STANDARDIZATION OF ECONOMIC EVIDENCE (INDIRECT EVIDENCE) TO PROOF CARTEL VIOLATION IN INDONESIA

A BACHELOR DEGREE THESIS

BY:

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INTERNATIONAL PROGRAM

FACULTY OF LAW

UNIVERSITAS ISLAM INDONESIA

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MOTTO

"Believe is seeing"

-Dr. Tony Evans

"Terbentur,terbentur,terbentur,terbentuk"

-Tan Malaka

"So do not weaken and do not grieve, and you will be superior if you are [true] believers."

-Q.S Ali 'imran (3:139)

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With gratitude to Allah S.W.T

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ABSTRACT

Evidence has an essential role in determining the existence of a violation in a competition case. However, the evidentiary of competition cases cannot be separated from the use of economic evidence because it is almost impossible to find a written agreement among the business actors. This is depicted by the cartel of Scooter Matic (Skutik), Tariff Operator, and Garlic case in Indonesia. This research tries to elaborate the application of economic evidence in the aforementioned cases. Hence, on the question regarding on how the KPPU verifies the economic evidence in the evidentiary process in handling those cases. Additionally, in figuring out whether or not the standardization of economic evidence had already been appropriate with the evidentiary process relating to the evidence guidance in the according to the procedurals of competition law. This research is conducted through a normative approach with the process of collecting data by both literature studies by collecting articles, documents and news. In the process of analyzing data during the process of this research, it is applied the qualitative method of analysis. It was done by describing the data, knowledge and information through description or explanation which is assessed by the opinions of the experts, by laws, and also by the researcher's own arguments. Subsequently, qualifying it and connecting the theory or doctrine related to the formulation of the problem in this study, as well making conclusions to determine the results and also recommendation. Economic Evidence of these cases is uses price parallelism in which the business actor creates a strategy to control the prices in the market. Practically economic evidence is not appropriate for the reason that KPPU often uses economic evidence as a final Evidence to determine the business actor's conduct of cartel. In this case there is no clear limit on what kind of Economic Evidence that qualifies as valid and convincing evidence. It is preferable for the amendment in the Law No. 5 of 1999 to discuss specifically on the position, application of economic evidence as direct evidence, along with the investigator's capacity to enforce the application of economic evidence.

Keywords:
Economic Evidence, Cartel

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CHAPTER I

INTRODUCTION

A. Context of study

To supervise the enforcement of the law it requires the existence of an institution which obtains the authority of the State. The existence of such authority is expected to have the power to carry out its duties and functions as well as possible and able to act independently. Business Competition Supervisory Commission /*Komisi Pengawas Persaingan Usaha* (KPPU) is regulated in Article 30 paragraph (1) of Law Number 5 Year 1999 which determines: "A Commission for the Supervision of Business Competition, hereinafter referred as the Commission, shall be formed to oversee the implementation of this Law".[1]

Similar to other existing commission in some countries, KPPU is an independent institution and a part of the influence and power of the government and any parties.[2] On that basis KPPU directly responsible to the president as chief executive (article 30 Paragraph 3 of Law No. 5 of 1999).

According to T.M.Luthfi Yazid, as explained by Lukman Hakim that the formation of state commissions is based on five important points:

[1] Ditha Wiradiputra Kurnia, dan freddy Harris, *pengantar hokum persaingan usaha,* kampus baru fakultas hukum universitas Indonesia Depok,2008, p 67-68.

[2] See the Article 30 paragraph 2 of Law No.5 of 1999

1. The absence of a pre-existing institutional credibility due to the assumption (and evidence) of systemic corruption, entrenched and difficult to eradicate.
2. Not independent of State institutions which for some reason are subject to the influence of a particular power.
3. The inability of existing state institutions to undertake tasks to be undertaken in the transition to democracy Either because of internal nor external issues.
4. The existence of a global influence that indicates the tendency of some States to establish extra state institutions called state auxiliary agencies or institutional watchdogs considered as a necessity and Compulsion because existing institutions have become a part of the system to be fixed.
5. There is pressure from international institutions to establish these institutions as a prerequisite for a new era towards democratization.[3]

More specifically, the reason for the establishment of KPPU according to Ayudha D. Prayoga is the philosophical reason that in overseeing the implementation of a rule of law is required as a state institution. The sociological reasons used as the basis for the establishment of KPPU are the decreasing of court image in examining and adjudicating a case, and the burden of trial that has

[3] Lukman Hakim, *kedudukan hukum komisinegara di Indonesia*, program pasca sarjana Universitas Brawijaya, Malang, 2010, Halaman. 33.

accumulated. Another reason, the business world requires a quick settlement and a confidential examination process.

Proofing of cartel cases is difficult to do when it is associated with civil procedure law in Indonesia, which emphasizes the use of Direct Evidence. In fact, direct evidence is very difficult to find in the alleged case investigation of the cartel, so the proof of cartel mostly uses indirect evidence. With indirect evidence, evidence submitted was not physical, but the evidence obtained as a conclusion of the case or events that occur in the trial. The question is, does Indonesia's positive law recognize indirect evidence? Article 184 of the Criminal Procedure Code determines the evidence consisting of witness statements, expert information, letters, guidance and description of the defendant. This order of evidence is as regulated under Article 42 of Law Number 5 Year 1999. Article 1866 of the Civil Code and Article 164 of the *Herzien Inlandsch Reglement* (HIR) determine the evidence consisting of written evidence, witness statements, allegations, confessions, and oaths.

Supreme Court decision recognizes two kinds of indirect evidence. In the case of the cartel, Communication evidence is evidence that cartel Actors meet or communicate, but do not describe the substance of their communication. This includes, among other things, telephone conversations between suspect cartel participants, but does not include the actual substance of the communication. Furthermore, the course to destination by public route or participation in meetings. Other communications evidence such as a Complete note at a meeting

indicating that the use of a price, a request or a capacity, an internal document proving knowledge or understanding of a competitor's price strategy, such as a predicted future price. Further economic evidence, is an economic analysis that aims to prove an unwritten agreement among cartel members because nowadays it is almost impossible to find evidence of a written agreement that contains an agreement to hold a cartel among business actors. Although it is not an absolute proof, economic analysis can become a foundation if the analysis is derived from a logical assumption and is used with the correct and relevant facts.

In the OECD roundtable conference (2006) it is stated that economic evidence is very important for two reasons:

1. The difficulty in obtaining direct evidence, resulting in the necessity of indirect evidence
2. Economic evidence is urgently needed for going through the investigation stage[4]

Therefore, the purpose of using economic evidence in the form of quantitative and qualitative economic analysis is to:

1. Be able to decide whether to proceed at the investigation stage in the relevant market, and
2. Justify whether the investigation stage is indeed feasible to proceed.

[4] Hans W. Friederiszick, "Detecting Cartels in Europe – the Role of Economics", paper presented at 25th Conference on Political Economy, 12-14 October 2006 Saarbrücken

In conducting economic analysis, there are at least two stages needed to be conducted, namely: 1) Structural Analysis, which is directed at establishing whether it is possible for cartel agreement in the relevant market and 2) Behavioral or Change Analysis, aimed at proving whether the behavior in the relevant market is consistent with cartel behavior and not competitive behavior. In the stage of structural analysis, the first activity to do is to define the relevant market appropriately. This stage is crucial to ascertain whether companies suspected of cartel deals are competing companies. To recall, a cartel deal only occur between companies that are supposed to compete.[5] If the companies that are suspected of carrying out a cartel agreement are in a different market, then the alleged violation of competition law on the behavior of the auto cartel is lost.

A significant problem occurs when the KPPU has legitimately severed the business actors involved in the cartel, however the decision was canceled through a mechanism of Objection of the Commission's Decisions in the District Court.[6] The reason given is that KPPU did not succeed in proving the proof of cartel agreement among business actors.

Examples of the use of indirect evidence in the practice of business competition law enforcement is the decision against alleged violation of Article 22 of

[5]Andi Fahmi Lubis, "Bukti tidak langsung (Indirect Evidence) Dan Penerapanya Dalam Hukum Persaingan Usaha", *Jurnal Hukum Bisnis*, Edisi No.5 Vol. 32, Yayasan Pengembangan Hukum Bisnis,2013, p 391

[6] Kontan, "16 importir bawang putih ramai-ramai gugat KPPU", Kontan 6 July 2014, article can be access on https://nasional.kontan.co.id/news/16-importir-bawang-putih-ramai-ramai-gugat-kppu (last updated September 20, 2018 at. 6:45A.M)

Law Number 5 Year 1999. Supreme Court in Decision Number 9 K/Pdt.Sus-KPPU/2016 and 1495 K/Pdt.Sus-KPPU/2017, related to operator tariff cases and Garlic cartel case which is previously canceled by District court Jakarta. Indirect evidence is evidence that can not clearly and clearly specify agreement material between business actors, whether economic evidence or evidence of communication or meeting. In order to use such indirect evidence, there must be a complete conformity of the facts, discovered during the case review process.

KPPU is an institution that serves to supervise unfair business competition. It is acknowledged since the establishment of KPPU, many cartel cases have been dealt with, such as:

1. ***Skutik* cartel Case involving:**
    a. Yamaha Indonesia Motor Manufacturing (YIMM) and
    b. Astra Honda Motor (AHM),
2. **Operator Tariff cartel involving:**
    a. PT. Exelcomindo Pratama Tbk (XL),
    b. PT Telekomunikasi Selular (Telkomsel)
    c. PT. Telekomunikasi Indonesia Tbk (Telkom),
    d. PT Bakrie Telcom,
    e. PT Mobile 8 Telecom Tbk and
    f. PT Smart Telecom,
3. **Garlic Cartel involving:**
    a. CV Bintang,CV Karya Pratama,

b. CV Mahkota Baru,

c. CV Mekar Jaya,

d. PT Dakai Impex,

e. PT Dwi Tunggal Buana,

f. PT Global Sarana Perkasa,

g. PT Lika Dayatama,

h. PT Mulya Agung Dirgantara,

i. PT Sumber Alam Jaya Perkasa,

j. PT Sumber Roso Agromakmur,

k. PT Tritunggal Sukses,

l. PT Tunas Sumber Rezeki,

m. CV Agro Nusa PermaI,

n. CV Kuda Mas,

o. CV Mulia Agro Lestari,

p. PT Lintas Buana Unggul,

q. PT Prima Nusa Lentera Agung ,

r. PT Tunas Utama Sari Perkasa,

s. Quarantine Agency Ministry of Agriculture,

t. Director General of Foreign Trade and Minister of Trade.

Table 1.1 Cartel case and the Economic evidence

No	Case	Economic Evidence
1.	*Skutik*	Price Parallelism[7]
2.	SMS	Price Parallelism[8]
3.	Garlic	Price Parallelism[9]

On the Court decision Number163/Pdt.G/KPPU/2017/PN Jkt.Utr regarding to *skutik* cases, Faisal Basri stated that Indirect Evidence is acceptable but must also be based on clear terms. Require data verification, view data entry, view consistent time series data. It is permissible to use the time series but it must observe the validity of the data entry. Hence, Economic evidence can be use but must be careful in determining the data, the modeling, and the same data processed by different people and the results should be similar, to create credible results of analysis.

Currently there are so many parties questioning the application of economic evidence in cartel case of the decisions made by KPPU, because KPPU's decision is deemed to not be based on relevant evidence. KPPU is considered not cautions and rushing the conclusion that there has been a cartel. It is very easy for KPPU to come guilty decisions and impose fines of billions of rupiah to business actors. This becomes an irony because the presence of KPPU is expected to protect the business

[7] KPPU Decision No :05/KPPU-I/2013
[8] KPPU Decision No :26/KPPU-L/2007
[9] KPPU Decision No :04/KPPU-I/2016

interests rather than threaten the business continuity. This is in contrast to the United States which permits the use of indirect evidence, so that the written proof of the agreement is no longer the primary evidence because the US does not require direct evidence in the cartel agreement. This is one of the underlying ways of comparing also the application of economic evidence in cartel case in Indonesia and the United States. The principle is that the more economic evidence (circumstances), the stronger the evidence.

