

The Use of *Per Se* Illegal Approach in Proving the Price-Fixing Agreements in Indonesia

Siti Anisah

Faculty of Law, Universitas Islam Indonesia, Indonesia. E-mail: siti.anisah@uii.ac.id

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ABSTRACT

The Indonesia Competition Commission (the ICC) often faces difficulties to find evidence in the form of agreement made by business actors in determining prices. The agreement is the main element to prove the price-fixing which is prohibited under Article 5 of Law No. 5 of 1999. The legal issue discussed in this research is whether the use of *per se* illegal approach in proving the price-fixing agreement requires direct evidence or it is sufficient with an indirect evidence. This normative study found that the competition authorities still impose sanctions to business actors even though the (legitimate) agreement does not exist. The examination requires an in-depth understanding of economic theories and should prioritize the principle of prudence due to its vulnerability to manipulation. The analysis of Decision No. 08/KPPU-I/2014 and 04/KPPU-I/2016 found that the ICC proved the price-fixing case using indirect evidence and included an analysis of the impact on competition. Both cases indicate that the ICC applied the rule of reason approach because of the difficulties in finding the evidence of the agreement. On the other hand, the ICC applied *per se* illegal approach in the Decision No. 10/KPPU-L/2009 and 14/KPPU-I/2014 due to the existence of direct evidence.

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1. Introduction

Article 5 of Law Number 5 of 1999 prohibits business actors from entering into price-fixing agreements. This provision uses *per se* illegal approach which does not require further proof of any impact arising from the agreement.¹ Practically, this provision shows different condition. Some decisions of the Indonesian Competition Commission's (ICC or Komisi Pengawas Persaingan Usaha or KPPU) decisions related to alleged violation of Article 5 of Law No. 5 of 1999 do not use *per se* illegal approach,

¹ Lubis et al. (2017). *Hukum Persaingan Usaha*, Jakarta: Komisi Pengawas Persaingan Usaha, p. 66. Another approach that is recognized under Law No. 5 of 1999 as rule of reason, means that this approach allows the ICC to observe and examine the whole facts related to the agreement agreed by parties, then determine the conclusion whether an agreement is supportive or detrimental to competition. See A.M. Tri Anggraini. (2003). *Larangan Praktek Monopoli dan Persaingan Tidak Sehat: Per Se Illegal atau Rule of Reason*. Jakarta: Program Pascasarjana Fakultas Hukum Universitas Indonesia, p. 80.

but rule of reason. The type of evidences used by the ICC in proving the alleged violation was hard evidence and/or indirect or circumstantial evidence.

The ICC Decision No. 10/KPPU-L/2009 which applied per se illegal approach has declined the application submitted by reported parties to consider the caused impact. In this case, the ICC used hard evidences for examining the ticket trading arrangements for Lion Air and Wings Air airlines in West Nusa Tenggara Province. In the ICC Decision No. 08/KPPU-I/2014 regarding cartels in four wheeled vehicle tire (automotive industry), the reported parties allegedly violate Article 5 paragraph (1) and Article 11 of Law Number 5 of 1999. The ICC did not use hard evidence in examining the case but circumstantial evidence. To prove whether or not the reported parties violate Article 5 of Law No. 5 of 1999, the examination should use per se illegal approach. However, the ICC has used the rule of reason approach.

The ICC has used per se illegal approach and hard evidence on the Decision No. 14/KPPU-I/2014 related to Liquefied Petroleum Gas (LPG) sales in Bandung and Sumedang. Furthermore, while deciding the case No. 04/KPPU-I/2016 related to price fixing of automatic motor scooter, The ICC used per se illegal approach and indirect or circumstantial evidence. This article will explain the differences in proving price-fixing agreement by analysing some ICC decisions as already mentioned above.

Therefore, this article explores the following research question: have the ICC decisions enforced per se illegal approach in proving price fixing agreement cases consistently?

2. Method

This paper is based on a normative legal study that was conducted through library research by tracing secondary data in the form of primary legal materials, secondary legal materials, and tertiary legal materials. The data were analyzed using qualitative analysis. The normative method used in this research is to analyze the implementation of per se illegal approach to prove the price-fixing agreement through case study of ICC decisions.

3. Analysis and Results

3.1. Proof of the Price Fixing Agreement

Law No. 5 of 1999 divides 3 types of prohibition, i.e.: prohibited agreement, activities, and dominant position. Price fixing is one of the prohibited agreements under Law No. 5 of 1999. "Agreement" as mentioned in Article 1 number 7 of Law No. 5 of 1999 is an act of one or more business actors to bind themselves to one or more other business actors under any name, both written and unwritten. The price fixing agreement is regulated under Article 5 of Law No. 5 of 1999, as follows:

- a. Business actors are prohibited to make an agreement with their competitors to pricing of goods and or services which should be purchased by consumer or customer in the relevant market.
- b. The provisions as referred to in paragraph (1) do not apply to:
 - 1) an agreement which is made in a joint venture; or
 - 2) an agreement which is based on applicable law.

Based on that provision, price fixing agreement uses per se illegal approach. Nevertheless, there is no explanation why per se illegal approach is used to prove the price fixing agreement violation in the minutes of discussion of Law No. 5 of 1999.² Practically, The Commission implements per se illegal or rule of reason approach for examining the allegation of price fixing agreement violation in case by case basis. Arguably, Law No. 5 of 1999 relies on the ICC to determine the approach to be used as mentioned in Article 35 (a) of Law No. 5 of 1999.

The case of price fixing agreement is inseparable from the general principle of proof. Proof or evidence has an essential role to make a decision whether there is a violation of law or not.³ Competition law has its own special characteristics in terms of proof because it includes criminal and civil law dimension. Competition law adopts a civil procedural law (codified in *Het Herziene Indonesisch Reglement* abbreviated as HIR, Stb 1848-16, Stb. 1941-44 dan *Rechtsreglement Buitengewesten* abbreviated as RBg, Stb. 1927-227), as indicated by the inspection process which tends to apply civil procedure. On this basis, The ICC could sentence the reported parties by their acknowledgment on the report from the reporter.⁴ Besides that, competition law also regulates prohibited agreements which are in the domain of civil law (*Burgerlijk Wetboek*, Stb. 1847-23 abbreviated as BW). Meanwhile, the truth sought under competition law is material truth as adopted in the criminal procedural law (Law No. 8 of 1981 concerning Criminal Procedural Law, the State Gazette of the Republic of Indonesia of 1981 No. 76, Additional Gazette No. 3209) Law No. 5 of 1999 also recognizes criminal sanctions. Moreover, competition procedural law as regulated under ICC Regulation No. 1 of 2010 determines the types of evidence that is similar to the evidence as recognized under criminal procedural law.⁵

3.2. Types of Evidence in Investigation

Article 42 of Law No. 5 of 1999 as also regulated in Article 72 of ICC Regulation No. 1 of 2010 concerning the Procedure for Case Handling, which has been updated in Article 45 of ICC Regulation No. 1 of 2010,⁶ determines the types of evidence of investigation in the form of witness statement, expert statement, letters and/or documents, indications, and information from business actors. In terms of the closeness between the evidence and the facts that will be proven, evidences are classified into direct and indirect evidence. Direct evidence is evidence in which the witnesses directly experience the fact or event that would be proven. Meanwhile, indirect evidence is evidence through the findings of the relationship between the facts; therefore the evidence can be seen after making certain.⁷ Indirect evidence generally applies to the criminal proceedings, subject to Indonesian Code of Criminal Procedure (KUHAP) especially related to evidence of indication. Article 188 paragraphs (1) of Law No. 8 of 1981 regulates that "indications are acts, events, or situations, which

² Anggraini, A. M. T. (2003). *Larangan Praktek Monopoli dan Persaingan Tidak Sehat: Per Se Illegal atau Rule of Reason*. Program Pascasarjana Fakultas Hukum Universitas Indonesia, p. 187.

