



CRITICAL REVIEW OF THE IMPLEMENTATION OF THE MAKING OF SOE AS A HOLDING FROM ANTI-MONOPOLY AND UNFAIR BUSINESS COMPETITION PERSPECTIVE

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ABSTRACT

This study aims to analyze the potential for SOE holdings to violate Law 5/1999. This study was conducted using a normative juridical method because the study was based on library research to obtain secondary data, sourced from primary, secondary, and tertiary legal materials. The specification of the research was descriptive-analytical because the author described the holding of SOE and then analyzed it to see if it has the potential to cause a violation of Law 5/1999. Data analysis using a qualitative juridical method. The results of the study indicated that the process of establishing an SOE holding based on Government Regulation Number 72 of 2016, so far has not been proven to have violated Law 5/1999. However, even though Article 33 of the Constitution of the Republic of Indonesia and Article 51 of Law 5/1999 intend SOE to be able to carry out a monopoly, the establishment of an SOE holding should still be able to guarantee the rights of the public to continue to do business in a healthy manner. The government needs to immediately stipulate regulations regarding governance in holding companies to maintain a competitive, healthy, and non-monopolistic business climate.

Keywords: monopoly; SOE holding; state-owned enterprises; unfair business competition

INTRODUCTION

In his inauguration speech as the President of the Republic of Indonesia for the 2019-2024 period, President Joko Widodo implied that he would transform economic policy from an industry based on natural resources to an industry based on added value. A bold step was taken by the Government by gradually issuing a ban on the export of raw materials, which has been the mainstay for generating foreign exchange, including a ban on nickel exports in 2020, a ban on bauxite exports in 2022, and subsequently a ban on copper exports in 2023. On the other hand, the Government has begun to focus on developing downstream industries, for example, currently, there are 21 smelters in the country, which include various mineral refining facilities such as nickel, bauxite, iron, copper, and manganese. As stated by the Minister of Investment of the Republic of Indonesia, Bahlil Lahadalia, in a Public Lecture at the Faculty of Law, Padjadjaran University on February 16, 2022, the downstream of mining minerals has a positive impact on increasing the export value of mining and mineral derivative

products. In the past 3-4 years, exports of nickel derivative products were only worth USD1.1 billion. In 2021, the export value of nickel derivative products is estimated to reach USD 20 billion¹.

It should be noted that the intended economic transformation is aimed at changing the basis of Indonesia's domestic economic growth, which so far has come from consumption activities to production activities. It is hoped that in the future Indonesia will not only be seen as a market in international trade but also be able to become a central player in production and industrial activities, at least for the national scope. The role and support of all stakeholders of the national economy, especially business actors, are needed to be able to make Indonesia the host of its own country.

As stated by Bung Hatta, the Pancasila Economic system has three sectors with three business actors, namely:

¹ Presentation of the Minister of Investment of the Republic of Indonesia in a Public Lecture of the Faculty of Law, Padjadjaran University on February 16, 2022

1. the cooperative sector, which is a forum for the people's economy;
2. the state business sector, for the management of strategic and important production branches (paragraph 2 Article 33) and managing natural resources (paragraph 3 Article 33); and
3. the private business sector, business actors other than the cooperative sector, and the state business sector².

Bung Hatta explained that the control by the State as stipulated in Article 33 of the 1945 Constitution does not necessarily mean that the State itself must carry out the business or the State itself is the entrepreneur (*ondernemer*), but the State can also act as a regulator³.

In line with the interpretation of Article 33 of the 1945 Constitution, related to the management of natural resources, it refers to several decisions on judicial review of laws by the Constitutional Court of the Republic of Indonesia, for example, Law 27/2007 concerning Management of Coastal Areas and Small Islands⁴, Law 22/2001 concerning Oil and Gas⁵, and Law 7/2004 concerning Water Resources⁶. It can be understood that Constitutional Judge believe that the implementation of State control through the functions of regulation, management, administration, and supervision (*regelendaad, beheersdaad, bestuursdaad, toezichthoudensdaad*) cannot be separated from the purpose of Article 33 paragraph 3 of the 1945 Constitution, which is to be used for the greatest prosperity of the people.

In order to achieve the goal of being "used for the greatest prosperity of the people", the State is present as a business actor by forming a State-Owned Enterprise (SOE). The formation and establishment of SOEs by the Government are not only based on economic goals (profit-oriented), but SOEs must also be able to function as agents of development⁷, as follows:

² Mohammad Hatta, *The description of Article 33 of the 1945 Constitution*, Penerbit Mutiara, Jakarta, 1977, page 14

³ Mohammad Hatta, *Ibid*, page. 28

⁴ Constitutional Court Decision No: 03/PUU-08/2010

⁵ Constitutional Court Decision No: 36/PUU-X/2012

⁶ Constitutional Court Decision No: 85/PUU-XI/2013

⁷ Paragraph III of the General Elucidation of Law Number 19 of 2003 concerning State-Owned

1. encouraging economic growth, by contributing to the State Budget through taxes and dividends, realizing optimal performance to support the sector through the provision of energy, and production inputs, and also acting as a companion for small entrepreneurs;
2. pioneering businesses through opening operational areas in remote areas, providing services in fields that have not been carried out by the private sector, and implementing public service obligations;
3. providing financing and implementing infrastructure development in the construction, telecommunications, and transportation sectors;
4. strengthening of the financial sector, which is marked by the fact that 3 out of 10 banks in Indonesia classified as BUKU 4 category are state-owned enterprises (BRI Bank, Bank Mandiri, and Bank BNI), providing and distributing MSME loans and mortgages, pawnshops, insurance, and stock exchange movers; and
5. encourage the creation of superior human resources through the development of the education sector by building educational facilities and infrastructures.

