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Make or Buy Policy in the Manufacturing Industry in Connection with Most Favored Customer Clauses in Vertical Integration Under the Indonesian Competition Law

SANTI HAPSARI DEWI ADIKANCANA[1] AND YAYAN HERNAYANTO[2]

ABSTRACT

Making the decision to make or buy a component is a crucial matter for manufacturing company. Those activities carried out both in-house and out-house require significant efficiency results. One of the goals is to ensure supply ability from suppliers with certain quantities and specifications. Decision making with the "Make or Buy policy" is related to the provisions of MFC (Most Favoured Customer) clauses, which can lead to lessening competition among business actors and impact to consumer welfare. This article will further discuss the potential competition problems associated with MFC, which will be discussed into three categories: (1) Reducing Competition (2) facilitating collusion between competitors, and (3) exclusive impact on competitors at the buyer level. This research focuses on creating a decision-making model in the backward supply chain of the manufacturing industry. The ultimate purpose of this research is to provide benefits for previous research regarding make or buy decision models and vertical integration within the scope of business competition law in Indonesia.

***Keywords**: Lessening Competition, Make or buy policy, Most Favoured Customer.*

I. INTRODUCTION

The development of businesses and industry, whether founded by domestic entrepreneurs or by foreign investors, continues to grow with the business fields chosen by each investor. The business fields in Indonesia are many and varied. This is regulated in laws and regulations relating to investment in Indonesia.[3]

However, each product has its own life span called the product life cycle. Product life cycle is an important concept in marketing management because it can help companies understand the

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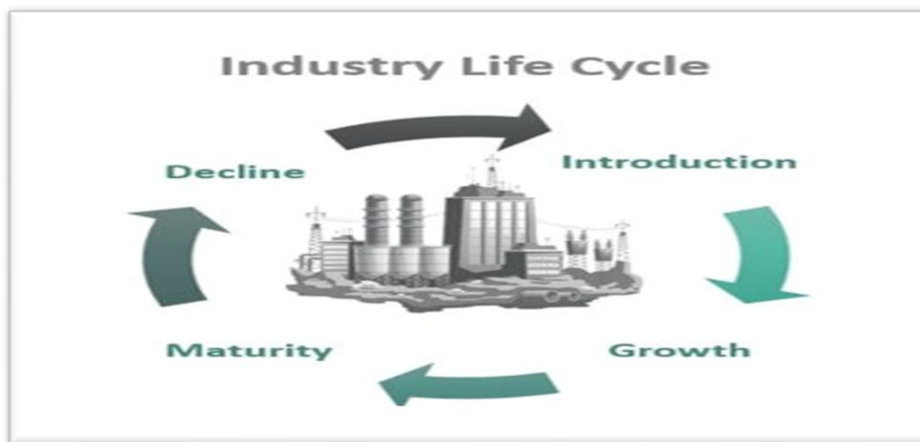
[3] Indonesia, *Undang-undang Penanaman Modal,* UU No. 25 tahun 2007 tentang Penanaman Modal, Lembaran Negara No. 67 tahun 2007.

stages that occur in a product and make the right decisions to manage the product.

If we look at the industrial life cycle, we will find several stages, namely: introduction, growth, mature and decline phases. The phase that business actors really avoid is the decline phase, which marks the end of the industry's ability to support growth. Market share negatively affects demand, leading to a decline in revenue.

This creates margin pressure, forcing weaker competitors out of the industry. Further consolidation is common as participants seek synergies and further benefits from scale. Downturns often signal the end of viability of existing business models, pushing industry players into adjacent markets. The decline phase can be delayed by large-scale product improvements or reuse, but this tends to prolong the same process.[4]



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www.wallstreetmojo.com

II. THE DEFINITION OF PRODUCT LIFE CYCLE[5]

Product life cycle is a concept that describes the journey of a product from the beginning of its launch until it is finally withdrawn from the market. Each product has a life cycle consisting of certain stages. The*se stages include introduction, growth, maturity, and decline.*

(A) Stages of the Product Life Cycle[6]

1. Introduction

The **introduction** stage is the stage at which a new product is introduced to the market. At this stage, the company must carry out many activities to introduce products to consumers, such as conducting promotional programs and building *brand awareness*. At this stage, product sales

[4] Ibid
[5] https://startupstudio.id/empat-tahapan-product-life-cycle-dan-faktor-pengaruhnya/
[6] Ibid

are usually still low and the company is still not profitable.

