LEGAL ANALYSIS IN THE IMPLEMENTATION OF PER SE ILLEGAL AND RULE OF REASON APPROACHES IN COOKING OIL CARTEL

THESIS

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INTERNATIONAL PROGRAM

UNDERGRADUATE LAW STUDY PROGRAM

FACULTY OF LAW

UNIVERSITAS ISLAM INDONESIA

2023

LEGAL ANALYSIS IN THE IMPLEMENTATION OF PER SE ILLEGAL AND RULE OF REASON APPROACHES IN COOKING OIL CARTEL

THESIS

Presented as the Partial Fulfilment of the requirements to Obtain a

Bachelor's Degree at the Faculty of Law

Universitas Islam Indonesia

Yogyakarta

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Student Number: 19410008

INTERNATIONAL PROGRAM

UNDERGRADUATE STUDY PROGRAM IN LAW

FACULTY OF LAW

UNIVERSITAS ISLAM INDONESIA

2023

PAGE OF APPROVAL

بسم الله الرحمن الرحيم

A BACHELOR'S DEGREE THESIS

LEGAL ANALYSIS IN THE IMPLEMENTATION OF PER SE ILLEGAL AND RULE OF REASON APPROACHES IN COOKING OIL CARTEL

Has been examined and approved by the Thesis Language Advisor to be submitted by the Board of Examiners at the Thesis Examination

on October 02, 2023

Yogyakarta, 04th October 2023

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LEGAL ANALYSIS IN THE IMPLEMENTATION OF PER SE ILLEGAL AND RULE OF REASON APPROACHES IN COOKING OIL CARTEL

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Yogyakarta, September 30, 2023
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MOTTO

وَلَا تَقْتُلُوْا اَنْفُسَكُمْ ,اِنَّ اللهَ كَانَ بِكُمْ رَحِيْمًا

This thesis is wholeheartedly dedicated to:

My beloved family, Umi Abi Faiza Alzam Kiya.

Alma mater, Universitas Islam Indonesia.

Myself and you.

ACKNOWLEDGEMENT

Alhamdulillahirabbil'alamin, all praise and gratitude to Allah Subhanallahu wa ta'ala, the Most Beneficent and Most Merciful, for His love and blessings that has been given in all my life, especially during the creation of my thesis titled, **Legal Analysis in The Implementation of Per Se Illegal and Rule of Reason Approaches in Cooking Oil Cartel.** Shalawat and Salam shall be granted to Prophet Muhammad Shallallahu 'alaihi wasallam, for bringing all humankind to a brighter era.

This thesis is written and prepared to fulfil the academic requirements for obtaining a Bachelor's degree (S1) in Law from the Faculty of Law, Universitas Islam Indonesia. The author understands there are many shortcomings in this writing and it is so far from perfect. Therefore, the author is open to and welcomes any constructive criticism and suggestions for the improvement of the learning process in the future.

During the process of making this thesis, the author realized that the thesis will never be finished without any contribution, assistance, guidance, and support from various parties. All gratitude shall be honoured to:

1. **Allah SWT,** The First and Foremost, The One and Only Lord, because of His *rahmat, hidayah and innayah* the author can finish this thesis properly.
2. **Prof. Fathul Wahid, S.T., M.Sc., Ph.D.,** as the Rector of Universitas Islam Indonesia.

3. **Prof. Dr. Budi Agus Riswandi, S.H., M.Hum.,** as the Dean of Faculty of Law Universitas Islam Indonesia.
4. **Dr. Siti Anisah, S.H., M.Hum.,** as my thesis advisor, who have provided direction, guidance and advice during the process of preparing the final assignment so that I can complete this thesis.
5. **All lecturers,** who have taught and guided me to complete my study. I am grateful for all the knowledge and guidance that has been given to me during my college studies.
6. My Parents**, Umi, Abi,** for the undying support, love, and prayers. I truly thank you for everything. If it were not for you, I would be nothing.
7. **Zulfia Rahmaputri, Novia Aulya Rahmadanti, Syahda Salsabilla**, who always accompanied me, listening to my complaints and sharing laughter together.
8. **Shalsa Tiya Prastika, Aninda Nofarija Dziktiara,** who always been the dearest friends.
9. **Azzahra Salsabil Sukma,** thank you for surviving this far, for fighting as hard as you can. You are great and enough. I am proud of you.
10. All parties who have not been mentioned one by one in providing support and assistance during the process of completing this thesis.

Finally, the author realized that there are still a lot of things that need to be improve, hence any kind of suggestion will be gladly accepted and considered for better future knowledge. Hopefully this thesis can be useful for anyone who reads this.

Yogyakarta, October 4th, 2023

Author,

Azzahra Salsabil Sukma

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ABSTRACT

Cartels are classified as serious violations of competition law because they affect price volatility, which in turn affects consumers' purchasing power. Law no 5 of 1999 regulates about monopolistic practices and unfair business competition which then obliged all business actors to implement a fair business activity. But still there are some people who don't complying the regulation like the occurrence of cases of alleged violation of Article 5 and Article 19 letter c of Law Number 5 Year 1999 which involved 27 palm oil companies producing cooking oil with the discovery of 1.1 million litters of cooking oil stockpiled in a storage warehouse in Deli Serdang. With problem formulation, namely, why the KPPU stated all the reported cooking oil producers are not proven to have committed a cartel and how to implement the per se illegal and rule or reason approaches in this case. This research uses normative method with 3 approaches that is statute approach, case approach, and conceptual approach. This study concludes that KPPU decided that the reported parties were not proven to have violated the law since there are elements of the article that are not fulfilled. For the implementation of approach in article 5 uses a per se illegal approach, which means that the action is deemed to have violated fair business competition without the need for further analysis. Meanwhile, Article 19c which uses the rule of reason approach requires further evaluation of actions that were violated by business actors, consideration, and determination of whether these actions impede competition by showing the consequences for other business actors or the general economy.

Keywords: *Cooking Oil Cartel, Per Se Illegal, Rule of Reason.*

CHAPTER I

INTRODUCTION

A. Context of Study

Cartel practices in Indonesia are legally prohibited. It is regulated and written in Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, which was promulgated on March 5, 1999 and came into force one year later. In general, the material for Law Number 5 of 1999 contains 6 regulatory sections consisting of prohibited agreements, prohibited activities, dominant positions, the Commission for the Supervision of Business Competition (Komisi Pengawas Persaingan Usaha or KPPU), law enforcement, and other provisions. With the enactment of Law Number 5 of 1999, every business actor is obliged to implement the provisions regarding how to carry out his business activities in a fair and conducive manner.[1] Business activities that violate Law Number 5 of 1999 are directly supervised by the Commission for the Supervision of Business Competition.[2]

Based on the Black Law Dictionary, a cartel is a coalition of producers of any product that joins to control the production, sale, and price of goods, thereby creating monopolies and limiting competition in certain industries or commodities.[3] In another word, a cartel is an attempt by business actors to gain

[1] Law No. 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition

[2] Andi Fahmi Lubis, et.al, *Hukum Persaingan Usaha*, Edisi Kedua, KPPU, Jakarta Pusat, 2017, p. 33

[3] https://blacks_law.en-academic.com/3923/cartel, accessed on Feb 14, 2023

market power by regulating the market by fixing prices, for example by limiting the availability of commodities on the market.

Cartel activities bring losses by reducing competition in the market thereby harming consumers as well. Cartel activity can be conceptualized as the creation or implementation of anti-competitive agreements, practices, or joint arrangements by competitors to fix prices, make fraudulent bids, impose yield restrictions, or divide markets by allocating customers, suppliers, territories or trade routes. Therefore, cartel activities are prohibited by all national competition laws of EU Member States.[4]

Indonesia, as previously mentioned, also has laws that governing the Prohibition of Monopolistic Practices and Unfair Business Competition. This law was made with the aim as stated in article 3 of Law No. 5 of 1999, "Safeguarding the public interest and increasing the efficiency of the national economy as one of the efforts to improve people's welfare, creating a conducive business climate through regulating fair business competition so as to ensure ensuring equal business opportunities for large, medium and small business actors, preventing monopolistic practices and or unfair business competition arising from business actors, and creating effectiveness and efficiency in business activities."[5]

This competition law has an important role in the market economy which is necessary for the existing market competition mechanisms to work

[4] Peter Whelan, "Cartel Criminalization and the Challenge of 'Moral Wrongfulness'", *Oxford Journals of Legal Studies*, Vol. 33 No. 3, 2013, p. 535

[5] Article 3 Law no. 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition

properly. Business actors in Indonesia in carrying out their business activities according to business competition law must be based on economic democracy by considering the balance between the interests of business actors and the public interest.[6]

One example of unfair business competition is the cooking oil cartel practice allegedly carried out by 27 palm oil companies producing cooking oil, followed by the discovery of 1.1 million litters of cooking oil stockpiled in a storage warehouse in Deli Serdang, North Sumatra. Although there has been no decision regarding this matter, the KPPU's press release dated April 21 2022 stated that the KPPU had opened an investigation into the cooking oil case with registration No. 03-16/DH/KPPU.LID.I/III/2022, concerning the Alleged Violation of Law No. 5 of 1999 regarding the Production and Marketing of Cooking Oil in Indonesia since March 30, 2022. The investigation was carried out on 3 alleged violation articles, namely Article 5 (pricing), Article 11 (cartel), and Article 19 letter " c" (market control through restrictions on the circulation of goods/services). From the investigation process, KPPU has pocketed at least two types of existing evidence, so that it is concluded that it is appropriate to proceed to the filing stage.[7]

As a further explanation, the actions taken by these business actors are suspected of having an indication of a violation of the articles stipulated in Law No. 5 of 1999, namely Article 5 regarding price fixing which in this case uses

[6] Article 2 Law no. 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition

[7] Siaran Pers KPPU Nomor 24/KPPU-PR/IV/2022

per se illegal approach, states that the agreement that occurs can actually impede competition, without the need for an in-depth study of the market and consumer impact of this price fixing.[8] This article also does not have to look for reasons why business actors commit such acts or it is not necessary to prove actions that gave rise to monopolistic practices or unfair competition so that law enforcers can directly apply this article to the business actors concerned.[9]

Another article that was violated was article 11, which uses the rule of reason approach. The formulation of a cartel as something that is examined according to the rule of reason principle is in line with the development of competition law enforcement which tends to look at and examine the reasons of business actors for committing an act deemed to violate the Business Competition Law. Thus, KPPU must be able to prove that the business actor's reasons are unreasonable.[10]

In carrying out investigations and proving that there is a violation of this provision, the reasons of business actors must be examined, and it must first be proven that monopolistic practices and/or unfair business competition have occurred. In other words, in examining the alleged existence of a cartel, the reasons of the business actors who committed the cartel act and the consequences of the agreement on business competition will be seen. Thus, it is necessary to have an in-depth study of the reasons for the agreement of the

[8] Dimas Aryadiputra, et.al, "Perbedaan Penerapan Pendekatan Per se Illegal dan Rule of Reason dalam Putusan KPPU tentang Kartel Penetapan Harga", *Jurnal Risalah Hukum*, Vol. 18 No. 1, 2022, p. 2

[9] Abdul Rahman, *Hukum Persaingan Usaha*, Deepublish, Yogyakarta, 2018, p. 35

[10] KPPU, *Pedoman Pelaksanaan Pasal 11 tentang Kartel*, p. 13

business actors in question compared to the losses or negative things the cartel has for business competition.[11]

Cartel provisions in Article 11 of the Antimonopoly Law stipulate that business actors are prohibited from entering into agreements with their competitors to influence prices "only if" such agreements can result in monopolistic practices and/or unfair competition. This provision forces the Business Competition Supervisory Commission to use a rule of reason approach in analysing cartels, thus requiring an in-depth investigation.[12]

And article 19 states that business actors are prohibited from carrying out one or several activities, either alone or together with other business actors, that may result in monopolistic practices or unfair business competition in the form of limiting the distribution or sale of goods or services by other business actors. This article uses the rule of reason approach. Indications of carrying out the activities as described in Article 19 letter C include the following:

a) There is a scarcity of products in the relevant market, and/or;
b) There is an exclusive agreement or contract between a business actor and a certain business actor or consumer/customer which contains an obligation not to enter into a relationship with its competing business actor, and/or;

[11] *Ibid, p. 15*

[12] Debora, "Penerapan Pendekatan Rule of Reason terhadap Bentuk Kartel Berdasarkan Hukum Persaingan Usaha di Indonesia (Studi terhadap Putusan KPPU Nomor: 03/KPPU-I/2003, Putusan KPPU Nomor: 10/KPPU-L/2005 dan Putusan KPPU Nomor: 11/KPPU-L/2005)", Tesis, Fakultas Hukum Universitas Indonesia, 2008, p. 6

c) The existence of a clause in an exclusive agreement that specifically or specifically prohibits buyers or sellers from accepting competitors' products;

d) The business actor limits the distribution and or sale of goods and or services in the relevant market by emphasizing limiting supply or reception channels through requirements for the use of certain products from the said business actor. For example, the distributor of vehicle X requires that its vehicles may only use parts supplied by the vehicle manufacturer and that these components may only be installed by mechanics who have received special training from vehicle manufacturer X.[13]

Based on this background, this research will examine the behaviour of business actors in the case of the cooking oil cartel in Deli Serdang by using the per se illegal approach and the rule of reason approach.

