

ENFORCEMENT OF BUSINESS COMPETITION LAWS IN IMPLEMENTATION INDIRECT EVIDENCE (*Direct evidence*) AGAINST CARTEL PRACTICES

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ABSTRACT

This article aims to know the enforcement of business competition law in the implementation of indirect evidence on cartel practices. This article belongs to legal principles and legal doctrines in order to answer the legal problems encountered who based focus read and study materials primary and secondary law. For law drafting to be able to produce arguments for new theories or concepts, it is a prescription for solving the problems of this legal research. The results of the research indicate that the enforcement of business competition law against cartel practices in Indonesia continues to face obstacles and has not been maximized. This indirect evidence can be used as a solution to the difficulty of proving the practice of cartels in business competition laws, provided that they are equipped with other evidence. Indirect evidence may be included in the category of evidence in Article 42 of Law No. 5 of 1999 on Prohibition of Monopoly Practices and Unfair Competition.

Keywords: Law Enforcement; Indirect Evidence; Cartel Practices

1. INTRODUCTION

The current development of the Indonesian economic system has made business competition one of the economic instruments since the reform was introduced. This is demonstrated through the promulgation of Law Number 5 of 1999 concerning Prohibition of Monopoly Practices and Unfair Business Competition. Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition is a milestone for the recognition of healthy business competition as an economic pillar in the Indonesian economic system based on Pancasila and the 1945 Constitution of the Republic of Indonesia. Birth of the Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition is also a correction to worrying economic developments, which have proven not to withstand the shock of the crisis in 1997. Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition is now become an important instrument in law enforcement in the economic market. (Andi Fahmi Lubis, *et al.*, 2009: 10).

The complex issue of enforcing the law prohibiting monopolistic practices and unfair business competition has implications for the effectiveness of the implementation of duties and authorities mandated by law. Proving in cartel cases is not easy, the difficulty of finding evidence that can be used in trials makes proving in cartel cases different from other evidence. Cartel actors as much as possible avoid using written agreements so that their activities are difficult to prove. It is certain that cartel perpetrators will always try to ensure that the secrets or agreements they make do not fall into the hands of the KPPU. For this reason, cartel actors will not hesitate to close meetings with parties they consider to have the potential to disrupt the agreements they have made (Binoto Nadapdap, 2019: 5).

The problem faced is how to enforce business competition law in the

application of indirect evidence (*indirect evidence*) against cartel practices. The aim of the research is to review and find out how business competition law enforcement applies to the application of indirect evidence (*indirect evidence*) against cartel practices. This research will be useful for business actors and business competition authority institutions to provide answers to the difficulties of handling cartel practices and provide views regarding business competition law enforcement in the use of indirect evidence (*indirect evidence*)

In this article the author will discuss how business competition law enforcers use indirect evidence (*indirect evidence*) against cartel practices.

2. RESEARCH METHODS

This article is included in the type of normative legal research. The nature of the research used is prescriptive research to produce new concepts in solving the problems faced (Peter Mahmud Marzuki, 2015:69). The research approach that will be used in this research is a statutory approach (*statue approach*) and case approach (*case approach*) (Peter Mahmud Marzuki, 2015:24). The type of data that the author will use in this research is secondary data, namely data obtained through reviewing existing libraries, in this case secondary legal materials are journals, books and doctrines from experts regarding an analysis, as well as Primary Legal Materials as legal materials that are binding and fundamental in nature. The technique for collecting legal materials that will be used in this legal research is document study or literature study (*library research*).

3. RESEARCH RESULTS AND DISCUSSION

Sherman Act section one states that: *Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court* (The Sherman Antitrust Act, 1980:1).

(Free translation: Every contract, whether jointly based on trust or otherwise, or conspiracy to restrain trade between several countries, or with foreign countries is declared illegal. Any person who will enter into a contract or be involved in this combination or conspiracy is declared illegal and will be considered guilty for committing a crime. If the perpetrator is a company and is found guilty, he will be subject to a fine of a maximum of \$10,000,000 or, if the perpetrator is an individual, he will be subject to a fine of a maximum of \$350,000, or imprisonment for a maximum of three years, or both penalties, according to the court's decision).

The definition of cartel in Indonesia is contained in Article 11 of Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, which is basically an agreement between one business actor and its competing business actor to eliminate competition between the two. Classically, cartels can be carried out through three things, namely price, production and marketing area. In this definition there are several elements, one of which is an agreement.

Agreements between business actors who are members of a cartel are a form of evidence that can be used to assist the process of proving cartel practices.

The secrecy maintained by cartel actors makes it more difficult for the KPPU to obtain evidence regarding cartel practices. Evidence that is very difficult to

produce but has an important role in proving cartel practices is direct evidence that shows the existence of cooperation between business actors to carry out cartels. The direct evidence referred to is a document or letter that clearly states a cartel agreement. Written agreements in the form of documents or letters are strictly avoided by business actors when carrying out cartels. So the Commission has quite difficulty in producing direct evidence in the form of agreements between business actors. Due to the difficulty of finding evidence to prove a cartel, the KPPU uses indirect evidence (*indirect evidence*) as a solution to deal with cartel practices. One of the pieces of evidence included is *indirect evidence* is through economic analysis.

