

## REFORMULATION OF BUSINESS COMPETITION LAW ENFORCEMENT BASED ON A HYBRID MODEL

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### Citation Guide:

Habibi,  
'REFORMULATION OF BUSINESS COMPETITION LAW ENFORCEMENT BASED ON A HYBRID MODEL'  
[2021] 3 (2) Prophetic Law Review 131.

### Received:

31 August 2021

### Accepted:

13 December 2021

### Published:

21 December 2021

### DOI:

10.20885/PLR.vol3.iss2.art2



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### Abstract

*Private enforcement in business competition law enforcement has several weaknesses rendering it sub-optimal in its compensation function. This article proposes a reformulation of business competition law enforcement based on a hybrid model for enhancing private law. This article uses a normative method with laws and regulation, cases, and a conceptual approach: law materials in the form of laws and regulations and Business Competition Supervisory Commission and court judgements are analyzed using hybrid theory so the weaknesses of business competition law enforcement can be identified, then, the result of a reformation proposal can be obtained by evaluating the result of analysis which are presented argumentatively. The result of this research study shows that a privately triggered public enforcement pattern which is implemented in private enforcement cannot work as compensation function optimally. The weakness in regulating private enforcement has created many obstacles for the appellant of trade damage. It is necessary to reformulate the business competition law enforcement in the future by enhancing private enforcement. The enforcement is conducted by facilitating the claimants with diverse features which ease them to get compensation for the trade damage they suffer.*

**Key Words:** *Private enforcement, public enforcement, hybrid modeling, competition law.*

### A. Introduction

Most business competition law enforcement is based on two enforcement pillars, public enforcement, and private enforcement.<sup>2</sup> Public enforcement refers to competition

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law which is enforced by the country. In common, law enforcement officers are granted with authority to investigate the breaches. Meanwhile, civic enforcement refers to litigation, which is initiated individually, either by doing stand-alone claim or follow-on action ahead of the court to get compensation for breaching the compensation law.<sup>3</sup>

The enforcement of Law No. 5 Year 1999 about The Prohibition of Monopoly and Unhealthy Competition Business Practice (LPMUBCP)<sup>4</sup> have a similar purview. The Business Competition Supervisory Commission (BCSC) is not granted the authority by the Laws to enforce business competition laws with public enforcement, but it is limited to specific authority to enforce competition business laws in dimension. In order to enforce business competition laws with public enforcement, Business Competition Supervisory Commission was granted with broad authority: as investigator (investigate function), as inspector, as examiner, as prosecutor, (prosecuting function), adjudicator (adjudication function), or as consultant (consultative function).<sup>5</sup> Meanwhile, in order to enforce the law privately, it should be based on the Business Competition Supervisory Commission's authority to decide and adjudicated damages suffered by other business practitioners or community<sup>6</sup> by enacting the payment of the compensation<sup>7</sup>.

It has been more than two decades after the Laws of Prohibition for Monopoly and Unhealthy Business Competition (LPMUBCP) were enacted, but in that period, there is a question related to the issue of business competition law enforcement, especially related to how to set private enforcement within the dominion of public enforcement. According to number of cases which has been decided by BCSC from year 2000 to year 2020, out of 373 decrees, there are no more than 18 cases in competition laws enforcement under private dimension.<sup>8</sup> In fact, the consistency of BCSC decisions is not in accordance with the small number of cases which are enforced through private action. BCSC decrees about the Matic Motorcycle Cartel consider damages on the consumers but did not enact the compensation in the decree. In the decree about the case related to Fuel Surcharge, BCSC

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<sup>2</sup> Kai Hüschelrath and Sebastian Peyer, 'Public and Private Enforcement of Competition Law: A Differentiated Approach' (2013) 36 *World Competition Law and Economics Review* 585, 591.

<sup>3</sup> *ibid.*

<sup>4</sup> Further, in this article, the name is shortened into LPMUBCP.

<sup>5</sup> Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition, s 36 and 47.

<sup>6</sup> *ibid.*, art. 36 (f).

<sup>7</sup> *ibid.*, art. 47 (2) (f).

