

## A. Context of Study

Handling of cartels by competing agencies around the world is growing rapidly with increasing complexity of the cartel problems that are confronted. The existence of competing agencies has been circumvented by various business actors to avoid from the evidence of the cartel such as regular meetings, an agreement to make the arrangements, and the matter that tend to be the evidence for the competition of law enforcement.<sup>1</sup>

Hence, the model of proving the cartel is developed by using indirect evidence or circumstantial evidence, which is the opposite of direct evidence. Indirect evidence cannot prove a material fact by itself. However, it tends to prove a material fact when it is considered with other evidence and done by drawing inferences.<sup>2</sup> Using indirect evidence is done through the use of various results of an economic analysis that could prove the existence of a correlation between an economic fact and the other economic facts. Thus, it became a comprehensive proof of the cartel with the identification number of losses for the society in it.<sup>3</sup>

As an institution that is entrusted to supervise the business competition, Komisi Pengawas Persaingan Usaha (KPPU) or the Commission for the Supervision of Business Competition has a responsibility to prevent and prosecute the cartels conducted in Indonesia. KPPU as stipulated in the Article 36 of Law No. 5 Year 1999 on the Prohibition Against Monopolistic

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<sup>1</sup> The Guidelines for the Implementation of Article 11 of Law No. 5 Year 1999 on the Prohibition Against Monopolistic Practices and Unfair Business Competition

<sup>2</sup> See Santos v. Providence, et al. 09-CV-348S

<sup>3</sup> The Guidelines for the Implementation of Article 11 of Law No. 5 Year 1999 on the Prohibition Against Monopolistic Practices and Unfair Business Competition

Practices and Unfair Business Competition, has the authority to enforce the law on cartel cases either based on the KPPU's own initiative or on the basis of reports from the public.

Furthermore, in order to fulfill the requirements of adequate initial evidence, KPPU may examine several initial indicators that can be summed up as an encouragement factor for the formation of cartel. In theory, there are several factors that may encourage or facilitate cartels both structural and conductible factors. Some or all of these factors can be used by KPPU as an initial indicator in identifying the existence of cartel in certain business sectors. Some of these factors are structural factors and conductible factors. Moreover, structural factors consist of the concentration level and the amount of company, the size of the company, product homogeneity, multi-market contact, supply and production capacity, ownership linkage, the ease of market entry, demand characteristics: regularity, elasticity and change, and buyer power. On the other hand, behavioural factors consist of transparency and exchange of information, and regulation of prices and contracts.

In December, 2014 KPPU announced that it had fined six national car tire manufacturers that are members of Asosiasi Perusahaan Ban Indonesia (APBI) or Association of Indonesian Tire Producers. The resume of APBI presidium meeting that was held in January 2009 is determined as the evidence by KPPU Investigators in the KPPU verdict related to the cartel of tires, on Four-Wheel Vehicle Products.

KPPU Investigators in the case stated that there was an information

exchange and the resume of APBI presidium meeting could be categorized as sufficient to be determined as communication evidence in order to prove the existence of the agreement to affect the prices by arranging the production of the market of four-wheel vehicle products.<sup>4</sup>

Meanwhile, PT Bridgestone Tire Indonesia, PT Sumi Rubber Indonesia, PT Gajah Tunggal Tbk., PT Goodyear Indonesia, Tbk., PT Elang Perdana Tyre Industry, and PT Industri Karet Deli or the Respondents affirmed that the collection of data and information regarding production, sales, and exports are delivered by every member of the APBI to APBI as the documents for APBI. They were not the proof of the existence of conducting cartel and/ or conducting price fixing. The submission of data and information to APBI was not conducted to facilitate the cartel and/ or price fixing, but to be submitted to the Government as a participation of APBI in helping the Government oversee the industrial development specifically in this case is the tire industry. Data and information contained in the APBI Annual Report did not affect the Respondents' business policy in the price fixing, the amount of production, nor the amount of the distribution. This is because each Respondent has its own market and business approach which have different characteristics and are influenced by the quality of the product, branding, cost of production, the number of requests, and so on.<sup>5</sup>

Therefore, the writer is interested to analyze the case, background of

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<sup>4</sup> The Commission for the Supervision of Business Competition Verdict No. 08/KPPU-I/2014 page 36

<sup>5</sup> The Commission for the Supervision of Business Competition Verdict No. 08/KPPU-I/2014 page 29

the case, and the Commission verdict deeply as the final assignment.

## **B. The Parties**

1. The parties that are directly related in the case of the research object in this case are the respondents, namely:

- a. PT Bridgestone Tire Indonesia, domiciled in the registered office in the Plaza Office Tower 11th Floor, MH Thamrin street Kav. 28-30 Jakarta;
- b. PT Sumi Rubber Indonesia, domiciled in the registered office in the Wisma Indomobil 12th Floor, Letjen M.T. Haryono street Kav. 8, Cawang, East Jakarta;
- c. PT Gajah Tunggal Tbk, domiciled in the registered office in the Wisma Hayam Wuruk 8 10th Floor, Hayam Wuruk street, Central Jakarta;
- d. PT Goodyear Indonesia, Tbk, domiciled in the registered office at Pemuda street No. 27 Tanah Sareal Kota Bogor, West Java;
- e. PT Elangperdana Tyre Industry, domiciled in the registered office at Elang street, Sukahati Village, Citeureup, Bogor Regency, West Java;
- f. PT Industri Karet Deli, domiciled in the registered office at K.L Yos Sudarso street Km. 8.3 Medan, North Sumatra.

2. The Commission Council that is examining the case, namely:

- a. Kamser Lumbanradja, M.B.A. as the Chairman of the Commission Council;

- b. Dr. Sukarmi, SH, M.H. as a Member of the Commission Council;
- c. Dr. Drs. Chandra Setiawan, M.M., Ph.D. as a Member of the Commission Council;
- d. Prof. Tresna Priyana Soemardi, S.E., M.S. as a Member of the Commission Council;
- e. Dr. Syarkawi Rauf, SE, ME as a Member of the Commission Council.

### **C. Statement of Fact**

This case begins from the existence of a clause made by the six national car tire manufacturers that are incorporated in Asosiasi Perusahaan Ban Indonesia (APBI) or Association of Indonesian Tire Producers that found in the resume of APBI presidium meeting that held in January 2009. That clause is a prohibition for APBI members to slash the tire prices in the Indonesian market. Prohibition to slash the tire prices assessed by Komisi Pengawas Persaingan Usaha (KPPU) or the Commission for the Supervision of Business Competition has violated the Article 5 of Law No. 5 Year 1999 on the Prohibition Against Monopolistic Practices and Unfair Business Competition. The reason is the consentience of the APBI members not to decrease the selling price could inflict financial losses to the consumers.

