.

Then the State's Right to control natural resources is further described-at least- in 11 laws regulating specific sectors which authorize the state to organize and administer the use, stockpiling and maintenance of natural resources and regulate its legal relations. This principle is contained in the Agrarian Law no. 5 years 1960; Forestry Law no. 5 years 1967; Mining Basic Act no. 11 of 1967; Act of the continental basis No. 1 year 1973; UU no. 11 of 1974 concerning Basic Regulations on Irrigation; Uu 13 of 1980 on the Way; UU no. 20 of 1989 on Basic Provisions on Defense of Security; UU no. 4 of 1982 on Basic Provisions on Environmental Management; UU no. 9 of 1985 concerning Provisions on Fisheries; Law no. 5 of 1984 on Industry; And Law no. 5 of 1990 on Conservation of Biological Resources.

Article 33 of the 1945 Constitution states that natural resources are controlled by the state and utilized as much as possible for the welfare of the people. So that. It can be concluded that the regulatory, administering, utilization, supply and maintenance of natural resources as well as the regulation of legal relations exist in the state. Article 33 mandates that the Indonesian economy will be sustained by 3 major players: cooperatives, state-owned enterprises (BUMN / D), and private sector that will realize economic democracy characterized by market mechanisms, as well as government intervention, and recognition of private property. The interpretation of the phrase "controlled by the state" in paragraphs (2) and (3) is not always in the form of ownership but primarily in the form of the ability to exercise control and regulation as well as give effect to the company to hold the principle of the interests of the majority of society and the greatest prosperity of the people.

The soul of chapter 33 is based on a social spirit, which places the mastery of goods for the benefit of the public (such as natural resources) to the state. This arrangement is based on the assumption that the government is the holder of the mandate to carry out the life of the state in Indonesia. To this end, the mandate holders should have

legitimate legitimacy and have control over their horns, whether they have run an honest and fair government, be accountable, and transparent (good governance).<sup>§§§</sup>

All this has become common knowledge that these practices tend to anti-competitive business contrary to the principles of good corporate governance has long been fertile and growing in Indonesia. The practice of conspiracy to determine winners in a tender is an example of one of the many anticompetitive practices often encountered in business activities in Indonesia.

It cannot be denied that one of the most important elements in creating a healthy business competition climate depends on the effectiveness of the application of the values or principles of good corporate management within a company. The application of Fairness, Disclosure and Transparency, Accountability and Responsibility (Responsibility) principles within the company should be used as a guide for business actors in conducting business activities.

A company that is capable of applying the principles of Good Corporate Governance in its company properly will have a high degree of sensitivity to all business activities it undertakes. Implementation of the principle of Good Corporate Governance is generally translated into a form of internal regulation which usually includes the business philosophy of the company, the guiding values that govern how to manage the company in achieving its business objectives, guidelines against customers, distributors, government officials, And other parties that have relationships with the company, including rules governing fair competition behavior with competing business actors. Internal guidelines have binding strength only within the scope of a company, generally better known as Corporate Code of Conduct.

Internal Guidance is a medium of delivery to all employees regarding the concept of good corporate governance (corporate governance) owned by a company in order to achieve business objectives, which externally internal guidelines can have a positive impact on actions, policies and corporate decisions Shall follow the provisions of the Code of Conduct.<sup>\*\*\*\*</sup>

The development of industry and trade in the current era of economic reforms is aimed at revitalizing the national economy in crisis. The reforms in the industry and trade sectors are closely tied to the medium-term objectives, and refer to the main priorities of the Development Reform Cabinet to achieve two targets: first,

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<sup>§§§</sup> “Membumikan Mandat Pasal 33 UUD 45”, tersedia (On-Line) di WWW:

[http://www.pacific.net.id/~dede\\_s/Membumikan.htm](http://www.pacific.net.id/~dede_s/Membumikan.htm).

