

## Legal Protection for Business Placers of Agreements between Business Players Holding Dominant Positions during the Pandemic Era<sup>\*</sup>

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**Abstract:** A dominant position is a situation where a business actor does not have a significant competitor in the relevant market in relation to the market share controlled, or the business actor has the highest position among his competitors in the relevant market in terms of financial capability, ability to access supply or sales, and ability to adjust supply between the demand for certain goods or services (Article 1 number 4 of Law Number 5 of 1999). Abuse of a dominant position in the market further aggravates the economic situation during the pandemic era. The procedure for determining the existence of abuse of a dominant position can be carried out by measuring the reach or scope of the relevant market, the existence of a dominant position in the relevant market, and proving the behavior of abuse of dominant position. The Government issued Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition (hereinafter Law Number 5 of 1999) intended as a legal instrument to enforce the rule of law and provide equal protection for business actors in efforts to create fair business competition. The law also provides legal certainty, so that it can encourage the acceleration of economic development to improve general welfare, as well as the implementation of the spirit and soul of the 1945 Constitution of the Republic of Indonesia. The form of abuse of the dominant position by PT Forisa Nusapersada in the Pop Ice program The Real Ice Blender is PT. Forisa Nusapersada made IOM and an agreement with the owners of Beverage Kiosks and/or Market Stores not to sell competing products like Pop Ice, which has resulted in the lost or at least reduced choice of consumers to attain S'Cafe and Milkjus brand products in the market.

**Keywords:** business actors, misuse of the dominant position, prohibition of monopolistic practices, unfair business competition, pandemic era.

## 大流行时期占据主导地位的商业参与者之间的协议的法律保护

**摘要:** 支配地位是指商业行为者在有关市场上没有一个重要的竞争对手,就所控制的市场份额而言,或商业行为者在有关市场上的竞争对手中,在财务能力、获得供应或销售的能力以及在对某些货物或服务的需求之间调整供应的能力方面,处于最高地位(1999年第5号法律第1条第4款)。滥用市场主导地位进一步加剧了大流行时期的经济形势。确定滥用支配地位存在的程序可以通过衡量相关市场的范围或范围、相关市场中存在支配地位以及证明滥用支配地位的行为来进行。政府颁布了1999年关于禁止垄断行为和不公平商业竞争的第5号法律(下称1999年第5号法律),旨在作为一项法律文书,加强法治,并为商业行为者提供平等保护,努力创造公平的商业竞争。该法律还提供了法律确定性,从而可以鼓励加快经济发展以改善一般福利,以及实施1945年印度尼西亚共和国宪法的精神和灵魂。由PT福丽莎 nusapersada 滥用主导地位的形式在流行冰程序真正的冰搅拌机是PT。福丽莎 Nusapersada 提出了国际移民组织,并与饮料亭和/或市场商店的所有者达成协议,不销售流行冰等竞争产品,这导致消费者失去或至少减少了在市场上获得安全、安全和牛奶酒品牌产品

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**关键词:** 商业行为者，滥用主导地位，禁止垄断行为，不公平的商业竞争，大流行时代。

## 1. Introduction

Development in the economic field must be aimed at the realization of social welfare based on Pancasila and the 1945 Constitution of the Republic of Indonesia, which is based on economic democracy while taking into account the balance between the interests of business actors and the public interest. The principle of economic democracy requires equal opportunities for every citizen to participate during the production process and marketing of goods and/or services, in a healthy, effective, and efficient business climate to encourage economic growth and the operation of a fair market economy. Therefore, every person who tries in Indonesia is required to be in a situation of fair and fair competition, so that there is no concentration of economic power on certain business actors, among others, in the form of monopolistic practices and unfair business competition, which is damaging to society and is contrary to social justice.

From business competition perspective, the COVID-19 pandemic has not only caused a health crisis but also had an impact on business activities, decreased sales to termination of work relationships to survive in crisis conditions. Companies must make an innovation and adjust its business strategies so that it is more efficient. Companies that cannot adapt to the COVID-19 Pandemic may not survive.