³ Sarjana, I. M. (2014). *Prinsip Pembuktian dalam Hukum Acara Persaingan Usaha*. Zifatama Publisher, p. 135.

⁴ *Ibid.*, p. 146.

⁵ See Article 188 of Law No. 8 of 1981.

⁶ ICC Regulation No. 1 of 2010 has amended by ICC Regulation No. 1 of 2019. Given that the case analyzed in this paper occurred during the enactment of ICC Regulation No. 1 of 2010, therefore, the study in this paper uses ICC Regulation No. 1 of 2010.

⁷ Sarjana, *op. cit.*, p. 150.

because of its concurrence whether between one and the other, or with the criminal act itself, indicates the occurrence of a criminal act and the person committing it”.

The important thing to prove price fixing violation is the consent of the parties. The violation of Article 5 of Law No. 5 of 1999 only occurs when business actors agreed on price fixing agreement in the relevant market. The pricing behavior of business actors in the relevant market either carried out jointly or concerted. All actions of other independent companies do not constitute a violation of competition law.

3.3. Direct and Indirect Evidence in the Price Fixing Agreements

3.3.1. Direct Evidence

Direct evidence of an agreement is that which identifies a meeting or communication between the subjects and describes the substance of their agreement. The most common types of direct evidence are among others:⁸

- 1) A document or documents (including email messages) essentially embodying the agreement, or parts of it, and identifying the parties to it;
- 2) Oral or written statements by co-operative cartel participants describing the operation of the cartel and their participation in it.

3.3.2. Indirect or Circumstantial Evidence

Indirect evidence is evidence that does not specifically describe the condition of the agreement, or the presence of the parties in it. Indirect evidence includes evidence of communication between alleged business actors who carry out cartels; economic evidence relating to the market; and the behavior of business actors that indicates concerted action.⁹

1) Communication Evidence

Communication evidence is types of indirect evidence where business actors meet or communicate, but there is no explanation about the content of the meeting or conversation. It includes:

- a) records of telephone conversations between competitors (but not their substance), or of travel to a common destination or of participation in a meeting, for example during a trade conference;
- b) other evidence that the parties communicated about the subject e.g., minutes or notes of a meeting showing that prices, demand or capacity utilization were discussed; internal documents evidencing knowledge or understanding of a competitors pricing strategy, such as an awareness of a future price increase by a rival.

Oliver Black explains that communications have various types and levels. The types of communications include indirect communication or through third parties' participation; general communication (non-specific communication) that occurs when someone makes an announcement addressed to the general public; inexplicit communication in which the listener needs to make his own conclusions to find out the

⁸ OECD. (2006). "Prosecuting Cartels without Direct Evidence of Agreement", *Policy Brief DAF/COMP/GF*, p. 1.

⁹ *Ibid.*

purpose of the speaker; and non-linguistic communication which involves gestures such as nodding or eye contact.¹⁰

Meanwhile, the levels of communication could be "the speaker says something to the hearer in words which they both understand in the words' normal sense" to the level "somewhere short of the case where one person simply causes another to believe something". The communication must be able to convey the intention of the speaker to take a certain action together with other parties, aside from the levels.¹¹

On the other hand, according to the provisions of the OECD, competition law will only impose penalties to business actors who make or agreed on prohibited agreements if the business actors do it together consciously, regardless of how the communication is carried out. To prove the violation of competition law, it must be clear whether there has been a "meeting of the minds" or conformity of the will to achieve a common goal or outcome, in other words "conscious commitment to a common scheme". Consequently, business actors will be declared innocent if they communicate solely in the form of actions in the market or even if there is communication, it does not contain a "conscious commitment to a common scheme".¹² Then the question is how to differentiate actions resulting from prohibited agreements with actions that inadvertently arise as a result from independent decision-making based on market movements.¹³

In this case, Black emphasizes the importance of communication among competitors or rivals to reach an agreement. Black developed the understanding of agreement in the context of parallel actions by oligopolists based on philosophical analysis. Communication is not enough to prove the occurrence of concerted action, but it needs to be followed by evidence of parallel actions among competitors. Meanwhile, an agreement can be fulfilled simply by communication, that is, if one party makes a conditional promise and the other party promises to respond (mutual promise).¹⁴

In the United States, the key elements for determining an action violates Section 1 of the Sherman Act is the action must be a concerted action, not the act carried out separately (unilateral behavior) by business actors. Henceforth, the term interdependent parallelism or conscious parallel behavior emerges, which has different legal consequences with concerted action.¹⁵

Concerted action can be proven by the existence of written agreement, oral statement which is issued concurrently or circumstantial evidence. Actions need to be distinguished, where there is a 'parallel conduct' and the behavior of business actors which happens to be similar but have a legitimate business basis.

A classic example of a case that involve concerted action is *American Tobacco Co. v. United States* (328 U.S. 781 (1946)), meanwhile the second case is not the example of concerted action i.e. *Williamson Oil Co., Inc. v. Philip Morris USA* (346 F.3d 1287 (11th Cir. 2003)). The Court ruled that interdependent parallelism was not an agreement,

¹⁰ Black, O. (2005). *Conceptual Foundations of Antitrust*. Cambridge University Press, p. 427.

¹¹ *Ibid.*

¹² OECD. *op. cit.*, p. 19.

¹³ Page, W. H. (2009). The Gary Dinnens and the Meaning of Concerted Action. *SMU Law Review*, 62(2), p. 615. <https://scholar.smu.edu/smulr/vol62/iss2/7>

¹⁴ *Ibid.*, p.426.

