I. Introduction

The belief that competition is of great importance to the promotion of national economy has induced states to support it by regulations. Indonesia was not left behind after the promulgation of the Act Number 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition (the Act). The Act bans several contracts (Articles 4 – 16), several activities (Articles 17 – 24), and abuse of dominant position (Articles 25 – 29).

In terms of contracts prohibited by the Act, there are several interesting things worthy of discussion through these following pages. The definition of the word contract itself, for instance, is not clear, and the Act does not explain it.

An other example is the absolute exemption of contracts in joint ventures from the prohibition of price fixing.7 The Act is silent about which kind of joint ventures that deserve the facility. In such countries as the United States, the European Union, and Australia, the requirement that "the benefit of joint venture must outweigh its detriment" must be satisfied for a joint venture to be exempted. Additionally, in Australia, in relation to price fixing, the exemption is not absolute but only from its rule of per se.8

The absolute exemption of contracts in relation to intellectual property rights (IPR) from the Act (See Article 50) is another important example. This is interesting taking into account the possibility of abuse of IPR so as to lessen or impede competition. This is why the US, EU, and Australia have otherwise made IPR bound to such certain stipulations of their antimonopoly law as abuse of market power and price fixing. Article 50 of the Act can therefore be deemed so loose that it may harm competition and consumers. This paper will try to discuss these foregoing issues.

II. The Concept Of Contract In The Act

Article 1 Number 7 provides that contract is "the action of one or more business actors for binding themselves to one or more other business actors under whatever name, either in writing or not in writing."

When the definition is considered, the following things can be concluded from it:

a. The definition does not mention the objective.

b. The contract is the action.

c. There are parties to the contract, namely business actors.

d. The contract can be in writing or not.

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7 S.H., L.M.; Sufi Pengajar Fakultas Hukum - UGM.
8 S.H., M.Hum.; Sufi Pengajar Fakultas Hukum - UGM.
1 See Article 1 Number 7.
2 See Article 1 (2).
The definition does not mention the objective of parties to the contract. As a consequence, the definition by this Article can not be regarded as being clear without being connected with activities carried out by contract consumption provided by next articles of the Act.

Like Article 1313 of the Civil Code, the definition by Article 1 Number 7 makes use of the word “act.” Some scholars have asserted that the use of the word constitutes one of the weaknesses of Article 1313 of the Civil Code. To competition law, I would think that the word might be beneficial of widening its reach.

Parties to the contract, according to Article 1 Number 7, are business actors. Then, Article 1 Number 5 of the Act explicitly mentions that business actor can be either a person or a business association (legal entity or not). This last article confines the meaning of business associations to those established (incorporated) and situated or doing activities in the territory of Indonesia. This is different from the US Antitrust Law that can apply to foreign business actors if their activity has a “direct, substantial, and reasonably foreseeable effect” on trade and commerce in the US.

If Article 1 Number 5 is closely red, it is not clear whether or not a person has to stay or carry out activities within the territory of Indonesia for the Act to apply. If not, it consequently follows that the meaning of a person can be broad. It is a pity that the Act does not explain it.

The contract defined in Article 1 Number 7 mentioned above is “unilateral.” One. It does not mean, however, that only that kind of contract that falls under the Act’s coverage; it shall be understood that a “bilateral” contract is also covered by the Act. I think the definition of the contract by the Act is beneficial of widening its reach. But is it not too strict? Is it a contract for price fixing, for instance, the contract can be deemed to exist when one party binds himself to another party to follow a certain price of certain products without the latter party also binding himself to the former. Since the latter does not bind himself to the contract, several hours after the consummation of the contract, the latter can lower the price to a competitive level. Can this case be regarded as lessening competition? I am sure the determination that a price fixing is under the per se rule is not without compelling reasons, such as that its negative effects on competition and consumers are much more possible to occur that not.

In Australia, the word contract in its competition law is basically defined as its general contract that requires the consideration. The consideration means that each party gives another party to the contract...
something for something he has received. In other words, a unilateral contract cannot be enforced. Furthermore, the word "assignment" and "understanding" as also used in its competition law also require "meeting of the minds" of parties despite their showing something less than a real or formal contract. In the US, the word "agreement" that covers "contract, composition," or "conspiracy" under Section 1 of the Sherman Act requires a concerted action of two or more parties the existence of which is readily quashed without their having "unity of purpose," "understanding," or "meeting of minds." The definition in Article 1 Number 7 of the Act is very similar to that in Article 1313 of the Civil Code that also defines the contract as of unilateral natures. The nature has caused Article 1313 to be weak. The weakness of this Article, however, has apparently not been regarded as being important since there has yet to be any effort to amend it. On the other hand, the "weakness" of the definition in Article 1 Number 7 of the Act cannot be deemed trivial because it can easily incriminate a party to contracts that are per se illegal.

