

Judging with Circumstantial Evidence: A Controversy in the Enforcement of Indonesia's Competition Law

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The process of enforcing competition law and policy relies on two types of evidence: direct evidence, and circumstantial, or indirect, evidence. Direct evidence is evidence that is used straight for proving unlawful activities by a corporation or business. Circumstantial evidence is evidence that does not specifically demonstrate or explain the unlawful activities, but grounds claims of collusion or conspiracy among business actors. The policy problem for Indonesian competition law is that the current legislation does not recognise indirect evidence. Article 42 of Law No. 5 of 1999 concerning the Prohibition on Monopolistic Practices and Unfair Business Competition (also known as the Competition Law), states that evidence includes witness testimony, expert testimony, letters and/or documents, indication, and business actors' own testimony. In practice, the Indonesia Competition Commission (ICC or KPPU) has made almost all of its decisions based on circumstantial, or indirect evidence. The KPPU argues that this kind of indirect evidence is analogous to an 'indication'. This view, however, has invited criticisms from academics and lawyers and has led to complications with the enforcement of Law No/ 5 of 1999. The legislative failure to define the types of evidence that the KPPU can base its decisions on has had the effect of misaligning the agency's mandate and the enforcement powers of the courts, where judges are the final arbiters of legislative meaning. As a policy matter, however, without access to indirect evidence, there are few unlawful activities that can be sanctioned based on Indonesian Competition Law. This article describes the current legislative problem with Law No. 5 of 1999 and why this matters for the development of business law, investment law and policy in Indonesia. It analyses recent decisions in competition cases by the KPPU, the District Court and the Supreme Court and it advocates for legislative reforms that are necessary in order to make competition law and policy in Indonesia more functional as tools of public policy.

Key words: *Competition law, circumstantial, evidence, business, court.*

Introduction

Indonesia's competition law is nearly 20 years old. In 1999, with the enactment of *Law No.5 of 1999 concerning Prohibition on Monopolistic Practice and Unfair Business Competition* (the Competition Law), Indonesia become one of the Asian economies to apply fair business competition principles in its economic activities. The Competition Law was implemented by Presidential Decree No.75 of 1999 concerning The Business Competition Supervisory Commission, which established Indonesia Competition Law (abbreviated in Indonesian as KPPU) in order to enforce Law No.5 of 1999.

The KPPU has the authority to receive reports from members of the public; conduct research on any business activity that might cause monopolistic practices or unfair business competition; conduct investigations; summon 'entrepreneurs', witnesses, and experts; and impose administrative sanctions on any entrepreneur found to be violating the provisions of Competition Law.

Law No.5 of 1999 is one of the oldest Competition Laws in Southeast Asia. There are many articles that are not accordance with Indonesia's development needs. However, Indonesia's Competition Law has not been revised in the 21 years since its enactment, to take account of the challenges of market regulation in a technology-enhanced, transnational business environment.

Law No.5 of 1999 not only regulates the substantive aspects of market competition, but also the procedural aspects of competition law (in Article 38 to Article 46). According to Article 42, the evidence to be examined by the KPPU takes the form of witness testimony; expert testimony; letters and/or documents; indication and an entrepreneur's own testimony. Reading Article 42 of the Law, it is apparent that the provision does not, on its face, define or regulate circumstantial evidence or indirect evidence of the kind necessary for law enforcement to prove the existence of unlawful cooperation between or among entrepreneurs.

Direct evidence is evidence that proves a physical meeting or communication between business actors (termed 'entrepreneurs' in the Competition Law) and describes an agreement between them to, for example, collude or fix prices (OECD, 2007). In addition to such direct evidence, the importance of indirect, or circumstantial, evidence is also internationally recognised. Circumstantial or indirect evidence can be used to describe, without specificity, the existence of an unwritten agreement between entrepreneurs or other parties involved in that agreement. The problem for Indonesia is that recognition of such circumstantial evidence is not only

lacking in the competition law, but is not generally recognised as part of Indonesia's law of evidence either. Certainly, there are debates about this among the KPPU, academics and business lawyers working on competition issues, We discuss these below. Direct evidence of anticompetitive behaviour is preferable as a basis for regulatory intervention, if it is available. In practice, however, it is not common for business actors to carry out collusion or conspiracy on the basis of a written agreement and it is much less likely that they would voluntarily offer up such documentation if it existed. It is also difficult to secure witnesses who can and are willing to give evidence of having directly witnessed a violation of the Competition Law. Thus, circumstantial evidence plays a vital role in the enforcement of Competition Law. This is particularly so for states where Competition Law is relatively new or is being newly enforced, where behavioural change is slow to take effect and where obtaining direct evidence will be difficult.