¹⁵ *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541, 1954.

merger, or conspiracy as stipulated in the Sherman Act §1.4. The Court ruled that parallel prices alone were not sufficient to prove conspiracy, but additional facts or plus factors were required to prove that parallel actions lead to or resulted in conspiracies.¹⁶ The 'plus factor' was then developed by Oliver Black through his philosophical theory of concerted action to explain the level of relationship between business competitors (correlation among rivals).¹⁷

Black analyzes the relationship between competitors, who leads to concerted action in six hierarchies or levels of tendencies, i.e.:¹⁸

- a) independent action, in which each party acts independently of all others;
- b) mutual belief, in which firms act in the belief that others are acting in a certain way;
- c) mutual reliance, in which firms act both believing the others will act in a certain way and relying on them to do so;
- d) mutual reliance with a common goal, in which firms act both believing the others will act in a certain way and relying on them to do so, and in doing so the firms have the same goal;
- e) mutual reliance with a common goal and with knowledge, in which firms act knowing that fourth condition is satisfied; and
- f) firms act with mutual reliance, a common goal, and knowledge gained, in part, by communication.

The first to fifth levels (letter a-e) are still conscious parallelism, but the last level (letter f), the conclusions can be drawn that concerted action has taken place.¹⁹

According to Black, to the extent that there is interdependence (mutual reliance) between business actors who have the same goals and with knowledge of the existence of these dependencies (letter e) is still limited to conscious parallelism. To reach the level of unlawful concerted action, business actors must be connected with a communication. Thus, what distinguishes between concerted action with parallelism conduct is if "firms are able to engage in consciously parallel conduct in part because they communicated their reliance and their goals to each other [sic]." The intended communication under these conditions is the discussion of future prices and carried out many times.²⁰

In other words, if the business actors have the same objectives and the same ways to achieve them but act individually, then the act includes conscious parallelism in which this behavior is not prohibited. Even if the similarity of objectives and ways to achieve them comes from market research or the business actors activities to monitor their competitors so as to result prices or relatively similar price movements, it is also not a concerted action. That is why it does not violate competition law. At a certain point, the act becomes a concerted action if there is an exchange of information between competitors related to prices or matters which affect prices. Accordingly, an action is a

¹⁶ OECD. *loc. cit.*

¹⁷ Page, W. H. (2007). Communication and Concerted Action. *Loyola University Chicago Law Journal*, 38(3), p. 405-460. <https://lawecommons.luc.edu/luclj/vol38/iss3/3/>

¹⁸ Black. *op. cit.*, p. 188-191.

¹⁹ Page. (2009). *op. cit.*, p. 177.

²⁰ *Ibid.*

concerted action if there is evidence of communication between competing business actors that gives rise to a common understanding. The common understanding generates the dependence, trust and knowledge are needed to manage prices.²¹

Thus, the existence of communication evidence is not sufficient to decide whether an action or agreement has been prohibited, but further testing must be carried out to determine what action must be taken on the evidence of communication. In fact, communication evidence is often accompanied by economic evidence to show the correlation between the actions of business actors who are suspected of making price fixes and their implementation in the market. In this case, a rule of reason approach is required to prove that price fixing occurred is not merely conscious parallelism.²²

2) Economic Evidence

Economic evidence can be classified as behavioral evidence or structural evidence. Behavioral evidence includes evidence of parallel actions by reported business actors, for example, continuously identical price increases, or in the form of facilitating practices. Meanwhile, structural evidence is in the form of high market concentration factors and homogeneous products. According to those two evidences, behavioral evidence is considered the most important.²³ Economic evidence is extremely important to prove market concentration, price simplification, price structure effect, and profitability. Normally, the evidence will be submitted by business actors who involved in the industry.²⁴ Economic evidence can be used to analyze whether the business actors in conducting their business are following their own interests or not (the evidence should be inconsistent with the hypothesis that the market participants are acting unilaterally in their self-interest).²⁵ In addition, economic evidence can also be based on the opinion of economists who will testify based on their theoretical understanding, surveys and statistics.²⁶

Economic evidence, on the other hand, is ambiguous. It could be consistent with either agreement or independent action.²⁷ This is because economic evidence requires in-depth analysis and high caution in evaluating economic data submitted by witnesses and reported parties. When errors occur in reading and analyzing data, it will affect the decision making process by the business competition supervisory authority.²⁸

Concerns about the credibility of economic evidence to prove violations of business competition law were raised by Henry L. King. He raised several substantial problems of economic evidence presented in the trial, i.e.:

²¹ Posner, R. A. (1976). *Antitrust Law: An Economic Perspective*. The University of Chicago Press, p. 62-71.

²² Conant. (1954). *Consciously Parallel Action in Restraint of Trade*. *Minnesota Law Review*, 38, p. 797. <https://scholarship.law.umn.edu/mlr/1945>

²³ OECD. *op. cit.*, p. 10.

²⁴ King, H. L. (1977). *Inferring a Price-Fixing Conspiracy*. *Antitrust Law Journal*, 46(2), p. 462. <https://www.jstor.org/stable/i40037530>

²⁵ OECD. *loc. cit.*

²⁶ King. *loc. cit.*

²⁷ OECD. *op. cit.*, p. 9

²⁸ *Ibid.*

- a) A court will have to sort out often conflicting views of opposing economic experts, furthermore apply its own particular economic theory as to the significance of the market factors involved. In this stage, judges in conscious parallelism cases determine whether the requisite interdependence was present; that is, whether the defendants were acting contrary to their self-interests. To determine whether businessman is acting contrary to their self-interests depends on a host of factors concerning costs, returns, long and short range objectives, capital expenditures, legitimate retrenchment and other such business considerations that may be as consistent with a neutral or innocent connotation as it is with a criminal connotation. Moreover, judicial determination of what is self-interest means that a person with little or no business experience is being called upon to read the minds of others engaged in different pursuits.
- b) It cannot be stated as general agreement, much less unanimity, among economists as to the theory of oligopoly pricing, and there are few empirical research proving that higher prices or increased profits derive from coordinated effect rather than mere concentration.
- c) There is much in statistics and sampling that simply is not reliable or has margins of error too great to rely on as a measure of what constitutes a crime.”²⁹

Nevertheless, economic evidence becomes the first stage to prove a cartel (price fixing is one of the types of cartels),³⁰ and it is very possible from the existence of economic evidence to be found other supporting evidence, including direct evidence. Economic analysis as an indirect evidence (circumstantial evidence) needs to prioritize the principle of prudence. The meaning of “prudent” is the evidence supported by:³¹

- a) definitive and legitimate data;
- b) the relevance of evidence and economic facts obtained;
- c) causal relationship between violation committed with the economic damage or losses occurred;
- d) a careful analysis based on economics;
- e) compliance with scientific methods and uphold the objectivity of the case being handled.

With economic analysis that upholds the principle of prudence, it is expected to prevent bias in determining the violations of business competition law.

In certain market, price fixing can easily be done and therefore easy to detect, but it could be that price fixing does not work in other markets. In another case, the price fixing which is agreed by parties usually in the form of a covert agreement (tacit agreement) made among business actors and it gives rise to difficulties while detecting.³² There is a view of Michael L. Glassman which states that:

“If benefit-cost ratios are very high, then it clearly is in the interest of conspirators to devise schemes which are extremely difficult to detect. In those circumstances conspirators will devote considerable energy and resources to maintaining the

²⁹ King. *op. cit.*, p. 262-263.

