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A Study of The Elimination of Criminal Sanctions in The Development of Business Competition Law in Indonesia

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Abstract:
The Job Creation Law which was passed in 2020 brought major changes to business competition law in Indonesia. One of the changes that occurred was in the sanctions provisions for alleged monopolistic practices and unfair business competition, namely the removal of the main criminal sanctions in Article 48 paragraphs (1) and (2) and additional criminal sanctions in Article 49. This deletion gave rise to pros and cons among the public. observer of business competition law and raises its own problems and results in confusion in the provisions of law enforcement procedures. The author is interested in conducting an in-depth study so that it is answered philosophically, and has a specific aim to offer conceptually ideal recommendations so as to straighten out the controversy that has occurred. This research is normative juridical research with a statutory, historical and conceptual approach. Historically and philosophically, since the beginning of discussions on the draft law prohibiting monopolistic practices in 1998, there has been a debate regarding the conceptualization of criminal sanctions for monopolistic practices and unfair business competition. The debate about the concept of criminal sanctions occurred as a result of a dilemma between law enforcement on the one hand and reasons for investment and economic development on the other hand. The debate regarding the elimination of criminal sanctions for violations of prohibitions against monopolistic practices and unfair business competition can be reduced by putting forward more consistent and clear legislative concept. The abolition of criminal sanctions should be followed by the abolition of articles that determine whether a case can be transferred to the criminal realm. Apart from that, in order for administrative sanctions to be more effective, integration needs to be established between other related institutions, so that the decisions of business competition authorities in Indonesia have dignity.

Keywords*:* *criminal sanctions; monopoly practice; unfair competition; job creation law.*

I. Introduction

Talking about business competition law in Indonesia, since 1999 it has always been focused on Law Number 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition. Law Number 5 of 1999 materially contains provisions regarding the prohibition for business actors to carry out any actions that result in monopolistic practices and unfair business competition. In addition, this law also regulates the threat of sanctions for

business actors who violate both administrative sanctions which are the authority of the Business Competition Supervisory Commission (KPPU) and criminal sanctions which are the authority of district court judges in the event that KPPU decisions are not carried out by business actors. According to Law Number 5 of 1999 in Article 44 paragraph (1), KPPU can submit cases to investigators as a result of the reported business actors not implementing the provisions of Article 44 paragraph (1) and paragraph (2) of Law Number 5 of 1999.[1] Administrative sanctions are regulated in Article 47, while criminal sanctions are regulated in Article 48 and Article 49.

After the enactment of the job creation law, [2] there were several fundamental changes to Law Number 5 of 1999. These changes include the process of handling cases, especially related to the submission of objections previously submitted to the District Court to the Commercial Court, changes in the concept of administrative sanctions in the form of fines, the elimination of several criminal sanctions and other changes. Interesting to be studied further in this study is the abolition of basic and additional criminal sanctions as stipulated in Articles 48 and 49 of the law. With the abolition of basic criminal sanctions and additional criminal sanctions based on the job creation law, there is confusion in the provisions of law enforcement. This is because the Article that determines business competition cases can be submitted to investigators is not deleted, but the Article regulating criminal sanctions (if the case ends in criminal justice) is deleted. In addition, the elimination of criminal sanctions raises pros and cons among observers of business competition law for various justification reasons that the author will describe further in the discussion section of this paper.

That is what the author wants to analyze in order to achieve effective and efficient Indonesian competition law which of course starts from material provisions and leads to (formal) enforcement. This study is a study that has a fairly high novelty value, because based on the research that the author did, the study of the elimination of criminal sanctions carried out previously has not been

[1] The provisions of Article 44 paragraph (1) itself regulate the obligation of reported business actors to implement the Commission's decision and report no later than 30 days after notification of the decision. Meanwhile, Article 44 paragraph (2), regulates legal remedies that can be submitted to the court no later than 14 days after notification of the Commission's decision. See more Law No. 5/1999.

[2] The Job Creation Law was originally contained in Law Number 11 of 2020, which was later declared conditionally unconstitutional after a judicial review by the Constitutional Court in 2021. In response to this, the government issued a Government Regulation in Lieu of Law Number 2 of 2022 concerning Job Creation. Furthermore, on March 31, 2023, Law Number 6 of 2023 concerning the Stipulation of Government Regulations in Lieu of Law Number 2 of 2022 concerning Job Creation became Law.

analyzed in more depth based on the legislative approach and conceptual approach. There are several studies on Law Number 5 of 1999 after the job creation law that have been carried out by several previous researchers including:

a. Gustini Widijaningsih, et al. with the title "*Dispute Resolution of Monopoly Practices and Unfair Business Competition After the Enactment of Law Number 11 of 2020 concerning Job Creation*". The study aims to analyze the existence of KPPU in the enforcement of business competition law before and after the enactment of the job creation law and the settlement of cases of monopolistic practices before and after the job creation law. The results of the study simply compare the authority of the KPPU before and after the enactment of the job creation law, and compare the submission of objections to KPPU decisions previously submitted to the District Court and after revision submitted to the Commercial Court.[3]

b. Rahmadi Indra Tektona, with the research title *"Quo Vadis: Legal Certainty of Monopoly Practice Rules and Unfair Business Competition in Law Number 11 of 2020 concerning Job Creation"*. The purpose of the study is to analyze legal certainty and analyze the legal implications arising after the job creation law. The results showed that changes to several articles in Law Number 5 of 1999 have not been able to answer the problems that exist in the enforcement of business competition law. In fact, the job creation law seems to be able to add new problems which if not resolved there will be parties who benefit from its enactment. The study also does not mention the issue of eliminating criminal sanctions as the authors will do in this study.[4]

c. Muhammad Habib et al, "*Development of Business Competition Law After the Enactment of Perpu Cipta Kerj*a". The purpose of the study is to analyze legal certainty and analyze the problems arising from the

[3] Gustini Widijaningsih, et al. "Dispute Resolution of Monopoly Practices and Unfair Business Competition After the Enactment of Law Number 11 of 2020 concerning Job Creation". Unizar Law Riview, Volume 5, Issue 1, June 2022, p. 20

