Faculty of Law, Universitas Krisnadwipayana | 2715-243X (Print), 2962-6226 (Online)

JUSTICE Voice

Vol. 2 | No. 1 | June 2023 | pp. 1-12

https://ejournal.hukumunkris.id/index.php/justicevoice

Monopoly Practice of PT. Carrefour Indonesia After Acquiring The Shares of PT. Alfa Retailindo

(Study of KPPU Decision Number 09/KPPU-L/2009)

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Submit: 29/04/2023 **Revised**: 05/08/2023 **Accepted**: 03/11/2023

DOI: 10.37893/jv.v2i1.395

***Keywords**:*

Competition; Dominant Position; Monopolistic Practices.

ABSTRACT

The study of The Decision of KPPU Number 09/KPPU-L/2009 to obtain an overview of the reasons for the KPPU to decide that Carrefour has committed monopolistic practices and the legal impact of the decision. By using the juridical research method, that is examining the KPPU's decision to obtain data on the KPPU's reasons for stating that PT. Carrefour Indonesia (hereinafter referred to as Carrefour) has committed monopolistic practices and unfair business competition. Where after the acquisition of PT. Alfa Retailindo shares, Carrefour managed to control the market by 57.999% and to achieve this position, Carrefour implemented various market entry barriers. Other business actors cannot enter the relevant market. Such barriers may include the imposition of different entry fees from one company to another. Because Carrefour was found guilty, the KPPU ordered that Carrefour must return Alfa's shares. The problem is that Law Number 5 Year 1999 does not have provisions governing the mechanism for returning the shares. Thus, KPPU should amend Law Number 5 Year 1999 specifically related to the mechanism for returning shares resulting from acquisitions.

A. INTRODUCTION

Monopolistic practices in Indonesia have been going on for quite a long time, both during the old order government, the new order government and the reform government. Some of the losses that can arise with monopolistic practices are unfair business competition between company, harming the general public and disrupting the interests of national development. In order to end such practices, the government issued Law Number 5 of 1999 Concerning Prohibition of Monopolistic Practices and Unfair Business Competition. The law regulates fair competition among company so as to fulfil profits for company, public welfare and the interests of national development. In other words, the occurrence of fair competition between company and the fulfilment of public welfare and national interests in a free market requires an extraordinary government role (Ganie 2023). The Business Competition Supervisory Commission (KPPU) has decided a dispute over monopolistic practices related to the takeover of shares owned by PT. Alfa

Retailindo by PT. Carrefour Indonesia, which is suspected of violating Article 17 and Article 25 of Law Number 5 of 1999.

Corporate actions in order to gain greater profits and control the market widely and quickly can be carried out by acquiring shares of other companies with similar business fields. Such legal actions are certainly not prohibited by law. However, since the enactment of Law Number 5 of 1999 Concerning Monopolistic Practices and Unfair Business Competition, each company who acquires shares of other companies must compliance with the terms and conditions in the law. Among other things, the legal action in the form of share acquisition does not violate the provisions regarding monopolistic practices and fair business competition in Indonesia. Based on the above description in general, the purpose of this study to explain in detail the legal reasons used by the KPPU in deciding that PT. Carrefour Indonesia is guilty or has committed monopolistic practices after acquiring PT. Alfa Retailindo shares and to explain the legal impact of the KPPU's decision on the status of PT. Alfa Retailindo shares that it has acquired.

B. METHOD

The research method uses an empirical juridical approach with a descriptive research type. Data collection techniques used through literature study. Data analysis techniques use a qualitative approach, that is primary data obtained directly from KPPU decisions analysed with legislation relating to monopolistic practices and unfair business competition.

C. RESULTS AND DISCUSSION

Monopolistic Practices According to Experts

There are several terms related to antitrust and unfair business competition, namely antitrust for the definition that is commensurate with the term anti-monopoly or the term domination used by the European community, which also means commensurate with the meaning of the term monopoly. In practice, these terms are interchangeable. In fact, there is no clear distinction between monopoly and monopolistic practices.

Monopoly according to Black's Law Dictionary (Bryan A. Garner 2014): monopoly is a privilege or peculiar advantage vested in one or more persons or companies, consisting in the exclusive right (or power) to carry on a particular business or trade, manufacture a particular article, or control the sale of the entire supply of a particular commodity. These two experts in their book *Law and Economics* argue that monopoly is closely related to extreme market structures. One indication of monopolistic practices is that company issue regulations as barriers to market entry for competitors so that competition in the relevant market is impossible. In addition to barriers through the issuance of regulations, other barriers are called technical barriers, which are related to the conditions for products to enter the market that must meet the conditions set by the company (R. Cooter and Gilbert 2022).

