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LEGAL REVIEW OF THE PRACTICE OF CARTEL IN LAW NUMBER 5 YEAR 1999 CONCERNING PROHIBITION OF MONOPOLISTIC PRACTICES AND UNFAIR BUSINESS COMPETITION

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Abstract: *A cartel is an agreement of one business actor with a competing business actor to eliminate competition between the two. This agreement is specifically regulated in Article 1 number (7) of Law Number 5 Year 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition. With the subject matter of the study, first what is the regulation of the cartel in Law Number 5 Year 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition? And second, how is Modus Operandi carried out by business actors against cartel practices in cases that occur in Indonesia? Based on the results of the study the authors conclude that the first cartel arrangement is contained in Article 11 of Act Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition, and regulations of the Business Competition Supervisory Commission Number 4 of 2010 concerning the Cartel as guidelines for implementing Article 11. The operandi carried out by business actors in Case Number 08/KPPU-I/2014 is to make arrangements to regulate production by holding meetings but the meeting is aimed at the gathering of members and meals.*

Keywords: *cartel practice, monopolistic practices, and business competition*

I. INTRODUCTION

In simple terms, a cartel is an agreement of one business actor with a competing business actor to eliminate competition between the two. In other words, cartels (cartels) are cooperation of certain product producers that aim to supervise production, sales and prices and to monopolize certain commodities or industries.[1]

Cartels include agreements between competitors to divide the market, allocate customers, and set prices. The type of cartel that occurs among sellers is a pricing agreement, division of market territory or customers, and an output limitation agreement. Whereas the most common among buyers are price fixing agreements, regional allocation agreements and

[1] Mustafa Kamal Rokan, *Hukum Persaingan Usaha*, Jakarta: PT Raja Grafindo Persada, 2010, p. 105

bid rigging (Tender Collusion). Similar business actors can make an agreement to unite their behavior in such a way that they face consumers as a whole, whose impact is like holding a monopoly. This is called the "offensive cartel" competition regulation can also be held to avoid competing ways that have led to self-destruction. Because it has led to a price war with prices lower than the cost of goods. Business competition falls into the "cut throat competition" (cruel or deadly competition).

In such circumstances, all companies will lose money, and eventually go bankrupt. The arrangement of competition among similar companies is intended to avoid such conditions, the name being "defensive cartel". For the defensive cartel, the government actually gives legal force to the defensive cartel, so that those who do not participate in the agreement are forced by the power of the law to follow their agreement.[2]

The one that encourages the existence of a cartel is strong competition in the market. To avoid this competition, cartel members agree to determine joint prices, arrange production, and even determine price discounts, promotions, and other sales conditions. Usually the price installed by a cartel is much higher than the price that occurs if there is no cartel. The existence of a cartel can protect an inefficient company, which can be destroyed if it is not included in the cartel agreement. One form of cartel that is often carried out by its members is price fixing. Pricing is referred to as naked restraint (overtly), if the agreement does not occur in a joint venture company conducted by participants (parties) in the joint venture activity.[3] In practice, agreements are rarely found that openly contain agreements to set prices. Although sometimes it is easy to show evidence that shows the existence of an agreement (express agreement) of that kind. Conversely when there is no evidence that directly indicates the existence of an agreement, then indirect evidence is needed that covers the occurrence of the agreement, such as conspiracy to determine the price or non-price.[4]

In monopoly theory, a group of business actors who have an oligopoly position will get maximum profit if they collectively act as monopolists. In practice, the position of the oligopolistic is manifested in what are called associations.[5] Through these associations, business actors can enter into collective agreements regarding the level of production; price level, marketing area, etc., which then raises a cartel agreement, and can also lead to the creation of monopolistic practices and / or unfair business competition.[6] Therefore, this cartel is a form of agreement made by business actors; therefore the preparation explains whether the agreement is included in the agreement group intended by the Civil Code (KUH Perdata). The agreement stipulated in Article 1313 of the Civil Code, according to the cartel compiler, is in common with the understanding of the agreement mentioned in Article 1313 of the Civil Code, but this cartel requires its own definition of the definition of agreement based on Law Number 5 Year 1999 concerning Prohibition of Monopoly and Competition Practices Unhealthy business.

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[2] A. Junaidi, "Pembuktian Kartel Dalam UU Nomor 5/1999", *Jurnal kompetisi, edisi 11, Volume 5, Tahun 2008*, p. 5

[3] *Ibid,* p. 3

[4] *Ibid*, p. 4

[5] Erwin B Pasaribu, "Tinjauan Atas Keberadaan Asosiasi Perusahaan Dalam Pasar Oligopoli Berdasarkan Hukum Persaingan Usaha di Indonesia",*(Skripsi pada Fakultas Hukum Universitas Indonesia, Jakarta)*, 2012, p. 28.

[6] *Ibid*.