PT Bridgestone Tire Indonesia, PT Sumi Rubber Indonesia, PT Gajah Tunggal Tbk., PT Goodyear Indonesia, Tbk., PT Elang Perdana Tyre Industry, and PT Industri Karet Deli or the Respondents are business entities that formed legal entities, which are engaged in the tire manufacturing

industry, and are members of APBI. APBI is an association that is formed for the benefits of its members who are competitors for each other that aims to help the improvement and the interests of its members together and focuses more on the economic goals rather than the individual interests.<sup>6</sup>

Furthermore, APBI is also the site of the communication and information exchange among the company members of APBI. The Respondents as the members APBI fulfilled their duties to provide monthly raw data per category that tends to be confidential to APBI. Moreover, that confidential data could not be given to any party, even to the agencies, in this case are the government agencies. Based on that description, it indicates peculiarity and provides information that APBI acts as a facilitator related to the price fixing among the Respondents. That peculiarity defined that it is true that the data is confidential and cannot be accessed by any party, including government agencies, what are the purposes of APBI in collecting the raw data that tend to be confidential.<sup>7</sup>

There are two (2) types of meetings are known in the APBI, the Presidium Meeting; and Specific Team Meeting, which consists of the Standardization Team Meeting, Raw Materials Team Meeting, Tire Adjustment Team Meeting, Labour Team Meeting and the Technical Team

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<sup>6</sup> The Commission for the Supervision of Business Competition Verdict No. 08/KPPU-I/2014 page 24

<sup>7</sup> The Commission for the Supervision of Business Competition Verdict No. 08/KPPU-I/2014 page 26

Meeting. Furthermore, the results of each specific meeting will be reported in the presidium meeting that usually held once a month.<sup>8</sup>

APBI also asked the members to submit data on a regular basis that would be the material to make monthly report and annual report of APBI. The data submitted consists of:

- a. Monthly data: sales data, production data, OE, replacement, exports, and inventory.
- b. Annual data: sales plan, production plan and tax payment plan.<sup>9</sup>

The company data that is submitted to the APBI should not be accessed by another company, which is a competitor. However, the fact is the data can be accessed through the mechanism of APBI meeting. Through the action as described above, there was an information exchange among APBI members that supposed to compete each other.<sup>10</sup>

APBI routinely perform the activities to hold the meeting together among its members, both in the APBI internal event and meetings by inviting the third parties. Presidium meeting is a meeting that is held once in a month, attended by all President Director of APBI members and several times attended by relevant government officials. Presidium meeting is usually held at hotels and/ or other places that are written in the resume and reported in the next presidium meeting. The concept of the resume of APBI presidium meeting contains the ratification mechanism and agreement that are

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<sup>8</sup> The Commission for the Supervision of Business Competition Verdict No. 08/KPPU-I/2014 page 28

<sup>9</sup> The Commission for the Supervision of Business Competition Verdict No. 08/KPPU-I/2014 page 37

<sup>10</sup> *Ibid.*

conducted at the beginning of the meeting and approved by all APBI members.<sup>11</sup>

The matters that are discussed in the APBI Presidium Meeting are:

- a. Take joint actions to maintain conducive tire market conditions, by seeking a balance between demand and supply of tires in the country according to the Indonesian economy that is still in recovery in order to always be able to maintain fair competition among APBI members.
- b. Carry out joint efforts in improving service quality standardization tires, and public awareness of the importance of the use and the right maintenance of the tire, through Safety Campaign at the Toll Road in cooperation with PT Jasa Marga, Police and the Ministry involved also through public announcements in the media, leaflets and writing in the newspaper in efforts to protect consumers from the use of tires that are not worth them to be used.
- c. Seek remedies together toward the problems that arise, both internally and externally with consistently maintaining and prioritizing the harmony among the APBI members as a family. Such as joint problems in the field of employment, procurement of raw materials standardization and consumer protection.
- d. Make efforts to protect the tire industry development in the country from unfair competition structurally.<sup>12</sup>

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<sup>11</sup> *Ibid.*

<sup>12</sup> The Commission for the Supervision of Business Competition Verdict No. 08/KPPU-I/2014 page 38



Besides the APBI presidium meeting, APBI also holds the other meetings, that includes Sales Director Meeting, Marketing Director Meeting, TAC Technical Team, Raw Materials Team, Human Resources Development Team that is held by the APBI members. Furthermore, those teams as mentioned above are obliged to report the result of the meetings to APBI in order to be discussed in the APBI presidium meeting.<sup>13</sup>

The resume of APBI presidium meeting is always given to the APBI members, and then the resume is read for the approval at the next APBI presidium meeting. Furthermore, there is never disagreement or negative response from the APBI members related to the approval of the resume of APBI presidium meeting in the previous month that presented by the Chairman of APBI, but merely a question in the form of editorial errors.<sup>14</sup>

In the early of 2014, KPPU noticed the peculiarity that occurred in the tire sector. KPPU considered from year to year, the price of the tire tends to rise without any reason. It is considered strange, because based on the economic theory, the increasing of the price would be reasonable if it is followed by the rise of other factors, such as the rising raw material prices and rising labor costs. However, the price of tires in Indonesia continues to increase without being followed by the rise of other factors.<sup>15</sup>

Another peculiarity that perceived by KPPU is that increasing price was disproportionate to the production of tires by those six national car tire

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<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> <http://www.hukumonline.com/berita/baca/lt537c814db5b31/pt-bridgestone-tire-indonesia-disinyalir-berbuat-curang>, accessed on June 20, 2015 at 15.39

manufacturers. The Respondents are the largest tire manufacturers in Indonesia, where each year, those tire companies are active in producing tires and even tend to increase. It can be seen from the number of car sales that tend to increase smoothly from year to year, so the demand for tires was also the same.<sup>16</sup>

Based on the indications of unfair competition that were committed by the Respondents, KPPU conducted research and investigation reports with the alleged violation of Law No. 5 of 1999 related to price fixing and cartel. After the process carried out, and the first trial began on May 20, 2014, KPPU declared Respondents were proven violating Article 5 paragraph 1 and Article 11 of Law No. 5 Year 1994 on the Prohibition Against Monopolistic Practices and Unfair Business Competition through the verdict of the case with No. 08/KPPU-I/2014. KPPU also fined the Respondents as much as Rp 25.000.000.000,00.

#### **D. Summary of Decision**

In the The Commission for the Supervision of Business Competition Verdict No. 08/KPPU-I/2014, the Commission Council decided:

1. Declare that the Respondent I, Respondent II, Respondent III, Respondent IV, Respondent V and Respondent VI, are proven legally and convincingly violating Article 5 paragraph 1 of Law No. 5 of 1999;

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<sup>16</sup> *Ibid.*

2. Declare that the Respondent I, Respondent II, Respondent III, Respondent IV, Respondent V and Respondent VI, are proven legally and convincingly violating Article 11 of Law No. 5 of 1999;
3. Punish the Respondent I, to pay fine in the amount of Rp 25,000,000,000.00 (twenty five billion rupiah) that must be paid to the State Treasury as income deposit fine of violations in the field of business competition Unit Business Competition Supervisory Commission through the Government bank acceptance code 423755 (Income Fine of Violations in the Field of Competition);
4. Punish the Respondent II, to pay fine in the amount of Rp 25,000,000,000.00 (twenty five billion rupiah) that must be paid to the State Treasury as deposit income fine of violations in the field of business competition Unit Business Competition Supervisory Commission through the Government bank acceptance code 423755 (Income Fine of Violations in the Field of Competition);
5. Punish the Respondent III, to pay fine in the amount of Rp 25,000,000,000.00 (twenty five billion rupiah) that must be paid to the State Treasury as deposit income fine of violations in the field of business competition Unit Business Competition Supervisory Commission through the Government bank acceptance code 423755 (Income Fine of Violations in the Field of Competition);
6. Punish the Respondent IV, to pay fine in the amount of Rp 25,000,000,000.00 (twenty five billion rupiah) that must be paid to the

State Treasury as deposit income fine of violations in the field of business competition Unit Business Competition Supervisory Commission through the Government bank acceptance code 423755 (Income Fine of Violations in the Field of Competition);

7. Punish the Respondent V, to pay fine in the amount of Rp 25,000,000,000.00 (twenty five billion rupiah) that must be paid to the State Treasury as deposit income fine of violations in the field of business competition Unit Business Competition Supervisory Commission through the Government bank acceptance code 423755 (Income Fine of Violations in the Field of Competition);
8. Punish the Respondent VI, to pay fine in the amount of Rp 25,000,000,000.00 (twenty five billion rupiah) that must be paid to the State Treasury as deposit income fine of violations in the field of business competition Unit Business Competition Supervisory Commission through the Government bank acceptance code 423755 (Income Fine of Violations in the Field of Competition);

#### **E. Legal Issue**

Based on the description above, in the study context of this case, the statement of fact, and the summary decision, the legal issue arising from this case is about the validity of indirect evidence that determined by Komisi Pengawas Persaingan Usaha (KPPU) or the Commission for the Supervision of Business Competition Investigators in the KPPU verdict related to the tire

cartel on four-wheel vehicle products that was conducted by PT Bridgestone Tire Indonesia, PT Sumi Rubber Indonesia, PT Gajah Tunggal, Tbk., PT Goodyear Indonesia, Tbk., PT Elang Perdana Tyre Industry, and PT Industri Karet Deli.

