

# LEGAL TEST OF RELEVANT MARKET IN MONOPOLY

(Case Study on KPPU Decision No 09/KPPU-L/2009)

A LEGAL CASE STUDY



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2012

# **LEGAL TEST OF RELEVANT MARKET IN MONOPOLY**

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## **A LEGAL CASE STUDY**

Presented as Partial Fulfillment of The Requirements to obtain  
The Bachelor Degree in the Business Law Department, Faculty of Law,

Universitas Islam Indonesia

By:

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**INTERNATIONAL PROGRAM**

**FACULTY OF LAW**

**UNIVERSITAS ISLAM INDONESIA**

**YOGYAKARTA**

**2012**

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

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This bachelor degree thesis has been examined and approved by the advisor to be submitted in the front of the Board of Examiners in an oral exam on the date of

April 30, 2012

Yogyakarta, March 20<sup>th</sup>, 2012

Content Advisor,



(Dr. Siti Anisah, SH., M. Hum.)



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Defended Before the Board of Examiners

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Signature

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## MOTTO

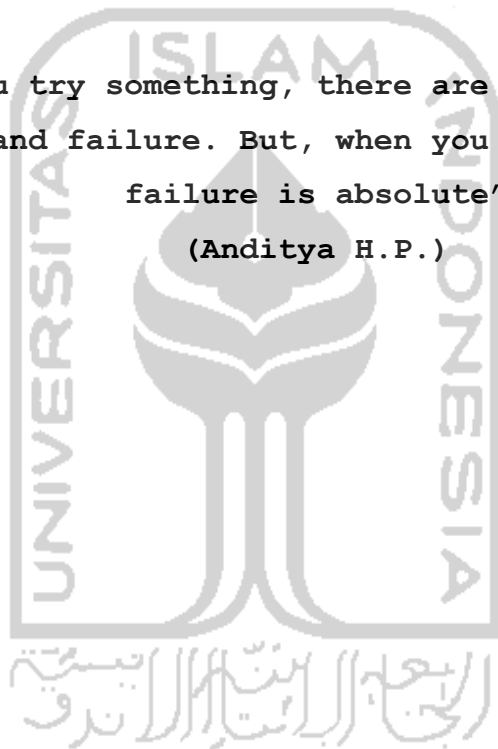
***"fainnama'al 'usri yusro.. innama'al 'usri yusro..."***

So, verily, with every difficulty, there is relief: Verily, with every difficulty there is relief.

***(Al – Insyirah: 5-6)***

"When you try something, there are options between success and failure. But, when you are not trying, failure is absolute"

(Anditya H.P.)





**I Dedicated This Legal Case Study For:**

My Parents Irianto Eko Utomo, ST and Ir. Cicik Tiyas Asih  
My Grand Parents KRT. Sukarno Mertopuspito and Kartini Erlina,  
also for Alm. Soeparto, BA and Alm. Sri Rasoena Soeparto, BA  
Person that always support me, my friends, and you  
All of the students in Law Faculty, Islamic University of Indonesia

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Dear Allah (SWT), I thank you for this day, the day that finally I could finish working on my legal case study. Without His guidance, help, and blessing, I believe this legal case study would never have been completed.

This legal case study is designed as a partial of fulfillment to obtain a bachelor degree in Faculty of Law, Islamic University of Indonesia. I believe that this thesis is still far from being perfect. But, I hope, this legal case study can give contribution in the development of business law studies

Working on this legal case study was a hard time for me. I believe this legal case study would never been done if I do it individually. But, then, with the help, pray and supports from many people. The legal case study titled as Legal Test of Relevant Market in Monopoly, finally done.

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Anditya Hutama Putra

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## A. Context of Study

One of the issues being raised related to the expansion of modern retail business that allegedly contain monopolistic practices and unfair business competition today is the attempt of foreign retailers Carrefour through PT Carrefour Indonesia in the acquisition of PT Alfa Retailindo (Alfa). The handlings of cases referred to were listed as case Number 09/KPPU-L/2009 the alleged the violation of Law No. 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition.

The case related to allegations of monopoly and unfair business competition with the initial evidence against PT Carrefour Indonesia indication of violation Article 17 paragraph (1) and Article 25 of Law No. 5 of 1999. In its ruling, Chairman of the Assembly Dedie S. Martadisastra, stated Carrefour violated Article 17 paragraph (1) and Article 25 paragraph (1) of Law No. 5 of 1999 or monopoly over ownership of PT Alfa Retailindo.<sup>1</sup> After the acquisition, Carrefour's market share on the upstream side increased from 44.75 percent to 66.73 percent, while on the downstream side, increased from 37.98 percent to 48.38 percent.<sup>2</sup>

Commission argued that Carrefour is proven violating Article 17 paragraph (1) and Article 25 paragraph (1) of Law No. 5 of 1999. Article 17 regulates the prohibition of production control and/ or marketing of goods (monopoly). While Article 25 paragraph (1) letter a, regulates dominant

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<sup>1</sup> "Carrefour Terbukti Monopoli Industri Ritel", <http://www.inilah.com/read/detail/176485/carrefour-terbukti-monopoli-industri-ritel/>, last accessed on January 4<sup>th</sup>, 2012

<sup>2</sup> "Dugaan Monopoli: Carrefour Diultimatum", <http://www.suarakarya-online.com/news.html?id=224435>, last accessed on January 4<sup>th</sup>, 2012

position to set restriction in setting the terms of trade. According to the commission, Carrefour is proven controlling 57.99 percent market share on the relevant upstream market when it acquired Alfa in January 2008. Previously, Carrefour controls 46.30 percent share of the upstream market, i.e. the relation between Carrefour with suppliers.<sup>3</sup> Market control also increases the entry barrier (inhibits businesses) on the upstream market. Consideration was referring to the Article 17 paragraph (2) of Law No. 5 of 1999 which determines the worth of business actors suspected of controlling the production and / or marketing of goods if it controls more than 50 percent market share of a particular type of goods or services.<sup>4</sup>

Based on the Commission's decision on Case Number 09/KPPU-L/2009, PT Carrefour Indonesia was objected to the South Jakarta District Court. South Jakarta District Court decided the case on February 17, 2010. In its decision, the South Jakarta District Court judges who filed the objection received PT Carrefour Indonesia over the decision of the Commission. PT Carrefour Indonesia was not proven violating Article 17 paragraph (1) and Article 25 paragraph (1) letter a of Law No. 5 of 1999.

In consideration, the judges argued that PT Carrefour Indonesia as the applicant's objection (previously as reported) is not proven to have committed

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<sup>3</sup> “Carrefour Harus Melepaskan Sahamnya di Alfa”, <http://pmg.hukumonline.com/berita/baca/lt4af1184b773d7/carrefour-harus-melepaskan-sahamnya-di-alfa>, last accessed on January 4<sup>th</sup>, 2012

<sup>4</sup> *Ibid*,

monopolistic efforts.<sup>5</sup> Referring to the results of AC Nielsen pollsters, Euro Monitor, and Mars Indonesia, the judge argued that the market is dominated by Carrefour cannot be said beyond the monopoly as required by the Law No. 5 of 1999.<sup>6</sup> Based on survey results of the survey three institutions, the judge argued Carrefour Indonesia does not violate the dominant position in the retail market by taking control of 50 percent of market dominant position, both before and after the acquisition.