Departing from such matter, then on March 5, 1999, the Government issued Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition (hereinafter Law Number 5 of 1999), which was intended as a legal instrument to enforce the rule of law and provide equal protection for each business actor to create a fair business competition. Additionally, the Act also aims to provide legal certainty, encourage accelerated economic development to improve public welfare, as well as the implementation of the spirit of the 1945 Constitution of the Republic of Indonesia.

The effective implementation of Law Number 5 of 1999 is expected to foster a healthy business culture so that it can continue to encourage and enhance competitiveness among business actors and can ensure market mechanisms work well and consumers enjoy the results of competitive processes or consumer surpluses. The goal of every rational business actor is to be able to develop their business as fully as possible or to be the best in their business. Ideally, these goals will encourage business actors to strive to improve their performance and competitiveness through innovation and efficiency so that they are superior to

their competitors. If successful, the logical consequence is that the business actor will obtain a dominant position and or have significant market power in the relevant market. With this relative advantage, the business actor can dominate the relevant market or be able to maintain its strong position in the relevant market.

One example of alleged cases of unfair business competition practices related to the abuse of dominant positions in the strategic industry sector is carried out by PT Forisa Nusapersada through the Pop Ice drink product The Real Ice Blender. PT Forisa Nusapersada is the dominant business actor in the market of the processed fruit-flavored powder beverage products that has a market share of 90.09% to 94.3%. Through these market forces, PT. Forisa Nusapersada has misused its dominant position by making agreements with the owners of Drinks Kiosks and/or Market Stores not to display and/or sell competing products. Such practices can certainly prevent or prevent consumers from obtaining Milkjuss and S'Cafe brand products while creating a barrier to entry into PT. Karniel Pacific Indonesia is a new business actor to enter and compete in a healthy market of the processed fruit-flavored powder beverage products [3].

Departing from the unfair behavior of business actors above, given the characteristics and impact of the abuse of the dominant position referred to potential competitors and small business actors, in this paper the author raises the title "Legal Protection for Business Actors Against the Agreement Made Between PT Forisa Nusa Persada As Actor Businesses that have a Dominant Position with Market Players." The author is expected to better understand the existence of the abuse of a dominant position in a business competition.

## 2. Research Methods

Research methodology uses the statute approach method to examine the laws and regulations that relate to the legal issues being addressed [6].

## 3. Results and Discussion

### 3.1. Dominant Positions and Abuse of Dominant Position Behavior

The definition of a dominant position legally can be seen in the provisions of Article 1 number 4 of Law Number 5 of 1999, which states,

"A dominant position is a condition where a business actor does not have a significant competitor in the relevant market in relation to the market share

controlled, or the business actor has the highest position among his competitors in the relevant market in terms of financial capability, ability to access supply or sales, and ability to adjust supply between the demand for certain goods or services."

Based on Article 1 number 4 of Law Number 5 of 1999, there are four conditions that must be possessed by a dominant business actor:

a. *Market share*: The percentage of market share domination determines the category of the business actor holding a dominant position;

b. *Financial capability*: The dominant business actor has a greater financial capacity than the competing business actor because the dominant business actor has the power to determine the price (monopoly power). Several factors to determine the financial capability of a business actor can be reviewed on the basis of authorized capital, cash flow, turnover, profits, credit limits, and access to financial markets;

c. *The ability to access the supply of sales*, namely the ability of dominant business actors to regulate the supply or sale of certain goods;

d. *The ability to adjust the supply or demand for certain goods or services*, which is identical to the ability to regulate the supply or sale of certain goods or services.

Based on the provisions of Article 25 Paragraph 2 of Law Number 5 of 1999, business operators are considered to have a dominant position if:

1. One business actor or a group of business actors controls 50% (fifty percent) or more of the market share or certain types of goods or services;

2. Two or three business actors or groups of business actors control 75% (seventy-five percent) or more of the market share of certain types of goods or services.

Therefore, it can be concluded that the dominant position is related to the market domination of a certain type of good and/or service in the relevant market by a particular business actor or group of business actors. Companies that have a dominant position have control over the markets in which they operate and have insignificant competitors or are generally referred to as small companies (fringe firms).