³⁰ Anggraini. *op.cit.*, p. 202.

³¹ Sarjana. *op. cit.*, p. 166.

³² Anggraini, *op. cit.*, p. 306.

stability and profitability of their arrangements because of the very large return from "investing in collusion." Complex systems will be devised so that the antitrust authorities cannot easily detect the existence of the conspiracy, for such detection will ordinarily have the effect of reducing or eliminating the very substantial profits from illegal activity. Price fixes may be based upon complicated codes or upon decision rules which are generated by mathematical formula so as to not be easily detectable. Whenever firms use strategies such as "phase of the moon pricing" or mathematically determined customer allocation, detection becomes more difficult because meetings are supplanted by complex automatic decision making rules".³³

In other words, dependence on hard evidence will provide biased results because only small business actors which do not even understand the competition law will be ensnared. Meanwhile, the major business actors who understand the theories of competition law will take the advantages from the weaknesses of regulations and the authority to impede competition and gain excessive profit.

The following ICC's Decisions describe the violation of Article 5 of Law No. 5 of 1999. In the following cases, the relationship between the background of the business actor and the type of business can be compared with the evidence used by the ICC in examining price-fixing agreements.

3.4. Case Study

3.4.1. Decision No. 10/KPPU-L/2009 related to Ticket Trading Arrangement on Lion Air and Wings Air Airlines in West Nusa Tenggara Province

This case involved airline ticket agents from West Nusa Tenggara. They were the members of the Ticketing Agent Association (ASATIN). ASATIN members carry out their business by selling airline tickets to end consumers as well as individuals or business entities/legal entities that purchase the tickets not for their interests but for the third parties (or called Sub Agents). For ticket sales transactions conducted by Sub-Agents, the Agents would give certain amount of fees to the Sub-Agent. Before ASATIN was formed, the amount of fees paid by ASATIN members to Sub-Agents varied greatly. Among the airplane ticket Agents competed each other to give the maximum possible fee to Sub-Agents. The objective is to achieve ticket sales target by the Agent. For the airplane ticket sales services by the Sub-Agents, the Reported Members of ASATIN made a written agreement to give the Sub-Agent a fee. Here are the airlines and the percentage of fee accepted by them that are Garuda Indonesia (2%), Merpati Nusantara (3%), Lion Air/Wings Air (3%), Batavia Air (3%), Indonesia Air Transport (3%), and Trigana Air (3%).

The examination result shows that the Agents (members of ASATIN) did not dispute the agreement in regards to the determination of fee accepted by Sub-Agents which included all fees for all airlines that serve routes to West Nusa Tenggara. The agreement also included penalty provision to the ASATIN members who violate it, although in reality there has never been a penalty imposed. This provision aims to give awareness to the members for complying with the agreement related to the fee amount to be given to Sub-Agents.

³³ Glassman, M. L. (1977). The Case for Inferring Price Fixing . *Antitrust Law Journal*, 46(2), p. 449. <http://www.jstor.org/stable/40842296>

According to the ICC, agreement made by ASATIN members has eliminated the element of competition in the airplane ticket sales. The Agents of ASATIN members no longer get incentives to innovate or to improving the performance in ticket purchasing through their Sub-Agents. They also have impeded the potential income received by Sub-Agents by defining the amount of fee.

The ICC qualified the relationship between Agent and Sub-Agent as relationship selling in which the Agent as the seller whiles Sub-Agent as the buyer and the airline as the owner of the airplane. The Agents has competence in marketing and selling the flight ticket from airline while Sub-Agents is the parties who buy the airplane ticket from the Agent not for their interest but for other parties or end consumer or passengers of the airplane. In such purchasing scheme, the price that must be purchased by Sub-Agents is lower than the price that must be purchased by end consumers/passengers. Therefore, Sub-Agents basically enjoy the profit from the difference between the sale price of airplane ticket to end consumer/passenger and purchase price of airplane ticket from Agents. This action by taking benefit from the difference price as explained above is also known as discount or fee for the Sub-Agents. The ICC stated that the 'fee' referred to in this case can be equated with 'price' in a broad sense. The price does not only include basic costs for goods and or services, but also other additional costs such as discounts and payment delays.

The ICC ignored the request of the reported party to consider the impact of the determination of fee. According to the reported party, the action did not affect the price enjoyed by the final consumer since the party who determine the end price of airplane ticket is the airlines, not the Agent. The ICC rejected the request because Article 5 (1) of Law No. 5 of 1999 is per se illegal, thus need no further examination of the impact to the effective competition. For this reason, Agents who are members of ASATIN are proven to have violated Article 5 of Law No. 5 of 1999 and must revoke the agreement on the determination of the fee amount from Agent to the Sub-Agent.

This case however was not decided unanimously by the ICC. One of the ICC Commissioners, Dr. Sukarmi, S.H., M.H, argued that the relationship between Agent and Sub-Agent is based on an agency agreement although the deal between parties was made unwritten. She cited Articles 1792 and 1794 of the Indonesian Civil Code which regulate the power of attorney agreement and wage agreement for the power granted. The granting of power of attorney in this case is to grant the power to sell tickets with the agreed fee. The acceptance of a power of attorney can also occur secretly and be inferred from the implementation by the person who receives that power of attorney. She also agreed with the reported parties if the price definition under Article 5 of Law No. 5 of 1999 is difference from the definition of 'fee' and the determination of that fee has absolutely no effect on the selling price of tickets to consumers. According to Dr. Sukarni, the price is formed first and then the fee is taken as a wage or reward to the parties who have contributed in tickets purchasing.

The written agreement which is recognized by the reported business actors and has a binding force to parties who agreed can be qualified as direct evidence. It shows the existence of the agreement in this case. Generally, ICC has properly used per se illegal approach to decide the prohibited agreements agreed by the reported parties. An illegal behavior per se will be punished without a complicated investigation process; however, it must meet two conditions, i.e.:

- 1) Focusing on business behavior rather than the market situation because its actions are done intentionally by business actors; therefore, the court does not require further investigation,
- 2) Types of practice or restriction on behavior that are prohibited can be identified quickly and easily without a complicated analysis process.³⁴

3.4.2. Decision No. 08/KPPU- I/2014 related to Cartel in the Automotive Industry (Four Wheeled Vehicle Tire Cartel)

The ICC initiated to investigate this case due to some unusual things occurred in tire industry sector. According to the ICC, the price of what tends to increase but it is not followed by an increase of other factors price, such as the price of raw materials and labour costs. The demand for tires tends to increase from year to year along with the increasing of car sales. Based on the economic theory, this situation provides unusual condition which is showed by the increasing of price although the production runs smoothly and the demand continues to increase.

