

# SUITABILITY OF ANTITRUST IMMUNITY LAW IN THE ASSIGNMENT OF THE COVID-19 VACCINE TO PT BIO FARMA (PERSERO)

[<sup>1</sup>]Sheila Intan Sari; and [<sup>2</sup>]Siti Anisah\*

Faculty of Law Universitas Islam Indonesia

Email: [<sup>1</sup>] [18410713@students.uii.ac.id](mailto:18410713@students.uii.ac.id); [<sup>2</sup>] [siti.anisah@uii.ac.id](mailto:siti.anisah@uii.ac.id).\*

\* Corresponding Author

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**Abstract:** In early 2020, the global shock of the Covid-19 outbreak led to the rapid development of vaccines in several countries. In Indonesia, PT Bio Farma was designated by the government to procure Covid-19 vaccines, as outlined in Presidential Regulation Number 99 of 2020. This study examines the legality of PT Bio Farma's direct appointment in vaccine procurement under business competition law and its compliance with antitrust immunity. Through normative legal research, it is found that while some regulations are adhered to, others are violated by the government, indicating that PT Bio Farma's direct appointment does not align with principles of fairness and economic democracy in business competition law. Moreover, Presidential Decree No. 99 of 2020 provides antitrust immunity, subject to fulfilling specific criteria, in line with certain articles of the Antitrust Law, as an exception to the prohibition of monopolistic practices.

**Keywords:** business competition, assignment, procurement, the covid-19 vaccine

## 1. INTRODUCTION

Competition law is the law that regulates everything related to business competition. According to Christopher Pass and Bryan Lowes, what is meant by competition law is part of the law governing monopolies, mergers and takeovers, restrictive trade agreements, and anti-competitive practices. In other words, business competition law is the law that regulates the interaction of companies or business actors in the market, while the behavior of companies when interacting is based on economic motives. Unfair Business Competition is the impact of business competition

practices. The condition of business competition in several respects also has negative aspects, one of which is when the competition is carried out by dishonest economic actors, contrary to the public interest. The extreme risk of this competition is of course the possibility of unfair competition because competition is considered an opportunity to get rid of competitors in any way. Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition (Anti-monopoly Law) is the basis of business competition policy in Indonesia.

Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition provides legal certainty guarantees to further encourage the acceleration of economic development in an effort to improve people's welfare, as well as the implementation of the spirit and spirit of the 1945 Constitution of the Republic of Indonesia. The objectives of Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition are as follows:

1. Creating a conducive business climate through regulation of fair business competition, so as to ensure the certainty of equal distribution of business opportunities for large business actors, medium business actors, and small business actors.
2. Maintaining the public interest and increasing the efficiency of the national economy as an effort to improve people's welfare.
3. Preventing monopolistic practices and or unfair business competition caused by business actors.
4. Creating effectiveness and efficiency in business activities.

In Indonesia competition law is the government's policy to deal with monopolies. Competition laws aim to stop the abuse of market power by large corporations and, sometimes, to prevent mergers and acquisitions of companies that would create or strengthen monopolies. (Economic Dictionary : What is Antitrust (Economic)) However to overcome the pandemic, government has legalized monopolistic practices for a group of corporations that want to produce a corona vaccine. Since the Covid-19 Pandemic there have been many crises, especially health problems, and this has been for a long time, and the prospects for returning to normal in the near future are very slim. So

many countries were improving the quality of their respective health fields. one of which was several countries producing Covid-19 vaccines. In Indonesia, assigning PT Bio Farma as a BUMN company appointed for the Procurement of the Covid-19 Vaccine. In accordance with the provisions contained in Presidential Regulation Number 99 of 2020 concerning Vaccine Procurement and Vaccine Implementation in the Context of Combating the 2019 Corona Virus Disease (Covid-19) Pandemic.

The question proposes in this case, is the direct appointment of PT Bio Farma as a BUMN in the Procurement of Vaccines has complied with the Principles of Business Competition Law. In addition, are the legal basis to appoint PT Bio Farma has complied with the regulations stipulated in Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition. Is the Presidential Regulation Number 99 of 2020 concerning Vaccine Procurement and Vaccine Implementation in the Context of Combating the 2019 Corona Virus Disease (Covid-19) Pandemic, included as Antitrust Immunity.

