REGULATION OF
THE COMMISSION FOR THE SUPERVISION OF BUSINESS COMPETITION OF THE REPUBLIC OF INDONESIA
NUMBER 7 YEAR 2010

CONCERNING

GUIDELINES ON IMPLEMENTATION OF THE PROVISIONS OF ARTICLE 25 CONCERNING ABUSE OF DOMINAN POSITION IN LAW NUMBER 5 YEAR 1999 CONCERNING PROHIBITION OF MONOPOLISTIC PRACTICES AND UNFAIR BUSINESS COMPETITION

THE COMMISSION FOR THE SUPERVISION OF BUSINESS COMPETITION

Considering : that to implement the provisions of Article 25 of Law Number 5 Year 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, related to the Abuse of Dominant Position, it is deemed necessary to enact a Regulation of the Commission for the Supervision of Business Competition concerning Guidelines on Implementation of the Provisions of Article 25 of Law Number 5 Year 1999 concerning Abuse of Dominant Position;

In view of :

1. Law Number 5 Year 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition (State Gazette of the Republic of Indonesia Year 1999 Number 33, Supplementary State Gazette of the Republic of Indonesia Number 3817);
2. Decree of the President of the Republic of Indonesia Number 75 Year 1999 concerning the Commission for the Supervision of Business Competition;
3. Decree of the President of the Republic of Indonesia Number 59/P Year 2006;

Bearing in mind: The Resolutions of the Commission's Meeting dated April 7th, 2010.

HAS DECIDED:

To enact : REGULATION OF THE COMMISSION CONCERNING GUIDELINES ON IMPLEMENTATION OF THE PROVISIONS OF ARTICLE 25 CONCERNING ABUSE OF DOMINAN POSITION IN LAW NUMBER 5 YEAR 1999 CONCERNING PROHIBITION OF MONOPOLISTIC PRACTICES AND UNFAIR BUSINESS COMPETITION

Article 1

In this Regulation of the Commission, referred to as:

1. Guidelines on Implementation of the Provisions of Article 25 concerning Abuse of Dominant Position in Law Number 5 Year 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, hereinafter referred to as the Guidelines, shall be the document of the guidelines on the implementation of Article 25;.

2. Commission shall be the Commission for the Supervision of Business Competition as stated in Law Number 5 Year 1999.

Article 2

(1) The Guidelines constitute the explanations to the basic principles and samples of the implementation of the provisions of Article 25.

(2) The Guidelines are intended for:

   a. Business actors and other parties who have an interest in understanding the provisions of Article 25 concerning the Abuse of Dominant Position in Law Number 5 Year

1999;

b. The Commission in performing its tasks and authorities as set out in Article 35 and Article 36 of Law Number 5 Year 1999 in conjunction with Article 4 and Article 5 of the Presidential Decree Number 75 Year 1999 concerning Commission for the Supervision of Business Competition.

Article 3

(1) The Guidelines are as contained in the Appendix to this Regulation.

(2) The Guidelines as stated in paragraph (1) shall be minimum standard for the Commission in performing its tasks, which shall form an integral part of this Regulation and bind all parties.

Article 4

(1) Decision and policies in relation to Article 25 concerning Dominant Position as decided and enacted by the Commission prior to the issuance of this Regulation shall remain enforceable.

(2) This Regulation shall take effect as of the date of its stipulation.

Enacted in Jakarta
On April 9th, 2010
THE COMMISSION FOR THE
SUPERVISION OF BUSINESS
COMPETITION
CHAIRMAN,

Prof. Dr. Ir. Tresna P. Soemardi, SE,. MS.

Forewords

As mandated in Article 35 point (f) of Law Number 5 Year 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, the Commission for the Supervision of Business Competition has a task to prepare the guidelines and/or publication in relation to the implementation of Law Number 5 Year 1999.

In this opportunity, the Commission prepares the Guidelines on Implementation of Article 25 concerning Abuse of Dominant Position based on Law Number 5 Year 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition. The Guidelines are prepared in a view that the Commission is able to performing its supervisory function on the implementation of Law Number 5 Year 1999 appropriately. In addition, the guidelines is expected to provide complete explanation, but easily understood by the parties who indirectly involve in the efforts of creating fair business climate, among others, business actors, government, law enforcement bodies and the public in general.

In line with very dynamic and fast growing business activities, this Guidelines might need an improvement in the future.

Chairman of the Commission

Appendix to the Regulation of the Commission for the Supervision of Business Competition
Number : 6 Year 2010
Date : April 9th, 2010

Guidelines on Implementation of Article 25 concerning Abuse of Dominant Position based on Law Number 5 Year 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition

Chapter 1
Background

To ensure that the business competition is fair, the House of Representatives of the Republic of Indonesia (*DPR RI*) issued Law Number 5 Year 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition (hereinafter "Law Number 5 Year 1999") which is effectively expected to foster a fair business culture so as to continuously promote and improve the competitiveness among the business actors. One of the purposes for enacting the Competition Law is to ensure that market mechanisms work well and consumers benefit from competition process or consumer surplus.

The goal of any rational business actor is to develop his business as much as possible or be the best in his business. Ideally, this goal shall encourage every business actor to make efforts to improve his performance and competitiveness through innovation and efficiency that are superior to his competitors. If it is successful, the logical consequence will be that the business actor will obtain a dominant position, or he has a significant market power in the relevant market. With this relative excellence, the business actor is capable to dominate the relevant market or may retain his strong position in the relevant market.

From an economic standpoint, possessing the ability of market domination achieved through excellent innovation and efficiency can provide positive effects for consumers. A business actor dominating a market may realize cost saving or ensure the supply of raw materials or products to achieve excellence of scale and economy of scale. The dominance of the relevant market also allows a business actor to be able to decrease the average cost of production through a broad range of production (economy of scope). All of these could lead to the emergence of low prices which benefit consumers as a whole.

On the other hand, the ability to control or maintain a position in the relevant market may also be performed through unfair business competition activities. For example, the business actors, either individual or in group, create barriers to competition (competition restraint) for competitors and potential competitors, such as inhibiting the entry of potential competitors, limiting competitors' production, inhibiting the market and technology development, and a variety of other unfair behaviors. Reduced competition resulting from this action could be disadvantageous to consumers in the end.

Furthermore, the abuse of dominant position may be disadvantageous to small business actors in the same market segment. This is certainly not in compliance with the principles and objectives of Law Number 5 Year 1999 .

In the end, considering the characteristics and impacts of such abuse of dominant position, an indepth analysis of goals, objectives and its effects are absolutely necessary. Therefore, guidelines for/in analyzing this activity are greatly required so as to create a harmonious understanding between the Commission and the business actors in assessing this activity.

Chapter 2

Goals and Scopes of the Guidelines

2.1. Goals of Guidelines Preparation

The Commission for the Supervision of Business Competition (the Commission) was established to oversee the implementation of Law Number 5 Year 1999. The Commission's tasks were mandated in Law Number 5 Year 1999. One of the tasks is to prepare guidelines and/or publications related to Law Number 5 Year 1999 (Article 35 paragraph (f)). The guidelines are needed to provide a clearer picture of Law Number 5 Year 1999. With the Guidelines, it is expected that the business actors and other stakeholders can adapt themselves to the Guidelines so as not to violate the business competition as required in Law Number 5 Year 1999.

Accordingly, the Guidelines of Article 25 regarding Abuse of Dominant Position (hereinafter referred to as "the Guidelines") aims at:

a. Providing clear and precise comprehension on the prohibition of activities related to Abuse of Dominant Position as intended in Article 25 of Law No 5 of 1999.

b. Providing a basic understanding and a clear direction in the implementation of Article 25 so that there is not any interpretation other than that described in the Guidelines.

c. Being used by all parties as a foundation in behaving so that not any party shall be harmed, and further this is to create business competition conditions that grow naturally.

The Guidelines is not meant to explain how the Commission examines in performing law enforcement or providing advice and policies, but it is focused on providing a clear understanding, coverage, and definitions on provisions of prohibition against market domination.

Even if the Guidelines provide elucidations of provisions on the abuse of dominant position, but in the process of enforcement of Law Number 5 Year

1999, the Commission's insights and decisions in conducting examinations over market domination measures that are alleged to violate Law Number 5 Year 1999 are given a priority and not limited to the Guidelines.

2.2. Scope of Guidelines

The Guidelines of Market Control through various activities prohibited under Article 25 of Law Number 25 Year 1999 cover the philosophy, spirit and direction of the provisions in promoting fair competition. In the Guidelines, it will be also briefly described about a condition as a result from the absence of a system which support the upholding of fair business competition, especially concerning the consequences of the unfair business competition practices in an effort of controlling the market. Systematically, these Guidelines cover:

Chapter I — Background

Chapter II — Objectives and Scopes of Guidelines
This chapter explains the objectives of the formulation of the Guidelines and matters included in the Guidelines.

Chapter III — Article 25 concerning Abuse of Dominant Position
This chapter explains the prohibition of the abuse of dominant position based on article 25, particularly the explanation of the relevant elements in the article aforesaid and correlation between Article 14 and other articles in Law Number 5 Year 1999.

Chapter IV — Abuse of Dominant Position and Sample Case .
This chapter explains the concept of abuse of dominant position, approaches that can be used in the analysis of abuse of dominant position, impacts of abuse of dominant position and some sample cases .

Chapter V — Rules of Sanction
This chapter states some sanctions which may be imposed by the Commission against the violation of article 25.

Chapter VI Closing

The writing system and language of these Guidelines are made as simple and clear as possible in order to be easily understood, thereby making it easier for all parties in understanding the prevailing provisions and in order to avoid any legal uncertainty in enforcing Law Number 5 Year 1999.