B. Problem Formulation

1. What is the basis for the KPPU's legal considerations which state that all the reported cooking oil producers are not proven to have committed a cartel?
2. How is the case of the cooking oil cartel in Serdang viewed from the perspective of the implementation of the per se illegal and rule of reason approach?

[13] Andi Fahmi Lubis, et.al, *Op. Cit*, p. 180.

C. Research Objectives

1. To analyse the basic legal considerations of KPPU which states that all reported cooking oil producers are not proven to have committed a cartel.
2. To analyse how the cooking oil cartel case in Serdang is viewed from the implementation of the per se illegal approach and the rule of reason.

D. Originality of the Research

A literature review method was carried out in advance to prepare for this research, where the search and analysis of library sources in the form of the findings of prior studies are relevant to the topic under discussion in this study.

No.	Sources	Discussion
1.	Analisis Pertimbangan Hukum Kasus Kartel Minyak Goreng di Indonesia, Yuniar Hayu Wintansari, Fakultas Hukum Universitas Islam Indonesia.	Problem formulation: pertimbangan hukum manakah yang tepat dalam kasus kartel minyak goreng antara KPPU, Pengadilan Negeri, dan Mahkamah Agung? Conclusion: Pengaturan kartel oleh KPPU bertujuan untuk menjamin hak berkompetisi sehat bagi pelaku usaha dan peluang kesejahteraan konsumen. KPPU bisa menindak kartel-kartel yang merugikan konsumen. KPPU meyakini bahwa kartel itu sama dengan perjanjian yang dilarang karena ada praktik monopoli pengusaha yang menguasai pasar kemudian menaikkan harga secara tidak wajar. KPPU menyatakan bahwa terjadi praktik kartel harga atau paralel pricing yang dilakukan oleh beberapa perusahaan minyak goreng di

		Indonesia. Dengan demikian, ini telah melanggar peraturan tentang kartel dalam Undang-Undang Nomor 5 Tahun 1999 tentang Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat (UU No. 5 Tahun 1999) seperti Pasal 5 tentang kartel harga (price fixing) dan Pasal 11 tentang kartel produksi dan pemasaran. Selain itu, kartel berseberangan dengan aturan dalam UU No. 5/1999 yakni Pasal 12 (trust), Pasal 22 (persekongkolan tender), Pasal 24 (persekongkolan menghambat produksi dan atau pemasaran). Pengadilan Negeri membatalkan putusan KPPU sebagaiman tertuang dalam Putusan No. 03/KPPU.JKT.PST. Putusan tersebut menetapkan bahwa praktik monopoli, oligopoli, kartel, dan kesepakatan terkait produksi yang dituduhkan KPPU tidak terbukti sehingga putusan denda oleh KPPU tersebut dibatalkan. Putusan MA No. 582 K/Pdt.Sus/2011 dalam amar putusannya menyatakan menolak permohonan kasasi KPPU dan menguatkan Putusan Pengadilan Negeri Jakarta Pusat No. 03/KPPU/2010/PN.Jkt.Pst. Mahkamah Agung (MA) menolak permohonan kasasi yang diajukan oleh Komisi Pengawasan Persaingan Usaha (KPPU) tentang kartel minyak goreng dengan pertimbangan bahwa majelis hakim menilai keputusan KPPU dengan menggunakan indirect evidence alias bukti tidak langsung tidak dapat digunakan dalam hukum persaingan di Indonesia. Selain itu, didalam pertimbangan lain, Majelis Hakim menilai bahwa berdasarkan keterangan saksi dan ahli dalam pemeriksaan tambahan menyatakan bahwa KPPU keliru dalam menetapkan putusan kepada pihak terhukumnya. Bukti ekonomi dan bukti tidak langsung seperti pertemuan pertemuan yang dilakukan oleh para pelaku usaha seharusnya tidak perlu dimasukan dalam bukti indirect evidence/ bukti tidak langsung karena jelas pengadilan akan menolak bukti tersebut karena susah dibuktikan dan peradilan Indonesia

		belum mengenal bukti indirect evidence. KPPU dapat menetapkan hasil temuannya seperti bukti ekonomi dan pertemuan tersebut ke dalam bukti tertulis sesuai alat bukti yang dikenal di peradilan Indonesia. Jadi, menurut ketentuan hukum atau kepastian hukum yang berlaku di Indonesia, pertimbangan hukum Pengadilan Negeri yang tepat dalam kasus kartel minyak goreng, tetapi berdasarkan asas keadilan dan kemanfaatan maka pertimbangan hukum KPPU yang tepat.[14]
2.	Analisis penerapan pendekatan rule of reason dan per se illegal terhadap kasus kartel di indonesia, Made Prasasta Primandhika, I Gede Artha, Program Kekhususan Hukum Bisnis Fakultas Hukum Universitas Udayana.	Problem formulation: 1. Pendekatan apa yang digunakan oleh KPPU dalam menangani kasus kartel? 2. Bagaimana pengaturan penggunaan alat bukti tidak langsung dalam proses pembuktian dugaan pelanggaran kartel? Conclusion: 1. Berdasarkan Pasal 11 Undang-undang Nomor 5 tahun 1999 KPPU menggunakan pendekatan rule of reason dalam menyelesaikan sengketa kartel yang mensyaratkan adanya pembuktian telah terjadinya praktek monopoli dan atau persaingan usaha tidak sehat. Dengan demikian, harus memeriksa secara mendalam alasan-alasan para pelaku usaha melakukan kartel, baru kemudian memutuskan apakah kartel yang dilakukan para pelaku usaha tersebut adalah tindakan yang melanggar hukum yang berpedoman kepada efisiensi dan kesejahteraan konsumen; 2. Penggunaan alat bukti tidak langsung dalam proses pembuktian praktik kartel di Indonesia oleh KPPU dapat digunakan dalam proses pembuktian praktik kartel namun harus didukung dengan alat bukti langsung atau dengan kata lain alat bukti tidak langsung tidak dapat dijadikan bukti satu-satunya dalam proses pembuktian praktik kartel oleh KPPU, kedudukannya sebagai alat bukti tambahan,

[14] Yuniar Hayu Wintansari, "Analisis Pertimbangan hukum Kasus Kartel Minyak Goreng di Indonesia", *Jurnal Hukum*, Vol. 5 No. 4, Fakultas Hukum Universitas Islam Indonesia, 2020.

		karena dalam ketentuan Pasal 37 ayat (3) huruf c Peraturan Komisi Pengawas Persaingan Usaha Nomor 1 Tahun 2010 tentang Tata Cara Penanganan Perkara menyebutkan bahwa 14 Laporan Hasil Penyelidikan paling sedikit telah memenuhi persyaratan minimal 2 (dua) alat bukti.[15]
3.	Pendekatan yang Dilakukan Komisi Pengawas Persaingan Usaha Menentukan Pelanggaran dalam Hukum Persaingan Usaha Alum Simbolon Universitas Katolik Santo Thomas Medan.	Problem formulation: pendekatan apa yang digunakan oleh Komisi Pengawas Persaingan Usaha (KPPU) dalam menentukan pelanggaran terhadap hukum persaingan usaha? Conclusion: Berdasarkan uraian di atas dapat disimpulkan bahwa pendekatan yang dilakukan oleh KPPU dalam menentukan pelangaran terhadap hukum persaingan usaha adalah pendekatan per se illegal yaitu larangan yang jelas tegas terhadap perilaku yang sangat mungkin merusak persaingan dan bukan pendekatan rule of reason. Penerapan per se illegal sudah tepat terhadap tindakan penetapan harga yang dilakukan oleh KPPU karena penetapan harga tersebut diakomodir oleh pasar.[16]

E. Theoretical Review

1. Business Competition.

Competition in Webster is defined as "a person or group that one is trying to succeed against: a person or group that one is competing with."[17] With this definition, the condition of competition is a

[15] Made Prasasta Primandhika dan I Gede Artha, "Analisis Penerapan Pendekatan Rule of Reason dan Per se Illegal Terhadap Kasus Kartel di Indonesia", *Jurnal Ilmu Hukum*, Vol. 6 No.7, Program Kekhususan Hukum Bisnis Fakultas Hukum Universitas Udayana, 2018.

[16] Alum Simbolon, "Pendekatan yang Dilakukan Komisi Pengawas Persaingan Usaha Menentukan Pelanggaran dalam Hukum Persaingan Usaha", *Jurnal Hukum Ius Quia Iustum* Vol. 20 No. 2, Universitas Katolik Santo Thomas Medan, 2013.

[17] https://www.merriam-webster.com/dictionary/the%20competition, accessed on Jan 8, 2023

characteristic that is inherent in human life. Anderson also argues that competition in the economic field is one of the most important forms of competition among the many competitions between humans.[18] The origins of business competition law can be traced back to ancient times. Between the age of barter and the modern age of extensive industrial organization, centuries passed. Throughout these laws, it was found that increasingly widespread prohibitions applied to two general classes of acts affecting competition. The first group came to be known as monopolies and trade restraints. The second group is actions that are called by law "methods of unfair competition."[19]

Meanwhile, for cartel itself, is a cooperation between producers of certain products, which aims to control production, sales and prices and monopolize certain goods or industries. Cartels are usually formed by unions and their members. A cartel is also known as a syndicate, which is a written agreement between several manufacturing companies and other like-minded companies to regulate and control things such as prices and marketing areas to suppress competition and generate profits.[20]

One of the competitions in the economic field is business competition which can simply be defined as competition between sellers in the "mastery" of buyers and market share. In relation to this, Khemani

[18] Arie Siswanto, *Hukum Persaingan Usaha*, Ghalia Indonesia, Jakarta, 2002, p. 13

[19] Franklin D. Jones, "Historical Development of The Law of Business Competition", *Yale Law Journal*, Vol. 35 No. 8, The Yale Law Journal Company, 1926, p. 905

[20] Yuniar Hayu Wintansari. *Op. Cit*, p. 2

states that economic competition is "… a situation where firms or sellers independently strive for buyer's patronage in order to achieve a particular business objective, for example, profits, sales or market share ... competitive rivalry may take place in terms of price, quantity, service, or a combination of these and other factors that customers may value."[21]

The existence of corporate competition affects the use of capital and other resources only in the most productive areas. Competition forces manufacturers to be flexible when implementing new technologies and requires manufacturers to continuously consider consumer needs. In a competitive system, and in the context of free consumption opportunities, it is the buyer who decides what to produce at what price, not the producer or supplier. Competition between suppliers or producers increases general welfare, because the free consumption choice of consumers or buyers determines the price of the goods and/or services produced. In addition, competition also encourages the development of technology to meet consumer needs.[22]

2. Theory of Per Se Illegal Approach.

Per se illegal approach is an approach that states a certain agreement or activity as a prohibited act without further proof of the impact caused by the agreement or activity.[23] In essence, all actions that

[21] *Ibid, p. 14*

[22] Siti Anisah, *Memahami Hukum Persaingan Usaha*, FH UII Press, Yogyakarta, 2022, p. 9

[23] Lewinda Oletta Sidabutar, "Pendekatan "Per Se Illegal" dan "Rule of Reason" dalam Undang-Undang Nomor 5 Tahun 1999 tentang Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat", *Jurnal Rechtsvinding*, 2020, p. 2

are per se illegal are assumed to have more serious consequences than the rule of reason. For example, Article 5 paragraph (1) regarding price fixing agreements: "Business actors are prohibited from entering into agreements with their competing business actors to fix prices for goods and or services to be paid by consumers or customers in the same relevant market." This article is an example of a per se illegal approach.[24]

The per se illegal approach is a statement of any agreement or certain business activity as illegal, without further proof of the impact arising from the agreement or business activity. Activities considered per se illegal usually include collusive price fixing of certain products, as well as fixing resale prices.[25] The application of the per se illegal approach often uses the term without the clause "..which may result in.." in articles that use the per se illegal approach.[26]

Types of behaviour that are classified as per se illegal are behaviours in the business world that are almost always anti-competitive in nature, and almost always never bring social benefits. The per se illegal approach from the point of view of the administrative process is easy. This is because this method allows courts to refuse to carry out