Part of the policy challenge for Indonesian competition law enforcement is the effect of having a legal system predominantly anchored in the European civil law tradition. One consequence of this is that the law of evidence, in both criminal and private law, adheres to the system of negative proof. This means that judges are constrained from freely accepting any evidence handed to them by a disputing party unless it is deemed valid and legitimate by statute. This is an example of the principle of 'that which is not expressly permitted is prohibited.' Judges thus build their judicial decisions on a closed and limited system of information. Judges can only make a decision if it is supported by a minimum of two different pieces of evidence and believe that what was alleged is proven (Yahya Harahap, 2004).

A further procedural challenge is that, as a civil law system, Indonesia does not apply the principle of precedent: each case is adjudicated on its merits and judges are not bound to follow any previous decisions of their own or a higher court.

For an independent administrative agency tasked with a regulatory mandate, such as KPPU, these are more than abstract features of procedural law. In practice they present considerable hurdles for the interpretation, application and enforcement of competition law.

In the face of debate about the definition and use of indirect or circumstantial evidence, the KPPU has made many of its decisions based on circumstantial evidence by pointing to it as evidence in the form of an 'indication.' The KPPU justifies this through its own Regulation No. 1 of 2010 concerning the Competition Procedural Law, where circumstantial evidence is considered to be an 'indication.' The KPPU has the authority to make such administrative regulations¹ but the view reflected in Regulation No. 1 of 2010 lacks legal support. Law No.5 of 1999 does not provide the definition of the term 'indication.' As a matter of statutory

¹ Id. Article 35 f.

interpretation, the definition of such as term should be sought by reference to other legislation. According to Article 184 of Law No.8 of 1981 concerning The Law of Criminal Procedure, ‘legal means of proof’ consists of ‘witness testimony, expert testimony, documents, indication and testimony of the accused.’ Article 188 Paragraph (1) states that,

[an] indication is an act, event or circumstance which because of its consistency, whether between one and the other, or with the offense itself, signifies that an offense has occurred and who the perpetrator is.

Furthermore, Article 188 Paragraph (2) states that an ‘indication’ as referred to in Paragraph (1) may only be obtained from: (a) a witness testimony; (b) documents; and (c) testimony of the accused. In each case, these forms of evidence are, of course, direct evidence.

It seems clear, then, on a plain reading of these criminal procedure provisions, that an ‘indication’ is not equivalent to circumstantial evidence.

Although KPPU Regulation No. 1 of 2010 was replaced by KPPU Regulation No. 1 of 2019, this principle is still adopted by new regulation. The policy question that rises is what happens if the competition authority is reliant on indirect evidence for investigating and penalising anticompetitive behaviour by business actors in Indonesia, while as a matter of formal procedural law, use of indirect evidence falls outside its legislative mandate.

This article seeks to propose a solution to this fundamental weakness in the legal capacity of Indonesia’s KPPU, with reference to the pattern of enforcement in Indonesian competition cases to date and approaches that have been successfully adopted outside Indonesia. Section 1 below discusses direct and indirect, or circumstantial, evidence – their characteristics and relative strengths. Section 2 analyses the law of evidence in Indonesia in both civil and criminal procedure. Section 3 applies this model to the patterns of enforcement of competition law in Indonesia and explains the practice of the KPPU in handling violations of the Competition law to date. The concluding section advocates for the need for a legal basis for using indirect or circumstantial evidence as part of the effort of competition law enforcement. It acknowledges the kind and quality of evidence necessary in order to convince both the KPPU and the courts that an act prohibited by Indonesia’s Competition Law has occurred. In order to achieve this policy goal, the article describes the amendments that are needed for Indonesia’s Law No. 5 of 1999.

What Types of Evidence Matter for Competition Law Cases?

Competition law as a form of regulatory law stands or falls on the quality of evidence about business activities. In the case of the most egregious forms of anticompetitive behaviours, such

as cartels or price-fixing, the penalties are severe and so proof of the infringing act is decisive. In less serious cases, where a regulator may elect to take a responsive approach to a business actor or an industry and issue a warning or a recommendation, the regulator's influence is in part dictated by the quality of the evidence to hand.

