

THE URGENCY OF MINIMUM FEE DETERMINATION FOR UNDERWRITER BOND COMPANIES TO PREVENT THE POTENTIAL OF UNFAIR COMPETITION IN THE CAPITAL MARKET IN INDONESIA

Winarsih

S.H, University of Indonesia, INDONESIA, winarsih.winnn@gmail.com

Abstract

This research aims to analyze the potential of unfair competition in the underwriter companies of bond issuances and to analyze the urgency of the minimum fee determination to prevent the potential of unfair competition in the capital market in Indonesia. The main method uses in this research is literature study to obtain the objective results. Literature study to do towards some regulations, journals, scientific papers, newspapers and other sources which are further analyzed by the researcher. While the type of research used is normative juridical. The results of this research are: The first, there is potential of unfair competition in the underwriter companies of bond issuances that enables small companies are bankrupt. This is due to the underwriter tariff is too low and not worth with the risk borne. For example the fee for underwriters reaches zero percent, whereas the underwriter's duties are so numerous and the risks are huge, especially in full commitment agreement. This ways are used by the large securities companies to switch off the opponent. The second, the minimum fee determination of underwriter companies is very important to prevent unfair competition. This is due to there is no regulation concerning the minimum fee of underwriter companies in Indonesia. Despite there are the provisions of Article 20 of Law No. 5 of 1999 about Prohibition of Monopolistic Practices and Unfair Competition which prohibits businesses do selling at a loss, but the arrangement concerning about fee for the underwriter is not necessarily being a subject to this regulation because the mechanism entirely submitted to the market. Under these conditions, the government should make a minimum threshold for the underwriter companies to prevent unfair competition in the form of regulation.

Keywords: Underwriters Companies, Bond, Unfair Competition, Regulations.

1. INTRODUCTIONS

The capital market is one of the most rapidly growing businesses in Indonesia. The capital market has a big role for the economy of a country because of the capital market run two functions, namely the economic functions and financial functions. In addition the capital market is expected to increase the economic activities because capital market can use as funding alternatives for the companies so that the companies

can operate with a wider scale and will ultimately increase the company's revenue and can bring prosperity to the wider communities¹.

Therefore, the companies in Indonesia, nowadays compete to get funds from the communities with means initial public offering (IPO) because in addition to getting the fund for the companies, IPO is also used as a tool to get a good name in the communities and the companies has gained the trust. By these conditions the various kinds of products in the form of securities offered by the companies, one of which is the bond that is usually offered through a public offering in the stock exchange.

Companies in the issuance of securities in this case is a bond certainly not wheezing, if the issuance of bonds raised doubts whether the securities is released to the investors sold out or not, if after being released these securities are not sold out, then this is being a "disaster "for the companies, which will result in a loss because the cost incurred can not be withdrawn. In addition, it also would decrease the company's reputation. It required underwriters that acts as a guarantee to the securities that have issued². This is to guarantee the securities issued by the companies to be sold out. Therefore, the underwriters have an important role for the companies, especially for companies that offer its shares. Although under the regulation, the use of underwriters in a public offering is not a necessity.

Furthermore bonds that offered through a public offering, according to some sources has increased in 2017. This is can be seen from some of the companies that increase the supply of bonds on the stock exchanges in Indonesia. The rise of bonds issued by the companies or issuers realize or not has given great opportunities to underwriters bonds companies. However, in the monitoring of Monopoly Watch, many securities companies are arbitrarily to set tariffs or fee for the services that given by underwriter bond companies. Monopoly Watch analyst, Sri Haryanti indicated that there is bond companies that sets a fee below one percent, some even up to 0.5 percent³. This resulted in unfair competition on the companies and cause small companies suffer losses so that eventually will bankrupt.

Low set fee for the underwriter is certainly not comparable with the responsibility and the risk borne. In this case the underwriter bond companies have duties include: gives advice on the kind of securities which should be issued, the price which reasonable for these securities and term securities (bonds and credit securities)⁴. Also in the full commitment agreement, the underwriters also have to take the rest of the bonds that are not absorbed by the market⁵. Therefore the roles and responsibilities of underwriters are substantially high and have a high risk and if the fee received is too low it will cause the small underwriter companies bankrupt.