Nevertheless, this agreement is specifically regulated in Article 1 number (7) of Law Number 5 Year 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition and this is closely related to Article 1313 of the Civil Code. In this case the cartel is regulated in Article 11 of Act Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition. The agreement made by a business actor with a competing business actor can be in the form of an agreement in writing or verbally. However, in practice the agreements made by business actors with competing business actors are more often made verbally, therefore this agreement is very difficult to prove. This is where the Business Competition Supervisory Commission (KPPU) has the role to be able to solve all cases regarding unfair business competition, especially the cartel case.

From the compilation discussion described above, that this case of the cartel has been very often carried out in Indonesia with 224 cases that have been decided by KPPU.[7] Recorded 74% or 177 of the 224 cases were cartel cases with details of 165 tender cases and 12 non-tender cartel cases. This cartel has considerable economic damage, because in addition to disincentives for competition it also takes advantage of consumer economics.[8]

Based on the description above, the author will conduct a special study related to the cartel practice and its arrangement in Law Number 5 Year 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition. With the subject matter of the study, first what is the regulation of the cartel in Law Number 5 Year 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition? And second how is the Modus Operandi carried out by business actors against cartel practices in cases that occur in Indonesia? With the aim of knowing how to regulate cartel in Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition. To find out the mode of business actors doing in cartel practices in cases that occurs in Indonesia. And this research is expected to have practical benefits as input for readers, and for business people in the field, both business actors of BUMN and private business actors about business competition law in Indonesia to create fair business competition in the business world or the Indonesian economy, especially about cartel practices.

II. RESEARCH METHOD

This study uses the normative legal research method. The object of the research is a number of contents concerning cartel regulation in Law Number 5 Year 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition and Business Competition Supervisory Commission Regulation Number 4 concerning 2010 concerning Article 11 Guidelines on Cartel. Collection of legal materials is done through library research techniques. This research also uses several approach methods, first, the statute approach, namely the approach that examines all laws and regulations relating to the legal issues under study. Both conceptual approaches, namely the approach taken by examining theories, legal principles, and opinions of experts that have to do with the problems being studied.

[7] Muhammad Nawir Messi *et, all*., “bertarung melawan kartel”,*Jurnal kompetisi, edition 3, Volume 5, 2013,* p.3

[8] *Ibid*

III. RESULT AND DISCUSSION

3.1 The regulation of the cartel in Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition

According to the Big Indonesian Dictionary, one of the terms of the agreement is to control the prices of certain commodities. In the Black Law Dictionary, the cartel is a combination of production and sale and control products, so as to obtain a monopoly and restrict competition in any particular industry or commodity. Meaning the cartel, seller prices, at least realize monopolistic behavior, and limit competition in various industrial or commodity groups.[9]

According to Munir Fuady, the cartel is a collaboration of producers of certain products that aim to supervise production, sales and prices and to monopolize certain commodities or industries. The cartel can also be interpreted as an association based on a contract between companies that have the same interests, designed to prevent competition. Usually through these cartel members of the cartel set prices or other trade conditions to curb a competition so that this can benefit the members of the cartel concerned.[10]

Cartel is a form of monopoly, where several business actors (producers) unite to control production, determine the price and / or marketing area of goods and / or services, so that they (business actors) are not created or there is more competition. So that the regulation of the cartel in Law No. 5/1999 focuses more on the prohibition element.

Cartels are generally practiced by trade associations along with their members. Benefits of forming cartels in a trade association, such as efforts to develop technical standards, or joint efforts to improve the standards of products of goods or services they produce. Usually through this cartel, members of the cartel can set prices or other trade conditions to curb a competition, so that this can benefit the members concerned. Another destructive aspect of the cartel, that the cartel can control or curb the entry of competitors in the business concerned.[11]

The arrangement regarding this cartel is included in the provisions of Article 11 of Act Number 5 of 1999 which stipulates the following:[12]

> "Business actors are prohibited from making agreements with competing business actors, which intends to influence prices by regulating the production and / or marketing of goods and or services that can lead to monopolistic practices and or unfair business competition".

If specified in accordance with the provisions of Article 11 above, the elements of this Article consist of:

a. *Elements of Business Actors;*
b. *Elements of the Agreement;*
c. *Elements of Business Actors and Competing Business Actors;*
d. *Elements Affecting Prices by Managing Production and / or Marketing of a Goods and / or Service;*

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[9] Fadid Nasution, "Kartel dan Problematikanya", *Jurnal Kompetisi, Issue 11, Volume 5, 2008,* p 4.
[10] Munir Fuady, *Hukum Antimonopoli*, Bandung : PT Citra Aditya Bakti, 2003, p. 63-64
[11] Rachmadi Usman, *Hukum Persaingan Usaha di Indonesia*, Jakarta : PT Gramedia Pustaka Utama, 2004, p. 283
[12] Article 11 of Law No.5 of 1999 concerning Monopolistic Practices and Unfair Business Competition.

e. *Elements of a Result in Monopolistic Practices and / or Unfair Business Competition.*

This of these elements theoretically has similarities with the elements in the cartel theoretically according to Rachmadi Usman, namely:[13]

a. Elements of Business Actors;
b. Elements of the Agreement;
c. Elements of Competing Business Actors;
d. Intended Elements Affect Prices;
e. Elements of Regulating Production and or Marketing;
f. Item Elements;
g. Service Elements;
h. Elements Can Cause Monopolistic Practices;
i. Elements Can Cause Unfair Business Competition.

