PRINCIPLE OF COMPETITIVE NEUTRALITY FOR STATE-OWNED ENTERPRISES TO AN ACCESS TO JUSTICE ON BUSINESS PRACTICES

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***Abstract** - This research is entitled" Principle of Competitive Neutrality for State-Owned Enterprises to an Access to Justice on Business Practices". The background of the problem in this dissertation is that business competition conducted by State-Owned Enterprises (SOE's) against private business actors is not neutral or fair, so it needs to be based on the principle of competitive neutrality. The principle of competitive neutrality is the principle of competition law that companies must compete on the basis of the superiority of their products and may not take undue advantage. In this case the state has a role as regulator and entrepreneur through SOE's, so that neutral competition is difficult to fulfill without being based on laws and regulations. The formulations of the problem in this dissertation research are: 1) Constitutional basis of state-owned enterprises in national development; 2) Legal principles of competitive neutrality in international legal instruments; 3) Principle of competitive neutrality in national law. Based on Article 1 paragraph (2) juncto Article 33 paragraph (1), paragraph (2) and paragraph (3) of the 1945 Constitution of the Republic of Indonesia that sovereignty is in the hands of the people, production branches which are important to the state and which affect the livelihood of the people at large are controlled by the state and used for the greatest prosperity the people, and most importantly the economy is structured as a joint effort on the principle of kinship, so principles are important as Competitive Neutrality for SOE's so that they can work together fairly with private business actors.*

***Keywords**: SOEs, Competition Law, Competitive Neutrality, Monopoly.*

INTRODUCTION

The mandate of the 1945 Constitution in establishing a government that protects all Indonesian people and advances the public welfare. The mandate of social welfare is regulated in Article 33 paragraph (1) of the Constitution, which states that the economy is organized as a joint effort based on the principle of kinship. Furthermore, paragraph (2) states that important production sectors for the state and those which affect the livelihoods of many people shall be controlled by the state. Additionally, paragraph (3) states that land, water, and natural resources contained therein shall be controlled by the state and used for the greatest prosperity of the people (Atmasasmita, 2016).

One aspect of depicting the welfare of a nation is the success in economic development. In the context of a market economy system, Indonesia has ratified through Law Number 7 of 1994 concerning the Approval of the Agreement on Establishing the World Trade Organization (Agreement on the Establishment of the World Trade Organization) (hereinafter referred to as Law 7/1994) (Dimyati, 2021). The main objective of the WTO is to promote fair competition.

In order to achieve fair competition, there are three legal instruments that need to be enforced, namely: Intellectual Property Law, Competition Law, and Unfair Competition Prevention Law. The Intellectual Property Law aims to protect intellectual creations from counterfeiting and piracy. This has been regulated in various laws in Indonesia, including Law Number 28 of 2014 on Copyright, Law Number 13 of 2016 on Patents, Law Number 20 of 2016 on Trademarks and Geographical Indications, Law Number 29 of 2000 on Plant Varieties, Law Number 30 of 2000 on Trade Secrets, Law Number 31 of 2000 on Industrial Designs, and Law Number 32 of 2000 on the Layout Designs of Integrated Circuits (Erwin, 2018).

Competition Law or Anti-Monopoly Law aims to ensure the existence of a market as a healthy competition arena. The Competition Law or Anti-Monopoly Law is regulated in Law No. 5/1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition (LN.1999/No.33, TLN No.3817). Meanwhile, the Unfair Competition Prevention Law aims to prohibit dishonest practices in industrial and commercial activities (European Comission, 2016).

In Indonesia, there is no specific law for this, but the regulations are scattered sporadically, including in Article 362 bis of the Criminal Code (hereinafter referred to as KUHP) regarding unfair competition, Law No. 32/2002 concerning Broadcasting (LN.2002/No.139, TLN No.4252), and Law No. 8/1999 concerning Consumer Protection (LN.1999/No.22, TLN No.3821).

The principle of preventing unfair competition is also spread across many regulations, including the principle of Competitive Neutrality that applies to State-Owned Enterprises (SOEs). On May 3, 2021, the Organization for Economic Cooperation and Development (OECD) recommended the principle of Competitive Neutrality (Harahap, 2013). The Competitive Neutrality principle is defined as "maintaining a level playing field between public and private business". According to the OECD, Competitive Neutrality occurs where no entity operating in an economic market is subject to undue competitive advantages or disadvantages. This principle ensures that the government's business advantages do not occur when competing with the private sector or that government benefits only occur in limited circumstances so that private parties cannot enter the market sector due to various regulations that do not provide protection for private businesses.

So far, competition law does not apply to government activities and interests, so the principle of Competitive Neutrality can prevent unhealthy business competition behavior for SOEs. Therefore, legal certainty and protection are essential for private business competitors of SOEs.

Referring to Article 1 number 1 of Law No. 19/2003 on State-Owned Enterprises (LN.2003/No.70, TLN.4297), State-Owned Enterprises (BUMN) are "business entities in which all or the majority of its capital is owned by the state through direct participation originating from state wealth that has been separated." According to Article 3 paragraph (1) of Law 19/2003, BUMN's capital is owned and derived from separated state wealth. In this case, the state's capital participation in the establishment or participation in BUMN comes from the State Revenue and Expenditure Budget, reserve capitalization, and/or other sources (Haq, 2011).

According to the OECD, there are several models of state ownership of businesses in BUMN, including the Centralized Model, Coordinating Agency, Twin Track Model, Separate Track Model, Dual Ownership, and Dispersed Ownership.

Based on the provisions of Article 10 paragraph (1) of Law 19/2003, BUMN consists of Persero Companies (Persero) and Public Companies (Perum), the establishment of which is determined by the government. The establishment of PT Persero is proposed by the Minister to the President accompanied by a basis for consideration after being jointly reviewed with the Technical Minister and the Minister of Finance (Hermansyah, 2009).

Law 19/2003 gives the government the authority to establish a BUMN called a Persero company for business activities as needed, which has the potential for monopolistic practices. The government is both a regulator and operator, allowing for a monopoly or dominant position. Legal facts support this potential, including the establishment of PT Semen Indonesia (Persero) Tbk, Pertamina's control of the oil and gas sector, PLN's monopoly on electricity distribution, and domination in the banking and construction sectors by BUMN (Hernoko, 2008).

