

USE OF INDIRECT EVIDENCE IN DISCLOSURE OF CARTEL VIOLATIONS ACCORDING TO BUSINESS COMPETITION LAW IN INDONESIA

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Info Artikel:

Received: 2024-04-12

Revised: 2024-05-17

Accepted: 2024-07-15

Vol: 3

Number: 1

Page: 01 - 07

Keywords:

Indirect Evidence,
Business Competition,
Cartel

Abstrak:

In cartel evidence, there are two approaches, namely direct evidence and indirect evidence. The Law on Monopolistic Practices and Unfair Business Competition in Indonesia does not yet regulate the use of indirect evidence to prove a cartel's occurrence. The ambiguity of this regulation causes legal uncertainty in the use of indirect evidence in the decision of the Business Competition Supervisory Commission (KPPU). This study discusses the use of indirect evidence in disclosing cartel violations according to the Business Competition Law in Indonesia by harmonizing the ideal concept and studying the relevant laws and regulations. The method of normative juridical approach. The research specification is descriptive analysis. Data was collected by using Library Research and analyzed using qualitative juridical. The results of the study indicate that there is an ambiguity in the arrangement of indirect evidence in the case of business competition in Indonesia, namely cartels. Although further regulation has been regulated in KPPU Regulation Number 1 of 2019 concerning Procedures for Handling Cases of Monopolistic Practices and Unfair Business Competition, this has not yet been regulated at the level of law.

INTRODUCTION

Business competition is a familiar thing for business actors in Indonesia. Business activities to earn an income aim to fulfill the needs of life to the ambition to dominate market share. On this basis, reviving business competition by business actors will impact the implementation of competition in the market economy. Business actors are individuals or business entities that are legal entities or not that carry out business activities within the territory of Indonesia (Jawani, 2022). All business actors want to get big profits by implementing strategies that are believed to increase income, but business actors often practice trade monopolies.

In this regard, competitive conditions in the business world are the main characteristic form of the market economy system, which indeed provides more benefits to business actors compared to anti-competitive conditions which require a concentration of economic power and hinder business competitors from entering the market.

Competition can have both positive and negative implications. Positive competition is a mechanism to achieve efficiency and public welfare. Through consistently maintained competition, benefits will be created for the consumer community in the form of a varied choice of products with market prices and high quality (Nurhayati, 2011). On the other hand, competition can have negative implications if it is carried out with negative behavior or is injured by anti-competitive actions by market participants so that it becomes uncompetitive and causes losses to consumers. To prevent the negative behavior of business actors that can distort the running of the mechanism



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of a fair business competition process, applying business competition law is a must for every country with a modern economic system (Rokan, 2010).

One form of unfair competition is cartels, which are often called collusive oligopolies. A cartel is a building of similar companies which openly agree to regulate their activities in the market. In other words, a cartel is an organization of producers of goods and services intended to dictate the market. If all firms in one industry agree to coordinate their activities, the market will form a perfect monopoly (Suhasril & Makara, 2010).

Cartels are challenging to detect because colluding companies try to hide their agreements between them in order to evade the law. It is rare for business actors to openly make agreements between them, make legal documents, perpetuate meetings, and publish agreements so that they can be used as direct evidence of agreements in the eyes of competition law. Various competition law enforcers also experience difficulty proving cartel cases in other countries. In dealing with cartel cases, business actors keep their activities secret. They do not cooperate with investigators to open this case unless there is an advantage for the business actors involved, such as the existence of a leniency program.

One way to prove a cartel is by using an indirect evidence approach, but the problem is that indirect evidence has not been explicitly regulated in Law no. 5 of 1999 may create legal uncertainty in its application. It becomes ambiguous because KPPU requires indirect evidence to explore their respective roles, which are not contained in official documents. It is solely the use of the rule of reason approach has a significant weakness because it is based on evidence (official documents and official agreements). This fact becomes even more evident when examining the 3 (three) decisions above, which have disparities due to the indirect evidence approach that has not been clearly and comprehensively regulated in Law no. 5 of 1999. In contrast, the development of indirect evidence has been widely practiced in various countries.

