

CHARACTERISTICS OF INDIRECT EVIDENCE TOWARDS PRICE FIXING AGREEMENTS IN THE PERSPECTIVE OF COMPETITION LAW

Elreddian Kusuma Dewi¹, Zahry Vandawati Chumaida^{2*}, Sinar Aju Wulandari³

¹⁻³ Faculty of Law, Universitas Airlangga, Surabaya, Indonesia

E-mail: ²⁾ vanda@fh.unair.ac.id

Abstract

In the ever-changing landscape of Indonesian business, the pursuit of profits drives actors to engage in intense competition, all regulated by the Business Competition Law. This unique legal field combines both conventional law and economics to address unfair business practices, such as agreements that manipulate prices to deceive consumers. This research focuses on the characteristics of indirect evidence utilized by the Business Competition Supervisory Commission (KPPU) when investigating cases of price-fixing. The goal is to gain a deeper understanding of the legal implications of using indirect evidence within the procedural framework of Business Competition Law in Indonesia. To achieve this, a Normative Research method is employed, utilizing a multi-faceted approach. Through case analysis, statutory examination, conceptual exploration, and comparative study, the research explores patterns, legal frameworks, theoretical concepts, and perspectives from different jurisdictions, all related to the use of indirect evidence in the context of price fixing. The results revealed that Indirect evidence, classified as clue evidence under Perkom No. 1 Of 2019, encompasses communication and economic evidence. When direct evidence is lacking, these components, including documents or electronic information, play a crucial role in proving allegations of price-fixing. The legal implications of indirect evidence in the Indonesian competition law evidentiary system highlight its widespread use in resolving cases. However, there is a legal gap that poses challenges to the admissibility of indirect evidence in court proceedings. This emphasizes the need for legal reforms to effectively accommodate the role of indirect evidence.

Keywords: *Business Competition Law, Price-fixing, Business Competition, Supervisory Commission (KPPU), Indirect Evidence*

1. INTRODUCTION

Business actors as the driving force of the economy in Indonesia will always think of various ways to gain profits in running their business. This is what forms a business competition between business actors in Business Competition Law. Business competition law itself is a field of law that has a different character from other laws and has a unique character. The main difference between business competition law and other laws lies in the combination of the field of conventional law with the economic field. So that business actors in the fulfillment of economic motives, namely seeking profits, carry out activities or acts of unfair business competition. Business actors entering into agreements with other business actors to influence prices that trick consumers is one of the acts of unfair business competition.

The Business Competition Supervisory Commission (KPPU) or hereinafter referred to as the Commission, in carrying out its duties and authority to conduct examinations and investigations into alleged violations of unfair business competition must show evidence of examination as stipulated in the provisions of Article 42 of Law Number 5 Of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition.

The development in the evidentiary system in competition law is the emergence of the terms direct evidence and indirect evidence (circumstantial evidence). This is related to the principle of per se illegal and rule of reason in conducting economic analysis to make a decision whether the business actor's actions violate Law No. 5 Of 1999 or not. However, in terms of evidence, especially in business competition law, it is difficult to find direct evidence, so the Commission as a supervisory institution that conducts examinations and investigations into alleged violations of unfair business competition often uses indirect evidence in resolving cases.

Business competition law in Indonesia has been regulated in Law Number 5 Of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition. Business competition is one of the important factors in running the economy of a country where business competition can influence policies related to trade, industry, conducive business climate, certainty and business opportunities, efficiency, public interest, people's welfare and so on. Based on the provisions of Article 2 of Law No. 5 Of 1999 related to the principles in business competition, business actors in Indonesia in carrying out their business activities are based on economic democracy with due regard to the balance between the interests of business actors and the public interest.

As for the business competition market that regulates the issue of price fixing, which is regulated in the provisions of Article 5 paragraph (1) of Law No. 5 Of 1999 which states as follows:

"Business actors are prohibited from entering into agreements with their competing business actors to fix prices for the quality of goods and/or services that must be paid by consumers or customers in the same relevant market."

Business actors who cooperate in price fixing with other business actors have occurred in several cases in Indonesia where the Commission used indirect evidence in its investigation, namely in the case of the Commission's decision with Case Number 24/KPPU-I/2009 which examined alleged violations of Article 4, Article 5 paragraph (1), and Article 11 of Law No.5 of 1999 relating to the Palm Oil Edible Oil Industry in Indonesia, the Commission's decision with Case Number 04/KPPU-I/2016 on alleged violations of Article 5 paragraph (1) of Law No.5 of 1999 relating to the Motorcycle Industry. Of 1999 relating to the Palm Cooking Oil Industry in Indonesia, KPPU's decision with Case Number 04/KPPU-I/2016 concerning alleged violations of Article 5 paragraph (1) of Law No.5 Of 1999 relating to the 110-125 CC Motorcycle Industry in Indonesia, and KPPU's decision with Case Number 15/KPPU- I/2019 concerning alleged violations of Article 5 paragraph (1) and Article 11 of Law No. 5 Of 1999 relating to Domestic Economy Class Passenger Scheduled Commercial Air Transport Services.

Regarding the indirect evidence used by the Commission in proving whether the alleged business actors are proven to have entered into a price fixing agreement, it should be noted that the use of indirect evidence is supported by additional evidence, namely communication evidence and economic evidence. The use of indirect evidence in price fixing and cartel cases in other countries can be seen from. Cases in the United States using indirect evidence related to price fixing agreements such as the case of *America Tobacco Co. V. United States*, 328, U.S. 781 (1946) which was decided by the Court on June 10, 1946. As well as the *High Fructose Corn Syrup* case in *In Re High Fructose Corn Syrup Antitrust Litigation*, 936 F. Supp. 530 (C.D. III. 1996) which was decided by the Court in August 1996. Conducted by Archer Daniels Midland Company (ADM) where the Chicago Court, ADM employees released sounds and videos that sounded conspiracy

meetings conducted by ADM managers regarding price fixing, so that it became one of the indirect evidence used as a basis for the verdict. Therefore, this thesis will discuss in more depth the characteristics of indirect evidence used by the Commission in investigating and resolving price fixing cases in Competition Law in Indonesia and the legal consequences arising from the application of indirect evidence, especially in the theory of evidence applicable in Indonesia.