In order to be said a monopoly; corporate retail businesses have proven to have committed a dominant market position of 50 percent. Before the acquisition, according to the judges, Carrefour control retail market in Indonesia by 14 percent.<sup>7</sup> Meanwhile, following the acquisition, the market share controlled by Carrefour is increasing at 17.5 percent.<sup>8</sup>

The interesting thing in this case is how each institution has a different view regarding the determination of the relevant market in deciding this case. When determining the relevant market is the most crucial thing in order to determine the presence or absence of a dominant position, which became the basis for determining the presence or absence of violations committed. This case study will be explore further about the determination of the relevant market and to study whether the mechanisms conducted by the Commission are in according with the regulation or not.

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<sup>5</sup> “Pengadilan Nyatakan Carrefour Indonesia Tidak Monopoli”, <http://hukumonline.com/berita/baca/lt4b7cc7d01140a/pengadilan-nyatakan-carrefour-indonesia-tidak-monopoli>, last accessed on January 4<sup>th</sup>, 2012

<sup>6</sup> *Ibid*,

<sup>7</sup> *Ibid*,

<sup>8</sup> *Ibid*,

## **B. Parties Identity**

### 1. Reported Party

The Reported Party in this case is PT. Carrefour Indonesia, a legal entity established under Indonesian laws and regulations, in accordance with the Deed of a Meeting Decision of PT Carrefour Indonesia, namely Deed No.18 on 11th August 2008 made before Notary Public & PPAT Merry Susanti Siaril, SH, in which PT. Carrefour Indonesia currently is located in Carrefour Building 3rd Floor, Jl. Lebak Bulus Raya No. 8, South Jakarta 12310

### 2. The Commission

The case has been submitted before Commission for the Supervision of Business Competition (KPPU). The Commission for the supervision of Business Competition (KPPU) is an independent authority established to supervise the implementation of the Law concerning the Prohibition of Monopolistic Practices and Unfair Business Competition. Independent from the influence and control of the Government and other parties, the KPPU's duties includes drafting implementing regulations, conducting examinations of any party alleged to have violated law No. 5 of 1999, issuing binding decisions, and imposing legal sanction(s) on any violator of the law.

### 3. Commission Assembly

Commission Assembly consisting of Ir. Dedie S. Martadisastra, SE, MM, as the Chairman of the Assembly; Prof. Dr. Tresna P. Soemardi,

SE, MS, Dr. AM Tri Anggraini, SH, MH, Benny Pasaribu, Ph.D and Prof. Dr. Ir. H. Ahmad Ramadhan Siregar, MS, each as a Member of the Assembly, assisted by Melanie Dinni, SH and Endah Widwianingsih, SH, MH, each as a Registrar

#### 4. Date of the Decision

Decision was decreed through a convention in the Commission Assembly Session on Tuesday, 3<sup>rd</sup> November 2009

### C. Statement of Facts

Firstly, it is important to study the Chronology of Acquisition of Alfa by Carrefour. On December 17<sup>th</sup>, 2007, the Memorandum of Understanding (MoU) between Carrefour, PT. Sigmantara Alfindo and Prime Horizon Pte.Ltd was signed for the purchase of 75 % of PT Alfa Retailindo, Tbk.'s shares. On December 18<sup>th</sup>, 2007, PT Carrefour Indonesia delivered a notification letter to the Indonesia Capital Market and Financial Institution Supervisory Agency (Bapepam-LK) and PT. Bursa Efek Indonesia on the planned purchase of 75% of Alfa's shares. On December 19<sup>th</sup>, 2007, the planning of Alfa's shares purchasing by Carrefour was announced in newspaper. On January 21st, 2008: Carrefour signed the Share Purchase Agreement (SPA) with PT. Sigmantara Alfindo and Prime Horizon. Pte.Ltd. Thirtyfive (35) percent of Alfa's shares owned by PT. Sigmantara Alfindo and forty-five (45) percent of Alfa's shares owned by Prime Horizon Pte. Ltd was purchased by Carrefour. On January 21<sup>st</sup>, 2008, Notification was sent to

Bapepam-LK and PT. Bursa Efek Indonesia concerning the signing of the SPA. January 22<sup>nd</sup>, 2008, Announcement published in the national newspaper on the purchase of Alfa's shares. After the acquisition, Carrefour renovated buildings of the ex-Alfa's outlets, trained human resources, upgrades the IT, and conducted the space efficiency. Out of 30 ex-Alfa outlets, 14 outlets changed its name to Carrefour Express and 16 outlets to be Carrefour, while one outlet was closed.

On January 21<sup>st</sup>, 2008, Carrefour management officially announced the signing of Share Purchase Agreement with PT Sigmantara Alfindo and Prime Horizon Pte. Ltd. For acquisition of 75 percent majority stake in Alfa Retailindo for a total price of Rp674 billion shares. Based on data from Retail Asia 2007, Carrefour Indonesia by the year 2006 had a turnover of up to Rp 7, 2 trillion and a retail market leader in Indonesia. While Alfa position at number 8 with a turnover of Rp1, 9 trillion. Alfa Retailindo has 29 supermarkets in Indonesia, 13 of them in Jakarta. Alfa has been built for 19 years. Alfa sales for 2006 reached Rp 3.624 trillion. With this acquisition, Carrefour Indonesia wants to strengthen its position as market leader in terms of food sales in Indonesia. Carrefour currently has 37 hypermarkets in various areas. In 2006 Carrefour recorded sales of 627 million euros, and sales rose 14.4 percent in first nine months of 2007. Carrefour will open at least three new stores in February 2008, namely in Jabotabek and the rest in Surabaya.<sup>9</sup>

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<sup>9</sup> "Pasca Beli Alfa, Carrefour akan Dipanggil KPPU", <http://hukumonline.com/berita/baca/hol18397/pasca-beli-alfa-carrefour-akan-dipanggil-kppu>, last accessed January 4<sup>th</sup>, 2012



The French retailer buying public shares worth Rp2.300 per share. Based on reports to KPPU, Carrefour's market share for the retail sector has exceeded the limit considered to be reasonable, thereby potentially causing unhealthy competition. In addition, the suppliers were also reported on an alleged Carrefour sells and rents space in expensive and burdensome cost of trading term.

Based on public statements and initiatives the Commission, the case is separated into two problems namely the monopoly of selling space and the high cost of trading term, and the acquisition of the French retail company against Alfa.<sup>10</sup>

After the acquisition Alfa, the cost of trading conditions beyond the listing fee for cosmetic products in Carrefour, for example, rose from 13 percent to 33 percent. The trend promotional costs charged to the supplier are also likely to increase from 8.5 percent to 11 percent. Promotional discounts, went up from 3.5 percent to six percent. Rabate increased from 2.5 percent to 7.5 percent. It is just that the focus remains on aspects of the retail market monopoly. It is because the Commission has undertaken two studies of Carrefour's market share in the upstream (with suppliers) and downstream (with competitors). The Commission found evidence of early, post-acquisition of Alfa, Carrefour's market share on the upstream side rose from 44.75 percent to 66.73 percent. While the downstream side rose from 37.98 percent to 48.38 percent.