<sup>8</sup> Based on the database of The Business Competition Supervisory Commission Decisions that have been processed 'Database Putusan KPPU' <<http://putusan.kppu.go.id/simper/menu/>> accessed 21 August 2021.

decided the compensation to be given to the country, not to the consumers as the injured parties. In decree about the case related to SMS Cartel, BCSC decided the damage on the consumers and was won by the consumers on appeal level, but BCSC denied the decree by stating that they did not have the authority to execute the dissemination of compensation to the consumers. In the case about a beauty contest in PT Pertamina, the court rejected the compensation claim proposed by businesses because they were not the informants. Besides, until now, there has been no consumer claim related to compensation of business competition damage which is filed to the court is won successfully.

Research shows that the position of private enforcement is not clear in the enforcement system of business competition laws.<sup>9</sup> Before the enactment of LPMUB, the claim on private compensation towards the anti-competition behavior was based on other various law provisions. There are many court cases related to Civil Code article 1365 seeking compensatory damages.<sup>10</sup> The law provisions are still implemented if they do not conflict with the LPMUB. Article 52 LPMUBCP.<sup>11</sup> The law is still implemented if they do not oppose the LPMUBCP. Article 52 in LPMUBCP is still in effect but in practice, there is no clear implementation in the court level.

Currently, Indonesia is excessively dependent on public enforcement and fails to provide an effective judicial mechanism for giving compensation and facilitating recovery towards the victims of business competition law breaches. Business competition law enforcement is ineffective because it fails in fulfilling the compensation and avoidance function. Improving private enforcement can become one key solution to optimizing Indonesian business competition law.<sup>12</sup>

Business competition law enforcement in Indonesia performed by BCSC contains many weaknesses. One of the reasons is because the Informed which is treated unfairly by the appellant does not get legal certainty related to compensation for the damage experienced because of unhealthy business competition practices. BCSC as the law

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<sup>9</sup> Ningrum Natasya Sirait, 'The Development and Progress of Competition Law in Indonesia' (2009) 54 *The Antitrust Bulletin* 15, 45–46. Manaek SM Pasaribu, 'Challenges of Indonesian Competition Law and Some Suggestions for Improvement' (2015) ERIA Discussion Paper Series, 18.

<sup>10</sup> Ningrum Natasya Sirait, 'The Development and Progress of Competition Law in Indonesia' (n 9) 46.

<sup>11</sup> Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition, s 52.

<sup>12</sup> Paripurna Sugarda and Muhammad Rifky Wicaksono, 'Power to The People: Enhancing Competition Law Enforcement in Indonesia Through Private Enforcement' (2019) 26(2) *Asia Pacific Law Review* 127, 130.

enforcement agency only enacts the existence of the damage, but it never directly charges the business practitioner to pay the compensation to the injured parties.<sup>13</sup>

The argument of this article is that current business competition laws have several weaknesses which are mainly related to private enforcement since it does not activate its role as compensation function optimally. This article offers reformulation for the development of business competition law enforcement based on a hybrid model by enhancing private enforcement in the future.

## **B. Problem Formulation**

The focus of the problem in this article is how to reformulate the development of business competition law enforcement based on a hybrid model in the future?

## **C. Methodology**

This article uses a normative method with laws, cases, and conceptual approach. Laws approach in this article is used to analyze the consistency of the regulation norms implementation on the compensation giving in business competition which is studied. The use of a case approach is to analyze ratio decidendi of the commissioner in BCSC and the judge decree which judge the cases related to compensation in business competition. Conceptual approach is aimed to identify the concept of compensation which is based on law doctrines. As a starting point, legal materials in the form of laws and BSCS and court decisions are analyzed with a hybrid model-based law enforcement theory so the weaknesses of business competition laws enforcement can be identified. The result of reformulation offer can be obtained by evaluating the result of analysis which is presented argumentatively.