#### **F. Legal Consideration**

The Commission Council of KPPU did legal consideration in this case that lead to the KPPU verdict number 08/KPPU-I/2014, with following considerations:

1. The evidences of violations of Law No. 5 Year 1999 on the Prohibition Against Monopolistic Practices and Unfair Business Competition that conducted by the Respondents, namely the resume of APBI presidium meeting that was held in January 2009 which contains some requests for the APBI members to present production, export, raw material use, selling reports, enforcement not to slash the tire price of Passenger Car Radial (PCR) Replacement Ring 13, Ring 14, Ring 15 and Ring 16 in the territory of Republic of Indonesia within period of 2009 to 2012, and also control the tire production.
2. The definition of Asosiasi Perusahaan Ban Indonesia (APBI) or Association of Indonesian Tire Producers that states an association formed for the benefit of its members who are competitors for each other that aims to help for progress and interests of its members

together and more focuses for economic goals than the individual interest. Furthermore, the Board of APBI as stipulated below.

Position	Board Name
The Chairman APBI	Drs. A. Azis Pane, MBA (PT Gajah Tunggal, Tbk.)
The Secretary General of APBI	Tjutju Dharmawan (PT Sumi Rubber Indonesia)
The Secretary of APBI	R. Tetty K. Supena
The Chairman of Wheel Coordinator Team 2	Harry Kalisaran (PT Gajah Tunggal, Tbk.)
The Chairman of Raw Material and Logistic Team	Renny Wibisono (PT Goodyear Indonesia, Tbk.)
The Chairmand of Technical for the Wheel Standardization Team 4	Agus Sarsito (PT Bridgestone Tire Indonesia)
The Chairmand of Technical for the Wheel Standardization Team 2	Hardjono (PT Gajah Tunggal, Tbk.)
The Chairman of Tyre Adjustment Committee (TAC)	Dwi Triono (PT Gajah Tunggal, Tbk.)
The Chairman of Human Resources Team	Sukirno (PT Bridgestone Tire Indonesia)
Export Communication Forum	William Gozali (PT Gajah Tunggal, Tbk.)

The Article of Association of APBI that obliges the APBI members to:

- a. Uphold the meaning, the purpose and the name of the association and the code of ethics association
- b. Implement and obey all decisions of the association
- c. Actively participate in the activities of the association
- d. Pay entrance fee, tuition and other donations that are required.

Moreover, the activities and the routines are conducted by APBI to conduct meetings among the members in both the internal event of APBI

and meetings by inviting third parties. Regular meetings of APBI members generally consist of several meetings; namely the team meetings as the Sales Director Meeting, Marketing Director Meeting, TAC Technical Team, Raw Materials Team, HRD Team and the Presidium Meeting that is held regularly every month.

3. The APBI Presidium Meeting that is defined as a meeting once a month, attended by all president director members of APBI, and several times attended by relevant government officials.
4. According to the provision of Article 1 Paragraph 10 of Law No. 5 Year 1999 on the Prohibition Against Monopolistic Practices and Unfair Business Competition, it is stipulated that the definition of relevant market is the market with regard to the range or specific area marketing by business actors for goods or services that are identical or similar, or substitution of goods and or services. On the basis of this provision, the relevant market includes products and geographical dimensions, which is relevant to the case, the relevant market in this case is as stated below.
  - a. Product Market, which in this case the product market is the tire for four-wheel vehicles that are used as passenger car tire for Ring 13, Ring 14, Ring 15, and Ring 16.
  - b. Geographic Market, which in this case the geographic market covers the entire territory of Indonesia, which is produced and marketed by the tire companies that are incorporated in APBI.

5. The definition of agreement based on Article 1 paragraph 7 on Law No.5 Year 1999 about the Prohibition Against Monopolistic Practices and Unfair Business Competition, which stipulates that an agreement is an act of one or more business actors to bind themselves to one or more other business actors with any name, whether it is written or unwritten.
6. The resume of APBI presidium meeting related to the price fixing, namely the consensus not to slash the tire prices of Passenger Car Radial (PCR) Replacement Ring 13, Ring 14, Ring 15, and Ring 16 in the territory of the Republic of Indonesia in a span of years 2009 to 2012 conducted by the Respondent I, the Respondent II, the Respondent III, the Respondent IV, the Respondent V, and the Respondent VI.
7. The resume of APBI presidium meeting related to the production arrangements and/ or marketing, namely the consensus to practice self-restraint and continue to control the tire distribution of Passenger Car Radial (PCR) Replacement Ring 13, Ring 14, Ring 15, and Ring 16 in the territory of the Republic of Indonesia within the period of 2009 to 2012 agreed upon and/ or approved by the the Respondent I, the Respondent II, the Respondent III, the Respondent IV, the Respondent V, and the Respondent VI.
8. The mechanism of making an agreement among APBI members in order to implement the activities and the APBI agreements. This is the reason why the Commission Council considered that presidium meeting is not a social gathering.



9. The impact of APBI agreement toward the product price.
10. The impact of APBI agreement toward the production and/ or marketing.
11. The impact of Industry Concentration and the agreement of APBI toward Price-Cost Margin (PCM).
12. The compliance of elements of Article 5 paragraph (1) of Law No. 5 Year 1999.
13. The compliance of elements of Article 11 of Law No. 5 Year 1999.
14. The tire production and/ or marketing of the four-wheel vehicle passenger car class for tire Ring 13, Ring 14, Ring 15, and Ring 16 in the period of 2009-2012 in Indonesian territory that is produced and marketed by the Tire Company in the Indonesian Tire Producers Association (APBI).
15. The domestic sales data of the APBI Annual Report that presented in the APBI Annual Report and Annual Report (Year To Date) PT MAS, Tbk.,

## **G. Legal Analysis**

Article 11 of Law No. 5 Year 1999 on the Prohibition Against Monopolistic Practices and Unfair Business Competition states:

"A business actor enters into an agreement with his business competitors to influence the prices by adjusting the production and or the marketing of the goods and or the services, which may result in monopolistic practices and or unfair business competition".

From the explanation above, it can be concluded that the regulation is consisting of nine elements, they are:

1. Business Actor

2. Agreement
3. Business Competitor
4. Intended to Influence the Price
5. Adjusting the Production and or the Marketing
6. Goods
7. Service
8. May Result in Monopolistic Practice
9. May Result in Unfair Business Competition

These below are the nine elements of cartel that set out in the Article 11 of Law No. 5 Year 1999 on the Prohibition Against Monopolistic Practices and Unfair Business Competition:

#### **1. Business Actor**

According to Article 1 Paragraph (5) of Law No. 5 Year 1999 on the Prohibition Against Monopolistic Practices and Unfair Business Competition, business actor is any individual or entity, whether a legal entity or non-legal entity established and domiciled or conducting activities within the jurisdiction of the Republic of Indonesia, either individually or together through agreements, conducting various business activities in the economic field.