This issue is becoming more prominent with the government's policy in the establishment of BUMN holding companies, which is feared to trigger the practices of Corruption, Collusion, and Nepotism (KKN). The Institute For Development of Economic and Finance (INDEF) provides three criticisms, namely, first, the mechanism for establishing the holding structure. Second, the division of business implementation sectors, and third, efforts to supervise.

METHOD

The research conducted is a normative and doctrinal legal research. The approach used is a comparative, statute, and conceptual approach. This research uses primary legal materials and secondary legal materials. Primary legal materials are authoritative legal materials, namely legislation in the field of business law, corporate law, competition law, good corporate governance, and unfair competition prevention law, among others: Law No. 7/1994; Law No. 5/1999, Law No. 19/2003, Law No.25/2007, Law No. 40/2007, Law No. 30/2014, Law No. 16/2021, while secondary legal materials are legal materials used to provide explanations regarding primary legal materials, namely books, national or international journals, and opinions of experts presented in various academic forums (Kelsen, 2008).

RESULTS AND ANALYSIS

IV.1. COMPETITIVE NEUTRALITY PRINCIPLE IN INTERNATIONAL LEGAL INSTRUMENTS FOR ACHIEVING FAIR COMPETITION

1. STATE-OWNED ENTERPRISES IN THE CIVIL AND COMMON LAW TRADITIONS

Legal research on State-Owned Enterprises (BUMN) can be conducted more efficiently using comparative legal approach. This approach involves comparing legal systems of different countries that have similarities or differences, to identify the legal basis for managing BUMN or State-Owned Enterprises (Rajagukguk, 2016). The two main legal systems that are widely adopted in many countries are the civil law and common law systems. By comparing these two systems, researchers can identify the differences and similarities between them, and determine how they are used to manage BUMN or State-Owned Enterprises (Ilmar, 2012).

The Chicago School of Economics, which emphasizes the role of the individual as the main driver of the economy and minimizes the role of government in regulating the economy, can also be considered as a source of legal research for BUMN or State-Owned Enterprises. This school of thought gained popularity due to its promotion by legal and economic experts from the University of Chicago, such as Robert Bork, Richard Posner, and Frank Easterbrook (Jr, 2007).

The Chicago School of Economics is a movement that advocates for business freedom and believes that the market should not be intervened by anyone, including the government. They believe that businesses should be allowed to innovate and take any actions, even if it may be harmful to consumers. The Chicago School of Economics trusts that the market has its own self-correcting ways to address any imbalances of competition without government interference.

The essence of the Chicago School of Economics approach is the belief in the value of free markets (laissez-faire). Simply put, the Chicago School of Economics asserts that an unregulated market will produce the best results for society, i.e., the most efficient outcomes. The main assumption of this movement is that individuals are rational actors (maximizing their self-interest), and therefore, they will respond to properly designed price incentives. At the societal level, a free market populated by rational actors will cause resources to be allocated according to their most valuable use (allocation efficiency).

The Chicago School of Economics' approach to antitrust law and regulation policy provides an excellent demonstration of its general principles. The traditional approach to antitrust regulation policy is to limit market power concentration, such as by breaking up monopolies. The Chicago School of Economics, on the other hand, argues that consumers are best protected by competition, even if it is only between a few large companies in an industry. Such large companies may have obtained their dominant market position through efficiency advantages that provide greater benefits to consumers than a market forced by law to include many small firms. Even if a company gains monopoly power, the Chicago School of Economics prefers to let the market fix the problem rather than relying on government intervention, which could cause greater damage to efficiency.

In addition to the Chicago School, there is also the Harvard School, which originates from Harvard University. Its proponents include Edward Chamberlain, Edward Mason, Joe Bain, Herbert Hovenkamp, Donald F. Turner, and Philip Areeda. The Harvard School believes that a market structure dominated by large companies always produces anti-competitive behavior and attitudes. The existing market structure under the control of these large companies will not allow new players to enter, so business players will only revolve around them. If competition occurs, they will consolidate themselves to maintain their market dominance. The Harvard School opposes such tendencies, so according to them, there must be efforts by the state to intervene. The aim of the intervention is to ensure that the opportunity to compete and do business is always given a prominent place for everyone (Lesson, 1981).

Examining the views of the Harvard School, Thomas A. Piraino Jr writes: "These scholars argued that when markets are concentrated, firms are more likely to engage in anticompetitive conduct. Harvard School academics pointed out that when Congress enacted the Sherman and Clayton Acts, it was concerned with the growing economic and political power of trusts such as the Standard Oil Company and United States Steel Corporation (Jr, 2007). In construing the broad language of the Sherman and Clayton Acts, the courts should be guided by Congress's desire to protect individual competitors from the market power wielded by large firms. Harvard scholars opposed market concentration, even when it might lower costs and prices, thereby benefiting consumers. Harvard scholarship convinced many judges to presume the illegality of any conduct by firms with market power, regardless of its effect on consumers. For example, in 1945, in United States v. Aluminum Co. of America, Judge Learned Hand found Alcoa liable for monopolizing the aluminum manufacturing market. Taking advantage of economies of scale by expanding its manufacturing capacity to meet increasing demand, Alcoa was able to deliver quality products to customers at low prices. Judge Hand's decision penalized Alcoa simply for engaging in aggressive competition that benefited consumers.

Academics from the Chicago School argue that government intervention in the market is unnecessary, as the market tends to correct any imbalances on its own. The role of antitrust regulators should only be to intervene when competition cases become so clear that anti-competitive behavior threatens consumer welfare. In terms of State-Owned Enterprises (SOEs), they are business entities wholly or partially owned by the government. The privatization of SOEs is carried out by selling state assets (Kagramanto, 2015). The legal form for SOEs is typically a Limited Liability Company (LLC), which separates the owner's wealth from the company's, leading to a dilemma since separated state wealth is supposed to be owned by the state or entrusted to SOEs. The formation of an LLC creates a new legal subject, which can be classified as a public or private legal entity. The distinction between the two types of legal entities is no longer heavily debated in legal studies due to the significant shift from private to public law. This shift can be divided into three phases, with the third phase representing a reduction in the government's role in the economy and society. This phase has caused economic activities to be less dominated by legal regulations (Kahirandy, 2013).

