

LEGAL ANALYSIS OF THE DOCTRINE OF ESSENTIAL FACILITIES DUTIES IN THE INDONESIA COMPETITION LAW

Nandi Wardhana
Universitas Diponegoro
nanwardhana@gmail.com

Abstract

Indonesian competition law today requires a renewal of one of them concerning the doctrine of essential facilities duties. The doctrine essential facilities duties is a doctrine imposed on a dominant business actor who has access to essential facilities to provide access for competing business actors to use the facility. Regulation of essential facilities duties are needed to reduce dominance of a dominant firm in a particular market. This study uses a statutory approach, conceptual approach, and a comparative approach between the arrangements in the United States, Europe and Indonesia. The approach is expected to illustrate, harmonize problems arising, and provide better legal protection in the world of business competition. The doctrine essential facilities duties were first applied in the United States and then followed by European countries. The doctrine of essential facilities duties in the United States is based on the sherman act and uses the approach rule of reason. The doctrine of essential facilities duties in European countries based on EC focuses on refusal to deal. The doctrine of essential facilities duties is explicitly implied in Law No. 5 of 1999. From this study it is concluded that the regulation on essential facilities duties in Law No. 5 of 1999 still can not provide a good legal protection for business competition in Indonesia.

Keywords: Legal Protection, Business Competition, Doctrine Essential Facilities Duties

1. Introduction

In a healthy competition a company must provide access to other companies seeking in Indonesia this is contained in the doctrine *essential facilities*. *Essential facility* is not a general term that has its own definition and definition but is embedded in the law of business competition. The right to gain access to *essential facilities* owned by dominant companies is a controversial topic in the business world as the application of the doctrine of *essential facility duties* is complex and an exception to the principle of freedom of contract.

The term *essential facility* is actually very difficult to define, although in terms of competition law, the basic idea of the term *essential facility* can be understood as a facility owned and controlled by business actors who have a dominant position in a particular market where other business actors (competitors) need access to provide similar products to the relevant market. A facility can be categorized as an "*essential facility*" if the facility is a vital facility for the continuity of competition because competitors can not compete effectively in the relevant market without access to the facility.¹

¹ Neale, 2002, *The Antitrust Laws of the United States*, USA: American Bar Association, p.280 Quoted by: Suhartono RB, 2008, *Conglomerate and Antimonopoly*, Jakarta: Sinar Harapan Heritage, p.

Neale in his book *The Antitrust Laws of the United States* to illustrate and analyze court decisions in the United States relating to cases of denial of access to competitors by dominant and integrated business actors in the market. The principal or basic idea of a US court decision concerning the doctrine *essential facility* becomes reference and developed by a business competition breaker in other countries.²

When the problem of *essential facilities* occur then the obvious impact of the disadvantaged is the community as consumers. Completion of business law has a goal to create peace in conducting business activities, will also give strict sanctions to those who violate the rules of business law. The provision of this sanction to provide assurance for the existence of legal certainty and justice in the hope that the community will be convinced that the existence of business law is really useful and can protect the community as a consumer.

The method used in this research is normative juridical research method. Normative Juridical Method of Research is a method of legal research based on the rules or legal norms contained in legislation.³ The behavior of the community studied is the behavior arising from interacting with the existing norm system.⁴ Such behavior can be observed clearly and is evidence of whether or not the citizens have behaved in accordance with the normative legal provisions (codification or law).⁵

2. Method of Reserach

In relation to normative juridical research, several approaches are used: *statute approach*, *conceptual approach* and *comparative approach*.

a. The Statutory Approach.

This approach is used in conjunction with the legal regulations governing the prohibition of monopolistic practices and unfair business competition and institutions having the authority to enforce competition law.

b. Conceptual Approach (*Conceptual Approach*).

This approach is used in conjunction with legal concepts governing the prohibitions to be considered by business entities in relation to the control of *essential facilities* in order to ensure fair market mechanisms and to provide benefits to the general welfare.

c. Comparative Approach (*Comparative Approach*).

² *Ibid*, p. 38

³ Sudikno Martokusumo, 2001, *Legal Discovery An Introduction*, cet. II, Yogyakarta: Liberty,, p. 29

⁴ Mukti Fajar and Yulianto Achmad, Indonesian Business Competition Law, Yogyakarta: Liberty pp. 51.

⁵ Abdulkadir Muhammad, 2004, *Law and Legal Research*, Bandung: Citra Aditya Bakti, p. 132.