<sup>\*\*\*\*</sup> M. Doddy Kusadrianto, “Menciptakan Persaingan Usaha Yang Sehat Melalui Penerapan Prinsip Good Corporate Governance”, tersedia (On-Line) di WWW:

<http://64.233.167.104/search?q=cache:>

[PGqULvrXXhgJ:www.fcgi.or.id/GCG%2520%26%2520Persaingan%2520Usaha%252026-02-2003.pdf+persaingan+usaha&hl=id](http://PGqULvrXXhgJ:www.fcgi.or.id/GCG%2520%26%2520Persaingan%2520Usaha%252026-02-2003.pdf+persaingan+usaha&hl=id)

availability and affordability of foodstuffs and basic needs of society, and secondly the re-rotation of the national economy. In addition serious efforts were also made to realize the concrete reform program of the industrial and trade sectors, based on the agreement with the IMF. The Ministry of Industry and Trade (Depperindag) is currently undertaking the provision of nine basic commodities (staples), especially rice, soybeans, corn, sugar, cooking oil, at affordable prices and eliminating any distortions that occur in every production activity and distribution of the main ingredients; An all-out export performance recovery to boost national foreign exchange earnings; And as soon as possible to move the wheels of the economy. The revitalization of industrial and commercial sector activities is driven to refer to agro-industry, agribusiness, export industries, resource-based industries activities, thus encouraging the opening of employment opportunities, the provision of basic commodities such as food and medicine, the creation of a full national and international business community. Similarly, the strengthening of legal and regulatory instruments that ensure fair, fair competition, encouraging small businesses, preventing monopoly and oligopoly practices, eliminating privileged facilities and privileges, pro-market competition.<sup>†††</sup>

## **2.2 Prohibited Agreements and Prohibited Activities Under the Anti-Monopoly Law**

### ***Prohibited Agreements***

In Law no. 5/1999 there are 11 kinds of agreements prohibited to be made by business actors with other business actors, as set forth in article 4 to 16. Such prohibited agreements are considered as unhealthy monopolistic and / or business practices. If the banned treaty is still made by the business actor, then such a treaty shall be void null and void or shall be deemed to have never existed, since the object of the treaty shall be unlawful<sup>††††</sup> things prohibited by law and hence not can be implemented by business actors who are subject to the agreement.<sup>§§§§</sup>

Based on the sound of Article 1 point 6 that there has been unfair business competition or unfair business or fraudulent if the business actors undertaking production activities and / or the distribution of goods and / or services done dishonestly, against the law, or hampering business competition.

From Article 4 to Article 16 of Law no. 5/1999, there are several agreements that are prohibited as follows:

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<sup>††††</sup> "Pidato Kenegaraan Presiden RI", tersedia (On-Line) di

WWW:[http://66.102.7.104/search?q=cache:bSajIFyAUTgJ:www.dprin.go.id/roren1/laporan/dato98\\_1.pdf+anti+monopoli&hl=id](http://66.102.7.104/search?q=cache:bSajIFyAUTgJ:www.dprin.go.id/roren1/laporan/dato98_1.pdf+anti+monopoli&hl=id)

<sup>††††</sup> Rachmadi Usman, 2004, *Hukum Persaingan Usaha Di Indonesia*, Jakarta, Gramedia, hal. 40.

<sup>§§§§</sup> Ahmad Yani & Gunawan Widjaja, 2002, *Anti Monopoli*, Jakarta, RajaGrafindo Persada, hal. 24.

### *Oligopoly*

Article 4 paragraph (1) of Law no. 5/1999 affirms "Business actors are prohibited to enter into agreements with other business actors to jointly control the production and or marketing of goods and services which may result in monopolistic practices and / or unfair business competition." Under the provision it is clear that the law only prohibits oligopoly which may result in monopolistic practices and / or unfair business competition. This latter indicator must be proved. This means that as long as the control of the production and / or marketing of goods and / or services do not result in monopolistic practices and / or unfair business competition, the business is not prohibited by law.\*\*\*\*\*

### *Fixing Price*

This Agreement is governed by Article 5 of Law no. 5/1999, which stipulates that "a Business Actor is prohibited from entering into an agreement with a competing business actor to fix the price of an item and or service to be paid by a consumer or customer in the same relevant market." Based on the above provisions, a business actor is prohibited from entering into an agreement with a competing business actor to establish a certain price on a good and / or a service to be traded in the relevant market, since such an agreement shall nullify the business competition between the business agents that entered into the agreement.††††

