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## Principles of fair competition as an effort to prevent monopoly crimes in the procurement of goods and services

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### Abstract

Deviations in the procurement of goods and services have become a never-ending topic of discussion, various forms of deviation and various cases related to goods and services have become real facts, there are legal policies that must be corrected, criminal acts of monopoly in the form of conspiracy which also give rise to unhealthy business competition is still widespread today, dynamic changes in procurement regulations and differences in the legal basis used in organizing procurement do not appear to have been implemented effectively. In the procurement of goods and services there are still many gaps in irregularities in procurement starting from the procurement stage, selection of providers, up to contract implementation which is still worrying using various forms of monopoly criminal acts, namely horizontal, vertical and even horizontal-vertical collusion, this proves that the procurement of goods and services is not appropriate with the principles of Healthy Competition. The legal issues that will be examined are: The mechanism for procuring goods and services is in accordance with the principles of Fair Competition; Implementation of legal considerations in the form of legal opinions, legal assistance and legal audits by the Prosecutor's Office in realizing healthy competition in the procurement of goods and services; future criminal legal policies in order to prevent criminal acts of monopoly in the procurement of goods and services. The research used is normative legal research. The approaches used are statutory approach, case approach and conceptual approach. Discussion: The dynamism of regulations in the procurement of goods and services does not mean that fraud will be eliminated, it has been proven that up to now there are still many loopholes for irregularities in procurement starting from the procurement stage, selection of providers, to contract implementation which is still worrying using various forms of monopoly crime, namely horizontal and vertical conspiracy even horizontally vertical, this proves that the procurement of goods and services is not in accordance with the principles of Healthy Competition.

**Keywords:** principles of fair competition, crime, procurement of goods and services

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### Introduction

The economy is the main thing of a country, it is a necessity when the state apparatus carries out an innovation in fulfilling its economy, this fulfillment includes a goal of welfare for all its citizens, in Paragraph IV of the Preamble to the 1945 Constitution states that in the formation of the Indonesian state government one of The aim is to advance general welfare which, if implemented in depth, is related to the economy itself, accelerating economic fulfillment through good and clean governance needs to be supported by effective, efficient, transparent and accountable financial management, to increase the efficiency and effectiveness of the use of state finances. Spent through the process of procuring government goods and services, efforts are needed to create openness, transparency, accountability and the principles of healthy competition/competition in the process of procuring government goods and services so that goods and services are obtained that are affordable and of good quality and can be accounted for both in terms of physical, financial and its benefits for the smooth running of government tasks and community services, based on the description above, this research is directed at the national economic system.

In the considerations in Law No. 25 of 2004 concerning the National Development Planning System (UU SPPPN), the strategic policy that must be taken by the Republic of Indonesia as a developing country is to carry out development. To ensure that development activities run effectively, efficiently and on target, national development planning is required and compiled in a national development planning system. Based on Article 2 paragraph (4) of the SPPPN Law, it aims to:

1. Support coordination between development actors.
2. Guarantee the creation of integration, synchronization and synergy both between regions, between spaces, between times, between government functions, as well as between the center and regions.
3. Ensure linkage and consistency between planning, budgeting, implementation and supervision, optimizing community participation, ensuring the achievement of efficient, effective, fair and sustainable use of resources.

The realization of national development planning requires the procurement of goods and services, the reason for the procurement of goods and services in government agencies is the main task of the existence of government agencies, not to produce goods and services aimed at profit-seeking orientation<sup>[1]</sup>, but it is more about providing services to the community, therefore, the government needs goods and services in order to improve public services on the basis of logical and systematic thinking, following principles and ethics and based on applicable procurement methods and processes<sup>[2]</sup>. Procurement of goods and services is one of the stages of the project cycle required by government agencies, the process starts from needs planning to completion of all activities to obtain goods and services between two parties in accordance with the agreement or contract<sup>[3]</sup>.

Procurement of goods and/or services has been determined and legalized by the Indonesian Government through a Presidential Regulation, including Presidential Regulation Number 12 of 2021 concerning Amendments to Presidential Regulation Number 16 of 2018 concerning Government Procurement/Services. Apart from this regulation, guidelines for implementing the procurement of goods have also been established and services, which are regulated in the Government Goods/Services Procurement Policy Agency Regulations. The Government Goods/Services Procurement Policy Agency Regulations are guidelines for implementing the procurement of goods and services which are used in each process according to the type of characteristics and process of procurement of goods and services, in addition to Presidential Regulations and LKPP Regulations (Government Goods/Services Procurement Policy Institute Regulations).

Procurement of goods/or services in general is also subject to laws relating to anti-monopoly and conspiracy which are currently regulated in Law Number 6 of 2023 concerning the Determination of Government Regulations in Lieu of Law Number 2 of 2022 concerning Job Creation Becoming Law, previously These regulations are contained in Law Number 5 of 1999 concerning Unfair Business Competition and Anti-

Monopoly as one of the agreements regulated in this Law. These regulations are present to fulfill the need for healthy competition and are expected to be able to realize social justice such as which is outlined in Article 33 of the 1945 Constitution which is coupled with the principle of Fair Competition.

Healthy Competition by means of equal treatment and not differentiating between business actors at each level is a step to prevent collusion in procurement, it is hoped that healthy competition can minimize the occurrence of corruption in the field of goods and/or services<sup>[4]</sup>. Robert Klitgaard, argued that corruption occurs because of monopoly power over economic resources accompanied by the authority to manage them without accountability. These three elements form a single unit that will always hold great potential or opportunities for corruption<sup>[5]</sup>.

