THE APPLICATION OF ECONOMIC EVIDENCE IN PRICE FIXING OF SCOOTER MATIC *(SKUTIK)* CASE IN INDONESIA

A BACHELOR DEGREE THESIS

By:

DIAN MARIS RAHMAH

Student Number : 14410215

INTERNATIONAL PROGRAM

FACULTY OF LAW

UNIVERSITAS ISLAM INDONESIA

2018

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Presented as the Partial Fulfillment of Requirements
to Obtain the Bachelor Degree at the Faculty of Law
Universitas Islam Indonesia
Yogyakarta

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Has been proven and declared acceptable by the Thesis Supervisor to be examined by the Board of Examiners at the Thesis Examination on

January 17th, 2018

Yogyakarta, January 17th 2018

Thesis Supervisor

Dr. Siti Anisah, S.H., M.Hum
NIK.014100111

PAGE OF APPROVAL

بِسْمِ اللَّهِ الرَّحْمَٰنِ الرَّحِيمِ

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Yaries Mahardika Putro, S.H.

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Defended Before the Board of Examiners

And Declared Acceptable on 20th February 2018

Examiners Signature

1. Chief of Examiner: Dr. Siti Anisah, S.H., M.Hum ……
2. Examiner I : Ratna Hartanto, S.H., LL.M. ……
3. Examiner II : Abdurrahman Al-Faqih, S.H., M.A., LL.M ……

International Program

Faculty of Law

Universitas Islam Indonesia

Dean,

Dr. H. AUNUR ROHIM FAQIH, SH., M.Hum.

NIK. 8441100101

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ORISINALITAS KARYA TULIS ILMIAH/TUGAS AKHIR MAHASISWA

FAKULTAS HUKUM UNIVERSITAS ISLAM INDONESIA

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Yang bertandatangan di bawah ini, saya:

Nama : Dian Maris Rahmah
NIM : 14410215

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Yogyakarta, 16 Januari 2018

Yang membuat pernyataan

DIAN MARIS RAHMAH

CURRICULUM VITAE

BASIC INFORMATION

Name : Dian Maris Rahmah

Date of Birth : 25th of August 1996

Place of Birth : Purwakarta, West Java

Gender : Female

Religion : Islam

Marital Status : Single

Phone Number : +62819 09530 196

E-mail Address : marisdian@gmail.com

Adress : Jl. Keramik No 17 Rt 009 Rw 003 Mulyamekar, Babakan Cikao, Purwakarta, West Java

Parents Identity :

a) Father : Ir. H. Agus Rachlan Suherlan, M.M
   Occupation : Civil Servant (Head of Dinas Pangan Dan Pertanian Kabupaten Purwakarta)
b) Mother : Dra. Hj. Yoyoh
   Occupation : Civil Servant (Teacher)

BACKGROUND OF EDUCATION

1. International Program Law Department of Universitas Islam Indonesia, Business Law Major, Concentrating in Competition Law, 2014-Present
2. SMA Negeri 1 Purwakarta 2011-2014
3. SMP Negeri 1 Purwakarta 2008-2011
4. SD Negeri 5 Nagri Kaler Purwakarta 2002-2008

ORGANISATION EXPERIENCE

Student Association of International Law (2015-2016)

Department of Human Resources Development. Organizing the activities related with the department's function. Responsible in the recruitment and development of organization's members.

Juridical Council of International Program (2016-2017)

General Secretary. Holding a role as the second-chair in the structure of organization (i.e. verify and value responsibility report of activities held by all departments, supervise the implementation of functions of all departments, assist the General Chief in issuing decision), responsible in administration of organization, and leading the highest organization's forum.

COMMITTEE EXPERIENCE

1. Visit Institutution 1.0 as Staff of Public Relation Department held by Juridical Council of International Program UII (2015)
2. JCI Functionaries Photo Session as Chief Organizing Committee held by Juridical Council of International Program UII (2015)
3. Legal Laboratory of Visit Institution 2.0 as Secretary of Organizing Committee held by Juridical Council of International Program UII (2015)
4. Village Project's Juridical Council of International Program as the Event Organizer Committee held by Juridical Council of International Program UII (2016)
5. International Students' Conference Juridical Council of International Program as Event Organizer Committee held by Juridical Council of International Program UII (2016)
6. International Program Festival (IP SUMMIT DAY 2016) as the Secretary of Project Organizer held by ISAC IP UII

AWARDS

The best GPA among the International Program of Law Department Students UII (2015)

WORKING EXPERIENCE

1. Internship in Pusat Studi Hak Kekayaan Intelektual (PS-HAKI) Fakultas Hukum, Universitas Islam Indonesia: Researcher (Currently)
2. Internship in Contract and Vendor Management, Indosat Ooredoo Head Office, Central Jakarta 2017
3. Dinas Pariwisata Kabupaten Purwakarta: Tourism Ambassador of the Purwakarta region, West Java in 2009
4. Organisasi Siswa Intra Sekolah (OSIS): Secretary General for the Leadership Section for the 2009/2010 period (during Junior High School)

LANGUAGE PROFICIENCY

Indonesian : Native Speaker
English : Excellent User

MOTTO

"Success is very fond of preparation"- Dian Maris Rahmah

"Kalau tidak bisa menjadi orang yang pintar dan cerdas, jadilah orang yang rajin dan pekerja keras."- Firman Nofeki

"But Allah is your ptotector, and He is the best of Helpers." -Q.S Ali Imran (3:150)

"Dunia beserta isinya akan terasa ringan dan mudah apabila tujuanmu adalah mencari Ridha Allah SWT. Maka dalami-lah ilmu agama dan ilmu pengetahuan, niscaya segala cita-citamu akan tercapai dalam hitungan waktu"- Unknown

DEDICATION

My humble effort I dedicate to:

My beloved parents

Papa and Mama,

Ir. H. Agus Rachlan Suherlan, M.M

Dra. Hj. Yoyoh

My thesis advisor who always inspired me in so many ways.

The best advisor a student could have asked for,

Dr. Siti Anisah, S.H., M.Hum.

ACKNOWLEDGMENT

Assalamualaikum Wr. Wb

Alhamdulillahirabbil'alamin, first and foremost I will thank Almighty God, Allah *Subhanahu Wa Ta'ala*, my Creator and my Master,the Compassionate and the Merciful, to whom I owe my very existence. I thank Allah for His blessings where He has bestowed upon me throughout the completion of this thesis.

Secondly, my humblest gratitude to the Holy Prophet Muhammad *Salallahu Alaihi Wasalam,* the most noble and influential person whose life become the light of knowledge for all seekers.

My grateful recognition for contribution, assistance, guidance, and support are also given to:

1. Mr. Nandang Sutrisno, SH., LL.M., M.Hum., Ph.D as a Rector of Universitas Islam Indonesia, for the permission to write this thesis;
2. Mr. Aunur Rohim Faqih, H., SH., M.Hum., as the Dean of Faculty of Law Universitas Islam Indonesia, for the permission to write this thesis;

3. Mr. Hanafi Amrani, SH., MH., LL.M., as the Chief of Study Program of Faculty of Law of Universitas Islam Indonesia, for the permission to write this thesis;
4. Mr. Dodik Setiawan Nur Heriyanto, S.H., M.H., LL.M., Ph.D., as the Director of International Program Faculty of Law of Universitas Islam Indonesia, for the permission to write this thesis;
5. Mrs. Dr. Siti Anisah, SH., M.Hum., as Thesis Advisor who always inspired me in so many ways, Thank you for the recommendation, guidance, and motivation during both learning and writing process, and also for saying "yes" for becoming my Thesis Advisor;
6. The lectures of International Program of Faculty of Law of Universitas Islam Indonesia who have taken significant part in my formation as a law students that I cannot mention one by one, may all the knowledge that have given to us becomes the *Amal Jariyah.*
7. Mama, **Dra. Hj. Yoyoh**. My greatest teacher of shaping my character to be the person who I am today. She is the one who supported me throughout everything. Without her, I probably would not be in the place that I am today. Thank you for all the prayers with secretly fallen tears that you have sent to me. No words can even describe how much I love you Mama…;
8. Papa, **Ir. H. Agus Rachlan Suherlan, M.M.,** Thank you for never stop believing me to choose every single step in my life, for being the best supporter in every decision I took. It was so precious. I know you have loved me as long as I've lived. But I've loved you my whole life and

beyond words, Papa. Hope you will always feel that even when I'm not around to tell you so;

9. My beloved sister a.k.a Teti, **Drh. Ira Agustina Dewi Gandasari**, thank you for all the childhood fun, for locking me in the wardrobe while playing hide-and-seek. But thanks for taking care of me when Mama and Papa go to work since I was 5 years old.
10. The lovely Ganda Sudjana's family: Apah, Mamah Aa, Uwa Dedi, Uwa Elli, Iman Gandana, dr. Adam Mici Gandana, dr. Muzna Mici Ruchyanti, Thanks for all the love and support.
11. The lovely Pandi's family: Grandma, Aunty, Uncle, Dek Ratih, Dek Ita, Dek Adi, Nisa, Fitri, Ayu, Dian Risma, Dicky, Silmi, Azzam, Fayadh Fauzan Adzima, Imran and Sabia. Thanks for all the love and support.
12. Mpa, Emah, and Aki Pandi, till we meet again in *Jannah, In shaa Allah.*
13. **Mr. Muhammad Setiawan, S.H.,** thank you for the helps throughout my college life. Also thanks for the serious advice yet sometimes joking.
14. **Ms. Novera Widyarani**, for your tremendous amount of administrative matters and other kind of assistance throughout my study.
15. My one and only, **Yaries Mahardika Putro, S.H**, the person who always inspire me to dream more, learn more, do more, and become more. My heartfelt gratitude for your time, support, patience and for always being there to tell me that I can do it and to show me that you care. I could not thank you enough for yet again making me happy even on pressure days. It's so hard actually to put you into words because you are truly an indescribable miracle of my life.

16. **Rifkha Setya Rini, S.H** soon to be M.Kn. She is the most comfortable place to lean on. Someone I can call when things aren't going right, she is my home, my life support, my forever sister. Needless to say, Dedek loves you, Mbak.
17. Class of 2014: Amalina, Inka, Alin, Memey, Citra, Ririn, Bella, Putri, Ratu, Julian, Irfan, Budi, Pras, Garin, Iqbal, Bang Ilham, Bayu, Piete, Wira, Renggi, Shaufa, Galih, Awan, Wildan, Maulana. Thanks for the laughter guys. Hope to see you on top soon.
18. **Nelvia Roza, S.H**, the person that I automatically connect with. Thanks for being my best friend since the very first beginning of colleges life, Beb. I love you, I really meant it.
19. My sisters and brothers from another mother, KKN Unit 226: Ifan Cezhar Hidayat, Ayik Muhammad Zaki, Rizqi Kridho Utomo, Mas Salaman Firdaus (Mas Emon), Illah Rahmawati, Chantika Husna Afifah, Adelia Dwiyani and Pipit Barato Vanezsa. Thanks for a month full of memories. *Umi loves you to the fullest, guys*.
20. My 9th years and still counting bestfriend which called as "Sweeter". Rianti Kusumaning Dewi, Rizki Yola Melansari Dewanti, Annisa Dewinta Putri, Ridha Asti Shabira, and Zeilfira Fazwiary. Thanks for always became my human diary since Junior High School, and stay still beyond distance and time.
21. My beloved IPA 3 SMANSA PURWAKARTA (SHIT3): Abdullah Reza, Aditya Wira Castrena, Alfianti, Amanda Ilma Tania, Annisa Maharani, Arsy Faridhatunnisa, Chrisan Bimo Prayudha, Asri Nur Rifayani, Desca

Arsela, Fadhil Dwi Yulian, Fitri Awalia, Hema Chiliandita, Inggrida Wisnu, Irfan Hadi Prasetyo, Khanza Khairunisa, Garin Maulana, Meidiana Yusup, M. Akbar Nugraha, M. Fachri Julianto, Munggarhana Aschi, Mutia Ravana, Nauval Ghifari, Ravela Febrianti, and Gilang. How should I put this into words? I treasure and cherish them with all of my heart, because I know that I can't find the best people like them. *You guys are my favorites.*

22. Juridical Council of International Program 2016/2017, which offered me a place to learn.
23. CHA Mainboard of JCI: Aris Rahmat Julian Noor and M. Arif Budi Irfandi, thanks for making me, dude. Thank you for singing a random song in the silence of the night and for being a "Good Demissioner". CHAAA!;
24. HRD Division of Student Association of International Law: Papito, Mas Faruq, Inka, Alin, and Ririn. Thanks for every warmth and laughter; and
25. Ibu and Bapak Fathurohim and all of my sisters from another mother, Mbak Rifkha, Adek Tiws, Adek Vina, Adek Icha, Adek Salsa, Adek Ririn, Adek Bella, Ganis, Ceuceu Ayu, Ceuceu Sekar, Mbak Afi, Mbak Hanung, Tata, Eka, Elma, and Asti. Thank you for making *kostan* feels like home and thank you for always remind me about this thesis like all the time.
26. Every single person who has encouraged me to complete this work that I cannot mention one by one.

Finally, suggestion and critics are widely opened since the thesis is still far from perfect.

ABSTRACT

Evidence has a very essential role to decide whether there is a violation or not in handling price fixing case. However the evidentiary of price fixing case cannot be separated from the use of economic evidence because it is almost impossible to find the written agreement among the business actors. For example in the price fixing of Scooter Matic (Skutik) case in Indonesia. This research tries to elaborate the application of economic evidence in the case of Yamaha and Honda Scooter Matic (Skutik) in Indonesia. Hence, there are so many parties question about how does the KPPU verify the economic evidence in the evidentiary process in handling Yamaha and Honda Skutik case in Indonesia? And also try to figure out whether the application of economic evidence already compatible with the evidentiary process relating to the guidance evidence in the Competition Procedural Law or not? This research is a normative-comparative approach with the process of collecting data was done through both literature studies by delve as many as possible knowledge and information from the books, journal, articles, documents and news. In the process of analyzing data during the process of this research, it is applied the qualitative method of analysis. It was done by describing the data, knowledge and information through description or explanation which is assessed by the opinions of the experts, by laws, and also by the researcher's own arguments. Then qualifying it and connecting the theory or doctrine related to the formulation of the problem in this study, as well making conclusions to determine the results and also recommendation. The result of this research are the legal considerations of KPPU's decision in the Yamaha and Honda Skutik case are based on indirect evidence that conducted an analysis using the methods of structural and behavioral factors to meet sufficient preliminary evidence requirements as the guidance evidence. Only structural factors or behavior factors by business actors are not sufficient to prove the existence of a price fixing. However, as long as both communication evidence and economic evidence forming a series of events that can be concluded it is a violating the law then the qualifications is part of guidance evidence. While guidance evidence is the knowledge of the Commission Assembly by which it is known and believed to be true. In Yamaha and Honda Skutik case, besides it is using the guidance evidence which is supported by the indirect evidence. There are also the expert testimony and witness testimony using in this case. Thus, it is already compatible with the evidentiary process in the Competition Procedural Law.

Keywords:

Economic Evidence, Price Fixing, Scooter Matic (Skutik)

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

BAP	Berita Acara Pemeriksaan
BBN	Bea Balik Nama
BW	*Burgerlijk Wetboek voor Indonesie*
HIR	*Herzien Inlandsch Reglement*
IMF	International Monetary Fund
KPPU	Komisi Pengawas Persaingan Usaha
MPR RI	Majelis Permusyawaratan Rakyat Republik Indonesia
OECD	Organization for Economic Cooperation and Development
PBUH	Peace Be Upon Him
Rbg	*Reglement voor de Buitengewesten*
Skutik	Scoteer Matic
TKDN	Tingkat Komponen Dalam Negeri
UMR	Upah Minimum Regional

LIST OF TABLES

LIST OF CHART

CHAPTER 1

INTRODUCTION

A. Context of Study

In a competitive market structure where new business actors in the market are large, and there are no barriers for business actors to enter the market. It makes every business actor in the market will not be able to drive the price according to their will. Business actors only accept the price set by the market and will strive to produce maximally in order to achieve an efficient level in production. On the contrary, in oligopoly market, where there are only a few business actors, business actors may work together to determine the price of the product and the amount of production from each business actor to become bigger and stronger. Therefore, it is common practice to grow and develop in an oligopoly-dominated market, where it is easier to unite and control most of the market share.[1]

The main characteristic of the oligopoly market is the possession of a good/service by only a few firms. Thus, although in the oligopoly market there is competition, but the intensity of existing competition is not the same as what happens in perfectly competitive markets or monopolistic markets. Competition occurs only among companies within the industry, and by entering into an agreement, competition can still be further reduced.

[1] Andi Fahmi Lubis, et al., *Hukum Persaingan Usaha Antara Teks & Konteks*, Deutsche Gesellschaft fur Technische Zusammenarbeit (GTZ) GmbH, Jakarta, 2009, p. 106.