The problem that may arise is: if a unilateral contract is not signed it will be abolished and, as a result, there will be so many unilateral contracts obeyed by all parties that harm competition and consumers. One of solutions to this problem is to add such other provision as "conspiracy." As a consequence, although an anticompetitive conduct can not amount to a formal contract it still can be caught by the Act. As a comparison, in the US, the word "conspiracy" has been able to solve the difficulty of proving the existence of a contract. In Australia, the word "arrangement" or "understanding" has also dispensed with that kind of difficulty. In addition to using the word contract, Japan also employs the word "agreement" or "any other concerted action" so as to widen its antimonopoly law's reach. The Act has also provided the prohibition of some conspiracies, that is, in Articles 22 and 23. It is a pity, however, that these articles have confined the conspiracies to certain activities thus making other conspiracies fall outside the prohibition.

iii. Some Prohibited Contracts

1. Cigolopoly

The prohibition of contract to attain monopoly by several business actors is laid down in Article 4 (1) of the Act. Under this article, the contract is prohibited only if it hurts or impedes competition. Thus it is not per se illegal.

This provision is interesting because the prohibition of oligopoly is only placed in the category of prohibited contracts. This may narrow the Act's coverage because of the limited meaning of a contract. At a comparison, in the US, besides they can be caught by Section 1 of the Sherman Act, oligopolists can also be snared by Section 2 of the act that employs the phrase "combine or conspire... to monopolize."
The use of "combination" or "conspiracy" in this case is more realistic in that many oligopolies have been attained without formal consent.

An oligopoly can be achieved by implicit verbal negotiation. This is the case when each firm holds press conferences to state its views about (1) demand, cost, or recent or forthcoming changes in demand, (2) the characteristics, adequacy, or desirability of past, present, or prospective prices, (3) industry profits, revenue, price, or other needs, or (4) its expectations or intentions with respect to output or price. The more detailed the statements about future price intentions, the more they approach negotiations. And if each speaks separately, the process would approximate conventional verbal coordination and agreement. In addition, tacit collusion is possible to achieve an oligopoly. In price fixing, for example, firms respond to each other and follow a price leader. In this case, the word "combination" or "conspiracy" is not readily capable of sharing oligopolists.

2. Price Fixing

a. Notional Price Fixing

Article 5 (1) prohibits business acts from making a contract with their competitors to fix price of certain goods or services for their consumers. Thus, they should have otherwise competed in the price, but the contract eliminates the competition among them.

Price fixing in Australia (Section 45A of the Trade Practices Act of 1974) and in the US (Section 1 of the Sherman Act of 1910) is considered as "unlawful restraint of trade with no purpose except the stifling of competition." Therefore, it shall be deemed per se illegal by those two countries.

Apparent, Indonesia follows those countries. Article 5 (1) of the Act indicates that a contract to fix price is prohibited without looking at effective efficacy of the contract on competition. Because a contract to fix price is per se illegal, it is of no relevance whether the price is high, low, or reasonable. To put it in other words, although the deterrents to the competition is the refusal to contract, the contract to fix price shall be illegal. It also follows that market power of the parties to the contract is not relevant either even if the likeness of price increase is higher when their market share is significant.

The result of Article 5 (1) of the Act is not clear. The meaning of "fixing" or "price" should have been exploited. A contract to fix price can actually take such firms as agreements on price decrease, agreements on a standard format according to which prices will be computed, agreements to maintain a fixed price between the prices of competing but non-identical products, agreements to eliminate price discounts or to establish uniform discounts, agreements on credit terms that will be extended to consumers, agreements to remove products from the market for high demand and keep prices high, etc.

b. Vertical Price Fixing (Retail Price Maintenance)

A contract to maintain resale price can occur at any stage of the supply or distribution process for goods or services. An example of this is an agreement between a supplier and its distributors in which the former fixes the lowest price of its products
that has to be complied with by the distribu-
tors. In other words, the distributors shall not
resell or resuppy the products to consumers
without the price lower than the fixed price.