### *Discrimination Price*

The discrimination in question is to fix the different prices that buyers have to pay for the same goods or services. Business actors are prohibited from entering into agreements to set prices for different prices to buyers on the same goods or services. This will lead to unhealthy competition in the market and will be detrimental to the purchasers of the goods or services. The provisions are contained in Article 6 of Law no. 5/1999.†††† In addition to the prohibition of price discrimination, it is also prohibited to set prices below market prices. Pricing below the market price may result in unfair business competition. For that competitors set the price below the market price. The prohibition of stipulating below market price is regulated in Article 7 of Law no. 5/1999.

### *Market Division*

Article 9 of Law no. 5/1999 affirms "Business actors are prohibited from entering into agreements with competitors in a bid to divide the marketing area or market allocation of goods and / or services so as to result in monopolistic practices and / or unfair business competition."

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\*\*\*\*\* *Rachmadi Usman, Op. cit., hlm. 43.*

†††† *Ibid., hal. 44.*

†††† *Bambang Poernomo Adiwiyoto, Konsep Dasar Persaingan Usaha Tidak Sehat, Makalah Lokakarya Terbatas Masalah-Masalah Kepailitan Dan Wawasan Hukum Bisnis Lainnya Tahun 2004, tanggal 17-18 Mei 2004, dalam Prosiding 2004, Undang-Undang Nomor 5 Tahun 1999 & KPPU, (Jakarta: PPH, 2004), hlm. 129.*



The existence of the division of marketing area will be able to lead to uncompetitive competition, because it creates territorial divisions. The territorial division in Article 9 may be a vertical and horizontal division of the territory.<sup>§§§§§</sup>

### *Boycott*

Article 10 of Law no. 5/1999 mentions the following:

- ✓ A business actor is prohibited from entering into an agreement, with a competing business actor, which may prevent other business actors from doing the same business, for both domestic and foreign markets.
- ✓ A business actor is prohibited from entering into an agreement, with a competing business actor, to refuse to sell any goods and or services from another business actor so that the action:
  - a. Harming or suspected to be detrimental to other business actors; or
  - b. Limiting other business actors in selling or buying any goods and or services from the relevant market.

Boycott is one of the business actors' conduct to block or deny other business actors entering the market or cooperating.<sup>\*\*\*\*\*</sup> From an economic point of view, the boycott act is the cessation of the supply of goods by the manufacturer to force the distributor to resell the goods under special conditions.<sup>†††††</sup>

### *Cartel*

Cartel is regulated in Article 11 of Law no. 5/1999, which affirms "Business actors are prohibited from entering into an agreement, with rival business actors, intent on influencing prices by regulating the production and or marketing of goods and or services, which may result in monopolistic practices and or unfair business competition." From an economic point of view, there are different points of view about this cartel Pass, Lowes, and Harter. Passes and Lowes see the cartel as a form of collusion in commerce (negative form), while Harter judges it as a form of fellowship of similar business actors for the benefit of joint ventures.<sup>†††††</sup>

### *Trust*

The Trust Agreement is governed by Article 12 of Law no. 5/1999, which affirms "Business actors are prohibited from entering into agreements with other business actors to cooperate by forming a joint company or a larger company, while maintaining and maintaining the viability of each company or its member companies, which aims to control the production And or marketing of goods and or services, which may result in monopolistic practices and or unfair business competition."

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<sup>§§§§§</sup> Elsa Ras Ginting, *Hukum Anti Monopoli Indonesia. (Analisis Dan Perbandingan Undang-Undang Nomor 5 Tahun 1999, Bandung: Citra Aditya Bakti, 2001, hlm. 43.*

<sup>\*\*\*\*\*</sup> *Ibid*

<sup>†††††</sup> *Ibid.*, hal. 130.

<sup>†††††</sup> *Ibid.*, hal. 46.