Collusion to restrict market entry or fix prices is the paradigmatic competition offence. A business actor can only be found to have committed such a conspiracy if it can be proved that the prohibited activities or agreements have been conducted and that there was a conscious effort by them to achieve their purpose unlawfully (OECD, 2006). In many antitrust cases, they are required to prove an existing agreement. In reality, it is very rare that a conspiracy violating antitrust law will make a written agreement. Beginning in the twentieth century, the Supreme Court of the USA formulated the issue of agreement by defining parallel behaviour (William R. Tevlin, 2016). A decade later, the Supreme Court echoed this rule:

“[I]t is not necessary to find an express agreement in order to find a conspiracy. It is enough that a concert of action is contemplated and that the dependants conformed to the arrangement. Therefore, the Supreme Court has repeatedly looked to circumstantial evidence in price fixing cases.”

Competition laws as they operate in many economies recognise two types of evidence, namely: (a) direct evidence, that is the evidence describing an agreement established between business actors and that also clarifies the content of such an agreement; and (b) circumstantial evidence or indirect evidence, that is, non-specific evidence that nonetheless indicates collusion between business actors. Another view is that circumstantial evidence is not enough to prove the material facts of an affair, but if it is sufficient to convince a jury (in legal systems that have jury trials), then the evidence will be taken as material fact (Luke Meier, 2014).

Direct evidence, where it exists, is usually presented in form of testimony of the person(s) accused of violating competition law, or the testimony of another party who may have joined a leniency program, or video or other documents that directly prove the violation. In the United States, where such direct evidence exists, the Department of Justice will generally treat the violation as a criminal matter. Indirect evidence will be accepted only as the exception, when there is an absence of direct evidence. This occurs especially with a violation such as price fixing by individuals, which needs direct and explicit evidence, but may accept strong indirect evidence to show that a prohibited action has occurred (Louis Kavlop, 2011).

Commentators generally agree that, to prove the existence of a cartel, enforcers of competition law face real difficulties in obtaining direct evidence, particularly physical evidence such as documents. The perpetrators certainly try to avoid leaving traces that might lead to an investigation of that violation by law enforcement in the future (Chang-Su Choe, 2012). They

are also likely to avoid self-incrimination through confession. Finding a witness who saw, heard or experienced the unlawful agreement while it was taking place and is willing to testify to this is also difficult. Thus, in certain cases, indirect evidence or circumstantial evidence is needed to prove a violation of competition law. This opinion is parallel with Republic Tobacco Co, 381 F.3d. 717 (7th Cir. 2004), which has changed the well-established trend whereby courts that usually place greater weight on direct evidence begin to rely on indirect evidence in such cases (Andrew I. Gavil, 2005).

Circumstantial, or indirect, evidence is the evidence that proves a violation of competition law by business actors through indications which lead to that conclusion. Louis Kavlop stated that the use of indirect evidence raise contradictions in proof because it is complex, expensive, and is often false. The Organisation for Economic Co-operation and Development (OECD), which is the multilateral body with the strongest policy posture on anticompetitive business behaviour, defines two types of indirect evidence, namely communication evidence and economic evidence. Communication evidence may include: phone records, notes from discussions, records that competitors were at same location, and documents that indicate communication between competitors (OECD, 2018). Communication evidence is generally seen as more convincing than economic evidence because economic evidence is open to multiple interpretations. Economic evidence is further divided into two types: (a) conduct, such as typical acts or behaviour, including typical price increases; and (b) economic structural evidence, such as high levels of market concentration. Evidence of conduct is considered to be more persuasive than economic structural evidence.