[4] Rahmadi Indra Tektona ,"Quo Vadis: Legal Certainty of Monopoly Practice Rules and Unfair Business Competition in Law Number 11 of 2020 concerning Job Creation", Journal of Business Competition, Volume 2, Number 1, Year 2022, p. 52

enactment of the Job Creation Perpu. The point of change in this Perpu is the transfer of objections to the original KPPU decision to the District Court to the Commercial Court. The penalty of fines is further specified in government regulations.[5]

d. Ahmad Adrik Yusri, et al. "*Construction of Business Competition Justice in the Job Creation Law According to the Pancasila Economic Review*". The research aims to answer how the construction of antimonopoly values in the job creation law and whether the values underlying the legal construction of the job creation law in terms of business competition are compatible with the pancasila economy. The research concludes first that the job creation law is a merger of several legislative products that specifically want to attract investment for business development and economic growth in Indonesia. Second, that the values used as the foundation for the preparation of the job creation law and its derivative regulations related to business competition are in accordance with the economic spirit of Pancasila.[6]

e. Final Report on Legal Analysis and Evaluation related to Protection from Monololy Practices and Unfair Business Competition, reported by the National Law Development Agency of the Ministry of Law and Human Rights of the Republic of Indonesia in 2020. The report was prepared by the Working Group for Legal Analysis and Evaluation Related to General Elections chaired by Edmon Makarim, including analyzing and recommending the lifting of criminal sanctions. However, the report does not explain what the rationale or philosophy of lifting criminal sanctions is.[7]

From several studies and studies conducted by previous researchers, it can be seen that these studies have not specifically raised the issue of lifting criminal sanctions in Law Number 5 of 1999. That is what the author will do so that according to the team of authors this study is very important and

[5] Muhammad Habib et al, "*Development of Business Competition Law After the Enactment of the Job Creation Perpu". USM Journal of Law Review, Vol. 6, No. 1, Year 2023, p. 125*

[6] Ahmad Adrik Yusri, et al. "Construction of Business Competition Justice in Law-
Job Creation Law According to the Pancasila Economic Review". Journal of Master of Science Law (Law and Welfare), Volume 6, Number 2, Year 2021. p. 19

[7] Final Report on Legal Analysis and Evaluation related to Protection from Monologue Practices and Unfair Business Competition, reported by the National Law Development Agency of the Ministry of Law and Human Rights of the Republic of Indonesia in 2020

has a high level of novelty as a contribution to the renewal of business competition law in the future to be more effective and efficient , which of course must start from the formulation of material provisions that accommodate problems in the community and lead to enforcement (formal) to achieve order and legal justice.

II. Legal Materials and Methods

This research is a legal study of criminal sanctions in business competition law in Indonesia after the job creation law. Therefore, this research is a "*normative juridical"* research also known as normative legal research. This is because what is researched is legal materials. The approach method used is a statutory approach and a conceptual approach to analyze changes that occur related to criminal sanctions according to the law prohibiting monopolistic practices and unfair business competition, after the promulgation of the job creation law

This research is Descriptive Analytical, namely by providing data as thorough and detailed as possible about rules, circumstances or symptoms related to problems and research objectives in order to help in strengthening old theories or in the framework of compiling new theories in this case concepts that are more relevant to criminal sanctions in the law prohibiting monopolistic practices and unfair business competition. The data that the author uses in this study is secondary data consisting of primary legal material in the form of laws and regulations and secondary legal material in the form of literature and other relevant documents.

III. Result and Discussion

1. History of the Development of Criminal Sanctions in Business Competition Law in Indonesia

When it was submitted in the form of a draft law (RUU) in 1998, the regulation that became known as the Law on the Prohibition of Monopoly Practices and Unfair Business Competition entitled Draft Law on "Prohibition of Monopoly Practices" (only) as an initiative of the House of Representatives of the Republic of Indonesia. After going through discussion after discussion from October 1998 to February 1999, Law Number 5 of 1999 was finally passed under the title Prohibition of Monopoly Practices and Unfair Business Competition on March 5, 1999. Although passed on March 5, 1999, the law became effective one year later. The Business Competition Supervisory Commission has recorded a history at the beginning of its duties by handling major matters, such as the fixing of SMS prices by 9 cellular operators in 2004, the retail cases of *carefour* and PT *Indomarco Prismatama* [8] and many other

[8] H.T.N. Syamsah and J. Jopie Gilalo, "Efforts to Ensure the Implementation of Fair Business Competition", De'Rechstaat, Volume 1, Number 1, March 2015, p. 28.

major cases that have a very good impact on business competition in Indonesia.

Historically, there has been a development of the concept of criminal sanctions for alleged violations of the law from the beginning in the formulation of the draft law to become Undan-law and last amended based on the job creation law. The author can describe these developments as follows:

a. The Concept of Criminal Sanctions According to the Draft Law on the Prohibition of Monopoly Practices

The formulation of criminal sanctions in the Draft Law on the Prohibition of Monopoly Practices is contained in Article 48 and Article 49 with the following description:

Article 48:

(1) "Whoever intentionally carries out activities as referred to in Articles 20 to 23 shall be punished with a maximum imprisonment of ten years and a maximum fine of Rp. 5,000,000,000.' (five billion rupiah).
(2) Whoever intentionally commits activities as referred to in Articles 24 to 29 shall be punished with a maximum imprisonment of seven years and a maximum fine of Rp. 3,000,000,000.' (three billion rupiah).
(3) Whoever intentionally carries out activities as referred to in Articles 9 to Article 18 shall be punished with a maximum imprisonment of 3 years and a maximum fine of Rp. 1,000,000,000.; (one billion rupiah).
(4) The criminal offences referred to in paragraph (1), paragraph (2) and paragraph (3) of this article are crimes."