From the formulation of Article 12 mentioned above, what is meant by this law as a trust is a combination of several large companies that are not competing with each other that aims to control the production or marketing for the sake of the survival of each company. The purpose of this joint establishment of large corporation cooperation has been emphasized in article 12 to distinguish prohibited substance.

#### *Oligopsony*

The Oligopsony Agreement is governed by Article 13 of Law no. 5/1999 which asserts the following:

- ✓ A business actor is prohibited from entering into agreements with other business actors which intend to jointly control the purchase or receipt of supplies in order to control the prices of goods and or services in the relevant market, which may result in monopolistic practices and / or unfair business competition.
- ✓ The business actor is reasonably suspected or deemed to jointly control the purchase and / or acceptance of supply as referred to in paragraph (1) if 2 (two) or 3 (three) business actors or group of business actors control more than 75% (seventy Five percent) the market share of a particular type of goods or services.

#### *Vertical Integration*

The vertical integration is set in Article 14 of Law no. 5/1999 which affirms "Business actors are prohibited to enter into agreements with other business actors that aim to master a number of products belonging to a certain series of goods or services in which each series of production is the result of processing or further process, either in a direct or indirect series, which may result in unfair competition or harm society."

#### *Exclusive Dealing*

This Agreement is governed by Article 15 of Law no. 5/1999 which mentions the following:

- ✓ A business actor is prohibited from entering into an agreement with another business actor containing the requirement that the party receiving the goods and or services will only supply or not re-supply the goods and or services to a particular party and or to a certain place.
- ✓ A business actor is prohibited from entering into an agreement with another party which contains the requirement that the party receiving certain goods or services must be willing to purchase other goods and or services from the supplier business actor.
- ✓ A business actor is prohibited from entering into agreements concerning prices or certain discounts on goods and or services, containing requirements that business actors receiving goods and or services from supplier business actors:
  - a. Must be willing to buy other goods and or services from the supplier business; or

- b. Will not purchase the same or similar goods and / or services from another business actor who becomes a competitor of the supplier business actor.

### *Agreement With Abroad*

This Agreement is governed by Article 16 of Law no. 5/1999 which affirms "Business actors are prohibited from entering into agreements with other parties abroad containing provisions which may result in monopolistic practices and or unfair business competition." This means that if the agreement does not contain provisions which may result in monopolistic practices and / or unfair business competition, then the agreement is not contradictory to this law, and the agreement is not prohibited. §§§§§§

### *Prohibited Activities*

#### *Monopoly*

In this law, the monopoly is also stipulated as a forbidden activity as contained in Article 17 of Law no. 5/1999 which mentions the following:

- ✓ Business actors are prohibited from exercising control over the production and or marketing of goods and or services that may result in monopolistic practices and or unfair business competition.
- ✓ Business actors are suspected or deemed to have control over the production and or marketing of goods and or services as referred to in paragraph (1) if:
- ✓ The goods and or services concerned have not been substituted; or
- ✓ Resulting in other business actors not being able to enter into the same business competition of goods and or services; or
- ✓ One business actor or a group of business actors controls more than 50% (fifty percent) of the market share of a particular type of goods or services.

#### *Monopsony*

Monopsony activities are regulated in Article 18 of Law no. 5/1999 which mentions the following:

- ✓ Business actors are prohibited from controlling the receipt of supply or becoming sole buyers of goods and or services in the relevant market which may result in monopolistic practices and / or unhealthy competition.
- ✓ The business actor is alleged to have controlled the receipt of supply or become a sole buyer as referred to in paragraph (1) if one business actor controls more than 50% (fifty percent) of the market share of a particular type of goods or service.

#### *Market Control*

The activities of business actors in the control of the market are regulated in Article 19 of Law no. 5/1999 explaining "Business actors are prohibited from performing one or several activities, either alone or together with other business actors, which

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§§§§§§ Bambang Poernomo Adiwiyoto, *Op.cit.*, hal. 133.

may result in monopolistic practices and or unfair business competition in the form of:

- ✓ Refuse and / or prevent certain business actors from conducting the same business activities in the relevant market;
- ✓ Deter customers or competitors of their competitors from entering into business relationships with their competitors;
- ✓ Restrict the circulation and or sale of goods and or services to the relevant market; or
- ✓ Discriminating against certain business actors.”