Based on the previous background description, the problem formulations that will be discussed in are:

- a) Characteristics of indirect evidence used by the Commission in examining price fixing cases in Indonesian Competition Law.
- b) Legal consequences arising from indirect evidence, especially in the evidentiary system in the procedural law of Business Competition in Indonesia.

2. RESEARCH METHODS

The Normative Research method is utilized in this study to delve into the characteristics of indirect evidence in the context of price fixing within the realm of business competition law. This research approach encompasses various methodologies, including the case approach, statute approach, conceptual approach, and comparative approach.

The case approach involves an in-depth analysis of specific legal cases related to price fixing. By examining these cases, researchers can identify patterns, trends, and commonalities in the use of indirect evidence in proving price fixing allegations.

The statute approach focuses on the examination of relevant laws and regulations pertaining to price fixing. Researchers analyze the language, provisions, and interpretations of these statutes to gain insights into the role of indirect evidence in legal frameworks.

The conceptual approach involves the exploration of theoretical concepts and principles related to indirect evidence and price fixing. Researchers examine existing literature, theories, and frameworks to develop a conceptual understanding of the nature, types, and implications of indirect evidence in the context of business competition law.

The comparative approach involves comparing and contrasting different jurisdictions, legal systems, or approaches to price fixing cases. Researchers analyze how indirect evidence is utilized in various contexts, considering differences in legal frameworks, cultural norms, and enforcement practices.

By employing these research approaches, this study aims to shed light on the characteristics of indirect evidence in relation to price fixing in business competition law. The combination of the case approach, statute approach, conceptual approach, and comparative approach allows for a comprehensive and nuanced understanding of the role and significance of indirect evidence in proving price fixing violations.

3. RESULTS AND DISCUSSION

3.1. Characteristics of Indirect Evidence Used by the Commission in Examining Price Fixing Cases in Indonesian Competition Law

Perkom (Regulation of the competition supervisory commission) No. 4 Of 2011 explains the definition of Price Fixing as a behavior that is highly prohibited in the

development of competition law regulation. This is because price fixing always results in a price that is always far above the price that can be achieved through fair business competition. This high price, of course, causes losses to the public, both directly and indirectly.

Horizontal price fixing in competition law in Indonesia uses a per se illegal legal approach. Horizontal restraint is an unfair business competition practice that results in losses for fellow business actors in the same horizontal degree in the same market. The effect of this horizontal price fixing agreement is that among competing business actors, it can reduce the desire to be innovative and cause market dominance or attempt to limit the entry of new competitors. Business actors and competing business actors may also promise to limit the entry of production so as to cause prices to rise, set the same price and harm the interests of consumers and the economy.

If a business actor and its competitors enter into an agreement knowingly or unknowingly, it will reduce or even eliminate the level of competition between them. That is, in accordance with Article 5 paragraph (1) of Law No. 5 Of 1999, horizontal price-fixing agreements are prohibited regardless of the effect of such agreements on competition. The prohibition of price-fixing agreements aims to prevent the actions of business actors to control the market for certain goods or services, because such price-fixing agreements have a direct effect on the price of the goods or services offered.

In relation to the Cartel in Article 11 of Law No. 5 Of 1999, Article 5 paragraph (1) of Law No. 5 Of 1999 is actually also a regulation on cartels, this is regulated in Perkom (Regulation of the competition supervisory commission) No. 4 Of 2011 which states that the cartel in question is a price cartel, so Article 5 paragraph (1) of Law No. 5 Of 1999 directly regulates the prohibition of price fixing. Meanwhile, the cartel regulated in Article 11 of Law No. 5/1999 is a production and marketing cartel whose ultimate goal is to influence prices. The definition of cartel according to the ELIPS Dictionary of Economic Law is defined as a conspiracy or alliance among several producers of similar products with the intention of controlling their production, prices, and sales, as well as to obtain a monopoly position.

US competition law, regulates cartels and price fixing under Section 1 of the Sherman Act, using the per se illegal approach. A behavior that is determined by the Court to be per se illegal, will be punished without a complicated investigation process. The per se illegal approach in terms of administrative process is straightforward. This is because it allows the Court to decline to conduct a detailed, usually lengthy and costly investigation into the facts of the relevant market.

Thus, the reason why the United States uses the per se illegal method in resolving cartel and price fixing cases is the great benefit of its use, namely its ease and clarity in the administrative process. The per se illegal approach has a broader self-enforcing power than prohibitions that depend on an evaluation of the effects of complex market conditions. Therefore, the use of the per se illegal approach can shorten the process to some extent in the enforcement of an antitrust law. A process that is considered relatively easier and simpler, as it only involves identifying the illegal conduct and proving it. In this case, there is no need to investigate the market situation and characteristics. Therefore, violations based on per se illegality are an easier issue to resolve.

In contrast to Japan, the Anti-Monopoly Law in Japan does not formulate cartels directly but instead regulates restraint of trade with the aim of prohibiting cartels. The resolution of cartel cases in Japan uses the rule of reason approach, where the competition

authority makes an evaluation of the effects of a particular agreement or activity, in order to determine whether the agreement or activity inhibits or supports competition. In addition, the purpose of the rule of reason approach is for the Court to carefully analyze business practices with many considerations to determine whether or not the business conduct is contrary to the antitrust laws.

In relation to Oligopoly in Article 4 of Law No. 5 Of 1999, oligopoly is one of the market structures, where most of the commodities (goods and services) in the market are controlled by a few companies (few sellers). Each company in the market has considerable power to influence market prices and influence the behavior of other companies in the oligopoly market. In an oligopoly market, there is a reaction relationship if a business actor increases the price of its goods, then other business actors will also increase the price of these goods. Vice versa, this condition is called mutually adjusting behavior among business actors, because the homogeneous nature of goods results in the absence of quality competition for traded goods and services.