Corruption cases handled by the Police, Prosecutor's Office and Corruption Eradication Committee are mostly related to the procurement of goods and services. Not a few state administrators, both executive, legislative and private parties, are forced to deal with the law because they are suspected or proven to have committed irregularities or used the government budget inappropriately through government projects, especially in terms of procurement of government goods/services, furthermore if Paying close attention to various regulations related to the procurement of goods and services, there is a lack of synchronization between the principles of Healthy Competition promoted by the government and the regulations below, this leads to conflicting regulations, creating opportunities for irregularities committed by perpetrators in the procurement of goods and/or services which can be said to be a form of criminal act. in the procurement of goods and services in the form of denial of the principles of healthy business competition, especially at the tender stage, even though in the Job Creation Law there are no criminal sanctions, in this case the author sees a regulatory vacuum, namely regarding conspiracy which is included in the act. Crime, conspiracy occurs to benefit oneself or other people, resulting in criminal acts, the potential for conspiracy is what can lead to criminal acts of corruption.

Conspiracy is mentioned in Article 1 paragraph (8) which explains that: "Conspiracy or business conspiracy is a form of cooperation carried out by business actors with other business actors with the aim of controlling the relevant market for the interests of the colluding business actors." Conspiracy can result in business competition which is unhealthy, further explained in Article 22 of Law Number 5 of 1999<sup>[6]</sup> explaining that business actors are prohibited from conspiring with other parties to organize and/or determine the winner of a tender so that it can result in unhealthy business competition, regulated further in the Regulation of the Chairman of the Commission Business Competition Supervisory Number 3 of 2023 concerning Guidelines for the Prohibition of Conspiracy in Tenders.

Business Competition Supervisory Commission (KPPU) Regulation no. 02 of 2010 concerning Guidelines for Article

<sup>1</sup> Adrian Sutedi, *Aspek hukum pengadaan barang & jasa pemerintah dan berbagai permasalahannya*, (Jakarta: Sinar Grafika, 2016), h. 12.

<sup>2</sup> Abu Salman Lubis. *Prinsip-Prinsip Pengadaan Barang/Jasa*, (Jakarta: Lembaga Pengembangan Insan Indonesia, 2017), h. 32.

<sup>3</sup> Purnomo Edy Mulyono. *Analisis pelaksanaan pengadaan barang dan jasa secara elektronik*, (Surabaya: Airlangga Development Journal: 2016) h. 37

<sup>4</sup> Alun Simbolon, *Hukum Persaingan Usaha*, (Liberty Jogjakarta, 2012), h 377

<sup>5</sup> Robert Klitgaard, *Penuntut Pemberantasan Korupsi dalam Pemerintahan Daerah*, (Jakarta: Yayasan Obor Indonesia, 2002), h. 29.

<sup>6</sup> Budi L. Kagramanto, Implementasi UU No. 5 Tahun 1999 Oleh KPPU, *Jurnal Ilmu Hukum Yustisia*, Vol, No, 2007, h. 2.

22 of Law Number 5 of 1999 concerning Prohibition of Conspiracy in Tenders, which includes Tenders carried out within the Government which are financed by the State Revenue and Expenditure Budget/Regional Revenue and Expenditure Budget, Tenders carried out within the State-Owned Enterprises or Government assignments and tenders carried out in the private sector, further Article 5 of this regulation explains that forms of tender conspiracy include horizontal conspiracy, vertical conspiracy and horizontal and vertical conspiracy.

Based on this definition, the basic scope of application of Article 22 is tenders or offers to submit prices which can be done through open tenders, limited tenders, public auctions and limited auctions. KPPU emphasizes that direct selection and direct appointment which are part of the tender/auction process are also covered in the application of Article 22 of Law Number 5 of 1999. Through this KPPU Regulation, it means that the word tender has been expanded by KPPU to also include auction activities, direct selection, and direct appointment, this is also in line with the Job Creation Law.

Regulating healthy competition should be the focus of the government as a commitment to realizing just economic development and creating economic efficiency to realize social welfare, the background for creating a healthy, effective and efficient business climate so that it can encourage economic growth and the functioning of a healthy market economy [7]. The aim of enacting this law is none other than to safeguard the public interest and increase national economic efficiency as an effort to improve people's welfare, create a conducive business climate through regulating healthy business competition so as to ensure certainty of equal business opportunities for tenders for procurement of goods and services, but to date there are still many cases related to the procurement of tenders for goods and services, this must of course be looked at in depth, especially regarding unhealthy business competition [8] in the form of conspiracy, this condition should be the concern of the government, especially law enforcement agencies, one of which is [9].

The Prosecutor's Office is aggressively carrying out the eradication of criminal acts of corruption. The Prosecutor's Office itself is present in its capacity as a law enforcement agency. In this case, apart from carrying out law enforcement, the Prosecutor's Office in the civil and state administration sector also has several duties, one of which is providing legal considerations. The authority to provide legal considerations is a preventive measure that can be provided by the Prosecutor's Office through its authority in the civil and state administration sector, because through the legal considerations provided, it is hoped that it can prevent decision-making officials in both government and corporate (BUMN/BUMD) from making mistakes in making decisions because it has no legal basis [10].