- a. Individual or natural person (*natuurlijkepersoon*) is a legal subject.

Every natural person is the holder of a series of status or legal qualities, who concerns the individual per se (*status personae*), his appurtenance (*status familiae*), and his appurtenance to the state

(*status civitatis*), the combination of which goes to constitute his personality. Furthermore, the question of status of person is usually connected with that of his legal capacity and capacity to act.<sup>17</sup>

b. Legal person or legal entity is a body, other than a natural person, that can function legally, sue or sued, and make decisions through agents.<sup>18</sup>

1) The legal entities which include the corporate forms as followings:

a) Perseroan Terbatas (PT) or Limited Liability Company according to Article 1 Paragraph 1 of the Law No. 40 Year 2007 on the Limited Liability Company, is a legal entity which is a capital alliance, established under an agreement, engaged in business with a capital base that is entirely divided into shares and fulfilled the requirements that set out in the law and its implementing regulations.<sup>19</sup>

b) Koperasi or Cooperation according to Article 1 Paragraph 1 of the Law No. 25 Year 1992 is a legal entity that consists of individuals or cooperation legal entity, which bases its business based on the principles of cooperation and people's economic movement based on the principle of kinship.<sup>20</sup>

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<sup>17</sup> Ridwan Khairandy, 2012, *Private Law Handout*. Yogyakarta: Fakultas Hukum Universitas Islam Indonesia, page 6

<sup>18</sup> *Ibid.*

<sup>19</sup> Article 1 Paragraph 1 of the Law No. 40 Year 2007 on the Limited Liability Company

<sup>20</sup> Article 1 Paragraph 1 of the Law No. 25 Year 1992 regarding Cooperation

c) Badan Usaha Milik Negara (BUMN) or State-Owned Enterprises according to Article 1 Paragraph 1 of the Law No. 19 Year 2003 is a legal entity whose capital is owned entirely by the state through direct investments from the state assets that are separated.<sup>21</sup>

(1) Perusahaan Persero (Persero) or Limited Liability Company according to Article 1 Paragraph 2 of Law No.19 Year 2003 is a state-owned limited liability company whose capital is divided into shares entirely or at least 51% (fifty one percent) owned by the Republic of Indonesia with the purpose of seeking profit.<sup>22</sup>

(2) Perusahaan Umum (Perum) or Public Corporation according to Article 1 Paragraph 4 of Law No.19 Year 2003 is a state-owned enterprise whose capital is owned entirely by the state and do not divided into shares which aims at public interests in the form of providing high-quality service and also the seeking profit based on the principles of company management.<sup>23</sup>

d) Badan Usaha Milik Daerah or Regional-Owned Enterprises

2) The non-legal entities include the corporate forms as followings:

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<sup>21</sup> Article 1 Paragraph 1 of the Law No. 19 Year 2003 regarding State-Owned Enterprises

<sup>22</sup> Article 1 Paragraph 2 of Law No.19 Year 2003 regarding State-Owned Enterprises

<sup>23</sup> Article 1 Paragraph 4 of Law No.19 Year 2003 regarding Stated-Owned Enterprises

- a) Persekutuan Firma or Firm is a partnership that is established to run the company with joint name.<sup>24</sup>
- b) Persekutuan Komanditer (*Commanditaire Vennotschap*) or Limited Partnership is a limited partnership established by more than one person, consisting of one or more active partners and one or more passive partners, which act as the management of partnership and the others only contribute the capital (contributions) without involving in management. The existence of passive partners is the main characteristic of the CV as limited partnership.<sup>25</sup>
- c. The scope of application of the Law No. 5 Year 1999 on the Prohibition Against Monopolistic Practices and Unfair Business Competition is the maximum area of Republic of Indonesia only. However, the Commission has determined that the scope of application of the Law No. 5 Year 1999 on the Prohibition Against Monopolistic Practices and Unfair Business Competition is not only limited to the area of Republic of Indonesia where the business actors established and domiciled or conducting activities, but also the business actors who have legal standing outside the territory of Republic of Indonesia who conduct and have an impact on the competition in the market of Republic of Indonesia.

In the cartel, business actors who are involved in this agreement

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<sup>24</sup> Ridwan Khairandy, *Pengantar Hukum Dagang*, FH UII Press, Yogyakarta, 2006, page

<sup>25</sup> *Ibid*, page 27

should be more than two business actors. In order to reach a successful cartel, the cartel needs the involvement of the majority of business actors in the relevant market.

The Respondents, in this case namely PT Bridgestone Tire Indonesia, PT Sumi Rubber Indonesia, PT Gajah Tunggal, Tbk., PT Goodyear Indonesia, Tbk., PT Elang Perdana Tyre Industry, and PT Industri Karet Deli are car tire manufacturers that are incorporated in Asosiasi Perusahaan Ban Indonesia (APBI) or Association of Indonesian Tire Producers. This means, the Respondents are considered as the business actors.

## **2. Agreement**

According to Article 1 Paragraph (7) of Law No. 5 Year 1999 on the Prohibition Against Monopolistic Practices and Unfair Business Competition, Agreement is an act of one or more business actors to bind themselves to one or more other business actors with any name, whether it is written or unwritten. Based on the historical interpretation in *memorie van toelichting* (minutes of discussion) of Law No. 5 Year 1999, the legislators are known to have a will to broaden the definition of agreement in the Law No. 5 Year 1999. The expansion of the definition is intended, that the definition of agreement refers to, but not limited to the definition as stipulated as the definition of agreement in the Indonesian Civil Code.

Sudikno Mertokusumo states, an agreement is a legal act between two (2) or more parties based on a consensus to give rise to legal consequences.<sup>26</sup> An agreement contains rules or binding rights and obligations to be adhered to and implemented by both parties.

Whereas R. Soebekti states, an agreement is an event in which one party promises to another party to do something.<sup>27</sup>

Furthermore, Wirjono Prodjodikoro states that the definition of an agreement is a legal act regarding property between two parties in which one party promises or deemed promise to do something, while the other party has the rights to demand the implementation of the agreement.<sup>28</sup>

The agreement as stated in the Article 1313 of the Indonesian Civil Code reads, an agreement is an act of two or more persons binding themselves to one or more other persons.

This formulation is given to show that an agreement is:<sup>29</sup>

- a. An action
- b. Between at least two persons (can be more than two persons)
- c. The act of raising the obligation between the parties that promise.

The action that mentioned in the initial formulation of the Article 1313 of the Indonesian Civil Code wants to explain that the agreement is only possible if there is a real action, either in the form of oral, or

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<sup>26</sup> Sudikno Mertokusumo, 1996, *Mengenal Hukum (Suatu Pengantar)*, PT. Liberty, Yogyakarta, page 103

<sup>27</sup> R. Soebekti, 1992, *Aneka Perjanjian*, Citra Aditya, Bandung, page 1

<sup>28</sup> Wirjono Prodjodikoro, 1981, *Hukum Perdata Tentang Persetujuan-Persetujuan Tertentu*, Sumur Bandung, Jakarta, page 8

<sup>29</sup> Kartini Muljadi dan Gunawan Widjaja, 2003, *Perikatan Pada Umumnya*, PT. Raja Grafindo, Jakarta, page 7

physical action, and not merely in the form of thought. On this basis of this idea then known became known for consensual agreement, formal agreement and real agreement.

Dale Hutchinson et al *The Law of Contract in South Africa* defines a contract as an agreement entered by two or more persons with the intention of creating a legal obligation or obligations. This means that not all agreements between parties constitute a contract. A contract requires a serious intention in the part of the contractants to create a legally enforceable obligation called *animus contrahendi*.<sup>30</sup>

An expert, Nindyo Pramono in the Investigation Report states:

The resume of the presidium meeting is the result of *gesamtakt*. Thus, if the content of the resume of the presidium meeting is a recommendation and subsequently the presidium meeting participants obey the recommendation, this condition could not indirectly be considered as an agreement, establish a consensus in the resume of the presidium meeting but that consensus in the content that results an agreement.