## **D. Discussion and Results**

### **1. The Urgency of Hybrid Modeling-Based Business Competition Law Enforcement**

The enforcement of hybrid model-based business competition law perceives that the ideal enforcement of business competition law is the combination of the enforcement of public law and private law. The emergence of two law enforcement approaches in business competition happened because business competition law has

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<sup>13</sup> Carissa Christybella Wijaya and others, 'Penegakan Hukum Persaingan Usaha di Indonesia Melalui Harmonisasi Public Enforcement dan Private Enforcement' XX (3) (2021) Law Review 342, 353.

hybrid characteristics. Kit Barker argues that business competition law is the hybridity of two types in legal field.<sup>14</sup>

Kit Barker identifies three hybridity dimensions in business competition.<sup>15</sup> *Firstly*, business competition law is the hybridity between public and private law. Businesses and individuals who engage in anti-competitive behavior breach both the nature of public law and in private law. The doer action which breaks the business competition law shows that the breach is aimed not only for the country (qua state) but also individuals.

*Secondly*, business competition law is the hybridity between public and private interests. According to Barker, business competition law protects both individuals' economic interests and the public interest in the whole of business competition. This statement is affirmed by two things: (a) tort common law related to intimidation, conspiracy, and intervention which are illegal subversions of the free market, has long acknowledge that every person has his/her right to trade and to get rid of other parties' intervention which is unfair. This indicates that the modern business competition law presents not only for the sake of individual business practitioners but also for the market; (b) the existing business competition law regime gives compensation to the individuals who are impacted by the anti-competition practice.

*Thirdly*, business competition law is the hybridity between public and private law enforcement. Public enforcement is every enforcement process which is controlled by the state agency or a body which work under the state mandate, as the opposite of individual/private or individual community. On the contrary, private enforcement is when a person or a group of people who represent(s) its members' interest take legal action.

Private enforcement of business competition law with a hybrid model, proposed by Kit Barker, refers to rationale of two arguments, that are moral argumentation and practical argumentation.<sup>16</sup> From the moral perspective, Barker states that the power of private enforcement is the main moral component of the rights and obligations. From the practical standpoint, firstly, private law enforcement should be done if public law enforcement is not possible to implement or vice versa. Secondly, the selected

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<sup>14</sup> Kit Barker, 'Modelling Public and Private Enforcement: The Rationality of Hybridity' (2018) 37(1) *The University of Queensland Law Journal* 9, 14.

<sup>15</sup> *ibid* 12–13.

<sup>16</sup> *ibid* 20–22.

enforcement law model should be the efficient one. Thirdly, there should be harmony between the form of law enforcement with the interest being protected. Fourth, the law enforcement process should be effective and cost friendly. Fifth, there should be an effort to avoid conflicts of interest and the importance of business competition law enforcement bodies independence.

The emergence of hybrid modelling is based on the limited success of the single approach in the law enforcement process. Often, according to Sant'Ambrogio, which is cited by Barnett<sup>17</sup> designing law enforcement regime requires considering various aspects which sometimes oppose each other. Only doing one-sided action by enforcing public or private law is not sufficient. Only focusing on public enforcement is insufficient because of limited agency resources to investigate and adjudicate all cases. Only focusing on private law is not sufficient because it can hinder the body ability in creating unified and coherent approach for the enforcement. Also, the adjudication processes in the courts and before administrative bodies are not reliable in providing recourse. Hence, the combination between private and public law enforcement brings benefit in mitigating the weaknesses the limitation of agency resources, gives additional information to the agency, and support the legitimation of the enforcing regime.

Foer dan Cuneo stated that there is no ideal construct for developing private law enforcement.<sup>18</sup> The differences in cultural and moral values, political values, legal context, economic context, also institutional ability precludes an ideal private enforcement model for all countries. Every country must develop its own model which is relevant to its condition.

Hybrid-based enforcement model is the combination of compensation and avoidance element. Foer and Cuneo classify three levels of possibilities of the mix/combination (hybrid) of the public and private enforcement based on the level of effectiveness and avoidance (table 1).<sup>19</sup>

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<sup>17</sup> Michael Sant'Ambrogio, 'Private Enforcement in Administrative Courts' (2019) 72(2) Vanderbilt Law Review 425, 433-434. Kent H. Barnett, 'Towards Optimal Enforcement' (2019) 72(4) Vanderbilt Law Review 127, 129.

<sup>18</sup> Albert Foer and Jonathan Cuneo, 'Toward an Effective System of Private Enforcement' in Albert Foer and Jonathan Cuneo (eds.), *The International Handbook on Private Enforcement of Competition Law* (Edward Elgar Publishing 2010) 593.

<sup>19</sup> *ibid* 594.