Despite its blurry nature, economic evidence prompts the crucial issue of how to distinguish whether a business act or conduct is a prohibited agreement, or simply a unilateral act that is legal (William E. Kovacic, 2011). The problem becomes more complicated when the act or conduct takes place in an oligopolistic market. It is commonly understood that an oligopolistic market is indicated by the existence of dependency between the entrepreneurs within that market. In a concentrated market such as an oligopoly, the difference between a tacit agreement with tacit coordination, and independent, unilateral behaviour is almost impossible to distinguish. Accordingly, proof of whether collusion exists between business actors cannot be gained only by observing typical evidence, but also requires indirect evidence such as communication evidence (Barack Orbach, 2016). In the United States, court decisions concerning oligopolies are often based on what are called 'plus factors.' which are the additional facts or factors that are required to be proved in respect of determining an act of collusion. Plus factors are facts which serve as additional evidence of concerted actions as a foundation for concluding the existence of collusion (Roger D. Blair and Jill Boylston, 2000). Put another way, 'plus factors' explain an ambiguity in circumstantial evidence; they are an accumulation of circumstantial evidence, so that it can be used to distinguish a collusion agreement from a tacit parallel action (Robert F. Lanzillotti and James T. McClave, 2005). In

using indirect evidence, there is a question of how many facts or circumstances are enough to prove that there is an agreement between or among competitors. In this case, Roger D. Blair stated that we should not confuse quality and quantity. Such ‘plus factors’ are typically: (1) an act that would contradict the interest of the accused unless it is a part of joint plan; (2) a condition that can only be rationally explained if it was a result of concerted action; (3) evidence of the accused that is being routinely communicated; and (4) industry performance data, such as massive profits that show a successful act of collusion. Professor Areeda, who was a Professor of Competition Law at Harvard Law School postulates, that in order for collusion to take place, there needs to be: (1) an opportunity to collude; (2) motive to collude; and (3) an overt act consistent with furthering concerted action. He recommends additional detailed evidence to distinguish whether an act is interdependent, or a conspiracy. He further suggests that ‘plus factors’ consist of proof in the form of poor economic performance and evidence of facilitating practices.

On the other hand, when the Department of Justice of the United State of America (DoJ) prosecutes cartels, it does so only once there is direct evidence regarding the existence of an unlawful agreement, and circumstantial or indirect evidence is supplemental to this. Only under extraordinary circumstances will the DOJ will proceed with a case when there is *only* indirect evidence. In the case of *American Tobacco Co v., the United States*, the courts decided that the existence of a formal agreement is not required to prove a conspiracy. Further, the court found that a conspiracy has taken place as the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.

Although circumstantial evidence has been internationally recognised as an indispensable form of evidence in the enforcement of competition law, there are still questions about how much indirect evidence is needed, since it can be ambiguous and thus interpreted as either representing competitive or anti-competitive behaviour. A ‘typical act’ between business actors, for example, could prove that cooperation or an agreement between them has taken place, but it could also be merely an interdependent act between them. An ‘agreement’ requires consent from at least two business actors. The form of the agreement is not important (Floris O.W. Vogelar et.al., 2000). An agreement exists if the businesses are reciprocally agreeing on the boundaries or the inhibitions of their actions in the market. Hylton, in his treatise on the economics of competition, defines ‘collusion’ -- whether discreet or written -- is a joint agreement regarding production margins and costs of the independent entrepreneur (Keith N. Hylton, et.al., 2010). He also stated that:

The Supreme Court has said that a Sherman Act an agreement need not be explicit, express, or formal, so long as the firms have a unity of purpose, a common design and understanding, or a meeting of minds or a conscious commitment to a common scheme.

Collusion will be successful if the business actors are competing to achieve agreement on primary matters and impose a way to discover and punish a partner for violating the agreement, usually through evaluating transactions of the competition. How much circumstantial evidence, then, is needed to determine if business actors engaged in collusion? On this question, Corones argues that, if the collusion occurs in a private law case, then indirect evidence will suffice if it is plausible and able to convey a conclusion with certainty, thus indicating that this is the strongest possibility open (S.G. Corners, 2007). Fisher J stated that the level of satisfaction requires the civil test, which is a balance of possibilities:

However, in my opinion, the handover from counsel to the accused, which is not objected by the plaintiffs, must be considered more on the seriousness of the affair, that the bigger the suit is, the more strictness of the proofs is required.

In other U.S. cases, such as Justice Clark's opinion in *Theatre Enterprises, Inc. V. Paramount Film Distributing Corp*, 346 US. 537, 74 S.Ct. 257, the important question was whether the defendants were conducting activities based on an independent decision or on an agreement, implicit or explicit. It is certain that business behaviour is accepting of circumstantial evidence, when the fact finder can conclude that there is an agreement (Thomas D. Morgan, 2014).