The prohibition of oligopoly agreements is regulated in Law No. 5 Of 1999 in the provisions of Article 4 paragraph (1) which states, as follows:

"Business actors are prohibited from entering into agreements with other business actors to jointly control the production and or marketing of goods and or services that may result in monopolistic practices and or unfair business competition."

Article 4 paragraph (1) of Law No. 5 Of 1999 is an article that is interpreted using the rule of reason legal approach. Therefore, in determining whether an act can be said to violate Article 4 of Law No. 5 Of 1999, the Commission institution needs to assess and evaluate the consequences of oligopoly agreements made by business actors whether they are inhibiting competition or not.

The relationship between oligopoly and cartels and price fixing is that cartels are part of a collusive oligopoly. That is, there has been a cooperation either intentionally or tacitly without any agreement between business actors (tacit collusion) to jointly fix the price or production of a good which is prohibited in competition law. An example of a case that constitutes a collusive and cartel oligopoly is OPEC (Organization of the Petroleum Exporting Countries), an oligopoly market structure that conducts a world oil price and production cartel. OPEC itself consists of oil-producing countries, such as Saudi Arabia, Iran, Iraq, Kuwait, and other oil-producing countries. The mission of OPEC is to coordinate and unify the petroleum policies of member countries and ensure oil market stability. Therefore, businesses will dare to set a price if the product is an item that is widely considered by consumers.

There are 2 (two) methods of approach in competition law in Indonesia, namely the legal approach and the economic approach. In the legal approach, there is the per se illegal approach and the rule of reason approach. The per se illegal approach is an approach that states that certain agreements or activities are illegal or unlawful, without the need for further proof of the impact caused. Meanwhile, the rule of reason approach is an approach used by the Commission to assess and evaluate the effects of agreements or activities in competition law whether they are inhibiting competition or not.

In general, in Law No. 5 Of 1999, the regulation of the legal approach can be seen from the formulation of articles where the use of the rule of reason approach is usually applied to articles that include the words "which may result" and or "reasonably

suspected". Meanwhile, the application of the per se illegal approach is usually used in articles that state the term "prohibited", without the clause "...which may result in...".

These two approaches certainly have their own advantages and disadvantages. The rule of reason has the advantage of economic analysis to be able to know with certainty the violation that occurred. With the disadvantage that the ability of Judges and other parties authorized to examine cases with the rule of reason approach has a limited understanding in the field of economics so that the inability to understand cases in business competition. Meanwhile, per se illegal has the advantage of a short period of proof because there is no need to look for the consequences of the agreement or business activity in question. In addition, the per se illegal approach has a firmer and broader binding force and does not depend on the evaluation and influence of complex market conditions.

There are differences in the use of the per se illegal and rule of reason approaches. In the per se illegal approach, if there is an agreement or activity that is prohibited in Law No. 5 Of 1999, the first analysis that can be done is to look at the wording of the article in the competition law, for example in business competition violations that use the per se illegal approach is the provision of Article 5 paragraph (1) of Law No. 5 Of 1999 on price fixing, in the article there is a word clause "...prohibited..." which means that it has fulfilled the elements in the use of per se illegal that any price fixing agreement made by a business actor with its competing business actors is an illegal or unlawful act.

Next, it explains the use of the rule of reason approach in competition law in Indonesia. If the commission has suspected a violation of an agreement or activity prohibited in Law No. 5 Of 1999, for example in the provisions of Article 11 on Cartel which contains the clause "...which may result in..." this is a rule of reason approach but an in-depth evaluation of other factors that are regulated more in each article is needed. Therefore, it takes a longer time to determine whether the evaluated factors support or hinder competition. If the agreement or activity is found to hinder competition, it is declared illegal or unlawful.

While in the economic approach method in competition law there are 4 (four) economic approaches that can be understood, as follows:

A. Relevant Market

Basically, the relevant market is regulated in the provisions of Article 1 paragraph 10 of Law No. 5 Of 1999. In the relevant market, there are 2 (two) approaches, namely production market and geographic market, with the following explanation:

According to Perkom (Regulation of the competition supervisory commission) 3 Of 2009 on Guidelines for the Application of Relevant Market, a production market is defined as competing products of a particular product plus. The most important thing in a production market is whether or not there are close substitutes in the market. For example, in the two-wheeled motor vehicle industry, company A raises prices by 7% and consumers continue to buy products from company A, so this condition has reflected a market power in the relevant market, which results in reducing the level of competition and limiting other competing products in the same industry. This is prohibited in competition law because consumers should be able to buy other products as substitute products.

Meanwhile, Perkom (Regulation of the competition supervisory commission) 3 Of 2009 explains that a geographic market is an area where a business actor can increase its prices without attracting new business actors or without losing significant consumers,

who move to other business actors outside the area. For example, in cellular telecommunication services in Indonesia, this service has different coverage areas in each region, so it can lead to competition between cellular telecommunication service business actors throughout Indonesia.

B. Market Power

Market dominance in the Article 19 guidelines made by the Commission is a monopolization behavior, which is the action or effort of a company or group of companies to maintain or increase a monopoly position or dominant position in a relevant market. Competition law does not prohibit a company from having a dominant position, but if the company utilizes its dominant position to reduce or eliminate competitive pressure from competing business actors, the company is declared to have committed abuse of monopoly or dominant position.

This behavior is contrary to the principles of competition law with the impact of limited consumer choice due to fewer competitors, increased prices paid by consumers, and decreased social welfare. An example of a case in this market control violation occurred in container services in case number 29/KPPU-L/2020 related to Goods Loading and Unloading Services at the Yos Sudarso Pier at Ambon Port which violated Article 19 letter a and letter b of Law No. 5 of 1999 where PT PI prevented consumers from using services at its competitors, through the act of sending letters by PT PI to its consumers.