Article 49

"Without prejudice to the meaning of Article 10 of the Criminal Code, to the criminal sanctions stipulated in Article 48, additional penalties may be imposed in the form of:
a. Revocation of business license; or
b. Orders to stop certain activities that cause harm to other parties; or
c. Obligation to withdraw goods from circulation; or
d. Prohibition to hold the position of directors or commissioners for members of the board of directors or commissioners of business actors who have been legally proven to have violated this law."

b. The Concept of Criminal Sanctions According to Law Number 5 of 1999

After going through a process of discussion after discussion of the Draft Law on the Prohibition of Monopoly Practices, there was a change in the substance of the contents of the article after it was passed into Law Number 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition as follows:[9]

Article 48
(1) Violation of the provisions of

[9] See Article 48 &; Article 49 of Law Number 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition. See also Brigitte Dewinta Naftalian Sanger et al, "Juridical Review of Business Competition Law Problems in Creating Legal Certainty", Journal of Lex Administratum, Volume IX, No. 3, April 2021. https://ejournal.unsrat.ac.id/v3/index.php/administratum/article/view/33219/31411

Article 4, Article 9 to Article 14, Article 16 to Article 19, Article 25, Article 27, and Article 28 shall be punishable by a fine of not less than IDR 25,000,000,000.00 (twenty-five billion rupiah) and a maximum of IDR 100,000,000,000.00 (one hundred billion rupiah), or imprisonment in lieu of a fine of up to 6 (six) months.

(2) Violation of the provisions of Article 5 to Article 8, Article 15, Article 20 to Article 24, and Article 26 of this Law shall be punishable by a fine of as low as IDR 5,000,000,000.00 (five billion rupiah) and a maximum of IDR 25,000,000,000.00 (twenty-five billion rupiah), or imprisonment in lieu of a fine of up to 5 (five) months.

(3) Violation of the provisions of Article 41 of this Law is punishable by a fine of as low as IDR 1,000,000,000.00 (one billion rupiah) and a maximum of IDR 5,000,000,000.00 (five billion rupiah), or imprisonment in lieu of a fine of up to 3 (three) months.

Article 49

By pointing to the provisions of Article 10 of the Criminal Code, additional crimes as stipulated in Article 48 can be imposed additional crimes in the form of:

a. revocation of business licenses; or
b. prohibition on business actors who have been proven to have violated this law to hold the position of directors or commissioners for at least 2 (two) years and for a maximum of 5 (five) years; or
c. termination of certain activities or actions that cause losses to other parties.

Then, at the inauguration of the second term of president Joko Widodo, he expressed his desire to have implications for several existing regulations in Indonesia by making an omnibuslaw.[10] The omnibuslaw is in the form of a law which was then successfully passed on November 2, 2020, known as Law Number 11 of 2020 concerning Job Creation. Although the law was declared conditionally unconstitutional after a judicial review by the Constitutional Court in 2021, the government issued a Government Regulation in Lieu of Law Number 2 of 2022 concerning Job Creation. Furthermore, on March 31, 2023, Law Number 6 of 2023 concerning the Stipulation of Government Regulations in Lieu of Law Number 2 of 2022 concerning Job Creation became Law.

c. The Concept of Criminal Sanctions for Monopoly Practices and Unfair Business Competition After the Job Creation Law

After being annotated based on the job creation law, there are changes to the sanctions provisions regulated in Article 48 and Article 49 as follows:

Article 48 (principal crime)

(1) Deleted
(2) Deleted
(3) Violation of the provisions of Article 41 of this Law shall be punished with a maximum fine of IDR 5,000,000,000.00 (five billion

[10] Arya Setya Novanto and Ratna Herawati, "The Effectiveness of the Job Creation Law in Indonesian Legal Development". USM Law Review Journal, Volume 5, Number 1, Year 2022

rupiah), or imprisonment for a maximum of 1 (one) year in lieu of a fine.

Article 49 (additional penalties)

"Deleted"

When compared between the provisions of criminal sanctions as stipulated in the Bill on the Prohibition of Monopoly Practices with Law Number 5 of 1999, there is a very significant difference. The criminal sanctions that are ultimately regulated in Law Number 5 of 1999 are very different. The prison penalty was changed to a lighter confinement, while the criminal sanction was a heavier fine. This happened due to the lobbying of representatives from elements of business actors during the discussion of the bill which considered fine sanctions would be more effective in terms of investment and productivity of business actors. The following is a summary of the discussion of criminal sanctions contained in the Minutes of Law No. 5 of 1999:[11]

1. On November 18, 1998, the 1st Working Meeting with the Minister of Industry and Trade. On that occasion, the Minister of Industry and Trade (Rahadi Ramelan) gave an explanation regarding criminal sanctions, namely further suggesting that the imposition of criminal imprisonment and criminal fines be left entirely to the panel of judges and proposed to establish criminal sanctions, fines only, but very severe. The proposed fine is as high as 100 billion and added up to 3 times the profit obtained from the violations committed.
2. Then on November 20, 1998 in the 1st Public Hearing Meeting (RDPU) with the Indonesian Chamber of Commerce and Industry (KADIN) of the Indonesian PULP and Paper Association, Pansus Member Ir.Ny. Arijanti Sigit Prakoeswo, stated that "here between the Government and the DPR-RI there is a kind of friction that from the government the sanctions are more burdened with civil sanctions, while we want there to be criminal and civil, they refer to the Criminal Code but if viewed from the Law on economic crimes, I think crimes are still imposed".
3. Furthermore, on November 20, 1998, the 2nd RDPU was held with IKAHI and Higher Education. In the meeting, IKAHI Chairman Prof. Mardjono Reksodiputro argued that violations of legal rules that want to protect healthy trade, which will basically protect consumers from obtaining good goods at reasonable prices, must be sanctioned so that the rules are effective. This opinion was responded by Pansus Subki member Elyas Harun who asked "about more effective sanctions whether imprisonment or fines. Because there are some parties who propose that the sanction is imprisonment, it is terrible for potential investors. So it has to be seen, which effective sanctions are, what is imprisonment or fines or both". Then answered by Mr. Mardjono Reksodiputro, regarding the effectiveness of prison or fines closely related, "prison is indeed effective in the sense of frightening and causing people to have a frightening pessiological effect when threatened against someone against humans. But if the fine, the high fine is certainly directed at one company, so it cannot be compared effectively which one because if only humans are dependent,

[11] See Minutes of Discussion of the Draft Law on the Prohibition of Monopoly Practices. Documentation of the Secretary General of the House of Representatives of the Republic of Indonesia.

there are people who would rather go to 3 years in prison than have to be fined".