The management of SOE is not always able to run effectively but also faces various challenges both domestically and internationally. To increase the capability and capacity of SOEs, so that national SOEs are able to face sectoral challenges and compete in the international arena, the Government through the Ministry of SOEs has launched a program for the establishment of SOE sectoral holding.

Historically, SOE holding is nothing new. The practice of SOE holding has been carried out by the Government since 1995 through the establishment of SOE holding in the cement sector. At that time PT Semen Gresik became the holding company, after first taking over the shares of two other state-owned companies shares, namely PT Semen Padang and PT Semen Tonasa. The process of the making of SOE as a holding has begun to be intensified since 2017, in line with the implementation of the rightsizing policy by the Ministry of SOE.

Enterprises

The initial step was taken by the Government to carry out the program of making SOE as a holding is to establish a legal basis. One of the tasks of the bureaucracy is to carry out the formation of public policies that can be accepted by all levels of society⁸. For this reason, the Government has established the legal basis for implementing the making of SOE as a holding, which is Government Regulation Number 72 of 2016 (PP 72/2016).

Taking into account the main considerations for establishing SOE holding, namely so that national SOEs are able to face sectoral challenges and in order to compete in the international arena, what is then interesting to study is whether this sectoral SOE holding policy results in violations of regulations in the field of anti-monopoly and anti-business competition as regulated in Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition (Law 5/1999). In addition, in the event that there are no violations, it is also interesting to analyze more deeply in order to identify gaps that might result in anti-business violations in the process of establishing and/or operating SOE holdings, and then formulating anticipatory steps that can be used as input for relevant stakeholders as a risk mitigation effort.

This research complements the previous research conducted by Nina Amelia Novita Sari in her thesis entitled "The Establishment of the Aviation Sector SOE Holding in the Perspective of Business Competition Law" with an update to this research in the form of a wider scope.

RESEARCH METHOD

This study used a normative juridical approach with descriptive analysis. The author conducted research preparation by explaining and analyzing legal provisions and getting adapted to current conditions. Furthermore, the study uses secondary data sources consisting of primary legal materials in the form of Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition and Government Regulation Number 72 of

⁸ Nizar Apriansyah. *Peran Pemerintahan Dalam Pembentukan Kebijakan Hukum* (The Role of Government in the Formation of Legal Policy), *Jurnal Ilmiah Kebijakan Hukum*, Vol. 10, No. 2, 2017. page 190.

2016 concerning Amendments to Government Regulation Number 44 of 2005 concerning Participation Procedures and Administration of State Capital in State-Owned Enterprises and Limited Liability Companies. Then, secondary legal materials were in the form of books and legal journals related to the problem being researched, tertiary legal materials in the form of a Legal Dictionary, Big Indonesian Dictionary, and mass media (electronic/print), as well as other required reading sources. In a pandemic condition, data collection techniques were carried out online with data analysis techniques starting from collecting, sorting data, displaying data, and drawing conclusions on the data so that analysis was created in this study.

DISCUSSION AND ANALYSIS

Policy of the Making of SOE as a Holding Policy

As a business entity in the form of a Limited Liability Company, the purpose and objective of establishing SOE are not only for economic purposes, which is to manage strategic economic sectors so that they are not controlled by certain parties but also for social purposes, in which SOE has an obligation to meet the needs of the society (public service obligation). The social purpose of SOE is what distinguishes SOE from the private sector, that SOE is not only profit-driven⁹.

With the wider role of SOEs in national development, it is necessary to increase value, strengthen competitiveness, expand business networks and be independent of SOEs. The government's strategy to achieve this is, for example, through restructuring and privatization. The restructuring of SOE is intended to revitalize SOE. By doing so, it is hoped that SOE can operate more efficiently, professionally, and transparently.

In carrying out the task of fostering SOEs, the Ministry of SOE restructures through a rightsizing program, with various SOE corporate action scenarios available, including stand-alone, merger/consolidation, forming a sectoral group company (holding), divesting, and liquidating.

⁹ Boby Wilda Estanto, Urgensi Holding BUMN dalam Peningkatan Sektor Pelayanan Angkutan Darat dan Udara, *Masalah - Masalah Hukum (The Urgency of the making of SOE as a Holding in Improving the Land and Air Transport Service Sector; Legal Issues)*, *Jilid 47 No. 2*, 2018, page 91

SOE Holding is intended to optimize the role of SOE through synergies between SOEs, downstream, and increasing local content. The establishment of SOE holding aims to increase the capacity and capital capability of SOE. It is projected that from 2020 to 2024 there will be at least nine sectoral SOE holdings, namely the pharmaceutical sector, insurance sector, survey service sector, food industry sector, manufacturing industry sector, defense industry sector, port service sector, media industry sector, and tourism sector¹⁰.

The establishment of SOE holding is carried out by a mechanism for transferring state-owned share ownership in the SOE target to the SOE parent. SOEs are expected to have independence in capital. Furthermore, stronger capital can create a multiplier effect on SOEs so that they can make SOEs competitive and ultimately succeed in attracting investment.

The issuance of Government Regulation 72/2016 is intended to explain and confirm the legal basis and guidelines for the establishment of SOE holding, with the substance of the regulation, as follows:

1. the process of establishing SOE holding is carried out by means of a mechanism for transferring State shares to other SOEs to become equity participation in SOE; and
2. regulating the status of State control in SOE holding subsidiaries which are former SOEs through ownership of Dwiwarna A series shares. With this Dwiwarna share ownership, the Government still has special rights in the subsidiaries of former SOEs, among others, having special authority to appoint members of the board of directors and commissioners, amend the Articles of Association, change the structure of share ownership, and to approve acquisitions by other companies.

