

## **GUIDELINE OF ARTICLE 51**

### **Law Number 5 of 1999**

#### **CHAPTER I**

#### **INTRODUCTION**

##### **1.1 Background**

Provision of Article 51 Law Number 5 of 1999 as juridical has close linkage with Indonesian Constitution of 1945 (hereinafter referred to as "UUD 1945"), particularly in Article 33. It is not only reflected on the part of In Viewing of Law Number 5 of 1999 that cites Article 33 of 1945 Constitution, but also reflected in the provision of Article 3 Law Number 5 of 1999 that mentions about Goal of creating Law Number 5 of 1999.

Article 33 of UUD 1945 concerning National Economy and Social Prosperity, particularly in paragraph (2), (3), and paragraph (4) sounds as follows:

Paragraph (2): Vital production stems for the state and that dominates living need of many people, are controlled by the state.

Paragraph (3): Earth and water and natural affluence contained within it is dominated by the state and used for as big as people prosperity.

Paragraph (4): National economy carried out on the basis of economic democracy in the principle of togetherness, equitable efficiency, continuity, environment-based, independence, and keep balance of progress and national economic unity.

In line with Article 33 of the UUD 1945, Law Number 5 of 1999 that also arranges about economic activities, is created with goal (Article 3) to:

- a. keep public interest and increase national economic efficiency as one of efforts to enhance people prosperity;

- b. realize conducive business climate through arrangement of fair business competition so that ensures any certainty of chance to engage similar business for large business actor, middle business actor, and small business actor;
- c. prevent monopolistic practices, and/or unfair business competition resulted in by actor of business; and
- d. created effectiveness and efficiency in business activity.

Provision of Article 51 arranges about the monopoly and/or concentration of activity that associates with production and/or marketing of goods and/or service that dominate living need of many people and vital production stems for the state, where henceforth needs to arrange with Law and implemented by State-Owned Company (SOES) and/or agency or institute established or designated by the Government.

Role of state in economic function can be realized by act of state administration, either juridical or non-juridical state administration act (factual). Those both acts of state administration are addressed to secure people basic rights.

One of state administration act types in juridical economic activities is arrangement of the monopoly and/or concentration of activities related to production and marketing of goods and/or service that dominate living need of many people and vital production stem for the state as meant in Article 51 Law Number 5 of 1999 concerning *Ban of Monopolistic Practice and Unfair Business Competition*. The monopoly and/or concentration of activities by the state must be arranged by Law and carried out efficiently and no operational implication results in monopolistic practices and/or unfair business competition.

In viewing of content material width in Article 51 Law Number 5 of 1999, it is necessary to formulate operational guideline. This guideline is formulated in order that no act of state administration leading to surpassing or abuse of authority so that no public interest is inflicted.

Based on the insight, the formulation of operational guideline in Article 51 Law Number 5 of 1999 is intended to equal perception in stakeholder groups, either Government, House of Representative (DPR), business actor, Commission for the Supervision of Business Competition (KPPU), or public in general.

## **1.2 Norm of Framework**

Economic activities, either performed by human being as individual or state as representation of human being collectively, are essential function in the interest of achieving mutual prosperity. Therefore, in economic activities contain essence of making prosperous and not inflicting each other (*consideration for others*).

Monopolistic activities and/or concentration of economic function carried out by state are addressed to as big as people prosperity and welfare.

## **1.3 Goal of Guideline Creation**

Guideline in state administration law is creation of legal order as guideline (*richtlijnen*) of law and regulation operational. One of the KPPU's tasks is as mandated in Article 35 point f Law Number 5 of 1999 is *to arrange guideline and/or publication that associates with this Law*.

Arrangement of operational Guideline to Article 51 Law Number 5 of 1999 aims to:

- a. identify clear legal definition concerning purpose of production field activities and/or marketing of goods and/or service that dominate living need of many people and vital production stem for the state.
- b. identify criteria for the SOES, agency and institute that may carry out the monopoly and/or concentration of activities related to production and/or marketing of goods and/or service that dominate living need of many people and vital production stem for the state.
- c. decide mechanism or order that can be made as the basic for the government to determine administrator party of the monopoly and/or concentration of

activities related to production and/or marketing of goods and/or service that dominate living need of many people and vital production stem for the state.

d. being guideline for parties in carrying out business activities so that no monopolistic practices and unfair business competition are resulted in.