*Gesamtakt* or joint action is consent of a group of people to establish a decision about a matter and the decision is binding all subjects of the law that related to the decision-making or all the members of the

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<sup>30</sup> “Law of Contract”,  
<https://www.ru.ac.za/media/rhodesuniversity/content/law/documents/10-students/2012courseoutlines/Law%20of%20Contract%20A.pdf>, accessed on 30 August, 2015 at 02.00



related group.<sup>31</sup>

a. Principles in Contract Law

In order to create a balance and maintain the rights possessed by the parties before the agreement is made into an obligation that binds the parties, the Indonesian Civil Code are given various general principles, which are the guidelines or benchmarks, and being the limits or signs in organizing and forming agreements which will be made up eventually to be an obligation that applies to the parties, which of the performance can be enforced. These below are the general principles of contract law that are set out in the Indonesian Civil Code:

1) The principle of *Pacta Sunt Servanda*

The principle that is set out in Article 1338 of the Indonesian Civil Code is all agreements made to be legally valid as law for those who make it.

The principle of *Pacta Sunt Servanda* is a logical consequence of the provisions of Article 1233 of the Indonesian Civil Code, which states that each of the obligation can be risen because of the laws or because of the agreement. So the agreement is the source of the obligation. As the obligation is made intentionally, the will of the parties voluntarily, everything that has been agreed and, approved by the parties should be

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<sup>31</sup> <http://rachmaddma2tt.blogspot.co.id/2012/12/fungsi-dan-tujuan-hukum-fungsi-atau.html>, accessed on March 3, 2016 at 19.08

implemented by the parties as desired by themselves. In case one of the parties in the agreement does not carry out the performance, then the other party in the agreement is entitled to enforce its implementation through the mechanisms and pathways of different laws.<sup>32</sup>

## 2) The principle of Freedom of Contract

Classical contract theory is emerged in the late nineteenth century to provide the foundation for the principles that govern the formation, performance, and enforcement of the bargain contract.<sup>33</sup> The theory insists that the unrestricted exercise of freedom of contract<sup>34</sup> between parties who possess equal bargaining power, equal skill, and perfect knowledge of relevant market conditions maximizes individual welfare and promotes the most efficient allocation of resources in the marketplace.<sup>35</sup>

The principle of freedom of contract is the legal basis in the formulation of Article 1320 paragraph 4 of the Indonesian Civil Code, which reads "a legal cause of the obligation (a permissible cause)".

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<sup>32</sup> Kartini Muljadi dan Gunawan Widjaja, *Op Cit.*, page 59

<sup>33</sup> See Lawrence M. Friedman, *Contract Law in America: A Social and Economic Case Study* (1965)

<sup>34</sup> See *Co. v. Sampson*, 19 L. R.-EQ. 462, 465 (M.R. 1875)

<sup>35</sup> This notion that the exercise of freedom of contract contributes to both individual and community

With the principle of freedom of contract, the parties who made and entered into an agreement is allowed to draw up and make an agreement that gives rise to any obligation, during and throughout performance that must be done is not a prohibited cause, the provisions of Article 1337 of the Indonesian Civil Code which states that a cause is not permissible if it is prohibited by law, or if it violates good conduct, or public order.

Basically all the agreements can be created and organized by everyone. Only agreements that contain performance on either party who violates the norms and public order are prohibited.<sup>36</sup>

The source of freedom of contract is the freedom of the individual, so that the starting point is the individual interests as well. Thus, it is understood that the freedom of the individual gives him the freedom to contract.<sup>37</sup>

### 3) The Principle of Consensualism

Based on the provisions of Article 1320 of the Indonesian Civil Code, generally agreement and obligation that arise have been set up since the consent accomplished.

Applicability of the principle of consensualism according to Indonesian Contract Law is to make firm the

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<sup>36</sup> Ibid., page 46

<sup>37</sup> Rosa Agustina T. Pangaribuan, 2003, *Asas Kebebasan Berkontrak Dan Batas-Batasnya dalam Hukum Perjanjian*, (www.theceli), page 1

principle of freedom of contract. Without the consent of one party, the agreement would be canceled. People could not be forced to give his consent. A consent that is given by force, is a *contradictio interminis*. Duress indicates the absence of consent which might be carried out by the party to give him a choice, whether to agree to bind themselves to the agreement, or disagree to bind themselves to the agreement with the result that the desired transaction did not take place (take it or leave it).

#### 4) The Principle of Complementary (Optional)

This principle is stipulated in Book III to the Indonesian Civil Code, that the provisions of the Act might not be followed, excluded, deviated from the provisions of the Act by the parties that promise.

#### 5) The Principle of Personality

Based on the provisions of Article 1315 of the Indonesian Civil Code, In general, an individual can commit only himself or agree to something on his own behalf.<sup>38</sup>

#### 6) The Principle of Obligatoir

The principle of obligatoir can be defined as an agreement that has been made and legally binding after the consent accomplished by both parties. Thus, the agreement is

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<sup>38</sup> Article 1315 of the Indonesian Civil Code

still on the phase of arising the rights and obligations between the parties.

b. The Conditions of Contract

For a valid agreement, an agreement shall fulfill the four conditions of the validity of an agreement based on Article 1320 of the Indonesian Civil Code, namely:

1) The consent of the parties undertaking the contract

Both parties in an agreement must have the will which is free to bind himself and the will has to be declared, this declaration can be done explicitly or implicitly. Free will as the first condition for an agreement will be considered invalid if it has been occurred because of duress (*dwang*), mistake or misperception (*dwaling*), fraud (*bedrog*), or undue influence (*misbruik van omstandigheden*) based on Article 1321 of the Indonesian Civil Code.<sup>39</sup>

- a) Any action, which is unfair, or threats that hinder the freedom of the will is considered as duress (*dwang*). In this case, any action or threat which violates the law if the action is a misuse or abuse of the authority of one of the parties to conduct a threat, which is any threat that aims to eventually the other parties give their rights, powers or privileges. Duress (*dwang*) can be either crime or the threat of crime, imprisonment or threat of imprisonment, confiscation and unauthorized possession, or the threat of

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<sup>39</sup> R.Subekti, 1979, *Pokok-Pokok Hukum Perdata*, PT.Intermesa, Jakarta, page 11

foreclosure or possession of an object or the ground which is conducted illegally, and any other action that violates the law, such as economic pressure, physical and mental suffering, cause a person in a state of fear, and so on.

b) Mistake or misperception (*dwalling*) can be defined as a party or several parties who have a wrong perception of the object or subject that contained in the agreement. There are two (2) kinds of mistakes; the first is error in persona, which means that the error is on the person. For instance, an agreement made by a popular artist, however, the agreement was actually made by a non-popular artist because they have similar name. The second is error in substantia, which means that the error is related to the characteristics of the object. For example, a person who bought a Basuki Abdullah's painting, but then after he arrived at his house, he realized that the painting that he had bought is an imitation painting of the Basuki Abdullah's painting.

c) Fraud (*bedrog*) is a trickery action. According to Article 1328 of the Indonesian Civil Code explicitly states that fraud is form grounds for nullification of an agreement, if the fraud by one party is of such nature that is apparent that the other party would never have concluded the agreement that is not for such deceit. Fraud is not presumed, but must be proven. The contract, which has an element of fraud, will not cause the contract null and

void, but the contract can only be cancelled or voidable. This means that as long as the party who suffers losses and damages does not demand to the competent court, the contract is still valid.

