CHAPTER IV

FINDING AND ANALYSIS

A. The legal approach of KPPU in determining that the case has violated Monopoly Act

1. Case Position

The KPPU issued a decision No. 09/KPPU-L/2009 related to suspicion of monopoly by PT Carrefour Indonesia after acquiring PT Alfa Retailindo. The reason of PT Carrefour Indonesia acquiring PT Alfa Retailindo is to increase sales and add outlets and to increase the retail formats developing into multiformat. Takeover or acquisition is the common way of companies in which based on Law No. 40 Year 2007 on Limited Liability Company, they can only take over shares. Therefore, other assets can not be acquired or taken over. Upon receiving the report from the public regarding alleged monopoly by PT Carrefour Indonesia, the KPPU has conducted the examination, clarification and filing so that the KPPU stated the report is complete and clear.

PT Carrefour Indonesia signed a Memorandum of Understanding (MoU) between PT Sigmantara Alfindo and Prime Horizon Pte. Ltd. to buy PT Alfa Retailindo. After that PT Carrefour Indonesia officially announced the signing of a Share Purchase Agreement (SPA) with PT Sigmantara Alfindo and Prime Horizon Pte. Ltd. to buy a 75% majority stake in PT Alfa Retailindo with the total share price of Rp 674 billion.

PT Carrefour Indonesia then notified Bapepam-LK and the Indonesia Stock Exchange regarding the signing of the SPA and after that PT Carrefour Indonesia announced it in a national newspaper regarding the purchase of shares of PT Alfa Retailindo.

After being acquired by PT Carrefour Indonesia, 14 outlets of PT Alfa Retailindo were renamed Carrefour Express and 16 outlets were renamed Carrefour. Thus PT Carrefour Indonesia operates on two formats namely hypermart and supermarkets which raised allegations of monopolistic practices and unfair competition as PT Carrefour Indonesia has a huge market power. Consequently, PT Carrefour is able to suppress and deny the supplier of choice for suppliers to conduct business transactions with outside parties of PT Carrefour Indonesia.

The KPPU stated that PT Carrefour Indonesia proved legally and clearly violated Article 17 (1) and Article 25 (1) a of Law No.5 Year 1999 on The Prohibition of Monopolistic Practices and Unfair Business Competition. In the Article 17 of Law No. 5 Year 1999 contains provisions on the prohibition of the business to pursue market share, while Article 25 Paragraph (1) contains the provisions related to a dominant position. Based on the evidence obtained during the inspection of the company, KPPU mentioned that market share of the retail companies increased from 46.30% in 2007 to 57.99% in 2009 after the acquisition of PT Alfa Retailindo dealing with upstream market supply of goods or services. Subsequent examination results showed that the

market share and the dominant position of PT Carrefour Indonesia has been misused to suppliers by increasing and imposing pieces of the purchase price of goods suppliers through a scheme called the trading terms. The decision of the KPPU was to punish Carrefour to pay a fine of Rp 25 billion, which had to be paid to the state treasury and ordered the release of all shares in PT Alfa Retailindo to all companies that were not affiliated with Carrefour no later than one year after the decision of the KPPU was finalized.[1]

In responding to the KPPU's decision, PT Carrefour Indonesia stated its objection to the South Jakarta District Court. From the objection, PT Carrefour Indonesia rejected the trading terms which were regarded as violation by KPPU. Decision of the South Jakarta District Court judge revealed that PT Carrefour Indonesia won a lawsuit against the KPPU and the issuance of Decision No. 1598/Pdt.G/2009/PN.Jak.Sel on February 18, 2010 was issued. KPPU filed a cassation against the Decision of the South Jakarta District Court to the Supreme Court. The cassation of the KPPU was rejected, and the Supreme Court granted the appeal panel decision of the South Jakarta District Court that won PT Carrefour Indonesia and refused cassation of the KPPU with the issuance

[1] Heri Susanto, "KPPU Perintahkan Carrefour Lepas Saham Alfa" taken from http://bisnis.news.viva.co.id/news/read/102363-kppu_perintahkan_carrefour_lepas_saham_alfa, accessed on Wednesday, 8th March, 2017 at 5:11 pm.

of the decision No. 502 K/Pdt.Sus/2010 the KPPU; PT. Carrefour Indonesia.

2. The Approach Used by The KPPU in Case

There are two approaches in competition law; the per se illegal approach and rule of reason approach. Both of these approaches have long been applied to assess whether a particular action of businesses violate the Antimonopoly Act or not. Both of these approaches were first listed as supplements to the Sherman Act 1980. This became the first act of Antimonopoly in the United States and it was first implemented by the United States Supreme Court in 1899 (for per se illegal) and in 1911 (for a rule of reason).[2]

Rule of reason approach can be identified by the use of written expression such as "that may result in" or "suspected". Rule of reason approach is an approach used by authority agency of business competition in making an evaluation on the impact of the agreement or certain business activities, in order to determine whether an agreement or the business activities inhibit or promote competition.[3]

On the other hand, the application of per se illegal approach states that any agreement or certain business activities are illegal without further evidence on the impact of the agreement or the bussiness activity.[4]

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[2] Hukum Online.com, "Pentingnya prinsip per se dan rule of reason di UU Persaingan Usaha", taken from http://www.hukumonline.com/klinik/detail/lt4b94e6b8746a9/pentingnya-prinsip-per-se-dan-rule-of-reason-di-uu-persaingan-usaha, accesed on Sunday, February 5th, 2017 at 11:01 pm
[3] Andi Fahmi Lubis dkk, *op. cit.,* p. 55
[4] *Ibid.*

Per se illegal approach usually uses written languages such as the term "prohibited", without the clause "... which can lead to ..." in the articles. Prohibition in this context is meant to be a clear and unequivocal ban in terms of attitudes or behaviour which tends to break the competition.[5]

In fact, the Act No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition does not state explicitly about the existence of rule of reason and per se illegal. However, some experts who are concerned about the Indonesian competition law state that Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unhealthy Business Competition contains the principle of the rule of reason and per se illegal. This opinion has no normative base in Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition because the Business Competition Law does not explicitly state the principle of the rule of reason and per se illegal.