Chapter 3

Article 25 concerning Prohibition of Abuse of Dominant Position

3.1. Article 25 concerning prohibition of abuse of dominant position

Law Number 5 Year 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition prohibits the abuse of dominant position by any business actors in Indonesia. It is stipulated in Article 25 of Law Number 5 Year 1999 :

(1) Business actors shall be prohibited from using dominant position either directly or indirectly to:
  a. determine the trading terms with the intention of preventing and or barring consumers from obtaining competitive goods and or services, both in terms of price and quality; or
  b. limiting markets and technology development; or
  c. bar other potential business actors from entering the relevant market.

(2) Business actors shall have a dominant position as intended in paragraph (1) in the following events:
  a. if one business actor or a group of business actors controls over 50% (fifty per cent) of the market segment of a certain type of goods or services; or
  b. if two or three business actors or a group of business actors control over 75% (seventy-five per cent) of the market segment of a certain type of goods or services.

3.2. Explanation of elements contained in article 25

- Business Actor

  Pursuant to Article 1 point 5 in the General Provisions of Law Number 5 Year 1999, business actors shall be "*any individual or business entity, either incorporated or not incorporated as legal entity, established and domiciled or conducting activities within the jurisdiction of the Republic of Indonesia, either independently or jointly based on agreement, conducting various business activities in the economic field*".

- Dominant Position

  Pursuant to Article 1 point 4 in the General Provisions of Law Number 5 Year 1999, dominant position shall be *"a situation in which a business actor has no substantial competitor in the relevant market in relation to the market segment controlled, or a business actor has the strongest position among its competitors in the relevant market in relation to financial capacity, access capacity to supply or sales, and the capability to adjust supply or demand of certain goods or services".*

- Directly or indirectly

  The definition of "directly" shall be any dominant business actors conduct the acts of abuse of dominant position, meanwhile, the definition of "indirectly" shall be any dominant business actors use other business actors in conducting the acts of abuse of dominant position.

- Trading terms

  The definition of trading terms shall be basically any event or points of agreement which by any related parties are made as reference that an agreement can be executed or not or the points aforeisad are stipulated as cancellation of the agreement.

- Consumers

  Pursuant to Article 1 number 15, consumers shall be "*every user and or utilizer of goods and or services, both for personal use as well as for the interests of other people".*

- Limiting Markets and Technology development

  Pursuant to Article 1 number 9, market shall be "*an economic institution in which sellers and buyers, either directly or indirectly, can conduct trading transactions of goods and or services*". Limiting markets and technology development mean a form of behavior which bars trading transaction, innovation and goods and/or service development .

- Other business actors

  Referreing to the explanation of Article 17 paragraph 2 point b, other business actors shall be "*business actors who have the capabilities to compete significantly in the relevant market*".

- Relevant Market

  Pursuant to the provisions of Article 1 point 10, the relevant market shall be "*the market related to a certain marketing scope or area by business actors for goods and or services of the same or similar type or substitutes for such goods and or services".*

- Market Share

  Pursuant to Article 1 number 13, market share shall be "*the percentage of the value of sales or purchases of certain goods or services controlled by a certain business actor in the relevant market in a certain calendar year*".

3.3. Correlation to other articles

There are some articles in Law Number 5 Year 1999 which have close correlation with with the miuse of dominant position. These articles are among others as follows:

- Article 6 concerning Price Discrimination

  A company which has dominant position having the power to influence the price at the market, among others, through price fixing (through agreement) which are different for the same or similar type of goods and/or services;

- Article 15 concerning Closed Agreement

  A company which has dominant position having the power to enter into closed agreements, in this case the concerned business partners which do not have strong bargaining power to obtain the conditions of agreement which are fairer and more proportional economically;

- Article 17

  A company with dominant position basically possesses the monopolistic power. In this condition, monopolistic practices which inhibit fair business competion are likely to occur;

- Article 18

  A company with dominant position especially at the downstream level has the capability to control the receipt of the supply or to become a sole buyer by stipulating the purchasing conditions which are not reasonable to the suppliers;

- Artocle 19

  A company with dominant position essentially possesses the power to control the market and conducts such behaviors as discrimination, limiting the distribution of goods/services and some other anti-competition behaviors;

- Article 20

  A company with dominant position has the capability to determine the cut loss or selling at lowest price in order to remove competitors unfairly;

- Article 26

  A company may abuse the dominant position indirectly as a result from multiple position among the relevant companies;

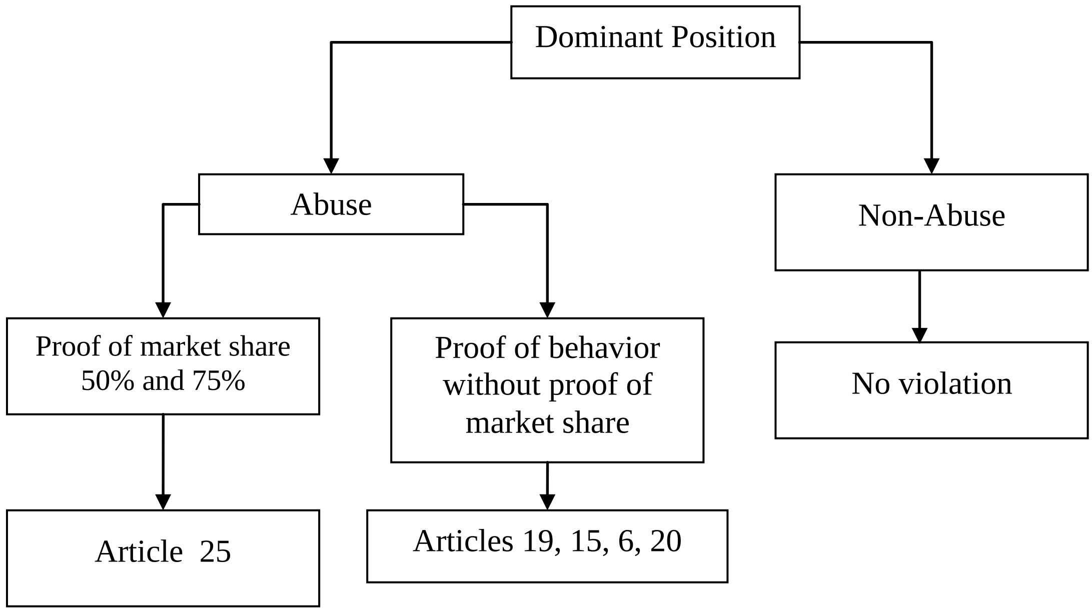
- Article 27

  A company may abuse the dominant position indirectly as a result from cross ownership among the relevant companies;

- Article 28

  A company with dominant position may be a company as a result of merger of some companies, consolidation in a group of companies or acquisition by other company ;

The correlation of article 25 and some other articles has been explain above. It does not have implication at all to the implementation of the article by the Commission, In other words, the Commission can apply Article 25 as a single indictment if related to the market structure or apply other articles (multiple indictment related to the of proof of market structure and behavior of the reported party in investigating the alleged abuse of dominant position.


Dominant Position
Abuse
Non-Abuse
Proof of market share 50% and 75%
Proof of behavior without proof of market share
No violation
Article 25
Articles 19, 15, 6, 20

Chapter 4. Abuse of Dominant Position

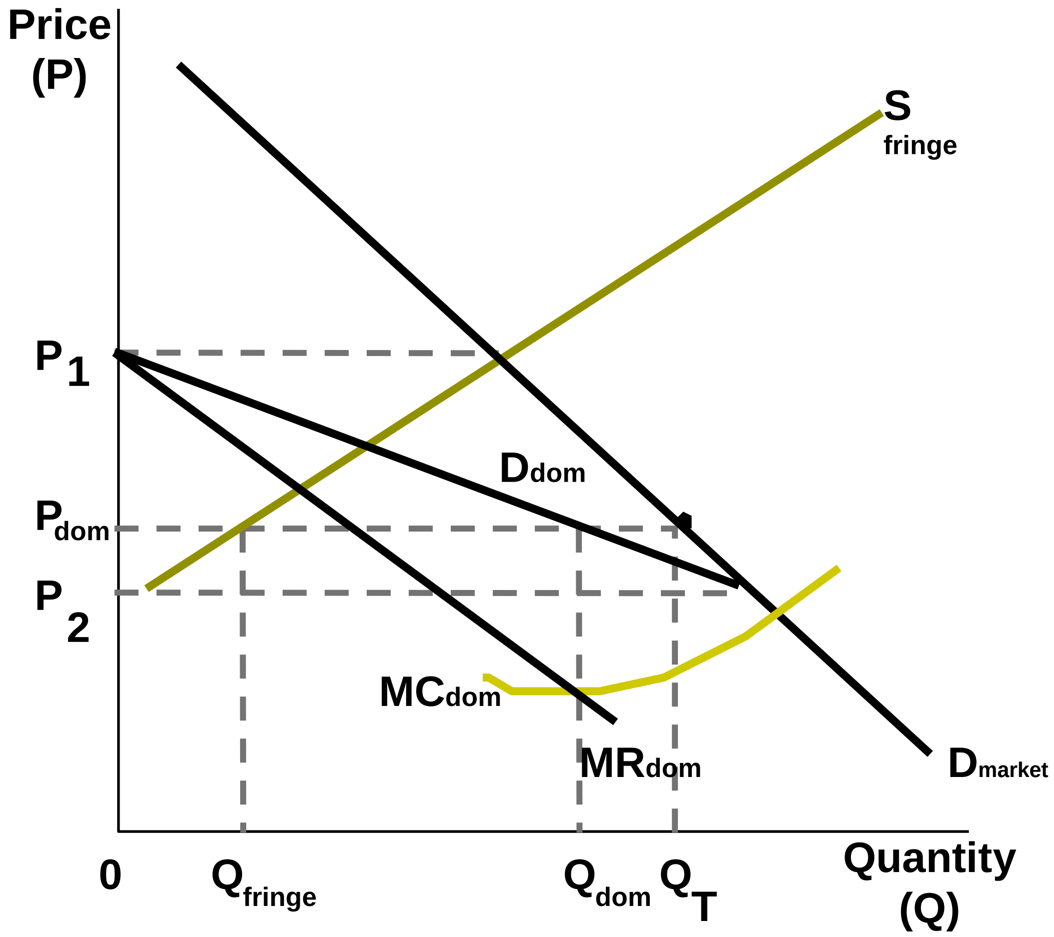
4.1 Basic Concept of Dominant Position

The firm having the largest market share in an industry is called a dominant firm. The firm may have a dominant position if it has control over the market where it operates and has insignificant competitors. The dominant firm's competitors are usually small in size that usually compete on the remaining market share. The small firm as a competitor against the dominant firm is a *fringe firm.* A firm may have a dominant position in an industry since it has a competitive advantage in terms of firm size, firm's recognized name and firm's resources.