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<sup>10</sup> “Carrefour diduga lakukan monopoli, KPPU bentuk Direktorat Merger dan Akuisisi”, <http://cybernews.cbn.net.id/cbprtl/cybernews/detail.aspx?x=Economy&y=cybernews|0|0|3|14563>, last accessed January 4<sup>th</sup> 2012

Market share is an excuse that Carrefour has allegedly violated Article 17 paragraph (1) and Article 25 paragraph (1) letter a. Article 17 on a prohibition on monopolies that control more than 50 percent market share of a particular type of goods or services, while Article 25 about the abuse of dominant position that could harm consumers and deter other businesses into a similar market.

#### **D. Summary of Decision**

1. Affirming that the Reported Party, PT. Carrefour Indonesia, is legally and convincingly proved to have violated Article 17 paragraph (1) and Article 25 paragraph (1) a of Law Number 5 Year 1999;
2. Affirming that the Reported Party, PT. Carrefour Indonesia, is not proved to have violated Article 20 and Article 28 paragraph (2) of Law Number 5 Year 1999;
3. Ordering the Reported Party, PT. Carrefour Indonesia, to release all of its ownership in the PT. Alfa Retailindo, Tbk. to any party not affiliated with PT. Carrefour Indonesia at the latest one year after this decision has a fixed legal power;
4. Penalizing the Reported Party, PT. Carrefour Indonesia, to pay a penalty of Rp.25,000,000,000.00 (twenty five billion rupiah) that shall be paid to the State Treasury Office as a penalty revenue for violation in business competition of the Department of Trade, Secretariat General for Task Unit of Business Competition Supervisory Commission through a state-

owned bank with an acceptance code 423 755 (Penalty Revenue for Violation against Business);

#### **E. Legal Issue**

Referred to the description in the context of study, statement of fact, as well as summary of decisions, the legal issue arisen from the case, Is the Commission for the Supervision of Business Competition (Commission) decision Number 09/KPPU-L/2009 in accordance with the legal test of relevant market stipulated in Law No. 5 of 1999?

#### **F. Legal Consideration**

Regarding violations against Article 17 paragraph (1) of Law No. 5 of 1999 The Examining Team in its conclusion stated that the market power owned by the Reported Party after its acquisition for the Alfa was proved to be misused and thereby violated Article 17 paragraph (1) of Law No. 5 Year 1999.

Article 17 of Law No. 5 Year 1999, in its complete paragraphs, states as follows:

"A business actor shall be prohibited from controlling the production and/or the marketing of goods and/or service which may result in a monopolistic practice and/or an unfair business competition"

"A business actor shall be reasonably suspected or deemed to control the production and or the marketing of goods or service referred to in paragraph (1) if:

1. concerned goods and/or service has not had its substitution yet; or
  2. the business actor causes another business actor to be incapable of entering a business competition for the same goods and or service;
- or

3. a business actor or a group of business actors dominates over a 50% market share of a type of goods or service

The Commission Assembly opines that, in order to declare that one has violated Article 17, it is necessary to meet the standards or some important elements, namely business, market domination, the business actor applies a business policy/ practice (conduct), and the business policy/ practice cause or may cause a negative impact on competition in terms of a monopolistic practice and or an unfair business competition;

Subsequently, the Commission Assembly reviewed the compliance with Article 17 paragraph (1) of Law No. 5 of 1999 with the following analyses;

1. Business Actors

That the Reported Party is a legal entity established and domiciled in Indonesia and undertook business activities in economic sector as previously described in the Reported Party's identity; Accordingly, this factor was fulfilled

2. Market Dominance

A business actor is considered to dominate a market in accordance with the provision of Article 17 paragraph (2) of Law No. 5 of 1999 if (a) concerned goods and/or service has not had its substitution yet; or (b) the business actor causes other business actors incapable of entering business competition for the same goods and or services; or (c) a business actor or a group of business

actors dominates over 50% market share of a particular type of either goods or service.

That based on the data of the Advanced Report of Examination Results (LHPL) and the Commission Assembly's consideration on the section of the Reported Party's Market Share, the Commission Assembly evaluated that the Reported Party has a market share of more than 50% (fifty percent), which amounts to 57.99% (fifty-seven point ninety nine percent) in the associated upstream market. Accordingly, this factor was fulfilled;

3. Behavior;

The Reported Party acquired the Alfa in January 2008; Accordingly, this factor was fulfilled;

4. Impact;

The Advanced Report of Examination Results (LHPL), the Examining Team essentially stated the Reported Party's acquisition resulted in anti-competitive impacts which originated from both the Reported Party's own conducts (unilateral conducts) and which were followed by the Reported Party's competing business actors (coordinated conducts);

This occurred due to the Reported Party's increasing market power after its acquisition for the Alfa and the high entry barrier towards the associated upstream market;

In its opinions or defenses, the Reported Party essentially stated that there were fair competitions in the retail industry, and the Reported Party assisted suppliers in seeking innovations, and there were no entry barriers;

The Commission Assembly reviewed that the arguments proposed by the Reported Party to show a fair competition were based on such a false definition of the relevant market;

Analysis on the competition level should have been measured at the relevant market, namely such associated downstream markets as hypermarkets and supermarkets within a radius of 4 km Jakarta province and a radius of 5 km outside Jakarta province, and also the associated upstream markets in terms of retail services of hypermarkets and supermarkets in the whole territory of Indonesia;

The incorrect definition of relevant market as proposed by the Reported Party had caused the Commission Assembly not to accept the Reported Party's considerations which were based on an incorrect definition of the relevant market;

The Commission Assembly argued that the occurrence of monopolistic practices and or unfair business competition was analyzed from competitive conditions arising out of business actors' actions in controlling the production and or marketing of goods or services;

The Commission Assembly argued that, in the relevant market, the number of business actors is measured from the increased number of business actors in the market and not from the increased number of produced outputs. The growth of such *outputs* represents an industrial development indicator, but such an industrial development does not necessarily mean that the *entry barrier* level is low, since an industry may possibly only grow and, at the same time, the *entry barrier* level remains high. The growth of such an industry is due to the constant growth of demands which are continually supplied by existing business actors. Therefore, the industry experienced growths but only the *incumbent* business actors enjoyed such growths;

## G. Legal Analysis

In each industrial study, the first step is to determine the relevant market. Determination of the relevant market is necessary to precisely measure the market structure and the limitation of anti-competitive behavior is performed.<sup>11</sup> Many antitrust case both merger and non-merger are decided by the outcome of how the relevant market is defined.<sup>12</sup> By knowing the relevant market can be identified then the real competitor of the dominant

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<sup>11</sup>Andi Fahmi Lubis, et. all. 2009. *Hukum Persaingan Usaha Antara Teks dan Konteks*. KPPU RI. Jakarta. p. 50

<sup>12</sup>ABA Section of Antitrust Law Market Power Handbook at p. 53. The term “relevant market” literally refers to the market that is relevant to the case at hand. This is a term of art that refers to the set of products over which the case will be decided and the geographic area in which those products are sold.

business actors which may limit their behavior. The exact definition of the relevant market is an important facility of an accurate analysis of the competition. A broad relevant market will generally include many firms and is therefore more likely to be competitive.<sup>13</sup> A narrow relevant market will generally include few firms and is therefore less likely to be competitive.<sup>14</sup> This of course becomes a case where too much emphasis is placed on the market share of the market definition that arises from an improper.