### *Conspiracy*

The juridical understanding of this conspiracy or conspiracy can be found in Article 1 number 8 of Law no. 5/1999 that affirms “Conspiracy or business conspiracy is a form of cooperation undertaken by a business actor with another business actor with a view to controlling the relevant market for the interests of the conspiring business actor.”

### **2.3 Application of Minus Margin In Case of PT. Carrefour (Study of KPPU Decision Number 02 / KPPU-L / 2005)**

This case arose after a report on 20 October 2004 regarding allegations of violation of Article 19 letter a (refusing and / or preventing business actors from engaging in the same business activity in the relevant market), Article 19 letter b (preventing consumers or customers of their competitors) Not having business relationships with its competitors) and Article 25 paragraph (1) letter a (dominant position in stipulating trade conditions with the aim of preventing and / or preventing consumers from obtaining competing goods and or services in terms of price or quality) Law no. 5/1999 conducted by Carrefour (Reported Party) in establishing trading terms to suppliers of goods.

The results of the examination, the Commission Assembly found the fact that Carrefour made a business relationship buying and selling products with suppliers who use the system break off. The business relationship is set forth in a written agreement called National Contract which contains trading terms that can be negotiated with the supplier, among others: listing fee, fixed rebate, minus margin, term of payment, regular discount, common assortment Cost, opening cost / new store and penalty. In the report, the supplier considers that the trading terms are burdensome, particularly regarding item listing listing requirements and minus margins, as each year Carrefour adds item types, raises fees and percentage fee trading terms.

Minus margin is a supplier guarantee to Carrefour that the selling price of their product is the cheapest selling price. If Carrefour receives written proof that its competitor can sell the same product at a price lower than Carrefour's purchase price, Carrefour shall be entitled to compensation from the supplier of the difference

between the purchase price of Carrefour and the selling price of its competitors. Compensation is obtained by Carrefour by imposing a minus margin sanction in the form of a supplier invoice deduction, without providing an opportunity to the supplier to prove that the supplier does not discriminate the selling price. The invoice deduction is calculated by multiplying the price difference with the remaining amount of the supplier's product at Carrefour's outlet. Carrefour's goal of applying minus margin is to keep the selling price cheaper among its competitors. Revenue from the imposition of sanctions minus margin from 99 suppliers who approved the minus margin requirement in 2004 amounted to 1.9 billion Rupiah.

According to Investigator KPPU said that minus margin has the same purpose with best price guarantee terms and penalty applied by competitor Carrefour, that is to avoid price discrimination by supplier. However, according to KPPU investigators, the real intention of applying minus margin by Carrefour is to make Carrefour's competitors more difficult to compete.

So the suppliers assume that the price set by Carrefour is a price guideline for suppliers. This resulted in the competitor is not free to determine the selling price is more competitive to consumers in the relevant market. Based on the above matter, KPPU considers that the application of the minus margin requirement by Carrefour has prevented Carrefour's competitors from doing the same business activity in the relevant market.

#### **2.4 Legal Consequences Of Agreements Containing Minus Margin Violations**

The Commission Council found that Carrefour has market power compared to Hypermart, Giant and Clubstore, since Carrefour has the largest number of outlets, a strategic outlet location with a high level of comfort and completeness of facilities, in addition to the number of product items at booth Carrefour is incomplete. With such market power, causing a dependence on suppliers for products to be sold at Carrefour outlets. The dependence arises because with many outlets, Carrefour has greater access capability in selling products to consumers, enabling suppliers to sell more products at Carrefour outlets. In addition, Carrefour outlet can be used as a promotion place to raise the image of new products and suppliers.

With the advantages it has, Carrefour has a bargaining power to suppliers in negotiating items trading terms. In fact, Carrefour used his bargaining power to pressure suppliers to accept additional trading terms, increased fees and percentage fee fees terms. Forms of pressure include: withholding payments due, deciding unilaterally not to sell a supplier's product by not issuing a purchase order, reducing the number of ordering items of the supplier's products.