As a matter of fact, the leafet made by the KPPU stated that Act No. 5 Year 1999 has no less than 19 violation articles that represent the rule of reason, such as:[6]

a. Oligopoly agreement; the agreement to set prices below the market (predatory pricing), zoning, cartels, trusts, oligopsonistic, vertical integration, and agreements with foreign parties.

[5] Susanti Adi Nugroho, 2001, *Hukum Persaingan Usaha di Indonesia*, Puslitbang Diklat Mahkamah Agung, 2001.

[6] Yakub Adi Krisanto, 2008, Prinsip Rule of Reason dan Per Se Rule dalam Hukum Persaingan Indonesia, taken from https://yakubadikrisanto.wordpress.com/2008/06/03/prinsip-rule-of-reason-dan-per-se-illegal/, accesed on Monday, March 6th, 2017 at 0:46 pm.

b. Activity monopoly; monopsony, market share, and the tender conspiracy.
c. Abuse of dominant position through concurrent positions and merger, consolidation or acquisition.

On the other hand, business practices of per se illegal were regulated in less than six articles of Law No. 5 Year 1999, among others:

a. Agreements for setting prices, price discrimination, boycotts, and closed agreements (exclusive dealing).
b. Conspiracy activity to inhibit the production and/or marketing of products and/or services of a competitor.
c. Abuse of dominant position in terms of inhibition of the consumer to acquire goods/services that are competitive in terms of price and quality, and have a position in a large company with a market similar or related fields.

Table 1. Determination on the Rule of reason and Per Se Illegal Approach

Rule of Reason	Per Se Illegal
1. Oligopoly 2. Price predatory 3. The division of the territory 4. Cartel 5. Trust 6. Oligopsony	1. Price fixing 2. Price Discrimination 3. Closed agreements 4. Conspiracy 5. Dominant Position (to article 25 paragraph 1)

7. Vertical Integration 8. Agreements with foreign parties 9. Monopsony 10. Monopoly 11. Market Control 12. Multiple Positions 13. Incorporation, mergers and acquisitions	6. Dominant Position (to Article 26 letters a and b)

Source: https://yakubadikrisanto.wordpress.com/2008/06/03/prinsip-rule-of-reason-dan-per-se-illegal/

The KPPU's rationale or reason suggesting that the provisions of the competition law are included in the category of rule of reason and per se illegal is the interpretation of each chapter using the analysis of these two principles. The interpretation made by the KPPU to determine an agreement or other prohibited activity included in the category of rule of reason and per se illegal is based on an analysis of written language or sentences contained in each article of the law. It can be seen when comparing certain articles which are included in the category of rule of reason and per se illegal. The KPPU's interpretations in determining a prohibited agreement or prohibited activity are based on:

a. Agreement or activity which is prohibited is determined as the rule of reason if the article has the objectives which may result in monopolistic practices and unfair business competition.

b. On the other hand, activity that is included in the category of per se illegal is specified as prohibited agreements and prohibited activities in which its purpose of such activities has no consequences.[7]

Thus, the acquisition of PT Alfa Retailindo by PT Carrefour Indonesia, by which the KPPU decision No. 09/KPPU-L/2009 suggested that it violated article 17 paragraph (1) and article 25 paragraph (1) letter a of Law No. 5 of 1999 on The Prohibition of Monopolistic Practices and Unfair Business Competition can be stated that the KPPU use the mechanisms of the rule of reason approach and per se illegal. The violation of article 17 paragraph (1) uses a rule of reason approach and violation of article 25 paragraph (1) letter a uses per se illegal approach.

Article 17, paragraph (1) states that:

"Businesses are prohibited from controlling the production and/or marketing of goods or services that are considered to result in monopolistic practices and or unfair competition."

The use of rule of reason approach to the violation of article 17 paragraph (1) is accurate because of two reason. Firstly, the use of the written language stating "which are supposed to result in monopolistic practices and or unfair business competition", refers to the principle of rule of reason.

Secondly, the acquisition of PT Alfa Retailindo by PT Carrefour Indonesia, resulting in the rise of the market share up to 57.99%, will

[7] *Ibid.*

affect to monopolistic practices and or unfair business competition with the evidence of PT Carrefour Indonesia market power increased after the acquisition of PT Alfa Retailindo. Thus, the rule of reason approach in this article's violation has been fulfilled.

Article 25, paragraph (1) letter a states that:

"Busines agents are prohibited from using a dominant position either directly or indirectly to: (a) setting out the terms of trade in order to prevent or deter consumers to obtain competitive goods and/or services, in terms of both price and quality."