Departing from this problem, this paper was made in order to figure out, to analyze, and to give a clearer view of those aforementioned legal issues with the tittle, "Standardization of Economic (Indirect Evidence) Evidence to Proof Cartel Violation".

B. Problem Formulation

Based on the background described above, then the problem in this research is:

1. Whether the economic evidence (Indirect Evidence) is appropriate to determine a case of cartel Violation?

C. Research Objective

Based on the formulation of the above, the purpose of this study are as follows:

1. To figure out whether or not the Economic Evidence appropriate to be used by KPPU to examining cartel case in Indonesia.

D. Definition of Terms

A conceptual framework is an essay that describes the relationship between the concepts specifically to be observed. Writing of this thesis use an operational definition as follows:

1. Standardization based on Cambridge Dictionaries means:[10]

   "*the process of making things of the same type have the same basic features".*

2. Indirect Evidence is evidence that cannot be explained in a specific and clear matter of agreement between business actors, whether economic evidence or evidence of communication or meeting. To use the indirect evidence, there must be a complete intact factuality, which was found during the case review process.[11]

3. Economic Evidence in cartel cases, the economics analysis can be broke down into two-step analysis, which are 1) structural analysis, to analyze whether the market under investigation had the possibility to collude, and 2) behavior or change analysis, to analyze whether behavior of the market under investigation consistent with cartel behavior.[12]

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[10] https://dictionary.cambridge.org/dictionary/english/standardization last updated January 5, 2018 at 7.41 P.M

[11] Djuwita Ramelan W, "Bukti Tidak Langsung (Indirect Evidence) Dan Penerapannya di Indonesia" in a *Law Business Journa*l, Vol. 32 Number 5 2013, p.ii.

[12] Andi Fahmi Lubis, "Analisis Ekonomi dalam Pembuktian Kartel" in a *Law Business Journal*, Vol. 32 Number 5 2013, p.386.

4. Cartel based on Black's Law Dictionary means:[13]

   "A combination of procedures or sellers that join together to control a product's production or price."

5. Business Competition Supervisory Commission (KPPU) is a commission established to supervise business actors in running their business activities in order

   not to monopolize and or unfair business competition.[14]

E. Theoretical Review

The core in the process of handling cases in the court is in the evidentiary system. Evidence has a very essential role to decide whether there is a violation or not. Thus the most defining law of evidence against those faced in the proceedings of whether they commit an offense or not.

> According to M. Yahya Harahap, as quoted by Syaiful Bakhri, that the evidence in the meaning of criminal procedural law is a provision restricting the trial in seeking and maintaining the truth, either by judge, prosecutor, defendant or legal counsel. The provisions and procedures and appraisal of the evidence have been determined by law, without being allowed to act independently in appraising evidence, including the defendant is not free to defend what he considers to be true outside the law. Thus the judge must be careful, conscious in judging and considering the strength of evidence, which is found during the examination in the hearing, and based on the evidence which is limitative determined by Article184 of the Criminal Code.[15]

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[13] Bryan A. Garnier, Ed., Black's Law Dictionary, Print.8, St. Paul Minnesota:West Publishing Co.,2004, p.751

[14] Republic of Indonesia, "Law of the Republic of Indonesia No.5 of 1999 Concerning the Ban on Monopolistic Practices and Unfair Business Competition", Chapter 1, Article 1 verse 18.

[15] Syaiful Bakhri, *Hukum Pembuktian Dalam Praktek Peradilan Pidana,* Total Media, Yogyakarta, p. 2-3.

According to Sudikno Mertokusumo by mentioning the word "prove", he mentioned some insights:[16]

> One of them is mentioned that: The word "prove" in the procedural law has juridical meaning. The evidence in this juridical sense applies only to those who are litigants or who are entitled to them. Evidence in the juridical sense does not lead to absolute truth. It is possible that the confession, testimony, or letters are false or false or falsified, and then in this case it is possible evidence of an opponent. Juridical evidence is nothing but historical evidence. This historical proof tries to establish what has happened concretely. Whether in a juridical or scientific evidence, then proving in essence means logically considering why certain events deemed true.

Hence, from the explanation above as the philosophical basis of evidence is to convince the judge of the truth of the arguments presented in a case.[17] It can also be said that evidence is a judicial process to look for the truth in order that the verdict imposed meets the sense of justice.

Then there is the difference between the concept of truth in criminal cases and civil cases. In general, it is said that in examining the criminal case, a judge will look for material truth (*materiele waarheid*). While in civil case, only the formal truth is already sufficient.[18]

Based on these two concepts of truth, in the competition law case embraces both: seeking formal and material truth. Material truths conducted in competition law case, is if the reporting business actor does not acknowledge

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[16] Sudikno Mertokusumo, *Penemuan Hukum Sebuah Pengantar*, Liberty, Yogyakarta, 2007. P. 92-93.

[17] R Subekti, *Hukum Acara Perdata,* Bina Cipta, Bandung, 1982, p.10

[18] *Ibid,* p. 9.

the violation that has been done in the judicial process. While the formal truth in the competition law case is that the decision can be dropped if the reported business actor admitted to the violation that has been done in front of the court.[19]

Specifically looking at material truth in the competition case, which becomes the central point of attention in the judicial process is the reported business actor. Thus, the reporting entity has the basic rights guaranteed by competition law; right to be investigated immediately; the right to know clearly; the right to provide information freely; the right to an interpreter; the right to legal assistance; the right to compensation and rehabilitation. The right that guarantees the business actor is reported in the preliminary hearing or in the hearing is to be accompanied by his legal counsel and apply the accusatory principle.[20] The process of handling any case, the evidences are always dimensionless to the protection of human rights, with the protection of basic rights, the right to be tried and open to the public, to bring witnesses and take legal action, thus there will be a justice.

Justice is the substance of the law.[21] In order to achieve justice, there are many concepts concept establish in accordance with the development of thought that occurred in this era. In the concept of justice that is discussed

[19] I Made Sarjana, *Prinsip Pembuktian Dalam Hukum Acara Persaingan Usaha,* Zifatama Publisher, Taman Sidoarjo, 2014, p.129

[20] *Ibid.*

[21] Andre Ata Ujan, *FIlsafat Hukum*, kanisius, Yogyakarta, 2009, p. 16.

about the benefits and legal certainty. The two concepts often contradict each other when the judicial process arrives at the stage of judgment.

> "The concept of fairness in terms of benefit is considered because the enforcement of competition law cannot be separated from the side of economics. As the background of the existence of business competition law is Indonesia embracing the market economy system, therefore enforcement of competition law cannot be separated from the efficiency of economy and people's welfare."[22]

Related to the two concepts of justice are legal certainty and benefit, and associated with two kinds of approaches known in the evidence of competition case are per se illegal approach and rule of reason. Then what happens are as follows:[23]

> "The result of the illegal per se approach is more inclined toward creating legal certainty. Every business competition case if it meets the elements specified in each of the articles that regulate it, then against the offender can already be sentenced. While the evidence with the approach of rule of reason, the results of evidence more leads to a verdict that meets the sense of justice based on its benefits. Approach through the rule of reason especially those using economic evidence more emphasis on whether the violation of business competition bring the impact of anti-monopoly and or unhealthy business competition or even bring positive impact for business competition. If based on economic evidence of violations committed by business actors adversely affect the economy and harm the public, then the violation is imposed with a sanction. On the contrary, even if the act of business actor has fulfilled the elements specified in a chapter, but if his actions have a positive impact on economic development, therefore, it is decided not guilty and not sanctioned."

The principle of evidence in the competition case is related to the purpose of Law No. 5 of 1999. That one of the goals of Law No. 5 of 1999 is to safeguard the public interest and to improve the efficiency of the national

[22] *Ibid,* p.130
[23] *Ibid,* p.133

economy as one of the efforts to improve the people's welfare. As a guideline in handling business competition cases, the decisions handed down in business competition cases are also in order to safeguard the public interest, and to improve economic efficiency so as to improve the welfare of the community. Thus, a fair ruling in the competition case is if it can create economic efficiency as one effort to improve people's welfare.

In essence the evidentiary stage in law enforcement shall not be to the expense of the reported business actor. The judge's decision is taken on the basis of the policy argument. Therefore it should be emphasized for whatever the reason, for the sake of greater economic interests for example, someone's right let alone the innocent should not be sacrificed.

Thus, it is wrong if someone's property is taken and given to others for economic efficiency. Often deliberate rights are ignored under the disguise of the common good.

The decision of a competition case on one hand is to create justice based on improving economic efficiency to prosperity of the people. On the other hand, the business competition outcome in order to create justice, it cannot ignore the principles of legal evidence and from the economic side, therefore to provide maximum protection to the reporting entrepreneur, the principle of prudence is always and must absolutely held firmly in the evidence of competition case.

The law of evidence has a very important function, hence refers to the theory of evidence which is contained in civil law, criminal law and criminal procedural law and competition law enforcement, the theory of evidences adopted in the competition law are as follows:[24]

In theory the negative evidence based on the Law emphasizes at least two valid evidences, then the judge's conviction. In Article 183 Criminal Procedure Code stated that, "The judge shall not impose a penalty on a person, except if with at least two valid evidences he / she obtains the conviction that a crime is actually happening and that the defendant is guilty of doing so".[25] From this understanding it is clear that it should be based on the Law (Criminal Procedure Code), namely the legal evidence in Article 184 of the Criminal Procedure Code, accompanied by the judge's conviction derived from such evidences.[26] Referring to the provisions of the Criminal Procedure Code, relating to Article 39 Paragraph (4) letter D of Commission Regulation No 1 of 2010, that the number of evidences determined is at least two evidences. The Regulation of the Commission does not expressly define the position of conviction as it is with the Criminal Procedure Code. The Commission's conviction according to the Commission Regulation is

[24] I Made Sarjana, *Op.Cit.*, p. 135.
[25] Set forth in Article 183 Criminal Procedure Code.
[26] Andi Hamzah, "*Hukum Acara Pidana Indonesia"*, revise edition, Sinar Grafika, Jakarta 2002, p.254.

particularly needed when using guidance as evidence.[27] On the other hand, the instructions obtained by the Commission may not exist without any other evidence. Thus according to the opinion of the author of the commission rules adhere to the negative evidence theory based on the law.

According to this theory a judge may decide if a person is guilty on the basis of his conviction, a conviction based on the grounds of proof accompanied by a conclusion based on certain rules of evidence. Thus, the judge's decision was imposed with a motivation.[28]

According to writer's opinion, this theory of proof is also embraced by the Commission in the proof of business competition case. By the approach of rule of reason, especially when conducting an economic analysis of the violations committed by the reported business actor. The role of economic evidence is to support other evidence or direct evidence. on the contrary economic evidence may also paralyze other evidences. Economic evidence has a role to prove whether there is economic damage or not as a result of the actions or deeds of the reported business actor.

If economic evidence proves that there is an economic loss as a manifestation of monopolistic practices and unfair business competition, then the business actor who committed the offense shall be liable to sanctions in accordance with the violated provisions. Whereas, if there is no monopolistic

[27] Article 72 Verse 3 Commission Regulation No 1 of 2010
[28] Andi Hamzah, *Op.Cit,* p.253

practice and unfair business competition, thus, it does not affect the economic loss such as economic inefficiency or harm consumers, the business actor who commits the violation is not sentenced in the form of sanction. Thus economic evidence is part of the rule of reason approach, which can be independently released from other evidence.

According I Made Sarjana, in the application of the provisions of Law no. 5 Year 1999 in case of business competition not only using normative legal analysis based on Law no. 5 Year 1999, but also by using economic analysis, which is whether or not the alleged violation of Law No. 5 Year 1999 by business actors have economic consequences, either for other business actors or to consumers.