#### **1.4 Scope of Guideline**

This guideline the KPPU arranges for parties who are related to implementation of Article 51 Law Number 5 of 1991, so that no provision results in varied interpretation. Thus, publication and socialization against provision of Article 51 Law Number 5 of 1999 can be performed systematically through this guideline.

This guideline is operational direction for knowing, understanding, and socializing fair business competition, particularly in association with the monopoly and/or concentration of activities that associate with production and/or marketing of goods and/or service that dominate living need of many people and vital production stem for the state according to Article 51 Law Number 5 of 1999.

**CHAPTER II**  
**ELEMENTS IN ARTICLE 51 LAW NUMBER 5 OF 1999**  
**AND DESCRIPTION**

Article 51 Law Number 5 of 1999 states:

*"Monopoly and/or concentration of activities that associates with production and/or marketing of goods and/or service that dominate living need of many people and vital production stems for the state are arranged by Law and carried out by the State Owned Enterprises and/or agency or institute established or designated by the Government."*

Provision of Article 51 Law Number 5 of 1999 as meant can be described and clarified in some elements as follows:

**(1) Monopoly and/or Concentration of Activities**

**1.1. Monopoly**

In Article 1 point 1 Law Number 5 of 1999, definition of the monopoly is:

*"Domination of production and/or marketing of goods and/or for certain service use by an actor of business or a group of business actor."*

Based on the definition, basically the monopoly describes any domination circumstance of business actor on certain goods and/or service that may be achieved without must carry out or result in monopolistic practices and/or unfair business competition occur.

**1. 2. Concentration of Activities**

Activities element of concentration in Article 51 Law Number 5 of 1999 can be defined as concentration of economic power as meant in Article 1 point 3 Law Number 5 of 1999, namely:

*"Actual domination on any relevant market by one or more actors of business so that price of goods and/or service can be determined."*

Based on the definition, concentration of activities in principle describes any actual circumstance of domination on a relevant market reflected from its ability in determining price that may be achieved by one or more actors of business without must carry out or result in monopolistic practices and/or unfair business competition occur.

Regarding description of the above-mentioned elements comprehension, either the monopoly or concentration of activities is not activities prohibited by Law Number 5 of 1999 and can be executed or achieved by one or more actors of business with constantly pay attention to the principle of fair business competition.

The state may carry out the monopoly and/or concentration of activities that associate with: (1) production and/or marketing of goods and/or service that dominate living need of many people; (2) vital production stems for the state.

**(2) Production and/or Marketing of Goods and/or Service that Dominate Living Need of Many People**

Based on theory of law and systematic interpretation to this element, the purpose of goods and/or service that dominate living need of many people is that having the function of:

- a. **allocation**, is addressed to goods or service derives from natural resources the state dominates to utilize for as big as people prosperity.
- b. **distribution**, addressed to goods and/or service that basically needed by people, but at certain time or continual market is unable to fulfill; and/or
- c. **stabilization**, associated with goods and/or service provided for public need such as goods and/or service in defense and security, monetary, and fiscal, which necessitate special arrangement and supervision.

**(3) Vital Production Stems for the State**

Definition of vital production stems for the state is various production business or goods and/or service provision that having nature of:

- a. **strategic**, is stem of production on goods and/or service that directly secure the interest of state defense and keep the national security; or
- b. **financial**, is stem of production that closes associates with manufacturing of goods and/or service for monetary stability and warranty of taxation, and financial service sector utilized for public interest.

The monopoly and/or concentration of activities by the state to the functions that associate with production and/or marketing of goods and/or service that dominate living need of many people and vital production stems for the state shall be **arranged by Law**.

**(4) Arranged by Law**

Definition of arranged by Law is legal condition from the state in order to carry out the monopoly and/or concentration of activities on goods and/or service that dominate living need of many people and vital production stems for the state.

It means the monopoly and/or concentration of activities by the state can only be performed after being arranged first in a form of Law (not law and regulation under Law).

The Law must mention clearly goal of the monopoly and/or concentration of activities and mechanism of state control and supervision in carrying out the monopoly and/or concentration of activities, so that not leading to monopolistic practices and unfair business competition.