The aforementioned condition is also supported by globalization, not only in the economic field but also in the social and cultural fields. Almost all countries agree that the role of the government in the economy should be reduced (Khairandy, 2013). The government should focus more on its main tasks in governance and providing welfare for the people, especially in terms of services and meeting the needs of the people through controlling important production branches for the country and leaving the unimportant ones to the private sector.

It is concluded that the government should not only fulfill its public duties through public law, but also through private law. Public law can make it difficult for the government to carry out its tasks quickly and satisfactorily, and it is bound by norms and procedures. Therefore, the government must choose another way to achieve its goals by using private law. This raises the question of whether the government is always free to choose between using public law or private law (Kurniawan, 2014).

There are two views on this matter in legal science. The first view is that if the government has the possibility to act under public law, then it also has the freedom to do so under private law. In this view, the government is seen as a legal subject that can participate on the same basis as other legal subjects in the legal system. The second view is that the government does not actively seek to use private law and only does so when necessary. The government is primarily a public legal entity and its participation in private law is only when it is compelled to do so (Lanur, 2015).

The essence of the above view is that the state or government only has the authority to act in private legal matters if it is explicitly granted to them by law. Therefore, it is not correct to say that the state or government can act freely in private law. The state or government must implement its policies using public legal tools available to it. The state or government cannot always choose between using public or private law because it is bound by the obligation to implement its policies based on the public legal authority available to it. If the state or government wants to operate according to private law, it must bear all legal consequences arising from it, such as voluntarily being liable for breach of contract. In the context of state-owned enterprises (SOEs) that belong to the state or government, if privatization occurs, the legal status of the SOE changes from being governed by public law based on its establishment requirements regulated by government regulations, to being a limited liability company (LLC) based on the provisions of the Limited Liability Company Law (Mill, 2015).

Therefore, all regulations related to the management and development of SOEs will no longer apply. As a private legal entity, the primary goal of the LLC is to seek profit, and the functions that SOEs must fulfill are no longer mandatory. When an SOE changes its legal status to an LLC, the characteristics of the LLC apply to the SOE as well. The characteristics of an LLC mean that any profit obtained is considered the company's property, while any debt or loss is considered the company's responsibility and is paid from the company's wealth. If an SOE changes its status, the responsibility of the SOE, which was previously governed by public law, will change too, as the state will no longer own the SOE but only hold shares. As a shareholder, the state is not allowed to act arbitrarily but must act based on a general meeting of shareholders and is limited to the amount of capital it has contributed to the relevant LLC (Nugroho, 2018).

Competitive Neutrality is the principle that private and state-owned companies should compete on a level playing field. It ensures that no entity operating in an economic market is subject to undue competitive advantages or disadvantages, resulting in fairness in business competition. The principle of equality ensures the greatest equal principle or the principle of equality of rights, where everyone has the same freedom guarantee, resulting in justice. Justice is synonymous with fairness, legality, lawfulness, impartiality, equality, equity, moral justification, and righteousness. The relationship between justice and law is explained by Aristotle through investigating the actions where justice is relevant and its place in these actions. Justice is a mindset that desires to act justly, and anything determined by law is just because it brings happiness to society. Legal justice is fair if it is applied to all cases that the law is supposed to apply to, and unfair if it is applied to one case and not another. Justice is a quality associated not with the content of the law, but with the application of the law.

2. THE PRINCIPLE OF COMPETITIVE NEUTRALITY IN THE WTO

The principle of Competitive Neutrality generally means that private and state-owned businesses should compete on a level playing field, with no participant operating in the market subject to undue competitive advantage or disadvantage. According to the definition proposed by the Organization for Economic Cooperation and Development, Competitive Neutrality means that public and private companies face the same set of rules, and if there is no contact with the state that brings a competitive advantage to any market participant. Competitive neutrality can also include advantages granted by the state to certain private businesses. However, achieving competitive neutrality is broad and requires several elements, with subsidies being the most important element that supports the principle. The World Trade Organization (WTO) agreement on subsidies and countervailing measures regulates the use of subsidies, and the agreement applies to all WTO members, including the European Union (EU) (Posner, 2007). The WTO defines subsidies as financial contributions, revenue, or price support provided by the government or public body that confer a benefit. The agreement has two main mechanisms for dealing with subsidies that are specific to WTO members. The first mechanism is the imposition of retaliatory measures, which are unilateral trade defense measures imposed by the importing country against the exporting country's goods. These measures usually consist of additional tariffs. Retaliatory measures can be imposed when the import of goods (that benefit from specific subsidies) causes harm to the domestic industry of the importing country that produces the same goods (Sabine, 1961).

The second mechanism of the agreement concerns enforcement through the dispute settlement of the WTO. Under the WTO regime, there are residual checks on subsidies, which means that any action taken to counter or assess the WTO compatibility of subsidies can only be taken after the subsidy has occurred. Depending on the specific nature of the subsidy, the review by the WTO dispute settlement body will differ. Export subsidies and import substitution are prohibited under WTO law. Other specific subsidies can only be challenged if they have an adverse impact on the interests of other WTO members. The World Trade Organization (WTO) is the only international organization dedicated to matters related to world trade, established by the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) to achieve a more orderly, smooth, free, liberal, transparent, and predictable global trade with disputes that can be settled fairly. Through the Republic of Indonesia Law No. 7 of 1994 on the Ratification of the Agreement Establishing The World Trade Organization, Indonesia agreed to participate in efforts to increase cooperation between countries, especially to accelerate the realization of an open, fair, and orderly international trading system that is free from obstacles and restrictions that have been deemed detrimental to the development of international trade. The law also ratified the General Agreement on Tariffs and Trade/GATT, which aims to create free and fair trade and promote economic growth and development for the welfare of humanity (Sandel, 2009).