4. On November 23, 1998, the 3rd RDPU with PT. Semen Gresik, PT. Pupuk Sriwijaya and PT. Bogasari. PT. Bogasari, represented by Franky, argued about criminal sanctions, namely "This bill applies the Criminal Law in addition to fines to business actors as stated in Article 48. To our knowledge, EU competition law does not impose criminal sanctions on businesses that engage in fraudulent business practices. Perhaps the Criminal Sanctions in this bill need to be reviewed again, because it is feared that this provision will cause investors, both domestic and foreign, to be reluctant to invest in Indonesia, because these criminal sanctions are considered criminal actors". PT. Semen Gresik argued, "If the criminal sanctions are indeed ours as businessmen, we as businessmen disagree, sir, because this error is an administrative error and maybe suddenly we become more than 30%. Let's say one factory closes, so we become 30% by then. At that time, the Board of Directors can be punished. I think it is also better to be fined, then the fine goes to the Government to be used to increase the business supervision commission or for other purposes of the Government". Then PT. Pupuk Sriwijaya represented by its President Director, Ir. Suhadi, argued, "about criminal sanctions as sub-therapy. If we as entrepreneurs, of course we don't like that. It has been work achieved and so on, then because of this it was punished. But if the fine is yes, I think the fine is big enough to be heavy enough. If it is avoided, of course I think if asked by shareholder businessmen, I think I want to avoid it, but if it is because we are a business, but the sanctions are also sanctions for funds. So the government instead of punishing people, people are not productive, the company stops, right. But if it is fined, a lot of money goes to the country so the state budget is quite safe.

7. On November 23, 1998, in the agenda of the 4th RDPU with PT. Social Security, NGOs, and INKUD, Pansus member Drs. Subki Elyas Harun asked the Social Security, NGOs, and INKUD. Our question is, "this businessman is afraid of going to jail". "There are *expert lines* from abroad saying the method that sanctions are enough fines. If we include only 5 billion, some propose 100 billion fines, if necessary 1 trillion fines but in the form of fines not imprisonment. Because our prison is so terrible in it, so fear them. But if it is a fine, for the rich how much they pay. But in our concept it is both, decades of imprisonment, and fines. On consideration for the proper effectiveness of this Act shall apply. Is it both, or just fines, because this mind is equally strong.
8. On November 23, 1998, in the agenda of the 5th Working Meeting with the Minister of Industry and Trade, the Government, namely the Minister Ir. Rahadi Ramelan explained about "this criminal sanction, there are things that we need to explore together, because we want the Government to impose this problem directly on the highest fine also associated with the problem of losses or profits obtained by actions against monopolies or unfair competition". Then by a member of the Pansus (special committee) Yanto S.H responded "We understand what the Government said, but actually we also mean that the perpetrators of violations in the field of economic actors are not limited to fines, because we expect that with the prison sentence there is shock therapy for the deterrent so, if just a fine maybe he will calculate if maybe from this fine there is still a profit he will also do that practice, but if there is a criminal threat even though it may be in the crime later we can formulate it as a last alternative or maybe after the

person has done the same thing, after the fine is repeated Iagi.

9. Furthermore, on December 1, 1998, the 6th Working Meeting with the Minister of Industry and Trade. The result of the conclusion of the 6th working meeting is that in addition to other sanctions, there are administrative sanctions and additional sanctions. It does not intersect too much, almost the same as the concept of government. But regarding "imprisonment sanctions", we do not use the word "prison sanctions". But the emphasis is on us to magnify the "criminal sanction of fines". Meanwhile, Pansus still argues that the issue of criminal sanctions for imprisonment or confinement is still to be included in this bill. Will it be treated later, there is one article that concerns the substitution of the penalty of fines stated is confinement which if the specified fine cannot be met by business actors, the substitution of the sentence of confinement which is also the time we stipulate in this bill. Then it was also handed over to Panja as well as consulted with the Supreme Court. The government responded, apparently the man was afraid of imprisonment, so as to deter. Indeed, in some countries this prison penalty still exists, only living in a few countries that have not made changes from their old Monopoly Laws. And even if it does, rarely or hardly any court has sentenced them to imprisonment in the course of their Antimonopoly Law."

From the excerpt of the minutes of discussion of the Monopoly Practice Bill above, it can be seen that there is a strong rejection of opinion between the government, legislature and representatives of entrepreneurs. The final result of the discussion on criminal sanctions can be seen in Law Number 5 of 1999 in Articles 48 and 49. Later in its development, more precisely after 20 years of effective effect, there was a new history in the Indonesian legal system, the passing of the job creation law which also had an impact on changes to Law Number 5 of 1999.

In Chapter VI of the Job Creation Law, precisely the eleventh part concerning the prohibition of monopolistic practices and unfair business competition, Article 118 amends several provisions of Law Number 5 of 1999. There are 5 points that become the changing point of the law prohibiting monopolistic practices and unfair business competition, including: Institutions and procedures for filing objections to KPPU decisions, affirmation of orders to stop business actors' activities, removal of maximum limits on fines, elimination of several principal criminal sanctions, and elimination of additional criminal sanctions.

2. Pros and Cons of Removing Criminal Sanctions After the Job Creation Law

As mentioned in the introduction of this paper, there are pros and cons with the removal of criminal sanctions for violations of the prohibition on monopolistic practices and unfair business competition after the job creation law. Some parties who contradict the removal of criminal sanctions argue that the removal of criminal sanctions can provide greater freedom for business actors to carry out business activities and business competition, so that it can harm the community as consumers. For example, the

opinion of Gustini Widijaningsih et al, who said that the elimination of basic criminal sanctions and additional crimes would benefit business actors and potentially cause unfair business competition. This is because business actors are not overshadowed by various criminal sanctions as stipulated in the previous law.[12]