On the other side, the large securities companies has extensive financial group, it will not matter because they are able to provide bank guarantee. Foreign affiliated securities companies, for example, commonly use corporate guarantee from the holding company. So the holding company can backing up partially and cover the risks that are not covered by a local securities companies⁶. Therefore, small-scale underwriter companies who will receive the impact of a price war such unnatural. In addition there are indications that the tariff is used as a tool to switch off the opposing companies.

If we look into the regulations in Indonesia, basically there is Article 20 of Law No. 5 of 1999 about Prohibition of Monopolistic Practices and Unfair Competition which states that:

"Businesses are prohibited from supplying goods or services by way of selling at a loss or assign a very low price with the intention of getting rid of or turn off business competitors in the relevant market, resulting in monopolistic practices and or unfair business competition".

Based on this provision, business actors are basically prohibited from selling loss. But even though there is the provisions of Article 20 which mentioned above, it does not mean the securities companies who may set

¹ Kadiman Pakpahan, "Strategi Investasi di Pasar Modal", *Journal of The Winners*, Vol. 4 No. 2, (September 2003), p. 139

² Asril Sitompul (I), *Pasar Modal Penawaran Umum dan Permasalahannya*, Cetakan Ke-III, (Bandung: Citra Aditya Bakti, 2004), p. 75

³ Hukum Online, "Ada Indikasi Persaingan Usaha Tidak Sehat dalam Tarif Obligasi" <http://www.hukumonline.com/berita/baca/hol10454/ada-indikasi-persaingan-tidak-sehat-dalam-perang-tarif-obligasi> accessed on 5th September 2017 at 11.31 WIB

⁴ Kadiman Pakpahan, *Op, Cit*, p. 142

⁵ Hamud, M. Balfas, *Hukum Pasar Modal Indonesia*, (Jakarta: Tatanusa, 2012), p. 278

⁶ Hukum Online, "Ada Indikasi Persaingan Usaha Tidak Sehat dalam Tarif Obligasi" <http://www.hukumonline.com/berita/baca/hol10454/ada-indikasi-persaingan-tidak-sehat-dalam-perang-tarif-obligasi> accessed on 5th September 2017 at 11:31 WIB

the lower fee rate can take an action. Because currently there is no regulation that prohibits the minimum fee of bond issuance because the mechanism is fully submitted to the market⁷. These conditions led to a price war that is not fair and there is indications of unfair competition which is detrimental to the market. Based on the exposure, the researchers interested in conducting research how are the potential of unfair competition in underwriter companies of bond issuances and how are the urgency of minimum fee determination to prevent the potential of unfair competition in the capital market?.

2. METHODOLOGY

The research method used in this research is normative juridical research that is focused to study the application of norms in positive law⁸. Normative juridical is also an approach that uses legis positivist conception. This concept sees law as identical to written norms created and enacted by authorized institutions or authorities⁹.

Furthermore to compile the data, the researcher uses literature studies by collecting secondary data. Literature study was conducted by collecting the relevant literature in the form of books, journals, scientific articles, thesis or dissertations, legislations, and other materials related to the research. Furthermore, the researcher perform data analysis based on the results of the literature that has been acquired to obtain the results of the relevant conclusions.

3. RESULTS AND DISCUSSIONS

3.1 The Potential of Unfair Competition in Minimum Fee Determination for Underwriter Bond Companies

Basically underwriter have an important role in the capital market in Indonesia, although there is no obligation to guarantee the securities if companies want to do an initial public offering. The regulation on the capital market did not require a public offering conducted must use the assistance of underwriter. Therefore, the presence or absence of underwriters in a public offering or issuance of bonds is based on the needs of the issuer¹⁰.

Law No. 8 of 1995 defines that the underwriters as a party to a contract with the issuer to conduct a public offering in the interest of issuers with or without the obligation to purchase the remaining unsold securities¹¹. From the provisions of the aforementioned article, the main duties and functions of the underwriter are to market the securities offered by the issuer in a public offering. The underwriter acts as a salesman for the securities that the issuer will sell and for which the underwriter earns a wage fee¹².