The use of per se illegal approach to the violation of Article 25 paragraph (1) letter a is accurate due to the use of the term "prohibited", without the clause "... which can lead to ...". This prohibition is clear and unequivocal and becomes attitude or behaviour which are potential to damage or break competition, having evidence that the market power held by PT Carrefour Indonesia increased and it was abused by determining various trading terms to suppliers. Therefore, the elements of per se illegal approach to the violation of this article are clearly fulfilled.

In summary, the mechanism used by KPPU in this case is using two approaches simultaneously, namely the rule of reason approach to the violation of article 17 paragraph (1) and the per se illegal approach in violation of Article 25 paragraph (1) letter a.

3. The Violation of PT Carrefour Indonesia According to KPPU

a. Dominant Position

Based on the KPPU's decision No. 09/KPPU-L/2009, PT Carrefour Indonesia has violated article 17 paragraph (1) and article 25 paragraph (1) letter a of Law No. 5 Year 1999. In violating article 17 paragraph (1) PT Carrefour Indonesia fulfils the elements of Article 17, namely business, market share, businesses to apply a policy (practice) business (conduct), and the policy (practice) of the business affect negatively towards competition in terms of monopolistic practices and or unfair business competition.

Based on the KPPU's decision, PT Carrefour Indonesia is a legal entity established and domiciled and it conducts business activities in the economic field. In the explanation of Article 17 paragraph (2) c it is stated that “some businesses or business groups control more than 50% market share of the type of goods or services”, PT Carrefour Indonesia has been proven to control more than 50% of market share, at 57,99% on the upstream market based on data from the Advanced Examination Report (LHPL) after the acquisition of PT Alfa Retailindo.

Upstream market is the market that supplies goods in hypermarkets and supermarkets as well as the retail services market

hypermarkets and supermarkets throughout Indonesia.[8] The complete earnings of the upstream market is as follows:

Table 2. Market Share Upstream Hypermarket and Supermarket in Indonesia 2005-2008

Ritel Name	2005	2006	2007	2008
Matahari	22,53%	22,49%	21,14%	18,58%
Carrefour Indonesia	32,49%	40,82%	46,30%	57,99%
Ramayana	16,46%	10,13%	9,52%	8,61%
Hero	15,82%	18,45%	16,40%	13,03%
Alfa Retailindo	9,21%	6,12%	4,79%	-
Yogya	0,31%	0,21%	0,23	0,29%
Lion Superindo	3,19%	1,79%	1,62%	1,51%
Total	100%	100%	100%	100%

Source: Kompetisi Media Berkala KPPU, Edition 9, 2009

Legally, PT Carrefour Indonesia is qualified to practice monopoly and dominant position, and based on LHPL data, it is said that the acquisition by PT Carrefour Indonesia resulted in anti-competitive effects, both resulted from the behavior of PT Carrefour Indonesia (unilateral conduct) and followed by businesses competitors (coordinated conduct). This happens because the market power of PT Carrefour Indonesia has increased after the acquisition

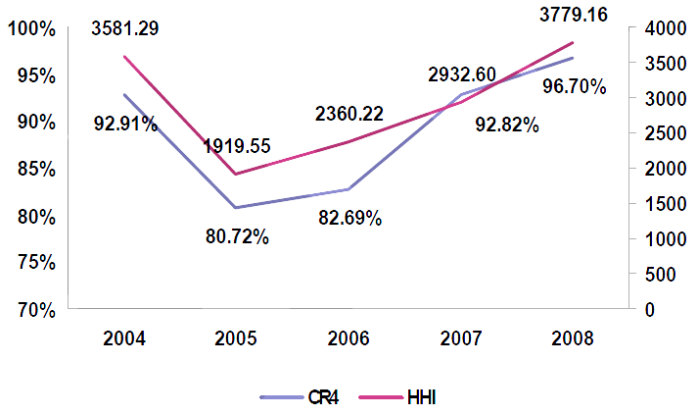
[8] Inilahcom, "Carrefour Terbukti Monopoli Industri Ritel", taken from: http://ekonomi.inilah.com/read/detail/176485/carrefour-terbukti-monopoli-industri-ritel, accesed on Saturday, March 4th, 2017 at 23:56 pm.

of PT Alfa Retailindo and its entry barrier to the relevant market is high.

In addition, the conditions of the competition can also be measured from the level of concentration and the trends because relevant industry market is dominated by certain business actors. This is shown by the LHPL data of the indicator value of HHI (Herfindahl Hirschman Index) and CR4 (Concentration Ratio) as a measurement technique that is commonly used in the analysis of competition.[9] The data obtained are as follows:

[9] Efendi Arianto, 2008, Mengukur Struktur Industri (Pasar) , taken from https://strategika.wordpress.com/2008/08/04/mengukur-struktur-industri/, accessed on Tuesday, March 7th, 2017 at 0:43 am.

Tabel 3. Concentration Indicators



Source: KPPU

Based on the graph, it is shown that prior to the acquisition in 2007, the HHI level reached 2950.09 with a CR4 value reaching 93.36%. Following the acquisition, the concentration level reached up to 3779.16 HHI and CR4 is 96.70% which indicates a very high concentration of an industry. This suggests that the market is highly concentrated in which PT Carrefour Indonesia became the dominant business actors in it. Market power held by PT Carrefour Indonesia was declared in violation of the competition law due to the market power unilaterally used to exploit consumer surplus.