In the enforcement of competition law, there are two approaches known as *Per Se Illegal* and *Rule of Reason* approach. In the *per se illegal* approach, declares any agreement or a particular business activity as illegal, without further proof of the impact of the agreement or business activity. The *per se illegal* approach does not require an economic analysis as to whether the actions of business actors have hampered competition. The matter need to be proven whether or not there has been a prohibited agreement. The proof does not have any written agreement, but simply by the occurrence of an oral agreement or inclination of the agreement. However, in the application of *the rule of reason* approach is the approach used by the competitiveness authority institutions to make an evaluation of the consequences of such agreements or

activities is inhibiting or supporting the competition. In the rule of reason approach required an economic analysis to determine whether the act inhibits or encourages competition. In this case, the theory of economic analysis in law can be applied. The advantage of rule of reason is to use economic analysis to achieve efficiency in order to know with certainty whether an act of business actor has an implication to the competition. In other words, an act is considered to impede competition or encourage competition as stated by Robert H. Bork, determined by "economic values, that is, with the maximization of consumer want satisfaction through the most efficient allocation and use resources"[29]

The cases that have been handled by KPPU with *the rule of reason* approach are the case of *Skutik* cartel with Decision No:04/KPPU-I/2016, Operator Tariff cartel with Decision No: No:26/KPPU-I/2007, And Garlic Cartel with Decision No:05/KPPU-I/2013

F. Research Method

1. Focus of Study

This research was held to analyze the Standardization of Economic Evidence in the proof process by KPPU in Cartel case in Indonesia by:

[29]I Made Sarjana,*Analisis Pendekatan Ekonomi Dalam Hukum Persaingan Usaha,* Zifatama Publisher, Taman Sidoarjo, 2014, p.80

a. (*skutik)* cartel Case by Yamaha Indonesia Motor Manufacturing (YIMM) and Astra Honda Motor (AHM),
b. Operator Tariff cartel involving PT. Exelcomindo Pratama Tbk (XL), PT Telekomunikasi Selular (Telkomsel) PT. Telekomunikasi Indonesia Tbk (Telkom), PT Bakrie Telcom, PT Mobile 8 Telecom Tbk and PT Smart Telecom, And
c. Garlic cartel involving CV Bintang,CV Karya Pratama, CV Mahkota Baru, CV Mekar Jaya, PT Dakai Impex, PT Dwi Tunggal Buana, PT Global Sarana Perkasa, PT Lika Dayatama,P T Mulya Agung Dirgantara, PT Sumber Alam Jaya Perkasa, PT Sumber Roso Agromakmur, PT Tritunggal Sukses, PT Tunas Sumber Rezeki, CV Agro Nusa PermaI, CV Kuda Mas, CV Mulia Agro Lestari, PT Lintas Buana Unggul, PT Prima Nusa Lentera Agung , And PT Tunas Utama Sari Perkasa) and to figure out whether the application of the economic evidence in cartel case already Appropriate with the standard of proofing process in Indonesian legal system

2. Data Approach

The approach in this research is uses the normative approach. Normative legal research is a study conducted by examining library materials or secondary data only.[30]

[30] Soerjono Soekanto and Sri Mamudji,,*Penelitian Hukum Normatif: Suatu Tinjauan Singkat*, (Jakarta: Rajawali Pers),1990, p.13.

3. Source of Data

This research uses secondary data. Secondary data is divided into three; primary legal materials, secondary legal materials and tertiary legal materials.

The primary legal materials that were used to complete this research are laws and regulations:

a. Indonesian Civil Code;
b. Law No. 5 of 1999 concerning The Ban on Monopolistic Practices and Unfair Business Competition;
c. KPPU Decision No:26/KPPU-I/2007,No:05/KPPU-I/2013,No:04/KPPU-I/2016
d. Commission Regulation No 4 Of 2011 concerning Guideline article 5 (Price Fixing) Law No 5 of 1999

The secondary legal materials comprises of books, journals, articles, documents and news that cover various aspects within this topic and written by relatively highly qualified writers.

As for the tertiary legal materials are law dictionary and business dictionary.

4. Data Collecting

The process of collecting data in the making of this research was done through both library studies by digging up as many as possible knowledge

and information from the books, journal, articles, documents and news, as well as from national and international laws.

5. Data Analysis

In the process of analyzing data during the process of this research, it is applied the qualitative method of analysis. Which is done by describing the already gained data, knowledge and information through description or explanation which is assessed by the opinions of the experts, by laws, and also by the researcher's own arguments.

G. Originality

This research different with the prior research, as follows:

1. *ANALISIS YURIDIS PEMBUKTIAN PERJANJIAN PENETAPAN HARGA DALAM HUKUM PERSAINGAN USAHA (STUDI TERHADAP PUTUSAN-PUTUSAN KPPU TENTANG PERJANJIAN PENETAPAN HARGA)* Devi Meyliana s.k, *Universitas Indonesia*,2012

   Problem Formulation

   d. *Bagaimana Konsep pembuktian dalam perkara perjanjian penetapan harga menurut hukum persaingan usaha?*

   e. Hal-hal apa saja yang digunakan oleh KPPU untuk membuktikan perbuatan perjanjian penetapan harga?

f. *Hal apa saja yang menjadi kendala bagi KPPU dalam mebuktikan suatu perbuatan perjanjian penetapan harga yang menghambat persaingan usaha*

2. *ANALISIS YURIDIS TERHADAP EKSISTENSI INDIRECT EVIDENCE (BUKTI TIDAK LANGSUNG) DALAM PENANGANAN PERKARA KARTEL DI INDONESIA.* Ahmad Ali Fikri P, *Universitas gadjah mada*,2015

   Problem Formulation

   a. *Bagaimanakah kedudukan hukum indirect evidence (pembuktian tidak langsung) di Indonesia?*
   b. *Bagaimanakah eksistensi indirect evidence (pembuktian tidak langsung) dan penerapannya oleh Komisi Pengawas Persaingan Usaha (KPPU) dalam menangani perkara kartel di Indonesia?*

3. THE APPLICATION OF ECONOMIC EVIDENCE IN CARTEL CASE IN THE DECISION OF KPPU, Dian Maris Rahma, *Universitas islam Indonesia*,2017

   Problem formulation:

   a. How KPPU in applying economic evidence in the proofing process in handling Yamaha and Honda *Skutik* case in Indonesia?
   b. Whether the application of economic evidence compatible with the proofing process relating to the guidance evidence in the Competition Procedural Law?

The difference between this research and previous research is, that the Author focuses more on the judge's consideration in approving the KPPU's decision regarding the use of Indirect evidence applied by the commission in trapping various cartel cases such as the cartel tariff on Short Message Service, the garlic cartel, and cartels carried out by YIMM and AHM. Based on these things, the Author personally has his own analysis on how the procedure to imposed Economic Evidence in dealing with the cartel case

H. Structure of Writing

To gain better understanding and facilitate in getting the figure in this thesis result, then the following will be explained briefly the discussion from Chapter I to Chapter VI.

In Chapter I the introduction in this essay contains the background, problem formulation, research objective, definition of terms, theoretical review, research method and structure of writing about The Standardization of Economic Evidence (Indirect Evidence) to proof cartel violation in the Decision of KPPU.

In Chapter II, it contains a general overview on cartel, covering the concept of evidentiary based on article 184 Indonesian criminal code, indirect evidence in the concept of competition law, cartel in general concept and in the concept of Law No. 5 of 1999, relationship between cartel and oligopoly industry, negative impact of cartel, oligopoly in Islamic perspective.

In Chapter III, it contains the results of research and discussion that describes the results of the analysis to answer the question on the problem formulation. Covering the explanation of the standardization of economic evidence (indirect evidence) to proof cartel violation in Indonesian.

In Chapter IV is Closure, covering the conclusions and suggestions, which explains the conclusions of the authors on the problems.

CHAPTER II

GENERAL OVERVIEW ON THE AUTHORITY TO PERFORM EVIDENTIARY, INDIRECT EVIDENCE, AND CARTEL

A. General Overview on the Authority of KPPU to Perform Evidentiary

1. The role of KPPU in the enforcement Competition Law

KPPU is an Independent institution which are implementation result of Law No. 5 of 1999[31]. Referring to article 32 of Law No. 5 of 1999 Instructs the organizational structure, duties and functions of the commission to be determined through a presidential decree. This commission was formed based on Presidential Decree No. 75 of 1999 and named the Business Competition Supervisory Commission (KPPU).

Hence, KPPU has the authority to enforce antimonopoly law and business competition. However, this does not mean that no other institution has the authority to handle monopoly and business competition cases. The District Court and Supreme Court are also authorized to settle the case.

As an independent institution, it can be said that the authority possessed by the commission is very large which includes the authority

[31] Syamsul Maarif, *Competition Law And Policy In Indonesia*,Jakarta,2001, p 2

possessed by the judicial institution. The authority includes investigation, prosecution. consultation, examination, hearing and decision making.

2. The Duties and Authorities Of KPPU

Article 35 Law no. 5 of 1999 stipulates that KPPU's duties consist of:

a. Evaluating agreements that can result in monopolistic practices and or unfair business competition as stipulated in Article 4 through Article 16;
b. Evaluating business activities and / or actions of business actors which can lead to monopolistic practices and or unfair business competition as stipulated in Article 17 to Article 24;
c. Assessing the existence or absence of abuse of dominant positions which may result in monopolistic practices and or unfair business competition as stipulated in Article 25 to Article 28;
d. Take action in accordance with the authority of the Commission as stipulated in Article 36;
e. Provide advice and consideration of Government policies relating to monopolistic practices and or unfair business competition;
f. Compiling guidelines and or publications relating to this Law;
g. Provide regular reports on the work of the Commission to the President and the House of Representatives.

In running the duties, article 36 of Law No. 5 Of 1999 gives authority to KPPU to:

a. to receive reports from the public and or from business actors about alleged monopolistic practices and or unfair business competition;
b. conduct research on alleged business activities and or actions of business actors that can lead to monopolistic practices and or unfair business competition;
c. investigate and / or examine cases of alleged monopolistic practices and or unfair business competition reported by the public or by business actors or found by the Commission as a result of his research;
d. concluded the results of the investigation and or examination of the existence or absence of monopolistic practices and or unfair business competition;
e. call out business actors suspected of having violated the provisions of this law;
f. call out and presenting witnesses, expert witnesses, and anyone who is considered aware of the violations of the provisions of this law;
g. ask for help from investigators to present business actors, witnesses, expert witnesses, or everyone as referred to in letters e and f, who are not willing to fulfill the Commission's summons;

h. request information from Government agencies in relation to the investigation and or examination of business actors who violate the provisions of this law;
i. obtaining, researching, or evaluating letters, documents or other evidence for investigation and / or examination;
j. decide and determine the presence or absence of losses on the part of other business actors or the community;
k. notifying the Commission's decision to business actors suspected of carrying out monopolistic practices and or unfair business competition;
l. impose sanctions in the form of administrative actions to business actors who violate the provisions of this Law[32]

Therefore, KPPU has the authority to conduct research and investigations to be consideration in deciding whether or not the business actor violates Law No. 5 of 1999. The business actor can submitted an objection to the KPPU's decision, the opportunity is 14 days after receiving the notification of the decision to file an objection to the district court.

3. Evidentiary by KPPU

Evidentiary in examinations by the KPPU consists of:

[32] Chatamarrasjid ais ,*"pokok-pokok hukum persaingan usaha Indonesia*",kencana prenada media group,Jakarta,p 75-77

a. Witness testimony,

b. Expert testimony,

c. Letter and / or documents,

d. Direction,

e. Information of the reported party / witness of business actors.[33]

Expert Testimony is needed in complicated case examinations. Expert witnesses can be presented at the initiative of business actors and KPPU. Although there is no definite definition of expert witnesses in monopoly cases and unfair business competition, it can be concluded that the notion of experts here are people who have expertise in the field of monopoly practices and business competition, and understand the business fields carried out by the business actors being examined.