[24] *Ibid, p. 3*
[25] Andi Fahmi Lubis, et.al, *Op. Cit*, p. 66
[26] Made Prasasta Primandhika, I Gede Artha, *Op. Cit,* p. 3

detailed investigations, which usually require a long time and are expensive to find facts in the relevant market.[27]

3. Theory of Rule of Reason Approach.

The rule of reason was born in the case of Standard Oil Co. v. United States of America in 1911. At that time, Chief Justice Edward Douglass White reached the long-winded and somewhat ridiculous conclusion that one cannot decide an antitrust case except by using "reason." Consequently, the rule of reason approach must be applied.[28]

The theory of the rule of reason approach basically is an approach used by KPPU to evaluate the consequences of a particular agreement or activity, whether it has caused the consequences stated in Law No. 5 of 1999 or not.[29] The rule of reason approach is an approach used by the business competition authority to evaluate the consequences of certain agreements or business activities, the purpose of which is to determine whether an agreement or activity is detrimental or supports competition.[30]

In contrast to the per se illegal approach, the rule of reason approach is used, among other things, to indicate that a violation has been declared to have occurred if the act has the potential to damage

[27] Ranyta Yusran, Pentingnya Prinsip "per se" dan "rule of reason" di UU Persaingan Usaha, terdapat dalam https://www.hukumonline.com/klinik/a/pentingnya-prinsip-per-se-dan-rule-of-reason-di-uu-persaingan-usaha-lt4b94e6b8746a9 , accessed on Jan 8, 2023

[28] Herbert J. Hovenkamp, "The Rule of Reason", *Florida Law Review*, Vol. 70, University of Pennsylvania Carey Law School, 2018, p. 85

[29] Lewinda Oletta Sidabutar, *Loc. Cit*

[30] Andi Fahmi Lubis, et.al, *Loc. Cit*

competition. The placement of the words "which may result" and/or "reasonably suspect" in the articles in Law No. 5 of 1999 implies the need for more in-depth research to determine whether an action can led to monopolistic practices that inhibit competition, in other words, using the rule of reason approach.[31]

As in Article 7 which reads: "Business actors are prohibited from entering into agreements with their competing business actors to set prices below market prices, which can result in unfair business competition." The word "can" here mean the consequences caused by the action (agreement/activity) beforehand do not need to exist first.[32] This approach allows courts to interpret laws such as considering competitive factors and determining whether a trade barrier is appropriate or not. This is because not all the agreements or business activities included in the Antimonopoly Law can lead to monopolistic practices, unfair business competition, or be detrimental to society. Otherwise, these agreements and activities can also lead to the dynamics of healthy business competition. Therefore, this approach is used as a filter to determine whether they give rise to monopolistic practices or unfair business competition or not.[33]

[31] Made Prasasta Primandhika, I Gede Artha, *Loc. Cit*
[32] *Ibid*, p. 3
[33] Ranyta Yusran, Loc. Cit

F. Operational Definition

1. Legal Analysis

In a broad sense, the word "legal analysis" refers to the process of identifying the legal issue in a case as well as deciding which laws apply and how they do so. Legal analysis, in its simplest form, is the process of applying the law to the case's facts. It examines how and why a particular law applies or does not apply.[34]

2. Per Se Illegal and Rule of Reason Approaches

Per Se Illegal and Rule of Reason Approaches is approach methods used in competition law that is applied to assess whether a particular action by a business actor violates competition law.[35]

3. Cartel

Cartel is an agreement between a group of companies that supply similar products or services and then reach agreements or agreements to fix prices and share markets to overcharge customers. As long as the companies adhere to the agreement or understanding, they can profitably increase their prices above the current level and earn larger profits.[36]

[34] William Putman, *Legal Analysis and Writing*, Thomson Delmar Learning, New York, 2003, p. 31

[35] Andi Fahmi Lubis, et.al, Op. Cit, p. 66

[36] Cento Veljanovski, "The Economics of Cartels", Finnish Competition Law Yearbook, Institute of Economic Affairs, 2006, p. 2

G. Research Method

1. Type of Research

The type of research used in this research is normative legal research, namely research carried out using literature. Normative legal research/doctrinal legal research, according to Peter Mahmud Marzuki, is a process to find a rule of law, legal principles, or legal doctrines to answer the legal issues at hand. In this type of legal research, law is often conceptualized as what is written in statutory regulations or law is conceptualized as rules or norms which are standards of human behaviour that are considered appropriate.[37]

2. Research Approach

This research using a statute approach, which requiring this research to be analyse and interpret the rules that related to the legal issues.[38] The statutes mention are namely Law No. 5 of 1999 Concerning the Prohibition of Monopoly Practices and Unfair Business Competition specifically on Article 5 and 19 C. Furthermore, case approach is used also to study of case related to the issues at hand which have become court decisions that have permanent force.

As well as conceptual approach, used in order to equalize the perception or understanding of legal language which has many

[37] Peter Mahmud Marzuki, *Penelitian Hukum*, Kencana Prenada, Jakarta, 2010, p. 35

[38] Kevin C. McMunigal, "A Statutory Approach to Criminal Law", *Saint Louis University Law Journal*, Vol. 48 No. 4, Case Western Reserve University School of Law, 2004, p. 1286

interpretations or multiple interpretations[39], namely in this thesis it refers to the per se illegal and rule of reason approach concepts.

3. Research Object

The object of this study examines the implementation of per se illegal and rule of reason approaches in the case of cooking oil cartel.

4. Research Data Sources

The data sources used in this study include data sources consisting of primary legal materials, secondary legal materials, and tertiary legal materials.

a. Primary legal material is legal material that is authoritative which means it has authority such as a document that contains a written record of the law.[40] As in this thesis are consist of laws and regulations, that are Law No. 5 of 1999 Regarding the Prohibition of Monopolistic Practices and Unfair Business Competition, Presidential Decree No. 18 of 2000 concerning Guidelines for Implementation of Procurement of Goods/Services for Government Agencies, Law No. 18 of 1999 Regarding Construction Services and KPPU decision case number 15/KPPU-I/2022.

b. Secondary legal materials are legal materials that use regulations to support and provide explanations for primary legal materials, either in the form of theory as basic principles or legal interpretations or

[39] Suhaimi, "Problem Hukum dan Pendekatan Dalam Penelitian Hukum Normatif", *Jurnal Yustitia* Vol. 19 No. 2, 2018, p. 208

[40] Self Paced Lesson – Tertiary and Secondary Legal Materials – Subject Guide, https://libguides.murdoch.edu.au/c.php?g=920526&p=6639889, accessed on Jan 17, 2023

opinions as an extrinsic material[41]. Secondary legal materials are data obtained from library materials.

c. Tertiary legal materials, namely materials that provide an explanation of primary legal materials and secondary legal materials as well as provide an overview and background on a topic,[42] namely the Big Indonesian Dictionary, Big English Dictionary.

5. Method of Collecting Legal Materials

The collection of legal materials used in this research is literature study which is carried out by collecting, reading, studying, reviewing, and criticizing the provisions of laws and regulations, doctrines and opinions of experts, journals, and similar research results.

6. Methods of Data Analysis

The data analysis method used in this study is a qualitative-descriptive analysis method, namely data obtained from written materials such as laws and books which are first described qualitatively and then analysed.

7. Systematic research

The systematics of writing research results is divided into 4 chapters, each of which has a relationship between one another. The systematics of research writing is as follows:

[41] *Ibid*
[42] *Ibid*

a. Chapter I is an introduction that tries to explain a general description of the problem to be studied. Chapter I covers the background of the problem, which discusses the background of the research, followed by the formulation of the problem, the purpose of the problem, as well as the research method. The end of this chapter will describe the systematics of writing.
b. Chapter II discusses the discussion of the literature review which contains the theoretical basis and conceptual basis of business competition and approaches taken by the commission for the supervision of business competition to determine violations in business competition law.
c. Chapter III discusses the conceptual analysis of the formulation of the problem to be examined, namely the legal analysis in the implementation of per se illegal and rule of reason approaches in cooking oil cartel.
d. Chapter IV is the concluding part which will outline the conclusions from what was stated in the previous chapters and provides suggestions based on research results that are expected to be useful for interested parties.

CHAPTER II

GENERAL OVERVIEW OF BUSINESS COMPETITION AND APPROACHES TAKEN BY THE COMMISSION FOR THE SUPERVISION OF BUSINESS COMPETITION TO DETERMINE VIOLATIONS IN BUSINESS COMPETITION LAW

A. General Overview of Business Competition

1. Definition of Business Competition

Market competition is indeed competition, not only between producers and consumers, but also between producers and consumers for the exchange benefits they must share. hence, competition can lead to distribution conflicts more broadly.[43] However, competition as one of the main characteristic forms in a market economic system is needed and tends to be preferred over non-competitive conditions/absence of competition.[44]

Competition in business has the benefit of increasing the effectiveness of the way business actors achieve optimal utilization of resources. With the existing competition, it will tend to reduce production costs so that prices become lower and the quality of the products produced increases. More than that, competition can be a fundamental basis for above average performance for the long term and

[43] Nathalie Berta, et.al, "On Perfect Competition: Definitions, Usages and Foundations", *Papers in Political Economy*, No. 63, 2012, p. 7

[44] Maryanto, *Dunia Usaha, Persaingan Usaha, dan Fungsi KPPU,* Unissula Press, Semarang, 2017, p. 13

it is called sustainable competitive advantage which can be obtained through 3 generic strategies, namely cost advantage, differentiation, and cost focus.[45]

Philosophically, the objective of a business actor establishing a company is to obtain profits from the results of business activities. To obtain large profits, business actors must be able to control market share by outperforming their competing business actors. Business actors will compete to attract more consumers by selling products at the lowest possible price level, improving product quality, and improving service to consumers as a form of business competition.[46]

Even so, competition has positive aspects as well as negative aspects. Broadly speaking, the positive aspects can be seen from 2 perspectives. In a non-economic perspective, competition causes the distribution of natural resources and equal distribution of income to occur mechanically without the intervention of government power or private parties holding power. A competitive economic system will also solve economic problems impersonally. In other words, business actors who experience a downturn in their business field are due to existing demands, not because of the power of those in power and competition

[45] Mustafa Kamal Rokan, *Hukum Persaingan Usaha: Teori dan Praktiknya di Indonesia*, Rajawali Press, Jakarta, 2010, p. 9

[46] Poernomowati, *Hukum Persaingan Usaha: Pemeriksaan Perkara Kartel*, Jakad Media Publishing, Surabaya, 2021, p. 4

brings positive aspects with the freedom of all parties to get equal opportunities in doing business.[47]

From the economic perspective, competition is a means to protect economic actors against exploitation and abuse. If competition does not exist, economic power will be centralized in a few parties. The existence of competition can encourage the allocation and reallocation of economic resources in accordance with the wishes of consumers. Competition can also be a force to encourage the efficient use of economic resources and methods of their utilization and to stimulate improvement in the quality of products, services, production processes and technology. Here, every competitor will try to reduce production costs and enlarge market share.[48]

On the negative aspect, competition entails certain costs and difficulties which are not found in a monopoly system. For example, such as contractual fees paid when there is longer time and harder effort from each party to reach a buy and sell agreement. Another negative impact is that competition can prevent the necessary coordination within certain industries. and competition is also prone to be carried out by dishonest economic actors as well as the possibility of fraudulent practices being carried out[49]

[47] Arie Siswanto, *Op. Cit,* p. 16
[48] *Ibid, p.17*
[49] *Ibid, p.18*

There are 3 sources of competitive advantage, according to Wen-Cheng Wang, Chien-Hung Ling, and Yieng-Chien Chu[50] that is:

a) Technology and innovation for competitive advantage.

   Through research and development to create new value where there is none, Innovation has an important role in the economic development of a country. Innovation includes product innovation where the birth of products that are considered new by both producers and customers. Process innovation refers to a new process that can reduce production costs or enable the production of new products. as well as technological innovation engaged in the constant search for better products, services, and ways of doing things by leveraging internal capabilities and other resources. because the aggregate innovative capacity of a country is derived from the collective innovative capacity of its firms. Innovation also promotes productivity, the output value produced by one unit of labor or capital. The more innovative companies a country has, the stronger the country's competitive advantage.

b) Human resources for competitive advantage.

   Human resources are individuals who comprise the workforce of an organization. the goal is to implement the organization's human resource requirements effectively. Companies can take advantage of

[50] Wen-Cheng Wang, et. Al, "Types of Competitive Advantage and Analysis", *International Journal of Business and Management*, Vol. 6, No. 5, Canadian Center of Science and Education, 2011, p. 102

this by creating value in a way that is difficult for competitors to imitate. Ulrich and Yeung (1989) argue that future HR Professionals will need 4 basic competencies to become partners in the strategic management process, namely business competencies, professional and technical knowledge, integration competencies and the ability to manage change.

c) Organizational structure for competitive advantage.