C. Barrier to Entry in the Relevant Market

One of the ways taken by business actors to launch business activities is to impose barriers to entry into the relevant market. By attempting to retain competing businesses with diverse characteristics and preventing entry barriers in the relevant market, is an appropriate action for antitrust enforcement. Concerns about the entry of new competitors who are more innovative and aggressive will force existing businesses to seek useful breakthroughs and the latest innovations in the products and production processes of certain goods and or services.

Barrier to entry is also one of the ways taken by one or several business actors who have controlled the market before, to inhibit other business actors who are considered to have the potential and ability to compete, thus reducing the profits to be achieved. Competing business actors are business actors that have the same/similar business activities in the same market or are in the relevant marketing area. This is what makes barrier to entry an approach to analyze whether there are indications or allegations of violations of Law No.5 of 1999 committed by business actors.

D. Pricing Strategy

Price is one of the benchmarks to observe whether there are allegations of violations of Law No. 5 Of 1999, which serves as a monitoring instrument for potential violations in competition law. The price strategies that are often carried out by business actors, especially in price fixing, are:

First, pricing that can generate maximum profit. Second, pricing strategies for costs and special demand structures on pricing based on holidays, for example on Eid holidays, Christmas holidays, New Year holidays, or state independence days. Another example for special demand such as demographic conditions, for example: the existence of products that are specific to a certain age, for example baby products. In addition, products that are specialized for certain genders, for example: special facial soap for women. There is also special demand in technology, for example in mobile phone

communication products with Apple or Android brands. Third, other anticompetitive pricing, which consists of:

- a) Pricing below marginal cost (predatory pricing or selling at a loss);
- b) Maximum pricing and minimum pricing; and
- c) Providing price discounts.

The evidentiary process in business competition law in Indonesia stipulates that there are 2 (two) means of evidence, namely direct evidence and indirect evidence. Direct evidence is evidence that can explain specifically, clearly, and distinctly the material of the agreement between business actors. OECD (Organization for Economic Cooperation and Development) states that direct evidence is such as documents, attachments included, oral or written agreements related to the participation of business actors.

Perkom (Regulation of the competition supervisory commission) No. 4 Of 2011 explains that what is meant by Direct Evidence or Hardcore Evidence is observable elements and shows the existence of a price-fixing agreement on goods and/or services by competing business actors. Where in the direct evidence there is an agreement and the substance of the agreement. Direct evidence can be in the form of: fax evidence, recordings of telephone conversations, electronic mail, video communications, and other tangible evidence.

Initially, all competition authorities in each country used direct evidence as stipulated in the law. Direct evidence can be in the form of documents (letters) or witness testimony. However, in its development, the use of direct evidence is not easy to use due to difficulties in obtaining direct evidence. In fact, it is almost impossible for competition authorities to obtain direct evidence. There are several reasons why direct evidence is difficult to obtain, among others, because business actors in conducting agreements or actions are no longer in the form of written agreements. However, it is already in the form of an oral agreement. Although, in the form of a written agreement, the evidence is neatly secured so that it cannot be known and at the same time so that it cannot be confiscated by the competition authority.

Characteristics of indirect evidence As in the provisions of Perkom (Regulation of the competition supervisory commission) No. 4 Of 2011 that in the development of price fixing case handling in various parts of the world, evidentiary efforts are also developed not only through direct evidence (hardcore evidence) but also other evidences through indirect evidence. The development of this indirect evidence in some countries has been known and explicitly recognized as evidence that is no longer distinguished from direct evidence.

Frederic Jenny, mentioned that almost all countries that have competition law laws use indirect evidence. This happens because direct evidence is becoming increasingly difficult to find because it has been avoided by business actors. Thus, the use of indirect evidence can develop and be used in accordance with the provisions of competition law in Indonesia.

The discussion of indirect evidence is closely related to the regulation of evidence in procedural law. However, what characterizes indirect evidence is that out of a number of evidence regulated in the legislation, there are no laws that expressly regulate indirect evidence. What is regulated in the law is presumptive evidence or instructions. Presumptive evidence is regulated in the HIR and Civil Code, while clue evidence is regulated in; Article 184 paragraph (1) letter d of Law No. 8 of 1981 concerning Criminal

Procedure or KUHAP, Article 36 paragraph (1) letter e of Law No. 24 of 2003 concerning the Constitutional Court, and Article 42 letter d of Law No. 5 of 1999 concerning Prohibition of Anti-Monopolistic Practices and Unfair Business Competition.

The explanation of indirect evidence in Perkom (Regulation of the competition supervisory commission) No. 4 Of 2011 is that indirect evidence is evidence that does not directly state the existence of a price fixing agreement. Indirect evidence can be used to prove the occurrence of a situation or condition that can be used as an allegation of the enactment of an unwritten agreement. Indirect evidence can be in the form of: Communication Evidence and Economic Evidence. The purpose of economic evidence is an attempt to rule out the possibility of independent price fixing behavior. A form of indirect evidence that is appropriate and consistent with the conditions of competition and collusion at the same time cannot be used as evidence that there has been a violation of Article 5 of Law No.5 Of 1999.

Indirect evidence can be "communications evidence" and "economic evidence". Communication evidence in the OECD report refers to recording calls or conversations between business actors, traveling together at a tourist attraction or participating in a meeting, such as a trade conference. In addition, official documents or reports related to prices, the existence of demand and capacity, evidence of internal documents, or strategies to determine competitors' prices.

One example of the emergence of modern evidence is electronic evidence in the form of electronic information or electronic documents in the provisions of Article 5 paragraph (1) of Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Electronic Information and Transactions, hereinafter referred to as the ITE Law, which states that "Electronic Information and / or Electronic Documents and / or their printouts are valid legal evidence". With the explanation of the Article which states that the existence of Electronic Information and / or Electronic Documents is binding and recognized as legal evidence to provide legal certainty for the Implementation of Electronic Systems and Electronic Transactions, especially in proof and matters relating to legal acts carried out through Electronic Systems.