The loss of competition in relation to the market comes from monopolistic practices

DOI: https://doi.org/10.37893/jv.v2i1.395

in various forms. Some of these include collusion between producers and suppliers to regulate goods entering the market, namely only one supplier. In addition, there are restrictions on certain goods entering the market. Which goods are the basic needs of the community (R. Cooter and Gilbert 2022).

Cooter and Ullen once again emphasized that monopolistic practices mean that there is only one seller of a particular good and no substitute goods in the relevant market. The monopolist dictates prices and non-technical barrier terms in contracts with suppliers. In such conditions, consumers have no other choice but what is offered. In the case of perfect competition, no company may dictate the price of goods as well as non-technical barriers so that consumers have the freedom to choose goods according to their abilities and needs (R. Cooter and Gilbert 2022).

Monopolistic practices according to Richard A. Posner in the book *Economic Analysis of Law* are closely related to the following matters: First, the selling price of goods is related to profit. Producers sell goods at a price that cannot be lower than cost (opportunity cost). The company determines the price related to the profit it sets which is obtained from the difference in production costs and other variable costs. The company to get maximum profit (output) monopoly companies set the selling price consistently. In a monopoly market there is no bargaining between consumers and producers because it has been set unilaterally by producers. This aims to achieve the maximum output level to obtain sales profit. Second, in a monopoly market, the output is less profitable than in a competitive market. This happens because in a monopoly market the price of goods is higher and there are no substitute goods. Meanwhile, in a competitive market, the price of goods is lower and there are substitute goods. Therefore, consumers must switch to substitute goods. Of course, these substitute goods must be at competitive prices (Posner 2014).

Monopoly Practice According to the Law

In the Law Number 5 of 1999 Concerning Prohibition of Monopolistic Practices and Unfair Business Competition, apart from the term monopoly, there is also the term monopolistic practice. Monopoly behaviour is not prohibited, but monopolistic practices as stipulated in the law are prohibited for company. What is monopolistic practice? Monopolistic practices are the concentration of economic power by one or more company which results in the control of production and/or marketing of certain goods and/or services so as to cause unfair business competition and may harm the public interest (Indonesia 1999). The behaviour of company who control the production and/or marketing of goods and/or services leads to unfair competition between company to the detriment of the public interest as one of the principles that must be fulfilled by company in carrying out their business activities. The business competition law prohibits the concentration of economic power because there is only a single company that sells commodities and there are no substitute goods, so to enter the industry is very difficult or impossible.

One important element of the definition is the concentration of economic power. This means that there is only one company or only a group of company who control a relevant market so that these company can determine the prices of goods and/or services themselves (Indonesia 1999). As a result, consumers do not get affordable prices with good quality goods. By controlling the supply of goods into the market, the company can at will increase the price of goods. Conversely, fair business competition certainly prohibits such monopolistic practices so that the principle of economic democracy will be realized for each company for the sake of realizing the interests of company and public interests. “Company in Indonesia in carrying out their business activities are based on economic democracy with due regard to the balance between the interests of company and the public interest.”

The prohibition of monopolistic practices and fair competition clearly aims to:

1) Safeguard the public interest and improve national economic efficiency as one of the efforts to improve the welfare of the people.
2) Realizing a conducive business climate through the regulation of fair business competition, so as to ensure equal business opportunities for large businesses, medium businesses, and small businesses.
3) To prevent monopolistic practices and/or unfair business competition caused by company.
4) Creating effectiveness and efficiency in business activities.

The legal standing between company is certainly born from an agreement to do something, an agreement between company and other company. According to business competition law, there are agreements that are prohibited and business activities that are prohibited. Both can lead to monopolistic practices and unfair business competition.

Carrefour Acquires Alfa’s Shares

PT. Carrefour Indonesia wants to increase sales and control the relevant market by adding outlets and adding modern retail formats such as supermarkets in accordance with the growing retail business trend to become multi-format in Indonesia. To realize this plan, on December 17, 2007 a Memorandum of Understanding (MoU) was signed between PT. Carrefour Indonesia with PT. Sigmantara Alfindo and Prime Horizon to purchase 75% (seventy five percent) of the shares of PT. Alfa Retailindo.