Implementation of the monopoly and/or concentration of activities by the state to the function that associates with production and/or marketing of goods and/or

service for the state, can be **carried out by the SOES and/or agency or institute established or designated by the government.**

- (5) Carried out by the State Owned Enterprises and/or agency or institute established or designated by the Government.**

**5. 1. Carried out by the State Owned Enterprises**

The State Owned Enterprises according to Article 1 point 1 Law Number 19 of 2002 is:

*"A corporation that entire or most of the capital owned by the state through direct participating derives from separated state properties."*

Implementation of the monopoly and/or concentration of production activities and/or marketing of goods and/or service by the state to the function that associates with production and/or marketing of goods and/or service by the state to the activities that associate with production and/or marketing of goods and/or service that dominate living need of many people and vital production stems for the state are prioritized and particularly carried out by the State Owned Enterprises (SOEs).

The existence of Regional-Owned Company is different and excluding in the scope of the SOEs definition. This is because of the specific arrangement and procedure of establishment and accountability is arranged different according to separate law and regulation i.e. that associated with regional government.

In case of where the SOEs has no capability to carry out domination of state monopoly, then based on Article 51 Law Number 5 of 1999, administration of the monopoly and/or concentration of activities can be executed by agency or institute established by the government.



## **5.2. Carried out by Agency or Institute Established by the Government**

The Government in definition of law and regulation is central government that consists of the President and all state administration apparatuses at central level. Thus, agency or institute established by the government is body or institute decided and arranged by law and regulation established by central government.

Agency or institute established by the government carries out task of public service, which its authority derives from central government and funded by national budget (APBN) or other public fund that having association with the state.

Agency or institute that government establishes to have feature of executing:

- (1). state governance;
- (2). state administration management;
- (3). controlling or supervision to the SOES and/or
- (4). state administration.

Agency or institute that government establishes in carrying out the monopoly and/or concentration of activities is obliged to meet with the following matters:

- 1) management and accountability of the activities are influenced, led, and reported to the government;
- 2) are not merely addressed to seek profit;
- 3) have no authority to delegate entire or some monopolies and/or concentration of activities to other party.

The SOEs and agency or institute the government establishes may carry out the monopoly and/or concentration of activities collectively according to need and judgment based on law and regulation.

In case of the SOEs, agency or institute the government establishes to have no ability for carrying out the monopoly and/or concentration of activities, and then the government may designate certain agency or institute.

### **5.3. Carried out by Agency or Institute Designated by the Government**

Agency or institute that government designates to have wider scope, including within it is civil agency or institute that having no association with state task and function.

According to the theory of state administration law, designation is authority from state administration officer who has authority and to have nature of decision for carrying out or performing certain activities one-sided. Thus, agency or institute that government designates is agency or institute decided by authorized state administration officer.

Procedure and requirement for designation of agency or institute the government appoints as administrator of the monopoly and/or concentration of those activities is carried out according to law and regulation that arranges about procurement of government goods and/or service so that not resulting in monopolistic practices and unfair business competition occur.

The SOEs and Agency or institute that government designates may carry out the monopoly and/or concentration of activities collectively, according to need and judgment based on law and regulation.

The SOEs or agency or institute that Government establishes or designates as administrator of the monopoly and/or concentration of activities as intended, is unable to delegate again administration rights of the monopoly and/or concentration of activities either partially or entirely to other party.