The primary function of the World Trade Organization (WTO) is to provide a platform for negotiation among its members. In addition, it regulates trade agreements between countries and encourages the flow of trade by removing barriers to the smooth movement of goods and services. The WTO also provides a permanent negotiating forum, helps resolve trade disputes, and monitors a member's trade policy. The WTO has agreed on five basic principles, including most-favored-nation treatment, tariff binding, national treatment, protection through tariffs, and special and differential treatment for developing countries. The WTO's Agreement on Subsidies and Countervailing Measures regulates the use of subsidies and applies to all 164 WTO members, including the European Union (Starr, 1988).

The collapse of the planned and/or controlled economic systems in Eastern Europe had an impact on many third world countries to adopt new economic policies. More than 80 countries in the world have laws for competition and anti-monopoly, while more than 20 other countries are attempting to develop similar regulations. The new economic policy based on healthy competition is expected to help increase the quality of goods and services, while prices remain affordable for consumers (Sugianto, 2013). Bureaucratic burden of government and officials due to excessive control of the economy through central planning has led many developing countries to abandon centrally planned economic policies. This has resulted in the emergence of a new economic order based on the principles of welfare and social justice. The principles were formulated by Soekarno in 1945 during the preparation of the Constitution of the Republic of Indonesia. The Constitution was intended to provide guarantees of prosperity and equitable distribution of resources to all citizens (Simanjuntak, 2015).

Based on Article 33 of the 1945 Constitution of the Republic of Indonesia, the foundation of economic democracy is set forth (Anugroho, et al. 2017). Production is carried out by all, for all, under the leadership or supervision of members of the community. The welfare of society takes precedence, not the welfare of individuals. Therefore, the economy is organized as a joint effort based on the principle of kinship. The appropriate form of enterprise is a cooperative. The economy is based on economic democracy and prosperity for all. Therefore, important branches of production for the country and those that control the lives of many people should be under state control, because otherwise, the means of production will fall into the hands of those in power, who will oppress the people. Only companies that do not control the needs of the people can be owned by individuals. The land, water, and natural resources contained therein are the basis of the people's prosperity and must be controlled by the state and used for the greatest possible prosperity of the people (Waldron, 1987).

After the fourth amendment to the 1945 Constitution on August 10, 2002, Article 33 was amended by adding two new paragraphs, namely: (4) the Indonesian economy is based on economic democracy with the principles of togetherness, efficient justice, sustainability, environmental awareness, self-sufficiency, and maintaining the balance of national economic progress and unity. (5) further provisions regarding the implementation of this Article shall be regulated by law (Ekaputra, et al. 2021).

According to some economists, this change has sparked controversy because they believe that the article is no longer appropriate for modern times. The first reason is that the economy can no longer be based solely on kinship because in modern business, it is unavoidable to have private ownership as a human right protected by the constitution. Second, important branches of production that control the livelihoods of many people should be under state control, but the term "control" does not mean ownership (Felano, 2021).

The General Agreement on Tariffs and Trade (GATT) is a multilateral trade agreement that aims to create free, fair trade and promote economic growth and development to achieve the welfare of humankind (Marchellia, 2021). GATT is intended to advocate the creation of free and fair trade, stabilize the international trading system, reduce import tariffs, and eliminate other trade barriers. WTO has made fair competition and healthy competition principles as a global agenda. Indonesia as one of the WTO members actively supports the achievement of healthy competition, which is believed to be an essential requirement to stimulate economic activity. The emergence of the principle of healthy competition is inseparable from the New Deal economic system that developed rapidly after the collapse of the centralized economic system (Nasir, 2017). One of the philosophical roots of economic liberalism is the thought of Jeremy Bentham, who believes that what is good is pleasure or happiness, and what is bad is suffering. Liberalism in the economy (laizzes faire) and private property rights must be protected. Finally, the nature of rights consists of two theories, the will theory, which emphasizes the will or choice, and the interest or utility theory, both related to legal objectives.

The concept of property in Indonesian law includes both things and legal relationships to acquire them, namely goods (zaak) and obligations (verbintenis). Property refers to an individual's belongings that have economic value and are recognized and protected based on valid proof. Ownership is the right to freely enjoy and dispose of a property as long as it is not in conflict with the law or the general regulations set by the proper authorities, and it does not interfere with the rights of others without reducing the possibility of revocation of the rights in the public interest, according to Article 570 of the BW. The law encompasses legislation, unwritten law, morality, and public order (Radbruch, 1950). The freedom in ownership that is not in conflict with the law implies that property owners cannot infringe on the rights of others or misuse their rights to cause harm. Moral and legal validity is the foundation of determining the legitimacy of property rights. The existence of morality in the law is shown through justice. The context of intellectual property law is based on natural law, morality, and rights, which justify creativity and inventiveness as property. The government needs to actively balance various conflicting interests based on the public and private spheres when giving and distributing rewards. Locke emphasized the importance of self-ownership, which is the foundation of respect and appreciation for efforts.

State action doctrine exceptions are given to state-managed strategic industries through state-owned enterprises (SOEs). The performance of SOEs, which is heavily influenced by bureaucracy and lack of competition, can have a significant impact on the effectiveness of this natural monopoly. Without competition, the natural monopoly may act inefficiently and cause losses to the government and general public as consumers (Rigo, et al. 2021). However, the implementation of state action doctrine should be limited to prevent opportunistic government behavior, and proper supervision is necessary to avoid anti-competitive behavior. The exception for SOE monopolies should be conditional and based on specific criteria, such as professionalism and transparency. The state action doctrine exception is often questioned for its fairness, and SOEs that do not meet specific criteria should not be exempt from the law.

In summary, while Law No. 5/1999 permits state-owned enterprises (BUMN) or government-appointed bodies/agencies to have a monopoly in a business activity if regulated by law, it is important to remember that they must not engage in monopolistic practices and unhealthy competition. Therefore, not all BUMN or government-appointed bodies/agencies are exempt from Law No. 5/1999.

3. THE PRINCIPLE OF COMPETITIVE NEUTRALITY IN THE OECD

The concept of competitive neutrality is widely accepted by policymakers, and OECD member governments have demonstrated their commitment to a level playing field. This commitment has been voiced at the ministerial level on several occasions. The OECD has developed guidelines to strengthen integrity, safeguard public interests, and level the playing field for the private sector. Many countries have enshrined the principle of competitive neutrality in their laws, and national practices serve as a valuable source for identifying best practices. The OECD has adopted various instruments, including norms and international standards, best practices, and policy principles, to promote competitive neutrality (Sachs, 1995). National practices related to competitive neutrality serve as building blocks for the best practice reports on competitive neutrality. This paper reflects the current position of the OECD on competitive neutrality, drawing from its broad knowledge base on various disciplines such as public management, taxation, finance, trade, and investment.