So with this it is clear that electronic evidence in the ITE Law is used in trials and is one of the judge's considerations. And with the existence of electronic evidence regulated in the ITE Law, it recognizes communication evidence as valid evidence. Likewise, the use of communication evidence does not only apply to certain procedural laws, but applies to all procedural laws, including in business competition procedural law. This means that the use of communication evidence in business competition cases already has a legal basis.

The next form of indirect evidence is economic evidence. This economic evidence identifies company behavior that shows that the agreement has been reached. This is by identifying in depth the overall industry behavior, elements of the market structure that show that secret price fixing has occurred. Seeing and identifying that there has been parallel price fixing, unreasonably high profits.

This economic evidence is used to determine with certainty the implications of a business actor's actions on fair business competition. In other words, the economic analysis that will be conducted is to ascertain whether an action is considered to hinder competition or encourage competition. By using economic analysis, the absence of written evidence on direct evidence should not be an obstacle in revealing the existence of a price fixing agreement.

Legal comparison with the United States, that in antitrust law in the United States is regulated by several laws, namely the Sherman Act 1890, Clayton Act, and Federal Trade Commission Act.⁵¹ The regulation of price fixing in the United States is regulated in Section 1 of the Sherman Act 1890 which states that:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court."

When freely translated it is as follows "Any agreement, combination or amalgamation in trust or otherwise, or conspiracy, in restraint of trade between the several states, or with any other state, is from now on declared illegal. Any person who makes a party to any contract engaging in a combination or conspiracy which is thereby declared illegal and is guilty of a felony, shall be deemed guilty of a felony and upon conviction thereof shall be punished by a fine of not more than \$100,000,000 if a corporation or if any other person, \$1,000,000 or by imprisonment not exceeding ten (10) years, or by both in the discretion of the Court." The trusts contemplated under Section 1 of the Sherman Act are prohibited agreements in the case of larger business combinations intended to restrain trade.

In the United States, agreements regulated in Section 1 of the Sherman Act 1890 are not only prohibited agreements (contracts), but the form of combination or combination and conspiracy is also prohibited. Because written or unwritten agreements between two or more business actors aim to take concerted action. The definition of concerted action is an action that is planned, organized, and agreed upon by the parties together and with the same purpose. The Sherman Act does not expressly state that agreements regarding prices are against the law, what is prohibited is agreements that hinder trade and unfair agreements.

This is different from the regulation of price fixing agreements as stipulated in the provisions of Law No. 5 Of 1999. Competition law in Indonesia has regulated forms of anticompetition and monopoly that are classified in the form of prohibited agreements and activities prohibited by the antitrust law. It specifically explains article-by-article what forms of anti-competition and monopoly are, as well as the regulation of price fixing which has been specifically regulated in Article 5 (1) of Law No. 5 Of 1999 on price fixing.

In addition, in the United States, the formulation of a price fixing agreement in Section 1 of the Sherman Act only mentions the element of the legal subject "any person", but in legal facts, it can be done by both the Company and the Association of Business Actors. This can be seen in the case of *Jung vs. Association of American Medical Colleges (AAMC)*. Competition law in Indonesia has regulated that in the provisions of Article 1 paragraph 5 of Law No. 5 of 1999 that the legal subject that violates is a business actor. Business actors themselves are individuals and/or legal entities, whether in the form of legal entities or not. Business actors as legal subjects enter into price-fixing agreements with their competitors, which are other business actors in the same relevant market.

The antitrust enforcement agency in competition law in the United States is The Federal Trade Commission (FTC) which was established in 1914 under The Federal Trade Act 1914 (FTC ACT 1914). According to the FTC ACT 1914, the FTC is an institution that has the authority to conduct inquiries and investigations and take action against violations of competition law. US law dictates that the FTC can only handle civil violations. The FTC does not have criminal jurisdiction over competition law violations. The antitrust enforcement agency in Indonesia is the KPPU which is an independent institution that has the duty and authority to oversee and implement Law No. 5 of 1999 and is directly responsible to the President of the Republic of Indonesia. KPPU has a law enforcement function in competition law but KPPU is not a judicial institution so it does not have the authority to impose criminal sanctions or civil sanctions. Therefore, in accordance with its authority, KPPU can only impose administrative sanctions on business actors who violate competition law.

Competition law in the United States considers that price fixing is per se illegal and also constitutes horizontal price fixing. The first case that applied the per se illegal approach was United States vs. Trans-Missouri Association. The reason for using the per se illegal approach is because of its ease and clarity in the administrative process, as well as its broader self-enforcing power, and its use shortens the process time in examining an antitrust case. The use of per se illegal in reality can change to rule of reason or vice versa. The reason is to determine whether a company's actions inhibit or encourage business competition. In contrast to the application of per se illegal in Indonesia, which in Law No. 5 Of 1999 has been determined with certainty, but sometimes in a case in one relevant market there can be two or more anticompetitive and monopolistic acts. For example, the Cartel case in the cooking oil industry in KPPU Decision No. 24/KPPU-I/2009 which violated the provisions of Article 4, Article 5, and Article 11 of Law No. 5 Of 1999, namely on oligopoly, price fixing, and cartel where oligopoly and cartel are rules of reason that require in-depth evaluation of whether the actions of business actors can be said to hamper or encourage competition while price fixing is per se illegal.

In addition, the United States is a member of the OECD and has been using indirect evidence for a long time. The rationale behind the use of indirect evidence is that there are limitations to obtaining direct evidence. This is an obstacle in solving problems in antitrust cases in the United States. Such constraints also encourage the use of indirect evidence, as an alternative to the use of indirect evidence "circumstantial evidence can be a valuable tool for competition authorities in cases where direct evidence of collusion is difficult or impossible to obtain." Which translates to circumstantial evidence being a valuable tool for competition authorities in resolving cases of collusion where direct evidence is difficult or impossible to obtain. Although Indonesia is not yet a member country of the OECD, Indonesia has shown its seriousness to join, namely at the meeting of the Minister of Finance (*Menkeu*), Sri Mulyani, has attended the OECD Council Meeting in the city of Paris, France. This is progress, especially in competition law in Indonesia, especially in the application of circumstantial evidence in resolving anticompetitive and monopoly cases.