For example, in Brazil, the cartel case was resolved by the Council for Economic Defense (CADE), which also used indirect evidence to prove the existence of a cartel in Brazil through economic evidence and because of the unreasonable price increase of steel companies (Antoni, 2014). Based on Parallel Pricing and Price Signaling, the communication between these entrepreneurs is used as the basis for KPPU to determine whether an agreement has occurred between entrepreneurs in determining the price and has complied with the requirements of the price-fixing agreement. Based on this, the author will focus on the issue of the use of indirect evidence in disclosing cartel violations under the Business Competition Law in Indonesia and chose to do a study research titled "*Use of Indirect Evidence in Disclosure of Cartel Violations According to Business Competition Law in Indonesia.*"

METHOD

In this study, the author uses a type of normative juridical research using primary, secondary and tertiary legal materials. The research specification is descriptive analysis. Data was collected by using Library Research and analyzed using qualitative juridical.

RESULTS AND DISCUSSION

When handling cases, KPPU often encounters various obstacles in proving cases, both in direct and indirect evidence. It happens in almost all types of cases, both tender and non-tender. As stipulated in the commission's regulations regarding handling cases, there must be at least two



pieces of evidence in deciding a case so that it can be filed as a case. This condition will, of course, pose a challenge in processing the documents required for the investigation. In an investigation, several types of evidence are needed, direct and indirect.

Direct evidence is tangible or tangible evidence showing a violation of the element of business competition (hard evidence). Direct evidence in the practice of price fixing (price cartels) that causes a conspiracy between business actors can be proven by the following factors: (1) price lists or prices published by associations; (2) notification of price changes; (3) meetings or telephone conversations between competitors; (4) exchange of price information between competitors; (5) evidence of competitor monitoring or cooperation policies between actors that have been carried out; (6) acknowledgment of the conspiring party; (7) documents, emails, faxes that accommodate the exchange of information between competitors.

Other mechanisms that business actors in cartels often use are facilitation between actors in the form of (1) the use of software to allocate markets and consumers; (2) periodic exchange of price information; (3) seminars for related employees; (4) the creation of joint steering committees and audit systems; (5) the existence of punishment for companies that do not want to participate in cooperation; and communication through other agencies (Nusantara, Abdul Hakim Garuda, 2010)

Competition law enforcement always tries to get direct evidence in the form of an agreement in cartel cases, which in reality is very difficult to obtain, so in this case, indirect evidence is essential. But at the same time, there are limitations to using indirect evidence. Indirect evidence means that the evidence does not directly describe the terms of the agreement but can be in the form of facilitating the existence of an agreement or the exchange of information.

There are two types of indirect evidence, including communication evidence and economic evidence. Of the two pieces of evidence, evidence of communication or facilitation is more critical than economic evidence. Evidence of communication is evidence where cartel actors meet to communicate but do not explain the substance of the communication. For example, telephone conversations between business actors suspected of cartels, or their trips to the same destination. Meanwhile, economic evidence can be divided into behavioral evidence and structural evidence. The explanations for the two types of indirect evidence are as follows:

Indirect Evidence from the Economic Side. Economic evidence can be used to point to specific reasons in an attempt to prove a cartel. The first type of evidence is behavior in which an agreement has been made. Parallel conduct, price, and reduced capacity are the main signs that can be used as a reference. The second type is a market structure that explains the existence of a cartel, for example, a highly concentrated market where there are homogeneous products. Of the two types, behavior type is more important than structure type. However, there should also be evidence of facilitation where accessible collaboration-building practices are maintained. Economic evidence should be used with caution. The evidence should be inconsistent with the behavioral hypothesis when market participants act unilaterally in their respective interests. Sound economic analysis can provide a basis for deciding a case, strengthening direct evidence.