2. Growth

After passing the *introduction* stage, the product will enter the *growth* stage. At this stage, the demand and sales of products begin to increase rapidly. Companies need to adjust their production to meet growing consumer demand. Companies should also try to maintain their product position in the market and strengthen *brand awareness*.

3. Maturity

The *maturity* stage is the stage at which the product has reached peak sales. At this stage, product sales begin to slow down, competition intensifies, and the company must strive to maintain the position of the product in the market. At this stage, companies can also try to innovate products or introduce new variants to maintain consumer interest.

4. Decline

The decline stage is the stage when product sales begin to decline significantly. At this stage, the company must consider whether it is still feasible to maintain the product on the market or not. Companies can take several actions such as reducing production costs, promoting or withdrawing products from the market.

Business actors always want to maintain a position of growth and maturity. Don't want to experience a stagnant phase or even decline. If this happens, business people will be prepared to bear losses and the business they run will not be sustainable.[7]

III. Factors affecting the product life cycle

At every stage, there are unexpected factors that can arise and affect the *product life cycle*. These factors are generally beyond the control of the manufacturer so can be considered a significant risk. Here are the factors:

1. Competition in the market

Competition is an important factor that affects *the product life cycle*. If a new product has many strong competitors in the market, it can be difficult for the product to pass the *stages of introduction* and *growth*. Conversely, if the new product is an innovative product and meets unmet consumer needs, then the product can pass the introduction and *growth* stages more

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[7] Industry Life Cycle By THE INVESTOPEDIA TEAM Updated September 28, 2020, Reviewed by ROGER WOHLNER. The industry life cycle refers to the evolution of an industry or business based on its stages of growth and decline. The four phases of the industry life cycle are the introduction, growth, maturity, and decline phases. The industry life cycle ends with the decline phase, a period when the industry or business is unable to sustain growth.

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easily.

2. **Technology**

Technology is an important factor that affects *the product life cycle*. Technology-related products usually have a shorter life cycle due to rapid technological changes. Products that still use old technology and do not develop quickly, tend to have a longer life cycle.

3. **Changes in consumer lifestyle**

Changes in consumer lifestyles also affect the product life cycle. Products that fit current consumer trends and lifestyles tend to have higher demand.

4. **Price**

If the price of the product is too high, it will be difficult for the product to pass the introduction and growth stages. Conversely, if the price of the product is too low, then the product can quickly pass the introduction and growth stages, but it will be difficult to maintain a position in the market at the maturity stage.

5. **Promotion**

Proper and effective promotion can help the product pass the stages of introduction and growth. However, if promotion is not effective, then the product can be difficult to pass the stages of introduction and growth. Product life cycle is an important concept in marketing management because it can help companies understand the stages that occur in a product and make the right decisions to manage the product.

Based on small decision business actors hope that supplies from suppliers will not be disrupted, so that it does not result in production stopping (line stop). Line stops result in disruption of the manufacturing production flow which will have an impact on the previous or next stage.

Therefore, our curiosity arises about communication patterns between manufacturing companies and their suppliers. Decision making with the "Make or Buy policy" which is closely related to the agreement that will be made is related to the provisions of MFC (Most Favored Customer) clauses, which can lead to lessening competition among business actors and impact to consumer welfare. This article will further discuss the potential competition problems associated with MFC.

Curiosity arises about communication patterns between manufacturing companies and their suppliers. Decision making with the "Make or Buy policy" which is closely related to the agreement that will be made related to the provisions of MFC (Most Favoured Customer) clauses, which can lead to lessening competition among business actors and impact to consumer

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welfare. This article will further discuss the potential competition problems associated with MFC.