By providing legal considerations, it is hoped that before making a decision, decision-making officials both in government and corporations (BUMN/BUMD) have gone through the correct mechanism and authorization so that they

can avoid the potential for unlawful acts, as in Article 34 paragraph (2) of Law Number 16 of 2004 concerning the Indonesian Prosecutor's Office which explains that the Prosecutor's Office can provide considerations in the legal field to other government agencies, legal considerations themselves can be realized in 3 (three) things, namely providing legal opinions, legal assistance and legal audits carried out by the State Attorney as an embodiment Attorney General Regulation RI Number Per-025/A/JA/11/2015 concerning Guidelines for the Implementation of Law Enforcement, Legal Aid, Legal Considerations, Other Legal Actions and Legal Services in the Civil and State Administration Sector, this is a preventive measure such as providing signs -legal signs in the issuance of legal opinions, legal assistance and legal audits of a project or making a contract agreement, which is one of the steps that the government can take as a form of prevention against criminal acts in the procurement of goods and/or services to create a climate of healthy competition in Indonesia.

Based on the problems above, the author is interested in studying the problems more deeply, namely: 1). Is the procurement mechanism for goods and services in accordance with the principles of Fair Competition?; 2). How is the implementation of legal considerations in the form of legal opinions, legal assistance and legal audits by the Prosecutor's Office in realizing healthy competition in the procurement of goods and services? and 3). What will be the future criminal law policy to prevent criminal acts of monopoly in the procurement of goods and services?

### Research Methodology

The research used is normative legal research. Normative legal research is research based on legal materials which focuses on reading and studying primary and secondary legal materials, so that legal research is carried out to produce arguments, theories and new concepts as prescriptions in solving the problems faced [11].

The research approach that will be used in this research is the statutory approach. The statutory approach is carried out by examining all laws and regulations related to the legal issue being handled. Second, the case approach, which is research on cases related to the research being studied, and third, the conceptual approach, which is research on legal concepts such as legal functions, legal institutions, and legal sources. This approach departs from the doctrines that have developed in legal science regarding the procurement of goods and/services with the principles of Fair Competition.

### Discussion

#### 1. The mechanism for procurement of goods and services is in accordance with the principles of healthy competition

In the function of government services in the context of implementing development activities, in general there are two large groups of activities or activities that initiate the need for procurement of goods/services, namely operational activities for implementing government activities and

<sup>7</sup> Suyud Margono, *Hukum Anti Monopoli*, (Jakarta: PT Sinar Grafika, 2009), h.5

<sup>8</sup> Mustafa Kamal Rokan, *Hukum Persaingan Usaha*, (Jakarta: PT Raja Grafindo Persada, 2010), h.100

<sup>9</sup> Hermansyah, *Pokok Pokok Hukum Persaingan Usaha di Indonesia* (Jakarta: Kencana, 2008), h.3

<sup>10</sup> Munir Fuady, *Pengantar Hukum Bisnis Menata Bisnis Modern di Era Global*, (Jakarta: PT Citra Aditia Bakti 2012), h.214

<sup>11</sup> Peter Mahmud Marzuki. *Penelitian Hukum Cetakan Kesembilan*. (Jakarta: Kencana Prenada Media Group), h. 35.

development activities in the form of various investments throughout Indonesia<sup>[12]</sup>. Procurement of goods/services related to the operation of government service functions is usually carried out to support daily operational activities which are repetitive in nature and have a fixed pattern of procurement needs, for example the purchase of office stationery, or other needs to support services to the community, over time<sup>[13]</sup>. The dynamics of goods and services regulations is a complicated and interesting matter, because almost every year regulations related to goods and services are changed, most recently in 2021 there was Presidential Regulation Number 12 of 2021 concerning Amendments to Presidential Regulation Number 16 of 2018

concerning Procurement of Goods/ Government Services, this is certainly something that must be studied together, the dynamic changes in procurement regulations and differences in the legal basis used in organizing procurement, are influenced by time, organizers and funding sources, so it is necessary to choose the right legal basis, in this case the author has collect regulatory guidelines that can be implemented, not only in Presidential Regulations but also in Government Goods/Services Procurement Policy Institute Regulations or other regulations covering the procurement of goods and services in various sectors or situations, namely as follows:

**Table 1:** Regulatory guidelines for procurement of goods and services

No	Type/Characteristics/Procurement Process	Regulatory Guidelines
1.	Preparation of government procurement planning.	<ul style="list-style-type: none"> <li>▪ Presidential Regulation of the Republic of Indonesia Number 12 of 2021 concerning Amendments to Presidential Regulation Number 16 of 2018 concerning Procurement of Government Goods/Services.</li> <li>▪ Government Goods/Services Procurement Policy Institute (LKPP) Regulation Number 11 of 2021 concerning Planning Guidelines for Government Goods/Services Procurement.</li> </ul>
2.	Organizing government procurement with self-management.	<ul style="list-style-type: none"> <li>▪ Presidential Regulation of the Republic of Indonesia Number 12 of 2021 concerning Amendments to Presidential Regulation Number 16 of 2018 concerning Procurement of Government Goods/Services.</li> <li>▪ Government Goods/Services Procurement Policy Institute (LKPP) Regulation Number 3 of 2021 concerning Self-Management Guidelines.</li> </ul>
3.	Organizing government procurement with Providers.	<ul style="list-style-type: none"> <li>▪ Presidential Regulation of the Republic of Indonesia Number 12 of 2021 concerning Amendments to Presidential Regulation Number 16 of 2018 concerning Procurement of Government Goods/Services.</li> <li>▪ Government Goods/Services Procurement Policy Institute (LKPP) Regulation Number 12 of 2021 concerning guidelines for implementing government procurement of goods and services through providers.</li> </ul>
4.	Maintenance exempt procurement.	<ul style="list-style-type: none"> <li>▪ Presidential Regulation of the Republic of Indonesia Number 12 of 2021 concerning Amendments to Presidential Regulation Number 16 of 2018 concerning Procurement of Government Goods/Services.</li> <li>▪ Government Goods/Services Procurement Policy Institute (LKPP) Regulation Number 5 of 2021 concerning Guidelines for Procurement of Goods/Services that are Excluded in Government Procurement of Goods/Services.</li> </ul>
5.	Organizing the procurement of Construction Services.	<ul style="list-style-type: none"> <li>▪ Presidential Regulation of the Republic of Indonesia Number 12 of 2021 concerning Amendments to Presidential Regulation Number 16 of 2018 concerning Procurement of Government Goods/Services.</li> <li>▪ Regulation of the Government Goods/Services Procurement Policy Institute (LKPP) Number 12 of 2021 concerning guidelines for implementing the procurement of Government goods and services through Providers.</li> </ul>
6.	Organizing BLUD procurement.	<ul style="list-style-type: none"> <li>▪ Presidential Regulation of the Republic of Indonesia Number 12 of 2021 concerning Amendments to Presidential Regulation Number 16 of 2018 concerning Procurement of Government Goods/Services.</li> <li>▪ Guidelines for Procurement of BLUD Goods and Services determined by the BLUD Leader</li> <li>▪ If not yet available, refer to Presidential Regulation Number 16 of 2018 and its amendments (PBJP).</li> </ul>
7.	Implementation of e-Purchasing.	<ul style="list-style-type: none"> <li>▪ Presidential Regulation of the Republic of Indonesia Number 12 of 2021 concerning Amendments to Presidential Regulation Number 16 of 2018 concerning Procurement of Government Goods/Services.</li> <li>▪ Government Goods/Services Procurement Policy Agency (LKPP) Regulation Number 9 of 2021 (Online Shops and Catalogs).</li> <li>▪ Decree of the Head of LKPP Number 122 of 2022 (Electronic Catalog Implementation).</li> </ul>
6.	Organizing procurement in BUMN.	<ul style="list-style-type: none"> <li>▪ Presidential Regulation of the Republic of Indonesia Number 12 of 2021 concerning Amendments to Presidential Regulation Number 16 of 2018 concerning Procurement of Government Goods/Services.</li> </ul>

<sup>12</sup> Ningrum Natasya Sirait, *Hukum Persaingan Usah Di Indonesia Uu No. 5 Tahun 1999 Tentang Larangan Praktek Monopoli Dan Peraingan Usaha Tidak Sehat*, (Pustaka Bangsa Pers, Medan 2004), h. 31

<sup>13</sup> Susanti Adi Nugroho, *Hukum Persaingan Usaha Di Indonesia*,(Jakarta: Kencana, 2012), h. 244

		<ul style="list-style-type: none"> <li>▪ Regulation of the Minister of State-Owned Enterprises PER-15/MBU/2012 of 2012 concerning Amendments to the Regulation of the Minister of State-Owned Enterprises Number PER-05/MBU/2008 concerning General Guidelines for the Implementation of Procurement of Goods and Services for State-Owned Enterprises.</li> </ul>
9.	Organizing procurement in the Education Unit.	<ul style="list-style-type: none"> <li>▪ Presidential Regulation of the Republic of Indonesia Number 12 of 2021 concerning Amendments to Presidential Regulation Number 16 of 2018 concerning Procurement of Government Goods/Services.</li> <li>▪ Regulation of the Minister of Education and Culture Number 18 of 2022 (PBJ Education Unit).</li> </ul>
10.	Organizing procurement of emergency treatment.	<ul style="list-style-type: none"> <li>▪ Presidential Regulation of the Republic of Indonesia Number 12 of 2021 concerning Amendments to Presidential Regulation Number 16 of 2018 concerning Procurement of Government Goods/Services.</li> <li>▪ Government Goods/Services Procurement Policy Agency (LKPP) Regulation Number 13 of 2018 (PBJP for emergencies).</li> </ul>

**Source:** processed with the author's creation

The regulations mentioned above have been used by the author in carrying out investigations on cases of procurement of goods and services. The complexity of irregularities in the procurement of goods and services makes the government continue to improve related regulations, this is none other than to prevent irregularities. The dynamics of regulations related to the procurement of goods and services from year to year, but in fact until now there is still a lot of corruption, especially in the procurement of goods and services, as stated by the Deputy Chair of the Corruption Eradication Commission Alexander Marwata "that most corruption cases occur in the goods and services procurement sector. Based on data held by the Corruption Eradication Commission, as many as 90 percent of corruption cases occur in the goods and services procurement sector. For example, in the process of procuring goods and services, this is mostly a case of corruption. If we talk about corruption, 90 percent of it is in the procurement of goods and services, therefore, the author tries to dissect irregularities in the procurement of goods and services from the procurement stage to the handover stage<sup>[14]</sup>. That the basic thing that needs to be considered is that the selection of regulations used needs to pay attention to aspects of the funding sources, such as: APBN, APBD, Loans, Grants, BUMN/BUMD, BLUD, apart from that, the selection of the basic regulations used must pay attention to the institutions that implement them, such as Regional Apparatus., BLUD, BUMN/BUMD, Community Organizations, Community Groups, which is no less important, it is necessary to pay attention to when procurement is carried out according to the stages of planning, preparation, selection of providers and contracts, therefore from all aspects of the procurement of goods and services there is no guarantee from irregular practices, including unfair business competition which leads to criminal acts<sup>[15]</sup>. Conspiracies that occur between business actors or providers of goods and services and fellow business actors or providers of competing goods and services.