In line with that, Dita Diradiputra as Director of the Institute for Competition and Business Policy Studies, Faculty of Law, University of Indonesia also regretted the removal of the criminal sanctions. This is because with the removal of criminal sanctions according to the law prohibiting monopolistic practices and unfair business competition, the next applicable criminal sanctions are criminal sanctions according to Article 382 bis of the Criminal Code, where the threat of punishment is much lighter. He further said that this would result in business actors preferring not to implement the KPPU's decision or file an objection to the Commercial Court, so that the KPPU would submit the case to the Investigator and would be processed with a lighter criminal sentence.[13] This opinion is in line with the opinion of Muhammad Habib et al who stated that the abolition of criminal sanctions for violations of monopolistic practices and unfair business competition through the job creation law means reviving Article 382 bis of the Criminal Code as a generalist lex.[14]

In addition, Alum Simbolon as one of the academics in the field of business competition, also gave opinions after the birth of the job creation law. He said that the removal of criminal sanctions under the Law on the Prohibition of Monopoly Practices and Unfair Business Competition was a weakness, while the transition of filing objections from the District Court to the Commercial Court was a strength because the Commercial Court was the right place to file objections to the KPPU's ruling.[15]

Conversely, those who agree with the removal of criminal sanctions for monopolistic practices and unfair business competition, argue that the previous criminal sanctions as stipulated in Law Number 5 of 1999 are too severe and can hinder innovation and investment in the business sector in the country. In their (pro) view, the removal of criminal sanctions can accelerate

[12] Gustini Widijaningsih et al, "*Dispute Resolution of Monopoly Practices and Unfair Business Competition After the Enactment of Law Number 11 of 2020 concerning Job Creation*", Unizar Law Review, Volume 5, ISSU 1, June 2022, p. 32. https://e-journal.unizar.ac.id/index.php/ulr/article/view/579/418

[13] Dita Wiradiputra, *Job Creation Law Creates Loopholes for Business Competition Cases*, News accessed on November 15, 2023, https://ekonomi.bisnis.com/read/20201012/9/1303642/uu-cipta-kerja-timbulkan-celah-untuk-perkara-persaingan-usaha

[14] Muhammad Habib et al, "*Development of Business Competition Law After the Enactment of the Job Creation Perpu". USM Journal of Law Review, Vol. 6, No. 1, Year 2023, p. 125*

[15] Alum Simbolon, *Job Creation Law From the Perspective of Business Competition Law*, Presentation Material, accessed on November 16, 2023, https://law.umy.ac.id/wp-content/uploads/2021/01/Prof.-Dr.-Alum-Simbolon-S.H.-M.Hum-PPT-UUCK-Dari-Perspektif-Persaingan-Usaha.pdf

economic growth and create new jobs. Conversely, the provisions of criminal sanctions contained in the law will actually make investors reluctant to invest in Indonesia. As is known that one of the objectives of the job creation law is in order to increase investment and ease of doing business, so that Indonesia can compete with other countries to attract investors so that it can fund important sectors.[16] In addition, the pro-opinion on the abolition of criminal sanctions is also based on the idea that criminal sanctions of confinement according to the previous law prohibiting monopolistic practices cannot be applied to business entities.[17]

KPPU itself responded to the elimination of criminal sanctions through the job creation law by releasing KPPU press release Number 51/PR-KPPU/XI/2020. KPPU understands that the abolition is intended to clarify criminal aspects in law enforcement that can be implemented. Criminal charges can still be imposed on business actors who refuse to be examined, refuse to provide information needed in the examination, or hinder the examination process, as well as for business actors who refuse to implement KPPU decisions. KPPU hopes that these changes will have an impact on creating a balance between increasing the ease of doing business actors in investing followed by quality competition law enforcement in an effort to create healthy business competition.[18]

The author sees that there is a skeptical or contra attitude towards the removal of criminal sanctions for violations of the prohibition on monopolistic practices and unfair business competition, on the one hand it can be understood both from a layman's understanding and from a scientific aspect. In general, society understands criminal sanctions as threats of punishment that cause fear so as to prevent someone from doing something that is prohibited. This means that in this context, in simple terms, the threat of criminal sanctions can be a tool to prevent the occurrence of a prohibited act (preventive). Moreover, the threat of criminal sanctions regulated by law is more severe than administrative sanctions. Of course, it is hoped that the

[16] Christian Erikson Sitio & Esti Suhesti, The Job Creation Bill Becomes a Polemic that Reaps Issues and Controversies in Society, Journal of Pearl Education, Volume 6, Number 1, March 2021, p. 9. https://ejurnal.stkipmutiarabanten.ac.id/index.php/jpm/article/view/43/47

[17] Maulana Malik Ibrahim, Elimination of Criminal Sanctions for Violations of Monopoly Practices and Unfair Business Competition Based on the Job Creation Law. Thesis, University of Indonesia Library. https://lib.ui.ac.id/file?file=pdf/abstrak/id_abstrak-20514759.pdf

[18] KPPU Press Release, Number 51/PR-KPPU/XI/2020, "Changes *to the Business Competition Law by the Job Creation Law, KPPU Encourages Ease of Doing Business Accompanied by Quality Law Enforcement Arrangements*", November 4, 2020 by the Public Relations and Cooperation Bureau, Secretariat of the Business Competition Supervisory Commission, https://www.kppu.go.id/wp-content/uploads/2020/11/Siaran-Pers-No.-51_KPPU-PR_XI_2020.pdf

formulation of heavier criminal sanctions will trigger business actors to implement administrative sanctions decided by the KPPU so that the case is over.

Furthermore, scientifically, of course, the threat of criminal sanctions in a regulation also has a background and purpose. Jan Remmelink states why the state acts when crime occurs and why the state acts to inflict suffering. It is intended as an appropriate means as it encourages the state to act fairly and avoid injustice. Criminal law here functions as a mechanism of social and psychological threats.[19] In addition, according to the classical school, criminal sanctions in a law emphasize actions so that they aim as retaliation and to frighten.[20] According to Marcus Priyo Gunarto, acknowledged or unrecognized, among legal practitioners there is still a perception that crime is the only appropriate reaction to behavior that is considered anti-social. Therefore, those whose actions meet the formula of offense must certainly be criminally charged.[21]

On the other hand, those who support the elimination of criminal sanctions for violations of monopolistic practices and unfair business competition can also be understood. As explained in the next sub-chapter, basically the criminal sanctions stipulated in Article 48 and Article 49 of Law Number 5 of 1999 are much lighter than the threat of criminal sanctions proposed according to the draft law on the prohibition of monopolistic practices in 1998. All of this happened because of political lobbying during the discussion process which basically carried the reason for hampering investment if criminal sanctions were too heavy. After the Job Creation Law, the reason for "investment" to accelerate economic growth was also made by the framers of the law and supporting parties to realize the elimination of criminal sanctions.