The OECD view is that the application of indirect evidence should be limited, due to its obscurity and the tendency to subject it to multiple interpretations. Such evidence could hint at a deal to obstruct trading, for example, yet it could also be a completely legitimate deal of independent action. Evidence, direct or indirect, could be used separately, and in most cases simultaneously. The Supreme Court of America in *Monsanto* held that there should have evidence that negates the possibility of independent behaviour (Joseph Skocilich, 2005). Although there are still many contradictions in using indirect evidence, there is a general agreement among academicians, competition agencies and Courts that indirect evidence is very important for proving the alleged conspiracy or collusion in antitrust cases.

Indonesia's System of Evidence

How are direct and indirect or circumstantial evidence regulated according to Indonesian Law? In Indonesia's system of evidence, both in private and in criminal law, a negative proof system is applied. Based on this system, judges decide a case must be supported by at least two different pieces that proves what was alleged. Under this system, evidence to be used to prove an individual or an entity guilty or not is regulated specifically by the provisions of law.

In Law No.8 of 1981 concerning Criminal Procedure Law, Article 184 stipulates that the forms of evidence consists of witness testimony, expert testimony, documents, indication and

testimony of the accused. Meanwhile the Code of Civil Procedure² stipulates that forms of evidence are written documents, witnesses, inferences, confession and solemn vows. Law No. 11 of 2008 concerning Information and Electronic Transactions has subsequently broadened these definitions of evidence to include electronic information or documents, along with its print form.³

As we saw earlier, Law No.5 of 1999 concerning the Prohibition of Monopolistic Practice and Unfair Business Competition limits the form of evidence under Article 42 to witness testimony, expert testimony, letters and/or documents, indication and entrepreneur's testimony. Competition Law does not further define those forms of evidence. In practice, there is no divergence of opinion regarding what is meant by witness testimony, expert testimony, documents and entrepreneur's testimony. However, the scope of Article 42 became problematic once the KPPU classified circumstantial evidence as a form of indication. As discussed above, because Law No.5 of 1999 does not define the evidence in the form of indication, it is necessary to look to other laws to define what constitutes evidence in the form of an 'indication'.

On its face, Law No.8 of 1981 concerning Criminal Procedure Law (abbreviated as KUHAP in Indonesian), in Article 188 Paragraph (1) defines an indication as an act, event or circumstance, which because of its consistency, whether between one and the other, or with the offense itself, signifies that an offense has occurred and who the perpetrator is. If we carefully consider this definition, there is a similarity with the concept of circumstantial evidence. However, Article 188 Paragraph (2) of KUHAP stipulates that an indication could *only* be obtained [our emphasis] through witness testimony, documents or confession of the accused. Accordingly, an 'indication' in the Indonesia law of evidence, could not be obtained by other means.

A term that is similar to 'indication' is 'inference,' as stipulated in the Code of Civil Procedure Law (abbreviated as HIR in Indonesian). However, the Elucidation of Article 173 of HIR does not further define 'inference'. That Article only states that a mere inference which has no legal basis, should only be considered if that inference is important, thorough, specific and corresponding one to another. Consequently, an inference under the civil procedure law of Indonesia is not a main form of evidence to be relied on when resolving a case. Further, Article 188 Paragraph (3) of Indonesia's Criminal Procedure Law (KUHAP), states that the assessment on the strength of an indication in each particular circumstance should be done wisely and

² Indonesian Civil Procedure Law originates from Inland Reglement (IR) that has taken effect since 1849. In 1941 number of changes were and the name was changed to Het Herziene Indonesisch Reglement (HIR). This civil procedure law after Indonesian independence with Law No. 1 of 1951 was declared still valid.

³ Law No. 11 of 2008 concerning Information and Electronic Transaction, article 5. 1 states that electronic information and/or electronic documents and/or along with its prints is valid legal proofs. Moreover, article 5. 2 states that evidence which is stated on article 5.1. is broaden of evidence based on procedural law in Indonesia.

prudently by a judge, after a careful and thorough hearing based on conscience. Taken together, Article 188 of KUHAP and Article 173 of HIR make it clear that an indication is a conclusion made by the judge thoroughly, after hearing witness testimony or testimony of the accused, or after the examination of the documents. Accordingly, an indication could not be the main or primary form of evidence, since it could only be obtained after the examination of other forms of evidence.