Business actors in the oligopoly industry will tend to do collusion.[2] One form of collusion is by forming a cartel. Cartel is a central and phenomenal issue that has always been the center of debate in the application of business competition law in various countries. In general, cartels are regulated and prohibited under Anti-Monopoly Laws in various countries.[3]

A combination of procedures or sellers that join together to control a product's production or price can also be called as cartel.[4] In other words, cartel is the organization of producers of goods and services that work together to control production in order to dictate the market.[5]

The impact of the cartel on the decline in social welfare is considered quite serious. In practice, business actors aim not to make their products price in the market fall and gain much profit by making agreements with other business actors to regulate the amount of production so that the amount is not excessive in the market. However, it is even detrimental to consumers because the resulting product becomes limited. Therefore, consumers have to pay more to get the product. It can be conclude, the main goal of cartel practice is to dig up much profit from the consumer to the producer. In terms of competition, cartel becomes a plague in the business activity because its existence can turn off the competition

[2] George J. Stigler, "Theory of Oligopoly" , *The Journal of Political Economy*, Vol. 72, No. 1 Feb, 1964, p. 45

[3] The essence of the Anti-monopoly Law that is generally present in various countries is: (1) Closed Agreement, (2) Price Discrimination and Price Fixing, (3) Collusive Tendering / Bid Rigging; (4) Boycott (5) Cartel (6) Mergers or Acquisitions and (7) Predatory Behavior, See Sutrisno Iwantono's speech in Law No. 5 of 1999 and KPPU: *Prosiding Rangkaian Lokakarya Terbatas Masalah-Masalah Kepailitan dan Wawasan Hukum Bisnis Lainnya*, Pusat Pengkajian Hukum, Jakarta, 2004, p.8.

[4] Bryan A. Garnier, Ed., Black's Law Dictionary, Print.8, (St. Paul Minnesota:West Publishing Co., 2004), p.751

[5] Suharsil and Muhammad Taufik Makrao, *Hukum Larangan Praktik Monopoli dan Persaingan Usaha Tidak Sehat di Indonesia*, Ghalia Indonesia, Bogor, 2010, p. 57

and hold back the rate of growth. One way to create an entry barrier that is detrimental to new business actors who intend to enter the market.

Based on the brief explanation above about the negative impact of cartel, it is well deserved that KPPU has been active in investigating alleged cartels by business actors in Indonesia.

In addition to conduct a more in-depth review of cartel cases, KPPU has issued Guidance on Implementation of Article 11 of Law No. 5 of 1999 concerning the Ban on Monopolistic Practices and Unfair Business Competition. It aims to emphasize explanations of the series of evidentiary in cartel cases that include structural and behaviors factors.[6] In these guidelines also set about early indicators of cartel identification that can occur through structural factors and behavioral factors. However, unfortunately the guidelines are unable to describe cartel legal tests and indicators in detail and comprehensively.[7]

The term cartel used in Law No. 5 of 1999 is too narrow.[8] In many countries the agreement to divide the territory, allocate customers, or price fixing is a cartel. Cartel actually has a broad sense, which means a formal agreement, between companies in an oligopoly industry. The members of the cartel make agreements such as price issues, total industrial products, market share, consumer distribution, territorial divisions, conspiracies, the creation of joint sales agents

[6] Hukum Online, "Mengkritisi Draft Pedoman KPPU tentang Kartel", Hukum online 22 April 2010, article can be access on http://www.hukumonline.com/talks/baca/lt4bcff9789844c/talk-hukumonline--discussion (last updated on October 10, 2017 at 6.26 A.M)

[7] Hukum Online, "Asosiasi Pengusaha Tuntut Term of Conduct Kartel", Thursday July 29, 2010, article can be access on http://2020.153.129.35/berita/baca/lt4c517768ed231/asosiasi-pengusaha-tuntut-iterm-of-conducti-kartel (last updated on October 10, 2017 at 6.35 A.M)

[8] A.M. Tri Anggraini, *Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat Per Se Illegal dan Rule of Reason*, Print 1., *Op.Cit.*, p. 402

and profit sharing or a combination of those in general. Therefore, it can be said that the regulation of Article 5 Paragraph (1) of Law No. 5 of 1999 which determines the prohibition of horizontal price fixing agreement is also a form of cartel which is a cartel of price.[9] However, in Indonesia, especially in the Law No. 5 of 1999 those are regulated under the different Articles.

The cartel's handling requires ability, expertise, and consistency in doing the right economic calculations, reading the rules and looking at the interpretation of the law. This matter is still less implemented by KPPU in handling price fixing cases in Indonesia. For example in the case that are ongoing and still in the process of appealing which is Yamaha and Honda Scooter Matic (*Skutik*) case, KPPU sentenced Yamaha and Honda proven legally and convincingly violating Article 5 Paragraph (1) of Law No. 5 of 1999 because have made the price agreement. Both Yamaha and Honda have fined maximum administrative fine of 25 billion rupiah for Yamaha and 22.5 billion rupiah for Honda. The fine for Yamaha is higher because the commission assesses that Yamaha has manipulated data during the trial.[10]

Article 5 Paragraph (1) of Law No. 5 of 1999 stated that:

"The Business Actor is prohibited from entering into an agreement with a competing business actor to fix the price of an item and or service to be paid by the consumer or customer in the same relevant market."

[9] R.S Khemani, *A Framework for The Design and Implementation of Competition Law and Policy*. OECD, World Bank, Washington DC, 1998, p. 7

[10] The legal issue developed in the society regarding *skutik* case is a cartel. However in the trial proved to be price fixing. Then the researcher tries to explain both and what is the real difference between cartel and price fixing.

The key interpretation of the Article lies in the phrase "prohibited from entering into an agreement." Means the KPPU have to prove the existence of an agreement between Yamaha and Honda for example about the selling price or so on. The reason is the market share of *Skutik* users in Indonesia is currently increasing has reached more than 70%. Moreover, in the oligopoly structure of capital-intensive and technological markets and the same price-forming compound, it is certain that it will be difficult to carry out cartel practices coupled with fewer automotive industry players.[11]

This certainly raises the question of what evidentiary standard is actually used by KPPU. Therefore, it will be very weak if in this case there is no direct evidence. The direct evidence must also be followed by the existence of two evidences.[12] Both evidences are important, thus the assembly of the District Court can strengthen the KPPU's decision.

A significant problem occurs when the KPPU has legitimately severed the business actors involved in the cartel, however the decision was canceled through a mechanism of Objection of the KPPU's decisions in the District Court. The reason given is that KPPU did not succeed in evidentiary process of cartel agreement among business actors. The other issue is related to the provision of orally cartel agreement (indirect evidence). Whereas, Law No. 5 of 1999 has tried

[11] Hukum Online, "KPPU Harus Sampaikan Direct Evidence Agar Vonis Kartel Skutik Yamaha-Honda Dikuatkan", Thursday March 2, 2017, article can be accessed on http://www.hukumonline.com/berita/baca/lt58b7d2f8bc21e/kppu-harus-sampaikan-idirect-evidence-i-agar-vonis-kartel-skutik-yamaha-honda-dikuatkan (last updated on October 10, 2017 at 7.33 A.M)

[12] *Unus Testis Nullus Testis* means one witness is not a witness. It stated under Article 185 Paragraph 2 of Criminal Procedure Code

to accommodate this shortage, since many agreements of cartel conducted orally. However, it is countered by the District Court by reason of the absence of written evidence (direct evidence).

From the explanation above, it can be conclude that in regards to the cartel case in Indonesia, there are two kinds of indirect evidence which are communication evidence and economic evidence. Both of them cannot be stand-alone without the direct evidence. However, as long as both communication evidence and economic evidence forming a series of events that can be concluded, it is a violation act then the qualifications are part of guidance evidence. Guidance is the knowledge of the Commission Assembly by which it is known and believed to be true.[13]

It is in accordance with the principle of *Unus Testis Nullus Testis,* which means one witness is not witness. This principle is affirmed in Article 1905 BW, article 169 HIR / 306 RBg, meaning to say that a witness has not reached the minimum limit of evidence. This principle is also stated in the Criminal Procedure Code set forth in Article 185 Paragraph 2 which stated "the testimony of a witness alone is not sufficient to prove that the defendant is guilty of the alleged act".[14] However, such a principle can be disaggregated by Article 185 Paragraph 3 of the Criminal Procedure Code which states that "such provision shall not be applicable if accompanied by valid evidence".[15] This may be compared to Article 300 Paragraph (1) of HIR which states that "a District Court judge shall not impose a

[13] See Article 72 Paragraph 3 of Commission Regulation No. 1 of 2010, p.32
[14] See Article 185 Paragraph 2 of the Criminal Procedure Code
[15] See Article 185 Paragraph 3 of the Criminal Procedure Code

penalty on the defendant if the defendant denied his wrongdoing and there was only one witness who charged the defendant while there was no other evidence".

> The true essence of the rule is not in the numbers, since there is no reason to say that a witness's testimony is less reliable, with two testimony of witnesses. But the reason is that with the testimony of a witness alone the possibility of reciprocal checking of evidence will not be possible. Therefore, to make a valid evidentiary required at least two evidences, to be able to punish on the basis of two evidences are not required that there should be certain conformity between the two evidences, but importantly there is a meeting point of each other. [16]

The principle of *Unus Testis Nullus Testis* is often misunderstood by a number of people because if this principle is really applied straight, it will be affected to the difficulty of proving a case. In fact, the testimony of a witness can be reinforced by another testimony and becomes valid evidence.[17]

> However, the evidentiary of cartel cannot be separated from the use of economic evidence (indirect evidence). The Organization Economic Development (OECD) also confirmed that the use of economic evidence to prove the existence of an unwritten agreement among cartel members because at this time it is almost impossible to find evidence of a written agreement that contains an agreement to hold a cartel among business actors. Even though it is not an absolute evidentiary, economic analysis can be a foundation when it comes from a logical assumption and is used in conjunction with relevant facts.[18]

Now there are so many parties question the application of economic evidence in cartel case of the decisions made by KPPU, because KPPU's decision is deemed not based on relevant evidence. KPPU is considered not careful and in a hurry in concluding that there has been a cartel. KPPU easily make guilty

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[16] A. Karim Nasution, *Masalah Hukum Pembuktian Dalam Proses Pidana II*. Jakarta, 1976, p.11.

[17] Hukum Online, "Unus Testis Nullus Testis Kerap Disalahartikan", Hukum Online 2 May 2009, article can be access on http://www.hukumonline.com/berita/baca/lt4fa0d5e3591ae/iunus-testis-nullus-testis-i-kerap-disalahartikan (last updated on October 13, 2017 at 10.30 A.M)

[18] Study by the UNCTAD Secretariat, "The Use of Economic Analysis in Competition Cases". Session 10, Jeneva 7-9 July 2009, p. 16

decisions and impose fines of billions of rupiah to business actors. It becomes an irony because the presence of KPPU is expected to protect the business interests rather than threaten the business continuity. It is in contrast to the USA, which permitting the use of indirect evidence, thus the written evidence of the agreement is no longer the primary evidence because the USA does not require direct evidence in the cartel agreement, besides the USA has handled the cartel case better from the other countries.

Thus, It is one of the underlying ways of comparing also the application of economic evidence in cartel case in Indonesia and the USA. The principle is that more economic evidence (circumstances), the stronger evidence. The attention of the judges has shown how strong the role of this economic evidence. The jury as a demolisher whether the cartel is proven or not, but the judge still holds an important role as a decision maker whether the evidence is enough or not before proceeding to the jury.

Departing from this problem, this paper was made in order to figure out, to analyze, and to give a clearer view of those aforementioned legal issues with the tittle, "The Application of Economic Evidence in Price Fixing of Scooter Matic *(Skutik)* Case in Indonesia".

B. Problem Formulation

Based on the context of study described above, then the problem in this research are:

1. How does KPPU verify the economic evidence in the evidentiary process in handling Yamaha and Honda *Skutik* case in Indonesia?
2. Whether the application of economic evidence compatible with the evidentiary process relating to the guidance evidence in the Competition Procedural Law?

C. Research Objective

Based on the problem formulation of the above, the purpose of this study are as follows:

1. To analyze the application of economic evidence in the evidentiary process by KPPU in Yamaha and Honda *Skutik* case in Indonesia.
2. To figure out whether the application of the economic evidence in cartel case already compatible with the evidentiary process relating to the guidance evidence in the Competition Procedural Law or not.

D. Definition of Terms

A conceptual framework is an essay that describes the relationship between the concepts specifically to be observed. Writing of this thesis use an operational definition as follows:

1. Application means practical use or relevance. [19]
2. Indirect Evidence is evidence that cannot be explained in a specific and clear matter of agreement between business actors, whether economic evidence or

[19] Accessed from https://en.oxforddictionaries.com/definition/application (last update on October 12, 2017 at 7.41 P.M)

evidence of communication or meeting. To use the indirect evidence, there must be a complete intact factuality, which was found during the case review process.[20]

3. Economic Evidence in cartel cases, the economics analysis can be broke down into two-step analysis, which are:
   a. structural analysis, to analyze whether the market under investigation had the possibility to collude, and
   b. behavior or change analysis, to analyze whether behavior of the market under investigation consistent with cartel behavior.[21]
4. Cartel is a combination of procedures or sellers that join together to control a product's production or price.[22]
5. Business Competition Supervisory Commission (KPPU) is a commission established to supervise business actors in running their business activities in order not to monopolize and or unfair business competition.[23]
6. USA Antitrust Law is a collection of federal and state government laws that regulates the conduct and organization of business corporations, generally to promote fair competition for the benefit of consumers. (The concept is called competition law in other English-speaking countries.)
7. *Unus Testis Nullus Testis* means one witness is not a witness. In the Criminal Procedure Code set forth in Article 185 Paragraph 2 which read "the

[20] Djuwita Ramelan W, "Bukti Tidak Langsung (Indirect Evidence) Dan Penerapannya di Indonesia" in a *Business Law Journal*, Volume 32 Number 5 (Year 2013), P.ii.

[21] Andi Fahmi Lubis, "Analisis Ekonomi dalam Pembuktian Kartel" in a *Business Law Journal*, Volume 32 Number 5 (Year 2013), p.386.

[22] Bryan A. Garnier, Ed., *loc.cit.*

[23] Republic of Indonesia, "Law of the Republic of Indonesia No.5 of 1999 Concerning the Ban on Monopolistic Practices and Unfair Business Competition", Chapter 1, Article 1 point 18.

testimony of a witness alone is not sufficient to prove that the defendant is guilty of the alleged act".[24]

E. Theoretical Review

In this Sub Chapter, the researcher will discuss about evidentiary in the competition procedural law, approach in evidentiary, evidence and the process of evidentiary.

The core in the process of handling cases in the Court is in the evidentiary system. The law of evidentiary has a very important function, hence refers to the theory of evidentiary which is contained in civil law, criminal law and criminal procedural law and competition law enforcement, the theory of evidentiary adopted in the competition law are as follows:[25]

a. Negative Evidence Theory Based on the Law (*Negative Wettelijk Bewijstheorie*)

Theoretically, the negative evidence based on the Law emphasizes at least two valid evidences, then the judge's conviction. In Article 183 Criminal Procedure Code stated that, "The judge shall not impose a penalty on a person, except if with at least two valid evidences he / she obtain the conviction that a crime is actually happening and that the defendant is guilty of doing so".[26] From this understanding it is clear that it should be based on the Law (Criminal Procedure Code), namely the legal evidence in Article 184 of the Criminal Procedure Code, accompanied by the judge's conviction derived

[24] Set forth in Article 185 Paragraph 2 Criminal Procedural Code.
[25] I Made Sarjana, *Op.Cit.*, p. 135.
[26] See Article 183 Criminal Procedure Code.

from such evidences.[27] Referring to the provisions of the Criminal Procedure Code, relating to Article 39 Paragraph 4 letter D of Commission Regulation No. 1 of 2010, that the number of evidences determined is at least two evidences. The Commission Regulation does not expressly define the position of conviction as it is with the Criminal Procedure Code. The KPPU's conviction according to the Commission Regulation is particularly needed when using guidance as evidence.[28] On the other hand, the instructions obtained by the Commission may not exist without any other evidence. Thus according to the opinion of the author of the commission rules adhere to the negative evidence theory based on the law.[29]

b. The Theory of Evidence Based on Judge's Conviction for Logical Reason (*Laconviction Raisonnee*)

According to this theory, a judge may decide a person guilty on the basis of his conviction, a conviction based on the grounds of evidentiary accompanied by a conclusion based on certain rules of evidence. Thus, the judge's decision was dropped with a motivation.[30]

This theory of evidentiary is also embraced by the KPPU in the evidentiary process in competition case. This theory is embraced when the commission applying the approach of rule of reason, especially when conducting an economic analysis of the violations committed by the business

[27] Andi Hamzah, *Hukum Acara Pidana Indonesia*, revise edition, Sinar Grafika, Jakarta 2002, p.254.

[28] Article 72 Paragraph 3 Commission Regulation No. 1 of 2010, determining the guidance referred to in paragraph 1 letter D shall be the knowledge of the Commission Assembly by which it is known and believed to be its truth.

[29] I Made Sarjana, *Op.Cit*, p. 136

[30] Andi Hamzah.,*Op.Cit*, p.253

actor report. The role of economic evidence is to assist other evidence or direct evidence. On the contrary, economic evidence may also paralyze other evidences. Economic evidence has a role to prove whether there is economic damage or not as a result of the actions or deeds of business actor report.

If economic evidence has been proved that render economic damage as a manifestation of monopolistic practices and unfair business competition, then the business actor who committed the offense shall be liable to sanctions in accordance with the violated provisions. Whereas, if there is no monopolistic practice and unfair business competition, thus, it does not affect the economic damage such as economic inefficiency or harm consumers, the business actor who commits the violation is not sentenced in the form of sanction. Thus, economic evidence is part of the rule of reason approach, which can be independently released from other evidence.

Evidence has a very essential role to decide whether there is a violation or not. Thus the most defining law of evidence against those faced in the proceedings of whether they commit an offense or not.