In Government Regulation 72/2016, the mechanism for establishing SOE holding is not the same as the mechanism for privatization. The restructuring of SOE with a holding mechanism is carried out by forming a group company, with one of the SOE companies being the holding

¹⁰ Regulation of the Minister of State-Owned Enterprises Number: PER-8/MBU/08/2020 concerning the Strategic Plan of the Ministry of State-Owned Enterprises for 2020-2024

company. The privatization of SOE is the sale of shares so that the shares of SOE are transferred to other parties¹¹. Through SOE holdings, in absolute terms, the value of the State's shares in companies incorporated in the holding remains the same (not reduced). The structure of state ownership before and after SOE holding is illustrated in the following figure: ¹²

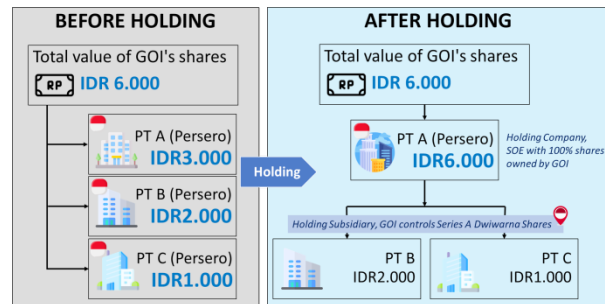


Figure 1. Structure of State Ownership in Holding
Source: Ministry of SOE, processed

From the illustration regarding the structure of State ownership before and after the SOE holding, holding is carried out by transforming state-owned shares through the mechanism of transferring shares to PT B (Persero) and PT C (Persero) to PT A (Persero). This share transformation made PT A (Persero) as the holding parent and PT B and PT C later became subsidiaries of PT A (Persero) as well as members of the holding. Referring to Government Regulation 72/2016, PT B and PT C are treated equally with SOE¹³ because the Dwiwarna shares of both companies are still owned by the government. Both of them can still accept government assignments related to public service obligations, as before the holding. In addition, PT B and PT C are still able to manage natural resources as given to SOEs.

¹¹ Jesly Yuriaty Panjaitan, *Kontroversi Holding BUMN (Controversy of the Making of SOE as a Holding)*, *Buletin APBN, 4th Edition Vol. II*, 2017, page 6

¹² <https://jdih.bumn.go.id/berita/info-grafis-pp-nomor-72-tahun-2016#:~:text=Substansi%20PP%2072%2F2016%20adalah,BUMN%2C%20tidak%20mengatur%20Privatisasi%20BUMN.>, accessed on 19 May 2022.

¹³ Rustam Magun Pikhulan and Abdul Karim Faiz, *Analisis Yuridis Tentang Kebijakan Holding Terhadap Badan Usaha Milik Negara (BUMN) Sektor Pertambangan (Juridical Analysis of Holding Policy on State-Owned Enterprises (BUMN) in the Mining Sector)*, *Diktum: Jurnal Syariah dan Hukum, Vol. 17 No 2*, 2019, page 30

The government's plan of making SOE as a holding is planned to continue to be developed, for example by adding PT Pengembangan Pariwisata Indonesia (Persero) into the second stage of the tourism sector holding and PT Garuda Indonesia (Persero) Tbk. in the third stage of tourism sector holding. In addition, there is a discourse to add PT PLN (Persero) to the energy sector holding. The latest discourse is to add PT Industri Nuklir Indonesia (Persero) as a member of the pharmaceutical sector holding. PT Industri Nuklir Indonesia (Persero) is the only SOE in the field of nuclear medicine, whose products are in the form of radioisotopes and radiopharmaceuticals. In addition, several sector groups are possible to form a holding, such as the construction and housing sector, the banking sector, and the geothermal sector.

In addition, the Ministry of State-Owned Enterprises is also regrouping its subsidiaries by establishing a holding company for the hospital and sharia banking sectors. Hospital holding is led by a subsidiary of the Pertamina Group, namely PT Pertamina Bina Medika IHC. The holding method for the hospital sector is carried out by means of consolidation and acquisition mechanisms for hospitals under the management of SOEs or non-SOEs. The holding of a state-owned sharia bank named PT Bank Syariah Indonesia Tbk is the result of the merger of several sharia subsidiaries of a state-owned bank.

SOE Holding in Indonesia is inspired by Temasek Holdings in Singapore and Khazanah Nasional Berhad as the sovereign wealth fund in Malaysia¹⁴. Temasek manages its investments and assets independently and professionally for commercial purposes, namely to maximize profits from the establishment of Temasek which reduces the role of the Government only as a policy maker and regulation in the market.

According to Toto Pranoto and Willem A. Makaliwe, reflecting on the experience of SOE holding in the cement and fertilizer sector, several important things can be learned as follows:

¹⁴ Expertise Body of People's Representative Council of Indonesia, "Draft of Academic Paper on Draft Law on State-Owned Enterprises", (2021), <<https://berkas.dpr.go.id/pusatpuu/na/file/na-106.pdf>>, [accessed on 11/03/2022]

1. PT Semen Indonesia's strategies to achieve synergy among holding members are 1) by regulating the marketing system per area; 2) by setting up an integrated marketing system; 3) by implementing a sales synergy system.
2. PT Semen Indonesia has transformed into a strategic holding so that it does not carry out operational activities.