This comparative approach is used as a tool for legal dogmatics which has the function of considering arrangements and settlements based on other legal arrangements.⁶ Comparative approach in this study uses micro comparison in order to compare the content and implementation of competition law in other countries, especially the United States and European Communities ("EC") with limited to the scope of Law Number 5 Year 1999. Library research conducted on elements that can than specifically the rules and implementation of competition law related to the existence of a monopoly over the *essential facility*.

3. Discussion

History of Development *essential facilities* in United States

In general cases of business competition in the United States related to *essential facilities* can be described among others as follows:⁷

a. Terminroad Railroad Ass'n v. United States

This case originated from an agreement made by a group of companies engaged in the field of rail infrastructure in St. Louis. Luis in 1889. The agreement was to incorporate the railway terminals owned by several companies so that a unified railway system was built along and across the Misissippi River. This agreement causes other companies not to access St. Luis, due to causing unnatural obstacles to other business actors who did not participate in the agreement to access St. Luis

b. Associated Press v. United States

Associated Press is an association of print media companies with members amounting to over 1,200 media companies. The Association engages in the collection and dissemination of news obtained by its members and some foreign media companies. In its development, the association imposes barriers to other media companies to become associate members so that new media companies do not get access to the news collection and distribution system.

c. Otter Tail Power Co. v. United States

Otter Tail Power Co. is a company with a business selling electricity in the Minnesota region. Furthermore, some cities intend to build their own electrical systems at

⁶ DHM Meuwissen, 2014, Empowerment, *Concerning Legal Science, Legal Theory and Philosophy of Law* over the language by B. Arief Sidharta, Surabaya: Refika Aditama p

⁷ <https://supreme.justia.com/cases/federal/us/224/383/case.html>, accessed on 28 January 2017

the retail level and compete with Otter Tail Power Co.'s retail, then Otter Tail Power Co. refused to supply electricity to the city.

d. Hecht v. Pro-Football, Inc..

Hecht as promoter of new football club intends and has the desire to rent a football stadium named Stadion Robert F. To serve as home base football club. The case arose when the owner and manager of the Stadio Robert F. Kennedy rejected Hecht's request on the grounds that the owner had an agreement with another football club called Washington Redskins.

e. MCI Communications Corp. v. American Tel. & Tel. Co (AT & T).

Prior to 1969, AT & T had the monopoly to provide telecommunications services and networks. The case started when MCI asked AT & T to be connected to AT & T's local networking facility but was refused.

European Countries⁸

a. Commercial Solvents v Commission [1974]

Commercial Solvents is a large company engaged in the manufacturing of chemicals while maintaining a dominant position in the production and sale of raw materials for the manufacture of ethambutol. Commercial Solvents has been a supplier of zoja since 1966. The case began when the early 1970s Zoja canceled the purchase of raw materials in a very large amount and of course this is very detrimental Commercial Solvents. In late 1970 Zoja plans to re-order, but this is rejected by Commercial Solvent.

b. United Brands V. Olesen {1972}

United Brands holds the dominant position in the banana market, with 40-45% market share. United Brands refused to supply banana production to Olesen who is actually one of his customers in Denmark. United Brands justify his decision with the fact that Olesen has participated in an advertising campaign with one of United Brands' top competitors.

c. Sea Container Ltd / Stena Sealink [1994]⁹

Sealink Harbors is a company that owns and operates ports in Holyhead Wales. The case started when Stena Sealink rejected the Sea Containers intent and closed the port access for the Sea Containers plan.

d. Morlaix (Port of Roscoff) [1995]¹⁰

⁸Vassilis Hatzopoulos, 2006, *The EU essential facilities doctrine 1*, European Legal Studies, p44

⁹ *Ibid* 47

The case stems from the desire of Irish Continental Group (ICG) to operate the ferry service from Ireland to Brittany. Therefore, ICG requires access to Port of Roscoff port managed by CCI Morlaix which is an institution granted the right of concession by the state. The case started when CCI Moralaix objected to providing access to ICG.

e. Oscar Bronner GmbH v. Mediaprint Zeitungs-undZeitschriftenverlag GmbH (1998)¹¹

Mediaprint is also a newspaper publisher with a market share of about 46.8%. Mediaprint builds a distribution network to very large customers. Problems begin to arise when Bronner asks Mediaprint to get the distribution distributed by using Mediaprint's distribution network to be more efficient and optimal. The request was rejected by Mediaprint on the grounds that the distribution system was built with considerable investment.