The investigation was carried out for the production and/or marketing of four-wheeled vehicle tires (passenger car) especially for the diameter size 13, 14, 15 and 16, in 2009-2012 in the Indonesian territory. These types of tire are produced and marketed by Tire Company that incorporated in the Indonesian Tire Companies Association (*Asosiasi Perusahaan Ban Indonesia* or APBI) which has 11 members from at least 13 tire manufacturing companies in Indonesia.

The ICC revealed the result of investigation that six of APBI members (PT Bridgestone Tire Indonesia, PT Sumi Rubber Indonesia, PT Gajah Tunggal Tbk, PT Goodyear Indonesia Tbk, PT Elang Perdana Tyre Industry, and PT Industri Karet Deli) are allegedly determine the price selling of tires in the Indonesian market territory. Based on the witnesses' testimony at the trial, there were communication and information exchange among the members through APBI. APBI regularly carried out some activities or events to hold meeting with its members, such as Sales Director Meetings, Marketing Director Meetings, TAC Technical Teams, Raw Materials Teams, HRD Teams and Presidium Meetings every month. APBI asked its members to submit data on a regular basis which will be used as material for drafting monthly and annual APBI reports. Data submitted includes sales and production data, operating expenses, replacement, exports, and inventory, sales plans, production plans, and tax payment plans.

The form of price fixing discovered by the ICC in the Minutes of Presidium Meeting on January 21, 2009 is indicated by the phrase of "APBI members are prohibited to drop the price" (*Anggota APBI jangan melakukan banting membanting harga*). In addition to the Minutes of the Presidium Meeting, there are minutes of meeting that discuss and agree on changes to the warranty claim ban rules from 3 (three) years to 5 (five) years. The ICC considers warranty claims to be included in the operating expenses component that will affect the calculation of the Profit and Loss Statement. Thus, the agreement regarding warranty claims includes as a part of the price-fixing agreement made by the six tire companies. According to the ICC, Minutes of Presidium Meeting is qualified as price fixing agreement made by APBI members. The results of the presidium meeting

³⁴ Anggraini. *op.cit.*, p. 92-93.

were sent and addressed to each President Director of APBI member companies and there was no rejection related to the contents of the minutes of meeting.

The ICC implemented the Harrington Model economic analysis³⁵ to find out the effectiveness and/or the impact of the price fixing agreement and tire production and/or marketing determination. This method is a merger from various methods that view cartels from various perspectives.³⁶ The method used in this case was the method of error relationship or residual regression between companies from the panel data estimation results. In econometrics, error or residual regression is always used as a basis for seeing the behaviour of a cartel. The ICC uses the Harrington method by comparing the price and production dependencies of each company.

According to Grout and Sonderegger³⁷ and Harrington³⁸ there are 2 primary methods to detect the existence of cartel, i.e.: structural and behavioural methods. Structural method is a method to identify the market characteristic that possibly to be conducive to a cartel occurrence. In this case, the ICC uses structural analysis in the form of analysis of the number of companies, analysis of barriers to entry, and analysis of concentration and size of the company. Behavioural method is related to observing the manner of the company or industry to conduct cartel or to observe the final result of a cartel. The manners carried out can be in the form of direct communication between cartel members or perceive the impact on the market from coordination on prices and quantities made by the company to the industry (Decision No.08/KPPU-I/2014: 75). Perceiving from the results of the Harrington model analysis, the ICC considered that the agreement between companies who incorporated in APBI, in 2009 have effectively pushed up the price of PCR (Passenger Car Radial) Replacement for diameter size of 13, 14, 15 and 16.

The ICC decided that the reported parties were proven to violate the Article 5 (1) and Article 11 of Law Number 5 of 1999. The ICC argued that the elements of price fixing agreement have been fulfilled and the agreement which regulated the arrangement of production and distribution of PCR tire for diameter size 13, 14, 15, and 16 has an impact on the unusual increasing price. The ICC imposed fine in the amount of Rp25.000.000.000 to each reported parties. The money must be deposited in the state treasury.

Upon the ICC's Decision, the six companies (reported parties) filed an objection to the Central Jakarta District Court. The Court confirmed the ICC's decision, but the amount of the fine was diminished. Upon the Court decision, The ICC filed a cassation to the

³⁵ The ICC Decision No.08/KPPU-I/2014, p. 74-75

³⁶ The Harrington model can be said as cartel check list because this model can be viewed from various aspects. This model uses analysis method of the error relationship or residual regression between companies from the estimation results of the panel data to detect cartels. The next step is to analyze the correlation among errors to decide whether the price determination between the manufacturers is independent and is not influenced by other companies by examining the contemporaneous correlations to see whether there is a relationship in determining the price between the company as a whole. See *Ibid.*, p. 159.

³⁷ Grout, P., & Sonderegger, P. (2005). Predicting Cartels, Office of Fair Trading. *Economic discussion paper of March 2005*, p. 15. <http://www.oft.gov.uk> accessed on October 25, 2019.

³⁸ Harrington, J. E. (2006). Behavioral Screening and the Detection of Cartels. EU Competition Law and Policy Workshop, p. 2. <https://pdfs.semanticscholar.org/cdd8/80848e6240a7c5d17f0fc736a75046bb739a.pdf>, [Accessed October 25, 2019]. See also Mihail Busu and Bodgan Cimpan. 2014. Screening Methods for the Detection of Cartels. *Network Intelligence Studies: Romanian Foundation for Business Intelligence, Editorial Department*, 3, p. 21-31.

Supreme Court. The Supreme Court confirmed the ICC decision and the Central Jakarta District Court and imposed fine amounted of Rp30.000.000.000 to be shared among six companies. Thus, the Supreme Court Decision No. 221 K/Pdt.Sus-KPPU/2016 which was ruled on June 14, 2016 has been recognized the existence of indirect evidence as legal evidence to examine the competition cases.

The Supreme Court stated that the agreements on price, production, territories (cartel) as well as other unfair competition agreement in practice are often carried out in a tacit manner. In the competition law, indirect evidence is accepted as a valid evidence as long as that evidence is sufficient and logical. Furthermore, there is no other evidence which can weaken that indirect evidence. The elements were fulfilled in *a quo* case so that the Respondent of the Objection/Cassation which was confirmed by *Judex Facti* (Central Jakarta District Court/KPPU) was correct, so it was worth defending.

This case has price fixing and cartel dimensions. The proof of collusive behavioural of business actors focused on some minutes of presidium meetings that indicated there was information exchange in the form of data possessed by each reported companies. In addition, it also focused on a conclusion making in the meeting which was agreed by each member of the association. Although the choice of words contained in the minute of meeting does not clearly state the number of agreed price, The ICC uses other elements that affect the price (the change of warranty claim period) as the basis for a "meeting of the mind" between reported business actors in determining the price of their products. In other words, the evidences used to prove the violation was not hard evidence but circumstantial evidence in the form of behavioural and structural analysis. This analysis is part of economic evidence. Thus, despite this case is supposed to be based on *per se* illegal, the ICC used rule of reason approach during investigation to interpret the facts and economic data acquired and to conclude that collusion has taken place to increase price.