With such a dominant position, the firm can undertake a strategy independent of business competitors' behaviors. A dominant firm may take action or make a strategy without being influenced by the business competitors or consumers since it has a big market power. Market power is a firm's ability to influence the prices of goods and services that it sells. As a result, the market power reflects the domination possessed by a firm in the market.

With such a market power that it possesses, the dominant firm can control prices. Nevertheless, since the dominant firm still has competitor(s), the price increases fixed by the dominant firm can cause consumers to shift to the *fringe firm.* Therefore, in business competition, the dominant firm should consider the *fringe firm's* reactions. The interaction in fixing a price and a quantity in a market with a dominant firm and a *fringe firm* is shown in the figure below.

Figure 1. Production of a Dominant Firm and a *Fringe Firm*



The picture above shows that the equilibrium price in the market is determined by the dominant firm based upon costs and demands it has; thus, the price listed on the market amounts to P_{dom}. A dominant firm will control quantities in the market, namely Q_{dom} while a fringe firm will only produce at $Q_{fringe.}$ If the equilibrium price increases, the fringe firm's outputs will also increase which take the shape of a curve (S_{fringe}). And conversely, if the price balance falls to below P_2, the *fringe* firm will get out of the market. It clearly appears that the dominant firm is a party acting as the largest market share holder, meanwhile the fringe firm is only capable of enjoying a market share that can not be fulfilled by the dominant firm.

Corporate strategies that may become a source of creation and maintenance of a dominant position involve resources investment in a firm that can not be imitated by its competitors. When a firm has been able to get hold of a dominant position in an industry, it can implement certain strategic behaviors to maintain its position just as detailed in the following:

- Merger. Merger is the most obvious way to maintain a firm’s dominant position because, with a merger, the firm's market share will get greater and greater.
- Direct cost-based strategy. This is a strategy that dominates the market by enlarging outputs and depressing prices in order to be able to prevent competitors from entering the market or depressing competitors to get out of the market
- Technology-based strategies. These, among others, are:
    - Expansion of production capacity. Excess production capacity may be performed with technology. If the most efficient way to increase production capacity is the possession of a large-scale factory, the firm will retain the excess capacity or risk losing demands that boom all of a sudden.
    - Vertical integration. Integration in terms of production undertaken by a firm with an aim at guaranteeing the supply of production inputs and reducing transaction costs to be spent if the firm coordinates with other production stages.
- Market-based strategy. This strategy consists of, among others, the following:
    - Product differentiation. This is another strategy to maintain a dominant position by way of reproducing product variations offered by a firm. Advertisement and other sales efforts can be applied to create a brand image in the eyes of consumers and generate brand loyality for consumers. Subsequently, a new firm wishing to enter the market shall face big costs to compete a dominant firm that has already got the brand loyality.
    - Access to consumers. Juxtaposing the firm itself to consumers can cause the firm to keep maintaining its dominant position, such as giving a discount on a number of specific sales, providing better services, or offering a diverse range of brand products.

4.2 Basic Concept on Abuse of Dominant Position

Becoming a dominant firm with the largest market share in the market is not wrong. If the largest market share is acquired through a competitive process where the firm manages successfully to carry out efficiency, innovation, and other pro-competitive strategies, thereby placing the firm in a superior position compared to other firms in the market, then the dominant position is an incentive from the firm's actions. Efficiency and innovation performed by the dominant firm will be expressed in cheaper prices and better goods quality. Problems arise when the acquired dominant position does not give rise to expected market performance. Even such a dominant position is applied to prevent a new firm from entering the market or deter a competitor already in the market not to expand.

An abuse of dominant position occurs when a business actor has got economic strength which enables it to operate in the market without being influenced by competition **and** perform actions that may lessen competition. There are two concepts in that sense, namely: *firstly:* the determination of dominant position, and *secondly:* carrying out anti-competitive actions.

4.2.1 Exclusive Behavior

Abuse of dominant position can usually be perceived from the firm's strategic behavior. *Strategic behavior* is a concept of how a firm can reduce the competition level among existing competitors and new potential competitors that will play in a market basically intended to increase firm *profits*. This behavior is not only focused on the fixing of price and quantity in a simple manner. However, the more complex things to do are pursuing market share, widening capacity, and narrowing space for competitors.

Strategic behavior consists of two types: cooperative and non-cooperative. Firstly, the non- cooperative *strategic behavior* refers to the firms' actions that try to increase their profits by improving the relative position against their competitors. They do not cooperate with one another. This kind of s*trategic behavior* usually increases a firm's profits and reduces the firm's competitors' profits.

Secondly, the cooperative *strategic behavior* is created to change the market conditions so as to make it easy for all firms to coordinate and limit their competitors' responses. This form of cooperative *strategic behavior* may increase the profit of all companies that play the market to minimize competition. This second concept refers to any of collusive behaviors driven by a dominant firm. The collusive behavior of *Price Leadership* is included in this second type.

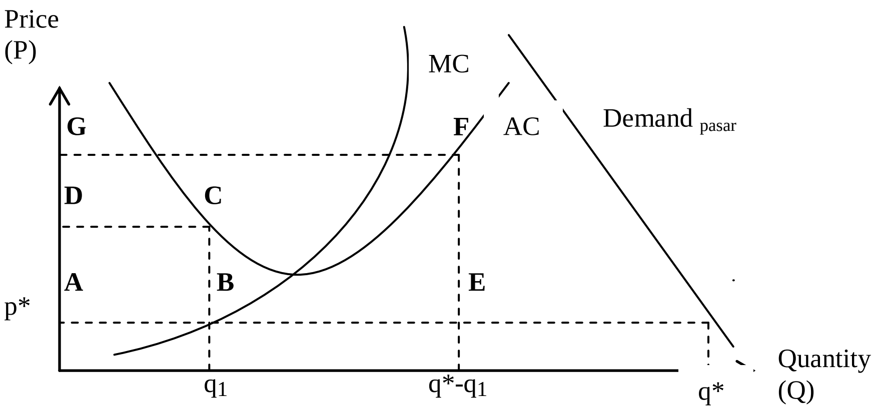
However, the Guidelines regarding Abuse of Dominant Position would only emphasize the strategic behaviors of non-cooperative firms. The strategic behavior that falls into this category can be termed as an *exclusionary strategic behavior.* This *exclusionary strategic behavior* is the dominant firm's behavior to restrict or exclude its competing firm. This kind of *behavior* can be further divided into two categories: (i) price behavior, and (ii) non-price behavior.

In connection with the previous descriptions of interactions between the dominant firm and the *fringe* firm, this sub-section will describe more about exclusive behaviors using the price instrument. Two types of exclusive behaviors are *predatory pricing* and *limit pricing.* These two types of *'non-cooperative strategic behaviors'* involve corporate policies designed to make the competitors not interested in competition in the marketplace. The dominant firm usually takes advantage of its position (both in terms of production capacity, distribution capability, access capability to supplies, and financial capability) when conducting the corporate strategy in the pursuit of market share.

- **Predatory Pricing**

Predatory Pricing is simply defined as the action of a dominant firm which expels its competitors by fixing prices below its production costs. But in practice, the *Predatory Pricing* is also used to prevent competitors from entering the market. Once all competitors are expelled from the market, the dominant firm will raise prices at once. During the period of predatory pricing practices, the dominant firm loses profits and suffers losses that exceed those of its competitors. Thus, the dominant firm can maintain low prices. However, its competitors are still free to determine outputs for reducing their losses. The following figure describes the interaction of a dominant firm and its competitors in the *predatory pricing* practices.

Figure 2. *Predatory Pricing*



For example, the dominant firm sets a price at p*, thereby forcing its competitors to lose money and get out of the market. Consequently, to carry it out, the quantity to be produced in the market is q* units so that the price to be paid by a consumer is equal to p *. If the marginal cost (MC) and the average cost (AC) of the dominant business actor and the competitors are equal, the competitors produce only at q_1 and at the price p*, then the competitors' losses reach an area of ABCD. Conversely, the dominant firm shall produce at q*- q_1, so that the total industrial outputs number q* units and the price remains at p*. With more quantities of product made, the dominant firm's losses are also bigger, namely the area of AEFG. The dominant business actors' losses get bigger if the market demand grows bigger as well.

The dominant actors' losses during this period of *predatory pricing* practices exceed the competitors' losses. In this period, the consumers benefit from this practice. They are allowed to purchase the product at the price p*. This price is much cheaper compared to that if both firms join in a duopoly. However, afterwards, when prices increase at a higher level (at a monopolistic price), the consumers will suffer losses.

If these predatory practices are successful so that these force its competitors to go bankrupt, it is certain that their assets may be withdrawn permanently out of the industry or at least will be controlled by predators. If not, other firms will come in and buy back those assets and competition shall be inevitable. This practice is most likely to succeed when the competitors' assets come out permanently from industry and are controlled by predators. Therefore, the most effective strategy for a successful practice is to make a competitor bankrupt and buy all the competitors' assets with offered prices.