**Table 1 Recovery Ability of Hybrid Law Enforcement Modelling<sup>20</sup>**

Level	Mechanism performed
Level I There is no compensation mechanism	<ul style="list-style-type: none"> <li>• There is no compensation mechanism</li> <li>• Competition authority only works for stopping the activity</li> <li>• Competition authority provides the power to charge fine sanction</li> </ul>
Level II Minimalist Mechanism	<p>First Model:</p> <ul style="list-style-type: none"> <li>• There is no mechanism for follow-on claims upon competition authority decree</li> <li>• The amount of compensation which is given is the final amount after detracted by fine sanction charged by the authority</li> </ul> <p>Second Model:</p> <ul style="list-style-type: none"> <li>• There is a mechanism for follow-on action claim upon business competition authority decree</li> <li>• The amount of compensation which is given is the final amount after detracted by fine sanction charged by the authority</li> </ul>
Level III Maximum mechanism	<p>First Model:</p> <ul style="list-style-type: none"> <li>• There is mechanism for stand-alone claim which is separated from the process in competition authority</li> <li>• The characteristics of the damage should be single upon the proved damage</li> </ul> <p>Second Model:</p> <ul style="list-style-type: none"> <li>• There is mechanism for stand-alone which is separated from the process in competition authority</li> <li>• The addition of diverse features, such as tribble, damage, punitive damage, join several liability, diversion on the costs of suit, and the like.</li> </ul>

Table I shows that a hybrid model of law enforcement can be developed with different level of complexity. There are higher expectations for a more complex of mechanism. The inexistence of private enforcement may make the enforcement system become more effective because there is no demand for compensation. However, it neglects the compensation function for the injured parties. On the contrary, if the private enforcement for the purpose of obtaining compensation is forced optimally so the law enforcement mechanism becomes more complex.

## **2. The Implementation of Business Competition Law Enforcement: Critical Note**

Although the regulation of compensatory damages has been stated imperatively since the enactment of LPMUBCP, the legal framework of the compensation issued nine years later. It can be seen from the issuance of Commission Regulation No. 4 Year

<sup>20</sup> *ibid.*

2009 about the Guidance of Administration Action in accordance with Provision Article 47 LPMUBCP. This regulation contains guidance for deciding the penalties for perpetrators and the damages awarded to the businesses or individuals that bring claims for the compensation in cases handled by the BCSC.

The enactment of compensation in the competition adapting the following principles:<sup>21</sup>

- a. Types of compensation is actual damages.
- b. The enforcement of punitive damages is based on the private law context.
- c. The process of calculating compensation is conducted by the parties who make the claims.
- d. The award compensation by BCSC is based on the calculation validity referring to the relevancy, fairness, and appropriacy principle.

The Commission Regulation No. 4, Year 2009, then, was affirmed with the issue of Commission Regulation No. 1 Year 2000 about the Procedure of Handling the Case.<sup>22</sup> The regulation divides the report categories into two types, reports without compensation claims and reports with compensation claims. Furthermore, this regulation manages the procedure in examining the report with compensation claim.<sup>23</sup> In 2019, the Commission Regulation No. 1 Year 2010 is repealed and exchanged with Commission Regulation No. 1, Year 2019.<sup>24</sup> However, although the complaining witness categories who make the compensation claim can be affirmed, the procedure of reporting is not regulated specifically in the Commission Regulation No. 1 Year. 2010.

On October 20, 2020, the Omnibus Law was enacted. The Omnibus Law<sup>25</sup> contains several changes from LPMUBCP. However, the changes did not address the management aspect related to competition compensation. The changes only converts four aspects:<sup>26</sup> First, the change related to exception effort from the State Court to Commercial Court; Secondly, the omission of handling duration towards the exception

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<sup>21</sup> The Business Competition Supervisory Commission Regulation No. 4 of 2009 on the Guidance of Administrative Action in Accordance with the Provision in Article 47 of Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition, Attachment letter f.

<sup>22</sup> The Business Competition Supervisory Commission Regulation No. 1 of 2010 on the Procedure of Handling Cases.

<sup>23</sup> Ibid, art. 46.

<sup>24</sup> The Business Competition Supervisory Commission Regulation No. 1 of 2019 on the Procedure of Handling Cases related to Monopoly and Unfair Business Competition Practice.