In Indonesia there were at least 2 cases that were decided by the Competition Authority, namely the Garuda Airline ticketing case, which required them to use a system that was still owned by Garuda (tying in). [8] Another case concerns unfair trading terms (trading terms) between Carrefour and its suppliers, where Carefour automatically deducts its current bills.[9]

Therefore, in this research the discussion will be divided into 3 things, namely being discussed into three categories: (1) Reducing Competition (2) facilitating collusion between competitors, and (3) exclusive impact on competitors at the buyer level.

(A) Research Methodology

The research method is normatively supported by empirical data, the processing and analysis of data depend on the type of data. In this case, normative legal research with secondary data consisting of primary legal materials, secondary legal materials, and tertiary legal materials. However, in order to manage and analyze legal material cannot escape from various interpretations methods in legal science and some experts theory. This research is also supported by empirical data, such as data interviews with business actors who carry out partnerships, among manufacturing industry and suppliers.

Large companies should focus on their line of business and the output they will produce, while small companies will focus on their areas of work with superior quality and competitiveness, so large companies will invite synergies with their respective roles. In addition, through good synergy and cooperation between the parties can produce a good final product as a result that is mutually beneficial for the parties.

Partnerships are carried out between large and small companies, with the aim of gaining competitiveness for both, while maintaining each other's existence. [10] With the factor of lower production costs, the movement of goods (logistics) is shorter, so in calculation it will be cheaper if it is purchased from supplier.

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[8] Putusan KPPU PUTUSAN Perkara Nomor: 01/KPPU-L/2003 tanggal 4 Agustus 2003.

[9] Putusan KPPU Perkara Nomor 02/KPPU-L/2005 tanggal 16 Agustus 2005.

[10] Robert Stanislawski and Grzegorz Szymanski, said that Competitiveness, which is very often associated with the position and the competitive potential, is closely linked to the long-term strategy. Among the factors that are essential for a high level of competitiveness are the perception by customers, the hallmarks of the company on the market, economic capacity and innovation. Used by SME existing opportunities are the essential form for the innovation development. Cooperation of Small Medium (SME's) and Large Enterprises in the Context of Open Innovation, Journal of Entrepreneurship, Management and Innovation, December 2017.

IV. Discussion

(A) Sustainability Production and the Continuity of Market

Business continuity management strategies are increasingly being implemented in companies represented in various industrial sectors. There are various factors that threatening the sustainability of the business, either it is external factors such as socio-economic instability, climate change, regulatory policies or the internal factors as part of the business process and strategies of the company. Both factors pose a risk to the continuity of the organization's activities and draw the attention of companies to the development of a strategy for disaster preparedness and recovery in the face of these threats.

Business continuity involves planning and preparing the company to implement business functions or quickly resume work in the event of an incident. The key goal of the continuity management strategy is to increase the company's resilience to incidents However, various factors also have different approach on the mitigating plan and the repressive mechanism. If the external factors sometimes not mitigatable, the internal factors such as the competitiveness products and efficiency of the production process could bu mitigated by the implementation of business continuity plans.

(B) Make or Buy Policy and Evaluating The Needs of Internal Supply in Inhouse or Outhouse

In the manufacturing industry, companies must consider every cost reduction decision in each process. One of them is by make or buy policy, this method is a powerful way and is widely taken by companies in the context of cost savings (efficiency). The decision to make or buy is an act or decision between producing an item internally or buying it from an external supplier (also known as subcontracting). Such decisions are usually made when a company that has manufactured a part or product, or modified it significantly, experiences problems with current suppliers, or experiences a decrease in capacity or varying demand.

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The Graphic of Risk and Advantage of Make or Buy Decision by cleverism.com

Some companies carry out all their operations in a series starting from the manufacture of raw materials to finished goods and carry out the final distribution of finished goods even to after-sales service. Some other companies are happy to integrate on a smaller scale by purchasing many of the parts and materials needed for their finished products. When a business engages in more than one activity across the value chain, it is vertically integrated. This kind of integration is quite common.

In the concept of vertical integration, it provides its own advantages for the parties who do it. Integrated companies are less dependent on their suppliers so that the flow of raw materials and spare parts for production can be ensured more smoothly and certainly than companies that are not integrated. In addition, some companies are confident that they can better manage quality by producing their own parts and materials rather than relying on quality control standards from external suppliers. What's more, an integrated company earns revenue from parts and materials "made" rather than "bought" in addition to revenue from its normal operations.

