Legal Responsibility for Procurement of Monopolistic Practices in the Field of Logistics

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Abstract. The purpose of this research is to understand the application of the Law of Contractual Obligations to Practice Monopoly in certain holding companies; especially how monopoly legal practices can be applied to the tender process to mitigate the emergence of monopolistic practices. The research method used is called juridical empirical legal research. The research findings from this study are as follows: Because they are the initiators of monopoly legal practices, procurement parties may be completely blind to practical monopoly legal practices in parent (parent) companies. This is because practical monopoly law is based on strict liability, vicarious liability, and theory. Apart from that, identification is also known as the business judgment rule, which states that directors cannot simply ignore disputes carried out by their staff, while in practice they apply monopoly law to the procurement department in connection with the tender process. It is carried out through a review process which includes review and approval from the relevant committees. Law enforcement as a *mens rea* and *actus reas* approach method, implements provisions regarding tender determination and direct appointment through clear mechanisms or procedures so that acts of prohibition against monopolistic practices can be implemented. Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition and the Criminal Code.

Keywords: Logistics, Legal Liability, Tender

1. Introduction

Economic activities in Indonesia can be realized in real terms through various business fields, whether carried out individually, jointly, or through a form of business entity called a company. Researchers in this article will focus on activities in the form of business entities where the business entity itself is divided into 2 (two) namely legal entity business entities and non-legal entity business entities.[1]

Business entities that have their legal entity, such as limited liability companies, cooperatives, and foundations, are based on Article 7 paragraph (4) of Law Number 40 of 2007 concerning Limited Liability Companies [2], namely "The company obtains legal entity status on the date of publication of the Minister's decision regarding the legalization of the entity. company law". Unincorporated forms of business such as Firms & Limited Partnerships, it is regulated in Articles 16 and Article 19 of the Commercial Code or abbreviated as KUHD, in Article 16 of the Commercial Code (KUHD) it is stated that a Firm Company is a company established to carry out a business under one joint venture, while Article 19 of the Commercial Code (KUHD) states that companies are formed by lending money or are also called limited partnerships.

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There are lots of logistics companies, especially in Semarang, and most of them collaborate with large companies such as DHL Express (Courier & Logistics), Ninja Express (Logistics), J&T (Logistics), Indah (Logistics & Courier), LALAMOVE (Logistics), & SELOG (Logistics). Therefore, these companies have parent companies or subsidiaries, which means they already have market share. Therefore, logistics companies have developed strategies to meet the needs of their clients, including their groups as well as the latest fluctuations in the Indonesian economy, especially in the mining and oil and gas sectors which are volatile with unpredictable market values.

These logistics companies enter into non-groups by working with partners or vendors, showing that they are not only focused on the interests of the group but are also venturing outside the group to increase revenue or maintain the stability of their clients. In this case, vendors who are not members of the group are invited to join so that logistics business actors can control the market and their customers. They do this by offering little promises of interest, such as providing goods from clients or consumer groups, even though it is just a promise of interest.

Experts are skeptical of these actions because they are essentially a cover for business fraud or the emergence of monopolistic practices within a network of partners, which will harm other small businesses. Alternatively, legal protection for large business customers or logistics company partners may be necessary, either as a preventive measure or as a response. commercial crime. Since their main goal is to develop a partner network, the fact of asset minimization will be linked to the vendor or partner selection process. Specifically, recruiters from a department within a company—usually referred to as procurement—are tasked with providing vendors and prices in procurement job descriptions. This is their primary goal, and the Company's Standard Operating Procedures do not clearly and consistently regulate how they provide vendors and pricing.

Researchers know that the public perspective that is formed about negotiation, which is a hidden talent, is something that cannot be justified, in fact, with skills and methods of determining the results of vendor provision and prices. Vendor provision is only discussed in technical terms, there must be a Company Deed, Permit Letter, Trading business, Transportation Services Business Location Permit at the provincial level in the area of issuance or licensing, Company Taxpayer Identification Number (NPWP), Copy of Tax Invoice Power of Attorney, Taxable Entrepreneurs, Vendor List Form where here the Terms of Payment Account Number and above are discussed. The account name must be the company as well, as well as a contact person who can be contacted by the logistics company.