> The evidence in the meaning of Criminal Procedural Law is a provision restricting the trial in seeking and maintaining the truth, either by judge, prosecutor, defendant or legal counsel. The provisions and procedures and appraisal of the evidence have been determined by law, without being allowed to act independently in appraising evidence, including the defendant is not free to defend what he considers to be true outside the law. Thus the judge must be careful, conscious in judging and considering the strength of evidence, which is found during the examination in the hearing, and based on the evidence which is limitative determined by Article184 of the Criminal Code.[31]

[31] Syaiful Bakhri, *Hukum Pembuktian Dalam Praktek Peradilan Pidana*, Total Media, Yogyakarta, p. 2-3.

> The word "prove" in the Procedural Law has juridical meaning. The evidence in this juridical sense applies only to those who are litigants or who are entitled to them. Evidence in the juridical sense does not lead to absolute truth. It is possible that the confession, testimony, or letters are false or falsified, and then in this case it is possible evidence of an opponent. Juridical evidence is nothing but historical evidence. This historical evidentiary try to establish what has happened concretely. Whether in a juridical or scientific evidence, then proving in essence means logically considering why certain events deemed true. [32]

Hence, from the explanation above as the philosophical basis of evidence is to convince the judge of the truth of the arguments presented in a case.[33] It can be said that evidence is a judicial process to look for the truth in order that the verdict imposed meets the sense of justice.

Subsequently, there is the difference between the concept of truth in criminal cases and civil cases. In general, it is said that in examining the criminal case, a judge will look for material truth (*materiele waarheid*). While in civil case, only the formal truth is already sufficient.[34]

Based on these two concepts of truth, in the Competition Law case embraces both seeking formal truth and material. Material truths conducted in Competition Law case, if the reporting business actor does not acknowledge the violation that has been done in the judicial process. While the formal truth in the competition law case is the decision can be dropped if the reported business actor admitted to the violation that has been done in front of Court.[35]

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[32] Sudikno Mertokusumo, *Penemuan Hukum Sebuah Pengantar*, Liberty, Yogyakarta, 2007. p. 92-93.

[33] R Subekti, *Hukum Acara Perdata, Bina Cipta*, Bandung, 1982, p.10

[34] *Ibid*, p. 9.

[35] I Made Sarjana, *Prinsip Pembuktian Dalam Hukum Acara Persaingan Usaha*, Zifatama Publisher, Taman Sidoarjo, 2014, p.129

Specifically to look for material truth in the competition case, which becomes the central point of attention in the judicial process is the business actor reported. Thus, the reporting entity has the basic rights guaranteed by competition law; the right to be checked immediately; the right to know clearly; the right to provide information freely; the right to an interpreter; the right to legal assistance; the right to compensation and rehabilitation. The right that guarantees the business actor is reported in the preliminary hearing or in the hearing is to be accompanied by his legal counsel and apply the *accusatoir* principle.[36] In the process of handling any case, the evidences are always dimensionless to the protection of human rights, with the protection of basic rights, the right to be tried and open to the public, to bring witnesses and take legal action, thus there will be a justice.

Justice is the substance of the law.[37] In order to achieve it, there are many concepts was created in accordance with the development of thought that occurred in this era. To discuss the concept of justice is only discussed the concept based on the benefits side and from the side of legal certainty. The two concepts often contradict each other when the judicial process arrives at the stage of judgment.

> The concept of fairness in terms of benefit is considered because the enforcement of competition law cannot be separated from the side of economics. As the background of the existence of business competition law is Indonesia embracing the market economy system, therefore enforcement of competition law cannot be separated from the efficiency of economy and people's welfare.[38]

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[36] The accusatoir principle shows that a suspect being examined is not an object but as a subject. This principle shows the examination conducted open to public where everyone can attend. *Ibid.*

[37] Andre Ata Ujan, *Filsafat Hukum*, Kanisius, Yogyakarta, 2009, p. 16.

[38] *Ibid,* p.130

Related to the two concepts of justice are legal certainty and benefit, and associated with two kinds of approaches known in the evidence of competition case are per se illegal approach and rule of reason.

a. *Per Se illegal*, means that the implementation of any prohibited action will be contrary to the applicable law. *Per Se Illegal* is an act that is inherently prohibited or illegal without the need to prove the impact of the action. In the other hand, the approach of *rule of reason* is the application of the law by considering the reasons for an action by a business actor.[39]

b. *Rule of Reason*, which means that if there is a monopoly practice or unfair business competition it is still seen how far it is unhealthy business competition practices or will result in restraint of market competition.

> The result of the per se illegal approach is more inclined toward creating legal certainty. Every business competition case if it meets the elements specified in each of the articles that regulate it, then against the offender can already be sentenced. While the evidence with the approach of rule of reason, the results of evidence more leads to a verdict that meets the sense of justice based on its benefits. Approach through the rule of reason especially those using economic evidence more emphasis on whether the violation of business competition bring the impact of anti-monopoly and or unhealthy business competition or even bring positive impact for business competition. If based on economic evidence of violations committed by business actors adversely affect the economy and harm the public, then the violation is imposed with a sanction. On the contrary, even if the act of business actor has fulfilled the elements specified in a chapter, but if his actions have a positive impact on economic development, therefore, it is decided not guilty and not sanctioned. [40]

If looked from the formulation of Article 5 of Law No. 5 of 1999, then the Article governing the issue of price fixing is formulated *per se illegal*, thus that in general law enforcers can directly apply this article to business actors who make

[39] Hermansyah, *Op.Cit.*, p. 78
[40] *Ibid,* p.133

price fixing agreement without having to wait for the emergence of the consequences of the action. In other words, the price fixing agreement is absolutely prohibited without the need to verify whether the act has a negative impact on consumers and business competition. By doing this approach, it is deemed more able to provide legal certainty for the parties so that there is no need to prove the mistake of business actor first.[41]

In order to prove the mistake of business actor, the principle of evidence in the competition case is related to the purpose of Law No. 5 of 1999 is important. That one of the goals of Law No. 5 of 1999 is to maintain the public interest and to improve the efficiency of the national economy as one of the efforts to improve the people's welfare. As a guideline in handling business competition cases, the decisions handed down in business competition cases are also in order maintain the public interest, and to improve economic efficiency so as to improve the welfare of the community. Thus, a fair ruling in the competition case can create economic efficiency as one effort to improve people's welfare.

In essence the evidentiary stage in law enforcement shall not be to the expense of the reported business actor. The judge's decision is taken on the basis of the policy argument must bear the punishment outside or heavier than it should not have happened. It is necessary to emphasize that whatever the reason, for example in the sake of a larger economic interest, the right of innocent person should not be sacrificed. Therefore, it is wrong if someone's property is taken and

[41] Andi Fahmi Lubis,,et,all., *Op.Cit,* p. 61

given to others for economic efficiency. The deliberate rights are often ignored under the guise of the common good.

The decision of a competition case on the one hand to create justice based on can improve economic efficiency to prosperity of the people. On the other hand, the business competition outcome to create justice cannot ignore the principles of legal evidence and from the economic side, therefore to provide maximum protection to the reporting entrepreneur, the principle of prudence is always and absolutely held firmly in the evidence of competition case.

One of the task of the assembly of the KPPU is to investigate whether or not a legal relationship on which the alleged report of violation is in accordance, and whether or not it violates the provisions of Law No. 5 of 1999. The existence of this legal relationship must be proven, if the reporter wants his report to be granted by the KPPU. Not all of the arguments on which the report should be based must be verified, because the arguments that are not denied, let alone fully acknowledged by the reporter, need not be proven again. When a registered business actor acknowledges the truth of the reporting report, only then is sufficient reason for the KPPU's assembly to pass a verdict that the Reported Party of Business Actor is proven to be in violation of Law No. 5 of 1999.[42]

In relation to the evidentiary process in KPPU, the concerned parties are not only reporters, the KPPU's Assembly shall determine who among the parties

[42] Binoto Nadapdap., *Hukum Acara Persaingan Usaha*, Jala Permata Aksara, Jakarta 2009, p.57

litigants who are required to submit evidence, whether the reporting party or the reported party.[43]

In the competition case, because there are any reports, then its nature is seeking material truth. If the commission assembly has not obtained a strong tool of evidence, the commission must look for evidence to pass the verdict. Because of the position of the commission is as a prosecutor and investigator. However, if the case under commission's initiative, the commission must fully be able to prove based on the evidence that it has violated Law No. 5 of 1999.[44]

> Proving is justifying the legal relationship. Accepting and justifying the report of the reporter means that the commission assembly comes to the conclusion that there has been a violation committed by the reported party. Therefore proving in a broad sense is to strengthen the conclusions of the commission council with the provision of valid evidence. In a limited sense, evidence is only required if the reporter's report is denied by the reported party. Therefore what is not denied by the reported party then it need not be proven. Article 163 of HIR determines that whoever claims to have the right or submits an event to strengthen the recognition of his rights or to deny the rights of others, that person shall prove the right or the event.[45]

The interesting thing in the evidentiary is that not all the evidence presented in the trial is used for the basis of the determination of the decision of the case. Irrelevant evidences should not be included as a basis for decision-making, as it will make the judgment does not reflect certainty. Irrelevant evidence will not get recognition.[46]

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[43] I. Made Sarjana., *Op.Cit*.,p.146
[44] *Ibid.*
[45] *Ibid*, p.147.
[46] *Ibid.*

The legal theory of evidence suggests that in order for evidence to be used as evidence in the Court, the following conditions are required:[47]

1. Permitted by law to be used as evidence;

2. Reliability is the evidence can be trusted validity (not fake);

3. Necessity is the evidence is necessary to prove a fact;

4. Relevance is the evidence has relevance to the facts to be proven.

> In terms of the proximity between the evidence and the facts to be proven there are two kinds of evidence that are: direct evidence and indirect evidence. Direct evidence is evidence where the witness saw firsthand the facts to be proved so that the facts are proven directly (in one stage only) with the existence of such evidence. As for what is meant by indirect evidence is a means of evidence where between the facts that occur and the evidence can only be seen relationship after drawn certain conclusions.[48]

Article 42 of Law No. 5 of 1999 stipulates that the instruments of examination of the commission are:[49] witness testimony, expert statements, letters and or documents, instructions and information of business actors. In regards to the strength of proof according to Law No. 5 of 1999 or in the Commission Regulation No. 1 of 2010 is not clearly defined. Therefore in this case shall refer to the provisions contained in criminal or civil procedural law.[50]

1. Witness testimony

Law No. 5 of 1999 does not provide any sense of the witness. According to Article 1 Paragraph 14 of Commission Regulation No. 1 of 2010 is any person or party who knows the occurrence of violations and provide information for the

[47] Munir Fuady, *Teori Hukum Pembuktian (Pidana Dan Perdata*), Citra Aditya Bakti, Bandung, 2006, p. 4

[48] Ibid, p.5

[49] Set forth in Article 42 of Law No. 5 of 1999.

[50] I Made Sarjana, *Op.Cit*, p. 150

purposes of examination.[51] The testimony of witnesses shall be regarded as evidence if the information given in the Commission Assembly concerning the matter experienced, witnessed or heard by the witness (Article 51 Paragraph 2 of Commission Regulation No. 1 of 2010). Testimony is an affirmation of something as righteous by a person or several witnesses of events and submitted to others to be trusted.[52]

The examination of witnesses in the KPPU, principally is same as in the District Court. Before giving testimony, witnesses will be sworn first, it accordance with their respective religions and beliefs.[53]

The difference lies in the process of examination, where in the District Court generally conducted publicly, but it also possible to close on certain cases in order to maintain the privacy, such as divorce cases. The examination of witnesses in the KPPU is essentially conducted in a closed manner and must be done openly if the relevant witness is willing to declare that the examination of him / her is done openly.[54]

> Not all of witnesses' statement has a value as evidence. The testimony of witnesses that have the value of evidence is the information in accordance with what is described in Article 1 No. 27 of the Criminal Procedure Code. Related to the explanatory sentence of Article 185 Paragraph (1), it can be deduced:
>
> 1. Any witness testimony beyond what he heard himself in a criminal incident occurring or beyond what he saw or experienced in a criminal incident, information given outside the hearing, sight, or personal experience of a criminal incident, "cannot be made and judged as evidence".

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[51] *Ibid,* p. 151

[52] Hyronimus Rhiti, *Filsafat Hukum, Edisi Lengkap (Dari Klasik Sampai Post Modernisme)*, Universitas Atma Jaya, Yogyakarta, 2011, p.211

[53] I Made Sarjana, *Op.Cit,* p. 151

[54] *Ibid,* p. 153

2. "*Testimonium de Auditu*" or witness testimony that he obtained as a result of hearing from others, has no value as evidence.
3. The opinion or invention that the witness obtained from the results of thought, not the testimony of the witness. [55]

The power value of the witness is free (Article 172 HIR, Article 1908 BW). Subject to the provision, the judge is free to consider or assess witness statements based on the similarity or interconnection between witnesses with each other. In contrast to the deed, it has perfect and binding legal force. Then the witness proofing power in court is considered imperfect and not binding because the judge is not obliged to be bound to accept or reject the truth, in accordance with the principles of evidence.[56]

Even though judges have the freedom to accept or reject witness statements, there are some things that serve as a standard in the determination of witnesses:

a.*Unus Testis Nullus Testis*. This principle is contained in Article 1905 BW, Article 169 HIR / 306 RBg that states; one witness is not witness.

b. At least two evidences

c. At least one witness person is added with one other evidence.

Supreme Court Decision No. 3901K/Pdt/1985, dated November 29, 1988, stated that the proof of statements which is a mere statement of those who give statements without being examined in court has no proven power. (Cannot be equated with testimony). Supreme Court Decision No. 3428K/Pdt/1985 dated February 5, 1990, stated that the proof of which is only a statement is not binding

[55] *Ibid.*
[56] *Ibid,* p. 155

and cannot be equated with the testimony that should be given under oath in Court.[57]

The numbers of expert witnesses to be heard and the judgment of the witnesses is up to the discretion of the judge concerned and this cannot be considered in the cassation examination (Supreme Court Decision No. 191.K/Sip/1962 on October 10, 1962.[58]

2. Expert Testimony

The expert according to Indonesian Dictionary (KBBI) is a skilled person, well understood in a science; adept right. The Commission Regulation No. 1 of 2010 does not impose limits on what is meant by experts. The Commission Regulation specifies only that an expert in the proceedings shall provide opinions, both written and oral, reinforced by an oath or a pledge of actual matter in his experience and knowledge. (Article 56 paragraph 22 Commission Regulation No. 1 of 2010).[59]

The fundamental difference between witness testimony and expert testimony is that the witness's testimony is experienced, seen and heard on his own. No witness may bear testimony on the basis of his or her ability or experience related to his or her abilities. While the expert's testimony is not based on what he experienced, heard and viewed in relation to the case in which the expert was consulted, but the expert informed him of his ability, his expertise was

[57] R. Soeroso, *Yurisprudensi Hukum Acara Perdata Bagian 4 Tentang Pembuktian*, Sinar Grafika, Jakarta, 2010, p. 295

[58] *Ibid,* p. 321

[59] I Made Sarjana, *Op.Cit*., p.156

academically acknowledged to have special knowledge relating to the matter when an expert was questioned.

Under the Article 42 of Law No. 5 of 1999, the position of evidence consisting of witness testimony, expert testimony, letters or documents, guidance and business actor's testimony are the same. The expert's testimony is binding and equal to the testimony of witnesses or letters and documents, as the expert's testimony is evidence. This is different from the meaning of the expert's testimony in the criminal case which may be used or not by the judge, because the expert's testimony is not binding, however the expert's testimony in the criminal law is stated as valid evidence as mentioned in Article 184 Criminal Procedure Law.[60]

3. Letters and or Documents

A letter is a piece of paper that is written and can be read, containing information or intent as a sign of something that the author wants. It also can be said that the letter is a piece of paper that contains signs of reading intended to pour out the heart or to convey a person's thoughts and used as evidence. Thus anything that does not contain reading signs or contains signs of reading but does not conceive of thoughts is not included in the sense of evidence of the letter.[61]

The document is a written or printed letter which can be used as proof of information (such as birth certificate, marriage certificate, letter of agreement).[62]

Article 76 of Commission Regulation No. 1 of 2010 determines:[63]
(1) Letters or documents as evidence consist of:

[60] *Ibid*, p.159
[61] Binoto Nadapdap, *Op.Cit.*, p. 65
[62] Kamus Besar Bahasa Indonesia, p. 272
[63] I Made Sarjana, *Op.Cit*. p. 162

a. Authentic Deed, is a letter made by or before a public official, who, in accordance with the laws and regulations, is authorized to make such a letter with the intention of being used as a proof of the events or legal events contained therein
b. Private deed made and signed by the parties concerned with the intention to be used as evidence of events or legal events contained therein
c. Decree or decision letter issued by the competent authority
d. The data contained on the reported business activities, among others, production data, sales data, purchasing data, and financial statement data
e. Other letters or documents not included as referred to in letter a, letter b, and letter c which have something to do with the case
f. At the request of the Commission Assembly may state the data referred to in letter e as confidential and not shown in the Examination.
(2) The letter or document submitted as evidence is a letter or an original document or not a copy
(3) A photocopy of a letter or document must be declared in accordance with the original, initialed by the authorized officer, with sufficient stamp duty

The evidence of the letter has the same power as the evidence in a law of civil procedure. The Commission is bound to the perfect evidence of letter. The equation is caused by activities of business actors is a business activity. Such activity is a civil nature which is often done through letters or documents in written form, thus that the violation is often done in connection with its business activities that have an impact on the public interest. Business activities such as monopolistic practices, oligopoly, merger, conspiracy, boycotts, pricing, market control, and others. They all have an impact on productivity, price, economic efficiency, quality, and others.[64]

4. Guidance

Guidance evidence is not specifically regulated under Law No. 5 of 1999. However, under Article 72 Paragraph 3 of Commission Regulation No. 1 of 2010

[64] *Ibid.*

stated that guidance is knowledge of Commission Assembly by which it is known and believed to be true.