On December 18, 2007 PT. Carrefour Indonesia submitted a notification letter to BAPEPAM-LK and the Indonesia Stock Exchange regarding the plan to purchase 75% of Alfa’s shares. Furthermore, on December 19, 2007 the plan to purchase Alfa shares by Carrefour was announced through newspapers. Because there were no objections from government agencies and the public, on January 21, 2008 Carrefour signed a share purchase agreement (SPA) between Carrefour and PT. Sigmantara Alfindo and Prime Horizon. The number of Alfa shares owned by PT. Sigmantara Alfindo purchased by Carrefour amounted to 35% and Alfa shares owned by Prime Horizon purchased by Carrefour amounted to 45%. As a public company, on January 21, 2008 Carrefour was required to notify BAPEPAM-LK and the Indonesia Stock Exchange of the signing of the SPA. After that, on January 22, 2008, an announcement was made in a national

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newspaper regarding the purchase of Alfa shares.

However, the Indonesian Business Competition Supervisory Commission (KPPU) suspected that the corporate action taken by Carrefour could potentially lead to monopolistic practices and unfair business competition. Therefore, KPPU conducted an examination of the acquisition of shares owned by PT. Alfa Retailindo by Carrefour. From the results of its examination, KPPU considered that the acquisition of shares by PT. Carrefour Indonesia of Alfa's shares had resulted in monopolistic practices and abuse of dominant position. On this basis, the Examination Team concluded that Carrefour had violated Article 28 paragraph (2), Article 17 paragraph (1) and Article 25 paragraph (1) letter a of Law No. 5 of 1999.

Carrefour's acquisition of Alfa's shares must follow the rules set out in Article 28 paragraph (2) of Law Number 5 of 1999 as the main requirement that must be met. Meanwhile, the abuse of dominant position regulated in Article 25 of the law is the result of the acquisition. Likewise, the violation of monopolistic practices and unfair business competition as regulated in Article 17 is also a result of the legal action of the acquisition of shares owned by Alfa by Carrefour. The violations of Article 25 and Article 17 are as a result of Article 28. Meanwhile, to implement Article 28, there must be a Government Regulation. When this dispute occurred the government regulation in question had not yet been issued or did not exist.

Monopoly Practice and Dominant Position of Carrefour

Monopolistic practices and dominant positions can lead to market failure. This failure occurs because there is only one company operating in the relevant market. This is what Cooter and Ullen call an extreme market structure. To prevent other company from entering the market, barriers to entry are formed in the form of statutory or prohibitive regulations to enter the market, economies of scale, which are related to the use of production machinery that must meet certain standards set by the monopolist. Because there is only a single supplier in the relevant market, what will happen is that the company will regulate the market at will, both in terms of determining the selling price of goods and substitute goods that tend not to exist. Buyers are forced to simply accept the market situation because there is no other choice or in the expression of Cooter and Ullen, the buyers must be responded by accepting the monopolist's offer or doing without the good. This is certainly contrary to perfect competition where in fact the position between sellers and buyers must be equal (R. D. Cooter and Hacohen 2020).

To smooth the occurrence of extreme market structure through collusion between market management and suppliers of goods (suppliers) and or collusion between the production of goods and buyers of goods to limit competition in the same market so that there is only one buyer of goods in the relevant market. This situation also makes it very difficult for other company to enter the relevant market. This leads to the concentration of economic power in one company or a group of company only (R. D. Cooter and Hacohen 2020).

An extreme market structure is contrary to a perfectly competitive market. According to Cooter and Ullen, a non-competitive market or market failure occurs when there are monopolistic practices so that company has market power or market power is only within their power. Thus, competition is in an unbalanced position between company. In terms of fair competition, company should have balanced autonomy or freedom to determine their own markets, including providing equal opportunities for consumers to make choices according to their needs and abilities. In addition, company often obtain unbalanced or different information from other company (asymmetry information). If there are unbalanced matters between company, this will also happen to consumers. Providing unbalanced information will cause harm to other company, including harm to consumers. It can be said that the profits obtained by certain company are obtained from the losses suffered by other company (R. D. Cooter and Hacohen 2020).