The term relevant market is the main term antimonopoly law and order comes from the antimonopoly law of the United States.<sup>15</sup> A common understanding of the market is limited in the relevant market. Limitation is related to<sup>16</sup>:

1. Outreach or marketing areas
2. Group of business actors
3. Goods and / or certain services, i.e. goods and / or services identical or similar, or substitution of goods and / or services

Limitation is important because the transaction as referred to in the sense of the market is only possible in certain business groups, the goods and

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<sup>13</sup> Stephan M. Levy, *Are Relevant Markets Ever Irrelevant?* (Fed. Trade Comm'n Project No. 92900, Horizontal Merger Guidelines Review, Public Comment No. 545095-00020, 2009), available at <http://www.ftc.gov/os/comments/horizontalmergerguides/index.shtm> ("The issue of the relevant market is particularly important. Many antitrust cases—both merger and non-merger—are decided by the outcome of how the relevant market is defined.").

<sup>14</sup> *Ibid*,

<sup>15</sup> Sih Yuliana Wahyuningtyas, *Urgensi Pengaturan tentang Pasar Bersangkutan (Relevant Market) dalam Hukum Persaingan Usaha di Indonesia* (Jurnal Hukum Bisnis, vol.24. No.2 Tahun 2005)

<sup>16</sup> *Ibid*,



/ or services, in a range or specific marketing areas as well.<sup>17</sup> In the U.S. Horizontal Merger Guidelines<sup>18</sup> relevant market is described by a product or a product group and a geographic area. European commission<sup>19</sup> argued that the main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved two (2) faces. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behavior and of preventing them from behaving independently of effective competitive pressure.<sup>20</sup>

Relevant market, according to Law No. 5 of 1999, defines as a market related to the range or certain marketing area of the entrepreneurs for the same kind or type of goods and/or services or substitutes of the said goods and/or services.<sup>21</sup> Provisions on the relevant Market in Article 1 paragraph (10) of Law No. 5 of 1999 have a significant role in the implementation of Law No. 5 of 1999. Interface between the Articles in the Law No. 5 of 1999 with the concept of relevant market is often found. Based on the interests, the Commission then issued a Commission Regulation No. 3 of 2009 on Guidelines for Implementation of Article 1 paragraph (10) concerning

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<sup>17</sup> *Ibid*, as cited from Knud Hansen et. al., *Undang-undang Larangan Praktik Monopoli dan Persaingan Usaha Tidak Sehat: Law Concerning Prohibition of Monopolistic Practices and Unfair Business Competition*, (Jakarta: GTZ dan Katalis Publishing Media Services, 2002), p. 20

<sup>18</sup> *Ibid*, as cited from U.S. Department of Justice and the Federal Trade Commission, "Horizontal Merger Guidelines", issued April 2, 1992, revised April 8, 1997, <http://www.usdoj.gov/atr/public/guidelines/horizbook/hmg1.html>,

<sup>19</sup> Commission notice on the definition of the Relevant Market for the purposes of Community competition law Official Journal C 372, 09.12.1997, p. 5

<sup>20</sup> *Ibid*,

<sup>21</sup> Article 1 paragraph (10), Law No. 5 of 1999 concerning prohibition of monopolistic practices and unfair business competition

relevant Market.<sup>22</sup> Defining the relevant market is an important part from the efforts to prove the alleged violation of Law No. 5 of 1999. Some chapters regulated in Law No. 5 of 1999, there is a relevant market which is an element of art so that the definition is required as part of the fulfillment process elements.<sup>23</sup> However in another Article, the relevant market is not an element of the Article. Besides, the definition greatly helps the Commission in an effort to understand the product and market dynamics that will facilitate efforts to prove in the process of enforcement by the Commission.<sup>24</sup>

Under commissions Regulation No. 3 of 2009 the following are some important elements in defining the relevant market<sup>25</sup>:

1. Market
2. Outreach or marketing areas
3. Business actors.
4. Goods and Services
5. Equal or similar or substitute

In order to examine whether the relevant market determination of the Commission's decision was correct or not, the elaboration of a draft or elements above will be done in more detail on the analysis of this law, in the case studies regarding the determination of relevant market pursuant to Article 1 paragraph (10) Law No 5 of 1999.

1. Market

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<sup>22</sup>Andi Fahmi Lubis, et. all, Op. Cit, p. 8

<sup>23</sup>*Ibid*,

<sup>24</sup>*Ibid*,

<sup>25</sup> Commission Regulation No. 3 of 2009 on Guidelines for Implementation of Article 1 paragraph (10) concerning relevant Market, p 15-16

Market shall be an economic institution in which sellers and buyers, either directly or indirectly, can conduct trading transactions of goods and or services.<sup>26</sup>

Economic institution according to Business Dictionary<sup>27</sup> can be defined as Network of commercial organizations (such as manufacturers, producers, wholesalers, retailers, and buyers) who generate, distribute, and purchase goods and services. In the same literature, seller<sup>28</sup> can be defined as a party that makes offers or contracts to make a sale to an actual or potential buyer. Then, buyer<sup>29</sup> can be defined as Party which acquires, or agrees to acquire, ownership (in case of goods), or benefit or usage (in case of services), in exchange for money or other consideration under a contract of sale.

Carrefour and Alfa is a business actor in Retailing Industry. In this modern retail industry, the relevant parties are modern retailers, competing retailers, suppliers and end consumers. The Decision of Minister of Trade defines retailer as a modern shop with independent service system, which sells several types of merchandises in retail in the form of Minimarkets, Supermarkets, Department Stores, Hypermarkets, or grocers in the form of wholesale. These modern retailers receive supply from the producer to be sold to the consumers. As compensation, these modern retailers receive services from the agreement made in the

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<sup>26</sup> Article 1 paragraph (9) Law No. 5 of 1999.

<sup>27</sup> <http://www.businessdictionary.com/definition/economic-institutions.html>

<sup>28</sup> <http://www.businessdictionary.com/definition/seller.html>

<sup>29</sup> <http://www.businessdictionary.com/definition/buyer.html>

form of trading terms. In its development, these trading terms from the modern retailer place more burden on the supplier due to the retailer's high buying power.<sup>30</sup>

Analogously to any market, a two-sided market has a double dimension: the material, or the relevant market of the product / service, and the geographic or the relevant geographic market. In the case of a two-sided market, the definition of the market dimensions differs, however, according to the side of the market that is considered.<sup>31</sup>

According to Rodrigues<sup>32</sup>, in what concerns the material dimension of the market, as referred by the European Commission (vide EC, 1997 and 2001), the relevant market is defined in terms of the substitutability concept. There are:

- a. In the upstream side of the market, since LRGs<sup>33</sup> operate in the demand-side, substitutability is defined in terms of the supply-side i.e. in terms of the customers suppliers have as an alternative to a LRG;
- b. In the downstream side of the market where LRGs act as service providers, substitutability is defined in terms of the products / services offered by retailers.