<u>Standard Determination of *Predatory Pricing Practice*</u>

Economic and legal literatures have widely developed specific standards for determining whether or not a firm is doing a *predatory pricing* practice. One of the most influential literatures on this case is that of Areeda and Turner developed in 1995. They evaluated that the standard determination of this practice could be seen when a firm fixes a price below its short-term marginal cost. However, due to the fact that data on short-term marginal cost was difficult to obtain, they advised to use the AVC (average variable cost) data as a proxy. The logics underlying this determination is that there has never been a firm that profits when operating under a condition where the price is lower than the short-term marginal cost, with the exception that there is either an interest, a tactics or a strategy. The fixing of price below the short-term marginal cost is unreasonable if there is not any prospect for profits in the long term.

Several other parties have developed Areeda and Turner's study with other alternatives. Some of the parties suggested determination by using LRMC (long run marginal cost); some also suggested using AC. Some others suggested that it still needed to undertake observations all the time for both price and quantity of output in order to ascertain whether or not the *predatory pricing* practice really occurred.

All types of tests to detect the presence of these practices still cause some problems, especially at the time of field implementation. The first type is for the reason of data needed to measure SRMC *(short run marginal cost)* or even AVC (average variable cost) data. Secondly, another problem is that if the firm does not do anything, but it may have been judged to have already done this practice. For example, there is a firm that has just entered the marketplace to attract consumers applies promotional prices. During the initial phase of its operations, it is common for the firm to give its products free of charge. And of course this can be contrary to the tests conducted by Areeda and Turner. The free giving of products is very effective as part of promotion for the sake of building a business in the future and certainly this can be made an initial step to improve profits.

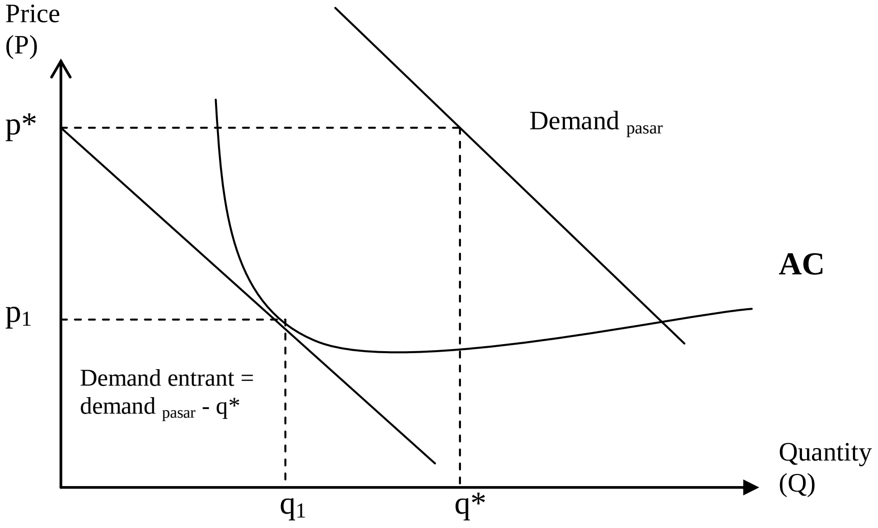
In addition to the promotional factor, the emergence of price fixing below short run marginal costs (SRMC) may actually occur reasonably if the firm is able to take action widely known as *learning by doing.* This refers to reduced production costs since the firm is able to produce much more efficiently. With the low price at the beginning, the firm certainly can increase sales and then is able to learn to be able to reduce costs in the future. Even if the current prices are lower than production costs, there are prospects for lowering costs in the future. By collecting all the existing information and know-how, it can be concluded that the low price fixing can now be viewed as an investment in the future.

In the competition context, this predatory practice is often confusing. Most lawsuits involving this practice are filed to oust its competitors. One competitor complains not due to the price fixed below the production cost, but due to price competition from much more efficient firms. If a firm is more efficient than others, it might be that the firm fixes lower prices and can take over the market.

- **Limit Pricing**

Another *strategic behavior* that also includes the abuse of dominant position is *limit pricing.* In the simple concept of limit pricing, a *potential entrant* believes that the dominant firm will not change its output level right after the entry of a new player. Therefore, a new player will believe that the total industry output will be equal to a competitor's output plus an incumbent firm's output. In this model, the dominant firm chooses the levels of output and price to eliminate the firm's incentive for entering the market.

Figure 3. ***Limit Pricing***



Theories of Bain, Modigliani and Sylos-Labini

The analysis of potential entrants and the dominant actor in the limit pricing model is illustrated in the picture above. The picture shows the industry demand and the AC curve faced by both business actors, viz. dominant and potential entrants. If a dominant actor produces q* units (and will continue to do so when any competitor enters), the demand curve facing a new competitor equals industrial demand minus q*. This image shows the demand curve shifting to the left of the total demand when q*. If a potential entrant does not enter the market, the dominant actor produces at q* and applies the price p*. If a new firm enters the industry and produces q units of output, then the total output of industry is q + q* and the price of industry p_1.

Note that p_1 equals AC of potential entrant producing q_1 units; this means that there is no incentive for them to get into the industry (basically the logics is that if P = AC will not be a firm that goes for zero profit). If q * is selected, the remaining demand in the face of new competitors is below or equal to its AC curve, then there is no output level produced by the new entrant that can generate profits in the industry. By choosing q*, the dominant firm is able to apply the limit price p *, which is above the AC. Despite the fact that the dominant firm needs not produce at q* to block the entry of any competitor, it is enough to give a threat with signals if the competitor does enter indeed.

4.2.2 Impact of Abuse of Dominant Position on Competition and Consumer

With the abuse of dominant market by a business actor, then it is certain that an increase in concentration level in an industry that becomes an indication of increased market power of a business actor in the industry. Increased market power provides flexibility for the business actor to fix prices *(price maker).* The presence or absence of the *market power* held by the business actor may be indicated with high selling price of product, relative to substitute products, relative to production costs, and high profit margins of the business actors in the relevant market.

- **Impact on Competition**

In an industry where there are dominant business actors, the high *market power* of a dominant firm against its competitors enables the firm to determine *output* and price without being affected by any competitor's decision. There are two forms of impacts due to the abuse of dominant position. The first impact arises as a result of the application of the cooperative strategic behavior. The dominant firm's decision to fix high prices as a form of *market power* at its optimum use will turn to be a protection and incentive for competitors to take part in enjoying high prices. This phenomenon is the type of emergence of *price leadership. The Price Leadership* explains that the dominant firm has the power to be the *price setter*. The prices fixed by the dominant firm will then be followed by other firms as *price takers.* The *price leadership* in an industry causes the consumers' choices in enjoying cheaper prices to become obstructed. The indications of *price leadership* are high product prices and high profit margins across the business. The second impact caused through the abuse of dominant position is the result of exclusive strategic behavior *(non-cooperative).* Based on the previous descriptions, it is shown that the implementation of this strategy will be able to limit or narrow the space for new players that will enter the industry, and even able to oust a competing firm (make it bankrupt).

- **Impact on Consumers**

During the period of *predatory pricing* in which the dominant actor fixes a price as low as possible, of course, the consumers get a positive impact, viz. increased *consumer surplus.* But, at the end of the period, and the dominant firm has succeeded in "ousting" its competitors and gets ready to perform a maneuver as a monopolist, it may be said surely that increased prices by a dominant firm will happen *(recoupment)* since its competitors become less in number and have almost no power. So, the *consumer loss arises* as a result of the high selling price of a product if compared to the real *consumer loss* may be purchased more cheaply, or the *output* quantity on the market increases in which the number is lower than the consumer should get.

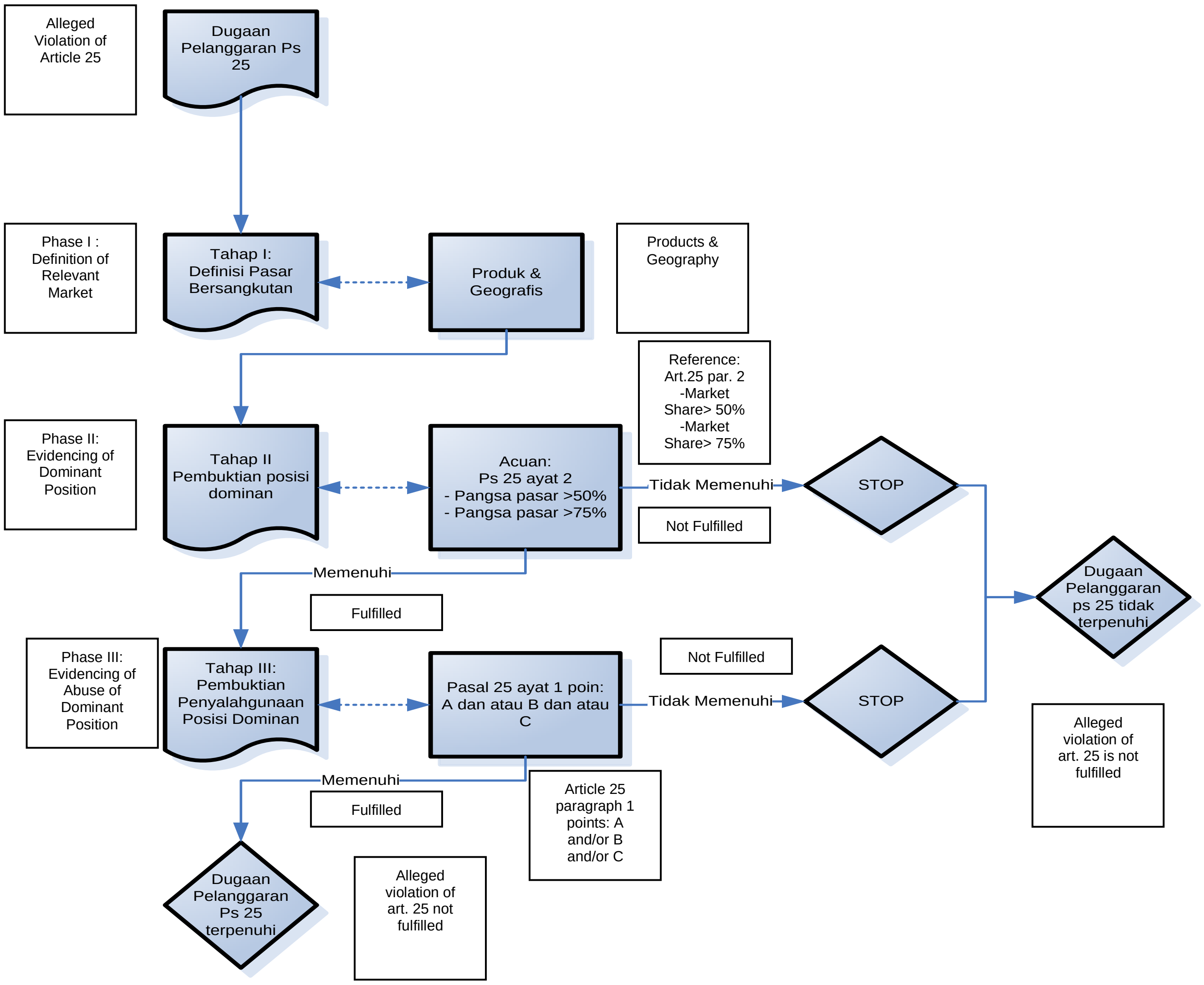
The other losses on consumers in the presence of acts of abuse of dominant position are the consumer's missing opportunity obtaining lower prices, the consumer's missing opportunity using more services at the same prices, the consumer's *intangible* losses, and the consumer's limited select alternatives.