Monopolistic practices according to Richard A. Posner originate from company in determining the selling price of goods associated with the profits that must be obtained by company or between price and output. It should be understood that to determine the selling price of a unit of goods is determined by the cost (opportunity cost) and the amount of profit value, the difference between production costs and other variable costs and the selling price. This is what Posner calls marginal revenue (concept of marginal revenue) (Posner 2014). Therefore, to assess the selling price of goods, it is necessary to use the concept of elasticity, which is a proportional change in one variable caused by a proportional change in another variable (Posner 2014). Posner's opinion should be used to assess whether the predatory price was actually carried out by a company so that it is accused of monopolistic practices and dominant position.

Another thing that needs to be considered to assess the occurrence of unfair business competition according to Posner is the need for in-depth examination of whether the selling value of goods is calculated from the total cost of production of one item with various variables plus profits for company. Company actually try to reduce production costs and various variables and reduce profits with the aim of selling one item cheaper in order to gain a market. In the end, this makes other company unable to compete in the relevant market. Monopoly prices are certainly very burdensome for consumers (Posner 2014). Again, according to Posner, monopolists generally set a single price. Such pricing forces consumers to buy at the set price. Consumers have no other choice. Not to mention that the goods sold do not have substitute goods. In the event that the monopoly market profits actually get smaller profits compared to the output of a competitive market that has substitute goods at competitive prices (Posner 2014).

Law Number 5 of 1999 in Decision Number 09/KPPU-L/2009

A very important aspect in Article 17 paragraph (2) of Law Number 5 of 1999 is market control. This means that a company is considered to control the market if the goods/services produced and/or marketed have no substitute or result in other company being unable to enter into business competition for the same goods and or services or the company controls more than 50 percent of the market share of a certain type of goods or services. Carrefour is deemed not to be practicing normal business practices because it has caused the loss of effective competition in the relevant market, so that these conditions cause consumers to suffer losses continuously.

Such market dominance is referred to by Cooter and Ullen as extreme markets structure. The aim is to prevent other company from entering the market. The method is to form various barriers to entry in the form of statutory or regulatory prohibitions to enter the market, economies of scale. Extreme market structure is contrary to a perfectly competitive market. According to Cooter and Ullen, an uncompetitive market or market failure occurs when there are monopolistic practices so that company has market power. Extreme market structure is certainly contrary to the provisions of Article 17 of Law Number 5 of 1999.

In the context of the acquisition of Alfa's shares, the commission considers Carrefour to have violated the provisions of Article 17 paragraph (1) of Law No. 5/1999 concerning control of the production and/or marketing of goods/services that may result in monopolistic practices and unfair business competition. Several elements of Article 17 paragraph (1) of Law No. 5/1999 related to the case of acquisition of Alfa shares by Carrefour are as follows:

1) Element of Company. Carrefour is a legal entity established and domiciled in Indonesia and conducts business activities in the economic sector, thus the element of a company is fulfilled.
2) Element of Market Control. According to the provisions of Article 19 paragraph (1) of Law Number 5 of 1999, a company is deemed to control the market if the goods/services produced and/or marketed have no substitute or result in other company being unable to enter into business competition for the same goods and or services or the company controls more than 50% of the market share of a certain type of goods or services. According to the Commission's consideration. Carrefour has a market share of more than 50 percent in the upstream relevant market. In the relevant market, the number of company is measured by the increase in the number of company in the market, not by the increase in the number of product outputs. The upstream relevant market is a market that shows the relationship between suppliers of goods/services and Carrefour, which is different from the downstream market, which is a market that shows the relationship between Carrefour and consumers.
3) The element of implementing business policies. According to the commission, by acquiring shares in Alfa, Carrefour has implemented a business policy in order to have a larger market share, in this case controlling Alfa's market share.

On the element of negative impact of business policy, the commission is of the opinion that Carrefour's actions in exploiting the surplus of suppliers by abusing its control of 57.99% of the relevant upstream market share after acquiring Alfa, among others: first, applying the amount of trading terms to Alfa's suppliers, so that after the acquisition, the trading terms between company, suppliers and retailers tend to increase from year to year without justification; second, applying the amount of trading terms to Alfa's suppliers; and third, applying the amount of trading terms to Alfa's suppliers.

Second, it forced Carrefour’s suppliers to also supply Alfa. With these various policies, Carrefour is considered to have taken actions that cause the loss of effective competition in the relevant market, so that these conditions cause consumers to be unable to avoid the abuse of market power by Carrefour so that in the short term consumers can lose choices, and the actions taken show an increasing trend so as to make the conditions detrimental to consumers potentially remain in the long term.