3.2. Legal Consequences of Indirect Evidence, Especially in the Evidence System in the Law of Business Competition Procedure in Indonesia

The anti-competition and monopoly enforcement agency in Indonesia is the Business Competition Supervisory Commission (KPPU) or the Commission as stipulated in Article 1 point 18 of Law No. 5 Of 1999 which states that the Commission is established to supervise business actors in carrying out their business activities so as not to commit monopoly and/or unfair business competition. The status of the Commission in accordance with the provisions of Article 30 paragraph (2) and paragraph (3) is an independent institution that is independent of the influence and power of the Government and other parties and is directly responsible to the President.

The Commission as an independent institution has enormous powers, including those of the judiciary. These powers include investigation, prosecution, consultation, examining and deciding cases. The Commission in the constitution is a complementary state institution (state auxiliary organ) that has the authority based on Law No.5 Of 1999 to enforce business competition law. So that the Commission has a multi-complex task in overseeing every move, step and practice of unfair business competition carried out by business actors. As well as carrying out duties and authorities in accordance with the provisions of Article 35 and Article 36 of Law No. 5 Of 1999.

The process of proving a violation of Article 5 paragraph (1) of Law No. 5 of 1999 in Perkom (Regulation of the competition supervisory commission) No. 4 of 2011 is that the Commission must fulfill all the elements in Article 5 of Law No. 5 of 1999 on cases that allegedly violate price fixing. After that, categorize whether the case is in the same relevant market, for example in the Case of Domestic Economy Class Passenger Scheduled Commercial Air Transport Services in KPPU Decision Number 15/KPPU-I/2019 which is a violation of Article 5 and Article 11 which are in the same relevant market.

After proving the same market, the next stage is proving the existence of an agreement among business actors suspected of entering into a price-fixing agreement. The Commission must find the agreement made by the business actors, if it can find it, the agreement is a form of direct evidence (direct evidence or hardcore evidence). However, if the Commission cannot find evidence of a direct agreement, the use of indirect evidence (indirect evidence or circumstantial evidence) becomes important when no direct evidence is found stating the existence of an agreement.

The indirect evidence sought is communication evidence and economic evidence. Economic evidence needs to be carried out with economic analyses that act as a tool to infer (infer) the existence of coordination or agreement between business actors in the market. Evidence from economic analysis is used to conclude whether the conditions in the market are favorable for a successful collusion (prerequisites for successful collusion). If a violation of price fixing is proven, indirect evidence can be used in the form of clue evidence as well as other evidence in Article 42 of Law No.5 Of 1999.

The evidentiary system using indirect evidence as evidence in competition law is sometimes not possible other than using evidence that has been regulated in law when in fact the evidence that can be used to prove a case is not only regulated in law. The Supreme Court in a number of decisions, also stated that clue evidence is not the same as indirect evidence. In the context of evidentiary theory, clues are circumstantial evidence or indirect evidence, which is complementary or accessory evidence. This means that

clues are not independent evidence, but are secondary evidence obtained from primary evidence.

Based on the provisions in Article 57 of Perkom (Regulation of the competition supervisory commission) No.1 Of 2019, the meaning or definition of clues as stated in Article 42 of Law No.5 Of 1999, is not the same as the clues in the Criminal Procedure Code. In Article 57 of Perkom (Regulation of the competition supervisory commission) No.1 Of 2019, the Commission provides an explanation that clues are communication evidence and economic evidence. This is also in line with the classification of indirect evidence as communication evidence and economic evidence adopted by a number of countries that are members of the OECD. In a number of OECD countries there is an agreement to recognize and use indirect evidence, as valid evidence in handling business competition cases.

The indirect evidence system, as previously explained, consists of Communication Evidence and Economic Evidence. An explanation of its forms is as follows:

1. Evidence of electronic communication or information

Udin Silalahi in his opinion states that evidence of communication can be in the following form:

- a) Recordings of telephone conversations (but not the content of the conversations) between competing businesses, or records of travel to the same destination or participation in certain meetings such as trade conferences;
- b) Other evidence of where business actors communicate include, among others, minutes or records of meetings indicating discussions on price, demand, or capacity utilization such as internal company documents indicating knowledge or understanding of competitors' pricing strategies such as knowledge of future price increases by competitors.
- c) Electronic information and communication evidence commonly used by law enforcement such as e-mail , short messages, chats via communication media and social media.

2. Economic evidence

Economic evidence can be classified into 2 (two) forms, as follows:

- a) Structural evidence: is a study relating to the level of market concentration, product homogeneity, entry barriers that make it possible to form a cartel, including the presence or absence of a market structure that allows for price fixing agreements. For example: the level of attention to the market, the level of market entry, vertical integration and standardization or equalization of products.
- b) Behavioral evidence: studies relating to suspicious bidding patterns and parallel price increases that indicate non-competitive behavior of business actors. This behavioral evidence may include parallel pricing, abnormally high profits, stable market share, history of competition law violations, and market structure.

Economic evidence in Perkom (Regulation of the competition supervisory commission) No. 4 Of 2011 refers to the conditions of competition and collusion, hence the proof by looking at parallel behavior or strategy, which cannot be used as sufficient evidence to prove the existence of a price fixing agreement. What is meant by parallel business conduct is a simple concept in economics that refers to the anti-competitive behavior of individual firms within an industry when they cooperate with each other in

some say - usually to control prices and/or production and thereby make unfair economic profits at the expense of consumers. Freely translated, parallel behavior is a simple concept in economics that refers to the anti-competitive behavior of individual firms within an industry when they cooperate with each other in some way - usually to control prices and/or production and thereby make unfair economic profits at the expense of consumers.