That this conspiracy can be categorized as a conspiracy by creating false competition or as if there is competition created in such a way between tender participants, in this horizontal conspiracy it does not involve the Procurement Committee/Auction Committee/Users of goods or services.

Business Actors/Providers of Goods or Services play alone, in most of these conspiracies, business actors have 2 (two) or more businesses in the form of CV or PT and then submit them to the offer with different names, so that it appears as if there are competitors when in fact they are competitors artificially created, apart from that, many business actors still have family ties or other ties, making it easy for business actors to disguise this vertical conspiracy.

## 2. Implementation of legal considerations in the form of legal opinions, legal assistance and legal audits by the prosecutor's office in realizing healthy competition in the procurement of goods and services

The Prosecutor's Office, which is an institution that embodies law enforcement in Indonesia, has duties and authorities in its position which are strictly regulated in Law Number 16 of 2004 jo. Law Number 11 of 2021 concerning the Regional Prosecutor's Office, including in the criminal field, civil field, state administration field and in the field of public order and tranquility. Prosecutors with special powers can act both inside and outside the court for and on behalf of the state or government. Apart from that, the Prosecutor's Office can also provide legal considerations to other government agencies<sup>[16]</sup>.

The duties and authority of the Regional Prosecutor's Office in the field of Civil and State Administration did not just emerge when the field of civil and state administration was structurally formed at the Attorney General's Office in 1992, but historically has been known since 1922 (*vide Staatblad 1922 No. 522, Vertegenwoordigevan den lande in Rechten*). In its development, the non-litigation function in the form of Legal Considerations and Other Legal Actions in the form of providing facilitation, mediation and conciliation is growing rapidly in line with the direction of the current government's legal political policy in law enforcement which emphasizes preventative aspects compared to repressive measures.

In 2021, the Prosecutor's Office issued Prosecutor's Regulation Number 7 of 2021 concerning Guidelines for the Implementation of Law Enforcement, Legal Aid, Legal Considerations, Other Legal Actions, and Legal Services in the Civil and State Administration Sector. This guideline is a reference for institutions and State Attorneys in

<sup>14</sup> Udin Silalahi, *Perusahaan Saling Mematikan Dan Persengkongkolan Bagaimana Cara Memenangkan*, (Gramedia Jakarta, 2007), h.34

<sup>15</sup> Fadhilah, M. (2019). Penegakan Hukum Persaingan Usaha Tidak Sehat Oleh Komisi Pengawas Persaingan Usaha (KPPU) Dalam Kerangka Ekstrateritorial. *Jurnal Wawasan Yuridika*, 3(1), 55-72

<sup>16</sup> Pasal 34 UU Kejaksaan RI

implementation of Law Enforcement, Legal Assistance functions. Legal Considerations, Other Legal Actions, and Legal Services in the civil and state administration fields. because he considers that the Attorney General's Regulation Number PER025/A/JA/11/2015 concerning Guidelines for the Implementation of Law Enforcement, Legal Aid, Legal Considerations, Other Legal Actions, and Legal Services in the Civil and State Administration Sector is considered to be no longer in accordance with organizational and development needs community law, so it needs to be replaced <sup>[17]</sup>.

The Prosecutor's Office through the Civil and State Administration Sector must be able to focus more on prevention, such as providing legal guidelines in issuing Legal Opinions or Legal Assistance for a project or making a cooperation agreement contract to stakeholders, namely Government Institutions/Institutions, BUMN, BUMD. By providing legal signs from an early age regarding corruption, this is in line with one of the Prosecutor's work mottos, namely Know the Law, Avoid Punishment, so that efforts to first make bureaucrats aware when making decisions can avoid criminal acts, in this case unfair competition. in the form of monopoly or conspiracy that leads to criminal acts.

The Legal Opinion is prepared based on the problems raised by the Petitioner. The problem presented must be a civil and state administrative law problem. To obtain answers to the problems raised by the Petitioner, the State Attorney is obliged to carry out a normative juridical analysis. Normative juridical analysis is a method of studying legal issues requested based on applicable laws and regulations and other legal sources. Based on this understanding, to examine each problem raised by the Petitioner, the benchmarks used by the Attorney General are used. The state is the applicable laws and regulations and other sources of law. Normatively, statutory regulations are the sequence of statutory regulations as stated in Law Number 12 of 2011 concerning the Formation of Legislative Regulations as follows:

#### Chapter 7

(1) The types and hierarchy of Legislative Regulations consist of:

- a. The 1945 Constitution.
- b. Decree of the People's Consultative Assembly.
- c. Law/Government Regulation in Lieu of Law.
- d. Government regulations.
- e. Presidential decree.
- f. Provincial Regional Regulations.
- g. Regency/City Regional Regulations.