As a holding, the parent company takes a better position by leveraging the Group's balance sheet, before each company applied for bank loans individually.¹⁵

Table 1 below informs that until the first quarter of 2022, fifteen sectoral SOE holdings have been formed. Four holdings were formed prior to the enactment of Government Regulation 72/2016, and the rest were formed after. SOE holding after Government Regulation 72/2016 is entirely led by SOE whose shares are 100% owned by the State, except for the ultra micro holding which is led by PT Bank BRI (Persero), Tbk. The establishment of four SOE holdings which was carried out before the enactment of Government Regulation 72/2016 also turned out to use the mechanism of transferring (inbreng) state shares on SOE to other SOEs. This is similar to the mechanism for establishing SOE holding which is regulated in Government Regulation 72/2016.

Concept of Business Competition Law

The Limited Liability Company Law ¹⁶ does not recognize the term holding company. However, regarding takeovers, it is known in Article 125, namely the takeover of the control of a company.

As explained above, the process of establishing an SOE holding begins with a transaction to transfer state-owned shares in an SOE company to a holding company. This transfer of shares may result in a violation of the antitrust prohibition and/or unfair business competition.

Prevention of monopolistic practices and provisions regarding the situation of fair business

¹⁵ Toto Pranoto dan Willem A. Makaliwe, "Restrukturisasi BUMN Menjadi Holding Company" (SOE Restructuring to Become a Holding Company), (2013), <https://lmfeui.com/data/Restrukturisasi_Holding_Company%20Revisi%202.pdf>, [accessed on 10/03/2022]

¹⁶ Law Number 40 of 2007 concerning Limited Liability Companies

competition has been regulated in Law 5/1999, the main provisions of which include prohibited forms of agreements (articles 4-16), prohibited

forms of activities (articles 17-24), and regarding the dominant position (articles 25-29).

No	Sector	Holding Parent	Holding Members	Legal Basis
1	Cement	PT Semen Indonesia Tbk	1. PT Semen Gresik 2. PT Semen Padang 3. PT Semen Tonasa	-NA-
2	Fertilizer	PT Pupuk Indonesia	1. PT Pupuk Kujang 2. PT Petrokimia Gresik 3. PT Pupuk Iskandar Muda 4. PT Pupuk Kaltim	Government Regulation Number 28 of 1997
3	Plantation	PT PTPN III (Persero)	PT PTPN I (Persero) to PTPN XIV (Persero)	Government Regulation Number 72 of 2014
4	Forestry	Perum Perhutani	PT Inhutani I to V (Persero)	Government Regulation Number 73 of 2014
5	Mining	PT Indonesia Asahan Aluminium	1. PT Timah (Persero) Tbk (65.005) 2. PT Aneka Tambang (Persero) Tbk (65.00%) 3. PT Freeport Indonesia (51.2%) 4. PT Bukit Asam (Persero) Tbk. (65.93%)	Government Regulation Number 47 of 2017
6	Energy	PT Pertamina	PT Perusahaan Gas Negara (Persero) (56.96%)	Government Regulation Number 6 of 2018
7	Pharmacy	PT Biofarma (Persero)	1. PT Kimia Farma (Persero) Tbk (90.02%) 2. PT Indofarma (Persero) Tbk (80.66%)	Government Regulation Number 76 of 2019
8	Insurance	PT Bahana Pembinaan Usaha Indonesia	1. PT Askrimdo (Persero) 2. PT Jamkrindo (Persero) 3. PT Asuransi Kerugian Jasa Raharja (Persero) 4. PT Asuransi Jasindo (Persero)	Government Regulation Number 20 of 2020
9	Minority	PT Perusahaan Pengelola Aset (Persero)	1. PT Indosat Tbk (14.29%) 2. PT Prasadha Pamunah Limbah Industri (5.00%) 3. PT Bank KB Bukopin Tbk (3.18%) 4. PT Kawasan Industri Lampung (20.36%) 5. PT Socfin Indonesia (10.00%)	Government Regulation Number 51 of 2021
10	Ultra Micro	PT Bank Rakyat Indonesia (Persero) Tbk.	1. PT Pegadaian (Persero) 2. PT Permodalan Nasional Madani (Persero)	Government Regulation Number 73 of 2021
11	Survey Service	PT Biro Klasifikasi Indonesia	1. PT Surveyor Indonesia 2. PT Superintending Company of Indonesia (Persero)	Government Regulation Number 66 of 2021
12	Food	PT Rajawali Nusantara Indonesia	1. PT Perusahaan Perdagangan Indonesia (Persero) 2. PT Sang Hyang Seri (Persero) 3. PT Perikanan Indonesia (Persero) 4. PT Berdikari (Persero) 5. PT Garam (Persero)	Government Regulation Number 118 of 2021
13	Tourist	PT Aviassi Pariwisata Indonesia	1. PT Hotel Indonesia Natour (Persero) 2. PT Sarinah (Persero) 3. PT Taman Wisata Candi Borobudur, Prambanan and Ratu Boko (Persero) 4. PT Angkasa Pura I (Persero) 5. PT Angkasa Pura II (Persero)	Government Regulation Number 104 of 2021
14	Defense Industry	PT Len Industri (Persero)	1. PT Dirgantara Indonesia (Persero) 2. PT PAL Indonesia (Persero) 3. PT Pindad (Persero) 4. PT Dahana (Persero)	Government Regulation Number 5 of 2022

No	Sector	Holding Parent	Holding Members	Legal Basis
15	Danareksa	PT Danareksa (Persero)	1. PT Nindya Karya 2. PT Kliring Berjangka Indonesia 3. PT Kawasan Industri Medan 4. PT Kawasan Industri Wijayakusuma 5. PT Kawasan Industri Makassar 6. PT Kawasan Berikat Nusantara 7. PT Balai Pustaka 8. PT Perusahaan Pengelola Aset 9. PT Jakarta Industrial Estate Pulogadung 10. PT Surabaya Industrial Estate Rungkut.	Government Regulation Number 7 of 2022

Table 1. List of SOE Holdings as of the First Quarter of 2022

Source: <https://jdih.setneg.go.id/>, processed

The prohibited forms of agreements are oligopoly agreements (article 4), price-fixing agreements (articles 5-8), territorial division agreements (article 9), boycott agreements (article 10), cartel agreements (article 11), trust agreements (article 12), oligopsony agreement (article 13), and vertical integration agreement (article 14).