In the explanation of Law Number 5 Year 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition. If we examine the formulation of Article 11 above that what is prohibited in the Article is that it covers agreements made by business actors with competing business actors in the form of written or verbally containing arrangements for the production and / or marketing of goods and / or services that have a purpose to influence prices, which can lead to monopolistic practices and unfair business competition.[14]

Provisions regarding the cartel ban can also be found in other articles contained in Law Number 5 of 1999 concerning the prohibition of monopolistic practices and unfair business competition, namely:[15]

a. Article 5 concerning price fixing:[16]
   1) *A business actor is prohibited from making an agreement with a competing business actor to determine the price of an item and / or service that must be paid by the consumer or customer in the relevant market.*
   2) *The provisions referred to in paragraph (1) do not apply to:*
      a) *An agreement made in a joint venture.*
      b) *An agreement based on applicable law.*

At a glance this Article has similarities with Article 11 which regulates cartels, the difference between Article 11 and Article 5 is in Article 5, business actors agree to set prices. Whereas the cartel agreed upon by members is affecting prices by regulating the production and or marketing of goods or services. So in the cartel the actors agree on the amount of production and or marketing of goods or services, which through this agreement will affect the price of the goods or services they produce.

[13] Rachmadi Usman, *Op. Cit,* p. 55
[14] *Ibid*, p. 284
[15] Regulation of the Business Competition Supervisory Commission No. 4 of 2010 concerning Guidelines for Article 11 concerning Cartel, p. 17-19
[16] Article 5 of Law Number 5 of 1999 concerning the prohibition of monopolistic practices and unfair business competition

b. Article 7 which reads:[17]

"Business actors are prohibited from making agreements with competing business actors to set prices below market prices, which can lead to unfair business competition".

The difference between Article 7 and Article 11, namely in Article 7 requires a price fix below the market price, while Article 11 has an agreement regarding the amount of production and marketing of goods or services. The provisions in Article 7 aim to kill competitors or reduce competition.

c. Article 9 concerning division of territory which reads:[18]

"Business actors are prohibited from making agreements with competing business actors that aim to divide up the marketing area or market allocation for goods and or services so that it can lead to monopolistic practices and or unfair business competition".

The formulation of Article 9 has similarities with Article 11. However, the purpose of the agreement in Article 9 is to divide up the marketing area or market allocation for goods or services. Article 9 does not require an agreement on the production of goods and services as required by Article 11.

d. Article 10 concerning Boycott which reads:[19]

1) Business actors are prohibited from making agreements, with competing business actors, which can prevent other business actors from doing the same business, both for domestic and foreign market purposes.
2) A business actor is prohibited from making an agreement with a competing business actor, to refuse to sell every item and or service from another business actor so that the action:
   a) Adverse or can be expected to harm other business actors; or
   b) Limiting other business actors in selling or buying any goods and or services from the relevant market.

If we pay attention to Article 10 at a glance, there is no similarity with Article 11. However, both Article 10 and Article 11 can affect the amount of goods circulating in the market. In addition, both can also cause losses to consumers, because either through the cartel or through boycotts, besides causing a reduction in goods or services in the market, it can also lead to price increases. The difference between the two is the means used, in the cartel the business actor agrees to regulate production, while in boycotting the business actor agrees to inhibit other business actors, which in turn will also result in the inhibition of the production of goods or services.

[17] Article 7 of Law Number 5 of 1999 concerning the prohibition of monopolistic practices and unfair business competition

[18] Article 9 of Law Number 5 of 1999 concerning the prohibition of monopolistic practices and unfair business competition

[19] Article 10 of Law Number 5 of 1999 concerning the prohibition of monopolistic practices and unfair business competition

e. Article 12 concerning Trust which reads:[20]

"Business actors are prohibited from making agreements with other business actors to collaborate by forming a larger joint company or company, while maintaining and maintaining the survival of each company or its member companies, which aims to control the production and or marketing of goods and or services, so that it can lead to monopolistic practices and or unfair business competition".

The difference between the Trust and the Cartel is that the agreement in the Trust is to form a joint company while maintaining the continuity of the company that is a member of the Trust. Whereas in the cartel there was no joint company, only agreed to coordinate or collusion.

f. Article 22 concerning conspiracy which reads:[21]

"Business actors are prohibited from conspiring with other parties to regulate and or determine the winner of the tender so that it can lead to a healthy business competition".

In the literature on competition law in various countries, tender conspiracy is one form of cartel. But when compared with the formulation of Article 11, Article 22 does not have anything in common. Collusion in Article 22 is to determine the winner of the tender, while collusion or collusion in Article 11 is aimed at influencing prices by regulating the amount of production or marketing of goods or services. In this case the essential equation between the two Articles only lies in the existence of a horizontal agreement or agreement among competing business actors which can result in unfair business competition.

g. Article 24 concerning Collusion which reads: [22]:

"Business actors are prohibited from conspiring with other parties to hamper the production and or marketing of goods and / or services of competing business actors with the intention that goods and or services offered or supplied in the relevant market become reduced both from the amount, quality and timeliness required".