The term antitrust is taken from United States law which was originally created to combat the business of trust (Varney, June 2012). In American language antitrust laws are immunities and exemptions that limit or hinder the application of antitrust laws to certain behaviors or industries. This step has been taken by the United States (US) to overcome the pandemic. Instead of limiting it, the US government has legalized monopolistic practices for a group of corporations that want to produce a corona vaccine. In Indonesia Antitrust is the government's policy to deal with monopolies. Antitrust laws aim to stop the abuse of market power by large corporations and, sometimes, to prevent mergers and acquisitions of companies that would create or strengthen monopolies (Economic Dictionary : What is Antitrust (Economic)). Antitrust immunity actually made specifically so that there is no clear deviation. From a business competition perspective this regulation favors one company or can be said to be one-sided. Based on Law Number 5 of 1999, it is excluded from the provisions of Article 50 letter b. Agreements relating to intellectual property rights such as licenses, patents, trademarks, copyrights, industrial product designs, integrated electronic circuits, and trade secrets, as well as agreements relating to franchises.

The Covid-19 pandemic is such a major global public health emergency that when certain conditions are met it may justify direct awards. There are genuine reasons to procure specific goods, services and works through assignment. One of which is assignment should aim to address current urgent needs that were not foreseeable before the crisis, i.e. procure indispensable material that needs to be used immediately, or replace an urgently needed existing supply source that has ceased to deliver, as a result of pandemic-related disruption. To assess the immediacy, types and volumes of such urgent needs, procurers should be in continuous communication with the units that will use the procured material, e.g. hospitals (OECD).

## 2. METHODS

The methodology in this study uses normative legal research conducted by examining library materials or secondary data using laws. The method of data collection is done through literature study, namely from secondary data; as well as some data taken from primary, secondary and tertiary legal materials related to the object of research. The data analysis method used is descriptive and qualitative by providing an overview in the form of legal explanations. The provisions in the main legal material related to antitrust immunity in the assignment of the Covid-19 Vaccine' to PT Bio Farma as a state-owned company that was granted monopoly rights by the Government through Presidential Regulation Number 99 of 2020, but the author found that there were Competition Law Rules that were violated, it was found in Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition.

## 3. RESULTS AND DISCUSSION

### 3.1 Is Presidential Regulation Number 99 of 2020 concerning Vaccine Procurement and Vaccination Implementation in the Context of Overcoming the Corona Virus Disease (Covid-19) Pandemic included as antitrust immunity

The history of the birth of Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition is divided into three parts:

1. Juridical Foundation. In the Preamble to the 1945 Constitution of the Republic of

Indonesia, it is clearly stated that the purpose of national development is to "protect the entire nation and the entire homeland of Indonesia, promote public welfare, educate the nation's life, and participate in carrying out world order based on independence, eternal peace and justice." social".

In the Economic Sector, the 1945 Constitution of the Republic of Indonesia requires the realization of the prosperity of the people equally, not the prosperity of individuals. Juridically, through basic legal norms (*state gerund gezet*), the desired economic system is a system that uses the principles of balance, harmony, and provides joint business opportunities for every citizen. Strictly speaking, Article 33 of the 1945 Constitution of the Republic of Indonesia is the basic concept of the national economy which according to Mohammad Hatta is socialist-cooperative. Article 33 paragraph (4) of the 1945 Constitution as a manifestation of the principle of economic democracy in Indonesia is a very important principle in the discussion of competition law. The principle of economic democracy must be prioritized for the balance between the interests of business actors and the public interest.

## 2. Socio-Economic Foundation

Socio-economically, the enactment of Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition is to create a strong economic foundation to create an economy that is efficient and free from market distortions.

## 3. Political and International Platforms

Politically and economically, there are parties who do not accept this law because they are more in a weak position. In the context of international relations, the enactment of Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition is also a consequence of the ratification of the Marrakesh Agreement by the DPR with Law Number 7 of 1974 which requires Indonesia to open up. and not subject to discriminatory

treatment, such as the provision of protection against corporate entry barriers and pressure from the IMF which has been Indonesia's creditor to limit the monetary crisis that hit and caused the Indonesian economy to slump widely.

This section may be divided by subheadings. It should provide a concise and precise description of the experimental results, their interpretation, as well as the experimental conclusions that can be drawn. Authors should discuss the results and how they can be interpreted from the perspective of previous studies and of the working hypotheses. The findings and their implications should be discussed in the broadest context possible. Future research directions may also be highlighted..