Business actors and witnesses can provide documents to strengthen their position / statement. Each document submitted will be received by KPPU. Then KPPU Assembly will provide an assessment of the document. Documents of business actors are deemed to have an objective nature, therefore in monopoly cases and business competition, business actor documents have specific evidences of compliance.

Direction can be used as evidence, as long as the direction have compatibility with other Direction or according to actions or agreements that are suspected of violating the antimonopoly law. The direction has

[33] See Article 42 of Law No. 5 of 1999

compatibility with other Direction or according to actions or agreements that are suspected of violating the antimonopoly law. The direction obtained in written form, the proof power is categorized the same as the strength of proof of the letter or document. The use of evidence in monopoly cases and business competition cannot be equated, but is determined by case cases.

B. General Overview on Indirect evidence

1. Concept Of Indirect Evidence

Indirect evidence according to commission regulation No. 1 of 2010 is one of the evidences in the cartel investigation process. In this context, indirect evidence is evidence that cannot explain clearly and specifically about the material agreement between business actors, which consists of evidence of communication and economic evidence. In indirect evidence, the role of communication evidence and economic evidence is not independent, both of them have interrelationship in exposing a cartel case.[34] The concept of a cartel based on the practice by the Business actor is an extremely complicated. It usually involves indirect evidence corroborated by economic evidence.[35] However, to use the indirect evidence, there must suitable of facts, which are found during the case investigation process.

[34] Mustafa Kamal Rokan., *"Hukum Persaingan Usaha",* (Jakarta: Raja Grafindo Persada, 2010 P 34

[35] Maurice Guerrin,"Cartels: Proof and Procedural Issues", *Fordham International Law Journal*, Vol. 16, Issue 2, 1992. p279

2. Form of indirect evidence

Indirect Evidence is an evidence that does not specifically describe the terms of an agreement, or the parties to it. It includes evidence of communications among suspected cartel operators and economic evidence concerning the market and the conduct of those participating in it that suggests concerted action. Specifically, indirect evidence divided is into:

a. Communication evidence

Communication evidence is evidence of records of telephone conversations (but not their substance) between competitors, or of travel to a common destination or of participation in a meeting, for example during a trade conference meetings or communication between business actors, but does not describe the substance of their communication.

b. Economic evidence.

Economic Evidence use to identify markets tendency to be cartels. Also used to prove the existence of a cartel by analyzing the behavior of the business actor on the market.[36]

The aim of Economic evidence is an attempt to override the possibility of independent behavior. A form of indirect evidence that is appropriate and consistent with the conditions of competition and collusion as well as not yet being used as evidence that there has been a violation of business

[36]OECD Policy Brief, Prosecuting Cartels without Direct Evidence of Agreement, 2007,p. 2

competition law.[37] With the understanding of companies in the market that coordinating explicitly and carrying out binding agreements that are poured on paper is a violation of law, the coordination process tends to be carried out without written agreement and argues that the company's behavior is independent.

Thus it would be very difficult to obtain direct evidence to declare that there has been an agreement or agreements. However, although it is difficult to obtain direct evidence, indirect evidence can be guidance there was an agreement or agreements between the business actor. All indirect evidence such as records of telephone conversations, electronic mail, and other communications that indicate the frequency of correspondence, or similarities in language and document format, which occur before collusion conditions are achieved, must be analyzed together and contextually with the alleged enforcement of the agreement, so that unilateral action can be excluded.

According to Hans W. Friederiszick, the economic evidence used in estimating the implementation of an agreement must contain several principles, such as:

a. the analysis is focused on changes and not facts at any one time,

[37] Chris Decker, "On the discovery and assessment of economic evidence in competition law", *Studies in Regulation, New Series*, Vol. 1, 2011. p.11

b. uses several indicators at once (not only using one general indicator), And in-depth analysis for each indicator, and

c. the balance between the cost of getting information and the results of the economic analysis. [38]

3. The legal basis of Indirect evidence

In the national legal system, the application of Indirect evidence contained in Article 72 of Commission Regulation No. 1 of 2010 stating that:

The Commission's evidence of inspection is:

a. witness testimony,

b. expert information,

c. letters and or documents,

d. Direction,

e. explanation from business actor.[39]

This article become a reference for KPPU using the Indirect evidence to reveal a cartel case

4. The purpose to use economic evidence

In the OECD roundtable conference (2006) it is stated that economic evidence is very important for two reasons, namely:

[38] Ibid 79

[39] See The Article 42 of Law No 5 of 1999

1. the more difficult to obtain direct evidence, so that the role of indirect evidence is needed and
2. economic evidence is needed to enter the investigation stage.

Therefore, the purpose of using economic evidence in the form of quantitative and qualitative economic analysis is be able to decide whether to proceed at the investigation stage in the relevant market and justifying whether the investigation stage is appropriate to continuing. Thus, economic evidence is not a tool to prove that the agreement in the cartel really happened. In carrying out economic analysis, there are at least two stages that must be carried out, namely:

1. Structural Analysis, which is directed at proving whether a cartel agreement is indeed possible in the relevant market (relevant market), and
2. Behavioral Analysis or Change, intended for prove whether behavior in the relevant market is consistent with cartel behavior and not competitive behavior.

In the structural analysis stage, the first activity that must be done is to define the relevant market appropriately. This stage is crucial to ascertain whether companies that are suspected of carrying out cartel agreements are companies that are competing. To recall, the cartel agreement only occurs

among companies that are supposed to compete. If companies that are suspected of carrying out a cartel agreement are in a different relevant market, then the allegation of business competition law violation of the cartel's behavior will automatically fall. Subsequent activities related to the determination of the analysis period, including the period in which the alleged cartel agreement occurred. In contrast to the use of direct evidence, which is only needed at the time of the alleged agreement, the use of economic evidence is based on changes in the behavior of companies in the market when it reaches a collusion condition and at the time of the coordination process. The next activity is to determine and assess the indicators used to show whether collusion can and may occur in the relevant market. This activity will take up the largest portion of the overall structural analysis. Some indicators that might be used to assess whether the company's motivation to collude is large enough, are:

1. Product homogeneity, The motivation of companies in the market to make an agreement will be even greater if the products produced by companies in the market have a fairly high resemblance.
2. Absence of close substitutes, Collusion agreements will be easier to implement if consumers do not have many choices except to buy goods and or services from a cartel member company.

3. Readily observed price adjustments, The ease of getting information about price changes in the market will reduce the company's incentives to commit fraud against the cartel agreement.
4. Standardized prices, Collusion agreements will be easier if the products traded on the market have price standards, and are easier to monitor to prevent fraud. 5. Excess capacity. The motivation to undertake a cartel agreement will increase when the profits from the cartel can be used to cover the inefficiencies due to the company not producing optimally.
5. Few sellers, The fewer number of companies in the market, the easier it is to coordinate in the framework of a cartel agreement.
6. High barriers to entry, The cartel agreement will be more easily carried out because there is no 'threat' from a new company that can thwart the agreement of companies in the relevant market.[40]

After structural analysis is carried out, then a behavioral analysis or change must conduct. Economic analysis carried out at this stage is basically aimed at stating that conditions in the market lead to the activity of a cartel agreement. The analysis emphasizes the changes in the indicators on the relevant market which are allegedly due to cartel agreements and not competing companies' behavior in the market that are carried out independently. Usually,

[40] Rachmadi Usman, *Hukum Persaingan Usaha di Indonesia*, (Jakarta: Sinar Grafika), 2013 P 95

detection are based on a theory of an alleged illegal behavior and use market data such as prices, costs, margins, quantities or market shares, aiming to differentiate between a collusive environment and a competitive one. [41]

The first activity carried out is to determine the indicators used to assess the outcome or outcome of the cartel agreement. The results obtained from collusion conditions are higher profit levels than competitive conditions. This higher profit can be obtained due to the implementation of higher prices or lower production quantities. Therefore, indicators that can be used include: changes in the level of profit of the companies participating in the cartel agreement, price changes determined by participating companies (before and after cartel agreements), and changes in the number of production of cartel member companies. In addition to indicators that show the results of the cartel agreement, other activities that must be carried out in the behavior analysis are the use of tools or instruments that can smoothen and stabilize the cartel agreement (facilitating devices).

C. General Overview On Cartel

1. Cartel in the Concept of Competition Law

All competition law prohibit, anticompetitive conduct by two or more business actor with the intention to gained the price above the standard in the

[41] Iuliana Zlatcu,at al," The Role of Economics in Cartel Detection. A Review of Cartel Screens", *Journal of Economic Development, Environment and People*, Vol. 6, Issue 3, 2017. P.20

market.[42] In a competitive market there are a large number of business actors who run their business, and there are no obstacles for businesses to enter and compete in the market, this makes business actors unable to control prices according to their desires, hence the business actors only accept standard prices that have been determined by the market and run production to the maximum in order to reach an efficient level. But in a structured market where there are only a few business actors (oligopoly market), the opportunity for business actors to collaborate to determine the price of the product and the number of products of each actor is large. Therefore, the practice of cartels can usually grow in markets with oligopoly structures, where too easy To do collaboration and control most of the market share.[43]

Basically, there are two types of barriers in trade, namely horizontal and vertical barriers. A horizontal obstacle is an action that involves competitors in a similar field of business in a treaty affecting trade in a particular region. While vertical barriers are trade barriers made by business actors from different levels in the series of production and distribution.

Horizontal barriers are broadly defined as a restrictive agreement and conspiracy practice including agreements that directly or indirectly fix prices and or other terms, such as agreements establishing oversight of production

[42] OECD Journal Of Competition Law and Policy, Volume 9 No 3,2009, article can be accessed on https://read.oecd-ilibrary.org/governance/oecd-journal-competition-law-and-policy/volume-9/issue-3_clp-v9-3-en#page3 (last updated on November 9, 2018 at 1:00 AM) p.60

[43] Andi fahmi lubis,et al, *"hukum persaingan usaha antara teks dan konteks*",Deutsche Gesellscaft fur technische zaummenarbeit(GTZ)Gmbh,Jakarta,2009,p 375

and distribution, the distribution of quotas or territories, or the exchange of information and data on markets , as well as information and market information agreements, and agreements to establish co-operation in sales and purchase in an organized manner or create entry barriers. Departing from that, cartels can be categorized as barrier in the form of horizontal barrier.[44]

Frequently an industry has only a few players who dominate the market. Such circumstances may encourage them to take joint action with the aim of strengthening their economic strength and enhancing profits. This will encourage them to limit the production levels and price levels by mutual agreement among them. It aims to avoid the occurrence of competition that harms their own.

Observing from the theory of monopoly, then an industry group that has oligopolistic position will receive maximal benefit if they apply as a monopolist. In practice this oligopolistic position is manifested through associations. Through this association they can joint and make an agreement on the level of production, price level, marketing area, and so forth which then spawned a cartel, and can create monopolistic practices and unfair business competition. In addition, the cartel will cause harm to consumers, because the price will be expensive and limited goods or services in the market. As a result, business actors will be able to raise the prices. If the demand is not

[44] Susanti Adi Nugroho, *Hukum Persaingan Usaha di Indonesia*, Jakarta: Puslitbang Mahkamah Agung, 2001,p.34-35

elastic, then the consumer will not move to another product or service. It will then cause the price of a product or a service to be higher. Similarly, if there are conditions where it is difficult for substitutes to enter the market because there are no other goods or services in the market, then the price will remain high. Cartel is a combination of procedures or sellers that join together to control a product's production or price. In other words, cartel is the organization of producers of goods and services that work together to control production or price in order to dictate the market. Cartel is an association under a contract among companies of equal importance designed to prevent a keen competition and to allocate markets, and to promote the exchange of knowledge of certain results and research, to exchange patents and standardization of specific products

Cartel almost always occurs in the oligopoly market. The oligopoly market is a market consisting of a small group of companies. In general, the oligopolistic industry is controlled by several companies that have a large market share, side by side with some companies with small market share.[45] Relationships between companies with a large market share affect each other. This interaction then influences the policies taken by other small companies. Therefore, any corporate decisions and policies should be taken with caution by considering the implications of market equilibrium.