In the form of trust, several entities are legally independent, but economically, these entities are independent because most of their equity capital is under the control of another entity. Apart from holding companies, trusts can also be formed from the merger of entities

Vertical integration can be defined as the control of several entities involved in the production chain of goods and/or services from upstream to downstream¹⁷.

There are several reasons why business actors practice vertical integration. The reasons include efficiency, the safety of raw materials, increased consumer access, transfer pricing, and eliminating competitors¹⁸.

Basically, vertical integration is a reasonable practice because it can provide economic benefits

in the form of production cost efficiency so that it can have a positive impact on consumers. However, vertical integration can also have negative effects, including price discrimination and industrial monopoly, either upstream or downstream.

Forms of activities that are prohibited in Law 5/1999 include monopoly (article 17), monopsony (article 18), market control (article 19-21), and conspiracy (article 22-24).

In the context of Law 5/1999, monopoly is control over the production and/or marketing of a particular product by a relatively large and dominant company. In a monopolistic market, there is only one seller who can control the number of products they sell, for example by looking at the amount of profit they earn, and sellers can set very high product selling prices (exceeding the fair price; excessive profit margins).

The term monopoly actually has a neutral meaning. That is the control of the production and/or distribution of a certain product by a person or group of business actors. This control does not always have negative implications. Certain types of monopoly cannot be avoided, for example, because of efficiency (*natural monopoly*) or based on the law (*statutory monopoly*)¹⁹.

Referring to the provisions of Article 17 paragraph (2) of Law 5/1999, a prohibited monopoly activity must meet the following criteria: 1) there has been no substitution for the

¹⁷ Mustafa Kamal Rokan, *Hukum Persaingan Usaha (Teori dan Praktiknya di Indonesia) (Business Competition Law (Theory and Practice in Indonesia))*, Rajawali Press, Jakarta, 2010, page 117

¹⁸ Hanifah Prasetyowati, Paramita Prananingtyas, Hendro Saptono, *Analisa Yuridis Larangan Perjanjian Integrasi Vertikal Sebagai Upaya Pencegahan Praktek Monopoli dan Persaingan Usaha Tidak Sehat (Juridical Analysis of Prohibition of Vertical Integration Agreements as an Effort to Prevent Monopolistic Practices and Unfair Business Competition)*, *Diponegoro Law Journal*, Vol. 6 No 2, 2017, Page 11

¹⁹ Adis Nur Hayati. Analisis Tantangan Dan Penegakan Hukum Persaingan Usaha Pada Sektor E-Commerce Di Indonesia (Analysis of Challenges and Enforcement of Business Competition Laws in the E-Commerce Sector in Indonesia). *Jurnal Penelitian Hukum De Jure*, Vol. 21. No. 1, 2021. page 113.

product concerned; 2) it has an impact on barriers for competitors to enter the competition (*barrier to entry*); or 3) there is a company that dominates the market share of a particular product, in this case, more than fifty percent.

Regarding monopoly, Article 51 grants state-owned companies monopoly rights to manage certain industries or business fields, which is a form of fulfillment of the State's Right to Control as mandated by Article 33 paragraph (2) and paragraph (3) of the 1945 Constitution. Such monopoly is called *monopoly by law*, characterized as relatively profitable for the State with industrial scopes related to the livelihoods of many people, such as the management of natural resources (water, electric power, gas), or transportation infrastructure.

Article 25 does not prohibit a company from having a dominant position as long as there is no *abuse of dominant position*. The criteria for *abuse of dominant position*, among others: 1) establishing trade conditions to prevent consumers from obtaining competitive products; 2) having no market restrictions and technology development; or 3) having no *barrier to entry*.

The criteria for the dominant position are: 1) there is a dominant business actor who controls the market share of a particular product of more than fifty percent; or 2) there are two, three, or groups of dominant business actors who control the market share of a particular product more than seventy-five percent.

Article 26 prohibits any form of affiliated management relationship through concurrent positions as directors or commissioners in two companies, provided that 1) it is in the relevant market; 2) there is a relationship with the field or type of business, for example in the process of production and marketing; or 3) both control the market share of a product, which then results in a violation of Law 5/1999.

Article 27 of Law 5/1999 prohibits companies from owning controlling shares (majority) in other companies of the same type; or establishing another company having the same business activities in the relevant market, provided that 1) there is a company that dominates the market share of a product dominantly (more than fifty percent); or 2) there are two, three or groups of companies that dominate the market share of a product dominantly (more than seventy-five percent).

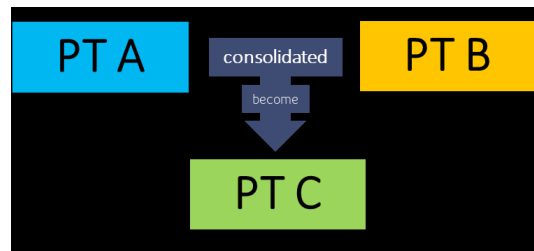
The majority share ownership must be interpreted as control²⁰. The company's de jure control is exercised by majority ownership of shares, and de facto can be exercised through significant ownership of shares.