The dominant position can be held by one business actor or a group of business actors, commonly known as a monopoly, where the actor or business group controls the production and/or marketing of goods and/or the use of certain services. The dominant position can also be controlled by two or more actors or groups of business actors that can be classified as oligopolies, namely the condition of a particular market where two or more business actors have almost equal or balanced market power. In Indonesia monopoly by dominant position is prohibited because based on the goals of the state, the state must participate in all social aspects, especially in the economic activities of the community. This is under the basic idea of the purpose

of the state, as outlined in the preamble to the State Constitution 1945 and the principle of the rule of law in the explanation section of the 1945 Constitution, where the concept of the welfare state and the principle of the rule of law are also accepted, both of which are based on Pancasila as the basis of the state [1] and the theory of transformation of state finances put forward by Prijatna Soeria Atmadja [4]. This theory essentially states that there is a change in the legal status of finance from state finance to legal entity finance, monopolistic actions by legal entities are still unjustified [4]. Indonesian law in principle views the law as part of the philosophical values and noble ideals of a society [2].

In essence, the position of the dominant business actor does not conflict with the laws and regulations, but rather encourages the business actor to be able to compete in the relevant market. The competition spurred businesses to evince efficiency and innovation to produce quality products and competitive prices compared to selling prices from competitors. It is the competition that drives business actors to become the dominant business actors [5]. However, dominant business actors are still considered to can abuse their position. In the horizontal direction, dominant business actors can build barriers for competitors/potential competitors (barriers) by implementing exclusionary strategies such as predatory pricing, tying, refusal to deal, and so forth. While in the vertical direction, dominant business actors can exploit suppliers or consumers, even often the dominant business actors conduct vertical integration, namely control of raw materials (upstream) to distribution (downstream) [7].

Prohibition of abuse of dominant position is listed in Article 25 Paragraph 1 of Law Number 5 of 1999, which stipulates that business actors are prohibited from using the dominant position either directly or indirectly to [8]:

- Establish trade conditions to prevent and or prevent consumers from obtaining competing goods and/or services, both in terms of price and quality;
- Limiting markets and technology development;
- Obstruct other business actors who can become competitors in entering the relevant market.

About variants of forms of abuse of the dominant position, we can refer to Law Number 5 of 1999, which states:

#### 1. *Multiple Positions*

Provisions regarding interlocking directorates are regulated in Article 26 of Law Number 5 of 1999, which is a form of abuse of the dominant position that occurs in the form of affiliated management. A commissioner and director of a company concurrently have a position in another company if the companies are in the same relevant market, have close links in the field and/or type of business, or collectively can control the market share of certain goods and/or services, which may result in monopolistic practices and/or

unfair business competition. Based on these provisions, multiple positions can occur horizontally (horizontal interlock) ie if the companies are in the same market. Additionally, multiple positions can also occur vertically (vertical interlock) if they occur in companies that are not engaged in the same line of business, but there is a business connection in the process of producing such goods from the upstream to downstream markets.

### 2. *Majority share ownership*

Article 27 of Law Number 5 of 1999 prohibits certain business actors from owning majority shares in several similar companies that conduct business activities in the same field in the same market or from establishing several companies that have the same business activities in the same market. This provision applies if the majority share ownership results in one business actor or group of businesses controlling more than 50% of the market share of a certain type of goods or services, and two or three business actors or groups of business actors control more than 75% of the market share of one type of goods or certain services.

### 3. *Merger, Consolidation, and Acquisition*

Article 28 of Law Number 5 of 1999 prohibits business actors from merging business entities or from taking over shares in other companies if such actions can result in monopolistic practices and/or unfair business competition. In essence, the act of merging, consolidation, and acquisition of shares has a positive impact because it increases economic efficiency; on the other hand, it can have a negative impact if intended to create anti-competition. Therefore, under the mandate of Article 29 of Law Number 5 of 1999, the act of merging or consolidation of business entities, or acquisition of shares that results in the value of assets and or sales value exceeding a certain amount, must be notified to the Commission, no later than 30 (three) twenty) days from the date of the merger, consolidation, or expropriation. Provisions regarding the value of assets and/or sales value as well as the procedures for notification referred to have been regulated through Government Regulation Number 57 of 2010 concerning Merger or Consolidation of Business Entities and the Acquisition of Company Shares That Can Lead to Monopolistic Practices and Unfair Business Competition.