The benefits of vertical integration are offset by the benefits of using outside suppliers. By combining requests from different companies, suppliers can enjoy economies of scale. These economies of scale can result in better quality and lower costs than if a business attempted to manufacture parts or provide services on its own. At the same time, a business must take care of maintaining control over the tasks necessary to maintain its competitive position. Case in point: Hewlett Packard manages software for laser printers manufactured in collaboration with Canon Inc. of Japan.

(C) Identify and Choose The Supplier That Capable to Provide Quality, Cost, Delivery, Safety, Moral Productivity, and Environment (QCDSMPE)

The process to choose suppliers is crucial step that quite complicated. Company must be considering many aspects before placing their choice into those suppliers.[11] Several steps to consider and calculate which of the suppliers that will be choose by the company are:

1. First step: Identified and Classified Core Activities and Non-Core Activities

Core activities are perceived by customers as adding value and therefore become the main determinants of a product's competitive advantage. Distinguishing between core activities and non-core activities is a complex task. The process of identifying core competencies and activities should be carried out by top management along with input from teams from lower

[11] David Robert, *Developing a MAKE or BUY strategy for manufacturing business*, The Institution of Electrical Engineers, London, United Kingdom 1997, P. 2.

levels in the organization. Each team should include a broad share of members functionally, divisionally, and hierarchically. The team must identify the key determinants of competitive advantage in the market, industry, or strategic group in which the organization competes or may want to compete. The framework proposed above assumes that, in general, all non-core activities will be outsourced.

2. Second Step: Analyzing Companies' Competency

Once all core and non-core activities have been identified, the next section deals with analyzing the company's competence in core activities to obtain potential external sources. Therefore, what is done at this stage is to evaluate the relevant value chain activities. Each core activity selected must be compared with the capabilities of all potential external providers of that activity. This will allow the company to identify its relative performance for each core activity alongside number of measures chosen.

3. Third Step: Analyzing Total Cost of Core Activities

A total cost analysis of core activities is a stage that involves an attempt to measure all actual and potential costs involved in sourcing activities internally or externally. The activity includes all costs associated with the acquisition of activities throughout the supply chain, so it is not just the purchase price

4. Forth Step: Analyzing Company and Suppliers' Relationship

The last thing to determine supply is to perform a relationship analysis. A good relationship between the company and suppliers is a non-technical issue that is quite important and can have a lot of influence. Several issues must be addressed prior to the implementation of outsourcing core activities. Companies may want to maintain standardization that allows the technology of their activities to be exploited, even while being provided by other partners. Therefore, controlling the new product development and design process is important. Companies can build buyer-supplier relationships ranging from partnerships to competitive deals. From this potential supplier analysis, the company will filter potential suppliers who match the company and non-potential suppliers.

(D) Most Favored Customer and Competition Law

"The Most Favored Customer" (MFC) clause is a clause in an agreement or contract that requires one party to provide the same treatment as the most favorable treatment given to a third party. MFC clauses more frequently included in contracts for procurement of privately manufactured products. The inclusion of this clauses aimed to ensure that the contracting

authority receives at least as favorable pricing as other customers making similar purchases and mitigating the chance of price discriminations. In practice, however, it is challenging to satisfy MFC clauses because they often contain ambiguous comparative terms that make MFC compliance an onerous undertaking. Further, the transaction process also includes various selling matrix that make it harder to settle down the prices' standardization. Specifically, in a world of complex products and services, it often is difficult—if not impossible—to identify "similar" products sold pursuant to "similar" terms and conditions.[12] The condition that make compliance even more challenging is once those MFC clauses do not define the subset of purchasers that will be the comparative standard to determine whether a price adjustment is necessary to satisfy the contractor's MFC obligations.

MFC clauses can relate to business competition, especially when used in agreements between suppliers or service providers and business customers. This clause may include terms that affect business competition, such as prices, discounts or payment terms provided to customers. It is often used in international trade agreements, investment agreements, and supplier agreements.