The LHPL data indicate some unilateral behavior of PT Carrefour Indonesia as an effort to exploit the surplus of its suppliers, among others:

a. Applying the amount of trading terms of PT Carrefour Indonesia to suppliers of PT Alfa Retailindo

b. Taking into account the type of trading terms additional rebate condition both to suppliers of PT Carrefour Indonesia and PT Alfa Retailindo is based on total sales of PT Carrefour Indonesia and PT Alfa Retailindo
c. Forcing suppliers of PT Carrefour Indonesia to supply PT Alfa Retailindo.

This case causes a loss of effective competition in the modern retail industry and harm consumers in the long run.

b. The Use of Dominant Position to Specify The Trading Terms

The acquisition of PT Alfa Retailindo by PT Carrefour Indonesia to increase PT Carrefour market power was abused by defining the terms of trade to the suppliers. It means, it violated Article 25 paragraph (1) letter a, which states that "Businesses are prohibited from using a dominant position either directly and indirectly to: (a) setting out the terms of trade with the aim to prevent and/or deter consumers to obtain competitive goods and/or services in terms of price and quality". In violating this chapter, PT Carrefour Indonesia met the essential element of violation, namely businesses, dominant position, their terms of trade, the consumer, the impact of these trading conditions to prevent or deter consumers to obtain competitive goods and/or services.

Trading terms are the terms of the cooperation agreement between the supplier with modern shops related to the supply of

traded goods.[10] The costs charged in trading terms, among others are, the cost of regular price cuts, price cuts permanent, special discounts, promotional discounts, promotional costs, distribution costs, and so forth. In general, there are some trade terms imposed by PT Carrefour Indonesia to its suppliers, such as listing fee, fixed rebate, minus margin, term of payment, regular discount, common, cost assortment, opening cost or new store and penalty. Suppliers consider listing fee and minus margin trading conditions seemed to burden them. Trading terms of the listing fee required the suppliers to pay the cost of the new products to each Carrefour outles in which it served as a guarantee if the goods were not sold. This condition was only applied once, and it was not refundable (non-refundable) in which the amount of them were different between large suppliers and small suppliers.[11]

In practice, both the type and amount of Carrefour's trading terms increase from year to year. This can be seen from the data that was obtained by KPPU as follows:

[10] Bisnis.com, 2014, Batasan Trading Terms 15% Dorong Pemasok Ritel IKM, taken from http://industri.bisnis.com/read/20140310/100/209508/batasan-trading-terms-15-dorong-pemasok-ritel-ikm, accessed on Tuesday, 7th March, 2017 at 1:23 am.
[11] Andi Fahmi Lubis, *op. cit.,* p.141

Table 4. Trading Terms Revenues Data of Hypermarket and Supermarket in Indonesia in 2005-2008 (Rupiah)

NAMA PERITEL	2005	2006	2007	2008
MATAHARI	221,666,960,164	378,222,467,887	413,694,613,678	455,599,378,443
CARREFOUR INDONESIA	319,740,000,000	686,623,000,000	906,045,000,000	1,422,042,000,098
RAMAYANA	161,961,600,000	170,322,600,000	186,255,500,000	211,154,200,000
HERO	155,658,000,000	310,345,000,000	320,951,000,000	319,431,000,000
ALFA RETAILINDO	90,605,177,529	102,861,918,068	93,780,485,254	
YOGYA	3,030,758,757	3,458,768,801	4,596,046,518	7,006,204,081
LION SUPERINDO	31,360,273,328	30,174,081,490	31,610,312,121	37,109,598,513
TOTAL	**984,022,769,778**	**1,682,007,836,246**	**1,956,932,957,571**	**2,452,342,381,135**

Source: Data KPPU

PT Carrefour Indonesia applied the trading terms as the hypermarket level to the supplier of PT Alfa Retailindo which basically PT Alfa Retailindo was only regarded as the supermarket level. There are three types of Playing Field Level in the industrial market, ie hypermarkets, supermarkets and minimarket. Clearly, this is a striking difference for suppliers. Suppliers feel aggrieved over the imposition of trading terms by PT Carrefour Indonesia because every year there are additional types of items as well as raising fees and a percentage fee trading terms.

The increase in trading terms pieces set by PT Alfa Retailindo post-acquisition by Carrefour increased in the range of 13% to 20% following the amount of trading terms used by PT Carrefour. Suppliers are powerless to reject the increase due to the

factual value of supplier sales in PT Carrefour Indonesia which is quite significant so that suppliers "inevitably" follow all the willingness of PT Carrefour Indonesia despite they already cut burdensome supplier trading terms.[12] In addition, PT Carrefour Indonesia also performed check competitor (control competition) so that PT Carrefour Indonesia can understand the price of goods suppliers to a competitor. This was affecting to the amount of trading terms which resulted into a limited amount of trading terms. Therefore, this type of trading terms of PT Carrefour Indonesia tend to be imitated by other businesses so that trading terms tends to rise. The suppliers are not flexible in negotiations to determine the trading terms. Supplier Incentives on new products will also be reduced because the advantage is absorbed into retail. There is coordination arrangements (coordinated conduct) in determining the terms of trade to the supplier, where the PT Carrefour Indonesia became the leader.[13]

This shows that after the acquisition of PT Alfa Retailindo, PT Carrefour Indonesia used direct dominant position to set the trading terms in terms of discounts imposed by retailers to the suppliers related to service activities. Their trading terms will give