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<sup>30</sup> Blair and Harrison (1993) implicitly mentioned the definition of upstream and downstream in the context of retail distribution under which both have their own dominating power. See Blair, R.D. and Harrison, J.L., 1993, *Monopsony–Antitrust Law and Economics*, Princeton University Press

<sup>31</sup> Jorge Rodrigues, *Buyer Power and pass-through of large retailing groups in the Portuguese food sector*, 2006, Autoridade de Concorrencia, Lisbon p. 6

<sup>32</sup> *Ibid*,

<sup>33</sup> LRGs: large retailing groups

## 2. Outreach or marketing areas

Referring to the determination of the relevant market based on the geographical aspect or area/ territory which is the location of the business conduct of their business, and/ or location availability or distribution of products and services and/ or where some areas have relatively uniform conditions of competition and different than the conditions of competition with other regions.<sup>34</sup>

The geographic market is the second element that must be taken into account for determining the relevant market. It may be described broadly as the area in which sellers of a particular product or service operate. It can also be defined as one in which sellers of a particular product or service can operate without serious hindrance. The relevant geographic market may be limited - for example, a small city - or it may be the whole international market. In between it is possible to consider other alternatives, such as a number of cities, a province, a State, a region consisting of a number of States.<sup>35</sup>

European Commission<sup>36</sup> defines The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be

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<sup>34</sup> Commission Regulation No. 3 of 2009, op. Cit p. 4

<sup>35</sup> UNCTAD, continued work on the elaboration of a model law or laws on restrictive business practices Draft commentaries to possible elements for Articles of a model law or laws, <http://www.unctad.org/en/docs/tbrbp81r5.pdf>

<sup>36</sup> Commission notice, Op. Cit

distinguished from neighboring areas because the conditions of competition are appreciably different in those area.

Article 1 paragraph (10) Law no. 5 of 1999 mentions the range or marketing area. This is the relevant market in geographical terms. With such identification will be determined in the range of markets are different: the local market, regional markets, national markets, supranational market, or the world market.<sup>37</sup>

Franquis Boisseleau<sup>38</sup>, explained that the relevant geographic market is defined as the area in which “the undertaking concerned are involved in the supply of relevant products or services in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring geographic areas because, in particular, conditions of competition are appreciably different in those areas”

Determination of market based on geographic aspect is extremely fixed by availability of product that being analysis object. Some determinant factors in the availability of product are a company policy, transportation cost, length of trip, tariff, and regulations that confine traffic of trade intercity/ territory.<sup>39</sup>

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<sup>37</sup> Knud Hansen, Op. Cit

<sup>38</sup> Boisseleau F. (2004), The role of power exchanges for the creation of a single European electricity market: market design and market regulation, PhD dissertation, Delft University

<sup>39</sup> Commission Regulation Number 3 of 2009, Op. Cit, 14, it is similar with Europe Practice, see Sih Yuliana Wahyuningtyas, *Urgensi Pengaturan tentang Pasar Bersangkutan (Relevant Market) dalam Hukum Persaingan Usaha di Indonesia* (Jurnal Hukum Bisnis, vol.24. No.2 Tahun 2005),

In association with the company policy, this factor is one of direct indications concerning geographic market coverage. In this matter, a company management decision will critically determine the product logistic primarily for the region or territory that made as marketing target. In addition to the company policy, indicator about cost and time of transportation, tariff, and regulation influence availability of product directly in certain area. In other word, those fourth parameters may become the indication on width and geographic coverage from product made as an analysis object.<sup>40</sup>

Article 1 (10) Law no. 5 of 1999 mentions the marketing area. Marketing area is the region where the suppliers of goods and / or services are experiencing competition. In practice, it is difficult to determine the criteria, but to identify the geographic market, a factor cannot be used independently of other factors that limit further marketing area.

In the case, the commission makes 2 different legal tests for the geographic market, for downstream and upstream market. The definition of geographical market from the downstream side is the extent the consumers have the willingness to do substitution on the retailer to be visited based on the transportation cost and facilitation for the consumers to go from one place to another. Therefore, the geographic market of an outlet will be restricted to the extent the consumers are willing to move

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<sup>40</sup> *Ibid*, p. 15

to another outlet in the event of increase in the price of goods sold to the outlet. For that purpose, the geographic market of an outlet is defined

One of references on geographic market is the regulation that regulates the radius of existence of a market from another market. Article 10 of Governor Regulation of DKI Jakarta No. 2 Year 2002 regarding Private Sector Market in DKI Jakarta stipulates that:

In organizing private sector market business, the distance of business facilities/places must comply with the following requirements:

- a. Private sector market with the floor area of 100 m<sup>2</sup> up to 200 m<sup>2</sup> must be in the radius of 0.5 km from the neighborhood market and shall be located on the side of neighborhood/collector/arterial roads;
- b. Private sector market with the floor area of between 200 m<sup>2</sup> and 1,000 m<sup>2</sup> must be in the radius of 1.0 km from the neighborhood market and shall be located on the side of Collector/arterial roads;
- c. Private sector market with the floor area of above 1,000 m<sup>2</sup> until 2,000 m<sup>2</sup> must be in the radius of 1.5 km from the neighborhood market and shall be located on the side of Collector/arterial roads;
- d. Private sector market with the floor area of above 2,000 m<sup>2</sup> up to 4.000 m<sup>2</sup> must be in the radius of 2 km from the



neighborhood market and shall be on the side of Collector/arterial road;

- e. Private sector market with the floor area of above 4,000 m<sup>2</sup> must be in the radius of 2.5 km from the neighborhood market and must be located on the side of collector/arterial roads.

From the upstream side, the parameter used to determine how far the geographic market shall be how far (within local area context) retailers can procure the supplies. The Commission did not find any hindrance for retailers in receiving products from national suppliers, whether with regard to the regulation, technology, sunk cost, or transportation cost. Also, suppliers can supply their product to outlets nationally owned by retailers.

Therefore, on the basis of all analysis above, the geographic market of each product market in this case is as follows:

- a. Geographic market downstream:
  - 1) In radius 4 km for Jakarta area; and
  - 2) In radius 5 km for areas outside Jakarta
- b. geographic market upstream: nationally

The conduct of Commission in writer's opinion is in accordance with the regulation and the doctrine that commonly used to determine the geographic market, since the geographic market required conditions of competition are sufficiently homogeneous and which can be

distinguished from neighboring areas. Which the writer believes has been explained clearly by the Commission.

### 3. Business actors

According to Article 1 (5) Law No. 5 of 1999, Business actors shall be any individual or business entity, incorporated or not incorporated as legal entity, established and domiciled or conducting activities within the jurisdiction of the Republic of Indonesia, either independently or jointly based on agreement, conducting various business activities in the economic field.<sup>41</sup>

Provisions of Article 1 (5) Law no. 5 in 1999 can be elaborated into:<sup>42</sup>

a. Forms of business:

- 1) Individuals, i.e. individuals who conduct business activities alone.
- 2) Business entity, i.e. a collection of individuals who jointly conduct business activities. The business can then be grouped into two categories, namely:

a) Legal Entity, as defined under Indonesian Civil Code (ICC)

is:

“In addition to an actual partnership, the law shall also acknowledge associations of individuals as legal entities, whether they are established by public authority or acknowledged as such, or whether they

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<sup>41</sup> Article 1 (5) law of the republic of Indonesia Number 5 year 1999 Concerning Prohibition of monopolistic practices and Unfair business competition

<sup>42</sup> See the explanation of Article 1 (3) Law no. 8 of 1999 on consumer protection regarding business actor

are permitted as lawful, or whether they are established with a specific objective, provided that they do not violate the law or proper order.”<sup>43</sup>

According to the law, business entities that can be classified into categories of legal entities are Limited Liability Companies, foundations, and cooperatives.