Organization is a form of association between two or more people who work together and are formally bound in the framework of achieving predetermined goals and in that bond, there is a person or group of people called subordinates. The organizational structure allows the allocation of stated responsibilities for different functions and processes to different entities such as branches, departments, work groups and individuals who can then define their mode of operation and performance.

In order to win in the competition a company can use various strategies including:

a) By selling products at competitive prices compared to other company products.
b) Forming a market image as a strategy to create a certain image on consumers.
c) Make product design improvements to create product features and designs that the market wants.

d) Maintain quality and provide higher performance at competitive prices.

e) Have good customer service.

f) Copying products from other companies and developing them.

The competitive strategies that have been mentioned can only be achieved in conditions of perfect competition where business actors are free to enter and leave the market, and there are no competitors who benefit from others. Business actors compete in a healthy manner without any criminal acts.[51]

2. Types of Competition Market

Richard A. Bilas in his economic point of view distinguishes competition into 2, namely pure competition and perfect competition where competition can be pure and perfect, or it can be pure but imperfect.[52] When people exclusively communicate with each other through an impersonal market that gives them information and allows them to make their own judgments, there is pure competition.[53] In other words, pure and perfect competition prevails in the economy when no individual can influence the prices at which goods are bought and sold. The resulting allocation of resources under perfect competition is the

[51] Maryanto, Op. Cit, p. 11

[52] Maryanto, Loc. Cit

[53] Lloyd Shapley and Martin Shubik, "Pure Competition, Coalitional Power, and Fair Division", *International Economic Review*, Vol. 10, No. 3, Economics Department of the University of Pennsylvania, 1969, p. 338

result of the pursuit of self-interested individuals and which does not affect the actions of any single agent.[54]

Based on that, a perfectly competitive market is a market or industry structure in which there are many sellers and buyers; each seller or buyer cannot influence the situation in the market." Perfect competition is the most ideal market structure because it is considered a market that will guarantee the creation of highly efficient goods or services production activities. The characteristics of perfect business competition are that the company is a price taker, each company easily enters and enters the market, produces similar goods, there are many companies in the market, and buyers have perfect knowledge of the market.[55]

Whilst imperfect competition happens if one of the parties whether it is a seller or a buyer has the power to influence the market. This market includes Monopoly, Monopolistic, and Oligopoly Markets.[56] Monopoly is a market structure in which there is only one seller, there are no close substitutes for similar products, and there are barriers to entry into the market. as well as business actors acting as

[54] Ali Khan, "Perfect Competition", *PIDE Working Papers*, Pakistan Institute of Development Economics, 2007, p. 1

[55] Muhammad Sadi, *Hukum persaingan Usaha di Indonesia (Sebagai Upaya Penguatan Lembaga Komisi Persaingan Usaha KPPU)*, Setara Press, Malang, 2016 p. 45

[56] Konta Intan Damanik dan Gatot Sasongko, *Pengantar ilmu ekonomi: mikro ekonomi*, Fakultas Ekonomika dan Bisnis Universitas Kristen Satya Wacana, Salatiga, 2010, p. 103

price setters. By controlling the level of production and the volume of products offered, the monopolist can determine the desired price.[57]

Whereas, monopolistic competition market is a market where there are many sellers who produce different goods. This market is a market that is in between the two extreme types of markets, namely perfect competition, and monopoly. Therefore, its characteristics contain elements of the nature of perfect competition market and the characteristics of monopoly competition. In monopolistic competition markets, the law must maintain and balance conflicting interests in the economic field or between various interests in the economic sphere, such as the interests between producers and consumers, between company owners and the interests of workers.[58]

Unlike the previous market, the oligopoly market structure has several giant companies that control the majority (70% to 80%) of the entire market. where companies that control the market will greatly influence other companies." This causes companies to be careful in decision makers changing prices, changing the design of production techniques. In an established economy, many markets are oligopolistic, because technology is already very modern, optimum efficiency must be achieved if the production capacity is very large. This situation results in a reduction in the number of sellers in the market.[59]

[57] Vera Sylvia, *Modul Ekonomi Mikro*, Fakultas Ekonomi Universitas Dirgantara Marsekal Suryadarma Unsurya, Jakarta Timur, 2020, p. 47

[58] Muhammad Sadi, Op. Cit, p. 47

[59] Muhammad Sadi, Op. Cit, p. 49

3. Business Competition Law in Indonesia

Business competition is an important factor in running the wheels of a country's economy because it can influence policies related to trade, industry, a conducive business climate, business certainty and opportunities, efficiency, public interest, to people's welfare. Therefore, competition is expected to be able to efficiently allocate resources in accordance with their designation to improve people's welfare. Laws on business competition in various countries generally focus on the public interest and people's welfare. the need for a policy and a business competition law determines the course of the competition process.[60]

Substantially, competition in the business world is an absolute requirement (condition sine qua non) for the implementation of a market-oriented economy. The role of law in business competition is to ensure fair and healthy competition, while at the same time preventing unfair competition from occurring.[61] The idea to implement antitrust laws and prohibit the activities of fraudulent business actors has started since 50 BC. The Roman regulations prohibiting the act of regulating or taking excessive profits as well as the Magna Charta established in 1349 in England which also developed principles relating to restraint of trade

[60] Cita Citrawinda, *Hukum Persaingan Usaha*, Jakad Media Publishing, Surabaya, 2021, p. 8
[61] Susanti Adi Nugroho, *Hukum Persaingan Usaha di Indonesia: Dalam Teori dan Praktik Serta Penerapan Hukumnya*, Kencana Prenada, Jakarta, 2012, p. 107

which forbid monopoly and agreements which limit individual freedom to compete with honest.[62]

In order to prevent unfair business competition from arising, therefore Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition was launched as a necessary legal complement in an economy that adheres to market mechanisms whose contents contain prohibited agreements, activities prohibited, and a dominant position. This law is necessary to ensure that competition in the economy can take place without hindrance and to function as a guard against unhealthy and unfair practices in the business world in Indonesia.[63]

The existence of this law was drafted based on economic democracy by considering the balance between business actors and the interests of society. So that the purpose of this law as emphasized in the provisions of Article 3 is formulated as follows:

a) Guarding the public interest and increasing the efficiency of the national economy as one of the efforts to improve people's welfare;
b) Creating a conducive business climate through regulation of fair business competition so as to ensure certainty of equal business opportunities for large, medium and small business actors;

[62] Rachmadi Usman, *Hukum Persaingan Usaha di Indonesia*, Sinar Grafika, Jakarta, 2013, p. 53

[63] Rizky Novyan Putra, "Urgensi Keberadaan Hukum Persaingan Usaha Dan Anti Monopoli Di Indonesia", *Business Law Review*: Volume One, Faculty of Law University Islam Indonesia, 2017, p. 39

c) Prevent monopolistic practices and or unfair business competition caused by business actors; And

d) Creating effectiveness and efficiency in business activities.[64]

This objective emphasizes 3 main things that are interrelated as follows:

a) Increasing the efficiency of the national economy,

b) Creating a healthy business climate that guarantees the right to equal business opportunities,

c) Preventing monopolistic practices and unfair business competition, and aims to improve people's welfare.[65]

Legal material aspects in the Act. No. 5 of 1999 was formulated into 3 qualifications. The first thing relates to agreements that are prohibited, including oligopoly, price fixing, price discrimination, agreements between competitors to set prices below market prices, agreements between competitors to sell or re-supply at lower prices, division of territories, boycotts, cartels, trusts, oligopsony, vertical integration, closed agreements, agreements with foreign parties. Then the qualifications for prohibited activities include monopoly, monopsony, market control, loss-selling, fraud in setting production costs, tender conspiracy, information conspiracy, and conspiracy to inhibit production. And the qualifications for a dominant position

[64] Putu Sudarma Sumadi, *Penegakan Hukum Persaingan Usaha*, Zifatama Jawara, Sidoarjo, 2017, p. 32

[65] *Ibid*

include abuse, concurrent positions, share ownership, and mergers, consolidations, and takeovers.[66]

In business competition, several principles are applied, namely:

a) The principle of honesty and not against the law.

   Fair competition is competition between business actors that is carried out honestly and not against the law. In Law No. 18 of 1999 regarding construction services, it has been explained regarding the understanding of the principle of fair competition, including:

   1) Service users and service providers are recognized as having equal status.
   2) Fulfilment of the provisions on the principle of openness in the process of selecting and determining services.
   3) In accordance with the capabilities and conditions required, there are opportunities for service providers to participate in each stage of fair competition.
   4) The existence of clear documents that are well known by all parties and are binding.

Besides that, the principle of fair competition is also explained in Articles 22 and 23 UU No 5 of 1999. This is an effort to create a business environment that can develop quality for business actors and minimize opportunities for state losses.[67]

[66] *Ibid, p. 47*

[67] Osgar S. Matompo, *Hakikat Hukum Sistem persaingan usaha yang sehat, kompetitif dan berkeadilan*, Genta Publishing, Yogyakarta, 2015, p. 93

b) The principle of openness

The principle of openness can be interpreted by the availability of information that can be accessed by service providers including technical administrative requirements, average evaluation methods, evaluation results, and determination of potential winners. By applying this principle, an auction process (auction according to Article 12 paragraph 2 letter a Presidential Decree No. 18 of 2000 concerning Guidelines for Implementation of Procurement of Goods/Services for Government Agencies is a series of activities to provide goods/services needs by creating healthy competition among providers of goods/services[68]). services that are equal and meet the requirements, based on certain methods and procedures that have been determined and followed by related parties) can not only be accounted for administratively but also sociologically because with this, the community can participate in supervising and correcting the auction process if fraud occurs or irregularities in its implementation.[69]

c) The principle of fairness

The principle of fairness is applied to provide equal treatment to all prospective service providers without any particular party benefiting in any way or reason. This principle is related to the principle of

[68] Article 12 paragraph 2 letter a Presidential Decree No. 18 of 2000 concerning Guidelines for Implementation of Procurement of Goods/Services for Government Agencies

[69] *Ibid*

equality before the law, the egalitarian principle, or the principle of non-discrimination.[70]

d) The principle of proportionality

The principle of proportionality competition is the principle of business competition carried out between business actors in accordance with the classification and qualifications of the business entities owned by each business actor where this principle is meant by dividing rights and obligations according to proportions covering all contractual aspects.

To oversee the implementation and enforcement of Law no. 5 of 1999, a business competition supervisory commission was formed based on Article 34 of Law no. 5 of 1999 which instructs that the formation of the organizational structure, tasks, and functions of the commission is stipulated through Presidential Decree No. 75 of 1999. Thus, the enforcement of competition law is within the authority of the KPPU assisted by the district court and the supreme court in settling cases. The KPPU's authority includes investigation, prosecution, consultation, examination, trial, and decision on cases.[71]

In Islam, business competition is referred to as al-munāfasah at-tijāriyyah. In language, al-munāfasah means competition accompanied by the desire to win and beat other parties. Competition is a battle

[70] Osgar S. Matompo, Op. Cit, p. 94
[71] Andi Fahmi Lubis, et.al, Op. Cit, p. 378

between many participants with one desired goal, where a lot of effort and sacrifice is required to win. The type of competition that Allah likes is competing in good things. The Qur'an mentions the term munāfasah in QS. al-Muthaffifīn verse 26 which reads,

خِتٰمُهٗ مِسْكٌۗ وَفِيْ ذٰلِكَ فَلْيَتَنَافَسِ الْمُتَنَافِسُوْنَ

"The shell is musk; and for this one should compete." something that causes the revelation of this verse is a call to Muslims to carry out healthy competition or competition in terms of goodness that brings Muslims to earn the pleasure of Allah SWT and reach His heaven.[72]

In a hadith narrated from Amr bin 'Auf RA, the Prophet Muhammad also explicitly mentions the term "munāfasah." The Prophet SAW said: "Be happy and hope for what pleases you. By Allah, it is not poverty that I fear the most for you, but what I fear is that the wealth of the world will be spread over you, as it was spread out to people before you, then you compete for it as they compete for it until you perish as they perish." In this hadith, the Prophet SAW criticized the behaviour of unfair business competition in worldly affairs. Islam only allows competition to be carried out in ways that are justified by Islamic teachings.[73]

[72] Rumadi Ahmad, et.al, *Fikih Persaingan Usaha*, Lakpesdam PBNU, Jakarta, 2020, p. 44
[73] *Ibid, p. 45*

B. General Overview of Approaches Taken by The Commission for The Supervision of Business Competition to Determine Violations in Business Competition Law

There are generally 2 ways to determine whether a business actor is alleged to have violated Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition or not, namely[74]:

1) Market Structure, for example when a company's market share exceeds the legal threshold of 50% for a single business actor or 75% for two or more business actors.
2) Behaviour, such as acts of selling at a loss (predatory pricing), distributor agreements, or other arrangements made by the aforementioned business actor with a rival business actor, and so on.