The arrangement of *essential facilities* in Indonesia

The Doctrine *Essential Facilities* in Indonesian Competition Law is formulated in Chapter IV of the third section, which regulates the control of the market, particularly article 19 of Law No. 5/1999. 5 of 1999.

Article 19 of Law No. 5 of 1999 stipulates that business actors are prohibited from performing one or several activities, either alone or with other business actors, which may result in monopolistic practices and or unfair business competition in the form of:

- a. refusing and / or blocking offenders a certain business to conduct the same business activity in the relevant market; or
- b. deter customers or customers of their competitors from entering into business relationships with their competitors; or
- c. restrict the circulation and or sale of goods and or services to the relevant market; or
- d. discriminating against certain business actors.

Besides this doctrine also entered the soul in Law No. 5 of 1999 CHAPTER V the first part of article 25 on the dominant position. Article 25 Paragraph (1) states that business actors are prohibited from using dominant positions either directly or indirectly to:

1. stipulate trade conditions with the aim of preventing and / or preventing consumers from obtaining competing goods and or services in terms of price or quality; or

¹⁰ *ibid* p 48

¹¹ *ibid*

2. restricting market and technology development; or
3. inhibit other potential business actors from becoming competitors to enter the relevant market.

Article 25 paragraph (2) states that a business actor has a dominant position as referred to in paragraph (1) if:

1. one business actor or a group of business actors owns 50% (fifty percent) or more market share of a certain type of goods or services; or
2. two or three business actors or group of business actors control 75% (seventy five percent) or more market share of one particular type of goods or service.

4. Conclusion and Suggestions

Conclusion

Regulations on *essential facilities duties* in Indonesia is still very less considering Indonesia adheres to the European continental law system (*civil law*). The European continental legal system is the basic legal system or legal reference that puts the source of the law the written rule. The law obtains a binding force, since it is manifested in laws that are in the form of laws and systematically arranged in certain codifications or compilations. This basic principle is embraced by binding that the ultimate value which is the objective of law is legal certainty. Legal certainty can only be realized if the actions of human law in the association of life is regulated by written rules.

Regulation of *essential facilities duties* must be explicitly regulated to ensure legal certainty of business competition in Indonesia. The case of violation of *essential facilities has* so far not been found in Indonesia, so the Indonesian government has not yet focused on the regulation of *essential facilities duties*.

the regulation of *essential facilities duties* should be regulated in more detail in the Indonesian competition law. The infrastructure approach is expected to be helpful in providing a deep understanding of *essential facilities*, what actions are prohibited in enforcing doctrine *essential facilities duties*, facility criteria included in *essential facilities* so as to improve Law no 5 of 1999. The regulation of *essential facilities* provides benefits including

1. Ensure legal certainty among business actors in Indonesia, so it is expected with the regulation of *essential facilities duties* business actors have a better legal awareness.
2. Reduces market dominance by dominant companies, thus providing an opportunity for new companies to enter into a market.

3. Creating a healthier competition, so that business actors can compete and can always improve the quality of its products and services.
4. Consumers have more diverse options and can enjoy products and services that are always better.
5. Provide certainty to KPPU and other legal apparatus to solve the problem of violation of *essential facilities duties* occurring in Indonesia

Suggestion

i expect that the Indonesian government will organize exclusively for the essential facilities of tasks to anticipate the problems of competition. Given the clearer regulation of essential facilities, the tasks that the conscious business performers do can not be done well, and can not be done better because there is a clear legal basis.

References

- Hatzopoulos, V. (2006). *The EU essential facilities doctrine* . European Legal Studies.
<https://supreme.justia.com/cases/federal/us/224/383/case.html> , . (n.d.).
- Meuwissen, D. (2014). *Tentang Pengembangan Hukum, Ilmu Hukum, Teori Hukum dan Filsafat Hukum* . Surabaya: Refika Aditama.
- Muhammad, A. (2004). *Hukum dan Penelitian Hukum*. Bandung: Citra Aditya Bakti.
- R.B, S. (2008). *Konglomerat dan Antimonopoli*. Jakarta: Pusaka Sinar Harapan.
- Sudikno Martokusumo. (2001). *Penemuan Hukum Suatu Pengantar*. Yogyakarta: Liberty.