#### (1) Limited Liability Companies

Based on Article 1 of law No. 40 of 2007,

“Limited Liability Company, hereinafter referred to as the Company, means a legal entity constitutes a capital alliance, established based on an agreement, in order to conduct business activities with the Company’s Authorized Capital divided into shares and which satisfies the requirements as stipulated in this Law, and its implementation regulations.”

Definition of Limited Liability Company consists of two words, namely "company" and "limited". The Company refers to the capital consisting of shares. The word refers to the holder of a limited extent only in the nominal value of all shares owned.<sup>44</sup>

#### (2) Cooperatives

According Article 1 (1) Law No. 25 of 1992,<sup>45</sup>

Cooperative is a business entity consisting of a cooperative or legal entity with bases its activities on

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<sup>43</sup> Indonesian Civil Code, (Promulgated by publication of April 39 1847 S.NO.23), accessed on <http://www.unhcr.org/refworld/pdfid/3ffbd0804.pdf>

<sup>44</sup> Ridwan Khairandy, *Pengantar Hukum Dagang*, FH UII PRESS, ctk.Pertama, Yogyakarta, 2006 p. 33

<sup>45</sup> Law No. 25 of 1992 concerning cooperatives

the principle of cooperative economics as well as people's movement is based on the principle of the family.

### (3) State-Owned Entity

According Article 1 (1) Law No. 19 of 2003,<sup>46</sup> "State-Owned Entity (BUMN)," means an entity, the capital of which is in part or in whole owned by the state through direct participation that is derived from the state's separated assets.

b) Not a legal entity. Type of business entity other than the above three forms of business entities can be categorized as a business entity is not a legal entity, such as the limited partnership (CV), firm, or group of people who conduct business activities incidentally.

#### (1) Partnership

According to Indonesian Civil Code (ICC) a partnership is an agreement by which two or more individuals bind themselves to contribute something jointly with the intent of sharing the proceeds there from among one another.<sup>47</sup>

#### (2) Firm

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<sup>46</sup> Law No. 19 of 2003 concerning State-Owned Entity

<sup>47</sup> Indonesian Civil Code, Article 1618

According to Indonesia Commercial Code, partnership with the firm (Fa) is a civil partnership which was established to run the company under the name together.<sup>48</sup>

(3) limited partnership (CV)

Basically limited partnership is a partnership firm having one or more allies' partnership. Limited partnership itself is an ally who only gave money or goods as income (inbrenng) for the partnership and he did not participate in the management or control of the partnership.

Article 19 of Indonesian Commercial Code mentioned as a partnership by borrowing money or also called the limited partnership concluded between partners or more personally responsible for all and one or more as a partner who lend money.

b. Subjective Territorial Principle

Law No. 5 of 1999 requires that business actors establish their business in Indonesia for business actor names can be listed in the list of corporate Indonesia, Indonesia after being allowed establishment, and then domiciled in Indonesia administratively, and the locations are in the territory of the Republic of Indonesia. Law

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<sup>48</sup> Indonesian Commercial Code, Article 16

no. 5 of 1999 can be applied to the activities of business entities that operate internationally, if the leadership group in Indonesia, although the domiciled subsidiaries abroad and the law No. 5 of 1999 shall not apply to Business entity established in Indonesia, but domiciled abroad.

c. Objective Territorial Principle

Business activities in the territory of the Republic of Indonesia relating to the location of the market (market economy). Economic activity aimed at generating income business actor, and offers an attractive form of buyers (consumers) Indonesia.

The scope of business actor breadth of understanding in consumer protection laws have in common with the understanding business actor in the European Community, especially the Netherlands, that which can be qualified as a manufacturer is: makers of finished product (finished product); producer of raw materials; parts maker; every person who manifests itself as a manufacturer, by putting his name, specific identification, or any other markings that distinguish the genuine product, on a particular product; importer of a product with a view to sale, rental, leasing or other forms of distribution in commercial transactions; supplier (the

supplier) , in terms of the identity of the manufacturer or importer cannot be determined.<sup>49</sup>

Based on the definition and understanding of the business actor above, this case study will further analyze who is called by business actor in the case of Carrefour's acquisition of the shares of PT. Alfa Sigmantara tbk. In this case, the authors refer to the explanation of reported identity as stated in the decision, namely

The Reported Party in this case is PT. Carrefour Indonesia, a legal entity established under Indonesian laws and regulations, in accordance with the Deed of a Meeting Decision of PT Carrefour Indonesia, namely Deed No.18 on 11th August 2008 made before Notary Public & PPAT Merry Susanti Siaril, SH, in which PT. Carrefour Indonesia currently is located in Carrefour Building 3rd Floor, Jl. Lebak Bulus Raya No. 8, South Jakarta 12310

Since PT. Carrefour Indonesia was established by the law of Indonesia, is domiciled in Indonesia, and conducting activities within the jurisdiction of the republic of Indonesia, therefore it can be referred to as the business actor.

#### 4. Goods and Services

According to Article 1 (16) Law No. 5 of 1999, Goods shall be any physical objects, tangible or intangible, movable or immovable, which may be traded, used, utilized or exploited by consumers or business actor.

- a. Tangible goods are goods that have a particular form, examples of these items such as books, pens, etc.

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<sup>49</sup>Ahamadi Miru dan Sutarman Yodo, Hukum Perlindungan Konsumen, (Jakarta: PT. Raja Grafindo Persada, 2004) p. 1

- b. Intangible goods are goods that do not have a particular form, examples of these items such as gas, water, etc.
- c. Movable goods can be defined as goods move from one place to another either by moving itself or transferred, examples of such goods, ships, boats, cars, etc.
- d. Immovable goods is an object that cannot be moved from one place to another, examples of these objects, namely land, tree roots are still stuck, etc.

According to Article 1 (17) Law No. 5 of 1999, Services shall be services in the form of work or performance traded in society to be utilized by consumers or business actors.

According to Christian Gronroos,

“A service is an activity or series of activities of more or less intangible nature that normally, but not necessarily, take place in interactions between the customer and service employees and /or systems of the service provider, which are provided as solutions to customer problems”<sup>50</sup>

There are four characteristic of service: Intangibility, Inseparability, Variability and Perish ability.<sup>51</sup>

- a. Intangibility means that cannot be seen, tasted, felt, heard or smelled before they are bought thus the customer cannot evaluate it.
- b. Inseparability character of service refers to the fact that services are produced and consumed at the same time and that they cannot be

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<sup>50</sup> Gronroos, C. Service Management and Marketing: Managing the Moment of Truth in Service Competition. Lexington, MASS: Lexington Books.1990 P. 27

<sup>51</sup> Kotler, P. and Keller, L. K. A Framework for Marketing Management. 3rd ed. New Jersey: Prentice Hall.2007



separated from their providers, whether the providers are people or machine.