3.4.3. Decision No. 14/KPPU-I/2014 related to Liquefied Petroleum Gas (LPG) Selling in the Bandung and Sumedang Regions

On June 21, 2011 the members of the LPG Hiswana Migas DPC Bandung Sumedang made a joint agreement regarding the selling price of LPG to the customers in the Bandung and Sumedang Region, West Java. The agreement was to determine the price of gas cylinder. The price for 12kg gas cylinder is Rp70.200;/cylinder for ex-Agent Warehouse; Rp71.200;/cylinder for franco sub-agents/distributors/stores/sales point; Rp73.200;/cylinder for direct delivery by agents to end consumers and intermediary users (industry/hotels/hospitals). The agreed price of 50kg gas cylinder is Rp375.000;/cylinder for franco sub-agents/distributors/stores/sales point and the agreed price for sales using bulk LPG is Rp10.250;/kg for franco intermediary users (industry/hotels/hospitals) in Bandung and Sumedang region. Aside from price fixing, it was also agreed the prohibition to give discount from the price agreed and to take over customers that have been fostered by other agents. Simultaneously, the level of gas cylinder price determined by PT Pertamina (Persero) was the price level of ex-agent warehouse, i.e. Rp70.200;/12kg gas cylinder and Rp367.750;/50kg gas cylinder.

The investigators found the fact that there were a series of meetings held by Hiswana Migas and attended by its members before the drafting and the signing of the Letter of Price Fixing Agreement. The members signed and put their companies' stamp on that Letter. According to the fact, reported parties admitted that they have signed the Joint Agreement Letter on the Selling Price of LPG on June 21, 2011 knowingly and without

coercion from other parties. Based on the information and documents acquired, the activity of price fixing was carried out without the consent from PT Pertamina (Persero). The ICC collected the original receipts or original copy or carbon copy as the evidence of LPG sales in 2011-2013. The ICC considered that the action of the reported parties who signed the Price Agreement with full awareness and without coercion is a form of agreement. The ICC also considered that the price fixing agreement signed by the Directors or designated employee and has the company's official stamp has a binding force.

The ICC stated that it does not require further proof of the impact caused by the price-fixing agreement, but it is sufficient by proving the fulfillment of the elements contained in Article 5 (1) of Law No. 5 of 1999.

Based on the analysis made by investigators, the relevant market in this case was LPG in 12kg gas cylinder, 50kg gas cylinder and sales using bulk LPG with marketing area in Bandung Sumedang from June 21, 2011 to December 15, 2013. In this period, the reported parties sold the LPG at a price above the production costs (average variable). The ICC considered the determination of selling price was supposed to be the authority of Pertamina as the LPG monopoly rights holder where the agent margin has been included in the calculation. Agents have no authority to determine the price so that the agreement made by agents was invalid or unauthorized. If the party wanted to increase the selling price, they must refer to transport costs as determined by Pertamina's Circular Letter to all agents in the Region II, Rayon V, Gas Domestic Bandung Branch No. 205/F/130/2009-S8.

The evidences of the price-fixing violation, in this case, were Price Agreement Letter (Surat Kesepakatan Harga abbreviated as SKH) affixed with company stamp and the recognition of some reported parties at the trial who agreed on the SKH consciously and without coercion. Those evidences were in written form that helped the ICC investigation to prove the fulfillment of the elements of Article 5 of Law No. 5 of 1999. As a result, proving the price determination, in this case, is relatively easy and fast with the discovery of hard evidence.

3.4.4. Decision No. 04/KPPU-I/2016 related to Price Fixing in the Automatic Motor Scooter Industry in Indonesia

Based on the investigation results, the ICC collected three evidences to prove the alleged price agreement between the two companies. The three evidences are: the meeting of two reported parties; the first e-mail dated on April 28, 2014; and the second e-mail dated on January 10, 2015. The ICC found that there was a meeting at a golf course between the President Directors of the two companies which discussed Yamaha would follow the selling price of motorcycles from Honda. The results of the meeting were followed up with an order by e-mail until an adjustment to the selling price of PT Yamaha Indonesia Motor Manufacturing products that followed the selling price of PT Astra Honda Motor products.

Another evidence acquired by the investigators was the existence of price movement in the selling price of automatic scooters 110-125CC produced by both companies. The ICC found that in 2004 Honda made 5 times of price changes followed by Yamaha. The price movement was used by The ICC as an indicator for cartel or price coordination between Yamaha and Honda. The ICC obtained the evidence based on the statement of witness, Yutaka Terada, who was a Marketing Director at the time of the alleged

violation happened. Interestingly, the witness, Terada, was not present at the trial. The statement of Terada is set forth in the Minutes of Investigation which chronologically explains the relationship between the meeting at the golf course and Yamaha's pricing policy. Terada's statements have strengthened the conclusion made by investigators where there is collusion between Yamaha and Honda. The ICC stated the investigation report of Terada which was read on the trial could be considered as communication evidence between the President Director of Yamaha and Honda.

The ICC did not only depend on the statement of Terada. The ICC, at the trial, confirmed the witness testimony with the statement of the parties who involved in the meeting, namely the President Director of Yamaha, Yoichiro Kojima, and the President Director of Honda where both parties admit that the meeting has been held.

One of the substantial defences from the reported parties was that the testimony of Terada was delivered unilaterally and not under oath in a trial process in front of the public. Regarding to this issue, Article 51 (4) of ICC Regulation No. 1 of 2010 regulates that the witness in giving testimony must be presented on the trial. If this provision is fulfilled, the testimony of the witness is recognized as legitimate evidence. The testimony of witness that is acquired outside the trial (Article 51 (5) of ICC Regulation of 2010) may be legitimate evidence as long as it meets the provision of witness examination (Article 51 (2) of ICC Regulation No. 1 of 2010). However, the provision under Article 51 contradicts to Article 52 which requires witnesses to take an oath and deliver their statements at the court before the reporting parties and reported parties.

Witness examination conducted by the ICC basically is the same as the examination conducted by the judges at the District Court. The difference lies in the process of examination which the process of examining witnesses in civil cases at the District Court is generally carried out openly except for certain cases which must be kept confidential. Meanwhile, the process of examining witnesses by the ICC is conducted in private. The examination may be conducted openly as long as the relevant witnesses agree to do so. At the end, the ICC will decide whether the evidence is valid or not (Article 72 (2) ICC Regulation No. 1 of 2010, in the decision of the ICC stated that the statement delivered by Terada was valid as evidence even though there was no further information regarding the process of taking the statement of Terada).