[45]Lucie SEVEROVÁ,et al, Oligopoly competition in the market with food products, article can be accessed on , https://www.agriculturejournals.cz/publicFiles/107_2010-AGRICECON.pdf (last updated on 9 November 2018, at 1:30 AM) p.580

The oligopoly market has several characteristics:

a. The resulting commodities can be standardized product or differentiated product. The first type oligopoly industry, usually producing raw materials such as steel industry, cement industry, and materials building; while commodities produced from the second type, usually in the form of final commodities, such as the car industry, cigarette industry, and such;

b. The power of price fixing depends on the form of cooperation of the company in the market. Without cooperation, the power of price fixing becomes very limited. When a company lowers its price, it will attract many buyers. Companies that lose a buyer will take retaliatory action by reducing the price to a larger amount so that the buyer moves on to the second company. However if the company in the oligopoly market cooperates to do a price fixing agreement, then the price can be stabilized at the desired level. Under these conditions, the power to price fixing is very strong.

c. Intensive advertising promotion is very often found in the oligopoly industry that produces differentiated product commodities; while in oligopolistic companies with standardized products, spending on advertising is minim.

The main characteristic of the oligopolistic industry is the possession of a good or service by only a few firms. Thus, although in the oligopoly market there is competition, but the intensity of existing competition is not the same as what happens in perfectly competitive markets or monopolistic markets. Competition occurs only among companies within the industry, and by entering into an agreement, competition can still be further reduced.[46]

The business actors in the oligopoly industry will tend to commit. One form of collusion is by forming a cartel. The number of companies in the market are relatively fewer which makes the effort to form a cartel easier.[47] This is related to the effectiveness of enforcement of agreements among cartel members because cartel without sanction system is in vain.

A cartel must have an incentive that keeps its members abiding by the agreement that has been made between them. The incentives are usually sanctions that will be imposed on members who violate the agreement. The number of companies in the market will affect the effectiveness of enforcement among them. The less number of companies then the oversight of the cartel members will be easier to do it. This is the reason why more cartels are found in industries with oligopoly structures.

[46] Audu,et al, The Conquering Strategies of Oligopoly Firms. A review on entry Strategies of Tesco Company Plc in the UK and beyond, *IOSR Journal of Business and Management*, Volume 16, Issue 8. Ver. II ,August 2014, p.7

[47] George J. Stigler, "Theory of Oligopoly" , *The Journal of Political Economy*, Vol. 72, No. 1 Feb, 1964, p. 44

2. Forms of Cartel

The things that are agreed upon in a business cartel may vary depending on the needs of the cartel business actors themselves. Therefore, based on the Organization for Economic Co-operation and Development (OECD) study there are four types of cartels (hard-core cartel), most often encountered in the business world, namely:

a. price fixing

b. market sharing

c. bid rigging

d. output control

Hard Core cartel is an anti-competitive agreement, established anti-competitive practice or anti-competition arrangement by competing business actors to:[48]

a. Set the price

b. Tender collusive (bid rigging)

c. Limit output or do quotas, and

d. Divide or separate markets by allocating consumers, suppliers, territories or commercial boundaries.

[48]OECD Recommendation of the Council Concerning Effective Action Against Hard Core Cartels (adopted by the Council in the 921 meeting session on March 25, 1998).

3.Cartel Based on KPPU Guideline

In the national legal system, the prohibition against cartels is contained in Article 11 of Law No. 5 of 1999 stating that "business actors are prohibited from entering into agreement with rival business actors intent on influencing prices by regulating the production or marketing of goods and or services that may result the occurrence of monopolistic practices and or unfair business competition.[49]

The agreement defined as an action by one or more business actors to bind themselves with one or more other business actors under any name, either made in writing or not.[50]

Cartel is an act that is against the law, so it is make sense if the cartel actors will try not to be detected by law enforcement. Therefore, agreements or collusion between business actors are rarely in the form of written documents, then it make not easy to detected there is written evidence.[51]

The formulation of article 11 which adheres to the *rule of reason,* thus interpreted that in conducting the Investigation and examination of violations on this provision, the reasons of the business actor must be examined and it is proven that monopolistic practices and unfair business competition have been proven first.

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[49] See the Article 11 of Law No 5 of 1999.

[50] See The Article 1 point (7) of Law Number 5 of 1999

[51] Lukáš NIKODYM,"Theoretical Aspects of Cartelization in Central Europe – An Introduction to Cartel Theory", *Central European Papper,* 2014, p.29

The definition of cartel based on the composition of the words contained in Article 11 of Law No. 5 of 1999 has eight elements. The elaboration of the eighth can be found in the Regulation of the Commission for the Supervision of Business Competition No. 4 of 2010 concerning Guidelines for the Implementation of Article 11 concerning the Cartel compiled by KPPU. Those are:

a. Business actors.

The meaning of business actors is any individual or business entity, whether it established in the form of a legal entity or non-legal entity and domiciled or conducting activities within the territory of the Republic of Indonesia, either independent or jointly through agreements, conducting various business activities in the economic field. To establish a business cartel, at least two business actors are required.

b. Agreement.

The agreement in question is any agreement made by business actors either in written or oral form. Agreements in competition law have been defined under Article 1 No. 7 of Law No. 5 Year 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition. Under the terms of the agreement is an act of one or more business actors to bind themselves to one or more other businesses under whatever name, whether written or unwritten. The agreement in the context of business competition is not perceived as a treaty similar to the civil law (BW),

Article 1313 theoretically elaborates in the deeds of one party with another party binding to give agreement, and it has always been a debate in the theory of contract law. In the development of the law of agreement, the emergence of the agreement is no longer said to be a legal act *(rechtshandeling)* one person with another, but is a legal relationship (*recht verhouding*), agreement in Law No 5 of 1999 still refers to the word deed, essentially there are business actors bind themselves other business actor by whatever name, whether written or unwritten. Law No. 5 of 1999 is wider in essence because unwritten agreement is also included in the scope of the definition.

c. Competitor.

A competitor is another business actor in a related market. The relevant market is a market related to a certain range or area of marketing by a business actor of the same or similar goods or services or substitution of the goods and or services.103 Understanding the relevant market here emphasizes the horizontal context that explains the position of business actors and their competitors. Based on this understanding, the scope of the meaning of the relevant market includes two perspectives, namely geographic market which related to reach and/or marketing area, and product market which related to similarity, or type and/or substitution level.

d. The intention to influence the price.

At a glance this article has in common with Article 5 of Law No. 5 of 1999 which regulates the price fixing. The difference is that in Article 5 the business actors agree to set the price, while the cartel agreed by the cartel members is to influence the price by regulating the production and or marketing of goods or services. In essence, Article 5 is also a regulation of the cartel, however the cartel in question is the cartel of price. Hence, in Article 5 governs directly about the prohibition of price regulation, and then in Article 11 prohibited are the production and marketing cartels that ultimately affect the price of the product. Therefore Article 5 is also one form of cartel. This is included in Article 11 which includes price fixing, tender collusion, customer and territory allocation and the production or arrangement of production.

e. The intention to regulate production.

The sentence to regulate production means determining the amount of production for both the cartel as a whole and for each member. This may be greater or less than a firm's production capacity or demand for the goods or services concerned, while regulating marketing means managing the amount to be sold or the area where the members sell their produce.

f. Goods.

Goods are any tangible or intangible goods, whether moveable or immovable, which may be traded, used, utilized, or taken advantaged by the consumer or business actor.

g. Services.

Service is any service in the form of work or performance traded in the society to be used by the consumers or business actors.

h. Monopolistic practice.

Monopolistic practice is the concentration of economic power by one or more business actors which result in the control of production and or marketing of certain goods and or services, resulting in unfair business competition. [52]

With the cartel, the production and marketing of goods and or services will be controlled by the cartel members because the final objective of the cartel is to gain the maximum benefit for the cartel members. This of course will harm consumers. still seen how far it is unhealthy business competition practices or will result in restraint of market competition.[53]

approach to prove a violation of the cartel, it is not only necessary to prove the existence of an agreement between the business actors but also to prove strong enough to show that the agreement has an impact on competition. Accordingly, a business actor is not prohibited from entering into an agreement with a competing business actor, intending to influence the price

[52] See the Regulation of the Commission for the Supervision of Business Competition No. 4 of 2010 concerning the Guidelines for the Implementation of Article 11 on the Cartel., p. 15.

[53] Susanti Adi Nugroho, *Hukum Persaingan Usaha di Indonesia*, Jakarta: Puslitbang Mahkamah Agung, 2001,p.43-45

by regulating the production or marketing of a good or service, so long as it does not result in monopolistic practices and/or unfair business competition.

a. Number of business actors.

   The more business actors incorporated in a cartel will be more difficult to implement the cartel. The cartel will be more easily shaped and more effective when the small business actors or the market is concentrated

b. The products

   On the market are homogeneous because with homogeneous products the price fixing will be more easily achieved;

c. The Elasticity on demand for goods.

   If demand for a product fluctuates, it will be difficult to reach a goods agreement on the amount of production or price;

d. The Easiness of supervision.

   In a cartel there will be a tendency for members to commit fraud, the more business actors will be the more difficult the implementation of supervision;

e. The Flexibility to market changes.

   The cartel requires the commitment of its members to execute an agreement in accordance with the demand and supply in the market. The cartel will be more effective if it can quickly respond to market conditions and make new cartel deals (if required);

f. Large investment.

If large investment is required as a requirement for entry into the market then there will not many business actors who can enter the market. Therefore, the cartel among business actors will be easier to do.

4. Supporting Factors of Cartel

The success of the cartel depends on the type of industry and the way the cartel operates which determines factor depending on cooperation / collusion among the members of the cartel itself. In addition to cooperation, there are other factors that support the establishment of a business cartel

a. Number of business actors. The more business actors incorporated in a cartel will be more difficult to implement the cartel.110 The cartel will be more easily shaped and more effective when the small business actors or the market is concentrated;
b. The products on the market are homogeneous because with homogeneous products the price fixing will be more easily achieved;
c. The Elasticity on demand for goods. If demand for a product fluctuates, it will be difficult to reach a goods agreement on the amount of production or price;
d. Prevention of the entry of new business actors into the market
e. The Easiness of supervision. In a cartel there will be a tendency for members to commit fraud, the more business actors will be the more difficult the implementation of supervision;

f. The Flexibility to market changes. The cartel requires the commitment of its members to execute an agreement in accordance with the demand and supply in the market. The cartel will be more effective if it can quickly respond to market conditions and make new cartel deals (if required);

g. Large investment. If large investment is required as a requirement for entry into the market then there will not many business actors who can enter the market. Therefore, the cartel among business actors will be easier to do.[54]

5. Negative Impact of Cartel

When the Companies in the market collude to form a cartel, they will coordinate to raise and even maximize mutual benefits, resulting in distortions to the ideal market mechanism. The people have to pay that high amount to avail that respected good or service, though actually that goods cost more less than what the consumers have to pay. it is of course as a great detriment to the consumer welfare. This assumption would not be excessive because according to the report of OECD there are sixteen global cartels that cause the loss of economic efficiency in the stagnation of more than US $ 55 billion. [55]

> In some countries, cartel is seen as a criminal offense. Cartel activity is properly viewed as a property crime, like burglary or larceny, although cartel activity inflicts far greater economic harm. Cartel activity robs