Article 24 also has similarities with Article 11, but the difference is that the conspiracy in Article 24 aims to inhibit the production of goods or services of competing business actors. However, the actions in both of these Articles can lead to the regulation of the number of goods or services on the market.

From the provisions of Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition that are relevant to the provisions of

[20] Article 12 of Law Number 5 of 1999 concerning the prohibition of monopolistic practices and unfair business competition
[21] Article 22 of Law Number 5 of 1999 concerning the prohibition of monopolistic practices and unfair business competition
[22] Article 24 of Law Number 5 of 1999 concerning the prohibition of monopolistic practices and unfair business competition

Article 11, namely:[23] That in the case of Article 11 in which this provision covers the collusive tender of the agency reporting the identified price, this is not the scope of Article 5 if we see from the definition of Article 5. Then regarding the division of market areas, this is closely related to Article 9, which in terms of marketing coordination which aims to influence the prices contained in Article 11, especially in terms of reaching customer division, is not included in the scope of Article 9. Whereas if we see from the provisions of Article 10, this provision basically also has a similar relationship with Article 9 and Article 11. Therefore the purpose of Article 11 to influence prices is very contrary to the provisions of Article 5.

In addition to the relevant articles above, Article 50 e has a very close relationship with Article 11, therefore the compiler will first describe the sound of Article 50 e as follows: What is excluded from the provisions of this law are: "e. Research collaboration agreement to improve or improve the living standards of the wider community. "

In Article 11 includes cartels that have different meanings in terms of other policies, which use the words "regulating production and / or marketing", this aims to influence prices ". This agreement eliminates opponents in the market to freely choose among the offers of the promised cartel members, but in terms of production and marketing coordination activities carried out often have pro-competitive benefits so that in the context of business competition policies often occur ambivalently in pure marketing coordination activities always an obstacle to serious business competition. Seeing the provisions of Article 11 and Article 50 e, here Article 11 only covers production and sales, not covering research and development or purchasing. Then it does not have protection if we refer to the provisions of article 50 e.[24]

In Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition. There are two types of approaches that we need to know together, where this approach is used in solving cases in the field of business competition, the approach is the illegal Per se approach and the Rule of reason approach.

The illegal per se approach is to declare that any particular business agreement or activity is illegal, without further verification of the impact caused by the agreement or business activity.[25] The per se illegal approach is clear, firm, and absolute in order to provide certainty for business people. This prohibition is strict and absolute due to behavior that is very likely to damage the competition so there is no need to prove the results of the act. Strictly speaking, the per se approach to illegal behavior or actions taken is against the law.[26] Whereas the rule of reason approach is an approach used by the Business Competition Supervisory Commission (KPPU) to make an evaluation of the consequences of a particular business agreement or activity, in order to determine whether an agreement or activity is inhibiting or supporting competition.[27] In this approach the action alleged must be examined in advance, whether the act has restricted inappropriate competition. For this reason, it is implied that the plaintiff can show the consequences of the agreement, activities and dominant positions that have hampered competition or caused losses.[28] The rule of reason approach may be justified by the existence of an anti-competitive business action (for

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[23] Knud Hansen *et, all,.Undang-Undang Praktek Monopoli dan Persaingan Usaha Tidak Sehat*, Jakarta : Katalis, 2002, p. 207

[24] *Ibid*.

[25] Andi Fahmi Lubis *Op. Cit*, p. 55

[26] Mustafa Kamal Rokan, *Op. Cit*, p. 72-74

[27] Andi Fahmi Lubis *et*, *all*., *Op cit*. p. 56

[28] Mustafa Kamal Rokan, *Op cit,* p. 77-78.

example a merger that results in the dominance of one business actor) but produces an efficiency that benefits consumers or the national economy in general.

Cartels in various countries are considered as per se illegal in western countries. Because the fact that price fixing and cartel actions have a negative impact on price and output when compared to competitive markets. The cartel rarely produces efficiency because what is produced is very small compared to the negative impact of its actions. A cartel if successful will make decisions about price and output, such as decisions issued by a monopoly company that result in the cartel obtaining monopoly benefits from consumers who continually buy goods or services at the cartel price, and the occurrence Incorrect source placement caused by a reduction in output because consumers should buy at competitive prices, in addition to wasting resources to maintain the existence of the cartel itself.[29]

If examined more closely, the provisions in Article 11 of Act Number 5 of 1999 adopt the principle of Rule of reason. The formulation of the cartel as a matter that is examined according to the Rule of reason principle is in accordance with the development of business competition law enforcement which tends to see and examine the reasons of the business actor committing an act that is considered to violate competition law. This means that the Business Competition Supervisory Commission must be able to prove that the reasons of business actors cannot be accepted.[30]