The ICC also strengthens the statement of Terada with economic evidence in the form of market structure analysis and the sales data of Yamaha and Honda in 2013-2014. The data was examined with economic theories presented by the experts. The result of the market structure analysis shows that the automatic motorcycle industry is in oligopolistic market structure as indicated by the narrow figures of business actors that produce the automatic motorcycle in Indonesia (only four companies, i.e.: Yamaha, Honda, Suzuki, and TVS). Furthermore, the sales data in the period of 2012-2014 concludes that the business actors who dominate the market of automatic motorcycle industry are Honda and Yamaha.³⁹

According to the statement of experts, Prof. Rina Indrastuti, companies that have dominant market share will compete for market share and observe pricing strategy carried out by each business actors before determining a selling price.⁴⁰ This will inflict a reaction from the competitors. In such market conditions, it is reasonable if Honda

³⁹ ICC Decision No. 04/KPPU-I/2016.,

⁴⁰ *Ibid.*, p. 45.

would increase prices and Yamaha would withstand an increasing price or at least increase the price but not follow the pattern of price increases made by Honda. Instead Yamaha can take advantage of Honda's increasing prices to obtain more market share which tends to decrease. Moreover, products in the automatic motorcycle industry do not have a low degree of differentiation and the products tend to be homogeneous. With the homogeneity of the Automatic Motorcycle product, it will cause the demand curve to be very elastic which means consumers will be very sensitive to the selling price of a product with the selling price of its substitute product. In the other hand, Suzuki and TVS are supposed to follow the increasing prices of Honda, but they decided to not increase price in 2014 because of their consideration to maintain their market share that were much lower than Yamaha and Honda. The measure of Suzuki and TVS is suitable with the kinked demand curve model or Sweezy model which states that if an oligopolistic company raises its price, hence other companies in the industry will not increase their prices and therefore the company will lose most of its customers. On the other hand, an oligopolistic company cannot increase its market share by decreasing the prices because other oligopolistic company will follow the price reduction (Decision No. 04/KPPU-I/2016: 373). Meanwhile, the pricing strategy of Yamaha that keep increasing the prices is not suitable with that theory.

The ICC considers the incompatibility of the behaviour of Yamaha and Honda and the theory shows that there is a collusion between them. That economic evidence indicates that Yamaha carried out an action that was not parallel with its interest (self-interest).

Yamaha and Honda deny the existence of collusion between them by arguing that the similarity of the price pattern is conscious parallel action rather than concerted action. According to the statement of an expert submitted by the reported parties, price parallelism is something reasonable happened in the oligopoly market structure where the price tends to be determined by the supplier and interdependence so that there is a similar price pattern.

The ICC also conducted structural and behavioural screening to prove the linkage between the prices of Yamaha and Honda scooter products as a concerted action. Structural screening was obtained by observing the movement of the concentration of 2 (two) companies (CR2) and HHI fluctuations during January 2012-December 2014. Then it was concluded that the two-wheeled motor vehicle industry had a tight and highly concentrated oligopoly structure. According the behavioural analysis, verification was carried out with informal method by using price charts and econometrics methods that use time series data with co-integration analysis. The result of that analysis is that there is an average price which is interconnected or influential between the two brands and there is a tendency for two companies to be able to maintain the same relative price.

The ICC also used collusion screening analysis method. This analysis uses a statistical approach, with the screening of average prices, standard deviations and Coefficient of Variation by comparing between periods of cartel and competition. In a normal situation, it can be compared when the collusion prices tend to be lower, the standard deviation will tend to be higher, and the Coefficient of Variation will tend to be higher.

The ICC conducted an analysis by comparing Yamaha and Honda price patterns for the period before and after April 2014. April 2014 was chosen as the start of effective collusion based on the evidence of email that states Yamaha will follow the pattern of

Honda increasing prices. The analysis by ICC shows that there was an increasing average price of Honda and Yamaha motorcycle products between the period before April 2014 and after April 2014 and there was a decrease in price variations between the period before and after April 2014. Analysis by the ICC is consistent with a study conducted by Abrantes-Metz, et.al, that shows the collusion condition where "the average price tends to be higher at the time of collusion than the competition period" and "the prices tend to be more stable when there is collusion than the competition period."⁴¹

According to the results, ICC considers that what happened in the automatic motorcycle was not price parallelism but concerted action. This evidence in accordance with Black theory, already explained before, that the existence of chronological relationship between economic and communication evidence shows that concerted action has taken place between competitors.⁴² This was opposed by the reported parties who stated that the investigators did not use the correct data in conducting economic analysis above. Data regarding the scooter sales prices examined by ICC are inaccurate due to the products was not apple-to-apple or in other words the compared products have different specification and should not be compared. The ICC ignored the defence delivered by reported parties and instead stated that Yamaha has manipulated sales data submitted.⁴³

Based on the case explanation above, it is necessary to re-understand the importance of the principle of prudence in using circumstantial evidence as the basis for proving violations of Law No. 5 of 1999. If there was an error in obtaining, processing and examining data or facts with relevant theories, then the evidence can actually lead to harm rather than benefit (good), especially to prove whether an action is unlawful concerted action or lawful conscious parallel action. To prove the occurrence of a concerted action (in price fixing case) that is not followed by evidence of written agreement or other hard evidence need the economic evidence but it is not sufficient solely based on economic analysis. It also requires the additional of supporting evidence namely plus factors.

Chief Justice of the Federal Court of Australia, Nye Perram, explained this plus factor in three stages:

- 1) the existence of actions that are contrary to their own economic interests (for example a company does not cut prices to increase market share while its competitors set prices above marginal cost);⁴⁴
- 2) meet or exchange of price information each other;⁴⁵ and
- 3) there is a motive for setting prices⁴⁶

⁴¹ *Ibid.*, p. 57-59.

⁴² *Ibid.*, p. 108.

⁴³ *Ibid.*, p.417.

⁴⁴ Kovacic et al., (2011). Plus Factors and Agreement in Antitrust Law. *Michigan Law Review*, 110(3), p. 405. <https://repository.law.umich.edu/mlr/vol110/iss3/1>, [Accessed on October 25, 2019].

⁴⁵ Marshall et al. (2011). Dominant Firm Conduct by Cartels. *Center for Study of Auctions, Procurements & Competition Policy, Working Paper*. <http://capcp.psu.edu/papers/2011/dominantfirm.pdf>, [Accessed October 24, 2019].

⁴⁶ HRS. 2014. Hakim Australia: Circumstantial Evidence Penting dalam Kasus Kartel. <http://www.hukumonline.com/berita/baca/lt53b5ecfaad76a/hakim-australia--circumstantial-evidence-penting-dalam-kasus-kartel>, [Accessed October 20, 2019].