Furthermore underwriter help issuer for prepare public offering including due diligence that required, help issuer set up statement registration and deliver it to Badan Pengawas Pasar Modal (Bapepam). After Bapepam stated effective the statement registration, underwriter then do preparation for marketing securities with inviting securities companies to join in syndication marketing and to sale the securities. Underwriter also will set the advertisement prospectus that needed, print prospectus and finally spread prospectus in order to sell the securities to the investor. The main duties of underwriters is for sell the securities that published by the companies to investor. But before that underwriters have an important role in the preparation undertaken by the companies, for example by give an advice to the companies about opportunities for funding and

⁷ *Ibid*,

⁸ Johnny Ibrahim, *Teori dan Metodologi Penelitian Hukum Normatif*, (Malang: Bayumedia Publishing, 2006), p. 295

⁹ Ronny Hanitijo Soemitro, *Metodologi Penelitian Hukum dan Jurimetri*, (Jakarta: Ghalia Indonesia, 1988), p. 13-14

¹⁰ Act of Capital Markets in Article 72 Paragraph 1 states that the underwriters appointed by the issuer. With the existence of this provision, there is no obligation to use the services of an underwriter in a public offering. It is entirely dependent on the willingness of issuers to use the services of an underwriters or not.

¹¹ Article 1 Point 17 of Law No. 8 of 1995 about Capital Market. Furthermore, in the United States under the provisions of Section 2 (a) (11) of the Securities Act 1933 the underwriter defined as "any person who purchased from an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from underwriter or dealer not in excess of the usual and customary distributors' or sellers commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer or any person under direct or indirect common control with the issuer.

¹² Hamud, M. Balfas, *Op, Cit.* p, 268

arranging the supply structure to be implemented¹³.

Besides the above reasons the need for underwriters also because of the difficulty in marketing, distribution and sale of securities, as based on provisions of the Act No. 40 of 2007 about Limited Liability Company (Company Law), shares or securities issued by the company should be taken by the financiers¹⁴. This underscores the importance of underwriters for the companies in public offering, though the capital market regulation, there is no obligation to use underwriters. Furthermore except the assignment as already mentioned, the underwriters also have responsibilities in underwriter agreement based on Article 39 Capital Market Law, that states: "Underwriter required obey all conditions in contract guarantee as it is loaded in statement registration". If the underwriter and the issuer have agreed to implement the public offering by type of contract or agreement that is determined, the parties shall conduct a public offering in accordance with the contract or agreement made and for it to be included in the prospectus¹⁵. While the models of underwriters who are often used, in Indonesia there are several models¹⁶:

- a. Full Commitment that is an agreement under which the underwriters ensure that the securities offered by the issuer will be absorbed by the market without remaining. Underwriters provide assurance that if the securities is not absorbed by the market then the underwriter will buy the remaining unsold securities. This type of guarantee is usually only done by underwriters who have great financial strength.
- b. Best effort is an agreement whereby the underwriter will not take any residual securities that will be issued by the issuer, if in the future the securities are not entirely absorbed by the market. The underwriters have an obligation to sell only as much as can be done by the underwriters. Thus the securities are not sold will be returned to the issuer.

In addition except the models that mentioned above, according Erdikha Elit as cited in Mega Kartika¹⁷, there are three models of underwriting by underwriters as follows: The first stand by commitment underwriting which in this model underwriters besides undertakes for offer the securities to communities, underwriters also undertakes for buy the rest of securities that unsold on something level price corresponding with requirement that promised. The second, underwriters with ability all or none (All or none offering). In this model the offering will be canceled if the securities unsold all. The third, underwriters with ability minimum and maximum which means the offering will be canceled if not achieved the minimum limit.

Various models above are types of models that exist, but commonly used in Indonesia is guaranteed by full commitment model. Under full commitment guarantees underwriters seek to minimize the risk so that not suffer losses due to unsold securities offered, because in this type, underwriters will buy the securities which unsold in the capital market¹⁸. This means that the underwriter is responsible for the remaining unsold securities based on the contract or agreement has been made. Article 39 of the Capital Market Law stipulates that the underwriter must comply with all provisions in the underwriting contract as stated in the registration statement. In this case the underwriting contract is subject in the Act of Capital Market and Civil Code¹⁹.