Based on the Regulation of the Business Competition Supervisory Commission Number 4 of 2010 concerning Article 11 Implementation Guidelines concerning Cartel Based on Law Number 5 Year 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, that the reasons of business actors who commit acts that hamper trade can be stated as something acceptable if:[31]

1. The activities of business actors show signs of a reduction in production or rising prices. If there are signs, it needs to be examined further.
2. Are the activities of business actors naked or ancillary. If the activity is direct, it is illegal, whereas if it is additional, it is permissible.
3. Business people have market power. If business people have market power, then there is a possibility that they abuse that power.
4. Are there high barriers to entry into the market, even though business people have market power, but if there are no significant barriers to entry into the market, it will be easy for new business actors to enter the market.
5. The actions of business actors whether creating substantial efficiency and creating improved product or service quality or innovation. If these reasons are not proven, then the action is illegal.
6. The actions of the business actors are indeed needed to achieve efficiency and innovation. This means that it must be proven whether the actions of the business actors are the best alternative to achieving that goal.
7. There needs to be a balancing test which means that the benefits obtained from the actions of business actors need to be measured compared to the negative consequences. If the profit obtained is greater than the loss, then the action is justified.

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[29] *Ibid*, p.119
[30] Rachmadi Usman, *Op.cit*, p. 286-287
[31] Article 24 of Law Number 5 of 1999 concerning the prohibition of monopolistic practices and unfair business competition

In examining a case in a rule of reason, it is necessary to take these steps before declaring an action as something that is acceptable (reasonable) or unacceptable (unreasonable restraint).[32]

By adhering to the rule of reason principle, the formulation of Article 11 of Act Number 5 of 1999 is interpreted that in carrying out checks and proof of violations of these provisions, the reasons of business actors must be examined and it is first proven that monopolistic practices and / or business competition have occurred not healthy. In other words, in examining the alleged existence of a cartel, the reasons of the business actor who committed the cartel's actions and the consequences of the agreement on business competition were seen. Thus, it is very necessary to have an in-depth study of the reasons for the agreement of the said business actors compared to the losses or negative matters of the cartel both for business competition.[33]

From the description above the compiler argues that in the use of approaches in solving cartel cases which use the rule of reason approach, this approach may be used but must be seen from case to case and not all cartel cases must use the Rule of reason approach because if the case has been proven to have been carried out or has fulfilled the elements in Article 11 of Law Number 5 Year 1999, it is not necessary to prove the impact of a cartel in the community. Because the action has been proven to be done, it will automatically harm the public and will disrupt the country's economy, and also be seen from the lack of the rule of reason approach.

The illegal per se approach must also be applied in cartel cases, because we all know this cartel practice is a form of unhealthy competition that is very deadly for the people or the state that can disrupt economic stability in a country, not only is the cartel's practice very dangerous with criminal acts of corruption and can lead to poverty for the people and our country. Therefore it is necessary to take firm action from the Business Competition Supervisory Commission in disclosing and resolving the cartel case.

In addition, according to the author, seen from the definition of a cartel in Law No. 5/1999 concerning the prohibition of Monopolistic Practices and Unfair Business Competition, that in reality price fixing and cartel actions have a negative impact on prices and output compared with a competitive market impact. Therefore the need to use the per se illegal approach in resolving cartel cases is seen on a case-by-case basis.

3.2 Modus Operandi conducted by the Business Actor on the Practice of Cartel in Cases that occurred in Indonesia

3.2.1 The cartel case in case Number 08 / KPPU-I / 2014 concerning Alleged Violations of Article 5 paragraph (1) and Article 11 of Law Number 5 Year 1999 in the Automotive Industry related to Cartel of Four-Wheeled Motorized Vehicle Tires

The reported party in this case is a member of the Indonesian Tire Companies Association (APBI), are: [34]:

[32] Rachmadi Usman, *Op.cit,* p. 288

[33] *Ibid*, p. 289

[34] "*Putusan KPPU No. 08/KPPU-I/2014"*, www.kppu.go.id/docs/Putusan_08_2014_apbi_upload3052014.pdf downloaded on 11 November 2017, p. 20

1) Reported Party I, PT Bridgestone Tire Indonesia, is domiciled at The Plaza Office Tower 11th Floor Jalan M.H. Thamrin Kav. 28-30 Central Jakarta 10350.
2) Reported Party II, PT Sumi Rubber Indonesia, is domiciled at Wisma Indomobil 12th Floor Jalan Letjen. M.T. Haryono Kav. 8, Cawang, East Jakarta.
3) Reported Party III, PT Gajah Tunggal, Tbk., Domiciled in Wisma Hayam Wuruk 10th Floor Jalan Hayam Wuruk 8, Central Jakarta.
4) Reported Party IV, PT Goodyear Indonesia, Tbk., Domiciled in Jalan Pemuda Number 27 Tanah Sareal, Bogor City, West Java.
5) Reported Party V, PT Elang Perdana Tire Industry, domiciled in Jalan Elang, Sukahati Village, Citeureup - Bogor Regency, West Java.
6) Reported Party VI, PT Industri Karet Deli, domiciled at K.L Yos Sudarso Street Km. 8.3 Medan, North Sumatra.