### **3.2. Presidential Regulation (Perpres) Concerning Vaccine Procurement And Vaccination Implementation In The Context Of Combating The 2019 Corona Virus Disease (Covid-19) Pandemic Included In Antitrust Immunity**

In Presidential Regulation Number 99 of 2020 concerning Vaccine Procurement and Vaccination Implementation in the Context of Eradicating the Corona Virus Disease 2019 (COVID-19) Pandemic, it has a legal basis, namely Article 4 paragraph (1) of the 1945 Constitution and Law Number 2 of 2020. Presidential Regulation This regulation regulates the acceleration of handling COVID-19 which is carried out by accelerating the procurement of the COVID-19 Vaccine and the implementation of the COVID-19 Vaccination. In the analysis, it can be seen from Article 50 letter a of Law Number 5 of 1999 which states that what is excluded from the provisions of this law are acts and or agreements that aim to implement the applicable laws and regulations, and also Article 51 of the Law Number 5 of 2020 which states that Monopolies and or concentration of activities related to the production and or marketing of goods and or services that affect the livelihood of many people as well as production branches that are important to the state are regulated by law and organized by State-Owned Enterprises and or other bodies or institutions. established or appointed by the Government. So that this Presidential Regulation Number 99 of 2020 was formed in accordance with Law Number

5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition.

Regarding Antitrust Immunity, Presidential Regulation Number 99 of 2020 is included in Antitrust Immunity. the most important thing is the conditions that must be met in order to be able to issue a regulation as Antitrust Immunity, the condition is to have complied with Article 50 letter A and Article 51 regulated in Law Number 5 of 1999 even though in this way the Government violates Article 50 letter B Antitrust immunity is an exception to the prohibition of monopolistic practices for business actors with certain criteria. In general, antitrust immunity is created to address national problems of an emergency nature or accelerate the production of goods and/or services that are urgently needed by the community. so that the President in issuing Presidential Regulation Number 99 of 2020 concerning PT Bio Farma as a State-Owned Enterprise appointed for Vaccine Procurement has complied with the requirements of Antitrust Immunity.

So there is also the Antitrust Immunity Policy, which indeed there must be a special policy applied by the antitrust agency in the Direct Appointment to PT Bio Farma (Banks, November 2021). Antitrust is the government's policy to deal with monopoly. Antitrust laws aim to stop the abuse of market power by large corporations and, sometimes, to prevent mergers and acquisitions of companies that would create or strengthen monopolies. The use of antitrust immunity cannot go unnoticed. It must be used under the right conditions. Not all circumstances can be used as an excuse to relax Law no. 5 of 1999. KPPU must ensure that there is no other alternative than this easing. Antitrust immunity is created to address national problems of an emergency nature or to accelerate the production of goods and/or services that are urgently needed by the community. So, it can be concluded that its use can only be used in an emergency or urgent situation. However, the antitrust immunity policy needs to be guarded by three things so that the practice does not harm the community. First, business actors who are granted exemptions from the prohibition of monopolistic practices must be closely monitored by KPPU. Second, corporations involved in the Red and White vaccine industry must consist of state-owned enterprises, the private sector,

and academics. So that the principle of healthy business competition is maintained and the price of the corona vaccine is affordable for all people. Finally, antitrust immunity is only temporary. When the corona vaccine is no longer a rare item, this rule must be repealed. With these three fences, the goal of creating a national vaccine industry is no longer just a hope. Efforts to restore the national economy can also run optimally (Heriani, 2022).

Therefore, the importance of Business Competition Policy is basically, competition policy is the main instrument to increase the efficiency of natural resource use and improve consumer welfare. Competition policy also plays a role in regulating market concentration so as not to interfere with competition and plays a role in increasing the flexibility of a country to survive in changing world economic conditions .

Regarding the KPPU (Business Competition Supervisory Commission), KPPU is the right institution to resolve business competition issues that have a multifunctional role and expertise so that they are considered capable of resolving and accelerating the process of handling cases (Is, 2016). KPPU issued KPPU Regulation Number 3 of 2020 concerning Relaxation of Law Enforcement Against Monopolistic Practices and Unfair Business Competition and Supervision of Partnership Implementation in Supporting the National Economic Recovery Program. It explains that the objective of the Relaxation of Competition Law Enforcement is to support the economic recovery program by protecting, maintaining, and increasing the economic capacity of business actors in running their business. So that this can also affect sustainable development and institutional reforms that need to be carried out. (Lianos, March 2022)