The MFC pertaining clause was first in the payment clause for healthcare providers and suppliers of the India Health Program. In the agreement there is a clause stating the prohibition of price discrimination given by providers / suppliers to consumers. Company will pay the amount of payment that is equal to the supplier's most favored customer proven by the nominal that stated in invoices and other related pricing and proof of payment. The clause reads as follows:

(1) If a specific amount has been negotiated with a specific provider or supplier or its agent by the I/T/U, the I/T/U will pay that amount, provided that such amount is equal to or better than the provider or supplier's Most Favored Customer (MFC) rate, as evidenced by commercial price lists or paid invoices and other related pricing and discount data to ensure that the I/T/U is receiving a fair and reasonable price. The MFC rate limitation shall not apply if:

   i. The prices offered to the I/T/U are fair and reasonable, as determined by the I/T/U, even though comparable discounts were not negotiated; and

   ii. The award is otherwise in the best interest of the I/T/U, as determined by the I/T/U.

(2) If an amount has not been negotiated in accordance with paragraph (a)(1) of this

[12] Mitchell S. Ettinger & James C. Altman, Compliance with Most Favored Customer Clauses: Giving Meaning to Ambiguous Terms While Avoiding False Claims Act Allegations, 90 Notre Dame L. Rev. Online 1 (2015). P. 1-3

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section, the I/T/U will pay the lowest of the following amounts:

i. The applicable Medicare payment amount, including payment according to a fee schedule, a prospective payment system or based on reasonable cost ("Medicare rate") for the period in which the service was provided, or in the event of a Medicare waiver, the payment amount will be calculated in accordance with such waiver.

ii. An amount negotiated by a repricing agent if the provider or supplier is participating within the repricing agent's network and the I/T/U has a pricing arrangement or contract with that repricing agent.

iii. An amount not to exceed the provider or supplier's MFC rate, as evidenced by commercial price lists or paid invoices and other related pricing and discount data to ensure that the I/T/U is receiving a fair and reasonable price, but only to the extent such evidence is reasonably accessible and available to the I/T/U.

MFN clauses are also found in the Blue Cross case of the Blue Shield of Michigan in the US. In this case, the health insurance company Blue Cross has agreements with hospitals in the region for the provision of health services to insured customers. The U.S. Department of Justice (DOJ) took issue with MFC clauses in these contracts that require hospitals to charge other commercial insurers at least the same as they charge Blue Cross. A number of agreements feature 'MF C-plus' clauses, under which hospitals are required to charge competing commercial insurers more than they charge Blue Cross. In return for agreeing to the MFN clause, the hospital is allowed to increase the price charged to the commercial insurance company.[13]

The Navy Exchange Service Command (''NEXCOM'') and the Army and Air Force Exchange Service (''AAFES'') (collectively, the ''Exchanges'') operate facilities that provide goods and services to customers in the military community.1 The Exchanges enter into contracts with vendors that contain Most Favored Customer provisions.

Pursuant to those government contracts, vendors must certify to the Exchanges that the prices, terms, and conditions they offer the Exchanges are comparable to or more favorable than the prices the vendors charge their other customers. Defendant Philip Morris has, since at least 2002, entered into contracts with and sold cigarettes to the Exchanges.[14]

The Exchanges purchased approximately 1.8 million cartons of Marlboro cigarettes from Philip

[13] Jan Peter van der Veer, *Antitrust Scrutiny of Most-Favoured-Customer Clauses: An Economic Analysis,* Journal of European Competition Law & Practice, Vol. 4 (6), P. 1-3
[14] FEDERAL REPORT 3d series, West Law. P. 36

Morris at improperly inflated prices. Philip Morris's contract obligated it to comply with the Most Favored Customer provisions and to certify its compliance. However, Philip Morris sold cigarettes to its affiliates at lower prices than it charged the Exchanges for identical cigarettes, and those affiliates resold the cigarettes at prices that undercut the Exchanges' pricing. Therefore, in violation of False Claims Act (FCA). The United States district Court for the District of Columbia. The Court of Appeals, Pillard, Circuit Judge, held that:

(1) the federal government's awareness of the company's obligation to provide best prices to military did not amount to a public disclosure;

(2) the company's inter-office transmittal memorandum did not publicly disclosure the company's obligation to pro- vide best prices to military; and

(3) the Court would not consider the com pany's arguments that were not presented to the District Court.