The use of economic analysis in cartels is an economic study or methodology to support the identification of factors that can be indicated as collusive or markets that facilitate the formation of collusive behavior. In general, economic analysis can be divided into two methodologies, namely the structural approach (*structural approach*) and behavioral approaches (*behavioral approach*). The structural approach involves identifying markets with characteristics that are conducive to carrying out collusive actions. In several studies or economic literature, several factors related to market structure and market power can be identified that encourage or facilitate the formation of cartel behavior. These factors can be used as indications of the formation of a cartel. For example, the formation of a cartel in a market will easily occur if the market consists of several business actors, with homogeneous products and demand (*demand*) which is stable. Another approach is the behavioral approach, which places more emphasis on an output in the form of the possibility of coordinating action between cartel actors. This approach focuses on the market impact of such coordination. Things that need to be suspected include prices, the same or identical discounts between competitors, parallel price movements or excessive price increases. *Unjustified run explained*, or different suppliers raise prices with *margins* the same thing at the same time. However, sometimes parallel price increases are an indication of the existence of a tightly competitive market (Anna Maria Tri Anggraini, 2010: 37-38).

indirect evidence (*indirect evidence*) can only be applied accompanied by a logical explanation using scientifically acceptable analytical methods, especially economics. Analysis of indirect evidence (*indirect evidence*) produce convincing indications that an anti-competitive act has occurred and who the perpetrator is. For this reason, not everyone can accept the application of indirect evidence. Apart from because it requires a specific understanding of economic aspects and because this evidence cannot directly show the occurrence of the alleged anti-competitive event or act. Apart from that, one of the shortcomings of Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition is that the procedural law used in Law Number 5 of 1999 is not yet clearly regulated. concerning the Prohibition of Monopolistic Practices and Unhealthy Business Competition for handling cases at the KPPU. In Indonesia there are a number of laws and regulations that regulate evidence. Of the several laws that regulate evidence, none specifically regulates direct evidence and indirect evidence. The law only regulates various types of evidence in a limited and enumerative manner (Binoto Nadapdap, 2019:195-197).

Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition does not explain the evidentiary system adopted in enforcing this law. Article 42 of Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition only mentions the evidence used by the Assembly in deciding cases of alleged violations of the law. This situation has given rise to differences of opinion regarding whether the Commission Council is obliged to prove using only the type of evidence listed in Article 42 of Law Number 5 of 1999 concerning

Prohibition of Monopoly Practices and Unfair Business Competition or whether it can use other evidence. Debate also occurred in relation to the minimum amount of evidence used by the Commission Council in deciding a case. If the Criminal Procedure Code explicitly states that the panel of judges in deciding a case uses at least 2 (two) pieces of evidence plus the judge's belief, then in Law Number 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition the norm is not clearly stated such (Mahmul Siregar, 2018:193).

Although the evidence is indirect (*indirect evidence*) is not mentioned explicitly in Article 42 of Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, does not mean that the indirect evidence is in no way related to the type of evidence as mentioned in Article 42 of Law Number 5 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition. One type of evidence in Article 42 of Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition which relates to the use of indirect evidence is indicative evidence. Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition does not explain further what is meant by evidence of guidance. Guidance evidence is the knowledge of the Commission Council which is known and believed to be true. The definition of indicative evidence in this Commission Regulation is broader than indicative evidence as generally known in criminal procedural law.

Based on *Policy Brief June 2007, Prosecuting Cartels without Direct Evidence of Agreement* issued by the OECD indirect evidence is evidence that does not directly describe the contents of the agreement or the parties to the agreement. Indirect evidence consists of evidence of communication between business actors suspected of carrying out a cartel and economic evidence about the market and the behavior of the cartel business actors involved in it who proposed the joint action. Thus, indirect evidence is a tool to detect that there are indications of cartel practices carried out by business actors, namely in the form of agreements between business actors that determine the selling price of certain goods or services to consumers (Mahmul Siregar, 2018: 192).

indirect evidence (*indirect evidence*) has actually been used in several countries. The same reasons underlying the application of indirect evidence (*indirect evidence*) is cartel proof related to finding an agreement between cartel actors as evidence which is very difficult so it is necessary to use evidence which can be a solution to the problem of proof, so that cartel practices can be stopped and not cause losses to business actors, consumers and the state. Several countries have implemented indirect evidence (*indirect evidence*) include (Binoto Nadapdap, 2019:251):

1. United States

Additional references such as plus factors or *facilitating devices* added to clarify evidence that a violation of the law has occurred *Anti-trust*. Plus a factor that is often emphasized by the courts is whether the actions of the company are contrary to its own interests (*against self-interest*), plus factors are the determining factors needed to strengthen confidence in economic evidence as part of *indirect evidence* where there is no written agreement (*naked agreement*). Enforcement concerns the economic factors that challenge the use of support facilities as a means of price signaling and price coordination among oligopolistic firms.