[12] Helli Nur Cahyo, 2009, *op. cit.*, p.11
[13] Hukumonline.com, "Pengadilan Nyatakan Carrefour Indonesia Tidak Monopoli" taken from http://www.hukumonline.com/berita/baca/ltb4b7cc7d01140a/pengadilan-nyatakan-carrefour-indonesia-tidak-monopoli, accessed on Wednesday, March 8th, 2017 at 3:23 pm

rise to discrimination due to the market dominance by PT Carrefour Indonesia. [14]

B. Legal Arguments of Supreme Court Rejected The KPPU's Cassation To Annul The Decision of The South Jakarta District Court Number 1598/Pdt.G/2009/PN.Jak.Sel About The Cancellation of The KPPU's Decision Number 09/KPPU-L/2009

1. Legal Arguments Used by Supreme Court

The KPPU decision No. 9/KPPU-L/2009 mentioned that PT Carrefour Indonesia violated article 17 paragraph (1) and Article 25 paragraph (1) letter a of Law No. 5 of 1999 on the prohibition of Monopolistic Practices and Unfair Business Competition. Against the KPPU's decision, PT Carrefour Indonesia was objected to the South Jakarta District Court and the verdict issued by the South Jakarta District Court judges stated that PT Carrefour Indonesia won a lawsuit against the KPPU, by decision No. 1598/Pdt.G/2009/PN/Jak.Sel about monopoly and dominant position in the retail market of modern sector of PT Carrefour Indonesia.

The objection letters submitted by PT Carrefour asked the judges to annul the decision of the KPPU on the application of Article 17 paragraph (1) and article 25 paragraph (1) letter a of Law No. 5 Year

[14] Alum Simbolon, "Kedudukan Hukum Komisi Pengawas Persaingan Usaha melaksanakan Wewenang Penegakan Hukum Persaingan Usaha", *Jurnal Mimbar Hukum, No 3, Volume 24,* p. 377, 2009

1999. In response to the South Jakarta District Court that has won PT Carrefour Indonesia or in other words, it has canceled the decision of the KPPU no. 09/KPPU-L/2009, the KPPU then filled a legal action called a cassation to the Supreme Court. The purpose of the KPPU's legal action or filing a cassation to the Supreme Court was to annul the decision of the South Jakarta District Court which has canceled the decision of the KPPU stating that PT Carrefour Indonesia held a monopoly in the retail trade.

Cassation proposed by the KPPU to the Supreme Court was finally rejected by the Supreme Court through the Supreme Court decision No. 502 K/Pdt.Sus/2010 by the following considerations:

a. Goods sold by PT Carrefour Indonesia are goods that are substitutes, or even the same as the goods sold by other modern retailers in the form of mini markets, supermarkets, hypermarkets, depstore, wholesalers including special modern shop, at national or local level
b. PT Carrefour Indonesia is not obstructing any party that wants to do the same business activities or other businesses can not enter into the modern retail business competition to sell the same product
c. PT Carrefour Indonesia on Carrefour's market share on the type of goods in Modern Retail sector is far below 50%
d. Based on the study by AC Nielsen, the market share of PT Carrefour Indonesia before the acquisition of Alfa Retailindo 14.5% and after the acquisition of Alfa Retailindo to 17% and based on study of Mars

Indonesia as well as data from Euromonitor showed the market share of PT Carrefour Indonesia was far below 50 %, so PT Carrefour Indonesia did not have a dominant position.

The consideration of the Supreme Court in giving their judgement is related to the South Jakarta District Court judgment in which the consideration of the South Jakarta District Court in dismissing the KPPU's decision was also obtained from the evidence submitted by PT Carrefour Indonesia. Some of the consideration are as follows:

First, in regarding the application of article 17 paragraph (1) of Law No. 5 of 1999, the judges reffered to article 17 paragraph (2) in which PT Carrefour is considered to control the production and/or marketing if it meets the following requirements:

a. Goods and/or services have no substitution
b. Other businesses cannot join into the same competition of goods or services
c. Controls more than 50% market share or certain types of goods and services.

This consideration mentioned in the article 17 were regarded bias because it was not clearly stated whether all of the three things or any item of these should be proven or not. The judges, in this case thought that the KPPU did not consider the first and second criteria in article 17 paragraph (2). In the KPPU explanation, it did not respond to the

arguments given by PT Carrefour Indonesia although these arguments were related to the first and second terms or conditions.

Related to the first requirements and criteria in which the goods had no substitution, the judge agreed with the arguments given by PT Carrefour Indonesia. In this case, the judges thought that PT Carrefour Indonesia was a company working in the marketing or sale of various types of retail goods, known as modern business retails. The goods sold by Carrefour were those that had many substitutions or similar to the goods sold by other retailers, such as supermarkets, hypermarkets or mini market. This can be seen at the following table:

Table 5. Description of The Same Type of Goods in The Modern Retail

	Mini Market		**Supermarket**					**Hypermarket**			**Cash & carry**	**Dept. Store**			**Speciality Stores**				
Category	Indomaret	Alfamart	Hero	Giant Supermarket	Superindo	Food Mart	Robinson	Hypermarket	Giant	Carrefour	Makro	Matahari	Ramayana	Centro	ACE Hardware	Electronic Solution	Best Denki	Index Funishing	Mitra 10
Daily needs																			
beverages	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y								
Cleaning Product	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y				Y				
Body Care Product	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y								
Food	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y								
Fresh Products																			
Vegetable			Y	Y	Y	Y	Y	Y	Y	Y	Y								
Fruit	Y	Y	Y	Y	Y	Y	Y	Y											
Meat			Y	Y	Y		Y	Y	Y	Y	Y								
Etc.																			
Stationery and Books	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y				Y				