[54] See the Regulation of the Commission for the Supervision of Business Competition No. 4 of 2010 concerning the Guidelines for the Implementation of Article 11 on the Cartel, p. 8-9

[55] Izabela Luiza Pop,*"Cartel: good or bad strategy?"* ,June 2015 p.32 article can be downloaded on https://mpra.ub.uni-muenchen.de/67314/1/MPRA_paper_67314.pdf, (Last updated on October 26, 2018 at 5:30 PM)

> consumers and other market participants of the tangible blessings of competition. Cartel activity is never efficient or otherwise socially desirable; cartel participants can never gain more than the public loses.[56]

The negative impacts on cartel those are the occurrence of monopoly practice by cartel actors that result to the inefficiency of resource allocation which is the resources allocation is not in accordance with the allocation indicated by conditions when the price level is not the same as the marginal cost economically. Generally caused by the wisdom of production restriction that is usually practiced by monopolist to keep the price remains high and in terms of consumers will lose the choice of price, competitive quality, and good service.[57]

This practice clearly very harmful the consumers on certain business actors are urgently needed. These type of cartel agreement causes minimization or even eliminates competition and causes the consumers have no other choice except to buy the goods even if the price is not reasonable.[58] Even though there is a hypothesis that business actors tend to collude in the

[56] Gregory Werden, "Sanctioning Cartel Activity; Let The Punishment Fit the Crime", *European Competition Journal,*, April 2009, p. 6, article can be download on https://www.justice.gov/sites/default/files/atr/legacy/2009/01/09/240611.pdf , (last updated on October 23, 2018 at 20.05 P.M)

[57] Johny Ibrahim, "*Hukum Persaingan Usaha: Filosofi, Teori Dan Implikasi Penerapannya di Indonesia"*, (Malang: Bayumedia Publishing, 2007) P103-104

[58] OECD Policy Brief, "Hard Core Cartels – Harm and Effective Sanctions",May,2002 p 1, article can be downloaded on http://www.oecd.org/competition/cartels/21552797.pdf (last updated on November 8, 2018 at 7:40 PM)

oligopolistic industry in practice the effort to form and coordinate the cartel is very difficult to implement. But the cartel practice is still often found.

6. Cartel in Islamic law perspective

To analyze the impact of cartel practices in trade from the perspective of Islamic law, it's noted that trade norms and ethics are established by the *shara* 'in *muamalah*. Based on existing norms and ethics, the access generated from these efforts is clearly contradictory, because in Islam emphasizes Truth and justice in *muamallah*. *Syirkah* and cartels have the same essence, which is to establish cooperation. Some scholars on *syirkah* there are those who allow something that does not depend on the purpose of the cooperation and vice versa. cartel itself is prohibited in law because there is an element of monopoly, in carrying out *syirkah* it must be of a *syar'I* value not subjectively or individually which is only beneficial for some parties.[59]

Islam is highly values the market mechanisms as a place for exchange of goods and services. The appreciation of the market mechanism has been shown by the Prophet Muhammad (SAW). A supply and demand system is a *sunatullah* that must be respected and upheld. The behavior that destroys the supply and demand system has violated the *sunatullah*

[59] Rozalinda, *Fikih ekonomi sayriah,* (Jakarta: PT Raja Grafindo, 2016) p191

As Allah's commandment in the Al-Hud verses 85:

وَيَٰقَوْمِ أَوْفُوا۟ ٱلْمِكْيَالَ وَٱلْمِيزَانَ بِٱلْقِسْطِ ۖ وَلَا تَبْخَسُوا۟ ٱلنَّاسَ أَشْيَآءَهُمْ
وَلَا تَعْثَوْا۟ فِى ٱلْأَرْضِ مُفْسِدِينَ ﴿٨٥﴾

"O my people! Give full measure and weight, with perfect equity, and do not wrong deprive people by depriving them of what is rightfully theirs, and do not go about acting wickedly in the land, causing disorder and corruption[60]."

The verse above is interpret about the producer must be fairly and Honestly in determining the price, Producer not only focus in making profit. In Islamic perspective, the price fixing itself is strictly prohibited since it will lead to a rise in the prices due to the free market competition and will also resulting in a shortage of production even when the demand is high or rising, which in turn will lead to the scarcity of goods.

Allah also has explained in An-Nisa verse 29 :

يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُوا۟ لَا تَأْكُلُوٓا۟ أَمْوَٰلَكُم بَيْنَكُم
بِٱلْبَٰطِلِ إِلَّآ أَن تَكُونَ تِجَٰرَةً عَن تَرَاضٍ مِّنكُمْ ۚ وَلَا تَقْتُلُوٓا۟
أَنفُسَكُمْ ۚ إِنَّ ٱللَّهَ كَانَ بِكُمْ رَحِيمًا ﴿٢٩﴾

"O, you who have believed, do not consume one another's wealth unjustly but only (in lawful) business by mutual consent. And do not kill yourselves (or one another). Indeed, Allah is to you ever Merciful."[61]

[60] Al-Hud verses 85

Business transactions must be conducted at a fair prices, this is a manifestation of Islamic sharia commitment to comprehensive justice. The price must reflect the benefits to the buyer and the seller fairly, that is, the seller earns a normal profit and the buyer benefits equal to the price paid. Thus, Islam guarantees a market where buyers and sellers compete with each other with a smooth flow of information in the context of justice.

The Islamic prohibition on price fixing has been exemplified by the Prophet Muhammad at a time when a market when prices was soared. The unstable price conditions made the Companions difficult, giving rise to their intention to propose to the Prophet Muhammad to fix the price[62]

The Hadith indicates that price fixing is something strictly forbidden. Understanding it can be taken from the attitude of the Prophet Muhammad who is a leader and market conditions that are not stable at that time. That is, the Prophet Mohammed greatly respects the prevailing market system of supply and demand law *('adlun jaizun).* State intervention in price fixing should be ignored as long as the market runs fairly, not because of monopolistic and monopsony drives. Because, according to history, most of the needs of Madina people are supplied from outside the region. The high price is not due to the market game, but the market price is so.[63]

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[61] An-Nisa verse 29

[62] HR. Ahmad, Abu Daud, Tirmizi, Ibnu Majah and valid by Ibn Hibban

[63] Mustafa Kamal Rokan, *Hukum Persaingan Usaha, Raja Grafindo Persada, Jakarta, 2010,* p. 44

Thus the prohibition of price fixing is firm and definite and is considered a tyranny, and the scholars punish it as a prohibited act. It can be argued that market law is a law of God *(sunatullah)* that must be upheld. One group or individual is not allowed to influence the market in unfair ways, because the market is a collective provision that has become God's provision. Violations of market mechanisms such as price fixing by improper means or reasons are an injustice that will be held accountable before God.[64]

[64] *Ibid.*

CHAPTER III

ANALYSIS OF APPROPRIATED ECONOMIC EVIDENCE IN DETERMINING CARTEL CASE IN INDONESIA

A. Economic Evidence (Indirect Evidence) in Court Proceedings of Operator Tariff, Garlic, and Yamaha and Honda *skutik* cases in Indonesia

The qualification of the cartel is seen from the KPPU's Decision in the Operator tariff, Garlic, and *Skutik* cartels, Then in the implementation of the violated article of the three cases, Not all of the cases are categorized in article 11 of Law 5 of 1999, because considering the cartel itself comprises of:

1. Price, which is the Parties will examine the minimum price with the intention to shell the good above the minimum price.
2. Production, the parties who involve on these cartel agreement will supplied the good in certain amount with the intention to make the good in the market become rare then the selling price become expensive
3. Territory, in this practice the member of business actor who conduct cartel is prohibited to shell their good to another territory

which controlled by another member of cartel. The cartel member often make an agreement about the sharing of market territory

4. Conspiracy, The parties of members will corporate with the aim of dominating the market.[65]

Theoretically those case which mention before are categorized in cartel which explain in article 11. It is because cartel itself known divided into price, production, marketing territory, and conspiracy[66]. Nevertheless in the application, if associated with the previous cases which are known in the decision on the *Skutik* cartel case and Operator tariff case impose article 5 which are regulate about Price Fixing. Meanwhile in Garlic cartel case, the article impose are article 11,19, and 24.which are known article 11 is regulate about cartel, article 19 regulate about market control, and article conspiracy.

Since the enactment of Law No. 5 of 1999, the ban on cartel practices has been applied. For more than 10 years standing KPPU has handled various cartel cases among business actors in Indonesia. Some the decision on the case of Operator tariff case No 26/KPPU-L/2007, Garlic case No : 05/KPPU-I/2013 And Yamaha and Honda *Skutik* No :04/KPPU-I/2016.

[65] OECD Council, Recommendation of the Council Concerning Effective Action Against Hard Core Cartels 1998.p. 23

[66] See the Regulation of the Commission for the Supervision of Business Competition No. 4 of 2010 concerning the Guidelines for the Implementation of Article 11 on the Cartel., p. 16.

1. Operator's Tariff cartel

a. Position of the case

KPPU began investigating the setting of SMS rates at intervals of Rp 250-Rp 350 which allegedly violated Article 5 of Law Number 9 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition which reads: Business actors are prohibited from making agreements with business competitors to set prices for goods and or services that must be paid by consumers or customers in the same relevant market. KPPU's investigation found evidence that business actors' profits from 2004 to April 2008 reached Rp 133 trillion. By using the difference between income at the price of the cartel and income at the price of the off-net SMS competition from the operator, the consumer loss amounted to Rp. 2,827 trillion. In this case Through the decision No: 26/KPPU-L/2007, KPPU imposes fines on cartel perpetrators: PT Excelcomindo Pratama, Tbk, PT Telekomunikasi Selular, PT Indosat, Tbk, PT Telekomunikasi Indonesia, Tbk, Terlapor V/PT Hutchison CP Telecommunication, PT Bakrie Telecom, Tbk, PT Mobile-8 Telecom, Tbk, and PT Smart Telecom.[67]

[67] Hukum online "Telkomsel dan XL Didenda Rp25 Milyar" Hukum online 19 Juni 2008, article can be accesed on https://www.hukumonline.com/berita/baca/hol19521/telkomsel-dan-xl-didenda-rp25-milyar (last updated on October 9, 2018 at 6.26 A.M)

b. Legal Considerations

Supreme court has make decision of No: 9 K/PDT.SUSKPPU/2016. Judge decision considering, that in respect of these objections, the Supreme Court is of the opinion: Whereas the reasons for the appeal for cassation from the Cassation Appellant can be justified, because the *Judex Facti* / Central Jakarta District Court misapplied the law with the following considerations:

1. Whereas the *Judex Facti* which has annulled the decision of the Respondent I of Objection / Cassation Applicant (KPPU) in this case is basically due to 2 (two) reasons, namely, first, KPPU is wrong in determining the relevant market, and secondly, KPPU is wrong in assessing the SMS rate to be paid by consumers;
2. Whereas according to the Supreme Court these *Judex Facti* considerations are wrong considerations with the following reasons: i. Regarding the determination of the relevant market:
    a. Whereas in terms of products, to determine that 2 (two) or more products are competing products so that they are included in one relevant market (relevant market), the two products must fulfill several criteria, among others, having the same character, and having a price that is not much

b. different from one another; Whereas it was proven that the product in this case was that the off-net SMS service had unequal characters compared to the characteristics of other additional services namely voice mail, MMS, and push e-mail, and in terms of price, it was proven that the off-net SMS service rates were cheaper compared to other additional service rates; Whereas because of that the *Judex Facti* consideration that the offshore SMS service is in the same relevant market as MMS, and push e-mail is a wrong consideration;

c. Whereas in terms of geography to determine whether the market area of *in-casu* products, the off-net SMS service covers regional, national, or global markets, in addition to the off-net SMS rate of the operator / Cassation Respondent abroad is the same as the off-net SMS rate at Indonesia, also in each of its main regions overseas, has similar communication networks owned by operators / Cassation Respondents, both of which are not proven in this case so that the Judex Facti consideration that the offnet SMS rate in this case is competition tariff is a consideration that does not based on;

3. Whereas there is no evidence that the off-net SMS tariff in this case is a tariff based on service fees incurred by each operator so that the *Judex Facti* consideration that the off-net SMS rate in this case is the price of competition is an unfounded consideration

4. Whereas in addition to that in accordance with the indisputable fact *(feitelijk)* the costs incurred by each operator for the provision of a communication service is determined by many factors so that the tariff that must be paid by the consumer for the off-net SMS by each operator should not be parallel in for Rp. 250.00 (two hundred fifty rupiahs);[68]

d. Economic Evidence

In the period 2004-2007, There were cartel SMS rates created by Telkomsel and XL and were forced to be followed by Telkom, Mobile 8 and Bakrie. The investigation Team found that there were several Interconnection Cooperation Agreements which contained a clause regarding the stipulation of SMS rates.