A further complication here is that the legal system applied by Indonesian law does not adhere to a precedent principle, so that judges are not bound to the decision of higher court or the preceding decisions.

As a consequence, the law of evidence in Indonesia, both in criminal and civil law does not recognise indirect evidence. According to the law, judges cannot determine that someone is guilty based merely on indirect evidence. This also aligns with the opinion of Professor Erman Rajagukguk, an economic law expert and one of the originators of Law No.5 of 1999 when it was being drafted, who stated that indirect evidence was not intended to be recognised as evidence under competition law (Rajagukguk Erman, 2011).

This situation presents a complicated problem for the KPPU. Under the current competition, KPPU does not possess the power to search, to seize or to obtain wiretaps in order to obtain evidence or proof of conduct infringing the law. M. Nawir Messi stated that KPPU's difficulty in obtaining direct evidence was also limited by the fact that the investigation period is limited to 150 days (M. Nawir Messi, 2011). He also stated that there are difficulties with summoning witnesses; and compelling companies coming to the KPPU to provide documentation. Furthermore, he acknowledges that there is a problem with the technical competence of judges, once cases are passed from the KPPU to the judiciary.

The difficulties of KPPU obtaining direct evidence are compounded by the fact that Indonesian competition law does not have a leniency program. The availability of a leniency program matters because it creates incentives for entrepreneurs who may be willing to provide information regarding acts of collusion to law enforcement authorities. In this way, a leniency program becomes one of the principal ways to obtain direct evidence.

The Application of Circumstantial Evidence by KPPU

Despite the controversy and weaknesses found within current competition law and the systemic design issues of the Indonesian legal system, the KPPU has explicitly asserted that, in its opinion, circumstantial evidence is equivalent to an 'indication' as found in the text of Law No. 5. There is even a regulation (the Regulation of The Indonesia Competition Commission No.01 of 2010 concerning Procedure of Case Handling) in Article 72 Paragraph (3) that states

that ‘indication’ is the knowledge of a panel of KPPU Commissioners, which in their view, is truth.

Therefore, the KPPU seems to have been persistent in using circumstantial evidence to resolve competition law cases. We could see this as an inevitable approach, because if the enforcement of competition law was to rigidly follow the legislation and Indonesia’s system of evidence, it would very likely be impossible to resolve a case using competition law in the absence of direct evidence. In practice, many decisions of the KPPU are based on circumstantial evidence, such as the case of stock trading by PT Indomobil Sukses Internasional and other cases including a wheel cartel case, a fuel surcharge case, a cement cartel case, and others (discussed below). The standpoint of the KPPU in those cases has been accepted and reinforced by the Court or the Supreme Court in some of those cases, but not all. Some key cases that turned on evidence are discussed below.

The 2002 stock trading case of PT Indomobil Sukses Internasional was a collusive public tender case. In that case, the KPPU in its decision No.03/KPPU-I/2002 inferred that the defendants, PT Indomobil Sukses Internasional and PT Citra Sarana Duta Perkasa, were guilty of conducting a conspiracy regarding a tender offer, in violation of Article 22 of Law No.5 of 1999. The key evidence in the case was the similarity of the tender documents provided by the defendants. The defendants filed an objection to the District Court, which then declared that the KPPU had been mistaken in finding a conspiracy based only on the similarity of tender documents made by the defendants.⁴ The Supreme Court accepted the KPPU’s evidence, by stating that the lower court’s finding of fact was incorrect when it claimed that the similarity of tender documents, word choices, formatting or grammatical choices cannot prove conspiracy. However, the Supreme Court also stated that the KPPU in their decision should not be using the executorial heading *Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa* (‘In the name of Justice based on Almighty God’), and for that the KPPU decision is null and void.⁵

In a 2009 price fixing case, KPPU Decision No. 25/KPPU-I/2009 found that 9 aviation companies had violated Article 5 of Law No.5 of 1999, by agreeing on a fixed price for a fuel surcharge. The evidence used by the KPPU was a tendency of airline companies to charge a similar fuel surcharge. In response to that decision, the defendants filed an objection to the Central Jakarta District Court, where the Court inferred that the defendants are not guilty of fixing a fuel surcharge, since there are many factors that could affect the amount of fuel surcharge, therefore a tendency toward similar changes on the fuel surcharge by those airline

⁴KPPU’s decision No. 03/KPPU-I/2002.