Therefore, it is not wise to put aside economic evidence completely, even more deliver a statement that indirect evidence or circumstantial evidence could not be applied in Indonesia legal system. Something need to be understand that based on criminal procedural law perspective especially Article 188 (2) of Law No. 8 of 1981 stipulates that indications can only be obtained from witness statements, letters and statements of the accused. Meanwhile, Articles 164 HIR/284Rbg and 1866 BW do not include the indications evidence. The nature of legal force of indirect evidence against direct evidence, the OECD determines that “direct evidence in the form of testimony from a single, unconvincing witness is less credible than strong and cumulative circumstantial evidence”.⁴⁷

It must be understood that the characteristic of procedural law in case examination by ICC cannot be tested using the standard implementation of other procedural law regimes.⁴⁸ ICC Regulation No. 1 of 2010 which regulates the competition procedural law is aimed to implement Law No. 5 of 1999 which cannot be aligned with Criminal Procedural Law (in *casu* Law No. 8 of 1981), Civil Procedural Law (HIR/RbG), and/or Administrative Procedural Law (in *casu* Law No. 51 of 2009 regarding second amendment of Law No. 5 of 1986 regarding State Administrative Court).

ICC Regulation No. 1 of 2010 has been strengthened by Supreme Court through judicial review mechanism in 2010, so that the legality of competition law as procedural law is also unquestionable.⁴⁹ Furthermore, in *PT Bridgestone Tire Indonesia, dkk v. Indonesian Competition Commission's (ICC)*, Supreme Court No. 221 K/Pdt.Sus-KPPU/2016 dated June 14, 2016, it also emphasized that indirect evidence is legitimate as long as it is sufficient and logical and there is no other evidences which can weaken that evidence. Supreme Court Decision No. 221 K/Pdt.Sus-KPPU/2016 has confirmed by strengthening the decisions of the Central Jakarta District Court Decision No. 70/Pdt.G/KPPU/2015/PN.Jkt.Pst and Decision No. 08/KPPU-I/2014 regarding the violation of Article 5 and 11 of Law No. 5 of 1999.

In addition to formal evidence such as documents and statements of witnesses, experts and/or reported parties, Article 72 (1) of ICC Regulation No. 1 of 2010 also accommodates the indications evidence. It is different from indications as referred to Article 188 (2) of Criminal Procedural Law (Law No. 8 of 1981). The indication under ICC Regulation No. 1 of 2010 is the knowledge of ICC which is known and believed to be true. This is closely related to the competition procedural proof system which involves economic analysis of law that is not recognized in either the Criminal Procedure Code (KUHP) or the Civil Code (KUHPPerdata).

Economic analysis plays a role as a tool to predict (infer) the existence of coordination or agreement between business actors in the market. In addition to evidence of communication, economic analysis is required to prove: whether the company's behaviour is rational even without collusion; does the market structure support the occurrence of collusion; whether the market characteristics are consistent as collusion facilities; whether the performance in the market is an allegation of the price fixing agreement; and conditions that occur as a result of a collusion agreement with conditions arising from competition. The use of economic analysis is to conclude

⁴⁷ OECD, Policy Brief, *Prosecuting Cartels without Direct Evidence of Agreement*, DAF/COMP/GF, p. 3-4.

⁴⁸ The ICC Decision No. 13/KPPU-I/2014 p. 312.

⁴⁹ Supreme Court Decision No. 336 K/Pdt.Sus/2010.

whether the conditions at the market will support the collusion (prerequisites for successful collusion). If the result was positive, therefore the indirect evidences can be used to infer the existence of concerted action in the market. In other words, it can be considered as an indication of violation of Article 5 of Law No. 5 of 1999.⁵⁰

The steps to prove violation of Article 5 of Law No. 5 of 1999 has been regulated under ICC Regulation No. 4 of 2011 regarding Guidelines for Article 5 (Price-Fixing) of Law No. 5 of 1999. One of the objectives is to provide an understanding of the approach taken by the ICC in examining price-fixing agreements. Along with the Guidelines, the ICC is supposed to implement the circumstantial evidence consistently, especially for price-fixing cases.

Thing need to be underlined in the proof system or procedure using circumstantial evidence is the verification process which is frequently complicated. It is reasonable if the data or reports provided by the reported parties during an investigation are data that has been manipulated to cover the traces of collusive actions that occurred. The statements of reported parties and witnesses also frequently changes during the investigation and the trial examination. In addition, the ICC also finds the forms of veiled communication where the substance of conversation is difficult to know. In this case, the rule of reason approach is needed to provide the flexibility to ICC in interpreting Article 5 of Law No. 5 of 1999 and conclude the violation of the article was based on the examination of circumstantial evidence obtained during the examination. In the *NCAA v. Board of Regents of the University of Oklahoma*, Judge Stevens states: "there is often no bright line separating per se from Rule of reason analysis. Per se rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct."⁵¹ In practice, under certain conditions, the per se illegal approach is not always accurate to rule on a price-fixing case as illustrated in the case of the PT Bridgestone tire cartel and the automatic motorcycle price cartel analysed above.

4. Conclusion

Agreement is the main element to prove the occurrence of price-fixing. Such an arrangement or consent is legally prohibited as provided in Article 5 of Law No. 5 of 1999. This provision uses per se illegal approach because price-fixing agreement is always considered to impede competition and harm to consumers. However, to prove the existence of the agreement is not easy since it can be made either clearly or silently (tacit agreement). Competition law recognizes both direct and indirect evidence to prove the existence of price-fixing agreement despite the pros and cons in its implementation.

The legal basis for indirect evidence is provided in Article 42 of Law No. 5 of 1999. Furthermore, ICC Regulation No. 1 of 2010 is also mentioned that indication evidence as "the knowledge of ICC which is known and believed to be true". The broad meaning of the indication evidence provides that economic evidences and non-formal evidences are included as part of the evidence in the examination by the ICC. This is reasonable because some competition cases have no direct evidence as in price-fixing

⁵⁰ ICC Regulation No. 4 of 201, p. 24.

⁵¹ *NCAA v. Board of Regents of the University of Oklahoma*, 104 S. Ct. at 2962. (1984).

cases. In the price-fixing cases, the examination of indirect or circumstantial evidence as legitimate evidence plays an important role in determining whether price-fixing occurs naturally in accordance with market conditions (interdependent parallelism) or constitutes a collusive action (concerted action). Nonetheless, the circumstantial evidence examination must prioritize the precautionary principle because it is very vulnerable to manipulation and requires a deep understanding of economic theories.

ICC Regulation No. 4 of 2011 regulates the procedure for using circumstantial evidence in price-fixing cases. On the other hand, when hard evidence is not available in the price-fixing case, the ICC shall switch to rule of reason approach as the case needs to consider the relationship between facts, data and their impact on competition. Based on the analysis of ICC Decision No. 10/KPPU-L/2009 and No. 14/KPPU-I/2014, the ICC uses per se illegal approach due to the availability of hard evidence. Meanwhile, in the ICC Decision No. 08/KPPU-I/2014 and 04/KPPU-I/2016, ICC does not find hard evidence; therefore, it applies rule of reason approach to prove the price-fixing agreement among reported parties. In other words, ICC proves price-fixing cases that is supposed to use per se illegal approach if it was found the direct evidence, but if the direct evidence could not be found, the ICC would implements the rule of reason approach.

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