As for the technical requirements in this case, according to researchers, every company has them. However, apart from that, the Procurement Team usually has partners from other fields, such as the number of fleets owned, capital strength, and selling price, and it is at this point that the non-technical interests of the Procurement Team come into play in determining the price of the company, but besides the team, there are problems with the operations team or the individuals doing the work. Their responsibilities and authorities differ in the Operations and Procurement Holding Companies. The researcher above mentioned the task of procurement, while the task of operations is to provide content and do it base on interests. If the operating partner is someone the operator likes or is interested in, he or she will provide a lot of content; otherwise, he will use trickery or intrigue to introduce a partner he respects or trusts.

Especially Procurement (As a Vendor and Price Provider), where Procurement's position is lower or often called Support, followed by Procurement (As a Vendor/Price Provider and also includes operations), where Procurement is a strategic position where, apart from being a service provider, it is also an operational or determining which vendor will be used or which

vendor has an interest between the two. Because Procurement and Operations occupy parallel positions, Operations can only take action in response to the appointment of the Procurement team concerning the other parent company. Because he finds partners negotiates prices and selects partners for projects, procurement responsibilities involve operations. That is, procurement plays an important role in the growth of a company or, more specifically, in the creation of a monopoly within it.

In the scope of business law, competition in determining tenders by Procurement often gives rise to fraud and/or fraudulent competition as in the example above, which is something that cannot be avoided by business actors, competition on the one hand can provide benefits and on the other hand it can cause losses, thus there are 2 (two) types of competition, namely: honest/healthy competition and unfair/unlawful competition, while fraudulent competition is an act against the law.[3]

When selecting winners or enlisting partners in a business, procurement is the source of unfair competition that researchers focus on. As a result, fraud is increasingly widespread because of the many interests involved. Of course, this also applies to the study of Justice Theory and equality for a person, company, or legal entity to participate in the partner registration process or product tender. To prevent monopoly, this idea is also needed as a theoretical basis for identifying or handling company operations. The following is the nature of justice according to John Rawls's Theory of Justice which contains a theory of justice:[4]

1. Maximizing independence, restrictions on this independence are only for the sake of independence itself;
2. Equality for all people, both equality in social life and equality in the form of utilization of natural resources (Social goods), restrictions in this case can only be permitted if there is a possibility of greater benefits;
3. quality of opportunity for honesty, and the elimination of exclusion based on birth and belief.

The origin of an agreement or contract regarding the main matters or important components of the contract, which will ultimately result in the conclusion of an agreement or contract to lock in and legitimize the processes that occur, is the cause and effect of this problem; hence, the Company or Parent Legal Entity (parent). Procurement that is required or protected by the Director cannot provide justice based on evidence and also leads to corporate crime. As a result, legal problems were revealed, and the researcher used this information to justify the title "Legal Accountability for Procurement of Tender Decisions for Monopoly Practices in the Logistics Sector".

2. Method

The type of research used is juridical legal research using field data as a complement. The juridical legal research method is also called doctrinal legal research. In this type of research, law is conceptualized as what is written in statutory regulations (law in books) or law is conceptualized as rules or norms which are benchmarks for human behavior that is considered appropriate. [5] In the research approach, the researcher will use a juridical-empirical approach, this approach is used to reveal whether Procurement can be responsible for the birth of a monopoly for business development where the department is directly under the director. This will later result in preventing corporate crime, where normative juridical is used in in order to find the right legal concept for business development.

3. Theoretical Review

3.1. Theory of Justice

The theory of justice is stated as a theory of correct action if it touches a sense of justice, holders of power are often faced with a fair period of truth, but this always contains subjectivity, truth is always relative and depends on the decision-maker, unfortunately, this is often distorted, until fabrications of truth are born.[6]

Various views of justice are discussed in legal literature. Ethical theory is one conception of justice; according to this theory, justice is the sole purpose of law. Moral beliefs about what is right and wrong shape the content of the law. This idea holds that the purpose of law is to achieve justice. This philosophical understanding of justice, especially when viewed through the lens of legal philosophy, is consistent with the theoretical framework of the three levels of legal science—legal theory, legal dogmatic, and legal philosophy—and is ultimately very beneficial for legal practice. The basic conception of rights developed by thinkers ranging from Aristotle to modern philosophers can serve as a guide for decision-makers in directing and carrying out regulatory tasks in the legal profession. [7]