As a guideline in the provisions of the Criminal Procedure Code it is determined that the guidance is an act, event or circumstance due to its correspondence, either between one another and the offense itself, indicating that there has been a crime and who the perpetrator is (Article 188 paragraph 1 Law No 8 of 1981).[65]

Article 188 Paragraph 2 of Law No. 8 of 1981 provides that guidance can only be obtained from:

a. Witness testimony

b. Letter

c. Defendant's testimony

Referring to the provisions in Law No. 8 of 1981, the guidance on the business competition case can be interpreted as a signal of the existence of an act, event or circumstance, which due to its correspondence, either between one another, and with reports of alleged violation of Law No.5 of 1999, indicating that there has been a violation of Law No. 5 of 1999 and who the perpetrators is.

> To understand guidance evidence in a business competition case can refer to the definition of guidance as set forth in Criminal Procedure Law, however an advantage contained in the business competition case evidentiary is by utilizing the economic analysis. Therefore, economic analysis is concerned with circumstantial evidence as commonly known in the business competition. Economic analysis has a function if the direct evidence is not sufficient to strengthen the decision which will be imposed by KPPU. This is a strong foundation to provide an argument from the

[65] *Ibid,* p. 164

side of economics, given that business competition is closely related to business practices that require a correct understanding of economics. [66]

Economic analysis is based on economic rationalization and cannot stand independently of other evidences, it has relevance to other evidences so as to constitute a unity to determine the decisions imposed by the commission. At the time of economic analysis supports other evidence, KPPU can impose the decision accompanied by sanction. As the principle of evidence which has its own character of circumstantial evidence, it is worthy of economic analysis as economic evidence to bring new colors into various unknown evidence in any principle of evidence. However, in its use must be careful because it is very important to determine the existence of business actors and the most important is if there is a mistake in the use of indirect evidence in this case of economic analysis, it will have an impact on the problem of economic damage and consumer losses and ultimately lead to problems public welfare.[67]

5. Business Actor Testimony

The business actor testimony in question is the testimony of the reported business actor submitted in front of the Commission Assembly concerning the agreement, the acts which them undertakes. The reported testimony is different from the reported acknowledgment. The reported testimony shall be an explanation of all matters submitted by the reported party, relating to the alleged violation committed by the reporter against Law No. 5 of 1999 before the commission. As long as the recognition is admitted by the violation of Law No. 5

[66] *Ibid*, p. 165
[67] *Ibid*, p. 167

of 1999 carried out by the business actor is reported in front of the Commission Assembly session. Thus the nature of the reporting is broader than the acknowledgment, because the notion of acknowledgment and rejection reported is included in the category of testimony reported.[68]

F. Research Method

1. Focus Study

This research was created to analyze the application of economic evidence in the evidentiary process by KPPU in Yamaha and Honda *Skutik* case in Indonesia and to figure out whether the application of the economic evidence in cartel case already compatible with the evidentiary process relating to the guidance evidence in the Competition Procedural Law or not.

2. Data Approach

The approach in this research is using the combination of the normative approach and comparative approach. Normative legal research is a study conducted by examining library materials or secondary data only[69] especially the legal basis regarding guidance evidence and KPPU's decision. Comparative research is done to compare the cartel case handling between Indonesia and United State. This research is conducted to compare the similarities and differences between two or more facts and the properties of the object in detail based on a particular frame of mind.

[68] *Ibid*, p. 169

[69] Soerjono Soekanto and Sri Mamudji,*Penelitian Hukum Normatif: Suatu Tinjauan Singkat,* (Jakarta: Rajawali Pers),1990, p.13.

3. Source of Data

This research uses secondary data. Secondary data is divided into primary legal materials, secondary legal materials and tertiary legal materials.

The primary legal materials that were used to complete this research are laws and regulations:

1. Indonesian Civil Code;
2. Indonesian Criminal Procedure Code;
3. Law No. 5 of 1999 concerning The Ban on Monopolistic Practices and Unfair Business Competition;
4. Commission Regulation No 1 of 2010 concerning the Procedure for Handling Cases;
5. KPPU Decision No :04/KPPU-I/2016

The secondary legal materials comprises of jurisprudence, expert opinion, books, journals, articles, documents and news that cover various aspects within this topic and written by relatively highly qualified writers.

As for the tertiary legal materials are law dictionary and business dictionary.

4. Data Collecting

The process of collecting data in the making of this research was done through both literature studies by delve as many as possible knowledge and information from the books, journal, articles, documents and news. The collecting data was done to find the source of data includes primary legal

materials, secondary legal materials and tertiary legal materials especially which related to the price fixing.

5. Data Analysis

In the process of analyzing data during the process of this research, it is applied the qualitative method of analysis. It is done by describing the data, knowledge and information through description or explanation which is assessed by the opinions of the experts, by laws, and also by the researcher's own arguments. Then qualifying it and connecting the theory or doctrine related to the formulation of the problem in this study, as well making conclusions to determine the results and also recommendation.[70]

G. Structure of Writing

In order to create better understanding in this thesis result, then it will be explained briefly from Chapter I to Chapter VI.

In Chapter I, the introduction in this essay contains the background, problem formulation, research objective, definition of terms, theoretical review, research method and structure of writing about The Application of Indirect Evidence in Price Fixing of Scooter Matic (Skutik) Case in Indonesia.

In Chapter II contains a general overview on competition law, general overview on cartel, general overview on price fixing, covering the price fixing in Islamic perspective and comparing the cartel handling between Indonesia and the USA.

[70] Siti Anisah, *Pendekatan Per Se Illegal Dalam Pembuktian Pelanggaran Perjanjian Penetapan Harga*, in the Proposal Penelitian Individu, p. 20

In Chapter III contains the results of research and discussion that describes the results of the analysis to answer the question on the problem formulation. Covering the standard explanation of the application of economic evidence in the KPPU's decision in the case of Yamaha and Honda *Skutik* cartels, and the evidentiary process in the Competition Procedural Law.

In Chapter IV is Closure, covering the conclusions and recommendation which explain the conclusions of the authors on the problems.

CHAPTER II
GENERAL OVERVIEW ON COMPETITION LAW, CARTEL, PRICE FIXING AND CARTEL CASE HANDLING BETWEEN INDONESIA AND UNITED STATE OF AMERICA

A. General Overview on Competition Law

1. Definition on Competition Law

Competition law in general can be regarded as a law that regulates all things related to business competition. It is the law that regulates the interaction among company or business actor in the market, while the company's behavior in the interaction among the business actor is based on the economic motives.[71] Competition law is a legal instrument that determines how the competition should be done.[72] In addition to emphasizing the competitive aspect, competition law also regulates business competition to prevent an unhealthy competition.

2. Historical Approach in Competition Law

After the collapse of the economic planning systems in Eastern Europe more than a decade ago, many countries also began to choose new economic policies. Instruments such as price and competition are increasingly being used by developing countries to improve the dynamics of development in their countries. It is due to the bad experience of the bureaucratic failure that overemphasizes government and state officials in the planned economic system. It can be seen from the level of people's welfare in their country.

[71] Andi Fahmi Lubis, et al., *Op.Cit.*, p. 21

[72] Hermansyah, *Pokok-Pokok Hukum Persaingan Usaha di Indonesia*, Kencana, Jakarta, 2008, p.1

> Until today there are more than 80 countries in the world that already have competition laws and anti-monopoly laws, and the rest are drawing up the same legislation. The move actually leads to a single goal that is to lay the groundwork for a rule of law to regulate and create a fair business competition climate. Fair competition is one of the requirements for countries to manage a market-oriented economy.[73]

One of the most important essentials for the implementation of the free market is the competition of market participants in meeting the needs of consumers. In this case, business competition is a process whereby business actors are forced to become efficient companies by offering choices of products and services in lower prices.

Competition only occurs when there are two or more business actors offering products and services to customers in a market. To entice consumer's interest, business actors strive to offer attractive products and services, both in terms of price, quality and service. The combination of these three factors to win the competition can be obtained by innovation, the application of appropriate technology, and the managerial ability to direct the company's resources in winning the competition. Otherwise, business actors will be eliminated naturally from the market arena.[74]

> For competition to take place, national economic policies in developing countries must first realize a functioning market and price mechanism. In that context, the aim is to provide market access as freely as possible and at the same time provide incentives to increase the national business actors. The level of integration of local and regional markets should also be improved through an increase in the country's infrastructure (for example in communication network and transport). Finally, a stability-monetary oriented policy is a prerequisite for the functioning of a competitive economy. Only in this way, competitive distortions that have the potential to incapacitate prices can be avoided.[75]

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[73] Andi Fahmi Lubis, et al., *Op.cit* , p.1
[74] *Ibid,* p. 2
[75] *Ibid,* p.3

The control of the market by one, two or more business actors in the free market should be prevented because in a market dominated by business actors, it is open to avoid or shut down the workings of market mechanisms so that the average is set unilaterally and harms the consumer. Fewer business actors can make deals to divide the marketing area, manage the price, quality and quantity of goods and services offered (cartel), in order to gain the maximum profit in a relatively short time. Competition among business actors can also occur fraudulently to the detriment of consumers, even countries. Therefore, the legal arrangement to guarantee free and absolute free market implementation is essential.[76]

In Indonesia, the immediate background of the Anti-monopoly law is an agreement between the International Monetary Fund (IMF) and Republic of Indonesia government on January 15, 1998. Under the agreement, the IMF approved the provision of financial assistance to the Republic of Indonesia of $ 43 billion aims to overcome the economic crisis, but with the condition of Indonesia to implement economic reforms and certain economic laws. However, the agreement with the IMF is not the only reason for the drafting of the law.[77]

> Since 1998, there have been intensive discussions in Indonesia regarding the need for antitrust legislation. The reform of the broad economic system and in particular the regulatory policies adopted since 1980 over a period of 10 years has led to a situation that is considered very critical. The business conglomerate is dominated by a certain family or party, and the conglomerate is said to remove the small and medium business actors through rough business practices and strive to influence the maximum possible preparation of laws and financial markets.

[76] *Ibid*
[77] *Ibid,* p. 14

> Against this background, it is recognized that the dissolution of the state-controlled economy and the monopolist is not enough to build a competitive economy. It is also aware of the things that form the basis of the formation of any anti-monopoly legislation that is actually the business actors themselves who sooner or later paralyze and avoid the pressure of business competition by entering into agreements or merging companies that impede competition and abuse of positions of economic power to harm the small business actors.

The initial year of reform in Indonesia raises people's concerns about the fact that large companies called conglomerates enjoy the largest market share in Indonesia's national economy. In many ways they seek to influence the economic policies of the government thus that they can regulate the supply of goods and services and set price unilaterally in which it will be very profitable for them.

The connections built with state bureaucracy provide widespread opportunities to make them become rent seeking. What they do is actually looking for opportunities to become rent seeking from the government given in the form of licenses, concessions, and other privileges. The rent-seeking activity by economists William J. Baumol and Alan S. Blinder is said to be one of the main sources of inefficiency in the economy and result in high-cost economy.[78]

> Indonesia itself has a new law in the field of Competition Law, after the initiative of the House of Representatives drafted the Bill of Monopoly Practices and Unfair Business Competition. The bill was finally approved in the plenary session of the House of Representatives on February 18, 1999, in which case the government was represented by industry and trade minister, Rahardi Ramelan. After all legislation procedures are fulfilled, finally the Law on Prohibition of Monopolistic Practices and Unfair Business Competition is signed by the president of B.J. Habibie and enacted on March 5, 1999 and valid for a year after the promulgation. The enactment of Law No. 5 of 1999 on the prohibition of monopolistic practices and unfair business competition as an advance to the results of the special session of MPR-RI outlined in MPR-RI's Decree. X/MPR/1998 on the subject of development reform in the framework of

[78] William J. Baumol and Alan S Blinder, Economics, Principles and Policy, 3rd ed. Harcourt Brace Jovanovich Publisher Orlando, Florida, 1985, p.550

the rescue and normalization of national life, then Indonesia entered a new round of organizing market-oriented economy.[79]

3. Philosophical Approach in Competition Law

From the very beginning, economic expert in the era of *Phsiocracy* such as Francois Quesnay (1694-1774) argue that free competition occurs as a result of the interaction between the forces of supply and demand in a market will produce the best price and the community will receive benefit if the individual is allowed to fulfill his personal will. Their economic argument is expressed in the statement, *"…free competition would result in an optimum allocation of resources".*[80]

The classical economic experts do not want the slightest interference from the government in economic affairs. The rationale that government intervention is not needed is based on the belief that the presence of invisible hands allows for automatic market mechanisms to take place. They argue that basically no one is deliberately designing the market, but the market can do its function properly. The market is a mechanism when buyer and seller of a commodity interact to determine its price and quantity, where price is a balancing process in the market mechanism.[81]

Developed countries have proven that in general the market mechanism is a fairly efficient system in allocating factors of production and promoting the economy. Economists attribute the success of economic growth, income generation and the prosperity of a country, to a correlation with economic

[79] Andi Fahmi Lubis, et al., *Loc.cit*.

[80] Harry Landreth and David C. Colander. *History of Economic Thought, ed. 3, Houghton Mifflin Company*, Boston, 1995, p.55

[81] Paul A. Samuelson Dan William D. Nordhaus, Microeconomics,Fourteenth edition, McGraw-Hill Inc. Indonesian edition, Mikroekonomi. Translation: Haris Munandar, et al., Erlangga, Jakarta 1997, p.43-45

freedom. Countries that consistently follow economic freedom are able to increase their economic growth and in return, it also can increase the income of individuals and the better living of standards. However, the course of history also proves that the mechanism of the market was also kept a variety of negative elements as side effects. In this case Keynes argues that an overly liberal economic system without direct government interference can bring destruction as has been proven in the great depression that swept the world in the 1930s.[82]

Market destruction is caused by distortions that interfere with performance and market mechanisms. The distortion to the market is caused by the fact that the market has never questioned that the distributions produced are fair or not socially. In a free market mechanism it means that every marketer is allowed to work on prosperity regardless of issues of justice and social distribution. The practice of monopoly, oligopoly, and other forms of fraudulent trading practices are permitted in the name of prosperity. Yet it is these practices that create distortions to market mechanisms that lead to market destruction.

In the end, even though government has limited their intervention, it is necessary to protect the freedom of the market itself, to create justice, order and legal certainty for every market participant and protect the market from failure. The role of the government is still needed to provide a common ground and a common ground rule for market participants. The law of business competition is a classic example of the need for government intervention to maintain market purity

[82] Normin S. Pakpahan, *Tatanan Hukum Ekonomi Pasar; Suatu Pendekatan Pembaruan Hukum untuk Pengembangan "Rule-Based Economy" dalam Perekonomian Indonesia Menyongsong Abad XXI*, edited by Sularso Sopater, et al., Pustaka Sinar Harapan. Jakarta 1998, p 160-161.

and freedom against elements that can cause disruption to the workings of market mechanisms reasonably.[83]

Competition law is not designed as a policy that serves to ensure prosperity in every segment of the economy or as a policy that serves to encourage every business actor to seek economic prosperity for the community. Competition law is simply designed to prohibit anti-competitive actions.[84] In other words the law of competition can be interpreted as a legal instrument that determines how competition should be done. Competition law is basically needed to prevent business actors, in competing, to use illegal means that can hinder other business actors.[85]

The competition law protects competition and fair competition process by preventing and sanctioning anti-competitive measures. Competition is a good thing for the society as well as for the economic development of a nation for various reasons. One of the benefits of competition is to encourage the decline in the price of a good or service, so it can be profitable for consumers. In addition, competition can also encourage production efficiency and natural resource allocation and encourage business actors to compete in infrastructure and products to win the competition or at least be able to stay in the market.

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[83] Johny Ibrahim,*Hukum Persaingan Usaha: Filosofi, Teori Dan Implikasi Penerapannya di Indonesia*, Bayumedia Publishing, Malang,2007, p. 131.

[84] Giorgio Monti, EC Competition Law, Cambridge University Press, New York, 2007, p.3

[85] A.M. Tri Anggraini. Perspektif Perjanjian Penetapan Harga Menurut Hukum Persaingan Usaha dalam Masalah-Masalah Hukum Ekonomi Kontemporer, edited by Ridwan Khairandy, Fakultas Hukum Universitas Islam Indonesia, Yogyakarta, p. 258.

B. General Overview on Cartel

1. Cartel in the Concept of Competition Law

To compete in the market, often the market participants use a way that can cause distortions to market mechanisms. Usually, it is done by creating barriers in the competition to prevent a fair competition resulting in losses in business activities, especially for parties directly related to the business field concerned.[86]

Basically, there are two types of barriers in trade, namely horizontal and vertical barriers. A horizontal obstacle is an action that involves competitors in a similar field of business in a treaty affecting trade in a particular region.[87] While vertical barriers are trade barriers made by business actors from different levels in the series of production and distribution.

Horizontal barriers are broadly defined as a restrictive agreement and conspiracy practice including agreements that directly or indirectly fix prices and or other terms, such as agreements establishing oversight of production and distribution, the distribution of quotas or territories, or the exchange of information and data on markets , as well as information and market information agreements, and agreements to establish co-operation in sales and purchase in an organized manner or create entry barriers.[88] Departing from that, cartels can be categorized as barrier in the form of horizontal barrier.