- d) Undue influence (*misbruik van omstandigheden*) occurs when a party moves due to some circumstances (*bijzondere omstandigheden*) in order to conduct a legal action, however, the other parties abuse these circumstances. Undue influence is related to the process in the preliminary agreement, which is when there is a party that is socially and economically weak and is abused by the other parties through the agreement. Because of the social and economical weak condition, this party does not own the free will in forming the agreement. Free will is not be fulfilled due to the social and economic condition, and this involves the principle of contract law, namely the principle of freedom of contract which requires the free will of the parties to enter into the agreement.

The resume of presidium meeting that was held on April 28, 2009 at Grand Melia Hotel was led by the Chairman of APBI and was attended by the members of APBI. The resume conveyed by seeing the tendency of sales during three months in 2009, concluded that the export sales of four-wheel tires was foreseen to fall steeply. Therefore, the all members of APBI were assigned to restraint and continue to

control the distribution.

The resume of presidium meeting that was held on May 26, 2009 at Nikko Hotel, which was chaired by the Chairman of APBI and was attended by the members of APBI. In the resume of presidium meeting contained this following clause:

- a) Whereas it was presented regarding the APBI Marketing Directors Meeting on May 25, 2009 which informed the domestic tire market trends
- b) Whereas the demand to all members of APBI for restraint and continue to control the distribution and keep the market conditions remain favorable in accordance with the development of tire demand

Based on the resume of APBI presidium meeting that was held on January 26, 2010 at Nikko Hotel in Jakarta, which was chaired by the Chairman of APBI and was attended by the members of APBI. In the resume of presidium meeting consisted this following clause:

- a) In 2009, we have been through several difficulties, but with the good cooperation among all members of APBI, the troubles could go through. Many things can be learned and be an experience to be able to fight the problems that exist, so that each member of APBI is still able to survive, and the existence of APBI which can be better than the previous year. We would like to thank the entire presidium and board, and chairman of the respective teams, which



have provided good understanding and cooperation to all members, so that all the existing problems can be solved well as it should be.

- b) We ask to the Chairman of the Team and the members of APBI to submit the report on its activities, either production, sales or export as the basis for writing the APBI report of 2009 (in accordance with the letter AS-107 dated November 23, 2009) which then would be conveyed to the Government and relevant agencies as Annual report, so that the existence of National Tire Industry can be secured.
- c) To all APBI Members, once again, is requested to restraint and continue to control the distribution and keep the market conditions remain favorable in accordance to the development of the tire demand.
- d) We are going to face 2010, the year that is expected to be better than 2009. However, the potential market disruptions is inevitable, notably the entry into force of the ASEAN-China FTA on January 1, 2010.

Furthermore, in the Presidium Meeting that was held on February 25, 2010 at Nikko Hotel, which was chaired by the Chairman of APBI and was attended by the members of APBI. In the resume of the presidium meeting contained this following clause:

- a) The situation in the domestic tire market is quite stable in the first

two months of 2010. According to the APBI Sales Director's Meeting that was held at BS yesterday, security measures will be taken jointly by the respective companies so that the market stability can be continuously maintained.

- b) Whereas in the presidium meeting that was held on February 25, 2010 at Nikko Hotel, it was announced the result of the APBI Sales Director's Meeting which contained the discussions regarding security measures which will be taken jointly by each company so that the market stability can be continuously maintained.

The Commission Council concluded that the sequence of presidium meetings above are the efforts of the Respondents to arrange the production and/ or the marketing in the *a quo* case. Furthermore, the Commission Council also agreed with the expert witness testimony from Andi Fahmi that states when discussing the Article 11 of Law No. 5 Year 1999 related to the arrangement of production, it is not necessarily in the form of specific quotas but can be an agreement to determine the output of the respective business actors. The arrangement of the production in question does not have to precise in one value of production.<sup>40</sup>

Therefore, the sequence of presidium meetings above, which attempted to arrange the production and/ or the marketing, are

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<sup>40</sup> The Commission for the Supervision of Business Competition Verdict No. 08/KPPU-I/2014 page 133

considered as the consent of the parties in undertaking the contract.

## 2) Capacity enter into contract

The existence of the capacity to act before the law is the second subjective condition of the formation of the valid agreement between the parties. The capacity to act in many ways related with issues of authority to act before the law.<sup>41</sup>

The authority of the individual acts before the law, according to the doctrine of jurisprudence that develops can be divided into:

- a) The authority to act for and on behalf of himself, that is related with his capacity to act before the law;
- b) The authority to act as the attorney of the other party;
- c) The authority to act in his capacity as guardian or representative of the other party;
- d) The ability and the authority to act in the framework of action for personal self interest. The following individuals are incompetent enter into an obligation:

(1) Minors;

(2) Individuals under guardianship;

(3) Married woman in the events that is stipulated by law and generally, all individuals who are prohibited by law to enter into certain obligations.

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<sup>41</sup> Kartini Muljadi dan Gunawan Widjaja, *Op.Cit.*, page 143

In the relation to the minimum age limit to act before the law, the Law No. 2 Year 2014 on the Position of Notary has been explained in the Article 39 Paragraph 1, which states that the requirement to be a party is at least age 18 (eighteen) years or has been married and legally competent. Thus, from the provision of the Article, it has declared that the age of 18 years is considered competent and mature to perform legal acts without the help of parents or guardian.<sup>42</sup>

The presidium meeting is a meeting that is held once in a month, attended by all President Director of the companies, which are members of APBI, and several times attended by relevant government officials. However, in the practice, the presidium meetings mostly are not attended by the president directors.

Agus Setiyanegara is a corporate secretary of the Respondent IV who had attended the Presidium Meeting. Furthermore, Agus Sarsito is a technical advisor of the Respondent I. The testimony of the Respondent III at the trial that was held on November 4, 2014 and the testimony of witness Daniel Yung Kwang Tjie in the trial that was held on August 25, 2014, it has been proven that the Board of Directors of the Respondent III (as the person who is authorized to act on behalf of the Respondent III) is rarely present in the APBI meetings, either in the presidium

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<sup>42</sup> Ningrum Puji Lestari, “Kecakapan Bertindak Dalam Melakukan Perbuatan Hukum Setelah Berlakunya Undang-Undang No. 30 Tahun 2004 Tentang Jabatan Notaris”, <https://core.ac.uk/download/files/379/11718062.pdf>, accessed on February 27, 2016 at 16.40

meeting or in any other activities that are held by APBI. Moreover, the employee of the Respondent III was the person who is often present in the meetings of the APBI.

Regarding the attendance of the meetings of the APBI, the member of the Board of Directors had never given the letter of attorney to represent and act on behalf of the Respondents to the employees. Furthermore, the member of the Board of Directors had never involved the employees in an agreement.

The representative of the Respondent IV who attended the presidium meeting is not a director but employee below the director. The Respondent IV states that the presidium had never considered important to attend. In addition, there is no formal procedure to appoint a person or an employee to attend the presidium meeting; it merely depends on who is available at that time and who is interested to enjoy a delicious lunch. There is no delegation of authority to represent the Respondent.

The representative of the Respondent VI was solely person who was ordered to 'eat delicious food', because they did not have the legal authority in any form to represent their company in enter into the agreement, which binds the company.

According to company law, a person's capacity to represent the company in certain legal actions on behalf of the company, includes signing an agreement, and any others are stipulated in

Article 98 paragraph (1) and (2) and Article 103 of Law No. 40 Year 2007 on the Limited Liability Company.