Another view of the theory of justice is that John Rawls put forward an idea in his book A Theory of Justice that the theory of justice is a method for studying and producing justice. There are thinking procedures to produce justice. In principle, the aim of the law is justice, therefore all actions taken in an agreement reached are justice or a sense of justice. The nature of a sense of justice is considered a constitutive part of law because law is seen as an ethical duty of humans in this world, meaning that humans are obliged to form a life together. good by managing it fairly.[8]

3.2. Business Judgment Rule Theory

The existence of an inherent fiduciary duty means that, as long as directors carry out their management duties in good faith and only in the best interests of the company, they cannot be held personally responsible for any losses incurred by the business. Directors are required to act in the best interests of the company, not at the discretion of a court, and to act by their own opinions. It acknowledges that choices made by directors have been evaluated and modified based on several considerations, including ethical, legal, business, public relations, and promotional considerations.

In the development of legal science, the business judgment rule is known, which arises from court practice in common law countries. This principle states that if the board of directors has decided after prior careful and careful business consideration, then he will receive immunity and cannot be sued. personal responsibility, even if the decision he takes turns out to be unfavorable to the company.

As long as there is no serious negligence, the decision-making process and substance of the assessments made by the board of directors will be maintained, except for irrational decision-making. This philosophy protects directors by allowing them to make mistakes, as long as decisions are taken fairly, precisely, and thoroughly and can be verified. Although shareholders cannot possibly trust that the board of directors will never make poor judgments, they have a right to expect that all decisions are made with care and consideration. Therefore, the responsibility of each member of the board of directors is measured using business judgment rules. This means that a member of the board of directors is considered irresponsible if he carries out his duties by considering the fiduciary principles that have been established in addition to having various reasonable considerations regarding the decisions he makes. However, this

approach does not protect directors if the actions they take have unfavorable aspects. components of gross negligence, illegality, conflict of interest, and fraud.

The definition of the business judgment rule has four prerequisites that need to be met or met before the quality of a board of directors' decision-making can be examined or evaluated. These prerequisites are as follows: Initially, a choice must be made. According to this theory, directors are not entitled to protection if, for example, they fail to conduct required studies or engage in other types of simple negligence. Second, to support their reasonable and resonant beliefs, directors must seek and gather all relevant facts to make the necessary judgments. Third, choices must be made in good faith. This need will not be met, for example, if directors realize that the choices they have made are illegal. Fourth, decisions taken by the board of directors are not influenced by any personal interests, including financial interests.[9]

3.3. Responsibility Theory

There are various legal bases for holding corporations or company managers accountable for their actions related to corporate criminal acts. These bases include Strict Liability, Representative Liability, Identification, and Culture. These four concepts are theories, doctrines, or teachings related to corporate legal crimes. Strict Liability comes first. In common law jurisdictions, the theory is understood as an absolute duty relating to the possibility of harm. One of the main characteristics of absolute liability is that there is no requirement regarding fault. This means that proof of guilt is not required; rather, it is sufficient to show that the perpetrator committed an act prohibited by criminal law, or, in other words, that the perpetrator is responsible for all potential losses that may arise from his actions.[9]

According to Abidin, there are three reasons for accepting strict liability for certain offenses, where the legislator does not require proof of the element of guilt or men's rea, namely: First, it is essential to ensure that certain important legal regulations for the welfare of society must be obeyed; secondly, proving men's rea for similar offenses is very difficult; and third, avoiding high "social dangers".

Among those who agree with the application of the strict liability doctrine, this argument is made that:

1. avoid/prevent loss/crime

   The main aim of criminal law is to avoid or prevent actions that can cause harm, so it does not make sense to limit criminal liability for this. Second, public protection must be guaranteed, because every loss must be accompanied by a *mens rea* requirement. This means that the consequences of the loss in question must be prevented, whether intentional or not. Third, the requirement to prove *mens rea* will result in the guilty party escaping criminal responsibility and will add unnecessary costs to the enforcement of the criminal justice system. There are many situations where society needs protection from negligence, and the existence of strict liability will force potential perpetrators to be more careful.