The Association of Indonesian Tire Companies (APBI) is an association formed for the interests of its members who are competitors with each other which aims to help the progress and interests of members together and focus more on economic goals compared to individual interests.[35]

The establishment of the Indonesian Tire Companies Association (APBI) was motivated by a meeting of several pioneering companies in tire business activities in Indonesia since 1971. At that time, tire business activities had a very strategic role to support the economy in the country. The Government (in this case the Minister of Industry and Trade) needs a place to support tire companies in developing their business in the country by continuing to coordinate with the Government on the implementation of each of its activities.[36]

The main function of the Association of Indonesian Tire Companies (APBI) for its business actors is as a bridge between the business actors to the Government, both to submit suggestions and objections relating to Government policies or regulations. APBI from its inception to the present is aimed at supporting the Government to create a healthy business climate in the tire industry by remaining under the supervision of the Government and not to facilitate or support price fixing and/or cartels.

However, it turns out that in fact APBI during this time has often conducted various meetings to compile an agreement/agreement which according to the Judgment of the Supervisory Commission (KPPU) agreement/agreement was a form of cartel regulated in Article 11 of Act Number 5 of 1999 concerning Prohibition of Practice Monopoly and Unfair Business Competition. Details of the case position are as follows:

The Commission Assembly considered that APBI asked members to submit data periodically which would be material to make monthly reports and annual reports of APBI submitted to APBI that cannot be accessed by other companies that are competing companies. But the fact that happens is that these data can be accessed through the mechanism of the APBI meeting, with the existence of these actions there has been an exchange of information between APBI members who should compete with each other.[37]

APBI in this case the Reported Party I up to the Reported Party VI was allegedly carried out through means of meetings facilitated by APBI. In the meetings held, finally the

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[35] A. Junaidi, *Op. Cit*, p. 10
[36] *Ibid.*
[37] KPPU Decision No. 08/KPPU-I/2014*, Op. Cit.* p. 51

members of APBI, in this case the Reported Party I to the Reported Party VI reached an agreement by agreeing to the substance as outlined in the Minutes of the Presidium Meeting.[38] Some points of agreement that are considered a violation are:

First, the Commission Assembly considered the Presidium Meeting on 21 January 2009 which basically stated "APBI members do not do slamming the price (vide APBI Minutes on 21 January 2009)" agreed at the Presidium Meeting on 17 February 2009 is a form of agreement on pricing. Secondly, the Commission Assembly considered the Presidium Meeting on 28 April 2009 which basically stated "all APBI members were asked to be able to exercise restraint and continue to control their respective distribution in accordance with the development of their requests (vide APBI Minutes of 28 April 2009)" approved at the Presidium Meeting on May 18, 2009. The agreement was repeated again at the Presidium Meeting on 26 May 2009 which was approved at the Presidium Meeting on 17 June 2009 (vide Minutes of the 26 May 2009 Presidium Meeting), and in subsequent developments the agreement was strengthened at the 26 January 2010 Presidium Meeting which was approved at the Presidium Meeting on 15 February 2010 (vide Minutes of the Presidium Meeting on 26 January 2010). At the next meeting the agreement was strengthened at the Presidium Meeting on February 25, 2010 which was approved at the Presidium Meeting on March 17, 2010 (vide Minutes of the February 24, 2010), the series of agreements at the Presidium Meeting was an attempt to regulate the production and / or marketing of cases that is.[39]

The approval mechanism for the minutes of the presidium meeting is held at the next presidium meeting. In the case of price fixing, the minutes of the January 21 2009 2009 presidium meeting were approved at the February 17, 2009 presidium meeting. Likewise with the minutes of the April 28 2009 presidium meeting approved at the May 18 2009 presidium meeting that discussed and agreed on the regulation of production and / or marketing. Minutes of the presidium meeting are sent to the Reported Parties aimed at each President Director and there is no rejection regarding the contents of the minutes. So according to the commission committee this is a pricing agreement and regulates production and / or marketing.[40]

To prove the occurrence or non-occurrence of violations Article 11 of Law No. 5 of 1999, the Commission Council considers the following elements:[41]

a. Elements of Business Actors
   That what is meant by business actors in this case are Reported Party I (PT Bridgestone Tire Indonesia), Reported Party II (PT Sumi Rubber Indonesia), Reported Party III (PT Gajah Tunggal, Tbk.), Reported Party IV (PT Goodyear Indonesia, Tbk.), Reported Party V (PT Elang Perdana Tire Industry) and Reported Party VI (PT IndustriKaret Deli) as referred to in point 1 which explained the identity of the reported parties, the elements of business actors have been fulfilled.
b. Elements of the Agreement
   The agreement in question is a joint agreement to be able to restrain and continue to control the distribution of Passenger Car (passenger) Replacement Ring13, Ring 14,