These exposures indicate that the duties and responsibilities also the role of underwriters in capital markets is basically very important and has a big risk, and should receive special attention in the regulation. Moreover, lately there is potential of unfair competition when determine the tariffs for underwriters which unnatural and can be deadly small companies.

Nonetheless until now there is no regulation governing the minimum threshold fee for bond guarantee so indicated to unfair competition. If it is not be handled properly then it will worsen the business conditions especially in the field of capital market. This is based on the statement of the Director of Development of the Indonesia Stock Exchange, Frederica Widyasari Dewi, which states that the fee war in determine fee for underwriters has made the competition in the domestic underwriters being more unhealthy. Even today,

¹³ Asril Sitompul (II), *Due Diligence dan Tanggung Jawab Lembaga-Lembaga Penunjang pada Proses Penawaran Umum*, (Bandung: Citra Aditya Bakti, 1999), p. 14

¹⁴ Hamud M. Balfas, *Op. Cit*, p. 62

¹⁵ The explanation of Article 39 of Law No. 8 of 1995 about Capital Markets

¹⁶ Hamud, M. Balfas, *Op. Cit*, pp 286-287

¹⁷ Mega Kartika, "*Peran dan Tanggungjawab Underwriter dalam Perjanjian Full Commitment di Pasar Perdana*", (Thesis Faculty of Law, University of North Sumatra, Medan, 2009), p. 25

¹⁸ Ang, Robert, *Pintar Pasar Modal Indonesia*, (Jakarta: Mediasoft Indonesia, 1997).

¹⁹ Mega Kartika, *Op. Cit*, p 135

many companies are dare to offer underwriters fee until 0.25 percent²⁰.

Furthermore she states that there is underwriter who dared to set a fee until zero percent on the bond issuance which have very good prospects. Typically, the underwriters did compensation of underwriters fee to the benefit in the secondary market²¹. It is certainly an improper fee determination because underwriters dare to set the fee up to zero percent which means the underwriter does not get a fee on the guarantee of bonds to be issued.

These competitions will lead to underwriters companies began to complain because the action undertaken by the competitors. The complaint was also raised by the members of stock exchange in Limited Discussion between underwriters and the capital market authorities. Around 50 stock exchange members attended the meeting. In the forum delivered if the first underwriter can get fee until 3%, currently can be below 1%. Besides that Vice President of Danatama Makmur Investment Banking, also said competition underwriters fee that are too low could potentially degrade the quality and credibility of the work of underwriters. He stated that underwriters not optimal to do research and will give impact to transparency of companies who want to issue shares or bonds²².

If it is allowed to be protracted it will certainly have a negative effect on the business climate in Indonesia capital market, especially for underwriters. Whereas on the other side underwriter or guarantor issuer has a very important role in the capital markets and have a big responsibilities starting from the first day of issuers intended to offer the securities, in this case underwriter will help issuers prepare public offerings, conducting due diligence, preparing the registration statement, through the registration process and submit to Bapepam. After Bapepam declares an effective registration statement, the underwriter then prepares for securities marketing by inviting other securities companies to join the syndication marketing and sale of such securities. The underwriter will also make the required prospectus advertisement, print the prospectus and finally distribute the prospectus in order to sell the securities to the investors²³.

3.2 The Urgency of Minimum Fee Determination for Underwriter Bond Companies

National economic activities in the regulation are set in Article 33 of the Constitution of Republic of Indonesia or UUD in which the economy is governed by cooperation and based on the principle of mutual cooperation. Indirectly in Article 33 of the Constitution contains the thoughts of economic democracy²⁴, in which the democracy has characteristic of the process embodied by all members of the communities for the benefit of the entire communities, and should serve the welfare of the communities.

