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JURIDICAL ANALYSIS OF PRICE FIXING AS UNFAIR BUSINESS COMPETITION

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Abstract

Price fixing is one of the prohibited agreements under competition law due to its inherently anti-competitive nature and harm to consumers. This research aims to analyze price fixing regulations under Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, focusing on the application of per se illegal approach, evidence using indirect evidence, and law enforcement challenges in Indonesia. The research method used is normative juridical with statutory, conceptual, and case study approaches. The results show that price fixing is regulated under Article 5 of Law No. 5 of 1999 with a per se illegal approach that does not require proof of impact. However, in practice, the Business Competition Supervisory Commission (KPPU) often faces difficulties in proof as business actors tend to avoid written agreements. The use of indirect evidence consisting of economic and communication evidence has become an increasingly developed alternative proof. This research recommends strengthening regulations regarding the position of indirect evidence and enhancing KPPU's capacity in economic analysis for effective competition law enforcement.

Keywords: Price Fixing; Unfair Business Competition; Per Se Illegal; Indirect Evidence; KPPU

INTRODUCTION

air business competition constitutes one of the primary prerequisites for establishing an efficient and equitable market economic system. In the era of economic globalization, competition among business actors has become increasingly intense and complex, necessitating adequate regulation to ensure that competition proceeds fairly and does not harm the interests of consumers or other business actors. Indonesia, as a country with a market economic system, possesses a legal instrument to regulate business competition, namely Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition (hereinafter referred to as Law No. 5/1999). The philosophy of Law No. 5/1999 fundamentally aims to protect the competitive process itself, rather than protecting competitors. This means that competition law is intended to ensure that market mechanisms function properly without distortions caused by anti-competitive behavior. One of the most serious forms of anti-competitive behavior prohibited in nearly all jurisdictions is price fixing. Price fixing constitutes an agreement among business actors who should be competing to set the price of goods or services at a certain level, thereby eliminating price competition among them.

Price fixing is regarded as highly prohibited conduct (hardcore cartel) in the development of competition law across various countries. This is because price fixing invariably results in prices that are significantly above those achievable through healthy competitive mechanisms. Elevated prices resulting from price fixing cause an unnatural wealth transfer from consumers to producers and generate economic inefficiency (deadweight loss). In Indonesia, the regulation of price fixing is contained in Article 5 of Law No. 5/1999, which stipulates that business actors are prohibited from entering into agreements with competing business actors to fix prices for goods and/or services that must be paid by consumers or customers in the same relevant market. This provision employs a per se

illegal approach, meaning that price fixing is automatically considered unlawful without the need to prove its negative impact on competition.

Nevertheless, law enforcement against price-fixing practices in Indonesia continues to face various challenges. One major challenge is the difficulty in proving the existence of price-fixing agreements, given that business actors tend to avoid creating written agreements and instead prefer implicit or indirect forms of arrangement. This condition has prompted the development of indirect evidence as an alternative method of proof in price-fixing cases.

Based on this background, this study examines two principal issues: First, how are the regulation and application of the per se illegal approach to price-fixing agreements implemented under Law No. 5/1999? Second, what is the status and use of indirect evidence in proving price-fixing cases in Indonesia, and what problems are encountered?

METHOD

This study employs a normative legal research method (doctrinal legal research) that is prescriptive in nature, utilizing a statutory approach, conceptual approach, and case approach. Legal materials used include primary legal materials in the form of Law No. 5/1999, Regulations of the Business Competition Supervisory Commission, and relevant KPPU decisions. Secondary legal materials include literature, scholarly journals, and legal doctrines from competition law experts. Analysis is conducted qualitatively using legal interpretation methods and economic analysis to address the research problems.

The research location is focused on Medan and its surrounding areas in North Sumatra, considering that this region has dynamic economic activities and has experienced several business competition cases involving price-fixing practices across various industry sectors.

RESULTS AND DISCUSSION

1. The Concept of Price Fixing in Competition Law

Price fixing constitutes one of the most harmful forms of horizontal collusion in competition law. Conceptually, price fixing can be defined as an agreement between two or more business actors who should be competing to fix, raise, lower, or stabilize the price of goods or services at a certain level. Price fixing eliminates competition among business actors who should be competing with each other on price, thereby preventing consumers from enjoying lower prices that would otherwise be formed through competitive mechanisms.

In competitive market conditions, prices are formed through the interaction of supply and demand, where each business actor independently sets prices based on their respective cost structures and business strategies. When competitors coordinate to set prices collectively, the natural price formation mechanism becomes distorted. Consequently, the resulting prices tend to be higher than competitive prices, output decreases, and inefficient resource allocation occurs.

Price fixing can take various forms, not merely limited to agreements regarding selling prices to consumers, but also encompassing agreements concerning price-influencing elements such as discounts, credit terms, payment conditions, shipping costs, and other price components. In practice, price fixing is often part of a broader cartel that also includes market allocation and output restriction arrangements.