4.3. Evidencing Abuse of Dominant Position

The Commission, in proving the alleged abuse of dominant position, applies an approach divisible into 3 *steps (3-step process),* namely:

a. Defining the relevant market;
b. Evidencing the existence of dominant position in the relevant market;
c. Evidencing whether the business actors who have a dominant position has committed abuse of dominant position;

The following is a schematic flowchart of process of evidencing of Article 25:



Definition of Relevant Market (Phase I)

- In determining the presence or absence of a dominant position, the Commission will specify the range or scope of the relevant market at first. The determination of the precise relevant market is necessary to define the market size of a product. This market size is important since it can identify to what extent the domination of a certain product in the market by a business actor. In the relevant market with too narrow coverage, it is very possible that the business actor who knows a certain product is considered to be the holder of a dominant position. Conversely, if the definition of a product market is too broad in scope, it is possible that the business actor is not considered to be the holder of a dominant position.

- In accordance with the provision of Article 1 paragraph 10 on General Provisions of Law Number 5 Year 1999 , the The relevant market shall be the market related to a certain marketing scope or area by business actors for goods and or services of the same or similar type or substitutes for such goods and or services. Defining the relevant market refers to the Commission's Regulation No.3 on Guidelines to Implementation of Article 1 Paragraph 10 on Relevant Market Pursuant to Law No 5 Year 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition.
- The relevant market shall be the market related to a certain marketing scope or area by business actors for goods and or services of the same or similar type or substitutes for such goods and or services.

- The relevant market consists of two dimensions: product dimension *(sets of products)* and area dimension *(relevant geographic market).* To determine what products are included in the relevant market, the Commission may approach elasticity of demand and elasticity of offer, through an analysis of consumer preferences using three main parameters as a means of approach *(proxy),* namely price, character, and function of the product. To determine which region is the geographic coverage of a product, the parameters considered are the company policy, indicators of cost and time of transports, tariffs and regulations.

A. **Market According to Product**

- Product market is defined as a competitor's products of certain type plus another product that usually substitutes the product. Another product substitutes a product if the existence of the other product limits the scope of price increase of the product. The definition of a market may be recognized from two sides, viz. consumer's demand *substitution (demand-side substitution)* and manufacturer's *substitution (supply-side substitution).* The Commission will integrate the definitions from two sides of approach.

- Substitution approach from the consumer side. The Commission will define the market through an analysis of the relationship between goods/services produced by a business actor under investigation and goods/services as close substitutes. The closest substitute goods will be categorized in the same relevant market with the goods under investigation if the consumer will transfer purchases to the closest substitutes in the event of significant price increases above the *competitive level* price in goods under investigation.

- The substitution from the manufacturer's side also affects the limitation or scope of the relevant market. If the price of goods/service under investigation rises significantly above the competitive price level, this will cause a business actor of another product to shift production facilities to produce close substitutes of the goods/service which are experiencing rising prices. Under such a condition, the Commission will categorize both the related goods and its substitution into a single relevant market.

B. **Market According to Geographic Area**

- Geographic market is an area where a business actor may increase his prices without attracting the entry of new business actors or without losing significant customers who switch to other business actors outside the area. This happens due to, inter alia, transport costs to be spent by consumers are insignificant; thus, it is unable to drive transfer of consumption of a product.

- The same method will be applied by the Commission to determine the geographic scope of a relevant market. If the price of the goods under investigation rises significantly above the price level of competition, can a consumer easily switch the purchase of the same (or similar) product from a producer in other areas? If yes, then other areas become part of the geographically relevant market.

Evidencing Dominant Position *(Phase II)*

- Pursuant to Article 1 paragraph (4) in General Provisions of Law Number 5 Year 1999 , the dominant position shall be a situation in which a business actor has no substantial competitor in the relevant market in relation to the market segment controlled, or a business actor has the strongest position among its competitors in the relevant market in relation to financial capacity, access capacity to supply or sales, and the capability to adjust supply or demand of certain goods or services. Under the condition of a dominant position, it can be assumed that the relevant business actor has a slightly significant *market power.*

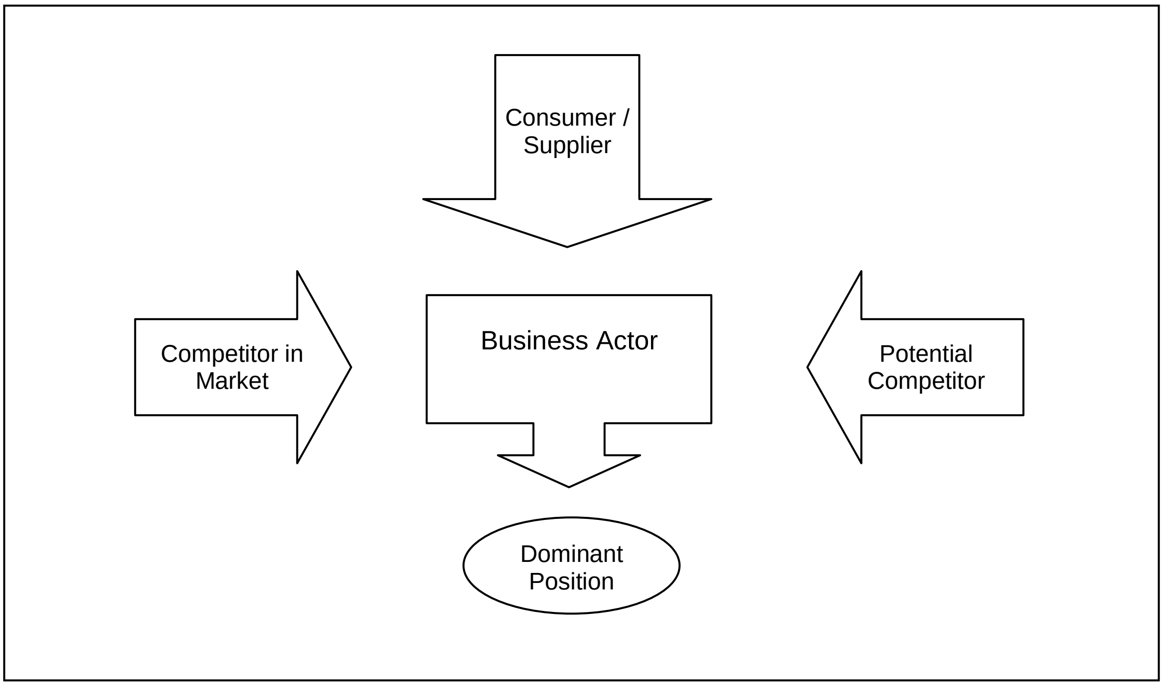
- Dominant position shall be a situation in which a business actor has no substantial competitor in the relevant market in relation to the market segment controlled, or a business actor has the strongest position among its competitors in the relevant market in relation to financial capacity, access capacity to supply or sales, and the capability to adjust supply or demand of certain goods or services.

- *Market power* is a business actor's ability to raise a price above the competitive level but still profitable for the business actor. The ability to raise a price indicates that a dominant business actor's behaviors are independent of the competitive pressures exerted by its competitors. In other words, the dominant business actor does not have any significant competitor in the relevant market. With this ability, the dominant business actor has capabilities to carry out anti-competitive actions while being capable of preventing the entry of any potential competitor or driving out the competitor from the market.

- With the ability to raise prices, the dominant firm's profits will increase. This increased profit occurs because of increasing prices and low production costs due to the utilization of economy of scale. Thereby, the profits of the dominant firm are higher than those of its competitors in the relevant market in which this has an implication for higher financial capability.

- As the dominant firm, its production will be greater than that of its competitors in the relevant market. From the viewpoint of production processes, a big production will require big supplies and big production factors. The purchase of the big supplies compared to what the competitors do will cause the dominant firm to have an ability to adjust supplies. From the sales side, a large production makes the sales quantity of a dominant firm higher than that of its competitors in the relevant market. This may give rise to increased ability of the firm to manage certain demands of goods or services.

- In determining a dominant position, the Commission will think over some limitations (or barriers) owned by a business actor alleged to have a dominant position. Those limitations (or barriers) could be expected to affect the independence of business actor's behavior against competitive pressures. The limitations/barriers consist of 3 (three) types: i) barriers from current competitors, ii) limitations/barriers resulting from potential competitors, and iii) other limitations/barriers such as those from consumers or suppliers. Principally, if these limitations/barriers are relatively insignificant, the firm's dominant position will get more and more strengthened.