- c. Services are variable and difficult to control. This is because they greatly depend on who provides the service as well as when, where and how they are provided.
- d. Perish ability means that service cannot be stored for later use or sale

Under the developing paradigm, retailed groceries are no longer as the form of distribution of goods but rather as the market for distribution services developed as additional transaction in addition to transactions of goods distribution. This is due to efficiency in a certain cost that retailer can make on goods and subsequently sell it to a supplier with the purpose of giving additional benefit for the sale of the supplier's product.

The services intended above include the service for carrying out retail sales to the consumers through rental of spaces, display stand, promotion media packed with modern management system, and comfortable services for consumers.

#### 5. Equal or similar or substitute

Referring to the relevant market definition based on the product. The product will be categorized in the relevant market or can be substituted with one another according to the consumer if there are similarities in terms of function / designation / use of, specific characters, as well as comparison of price levels of products at a price of other

goods. From the supply side, substitutes are potential products generated by businesses that could potentially enter the market.

The product market (reference to product includes services) is the element that must be taken into account for determining the relevant market. In practice, two closely related and complementary tests have been applied in the identification of the relevant product/service market, namely the reasonable interchangeability of use and the cross-elasticity of demand. In the application of the first criterion, two factors are generally taken into account, namely, whether or not the end use of the product and its substitutes are essentially the same, or whether the physical characteristics (or technical qualities) are similar enough to allow customers to switch easily from one to another. In the application of the cross-elasticity test, the factor of price is central. It involves inquiry into the proportionate amount of increase in the quantities demand of one commodity as a result of a proportionate increase in the price of another commodity.<sup>52</sup>

European Commission<sup>53</sup> defined that a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use.

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<sup>52</sup> UNCTAD, continued work on the elaboration of a model law or laws on restrictive business practices Draft commentaries to possible elements for Articles of a model law or laws, <http://www.unctad.org/en/docs/tbrbp81r5.pdf>

<sup>53</sup> COMMISSION NOTICE on the definition of relevant market for the purposes of Community competition law (97/C 372/03), van be accessed on [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997Y1209\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997Y1209(01):EN:NOT)

In Article 1 (10) Law no. 5 in 1999, the market is a market where there are factual goods and / or the same or similar services, including substitutes. However, the regulation does not govern who determines whether the goods and / or services are identical or substantially similar, and neither set of criteria to determine the goods and / or services are identical or similar.<sup>54</sup>

Franz Jurgen Sacker and Jens Thomas Fuller argued for the separation of the market in terms of factual. According to them, the most important concept is the concept of substitution to determine the relevant market in terms of factual with how to define the goods and / or services which may be substituted for goods and / or other services. As part of the concept, there are various models to determine the relationship of substitution.<sup>55</sup> The models include the concept of the economic plan that defines the relationship between competitors, and thus factually relevant market, based on the knowledge held by the supplier that the marketing of goods is not only determined by the parameters of their own activities, but also by parameters other suppliers.<sup>56</sup>

In the analysis of Article 1 (10) Law No. 5 of 1999, Franz Jurgen Sacker and Jens Thomas Fuller described that the substitution criteria can be analyzed as follows<sup>57</sup>: first, can be determined in absolute terms the nature of the goods and / or the same or similar services. The first clue is

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<sup>54</sup> Knud Hansen, op cit. p. 95

<sup>55</sup> *Ibid*,

<sup>56</sup> Sih Yuliana Wahyuningtyas, Op. Cit p. 26

<sup>57</sup> *Ibid*,

the same physical properties of the goods and / or services, related to the use of the same goals that are interchangeable. In addition, external attributes such as brand image or the results of testing of goods and / or related services that may affect the behavior of buyers. The second, based on the nature of the goods and / or services, the buyer needs to assume that the goods and / or services can be replaced with the goods and / or other services. What important is the use of concrete by the buyer and not the intended use of the hypothesis of potential.<sup>58</sup>

Based on Presidential Decree No. 112 of 2007 on Settlement and Development of Traditional Market, Shopping Center and Store Modern and Regulation of the Minister of Trade No. 53/M-DAG/PER/12/2008 on Settlement and Construction Guidelines for Traditional Market, Shopping Center and the Modern Store, market can be divided into several categories:

a. Traditional Market

That the traditional retail business can be characterized by, among others:

- 1) the goods sold may be offered by consumers who want to buy
- 2) there is no specific price tag on the goods sold (bar code)
- 3) consumers do not pick up their goods to be purchased;

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<sup>58</sup> Knud Hansen, Op. Cit. p. 97

- 4) convenience store or a place to sell is not a special consideration for consumers in choosing the store where he will shop
- 5) not all the merchandise on display;
- 6) managers can be either individual entrepreneurs;
- 7) payments are generally made in cash;

The traditional retail business is conducted by the market as traditional or conventional stores. Each of the traditional retailers sell only certain goods or types of groups of certain goods, e.g. food commodity group, group of basic goods (nine basic needs), Articles of household appliances, etc.

The business relationship between traditional retailers with suppliers is generally broken system of buying and selling. Prevailing party suppliers as sellers of goods and traditional retailers as purchasers of goods. Retailers then resell the goods supplied by suppliers to consumers. Retailers have benefited from the margin or the difference between the purchases prices from the supplier with sale prices to consumers

#### b. Modern Market

That the modern retail business can be characterized by, among others:

- 1) consumers can not bargain the price of goods to be purchased;

- 2) there is a special price tag on the goods sold (bar code);
- 3) consumers choose and make their own items to be purchased (self-service);
- 4) convenience store or a place to sell a special consideration for consumers in choosing the store where she will shop;
- 5) all goods sold on display;
- 6) generally manager is a form of business entity with well-organized management ;
- 7) payments can generally be made in cash and credits

That the modern market based on characters described above, the modern market can be classified into minimarkets, supermarkets and hypermarkets. Each form of the modern market can be characterized as follows:

- 1) Minimarket, has the following characteristics:
  - a) types of commodity or merchandise sold are daily household products such as food and beverage in fast food packaging;
  - b) activities carried out in retail sales and services conducted in their own way by the consumer using a portable cart or other equipment (stroller that has been provided);
  - c) its maximum floor area 200 m<sup>2</sup>;
  - d) price of merchandise sold is listed clearly and definitely;

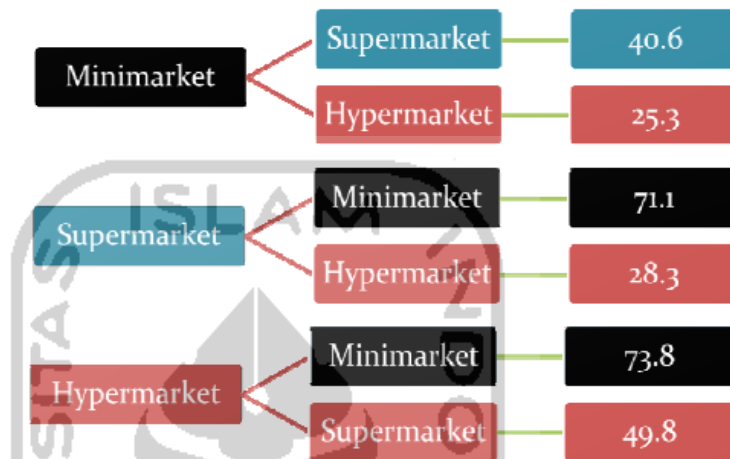
- e) number of items of products sold between 2000-3000 item of products;
  - f) the presence of stores in locations around the housing;
  - g) Cash register has a maximum of two machines
- 2) Supermarket, has the following characteristics:
- a) type of commodity or merchandise that is sold are daily household products included nine basic needs;
  - b) activities carried out in retail sales and services conducted in their own way by the consumer using a portable cart or other equipment (stroller that has been provided);
  - c) price of merchandise sold stated clearly and definitely on the packaging of the goods at a certain place that can be easily seen by consumers;
  - d) its maximum floor area 4000 m<sup>2</sup>;
  - e) number of items of products sold between 10.000 - 18.000 product items (70% retail goods and 30% fresh product);
  - f) Cash register has more than three machines
- 3) Hypermarkets, has the following characteristics:
- a) commodity type of merchandise sold represents the needs of everyday household products such as food and beverage in fast food packaging, nine basic needs as well as fresh products, household products and electronics;