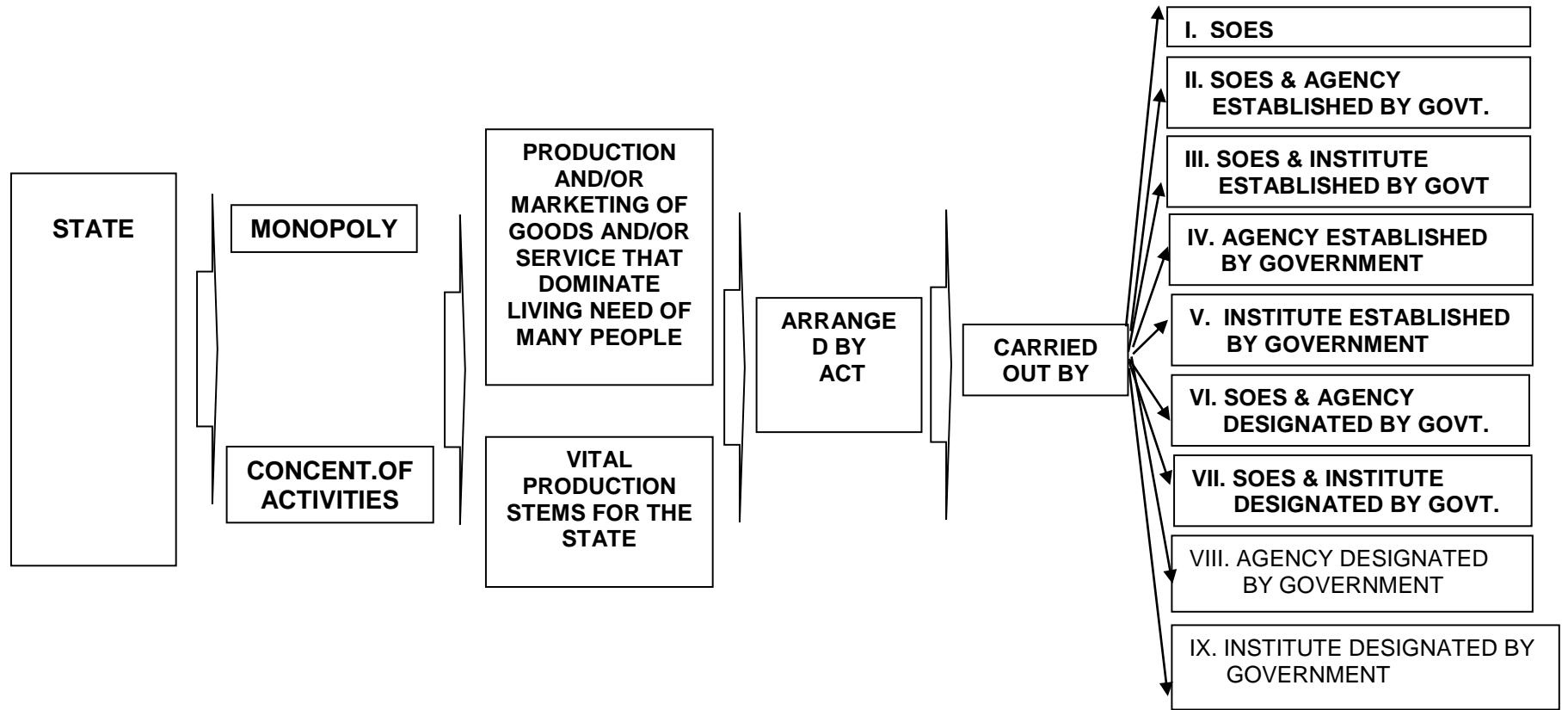
Regarding the above-mentioned description, the in association with administration of the monopoly and/or concentration of activities on goods and/or service that dominate living need of many people and vital production stems for the state, Article 51 Law Number 5 of 1999 determines it systematically by constantly grounded in rational reasons such as judgment of professionalism, legality, and effectiveness of achieving goal and objective to carry out the monopoly and/or concentration of activities.

Systematically, according to Article 51 Law Number 5 of 1999, sequences that can be made as reference for the government to determine administrator party of the monopoly and/or concentration of activities that associate with production and/or marketing of goods and/or service that dominate living need of many people and vital production stems for the state are as follows:

- (1) Carried out by the SOEs.
- (2) Carried out by the SOEs and agency established by the government.
- (3) Carried out by the SOEs and institute established by the government.
- (4) Carried out by the Agency established by the government.
- (5) Carried out by the Institute established by the government.
- (6) Carried out by the SOEs and agency designated by the government.
- (7) Carried out by the Agency designated by the government.
- (8) Carried out by the Institute designated by the government.

Description of Article 51 Law Number 5 of 1999 that arranges about the monopoly and/or concentration of activities and/or marketing of goods and/or

service that dominate living need of many people and vital production stems for the state may be illustrated as follows:



## CHAPTER III

### CASE SIMULATION RELATED TO ARTICLE 51 LAW NUMBER 5 OF 1999

In order to provide clear illustration about comprehension and possibility of disruption from provision in Article 51 Law Number 5 of 1999, following are case simulations (not real case).