This requires additional analysis (plus factors) that can be used as indirect evidence as described in Perkom (Regulation of the competition supervisory commission) No.4 of 2011, as follows:

- 1) Pricing Rationality
- 2) Market Structure Analysis
- 3) Work Data Analysis
- 4) Analysis of the Use of Facilitating Devices

However not all of the above plus factor analysis tools must be fulfilled but must be interpreted as a whole and not separately. If the plus factor analysis supports the indirect evidence of the price fixing process, the indirect evidence can become evidence in the form of clues, as referred to in Article 42 of Law No. 5 Of 1999. The best proof is to use direct evidence and indirect evidence together. However, in a condition where direct evidence is difficult to obtain, the use of indirect evidence must be applied carefully. The best use of indirect evidence is to combine communication evidence and economic evidence.

Competition cases that use indirect evidence:

- 1) Case Number 04/KPPU-I/2016 concerning the 110-125 CC Matik Scooter Type Motorcycle Industry in Indonesia
- 2) Case Number 15/KPPU-I/2019 Regarding Domestic Economy Class Passenger Scheduled Commercial Air Transportation Services

The legal consequences of indirect evidence used by the Commission in resolving business competition cases in Indonesia are not regulated in the laws and regulations, especially in Law No. 5 Of 1999. This is what causes the existence of indirect evidence in proof in business competition procedural law is often unacceptable on the grounds that indirect evidence has no governing rules or indirect evidence is difficult to accept. The various types of evidence regulated in several laws, such as in civil procedure law, criminal procedure law, and Law No. 5 of 1999 have not covered the development of evidence in business traffic.

Competition law in Indonesia using Law No. 5 of 1999 is still limited and to use evidence other than the system of evidence that has been regulated is still limitative. Seeing the development made by business actors is no longer making agreements in writing, making it difficult to obtain direct evidence of agreements. The Commission's way to be able to create a world of fair business competition is by conducting observations with economic analyses if there are allegations of competition violations, especially against violations of Article 5 paragraph (1) of Law No. 5 Of 1999 concerning price fixing.

The legal effect of the use of indirect evidence is that there is a legal vacuum in regulating the use of indirect evidence in the settlement of competition law cases in

Indonesia. Although in Article 57 of Perkom (Regulation of the competition supervisory commission) No. 1 Of 2019 it has been explained that direct evidence in competition law is economic evidence and communication evidence which are part of indirect evidence, this is not yet a strong basis. The discussion of indirect evidence is also discussed in Perkom (Regulation of the competition supervisory commission) No. 4 of 2011 which explains the additional analysis (plus factors) in economic evidence in analyzing cases of alleged violations of business competition in Indonesia, especially violations of Article 5 paragraph (1) of Law No. 5 of 1999 concerning price fixing. In its decisions, when reading the Commission's decisions, it often uses cases from other countries with the intention of showing that the use of indirect evidence is also used in the same or related cases. For example, Case No. 03/KPPU-I/2002 was the first to use indirect evidence in Indonesia regarding the sale of shares in PT Indomobil Sukses Internasional. To corroborate its evidence the Commission used indirect evidence referring to cartel cases in Brazil in the Steel Cartel case and the Sao Paulo Airlines case, which were used by Brazil's competition enforcement agency, Brazil's Council for Economic Defense (CADE).

The Commission has been aware of the development of circumstantial evidence which has been commonly used in other countries. Indirect evidence has been used for a long time by the United States in resolving competition cases. Likewise, the use of indirect evidence has been commonly used in OECD member countries, therefore the use of indirect evidence itself is important in resolving cases in competition law in Indonesia.

4. CONCLUSION

The characteristics of indirect evidence in business competition law in Indonesia are used when in a business competition case, especially a case on price fixing, there is no evidence of a written agreement (direct evidence) made by business actors to reach an agreement to influence prices. Indirect evidence is regulated as clue evidence according to Article 57 of Perkom (Regulation of the competition supervisory commission) No. 1 Of 2019 which consists of communication evidence and economic evidence. Communication evidence in its development can be in the form of documents or electronic information while economic evidence itself can be further classified through behavioral evidence and structural evidence as well as with additional analysis (plus factors).

The legal effects of indirect evidence in the evidentiary system in competition law in Indonesia by seeing that through business competition cases many use indirect evidence in resolving cases. However, the regulation of indirect evidence has not facilitated developments in the evidentiary system in competition law. There is a legal vacuum that can cause indirect evidence to not be used in court cases.

REFERENCES

AMA Journal of Ethics. (2015). Challenging the Medical Residency Matching System through Antitrust Litigation. Available from: <https://journalofethics.ama-assn.org/article/challenging-medical-residency-matching-system-through-antitrust-litigation/2015-02> (Accessed November 24, 2023).