(2) The legal force of Legislative Regulations is in accordance with the hierarchy as intended in paragraph (1).

#### Chapter 8

(1) Types of Legislative Regulations other than those referred to in Article 7 paragraph (1) include regulations stipulated by the People's Consultative Assembly, People's Representative Council, Regional Representative Council, Supreme Court, Constitutional Court, Financial Audit Agency, Judicial Commission, Bank Indonesia, Minister, body, institution or commission of the same level

established by Law or the Government by order of the Law, Provincial Regional People's Representative Council, Governor, Regency/City Regional People's Representative Council, Regent/Mayor, Village Head or equivalent.

(2) Legislative Regulations as intended in paragraph (1) are recognized for their existence and have binding legal force as long as they are ordered by higher Legislative Regulations or are formed based on the authority.

After knowing the types and hierarchy of statutory regulations, the next thing that needs to be done is to understand the system of statutory regulations, which is related to the content of each statutory regulation as follows.:

- a. Content that must be regulated by law contains:
  1. Further regulations regarding the provisions of the 1945 Constitution.
  2. Order a law to be regulated by law.
  3. Ratification of certain international agreements.
  4. Follow up on the decision of the Constitutional Court.
  5. Fulfillment of legal needs in society.
- b. The content of the Government Regulation in Lieu of Law is the same as the content of the Law.
- c. The content of Government Regulations contains material for implementing the Law as it should.
- d. The contents of a Presidential Regulation contain material ordered by law, material to implement Government Regulations, or material to carry out the administration of government power.
- e. The content material of Provincial Regional Regulations and Regency/Municipal Regional Regulations contains content material in the context of implementing regional autonomy and assistance tasks as well as accommodating special regional conditions and/or further elaboration of higher statutory regulations.

Based on the description of the content of statutory regulations above, when conducting an analysis of a statutory regulation, it must be carried out from the highest level provisions first in a hierarchical manner so that a structured and systematic analysis can be produced <sup>[18]</sup>.

Analysis of the types and hierarchy of statutory regulations is carried out by taking into account legal principles, among others:

- a. *The principle of Lex Superior Derogat Legi Inferior, this principle means that higher regulations override lower ones (hierarchy principle), where in the event of a conflict, what is considered is the hierarchy of statutory regulations, for example when there is a conflict between Government Regulations (PP) with the Law, then the Law is used because the Law is of a higher rank.*
- b. *The principle of Lex Specialis Derogat Legi Generalis, the principle of law that is specific (lex specialis) overrides the law that is general (lex generalis), there are several principles that must be taken into account in the principle of lex specialis derogat legi generalis,*

<sup>17</sup> Amanda, S. (2019). Tinjauan Yuridis Tentang Larangan Praktek Monopoli Dan Persaingan Usaha Tidak Sehat Menurut Undang-Undang Nomor 5 Tahun 1999 (Doctoral dissertation, Universitas Tadulako)

<sup>18</sup> Rumimpunu, R. (2016). Penegakan Hukum Antimonopoli Dan Persaingan Usaha Tidak Sehat Berdasarkan Uu No. 5 Tahun 1999. *LEX ET SOCIETATIS*, 4(1).

namely: <sup>[19]</sup>.

1. The provisions found in general legal rules remain valid, except for those specifically regulated in the special legal rules.
  2. The provisions of the *lex specialis* must be equivalent to the provisions of the *lex generalis* (law with law).
  3. The provisions of the *lex specialis* must be in the same legal environment (regime) as the *lex generalis*. The Commercial Law Book and the Civil Code both belong to the civil law environment.
- c. *The principle of Lex Posterior Derogat Legi Priori, the principle applies to the same regulations, the newest regulations disable the old regulations. So regulations that have been replaced with new regulations, automatically based on this principle, the old regulations no longer apply. In carrying out the analysis, the State Attorney can interpret the following statutory regulations:*
1. Authentic, namely interpretation carried out based on the meaning determined by the regulator.
  2. Grammatical, namely interpretation based on the meaning of words according to grammar or according to custom.
  3. Systematic, namely interpretation carried out by reviewing the arrangement relating to other articles both in the same and other statutory regulations.

If there is a conflict between two or more laws and regulations, either vertically or horizontally, the State Attorney cannot determine which provisions apply and which do not apply. If a law is alleged to be in conflict with the 1945 Constitution of the Republic of Indonesia, the review is carried out by the Constitutional Court. Meanwhile, in the event that a statutory regulation under the Law is alleged to be in conflict with the Law, the review is carried out by the Supreme Court.

### 3. Future Criminal Law Policy to Prevent Monopoly Crimes in the Procurement of Goods and Services

The application of criminal law in criminal acts of monopoly, which in this case includes conspiracy to create unfair competition, is an interesting discussion. When we talk about monopoly, of course it is related to business competition within the scope of civil law, but in this case the author tries to dissect it further when a Unfair competition that occurs as a result of monopoly makes it a criminal act in the procurement of goods and services, the relationship between civil law and the procurement of goods and services can be discussed from the nature of civil law which regulates the relationship between the Procurement Committee/Tender Committee/Users of goods or services and Business Actors/Providers Goods or Services from the procurement process until the contract completion stage, the legal relationship is a contractual/agreement relationship, in the process of procuring goods and services, based on the delegation of authority represented by procurement officials, namely first PA/KPA, second Commitment Making Officer,

third Procurement Services Unit Working Group/Procurement Officer, and Committee/Official Recipient of Work Results. Meanwhile, providers of goods and services can be individuals or legal entities (private).