There are 2 types of clauses concerning the stipulation of SMS rates contained in the Interconnection Agreement, namely the SMS rates of access search operators:

[68] See Supreme Court Decision Number : 26/KPPU-L/2007 p. 21-24

a. The cost not be lower than IDR 250;

b. The cost may not be lower than the access provider's retail rate

Based on information from Telkomsel and Bakrie, the clause type (a) above is contained in the Interconnection Agreement between Telkomsel and Bakrie

In 2007, the Indonesian Telecommunications Regulatory Agency/*Badan Regulasi Telekomunikasi Indonesia* (BRTI) calculated SMS interconnection fees that will be used as a reference in calculating SMS costs in 2008, which amounted to Rp. 26 for originating and Rp. 26 for terminating. From the information obtained from the BRTI, the SMS rate of 250 - Rp. 350 seems too high. The cost element for calculating SMS rates consists of the Network Element Cost (NEC) + Retail Service Activity Cost (RSAC) + Profit Margin, where the amount of NEC is Rp. 76, RSAC is 40% of the total SMS rate element, and profit margin is 10% the number of elements of the SMS rate[69]

Based on information obtained from Expert Witness Faisal Hasan Basri, the Similar SMS rate applied by the operator is the cartel tariff. In general, price cartels use a range.

[69] See Supreme KPPU Decision Number : 9 K/PDT.SUSKPPU/2016 p. 266-268

2. Garlic Cartel

a. Position of the case

KPPU found allegations of violation of Article 11, Article 19 letter C and Article 24 in Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition. There are 22 reported parties consist of:

1.CV Bintang,

2.CV Karya Pratama,

3.CV Mahkota Baru,

4.CV Mekar Jaya,

5.PT Dakai Impex,

6.PT Dwi Tunggal Buana,

7.PT Global Sarana Perkasa,

8.PT Lika Dayatama,

9.PT Mulya Agung Dirgantara,

10. PT Sumber Alam Jaya Perkasa,

11. PT Sumber Roso Agromakmur,

12. PT Tritunggal Sukses,

13. PT Tunas Sumber Rezeki,

14. CV Agro Nusa PermaI,

15. CV Kuda Mas,

16. CV Mulia Agro Lestari,

17. PT Lintas Buana Unggul,

18. PT Prima Nusa Lentera Agung ,

19. PT Tunas Utama Sari Perkasa

20. Quarantine Agency Ministry of Agriculture,

21. Director General of Foreign Affairs Ministry of Trade and

22. Minister of Trade.

This case began when KPPU saw the practice of garlic import cartel in November 2012-February 2013. Based on these allegations, at the trial on 21 March 2014, the KPPU Judge stated that the 19 importing companies were proven to carry out cartels. The judge passed a fine with a nominal amount.[70]

b. Legal Consideration

Decision No. 1495 K / Pdt.Sus-KPPU / 2017 the Supreme Court granted the appeal KPPU regarding the alleged garlic cartel. As many as 19 garlic import companies, stated by the Supreme Court, disrupted the national garlic trade system. In the consideration, The Judge stated that the *Judex Facti* of the North Jakarta District Court in its decision which rejected the KPPU's decision was wrong. Especially the matter of

[70] Hukum online "KPPU hukum belasan importir bawang" Hukum online 21 maret 2014, article can be accesed on https://www.hukumonline.com/berita/baca/lt532c2b65c4652/kppu-hukum-belasan-importir-bawang (last updated on October 7, 2018 at 6.26 A.M)

consideration of indirect evidence. Before that, District court north Jakarta canceled the decision of KPPU but through cassation process in Supreme Court the judge explain that indirect evidence, in a conspiracy case is considered very important. Because business actors with other business actors and other parties will make a silent agreement, which is followed by concerted action or mutually adjusting behavior, for example the use and utilization of certain same people. Related to the matter of other parties which according to the North Jakarta District Court can only be associated with business actors is wrong. Because, other parties are not merely business actors. so Government, in this case the Director General of Foreign Trade, Ministry of Trade, and the Minister of Trade, are included in other parties.[71]

c. Economic Evidence

Allegations of violations of the provisions of the Minister of Agriculture Regulation and the Minister of Trade Regulation relating to the import of garlic are allegedly an attempt to regulate the supply of garlic to the country in order to regulate prices.

The Companies alleged of affiliation are:

1. CV Bintang,
2. CV Karya Pratama,

[71] See KPPU decision Number: 26/KPPU-L/2007 p. 22-24

3. CVMahkota Baru,
4. CV Mekar Jaya,
5. PT Dakai Impex,
6. PT Dwi Tunggal Buana,
7. PT Global Sarana Perkasa,
8. PT Lika Dayatama,
9. PT Mulya Agung Dirgantara,
10. PT Sumber Alam Jaya Perkasa,
11. PT Sumber Roso Agromakmur,
12. PT Tritunggal Sukses
13. PT Tunas Sumber Rezeki

Controlling the supply of domestic garlic for November 2012 - February 2013 amounting to 56.68% or equal to 23,518,018 kg.

The Companies alleged of affiliation are:

1. CV Agro Nusa Permai,
2. CV Kuda Mas,
3. CV Mulia Agro Lestari

Controlling the supply of domestic garlic for November 2012 - February 2013 amounting to 14.03% or 5,515,000 kg.

The Companies alleged of affiliation are:

1. PT Lintas Buana Unggul
2. PT Tunas Utama Sari Perkasa

Controlling the supply of domestic garlic for November 2012 - February 2013 amounting to 10.67% or equal to 3,217,000 kg

The alleged supply arrangements made by groups of business actors as described above are part of an effort to regulate the price of garlic on the market[72]

3.Yamaha and Honda *Skutik* cartel

a. Position of the case

KPPU Secretariat has conducted research on alleged violation of Law No. 5 of 1999 in Motorcycle Industry Scooter Matic *(skutik)* Type 110-125 CC in Indonesia. This case involves two business actors in the Motorcycle Industry, those are: PT. Yamaha Indonesia Motor Manufacturing (Yamaha) and PT. Astra Honda Motor (Honda).

In this case, the Commission Assembly summons the perpetrators who violating Article 5 Paragraph (1) of Law No. 5 of 1999 because there is a meeting between the President Director of PT. Yamaha Indonesia Motor Manufacturing and President Director of PT. Astra Honda Motor, where the meeting, according to the witness Yutaka Terada, discussed about the agreement that PT. Yamaha Indonesia Motor Manufacturing will follow the selling price of motor from PT. Astra Honda Motor. Then the result of

[72] See KPPU decision Number: 05/KPPU-I/2013 p. 28-29

the meeting then followed up by the order via electronic mail that in the end there is adjustment of product selling price of PT. Yamaha Indonesia Motor Manufacturing which follows the selling price of PT. Astra Honda Motor.

The core of the considerations used by KPPU is described in the following paragraphs:

1. KPPU determines the fulfillment of business actor element in this case, whereas PT Yamaha and PT Honda is a business entity which established in the form of legal entity and domiciled or conducting activities within the jurisdiction of the Republic of Indonesia in the form of business activities such as sales of automatic scooter motorcycles *(skutik)* with a capacity of 110 - 125 CC in the territory of Indonesia.
2. KPPU then determines the fulfillment of the agreement element, that the agreement referred to in the case is an agreement between PT. Yamaha and PT. Honda to determine the selling price of goods and / or services (in this case is *Skutik* 110 - 125 CC) paid consumers in the territory of Indonesia. As the provisions of Article 1 point (7) of Law No. 5 of 1999, the Commission Council is of the opinion that the agreement includes both written and unwritten, including concerted action of business actors. It is reinforced by the

expert's testimony which essentially states that the concerted action is not required that there is a written agreement requiring the parties to concerted action need not be proven as such. In concerted action it is important that communication occurs.

3. KPPU considered that in the case there has been an act of binding business actors to other business actors (in this case competitors) in an unwritten or concerted action as evidenced by the behavior of Reported Parties as described in the Related Law of the Reported Behavior (in point 6) and further substantiated by economic evidence of pricing implementation as described in the Section Concerning the Related Laws of Determination (in point 7).
4. Further consideration is the element of business actors and competitors; the KPPU believes that the competitor is the other business actor in the same relevant market. Based on the provisions of Article 1 point 10 of Law No. 5 of 1999, the same relevant market is a market related to a certain range or area of marketing by business actors on goods and / or services of the same or similar kind or substitution of such goods and / or services.

In this case, KPPU acknowledges implicitly that in order to prove the existence of cartel presence in the motorcycle industry, KPPU uses indirect

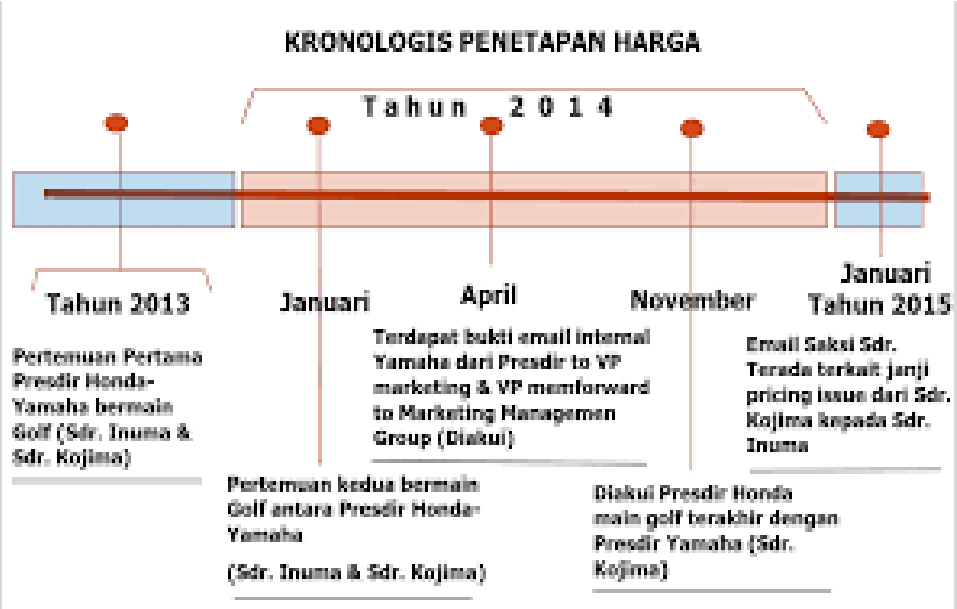
evidence. This consists of two main classifications namely communication evidence and economic evidence.