2. Regulation of Price Fixing under Law No. 5/1999

Price fixing in Indonesian competition law is regulated under Article 5 of Law No. 5/1999, which states: "Business actors are prohibited from entering into agreements with competing business actors to fix prices for goods and/or services that must be paid by consumers or customers in the same relevant market." This provision constitutes a per se illegal prohibition, which can be identified from the use of the word "prohibited" without accompanying clauses such as "that may result in" or "reasonably suspected."

Based on Business Competition Supervisory Commission Regulation Number 4 of 2011 concerning Guidelines for Article 5 (Price Fixing), the elements that must be fulfilled for a violation of Article 5 of Law No. 5/1999 include: First, the existence of business actors. According to Article 1 point 5 of Law No. 5/1999, a business actor is any individual or business entity, whether in the form of a legal entity or not, established and domiciled or conducting activities within the legal jurisdiction of the Republic of Indonesia. Second, the existence of an agreement. Article 1 point 7 of Law No. 5/1999 defines an agreement as an act by one or more business actors to bind themselves to one or more other business actors under any name, whether written or oral.

Third, the agreement is made between a business actor and a competing business actor. This means that prohibited price fixing is a horizontal agreement between business actors at the same level in the production or distribution chain who compete with each other in the same market. Fourth, the agreement aims to fix prices for

goods and/or services. Fifth, the price is that which must be paid by consumers or customers in the same relevant market.

Article 5 paragraph (2) of Law No. 5/1999 provides exceptions that the price-fixing prohibition does not apply to: (a) an agreement made within a joint venture; or (b) an agreement based on applicable legislation. These exceptions provide space for legitimate forms of business cooperation not intended to impede competition.

3. The Per Se Illegal Approach in Price-Fixing Cases

In competition law, there are two main approaches for assessing whether an agreement or business activity violates the law: the per se illegal approach and the rule of reason approach. The per se illegal approach is a method that considers certain agreements or business activities automatically illegal, without requiring further proof of the impact generated by such agreements or activities on competition.

Price fixing is classified as a per se illegal violation for several reasons. First, price fixing almost invariably produces negative impacts on competition and consumer welfare, eliminating the need for case-by-case impact analysis. Second, this approach provides high legal certainty because business actors can clearly know that price fixing with competitors is prohibited. Third, this approach is efficient from a law enforcement perspective because it does not require complex proof regarding relevant market definition and anti-competitive effects.

Unlike the rule of reason approach, which requires in-depth analysis of the pro-competitive and anti-competitive effects of an agreement or activity, the per se illegal approach fundamentally does not allow business actors to provide justification for their actions. In other words, once a price-fixing agreement is proven to exist, a violation is deemed to have occurred.

4. Evidentiary Problems in Price Fixing

Although price fixing is a per se illegal violation that does not require proof of impact, proving the existence of a price-fixing agreement itself often faces significant difficulties. In the development of price-fixing case handling worldwide, business actors have become increasingly sophisticated in concealing their agreements. Direct evidence (hard evidence) in the form of written agreement documents or recorded communications that explicitly demonstrate the existence of a price-fixing agreement has become increasingly difficult to find.

This condition has prompted the development of indirect evidence (circumstantial evidence) as an alternative method of proof. Indirect evidence is evidence that does not directly prove the existence of an agreement, but from which it can be concluded that business actors have coordinated in fixing prices. Indirect evidence generally consists of two main components: economic evidence and communication evidence.

Economic evidence encompasses analysis of price behavior in the market that demonstrates patterns inconsistent with independent competitive behavior. Several economic indicators that may indicate price coordination include: price parallelism, prices that are unresponsive to changes in production costs, unnaturally stable market shares, and abnormally high profit margins. Meanwhile, communication evidence includes records of meetings or contacts among competitors that cannot be explained by legitimate business reasons.

5. The Status of Indirect Evidence in Indonesia's Evidentiary System

Article 42 of Law No. 5/1999 regulates the types of evidence that can be used in competition case examinations, including: (a) witness testimony; (b) expert testimony; (c) letters and/or documents; (d) indications; and (e) business actor statements. The status of indirect evidence in this evidentiary system can be associated with the category of "indications" as regulated in that article.

The use of indirect evidence by KPPU has undergone significant development. KPPU has adopted the concept of indirect evidence to assess cartel and price-fixing indications, where "market behavior" or "communication traces" can be interpreted as indications of unlawful coordination. Business Competition Supervisory Commission Regulation Number 1 of 2019 concerning Procedures for Handling Cases of Monopolistic Practices and Unfair Business Competition has further regulated the use of indirect evidence, although this regulation has been revoked by KPPU Regulation Number 6 of 2023.

Nevertheless, the status of indirect evidence in the competition law evidentiary system remains subject to debate. The Supreme Court in several decisions has expressed doubts regarding the validity of using indirect evidence as legitimate proof under Article 42 of Law No. 5/1999. However, in other cases, the Supreme Court has actually upheld KPPU decisions that used indirect evidence as the basis for proof. This inconsistency creates legal uncertainty in competition law enforcement.