There are several forms of relaxation provided by KPPU, namely firstly relaxation of law enforcement on the implementation of the procurement of goods and/or services using the State Revenue Expenditure Budget or Regional Revenue Expenditure Budget. Second, relaxation of law enforcement on plans for agreements, activities and/or using a dominant position aimed at handling Covid-19 and/or increasing the economic capacity of business actors in running their business. The two relaxations are given if business actors meet various criteria determined by the KPPU. Relaxation of law enforcement on the procurement of goods and/or services is provided for procurement

aimed at meeting medical needs and/or providing supporting facilities for handling Covid-19 (such as procurement of drugs, vaccines, construction of emergency hospitals, appointment of hotels/buildings for self-isolation, or procurement of medical needs/other supporting facilities for handling Covid-19); and in the context of distributing social assistance and government social networks to the community. In addition, relaxation of law enforcement on plans for agreements, activities and/or using dominant positions is given by KPPU after business actors submit written requests to KPPU. Based on the request, KPPU will analyze the agreement plan, activities and/or use of the dominant position and make a decision on it no later than 14 (fourteen) days after the request is received by KPPU. (Lianos, March 2022)

So this shows that this is what is called Antitrust Immunity, and this KPPU's Regulation Number 3 of 2020 does not only mention the criteria regarding the objectives of the regulation but also mentions several forms of relaxation provided by the KPPU. So from here we can know that the Regulation of Appointment of PT Bio Farma in the Covid-19 Vaccine Assignment is included in the category of the KPPU Regulation

### **3.3. Any Possibilities of Violation Antitrust Immunity in the Direct Appointment of PT Bio Farma as a BUMN in Vaccine Procurement**

As we also know that discussing a company will not be separated from a regulation or the number of legal regulations that regulate, especially Business Competition Law, especially if the company is a state-owned company which is of course regulated by the state. Regulations that appoint PT Bio Farma as a BUMN that was formed for the Procurement of Vaccines is stated in Article 4 of the Presidential Regulation of the Republic of Indonesia Number 99 of 2020 concerning Vaccine Procurement and Vaccination Implementation in the Context of Combating the 2019 Corona Virus Disease Pandemic (Covid-19). So with this matter, it has taken into account Article 51 of Law no. 5 of 1999 which states that Monopolies and or concentration of activities related to the production and or marketing of goods and or services that affect the livelihood of many people as well as production branches that

are important to the state are regulated by law and organized by State-Owned Enterprises and or agency or institution established or appointed by the Government. So that the author in this case analyzes Article 51 of Law no. 5 of 1999 which became the guideline for the implementation of the appointment of PT Bio Farma in the Government's Covid-19 Vaccine Assignment. We need to know that State-Owned Enterprises (BUMN) do get an exception in Law no. 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition (Anti-Monopoly Law). But it turns out that this is not the case, not all SOEs get exceptions.

In Article 51 of Law no. 5 of 1999 (Anti-Monopoly Law) it is stated that monopoly and or concentration of activities related to the production and or marketing of goods or services that affect the livelihood of many people as well as production branches that are important for the state are regulated by law and organized by BUMN and or agency or institution established or appointed by the government. This is interpreted by many parties as a form of exception for BUMN in terms of conducting a business monopoly. However, this is not an absolute exception. The Anti-Monopoly Law does not provide exceptions to SOEs conducting unfair business competition. What is meant by the Anti-Monopoly Law is the granting of exceptions to BUMN to carry out a monopoly under certain conditions. "This Law does not provide exceptions to BUMN that conduct unfair business competition. Because this Law states that BUMN monopoly is allowed under certain conditions. These requirements include, firstly, that activities carried out by BUMN are activities that control the livelihood of many people. Second, the activities that affect the livelihood of the people must be stipulated by law. Third, the BUMN is indeed appointed by the government to carry out the business activity. If a BUMN has fulfilled these requirements, then the BUMN can be said to be included in the the exception category as referred to in the Anti-Monopoly Law. However, it must be remembered that what is excluded is the structure that SOEs are allowed to monopolize. "But their conduct or behavior is still not excluded (Ari, 2022) unhealthy, for example with n inhibiting other business actors from entering the relevant business field, the BUMN must still comply with the regulations contained in the Anti-Monopoly Law. Especially during the current Pandemic situation where the Government finally

appointed PT Bio Farma to carry out the task of Procurement of Covid-19 Vaccines. So it is said that PT Bio Farma can be categorized as a BUMN in the Regulation of the Business Competition Supervisory Commission (KPPU).