[38] *Ibid.*
[39] *Ibid.* p. 54
[40] *Ibid.*
[41] *Ibid.* p. 64

Ring 15 and Ring 16 tires in the territory of the Republic of Indonesia in 2009 to 2012 agreed and / or approved by The Reported Party I, Reported Party II, Reported Party III, Reported Party IV, Reported Party V and Reported Party VI as in the Minutes of the APBI Presidium Meeting described in Item 7.3 of the Minutes of the Presidium Meeting related to Production and / or Marketing Arrangement on 28 April 2009 at the Grand Melia Hotel led by the Chairperson of the APBI and item 7.4 concerning the Agreement Taking Mechanism among APBI Members, thus the element of the agreement has been fulfilled.

c. Elements of Business Actors and Competing Business Actors
Whereas the same relevant market in this case is Passenger Car (Passenger) Replacement Ring 13, Ring 14, Ring 15 and Ring 16 tires in the territory of the Republic of Indonesia in the period of 2009 to 2012 as described in point 5 concerning Law. Business actors that compete with each other in the relevant market and make agreements in this case are Reported Party I (PT Bridgestone Tire Indonesia), Reported Party II (PT Sumi Rubber Indonesia), Reported Party III (PT Gajah Tunggal, Tbk.), Reported Party IV (PT Goodyear Indonesia, Tbk.), Reported Party V (PT Elang Perdana Tire Industry) and Reported Party VI (PT Industri Karet Deli). Thus the elements of business actors and competing business actors are fulfilled.

d. Elements Affecting Prices by Managing Production and /or Marketing of Goods and/ or Services
That the regulation of production and/or marketing of goods affects prices as described in point 8 which discusses profits which consists of analyzing the effect of APBI agreements on prices, Analysis of the Influence of APBI Agreements on Production and/or Marketing, Effects of Industrial Concentration on PCM Margin). Thus the element influences the price by regulating the production and / or marketing of goods and/or services fulfilled.

e. Elements of a Result in Monopolistic Practices and / or Unfair Business Competition
The high concentration of industry is indicated by the high CR4 (number of market share of the four largest companies) or HHI (Herfindahl-Hirschman Index) on PCR Replacement Ring 13 and 15 tires negatively affecting technical efficiency, while PCR Replacement Ring 14 tires are only marked by high HHI (Herfindahl-Hirschman Index) which also negatively affects technical efficiency. This has led to inefficiencies which have resulted in losses on the consumer side, while the Reported Parties in this case that were supposed to compete and be efficient did not occur. Inefficiencies as described above were strengthened by PCM (Price Cost Margin) which experienced an increase after the agreement of the Indonesian Tire Company Association (APBI) in 2009, indicating that the company obtained excess profits on PCR Replacement Ring 13, 14 and 15 tires. Even though PCR Replacement Ring tires 16 of the Reported Parties used their efficiency to compete, the effect of the APBI agreement on PCM (Price Cost Margin) was positive. This indicates that the agreement of the Reported Parties to encourage an increase in PCM (Price Cost Margin) through price increases on the PCR Replacement Ring 16 as described in item 8.3.2 concerning Law, thus monopolistic practices have been fulfilled.

3.2.2 Mode carried out by business actors in case Number 08 / KPPU-I / 2014 concerning Alleged Violations of Article 5 paragraph (1) and Article 11 of Act Number 5 of 1999 in the Automotive Industry related to Cartel of Four-Wheeled Motorized Vehicle Tires

From the cases described above the compilers can find modes that are carried out by business actors in case Number 08 / KPPU-I / 2014 concerning Alleged Violations of Article 5 paragraph (1) and Article 11 of Law Number 5 Year 1999 in the Automotive Industry related to Four Wheel Motorized Vehicle Cartel, as follows:

1) Establish associations that have the aim of helping the progress and interests of members together and focus more on economic goals compared to individual interests, and the establishment of such associations is legitimate in accordance with applicable laws and regulations as practiced by APBI (Association Indonesian Tire Company).
2) The participation of business actors in associations. Through these associations, business actors can enter into collective agreements regarding the level of production, price level, marketing area, and so on, which then raises a cartel agreement, and can also lead to the creation of monopolistic practices and or competition unhealthy business, this matter was mentioned earlier in the previous chapter of this thesis. In the case of the cartel which has been outlined above by the compiler above, the Reporting Party I until the Reported Party VI was a member of the Association of APBI (Association of Indonesian Tire Companies).
3) Judging from the management of the Indonesian Tire Companies Association (APBI), that most of the APBI management was reported I, II, II and IV, even though the participation of the reported V and VI was not included because it did not significantly affect the policies made. Because by being a management in APBI that in making an agreement or agreement in accordance with the status of the reporters, it will facilitate all those who have been promised.
4) Then the mode carried out by the members of APBI, that in processing the data of member companies, which will periodically become material for making monthly reports and annual reports of APBI submitted to APBI. Even though the collected data cannot be accessed by other companies or will be kept confidential by APBI, in reality the companies that are members of APBI can access these data through the mechanism of the APBI meeting, with this action there is an exchange of information between business actors with competing business actors including APBI members, even though the business actors should compete with each other.
5) Making agreements affect prices by regulating the production and or marketing of goods and or services, this is done in the Minutes of the Indonesian Tire Companies Association (APBI) Presidium Meeting on January 21, 2009 at the Inter-Continental Hotel in Jakarta, where the discussion is not very shown however, using the term "APBI Members do not slam the price", fill in the Minutes of the Presidium Meeting which reinforces the indication of a cartel agreement other than the Minutes of the Presidium Meeting on 21 January 2009 and so that no agreement can be made. Then the minutes of the meeting also discussed and agreed on the agreed tire warranty claim arrangements changed from 3 (three) years to 5 (five) years. Then from the results of the minutes of the presidium meeting sent to each company director the Reported Party I-VI, it turns out that the results in the said cartel agreement and pricing are agreed upon by all reported parties. The mode is done by the way the meeting is conducted; it is done solely for members' gatherings and meals.