⁵Because Law 5 of 1999 concerning the Prohibition on Monopolistic Practices and Unfair Business Competition has not stipulated that KPPU decision uses phare “executorial heading *Demi Keadilan Berdasarkan Ketuhanan Yang Maha Esa*” (‘In the name of Justice based on Almighty God’). Therefore, KPPU can not use the phrase in its decision.

companies could not be legally determined as an agreement between airline companies.⁶ From that District Court Decision, the KPPU filed a cassation appeal to the Supreme Court. The Court upheld (No.613K/PDT.Sus/2011) the decision of the Central Jakarta District Court.

The wheel cartel case began with a suspicion by the KPPU about a potential violation of Article 5 of Law No.5 of 1999 regarding price fixing and Article 11 of that Law regarding cartels. Six companies affiliated to the Indonesia Wheel Companies Association (Asosiasi Perusahaan Ban Indonesia, also known as APBI) seemed to be fixing prices and operating a cartel. Through its decision No. 08/KPPU-I/2014, the KPPU stated that those companies were guilty of price fixing and cartel behavior. The evidence underlying that decision was that the APBI reported in its meetings a trend of reduced wheel exports and so recommended that each company suppress and control its distribution.⁷ In that APBI meeting, a recommendation was also given to members to submit reports on their production, sales and exports, as a reference for an APBI report to the Government. In addition, APBI also recommended each member to extend the warranty claim period from 3 to 5 years, since imported wheels provided warranty claims within a 5-year period. In response to this KPPU decision, the defendants filed an objection to the Central Jakarta District Court, which then affirmed the KPPU decision with District Court Decision No.07/Pdt.G./KPPU/2015. The defendants brought a further cassation appeal in the Supreme Court, which concurred with the District Court decision -- that in accordance with the evidence presented, the defendants were guilty of violating Article 5 and Article 11 of Law No. 5 of 1999 concerning Prohibition on Monopolistic Practices and Unfair Business Competition.⁸

Another case is the cement cartel case, where the KPPU stated that allegedly 8 cement production companies had been dividing their marketing areas into Aceh, Riau, North Sumatra, West Sumatra, South Sumatra, Jakarta, West Java, Central Java, East Java, South Celebes and East Borneo.⁹ Those are the areas with the most stable market share from year to year. The allegation of cartel behaviour was also supported by the existence of meetings by the Indonesia Cement Association (Asosiasi Semen Indonesia, also known as ASI), that provided reports on production and market realisation by each of the defendants, and the cement price percentage for each area. In regard to this matter, the KPPU claimed that this was a facilitating practice. However, the panel of KPPU Commissioners inferred that the defendants were not guilty of establishing a cartel, since a parallel price cannot be used as strong evidence to prove the existence of a cartel.

In a more recent decision, the controversy concerning the application of indirect evidence by KPPU is still ongoing. In an auction of road widening works in Simalungun Regency, North

⁶ Central Jakarta District Court Decision Putusan No. 02/KPPU/2010/PN.Jkt.Pst.

⁷ KPPU's Decision No. 08/KPPU-I/2014.

⁸ Supreme Court Republic of Indonesia Decision No. 221K/Pdt.-Sus-KPPU/2016.

⁹ KPPU decision No. 01/KPPU-I/2010.

Sumatra, the KPPU declared the defendants guilty of violating Article 22 of Law NO. 5 of 1999. The KPPU stated that there was a vertical conspiracy because the technical requirements for the tender benefited the winning bidder.¹⁰ The defendants filed an objection to the South Jakarta District Court, which granted the objection request on the grounds of insufficient evidence.¹¹ This decision was affirmed by Supreme Court.¹² In the procurement of cocoa intensification fertiliser case, the KPPU's decision declared that there had been a tender conspiracy between Defendant I to Defendant VIII. However, the court stated that Defendant V was innocent by reason of the similarity of the bidding document with Defendant VII in another project, which did not necessarily prove the existence of a conspiracy. The Supreme Court, through its decision, affirmed the KPPU Decision.¹³ In the case of Labuhan Batu road maintenance, North Sumatra, the KPPU declared that the Defendants were guilty because of the similarity of bid documents. This decision was affirmed by the District Court of Lubuk Pakam,¹⁴ and also by Supreme Court Decision.¹⁵