- Aminah, S. (2023). Kedudukan Bukti Tidak Langsung (Indirect Evidence) Dalam Penyelesaian Praktik Kartel Di Indonesia. *Dharmasiswa Jurnal Program Magister Hukum FHUI*, 2.
- Bain, S. (2023, December 4). Parallel Conduct Definition and Meaning. Available from: <https://www.dyingeconomy.com/parallel-conduct.html>
- Bhakti, R. T. A. (2015). Analisis Yuridis Dampak Terjadinya Pasar Oligopoli Bagi Persaingan Usaha Maupun Konsumen Di Indonesia. *Jurnal Cahaya Keadilan*, 3(2).
- Connor, J. M. (2001). *Global Price Fixing: Our Customer Are The Enemy*. Massachusetts: Kluwer Academic Publishers Group.
- Devlin, A. (2007). A Proposed Solution to Problem of Parallel Pricing in Oligopolistic Markets. *Stanford Law Review*, 59(4).
- Fitriyah, S., & Sulistiyono, A. (2018). Analisis Yuridis Dan Penggunaan Indirect Evidence Dalam Kasus Kartel Sepeda Motor Di Indonesia Ditinjau Dari Hukum Persaingan Usaha Indonesia. *Privat Law*, 6(1).
- Hermansyah. (2009). *Pokok-Pokok Hukum Persaingan Usaha Di Indonesia*. Jakarta: Kencana.
- Hiariej, E. O. S. (2013). *Teori Dan Hukum Pembuktian*. Jakarta: Erlangga.
- Hidayah, R. K. (2021). Circumstantial Evidence (Bukti Tidak Langsung) Sebagai Alat Bukti dalam Perkara Kartel Di Indonesia. Disertasi, Program Pascasarjana Universitas Airlangga, Surabaya.
- Hidayah, R. K. (2021). *Circumstantial Evidence Sebagai Alat Bukti Dalam Perkara Kartel: Praktik Dan Standar Pembuktian Di Masa Depan*. Jakarta: Kencana.
- Hovenkamp, H. (1993). *Anti Trust*. St. Paul Minnesota: West Publishing, Co.
- Hovenkamp, H. (1999). *Federal Antitrust Policy The Law of Competition and Its Practices*, 2nd Edition. West Academic Publishing.
- Jemarut, W. (2020). Pendekatan Rule Of Reason Dan Per Se Illegal Dalam Perkara Persaingan Usaha. *Widya Yuridika*, 3(2).
- Jenny, F., & Katsoulacos, Y. (2016). *Competition Law Enforcement in the BRICS and in Developing Countries: Legal and Economic Aspects*. Switzerland: Springer Publisher.
- Juwana, H., et al. (2003). *Peran Lembaga Peradilan Dalam Menangani Perkara Persaingan Usaha*. Jakarta: Partnership for Business Competition.
- Kagramanto, L. B. (2012). *Mengenal Hukum Persaingan Usaha*. Sidoarjo: Laros.
- Kaplan, B. M. (1985). *A Guide To Modern Business and Commercial Law*. Chicago: Commerce Clearing House.
- Koloay, R. N. S. (2016). Perkembangan Hukum Indonesia Berkenaan Dengan Teknologi Informasi Dan Komunikasi. *Jurnal HUKUM Unsrat*, 22(5).
- Kumalasari, D. M. S. (2013). *Hukum Persaingan Usaha: Studi Konsep Pembuktian Terhadap Perjanjian Penetapan Harga Dalam Persaingan Usaha*. Malang: Setara Press.
- Lubis, A. F., et al. (2017). *Hukum Persaingan Usaha*. Jakarta: Komisi Pengawas Persaingan Usaha (KPPU).
- Menteri Keuangan. (2023, December 8). Menkeu: Seluruh Negara Anggota OECD Dukung Penuh Proses Akses Indonesia. Available from: <https://www.kemenkeu.go.id/informasi-publik/publikasi/berita-utama/Negara-Anggota-OECD-Dukung-Akses-Indonesia>

- Munandiya, R. (2011). Bukti Tidak Langsung (Indirect Evidence) Dalam Penanganan Kasus Persaingan Usaha. *Jurnal Persaingan Usaha*, Edisi 5.
- Muzakki, A. I. (2023). Perkembangan Pendekatan Dalam Hukum Persaingan Usaha: Truncated Rule of Reason. *Jurnal Persaingan Usaha*, 3(2).
- Nadapdap, B. (2019). *Hukum Persaingan Usaha Bukti Tidak Langsung (Indirect Evidence) versus Tembok Kartel*. Jakarta: Permata Aksara.
- Nadapdap, B. (2020). *Hukum Acara Persaingan Usaha Pasca-Putusan Mahkamah Konstitusi*. Jakarta: Kencana Prenada Media.
- OECD. (2006). *Policy Roundtables: Prosecuting Cartels without Direct Evidence*. Available from: <https://www.oecd.org/daf/competition/37391162.pdf> (Accessed September 11, 2023).
- Organisation for Economic Co-operation and Development (OECD). (2014). *OECD Competition Policy Roundtable on the Use of Circumstantial Evidence in Competition Cases: A Follow Up*.
- Pratama, A. P. R., et al. (2023). Urgensi Pengaturan Leniency Program Terhadap Dugaan Kartel Atas Kelangkaan Minyak Goreng Di Indonesia. *UNES Law Review*, 5(4).
- Silalahi, U., & Edgina, I. C. (2017). Evidentiary Process of Cartel Cases in Indonesia Using Indirect Evidence. *Jurnal Yudisial*, 10(3).
- Silalahi, U., & Parluhutan, D. (2011). Circumstantial Evidence in The Substantiation Mechanism Against Cartel Infringements in Indonesia. *Jurnal Hukum Bisnis*, 30(2).
- Siswanto, A. (2004). *Hukum Persaingan Usaha*. Bogor: Ghalia Indonesia.
- Sitompul, A. (1999). *Praktek Monopoli Dan Persaingan Usaha Tidak Sehat (Tinjauan Terhadap UU No. 5 Tahun 1999)*. Bandung: Citra Aditya Bakti.
- Syahdeini, S. R. (2000). Larangan Praktik Monopoli Dan Persaingan Usaha Tidak Sehat. *Jurnal Hukum Bisnis*, 10.
- US Supreme Court. (1946). *America Tobacco Co. V. United States*, 328 U.S. 781. Available from: <https://supreme.justia.com/cases/federal/us/328/781/> (Accessed October 4, 2023).
- US Supreme Court. (1996). *In Re High Fructose Corn Syrup Antitrust Litigation*, 936 F. Supp. 530 (C.D. III. 1996). Available from: <https://law.justia.com/cases/federal/district-courts/FSupp/936/530/1487124/> (Accessed October 4, 2023).
- Usman, R. (2004). *Hukum Persaingan Usaha Di Indonesia*. Jakarta: Gramedia Pustaka Utama.
- Widhiyanti, H. N. (2015). Pendekatan Per Se Illegal Dan Rule of Reason Dalam Hukum Persaingan (Perbandingan Indonesia-Malaysia). *Arena Hukum*, 8(3).

Copyrights

Copyright for this article is retained by the author(s), with first publication rights granted to the journal.

This is an open-access article distributed under the terms and conditions of the Creative Commons Attribution license (<http://creativecommons.org/licenses/by/4.0/>).