Article 98 paragraph (1) and (2) of Law No. 40 Year 2007 on the Limited Liability Company states:

- (1) The Board of Directors represents the company both inside and outside of the court.
- (2) In the case of the members of the Board of Directors is composed of more than 1 (one) person, each member of the Board of Directors is authorized to represent the company, unless otherwise provided in the articles of association.<sup>43</sup>

Article 103 of Law No. 40 Year 2007 on the Limited Liability Company states:

“The Board of Directors may give the power of attorney to 1 (one) of the company's employee or more or to any other person on behalf of the company to engage in certain legal actions as described in the power of attorney.”<sup>44</sup>

If the APBI meeting is considered as an agreement by KPPU Investigators, the resume of the meeting shall be agreed or signed by individuals who have the capacity or obtain the power of attorney from the company to bind the company in an agreement. If those persons do not have the authorization of the company to represent the company in an agreement, then the agreement solely applies only to themselves but not to the company.

Despite the absence of the authorization of the company to represent the company in agreement, the companies still conducted

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<sup>43</sup> Article 98 paragraph 1 and 2 of Law No. 40 Year 2007 on the Limited Liability Company

<sup>44</sup> Article 103 of Law No. 40 Year 2007 of Law No. 40 Year 2007 on the Limited Liability Company

the agreement on the ground. This action might lead to a conclusion that Board of Directors agreed to the resume of APBI Presidium Meeting. It is revealed from the rapid increase of tire sales trends of Passenger Car Radial (PCR) Replacement Ring 13, Ring 14, Ring 15 and Ring 16 which are appropriate with the clause that is stipulated in the resume of APBI presidium which states a prohibition for APBI members to slash the tire prices in the Indonesian market. In addition, the prohibition for APBI members to slash the tire prices in the Indonesian market is defined as the increasing price of the tire.

The persons who attend the APBI presidium meetings must be 18 years old or more and categorized as competent to enter into contract. Nevertheless, they are not authorized to act or represent the company. In spite of the lack of capability to represent the company, the companies consistently carried out the agreement, which means that the persons are considered competent and capable by the Board of Directors of the companies themselves.

- 3) A certain object which forms the subject matter of the undertaking the contract (certain subject)

Indonesian Civil Code describes certain subject by providing formulation in the Article 1234 of the Indonesian Civil Code, which states intended obligation to give something, to do something or not to do something.

An agreement that is agreed has to be an object or a matter that is sufficiently clear or specific. This condition is required in order to determine the obligations of the party if there is a dispute. Goods that are referred to the agreement have to be at least specified. Whereas the goods already exists or was already in the hands of the party at the time the agreement is made, are not required by law. Mentioning the amount is not required as well, if it can be calculated or determined later.

The condition that a performance shall be certain or can be determined is to define the rights and obligations of both parties, if the dispute arises in the implementation of the agreement. If the performance is felt unclear, which led to which can cause the agreement cannot be implemented, it is considered that there is no object of the agreement and the legal consequences of the agreement are null and void.<sup>45</sup>

The certain object in the *a quo* case is the clause within the resume of APBI presidium meeting that was held in January 2009 which assigned the APBI members to present production, export, raw material use, selling reports, and not to slash the tire prices of Passenger Car Radial (PCR) Replacement Ring 13, Ring 14, Ring 15 and Ring 16 in the territory of Republic of Indonesia within period of 2009 to 2012.

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<sup>45</sup> Rosa Agustina T. Pangaribuan, *Op.Cit.*, p.1



4) A legal cause of the contract (a permissible cause)

Furthermore, the law requires the existence of a legal or permissible cause for the validity of an agreement. According to Article 1335 of the Indonesian Civil Code, an agreement that does not contain a permissible cause or made with a counterfeit or prohibited cause will have no power. According to explanation above, it is clearly obvious that practically almost none of agreements has no cause. A cause that contains counterfeit is an agreement that is made with solely by pretending, in order to hide the real cause that is prohibited.

Moreover, based on the Article 1337 of the Indonesian Civil Code, there is a cause that is also prohibited, which is contrary to law, morals and public order.

Regarding the object of the agreement further stipulated in Article 1332 of the Indonesian Civil Code which states that only goods can be traded that can be the subject of an agreement. Thus, according to this Article, only goods that have economic value can be the object of an agreement.

A certain object and a permissible cause are objective conditions, thus if one of these conditions is not fulfilled in the agreement, then the legal consequence toward the agreement that is made is null and void (*nietigbaar*). Furthermore, the agreement that is made is considered never exist or made before the law, and the

parties who entered into the agreement have no rights to demand the compensation to each other.

However, the provision that is stipulated in the Article 1320 of the Indonesian Civil Code can not be applied to measure the legitimate requirements of the agreement in the context of Law No. 5 Year 1999. The agreement in the context of Law No. 5 Year 1999 certainly will never meet the conditions of contract as stated in the Article 1320 of the Indonesian Civil Code.

Substantially, Law No. 5 Year 1994 on the Prohibition Against Monopolistic Practices and Unfair Business Competition consists of 3 (three) parts, namely: the prohibited agreement, the prohibited activities, and the dominant position. Furthermore, the infringement in the *a quo* case that is conducted by the Respondents is included in the prohibited agreement, namely Article 11 of Law No. 5 Year 1994 on the Prohibition Against Monopolistic Practices and Unfair Business Competition. Thus, it does not fulfill the condition of a legal cause of the obligation or permissible cause.

### **3. Business Competitor**

Business competitor is another business actor in the similar relevant market that performs the agreement. According to the provision of Article 1 paragraph 10 of Law No. 5 Year 1999 on the Prohibition

Against Monopolistic Practices and Unfair Business Competition, the definition of relevant market is stated below:

“Relevant market is the market with regard to the range or specific area marketing by business actors for goods or services that are identical or similar, or substitution of goods and or services”.

On the basis of this provision, the relevant market includes products and geographical dimensions, which is relevant to the case, the relevant market in this case is as stated below.

- a. Product Market, which is in this case the tire for four-wheel vehicles that are used as passenger car tire for Ring 13, Ring 14, Ring 15, and Ring 16.
- b. Geographic Market, which is in this case covers the entire territory of Indonesia, which is produced and marketed by the tire companies that are incorporated in APBI.

Thus, the similar relevant market in the *a quo* case is the tire Passenger Car Radial (PCR) Replacement Ring 13, Ring 14, Ring 15, and Ring 16 in the territory of the Republic of Indonesia within the period 2009 to 2012. The business actors who compete each other in the relevant market and carry out the agreement in this case are the Respondent I (PT Bridgestone Tire Indonesia), the Respondent II (PT Sumi Rubber Indonesia), the Respondent III (PT Gajah Tunggal, Tbk.), the Respondent IV (PT Goodyear Indonesia, Tbk.), the Respondent V (PT Elang Perdana Tyre Industry), and the Respondent VI (PT Industri Karet Deli).

#### 4. Intended to Influence the Price

As formulated in the Article 11 of Law No.5 Year 1999, cartel is intended to affect the price. In order to achieve this objective, the cartel members agreed to organize the production and or marketing of the goods and or the services.

The following is a tire sales trends of Passenger Car Radial (PCR) Replacement Ring 13, Ring 14, Ring 15 and Ring 16 which is the object of this case:

Size	2007	2008	2009	2010	2011	2012
IKD 13- 16	59,926	62,577	63,317	119,375	201,026	185,890
APB I 13- 16	5,507,0 00	6,558,529	6,387,012	8,011,686	8,765,301	10,118,0 52

From the table above, the data show that the production value of PT Industri Karet Deli on the domestic market Passenger Car Radial (PCR) Replacement Ring 13, Ring 14, Ring 15 and Ring 16 has the same rising trend as the production of APBI members in the domestic market Passenger Car Radial (PCR) Replacement Ring 13, Ring 14, Ring 15 and Ring 16. A difference merely occurred in 2012 when PT Industri Karet Deli experienced a downward trend while APBI members still had an upward trend of sales. This has shown that PT Industri Karet Deli had been following the consensus for arranging the production and the marketing of APBI.