In many OECD countries, public entities provide goods and services in competition with the private sector or where the private sector is potentially competitive. Competitive neutrality occurs when there are no entities operating in the economy that are subject to unwarranted competitive advantage or disadvantage (Vuylsteke, 1995). However, distortions in competition can occur due to the profit or loss faced by some commercially oriented public sector activities because of their ownership. Governments may create an unleveled playing field in markets where SOEs compete with private firms, driven not only by commercial but also non-commercial priorities. The issues can arise from commercial activities of non-profit sectors but are outside the scope of the report. The most relevant tool in this report is the BUMN Corporate Governance Guidelines. The report recommends a level playing field in activities where SOEs and private companies compete. The guidelines are mainly oriented towards SOEs that are separate from the public administration and are mostly commercially oriented. However, if government involvement in business activity is not done through corporate means, other recommendations outside the BUMN Guidelines may be necessary. In most OECD countries, reform trends are leading to simplification of the operational form of government business activities towards the corporatization of SOEs and other commercial entities that are more comprehensive. The benefits of this include limiting the scope for anti-competitive practices and non-commercial goals in general (Sachs, 1995). The report concludes that corporatization enables state-owned enterprises to operate in accordance with good corporate governance practices as recommended by the BUMN Guidelines and to minimize the potential for distortions in competition.

Good Corporate Governance (GCG) is defined by the World Bank as a combination of laws, regulations, and voluntary private sector practices that allow companies to attract financial capital and labor, perform efficiently, and sustainably generate long-term economic values for shareholders while also taking into account the interests of stakeholders and the wider community. The OECD's Principles of Corporate Governance assert that the framework for corporate governance should encourage transparency and efficient markets, adhere to the rule of law, and clearly delineate the duties and responsibilities among regulatory, supervisory, and enforcement authorities (Sachs, 1995). There are several critical principles of the G20/OECD Principles of Corporate Governance, including the need for an effective corporate governance framework, which requires a reliable legal, regulatory, and institutional framework that can be relied upon by market participants when building business contractual relationships. Such a framework must ensure fair treatment for all shareholders, encourage good governance, promote transparency and accurate disclosure, and recognize the rights of stakeholders established by law or through collective agreements while facilitating active cooperation between companies and stakeholders to create healthy, financially sustainable corporations.

The government may operate State-Owned Enterprises (SOEs) in the primary support sector of the economy by exploiting external conditions of SOEs to benefit other industries or pursue social goals, for instance, by providing subsidized or non-profit services to vulnerable consumers or remote areas. SOEs have become an instrument to support the government's social and economic policies for the development of several countries. The case of Malaysia serves as an example, where the establishment of several SOEs supported the government's policy of promoting political stability, contributing to high economic growth in the late 1980s and early 1990s. In the context of a level playing field, most policymakers agree that competitive neutrality is a reasonable idea, and the OECD has shown its commitment to an equal playing field for public and private sectors. Several countries have embedded this principle in their legislation. Reports and guidelines regarding competitive neutrality have been published by the OECD's Working Party on State Ownership and Privatization Practices and competition committee, covering various areas such as public management, taxation, finance, trade, and investment. This report compiles existing OECD instruments, good practices, and related guidelines related to competitive neutrality and organized them into eight relevant priority areas identified by WPSOPP (Sachs, 1995). These issues may apply to public business activities that are not incorporated, public enterprises with a ring-fence, actual SOEs, or other public or state agencies.

The article discusses Competitive Neutrality and its relevance to the activities of government-owned commercial entities (GOCEs) in OECD member countries. It highlights the different types of OECD instruments adopted by the OECD council, including norms and international standards, best practices, guidelines, and policy principles. The article also emphasizes the need for a level playing field in the market and the potential impact of distortions to competition caused by GOCEs' commercial activities. The government's ownership of GOCEs can create an uneven playing field that favors these entities due to non-commercial priorities such as maintaining public service obligations, industrial policy, fiscal revenue protection, and political considerations. The article also discusses the ongoing trend towards simplifying the operational form of GOCEs, corporate governance, and the importance of Good Corporate Governance principles. It concludes that creating a clear legal status, identifying the relationship between government ownership and GOCEs, and instilling a full awareness of GOCEs' management obligations to play fairly can help to promote Competitive Neutrality.

The Organization for Economic Cooperation and Development (OECD) guidelines state that state-owned enterprises (SOEs) should achieve the same rate of return as private sector businesses, with performance compared to similar activities in the same industry. SOEs should pursue profit, with transparency and accountability guidelines in place to ensure that their goals are clear and do not impede actual or potential competition. Regulations should be consistent and neutral, regardless of ownership, institution, sector, or market, and financial regulation must be effective and efficient. Transparent policies and procurement procedures should be in place to ensure fair and non-discriminatory supplier selection, and any unfair barriers should be eliminated. Net neutrality is used to maintain competitive neutrality, and to achieve this, government businesses must operate in an environment with the same regulations as private companies (Sachs, 1995). Full corporatization of government businesses can be achieved through consistent implementation of the OECD Guidelines for SOEs, which recommend that the government streamline operational practices and legal forms under which SOEs operate.