Procurement officials in carrying out legal relations in the field of agreements act individually/personally. This means that if there is a state loss, then the state will compensate the loss personally, as stipulated in Article 18 paragraph 3 of Law no. 1 of 2004 concerning the Treasury, states: "Officials who sign and/or ratify documents relating to letters of evidence which are the basis for expenditure at the expense of the APBN/APBD are responsible for the material truth and consequences arising from the use of the letters of evidence in question", in addition to the meaning There is no element of "unlawful" in the KPPU or business competition regulations, even though article 22 of Law no. 5 of 1999 which contains elements of unfair business competition. In the absence of regulations that specifically determine the element "against the law" in business competition law, the element "against the law" will be discussed as one of the elements in "acts against the law" as regulated in Article 1365 of the Civil Code.

The intersection between civil and criminal law in the procurement of goods and services, especially in monopoly and conspiracy, is something that is often debated. The KPPU as the supervisor of business competition always applies administrative sanctions if a violation occurs, in contrast to law enforcement officials who see a monopoly or conspiracy that makes it unhealthy <sup>[20]</sup>. Competition as an act against the law which could cause financial losses to the state, in this case against the law (*onrechtmatig*) can be interpreted narrowly or broadly. The narrow definition of against the law is an action that violates the subjective rights regulated by law (*wettelijksubjectiefrecht*) or is contrary to the legal obligations of the perpetrator as determined by law <sup>[21]</sup>.

The intersection of "against the law" in the context of criminal law and in the context of civil law stems from the difference in the nature of criminal law which is public in nature and civil law which is private in nature, the difference between going against civil law and going against criminal law lies in the interests that are violated, if you look further then in criminal cases, many public interests are violated, whereas in violating civil law, only personal interests are violated. Public interests in this criminal case are not only limited to formal interests but are also further related to state losses arising from an act, including in the procurement process goods and services.

Various business competition cases handled by the KPPU actually relate to criminal acts because there are state losses resulting from business competition. In the field, conspiracy to tender government goods or services is often related to criminal acts of corruption which are regulated in Law no. 31 of 1999 in conjunction with the Corruption Eradication Law, especially Article 2 paragraph (1) and article 3, namely regarding every person who benefits themselves and/or other people or corporations which can cause losses to the state or the state economy, in connection with this procurement goods and services in the concept of monopoly or conspiracy which

<sup>19</sup> Bagir Manan, *Hukum Positif Indonesia*, (Jakarta: FH UII Press, 2004) h. 56.

<sup>20</sup> Rilda Murniati, *Hukum Persaingan Usaha* (Bandar Lampung: Justice Publisher, 2014), h.145

<sup>21</sup> J. Satrio, *Hukum Perikatan, Perikatan yang Lahir dari Undang-Undang, Bagian Pertama*, (Bandung: Citra Aditya Bakti, 2001) h. 142.

causes a climate of unhealthy competition must be looked at in depth regarding whether the action is against the law, and/or whether the action is detrimental to the state's finances or economy, therefore the relationship between the KPPU and the legal apparatus is very close to be able to realize there is continuity of thought regarding unlawful acts in the process of procuring goods and services, whether in the form of monopoly or conspiracy which causes unfair competition.

Cassation Decision number 2608 K/Pid/2006, defendant Achmad Rojadi, has become a jurisprudence regarding the fulfillment of the nature of unlawfulness, which is not only based on the law but also on the sense of justice in society, in criminal law, especially in cases of criminal acts of corruption, has been There has been a shift in practice in court where going against the formal law (*formele wederrechtelijkheid*) is not an absolute element to convict someone, but there is an aspect against the material law (*materiele wederrechtelijkheid*) which can be taken into consideration by the judge's law, therefore the government, in this case, the KPPU, no longer needs to hesitate to be involved. There is a difference in the definition of going against the law in terms of civil law and criminal law, because as long as it is in the public interest and state losses, this matter can be delegated to law enforcement officials.

The need for goods and services is an important thing and cannot be separated from the administration of government, the availability of goods and services is apart from being part of the government's obligations as an effort to fulfill the needs of the community, it is also a need for the government in running its government, the application of general principles of good governance (AAUPB) including Impartiality/Non-Discrimination, the Principle of Orderly Administration of the State and the Principle of Justice as an embodiment of the principle of the State Attorney as an absolute necessity in order to achieve balance and healthy competition in the process of providing goods and services, this is also a driving factor for the realization of the government's idea of wanting every process government in the procurement of goods and services can run transparently, effectively, efficiently by implementing healthy competition in every procurement.

When talking about current legal policy, of course you have to pay attention to the direction of legal development in the National Long Term Development Plan (RPJPN) 2025-2045 and (National Medium Term Development Plan) RPJMN 2025-2029, this is the right moment to formulate future legal policy, bearing in mind there will be a change in leadership and changes to the National Medium Term Development Plan, legal policies in the procurement of goods and services are something that must be considered considering that there are still many cases of procurement of goods and services that lead to criminal acts.

The legal system is formed by the interaction between the seven elements above, so that if one element does not meet the requirements, then the entire legal system will not function as it should, or if one element changes, then the entire system or other elements will also or must change. In other words, changing the law alone will not bring improvement, if it is not accompanied by changes in the same

direction in the fields of justice, recruitment and legal education, bureaucratic reorganization, harmonization of work processes and mechanisms, and modernization of facilities and infrastructure as well as development of legal culture and behavior a society that recognizes law as something that is very necessary for peaceful, orderly and prosperous social and state life<sup>[22]</sup>.