- b) activities carried out in retail sales and services conducted in their own way by the consumer using a portable cart or other equipment (stroller that has been provided);
- c) price of merchandise sold must be listed clearly on the packaging and in a certain place that is easily seen by consumers;
- d) business floor area of more than 4000 m<sup>2</sup> and a maximum of 8000 m<sup>2</sup>;
- e) number of items of products sold between 19000-40000 product items (70% retail goods and 30% fresh product);
- f) Cash register has at least twenty machines

However, the retail services in mini-markets have different service characteristics as compared to the retailer services offered to hypermarkets and supermarkets. The selling space for mini-markets is limited to 200 m<sup>2</sup> in area and therefore, the total items that can be sold by mini-markets are also limited up to 4000 items. On the other hand, hypermarkets and supermarkets provide broader selling space so that they can absorb up to 40,000 items of products. The consequence is mini-markets cannot be the substitute for nearly all products sold in hypermarkets and supermarkets, and only about 10% of hypermarket and supermarket products that can make mini-markets as substitution.



Based from survey on consumers cross shopping.<sup>59</sup> Cross shopping is consumer's shopping behaviors which use some retails formats in meeting their needs.



Based on the above percentage, there is a trend that larger market consumers (consumers' main shopping) do the cross shopping to the smaller format (additional shopping place) than to the larger format. High cross shopping of hypermarket consumer to minimarket again indicates that the existence of minimarket is to complement the hypermarket. On the contrary, smaller cross shopping of supermarket consumers to hypermarket affirms that to supermarket consumers, the existence of hypermarket is a substitution for the supermarket existence.

Basically, "Modern Store" is a store by system of self-service, to sell multifarious of goods in retails in the form of Minimarkets,

<sup>59</sup> Mars, conducted on November 2008 – January 2009, Total respondents: 5476 household respondents, Margin of error: 1.4%, Locations: Jakarta, Bandung, Semarang, Surabaya, Medan, Makassar, Balikpapan, and Palembang, Methodology: Face to face personal interview by using structured questionnaires, Sampling technique: Random Sampling with Multistage Random Sampling

Supermarkets, Department Stores, Hypermarkets or grocers in the form of Wholesaling Stores.<sup>60</sup> To undertake in the businesses of Traditional Markets, Shopping Centers and Modern Stores the following licenses obligate own, "...Modern Stores Business Licenses (IUTM) for Minimarkets, Supermarkets, Department Stores, Hypermarkets and Grocery Stores.<sup>61</sup>" The concept of relevant market under Article 1 (10) is focus on which expressly states that the associated market is only associated with "... a certain scope or area from a business actor for the same or similar goods and or service or the substitution of goods and or service. Accordingly, the definition contained in the Minister of Trade's Regulation No.53/M-DAG/PER/12/2008 used by the Reported Party as a basis for determining the relevant market cannot restrict the Commission Assembly in determining the relevant market. The Minister of Trade's Regulation only defines a modern store rather than a relevant market in the case of business competition. In addition, the Commission has also issued guidelines to the Articles on relevant market arrangement. None of the explanations in the associated market guidelines states that the scope of the associated market may be constrained by the definition as stipulated in a governmental regulation. Thus the writer believes that the Commission is appropriate in determining the relevant market on product, which is supermarket and hypermarket.

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<sup>60</sup> Regulation Of The President Of The Republic Of Indonesia Number 112 Year 2007 Regarding Structuring And Directions Of Traditional Markets, Shopping Centers And Modern Stores.

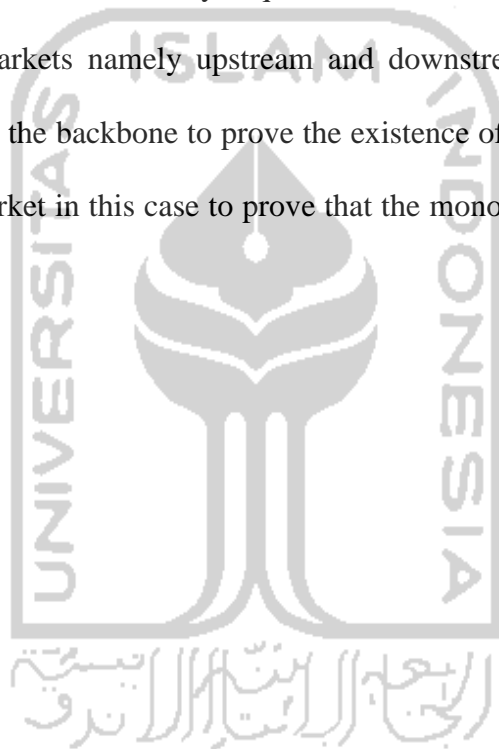
<sup>61</sup> *Ibid*,

## H. Conclusion

Based on legal analysis performed, the legal tests set in determining the relevant market on the Business Competition Supervisory Commission Decision No. 09/KPPU-L/2009 about the acquisition by Carrefour's towards Alfa is appropriate. Because based on legal analysis, the elements of the relevant markets in Article 1 paragraph (10) of Law number 5 of 1999 have met the requirement. The Commission takes a comprehensive research in formulating the relevant market. In outreach or marketing areas, the commission makes 2 different legal tests, for downstream and upstream market. The definition of geographical market from the downstream side is the extent the consumers have the willingness to do substitution on the retailer to be visited based on the transportation cost and facilitation for the consumers to go from one place to another. From the upstream side, the parameter used to determine how far the geographic market shall be and how far (within local area context) retailers can procure the supplies. In equal or similar or substitute product, commission decided the first legal test is the same physical properties of the goods and / or services, related to the use of the same goals that are interchangeable. Second, based on the nature of the goods and / or services, the buyer needs to assume that the goods and / or services can be replaced with the goods and / or other services

In contrary, based on the number 09/KPPU-L/2009 decision, the Commission bases its consideration of upstream and downstream markets division only on the doctrine of the proposed experts. Without linking or

taking an analogy with the legal regulations applicable in Indonesia, it becomes a weakness, and then backfired, because this element which later used by appeal court became the basis of the district court to overturn the verdict 09/KPPU-L/2009. Evidence of the Commission was very weak because in proving the relevant market is only grounded on the doctrine of the experts whose credibility is questionable. Whereas, the division of market into two markets namely upstream and downstream market becomes very crucial. It is the backbone to prove the existence of market domination on the relevant market in this case to prove that the monopoly really happened upon this case.



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