Indirect Evidence from the Legal Side. The location of the economic analysis in the case of competition is also influential from a legal perspective. Plaintiffs often argue against the economic approach as circumstantial evidence because the economic approach is the opposite of the theory of legal evidence, which, depending on models and assumptions, can even lead to different results. Disagreements between economists, who submit different analyzes are not an accidental occurrence which refers to the absolute conclusion that economic evidence is unreliable. In addition, judges and lawyers have limited knowledge of economic evidence. Agreements to

control the outcomes of public or private bidding processes or not to compete in particular geographic or product markets may also result in criminal liability. The agreement need not be explicit, as in the form of a written contract. The agreement can be demonstrated as long as there is sufficient 'mind meeting' for anti-competitive action. The agreement can be proven by direct or indirect evidence.

There are economic limitations in competition law. Judge Breyer stated in dissent in the 2007 *Leegin* Judgment that law, unlike economics, is an administrative system. Law has an effect through judges and lawyers advising clients, where competition law must be an existing administrative system. Antitrust laws cannot and should not imitate the economic outlook entirely. The view of economic restrictions in competition law is the same as that of other experts. They identify challenges for law enforcement to adapt to analytical techniques that accurately differ from pro-competitive behavior toward administrative rules. These administrative rules are considered rules that can be applied by competition and judicial institutions because they are stable and predictable so that the business can run (Kovacic, 2009)

As explained earlier, a cartel is an agreement among competitors to set prices, allocate markets, or rigged tenders (bids). They are the most dangerous of all competition law violations and should be severely punished. It can be used exclusively to prove agreement, but it can also be used to significant effect in tandem with direct evidence. However, circumstantial evidence can be challenging to interpret.

Economic evidence, in particular, can be ambiguous and consistent with joint or independent action. The better practice is to consider circumstantial evidence in the case as a whole, give cumulative effects, not on an item-by-item basis, and be subject to economic evidence for careful economic analysis. There are different types of circumstantial evidence. One type is evidence that cartel operators met or communicated but did not explain the substance of their communication. It can be called evidence of "communication". That includes a recording of telephone conversations between competitors, travel to a common destination or participation in meetings, for example, during trade conferences and other evidence that the parties communicated the subject, for example, minutes or minutes of meetings showing that prices, demand or capacity utilization have been discussed; internal documents that attest to knowledge or understanding of competitors' pricing strategies, such as awareness of future price increases by competitors.

Competition, and law enforcement officials, prefer direct evidence, but as noted above, that evidence is not always available. It should be noted, however, that there is not always a clear line between direct and indirect evidence, especially when considering the various forms of communication evidence. Furthermore, all kinds of direct and indirect evidence greatly help competition law enforcement. They can, and often are, used together. And finally, quality matters. Direct evidence from an inconclusive witness is less credible than strong and cumulative circumstantial evidence.

From the Indonesian perspective, judicial practice in Indonesia can be found in other evidence from one another. Law No. 5 of 1999 has classified that there are only five pieces of evidence in the business competition procedural law: witness statements, expert statements, letters and/or documents, instructions, and business actors. In the instructional evidence recognized in Law Number 5 of 1999, the evidence is an act, event or condition which, due to their conformity, either with one another or with prohibited activities and agreements, abuses authority over a dominant position.

As previously explained, several of KPPU's decisions reveal that KPPU puts forward evidence that is included in the category of indirect evidence, including the case of the garlic import cartel. As evidence of instructions, there has been a revision to the Regulation of the Business Competition Supervisory Commission Number 1 of 2010 concerning Procedures for Handling Cases to become Commission Regulation Number 1 of 2019 concerning Procedures for Handling Cases of Monopolistic Practices and Unfair Business Competition, which in the regulation contains the existence of evidence of instructions can be in the form of economic evidence and evidence of communication, where economic evidence and evidence of this communication are classified as indirect evidence.

To expedite the evidentiary process at KPPU, the application of indirect evidence must later be accompanied by other evidence because the legal system in Indonesia accommodates the principle of "unus testis nullus testis" which means that one evidence does not mean evidence with this principle requiring that one evidence requires other evidence as supporting evidence (Ikarini et al., 2022). The researcher believes that this reason makes the application of indirect evidence there must be a match between the evidence mentioned so that the congruence between the evidence will form one piece of evidence, evidence of guidance.

