

CHAPTER I

INTRODUCTION

A. Background of Research

National development in Indonesia is directed for achieving the enhancement of the prosperity of Indonesian citizen.¹ For achieving that prosperity, all of that matters has already become the responsibility of the state. Because of that, one thing that can be done by the state is doing economic activities. There are some types of economic activities done by the state such as establishing the State-Owned Enterprises. In the effort to realize people economic prosperity, the government has duty to allocate, regulate, and manage all of the resources and all of the production factors which exist in the state. Therefore, the state establishes enterprise which is known as State Owned Enterprises,² in which the enterprises have function to manage all of the resources and production factors which exist in the state, for economic prosperity of the people.

Based on Article 1 point (1) of Law No. 19 of 2003 on State Owned Enterprises, the State-Owned Enterprises is defined as a state company which all or half of the capital is owned by the state through direct inclusion which comes from separated state wealth.

¹ Galuh Puspaningrum, *Hukum Persaingan Usaha: Perjanjian dan Kegiatan yang Dilarang dalam Hukum Persaingan Usaha di Indonesia*, Aswaja Pressindo, Yogyakarta, 2013, p. 1.

² Andy M, 2012 “Peran BUMN dalam Sistem Perekonomian Indonesia (Ekonomi Kerakyatan)” http://web.unair.ac.id/admin/file/f_19997_sei11.pdf, accessed on 20 October 2017 at 11.02

In running the business, the State-Owned Enterprises has two elements which are very essential; as state element in one side because the state act as stock holder and on the other side act as business element, so State Owned Enterprises can be called as a company that has special characteristics. According to Anoraga, this special characteristic is formulated as follows “A corporation clothed with the power of government but possessed the flexibility an initiative of a private enterprise”.³ Therefore, the researcher has opinion that although State Owned Enterprises is independent legal entity, in the business activity State Owned Enterprises is very potential to be influenced by the state which act as stock holder. This thing is appropriate with Article 1 point 2 of Law No. 19 of 2003 which regulate that capital of State Owned Enterprises is divided into stock in which all or at least 51% (fifty-one percent) of that stock was owned by the State Republic of Indonesia. The majority of stock holder has big enough control in business activity done by State Owned Enterprises. With minimum of 51% of vote, it is very possible that most of every company policy is determined by majority stock holder⁴ in this case the state was the holder of stock majority. However, the question is how far the state by its status as the stock holder can interfere the business activity of State Owned Enterprises remembering that State Owned Enterprises was an independent legal subject.

³ Nur Fadjrih Asyik, “Political-Economy Accounting Perspective: Landasan Baru Pemberdayaan BUMN”, *Jurnal Investasi*, Vol. 6, No. 1, 2010, p. 64

⁴ Ridwan Khairandy, 2009, *Perseroan Terbatas (Doktrin, Peraturan Perundang-Undangan, dan Yurisprudensi)*, Yogyakarta, Total Media, p.195.

When talking about state intervention, actually the intervention is not always having bad ending. In the context of economic, the existence of government intervention become an effort done by the government in regulating the way of economic activity in order to follow the corridor of prevailing law.

The function of regulating a state can be said as intervention of the state against the market in the form of “competition regime”. This regulation function is very needed as step to maintain market in order it is still competitive and also to protect the consumer from the actions of business actors which is abusive.⁵ Therefore in running the regulation function, the state issued the Law No. 5 of 1999 on Prohibition of Monopoly Practice and Unfair Business Competition. The formulation of the law has objectives as signs and limitation for business actors in conducting business activity in order they are not arbitrary in running their business, so it will create fair competition in market. One of the objectives on formulation of Law No. 5 of 1999 is to maintain public interest and enforce efficiency of national economic as one effort to increase people prosperity.⁶ The Law No. 5 of 1999 is valid and binding generally including for State Owned Enterprises and private business actors. The validity basically in line with Article 3 of Law No. 19 of 2003 on State Owned

⁵ Togar Tanjung, “Persaingan Usaha dan Peran Pemerintah”, <http://law.ui.ac.id/v3/persaingan-usaha-dan-peran-negara/> accessed on 25 oktober 2017

⁶ Ezra Monica Saragih, “Analisis Efektivitas Undang-Undang Nomor 5 Tahun 1999 tentang Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat Terhadap Pembatasan Praktek Kartel di Indonesia”, 2015, Yogyakarta, Universitas Atma Jaya, <http://e-journal.uajy.ac.id/9244/1/JURNALHK10977.pdf> accessed on 22 November 2017 at 12.37

Enterprises which said that this Law (Law No. 19 of 2003), statutes, and other legislation, including the Law No. 5 of 1999 are applied against State Owned Enterprises.