A. **Barriers from Current Competitors**

- The competition with rival business actors currently existing refers to the business actors in the same relevant market as the dominant business actors.
- Measuring the limits of existing competitors in the market may be carried out by considering the market shares of the dominant business actor and its competitors. The use of the market share size is based on the assumption of a positive correlation between the market share and the *market power.*
- Just as elaborated in the previous section, the calculation of the market share refers to Article 1 paragraph 13, viz. based on the percentage of selling or buying values of a particular type of goods or service controlled by the business actors in the relevant market in a particular calendar year.
- The abuse of dominant position may be performed by a single dominant business actor *(single dominance)* or more dominant business actors

collectively *(collective dominance).* In Article 25 paragraph (2) of Law Number 5 Year 1999 , a business actor is called a single dominant if one business actor or a group of business actors controls 50% or more of the market share for one particular type of goods or service.

- Meanwhile, the business actors are called collectively as dominant if two or three business actors or a group of business actors control 75% or more of the market share for one particular type of goods or service. The dominant position held by two or more independent business actors arises when, among those business actors, the same application of strategies and policies exists in the market. The sameness can occur due to structural relationships or only due to adoptin of the same policy. For example, the business actors impose the same pricing policy in the market although they do not have an agreement on pricing, then those business actors are said to have a collective dominant position.

B. **Constraints from Potential Competitors**

- The limitations or barriers coming from potential competitors demonstrate the extent of barrier to entry *(entry barrier)* into the market. The business actors in the relevant market can be protected from potential competitors if a level of entry barriers is high enough. This entry barrier arises when the dominant business actor already in the market has advantages if compared to potential competitors *(potential entrant).*
- Under a condition where a significant barrier to entry exists, it can be assumed that it contributes to the formation of a dominant position by a certain business actor. The Commission will analyze the barrier to entry and indicator of significance through quantitative and qualitative techniques which are building upon a case-by-case approach.

C. **Other Barriers**

- If the power possessed by the consumer *(buyer power)* is quite strong relative to the firm alleged to have a dominant position, then this condition can prevent its abusive behavior even though the concerned firm has a substantial market share.

D. **Determination of Dominant Position**

- The determination of the presence or absence of a dominant position entirely refers to Article 25 paragraph (2) of Law Number 5 Year 1999 with the limitations of the dominant business actor's market share by 50% or more for one business actor or a group of business actors and 75% or more for two or three business actors or a group of business actors.

- Under a condition where the ratio of the market share of the relevant business actor reaches more than 50% (individual) and/or 75% (collectively), it may be said that the condition of a dominant position is fulfilled.

- Under a circumstance in which the ratio of the relevant market share indicates a figure below the market share limit criterion, accordingly the aspect of Article 25 paragraph (2) is not fulfilled. Consequently, the alleged violation against Article 25 is not proven.

4.4. Behavior of abuse of dominant position (Phase III)

- After defining the relevant market and evidence of the dominant position, the next step is to prove the behavior of the abuse of dominant position by the concerned business actors. The business actor's behavior may be considered as the abuse of dominant position if the dominant business actor's behavior impacts negatively on the *competitive process.*

- The behavior of the business actor with a dominant position can not be said to be a form of abuse if such a behavior is related to increased efficiency, such as innovation, economies of scale, and *economies of scope.*

- Conceptually, the behaviors included as abuses of dominant position can generally be divided into two categories, namely:

    - Behavior detrimental to consumers or suppliers. The behavior detrimental to consumers is generally in the form of fixing of *excessively high price.*

    - Exclusive behavior. The behavior that may be classified as exclusive is anti-competitive behavior since it restricts or eliminates competition from the business actors of existing competitors or those who will enter the market *(potential competitors).*

- In Article 25 of Law Number 5 Year 1999 , the behavior of abuse of dominant position is affirmed explicitly in paragraph (1). Article 25 paragraph (1) Law Number 5 Year 1999 states that there are 3 (three) behaviors of abuse of dominant position, namely:

  a. determine the trading terms with the intention of preventing and or barring consumers from obtaining competitive goods and or services, both in terms of price and quality; or

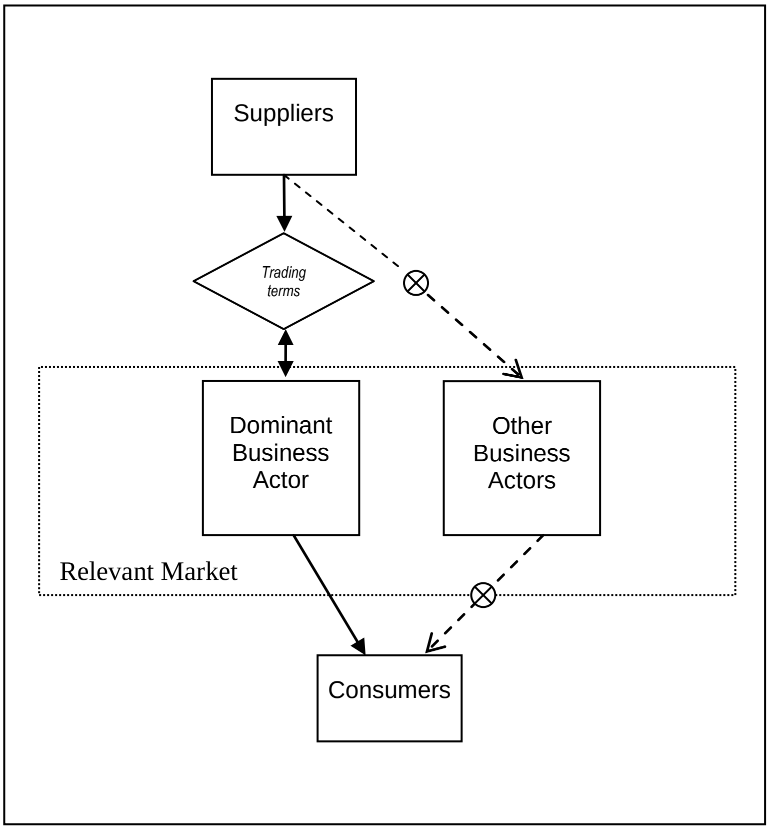
  b. limiting markets and technology development; or

  c. bar other potential business actors from entering the relevant market.

Point A: Fixing the trading terms with an aim at preventing and/or deterring consumers from obtaining goods and/or service that compete in both price and quality of the product.

- The behavior of abuse of dominant position related to the fixing of the *trading terms* arises in relation to upstream-downstream level or occurs in commercial transactions between a buyer and a supplier. The dissemination of the trading terms as a means to prevent and/or deter consumers from obtaining competitive goods and or services may be implemented by a business actor acting as *the dominant buyer* or by a business actor acting as the seller. In the first case, the buyer with a dominant position may perform an abuse through the setting up of points of agreement (which is part of the trading terms), such as requiring any supplier not to supply goods to other buyers. This request is accompanied by a condition in which the buyer will reduce or stop supplying without clear justification (*refusal to trade*), resist or change a previously agreed payment system so that it can harm suppliers, and various other disagreeable behaviors. In the second case, the existing relationship remains in the upstream-downstream level, but the ongoing thing is a transaction where the (dominant) seller fixes the trading terms so that the business actor as a buyer does not purchase goods from another seller.

- The impact of fixing the trading terms as in Point A is the reduced alternative choices for (or hinder) the consumers in obtaining a competitive product (based on price and quality). The impact on consumers is indirect while the immediate impact is exclusion of competitors from the market since they do not get supplies (fixing the trading terms by the purchaser) or removal of competitors from the market because it does not find a buyer (fixing the trading terms by the seller). Under the condition in which a supplier does not have significant *bargaining power,* fixing the trading terms generally will be observed. This is undertaken by considering the possibility of sanctions from the dominant trading partner, ranging from the lightest sanction (warning) to the most severe warning (such as unilateral termination of sale-and-purchase contract).



- The supplier complies with the fixing of the trading terms requested by the dominant firm since the dominant firm is one with a large market share in which the purchase of supplies is greater than that of its competitor in the relevant market. Therefore, the measurement of market share in the relevant market becomes important in order to see whether the action of fixing the trading terms can be used to prevent consumers from obtaining goods and/or services in the competing firm with the same or lower price, or obtain goods and/or services in the competing firm with the same or higher quality.

Point B: Restricting the market and technology development

- The behavior of abuse of dominant position by restricting the market and technology development is a fairly broad concept. With reference to the elaboration of element of Article 25 of Law Number 5 Year 1999 in advance, restricting the market and technological development means a form of behavior that impedes commercial transactions and the innovation and development of goods and/or services in the relevant market. These impeding activities may include restriction of the dominant firm's production and indirectly restriction of competitor's production. The activity intended to limit the market in point (b) is focused on behaviors that reduce competition with real competitors already on the market *(existing competitors).*
- Technological aspect is often associated with the innovation activities *(research and development).* The behavior of limiting the market and technological development can also be categorized as an *abuse* when a dominant firm that has already had a technological patent rejects (in an *unfair manner* and or exceeds the restrictions of provisions on intellectual property rights) to grant a license to another firm. Such a condition may exert a negative impact on competition climate when not any other firm is able to enter the *downstream market.* It means that the technology owned by the dominant firm is the only technology that produces a product or that does not have a *close substitute.* Thus, in addition to giving rise to an *entry barrier,* such various restrictions can hinder research and development activities that may result in low product innovation and service in the future.