When studied from a scientific aspect, especially in the development of criminal law, indeed the formulation of criminal sanctions in a law must pay attention to several basic things, especially that criminal sanctions should only be imposed as a final resort or *ultimum remedium* if other forms of

[19] Suhariyono A, *Determination of Criminal Sanctions in a Law*, Journal of Indonesian Legislation, Volume 6 Number 4, 2009. https://e-jurnal.peraturan.go.id/index.php/jli/article/viewFile/337/221

[20] Ruben Achmad, *The Nature of the Existence of Criminal Sanctions and Penalties in the Criminal Law System*, Journal of Legality, Volume V, Number 2, December 2013, p. 93. http://legalitas.unbari.ac.id/index.php/Legalitas/article/view/98/85

[21] Marcus Priyo Gunarto, *Goal-Oriented Attitudes of Penalties*, Legal Pulpit, Volume 21, Number 1, Year 2009, p. 2. https://journal.ugm.ac.id/jmh/article/view/16248/10794

sanctions such as administrative sanctions are considered ineffective.

Teguh Prasetyo as quoted by Titis Anindyajati et al said, that ideally the inclusion of criminal sanctions in a law refers to the principle of *ultimate remedium*, where criminal sanctions are the last alternative, not *primum remedium* where criminal sanctions are the main alternative. For this reason, the framer of the law needs to realize that in the inclusion of criminal sanctions, rationality and proportionality are needed. Rational means that crime is given for justifiable reasons, while proportional means that crime needs to be balanced with the needs of the state in order to maintain, protect and maintain order and security in society. [22] Meanwhile, according to Moeljatno, there are three criteria for criminalization in the criminal law reform process, namely it must be in accordance with the legal feelings of the community, whether crime is indeed the main way, and whether the government is really able to implement it.[23]

3. Regulation of Criminal Sanctions in Other Countries of the World

When viewed the regulation of criminal sanctions according to competition law in other countries, in general, competition law in other countries regulates criminal sanctions, both principal and additional criminals. As the author quotes from the research of Hersen Monarchy et al:

> "In some countries, cartel criminal sanctions (including other unfair business competition acts) are more severe than criminal sanctions in Indonesia. Call it America and Japan. In the United States, for example, the provisions of sanctions based on the latest amendments following the promulgation of the *Antitrust Criminal Penalty Enhancehment and Reform Act* of 2004 increase the number of criminal sanctions previously regulated in the *Sherman Act*. In the regulation, the original penalty of 3 years to 10 years is determined with a maximum fine of 1 million US dollars which was originally only 350 US dollars. *The Competition Act* 1986 basically recognizes two types of actions that are considered to violate the provisions of business competition. The first are acts which the Competition Act 1986 considers criminal *offences*. Meanwhile, a fairly severe criminal offense is also provided by the *United States Antitrust Law*. Under the country's law, violations of *Section* 1 and *Section* 2 are considered *felonies*. Individuals who commit violations face imprisonment of up to three years and/or fines of up to USS 350,000. Meanwhile, in Japan, *Antimonopoly Law* criminal sanctions for corporations can be in the form of a maximum fine of ¥500 million, while for individuals in addition to a maximum fine of ¥5 million can also be imposed both cumulatively and alternatively, *imprisonment with work* a maximum of 5 (five) years. But behind the severity of criminal sanctions imposed by the two countries

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[22] Titis Anindyajati et al, *The Constitutionality of Criminal Witness Norms as the Ultimate Remedium in the Formation of Legislation, Journal of the Constitution*, Volume 12, Number 4, December 2015, p. 11. https://jurnalkonstitusi.mkri.id/index.php/jk/article/view/12410/89

[23] Moeljatno, *Principles of Criminal Law*, (Jakarta: PT Bina Cipta, 1985), p. 5.

have implemented a policy to deal with cartels, namely *the policy of leniency*.[24]

4. The Ideal Concept of Criminal Sanctions in Competition Law Reform in the Future.

Looking further based on the pros and cons of eliminating criminal sanctions for violations of monopolistic practices and unfair business competition as described above, it can be understood that there are benchmarks that lead us to understand that there are good and bad consequences of the elimination of criminal sanctions for violations of monopolistic practices and unfair business competition. Among the virtues of the removal of criminal sanctions such as the opening of greater investment opportunities, the ease of business actors to expand, the opening of jobs, so that it is expected to spur the acceleration of economic growth. On the other hand, the ugliness of the removal of criminal sanctions for monopolistic practices includes opening the door to monopolistic practices and wider unfair business competition, harming the community as consumers, potentially ignoring KPPU rulings, so that enforcement of business competition law does not run effectively.

When viewed from the aspect of law enforcement effectiveness, Anthony Allot as quoted by Diana Tantri Cahyaningsih, that the purpose of the law is to regulate or shape the behavior of community members, either by determining what is allowed or prohibited through a law.[25] Further related to that, to achieve the intended purpose of the law, a device is needed so that the law is obeyed and the purpose of the law is achieved. The prohibition to do an act in a law will certainly not be effective if it is not accompanied by sanctions (law).[26] One of the sanctions referred to here is criminal sanctions, in addition to other types of sanctions such as administrative sanctions and others.