By looking at the analysis of Article 51 of Law No. 5 of 1999, we must know that in addition to regulations that are complied with or fulfilled, there are also legal regulations that are violated by the government in the appointment of PT Bio Farma is Article 50 letter B of Law no. 5 of 1999 which explains that what is excluded from the provisions of this law are agreements relating to intellectual property rights such as licenses, patents, trademarks, copyrights, industrial product designs, integrated electronic circuits, and trade secrets, as well as agreements related to with a franchise. Article 50 letter B has regulatory criteria which indicate that all competition activities violated in Law no. 5 of 1999 (the Anti-Monopoly Law) has their respective penalties and can be subject to criminal penalties, except for the things that have been mentioned in Article 50 letter B. While the Government in making Presidential Regulation Number 99 of 2020 concerning Vaccine Procurement and Vaccination Implementation in the Context of Combating the Corona Virus Disease 2019 (Covid-19) Pandemic to appoint PT Bio Farma in Vaccine Assignment, if viewed from the Government's business competition, it means that it favors only one company so that here it is clearly detrimental to other companies operating in the world of Health, especially in the field of vaccines, the author analyzes that Presidential Regulation No. 99 of 2020 was made by the government so that it seems - if PT Bio Farma as a BUMN does not violate Article 50 letter B of Law no. 5 of 1999, whereas if viewed from the perspective of the Government's Business Competition Law in appointing PT Bio Farma through the Presidential Regulation has violated Article 50 letter B of Law No. 5 of 1999.

Therefore, the Direct Appointment of PT Bio Farma as a BUMN in the Vaccine Assignment is not in accordance with the Principles of Fairness in the Law of Business Competition, and also not in accordance with the Principles of Economic Democracy, from this principle means that the government must also pay attention to the balance between the interests of business actors and the public interest. So actually this is the

most important principle in Business Competition Law, from the five existing business competition law principles. So it can be said that the direct appointment of PT Bio Farma is not in accordance with the Principles of Economic Democracy of our country.

#### **4. CONCLUSIONS**

The appointment of PT Bio Farma as a state-owned enterprise (BUMN) for vaccine procurement, as outlined in Presidential Regulation Number 99 of 2020, raises questions regarding its alignment with business competition law and principles of economic democracy. While the regulation cites Article 4 of the Presidential Regulation, it fails to fully adhere to Article 51 of Law no. 5 of 1999, which provides guidelines for such appointments. Despite some state-owned enterprises being granted exceptions under Law no. 5 of 1999, not all are entitled to such privileges, particularly in monopolistic practices. Thus, the direct appointment of PT Bio Farma does not comply with the principles of fairness and economic democracy in business competition law.

Presidential Regulation Number 99 of 2020 was enacted during the COVID-19 pandemic to address urgent vaccination needs, reflecting the necessity for expedited measures. However, the regulation's inclusion of antitrust immunity raises concerns regarding monopolistic practices. While antitrust immunity may be warranted in emergencies or for accelerating critical goods and services, compliance with Article 50 letter A and Article 51 of Law Number 5 of 1999 is essential, despite potential violations of Article 50 letter B. The issuance of this regulation ensures PT Bio Farma's appointment meets the criteria for antitrust immunity.

Regarding the Business Competition Supervisory Commission (KPPU), its Regulation Number 3 of 2020 relaxes law enforcement on monopolistic practices and unfair business competition to support national economic recovery. This regulatory context underscores the complexities of balancing emergency measures with fair competition principles in the context of the pandemic.

#### **5. SUGGESTION**

There is a discrepancy between the Principles of Business Competition Law and Presidential Regulation Number 99 of 2020, firstly it is not in accordance with the Principles of Fairness in the Law of Business Competition Principles, the second is not in accordance with the Principles of Indonesian Economic Democracy, namely from this principle that the government must also pay attention to the balance between the interests of business actors. and public interest. Therefore, the authors hope that the Government in the future in making regulations, especially in appointing companies, must be much more concerned with and consider all aspects that have been stipulated by law so that they are not only concerned with what is more profitable for one company in appointing a BUMN company. Then for the KPPU (Business Competition Supervisory Commission) as an independent institution that was formed to oversee the implementation of Law no. 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition. KPPU is responsible to the President. The KPPU should play a very important role here in coordinating with the President, if the President is to make Regulations relating to Competition. so that the role of KPPU should be to provide input to the government before the government determines its policies in the Presidential Regulation Number 99 of 2020.

What should have been done by the Government before stipulating the Regulation to be ratified, it must be examined and considered again in making regulations, namely Presidential Regulation Number 99 of 2020. whether or not there is a violation of the Articles contained in Law no. 5 of 1999 as the main regulation regarding its relation to competition. So that in the author's analysis, the role of KPPU should be in its regulations that have been made concerning Relaxation of Law Enforcement of Monopolistic Practices and Unfair Business Competition and Supervision of Partnership Implementation in the Framework of Supporting the National Economic Recovery Program. also included as Antitrust Immunity because in order to comply with the objectives of the Business Competition Law to create fair competition and not cause harm to other parties or companies other than PT Bio Farma, which was also involved in the Covid-19 Vaccine Assignment in Presidential Regulation Number 99 of 2020.

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