According to the Business Competition Supervisory Commission (KPPU), the suppliers can not sell their products at their stores until Carrefour's competitors raise the selling price of the products. Carrefour's minus margin requirement also resulted

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in the selling price of Carrefour's products being a price guideline for suppliers so that Carrefour's competitors are not free to set a more competitive price to consumers in the relevant market.\*\*\*\*\*

If Carrefour receives written proof that its competitor can sell the same product at a price lower than the purchase price of Carrefour, then Carrefour has the right to request compensation from the supplier of the difference between the purchase price of Carrefour and the selling price of its competitors. The compensation is a "minus margin" sanction by cutting off the supplier's invoice without providing an opportunity for the supplier to prove that the supplier does not discriminate the selling price. The deduction is calculated by multiplying the price difference with the remaining amount of the supplier's products at Carrefour's outlet.

### 3. KPPU Decision

The Business Competition Supervisory Commission (KPPU) has completed the examination in accordance with the prevailing provisions and has stipulated the decision on the case No. 02 / KPPU-L / 2005 which is alleged violation of Law no. 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition (Law No.5 / 1999) relating to the stipulation of terms of trade to suppliers of goods made by PT. Carrefour Indonesia (Carrefour). The Commission Assembly consisting of Tadjuddin Noer Said (Chairman), and Bambang P. Adiwiyoto and Mohammad Iqbal who respectively act as Members of the Commission Assembly, decide that there has been a violation of Article 19 letter a of Law No.5 / 1999.

The application of the minus margin requirement by the Reported Party resulted in one supplier stopping its supply to one of the Reported Party's competitors who sold the supplier's products at a cheaper price than the selling price in the Reported Party's booth. Whereas with the termination of supply to the Reported Party's competitor, resulted in the completeness of the number of products sold in the competitor's booth of the Reported Party is reduced.

Based on this, the suppliers consider the selling price of the Reported Party to be a price guideline. So the selling price in the Reported Party's outlets is a price guideline for. Supplier to avoid imposing sanction of minus margin requirement by Reported Party. Whereas the sale price of the Reported Party's products as a price guideline for suppliers results in the Reported Party's competitors not being free to determine the selling price that is more competitive to the consumers in the relevant market. Therefore, based on the above description, the implementation of the minus

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\*\*\*\*\* "*KPPU: Carrefour Dapat Terancam Sita Jaminan*",  
[http://www.republika.co.id/koran\\_detail.asp?id=222594&kat\\_id=4](http://www.republika.co.id/koran_detail.asp?id=222594&kat_id=4), Rabu, 23 November 2005.

margin requirement by the Reported Party has prevented the Reported Party's competitors to conduct the same business activity in the relevant market.

Therefore, based on the facts and evidence revealed in the hearing in KPPU, PT Carrefour Indonesia violated Article 19 letter a of Law Number 5 Year 1999 regarding rejecting and / or obstructing business actors to conduct the same business activities in the relevant market.

With regard to the objective of the Anti-Monopoly Law is the creation of efficiency. Efficiency means that if there is competition where there is more than one business actor, the price will be cheap, the output will be better quality, the service will be better & encourage the innovation. The existence of business competition will also prevent the waste of natural resources and human resources.

The second objective of this law is consumer welfare. Consumers can choose products that exist in the market, with the choice of the consumer can get a cheap price. In the case of the authors present, it must be seen the economic aspect, is it allowed a factory to give discount to certain business actor because the business actor is buying in large quantity and has strong bargaining power while the small business actors are not given a discount.

#### **4. Conclusion**

The regulation of minus margin in Law Number 5 Year 1999 is explicitly stipulated in Article 19 of Law Number 5 Year 1999. Minus margin is an activity of business actors which in its application may result in monopolistic practices and / or unfair business competition In the market where the business actor is trying. Where the application of minus margin is applied with the aim to keep the selling price of the product at the outlet as the cheapest selling price in the relevant market. So that other business actors cannot determine the price freely.

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