2. Japan

The appropriate formula for using indirect evidence in handling cartel practices is communication coupled with similar behavior. Communication and similarity of behavior itself is not direct evidence but is indirect evidence. In short, it can

be said that to be able to use indirect evidence in dealing with cartels, there must be at least two pieces of indirect evidence, even if they are not accompanied by direct evidence.

3. European Union

There are no clear regulations regarding what evidence can be used by the competition commission in handling cases of violations of anti-monopoly law. The commission is given the authority to determine for themselves what evidence they use. Proof can be carried out using all evidence. The Commission has the freedom to choose evidence and there is no complete list of circumstantial evidence.

indirect evidence (*indirect evidence*) is a fact that is not the only fact related to a case, but the fact comes from facts that are related or not to the case, from which conclusions can then be drawn. The conclusion in question is related to the occurrence of a certain event or legal action. Furthermore, Munir Fuady stated that indirect evidence (*indirect evidence*) must have rational relevance that can show that the application of indirect evidence (*indirect evidence*) in the court process, it is more likely to make the proven facts clearer than if indirect evidence was not used (*indirect evidence*) (Munir Fuady, 2012:5).

In Indonesia itself, although the application of indirect evidence (*indirect evidence*) is still being debated, but the Supreme Court has already decided a case in favor of the KPPU in the application of indirect evidence (*indirect evidence*) regarding the West Jakarta District Court's decision which annulled KPPU Decision Number 02/KPPU-L/2009 concerning the Tender Case for Clean Water Network Development Work Packages in Lingga Regency. Then the KPPU submitted a cassation action to the Supreme Court. This cassation request from the KPPU was granted by the Supreme Court through its decision in Case Number 582K/Pdt.Sus/2009 dated 28 September 2009 (Binoto Nadapdap, 2019:377).

The difficulty of proving the existence of a cartel and the KPPU's limited time in uncovering alleged cartels and the pros and cons in practice often lead to problems. So, to avoid and provide legal certainty for all parties, it is necessary to amend Law Number 5 of 1999 concerning Prohibition of Monopoly Practices and Unfair Business Competition by including indirect evidence (*indirect evidence*) into the types of evidence that are clearly regulated in Article 42 regarding valid evidence. Then, it is necessary to strengthen the authority of the KPPU which is clearly regulated in Article 36 by adding the authority to carry out searches or confiscations, giving the KPPU the right to wiretap and increasing the time period for handling cartels (Sukarmi, 2011: 144).

4. CONCLUSION

Enforcement of business competition law against cartel practices in Indonesia still faces obstacles and is not optimal. Application of indirect evidence (*indirect evidence*) still faces pros and cons because there are no statutory regulations that clearly regulate this type of evidence. Although the regulations regarding indirect evidence (*indirect evidence*) is not yet clear, but the Supreme Court has already upheld the KPPU's decision regarding the application of indirect evidence (*indirect evidence*) in cartel cases. indirect evidence (*indirect evidence*) can be an update and solution to the difficulty of enforcing business competition law against cartel practices. The difficulty of obtaining direct evidence in the form of agreements between cartel actors requires an update and breakthrough by amending Law Number 5 of 1999 concerning Prohibition of Monopoly Practices and Unfair Business Competition. The intended amendment is to add indirect evidence (*indirect evidence*) into Article 42 regarding the types of valid evidence. Apart from that, giving additional authority to the KPPU to carry out confiscations and searches is deemed necessary to

make it easier for the KPPU to handle cartel cases, then if it is deemed appropriate and necessary, it can add regulations regarding legal immunity or legal relief for individuals, company employees and the first company. provide information or information related to cartel practices or what is known as *leniency program*.

5. SUGGESTIONS

Legal considerations of the Supreme Court which accepts indirect evidence (*indirect evidence*) as valid evidence in business competition law can be a legal breakthrough in enforcing business competition law in Indonesia, both for the KPPU and the District Court. If the evidence is indirect (*indirect evidence*) wants to be accepted as valid evidence without giving rise to differences of opinion, it is necessary to regulate its position as a type of valid evidence in Article 42 of Law Number 5 of 1999 concerning Prohibition of Monopoly Practices and Unfair Business Competition. Additional authority for the KPPU regarding searches and confiscations must be added and regulated because in this way the KPPU can more easily obtain direct evidence in the form of documents indicating the existence of a cartel agreement. *Leniency* The program should be considered to be regulated in Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, considering that many other countries have implemented and provided effective results in making it easier to deal with cartel practices.

Therefore, it would be best for the House of Representatives of the Republic of Indonesia to amend Law Number 5 of 1999 concerning Prohibition of Monopoly Practices and Unfair Business Competition considering the need for this step to be taken.

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