## **3.2. Analysis of KPPU Decision Number 14/KPPU-1/2015 in Case on Behalf of the Reported Party of PT Forisa Nusapersada Based on the Application of Article 25 of Law Number 5 of 1999 Concerning Prohibition of Monopolistic Practices and Unfair Business Competition**

The case began with a public report submitted to the KPPU Secretariat regarding allegations of unfair business competition practices by PT Forisa Nusapersada through the Pop Ice The Real Ice Blender program, with the following case position descriptions:

- On December 29, 2014, PT Forisa issued Internal Office Memo No. 15/IOM/MKT-DB/XII/2014 concerning the Pop Ice The Real Ice Blender Program, which is addressed to the Area Sales Promotion Manager (ASPM) and directed to the Area Sales Promotion Supervisor (ASPS);

- IOM No. 15/IOM/MKT-DB/XII/2014 was published to maintain the position of Pop Ice as a market leader and maintain Pop Ice seller loyalty both at the market level and at the beverage stall level, by issuing the Pop Ice The Real Ice Blender Program;

- Pop-Ice The Real Ice Blender Program consists of three programs: the Drink Kiosk Exchange Assistance Program (BATU), the Drink Kiosk Display Program, and the Market Shop Display Program;

- To join the program, some requirements must be obeyed by beverage kiosks and market stores not selling and not displaying the (competing) products of competitors, which will later gain a prize from PT Forisa Nusapersada if it meets these requirements;

- Beverage Kiosks participating in the program sign a Pop Ice Display Contract Agreement that contains a regulatory clause willing to display Pop Ice products exclusively and not sell competitor products;

- The action taken by PT Forisa Nusapersada can cause unfair business competition in the milk powder beverage market throughout Indonesia;

- Based on this, PT Forisa Nusapersada in the Pop Ice The Real Ice Blender Program is alleged to have violated Article 19 letter a; Article 19 letter b; Article 25 paragraph (1) letter a, and Article 25 paragraph (1) letter c of Law Number 5 of 1999.

Related to unfair business competition cases conducted by PT Forisa Nusapersada in the Pop Ice The Real Ice Blender Program, an analysis can be carried out based on the examination procedures for the abuse of dominant position as stated in KPPU Regulation Number 6 of 2010.

### **3.3. Defining Related Markets**

The definition of the relevant market is regulated in Article 1 number 10 of Law Number 5 of 1999. Guidelines for the application of the relevant market can refer to the provisions of KPPU Regulation Number 3 of 2009, where the relevant market can be divided into:

1) Product relevant market, which is defined as competing products of certain products plus other products that can be substituted for these products. Other products become substitutes for a product if the existence of other products limits the space for price increases for these products. Thus, the preferences or tastes of consumers are seen as a determining factor in defining the product market, which is at least represented by the main indicators namely: price, character or characteristics of the product concerned, and its usefulness (function).

a) *Price*

Several factors will be considered in determining the relevant market:

- Product prices that reflect fair/competitive market prices;
- The products analyzed do not have to have the same price because the price variations of the products analyzed are very likely to occur;
- Price increases (hypothetically) should only occur in product A, while the price of substitute products does not change;
- The price increase must be assumed to be continuous, ie long-lasting (non-transitory);
- Hypothetical price increases should be slight, but significant.