Frequently an industry has only a few players who dominate the market. Such circumstances may encourage them to take joint action with the aim of

[86] Stephen F. Ross, *Principle of Antitrust Law*, The Foundation Press, Westbury New York, p.117

[87] E. Thomas Sullivan and Jeffrey L.Harrison, understanding and its economic Implication, Matthe Bender&co., New York, 1994, p. 75

[88] A.M. Tri Anggraini, *Op.cit.*, p. 259

strengthening their economic strength and enhancing profits. This will encourage them to limit the production levels and price levels by mutual agreement among them. It aims to avoid the occurrence of competition that harms their own.[89]

If looking at the theory of monopoly, then an industry group that has oligopolistic position will receive benefit maximally if they apply as a monopolist. In practice this oligopolistic position is manifested through associations. Through this association they can joint and make an agreement on the level of production, price level, marketing area, and so forth which then spawned a cartel, and can create monopolistic practices and unfair business competition.[90] In addition, the cartel will cause harm to consumers, because the price will be expensive and limited goods or services in the market. As a result, business actors will be able to raise the prices. If the demand is not elastic, then the consumer will not move to another product or service. It will then cause the price of a product or a service to be higher. Similarly, if there are conditions where it is difficult for substitutes to enter the market because there are no other goods or services in the market, then the price will remain high.

Cartel is a combination of procedures or sellers that join together to control a product's production or price.[91] In other words, cartel is the organization of producers of goods and services that work together to control production or price in order to dictate the market.[92] Cartel is an association under a contract

[89] Rachmadi Usman, *Hukum Persaingan Usaha di Indonesia*, Sinar Grafika, Jakarta, 2013, p. 282.

[90] Agus Sardjono, *Pentingnya Sistem Persaingan Usaha yang Sehat dalam Upaya Memperbaiki Sistem Perekonomian*, Yayasan Pusat Pengkajian Hukum, Jakarta, 1998. p.26.

[91] Bryan A. Garnier, Ed., *Loc.cit*

[92] Suharsil and Muhammad Taufik Makrao., *Loc.cit*

among companies of equal importance designed to prevent a keen competition and to allocate markets, and to promote the exchange of knowledge of certain results and research, to exchange patents and standardization of specific products.[93]

Cartel almost always occurs in the oligopoly market. The oligopoly market is a market consisting of a small group of companies. In general, the oligopolistic industry is controlled by several companies that have a large market share, side by side with some companies with small market share. Relationships between companies with a large market share affect each other. This interaction then influences the policies taken by other small companies. Therefore, any corporate decisions and policies should be taken with caution by considering the implications of market equilibrium.

The oligopoly market has several characteristics: [94]

a. The resulting commodities can be standardized product or differentiated product. The first type oligopoly industry, usually producing raw materials such as steel industry, cement industry, and materials building; while commodities produced from the second type, usually in the form of final commodities, such as the car industry, cigarette industry, and such;
b. The power of price fixing depends on the form of cooperation of the company in the market. Without cooperation, the power of price fixing becomes very limited. When a company lowers its price, it will attract

[93] Munir Fuady, *Hukum Antimonopoli Menyongsong Era Persaingan Sehat*, Citra Aditya Bakti, Bandung, 1999, p. 63

[94] Sugiarto, et all, *Ekonomi Mikro Komprehensif* , PT. Gramedia Pustaka Utama, Jakarta, 2002, p. 436

many buyers. Companies that lose a buyer will take retaliatory action by reducing the price to a larger amount so that the buyer moves on to the second company. However if the company in the oligopoly market cooperates to do a price fixing agreement, then the price can be stabilized at the desired level. Under these conditions, the power to price fixing is very strong.

c. Intensive advertising promotion is very often found in the oligopoly industry that produces differentiated product commodities; while in oligopolistic companies with standardized products, spending on advertising is minim.

The main characteristic of the oligopolistic industry is the possession of a good or service by only a few firms. Thus, although in the oligopoly market there is competition, but the intensity of existing competition is not the same as what happens in perfectly competitive markets or monopolistic markets. Competition occurs only among companies within the industry, and by entering into an agreement, competition can still be further reduced.

The business actors in the oligopoly industry will tend to do collusion.[95] One form of collusion is by forming a cartel. The number of companies in the market relatively fewer makes the effort to form a cartel easier. This is related to the effectiveness of enforcement of agreements among cartel members because cartel without sanction system is in vain.

[95] George J. Stigler, "Theory of Oligopoly" , The Journal of Political Economy, Vol. 72, No. 1 Feb, 1964, p. 45

A cartel must have an incentive that keeps its members abiding by the agreement that has been made between them. The incentives are usually sanctions that will be imposed on members who violate the agreement. The number of companies in the market will affect the effectiveness of enforcement among them. The less number of companies then the oversight of the cartel members will be easier to do it. This is the reason why more cartels are found in industries with oligopoly structures.

2. Forms of Cartel

The things that are agreed upon in a business cartel may vary depending on the needs of the cartel business actors themselves. Therefore, based on the OECD study there are four types of cartels (hard-core cartel), most often encountered in the business world.

Hard Core cartel is an anti-competitive agreement, established anti-competitive practice or anti-competition arrangement by competing business actors to:[96]

a. Set the price
b. Tender collusive (bid rigging)
c. Limit output or do quotas, and
d. Divide or separate markets by allocating consumers, suppliers, territories or commercial boundaries.

[96] OECD Recommendation of the Council Concerning Effective Action Against Hard Core Cartels (adopted by the Council in the 921 meeting session on March 25, 1998).

3. Cartel Based on Law No. 5 of 1999

In the national legal system, the prohibition against cartels is contained in Article 11 of Law No. 5 of 1999 stating that "business actors are prohibited from entering into agreement[97] with rival business actors intent on influencing prices by regulating the production or marketing of goods and or services that may result the occurrence of monopolistic practices and or unfair business competition."[98]

The definition of cartel based on the composition of the words contained in Article 11 of Law No. 5 of 1999 has eight elements. The elaboration of the eighth can be found in the Regulation of the Commission for the Supervision of Business Competition No. 4 of 2010 concerning Guidelines for the Implementation of Article 11 concerning the Cartel compiled by KPPU. Those are:

a. Business actors. The meaning of business actors is any individual or business entity, whether it established in the form of a legal entity or non-legal entity and domiciled or conducting activities within the territory of the Republic of Indonesia, either independent or jointly through agreements, conducting various business activities in the economic field.[99] To establish a business cartel, at least two business actors are required.[100]
b. Agreement. The agreement in question is any agreement made by business actors either in written or oral form. Agreements in competition law have

[97] The agreement as defined in Article 1 point 7 of Law Number 5 of 1999 is an action by one or more business actors to bind themselves with one or more other business actors under any name, either made in writing or not.

[98] See the Article 11 of Law No 5 of 1999. *Op,Cit.*, Article 11

[99] See the Article 1 point (5) of Law No 5 of 1999, *Ibid.*, Article 1 point (5)

[100] See the Regulation of the Commission for the Supervision of Business Competition No. 4 of 2010 concerning the Guidelines for the Implementation of Article 11 on the Cartel., p. 16.

been defined under Article 1 No. 7 of Law No. 5 Year 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition. Under the terms of the agreement is an act of one or more business actors to bind themselves to one or more other businesses under whatever name, whether written or unwritten.[101]

The agreement in the context of business competition is not perceived as a treaty similar to the civil law (BW), Article 1313 theoretically elaborates in the deeds of one party with another party binding to give agreement, and it has always been a debate in the theory of contract law. In the development of the law of agreement, the emergence of the agreement is no longer said to be a legal act *(rechtshandeling)* one person with another, but is a legal relationship (*recht verhouding*), agreement in Law No 5 of 1999 still refers to the word deed, essentially there are business actors bind themselves other business actor by whatever name, whether written or unwritten. Law No. 5 of 1999 is wider in essence because unwritten agreement is also included in the scope of the definition.[102]

c. Competitor. A competitor is another business actor in a related market. The relevant market is a market related to a certain range or area of marketing by a business actor of the same or similar goods or services or substitution of the goods and or services.[103] Understanding the relevant market here emphasizes the horizontal context that explains the position of business actors and their competitors. Based on this understanding, the scope of the meaning of the relevant market includes two perspectives, namely geographic market which related to reach and/or marketing area,

[101] See the KPPU Decision No : 04 / KPPU-I / 2016, p. 94
[102] *Ibid*, p. 96
[103] See the Article 1 point (6) of Law No 5 of 1999, *Ibid,* Article 1 point (6)

and product market which related to similarity, or type and/or substitution level.[104]

d. The intention to influence the price. At a glance this article has in common with Article 5 of Law No. 5 of 1999 which regulates the price fixing. The difference is that in Article 5 the business actors agree to set the price, while the cartel agreed by the cartel members is to influence the price by regulating the production and or marketing of goods or services. In essence, Article 5 is also a regulation of the cartel, however the cartel in question is the cartel of price. Hence, in Article 5 governs directly about the prohibition of price regulation, and then in Article 11 prohibited are the production and marketing cartels that ultimately affect the price of the product. Therefore Article 5 is also one form of cartel. This is included in Article 11 which includes price fixing, tender collusion, customer and territory allocation and the production or arrangement of production.

e. The intention to regulate production. The sentence to regulate production means determining the amount of production for both the cartel as a whole and for each member. This may be greater or less than a firm's production capacity or demand for the goods or services concerned, while regulating marketing means managing the amount to be sold or the area where the members sell their produce.

[104] See the Regulation of the Commission for the Supervision of Business Competition No. 3 of 2009 concerning the Guidelines for the Implementation of Article 1 point (10) on Related Market based on Law No 5 of 1999 ("Guideline of Related Market"), p.15.

f. Goods. Goods are any tangible or intangible goods, whether moveable or immovable, which may be traded, used, utilized, or taken advantaged by the consumer or business actor.[105]

g. Services. Service is any service in the form of work or performance traded in the society to be used by the consumers or business actors.[106]

h. Monopolistic practice. Monopolistic practice is the concentration of economic power by one or more business actors which result in the control of production and or marketing of certain goods and or services, resulting in unfair business competition.[107] With the cartel, the production and marketing of goods and or services will be controlled by the cartel members because the final objective of the cartel is to gain the maximum benefit for the cartel members. This of course will harm consumers.

Article 11 of Law No. 5 of 1999 adheres to the rule of reason approach to the cartel.[108] In this approach to prove a violation of the cartel, it is not only necessary to prove the existence of an agreement between the business actors but also to prove strong enough to show that the agreement has an impact on competition. Accordingly, a business actor is not prohibited from entering into an agreement with a competing business actor, intending to influence the price by regulating the production or marketing of a good or service, so long as it does not result in monopolistic practices and/or unfair business competitio

[105] See the Article 1 point (16) of Law No 5 of 1999. *Op.cit*, Article 1 point (16)
[106] See the Article 1 point (17) of Law No 5 of 1999, *Ibid*., Article 1 point (17)
[107] See the Article 1 point (2) of Law No 5 of 1999, Ibid, Article 1 point (2)
[108] Rule of reason means that if there is a monopoly practice or unfair business competition it is still seen how far it is unhealthy business competition practices or will result in restraint of market competition.

4. Supporting Factors of Cartel

The success of the cartel depends on the type of industry and the way the cartel operates which the determining factor depends on cooperation / collusion among the members of the cartel itself. In addition to cooperation, there are other factors that support the establishment of a business cartel:[109]

a. Number of business actors. The more business actors incorporated in a cartel will be more difficult to implement the cartel.[110] The cartel will be more easily shaped and more effective when the small business actors or the market is concentrated;
b. The products on the market are homogeneous because with homogeneous products the price fixing will be more easily achieved;
c. The Elasticity on demand for goods. If demand for a product fluctuates, it will be difficult to reach a goods agreement on the amount of production or price;
d. The Easiness of supervision. In a cartel there will be a tendency for members to commit fraud, the more business actors will be the more difficult the implementation of supervision;
e. The Flexibility to market changes. The cartel requires the commitment of its members to execute an agreement in accordance with the demand and supply in the market. The cartel will be more effective if it can quickly respond to market conditions and make new cartel deals (if required);

[109] Giorgio Monti, p. 16; George J. Stigler, "Theory of Oligopoly", *The Journal of Political Economy*, Vol. 72, No. 1. (Feb, 1964), p.44-61.
[110] *Ibid.*

f. Large investment. If large investment is required as a requirement for entry into the market then there will not many business actors who can enter the market. Therefore, the cartel among business actors will be easier to do.[111]

5. Negative Impact of Cartel

An agreement to limit the amount of production and agreement to raise prices above competitive prices is a very clear act of destroying competition.[112] When companies in the market collude to form a cartel, they will coordinate to raise and even maximize mutual benefits, resulting in distortions to the ideal market mechanism.[113] This assumption would not be excessive because according to the report of OECD there are sixteen global cartels that cause the loss of economic efficiency in the stagnation of more than US $ 55 billion.[114]

> In some countries, cartel is seen as a criminal offense. Cartel activity is properly viewed as a property crime, like burglary or larceny, although cartel activity inflicts far greater economic harm. Cartel activity robs consumers and other market participants of the tangible blessings of competition. Cartel activity is never efficient or otherwise socially desirable; cartel participants can never gain more than the public loses.[115]

There are two negative impacts on cartel those are the occurrence of monopoly practice by cartel actors that result to the inefficiency of resource

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[111] See the Cartel's Guideline, p. 4

[112] Ernest Gellhorn and William E. Kovacic Antitrust Law and Economics in a Nutshell, West Publishing Group, New York, 1994, p.156

[113] Udin Silalahi and Rayendra L.Tobing, *Op.Cit*, p. 17

[114] OECD 2006, "Hard Core Cartels- Third Report on The Impleentation of the 1998 OECD Recommendation", in *OECD Journal of Competition Law and Policy*, Vol. 8 No. 1.

[115] Gregory Werden, "Sanctioning Cartel Activity; Let The Punishment Fit the Crime", *European Competition Journal*,, April 2009, p. 24, article can be download on https://www.justice.gov/sites/default/files/atr/legacy/2009/01/09/240611.pdf, (last updated on December 3, 2017 at 22.20 P.M)

allocation which is reflected by the emergence of deadweight loss[116] or weight loss which is generally caused by the wisdom of production restriction that is usually practiced by monopolist to keep the price remains high[117] and in terms of consumers will lose the choice of price, competitive quality, and good service.

This is very detrimental to consumers on certain business actors are urgently needed. This type of cartel agreement causes minimization or even eliminates competition and causes the consumers have no other choice except to buy the goods even if the price is high or not reasonable.

Cartel in general is very harmful because of the allocation of resources that are not maximized, such as by blocking new competitors to enter the market. In addition to the loss of elements of competition, incentives to innovate are also reduced. This is certainly a disadvantage to consumers because consumer choices are limited.

Even though there is a hypothesis that business actors tend to collude in the oligopolistic industry in practice the effort to form and coordinate the cartel is very difficult to implement.[118] In coordinating the cartel needs to be done several stages:

a. Cartel members must agree on the terms of their collaboration and this is not easy to do. Emerging companies will expect more division in the future and the company that incurs losses will insist on maintaining an agreed share. This distinction causes consensus to be difficult to achieve.

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[116] Mustafa Kamal Rokan, *Hukum Persaingan Usaha*, Raja Grafindo Persada, Jakarta, 2010, p.106.

[117] Johnny Ibrahim, *Op.Cit*, p. 103-104.

[118] *Ibid.*

Once consensus is reached, another problem that will arise is the tendency to cheat among the cartel members themselves. To form a cartel each member must comply with any agreement that has been agreed between them. However, when business actors within an industry agree to set prices above marginal costs, every business actor will be tempted to commit a cheat.[119]

b. When a company is well established they will tend to worry when raising profits and then new producers will be tempted to enter into the industry. If cartel members gain a high profit by limiting production, then new players will be tempted to operate.[120] If the cartel does not succeed in hampering the entry of new players, then the supply of commodities to the market will increase which will further reduce the price of these commodities. To maintain the cartel may require barriers to enter the industry concerned for newcomers or cooperate with accepting them as cartel members. With this latter option taking the consequence that cartel members must be willing to get a smaller share of the market, or output will go up and it will lower the price.[121]

The existing problems show that running a cartel is not as easy as turning a palm. Aware of the difficulties and consequences of a cartel, business actors prefer to compete rather than avoid competition by forming a business cartel.

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[119] *Ibid*, p. 44

[120] Sugiarto, et all, *Op.cit*., p.466

[121] Ayudha D. Prayogo, et al.,*Persaingan Usaha Dan Hukum yang Mengatur di Indonesia*, Partnership for Business Competition, Jakarta, 2001, p. 69

C. General Overview on Price Fixing

1. Price Fixing

To gain the profit is one of the behaviors of business actors (objective firm).[122] The existence of a competitor makes the business actors change the method of competition that was lived before. The strategy is undertaken with the aim of increasing or maintaining profit and minimizing the possibility of losses that will arise.