Article 28 regulates the prohibition of consolidation, merger, and/or takeover of companies if it results in unfair business competition. Briefly, the following describes the scheme for consolidation, merger, and/or takeover of business entities²¹:

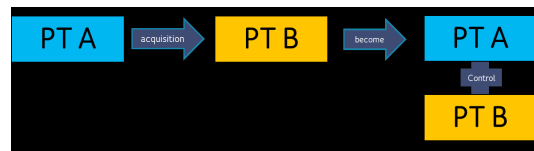
1. Merger, where an entity merges with another entity, and as a result, the assets and liabilities of the combined entity also transfer to the receiving entity. Merged entity status ends.



2. Consolidation, where two or more entities merge to create a new entity, and as a result, the assets and liabilities of the two merged entities become the property of the new consolidated entity. The business entity status of the two merged entities ends.



3. Takeover (acquisition), which is a legal action in which one entity purchases the shares of another company so that control of the entity is transferred to the entity that takes over.



²⁰ Mustafa Kamal Rokan, *Hukum Persaingan Usaha (Teori dan Praktiknya di Indonesia) (Business Competition Law (Theory and Practice in Indonesia))*, Rajawali Press, Jakarta, 2010, page 208

²¹ Government Regulation Number 57 of 2010 concerning Merger or Consolidation of Business Entities and Acquisition of Company Shares Which Can Result in Monopolistic Practices and Unfair Business Competition

Article 29 authorizes the Indonesia Competition Commission (KPPU) to supervise and control the consolidation, merger, and/or takeover of business entities. The said supervision and control are carried out utilizing a consultation mechanism by business actors with KPPU. Merger and acquisition transactions that must be notified no later than 30 working days from the effective date of the transaction are with a threshold: asset value exceeding IDR2.5 trillion or turnover exceeding IDR5 trillion, except for merger and acquisition transactions in the banking sector with the value of the assets resulting from the transaction exceeding IDR20 trillion.

Article 50 letter a stipulates general exceptions to Law 5/1999, namely if the act is intended to be the implementation of the Act, then all provisions of Articles 27, 28, and 29 above become invalid.

Fair business competition has positive consequences, both for business actors and consumers. For business actors, it can increase efficiency, productivity, and innovation, and improve the quality of the products produced. For consumers, the intended production efficiency results in a price decrease, which in turn is able to provide a more varied choice of products and better product quality. On the other hand, unfair competition between business actors has a negative impact not only on business actors and consumers but also on the economy²².

Analysis of the Implementation of SOE Holdings Associated with Law 5/1999

From the perspective of Law 5/1999, the transaction of transferring state shares to the holding parent in the holding process for sectoral SOEs must fulfill 3 things, namely 1) not to create cross-holding conditions; 2) the takeover (acquisition) of shares does not give rise to monopolistic practices or unfair business competition; and 3) if the combined asset value or

²² Ayup Suran Ningsih. *Implikasi Undang-Undang Nomor 5 Tahun 1999 tentang Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat pada Pelaku Usaha Mikro Kecil dan Menengah (UMKM)* (Implications of Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition for Micro, Small and Medium Enterprises (MSMEs)). *Jurnal Penelitian Hukum De Jure*, Vol. 19, No. 2, 2019. page 208.

turnover exceeds a certain value (threshold), the share acquisition transaction must be notified to KPPU²³.

In terms of cross-holding, the transfer of Government shares to the holding parent will cause the SOE parent to have a majority stake in the holding member companies. However, with the regulation of Article 2a paragraph (2) of PP 72/2016, the controlling status of the holding subsidiary company is still with the Government, not the holding company, through Dwiwarna share ownership.

Regarding the potential for trust (Article 12 of Law 5/1999) in SOE holding, Agnesia Putri Fajarini in her research gave an example that the establishment of SOE holding in the cement sector only fulfills six of the seven elements of a violation of Article 12 of Law 5/1999, so that the cement holding does not violate Article 12 of the Law 5/1999²⁴. The element of violation that is not fulfilled “*may result in monopolistic practices and/or unfair business competition*”. This is very logical considering the fact that there are still many companies, both national and multinational private, that run the cement business in Indonesia, for example, Semen Baturaja, Heidelberg Cement, Lafarge Cement, Conch, Indocement, Italcementi, and Cemex.

In relation to the potential violation of Article 14 of Law 5/1999 regarding vertical integration in SOE holdings, according to Nina Amelia Novita Sari, SOE holdings whose members are engaged in different business fields can lead to the interdependence between companies, so it is feared that a company’s strategic decisions could affect the behavior of other

²³ Agus Darmawan, *Aspek Hukum Pembentukan Holding BUMN Pertambangan (Legal Aspects for the Establishment of a Mining BUMN Holding)*, UAD Press, Yogyakarta, 2021, page 54

²⁴ Agnesia Putri Fajarini, *Tinjauan Terhadap Trust dalam Pembentukan Holding Company Badan Usaha Milik Negara Ditinjau dari Undang-Undang Nomor 5 Tahun 1999 tentang Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat (Studi Kasus pada PT Semen Indonesia Tbk)* (Overview of Trust in the Establishment of a State-Owned Enterprise Holding Company Judging from Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition (Case Study on PT Semen Indonesia Tbk)), *Diponegoro Law Review*, Vol. 5, No. 2, (2016), Page 15.

business actors. The current state-owned holding structure creates share support between companies within the holding (group). In this way, companies can synergize with each other by providing assistance (support) to one another. This can create a sense of injustice among other business actors²⁵.