- ***Exclusive Dealing***

Exclusive dealing may be considered as one of the behaviors (by agreement) limiting the market: both sales market and purchasing market. Conceptually, the behavior of abuse of dominant position is included in the exclusive behaviors by using non-price instrument. In the purchase market, a downstream business actor purchases goods and services from an upstream business actor, with a requirement that the upstream business actor will not sell goods and services to other downstream business actor, thus restricting competition. This behavior is similar to another one in (a), namely the fixing of the trading terms. The difference is in point (a), supplier or buyer becomes the party directly suffering a loss, whereas in the case of this exclusive agreement, the supplier or buyer should not have suffered any loss, but a business competitor. In the sales market, an upstream business actor sells goods and services from a downstream business actor under a condition that the downstream business actor will not buy goods and services from another upstream business actor.

- **Domination of Input.**

  Another example of abuse of dominant position behaviors related to market restricting activity is domination of production inputs that are *essential facilities.* This behavior occurs when a dominant business actor controls over essential inputs and refuses to supply the input to any business competitor so that the competitors will find it difficult getting input that impacts on the increased production costs. Such a behavior may be said as a behavior to raise *rival's cost* in an unfair way.

- **Price Discriminating Practice and Predatory Price**

  The price discriminating practice is the fixing of different prices for goods and/or services on the relatively same time and conditions. The price discriminating practice is not classified as an anti-competitive practice if it is aimed to obtain greater benefits *(self-interest).* This activity can be classified as an anti-competitive behavior if it is intended to cause its competitors in the relevant market to get out of the market. The practice to exclude competitors from the market is committed by selling goods and/or service at very low prices up to below production cost. This practice is known as predatory price fixing behavior (see the previous description of *predatory price* concept). The predatory price fixing practice is classified as an anti-competitive behavior because it is intended to exclude other firms that can exert competitive pressures against the dominant firm. The predatory pricing practice can be done independently or in conjunction with the price discriminating practice. This practice can be used as a tool to oust competitors from the relevant market when it is combined with predator's price fixing.

- ***Vertical Restraint***

  The behavior *of vertical restraint* is also one of the market restriction forms, such as a *territorial restriction* or *territorial confinement,* where a manufacturer as the dominant business actor specifies a particular geographic area that can be served by a particular dealer or retailer. Another behavior such as selective and exclusive distribution from the manufacturer is able to limit the number of retailers in certain areas, such as that in which distributor A only approves a deal with retailer A to market the products. So exclusively, only retailer A sells manufactured product A. Other selective policy could also be the fulfillment of certain standards not related to the goods quality or consumer satisfaction. A retailer who does not meet these standards is not allowed to sell manufactured products; hence this will tend to limit the number of retailers and may also increase the cost of retailers. The division of marketing areas is designed to avoid/reduce competition at retailer level *(intra-brand competition).* Given such various limitations, the dominant firm (manufacturer) may enjoy *excessive profits.*

Point C: Obstructing any other business actor who potentially becomes a competitor to enter the relevant market

- The business actor with a dominant position has the ability to build and abuse an unfair and anti-competitive barrier to market entry *(entry barrier)*. There are various economic parameters which, among others, are *scale of economics* and *scope of economics* as indicators for barriers to entry. The form of abuse against the unfair barriers to market entry by a certain business actor can be categorized as an abuse of dominant position.
- The business actor's activity that fairly seeks to optimally utilize various excellences of economies and scopes of economies is not categorized as one form of abuse of dominant position. In this case, the level of output and price may serve as an early indication. Various efforts for using barriers to entry unfairly and anti-competitively will result in, among others, reduced or limited

innovation and output in the market and the high prices to be paid by end consumers.

- Another behavior of abuse of dominant position is one with a nature of *raising rival's costs,* so it becomes a disincentive for a business competitor who will enters into the relevant market *(potential entrant)* which in turn will reduce competition. For example, a dominant business actor has an access to information on sources of supply which are efficient for production. If the dominant business actor deliberately blocks unfairly the potential competitor's access to a cheap supply so that the available products for potential competitors are more expensive sources of supplies, then the production costs for a potential competitor will be higher than those of the dominant *business actor. This* may reduce incentives for the entry of new business competitors into the market.
- In other words, the production capacity utilized by a business actor does not reflect consumer demand in the market. This behavior will result in lower number of outputs in the market so that prices will rise. If there is a potential business actor for entry into the relevant market, a dominant business actor will increase production (utilization of production) so that the supplies increase and prices will reduce for a while. Such reduced prices and additional supplies will be a factor of disincentive for any potential business actor to enter the relevant market.

4.5. Impacts of abuse of dominant position

- Consumers are those who feel the negative effects of competition process, both i) directly *(direct effect),* and ii) indirectly *(indirect effect).* Therefore, in order to determine whether the behavior of a firm is classified as an abuse of dominant position, direct and indirect impacts perceived by consumers may be made an early indicator.

- The direct impact is an effect perceived by the consumer, such as a behavior related to *excessive* price fixing. The indirect impact is a negative effect against competitive process such as, among others, competitor's limited supply and supplier's limited distribution channels. A number of indirect impacts will ultimately cause the consumers to suffer losses.

- Article 25 is per se illegal. Thereby, as long as all the necessary elements are fulfilled, the Commission will state that an alleged violation against the said Article has been legally and convincingly proven. The calculation and presentation of the impact of such an abuse of dominant position could be prepared to strengthen the evidence of violation and confirmation of sanction scale if it has been really proved to violate.

- It is noticeable from previous descriptions that the scope of the abuse of dominant position is quite widespread. Some behaviors of abuse of dominant position are regulated in separate articles, such as Market Dominance Behavior (Article 19), Loss Selling Behavior (chapter 20), Closed Agreement Behavior (Article 15), and other Articles. The main difference of Article 25 on the abuse of dominant position with other related Articles is the use of market share size as a threshold. The market structure aspect becomes very important in Article 25 so that the imposition of this Article shall be applied carefully. The spirit to be conveyed in the Guidelines is that Article 25 is applied if the following conditions are fulfilled:

    - The behavior of abuse of dominant position that occurs has not been provided in other Articles
    - The behavior of abuse of dominant position that occurs has a very significant impact on consumers' welfare.

4.6. Case Sample of Abuse of Dominant Position

'Oust Competitor' Program (*Program Geser Kompetitor*) in Battery Marketing

PT X is a company engaged in battery production. In running its business, PT X distributed its products to outlets across Indonesia, including traditional markets. In connection with distribution to outlets/traditional markets, PT X agreed to a clause offering a 2 (two) percent discount for each sale of PT X product on the condition that each outlet/traditional market did not sell the batteries of a kind owned by any PT X's competitor.

Such a behavior of PT X was alleged to violate Article 25 paragraph (1) point a *"A business actor is prohibited from using a dominant position both directly and indirectly to fix trading terms with an aim to prevent and or deter a consumer from obtaining* *goods and or service that compete in terms of both price and quality." In* this case, the 'Oust Competitor' Program applied by PT X and various discount requirements can be categorized as a condition of trade. The obligation not to sell any type of competitor's product of battery as a key condition of such a GSK program is an effort to prevent or deter consumers to obtain competing products of a kind.

The first stage in proving a violation against Article 25 is determining the relevant market. In line with criteria of the product market, batteries with brand C distributed by the Reported Party (PT X) and other batteries distributed by competitors can be classified by class, type, and quality. In view of their classes, the batteries can be distinguished as Alkaline battery and *Carbon Zinc* battery or *Manganese* battery (hereinafter referred to as **"Manganese batteries").** Each of these batteries has different characteristics and prices with one another so that each has a different market segment.

That for the type of Manganese, battery brand C and competing batteries can be distinguished from type, quality and or color. That with reference to the Reported Party's documents about price comparison of brand C to competitor's battery during the period of June 2003, the Reported Party classifies its own batteries and its competitors' batteries based on type, quality and or color as shown in the table below

Table of Manganese Battery Products Classification

Brand C	Other Brand	Other Brand
R-20 SPW	R-20 BLACK	R-20 NEO HITOP
R-20 SPC	- -	R-20 HITOP
R-20 BLUE	R-20 RED	R-20 PRIMA
R-20 GREEN	R-20 SILVER	R-20 GREEN
R-20 YELLOW	- -	R-20 YELLOW
R-14 SPW	R-14 BLACK	R-14 NEO HITOP

R-14 BLUE	R-14 RED	R-14 PRIMA
R-6 SPW	R-6 BLACK	R-6 NEO HITOP
R-6 SPC	- -	R-6 HITOP
R-6 BLUE	R-6 RED	R-6 PRIMA
R-6 GREEN	R-6 SILVER	R-6 PELITA

Based on these data, the Reported Party classified the batteries it sold in such a way that each type, color and quality of the battery has its own competitor, and the type or quality of a battery does not compete with the type or quality of another battery.

If, in view of demand side, consumers consider every type of battery product has different characteristics or functions and prices so that each type of battery has its respective market in which one type of battery and another type of battery are not *substitutable* or *interchangeable.* That, in accordance with testimonies from witnesses, if the blue battery is not available, buyers of this blue battery will not shift to another color of battery. In this case, the Reporting Party expressed an allegation on the presence of PGK by the Reported Party directed against the Panasonic batteries, especially for item *single pack* AA. Accordingly, based on the aforementioned facts, the Commission Assembly was of opinion that the relevant product market in this case was "manganese battery UM-3 or R6 blue or AA blue or a product with equivalent quality, function and price.

Under the perspective of Geographic Market, in compliance with documents and examination results on the Reporting Party, the Reporting Party expressed an allegation that there had been a discount program of batteries of a kind throughout Indonesia except in Sumatra area. The Commission Assembly was of opinion that several factors could be applied to determine a geographic market. One of those factors is *actual sales pattern* which refers to Antitrust Law Development, ABA Section of Antitrust Law, Fifth Edition 2002 Volume I, pages 577-578.