#### **A. Case of monopoly on goods dominating living need of many people and arranged by Law**

The government in approval of DPR considers gas as commodity dominating living need of many people so that it must be monopolized and arranged in Law concerning Gas. The Law decides that gas must be dominated by the state and the management (including exploration, exploitation, and distribution) is carried out by the SOEs. Furthermore, the government issues Government Regulation as an implementation of the Gas Law that designates SOE PT X as the monopoly administrator of gas management throughout Indonesian territory.

#### **Discussion:**

In above case example the Government in approval of DPR has decided that gas must be monopolized and arranged in Law concerning Gas. Based on Law of Gas, the monopoly of gas carried out by the SOEs and the management performed in accordance with Law concerning Gas. In implementation the Government then issues the Government Regulation (as operational regulation from Law of Gas) that appoints the PT X to carry out the monopoly on gas management. Provision of monopolistic rights to the PT X for carrying out exploration, exploitation, and distribution of gas arranged by Law is harmonious or not contrary with what intended in operational guideline of Article 51 Law Number 5 of 1999.

**B. Case of monopoly leading to Monopolistic Practices and/or Unfair Business Competition.**

The PT X is monopolistic rights holder of gas management. Besides through one of its subsidiaries (namely PT Y), PT X also cooperates with the partner (unaffiliated) to distribute gas in various regions.

In distributing gas at dense population regions, PT X directly designates PT Y that is its subsidiary. In the region with dense population, the PT X gives no chance to other distributor (having relative equal competence) for offering cooperation pattern with the PT X. In addition, in the practice, the PT X also decides higher (expensive) gas sale price with service quality that in consumer's opinion is disappointing.

**Discussion:**

Article 51 Law Number 5 of 1999 recognizes the state authority in providing monopolistic rights to the SOEs and/or agency/institute established or designated by the government in order to carry out the monopoly on goods and/or service that dominates living need of many people and vital production stems for the state. However, for action performed by holder of monopolistic rights that contrary to the principle of fair business competition, is exempted.

When PT X designated PT Y (as subsidiary) to monopolize distribution of gas at dense population district, without providing chance to other similar company for offering a form of competitive cooperation, then impact potency in the principle of fair competition may occur, particularly in association with assumption of inhibiting competition as intended in Article 19 Law Number 5 of 1999.

Monopolistic management on goods and/or service dominating living need of many people and vital production stem for the state must be carried out efficiently as described in guideline provision of Article 51 Law Number 5 of 1999.

Application of higher price decision (exploitative) along with minimum service quality carried out by the PT X as monopolist, having potency to impact with the principle of fair competition, particularly related to assumption of violation concerning the monopoly as arranged in Article 17 Law Number 5 of 1999.

**C. Case of monopoly and/or concentration of production activities and/or marketing carried out by the SOEs and delivered partially or entirely to the subsidiary or other party,**

The PT X that having rights to monopolize domestic gas management in operational to delegate part of the management by outsourcing to the subsidiary (PT Y) and its partner (PT Z) along with compensation of certain fee amount.

**Discussion:**

Delegation of monopolistic rights from the state to the PT X can be understood as juridical. However, delegation of monopolistic rights from the PT X to other party can not be justified, as intended in Guideline of Article 51.



## **CHAPTER IV**

### **CLOSING**

Monopoly and/or concentration of activities related to production and/or marketing of goods and/or service dominating living need of many people and vital production stems for the state are carried out in order to enhance public advantage, ensure public need, carries out government function, and realize state prestige. However, in order to avoid implementation that possibly leading on the monopolistic practices and unfair business competition, this guideline arranged to give comprehension, understanding, and description in performing provision of Article 51 Law Number 5 of 1999.

Because of economic development and state administration that so dynamic, this guideline is not completely providing guideline of the monopoly and/or concentration of production activities and/or marketing of goods and/or service dominating living need of many people and vital production stems for the state. Therefore, this guideline will continually be completed according existing economic development and state administration or national economic policy change thoroughly.