2. Vicarious Liability Theory

   Criminal liability: Also known as vicarious misconduct, a person can be sued for a crime committed by another person. In general, criminal liability is personal and non-transferable, therefore it is impossible to hold someone responsible for a crime they did not commit. by another person, and that person is punished criminally because of his own actions,

not because of other people's actions. Criminal wrongdoing is usually limited to cases where the author has *mens rea*, or an element of guilt; The exception to this rule is vicarious liability, which makes another person responsible for another person's actions.

3. Identification Theory

   In this case the court applied the organ theory which equates legal entities such as humans with their body organs, one of which is the center of the mind or brain. Theory II, which is called the identification theory, states that corporations can commit criminal acts directly through people who have close relationships with the corporation and are seen as the corporation itself, which is carried out by people who have the ability or authority to do so intra vires. The doctrine that a limited liability company is an independent legal entity will give rise to legal problems if it meets the part of the law that applies to individuals, which requires an assessment of a person's mental state in order to be liable.

4. Discussion

4.1. Procurement is responsible for acts of conspiracy and prohibited agreements

In Article 1 number (5) of Law Number 40 of 2007 concerning Limited Liability Companies, it is stated that the Board of Directors in a Limited Liability Company ("Company") is the organ of the Company which has the authority and is fully responsible for managing the Company for the interests of the Company, by the aims and objectives of the Company. and represent the Company, both inside and outside the court by the articles of association. The company is an artificial person that cannot be seen with the eye but only exists on paper, the company operates through human intermediaries called directors, and the authority of the directors is explained in the articles so that they are the ones who work and decide matters on behalf of the company, with them having the same necessary authority to act.[10]

The researcher examines it from the perspective of Business Judgment Rule Theory which explains that the Director is not fully attached to the problem, but this basis refers to Law Number 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition which states that the party responsible is the business actor. It is following law for losses, both large and small, because directors are considered to have careful decision-making skills. Essentially, the director assumes responsibility for the procurement function, and fulfilling his duties is part of that responsibility. However, directors may not fully understand that the procurement function is not just a support but also an integral component of the company's main business.

In the correspondence that researchers found, Procurement is a department that is included in the core category of the company because it has a big influence on business interests. This is to the results of respondents from 18 Procurement who answered that Procurement is a Support department so that its function and role is only to carry out orders, even though where there are activities or legal action mechanisms that violate norms

Apart from that, the company's current goal is to minimize assets to increase profit/revenue, therefore the role of procurement is very large in determining a company. This is by procurement respondents where a percentage of 72% agree that

minimizing a company's assets is part of the profit. due to maintenance costs, insurance costs, overhead costs, and other costs related to the unit that come from vendors or suppliers.

Assessment rules perspective Based on research correspondence with suppliers and vendors who conveyed their victory over direct appointment, business actors were proven to receive legal protection when placing procurement strategically and avoiding crimes or legal acts committed by procurement in the form of collusion and price agreements. Direct appointment is a way to obtain user requirements quickly but does not take into account the mitigation of direct tender decisions. Based on the results of respondents, 16 out of 18 vendors/suppliers stated that almost all of them had received direct appointments, and this information came from procurement. Because procurement is a supporting department and its responsibility is to users or parties who need it, not procurement which is part of the core business and must be able to assume this responsibility because it can select and determine partners or vendors, the practice of direct appointment results in the prohibition of monopolistic practices. Of course, this is a legal issue.

Given the theory of legal liability in corporations, there are 3 (three) groups to determine which type or where the Procurement legal liability is located, namely Strict liability, Vicarious liability, and Identify Theory.

1) Strict liability

   The key is only the actus reus - namely an act prohibited by criminal provisions - which must be proven before someone can be held responsible for the prohibited act. For example, when a procurement action asks customers or consumers not to go directly to partners, this is a form of conspiracy - because in general monopolies often occur and it is a wrong action if the monopoly is intentional, giving rise to unhealthy competition between business actors. Apart from that, another action is the implementation of direct appointment which is believed to be very vulnerable to carrying out prohibited actions such as price fixing through markups, and Margin and Procurement are the parties closest to this action.