An example is the holding of the tourism industry sector. The relationship between members of the tourism holding is described as follows²⁶:

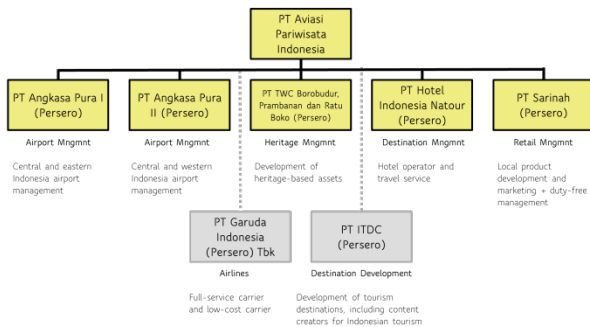


Figure 2. Stages of Formation of Tourism Holding
Source: Joint Study on the Establishment of Holding for Tourism and Supporting SOE on August 7, 2020

Members of the tourism holding are PT Hotel Indonesia Natour (Persero), PT Sarinah (Persero), PT Taman Wisata Candi Borobudur, Prambanan and Ratu Boko (Persero), PT Angkasa Pura I (Persero) and PT Angkasa Pura II (Persero). It is planned to further include PT Pembangunan Wisata Indonesia (Persero) into the second stage of the tourism holding and PT Garuda Indonesia (Persero) Tbk. in the third stage of tourism holding.

An example of share support practice in a tourism SOE holding that may occur is when holding member companies can collaborate by developing an integrated tourism area project through synergies between holding member companies, starting from booking plane tickets and hotel vouchers by Inna, developing tourism areas by ITDC and TWC, a souvenir monopoly by Sarinah, and directing tourists to travel using

Garuda Indonesia airline flights, which of course will use airport facilities at Angkasa Pura.

Regarding the dominant position as referred to in Article 25 of Law 5/1999, it should be noted that the subsidiaries of SOE holding companies in several sectors do not carry out activities in the same field or in the relevant market. For example, in the holding of the pharmaceutical sector, the subsidiaries of state-owned holding companies, which are PT Kimia Farma (Persero) Tbk and PT Indofarma (Persero) Tbk are still engaged in the business as originally, namely:

1. PT Kimia Farma (Persero) Tbk, covering the fields of production, processing, marketing, and distribution of chemicals, pharmaceuticals, biologics, and other materials; and
2. PT Indofarma (Persero) Tbk, covers the fields of generic drug production, rapid diagnostic tests, packaging materials, machinery, equipment, and infrastructure related to the pharmaceutical industry.

Regarding article 26 of Law 5/1999 regarding affiliated relationships, reflecting on best practices in the management of SOEs so far, one of the directors of the parent company is usually one of the commissioners of the subsidiary, for example, currently one of the Directors of PT Inalum (Persero) which is the parent of SOE mining sector holding and concurrently serving as a commissioner at PT Aneka Tambang, Tbk, which is a member of the SOE mining sector holding company.

Regarding dominant market share control (more than fifty percent) as stipulated in Article 27 letter (a) of Law 5/1999, reflecting on the KPPU's decision in the Temasek case²⁷, an anti-competitive impact is required to fulfill the elements of a violation of Article 27. It can be concluded that Dominant market domination does not automatically result in a violation of Article 27 until it can be proven that there is an anti-competition impact as a result of the said market domination. As an example of market domination by SOE oil and gas holding companies, citing CNBC Indonesia, PGN together with Pertamina as a subsidiary, succeeded in managing 96% of gas pipeline infrastructure and 92% of gas trading

²⁵ NAN Sari, "Pembentukan Holding BUMN Sektor Penerbangan Dalam Perspektif Hukum Persaingan Usaha" ("Formation of Holding for Aviation Sector BUMN in the Perspective of Business Competition Law"), Airlangga University Dissertation (2020), page 6

²⁶ Ministry of SOE, *Kajian Bersama Pembentukan Holding BUMN Pariwisata dan Pendukung (Joint Study on the Establishment of Tourism BUMN Holding and Supporters)*, Jakarta, 2020. Page 126.

²⁷ Decision of the Indonesia Competition Commission (KPPU) Number 07/KPPU-L/2007 dated 19 November 2007

market share²⁸.

However, PGN's advantage as a major player in the gas pipeline business does not only occur after the formation of the holding but even long before that. Citing the research results of J.T. Saragih, as of April 2011 PGN was able to control 88.38% market share in the gas transmission and distribution sector in West Java, even though PGN had to compete with 27 similar companies²⁹.

Furthermore, regarding the obligation to notify KPPU as referred to in Article 29 (1) of Law 5/1999, the following analysis can be submitted:

1. Article 7 of Government Regulation 57/2010, stipulates that the acquisition of shares is not required to submit a notification to the KPPU if the inter-company is affiliated.

2. What is meant by "affiliated" is related to the state of control of a company over another company, or the condition of the same party controlling two companies or the situation between a company and the main shareholder.

3. At a glance, it can be concluded (temporarily) that a company with the status of an SOE is basically a company that is affiliated with each other because of the control by the same party, which is by the Government.

4. However, taking into account the Supreme Court's Cassation Decision regarding the Temasek case that the Government is not categorized as a business actor. Then the regulation of Article 7 of Government Regulation 57/2010 becomes relevant, that the transfer of shares between SOEs in the context of forming a holding which is not a transaction between affiliated companies.

5. Thus, it can be concluded that the takeover of State shares by the SOE holding parent must still comply with the provisions of Article 29 of Law 5/1999, which must be notified to KPPU.