Suppose you look, for example, at a criminal case. In that case, five pieces of evidence are recognized in Article 184 of the Criminal Procedure Code, including witness statements, expert statements, letters, instructions, and statements from the defendant. In the application of evidence, the instructions are intended to reflect the protection of the defendant's rights within the framework of fair criminal justice, where the judge must pass four processes, namely First, the examination of witness statements, defendants' statements, and documentary evidence carefully, thoroughly and carefully. Second, concluding every statement submitted by witnesses, defendants and documentary evidence. The third is the analysis of the suitability of these conclusions, the results of which are in the form of evidence. Fourth, linking the evidence that has been obtained from the analysis of conformity with the crime/objective element and error/subjective element of the defendant.

On the other hand, in civil procedural law, five valid pieces of evidence are recognized in Article 164 HIR, namely letters, witnesses, suspicions, confessions, and oaths. In proving civil cases, the judge uses the most convincing party arguments according to the judge. The court handling the case must decide the case based on the evidence of the arguments presented in the court, which is in the form of the parties' beliefs, and the court has no obligation to seek the truth on its own. It is based on the independence of the judge namely the decision of the judge or panel of judges which was initially an individual or panel decision, but when the judge's hammer was tapped as a sign of a decision, then at that time the judge's decision must be seen as an institutional court decision because after the judge's decision or the decision of the panel of judges said in a trial that is open to the public, then such a decision has been transformed into a court decision and has become public property (Adonara, 2015).

The judge in the case must decide whether the argument of the plaintiff or the defendant is more logical and acceptable. Furthermore, the internal evidence of civil procedural law can be aligned with the judge's suspicion. The judge's suspicion is indirect evidence. For example, the absence of a person in a particular place by proving simultaneously in another place. The evidence of criminal procedural law or civil procedural law has different characteristics. If they are related to business competition law, the three are independent evidence from one another, so their existence cannot be equated.

Indirect evidence is evidence that can explain specifically the agreement between business actors, economic evidence and evidence of communication or meetings. So, to use indirect evidence, there must be complete conformity of the facts found during the case examination process. The application of indirect or indirect evidence later in business competition law must be carried out through a consistent approach in applying the economic proof method and using an analogy of facts that are almost the same in every cartel case so that the KPPU does not immediately submit the indirect evidence. KPPU will later form a commission that will carry out a reasonably long research process in which the results of these findings can be accounted for the validity and validity of the analysis it has made. The heavy point used in the use of indirect evidence is as a way of determining the substitution of the product. The method used in the analysis, ie. First, look for economic data relating to business actors suspected of violating business competition. The data obtained must come from reliable sources so the data can be accounted for later. Second, market research or market research is more focused on a predetermined market for a more specific product or service (Ariestonandri & Sudiarto, 2006).

The market research will later function as a liaison between consumers, customers, and the general public with marketers through the information that will be obtained. The existence of this information can serve for the identification process and determination of problems and opportunities that exist in the market. Third, market definition, at this stage, the commission can define the market through direct interviews with business actors and consumers directly related to the business competition case. In addition, the market definition can not only be done through direct only evidence but also through indirect evidence, namely by providing consumer surveys that can be taken by means of surveys with questionnaires given to business actors and consumers.

Based on the existence of indirect evidence, KPPU can conduct an analysis related to indications of business competition violations, especially in cartel cases. Therefore, with the indication of the violation, the KPPU can use the initial weapons of indirect or indirect evidence to reveal the existence of a cartel case. So that the acceptable impact is that the cartel practices carried out by several business actors can be tackled early by the KPPU.

CONCLUSIONS

Indirect evidence is not known in Law No. 5 of 1999 but is regulated explicitly in Commission Regulation 1 of 2019 concerning Procedures for Handling Monopolistic Practices and Cases. Unfair Business Competition. So that the KPPU can use indirect evidence to reveal a cartel case's existence. However, this does not become the legality of indirect evidence having a strong position because it has not been regulated at a higher level of legislation. Therefore, the use of indirect evidence by the KPPU must be carried out by conducting a comprehensive and explicit normalization in order to avoid multiple interpretations and provide legal certainty.

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