<sup>25</sup> Law No. 11 of 2020 on Job Creation.

<sup>26</sup> Fitri Novia Heriani, '4 Poin Penting terkait Penegakan Hukum Persaingan Usaha dalam UU Cipta Kerja' (*hukumonline*, 5 November 2020) <<https://hukumonline.com/berita/baca/lt5fa38acac9fab/4-poin-penting-terkait-penegakan-hukum-persaingan-usaha-dalam-uu-cipta-kerja/?page=1>> accessed 21 September 2021.



effort by Commercial Court and Supreme Court; and third, the omission the maximum fine limitation and fourth, related to the omission of criminal warning on the monopoly practice breach and unhealthy business competition. Government Regulation No. 44 Year 2021<sup>27</sup> which was issued after the issue of Omnibus Law affirms the BCSC authority in enacting the compensation payment.<sup>28</sup> However, there is no regulation about the compensation provision in Commission Regulation No. 2, Year 2021,<sup>29</sup> as in Commission Regulation No. 4 Year 2009.

According to the initial framework about compensation regulation, which was enacted, so the operation movement of business competition law enforcement takes hybrid modelling with privately triggered public enforcement modelling. This kind of pattern which carries private enforcement consequence can emerge if it is triggered with public enforcement by BCSC. Accordingly, the current emerging private enforcement is not in the “pure” form like the private cases handled in the court. The provisions in LPMUBCP only allow the informant to claim the compensation as the part of public enforcement process in BCSC.<sup>30</sup>

So far, a hybrid model-based business competition law enforcement scheme with the privately triggered public enforcement pattern has been implemented indicates that it has many weaknesses. In general, the weaknesses are related to the compensation claim mechanism which is with bias on the informant to be the claimant. The principal weaknesses of business competition law enforcement can be elaborated as follows.

#### **a. Limited Legal Standing**

Private enforcement, which is implemented up to this time, restricts legal standing. Legal standing is only granted to a business practitioner as the informant who claims the compensation. The business as a competitor that is damaged, but its status is not as the informant, his/her legal standing is not acknowledge. This is reflected from the case *Beauty Contest PT Pertamina*.<sup>31</sup> The intervention claims of the business practitioner competitor which is aimed to claim the compensation was

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<sup>27</sup> Government Regulation No. 44 of 2021 on the Implementation of the Prohibition of Monopolistic Practices and Unfair Business Competition.

<sup>28</sup> *ibid*, art. 6 (2) (f).

<sup>29</sup> The Business Competition Supervisory Commission Regulation No. 2 of 2021 on the Guidance of Fine Sanction Imposition for Performing Monopoly and Unfair Business Competition Practice.

<sup>30</sup> Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition, s 48.

<sup>31</sup> *The Case of Donggi-Senoro Project Beauty Contest Process* [2010] Komisi Pengawas Persaingan Usaha No.35/ KPPU I/ 2010. *PT Pertamina (Persero) vs The Business Competition Supervisory Commission* [2011] Pengadilan Negeri Jakarta Pusat No.34/PDT.G/ KPPU/2011/ PN.JKT.PST.

rejected by the court because the business competition case does not recognize intervention claim. Consumer community gets same treatment. Although it is often that in business competition cases the harm to consumers proves the existence of breaching towards LPMUBCP but the final decree of BCSC does not state that the consumers become the parties who get the compensation from the damage award.<sup>32</sup>

**b. No statute of limitations on claim requests**

The time limitation on compensation requests is not regulated. So far, the compensation request is coincident with the report of breaching allegations. Sometimes, the injured parties realize the damage undergone lately. Besides that, they need time for preparing the request because there is consequence in which they require to prove the damage they have undergone. In the case Beauty Contest PT Pertamina, it can be seen that the business practitioners claimed the compensation late, so when it was claimed, the case was about to enter the exception proposal phase, and as the result their claim was rejected.