If related to unfair business competition cases conducted by PT Forisa Nusapersada in the Pop Ice The Real Ice Blender Program, it can be seen that the Investigator and Reported Party's conclusions, as well as the Assembly's considerations, have not been too detailed in explaining the price factor in determining the relevant market. In this regard, it can be seen that the approach that should be carried out by Investigators and the Assembly to prove the price in the product market is to use the SSNIP test (Small but Significant, Non-transitory Increase in Price), which is done through two stages [5]:

- Proof of whether the decision to raise prices will benefit the company. This is seen from the logic of maximum profit, ie the company will decide to raise prices if marginal revenue is smaller than marginal cost. The proof is done by seeing  $1/\epsilon > L$  (*margin*). Where  $\epsilon$  shows the price elasticity (own price elasticity), but this first stage does not provide a limit on how much the company will raise prices;
- Compare the critical elasticity of demand with its own price elasticity  $Critical\ elasticity = (1+t) / (m+t)$ , where t is the SSNIP limit, m represents the margin owned by the company (the value is a percentage, not direct profit, for example, return on equity). If the critical elasticity is greater than the own price elasticity, the market meets the SSNIP test.

b) *The character and usefulness of the product*

Character parameters or product characteristics and usability or function can be described as follows:

- Given that under certain conditions, it is relatively difficult to find products that are perfect substitutes, perfect product definitions are based on close substitutes;
- Products in a market do not have to be of the same quality. As long as consumers determine that the related products have the same character and function, then the products can be said to be substitutes for each other regardless of the technical specifications, brands, or specific packaging attached to these products.

In the verdict on this case, the object of the case, namely Pop Ice, is classified as a soft drink product that has the following characteristics:

- Based on the presentation, Pop Ice is a processed drink;
- Based on its shape and composition, Pop Ice is a fruit-flavored powder drink containing milk;
- Based on the packaging, Pop Ice is packaged in the form of sachets, which is one of the main characteristics of Pop Ice because of the presenting instructions contained in the sachet's maturity and there is no other method of presentation. Additionally, Pop Ice products are produced only in sachets and not in other products.

Based on the definition of Pop Ice as stated on the Reported Party's website, Pop Ice is classified as a refreshing drink.

Starting from the arguments and considerations described above, it can be concluded that the product market, in this case, is Processed Fruit Powder-Contained Milk Drinks. Therefore, it can be stated that several products have the same characteristics and use as Pop Ice, namely MilkJuss soft drinks produced by PT Karunia Alam Segar and S'Cafe soft drinks produced by PT Karniel Pacific Indonesia.

2) Geographic relevant market, that is, areas where a business actor can increase prices without attracting new business actors or without losing significant consumers, who move to other business actors outside the region. Some determining factors in product availability are company policy, transportation costs, the length of travel, tariffs, and regulations that limit trade traffic between cities/regions.

Based on these provisions are associated with cases of unfair business competition conducted by PT Forisa Nusapersada in the Pop Ice The Real Ice Blender Program, it can be seen that:

- The Assembly believes that the geographical market of Pop Ice soft drink products covers all regions of Indonesia;
- Regarding Milkjuss soft drink products, the geographical market also covers the entire territory of Indonesia;
- Regarding S'Cafe soft drink products, it can be seen that PT Karniel Pacific Indonesia is a businessperson who only mass-marketed its products in December 2004 and is still concentrated in big cities. However, given that there are no regulatory obstacles to marketing its products in all parts of Indonesia, the geographical market of S'Cafe soft drinks also covers all regions of Indonesia.

Strengthened by the absence of difficulties from consumers to get the three products, namely Pop Ice, Milkjuss, and S'Cafe in all parts of Indonesia, it can be concluded that the argumentation from the investigator and consideration of the Assembly stating that the geographic market, in this case, is all Indonesian territory, is considered appropriate because it has been based on evidence and applicable law.

The dominant business actor's behavior can be classified as misuse if the impact of the business actor's

behavior negatively influences the competitive process. However, the behavior of business actors who have a dominant position cannot be classified as an act of abuse if the behavior is related to increased efficiency, such as innovation, economies of scale, and economic scope.

Forms of abuse of the dominant position, alleged in this case, are enumerated in Article 25, Paragraph 1a and 1c of Law Number 5 of 1999:

Business actors are prohibited from using dominant positions, directly or indirectly, to:

- a. Establish trade conditions to prevent and or prevent consumers from obtaining competing goods and/or services, both in terms of price and quality;
- b. Inhibiting other business actors who can become competitors in entering the relevant markets.