The guidelines for state-owned enterprises (SOEs) recommend alternative options if the legal form of the SOEs cannot be changed. For example, simplifying operational practices and subjecting SOEs to the same regulations as private sector companies, voluntarily or by expanding the validity of the regulations to cover the relevant SOEs. Transparency and openness requirements are generally the key to persuading the public that SOEs are operating in the best market-oriented principles. This includes disclosing public service requirements, compensation received to fulfill them, and properly accounting for them; and disclosing different tax treatments, regulations, or debts. It also means that SOEs must be transparent about their objectives, especially if the choice is made not to fully incorporate; this includes transparency about their commercial and/or political objectives (i.e. to protect national champions or pursue industrial policy objectives; to fulfill public service obligations; if the costs are higher than the benefits; if fiscal revenues are protected, etc.). Solutions must be taken to level the playing field if the operational form of the SOEs from these related objectives provide advantages or disadvantages compared to the private sector. In 2001, the OECD Council adopted the Recommendation of the Council on Structural Separation in Regulated Industries, which suggested that Member countries consider implementing structural measures in regulated sectors (especially public utilities and network industries) that undergo liberalization (Sachs, 1995). This aims to highlight the problems that policymakers may face when undergoing liberalization, especially when the incumbent, usually SOEs or former SOEs, which operate on both a competitive and non-competitive basis, can provide preferences towards their own competitive activities by controlling the terms and conditions under which competing companies in the competitive component have access to non-competitive components. A range of appropriate incentives must be available to change such behavior. The recommendations address the use of "behavioral" measures and the use of "structural" measures. In general, the recommendations advocate structural separation, but recognize that careful cost-benefit considerations must be made. The cost-benefit must consider the economics of a particular sector, especially those showing natural monopoly characteristics, which can benefit from remaining integrated; further consideration must be made in terms of the overall outcomes for consumers. The Corporate Governance Committee issued a paper entitled Privatization in the 21st Century: Recent Experiences of OECD Countries, which discussed the cross-economy corporatization process of OECD. It discusses some of the costs and benefits associated with corporatization.

The cost is an important factor that must accurately reflect all cost items. When charging below cost, guidelines state that if costs cannot be recovered, the level of subsidy must be transparent. The guidelines tend to support the actual cost being charged to the user while ensuring equity considerations through other means such as taxes or other benefits. The guidelines refer to a number of national best practices that include various aspects of user charges for government services. Accounting systems should be designed to separate direct costs in a sufficiently simple manner. Allocating indirect costs is more complex, but the guiding principle is that costs should be calculated to ensure economic efficiency and fairness. If the public sector faces cost losses, an analysis must be conducted to determine whether these costs are due to external factors and whether they exceed the costs faced by the private sector. Good practices generally prefer eliminating cost losses rather than adjusting prices. If prices cannot meet the cost standard in the medium to long term, to maintain competitive neutrality, the government should cease providing services with non-neutral prices or consider subsidizing them (in a transparent and accountable manner) if necessary for social/political reasons.

The Best Practice Guidelines for Government Contracting provide specific guidance and identify best practices for contracting government services. Best practices specifically address cost identification for this purpose in order to establish a valid comparison in evaluating contract proposals from internal service providers or external service providers. Competitive neutrality debates arise again when third-party contractors are expected to compete with public service providers. Public service providers may not fully reflect their costs if they do not consider a number of factors that may disadvantage or advantage them compared to the private sector. Guidelines suggest that public service providers should consider joint finances (overhead costs) and non-financial costs (depreciation, capital costs, and tax treatment). Costs should also include employment obligations, salaries, benefits, and pensions. Significant differentiating factors between internal and private sector public offers can be the difference in the treatment of these costs (Sachs, 1995).

Accountability and Transparency: A Guide for State Ownership, published by WPSOPP, is a guide intended to facilitate the practical implementation of the State-Owned Enterprises Guidelines in the areas of transparency and accountability. It provides policy options and practical steps, as well as examples of good practices that promote good governance in state-owned enterprises. The guide has a specific section entitled "Identifying, Calculating, and Funding Public Services and Other Special Obligations," which provides guidance on how to ensure equality when dealing with special obligations and the financial benefits associated with these obligations. It recommends a number of cost identification techniques that are discussed in detail that includes full distributed cost, marginal cost, incremental cost, and avoidable cost and gives examples of situations where some methods are more appropriate than others.

Therefore, one of the key levers to address the issue of competitive neutrality is to require government business activities to obtain a reasonable rate of return on the capital used and to set appropriate dividend targets. However, it should be noted that competitive neutrality does not require government businesses to achieve a certain ROR in every transaction or even in every budget period. ROR requirements do not prevent state-owned enterprises from differentiating their profit margins in the same way as private companies. The main goal is to prevent cross-subsidies from governmentfunded activities. Doing so would change the incentive structure for government business and ultimately reduce waste of public resources due to inefficient SOEs.

4. THE PRINCIPLE OF COMPETITIVE NEUTRALITY IN THE PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY

The Paris Convention for the Protection of Industrial Property, established on March 20, 1883, was the first international convention that regulated trademark protection. It covers provisions that protect industrial property rights, including patents, trademarks, industrial designs, utility models, service marks, trade names, geographical indications, and unfair competition suppression (European Comission, 2016). This Convention has been ratified by the Government of the Republic of Indonesia through Presidential Decree No. 15 of 1997. Article 10Bis of the Convention obligates its signatories to ensure effective protection against unfair competition (Norton, 1999). The Convention establishes three main categories: national treatment, priority rights, and general rules. It requires signatories to provide nationals of other member countries with the same protection as their own citizens. It also establishes priority rights for patent, trademark, and industrial design applications, allowing applicants to seek protection in other signatory countries based on their first application. The Convention also introduced the principle of suppressing unfair competition practices in Article 10bis, which was not initially included in the 1883 Convention.

The purpose behind Article 10bis of the Paris Convention is to establish a foundation for international standards regarding protection against unfair competition. As the world becomes increasingly interconnected, reliable regulatory standards for all trademark owners become more urgent (Rigo, et al. 2021). Uniform international regulations, as enforced in the United States, will provide trademark owners in countries bound by the Paris Convention with the same uniform regulations, which will be used as a reference by American courts to enforce the uniform standards established by the Convention (Sachs, 1995). This will create a higher level of confidence in the global market for trademark protection by upholding these uniform standards. The connection between the protection of intellectual property rights and unfair competition is governed by Article 50 of Law No. 5/1999, which provides exceptions to agreements related to intellectual property rights such as licenses, patents, trademarks, copyrights, industrial design, integrated circuit layout designs, trade secrets, and franchise agreements. This becomes problematic because in competition law, intellectual property rights and franchise agreements are often seen as paradoxical, as they provide the right to monopolize exclusively, which is even protected by law (Ekaputra, 2021).