Price fixing is closely related to the price mechanism. The price mechanism is a process that runs on the basis of style or tensile strength between consumers and producers who meet in the market.[123] At any given time, the price of a good or service may rise as the attracting force of the consumer becomes stronger as the consumer demands more of it. Conversely, the price of a good or service decreases when consumer demand weakens.[124]

Price fixing is not only due to factors of production, but can also occur or comes from the location of the sale, the size of the market, the uniqueness of a product, the brand of the goods, the patent holder, and the way of sale. These factors influence the determination of a price of a marketed product[125]

There are two parties who are always involved in every transaction in a market, which are sellers and buyers, or producers and consumers. The occurrence

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[122] Business behavior can be seen from 3 elements, 1. Objective firm; 2. Competition method; 3. Interfirm conduct. Johny Ibrahim, *Op.Cit*, p. 92

[123] Asri Ernawati, *Penetapan Harga dalam Perspektif Undang-Undang No. 5 Tahun 1999 tentang Larangan Praktek Monopoli Dan Persaingan Usaha Tidak Sehat Studi Kasus Penetapan Tarif Bus Kota Patas AC di Wilayah DKI Jakarta",* Thesis Pasca Sarjana Fakultas Hukum Universitas Indonesia, Jakarta, 2004, p. 21

[124] Boediono, *Seri Sinopsis Pengantar Ilmu Ekonomi No. 1 Ekonomi Mikro*, second edition, BPFE, Yogyakarta, 2002, p. 8

[125] Marshall C. Howard, *Legal Aspect Marketing*, Mc.Graw-Hill, Inc, Massachusets, 1964, p. 23

of a price depends on the relative strength that both parties have.[126] The power is dependent or limited by three forms of competition that affect the occurrence of a price, those are: [127]

a. Competition among consumers arises as a result of the limited amount of goods or services that the market can offer. This results in a decrease in the ability of consumers to make an offer. If there is a limited amount of goods or services offered, consumers will try and compete with other consumers to meet all their needs. Consumers who can pay higher than other consumers will get the goods or services they want.
b. Competition among producers arises when there are more than one manufacturer for a particular commodity in a market. Assuming there is limited number of consumers for the offered commodity, the producer will compete with other producers both in quality and in price to seize the existing customers. Competition among producers leads to an increase in consumer bargaining position.
c. Competition between consumers and producers emerged as a result of the difference of interest between the consumer and the producer. Consumers always try to get the lowest price possible with good quality, while the producers try to get the maximum price to get profit. This is where the concept of supply and demand occurs. If the consumer asks the price too low, the producer will not be willing to

[126] Asri Ernawati, *Op.Cit*., p. 22
[127] *Ibid*, p. 23

release the goods. Vice versa, if the producer offers a price that is too high, then the consumer will not be willing to buy it[128]

The strategy used to dominate the market by business actors in general is to play the price in the market, because the price has an important role for those who are interested in buying the product. Price is a payment for goods or a service which not only covers the cost of goods or services, but it must include additional fees such as discounts or deferred payments. It is based on the fact that payments in return for the goods or the maxim should be determined by free business competition.[129]

The market structure also determines the potential for a pricing agreement. The market characteristics and factors that support the occurrence of price fixing: [130]

a. Market Concentration.
   A market concentration levels where there are only a small number of similar companies and the similarity of conditions of each business actor will increase the likelihood of price fixing. Conversely, if the larger firms in a market will make it more difficult for price fixing;
b. Barriers to entry
   Significant barriers to entry make it difficult for competitors to enter so that substitutes are not available in the market. Under these circumstances, the old player in the incumbent market is likely to collude with other companies to set prices;
c. Sales Methods
   The method of selling through the auction process, increasing the possibility for the emergence of price fixing among business actors
d. Product homogeneity
   Product homogeneity or similarity of products available in the market will enable business actors to make price fixing if the goods are available in various markets, both in quantity and quality, because consumers have more choices;

[128] Ayudha Prayoga D, et.al, *Op.Cit*, p. 91
[129] Asri Ernawati, *Loc.cit.*
[130] A.M Tri Anggraini, *Op.Cit*, p. 262-264

e. Facilitation Device
The tools that can facilitate the occurrence of price fixing such as: product standardization, vertical integrity, pricing arrangements by retailers and price announcements explicitly or implicitly, and arbitrary price shipment. In addition, facilities in trade associations that oversee the interests of business actors can also be used as a facility for business actors to enter into price fixing agreements.

2. Definition of Price Fixing

Price fixing is a term usually applied to actions taken by competitors who have a direct influence over the price. The simplest form is an agreement on the price that will be charged to some or all of the customers. If customers do not have an alternative to the product being tacked and cannot easily reduce their consumption, and then the price increase can be huge. At the very least, the cartel will generally price above the smallest producer price in the market.[131]

The meaning of a price fixing agreement is an agreement between the sellers to raise or fix the price, in order to restrict competition between inter-firm and earn higher profits. A price fixing agreement are formed by a group of firms in an attempt to act collectively behave as a monopoly.[132]

Price fixing can be easily done in certain markets compared to other practices. However, it is possible that price fixing cannot run at all in a market that is a clandestine agreement and is often very difficult to detect. It takes good

[131] R.S Khemani, et.al. *Kerangka Rancangan Dan Pelaksanaan Undang-Undang Dan Kebijakan Persaingan*. Bank Dunia and OECD, Washington D.C and Paris, 1999, p. 27

[132] RS Khemani and DM Shapiro, *Glossary of Industrial Organisation Economics and Competition Law*, OECD, Paris, 1996, p. 44

economic analysis to create law enforcement in related markets most conducive to price fixing.[133]

Vertical and horizontal price fixing is considered a restraint of trade, which has a negative impact on price competition. In other words, when price fixing is done then the freedom to set prices independently becomes reduced.

Horizontal price fixing occurs when more than one company is in the same production stage, thus one company with another is a competitor, determining the selling price of their product in the same level.[134] Meanwhile, vertical price fixing occurs when a company in a certain production stage determines the price of a product to be sold by another company in a lower production stage.[135]

3. Price Fixing Based on Law No. 5 of 1999

The price fixing agreement is divided into four categories as set forth in Article 5 through Article 8 of Law No.5 of 1999. The first form of the pricing prohibition is set forth in Article 5 of Law No. 5 of 1999. As follows:[136]

> Article 5
> (1) Entrepreneurs are prohibited from making any contract with other business competitors in order to fix prices on certain goods and/or services to be borne by the consumers or clients in the same relevant market.
> (2) Provisions as referred to under Paragraph (1) of this Article shall not be applicable to
> a. a contract made in a joint partnership; or
> b. a contract made based on the existing law.

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[133] A.M Tri Anggraini, *Larangan Praktek Monopoli Dan Persaingan Usaha Tidak Sehat Per Se Illegal atau Rule of Reason*, Program Pasca Sarjana Universitas Indonesia, Jakarta, 2003, p. 306

[134] Tresna P Soemardi, *Kartel Internasional: Fenomena Kartel Internasional Dan Dampaknya Terhadap Persaingan Usaha Dan Ekonomi Nasional*, Journal of KPPU, second edition of 2009, KPPU RI, Jakarta, 2009, p. 49

[135] *Ibid.*

[136] See Article 5 of Law No. 5 of 1999

The Article governs the price fixing agreement, that is, if there is a coercion of price desired unilaterally by the producer to the consumer, where the price imposed is a price that is above fairness. If it is done by every business actor in a market, consumers have no alternative but to accept the goods and prices offered by the business actor.

The provision of Article 5 Paragraph (1) of Law No. 5 of 1999 sets a complete ban on horizontal price fixing agreements and this regulation prohibits long-known price cartels. This provision does not include vertical pricing agreements between business actors at different market stages. This provision does not include inter-market pricing agreements. Paradigm applicable to Article 5 Paragraph (1) of Law No. 5 of 1999 is an agreement between producers, in which the producer determines the price to be paid by the recipient of goods and /or services, which is traded in the same market in terms of factual and geographical.[137]

Based on the formulation, the provision of Article 5 of Law No. 5 of 1999 requires the principal thing, that are the existence of business actors and competitors, the existence of agreements whose contents set the price of a certain goods or services and the existence of the same relevant market. The elements of the Article 5 of Law No. 5 of 1999 will be described as follows:

a. The existing of business actor and its competitors. The definition of business actor and its competitor shall refer to the meaning of Article 1 point 5 of Law No. 5 of 1999, that is any individual or business entity,

[137] Knud Hansen, et.all., *Undang-Undang Larangan Praktek Monopoli Dan Persaingan Usaha Tidak Sehat (Law Concerning on Monopolistic Practises and Unfair Business Competition),* second print, GTZ with PT. Katalis, Jakarta, 2007, p. 44

whether in the form of legal entity established and domiciled or conducting activities within the territory of the Republic of Indonesia, either alone or jointly through the agreement, conducting various business activities in the field of economy.[138]

b. The agreement related to the price fixing on certain goods and/or services. The meaning of agreement based on Article 1 point 7 of Law No. 5 of 1999 is an action by one or more entrepreneurs to bind themselves with one or more entrepreneurs under any name, either made in writing or not.[139] In order to comply with the above provisions, the contents of the agreement shall clearly state the existence of pricing on certain goods or services to be paid by the consumer.[140]

c. Furthermore, the business actor and the competitor must be in the same relevant market. It means that a market related to the range or certain marketing area of entrepreneurs for the same kind or type of goods and/or services or substitutes of the said goods and / or services.[141]

The prohibition of price fixing as referred to Article 5 of Law No. 5 of 1999 can be categorized as *per se illegal*. Meaning to say that to determine any violation of Law No. 5 of 1999, KPPU as a supervisor party only needs to proof of agreement about price determination either in written agreement or unwritten agreement done by business actor with its competitor in same relevant market.[142]

[138] See Article 1 point 5 Law No. 5 of 1999
[139] See Article 1 point 7 of Law No. 5 of 1999
[140] Asri Ernawati, *Op.Cit*., p. 38
[141] See Article 1 point 10 of Law No. 5 of 1999
[142] See Article 1 point 7 of Law No. 5 of 1999

4. Negative Impacts on Price Fixing

Some of the negative impacts that occur when a business actor makes a price fixing agreement are:

a. The price paid by the consumer is higher than the price at the time the business actor competes competitively.
b. Business actors have the potential to reduce the amount of output that can cause scarcity.
c. Consumer losses occur, because the price fixing actors get a bigger profit by exploiting the consumer surplus.
d. There is a dead weight loss from the number of consumer surplus and surplus producer.[143]

The existence of pricing leads to the freedom to determine prices independently to be reduced. Therefore it is prohibited because it causes a negative impact on price competition. In addition to harming the competition, price fixing actions also harm consumers in the form of higher prices and less available quantities of goods. Economists and business law practitioners claim that price fixing agreements have a fatal effect on competition by raising prices above competitive prices and are often called "naked agreements to eliminate competition".[144]

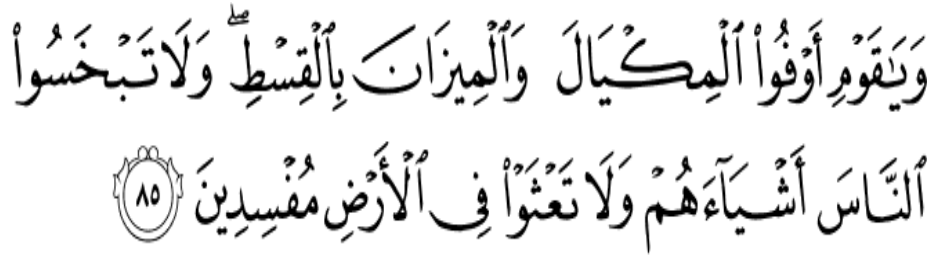
[143] Michael K. Vaska, "Concious Parallelism and Price Fixing: Defining The Boundary",*University of Chicago Law Review*, Vol.52, 1985, p.508

[144] Susanti Adi Nugroho,*Hukum Persaingan Usaha di Indonesia*, Puslitbang Mahkamah Agung, Jakarta, 2001, p. 34-35

5. Price Fixing in Islamic Law Perspective

Islam is highly values the market mechanisms as a place for exchange of goods and services. The appreciation of the market mechanism has been shown by the Prophet Muhammad Peace Be Upon Him (PBUH). A supply and demand system is a *sunatullah* that must be respected and upheld. The behavior that destroys the supply and demand system has violated the *sunatullah.*[145]

As Allah's commandment in the Al-Hud verses 85:



"O my people! Give full measure and weight, with perfect equity, and do not wrong deprive people by depriving them of what is rightfully theirs, and do not go about acting wickedly in the land, causing disorder and corruption."

The meaning of the verse above is that in determining the price of a producer, it must act fairly and honestly to the community as well as its competitors, it must not only focus in making profit. In Islamic perspective, the price fixing itself is strictly prohibited since it will lead to a rise in the prices due to the free market competition and will also resulting in a shortage of production

[145] Mustafa Kamal Rokan, *Hukum Persaingan Usaha (Teori Dan Prakteknya di Indonesia)*, Raja Grafindo Persada, Jakarta, 2010 p.43

even when the demand is high or rising, which in turn will lead to the scarcity of goods.[146]

Allah also has explained in An-Nisa verse 29 :

"O, you who have believed, do not consume one another's wealth unjustly but only (in lawful) business by mutual consent. And do not kill yourselves (or one another). Indeed, Allah is to you ever Merciful."[147]

The Islamic prohibition on price fixing has been exemplified by the Prophet Muhammad (pbuh) at a time when a market when prices was soared. The unstable price conditions made the Companions difficult, giving rise to their intention to propose to the Prophet Muhammad (pbuh) to fix the price. However, explicitly the Prophet Muhammad (pbuh) forbade it by saying:

"Allah is the one who has set the price, withholding and enlarging and giving sustenance and indeed I hope to meet with God in the state of no one than you are demanding me for the wrongdoing of the soul or the price (the goods)"[148]

[146] Aulia Sarah Jauharani, *The Indication of Unfair Business Competition Done by Business Actors Towards Price Ceiling of Cigarettes in Indonesia, Thesis Faculty of Law Universitas Islam Indonesia,* Yogyakarta, 2018

[147] Aulia Sarah Jauharani, *Ibid.*

[148] HR. Ahmad, Abu Daud, Tirmizi, Ibnu Majah and valid by Ibn Hibban

The Hadith indicates that price fixing is something strictly forbidden. Understanding it can be taken from the attitude of the Prophet Muhammad (pbuh) who is a leader and market conditions that are not stable at that time. That is, the Prophet Mohammed (pbuh) greatly respects the prevailing market system of supply and demand law *('adlun jaizun).* State intervention in price fixing should be ignored as long as the market runs fairly, not because of monopolistic and monopsony drives. Because, according to history, most of the needs of Madina people are supplied from outside the region. The high price is not due to the market game, but the market price is so.[149]

Thus the prohibition of price fixing is firm and definite and is considered a tyranny, and the scholars punish it as a prohibited act. It can be argued that market law is a law of God *(sunatullah)* that must be upheld. One group or individual is not allowed to influence the market in unfair ways, because the market is a collective provision that has become God's provision. Violations of market mechanisms such as price fixing by improper means or reasons are an injustice that will be held accountable before God.[150]

Even the sale of the goods at market prices is like one who strives in the way of Allah *(jihad fi sabilillah*), while the person who fixes the price includes a disbelieving deed of God. In a hadith it is mentioned, when Prophet Muhammad (pbuh) a man selling food at a price higher than the market price, the Prophet said:

[149] Mustafa Kamal Rokan, *Op.Cit*., p. 44
[150] *Ibid.*

"The people who come to bring the goods to this market are like those who strive in the way of fi sabilillah, while those who raise the price (exceeding market prices like those who disbelieve in God)".[151]

If looked at the approach of business competition law conducted by Prophet Muhammad (pbuh), that the prohibition of price fixing is clear, firm and absolute regardless of the impact that occurs in the market which called in terms of anti-monopoly law approach with *per se illegal* with no need to look to the impact of the action.[152]

> The respect of the laws of the market in Islam in order to create a fair price is the price of a product paid for the same object is given at the time and place submitted. There are several terminologies used in fair pricing by the Prophet Muhammad (pbuh) and his companions Umar bin Khattab and become the jurisprudence of the judges, namely *qimah al-adl, thaman al-mithl, si'r al-mithl*. Ibn Taymiyya used two terminology in terms of price,
> a. *'iwad al-mithl* (equivalent compensation)
> b. *dhamam al-mithl* (equivalent price).
> Equivalent compensation is measured and assessed by equivalents. This is what is called the core of justice *(nafs al-adl)*, meaning that a business actor makes the estimated price corresponding to the equivalent of size. The equivalent price as the standard price (*s'ir*) is the price that is generally agreed upon by the population when they sell the goods as an equivalent. In other words, this type of price is called a competitive market price. Ibn Taymiyya said, "if the people sell their goods in the normal way (*al-waj al ma'ruf*) is not an unjust means, but the price increases *(irtafa'a al-sa'r)* because of the influence of the lack inventory of goods or due to increasing population means increased demand, it is all because of God, in this case forcing sellers to sell their goods at special prices is the wrong coercion *(ikrah bi ghairi haqqin).*[153]

Therefore, an ideal market is a market that is based on a fair price, and a fair price is a price based on market law in accordance with supply and demand. Good pricing behavior undertaken by the government as well as the parties'

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[151] *Ibid.*
[152] *Ibid.*
[153] *Ibid.*

agreement is a denial of the law of the market, so fixing the price is a cruel and forbidden act.[154]

Tas'ir in Arabic comes from *sa'ara* (fi'il madhi), *yusa'iru* (fi'il mudhari), *tas'iiran* (mashdar). This means that in Arabic terms is agreement on a price (*al-ittifaq 'ala si'rin*).[155]

As according to the definition of sharia, there are some understandings. *Tas'ir* is a price fixing for merchandise performed by the ruler to the seller of food in the market with a certain number of dirhams.[156] *Tas'ir* is the command of the guardian (ruler) to market participants so that they do not sell their merchandise except at a certain price.[157] According to Imam Al-Bahuti (Hanabilah scholar), *Tas'ir* is the fixing of a price by the Imam (Caliph) or his deputy over the community and the Imam forces them to sell at that price.[158] *Tas'ir* also interpreted as the command of the ruler or his representatives or anyone who governs the affairs of the Muslims to market participants so that they do not sell their merchandise except at certain price and prohibited any addition or subtraction of the price for reasons of blessing.[159]

> *Tas'ir* is the command of the ruler or his representatives or anyone who governs the affairs of the Muslims to market participants so that they do not sell their merchandise except for a certain price, and they are prohibited from adding to the price so they do not raise prices, or subtract from that price so that they do not harm others. That is, they are prohibited to increase or subtract from the price for the benefit of society.[160]

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[154] *Ibid.*

[155] Ibnu Manzhur, Lisanul Arab, IV/35. Quoted by Ahmad Irfah, *At-Tas'ir Ahkamuhu Dirasah Fiqhiyah Muqaranah*, p. 4

[156] *Ibid*.