Therefore, basically the presence of the state in this case is manifested by the regulation in the field of economy is very important, not least in the field of capital markets. The presence of the state is also expected to reduce the potential for injustice in the market, including unfair business competition that aims to switch off the opponent's business in ways that are prohibited by law. If the state does not provide the regulation so that the market will have to compete with one another to get benefit as much as possible and one company may conduct monopoly market.

If we examine an example of the Philippines has to supervise the underwriting agreement to provide protection through the approval of the Commission. As cited in the Manual of Regulations for Non-Bank Financial Institutions stating that underwriting agreements entered into by an Invesement House, with respect to public distribution of securities, including the fees to be charged in connection therewith, shall be subject to the approval of the Commission, it being understood that no public distribution of securities shall be made without such approval. The Commission may impose such terms and conditions as may be necessary in the public interest and for the protection of investors; and it may requires the submission of such documents as may be necessary to ascertain compliance with such standards of operation as it may establish.

It is a form of state supervision delegated to the Commission to provide protection and create healthy competition in the capital market. Therefore, Indonesia is also deemed necessary to conduct supervision in

²⁰ Pos Kupang " Perang Tarif Penjamin Emisi Tidak Sehat " <http://kupang.tribunnews.com/2010/03/27/perang-tarif-penjamin-emisi-tidak-sehat> accessed on 5th September 2017 at 13:51 WIB

²¹ *Ibid*,

²² Kontan, " Perang Fee Penjamin Emisi Makin Sengit " <http://investasi.kontan.co.id/news/perang-fee-penjamin-emisi-makin-sengit> accessed on 5th September 2017 at 13:29 WIB

²³ Mega Kartika, *Op, Cit* , p 134

²⁴ Binoto Nadapdap, *Hukum Acara Persaingan Usaha*, (Jakarta: Jala Permata Aksara, 2009), p. 6

the field of underwriters, especially in the determination of the minimum fee. Because if it is not done it will be very detrimental to the public, especially as has been described above that the capital market is a business field which has an important role for a country. In addition, the position of business actors in it also affect each other including underwriter. Like as was explained earlier that there has been no regulation on fees for underwriters who indicate there are the potential of unfair competition in it by setting the fee until zero percent which used to switch off the rival companies and in the other side underwriters have a heavy task and a great responsibilities.

For example in this case is the agreement PT. X Tbk with the underwriters as cited in Mega Kartika which stated that the agreement requires the underwriter to purchase all shares or securities that are unsold in the market in accordance with the bid price by the underwriters under guarantee section. In case the underwriters negligent or failed to perform its obligations, then all right underwriters based on agreements (including the right to receive a fee) to be lost by not freeing underwriter of obligations that arise as a result of negligence that under the terms of the agreement²⁵.

From the agreement it can be analyzed that the underwriter in providing services to the issuer is done by full commitment with the obligation to buy fully shares or unsold securities in the capital market. It certainly takes the courage of underwriters to take a big risk and if the fees are set not worth with the risk and the responsibilities that would adversely affect to the continuity of underwriter companies especially for small businesses, if the fee sets until zero percent. It is certainly beyond the limits of fairness and cause harm to business actors.

If we analyzed basically doing a business activities in this case do guarantee to the securities by loss selling has been banned by the business law, but as mentioned above that the capital market is not necessarily being a subject of this rule because the mechanism is submitted entirely to the market. To sell a loss or set a very low price with the aims to eliminating or disabling a competitor in the relevant market is one form of predatory pricing that prohibited by the business law. Loss selling is a pricing strategy by businesses to exclude the competitors from the market concerned to maintain the dominant position²⁶.

In addition it is also mentioned in Article 20²⁷ which states that "Businesses are prohibited from supplying goods or services by way of loss selling or assign a very low price with the intention to turn off the business competitors in the relevant market, resulting in monopolistic practices and or unfair business competition". This is clearly regulated in the business law.

Furthermore the loss selling practises with aims to eliminate their competitors in the market in a competitive context is an attitude of businesses that generally have a dominant position in the market or as entrepreneurs incumbent who sets the price which disadvantage economically over long time period. Such strategies result in competitors being eliminated from the relevant market and hindering other business actors entering the market²⁸.