The Law on Competition attempts to regulate permitted monopolies to be balanced and not exploited, while the basic principle of Intellectual Property Rights (IPR) aims to improve the quality of human life and requires research, time, and high cost (European Comission, 2016). Therefore, it is reasonable to provide incentives to enjoy the results and gain economic benefits through granting temporary monopolies before they become public domain. The substantive provisions of the Convention fall into three main categories: national treatment, priority rights, and general rules. The Convention requires each participating country to cooperate in protecting industrial property, and provides priority rights for patents, trademarks, and industrial designs based on the first application submitted in a participating country (Rigo, et al. 2021). It also establishes general rules that must be followed by all participating countries, such as the right of inventors to be named in patents, and the obligation to provide effective protection against unfair competition.

5. THE PRINCIPLE OF COMPETITIVE NEUTRALITY IN IMF

According to the International Monetary Fund (IMF), the general objectives of the establishment of state-owned enterprises (SOEs) in various countries are to support national economic and strategic interests, supply goods and services, support social goals, ensure national ownership of companies, conduct business operations in natural monopolies regulation, and create state monopolies where market regulation is deemed inefficient. Some countries, such as Australia and the European Union (EU), have pursued a holistic approach by implementing Competitive Neutrality principles, including reforms to state-owned enterprises, expansion of anti-competition laws, and the creation of a national access regime for third-party access to infrastructure monopolies (European Comission, 2016). Australia has appointed specific bodies to enforce Competitive Neutrality, such as the Australian Competition and Consumer Commission, the National Competition Council, and the Productivity Commission. In Sweden, the government's investment strategy for SOEs follows the OECD Guidelines on Corporate Governance of State-Owned Enterprises to avoid passive ownership errors (Sachs, 1995). Government intervention in the financial system, such as through general banks, still occurs in many countries. State ownership of banks has been justified by the need to address market failures and promote economic development, but it can also have economic and fiscal implications such as distorting competition and lowering growth and tax revenue.

Naftogaz, Ukraine's national oil and Gas Company, went from a loss-making enterprise reliant on significant budgetary assistance to a profitable company in just a few years due to significant increases in gas and heating prices, along with governance restructuring and reform efforts since 2014, accompanied by an expanded utility subsidy program for vulnerable households. The performance of state-owned enterprises (SOEs) and their fiscal risks can have a significant impact on public finances. Across years, governments have provided significant support to SOE finances, primarily capital injections for financial SOEs and recapitalizations and debt assumption for nonfinancial SOEs (European Comission, 2016). SOEs operating in the airline, banking, mining, railway, and utility sectors are among those requiring costly support. In some countries, SOE debt exceeds 20% of GDP and, in some cases, reaches more than half of public sector debt. SOEs in some countries also have significant obligations to private parties through joint ventures, public-private partnerships, and power purchase agreements.

Achieving competitive neutrality in many countries in the Middle East & Central Asia will require achieving neutrality in regulation, taxation, public procurement, access to resources, and separation of non-commercial and commercial SOE activities (Rigo, et al. 2021). According to recent assessments, there is no country in the Middle East & Central Asia region that effectively separates non-commercial from commercial SOE activities. This means there is potential for cross-subsidies of commercial activities and reduction of private sector players. While the separation of activities may be mentioned in competition law or related laws in some countries, effective implementation is lacking. In some countries in the region, some SOEs that hold dominant and monopolistic positions in certain sectors are exempted from competition laws or can be entirely exempted from competition laws (e.g., Algeria, Egypt, Kuwait, Qatar, Saudi Arabia, Tunisia, and the United Arab Emirates) (European Comission, 2016). There are also cases where SOEs are exempted or treated differently in specific laws (e.g., bankruptcy laws) or receive special status or rights under sector-specific regulations.

The steps to improve the transparency and fiscal risk mitigation of SOEs include: (1) clarifying the definition of SOEs and government ownership policies; (2) describing the authority of each ministry; (3) establishing an inventory of SOEs with key administrative and financial indicators; and (4) publishing audited financial reports of SOEs annually. These reforms will allow Sudan to assess the alignment of SOE's strategic goals with government policies. In Pakistan, the Governance and Operation of State-Owned Enterprises Act aims to improve the governance, management, and financial efficiency of SOEs. The law has been approved by the Cabinet and submitted to the National Assembly (Sachs, 1995). The current ownership model is fragmented, resulting in weak corporate governance, low productivity and efficiency, and substantial fiscal losses and contingent liabilities for the government. The new law proposes a more centralized model of ownership and supervision, and separates the regulation and policymaking functions of the state. The Federal Footprint - Annual SOE Report is issued to assess the risk of the SOE portfolio in a more structured and transparent manner. Under the new model, a nomination committee led by the minister responsible for SOEs and four other members, including two private sector experts with a minimum of 20 years of experience, will be responsible for selecting SOE board members. The performance gap between SOEs and private companies in the same sector may reflect differences in ownership or sector of operation. Mixed ownership also contributes to the difference (Rigo, et al. 2021).

The government needs to include nonfinancial state-owned enterprises (SOEs) in the fiscal targets to ensure consistency in public sector policy objectives. The inclusion would create greater incentives for fiscal discipline and transparency, given the government's supervision of the entire SOE loan and more limited options to avoid fiscal targets. If a comprehensive coverage of all SOEs is not feasible, the SOEs' debt should be incorporated into public sector debt if they pose significant fiscal risks. The use of SOEs to support employment during economic downturns is less efficient than direct and transparent policy tools. Pricing policies in sectors with negative externalities, such as fossil fuels, need to be adjusted to protect vulnerable households, and the government should compensate SOEs for the increased cost. Regulators should balance various interests, ensuring the transparent and well-defined rules and professional management (European Comission, 2016).

Disclosure of financial and operational performance of state-owned enterprises (SOEs) and their financial relationship with the government should be made to reduce the possibility of SOEs being used for expenditures and borrowing beyond the budget, political patronage, or corruption. However, financial information on SOEs in many countries is still limited, especially for those managing large assets, particularly in the Middle East and sub-Saharan Africa. SOEs' financial reports should be audited by the national audit office or a private auditing firm approved by the national audit office. Several countries publish performance assessments for at least their largest SOEs (Ekaputra, 2021). Annual reports with detailed information and analysis of the SOE sector's performance in aggregate, sectorial, and individual company levels can be an effective communication tool. Data on SOEs' financial performance should be integrated into the public sector balance sheet to provide a comprehensive view of public finance. Transparency is also required in the financial interaction between the government and SOEs (Sachs, 1995). The government's mandate to SOEs should be clearly defined, transparently disclosed in the budget, and compensated if necessary. Fiscal risks associated with SOEs, both at the public sector and corporate levels, if relevant, should be reported regularly (including contingency liabilities).