Home Cleaning tools			Y	Y	Y	Y	Y	Y	Y	Y	Y				Y				Y
Battery Lamp	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y				Y				
Garden Tools																			
Building and Electricity Tools		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y				Y				Y
Bike Sport								Y	Y	Y	Y				Y				
Automotive															Y				
Furniture															Y			Y	Y
Luggage								Y	Y	Y	Y	Y	Y	Y	Y				
Texil																			
Clothes								Y	Y	Y	Y	Y	Y	Y					
Towels, Bed Linen, Tableclothes, pillowcase												Y	Y	Y				Y	
Baby gear								Y	Y	Y	Y	Y	Y	Y					
Underwear	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y					
Accessories													Y	Y	Y				
footwear	Y	Y	Y					Y	Y	Y	Y	Y	Y	Y	Y				
Elektronic																			
Refrigrator, washing machine								Y	Y	Y	Y					Y	Y		
Iron, rice cooker, blender, coffe maker								Y	Y	Y	Y				Y	Y	Y		
Camera digital								Y	Y	Y	Y								
Hi Fi, Audio								Y	Y	Y	Y					Y	Y		
TV, LCD, DVD Player								Y	Y	Y	Y					Y	Y		
Handphone								Y	Y	Y	Y					Y	Y		

Source: KPPU verdict No. 9/KPPU-L/2009

From the table above it can be seen that there is a similarity of goods sold by Carrefour hypermarket with the goods sold by other modern retailer, either in the form of minimarket, supermarkets, department stores, wholesalers, and other modern specialist shops.

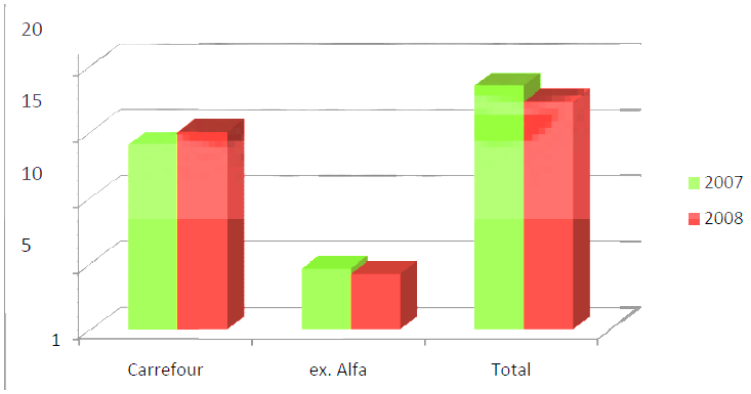
Goods sold by Carrefour were not exclusive, but goods which were the same, similar, or there was a substitution with other goods sold by other modern retailers. Moreover, in terms of its bussiness type, there was similarity with other business substitution because there were many modern retailers in Indonesia with a variety of formats, both at local and national levels such as described by AC Nielsen data. Thus, this is correlated with the data, and it can be concluded that the elements of production control and or marketing of goods regulated by Article 17 paragraph (2) letter a of Law No. 5 1999 was not proven.

The next consideration of the judges were related to the second criteria in the article, stating “other businesses can not join into competition for the similar goods or services”. In this case, the judge were in agreemnet with the defense of PT Carrefour Indonesia in which there was not enough evidence that PT Carrefour Indonesia inhibited or restricted any party who wanted to do the same business activities. Then PT Carrefour Indonesia business activities could not be regarded as prohibiting other businesses to join into the modern retail business competition. Other businesses had the freedom to join fully into similar modern retail market or similar business activities. This proved that in fact PT Carrefour did not have a role in creating barriers of market competition (no entry barrier) in the modern retail sector in Indonesia. This is because there were a number of modern retailers which always increased from time to time. In addition, each of the modern retailer is

constantly expanding to open up land or new outlets without any problem, so that each year the number of stores increase. In selling similar goods, other business agents have the freedom to join fully into the modern retail market sectors such as on the format of minimarket, supermarkets, department stores, hypermarkets, wholesalers, including modern store specialists. Thus, the elements of article 17 paragraph (2) letter b of Law No. 5 1999 was not proven.

The following discussion is concerning with the relevant market related to market share. In this case the relevant market is the modern retail sector in Indonesia. PT Carrefour Indonesia did not control more than 50% of market share in the modern retail sector. Based on AC Nielsen's study, the number of Carrefour's market share in modern retail market sector reached up to only 17% in 2008. This is supported by the evidence in the table below:

Table 6. Carrefour Market Share in Modern Retail



Source: Data of AC Nielsen

On the other hand, based on the study of MARS Indonesia Carrefour's market share in modern retail sector was only 5.8% in 2008. Then, based on Euromonitor data in the KPPU's decision, Carrefour's market share only amounts up to 19.63% in 2007. It can be concluded that the share of Carrefour market is still far below 50%. On the other hand, the KPPU in its decision and its explanation found that PT Carrefour Indonesia had a market share above 50%. In this case the judge considered that there is a difference between Carrefour's market share precentage according to its own version and according to the KPPU's version. This deference is not based on the documents or evidence used by Carrefour and the KPPU, but it is based on the differences in detemining the relevant market.