Therefore, the commission considers that there is a negative impact on competition as a result of Carrefour’s acquisition of Alfa. In addition, Carrefour also conducts a competitor check (controlling competition), so that Carrefour can find out the prices of supplier goods to competitor places. This affects the amount of the trading terms system made by Carrefour as the amount of the trading terms system results in a limitation because the system is often copied by other company so that the trading terms system tends to increase. As a result, suppliers are not flexible in negotiating to determine trading terms. The supplier’s intensive on new products will also be reduced as profits are absorbed into retail. This is because there is a coordination arrangement in determining the trading terms to suppliers, where Carrefour is the determinant. The high frequency of Carrefour workers moving to other retailers causes Carrefour’s trading terms to also be implemented by other competitors.

In its consideration, the Commission has concluded that the acquisition of Alfa by Carrefour increased the market power possessed by Carrefour or in Cooter and Ullen term as extreme markets structure. To achieve this position of control, Carrefour sets various trading terms to suppliers of goods to Carrefour’s space selling area and market entry barriers. Based on this, Carrefour is declared to have violated Article 25 paragraph (1) letter (a) of Law Number 5 of 1999. Article 25 paragraph (1) letter (a) states: Company are prohibited from using a dominant position either directly or indirectly to: a. set trade conditions with the aim of preventing and or obstructing consumers from obtaining goods and or services that compete in terms of price and quality.

The market control by Carrefour resulted in the occurrence of a dominant position which, according to the provisions of Article 25 paragraph (2) of Law No. 5 of 1999, is when (a) one company or a group of company controls 50% (fifty percent) or more of the market share of a certain type of goods and or services; or (b) two or three company or groups of company control 75% (seventy-five percent) or more of the market share of a certain type of goods and or services. The Commission considers that Carrefour has a market share of more than 50% (fifty percent), amounting to 57.99% (fifty-seven point ninety-nine percent) in the hypermarket and supermarket services market in the entire territory of Indonesia arising after the acquisition of Alfa shares.

To smooth out its intentions as a concentration of economic power, Carrefour sets trade conditions for company, especially suppliers of goods. The terms of cooperation between suppliers of goods and Carrefour are clearly stated in the cooperation agreement, which the parties use as a measure that the agreement can be the percentage is measured by how many company compete in the relevant market, not the increase in the amount of production output. The upstream relevant market is the market that shows the relationship between suppliers of goods/services and Carrefour, which is different from the downstream market, which is the market that shows the relationship between Carrefour and consumers.

In terms of market share, Carrefour shows high concentration and tends to increase. This means that the relevant market conditions are dominated by Carrefour. Therefore, the commission considers that the condition of the relevant upstream market is highly concentrated with an increasing trend, where Carrefour is the dominant company in it. Prior to the acquisition of Alfa in 2007, the HHI level of the industry reached 2,950.09 with a CR4 value of 93.36%, indicating a very high concentration of the industry. After the acquisition this figure increased further. The HHI and CR4 values indicate the market power possessed by Carrefour which affects the reduction of fair competition. This is reasonable enough to state that Carrefour, which has market power, is categorized as an illegal act. Market power owned by Carrefour is declared to violate business competition law if the market power harms other company and harms consumers and society as a whole, not to mention applying barriers to entry to other company. The commission refers to the findings of several unilateral behaviours of Carrefour as an attempt to exploit surpluses. The commission refers to the findings of some unilateral behaviour of Carrefour as an attempt to exploit the surplus of its suppliers. Thus, the impact of Carrefour's trading terms on suppliers creates unfair competition and prevents consumers from obtaining competitive goods and services.

Legal Impact of the KPPU Decision

One of the impacts of the cancellation of the acquisition of Alfa shares by Carrefour is that the legal status of the company whose acquisition transaction has been cancelled by the KPPU actually becomes increasingly unclear and legal uncertainty arises. This is because the law on the prohibition of monopolistic practices and business competition does not regulate the mechanism of returning to the original state of the acquired company, in addition to requiring a lot of costs because first, the absorbing company is obliged to re-establish the company in accordance with its legal provisions. Second, the absorbing company must return the absorbing company's shares to the absorbed company, but there is no clear mechanism regarding the return procedure and share ownership status. Likewise, how is the mechanism for returning obligations to the state such as share purchase tax and costs related to the acquisition event that has occurred.