**c. The compensation petitioner's claim should prove by him/herself the failure element which cause him/her to be damaged but in another side, there is no facility to access the competition authority documents**

According to the burden of proof in Article 163 HIR/283 RBG, it states that "Whoever who claim possess the right or an event, he/she has to prove the right or the event." This point gives the obligation to the petitioner in proving that the breaching upon the business competition law causes him/her damaged. The evidentiary burden is not easy especially when the petitioner needs to prove the failure component. Several cases which were rejected for granting the compensation claim indicate the difficulty to prove the damage in business competition cases related to the complex economic analysis.<sup>33</sup>

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<sup>32</sup> *The Case of SMS Cartel* [2007] Komisi Pengawas Persaingan Usaha No.26/KPPU-L/2007. *The Case of Fuel Surcharge Pricing in The Domestic Aviation Services Industry* [2009] Komisi Pengawas Persaingan Usaha No.25/KPPU-I/2009. *The Case of Alleged Violations of Article 5 (1) of L Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition in the 110-125 Cc Automatic Scooter Motorcycle Industry in Indonesia* [2016] Komisi Pengawas Persaingan Usaha No.4/KPPU-I/2016.

<sup>33</sup> *The Case of Discrimination of Gas Distribution by the Pertamina* [2006] Komisi Pengawas Persaingan Usaha No.21/KPPU-L/2005. *The Case of Clean Water Management in Batam Island* [2008] Komisi Pengawas Persaingan Usaha No.11/KPPU-L/2008. *The Case of Tender for Procurement of Health Equipment at the Department of Health and Social Welfare, Natuna Regency, Riau Island, 2007 Financial Year* [2008] Komisi pengawas Persaingan Usaha No.30/KPPU-L/2008. *The Case of Class Action Lawsuit on Automatic Motor Cartel* [2019] Pengadilan Negri Jakarta Pusat No.526/Pdt.G/2019/PN.Jkt.Pst.

The difficulty in proving the elements of anti-trust with the inexistence of facility which allows the petitioner to get the access to the documents as the proofs from the competition authority (BCSC). Often, probative evidence offered by the claimant are in the possession of the competition authority. The competition authority with its investigation power and ability will be easier in getting the important required information for the proofing process. There is no provision allowing the claimant to access the evidence will become difficult for the petitioner.

**d. There is no mechanism for collective claims**

The Legal framework of private enforcement does not provide mechanism to do collective claim/class action. Several business competition cases often encompass big amount of damage potential, massive scale from the number of parties which get the damage or the spreading area.<sup>34</sup> So far, consumers who do the class action are not included as the part of private enforcement framework in BCSC. The petitioners' claims refer to Laws No. 8 Year. 1999, on Protection for the Consumers. However, BCSC states that they do not have competency to protect the consumers.<sup>35</sup>

According to several evidence, business competition law enforcement with privately triggered public enforcement scheme which is implemented by BCSC has several basic weaknesses. The scheme has handicapped private enforcement to be incapable to achieve its compensation function optimally.

**3. Reformulation of Business Competition Law Enforcement Based on a Hybrid Model**

The reformulation of business competition law enforcement based on a hybrid model requires the combination of public and private enforcement in the business competition law enforcement. Each law enforcement pathway has its own strengths and weaknesses. The combination of both enforcements is aimed to complete each other to reach optimal enhancement purpose.

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<sup>34</sup> *The Case of Alleged Violations by the Tamasek Business Group* [2007] Komisi Pengawas Persaingan Usaha No.07/KPPU-L/2007. *The Case of SMS Cartel* (n 31). *The Case of the Broadcasting Right Barclays Premier League (English Mayor League) Season 2007-2010* [2008] Komisi Pengawas Persaingan Usaha No.03/KPPU-L/2008. *The Case of Alleged Violations of Article 5 (1) of L Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition in the 110-125 Cc Automatic Scooter Motorcycle Industry in Indonesia* (n 31).

<sup>35</sup> Fika Nurul Ulya, 'KPPU: Perkara Perlindungan Konsumen Korban Kartel Yamaha-Honda Silakan Dilanjutkan Pihak Lain' (*Kompas*, 6 May 2019) <<https://money.kompas.com/read/2019/05/06/184100526/kppu-perkara-perlindungan-konsumen-korban-kartel-yamaha-honda-silakan>> accessed 12 September 2021.

For the last two decades, the facts that private enforcement has not developed. Meanwhile, public enforcement dominates and is the main option in business competition law enforcement. The enhancement of private enforcement is important to ensure the business competition law enforcement not only to reach the avoidance function but also to ensure compensation for the injured parties.