2) Vicarious Liability Theory

   This is known as vicarious liability. In general, criminal responsibility is assigned to the individual who committed the act; However, in a theoretical context, this does not apply if the act is proven to have been carried out with *mens rea*. If this is directly related to Law Number 40 of 2007 concerning Limited Liability Companies which shows that the directors are fully responsible for the interests of the company; the only difference is that this theory focuses more on civil issues; However, if the topic is punishment for breaking the law, then Vicarious Liability theory can be applied. This means that the director or other person in charge of a company, where the company is suspected of carrying out prohibited monopolistic practices, can use the Vicarious Liability theory approach where the substitute actor is the worker as the party who has the original rights. Legal accountability is referred to as the theory of "tort of law", or *onrechtmatige daad*. A can hold C responsible for any losses he suffers as a result of B's intentional or reckless actions. This can be used if C and B are employer and employee

(Master and Servant), provided that B's activities are carried out to fulfill his work duties. This kind of accountability is built on the idea that the principal is responsible for any illegal acts committed by his agents or employees, or that the principal is responsible for any illegal acts committed by the agent. The phrase *respondeat superior*, which means that a superior person or superior must be responsible for an unlawful wrong committed by a subordinate or that a master is responsible for the wrongdoing of a servant, epitomizes this concept.

This doctrine has been applied within the framework of the legal relationship between an employer or principal and an employee or agent, as long as it can be proven that the actions carried out are within the framework of carrying out their duties. After the first element of error is discovered without the need for proof, namely conspiracy, direct appointment in price fixing, the next party that can be responsible other than the director is the employee other than the director who is the party who has violated the law.

3) Identity Theory or identification theory

This theory discusses organs, or the peak of identification theory, where those responsible in a corporation are organs, such as procurement, where they have carried out legal acts such as conspiracy and price fixing agreements to face criminal penalties or civil, only those who occupy senior official or administrative positions and above are held accountable according to this view. Although researchers believe that these two titles indicate the degree of a position, some organizations give their employees the titles Junior Officer and Senior Officer. However, this cannot be understood as a managerial component; rather, it may be a strategy used by companies to protect Procurement from harm if, in terms of nomenclature, it is not the domain of senior officials.

These three theories of legal responsibility have been answered in accordance with the facts or through correspondence from Procurement. If Procurement becomes part of the core business, then this will of course further strengthen accountability for the prohibition of monopolistic practices and unfair business competition.

4.2. Legal Consequences of Prohibition of Monopoly Practices for Procurement Actions

Procurement's actions in determining vendors or partners are the trigger for the prohibition of monopolistic practices because apart from that, he can commit acts against the law, in monopoly itself there are several actions that are considered prohibited in Law Number 5 of 1999 concerning Prohibition of Monopoly Practices and Business Competition. Healthy, namely:

Several articles in Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition discuss agreements that are prohibited within the 75% control limit, namely: Article 4 paragraphs (1) and (2) of Law Number 5 of 1999, concerning Prohibition of Monopolistic Practices and Unfair Business Competition states that "Business actors are prohibited from entering into agreements with other business actors to jointly control the production and/or

marketing of goods and/or services which may result in the prohibition of monopolistic practices and/or unfair business competition."

In the Vendor/Supplier Partner Guidelines, researchers found writing that requires that partner companies are prohibited from having direct contact with customers, meaning this is part of the agreement because, at the end of the guideline, the partner must sign a statement following the business ethics, even though this action is part of the prohibited actions.

Apart from that, the article also discusses price fixing, which is an action that is often found in practice, such as determining standardization of prices where the determined price is used as a reference so that partners agree. In determining this price, the price will be actualized in the form of a regular contract. In Article 17 and Article 22 of Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, the articles discuss or study prohibited activities. This is the context of a conspiracy where the parties conspire to determine the winner of the tender, namely: Article 17 paragraph (1) "Business actors are prohibited from exercising control over the production and/or marketing of goods and/or services which could result in monopolistic practices and/or unfair business competition.