The regulations for procurement of goods and services currently in force are Presidential Regulation of the Republic of Indonesia Number 12 of 2021 concerning Amendments to Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods/Services and Regulations of the Government Goods/Services Procurement Policy Institute (LKPP) or other regulations that cover procurement of goods and services in various sectors or situations, in the context of legal policy development, procurement of goods and services has an important meaning, namely first, procurement of goods and services as a protection and preference for domestic businesses, in this case the government has issued regulations related to national development must use domestic components (TKDN) as an effort to create healthy competition in realizing the national economy<sup>[23]</sup>. Second, the procurement of goods and services is a significant sector as an effort to grow the national economy. Third, the principles of procurement of goods and services must prioritize the principles of healthy competition as the main value in procurement, this is a real step that must be realized so that all can compete in a healthy manner without monopoly or conspiracy which could lead to criminal acts. Fourth, in the procurement of goods and services it touches all sectors in the aspect of nation building, therefore the realization of legal policy Future criminal law must adhere to the principle of healthy competition as the main form in the procurement of goods and services which can be stated in (RPJPN) 2025-2045 and (National Medium Term Development Plan) RPJMN 2025-2029.

Regulation of government procurement of goods and services requires clear legal regulations capable of fulfilling the principles of healthy competition, so that legal objectives, namely legal certainty, legal justice and legal benefits, can be obtained by the parties involved in the procurement process. Procurement of government goods and services, whether based on national law or international law, must be based on healthy competition, transparency, efficiency and non-discrimination. The Prosecutor's Office through the State Attorney in legal consideration activities has become something that is needed apart from being a companion and also as an advisor to procurement activities, the popularity of legal considerations is starting to become more popular. by the Prosecutor's Office is something that should be appreciated, considering that from year to year a lot of state money has been saved by the State Attorney, in 2023 the amount of state financial rescue will be IDR. 74,733,397,101,429,- (Seventy four trillion seven hundred seventy four billion three hundred ninety seven million one hundred one thousand four hundred and twenty nine rupiah) while the state money that can be recovered is Rp. 10,492,421,079,735,- (ten trillion four hundred ninety-two

<sup>22</sup> Sunaryati Hartono, *Upaya Menyusun Hukum Ekonomi di Indonesia Pasca Tahun 2003*, (Jakarta: BPHN dan Perum Percetakan Negara Republik Indonesia, 2004), h. 228.

<sup>23</sup> Yulina Juwita, *Larangan Persekongkolan Tender Berdasarkan Hukum Persaingan Usaha, Suatu Perbandingan Pengaturan di Indonesia dan Jepang*, Tesis Fakultas Ilmu Hukum Program Pasca Sarjana Universitas Indonesia, 2012, h 45.



billion four hundred twenty-one million seventy-nine thousand seven hundred thirty-five rupiah)<sup>[24]</sup> as a concrete form of the role of State Attorneys in national development, the involvement of State Attorneys becomes something vital that the government can implement in every procurement of goods and services as an effort to realize the principle of healthy competition.

The government must have the courage to issue a regulation regarding the involvement of the State Attorney in every procurement of goods and services, so that it can provide legal signs from an early stage of fraud, whether in the form of monopoly, conspiracy or unfair competition in the process of procuring goods and services, on the other hand, the prosecutor's office also must issue guidelines or regulations for State Attorneys regarding involvement in every procurement of goods and services by the government, apart from that the provision of knowledge of legal considerations for State Attorneys must properly prioritize the nature of State Attorneys as companions and advisors in procurement which is carried out by prioritizing the theory of legal objectives as The main provision in carrying out legal assistance, in this way the "principle of healthy competition" can be achieved.

### Conclusion

Procurement of goods and services is currently regulated in Presidential Regulation of the Republic of Indonesia Number 12 of 2021 concerning Amendments to Presidential Regulation Number 16 of 2018 concerning Government Procurement of Goods/Services and Government Goods/Services Procurement Policy Institution Regulations or other regulations covering the procurement of goods and services in various sectors. The dynamism of regulations in the procurement of goods and services does not mean that fraud will be eliminated, it has been proven that up to now there are still many loopholes for irregularities in procurement starting from the procurement stage, selection of providers, to contract implementation which is still worrying using various forms of monopolistic crime, namely horizontal, vertical and even horizontal conspiracy. vertically, this proves that the procurement of goods and services is not in accordance with the principles of Healthy Competition.

The authority of the Prosecutor's Office to provide legal considerations in the form of legal opinions, legal assistance and legal audits is an effort to prevent by providing legal signs from an early stage of unfair competition in the form of monopoly or conspiracy which leads to criminal acts of monopoly. In the future, Criminal Law policies are needed to equalize perceptions regarding unlawful acts in criminal and civil law so that the KPPU does not hesitate to hand over indications of monopoly in the form of conspiracy or otherwise to law enforcement officials. On the other hand, the involvement of State Attorneys in every procurement of

goods and services can be a solution, seeing that the many legal considerations of the Prosecutor's Office produce real results in saving state finances and restoring the state, the government and the prosecutor's office must complement each other in order to create the principle of healthy competition in the procurement of goods and services.

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