In the Indonesian legal system, we often see criminal sanctions as a complement to administrative sanctions. Call it the Law on Taxes, Environmental Law, and one of them is the Law on the Prohibition of Monopoly Practices and Unfair Business Competition as discussed specifically in this paper. Theoretically, one way that the provisions of the law can be implemented is to regulate material that contains criminal sanctions in a law, so that it is said that criminal law is a remedy or the last way

[24] Hersen Monarchy et al, Reformulation of Criminal Sanctions in Cartel Crimes, Collection of Student Journals of the Master of Law Program, Faculty of Law, Universitas Brawijaya in 2014. https://core.ac.uk/download/pdf/294926137.pdf

[25] Diana Tantri Cahyaningsih, Unraveling Anthony Allot's Theory of Effectiveness of Law, Rechtsvinding Journal: National Legal Development Media, March 2020. https://rechtsvinding.bphn.go.id/jurnal_online/Mengurai%20Teori%20Efectiveness%20of%20Law%20%20Anthony%20Allot%20(Final).pdf

[26] M. Ali Zaidan, "Indonesian Norms, Sanctions and Criminal Theory" Juridical Journal, Vol. 1, June 2014 : 107-124. https://media.neliti.com/media/publications/282152-norma-sanksi-dan-teori-pidana-indonesia-755970ea.pdf

(*ultimum remedium*) so that a provision can be obeyed by the community.[27]

In the context of the law prohibiting monopolistic practices and unfair business competition in Indonesia, initially the lawmakers included criminal sanctions, of course, with the intention of complementing administrative sanctions in order to support the achievement of the objectives of the law, one of which was to prevent monopolistic practices and unfair business competition. This can be understood because criminal sanctions actually function as a tool to scare so that actions threatened with criminal sanctions are not carried out by everyone, in this case business actors. In addition, in laws that prioritize administrative sanctions such as the law prohibiting monopoly paractek and unfair business competition in Indonesia, criminal sanctions are also actually sanctions that function to maintain the authority of the law itself to be implemented.

In the context of competition law in Indonesia, more specifically, the function of criminal sanctions in addition to maintaining the authority of the law materially, more importantly functions to maintain the legal authority of the decision of the Business Competition Supervisory Commission. This is because in the context of ultimate remedium, criminal sanctions become the final resort if administrative sanctions under the authority of the KPPU are not implemented by business actors who are proven to violate the provisions of the law. However, if the criminal sanction is removed, then the authority of the KPPU decision will be low, because there are no legal consequences for business actors who ignore the KPPU ruling.

Actually, apart from the pros and cons of the abolition of criminal sanctions that the author has described above, the most fundamental problem of the elimination of criminal sanctions for violations of monopolistic practices and unfair business competition, according to the author, is the maintenance of article 44 paragraph (4) of Law Number 5 of 1999 which is the door for business competition cases to turn into criminal cases. This results in confusion in understanding the law and enforcing the law. Conceptually, the non-deletion of Article 44 paragraph (4) results in inconsistencies in concepts in legislation which certainly do not reflect a good legislation.

Ideally, if the philosophical ratio of the elimination of criminal sanctions for violations of monopolistic practices and unfair business competition was originally to further optimize administrative sanctions, of course the article that opened the way for cases to change direction to criminal cases

[27] Titis Anindyajati et al, "The Constitutionality of Criminal Sanctions Norms as the Ultimate Remedium in the Formation of Legislation", Constitutional Journal Volume 12 Number 4, December 2015. https://www.mkri.id/public/content/infoumum/penelitian/pdf/Konstitusionalitas%20Norma%20Sanksi%20Pidana.pdf

was also removed. Thus, the elimination of criminal sanctions does not cause greater and sharper confusion and problems after the job creation law.

This is because basically the elimination of criminal sanctions can be accepted if it is based on data for more than 20 years, Law Number 5 of 1999 has been effective since March 5, 2000, it turns out that there has never been a business competition case that led to a criminal case as regulated according to Article 44 paragraph (4). This is based on data obtained by the author from the Information and Documentation Management Officer (PPID) of the Business Competition Supervisory Commission (KPPU), it turns out that the KPPU itself has never submitted a business competition case to investigators as a result of violations of Article 44 paragraph (4) of Law Number 5 of 1999.[28] The data presented by the author is relevant to the results of research by Gloria Damaiyanti Sidauruk who said that KPPU until now has never implemented Article 44 paragraph (4) and Article 44 paragraph (5) of Law No. 5 of 1999 because this legal step is not effective for the implementation of KPPU decisions due to the sanctions given, namely criminal sanctions to business actors, especially the rules for fines, can be replaced by confinement sanctions, which according to the KPPU these sanctions can be a legal loophole for business actors to avoid paying fines for violations of Law No. 5 of 1999. In addition, neither commission regulations nor other implementing regulations regulate in more detail the procedural law of submitting KPPU decisions to investigators, the examination process and what kind of examination results.[29]

On that basis, according to the author, there needs to be consistency from the framer of the law in the amendment process (next) in order to achieve Indonesia's effective competition law and achieve its goal of people's prosperity.[30] The point is that if in a change in the law it is decided that criminal sanctions are removed, then the abolition of criminal sanctions should also be followed by the removal of provisions governing the submission of cases to investigators for the settlement of criminal business competition cases. This consistency is very important

[28] Data from the Information and Documentation Management Officer (PPID) of the Business Competition Supervisory Commission (KPPU), sent on August 1, 2023

[29] Gloria Damaiyanti Sidauruk, "Legal Certainty of the Business Competition Supervisory Commission Decision in the Enforcement of *"Renaissance"* Business Competition Law, No. 1, Volume 6, January 2021. https://journal.uii.ac.id/Lex-Renaissance/article/view/16960/pdf

[30] The establishment of laws and regulations plays an important role in realizing the ideals and goals of the country, namely the prosperity of the people. Quoted from Ricca Anggraeni, "Interpreting the Function of the Constitution as an Ideal in Law Formation", Journal of Legal Issues, Volume 48, Number 3, July 2019, pp. 283-293, https://ejournal.undip.ac.id/index.php/mmh/article/view/23545/15629

considering that a regulation must have a clear background, clear objectives and clear formulation. As is known that among the principles in the formation of good laws and regulations are the principles of clarity of purpose and clarity of formulation.[31]

