

Pergeseran Pembuktian Pasal *Per Se Illegal* Menjadi *Rule of Reason* dalam Hukum Persaingan Usaha di Indonesia dari Perspektif Teori *Justice as Fairness*: Studi Putusan Komisi Pengawas Persaingan Usaha Tahun 2017-2022

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Penelitian ini bertujuan untuk menganalisis dan mengevaluasi praktik pergeseran pendekatan dalam putusan-putusan KPPU periode 2017-2023 dari perspektif teori *Justice as Fairness* yang digagas oleh John Rawls. Manfaat dari penelitian ini adalah untuk memperkaya khazanah keilmuan hukum persaingan usaha dengan menawarkan evaluasi berbasis filsafat keadilan, serta memberikan masukan praktis untuk mewujudkan iklim usaha yang lebih adil dan dapat diprediksi bagi para pelaku usaha dan masyarakat.

Metode yang digunakan dalam penelitian ini adalah yuridis normatif-empiris dengan sifat penelitian eksploratif analitis. Pendekatan yang digunakan meliputi pendekatan perundang-undangan (*statute approach*), pendekatan kasus (*case approach*), dan pendekatan konseptual (*conceptual approach*). Data yang digunakan merupakan data sekunder yang terdiri dari bahan hukum primer, seperti peraturan perundang-undangan (UU No. 5 Tahun 1999 dan Peraturan KPPU terkait) dan putusan KPPU (yaitu Putusan No. 31/KPPU-L/2019 dan No. 08/KPPU-L/2018), serta bahan hukum sekunder berupa buku, jurnal, dan literatur lainnya yang relevan. Seluruh data yang terkumpul dianalisis secara kualitatif untuk mendapatkan pemahaman mendalam mengenai praktik pergeseran pendekatan dan mengevaluasinya menggunakan kerangka teori *Justice as Fairness* sebagai standar nilai.

Hasil penelitian menunjukkan bahwa praktik pergeseran pendekatan oleh KPPU, yang terjadi melalui interpretasi dan diskresi Majelis Komisi, menimbulkan persoalan fundamental jika ditinjau dari kerangka keadilan John Rawls. Praktik ini dinilai melemahkan prinsip *rule of law* karena kurangnya prediktabilitas dan kriteria yang jelas, sehingga melanggar Prinsip Kebebasan yang Setara. Selain itu, praktik ini juga belum sejalan dengan Prinsip Kesetaraan Kesempatan yang Adil (*Fair Equality of Opportunity*) karena cenderung menguntungkan pelaku usaha besar dengan sumber daya melimpah dalam berperkara. Terakhir, analisis dampak yang dilakukan KPPU belum secara konsisten menerapkan Prinsip Perbedaan (*Difference Principle*) yang memprioritaskan perlindungan bagi kelompok masyarakat yang paling tidak diuntungkan. Dengan demikian, disimpulkan bahwa praktik pergeseran pendekatan ini, meskipun mungkin bertujuan baik, secara filosofis belum memenuhi standar keadilan yang utuh dan disarankan untuk diformalkan dalam kerangka regulasi yang jelas demi menjamin kepastian hukum dan keadilan bagi semua pihak.

Kata Kunci: Persaingan Usaha, *Rule of Reason*, *Per Se Illegal*, *Justice as Fairness*

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The Shift from Per Se Illegal to Rule of Reason in Indonesian Competition Law from the Perspective of Justice as Fairness Theory: A Study of the Indonesian Business Competition Supervisory Commission's Decisions from 2017 to 2022

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This study aims to analyze and evaluate the practice of this shifting approach in KPPU decisions from the 2017-2023 period from the perspective of John Rawls's theory of Justice as Fairness. The benefits of this research are to enrich the scientific body of competition law by offering an evaluation based on the philosophy of justice, as well as to provide practical input for creating a fairer and more predictable business climate for business actors and the public.

The method used in this research is normative-empirical juridical with an exploratory analytical nature. The approaches employed include the statutory approach, the case approach, and the conceptual approach. The data used is secondary data consisting of primary legal materials, such as legislation (Law No. 5 of 1999 and related KPPU regulations) and KPPU decisions (including Decision No. 31/KPPU-L/2019 and No. 08/KPPU-L/2018), as well as secondary legal materials in the form of relevant books, journals, and other literature. All collected data were analyzed qualitatively to gain an in-depth understanding of the shifting practice and to evaluate it using the Justice as Fairness framework as a standard of value.

The results show that the KPPU's practice of shifting its approach, which occurs through the interpretation and discretion of the Commission Council, raises fundamental problems when viewed from the framework of John Rawls's justice. This practice is deemed to weaken the rule of law principle due to a lack of predictability and clear criteria, thereby violating the Principle of Equal Liberty. Furthermore, this practice is not yet in line with the principle of Fair Equality of Opportunity as it tends to benefit large business actors with abundant resources in legal proceedings. Finally, the impact analysis conducted by the KPPU has not consistently applied the Difference Principle, which prioritizes the protection of the least-advantaged members of society. Thus, it is concluded that this shifting practice, despite its potentially good intentions, philosophically fails to meet a complete standard of justice, and it is recommended that it be formalized within a clear regulatory framework to guarantee legal certainty and justice for all parties.

Keywords: *Competition, Rule of Reason, Per Se Illegal, Justice as Fairness*

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