From a juridical point of view, there are two approaches that can be used by KPPU to analyse whether there are indications of violations against Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition by business actors in carrying out their business activities. The first one is juridical approaches, namely per se illegal and the rule of reason. And economic approaches where KPPU can carry out an analysis of violations committed by business actors based on the relevant market, market

[74] Alum Simbolon, *Hukum Persaingan Usaha Edisi Kedua*, Liberty Yogyakarta, Yogyakarta, 2018, p. 69

power, barriers to entry, pricing strategy applied by business actors. This economic approach is carried out by KPPU to determine whether what is being done by these business actors affects the level of competition or not and to determine whether the actions of business actors will result in worsening economic conditions or not.[75]

Judge Peckham in his view, explained that if there is a law that has set competition standards, then these standards or regulations will apply and be applied legally anywhere. Including by fixing prices that directly and significantly limit competition which is deemed invalid without the need for further proof. But on the other hand, it is possible if there is a counter arrangement which if through an analysis will not appear to have a significant impact on competition where the arrangement is considered as something that is reasonable and does not hinder trade, so it does not conflict with the law.[76]

1. Per Se Illegal Approach

The word "per se" comes from the Latin language which means by itself, taken alone, by means of itself, inherently, in isolation, unconnected with other matters, simply as such in its own nature without reference to its relation. If an activity has a clear intention and has a detrimental effect, there is no need to question whether or not the

[75] *Ibid*

[76] A. M. Tri Anggraini, *Larangan Praktek Monopoli dan Persaingan Tidak Sehat Perse Illegal atau Rule of Reason*, Fakultas Hukum Universitas Indonesia, Jakarta, 2003, p. 85

reasonableness of the same event with the event being tried to determine that the event in question constitutes a violation of competition law.[77]

This principle is also known as the “per se doctrine” and per se violation, in competition law is a term that implies that certain types of agreements (for example price fixing/horizontal price fixing), or certain actions are considered to be inherently tend to anti-competitive and detrimental to society without the need to prove that the act has actually damaged competition. The per se illegal approach must fulfil 2 conditions, namely it must be aimed more at "business behaviour" than the situation that surrounds it. This is fair, if the illegal act was a “deliberate act” by the company, which could have been avoided and there was quick or easy identification of the type of practice or boundaries of prohibited behaviour.[78]

Fundamentally the doctrine of Per Se Rule rests on a way of thinking, that certain pro-competitive practices do not require weighty arguments as evidence, but what should be prohibited are anti-competitive practices. Law enforcers in this evidentiary effort cannot escape the aid of argumentation. Herbert Hovenkamp stated, "the purpose of the rule is to avoid expensive litigation in areas in which it is applied to horizontal price fixing, horizontal territorial or customer

[77] Meita Fadhilah, “Penegakan Hukum Persaingan Usaha Tidak Sehat Oleh Komisi Pengawas Persaingan Usaha (KPPU) Dalam Kerangka Ekstrateritorial”, *Jurnal Wawasan Yuridika*, Vol. 3 No. 1, Fakultas Hukum Universitas Padjadjaran Bandung, 2019, p. 68

[78] *Ibid, p. 69*

division, vertical price fixing (resale price maintenance), and some concerted refusal to deal and tying agreements.[79]

In the per se illegal approach, every agreement or certain business activity is stated as illegal, without further proof of the impact arising from the agreement or business activity. The per se illegal approach does not require economic analysis regarding whether the actions of business actors have hindered competition. The thing that needs to be proven is whether an agreement that is prohibited has occurred. The proof does not have to be a written agreement, but it is enough to have an oral agreement or a tendency to have an agreement.[80]

A new action or behaviour can be declared anti-competitive behaviour by looking at the consequences of the actions taken, for example price fixing. In terms of perse illegal, the party accused of committing a violation must prove that the action was carried out without having to prove the effect or consequence. The actions taken do not have rational business or economic considerations that can be justified, for example, price fixing aims to avoid competition. In this case, the clear separation between the perse illegal approach and the rule of reason is expressed by the bright line test. The next step is to consider the variables that affect whether an action has an impact by examining the components of reason or "reasonable" and by assessing the

[79] Putu Sudarma Sumadi, Op. Cit, p. 79

[80] I Made, Analisis Pendekatan Ekonomi Dalam Hukum Persaingan Usaha, Fakultas Hukum Universitas Udayana, 2013, p. 13

objectives and outcomes of his choices in a market or competitive process.[81]

According to the per se illegal approach, a provision that is per se illegal is no longer required to demonstrate how the prohibition has affected society. As a result, if a business actor engages in conduct that is expressly prohibited by law, the business actor is deemed to have violated the provision without having to demonstrate how the conduct has affected society.[82]

The per se illegal approach must fulfil 2 conditions, namely it must be aimed more at business behaviour than situations of further examination, for example, regarding the consequences and the things that surround it. for example, the illegal act is a "deliberate action" by the company, which should be avoided. Moreover, there is quick and easy identification of the types of practice or limits of prohibited behaviour with an assessment of the actions of business actors both in the market and in the process court which should be easily determined. It is recognized, however, that there are behaviours that lie within the unclear boundaries between prohibited behaviour and lawful behaviour.[83]

The advantage of the per se illegal approach is that it provides certainty whether an action has violated the law, but it is not as accurate

[81] Alum Simbolon, Op. Cit, p. 71
[82] Rachmadi Usman, Op. Cit, p. 94
[83] A. M. Tri Anggraini, Op. Cit, p. 93

as whether the action actually hindered competition and harmed consumers. In addition, the difficulty in applying the per se illegal approach is how to prove whether there is an agreement between business actors. Therefore, behaviour in business that is per se illegal is almost always anti-competitive in nature and almost always does not have social benefits in the business world.[84]

In addition, this approach has broader binding (self-enforcing) power than prohibitions which depend on evaluating the influence of complex market conditions. Therefore, the use of this approach can shorten the process at a certain level in the implementation of laws. because it only includes identification of illegal behaviour and proof of the illegal act and does not require investigation of the market situation and characteristics. In this case, the process is considered relatively easy and simple.[85]

2. Rule of Reason Approach

The rule of reason approach is an approach used by the business competition supervisory commission to make an evaluation regarding the consequences of an agreement or activity that inhibits or supports competition. In this approach, it is determined that even though an act has complied with the formulation of the provisions in the law, if it turns

[84] Ni Ayu Putu Mery Astuti, I Wayan Wiryawan, "Pendekatan Per Se Illegal Dalam Perjanjian Penetapan Harga (Price Fixing) Terkait Kasus Pt. Excelcomindo Pratama, Tbk.", *Jurnal Ilmu Hukum Perdata Fakultas Hukum Universitas Udayana*, Vol. 3 No. 2, 2015, p.2

[85] A. M. Tri Anggraini, Op. Cit, p. 92

out that there are objective reasons (economic reasons) that can justify the act provided that the reasons are reasonable, then the act is not a violation of the law. That is, the application of the law depends on the consequences, whether the actions of the business actors have given rise to monopolistic practices or not.[86]

The rule of reason approach was first applied as an interpretation of the Sherman Act in 1911 in the Standard Oil Co. of N.J. v. United States. This interpretation results in a premise that the main legal consideration in applying this approach is maximizing consumer welfare or satisfying consumer needs. judges Peckham, Taft, and White held that the law was not aimed at destroying an efficient form of corporate combination, but aimed at suppressing forms of cooperation in the field of sales that intended to eliminate competition. The existence of the element of satisfying consumer needs as the main consideration of the law requires the court to apply basic criteria such as whether an agreement will have an impact on realizing efficiency, will it be able to increase products, or will it have an impact on limiting production.[87]

The rule of reason is a 'standard' that allows courts to judge the ambiguity or levels of competitive influence. In applying this approach, it can be studied through the purpose of the agreement, the character of

[86] Indra Sanjaya, Penerapan Pendekatan Rule of Reason Oleh Kppu Dalam Dugaan Pengenaan Harga Eksesif (Studi Kasus Putusan KPPU Nomor Perkara 03/Kppu-I/2017), *Jurnal ilmu sosial dan Pendidikan*, Vol. 4 no. 2, Pascasarjana Fakultas Hukum Universitas Indonesia, 2020, p. 131

[87] Andi Fahmi Lubis, et.al, Op. Cit, p. 76

the parties, and the important consequences arising from these actions to assess a prohibited agreement which is declared as an obstacle to trade. Although in the end the American Supreme Court used a flexible rule of reason approach, which determined that a law only punishes unreasonable behaviour. Analysis in this approach is needed to determine certain practices that hinder or encourage competition, or if there is a tendency for both, then the court will take steps that have the most efficient effect on society at large. This approach is also rich in implications regarding the types of analysis needed to address issues, as in the case of the Chicago Board of Trade v. United States, where Judge Brandeis expounded on a previously unresolved issue of reasonableness. In this case the judge stated, among other things, that the investigation was based on the rule of reason with regard to whether the agreement being sued was something that promoted competition or eliminated competition.[88]

This approach focuses more on the negative consequences of actions that cannot be seen easily, meaning that the negative consequences must be investigated further, whether the actions are illegal or not without analysing the consequences of these actions on business competition conditions. In this approach, the court is required to consider various reasons, such as the reasons underlying the act, the business reasons underlying the act, and the position of the business

[88] A. M. Tri Anggraini, Op. Cit, p. 105

actor in a particular industry. After considering the various reasons, then it can be determined whether the actions carried out by business actors are legal or not.[89]

In the rule of reason approach, economic analysis is needed to find out whether the action inhibits or encourages competition. In this case, the theory of economic analysis in law can be applied. The advantage of the rule of reason is that it uses economic analysis to achieve efficiency in order to determine with certainty whether an action by a business actor has implications for competition. In other words, an action is deemed to impede competition or encourage competition as stated by Robert H. Bork, determined by: "…economic values, that is, with the maximization of consumer want satisfaction through the most efficient allocation and use of resources…"[90]

The approach to economic analysis in law was born in the United States which adheres to the common law system where judges play an important role in determining what constitutes law. However, in civil law countries, unlawful acts, property rights and contracts are inseparable from statutory regulations which are the determining elements in the civil law system. The role of judges in the Common Law system in terms of only tends to find the right rules in case law, while judges in Civil Law countries mostly interpret or apply written statutory

[89] Andi Fahmi Lubis, et.al, Loc. Cit
[90] I Made, Op. Cit, p. 14

regulations. Civil law judges may not reject a case because the law does not exist or is unclear. Judges must create laws. However, a civil law country like Indonesia, for example, will experience several obstacles in applying economic analysis to law. First, the flow of positivism in law considers that the law is a written statutory regulation that contains norms, among which are the norms of justice. The approach to economic analysis in law places too much emphasis on the cost-benefit ratio, which sometimes does not bring justice. The concentration of economists who are focused on efficiency, do not really feel the need for an element of justice. This is of course denied by adherents of the economic analysis approach in law, saying that it is not true that economics does not think about justice. In trying to determine normative claims regarding the distribution of income and welfare, one must have a political philosophy that goes beyond purely economic considerations.[91]

The Rule of Reason approach considers that an action cannot be easily said to be illegal or prohibited. The use of the Rule of Reason approach in the formulation of articles leads KPPU to have to evaluate a consequence resulting from the existence of an agreement, activity, or dominant position in evidence, even though the allegations of the alleged actions were real or factual. an evaluation is carried out to find out whether it is true that the said action has created and supported an

[91] A. M. Tri Anggraini, Op. Cit, p. 12

obstacle for other business actors to enter the market. By using this approach, courts can carry out in-depth legal interpretations of statutes as well as comprehensive market interpretations.[92] The focus of the rule of reason is to make significant changes in analysis. The Supreme Court considered "economic efficiency" as a term to define competition. The Supreme Court's examination includes whether economic efficiency is achieved without sacrificing output products. This is the starting point for the Supreme Court's decision in almost all subsequent price fixing cases.[93]

Within the scope of the rule of reason doctrine, if an activity that is prohibited is carried out by a business actor, it will be seen how far the negative effect is. If it is proven that there are factors that significantly impede competition, legal action will be taken. Basically, the rule of reason approach is applied to actions that have the potential to negatively affect company competition. For prohibitions that are rule of reason in nature, then the form of a rule states that there are certain requirements that must be fulfilled, so that it fulfils the qualification for the potential for monopolistic practices and/or unfair business competition practices.[94]

In view of the provisions of Article 35 of Law Number 5 of 1999 which states that the KPPU's task is to assess all agreements and

[92] Dimas Aryadiputra, et.al, Op. Cit, p. 10
[93] A. M. Tri Anggraini, Op. Cit, p. 136
[94] Rachmadi Usman, Op. Cit, p. 97

activities of business actors which may result in monopolistic practices and unfair business competition. Determining the use of both per se illegal and rule of reason approaches does not solely depend on the sound of the words in the provisions of the law which state, for example the word "prohibited" means using a per se illegal approach. While the words "reasonably suspected" or "which may result" mean using the rule of reason approach. Therefore, KPPU has the authority to alternatively use one of the two extreme different approaches. In determining one of the two approaches, KPPU bases on the practice that is considered the best (best practice) for assessing a particular agreement or business activity, while still referring to the objective of establishing Law Number 5 of 1999, which, among other things, is efficiency and consumer welfare.[95]

The strengths and weaknesses of the rule of reason approach are first in its application using economic analysis to achieve efficiency to find out for sure whether an action of a business actor has implications for competition. Second, the rule of reason approach can accurately, from an efficiency point of view, determine whether an action by a business actor impedes competition. The weakness of this approach is that an accurate assessment can lead to differences in the results of the analysis which bring uncertainty and in applying the rule of reason the

[95] Maryanto, Op. Cit, p. 53

investigation will take a long time and require economic knowledge.[96] Another weakness of the rule of reason is that the rule of reason used by judges and juries requires knowledge of economic theory and a number of complex economic data, which they may not necessarily have sufficient ability to understand, in order to make rational decisions. The limited ability and experience of judges to deal with complex litigation processes has often caused problems throughout the history of the court system in the United States. In addition, it was not easy to prove the market power of the defendants, considering that the plaintiffs had to provide expert witnesses in the economic field and extensive documentary evidence from other competitors. so often the rule of reason approach is seen as a rule of per se legality. This view is strengthened by the opinion which states, that "..that the application of the rule of reason rarely results in a finding of [97]illegality due to the plaintiff's difficult burden of proof..."