In the short time, the loss selling is very profitable for the consumer in this case is the issuer, but after eliminate the competitor from the market and hampering the new competitor, the dominant business actors and the incumbent businessmen will raise the price significantly. In general the price is set to cover losses. The next strategy is very low pricing are included also in the limit-pricing strategy that is identified with the eagerness of businesses to protect monopolies or dominant position by give a low price. This behavior is intended to inhibit the opportunity of new business actors so that monopolist business actors can maintain their dominant position²⁹.

Although initially low pricing can provide benefits to consumers, the benefits are only for some time. It is used for large-scale business actors to turn off their competitors so that business actors get dominant positions and create prices according to their eagerness. This leads to monopoly. These activities based on the provisions of Article 20 of Law No. 5 of 1999 needs assessment conducted by grounding the framework of economic analysis.

²⁵ Article 6 point 3- 6 Underwriting Agreement PT.X Tbk. No. 6 in Mega Kartika, *Peran dan Tanggungjawab Underwriter dalam Perjanjian Full Commitment di Pasar Perdana*, p. 74

²⁶ Susanti Adi Nugroho, *Hukum Persaingan Usaha di Indonesia: Dalam Teori dan Praktik serta Penerapan Hukumnya*, (Jakarta: Kencana Prenadamedia Group, 2014), p. 260

²⁷ Indonesia, Law No. 5 of 1999 about Prohibition of Monopolistic Practices and Unfair Competition, LN 33, TLN 3817

²⁸ Susanti Adi Nugroho, *Op, Cit*, p. 260

²⁹ *Ibid*, p. 261

Furthermore when we analyzed in determining the underwriter fee that has been described above there are some characteristics of unfair competition that is marked by do loss selling or a set price below the selling price and the fact is the practice of loss selling during the running of businesses will experience substantial losses. However, in fact the losses incurred by entrepreneurs will be greater if compared to other business actors. A business that practices it is usually a large-scale and dominant business actor in the market. This argument appears because only large businesses can overcome the losses by corporate guarantee or syndicate, while small businesses can not do it³⁰.

If it is allowed to continuously then it will give negatively impact to the capital market and would harm to the economy of Indonesia. Based on these, the determination of the minimum fee for the underwriter of bonds in the form of regulation as a form of state presence in the capital markets is very necessary. This is because the potential of unfair business competition that is allegedly used as a tool to eliminate the opponent. If these regulations are not set, then the company will lose money and small companies will suffer bankruptcy and it will harm to the community and have a bad effect to capital market in Indonesia.

4. CONCLUTIONS

4.1 There are the potential of unfair competition in the underwriter companies of bond issuances that enables small companies are bankrupt. This is due to the underwriter tariff is too low and not worth the risk of borne. For example the fee for underwriters reaches zero percent, whereas the underwriter's duties are so numerous and the risks are huge, especially in full commitment agreement. This ways are usually used by the large securities companies to switch off the opponent. Although there are regulations regarding the ban on selling at a loss under Article 20 of the business law, but the determination of the fee for underwriter of bonds are not necessarily being a subject to these regulations because the mechanism to determine the fee is entirely submitted to the market mechanism.

4.2 The minimum fee determination of underwriter companies is very important to prevent unfair competition. This is due to there is no regulation concerning the minimum fee of underwriter companies in Indonesia. Under these conditions, the government should make a minimum threshold for the underwriter companies to prevent unfair competition in the form of regulation. It is also a manifestation of the presence of the state in regulating underwriter companies and is a form of economic democracy in Indonesia to create a healthy business climate in the capital market.

5. ACKNOWLEDGEMENT

With finished this research, the researcher with the deepest heart would like to thank:

1. Indonesia Endowment Fund for Education that has provided full support funding to the researcher.
2. University of Indonesia as the place for researcher to study.
3. Dr. Ihat Subihat, S.H, .M.H and Ferry Fathurokhman, S.H, .M.H, .Ph. D who are willing to become the reviewer for the researcher.
4. All parties who have participated in this research so that research can be completed properly.

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³⁰ Hamud, M. Balfas, *Op, Cit*, p. 263

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