6) Then the method taken by this businessman is to reduce the production of goods, namely the Passenger Car Radial (PCR) Replacement Ring 13, Ring 14, Ring 15 and Ring 16, after the goods have been taken in the market then the business actors are incorporated in the Company Association Indonesian Tires (APBI) produce more and ultimately are able to influence prices by setting prices according to what business people want that can harm consumers.

IV. CONCLUSION AND RECOMMENDATION

4.1 Conclusion

Based on the description in the previous chapter, the author can find the following conclusions:

First, cartel arrangements are contained in Article 11 of Act Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, which states that: "Business actors are prohibited from making agreements with competing business actors, which intends to influence prices by regulating production and / or marketing of goods and or services that can lead to monopolistic practices and or unfair business competition. And the regulations of the Business Competition Supervisory Commission Number 4 of 2010 concerning Cartel as guidelines for implementing Article 11. In Article 11 of Law Number 5 Year 1999, the emphasis is on the application of the rule of reason principle which is interpreted that in conducting checks and proof of violations of these provisions, the reasons for the business actor must be examined and it is first proven that monopolistic practices and/or unfair business competition have occurred.

Second, the modus operandi of business actors in Case Number 08/KPPU-I/2014 concerning Alleged Violations of Article 5 paragraph (1) and Article 11 of Act Number 5 of 1999 in the Automotive Industry related to the Four Wheel Motorized Vehicle Tires as a The following: business people form a good-purpose association, become a membership of the Indonesian Tire Companies Association, serving in the APBI management, APBI members collect data that is very influential in the occurrence of cartels where the data should not be accessed by competing companies but the data can be accessed through the APBI meeting, made an agreement to regulate production by holding meetings but the meeting was aimed at the gathering of members and meals, reducing the production of goods resulting in scarcity of goods in the market and then producing more and finally able to influence prices that could detrimental to the country's economy.

4.2 Recommendation

The author advises the government (in this case the President and DPR) to make amendments to Article 11 to harmonize the provisions of Article 5 so that the sound of Article 11 becomes a price that does not affect prices and harmonizes Article 50 (e) to increase research in the sound of Article 11 of Act Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition. And the Government (in this case the Minister of Industry and Trade) and the Business Competition Supervisory Commission (KPPU) in carrying out the oversight function of the implementation of Law Number 5 Year 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition Practices. Then the two institutions must collaborate actively to minimize the practice of cartels so that they can achieve maximum results.

REFERENCES

Andi Fahmi Lubis*et, all*. 2009. *Hukum Persaingan Usaha Antara Teks dan Konteks*. Jakarta: Deutschaft fur Technische Zusammenarbeit (GTZ) GmbH.

Knud Hansen *et, all,*. 2002. *Undang-Undang Praktek Monopoli dan Persaingan Usaha Tidak Sehat*, Jakarta : Katalis.

Munir Fuady. 2003. *Hukum Antimonopoli*, Bandung : PT Citra Aditya Bakti.

Mustafa Kamal Rokan. 2010. *Hukum Persaingan Usaha*, Jakarta: PT Raja Grafindo Persada.

Rachmadi Usman. 2004. *Hukum Persaingan Usaha di Indonesia*, Jakarta: PT Gramedia Pustaka Utama.

A. Junaidi, "pembuktian Kartel dalam Undang-Undang No. 5/1999", *Jurnal Kompetisi, Edisi 11, Volume 5, Tahun 2008*

Erwin B Pasaribu. 2012. "Tinjauan Atas Keberadaan Asosiasi Perusahaan Dalam Pasar Oligopoli Berdasarkan Hukum Persaingan Usaha di Indonesia", *(Skripsi pada Fakultas Hukum Universitas Indonesia, Jakarta).*

Fadid Nasution, "Kartel dan Problematikanya"*, Jurnal Kompetisi, Edisi 11, Volume 5, tahun 2008*

Muhammad Nawir Messi *et, all*., "Bertarung melawan kartel",*Jurnal kompetisi, edisi 3, Volume 5, 2013.*

Law No.5 of 1999 concerning Monopolistic Practices and Unfair Business Competition;

Regulation of the Business Competition Supervisory Commission No. 4 of 2010 concerning Guidelines for Article 11 of Act No.5 of 1999 concerning Monopolistic Practices and Unfair Business Competition