According to the PT Carrefour version, the relevant market is a modern retail in all forms both at local and national levels. On the other hand, the KPPU had different opinion in its explanation, in which what is meant by the relevant market is the market share of the downstream market and market share upstream, which only included supermarkets and hypermarkets that have national networks and excludes hypermarkets and supermarkets that have only local network. But in this verdict, the judge did not agree with the conclusions of the KPPU. Thus, the market share of Carrefour which was based on the study of AC Nielsen stated that the number of Carrefour's market share in modern retail sector was 17% after the acquisition of PT Alfaretailindo in 2008.

In addition, based on the study of MARS Indonesia, Carrefour's market share in modern retail sector was 5.8% in in 2008 and based on the data from Euromonitor the Carrefour's market share was amounted to 19.63% in 2008. Therefore it can be concluded that Carrefour's market share was still well below 50%, thus, the element of control more than 50% market share referred to in Article 17 paragraph (2) c of Law No. 5 1999 was not proven.

Therefore, the consideration of the judges of the Supreme Court which stated that:

a. goods sold by PT Carrefour Indonesia are goods that are substitutes; or even the same as the goods sold by other modern retailers in the form of mini markets, supermarkets, hypermarkets, Depstore, wholesalers including Modern Shop Special, national or local level
b. PT Carrefour Indonesia is not obstructing any party that wants to do the same business activities or other businesses can not join into the modern retail business competition to sell the same goods

is completely in accordance with the provisions of Law No. 5 1999 and does not deviate from the rules and provisions that apply legally.

Second, the issue of law raised by PT Carrefour regarding the application of Article 25 paragraph (1) of Law No. 5 of 1999 was related to dominant position. In its decision, the KPPU stated that PT Carrefour Indonesia also violated article 25 paragraph (1) letter a of Law No. 5 1999 which stated that “Businesses are prohibited from using a dominant

position either directly or indirectly to: a. Sets out the terms of trade with the aim of preventing and or deter consumers to obtain goods or services that compete, in terms of both price and quality."

There are two elements in the article which has a dominant position and setting out the terms of trade to prevent and/or deter consumers to obtain goods and/or services that compete. This article was also similar to article 17 paragraph (1) in which one of the conditions or criteria are met, then the alleged businesses of this article is considered proven. Thus, PT Carrefour can be found guilty of violating Article 25 paragraph (1) of the dominant position. The panel of judges referred to the application of Article 25 paragraph (1) to Article 25 paragraph (2) a which stated that: "businesses have a dominant position as referred to in paragraph (1) if: a. One business actor or a group of business actors controls 50% or more of the market share of one type of goods or services." Under the terms of that article it is clear that a new businesses can be said to have a dominant position if the market share is 50% or more of one kind of or certain services. In this case, PT Carrefour did not have a dominant position since its market share is far below the 50%. The data generated by AC Nielsen revealed that Carrefour's market share in modern retail prior to the acquisition of PT Alfa Retailindo was only 14.5% and after the acquisition increased up to 17%. In addition, the study of MARS Indonesia also stated that after the acquisition of PT Alfa Retailindo by PT Carrefour Indonesia, the national retail market share

was 2.7% and in modern retail was 5.8%. It is based on the following table:

Table 7. Market Share of Each Hypermarket

Gerai	Pangsa Pasar di Toko Modern *	Pangsa Pasar di Ritel Nasional **
Carrefour	5,8 %	2,7 %
Hypermart	3,8 %	1,8 %
Giant	2,6 %	1,2 %
Makro	2,4 %	1,1 %
Total	**14,7 %**	**6,8 %**

Information:

- * = consisting of hypermarkets, supermarkets, minimarkets and grocery (not including department store format)
- ** = consisting of hypermarkets, supermarkets, wholesale and traditional markets (not including department store format)

Source: MARS Indonesia

Retail market share surveyed by AC Nielsen and MARS Indonesia did not include the department store format, in which if the market shares of department store format also calculated, the market share of PT Carrefour Indonesia would be smaller. It also proved that there was no concentration of economic power or market dominance by PT Carrefour because the market share of Carrefour was very small and insignificant, or well below 50%.

Regarding the positions of PT Carrefour as businesses that did not have a dominant position can be seen through the fact that the supplier did not depend on PT Carrefour and suppliers had many options of modern stores as their supply because there were a number of business operators or retailers involved in the business, either new retailers or old

retailers. Thus there are many choices or alternate format retail outlets. Competitors of PT Carrefour as modern retailers are numerous and powerful, such as Hypermart, Giant, Hero, Macro, Indomaret, Ramayana, ACE, Metro etc. The fact that there are many retailers in this business sector ultimately benefit the consumer and the supplier. For those consumers, they have many choices of places to shop at very competitive prices, while for suppliers, they have many choices as the supply of its products. It can be correlated that suppliers can easily and freely stop to become the suppliers of PT Carrefour and they can become suppliers of other retailers. Suppliers have the freedom to choose to become the supplier or cease to be the supplier of PT Carrefour. This condition proves that PT Carrefour does not have a dominant position and PT Carrefour also do not have control of the market as alleged by the KPPU and the elements of article 25 paragraph (1) letter a and article 25 paragraph (2) letter a were not proven.