Therefore, to distinguishing the features of prohibitions that are rule of reason in nature is that rule of reason is rules that specify certain requirements that must be met in order to qualify for the potential for monopolistic practices and/or unfair business competition practices. Then if the rule contains a clause "reasonably suspected or presumed". Law Number 5 of 1999 makes the application of the rule of reason

[96] Susanti Adi Nugroho, Op. Cit, p. 712
[97] A. M. Tri Anggraini, Op. Cit, p. 141

theory, seen from the words stated in the regulation "resulting in or may result in monopolistic practices and/or unfair competition". then agreements or actions prohibited in the articles of Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition can be categorized as; prohibited per se illegal, prohibited by the rule of reason, and between per se and the rule of reason.[98]

3. Approaches to Direct and Indirect Evidence in Resolving Business Competition Cases

In order to prove that there has been a violation of the provisions of Law Number 5 Year 1999, KPPU requires the fulfilment of the elements of the agreement to prove that there has been a violation of the provisions of the aforementioned articles. However, it is undeniable that there are cases of business competition formed and carried out in secret, which then prove the existence of the agreement, causing problems and difficulties in settling the case. In this case, it is difficult for KPPU to find written agreements or other documents that explicitly contain agreements regarding prices, marketing areas, and production of goods and/or services between business actors. Therefore, in its development

[98] Meita Fadhilah, Op. Cit, p. 70

to prove the existence of a cartel, evidence called indirect evidence is needed.[99]

Examination evidence used in settling business competition cases has been mentioned in Article 42 of Law Number 5 of 1999 including witness statements, expert statements, letters and/or documents, indications and statements from business actors. Evidence is divided into direct evidence and indirect evidence, judging from the closeness between the evidence and the facts to be proven. Direct evidence is evidence in which witnesses directly experience the facts or events to be proven. Meanwhile, indirect evidence is evidence through the discovery of a relationship between facts, therefore the evidence can be seen once confirmed.[100]

Based on the OECD evidentiary issues in proving dominance, evidence that can be used to show that a company has great market power is divided into direct evidence and indirect evidence. Direct evidence will seek to measure the company's ability to raise prices above competitive levels or assess the company's profitability. evidence that firm behaviour has an anticompetitive effect can also be considered as direct evidence of market power. whereas indirect evidence is more about whether a company can be considered to have substantial market

[99] Udin Silalahi, Isabella Cynthia Edgina, "Pembuktian Perkara Kartel Di Indonesia Dengan Menggunakan Bukti Tidak Langsung (Indirect Evidence) : Kajian Putusan Kppu Nomor 17/Kppu-I/2010 Dan Nomor 08/Kppu-I/2014 Serta Putusan Nomor 294 K/Pdt.Sus/2012 Dan Nomor 221 K/Pdt.Sus-Kppu/2016", *Jurnal Yudisial*, Vol. 10 No. 3, 2017, p. 313

[100] Siti Anisah, "The Use of Per Se Illegal Approach in Proving the Price Fixing Agreements in Indonesia", *Jurnal Media Hukum*, Vol. 27, No. 1, 2020, p. 101

power. Market share will be part of this analysis, but barriers to entry and other factors that can affect a company's ability to exercise market power should also be relevant. The following are types of indirect evidence:[101]

a) Market shares

Competition law in most cases relies on circumstantial evidence related to market structure to establish the dominant position/monopoly power of a company. The use of market share and other concentration measures to establish dominance/monopoly power in cases of single firm behaviour is based on the idea that market structure determines the behaviour of firms which can determine their performance. with the conclusion that the more concentrated the market, the more likely it is not to have effective competition, which also shows that market share to some extent can indicate market power. Another approach to market definition in cases where the behaviour of a single firm is examined ex post would be to see whether a small price reduction will cause buyers to switch from outside products and locations to products and locations in candidate markets in large numbers. If there are not many substitutes, the candidate market is most likely an antitrust market. Others have pointed out, however, that using a hypothetical markdown raises many challenging questions and may not result in

[101] OECD Policy Roundtables: Evidentiary Issues in Proving Dominance, 2006, p. 26

a properly depicted market. Additionally, in assessing the evidentiary value of market share, consideration must also be taken of the process by which the relevant market was established and shares assigned. that according to commentators, the greater the uncertainty in defining the relevant antitrust market, the less weight should be given to market share figures as an indicator of market power, relative to other factors such as barriers to entry.[102]

b) Entry barriers

Barriers to entry are an important single factor in assessing whether a company has substantial market power. a company will not be able to maintain market power in the long run without the ability to exclude new entrants and without other circumstances preventing entry so that its market power will not last long. John Fingleton in this regard argues that because entry barriers are a fundamental source of market power. procedures for identifying market forces, rather than focusing on concentration analysis, should begin with an assessment of barriers to entry and the presence of price competition. In general, barriers to entry are characterized as market conditions and circumstances that would delay or prevent the entry of the anti-competitive effect at issue in individual cases.[103]

c) Buyer power

[102] OECD Policy Roundtables: Evidentiary Issues in Proving Dominance, Op. Cit, p. 31
[103] *Ibid*, p. 32

The level of buyer power can affect the assessment of whether a company has great market power. Economically strong customers may deny a company's ability to act anticompetitively by exercising substantial market power. As the OFT Guidelines show, however, it is not always the economic strength of the buyer that counts, but the buyer has a choice of effective alternatives. That choice may exist because of the ability to switch to another supplier, to integrate vertically, or to sponsor the entry of a new supplier. The role of buyer power in assessing substantial market power may be particularly important where government agencies act as major buyers which also regulate industry-wide suppliers.[104]

d) Other factors

In markets where the procompetitive effects of technological developments and network effects are difficult to isolate, several other factors can be considered in determining whether a company has a large market power or not. Thus, which effect prevails in a particular case and how it influences the existence of substantial market power must be analysed within the applicable categories of barriers to entry and market competitive performance.[105]

While for direct evidences method identifies the extent to which a firm's sales are sensitive to changes in rival sales and customer

[104] OECD, Op. Cit, p. 36
[105] OECD, Op. Cit, p. 37

reactions, and determines whether a firm's "performance" is indicative of market strength because company behaviour and the competitive effects of such behaviour can also provide evidence of whether a company has great market power or not.[106] The most common types of direct evidence include:[107]

1) Documents including email messages stating the agreement and identification of the parties therein;
2) An oral or written statement from cartel participants describing the cartel's operations and their participation in it.

[106] *Ibid*
[107] Siti Anisah, Op. Cit, p. 102

CHAPTER III

LEGAL ANALYSIS IN THE IMPLEMENTATION OF PER SE ILLEGAL AND RULE OF REASON APPROACHES IN COOKING OIL CARTEL

A. The basis for the KPPU's legal considerations which state that all the reported cooking oil producers are not proven to have committed a cartel

In February 2022, the North Sumatra Regional Police together with the food task force (task force unit) discovered a warehouse in Deli district, Serdang, which had stockpiled cooking oil up to 1.1 million kilograms.[108] The discovery of the oil warehouse originated from an inspection carried out by the Sumatra Province Food Task Force and the local Police on the grounds that the inspection was carried out because since the past week there has been a shortage of cooking oil on the market, especially in the North Sumatra region. During the inspection, the 1.1 million kilograms of oil found in Deli Serdang turned out to be ready for distribution. Various brands of cooking oil were found such as Bimoli, Delima and Amanda.[109]

There were 3 warehouses that were checked according to information from the Head of Public Relations of the North Sumatra Regional Police, Kombes Pol Hadi Wahyudi. The 3 warehouses are

[108] https://news.detik.com/berita/d-5950952/tentang-temuan-besar-minyak-goreng-di-deli-serdang, accessed on May 9, 2023

[109] https://regional.kompas.com/read/2022/02/20/083500878/berawal-dari-sidak-ini-kronologi-penemuan-1-1-juta-kg-minyak-goreng-di-deli?page=all, accessed on May 9, 2023

known to belong to PT Indomarco Prismatama, PT Sumber Alfaria Trijaya Tbk, and PT Salim Ivomas Pramata (SIMP) Tbk. A lot of cooking oil was found ready for distribution. In PT Indomarco Prismatama's warehouse, 1,184 boxes or 23,680 pcs of Parveen cooking oil were found. Then, PT Sumber Alfaria Trijaya Tbk found 1 liter packaging cooking oil with the Parveen brand as many as 1,121 boxes or 22,420 pcs. Meanwhile, at PT Salim Ivomas Pratama Tbk, 25,361 boxes of packaged cooking oil were found.[110]

Regarding the issue of 1.1 million kilograms of packaged cooking oil in the Deli Serdang area, PT Salim Ivomas Pratama Tbk (SIMP) as a cooking oil producer provided clarification stating that the cooking oil was prioritized to meet the cooking oil needs of the company's instant noodle factory. This is to ensure that food needs are available in good supply. The subsidiary of PT Indofood Sukses Makmur Tbk (Indofood) explains that a total of 1.1 million kg of cooking oil is equivalent to 80 thousand cartons, which is a total of cooking oil shipped within 2 to 3 days.[111]

The finding of cooking oil which has not been distributed in very large quantities on the grounds of waiting for management's policy, shows the reluctance of producers to cooperate with the government in ensuring availability in the market. According to Ridho Pamungkas, the

[110] *Ibid*
[111] *Ibid*

case indicates coordination, policy and market failures which can be seen from the lack of solid coordination between governments and between the government and business actors in implementing cooking oil trade policies both related to rafaction (rafaction referred to in this case is a reduction in the price of the delivered goods because the quality is lower than the sample, or because it was damaged in the delivery[112]) and DMO (Domestic Market Obligation (DMO) is the obligation of a Business Entity or Permanent Establishment to hand over part of their share of oil and natural gas to the state through the Executing Agency in the context of supplying oil and natural gas to meet domestic demand, the amount of which is regulated in the Cooperation Contract[113]). Policy failure means that the policies adopted were not appropriate when implemented or paid little attention to the technical aspects of their implementation in the field. There is also market failure, he said, in the sense of the behaviour of business actors who deliberately withhold supply for a specific purpose or motive.[114]

Therefore, the Business Competition Supervisory Commission (KPPU) is investigating the alleged hoarding of cooking oil to see if there are indications of a cartel taking place. This then prompted the Business Competition Supervisory Commission (KPPU) to intervene to

[112] https://kbbi.web.id/rafaksi, accessed on May 9, 2023

[113] Article 1 Paragraph 5 of The Regulation of The Minister of Finance Number 56/PMK.02/2006 Concerning Procedures for Paying Domestic Market Obligation Fee And Over/Under Lifting In The Oil And Gas Sector Minister Of Finance

[114] https://www.liputan6.com/bisnis/read/4892402/kppu-dalami-dugaan-kartel-di-kasus-penimbunan-minyak-goreng-deli-serdang, accessed on May 9, 2023

investigate the alleged occurrence of Article 5 and Article 19 letter c in Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition by 27 packaged cooking oil companies (Reported).[115]