In terms of advantage side, essentially the direct appointment by the State Owned Enterprises in procurement of goods and/or services is very good program because it will cut the cost in running any activities. Normally the procurement has to be done by the tender offering competition where many company offer their deal to the auction committee and the auction committee will assess the company deal which one is better and proper which is already regulated in the President Regulation No. 54 of 2010. However, since the direct appointment by State Owned Enterprises was recognized as the method of procurement of goods and/or services by State Owned Enterprises that does not need to follow the tender auction procedure, the State Owned Enterprises only need to directly choose the provider of the goods and/or services using its own subsidiary company or affiliated State Owned Enterprises. Of course, this matter causes the State-Owned Enterprises well developed. But if we look from the side of business competition, the direct appointment by the State Owned Enterprises in the procurement of goods and/or services where it is allowed to directly appoint the subsidiary company or affiliated State Owned Enterprises could have a potential to violate provisions of the Article 19 letter d on discrimination and also Article 22 of Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition in which business actors are prohibited from conspiring with other parties to rule and or determine

tender winner so it can cause the unfair business competition.

The State Owned Enterprises which is allowed to conduct direct appointment in procurement of goods and/or services in its scope emerge a question whether the State Owned Enterprises conduct direct appointment the providers in the procurement of goods and/or services violate the provision in Article 19 letter d and also Article 22 of Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition. Conspiracy that happen among business actors with tender committee or auction committee was done starting from the plan of procurement of goods and/or services by determining the requirement of qualification and technical specification that lead into a brand, so it obstructs the other business actors to join the tender. Procurement of goods and/or services which done by the direct appointment can remove the business competition and cause clumsiness in the price that agreed to procure the goods and/or services, considering in the direct appointment, there is no price comparison that offered by other companies. Whereas the fair competition needs in the business, because with the fair business competition so that every company which compete will improve the grade and quality on what the company offer.

The direct appointment gives the impact in the procurement of goods and/or services where that matter will remove the essential of the business competition in giving the offer of goods and/or services needed in the procurement of goods and/or services by the State-Owned Enterprises. Considering the subsidiary company of State Owned Enterprises or affiliated

company of State Owned Enterprises become the winner of tender directly in the procurement of goods and/or services by State Owned Enterprises. This condition has potential of incompatibility of the specification and the price with the grade and quality of goods and/or services which will be procured, because there are no competitor companies that can and want to compete in procuring the goods and/services. This indicates a violation of the provision in Article 19 letter d of Law No. 5 of 1999 on Prohibition of monopoly practice and unfair competition where by the existence of the direct appointment by State Owned Enterprises to the subsidiary company of State Owned Enterprises or other State Owned Enterprises, the appointed company will be one and only company that become the provider of goods and/or services in the State Owned Enterprises company.

Regulation on the procurement of goods and/or services in the State-Owned Enterprises environment cause polemic in the business world, of course related to the competition principle aspect such as the discriminative action in the form of barrier to entry for the non- State-Owned Enterprises business actors and there is no competition in the offering of price in the procurement of goods and/or services by State Owned Enterprises.

Based on the above fact, I want to propose the undergraduate thesis under the title **“UNFAIR COMPETITION IN TENDER: A CASE STUDY OF DIRECT APPOINTMENT IN PROCUREMENT OF GOODS AND/OR SERVICES BY STATE OWNED ENTERPRISE”**

B. Research Problems

1. How is the regulation on the direct appointment to the state-owned enterprise in the procurement of goods and/or services by the government?
2. How is the legal status of direct appointment by state owned enterprise in the procurement of goods and/or services against the business competition law?

C. Objectives of Research

1. To analyze the regulation on the direct appointment to the state-owned enterprise in the procurement of goods and/or services by the government.
2. To analyze the legal status of direct appointment by state owned enterprise in the procurement of goods and/or services against the business competition law whether it is contrary to the business competition law or not.

D. Benefits of Research

The benefit of this research are:

1. Theoretical Benefit

To give detail and clear information on the direct appointment by State Owned Enterprises in the procurement of goods and/or services reviewed from the general procedure of procurement of goods and/or services and the perspective of business competition law.

2. Practical Benefit

Become the reference in the relevant field of study and give clear information to public society about direct appointment by State Owned Enterprises in the procurement of goods and/or services.