[157] *Ibid.*

[158] *Ibid.*

[159] *Ibid.*

[160] Taqiyuddin An-Nabhani , *An-Nizham Al-Iqtishadi fil Islam*, p. 199.

From the various definitions above, basically there are similarities in the meaning contained in the definitions which are always mentioned the same three elements; First, the ruler as the party issuing the policy. Secondly, the market participants as the policy target. And the third is the determination of a certain price as the substance of the policy.

The fiqh scholars agree that this price fixing provision is not found in the Qur'an. In the hadith of the Prophet Muhammad (pbuh) found some Hadith, which from the logic of Hadith it can be induced that the price fixing is allowed. The dominant factor underlying the law of *at-tas'ir*, according to the agreement of fiqh scholars is *al-maslahah al-mursalah*.

The hadith of the Messenger of Allah related to the price fixing is a narration from Anas Ibn Malik. In the narration it is said,

> "Muhammad bin Basishyar told us, Hajj bin bin Minhal told us, Hammad bin Salamah told us from Qatadah, Thabit and Humaid of Anas RA, he said, "In the time of the Prophet Muhammad, the price of basic materials went up, then the friend said to Rasulullah SAW, "O Messenger of Allah, set the price of goods for us." Rasulullah SAW replied, "Verily only Allah is entitled to price, Supreme Narrow, All-Giving and Giving sustenance, and I hope, when I met my Lord. none of you demanded me for a good deed of blood and wealth. "(Narrated al-Bukhari, Muslim, Abu Dawud, at-Tirmizi, Ibn Majah, Ahmad Ibn Hanbal and Ibn Hibban).[161]

Imam Ibnul Qayyim explains that the allowable *Tas'ir* is an example: the ruler prohibits traders from selling goods at a higher price than the market price, while the people are in desperate need of the goods. Thus, in these circumstances

[161] *Ibid.*

the ruler obliges the merchant to sell at market price, because this means necessitating justice. Yet justice is what God has commanded.[162]

The fiqh scholars claim that the price increase that occurred in the time of the Prophet, it is not by arbitrary action of the merchants, but because it is limited commodity. In accordance with economic law when stocks are limited, then the price of goods is usually rising. Therefore, in such circumstances, Prophet does not want to intervene to limit the price of commodities in the market, because such actions are unjust to the traders. In fact, Prophet will never do wrong to fellow human beings, without exception to traders and buyers. Thus, according to fiqh experts, if the price increase is not due to the act of traders, then the government should not intervene in the issue of price, because the action is to oppress the traders.[163] *Tas'ir* has two forms, there are those that allowed and some are forbidden. *Tas'ir* there is unjust is forbidden and there is a fair that's what is allowed.[164]

> Unfair and unlawful price fixing applies to rising prices due to free market forces competition, resulting in supply shortages or raising demand. Ibn Taymiyyah often mentions several conditions of perfect competition. For example, he states, "Forcing people to sell merchandise without any basis of obligation to sell, is unfair and injustice is prohibited." This means that the population has complete freedom to enter or exit the market. Qardhawi states that if price fixing is done by forcing sellers to accept prices they are not satisfied, and then this action is not justified by religion. However, if the price fixing raises a justice for the whole community, such as establishing a law not to sell above the official price, then it is permissible and must be applied.[165]

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[162] Ibnul Qayyim, Ibnul Qayyim, *Ath-Thuruqul Hukmiyah*, p. 291. This opinion is also the opinion of his teacher, Ibn Taimiyah, in the book Majmu'ul Fatawa, Juz 28 p. 76-77. See Yusuf Al-Qaradawi, Daur Al-Qiyam wa Al-Akhlaq fi Al-Iqtishadi Al-Islami, p. 429

[163] Mustafa Kamal Rokan, *Ibid.*

[164] Yusuf Qardhawi.*Norma Dan Etika Ekonomi Islam* ,Gema Insani,Jakarta, 1997, p.257.

[165] *Ibid.*

While the price fixing is fair and legitimate as in the above explanation of the price fixing applied when there is tyranny in price fixing or because there is a price imbalance that would require the existence of *Tas'ir*. And legitimate if for the common good. According to Qardhawi, if a trader holds an item, while a buyer needs it with the intention that the buyer wants to buy it at twice the price of the first.[166] In this case, traders voluntarily have to accept price fixing by the government. The competent authority shall determine the price. Thus, the price fixing must be done so that the merchant sells the appropriate price for the sake of justice as required by God.[167] Meanwhile, according to Ibn Taimiyah, "Price is determined by the power of demand and supply".[168]

D. The Comparison of Cartel Case Handling in Indonesia and United States of America (USA)

In general, cartels have been organized almost all countries in the world. The cartel settings contained in these countries are not the same. But principally the regulations contained in these countries prohibit the practice of the cartel and regard the cartel as unlawful. The occurrence of similarities or differences is caused by sociological and political conditions that occurred at the time of formation of the regulation. Because the regulation of business competition as a

[166] Taqiyuddin An-Nabhani , *An-Nizham Al-Iqtishadi fil Islam, Ibid.*
[167] Ibid.
[168] Adiwarman Karim,.*Ekonomi Mikro Islam,* Penerbit III T Indonesia, Jakarta, 2003, p. 224

legal product cannot be separated from the political influence and government policy of the country concerned.[169]

Even though it has got the similarity of business competition regulation among state, but in its implementation may be difference. It occurs because of two things, namely differences in the character of the economic system and the absence of international interpretation standards.[170]

Similarly, the cartel arrangements in Indonesia and the USA that have differences despite having the same subject of the cartel are unlawful because they can hamper fair business competition.

The first difference of cartel arrangements in Indonesia and the USA lies in the source of the law used. The regulation of competition law is regulated specifically in the Law No. 5 of 1999. While the USA uses a statutory legislation called *Antitrust law* with the provisions governing the cartel in the *15 U.S Code § 1 (Section 1 Sherman Act),* including the *15 U.S. Code 13-14 (Section 2 and Section 3 Clayton Act*), *15 U.S. Code § 8(Section 73 Wilson Tariff Act*), and *15 U.S. Code § 13a (Robinson Patman Act).* In addition, there are other comparisons between Indonesian business competition law and Antitrust Law in the USA, as described in the table below:

[169] Mustafa Kamal Rokan, *Op.Cit.*, p. 251
[170] *Ibid* .

Table 2.1 Comparison between Indonesian Competition Law and Antitrust Law in USA

No	Comparison	Indonesia	USA
1.	Legal Basis	Article 11 Law No. 5 of 1999, including Article 5, Article 7, Article 9, Article 10, Article 12, Article 22, and Article 24 of Law No. 5 of 1999	*15 U.S Code § 1 (Section 1 Sherman Act)*, including the *15 U.S. Code 13-14 (Section 2 and Section 3 Clayton Act*), *15 U.S. Code § 8(Section 73 Wilson Tariff Act*), and *15 U.S. Code § 13a (Robinson Patman Act).*
2.	Authorized Institution	Based on Article 30 of Law No. 5 of 1999 which is authorized is KPPU. (Commission for the Supervision of Business Competition).	1.For the Sherman Act and the authorized criminal prosecution is the Antitrust Division of the Department of Justice, it can also conduct civil prosecution. 2. For civil prosecution and authorized consumer protection is the Federal Trade Commission (Section 45 FTC Act).
3.	Sanction	1. Administrative Sanction 2. Primary sanction a. Fines of 25 Billion Rupiah up to 100 Billion Rupiah or imprisonment in lieu of fines for six months b. Fines of 5 Billion Rupiah up to 25 Billion Rupiah or imprisonment of fines substitute for a maximum of five months 3. Additional sanction.	1. In the *Section 1 Sherman Act*, 100 million US dollars for actors who are companies or associates and at most a company of 1 Million US dollars for individuals with a maximum of 10 years imprisonment. 2. In the *15 U.S. Code § 8(Section 73 Wilson Tariff Act*) a minimum fine of 100 to maximum 5000 US

			dollars and a minimum 3 month imprisonment or a maximum of 12 months 3. *15 U.S. Code § 13a (Robinson Patman Act). a maximum fine of 5000 US dollars or a maximum imprisonment of 1 year or both at the same time.*
4.	Time Frame	The time for the preliminary examination is only 30 days, while the time for a follow-up examination is only 60 days with a 30-days extension possible. 30 days after the advanced examination is over, the verdict has to be announced.	The investigations can take years or more.
5.	Stage of proceeding	1. Report to KPPU is sourced from the Reporting Party or on KPPU's initiative 2. Investigation 3. Filing 4. An examination consisting of a preliminary examination and advance examination 5. Commission Council Assembly 6. KPPU's Decision.[171]	a. To look for and evaluate antitrust complaints b. Recommend Preliminary examination c. Conducting Preliminary examination d. Implement the Judge's Investigation e. Complete the investigation and recommend a civil or criminal lawsuit.[172]

[171] Nur Ana Wijayanti, *Perbandingan Penanganan Kartel dalam Hukum Persaingan Usaha di Indonesia Dan Amerika Serikat*, Thesis Faculty of Law Universitas Indonesia, 2014, p. 10

[172] US Department of Justice , Antitrust Division Manual, Fifth Edition, Last Updated on January 7 2017, Chapter III. Investigation and Case Development, p. III-1-III-4

			After going through a series of investigations, it will proceed to the court stage. The trial stage is run by general court procedure, but in certain cases it can be asked for preliminary injunction, after the first trial can be appealed and then can be submitted to the Supreme Court.
6.	Evidentiary Process	In Indonesia it is only acceptable the use of direct evidence in the form of instructions, expert testimony, witness testimony, letters and or documents and testimony of business actors.	Can use direct evidence such as the recording of testimony as well as indirect evidence such as suspicious offers, travel records and travel expenses, telephone records, and diaries.[173]
7.	The Application of Leniency Program	Indonesia cannot carry out forced efforts such as searches and tapping that are actually needed to reveal a cartel.	A leniency program that can be done either before or after the preliminary examination. This leniency program provides amnesty for parties reporting antitrust law violations.

The final result of case handling by KPPU is KPPU's decision containing administrative action sanction. Against KPPU's decision can be filed an objection to KPPU's decision submitted to the District Court, after passing an objection, the subsequent legal effort that can be filed is Appeal to the High Court, then appeal to the Supreme Court. After the decision of legal force will still be executed

[173] Shriya, Luke, *Role of Circumstantial Evidence in the Prosecution of Cartels*, Amity Law School, Delhi, 2012, p. 37

decision and monitoring decision. This can be submitted to the Supreme Court. In Supreme Court Regulation of Article 7 Paragraph (1) No. 03 of 2005 stated that the request for the determination of the execution of the verdict that has been examined through the objection procedure, filed by KPPU to the District Court which decide the related objections. On the other hand, if the petition for determination of the execution of the decision which is not filed an objection, it is submitted to the District Court where the legal status of the business actor.[174]

In conducting cartel handling, KPPU is often difficult in obtaining written evidence in practice. Therefore, KPPU often uses indirect evidence, as happened in the case of Yamaha and Honda *Skutik* Case. Unfortunately, KPPU's decision is often canceled in the District Court. This is in contrast to that in the USA which makes it possible to use indirect evidence but with extreme caution. It is because the USA does not require the provision of a written agreement between the parties in the cartel agreement. Therefore the problem of evidence is one of the problems experienced in the enforcement of cartel cases in Indonesia. Therefore, there are problems regarding KPPU's decision which are often countered by the District Court.[175]

Regarding the handling of cartels in the USA, the country has two law enforcement agencies Antitrust law namely the *Antitrust Division of the Department of Justice* (AD-DOJ) and the *Federal Trade Commission* (FTC). These two bodies have a separation of powers in handling cartel cases. Therefore, in law enforcement of cartel cases can be done in three ways, namely: Criminal

[174] Ningrum Natasya Sirait, et. all., *Ikhtisar Ketentuan Hukum Persaingan Usaha*, Nasional Legal Reform Program, Jakarta, 2010, p. 279

[175] Nur Ana Wijayanti, *loc.cit.*

and civil enforcement by AD-DOJ, civil enforcement by FTC, and lawsuits by related parties to civil lawsuits.[176]

In case of evidentiary process in USA can use direct evidence such as the recording of testimony as well as indirect evidence such as suspicious offers, travel records and travel expenses, telephone records, and diaries. Indirect evidence can be divided into two namely the evidence pertained communication evidence and economic evidence. There are two types of economic evidences: the market structure is such that it is feasible to establish a cartel, and the market behaves in a non-competitive way.

Basically, in comparison of cases of cartel handling in Indonesia with the USA, there are differences that become the main discussion, namely:

a. The different institutions that handle the case

The first difference lies in the institution authorized to handle cartel cases. In Indonesia, the institution authorized to handle the cartel case is KPPU as an independent institution and responsible to the President. While in the USA the authorized institutions are The Antitrust Division of the Department of Justice U.S (AD-DOJ) and the Federal Trade Commission (FTC).

b. The different authority of the handling institution

The second difference lies in the authority of the institution that handles cartel cases. KPPU's in Indonesia cannot carry out forced efforts such as searches and tapping that are actually needed to reveal a cartel. This is in contrast to the

[176] *Ibid.*

AD-DOJs that can forcibly execute, for example, against reports of leniency programs; AD-DOJ can perform the necessary searches.

c. The different stages of cartel case

The third difference lies in the stages of cartel case handling. The important difference in this case is that in Indonesia, further investigation has given the KPPU's decision to impose penalties for the violating business actor, while in the USA the results of the jury investigation will proceed to the litigation.

d. The different of time frame

In the KPPU, the time for the preliminary examination is only 30 days, while the time for an advance examination is only 60 days with a 30-days extension possible. 30 days after the advanced examination is over, the KPPU's decision have to be announced. The timeframe given is very strict when compared to the time period in the USA where cartel investigations can be conducted for years.

e. The differences in the application of leniency programs

Another difference is in the handling of cases that in the USA there is a leniency program that can be done either before or after the preliminary examination. This leniency program provides amnesty for parties reporting antitrust law violations. Currently, KPPU is developing a discourse on the importance of using leniency program because in the USA this has been proven effective

f. Different sanctions applied

Another difference in the outcome of the KPPU decision and the court decision in the USA relating to the cartel case is in the case of the sanctions being applied. Similar to various countries around the world, in the USA the cartel is considered a criminal offense. Therefore, the penalty imposed in addition to the fine is a maximum imprisonment of 10 years for violation of Article 1 of the Sherman Act. This is different from KPPU which only impose administrative sanction in the form of punishment of fines, and although there are criminal sanctions in the form of fine but not yet clearly set criminal prosecution mechanism. In addition, criminal sanctions imprisonment is only imposed in lieu of fines.

g. Differences in the evidence used.

The last difference is in the evidence used for cartel case. In Indonesia it is only acceptable the use of direct evidence in the form of instructions, expert testimony, witness testimony, letters and or documents and testimony of business actors. Even though KPPU has used indirect evidence, it is usually not accepted when an objection is filed in the District Court. In the end, the KPPU's decision was canceled. [177] This is in contrast to the USA that uses direct evidence and indirect evidence (including economic evidence). This makes the cartel case handlers in the USA more effective than Indonesia.

[177] Nur Ana Wijayanti, *Op.Cit*,. p. 14

CHAPTER III

THE APPLICATION OF ECONOMIC EVIDENCE IN PRICE FIXING OF SCOOTER MATIC *(SKUTIK)* CASE IN INDONESIA

A. The Application of Economic Evidence in Evidentiary Process by KPPU in Yamaha and Honda *Skutik* Case in Indonesia

Since the enactment of Law No. 5 of 1999, the ban on cartel practices has been applied. For more than 10 years standing KPPU has handled various cartel cases among business actors in Indonesia. One of them is the decision on the case of Yamaha and Honda *Skutik* No :04/KPPU-I/2016.

1. Case Position

KPPU Secretariat has conducted research on alleged violation of Law No. 5 of 1999 in Motorcycle Industry Scooter Matic *(skutik)* Type 110-125 CC in Indonesia. This case involves two business actors in the Motorcycle Industry, those are: PT. Yamaha Indonesia Motor Manufacturing (Yamaha) and PT. Astra Honda Motor (Honda).

In this case, the Commission Assembly summons the perpetrators who violating Article 5 Paragraph (1) of Law No. 5 of 1999 because there is a meeting between the President Director of PT. Yamaha Indonesia Motor Manufacturing and President Director of PT. Astra Honda Motor, where the meeting, according to the witness Yutaka Terada, discussed about the agreement that PT. Yamaha Indonesia Motor Manufacturing will follow the selling price of motor from PT. Astra Honda Motor. Then the result of the meeting then followed up by the order

via electronic mail that in the end there is adjustment of product selling price of PT. Yamaha Indonesia Motor Manufacturing which follows the selling price of PT. Astra Honda Motor.