In this case, the Respondents are proven legally and convincingly intended to influence the price through a collective consensus to conduct self-restraint and control the distribution of tire Passenger Car Radial (PCR) Replacement Ring 13, Ring 14, Ring 15, and Ring 16 in the territory of the Republic of Indonesia within the period 2009 to 2012 which had been agreed and/ or approved by the Respondent I, the Respondent II, the Respondent III, the Respondent IV, the Respondent V, and the Respondent VI as stipulated in the resume of APBI presidium meeting. This arrangement of the production and/ or the marketing of the goods is considered to affect the price.

#### **5. Adjusting the Production and or the Marketing**

Adjusting the production is defined as the determination of the bulk of the production either for the cartel as a whole or for each member. This matter can be larger or smaller than the company's production capacity or the demand for the goods or services concerned. On the other hand, adjusting the marketing is defined as the arrangement of the amount that will be sold and or regions where the members sell their products.

Adjusting the production and/ or marketing of the goods and/ or the services in this case is the concerted action to restrain and control the distribution of tire Passenger Car Radial (PCR) Replacement Ring 13, Ring 14, Ring 15, and Ring 16 in the territory of the Republic of

Indonesia in the maturity of 2009 to 2012 that had been agreed and/ or approved by the Respondent I, the Respondent II, the Respondent III, the Respondent IV, the Respondent V, and the Respondent VI as stated in the resume of APBI presidium meeting.

## **6. Goods**

According to Article 1 Paragraph 16 of Law No. 5 Year 1999 on the Prohibition Against Monopolistic Practices and Unfair Business Competition, goods can be defined as any object, whether tangible or intangible, whether movable or immovable, which can be traded or used by consumers or business actor.

- a. Tangible goods can be defined as the goods, which are tangible and can be captured with the five-senses. For instance, land and car.
- b. Intangible goods can be defined as some certain rights, which can be made into rights of ownership. For instance, debt, shares, and intellectual property rights.
- c. Movable goods are defined by exclusion, namely, as all things that are not immovable.
- d. Immovable by nature which are those things normally can not move from one place to another without altering their structure and nature. Those things that are specifically deemed to be immovable.

Goods in the *a quo* case are the tire Passenger Car Radial (PCR) Replacement Ring 13, Ring 14, Ring 15, and Ring 16 in the territory of the

Republic of Indonesia within the period of 2009 to 2012.

## **7. Service**

According to Article 1 Paragraph (17) of Law No. 5 Year 1999 on the Prohibition Against Monopolistic Practices and Unfair Business Competition, service is defined as any service in the form of work or performance that is traded in the society to be used by consumers or business actor.

## **8. May Result in Monopolistic Practice**

According to Article 1 Paragraph (2) of Law No. 5 Year 1999 on the Prohibition Against monopolistic Practices and Unfair Business Competition, monopolistic practice is a concentration of economic power by one or more business actors that causes the control of the production and or marketing of goods and or services which raises the unfair competition. The existence of the cartel creates a condition where the production and or the marketing of goods and or services will be controlled by the cartel members. Because the achievement of high profits is the ultimate goal of the cartel, this action will harm the public interest.

In terms of the impact, the thing that could harm the public interest is the inefficiency and the increase of the price, which harm the consumers.

There is a high concentration of industries characterized by high CR4<sup>46</sup> or HHI<sup>47</sup> on tires of Passenger Car Radial (PCR) Replacement Ring 13 and 15 which gives negative effect on technical efficiency, whereas for tires of Passenger Car Radial (PCR) Replacement Ring 14 are only characterized by high HHI also negatively affect the technical efficiency. This leads to inefficiencies that result losses in the consumer side, meanwhile the Respondents in the *a quo* case that should be competing each other and be efficient precisely did not happen.<sup>48</sup>

Inefficiency as described above, is reinforced by the Price-Cost Margin (PCM). Price-Cost Margin is one of the methods that can be approached for ascertaining whether a price is above what exist in a competitive market.<sup>49</sup> The Price-Cost Margin was increased after the APBI presidium meeting that was held in January 2009. This has indicated that the companies had gained excess profits on the tires of Passenger Car Radial (PCR) Replacement Ring 13, 14 and 15.

Even though the tires of Passenger Car Radial (PCR) Replacement Ring 16 of the Respondents used efficiency for compete, but the influence of the consensus in the APBI presidium meeting toward the Price-Cost Margin was positive. This matter has indicated that the consensus of the Respondents to encourage the increasing of Price-Cost

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<sup>46</sup> CR4 is defined as the amount of market segmentation of four largest companies

<sup>47</sup> HHI (*Herfindahl-Hirschman Index*) is defined as a good indicator to see whether structurally, certain market encourages the existence of a cartel

<sup>48</sup> The Commission for the Supervision of Business Competition Verdict No. 08/KPPU-I/2014 p. 229

<sup>49</sup> *Ibid.*



Margin (PCM) through increasing the price on the Passenger Car Radial (PCR) Replacement Ring 16.<sup>50</sup>

## **9. May Result in Unfair Business Competition**

According to Article 1 Paragraph (6) of Law No. 5 Year 1999 on the Prohibition Against monopolistic Practices and Unfair Business Competition, unfair business competition is competition among business actors in the activities for the production and/ or marketing of goods or services that are conducted dishonestly, or unlawfully, or restrict business competition.

Cartel is a collusion or collaboration of the business actors. Therefore, all the benefits of the cartel are merely intended for the benefit of its members, so that their actions have been done unhealthily and dishonestly. In this case, it reduces the production or unlawful or restricting the business competition, for instance by fixing the prices or zoning.

The Respondents have conducted unfair business competition by conducting a deal to arrange the production and the marketing of tires. PT Bridgestone Tire Indonesia, PT Sumi Rubber Indonesia, PT Gajah Tunggal Tbk., PT Goodyear Indonesia, Tbk., PT Elang Perdana Tyre Industry, and PT Industri Karet Deli agreed to hold the marketing of new

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<sup>50</sup> *Ibid.*

tires, thus the supply of tires on the market would be limited. As the result, the tire prices could increase because of the demand on the tires.

## **H. Conclusion**

Based on the research, it is concluded that the validity of indirect evidence in the form of resume of APBI presidium meeting that was held in January 2009 in Komisi Pengawas Persaingan Usaha (KPPU) or The Commission for the Supervision of Business Competition Verdict No. 08/KPPU- I/2014 related to the cartel of tires on four wheel vehicle products that was conducted by PT Bridgestone Tire Indonesia, PT Sumi Rubber Indonesia, PT Gajah Tunggal, Tbk., PT Goodyear Indonesia, Tbk., PT Elang Perdana Tyre Industry, and PT Industri Karet Deli is valid. In this case, the resume of APBI presidium meeting that was held in January 2009 is also followed by other evidences that were included in the indirect evidences, namely the economic and the communication evidences. Furthermore, the economic evidences consist of a high concentration of industries characterized by high CR4 or HHI on tires of Passenger Car Radial (PCR) Replacement Ring 13 and 15 gave negative effect on technical efficiency and the increasing of Price-Cost Margin after the APBI presidium meeting that was held in January 2009. On the other hand, the communication evidences consist of the sequence of presidium meetings that were started from April 28, 2009 until February 25, 2010.

Based on the existence of those indirect evidences, it can be

concluded that there is a set of conducts of business actor to bind himself to the other business actors (concerted action). Moreover, during the trial there is also expert witness testimony, which has taken an oath and can be considered as evidence.