In Case No. 15/KPPU-I/2022 concerning Alleged Violations of Article 5 and Article 19 Letter c in the Sales of Packaged Cooking Oil in Indonesia, 27 reported allegedly violating Articles 5 and 19 letter c of law no 5 of 1999. In article 5 in essence, it is stated that business actors may not enter into an agreement with their competing business actors in stipulating products on the same market. Meanwhile Article 19 letter c states that business actors are not permitted either individually or jointly to carry out an act which results in limiting the circulation and or sale of goods and or services in the relevant market.[116]

However, after the investigation and trial took place, in the decision of this case, the business competition supervisory commission stated that the reported parties were not proven to have committed an alleged violation of the provisions of Article 5 and Article 19 letter c of Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition. This is based on the fact that KPPU considers that the determination of the relevant market in a quo case was not carried out comprehensively and accurately by the

[115] Siaran Pers KPPU Nomor 47/KPPU-PR/X/2022

[116] Alfatri Anom, "Analisis Penggunaan Alat Bukti Dalam Pemeriksaan Perkara Minyak Goreng No. 15/KPPU-I/2022", *UNES Journal of Swara Justisia* Vol. 7, Issue 1, 2023, p. 178

investigator because it did not meet the substitution analysis from the aspects of price, use and product characteristics.[117]

The analysis of determining the relevant market does not consider various important aspects, including[118];

1) The relevant market analysis is based on the wrong function and use of cooking oil, namely as a supporting component in the manufacture of food.
2) There is no analysis on whether palm-based cooking oil can be substituted with other vegetable-based cooking oils or even animal-based cooking oils.
3) There is no analysis of the possibility that the relevant market segmentation is narrower between simple packaged cooking oil and premium packaged cooking oil, at least from the aspect of price differences, customer switching costs, and customer preference/loyalty.
4) There was intra-brand competition in which the Reported Parties produced simple packaged cooking oil and premium packaged cooking oil under several brands. There is a difference between simple packaged cooking oil and premium packaged cooking oil in terms of the quality of the packaging and the quality of the cooking oil sold at different volumes and prices. This of course will affect

[117] Decision on Case Number 15/KPPU-I/2022 concerning Alleged Violations of Article 5 and Article 19 Letter c in the Sales of Packaged Cooking Oil in Indonesia, p. 584

[118] *Ibid*, p. 585

consumer preferences and have an impact on consumer decisions in determining consumption patterns.

The commission assembly in this case describes the analysis of product market determination in a quo case where in essence it is found that there are similarities in uses and characteristics between palm cooking oil and vegetable cooking oil. Whereas the market for palm cooking oil products is not substituted for either animal or vegetable cooking oil so that they are not in the same relevant market. According to the commission assembly, for the cooking oil market in Indonesia, the product market analysis assessment is more relevant for similar products, namely cooking oil made from crude palm oil. It is also known that the production of palm cooking oil is divided into bulk cooking oil and packaged cooking oil. In addition, the commission assembly assessed that there are characteristic differences between bulk cooking oil and packaged cooking oil in terms of the production process, product quality, and the form of product packaging.[119]

Accordingly, the commission assembly considered that there was inter-brand and intra-brand competition in packaged cooking oil because it was in the same relevant market based on function, characteristics, and price. The commission assembly considers that bulk cooking oil is not substituted for packaged cooking oil, so it is not in the same relevant market. Based on this, it was concluded that the product

[119] *Ibid*, p. 592

market in the a quo case was packaged cooking oil made from palm oil. Then an analysis and assessment of the geographical market determination was carried out by the commission assembly, they considered that the market concerned in a quo case was the sale of packaged cooking oil made from palm oil throughout Indonesia.[120]

In order to prove whether or not there has been a violation of Article 5 Law No. 5 of 1999 in this case, where the article prohibits business actors from entering into agreements with their competing business actors to fix prices for goods and or services that must be paid by consumers or customers on the same relevant market. Based on the facts of the trial, there were several business actors who were cooking oil producers affiliated with other reported parties. The definition of affiliated as can be quoted based on Article 7 of Government Regulation Number 57 of 2010 concerning Merger or Consolidation of Business Entities and Acquisition of Company Shares that Can Lead to Monopolistic Practices and Unfair Business Competition, namely[121]:

a. Relationship between companies, either directly or indirectly, controlling or being controlled by said companies;
b. Relationship between 2 companies that are controlled, either directly or indirectly, by the same party, or;
c. Relationship between the company and major shareholders.

[120] *Ibid*, p. 601
[121] *Ibid*, p. 607

Documentary evidence and statements from the reported parties at trial show that it is true that there is an affiliation between packaged cooking oil producers with one another by having a share ownership relationship. Whereas the affiliation relationship among the reported parties can be analysed using the Single Economic Entity Doctrine. According to this doctrine, there is a relationship between the parent and subsidiary companies where the subsidiary does not have the independence to determine the direction of company policy as a single economic entity.[122]

Furthermore, the commission assembly calculates market concentration by considering the number of business actors and/or groups of business actors in the same relevant market as one of the parameters in determining market structure. Based on this market share analysis, market concentration can be calculated using the concentration ratio (CR), which is the sum of the market share percentages of several business actors or business groups with the highest market share. The Commission Assembly considers that this case has an oligopoly market type based on the market concentration of 4 companies with the highest market share, being in a tight oligopoly market, namely between 60% - 100% which makes it relatively easier to agree between their actors to set prices.[123]

[122] *Ibid*, p. 614
[123] *Ibid*, p. 617

Whereas the Commission Assembly considered that the Reported Parties who were vertically integrated were business actors who controlled the national cooking oil market, so that the Reported Party's behaviour became a reference for business actors who were not integrated. as well as the Reported Parties that are integrated horizontally, each of which performs cooperation with one another, both production cooperation and marketing cooperation. and based on the facts of the trial it was found that there were 425 brands for simple packaging and premium packaging registered with the Ministry of Trade. However, most of these marks are not circulated in the domestic market because they are only registered but not produced or are marks specifically intended for the export market.[124]

Another parameter that can be used to test the oligopoly market structure is the barriers to market entry and exit. The Commission Assembly sees that there are several barriers to entry in the cooking oil industry where new entrants must provide large capital with large potential sunk costs because they have to build production facilities, buy production machines and develop distribution networks. New business actors have limited control over limited access to inputs or raw materials, have not been able to achieve economies of scale to produce a low-cost structure, and must compete with businesses that are integrated both vertically (from upstream to downstream) and

[124] *Ibid*

horizontally (other companies that have same business activity). The Commission Assembly concluded that the market structure in the cooking oil industry is a tight oligopoly with high market concentration, has homogeneous products and there are several barriers to market entry.[125]

Investigators in the Alleged Violation Report stated that basically based on the results of the homogeneity of variance test on the selling price data for packaged cooking oil by the Reported Parties, it showed that there was price parallelism (price movement) for packaged cooking oil by the Reported Parties. However, the Commission Assembly considered that the correlation test for the selling price of packaged cooking oil for the Reported Parties was only carried out on 23 Reported Parties, while the Prosecution Investigator did not carry out correlation testing for the selling price of cooking oil for the other 4 Reported Parties. the economic evidence submitted by the Investigator did not use the correct cartel price fixing test method and was not supported by a representative sample. It was proven that there was no price fixing agreement because in fact there was a price discount promotion in selling packaged cooking oil.[126]

Then based on the facts of the trial, no evidence was found of a price fixing agreement in the form of a written agreement between the

[125] *Ibid*, p. 618
[126] *Ibid*, p. 621

Reported Parties. The Commission Council also did not find any direct price agreement that explicitly set a certain price between the Reported Parties. In order to examine the existence of unwritten agreements and indirect price agreements, the Commission Council conducted an analysis of indirect evidence in the form of economic evidence and communication evidence. The Commission Assembly conducted an analysis of the communication evidence submitted by the Prosecution Investigator based on the meetings of the GIMNI association (Indonesian Vegetable Oil Industry Association) and considered that the evidence of communication in meetings within the GIMNI association did not explicitly schedule or discuss price fixing agreements. In addition, there was no hard evidence found in the form of minutes of association meetings which directly or indirectly agreed on the selling price of packaged cooking oil during the alleged violation period.[127]

Then the Commission Assembly conducted indirect evidence analysis based on economic evidence consisting of descriptive analysis and statistical analysis to prove whether there was a price fixing agreement between the Reported Parties which was an unwritten agreement on indirect price fixing. The Commission Assembly considers that there is a potential for an indirect price fixing agreement to occur through the KPBN as the central institution.[128]

[127] *Ibid*, p. 627
[128] *Ibid*, p. 628

During the trial, the Reported Parties stated that the increase in the price of packaged cooking oil, both simple and premium, during the violation period was caused by an increase in the price of CPO which referred to the KPBN tender price. The Commission Assembly then concluded the results of the average KPBN Price Ratio with the Cost of Sales of simple packaged cooking oil and premium packaging, the Cost of Production of simple packaged cooking oil and premium packaging and the Selling Price of simple packaged cooking oil and premium packaging for the Reported Party I to Reported Party XXVII shows that the profit margin obtained by the Reported Party I to the Reported XXVII was getting smaller during the period of the alleged violation when compared to the ratio during the period before the alleged violation.[129]

Whereas in analysing the evidence of Article 19 letter c regarding restrictions on circulation and/or sales in a quo case, the Commission Council used the calculation of the average volume of production and/or the average volume of sales of cooking oil (simple and premium packaging) during the period of the alleged violation i.e. in January-May 2022 and also in the period prior to the alleged breach. based on the results of the analysis, the Commission Council concluded that the Reported Party III, the Reported Party IV, the Reported Party VI, the Reported Party VII, the Reported Party VIII, the Reported Party

[129] *Ibid*, p. 672

IX, the Reported Party X, the Reported XI, the Reported XII, the Reported XIII, the Reported Party XIV, the Reported XV, the Reported XVI, the Reported XVII, The Reported Party XIX, the Reported Party XXI, the Reported Party XXII, the Reported Party XXV, the Reported Party XXVI and the Reported Party XXVII were not proven to have restricted the distribution and/or sale of simple and/or premium packaged cooking oil during the period of the alleged violation. while the Reported Party I, Reported Party II, Reported Party V, Reported XVIII, Reported XX, Reported XXIII and Reported XXIV were proven to have restricted the circulation and/or sale of simple and/or premium packaged cooking oil during the alleged violation period.[130]

The Commission Assembly in proving the alleged violations in this case used the rule of reason approach which was divided into several stages, namely defining the relevant market, proving that there is a concentrated market structure in the relevant market and Identification and proof of negative impacts from the affected parties. The Commission Assembly assessed that the impact of the scarcity of cooking oil resulted in a decrease in welfare or deadweight loss. Deadweight loss is a loss of economic efficiency for consumers and producers due to the absence of a meeting point between supply and demand. the behaviour of the Reported Parties to decrease production volume and/or sales volume during the violation period even though the

[130] *Ibid*, p. 841

raw materials were available was the behaviour of business actors who were dishonest and hindered business competition in conducting production and/or marketing of packaged cooking oil. then the Commission Council concluded that there had been an impact of violations of Article 19 letter c of Law Number 5 Year 1999 in the form of unfair business competition carried out by the Reported Parties in a dishonest way and hindered business competition.[131]

Regarding the fulfilment of the elements of Article 5, the Commission Council considered that there was no price agreement set in the framework of a joint venture carried out by the Reported Parties. The element of the agreement to fix the price was not fulfilled because the Commission Council did not find sufficient evidence to prove the existence of direct evidence or hard evidence in the form of a written agreement or direct price agreement agreed upon by the Reported Parties in the a quo case. the unwritten agreement based on evidence of communication in meetings within the GIMNI association as argued in the Alleged Violation Report also does not explicitly schedule or discuss price fixing agreements. So, no hard evidence was found in the form of minutes of association meetings which directly or indirectly agreed on the selling price of packaged cooking oil during the alleged violation period. The element of setting prices was also not fulfilled because based on the results of the ratio test between input variables and output

[131] *Ibid*, p. 847

variables, the Commission Council believed neither excessive prices nor profits were set by each Reported Party during the period of alleged violations. And regarding the fulfilment of the elements of Article 19c, all of them were not fulfilled with a note that the element of carrying out one or several activities in the form of limiting circulation and/or sales was fulfilled for the Reported Party I, the Reported Party II, the Reported Party V, the Reported XVIII, the Reported XX, the Reported XXIII and the Reported XXIV.[132]

With that the case decision Number 15/KPPU-I/2022 concerning Alleged Violations of Article 5 and Article 19 Letter c in the Sale of Packaged Cooking Oil, adjudicates as follows[133]:

1) Declare the Reported Party I, the Reported Party II, the Reported Party III, the Reported Party IV, the Reported V, the Reported Party VI, the Reported Party VII, the Reported Party VIII, the Reported Party IX, the Reported X, the Reported XI, the Reported XII, the Reported XIII, the Reported XIV, the Reported XV, the Reported XVI , Reported XVII, Reported Party XVIII, Reported Party XIX, Reported XX, Reported XXI, Reported XXII, Reported XXIII, Reported XXIV, Reported XXV, Reported XXVI and Reported XXVII were not proven to have violated Article 5 Law Number 5 of 1999.