> The communication evidence in this case is in the form of the meeting and/or communication between business actors in the 2013 to November 2014. Whereas Mr. Yoichiro Kojima as President Director of PT. Yamaha Indonesia Motor Manufacturing at that time and Toshiyuki Inuma as President Director of PT. Astra Honda Motor had a meeting on the golf course. However, KPPU does not know in detail about this meeting. Then in January 2014, based on evidence of internal email of PT Yamaha sent by witness Mr. Yukata Terada, President Director Kojima has asked the marketing management group to follow the pattern of price increase starting from January 2014 as a promise to President Director of Honda. Inuma. Here's the full email of witness Terada;
>
> "President Kojima san has requested us to follow Honda price increase many times since January 2014 because of his promise with Mr. Inuma President of AHM at Golf Course. As we know this is illegal. We never follow such price negotiation process. YMC also educated all employees not to negotiate prices with competitors."

Pricing agreements made by Honda and Yamaha Classify into the category of unwritten agreements (tacit collusion). This is proven by the chronology of events, communication evidence and economic evidence. The chronology starts from the fact that there is a meeting between the President of the Automotive Director on the golf course. The first meeting between the President Director of Honda and the President Director of Yamaha occurred in 2013 to November 2014. Based on e-mail evidence there was information that basically Yamaha would follow Honda's price increase. Then in April 2014 there was an e-mail evidence from Yamaha President Director sent to VP and the Marketing Management group which basically stated "we need to send a

message to Honda that Yamaha follows H price increase". Whereas in his statement at the trial, Mr. Inuma and Mr. Kojima admitted to playing golf together. Mr. Inuma stated that he last played golf with Mr. Kojima in November 2014 as the chronological picture below;

Chart 1 Chronology price fixing



Source: District Court Decision Number 163/Pdt.G/KPPU/2017/PN jkt. Utr.

b. Legal Consideration

District court has make decision through decision No: 163/Pdt.G/KPPU/2017/PN jkt. Utr. Judge decision considering, that after the Panel of Judges check and research the case files and decisions of KPPU Number 4 / KPPU-I / 2016 dated February 20, 2017 according to the Panel of Judges the legal consideration of the KPPU's decision was correct and

accurate so that it was taken over into legal consideration in this decision, with additional considerations as follows:

Considering, that regarding the Yutaka Terada witness who was not presented before the trial according to the Panel of Judges because the Yutaka Terada witness had been examined at the investigation stage and the minutes of the Investigation Team were made according to the Investigation Report dated January 16, 2015, January 22 2015 and date February 25, 2015, the Minutes of Inquiry into the Yutaka Terada witness coded B1, B2 and B9 because they were made by an authorized official, the Minutes included documentary evidence as stated in Article 42 of the Law of the Republic of Indonesia Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition;

Considering, that based on the considerations, the objection of Applicant I and Applicant II must be rejected and the Panel of Judges upholds the KPPU's Decision Number 04 / KPPU-I / 2016 dated February 20, 2017.[73]

c. Economic Evidence

In the case of Yamaha and Honda, there was a meeting of business actors on the golf course. Shortly after the meeting, there was an email message from one of the guys on the golf course to his subordinates and said to always pay attention to the price of his competitors. The email was then

[73] See District court decision Number : 163/Pdt.G/KPPU/2017/PN Jkt.Utr p.511-512

passed on to the marketing. Lastly, in the same year, in 2014, KPPU found that Honda made five times price changes. The change was followed by Yamaha with the same amount. The all of three evidences, KPPU believes that indirect evidence can be used in this case.

B. Standardization of Economic Evidence to proof Cartel violation

1. The Concept of Cost Production

Costs in terms of production are all expenses that must be borne by the producer to produce a production. Production costs are all expenditures made by the company to obtain production factors and raw materials that will be used to create goods produced by the company. To produce goods or services required production factors such as raw materials, labor, capital and entrepreneurial expertise. All the factors of production used are sacrifices of the production process and also serve as a measure to determine the cost of goods.[74]

2. Concept of Price Parallelism

Competition between business actors can be based on the quality of goods, services and prices. However, price competition is one of the easiest to know. Competition in prices will cause prices to be as low as possible, thus forcing companies to utilize existing resources as efficiently as possible. The

[74] Agus tri basuki, "*Teori Pengantar Ekonomi"*,Mitra Pustaka Nurani,Yogyakarta,2014 p115

existence of pricing agreement, business actors involved in pricing agreements are likely to dictate or impose the desired price unilaterally to consumers, where prices are usually placed on consumers, where usually the prices dictated to consumers are above fairness.

In the competitive market, the act like Price parallelism strictly prohibited. As know that Price parallelism is the strategy among business actor in an oligopoly that occurs without an actual agreement between the players. Instead, one competitor will take the lead in raising or lowering prices. The others will then follow suit, raising or lowering their prices by the same amount, with the understanding that greater profits result.[75]

This practice can be harmful to consumers who, if the market power of the firm is used, can be forced to pay monopoly prices for goods that should be selling for only a little more than the cost of production. Nevertheless, it is very hard to prosecute because it may occur without any collusion between the competitors. Courts have held that no violation of the antitrust laws occurs where firms independently raise or lower prices, but that a violation can be shown when "plus factors" occur, such as firms being motivated to collude and taking actions against their own economic interests.

The term has also been used to describe industry-wide assumption of terms other than price. For example, all competitors in an industry might

[75] Blechman, Conscious Parallelism, "Signalling and Facilitating Practices: The Problem of Tacit Collusion under the Antitrust Laws", New York Law School Law Review, Vol. 24, 1979, p. 881

make only long-term leases of products such as heavy machinery, leaving lessors with no opportunity to make a short-term lease of that product from any competitor.

3. Existence of Economic Evidence in KPPU Decision

As it is known to present direct evidence in cartel cases in Indonesia is a very difficult thing, this is also because the authority of KPP mentioned in Article 36 of Law 5 of 1999 is as follows:

1. to receive reports from the public and or from business actors about alleged monopolistic practices and or unfair business competition;
2. conduct research on alleged business activities and or actions of business actors that can lead to monopolistic practices and or unfair business competition;
3. investigate and / or examine cases of alleged monopolistic practices and or unfair business competition reported by the public or by business actors or found by the Commission as a result of his research;
4. concluded the results of the investigation and or examination of the existence or absence of monopolistic practices and or unfair business competition;
5. call out business actors suspected of having violated the provisions of this law;

6. call out and presenting witnesses, expert witnesses, and anyone who is considered aware of the violations of the provisions of this law;
7. ask for help from investigators to present business actors, witnesses, expert witnesses, or everyone as referred to in letters e and f, who are not willing to fulfill the Commission's summons;
8. request information from Government agencies in relation to the investigation and or examination of business actors who violate the provisions of this law;
9. obtaining, researching, or evaluating letters, documents or other evidence for investigation and / or examination;
10. decide and determine the presence or absence of losses on the part of other business actors or the community;
11. notifying the Commission's decision to business actors suspected of carrying out monopolistic practices and or unfair business competition;
12. impose sanctions in the form of administrative actions to business actors who violate the provisions of this Law[76]

KPPU has the authority to carry out its duties, to receive reports from the public and or from business actors about alleged monopolistic practices and or unfair business competition, conduct research on alleged business activities

[76] Chatamarrasjid Ais, *Pokok-Pokok Hukum Persaingan Usaha Indonesia*,Jakarta: kencana prenada media group,2009, p. 77

and or actions of business actors that can lead to monopolistic practices and or unfair business competition and Also investigate examine cases of alleged monopolistic practices and or unfair business competition reported by the public or by business actors or found by the Commission as a result of his research. After the existence of a report or an indication of allegations by the KPPU regarding the cartel's practice, in using an analysis of economic evidence, KPPU applies a structural analysis and Behavior analysis to obtain data on the existence of cartel practices carried out by business actors. As is known, KPPU does not have the authority to conduct rummage in disclosing cartel cases, make it difficult to obtain evidence in physical form or Direct Evidence. KPPU does not have the authority to conduct searches and investigations.

Competition Law enforcement official always strive to obtain direct evidence of agreement in prosecuting cartel case, but sometime it is not available. The business actor who involve in Cartel agreement often conceal their activities and usually they do not co-operate with an investigation of their conduct, In this context, indirect evidence can be important. Almost every country making a written or oral contribution to the roundtable described at least one case in which circumstantial evidence was used to significant effect. The authority of KPPU In carrying out their duty to discover cartel violation, when there is a report or an indication of allegations by the KPPU regarding the cartel's practice, on these cases, their using an

analysis of economic evidence, KPPU applies a structural analysis and behaviour analysis to obtain data on the existence of cartel practices carried out by business actors.

When the commission faces against cartel, one of the challenges in dealing with cartels is to find evidence of an agreement or proof of communication, such as meetings, phone calls or e-mail exchanges between cartel members.[77] In many jurisdictions, courts look for direct evidence of an agreement and indirect evidence is deemed insufficient to prove the infringement. However, finding evidence of a cartel agreement is very difficult and is one of the biggest challenges. This challenge, however, may be dealt with by giving sufficient powers and resources to the competition authority to carry out dawn raids, search and seize evidence, and build human and technical capacities of the agency to investigate and successfully prosecute cartels. In the prior explanation mention that, Price parallelism which is these business actor make a strategy in an oligopoly that occurs without an actual agreement between the players. Instead, one competitor will take the lead in raising or lowering prices. The others will then follow suit, raising or lowering their prices by the same amount, with the intention to obtain greater profits result.

[77] Study by the UNCTAD secretariat, *The impact of cartels on the poor*, Geneva, 8–12 July 2013, p. 11

Referring to the prior cases has been decided by KPPU, know are KPPU using Economic Evidence to deciding the cases. On the analyzing, KPPU find those cases conduct price parallelism practice which is prohibited by the Law. Economic Evidence is a part of Indirect Evidence Commission Regulation No 1 Of 2010 is interpretation as guidance which is associated with Evidentiary in law No. 5 of 1999, than guidance is involve in the element of article 42 which regulate about evidentiary. However, the existence of principle *Unus Tesitis Nullus* Testis make it clearly that Economic Evidence which is in this context as guidance cannot stand alone because based on the theory has been explain before, economic evidence cannot applied as the primary evidence to examine the final result of investigation. as known that the commission often using the economic evidence as the final result to examine the business actor violate law No 5 of 1999 even though the guidance evidence cannot be used as a primary evidence. Economic Evidence Must be supported by the element which mention in article 42 such as witness testimony, expert testimony, letter and document, and information from business actor. Theoretically Economic Evidence is appropriate to use in cartel case because as known that finding Direct Evidence in the Physical Form of a cartel agreement is very difficult, however economic evidence only can applied as a preliminary guidance which has function as guidance to found another evidence to examine either the business actor conduct cartel or not.

Although economic evidence has been widely used in other countries in business competition cases, it has not yet become a standard of proof in Indonesia. Therefore, indirect evidence must be encouraged so that it can be used as a standard of proof of business competition cases. This is due to the difficulty of finding direct evidence for competition institutions that do not have the authority to investigate and search.

CHAPTER IV

CONCLUSION AND RECOMMENDATION

A. Conclusion

Based on the discussion of the previous chapters, then the conclusions of this thesis is, evidentiary process conducted by KPPU using indirect evidence in this context economic evidence can only be used with very strict requirements. These evidence cannot be stand-alone without another evidence because economic evidence is only applied for preliminary evidence which has functions as guidance in obtaining other evidences. However, as long as economic evidence forms a series of economic data or analysis that can be concluded as a violation the law then the qualifications is part of guidance evidence. Theoretically, Economic Evidence has a function as a preliminary Evidence or guidance to obtain Evidence, However in the practice Economic Evidence often using by KPPU as final Evidence to determine the business actor conduct Cartel practice, hence caused Economic Evidence Is not appropriate to use.

B. Recommendations

In connection with the conclusion above, one mater that needs to be examined further, namely, The competition law does not explicitly permit

indirect evidence in the evidentiary process. In this case there is no clear limit on what kind of indirect evidence that qualifies as a valid and convincing evidence. It would be better if the amendment in the Law No. 5 of 1999 discussed specifically about the Position and application of economic evidence as evidence. The investigator also should have Skill or Capacity to Enforce the application of economic evidence.

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