The reformulation of business competition law enforcement based on a hybrid model can be implemented by improving the combination complexity between the public and private enforcement. Previously, private enforcement can happen if it is triggered by public enforcement, but in the future, this scheme should be abandoned. The petitioners should get facilities in the form of compensation regulation which give more fair legal certainty guarantee.

In Indonesia, the development of private approach in the future should select minimalist compensation level scheme. The minimal compensation maintains the equilibrium among the effectivity, efficiency, and cost-friendly principles. Mainly, the mechanism is as follows: Firstly, all cases related to business competition should be handled by BCSC as the first tier “adjudicator.” Secondly, the BCSC only renders administrative sanction and fines. Thirdly, the parties who request for the compensation do follow-on action claim to the commercial court based on the BCSC decision.

With the mechanism, the settlement of the business competition cases can place the public enforcement initiated by Business Competition Supervisory Commission (BCSC) as the superior mechanism to the private enforcement through private litigation. The mechanism can distinguish the competency of BCSC’s role as the public law enforcing body and commercial court as the private law enforcing body in settling business competition law cases.

The regulation mechanism of compensation in business competition, with the privately triggered public enforcement scheme, which can be implemented up to this time referring to BCSC. Meanwhile, on the other hand, BCSC is empowered with the public enforcement function. This multi roles cause the private enforcement becomes less maximal. Ideally the public enforcement function should be separated clearly from the private enforcement function. There two main reasons. Firstly, with the BCSC’s authority to award compensation, it is difficult for BCSC to avoid conflicts of interest

upon its own decree<sup>36</sup> Often, BCSC becomes the party which is charged in a compensation case in the court. In the claim, the business practitioners and/or consumers make the problem from the BCSC decrees which are not able to enact the compensation for them. Secondly, if BCSC is not granted with authority for private enforcement, the BCSC limited resources can give more priority in doing its roles and functions.

If the private enforcement action ends up in court, the petitioner can claim for the compensation to the court by requesting the follow-on action claim. A follow-on action claim is selected based on the consideration that it is more effective than stand-alone claim which requires complex proofing process. Follow-on action claims are requested after there is decrees from BCSC than the business practitioners are sentenced as the guilty party. Referring to the decree, the petitioner is not expected to prove the failure components in the proofing phase. The petitioner in the court just needs to prove that the offending action has caused damage by claiming the damage estimation that he/she has experienced.

One of characteristics of private dispute resolution is the possibility of settlement based on the parties in dispute. With the non-litigation settlement option, the parties can settle the cases with their own selected way. This mechanism allows the victims to settle the problem faster and easier based on the voluntary agreement. Considering the cost and uncertainty of the litigation process, and the complexity of the compensation claim related to competition, most private enhancement systems try to introduce the settlement of compensation claim outside the court. Three main mechanisms can be found in the world: (i) voluntary compensation scheme; (ii) ADR scheme; and (iii) Arbitration scheme.<sup>37</sup>

The mechanism for compensation in the future requires the affirmation of broader legal standing regulation. The legal standing should not only for the business practitioners but also for the consumers. Consumers can get the legal acknowledgement for the legal standing to get compensation upon the damage they have experienced, at least for two reasons: Firstly, as the business practitioner competitor, Consumers are the parties who are affected directly by breaching LPMUBCP. Secondly, Consumers become the last estuary from the economic damage who are the most vulnerable to be

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<sup>36</sup> *PT Pertamina (Persero) vs The Business Competition Supervisory Commission* (n 30).

<sup>37</sup> Miguel Flores and Abel Rivera, 'Antitrust Damages Claims: Is Mexico in the Right Path?' (2016) 4 *CPI Antitrust Chronicle* 45, 79–83.

exploited by the anti-competition business practitioner action. So far, Consumers' positions are the weakest point in the movement of business competition law enforcement operational with public administrative approach performed by BCSC.