[132] *Ibid*, p. 860
[133] *Ibid*, p. 887

2) Declare the Reported Party III, the Reported Party IV, the Reported Party VI, the Reported Party VII, the Reported VIII, the Reported Party IX, the Reported X, the Reported Party XI, the Reported Party XII, the Reported XIII, the Reported Party XIV, the Reported XV, the Reported XVI, the Reported XVII, the Reported XIX, the Reported XXI , the Reported Party XXII, the Reported Party XXV, the Reported Party XXVI and the Reported XXVII were not proven to have violated Article 19 letter c of Law Number 5 Year 1999.
3) To declare that the Reported Party I, the Reported Party II, the Reported Party V, the Reported Party XVIII, the Reported Party XX, the Reported Party XXIII and the Reported Party XXIV were legally and convincingly proven to have violated Article 19 letter c of Law Number 5 of 1999.
4) Sentenced the Reported Party I, PT Asianagro Agungjaya to pay a fine of Rp. 1,000,000,000.00 (one billion rupiah) which must be deposited into the State Treasury as a deposit of income from fines for violations in the business competition sector of the KPPU Work Unit through a bank with the receipt code 425812 (Revenue of Violation Fines in the Field of Business Competition).
5) Sentenced to the Reported Party II, PT Batara Elok Semesta Terpadu paid a fine of Rp. 15,246,000,000.00 (fifteen billion two hundred forty-six million rupiah) which had to be deposited into the State Treasury as a deposit of revenue from business competition

violation fines, Unit KPPU's work through banks with acceptance code 425812 (Revenue of Violation Fines in the Field of Business Competition).

6) Sentenced Reported V, PT Incasi Raya paid a fine of Rp. 1,000,000,000.00 (one billion rupiah) which had to be deposited into the State Treasury as a deposit of income from fines for violations in the field of business competition, KPPU's Work Unit through a bank with acceptance code 425812 (Revenue of Violation Fines in the Field of Business Competition).
7) Sentenced the Reported Party XVIII PT Salim Ivomas Pratama, Tbk to pay a fine of IDR 40,887,000,000.00 (forty billion eight hundred and eighty-seven million rupiahs) which had to be deposited to the State Treasury as a deposit of income from fines for violations in the field of business competition, KPPU Work Unit through a bank with acceptance code 425812 (Revenue of Violation Fines in the Field of Business Competition).
8) Sentenced the Reported Party XX PT Budi Nabati Perkasa to pay a fine of Rp. 1,764,000,000.00 (one billion seven hundred and sixty-four million rupiah) which had to be deposited into the State Treasury as a deposit of income from fines for violations in the business competition sector of the KPPU Work Unit through a bank with the code revenue 425812 (Revenue of Violation Fines in the Field of Business Competition).

9) Sentenced the Reported Party XXIII PT Multimas Nabati Asahan to pay a fine of Rp. 8,018,000,000.00 (eight billion eighteen million rupiah) which had to be deposited into the State Treasury as a deposit of income from fines for violations in the business competition sector of the KPPU's Work Unit through a bank with receipt code 425812 (Revenue of Violation Fines in the Field of Business Competition).
10) Sentenced the Reported Party XXIV PT Sinar Alam Permai to pay a fine of IDR 3,365,000,000.00 (three billion three hundred sixty-five million rupiah) which had to be deposited into the State Treasury as a deposit of income from fines for violations in the business competition sector of the KPPU Work Unit through a bank with the code revenue 425812 (Revenue of Violation Fines in the Field of Business Competition).
11) Ordered the Reported Party I, the Reported Party II, the Reported Party V, the Reported XVIII, the Reported XX, the Reported XXIII, and the Reported XXIV to pay a fine no later than 30 (thirty) days since this Decision has permanent legal force (inkracht).
12) Ordered the Reported Party I, the Reported Party II, the Reported Party V, the Reported Party XVIII, the Reported Party XX, the Reported Party XXIII, and the Reported Party XXIV to pay the fine, report and submit a copy of proof of payment of the fine to KPPU.

13) Ordered the Reported Party I, the Reported Party II, the Reported Party V, the Reported XVIII, the Reported Party XX, the Reported XXIII, and the Reported Party XXIV to submit a bank guarantee of 20% of the value of the fine to KPPU no later than 14 days after receiving notification of this decision, if submitting an objection legal action.
14) Ordered the Reported Party I, Reported Party II, Reported Party V, Reported XVIII, Reported Party XX, Reported Party XXIII, and Reported Party XXIV to pay a late fee of 2% per month of the value of the fine, if the payment of the fine is late.

B. The Case of The Cooking Oil Cartel in Serdang Viewed from The Perspective of The Implementation of The Per Se Illegal and Rule of Reason Approach

In the economics literature, price-fixing behaviour between companies competing in the market is a form of collusion, namely a situation where companies in the market coordinate their actions with the aim of obtaining higher profits. Coordination in this collusion is used to agree on several things, such as, an agreement to set a certain price that is higher than the price obtained through a competition mechanism, an agreement to determine a certain quantity that is lower than the

quantity in a competitive situation, and a market sharing agreement.[134] Based on Article 5 paragraph (1) Law No. 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition, it is written that horizontal price fixing agreements are prohibited regardless of the negative effects of these agreements on competition. The price fixing agreement in Article 5 is per se illegal. So, whether if the price set is high or low, it becomes irrelevant and unnecessary. Even though the negative effect on competition is small, the price fixing agreement is still prohibited. Boycott occurs when two or more competing actors do not provide goods or services to certain business actors.[135]

The use of the Per se Illegal approach brings an understanding that the agreements that have taken place can actually obstruct competition, without the need for an in-depth study of what the consequences of this price fixing are to the effect of the market and consumers.[136] In illegal per se, the words used are "prohibited", "... which can result in ..." indicating that the article is said to be illegal without the need for further proof where business actors do not have to be proven as a basis for judgment. There are two conditions in taking a per se illegal approach. First, the approach is more directed to business people than market situations by considering whether the actions of

[134] KPPU, *Draft Pedoman Pasal 5 tentang Penetapan Harga Undang-Undang No 5 Tahun 1999 Tentang Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat*, p. 11

[135] Made Prasasta Primandhika, I Gede Artha, Op. Cit, p. 7

[136] Dimas Aryadiputra, et.al, Op. Cit, p. 2

business people are intentional or not. Second, there is proper identification of the types of prohibited practices or limits of behaviour. Assessment of the actions of business actors both in the market and in court must be easily determined.[137]

The application of the per se illegal approach in investigations into competition law provisions provides more legal certainty because the types of unfair business competition are expressly formulated in law, thus providing certainty for business actors to find out the legitimacy of a business action. This allows business actors to be able to predict a business action in order to avoid lawsuits by law enforcement which can result in large losses.[138]

Article 19 letter c in the KPPU Law is an article related to market control. This article prohibits business actors from limiting the distribution and/or sale of goods and/or services in the relevant market, using a rule of reason approach, where it is necessary to evaluate the impacts caused. When applying the approach, these limiting elements must be proven, and of course accompanied by an analysis of the relevant market to prove that the business actor is in the relevant market. By limiting circulation or sales which causes the circulation of goods on the market to become scarce while consumer needs remain, the impact is price control.

[137] Wihelmus Jemarut, "Pendekatan Rule of Reason Dan Per Se Illegal Dalam Perkara Persaingan Usaha", *Jurnal hukum Widya Yuridika*, Vol. 3 No. 2, 2020, p. 380

[138] *Ibid*

Therefore, KPPU as the enforcer of business competition law must be able to prove the limiting elements accompanied by an analysis of the relevant market to obtain evidence that a business actor is in one relevant market. By limiting circulation or sales which causes the circulation of goods in the market to become scarce while consumer needs remain, the effect is price control. The elements contained in Article 19 do not clearly state the existence of an agreement. However, if there has been market domination involving business actors together, an agreement has been made regarding this matter which can be called an agreement. To prove directly that there is a written agreement in controlling the market is not easy. Therefore, KPPU as the enforcer of business competition law uses indirect evidence, such as communication evidence and economic evidence.[139]

The concept of "rule of reason" according to Syamsul Maarif and BC Rikrik Rizkiyana is that several forms of business competition actions are only considered wrong if it has been proven that the consequences of these actions harm other business actors or the national economy in general. In the rule of reason approach, it is possible to justify the existence of a business action that is anti-competitive, but results in an efficiency that benefits consumers or the national economy in general. Conversely, a business action can be considered wrong, even though it is aimed at efficiency but in practice it leads to the abuse of a

[139] Alfatri Anom, Loc. Cit

dominant position which is detrimental to business actors, consumers, and the national economy in general. Things like this often occur in vertical integration actions that are accompanied by restrictive actions that produce barriers to entry. Therefore, what is emphasized in the rule of reason approach is the material element of the action. In the rule of reason approach, the main emphasis is on the effects of competitive business actions on other business actors and on the national economy. Therefore, for these actions in the substance of the regulation, causality clauses are needed such as "which could result", and or "reasonably suspected".[140]

So, the carrying out of prohibited actions does not automatically conflict with the law, because in applying the rule of reason it must be seen in advance the extent to which the consequences of these actions create a monopoly or will result in unfair competition. the word "which can result" written in Article 19 can mean that the consequences caused by actions (agreement/activities) can inhibit competition by showing the consequences for the competition process, so further analysis is needed whether the action is unfair or has other considerations. courts are required to interpret business competition regulations and the pattern of approach used to find out whether an action by a business actor has competition implications or not.[141]

[140] Wihelmus Jemarut, Op. Cit, p. 379

[141] Dwi Fidhayanti and Risma Nur Arifah, "Penerapan Prinsip Rule of Reason pada Putusan Perkara Nomor 08/KPPU-I/2020 tentang Dugaan Praktik Diskriminasi antara Telkom-Telkomsel dan Netflix", *Jurnal Persaingan Usaha*, Vol.1 No. 1, 2021, p. 75

CHAPTER IV

CLOSING

A. Conclusion

1. The articles in the competition law that were violated by 27 business actors who were reported in the case of hoarding cooking oil in Deli, Serdang were article 5 regarding price fixing and article 19c concerning product circulation restrictions. In the decision on case Number 15/KPPU-I/2022, the KPPU decided that the reported parties were not proven to have violated Article 5 because there were 2 elements that were not met. As for Article 19c, some of the reported parties were proven to fulfil the element of restricting circulation. In my opinion, the application of the article violated by the defendant in this case is still lacking, where Article 11 of Law No. 5 of 1999 prohibits business actors from entering into agreements with competing business actors, which intend to influence prices by regulating the production and/or marketing of goods and/or services, which can result in monopolistic practices and/or unfair business competition can also be applied to this case. by looking at cartel indicators from the actions carried out by the defendants, such as the level of concentration and number of companies, company homogeneity, multi-market contacts, as well as inventory and production capacity.

2. The application of the approach used in each of articles 5 and 19c uses a different approach. where article 5 uses a per se illegal approach, which means that the action is deemed to have violated fair business competition without the need for further analysis. Meanwhile, Article 19c which uses the rule of reason approach requires further evaluation of actions that were violated by business actors, consideration, and determination of whether these actions impede competition by showing the consequences for other business actors or the general economy. I agree with the application of the per se illegal approach in article 5 and the rule of reason in article 19C, but it is necessary to add a rule of reason approach regarding article 11 because cartels regulated in article 11 of law no. 5 of 1999 require prior in-depth research as to whether an action can whether it creates monopolistic practices that inhibit competition or not. The bad impact of cartels can be detrimental to a country's economy, such as allocation and production inefficiencies and for consumers, such as the goods or services produced can be limited both in terms of quantity and/or quality so that consumers do not have free choices in trading. Later, after sufficient evidence has been obtained, it is necessary to carry out proof in order to prove whether a prohibited cartel has occurred. It is necessary to carry out an in-depth examination of the reasons for the business actors carrying out the cartel. such as whether the action is solely aimed at reducing or killing competition, or

whether the action is not the aim of collaboration but is only a byproduct. If collaboration is direct, it will be against the law.

B. Recommendation

1. Business competition supervisory commission should carry out stricter supervision of cooking oil producers in their distribution to the market so that its distribution to the community can be right on target and evenly distributed.
2. The use of the analytical approach in articles in Law No. 5 of 1999 is necessary to achieve justice, especially in applying the rule of reason, it must consider the reasons of the business actor and the impact of the business activities carried out.

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