From the case of PT Indomobil Sukses Makmur share trading, we learn that the KPPU had based its decisions on circumstantial evidence, and while its decision were cancelled by the District Court due to the use of that evidence, the Supreme Court reinstated the KPPU decision. In the fuel surcharge case, the KPPU decision that was based on the circumstantial evidence was rejected both by the District Court and by the Supreme Court. In the wheel cartel case, the KPPU decision based on circumstantial evidence was reinforced by both the District Court and the Supreme Court. In the cement cartel case, the KPPU decided that the defendants were not guilty because there was insufficient evidence to prove the unlawful acts of the defendants. In other cases, there were still different opinions among lawyers, and the district court and Supreme Court on the validity of indirect evidence or circumstantial evidence. It is apparent that there has not yet been established a uniformity of opinion as between the District Court and Supreme Court regarding the validity of circumstantial or indirect evidence.

Those cases show that there has not yet been established a uniformity of opinion by Lawyers or by the judiciary, namely the District Court and Supreme Court. Those law enforcement institutions are accepting of circumstantial evidence in some cases, but refuse it in others. It is unfortunate that, on the one hand, the KPPU insists on circumstantial evidence as being evidence in form of indication,¹⁶ but on the other hand states that such evidence is insufficient,

¹⁰ KPPU Decision No. 03 / KPPU-L/ 2016.

¹¹ South Jakarta Distric Court Decision No. 907K / Pdt.G-KPPU / 2016 / PN Jkt.Sel

¹² Supreme Court. No. 752K / Pdt.Sus-KPPU / 2017.

¹³ Supreme Court decision No. 1175K / Pdt.Sus- KPPU / 2018

¹⁴ Decision of Lubuk Pakam District Court, North Sumatra, Indonesia No. 122/Pdt.G/2009/PN.LP.

¹⁵ Supreme Court decision No. 382K / Pdt.Sus- KPPU / 2019.

¹⁶ Since I have become KPPU Commissioner and Chairman of KPPU in Mei 2018, there have been fifty six KPPU decisions. Six of the fifty six decisions were void. Seventeen of the fifty six decisions are merger cases which are no need indirect evidence. The rest of them have been rejected by the Dependants due to use of indirect evidence. Now all of thirty three decisions have been reviewing at Supreme Court.

as in cement cartel case. Accordingly, the existence of circumstantial evidence in practice is still a controversy, let alone the questions of how strong that evidence needs to be and how many types of circumstantial evidence are necessary to convince the law enforcement bodies that a violation of competition law has occurred. This kind of inconsistency is not ideal for the business climate and the health of competition policy in Indonesia; it does not contribute to legal certainty among domestic entrepreneurs or foreign investors.

At the time of writing the Indonesian Parliament has initiated a wide-ranging amendment to Law No. 5 of 1999 concerning Prohibition on Monopolistic Practices and Unfair Business Competition. If passed, this would be the most comprehensive overhaul of this legislation since its enactment in 1999. The government has submitted its list of comments on problems with the draft amendments. However, thus far, the issue of indirect or circumstantial evidence has not been part of the drafting conversation. It would be timely to include this issue as part of the amendment process. If that were done, one of the key problems inhibiting the enforcement of Law No. 5 of 1999 could be resolved.

Conclusion

A modern, functioning competition Law is one of the most important requirements for maintaining the fairness of business activities and increasing the benefits of business for citizens. As we have seen, in attempting to enforce competition law, the responsible agencies struggle to obtain direct evidence of breaches of the law. Even though in practice circumstantial evidence is recognised and accepted widely in a social sense, it has not been embraced under Indonesian procedural law. Thus, it remains controversial theoretically, as well as practically. The difficulty is that indirect or circumstantial evidence is often essential for detecting and sanctioning anti-competitive behaviour, so it matters for enforcement agencies, and businesses also need clarity about how the law will be applied. In Indonesia the Parliament and the government are presently in a discussion to amend Law No.5 of 1999 and it is highly desirable that a provision recognising and allowing the use of circumstantial evidence be included in that amendment. It should also stipulate what evidence needs to be and which factors define it as evidence, or on which conditions it will fulfil the requirements of evidence to prove a violation of business competition law. This would contribute to public policy by closing off the debate about what types of evidence of anti-competitive behaviour are acceptable in Indonesia and in so doing, substantially strengthen the capability of the KPPU to adequately enforce competition law.



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