A statute of limitations should be imposed. The deadline for filing claims has an important meaning to guarantee the legal certainty. For the petitioner, by having, time, they will be able to ensure the preparation to consolidate the ongoing claims. Meanwhile, for the petitioners, by having the time, they will be able to ensure the effectiveness of the claim in one side and in another side to ensure that the case can be avoided from *nebis in idem* principle. In comparison, in the USA the statute of limitations is four years<sup>38</sup> and in the Europe Union the deadline is five years, starting from the occurrence of the breaches.<sup>39</sup>

To improve the success of private enforcement, it is necessary to do two important steps which should be affirmed, that are: first, to alleviate the proofing burden by omitting the regulation which demands the obligation for the petitioner to prove the failure component in proofing phase in court.<sup>40</sup> The unimportance of proving the failure component is bound tightly with follow-in action claim which has been recommended previously. Hence, the guilty decree from the competition authority is enough to confirm that the failure component is fulfilled. The adjudicator does not need to obligate the petitioner to prove the failure components of the claim. Secondly, another thing that can improve the private enforcement success is the facility to access the documents files possessed by the competition authority.<sup>41</sup> The burden of proof in competition cases is not always easy. In cartel case, for example, it can be ensured virtually that the evidence are possessed by cartel practitioners because in common, the cartel actions are done secretly among the cartel practitioners. Therefore, the facility to access the document files possessed by the competition authority is rational for the sake of enhancing private enforcement in the future.

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<sup>38</sup> *Zenith Radio Corp v Hazeltine Research* [1971] United States Court of Appeals for the Seventh Circuit 401 US 321.

<sup>39</sup> Directive 2014/104/EE of The European Parliament and of The Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1, s 10 (3).

<sup>40</sup> Directorate for Financial and Enterprise Affairs Competition Committee, *Relationship Between Public and Private Antitrust Enforcement* (Organization for Economic Co-operation and Development 2015) 12.

<sup>41</sup> *ibid.*

Effective private enforcement should cover the claim combination method. There are three reasons as the basis of claim combination need to be done. According to Foer dan Coneo<sup>42</sup>, *first*, if the value of claim is small and not necessary to combine, the consumers of micro business practitioners will not be accommodated since their claims and resources are limited to fund the case. *Secondly*, if several claims are relatively small but they are possible to be claimed, it is not efficient for the system to allow the combination since several emerging small claims upon the same similar action will be costly to proceed in court and for the appellant to defend and cause opposing result. *Thirdly*, the failure to provide compensation for end consumers in big amount will omit antitrust system from the consumer constituent whose potential is strong. To assist in overcoming collective claims, jurisdictions around the world has developed mechanisms to promote collective compensation – usually by opt-in, opt-out class action status, or the combination of both systems. The compensation mechanism gives solutions for the economic barriers which are confronted by the individual petitioners with quite small damage to support the litigation cost – by combining big number of individual claims into one claim.<sup>43</sup>

The mechanism of combining the claim / class action is not regulated in LPMUBCP. Supreme Court Regulation No. 1, Year 2002, about Representative Group Claiming Procedure also does not regulate it.<sup>44</sup> Hence, the mechanism of class actions does is not a part of private enforcement mechanism in business competition law. However, looking at several class action claims related to LPMUBCP breaches, the mechanism of class action claims in the future can be possibly done, mainly in relation to the consumers' damage based on Article 46 Laws No. 8 Year 1999 about Protection for the Consumers.

## **E. Conclusion**

This article concludes that the privately triggered public enforcement mechanisms, which are implemented in private enforcement has not been able to work as compensation function optimally. The private enforcement pattern has several basic weaknesses in

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<sup>42</sup> Albert Foer and Jonathan Cuneo (n 18) 604.

<sup>43</sup> Pedro Caro de Sousa, 'Identifying the Building Blocks of Private Competition Enforcement' (2019) 2 CPI Antitrust Chronicle 15, 17.

<sup>44</sup> Susanti Adi Nugroho, *Class Action Dan Perbandingannya Dengan Negara Lain* (Kencana Prenada Media 2010) 316.

business competition law enforcement. The weaknesses have created many barriers for the petitioner parties for getting compensation.

The reformulation of business competition law enforcement development based on hybrid modelling in the future can be done with enhancing the mechanism of private enforcement. The enhancement of enforcement mechanism should be equipped with features which are able to provide the claimants feasible facility so it can facilitate the award of compensation for the damage which they have experienced.

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