"One of the reasons to make a contract of
resale price maintenance (RPM) is to avoid
intra-brand competition among distributors
that may threaten the stability of their retail
network. In addition, the supplier wants to
maintain his consumers' perception toward
the quality of his product.21 RPM can also
occur with a view to implementing price
fixing agreement consummated in a cartel
between retailers. Because it is very
difficult for them to implement the agreement, they
peruse or force their supplier to implement it
by making an RPM agreement. It is also
possible that a supplier fixes resale price as
so as to enforce a (horizontal) price fixing
agreement between this supplier and other
suppliers.22

It can be concluded from the provision of
Article 8 of the Act that RPM contract is
prohibited only if it may result in unfair
competition. That is, unlike price fixing, it is
not per se illegal. The writer does not know
the reason why there is such kind of
difference despite their similarity of touching
on price, a very important factor in competi-
tion, and of eliminating price competition that
constitutes the most important objective of
any competition law.23 As a comparison, it is
important to mention that the US24 and
Australia25 deem both price fixing and RPM
agreements per se illegal.

3. Market Allocation

Price fixing is not the only method to
control price. There is another method that,
although indirectly, can control it, that is an
agreement among business actors not to
compete one with each other. By this
agreement, they allocate market of their
products and services.

A contract to allocate markets may vary:
first, the business actors may allocate the
market geographically; second, they can
allocate the kinds and classes of consumers
(e.g. wholesalers and retailers). Third, they
may allocate the market based on the kinds of
products (e.g. professional video equipment
and amateur ones).26

Article 9 of the Act places market alloca-
tion contract under the rule of reason. It is
only banned if it may result in monopolistic
practices and or unfair competition. This is
different from the US Antitrust Law that
regards it as per se illegal.27 Generally, the
US courts treated market allocation as price
fixing. A price fixing agreement enables each
competitor to sell his products at monopoly
price without being afraid that other
competitors will lower the price. Market
allocation leads to the same result since every
competitor does not face competition in
relation to consumers; thus they are free to
set monopoly price.28

4. Cartel

A cartel has been defined as "an
arrangement in which competing firms have
substituted an agreement on price, output, or
related matters for independent decision
making.29 Thus, in a cartel the element of
price and output is very important; parties to
the cartel who are otherwise independent

21 Tyrer, supra, note 3, at 710.
22 Geithorn, supra, note 9, at 204.
23 Lantme, supra, note 7, at 554.
26 Adderson v. Prof. Soc. of America, United States, 85 S. Ct. 271 (6th Cir 1965).
27 Geithorn, supra, note 9, at 227.
28 Kauper, Thomas E. The Treatment of Carrels Under Antitrust Law of The United States, The University of
From time to time, however, it has been argued that cartel should be tolerated because they bring stability and certainty to the market, or that the monopoly profits which result are desirable because they may be used to finance something else of social value, such as research. Additionally, cartels are inherently unstable. Unless protected by government, they will invariably disintegrate over time. Unlike a single firm monopolist which is in control of its own decisions, cartels are dependent on achieving and maintaining agreements with a significant number of parties, each of whom stands to gain by cheating on the cartel if it can do without causing the cartel to collapse. Agreements in cartels may be difficult to achieve when industry members have significantly different costs or when products are significantly differentiated. The prices agreed upon must cover the costs of the least efficient producer, a level that may be unacceptable to others. Moreover, even if an agreement is reached each member of the cartel will be tempted to cheat by using secret rebates or discounts to some customers. In addition, if price is set at monopoly levels, other firms may be induced to enter the market. Thus, it is difficult to maintain cartels.

The arguments against anti-cartel rules mentioned above had probably influenced the writing of Article 11 of the Act that characterized a cartel as under the rule of reason. Nevertheless, it is worth to note that those arguments are not far from flaws. First, the stability or certainty cartels may create is artificial and inconsistent with the free flow of supply and demand that control price movements. Second, there is little reason to believe that cartel members would use monopoly profits to benefit consumers in any event. In addition, although it is understood...
that many cartels have easily collapsed, there are also a number of cartels that have endured for long period of time, even short-lived cartels inflict harm for however long they exist. Apparent, Indonesia has followed Japan’s policy to require the effect of “a substantial restraint of competition in any particular field of trade” in the prohibition of a cartel. Thus, it may be interpreted that a cartel agreement in Japan is illegal if it has been put into practice and has substantially lessened competition. Nevertheless, it may be foolish to maintain that the Fair Trade Commission (FTC) in Japan has until today waited for the implementation of the cartel. The FTC has taken a stance of compromise which allows the government to bind the law and speed up legal measures, that is to construct a system which holds that a cartel agreement is unlawful as soon as the members of the cartel take the first step to implement it. In other words, the theory presumes that the implementation of the cartel will inevitably lead to a substantial restraint of competition if it were not prohibited.