In summary, the judges disagreed with the conclusions of the KPPU in its decision which stated that the definition of the relevant market covered only national hypemarket and supermarket, and did not include modern retail nationwide such as mini markets, department stores, and wholesale. Thus, Carrefour's market share based on AC Nielsen study and MARS Indonesia was the correct data, as well as the data processed from the KPPU based on data obtained from Euromonitor data. Based on this facts, the judges considered that there was no

concentration of economic power or market control done by Carrefour as its market share in modern retail sector was still far below 50%. Therefore, the judges decided that Carrefour did not have a monopoly position and a dominant position in the modern retail market before and after the acquisition of PT Alfa Retailindo. Therefore, based on such consideration, the cassation filed by the KPPU to the Supreme Court was rejected, and it was correct and in accordance with the procedures and the implementation of Law No. 5 of 1999 in order to enforce the rule of law in the field of competition law in Indonesia.

2. Legal Consequences of Supreme Court Decision

After the Supreme Court rejected all cassation by the KPPU, then legally the Supreme Court issued Decision Number 502 K/Pdt.Sus/2010. The Impact or legal consequences that occurred after the Supreme Court decision is as follows:

a. The Impact on KPPU

The KPPU is an institution that has the authority to oversee the businesses in operation to refrain from monopoly and unfair competition. Implementation of the KPPU's supervisory function must be optimized in the acquisition, potential preventive ability can be carried out by the KPPU prior to the acquisition. The use of the authority to conduct prevention can be done to reduce the impact of anti-competitive actions to the public and consumers. Enforcement by the KPPU is waiting for the occurrence of monopolistic practices and

unfair business competition as if it was left because there are no regulations governing each company will make acquisitions required to report to the KPPU as a supervisory agency business competition.

So after the Supreme Court rejected the KPPU's cassation, there is a need for special regulations for the KPPU concerning the company which will undertake the acquisition in which it must first seek approval from the KPPU. It is necessary in order to anticipate the actions of monopoly in business competition in Indonesia. It is because at the time the KPPU performs its duties, it suggested that the impact of the acquisition of the trade was regarded a monopoly action but the decision of Supreme Court and District Court was different.

The acquisition of PT Alfa Retailindo by PT Carrefour Indonesia should ideally not only be reported to the authority of the capital market, but also to the KPPU, because the KPPU's role is very important to assess the competitive impact of the acquisition of PT Alfa Retailindo by PT Carrefour Indonesia. Therefore, after the Supreme Court rejected the cassation of KPPU, the KPPU needed to monitor PT Carrefour Indonesia to ensure that PT Carrefour Indonesia did not go into the mini market through the acquisition of companies, namely PT Alfa Retailindo. The KPPU also needed to monitor market behavior of PT Carrefour Indonesia and PT Alfa Retailindo related to the sale price or they did not do predatory pricing. The KPPU needed to monitor that PT Carrefour Indonesia and PT Alfa Retailindo did not

prohibit small enterprises to grow. PT Carrefouur trading terms to its suppliers should be clear and transparent based on the Presidential Decree No. 112 of 2007 and Ministry of Trade Regulation No. 53 of 2008..

b. The Impact on PT Carrefour Indonesia

After the Supreme Court's decision, the market power of PT Carrefour Indonesia in the modern retail market will grow by acquisiting PT Alfa Retailindo, and so is its market share of PT Carrefour Indonesia. This can make PT Carrefour apply trading terms to its suppliers so that it can lead to the abuse of market power by forcing various conditions of trading terms which can give disadvantages to the suppliers.

In addition, the high barrier to join competitions from other business causes the difficulty in monitoring of PT Carrefour Indonesia through the market mechanism. Thus, in the KPPU's supervision are essential.

c. The Impact on Bussiness Competition in Indonesia

Basically not all acquisitions can be profitable, but it can also cause harm. Acquisitions can also be used as a tool to shut down the business in a way competitors bankrupt or closing the acquired company. Acquisitions also adversely affect the interests of society and foster unfair competition between companies. This is important,

considering that if the acquisition of shares is in a dominant position, then the acquirer legally has control in the company management.

Regarding the case of the majority of PT Alfa Retailindo acquisition by PT Carrefour Indonesia over 75%, it could be categorized that the position of PT Carrefour Indonesia is dominant towards PT Alfa Retailindo. This can have broad impact, especially PT Alfa Retailindo is one retail companies that have locations and a large market share and the dominant position and spread in various remote areas in Indonesia. In addition, the decision of the Supreme Court has an impact to small businesses because of PT Alfa Retailindo and PT Carrefour Indonesia are trading together with small businesses in various areas, so they have chances of having unfair competition and they have a negative impact on the existence of traditional small retailers.

Article 13 of Law No. 25 Year 2007 on Capital Investment stated that "The Government shall establish a business field reserved for micro, small, medium, and cooperatives as well as business fields to large businesses with a condition that they must cooperate with micro, small, medium, and cooperatives."[15] After the issuance of Supreme Court decision supporting the acquisition of PT Alfa Retailindo by PT Carrefour Indonesia, article 13 of Law No.25 of 2007 has not been fully implemented because of the large retail

[15] Indonesia, Law No. 25 Year 2007 on Capital Investment Article 25

business such as PT Carrefour Indonesia and PT Alfa Retailindo can harm many traditional retailers in which most of them are small businessmen.