Article 17 paragraph (2) states that: "Business actors should be suspected or deemed to exercise control over the production and/or marketing of goods and/or services as intended in paragraph (1) if: a. There are no substitutes for the goods and/or services in question; or b. Resulting in other business actors not being able to enter into competition for the same goods and/or services; or c. One business actor or one group of business actors controls more than 50% (fifty percent) of the market share of a particular type of goods or services.

Article 22 Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, namely: "Business actors are prohibited from conspiring with other parties to organize and/or determine the winner of a tender so that it can result in unfair business competition," context This happened in determining direct appointments according to the results of respondents where 12 correspondents or 66.67% stated that they agreed on prices with partners.

So the legal consequences of Procurement's actions in determining vendors and prices lead to the Prohibition of Monopoly Practices, namely based on: Prohibited Agreements, Price Fixing, Monopoly, and Conspiracy, and of course, this will damage the business order which so far has not been held accountable for Procurement's actions, this is also only based on Presidential Regulation Number 16 of 2018 concerning Procurement of Goods and Services, apart from that, in the correspondence provided regarding allegations of conspiracy, 83.3% or 15 people answered yes or prohibited partners/suppliers from participating in tenders held by the logistics company.

In terms of accountability for legal consequences, the party given criminal or civil sanctions in Law Number 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition is the Business Actor, the Director is fully responsible for the prohibition of Monopoly Practices, monopoly law does not fully regulate other parties as healthy actors because according to the researcher's view, the law prohibiting monopolistic practices should be reformed to realize legal certainty and legal justice for business actors.

Apart from that, the general teachings or general principles that apply, criminal liability can only be imposed on: 1. Individual people (Physical

Persons), so those who can be the subject of criminal acts are humans who are referred to as human elements, namely individuals or natural persons, that's why criminal responsibility (*strafrecht verantwoordelikjkheid*), or criminal responsibility is personal responsibility 2. For criminal acts committed by someone, they cannot be held accountable to anyone other than the perpetrator.

In Procurement criminal liability cannot be blamed from the perspective of the act because the basis above refers to the opinion or definition of criminal liability in Article 55 paragraph (1) of the Criminal Code (KUHP) that "Punishable as a person who commits a criminal event: 1. The person who commits, who orders the commission of, or participates in the commission of, the act; 2. A person who, utilizing a gift, or agreement, wrongly uses power or influence, violence, threats or deception or by providing an opportunity, effort, or information, deliberately induces an act to be committed.

The explanation above is that a person or perpetrator has committed a criminal act, namely in the context of the prohibition of monopolistic practices in the form of conspiracy which cannot be separated, a person can be punished for a criminal act that he committed, meaning that there is no criminal event without a perpetrator or it can be called criminal liability and the basis of the theoretical approach vicarious liability through the construct of *respondeat superior*.

Although the Vicarious Liability Theory provides a strong basis for admitting workers in criminal cases, its application differs from civil law because workers and subordinates cannot be held liable to directors or employers; in criminal law, by contrast, entrepreneurs and leaders are usually exempt from liability. violations committed by employees, or in this case, procurement. 30 Although the doctrine of representation is acceptable in the criminal field, it is important to remember that culpability is essentially personal and individual. An employer does not always bear criminal responsibility (criminally responsive) for unlawful acts committed by his subordinates or employees.

The application of the doctrine in the criminal field must be limited so that demands for application in the past can be avoided. However, it must be accompanied by a detailed outline of its implementation in non-criminal legislation on one aspect, but on the other aspect, even though the field is non-criminal, its implementation is very necessary for the sake of orderly public life, so in laws relating to these fields, needs to be accompanied by "criminal threats" which are called statutory crimes or statutory crimes.

5. Conclusion

The procuring party is the perpetrator of legal acts, for example, conspiracy and fixing the price of an agreement. Thus, based on the theory of legal responsibility known as Vicarious Liability Theory - which holds that the director cannot immediately be punished or given sanctions for losses or actions of that party company or limited liability company known as the Business Judgment Rule theory, procurement can be held responsible for enforcing prohibitions on monopolistic practices in the parent (parent) company.

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