SOE risk assessments and mitigation measures should be disclosed. Fiscal risk statements are a good means of doing this. The government must establish and enforce SOE corporate governance standards in line with best international practices. The composition of the SOE board plays a crucial role in the quality of corporate governance. At a minimum, the government should promote a professional board that can help ensure appropriate accountability. In some countries, some or all board members should be independent of the government (e.g., Canada, Germany, the Netherlands, and Switzerland) (European Comission, 2016). Appropriate SOE regulations are another important element of corporate governance. In Chile, the Netherlands, Norway, and Sweden, at least the largest SOEs are subject to the same regulatory framework as listed private companies. The third attribute of good corporate governance is the regular assessment of SOE management performance. This can be difficult but achievable. For example, New Zealand has a good and effective performance contract framework where SOE goals are informed by risk oversight. The fear that government support may provide a competitive advantage for SOEs is increasing. Thus, SOE activities can distort the international market, including when they are protected from foreign competitors in their domestic market. Another concern is that SOE expansion abroad is not always based on commercial objectives but may reflect other home country objectives, such as resource ownership, technology acquisition, or political or diplomatic objectives. Additionally, SOEs are a major channel for foreign bribery (Rigo, et al. 2021).

According to the IMF, State-Owned Enterprises (SOEs) have a significant economic and fiscal impact in many countries, as they are among the largest companies in the world and have become global players. However, many SOEs struggle with low productivity, distortion of competition, and corruption, particularly in developing countries where they often fail to provide basic services. Weak SOEs have drained significant government resources and, in some cases, led to economic and fiscal crises (Ekaputra, 2021). Concerns over the activities of multinational SOEs have grown, which could trigger protectionist measures. Therefore, strengthening the management and governance of SOEs is crucial in many countries, especially since they provide core economic services and can be an important means of achieving sustainable development goals. Experience from other countries provides lessons on how to move forward. In areas where intervention is not necessary, the government should not waste public resources. In cases where SOEs play a dominant role, such as public utilities, improving their performance and achieving sustainable business models should be a priority. The government should also seek ways to attract private investment to complement SOE activities (Rigo, et al. 2021). Appropriate incentives and healthy institutions need to be established to ensure that SOEs operate efficiently and that fiscal costs are minimized (Ekaputra, 2021). A robust framework would include a clear and comprehensive ownership policy supported by appropriate government oversight and good corporate governance. Transparency in SOE activities and their relationship with the government is crucial to support accountability. With the increasing presence of SOEs in global trade and investment, ensuring a competitive level of competition is important to promote domestic economic efficiency and address international spillovers (European Comission, 2016). Some countries have adopted rules to address these issues, and some of these problems are also addressed in international trade and investment agreements. However, there is room for a more coordinated international approach that can benefit from the establishment of global principles for multinational SOEs

CONCLUSION AND SUGGESTION

Based on all the explanations and discussions on the research problem that have been presented in previous chapters, the following conclusions can be drawn:

The constitutional basis for State-Owned Enterprises (BUMN) in carrying out national development is Article 1 paragraph (2), Article 33 paragraph (2) and (3) of the 1945 Constitution of the Republic of Indonesia regarding sovereignty and ownership controlled by the state, represented by BUMN. This is reinforced by the MPR XVI/MPR/1998 Decree in the context of implementing Economic Democracy, which prohibits asset accumulation and concentration of economic power in one person, a group of people, or a company that is not in line with the principles of justice and equality.

The Competitive Neutrality principle contains the understanding that private and state-owned companies must compete on a level playing field, and thus the qualification of businesses that can be conducted by BUMN needs to be regulated by law. Based on an economic analysis of the law, justice should be viewed as a distributive quality, have an equality component, contain fairness elements, and even be studied for efficiency. This is in line with the efficiency and justice principles stipulated in Article 33 Paragraph (4) of the 1945 Constitution of the Republic of Indonesia.

The Competitive Neutrality principle in international legal instruments that apply to the World Trade Organization (WTO), Organization for Economic Cooperation and Development (OECD), International Monetary Fund (IMF), and Paris Convention recognizes and accommodates this principle as applied in the European Union's legal instruments, which limit subsidies for State-Owned Enterprises. This principle is based on the prohibition of unfair competition and the need for private and state-owned companies to compete on a level playing field.

The Competitive Neutrality principle in national legislation already supports business equality for BUMN and other private companies, but BUMN is still exempted in the Anti-Monopoly Act of 1999, which is rule of reason-based, and in the 2003 BUMN Restructuring Scheme Act, which is needed to improve BUMN's health. The 2014 State-Owned Enterprises Act requires BUMN to conduct business based on the principles of Good Corporate Governance, while the 2007 Limited Liability Company Act allows derivative lawsuits, and the 2007 Investment Law prohibits nominee share ownership.

SUGGESTION

Referring to all the discussions and conclusions stated above, the following recommendations are suggested:

1. The Government of the Republic of Indonesia and the House of Representatives of the Republic of Indonesia should consider incorporating the principle of Competitive Neutrality into the legislation governing state-owned enterprises (e.g., Law No. 40/2007, Law No. 19/2003, Law No. 5/1990, etc.), in order to create a fair and efficient economic development, in accordance with the mandate of Article 33 of the 1945 Constitution, and to align with the development of regulations concerning state-owned enterprises in other developed countries and international legal instruments that support the principle of healthy competition, thereby qualifying which businesses can be operated by state-owned enterprises and which do not need to be.

2. The three principles of Competitive Neutrality, GCG, and AUPB should be enforced in the laws, regulations, and legal practices of state-owned enterprises in Indonesia.

3. It is recommended that a specific codification of the Anti-Competitive Practices Law should be established, similar to the one in the Netherlands.

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