With reference to the Reported Party's *actual pattern,* the patterns of battery marketing can be mapped which divides the marketing areas comprising Banten, Jakarta, West Java, Central Java, East Java, Bali, Sulawesi and Kalimantan. To support such a marketing pattern, the Reported Party employed more or less 80 agents for areas outside Java Island. For additional information, based on the results of field investigation undertaken by the Commission's team, such programs of a kind were not found in Kalimantan and Sulawesi. That, based on the results of field investigation and examination, PGK was found in a number of wholesalers and traditional semi-wholesalers in Java and Bali areas where the marketing or distribution of batteries brand C was controlled directly by the Reported Party. Consequently, in compliance with those facts, the Commission argued that the relevant geographic markets in this case were a number of wholesalers and traditional semi-wholesalers in Java and Bali.

The next step in proving Article 25 is to identify the presence or absence of dominant position by the Reported Party in the relevant market. In terms of market share based on historical data, in fact PT X controls nearly 90 percent of the nationwide industrial market share of product A. In a more specific context, PT X controls around 89 percent of market share of brand C battery sales as the focus in this case. In the relevant market, the competitor of brand C (there are 4 competing brands) cumulatively only has a market share of less than 11%. In consequence, PT X is affirmed to have met the aspect of Article 25 paragraph (2) point 1, namely Article 25 paragraph (2) letter a which reads *"A business actor has a dominant position as intended in paragraph (1) if one business actor or a group of business actors controls 50% (fifty percent) or more of the market share of one particular type of goods or services."*

In this case, the Commission Assembly was of opinion that the essence of the 'Oust Competitor' Program (*Program Geser Kompetitor*) by the provision of discounts in a condition in which not to sell competitors' battery products was clearly an anti-competitive action. PT X's behaviors caused traditional outlets to divert the purchasing (order of supply) of only PT X's batteries and leave the same type of battery products made by PT X's competitors. The impacts of PT X's distribution policy at least have given rise to *lessening competition* through imposing the trading terms resulting in reduced alternatives of battery available in the market. In addition to this, PT X's distribution policy also impacted indirectly on its competitors since they found it difficult distributing batteries to traditional booths/ markets. Data and information collected during the investigation process corroborated the existence of the program and the impacts being perceived by both competitors and end consumers. As a result, the Commission Assembly decided that PT X, pursuant to Article 25 paragraph 2, was confirmed to have held a dominant position and was legally and convincingly proven to commit an abuse of its dominant position as articulated in Article 25 paragraph (1) point a.

Abuse of Dominant Position in Seaport Terminal Operations

The functional implementation of public seaport management in Tanjung Priok was already delegated by the Government to the PT C as a State-owned Enterprise (SoE). In performing its function in terms of the provisions of container terminal services, PT C involved PT A as a Legal Entity in Indonesia in cooperation for the seaport management for a 20-year concession period that was embodied in the Agreement on Authorization for Operation and Maintenance of Container Terminal in Tanjung Priok Seaport (P*erjanjian Pemberian Kuasa Pengoperasian dan Pemeliharaan Terminal Petikemas di Pelabuhan Tanjung Priok*) through an *authorization agreement.* Clause 32.4 in the *authorization agreement* states that *the parties agree that there will be not any other development in International Container Terminal to be held in Tanjung Priok Seaport as an addition to the Container Terminals I, II and III until throughput in Tanjung Priok Seaport has reached 75% (seventy-five percent) of an annual design and construction capacity of 3.8 million TEUs.*

The Commission Assembly in this case defined the relevant market with reference to service and geographic aspects. In the context of seaport terminal services, activities that may serve the loading and unloading (stevedoring) of containers are commercial transactions between 2 (two) parties, namely between a shipping company that transports containers as a service user or buyer and a party that arranges port terminal services that can serve the stevedoring of containers as a service provider or seller. In the arrangement of terminal services that may serve goods stevedoring at several national seaports, there are 3 (three) terminal characteristics, viz. conventional terminal, international container terminal and *multipurpose* terminal.

A conventional seaport terminal has the characteristics of not having container *crane* facilities, and also geographically it is unable to serve berthing activities for big ships with the haulage being thousands of TEUs; so, generally conventional terminals only serve goods stevedoring activities of goods between islands (interinsuler). International container terminal has good characteristics with *crane* facilities and geographical conditions in that it is highly possible to serve berthing activities of large ships with carrying capacities reaching thousands TEUs. Thus, generally this type of terminal serves goods stevedoring carried by international shipping companies. *Multipurpose* terminal is a terminal with the characteristics of service activities in addition to providing goods stevedoring between islands (interinsuler) and also providing stevedoring activities of containers carried by international shipping companies.

Building upon the classification of characteristics of each terminal mentioned above, the characteristics of terminals for competition in the terminal service business that can serve, in this case, the stevedoring of containers are the international container terminal and the *multipurpose* container terminal since both terminals can provide international container stevedoring services.

From geographic side, the geographic range or area for marketing as meant in the definition of relevant market in this case is based on closeness between a service-providing area that can serve the stevedoring of containers and a final destination area of goods shipment by a terminal service user that can serve the stevedoring of containers under some economic considerations. It is not economically efficient action if the goods shipment by service users is executed through a terminal that can serve the stevedoring of containers far from a final destination area of goods delivery by service users. With an assumption *ceteris paribus, a* service terminal service providing area that can serve the stevedoring of containers located far from the final destination of delivery by a terminal service user that can serve the stevedoring of containers is not the substitution for a container terminal service providing area that is located closer. Under the aforementioned restrictions, the relevant market in this case is terminal service market that can serve international container stevedoring at Tanjung Priok Seaport area, hereinafter referred to as the relevant market. Related to the above, the relevant market in this case is that of terminal service that can serve the international container stevedoring at Tanjung Priok Seaport.

In a previously appointed relevant market, there are several business actors as the providers of terminal service for stevedoring of containers that can serve international container stevedoring, viz. PT A, PT B, PT X, and PT Y. According to current data, the stevedoring of containers at Tanjung Priok International Seaport during 2002 period reached at 2,210,796 TEUs. Out of these data, PT A dominated a market share of 69.53% and PT B dominated a market share of 24.93%. In this case, PT A had a dominant position in Tanjung Priok Seaport, both in the sense of not having a meaningful competitor in the relevant market and in the sense of controlling 50% or more market share on the relevant market. Empirical data already proved that PT A has dominated more than 50% market share in the relevant market so that the essence of ownership of a dominant position in the relevant market as intended in Article 25 paragraph (1) of Law Number 5 Year 1999 was fulfilled.

Building upon the finding of evidence of correspondence between PT A and PT B, there is a strong indication that the two dominant firms has abused their dominant positions indirectly to inhibit other business actors, namely PT X and PT Y which were potential to become competitors to enter the relevant market. Therefore, the essence of abusing a dominant position indirectly to inhibit other business actors that could potentially be competitors to enter the relevant market as intended in Article 25 paragraph (1) letter c of Act No.5 of 1999 is declared to be **fulfilled** by the Commission Assembly.

Chapter 5

Rules of Sanctions

Pursuant to Law Number 5 Year 1999 , the Commission is authorized to impose an administrative sanction against the business actor that violates the provisions of Article 25 as follows:

Article 47

1. The Commission is authorized to impose a sanction in terms of administrative measures on the business actor who violates the provisions of this Law.
2. The administrative measures referred to in paragraph (1) shall be as follows:
   a. affirmation of agreement cancellation as intended in Article 4 up to Article 13, Article 15 and Article 16 and or
   b. order to the business actor to stop any activity that is proven to cause or give rise to monopolistic practices and unfair business competition and or detrimental to society, and or
   c. order to any business actor to stop the abuse of dominant position and or
   d. affirmation of cancellation on merger or consolidation of business entities and share acquisition as intended in Article 28 and or
   e. affirmation of compensation imbursement or
   f. imposition of a fine at a minimum of Rp 1.000.000.000 (one billion rupiah) and at a maximum of Rp 25.000.000.000 (twenty billion rupiah)
   g. imposition of a fine at a minimum of Rp.1.000.000.000 (and at a maximum of Rp.25,000,000,000 (twenty five billion rupiah).

Primary Penal Punishment

Article 48

1. Violation against the provisions of Article 4, Article 9 to Article 14, Article 16 to Article 19, Article 25, Article 27 and Article 28 shall be punished with a fine at a minimum of Rp.25.000.000.000 (twenty five billion rupiah) and at a maximum of

Rp.100.000.000.000 (one hundred billion rupiah), or imprisonment as fine substitution for 6 (six) months.

2. Violation against the provisions of Article 5 to Article 8, Article 15, Article 20 to Article 24, and Article 26 of this Act is punishable at a minimum of Rp.5.000.000.000 (five billion rupiah) and a maximum of Rp. 25.000.000.000 (twenty five billion rupiah) or imprisonment as fine substitution for 5 (five) months.

3. Violation against the provision of Article 41 of this Act is imposed with a fine at a minimum of Rp.1,000,000,000 (one billion rupiah) and at a maximum of Rp.5.000.000.000 (five billion rupiahs) imprisonment as fine substitution for 3 (three) months.

Additional Penal Punishment

Article 49

By referring the provision of Article 10 of KUHP (*Indonesian Penal Code*) towards the crime as provided for in Article 48 an additional penalty may be imposed in the form of:

a. Revocation of business license

b. Prohibition to a business actor who has been legally proved to violate this Act for holding the position of a director or a commissioner for a minimum of 2 (two) years and a maximum of 5 (five) years; or.

c. Cessation of a certain activity or action that causes an*other party to suffer a loss*

Chapter 6. Closing

The abuse of dominant position is an activity prohibited in Law Number 5 Year 1999 since it can hinder business competition. It is expected that each business actor uses these guidelines in fairer competition mechanism in the market. It is possible that the Guidelines will continue to be refined in line with business development and allow it to get a clearer definition on explanation of what is meant by a discriminative act. .

Therefore, any person or party who suffers any loss through the business actor's abuse of dominant position is allowed to report in writing to the Commission with obvious details on the incidence of violation, by attaching the identity of the Reporting Party to the address below. Each identity of the Reporting Party will be kept confidential by the Commission.

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