Based on this, the following analysis can be carried out:

- That the Reported Party issued an Internal Office Memo (IOM) Number: 105/IOM/MKT-DB/XII/2014 concerning the Pop Ice The Real Blender Program, in which the Reported Party carried out three programs:

- Beverage Kiosk Swap (BATU) Program, which is an effort to exchange S'Cafe products with Pop Ice and gift products;
- Beverage Kiosk Display Program, which facilitates the use of displays at beverage kiosks with certain commitments and promises prizes, if not selling competing products;
- Market Shop Display Program, which facilitates the use of displays in the Market Shop with certain commitments and promises prizes, if not selling competing products.

- The existence of a Pop Ice Display Contract Agreement between the Reported Party and the owner of the Beverage Kiosk and/or Market Shop, which essentially contains:

- Willing to display Pop Ice products exclusively according to agreed targets;
- Not selling competing products like Pop Ice (S'Cafe, Camelo, Milkjus, and others);
- The display is carried out according to conditions and during the contract, the period lasts 3 (three) months;
- Compensation Display:
  - The first month: one Chocolate Pop Ice ball;
  - The second month: two Pop Ice shirts;
  - The third month: Philips Blender.

Prizes are awarded at the end of every month after the Reported Party verifies compliance.

Based on the facts described above, it can be seen that:

- Actions of the Reported Party through the making of IOM and the agreement with the owner of the Beverage Kiosk and/or Market Shop have resulted in the lost or at least reduced choice of consumers to

attain S'Cafe and Milkjus brand products in the market, thus the element in Article 25, Paragraph 1a of Law Number 5 of 1999 has been proven legally and convincingly;

- Actions of the Reported Party through the making of IOM on December 29, 2014, which was followed up by agreeing with the owner of the Beverage Kiosk and/or Market Shop is a response from the Reported Party to the market penetration of Fruit Flavored Milk Powder Processed Beverage by PT Karniel Pacific Indonesia through S'Cafe products was introduced only in November 2014. The Reported Actions also impacted the decrease in the sales volume of S'Cafe products by 50% from the beginning of marketing until July 2015. Thus, it can be concluded that the elements in Article 25 paragraph (1) letter c of the Law Law Number 5 of 1999 have been proven legally and convincingly.

That the Pop Ice The Real Ice Blender program poses obstacles to:

- *Competitors 'product barriers:* The Pop Ice The Real Ice Blender program impacts the loss or at least reduction of competitors' products from the Reported Party in the market or results in reduced opportunities for business competitors from the Reported Party to conduct marketing activities of their products. Where this can also be seen from the decrease in the sales volume of S'Cafe products by 50% from the beginning of marketing until July 2015;

- *Consumer barriers:* The Pop Ice The Real Ice Blender program has resulted in loss or at least reduced access from consumers to get alternative products or competing products, in this case, S'Cafe and Milkjuss;

- Based on the abovementioned entire description, it can be seen that the Reported Party (PT Forisa Nusapersada) through the Pop Ice brand beverage product is the dominant business actor in the Dairy Beverage Fruit Powder Processed product market because it has a market share exceeding 50%, which is 90.09% up to 94.3%. Through its market power, the Reported Party has abused its dominant position through the Pop Ice The Real Ice Blender program, which was then followed up by making agreements with the Beverage Kiosk owners and/or Market Stores, which prevents consumers from obtaining Milkjuss brand products and S'Cafe while creating a barrier to entry to PT. Karniel Pacific Indonesia, which is a new business actor to enter and compete in a healthy market in the Processed Fruit Flavored Beverage Powder products.

## 4. Conclusion

A dominant position is a situation where a business actor does not have a significant competitor in the relevant market in relation to the market share controlled, or the business actor has the highest position among his competitors in the relevant market in terms of financial capability, ability to access supply

or sales, and ability to adjust supply between the demand for certain goods or services (Article 1 number 4 of Act Number 5 of 1999). PT Forisa Nusapersada's form of abuse of the dominant position in the Pop Ice The Real Ice Blender program is that PT Forisa Nusapersada made an IOM and an agreement with the Beverage Kiosk owner and/or Market Shop to not sell competing Pop Pop-like competitors' products has resulted in loss or at least whether or not it reduces the choice of consumers to get S'Cafe and Milkjus brand products in the market.

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