In relation to Article 50 letter an of Law 5/1999 regarding exceptions to Law 5/1999,

²⁸ <https://www.cnbcindonesia.com/market/20200616124831-17-165706/demi-ri-pgn-luncurkan-sapta-program-gasifikasi-nasional>

²⁹ J.T. Saragih and Eko Suwardi, Strategi Bersaing PT Perusahaan Gas Negara (Persero) Tbk SBU Distribusi Wilayah I, Jurnal Manajemen (Competitive Strategy of PT Perusahaan Gas Negara (Persero) Tbk SBU Distribution Region I, Management Journal.), *Strategi Bisnis dan Kewirausahaan Vol. 8, No. 2*, (2014), Page 117.

sectoral SOE holding transactions through the transfer of State shares to SOE holding parent are exempt from the provisions of Law 5/1999 if the formation of a holding is mandated by law. For this reason, it can be concluded that the implementation of the making of SOE as sectoral holding using Government Regulation 72/2016 is not sufficient to be excluded from Law 5/1999 so the implementation of the making of SOE as sectoral holding must also comply with the provisions of Law 5/1999.

Proving the practice of oligopoly, territorial division, trust, vertical integration, cross-shareholding, and/or multiple positions, needs to use a *rules of reasons* approach. This approach allows for an action to be categorized as anti-competition but provides benefits for consumers and the national economy in general, or in other words it is necessary to consider causality (causation principle) between the action and the consequences/benefits caused to the national economy³⁰. Market data and competitive economic analysis are needed to determine the impact of this the making of SOE as a holding transaction.

Even though Article 51 of Law 5/1999 provides special regulations regarding monopoly by SOE, presumably the financial power and market domination capabilities that arise as a result of the establishment of SOE holding can still guarantee the rights of other business actors and the public to be able to do business in a healthy manner and compete fairly. In addition to making the business competition climate unfavorable, of course, monopolistic practices will ultimately harm consumers.

As stated by Bambang Utuyo in his research, that in order to improve the performance of SOE holding subsidiaries, performance improvements in new SOE holdings will arise along with increased synergy between SOE holding subsidiaries.³¹

³⁰ Azhar Rahadiyan Anwar, Perkembangan dan Pembatasan Penggunaan Bank Garansi Sebagai Jaminan Pelaksanaan oleh Pemerintah dan Perusahaan BUMN dalam Pelaksanaan Perjanjian (Developments and Restrictions on the Use of Bank Guarantees as Implementation Guarantees by the Government and State-Owned Enterprises in the Implementation of Agreements), *Technology and Economics Law Journal, Vol.1, No.1*, 2022. Page 46

³¹ Bambang Utuyo, Marimin, Idqan Fahmi and Agung Primanto Murdanoto, Apakah Pembentukan

This indicates that in a holding it is very possible for coordination between companies (which is commonly referred to as SOE synergy), which although it is good for the purpose of improving the company's performance, on the other hand, for other business actors this can be interpreted as a concentration of economic power, which has the potential to cause adverse effects in competition with other business actors.

KPPU is still obliged to supervise the business practices carried out by SOE holdings in the future on the aspect of business competition, even though SOEs are exempted from monopolizing.

Supreme Court Cassation Decision regarding the Temasek case, on page 826³² provides an important guideline in implementing sectoral SOE holdings in the future, which the establishment of SOE holding aimed solely at safeguarding the national interest, and not profit-oriented so that holding operations should be carried out by either subsidiary holding, SOE parent or even by the Ministry of SOEs as the controller of the holding group who must remain based on good faith while upholding the ethics of healthy business competition.

CONCLUSION

SOE as one of the three pillars in the Indonesian economy plays a fairly central role, especially as an agent of development. Increasing the capacity and capability of SOEs is intended so the national SOEs are able to face sectoral challenges and to be able to compete in the international arena in order to safeguard the national interest. The government through the Ministry of SOEs has launched a restructuring and restructuring program for SOEs, with the establishment of a sectoral SOE holding company. SOE Holding will create a group of state-owned companies that are healthy and

Holding Meningkatkan Kinerja Perusahaan? Analisis Perbandingan Kinerja Anak Perusahaan ABC BUMN Holding Sebelum dan Setelah Holdingisasi dan Faktor yang Mempengaruhinya (Marimin, Idqan Fahmi and Agung Primanto Murdanoto, Does the Formation of Holding Improve the Company's Performance? Comparative Analysis of the Performance of ABC BUMN Holding Subsidiaries Before and After Holding and Factors Affecting It), *MIX: Jurnal Ilmiah Manajemen*, Vol. No. 2, (2019), Page 267.

32 Supreme Court Cassation Decision Number 496 K/Pdt.Sus/2008 dated September 10, 2008

strong in terms of capital and market dominance, so there is a high potential for violations of Law 5/1999, both at the formation stage and at the holding operationalization stage. Although Article 33 of the 1945 Constitution and Article 51 of Law 5/1999 grant monopoly rights to SOEs, this does not necessarily legitimize SOEs to be able to monopolize the market which can harm the community. Based on the discussion and analysis, it can be concluded that the establishment of SOE holding so far is not an act that results in a violation of Law 5/1999.

SUGGESTIONS

The establishment of SOE holding must be aimed at safeguarding the national interest, and not solely profit-oriented SOEs so that the operation of holding either by the holding subsidiary, the SOE parent, or even by the Ministry of SOEs as the controller of the holding group must remain based on good faith while upholding the ethics of healthy business competition.

Furthermore, the Ministry of State-Owned Enterprises as the shareholder in the holding parent company needs to immediately stipulate regulations regarding governance in this holding company, primarily to create and/or maintain a competitive, healthy, and non-monopolistic business climate.

In addition, to provide a stronger legal basis for implementing this SOE holding, it is necessary to increase the level of regulation of SOE holding from the previous Government Regulation to a Law, for example by making changes (revisions) to the SOE Law.

In relation to the plan to establish a sectoral SOE holding in the future, the Ministry of SOE needs to always coordinate beforehand with the KPPU to confirm that the corporate action of establishing SOE Holding and the plan to operate SOE holding in the future is not an act that violates monopoly and/or anti-business competition.

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