6. Analysis of Price-Fixing Cases in Indonesia

Several price-fixing cases handled by KPPU provide insights into the dynamics of competition law enforcement in Indonesia. One case that attracted public attention was KPPU Decision Number 04/KPPU-I/2016 regarding alleged price fixing in the 110-125cc automatic scooter motorcycle industry. In this case, KPPU suspected price-fixing practices by PT Yamaha Indonesia Motor Manufacturing (YIMM) and PT Astra Honda Motor (AHM), which controlled approximately 97% of the motorcycle market share in Indonesia.

Another significant case was KPPU Decision Number 15/KPPU-I/2019 regarding an airline ticket cartel involving seven airlines in Indonesia. This decision has permanent legal force (inkracht) after the Supreme Court upheld Cassation Decision Number 1811 K/Pdt.Sus-KPPU/2022 in 2023. In this decision, KPPU found seven airlines guilty of proven cartelization of domestic economy class airline ticket prices and required the airlines to notify KPPU before making ticket price changes.

Another noteworthy case was KPPU Decision Number 15/KPPU-I/2022 regarding alleged cooking oil cartel activities. In this case, 27 cooking oil manufacturing companies were suspected of price fixing under Article 5 of Law No. 5/1999. However, in the final decision, the Commission Panel stated that the 27 respondents were not proven to have violated Article 5 regarding price fixing, although 7 respondents were found to have violated Article 19 letter c regarding restriction of goods circulation. This case demonstrates that proving price fixing requires strong evidence and cannot rely solely on parallel price movements in the market.

7. Sanctions for Price-Fixing Violations

Law No. 5/1999 regulates various types of sanctions that can be imposed on business actors who violate price-fixing provisions. First, administrative sanctions as regulated in Article 47 paragraph (2), including: determination of agreement cancellation, orders to cease activities proven to cause monopolistic practices and/or unfair business competition and/or harm the public, determination of compensation payment, and imposition of fines.

Second, principal criminal sanctions as regulated in Article 48, in the form of fines with a minimum of IDR 25,000,000,000 (twenty-five billion rupiah) and a maximum of IDR 100,000,000,000 (one hundred billion rupiah), or substitute imprisonment for a maximum of 6 months. Third, additional criminal sanctions as regulated in Article 49, including: revocation of business licenses, prohibition of business actors from serving as directors or commissioners, and cessation of certain activities or actions that cause harm to other parties.

8. Recommendations for Strengthening Law Enforcement

Based on analysis of various problems in the application of price-fixing law in Indonesia, several recommendations can be formulated for strengthening law enforcement as follows:

First, there needs to be regulatory clarity regarding the status and procedures for using indirect evidence in proving cartel and price-fixing cases. The government needs to establish regulations that explicitly recognize and regulate the use of indirect evidence as legitimate proof, including standards and criteria that must be met for indirect evidence to be accepted as a basis for proof.

Second, KPPU needs to enhance its capacity in conducting economic analysis to identify and prove the existence of unnatural price coordination in the market. Comprehensive economic analysis, including market structure analysis, price behavior analysis, and plus factors, is crucial to support price-fixing proof.

Third, consideration should be given to implementing a leniency program that provides incentives for business actors to disclose their involvement in cartels or price fixing in exchange for reduced or waived sanctions. This program has proven effective in various countries in enhancing cartel detection and case resolution.

Fourth, more intensive socialization and education need to be conducted for business actors regarding price-fixing prohibitions and associated legal risks. A sound understanding among business actors is expected to prevent price-fixing practices and enhance compliance with competition law.

CONCLUSION

1. Conclusion

Based on the research findings and discussion, the following conclusions can be drawn: First, price fixing constitutes a prohibited agreement under Article 5 of Law No. 5/1999 with a per se illegal approach. The elements of price-fixing violations include: the existence of business actors, the existence of an agreement whether written or oral, the agreement is made between a business actor and its competitor, and the agreement aims to fix prices for goods and/or services in the same relevant market. The per se illegal approach is applied because price fixing is inherently anti-competitive and does not provide economic benefits that can serve as justification.

Second, the use of indirect evidence in proving price-fixing cases in Indonesia continues to face problems in the form of inconsistent court positions, lack of regulatory clarity regarding the status and standards for using indirect evidence, and the need for enhanced economic analysis capacity at KPPU. Indirect evidence consisting of economic evidence and communication evidence has the potential to become an effective evidentiary instrument, but requires stronger regulatory support to ensure legal certainty.

2. **Recommendations**

Based on these conclusions, the following recommendations can be formulated: First, for legislators, Law No. 5/1999 needs to be revised to provide clarity regarding the status of indirect evidence in the competition law evidentiary system and to consider implementing a leniency program to enhance cartel detection effectiveness. Second, for KPPU, there is a need to enhance investigation and economic analysis capacity, as well as develop more comprehensive guidelines regarding the use of indirect evidence. Third, for business actors, there is a need to increase understanding and compliance with competition law and avoid all forms of communication or coordination with competitors that can be categorized as price fixing.

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