However, the terms of MFC clauses often are broadly constructed without consideration to the burden placed on the supplier to comply with them. Other than the MFC in form of pricing discrimination, MFC practices also exist in form of volume order discrimination. In the business practice, favoritism practice not only comes by providing them cheaper price but also prioritizing their order rather than classified it by based on '*first come first serve'* principle.

(E) The Provision of The Most Favored Customer in Law Number 5 of 1999 Concerning Prohibition of Monopolistic Practices and Unfair Business Competition

A major question of oligopoly theory is whether firms can collude to achieve the monopoly outcome. Overt formal coordination, such as actual agreements to fix prices, has been the primary object of antitrust law. A more subtle form of coordination that resembles the monopoly outcome is tacit collusion, in which firms choose higher prices because of mutual recognition of their interdependence.

Even though Most Favored Customer (MFC) not explicitly prohibited and regulated in the Law Number 5 of 1999, the article number 15 of this law has the same negative impact with the practicalities of MFC in prioritizing the favored customer's order. The regulation as follow:

(1) Business actors are prohibited from making agreements with other business actors that contain requirements that the party receiving goods and or services will only supply or not resupply the goods and or services to certain parties and or in certain places.

(2) Business actors are prohibited from making agreements with other parties that contain

requirements that parties who receive certain goods and or services must be willing to buy other goods and or services from supplier.

(3) Business actors are prohibited from making agreements regarding certain prices or discounts on goods and or services, which contain requirements that business actors who receive goods and or services from supplier:

a. must be willing to purchase goods and or other services from supplier business actors; or

b. will not buy the same or similar goods and or services from other business actors who are competitors of supplier.

The regulation stated in article number 15 further explained in Business Competition Supervision Commission Regulation Number 5 of 2011. The regulation explained deeper form of agreement that are prohibited because violating the business conduct regulated in the article number 15 of law number 5 of 1999.

1. Article 15 paragraph (1) of Law No. 5 of 1999

Paragraph (1) explains the prohibition for business actors (upstream) to enter into exclusive distribution agreements, with other business actors, whether suppliers, distributors, or downstream business actors. The purpose of an exclusive distribution agreement is an agreement that contains an arrangement that suppliers will only supply or not resupply goods and / or services to certain parties and in certain places. In addition to potentially causing practices that harm healthy competition in the series of production - vertical distribution in the form of inter-brand and intra-brand competition, the element of supply restrictions in certain places also has the potential to cause regional division practices.

2. Article 15 paragraph (2) of Law No. 5 of 1999

Paragraph 2 explains the prohibition for business actors to make tying agreements. Tying agreement is an agreement that specifically tying business actors acting as suppliers (upstream sector) are not allowed to impose obligations for other business actors (as recipients of supplies and/or distributors) to purchase other products and/or services that are different from their basic products.

3. Article 15 paragraph (3) point a of Law No. 5 of 1999

Paragraph 3 point a regulates the prohibition for business actors to make agreements regarding or provide certain prices or discounts on goods and / or services that contain requirements that business actors who receive goods and / or services from supplier business actors must be

willing to buy other goods and / or services from supplier business actors.

4. Article 15 paragraph (3) point b of Law No. 5 of 1999

Paragraph 3 point b regulates the prohibition for business actors to make agreements regarding or provide certain prices or discounts on goods and / or services that contain requirements that business actors who receive goods and / or services from supplier business actors will not buy the same or similar goods and / or services from other business actors who are competitors of supplier business actors.

V. CONCLUSION

1. Make or buy is one way to develop a more agile supply chain. Working in collaboration with suppliers and by outsourcing and subcontracting it is possible to achieve a more flexible, more efficient and more agile supply chain.
2. The reason for being efficient in costs and so on does not result in the use of MFC being detrimental to other parties.
3. Restrictions on prices and product capacity from suppliers by the manufacturing industry, resulting in lessening competition, facilitating collusion and vertical restraint in supply transactions.

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