5. Boycott

A boycott is a horizontal agreement among competitors not to deal with other competitors, suppliers, or customers. In general, boycotts are characterized by efforts to disadvantage competitors by either directly denying or coercing suppliers or customers to stop dealing with those competitors. This situation has been depicted by Article 10 of the Act. This kind of prohibited conduct often shuts off access to a needed input (product, facility, or market).

In Australia, a boycott, which is referred to as “exclusive provisions,” is per se illegal irrespective of its negative impact on competition. Article 10 of the Act obviously “imitates” Australia in this case. Nevertheless, paragraph (2) of this article requires the existence or the existence of damage suffered by a business actor targeted by the boycott. This is not necessarily to say, however, that there must be a negative effect on competition.

IV. Contracts Exempted From The Act

1. Exempted From All Provisions Of The Act

Article 50 of the Act has exempted from all provisions of the Act such contracts as: contracts to implement (government) regulations, contracts in relation to intellectual property rights (IPR), contracts to fix certain technical standards, contracts to agency, contracts to do joint research with a view to improving life standard of the society, international agreements that have been ratified, and export contracts.

It may be requested that the Act does not explain all of those exempted contracts although there is possibility that some business actors will avail themselves of the Article 50 exemption. I would think that the uncertainty of the meaning of the exemption could probably be abused. A contract to implement (government) regulations, for instance, may be abused by the government or business actors in collusion with the government by conceiving regulations that favor certain business actors, such as those to form or maintain a cartel.

In the US, the well-known “state action” doctrine, which exempts certain business activities to implement state’s regulations
from Antitrust Law, is not without limitations. Anti-competitive state’s regulations can not be exempted if they are violative of (1) Federal Constitution, that is, unreasonably impeding trade or commerce, (2) the first amendment of the Constitution, or (3) certain federal laws, such as the Federal Trade Commission Act or Patent laws.

Thus, the explanation about the meaning of contracts to implement government regulations that deserve the exemption is undoubtedly very important. It is suggested that the meaning be narrow and that the condition that benefits for the society outweigh the detriment of the contracts to competition be satisfied.

The writer has not understood why contracts in relation to IPR are absolutely exempted by the Act. Even if IPR constitute legal monopoly rights conferred by the government, they should not be incommensurate with aninmonopoly law. The US Supreme Court in Atari Games Corp. v. Nintendo of Am. Inc. (1996) held that patent and antitrust law actually are "complementary, as both are aimed at encouraging innovation, industry and competition." If the IPR absolute exemption is maintained, there will be many abuses of IPR, such as tie-in agreements in which patent owners sell their patented products to consumers on the condition that the consumers buy their unpatented products. When the patent owners have significant market power, they will exactly harm competition and consumers.

In the US, that kind of tie-in agreement violates antitrust law. In Motion Picture Patent Co. v. United States Film

Manufacturing Co. (1917), plaintiff (Motion) possessed the patent on motion picture projectors, which it sold to defendant subject to the stated condition imprinted on the machine that it was licensed for use only to project certain motion pictures of the plaintiff involving expired patents. The Supreme Court held Motion’s license invalid asserting that ‘the owner intends to and does derive its profit, not from the invention on which the law gives it a monopoly but from the unpatented supplies, which are wholly without the scope of the patent monopoly.’ Thus, in this case, the patent owner was not permitted by its legal device (patent) to impose an unjust charge upon consumers in return for the use of it. Also in the US, price fixing in patent-cross-licensing agreements is considered as per se illegal.

In Australia, although IPRs are exempted from certain sections of the Trade Practices Act of 1974 they can not escape from the reach of Section 46 and 46A on misuse of market power and Section 48 on resale price maintenance. Internationally, the position of the Act pertaining to IPR is interesting. When most of nations in the world begin to be suspicious of the possibility of negative effects of some IPR licensing practices on competition, the Act takes a different and contrary attitude. Article 40 (1) of the TRIPs (Trade-Related Aspects of Intellectual Property Rights) Agreement provides that members agree that some licensing practices on conditions pertaining to IPR restrain competition, may have adverse effect on trade and may impede the transfer and dissemination of technology. The second paragraph of this article provides

37 Amerada, supra, note 9, at 138 - 139.
38 Callihan, supra, note 6, at 409.
39 Amerada, supra, note 9, at 710-711.
40 Line Material Co. v. the United States, 333 US 287: a licent patent owner and an improvement patent owner licensed with a condition in order that each could efficiently exploit both inventions. The quaslicense agreement contained a price limitation designed to assure that each patent owner received its monopoly value without a complex royalty arrangement. The Supreme Court held that such license agreement was illegal law at. See Callihan, supra, note 6, at 419 - 420.
41 Latimer, supra, note 7, at 549.