So the status of share ownership of the company that has returned to its original state has not been regulated in the applicable laws and regulations other than through the mechanism of conducting an Extraordinary General Meeting of Shareholders (EGMS) to sell back the shares that have been purchased to the original owner. Whereas this can be arranged by placing assets and liabilities to their original position, so that the status of share ownership will also return to what it was before the company was acquired. This kind of legal vacuum will clearly harm business competition in the decision to declare unfair competition and monopolistic practices in the merger of companies.

The Law Number 40 of 2007 (UUPT) itself does not even explain the transfer of rights to shares that are retroactive (returned to the way it was before the agreement). Article 38 paragraph (1) of the Company Law only explains that share buy-backs can only be implemented based on the approval of the General Meeting of Shareholders (GMS). While the legal status of the absorbing company is still an incorporated company, it certainly cannot do so. Meanwhile, Articles 48 to 62 of the Company Law also only regulate the transfer of rights to shares that are non-retroactive (*et nunc, ex ante factum*).

The mechanism of cancelling the acquisition of shares by KPPU apparently cannot guarantee the re-establishment of the company as before. KPPU's concern on the acquisition issue is not without reason and is not only about administrative compliance issues. The acquisition of shares can potentially affect market conditions in the relevant business of the companies, including the risk of dominant position or uncontrollable market control. Which may lead to monopolistic practices and unfair business competition (Almanda, Anam, and Sitowing 2019).

There are several issues related to the acquisition of shares in Indonesia under the law on the prohibition of monopolistic practices and unfair business competition. First, because the acquisition notification system used in Indonesia is the post notification system (Fitri, Sihabudin, and Winarno 2019). This is an obstacle because there is no further regulation regarding the mechanism of the procedure for returning to the original state (restitutio ad integrum) concerning share ownership which must go through the GMS. In this case, the absorbing company does not even have an existence anymore as a legal subject and must re-establish the company until it has a corporated status. This means that the transfer of rights to these shares is also difficult to be carried out by Carrefour to Alfa. Second, the cancellation of the acquisition by KPPU was not followed by a follow-up with KPPU Regulations to explain the mechanism of procedures for transferring rights to shares to the absorbing company in the context of *restitutio ad integrum* (Fitri, Sihabudin, and Winarno 2019). This means that there is a legal vacuum (*rechtsvacuum*) here. This will be an obstacle for company whose company acquisitions are cancelled by KPPU and provide considerable losses considering that the stages of the company acquisition agreement are costly and labour-intensive.

So far, KPPU has never cancelled a prohibited company acquisition transaction except in the case of the cancellation of the acquisition of shares of PT. Alfa by Carrefour. In the KPPU Decision No. 09/KPPU-L/2009, one of the rulings stated "ordering Carrefour to release all of Alfa's ownership to parties that are not affiliated with Carrefour" (Inu 2010), meaning that the KPPU here cancelled the transaction and indirectly caused legal consequences for Carrefour to conduct *restitutio ad integrum*. However, in that case, Carrefour filed an objection to the KPPU decision and the South Jakarta District Court granted Carrefour's objection and stated that there was no monopoly in the business conducted.

If KPPU does indeed cancel the company's acquisition, it will also be a challenge regarding its execution. Because KPPU actually does not yet have the authority to carry out the execution of its own decisions. The authority of KPPU seems strong to be attached to KPPU, but in practice there are still weaknesses related to the execution. Violations of the acquisition provisions will be examined by KPPU and then given a penalty if proven to have committed a violation (Putri, Prananingtyas, and Mahmudah 2019).

DOI: https://doi.org/10.37893/jv.v2i1.395

D. CONCLUSION

KPPU through the Decision Number 09/KPPU-L/2009 has proven that Carrefour violated the provisions of Article 17 paragraph (1) and Article 25 paragraph (1) letter a of Law Number 5 Year 1999 where Carrefour after acquiring Alfa shares controlled 57.99% market share, using the terms Cooter and Ullen extreme market structure through barriers to entry and regulations prohibiting entry into certain markets with terms and conditions that are very burdensome for other business actors.

The KPPU through its decision ordered Carrefour to return all the shares it had purchased to Alfa. The problem is that Law Number 5 Year 1999 does not regulate the mechanism for returning the shares and also the tax and other fees for the sale and purchase of shares.

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