The non-abolition of Article 44 paragraph (4) certainly causes confusion in concept and confusion in law enforcement.[32] For example, there are business actors who ignore the KPPU decision where the business actor does not file an objection to the Commercial court (so that according to the law the business actor is considered to accept the KPPU decision), but also does not implement the KPPU decision. Therefore, based on Article 44 paragraph (4), KPPU can hand over business actors to investigators for criminal processing, where the KPPU decision is sufficient preliminary evidence. However, due to the abolition of criminal sanctions, which are basically the authority of criminal judges, judges are guided by criminal sanctions according to the Criminal Code as a material law of a general nature. Of course, it will cause confusion and seem to be a futile legal solution. This is because the threat of criminal sanctions in the Criminal Code version is very low which certainly will not have a deterrent effect on business actors who carry out violations.[33] This confusion is very reasonable considering that one of the backgrounds for the birth of Law Number 5 of 1999 was due to the ineffectiveness of existing laws and regulations. Even if the intention of lawmakers of material criminal provisions for violations of business competition in the future will use the new Criminal Code, it will still cause confusion, because the elements of fraudulent competition according to the Criminal Code are very common, so they do not accommodate substantially the form of violation of Law Number 5 of 1999. [34]

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[31] See Law Number 12 of 2011 concerning the Establishment of Laws and Regulations. See also Andi Bau Inggit AR, Principles of Legislation Formation in the Preparation of Regional Regulation Drafts, Journal of Restorative Justice, Volume 3, Number 1, May 2019, p. 7. https://ejournal.unmus.ac.id/index.php/hukum/article/view/1935/2671

[32] In full, Article 44 of Law Number 5 of 1999 After the Job Creation Law is as follows: (1) Within 30 (thirty) days after the business actor receives notification of the Commission's decision as referred to in Article 43 paragraph (4), the business actor must implement the decision and submit a report on its implementation to the Commission. (2) Business actors may file an objection to the Commercial Court no later than 14 (fourteen) days after receiving notification of the decision. 10 (3) Business actors who do not raise objections within the period referred to in paragraph (2) are deemed to accept the decision of the Commission. (4) If the provisions referred to in paragraph (1) and paragraph (2) are not carried out by the business actor, the Commission shall submit the decision to the investigator for investigation in accordance with the provisions of the applicable laws and regulations. (5) The decision of the Commission as referred to in Article 43 paragraph (4) shall constitute sufficient preliminary evidence for the investigator to conduct an investigation

[33] Article 382 bis of the Criminal Code reads in full as follows: Whoever in order to obtain, carry out or expand the proceeds of trade or a company belonging to himself or others, commits fraudulent acts to mislead the public or a particular person, shall be threatened, if the act may cause harm to his concurrent or other people's concurrents, because of fraudulent competition, with imprisonment for not more than one year and four months or a fine At most thirteen thousand five hundred dollars.

[34] For example, it can be seen from Article 500 of Law Number 1 of 2023 (new Criminal Code) which reads: Any person who commits fraudulent acts to mislead many people or certain people with the intention of establishing or enlarging the results of his trade or his

Moreover, the new Criminal Code combines the regulation of fraudulent acts in various aspects such as consumer protection, business competition, insurance, credit, etc., so that it does not regulate in detail the forms of acts that indicate monopolistic practices and unfair business competition.

It is undeniable that the development of penal theory today is more directed towards solving cases that do not always lead to punishment, but lead to the restoration of the situation. On that basis, according to the author, the removal of criminal sanctions for violations of monopolistic practices and unfair business competition is acceptable as long as administrative sanctions are imposed and strictly implemented. Supervision by the business competition authority institution, in this case, KPPU must be strengthened and administrative enforcement of business competition law must be carried out consistently and strictly.

In addition, according to the author, if the elimination of criminal sanctions is indeed a strategic step according to lawmakers in order to secure investment and economic development, the government must also not forget the importance of maintaining the authority of KPPU institution decisions. Do not let the removal of criminal sanctions, business actors ignore the KPPU decision without any follow-up on the waiver. Regarding the authority of the decision of the KPPU Institute in the future, the author recommends that administrative sanctions that are the authority of the KPPU be followed up with other efforts integratively with other authority institutions in related fields, so that there needs to be integration and coordination between KPPU and other institutions in the business sector. For example, to maintain the spirit of the KPPU decision, if the business actor turns out to be ignorant or does not implement the KPPU decision, also does not file an objection to the Commercial Court, which used to be a criminal case, it can now be followed up with coordination between institutions. Business actors who ignore the KPPU decision will become a black note in other relevant institutions so that it becomes an obstacle for these business actors to deal further in government institutions, such as business license renewal arrangements, taxation, and can even be blacklisted from banks until the business actors concerned implement the KPPU ruling. Of course, this requires joint commitment and consistency in order to cause a deterrent effect on business actors who carry out monopolistic practices and unhealthy business competition

own company or someone else's, so as to cause losses to his rivals or other people's rivals, convicted of fraudulent competition, with a maximum imprisonment of 2 (two) years or a maximum fine of category III.

IV. Conclusion and Suggestion

The pros and cons of removing criminal sanctions, violations of monopolistic practices and unfair business competition can be understood because they have both positive and negative impacts. Positively, the removal of criminal sanctions can open more investment and create jobs for the workforce in Indonesia, but negatively the removal can open up opportunities for higher monopolistic practices and unhealthy business competition due to the absence of criminal threats. In fact, criminal sanctions are complementary and guardians of the authority of a law that prioritizes administrative sanctions. In the context of competition law in Indonesia, more specifically, criminal sanctions are actually useful to maintain the authority of KPPU decisions. However, it seems that the government is still more inclined to remove the criminal sanctions with various considerations of economic progress, which also colored the debate in the discussion of the Monopoly Practices Bill in 1998. Although the author is more contradictory to the removal of criminal sanctions, considering the data reported by the KPPU turns out that for more than 20 years the handling of business competition cases has been carried out, not a single case has been submitted to investigators to be handled criminally, so the author suggests several things. *First*, the development of business competition law in the future will revive criminal sanctions as the ultimate remedium in order to maintain the authority of KPPU decisions. *Second*, in the future renewal of business competition law, it is necessary to add provisions that integrate the authority of KPPU with other institutions in the business world, so that business actors who do not implement KPPU decisions, directly receive consequences such as not being served in administrative management in other institutions. This needs to be done in order to maintain the spirit of the KPPU decision and avoid ignoring business actors. Thus the law can be effective and achieve its goals for the prosperity and prosperity of the Indonesian people.

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