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that members may specify in their legislation certain licensing practices and conditions that may constitute an abuse of IPR having an adverse effect on competition. Although this international accord does not refer to certain licensing practices and conditions (except for exclusive grant-back clause) that may harm competition, it can be regarded as a global notion that agreements pertaining to IPR shall not contravene antimonopoly laws.

It is therefore necessary to define IPR exemption in order to avoid any abuse. I would think that Article 15 (closed agreements) and Article 25 (abuse of dominant position) of the Act must apply to IPR contracts.

2. Exempted From A Certain Article

Two kinds of contracts have been exempted from Article 5 (1) (price fixing), i.e. contracts based on prevailing legislation and contracts in a joint venture.

The absolute exemption of contracts in a joint venture from that article is interesting. What kind of joint venture deserving the exemption is not explained. It may not be disputed that a joint venture between parties who are not competitors or potential competitors probably does not lead to anticompetitive effects. Nevertheless, if the joint venture create a "collateral restraint," that is an agreement to restrict competition between the parties in the future, this form of business may run the risk of antimonopoly violation suit. Furthermore, a joint venture between competitors can possibly eliminate competition unless it is forced to serve markets that all participants would not have served individually. Thus, it can not be said that contracts in all joint ventures do not harm competition and consumers at all. It is therefore worth defining sorts of joint ventures that may be exempted.

As a comparison, in Australia, Section 45 A (2) and (4) exempt contracts in joint ventures from the prohibition of price fixing. This exemption, however, is only the exemption from the per se rule of price fixing. Consequently, if it is finally proved that the joint venture has negative impacts on competition, the price fixing agreement in the joint venture must be held invalid. In addition, certain other conditions must be satisfied.

In the US, under the Export Trading Company Act of 1982, to get a limited immunity from the antitrust law a joint venture for export trade has to comply with such conditions as: not to restrain competition and trade in the US or in its export commerce, not to unreasonably enhance, stabilize, or depress prices in the US of the class of products (goods or services) exported by the joint venture, not to constitute unfair methods of competition against competitors in the export of the class of products exported by the joint venture, etc. Additionally, the Department of Justice and the Federal Trade Commission have provided some guidelines for other joint ventures that need to take limited immunity from the antitrust law. It is also important to note that in the EU, joint ventures are commonly found to less or distort competition thus violating Article 81 (3) of the Treaty of Rome. Nevertheless, the EU Commission can exempt a joint venture based on Article 85 (3) on the condition that "contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the benefits of economies of scale or other substantial advantages of a similar nature."
resulting benefit," and that does not result in restrictions on competition of the products in question.17

V. CONCLUSION

The proscription of the Act Number 5 of 1999 can evice this country’s efforts to develop its economy. However, some provisions laid down in the Act are not clear.

The definition of contract in Article 1 Number 7, for instance, still needs explanation. Like Article 1313 of the Civil Code, a contract according to this article is unilateral one. This may cause a contract not obeyed by one party, which actually does not harm competition, to be invalid. Furthermore, the use of the word “contract” without having some alternative words can contribute to the limitation of the Act’s reach. In this case, other countries’ experience has indicated that most business actors tend to avoid any formal agreement in their effort to render anti-competitive conduct.

The flaw of the Act can also be obvious when its prohibition of oligopoly is paid attention. In some other countries, many oligopolies have occurred not by formal contracts but by implicit verbal negotiations or tacit collusion that can also lead to the results equivalent to those achieved by any formal contract. The discrimination of the Act to horizontal price fixing and vertical price fixing (resale price maintenance) is also interesting inasmuch as the two are “naked restraint” of competition.

The undefined articles on exemption are also another oversight in the Act. Article 50 of the Act confers very broad exemptions that can presumably be abused. The absolute exemption of contracts pertaining to IPR from the Act, for instance, is interesting because it is undoubtedly reasonable to maintain that although IPR constitute valid monopoly rights but their exploitation shall not inflict harms on competition and consumers. In addition, the absolute exemption of contract in joint ventures from the prohibition of price fixing may also indicate inaccuracy of the Act because not all joint ventures can benefit the society but some of them may lessen or restrain competition.

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