The core of the considerations used by KPPU will then be described in the following paragraphs:

1.) KPPU determines the fulfillment of business actor element in this case, whereas PT Yamaha and PT Honda is a business entity which established in the form of legal entity and domiciled or conducting activities within the jurisdiction of the Republic of Indonesia in the form of business activities such as sales of automatic scooter motorcycles *(skutik)* with a capacity of 110 - 125 CC in the territory of Indonesia.

2.) KPPU then determines the fulfillment of the agreement element, that the agreement referred to in the case is an agreement between PT. Yamaha and PT. Honda to determine the selling price of goods and / or services (in this case is *Skutik* 110 - 125 CC) paid consumers in the territory of Indonesia. As the provisions of Article 1 point (7) of Law No. 5 of 1999, the Commission Council is of the opinion that the agreement includes both written and unwritten, including concerted action of business actors. It is reinforced by the expert's testimony which essentially states that the concerted action is not required that there is a written agreement requiring the parties to concerted action need not be proven as such. In concerted action it is important that communication occurs.

3.) KPPU considered that in the case there has been an act of binding business actors to other business actors (in this case competitors) in an unwritten or concerted action as evidenced by the behavior of Reported Parties as described in the Related Law of the Reported Behavior (in point 6) and further substantiated by economic evidence of pricing implementation as described in the Section Concerning the Related Laws of Determination (in point 7).[178]

4.) Further consideration is the element of business actors and competitors; the KPPU believes that the competitor is the other business actor in the same relevant market. Based on the provisions of Article 1 point 10 of Law No. 5 of 1999, the same relevant market is a market related to a certain range or area of marketing by business actors on goods and / or services of the same or similar kind or substitution of such goods and / or services.[179]

In this case, KPPU acknowledges implicitly that in order to prove the existence of cartel presence in the motorcycle industry, KPPU uses indirect evidence. This consists of two main classifications namely communication evidence and economic evidence.

> The communication evidence in this case is in the form of the meeting and/or communication between business actors in the 2013 to November 2014. Whereas Mr. Yoichiro Kojima as President Director of PT. Yamaha Indonesia Motor Manufacturing at that time and Toshiyuki Inuma as President Director of PT. Astra Honda Motor had a meeting on the golf course. However, KPPU does not know in detail about this meeting. Then in January 2014, based on evidence of internal email of PT Yamaha sent

[178] See the KPPU Decision Number: 04 / KPPU-I / 2016. p.412
[179] *Ibid*, p.415

by witness Mr. Yukata Terada, President Director Kojima has asked the marketing management group to follow the pattern of price increase starting from January 2014 as a promise to President Director of Honda. Inuma. Here's the full email of witness Terada;

"President Kojima san has requested us to follow Honda price increase many times since January 2014 because of his promise with Mr. Inuma President of AHM at Golf Course. As we know this is illegal. We never follow such price negotiation process. YMC also educated all employees not to negotiate prices with competitors."

On Monday, April 28, 2014 based on proof of PT Yamaha internal email, at 05.07 PM, Mr. Dyon (Dyonisius Beti - Vice President of PT Yamaha Indonesia Motor Manufacturing) uses email address dyon@indosat.blackberry.com forward the email from Mr. Yoichiro Kojima (President Director of PT Yamaha Indonesia Motor Manufacturing - email address kojimayo@yamaha-motor.co.id) with subject email Fw: Pricing Issue, addressed to Mr. Terada (Marketing Director of PT.Yamaha Indonesia Motor Manufacturing) email address teradayu@yamaha-motor.co.id, Mr. Yuji Tokunaga (Marketing Director of PT Yamaha Indonesia Motor Manufacturing) with email address tokunagayu@yamaha-motor.co.id, Mr. Sutarya (Sales Director of PT Yamaha Indonesia Motor Manufacturing) with email address sutarya@yamaha-motor.co.id, Mr. Hendri Wijaya (General Manager Marketing PT Yamaha Indonesia Motor Manufacturing) with email address hendri_mkt@yamaha-motor.co.id, and Mr. Ichsan Nulhakim (Chief DDS 3 of PT Yamaha Indonesia Motor Manufacturing) with email address ichsan_mkt@yamaha-motor.co.uk.

The contents of the email above are as follows:

"Please find attached the IDN price comparison material presented by YMC at Asean Mtg just after GEC. As you can notice, prices of some models are lower Honda, such as Vixion, Fino, etc. We need to send message to Honda that Yamaha follows Honda price increase to countermeasure exchange rate fractuation / labor cost increase as a common issue for the industry. So please review the current pricing and where there is a room, please adjust the price. I understand that to maintain the volume, if necessary, we use the amount of price increase for promotion of the models at least for the time being. Thanks, Kojima (see attached file: Price position IDN 2014. Pptx)"[180]

[180] *Ibid*, p.20

The evidence of the email has been confirmed and acknowledged by the witnesses present at the hearing, such as Mr. Kojima (Former President of the PT. Yamaha), Mr.Sutarya, Mr. Dyonisius, Mr.Hendri and Mr. Ichsan.

In the economic side, based on Article 1 No. 10 of Law No 5 of 1999, the scope of understanding of the relevant market includes two perspectives, namely market by product and market based on geography; The product market in A Quo case is a motorcycle scooter matic *(skutik)* type 110-125 CC, while the Geographic Market in the case is all over Indonesia.

Related to the Market Structure refers to the data issued by AISI (Indonesian Motorcycle Industry Association), as follows:[181]

Chart 3.1 Document of Motorcycle Industry in Indonesia

Based on data obtained from the AISI, the two-wheeled motorcycle industry is controlled by 6 business actors. Based on the investigation and examination results of the commission assembly, only four business actors issued and marketed the scooter motorcycle product matic 110-125 CC, namely PT Astra

[181] *Ibid*, p.38

Honda Motor Indonesia , PT Yamaha Motor Manufacturing Indonesia, PT Indomobil Suzuki International and PT. TVS Motor Company Indonesia.[182]

The market structure can be given as an environmental condition in which the company conducts its production activities. The market structures are divided into four forms including:

a. Perfect competition market;

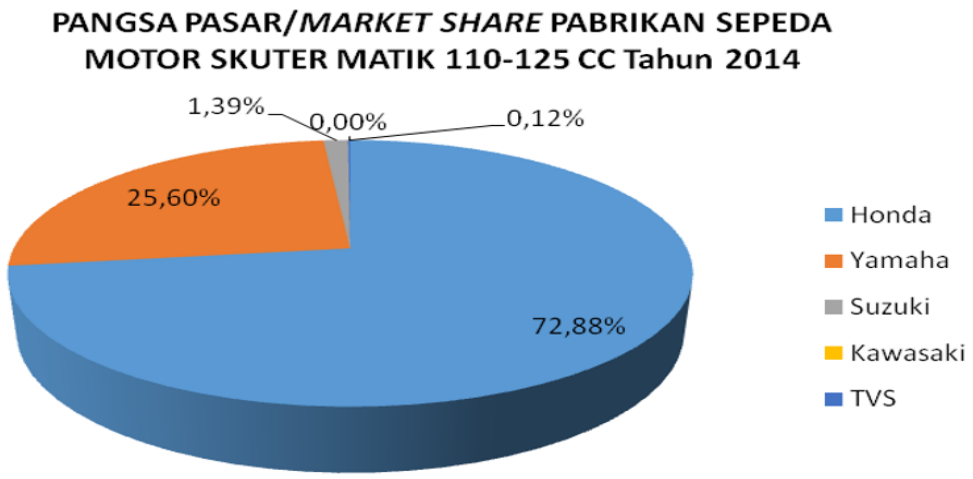
b. Monopolistic competition market;

c. Oligopoly market;

d. Monopoly market.

Based on data released by the AISI the market share of motorcycle *(skutik)* 110-125 CC in the year of 2014 are as follows:[183]

Chart 3.2 Market Share of Motorcycle *(Skutik)* in 2014

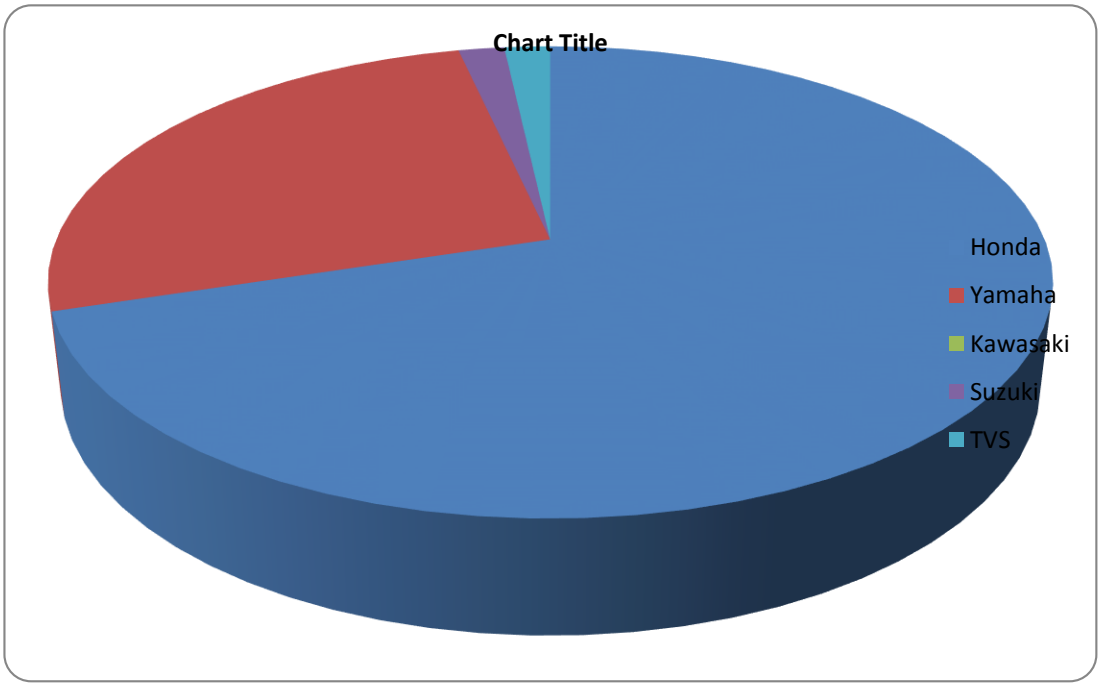


Sumber :Data Asosiasi Industri Sepeda Motor Indonesia (AISI) – (diolah KPPU)

[182] *Ibid*
[183] *Ibid*, p. 39

Even the latest data of market share in September 2017 is not much different with the market share in 2014.[184]

Chart 3.3 Market Share of Motorcycle (Skutik) in September 2017



Source: Document of Indonesian Motorcycle Industry Association (AISI)

The difference in market structure is influenced by the ability of the firm to influence the price formed in the market and the difference is due to the different characteristics of each market. Currently, the market conditions are no longer found to be perfectly competitive market structures other than stock markets that have homogeneous product characteristics, and sellers and buyers can have perfect and balanced information access.[185]

In Indonesia monopoly market usually occurs only in the market of goods and services that affect the livelihood of the people and is generally managed by State Owned Enterprises (SOEs). In general today, market conditions are

[184] Accessed from http://aisi.or.id/statistic (last update on 5 January 2018 at 00.19 A.M)
[185] *Ibid*, p. 40

oligopoly and monopolistic. What distinguishes both market traits is from the degree of differentiation or homogeneity of a product or service. In the monopolistic market the nature of its goods and services are more towards differentiated meaning that there are significant differences in goods or services even though the goods are mutually substituted with each other and are in the same market. With differentiated products and / services in a relevant market then the seller can provide options or variations of products and / or services to consumers so that in the monopolistic market, relative business actors can determine the price different from each other.

In the oligopoly market, the products and / or services offered are usually homogeneous or very low degree of differentiation. With the nature of the product, the Seller cannot provide a significantly different product choice to the consumer. So that consumers will be very sensitive to the differences or changes in prices. Therefore, in setting the price, the producer / seller in the oligopoly market is highly dependent on one another and will monitor each other's price and cannot freely determine the selling price of the product / service it sells.[186]

In the Motorcycle Industry type *Skutik* there are only four Business Actors, those are:

a. Astra Honda Motor;

b. Yamaha Indonesia Motor Manufacturing;

c. Suzuki Indomobil Motor;

d. TVS Motor Company Indonesia.

[186] *Ibid*, p. 41

With only four business actors producing s*kutik* as mentioned above, it shows that Motorcycle *skutik* industry is in oligopolistic market.[187]

> Based on sales data of each motorcycle producer *skutik* obtained market share of each business actor that is in 2012, Honda has a market share of 68%, Yamaha controls 30% market share, Suzuki controls 2% market share. The market share of each business actor in 2013, Honda controls 70% market share, Yamaha owns 28% market share, Suzuki owns 2% market share. While the market share of each business actor in 2014, Honda controls market share of 73%, Yamaha market share of 26%, Suzuki controls market share of 1%.[188]
> Thus the dominant business actor in the motorcycle industry in the period of 2012-2014 is Honda, while its closest competitor is Yamaha. Both companies can be regarded as the dominant business actors in the automatic motorcycle industry in Indonesia. If the Motorcycle *skutik* industry is entered into the oligopolistic market, then the business actor has sufficient space to determine the price and quantity to be sold even if it is not as wide as the Business Actor in the Perfect Competition Market or the Monopolistic Market to determine the price and quantity to be sold. Companies in the Motorcycle *skutik* industry that oligopolistic in determining the selling price (pricing strategy) will be highly dependent with other companies in the same industry.[189]

On the other hand, in a competing oligopolistic market, a non-dominant firm in market share such as Suzuki and TVS will depend heavily on the prices of Yamaha and Honda and should tend to be a follower of the Dominant Business Actor, especially in terms of price as long as it is profitable and does not reduce its market share. If Honda raises the price, then it should be in the competing oligopoly market, Yamaha will withstand the price increase or at least raise the price but not follow the pattern of price hikes made by Honda considering Yamaha can take chances from the price increase Honda to increase its market share.

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[187] *Ibid*, p. 43
[188] *Ibid*, p. 44
[189] *Ibid.*

This becomes relevant, that given the products in the motorcycle industry do not have a low degree of differentiation and lead to more homogeneous products. Thus, with homogeneous Motorcycle *(skutik)* product causes the demand curve to be very elastic which means the consumer will be very sensitive to the selling price of a product with the selling price of its substitute product.

With the pricing strategy of the Yamaha that turns out to follow Honda's price in the period of 2014, Yamaha's behavior becomes irrational and tends to show there is a collusive behavior of prices between Yamaha and Honda so there is no fear between them to raise prices many times in 2014.

The behavior of Yamaha and Honda is clearly at odds with the Economic Theory of the Curve Demand Model in a book entitled The Microcredit Theory of Third Edition written by Dominick Salvatore who states:[190]

> "As a further development towards a realistic model, we recognize the model of a kinked demand curve model or Sweezy mode. This model tries to explain the price rigidity often observed in the oligopolistic market. Sweezy thinks that if an oligopolistic company raises its price, other companies in the industry will not raise their price and therefore the company will lose most of its customers. On the other hand, an oligopolistic company cannot raise its market share through price reductions because other oligopolies in the industry will follow the price decline."

The price fixing strategies implemented by Yamaha have occurred collusive behavior with Honda can be proven by using collusion screening analysis method based on price and cost data from Yamaha and Honda.

Therefore, based on economic analysis conducted by KPPU investigator team with screening analysis method to this case produced head to head products Honda and Yamaha proved collusion.[191]

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[190] *Ibid*, p. 57

In the USA to prove a concerted action must be proven by direct evidence and indirect evidence which may indicate the commitment made by the parties in drawing up a plan to achieve a result that clearly violates the law. In the case of Tobbaco Co. v. USA (1946) the Court gave recognition to indirect evidence by saying:

> "No formal agreement is necessary to constitute an unlawful conspiracy. Often, crimes are a matter of inference deduced from the acts of the person accused and done in pursuance of a criminal purpose. Where the conspiracy is proved, as here, from the evidence of the action taken in concert by the parties to it, it is all the more convincing proof of intent to exercise the power of exclusion acquired through that conspiracy…Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement."[192]

Although the use of indirect evidence is permissible in concluding the existence of agreements between business actors, there are limitations to consider in using indirect evidence.

In the Yamaha and Honda *Skutik* case, the Commission Assembly conducted an analysis using the methods of structural and behavioral factors. To meet sufficient preliminary evidence requirements, KPPU can examine some preliminary indicators that can be summarized as factors driving the formation of the cartel both structurally and behaviorally. Some or all of these factors can be used by KPPU as an early indicator in identifying the existence of a cartel in a particular business sector. Some of these factors are:

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[191] *Ibid*, p. 109
[192] American Tobacco Co. v. United States, 328. U.S 781 (1946)

a. Structural factors

1.) Level of concentration and number of companies

Cartel will be more easily formed if the number of companies is not much. In this case to measure the level of market concentration used calculation method CR4 or Herfindahl-Hirschman Index (HHI).[193]

The USA is the country governing competition in Antitrust Law by approaching the structural factors. To listen to the background of the determination of market share in Law No. 5 of 1999 it needs to be studied about the guidelines on mergers issued by the US Department of Justice, especially in 1987. However, in the 1987 Merger guidelines the relevant market concentration measurements no longer use the four firm ratios as set out in the previous rule (Merger Guidelines 1968). However it was replaced by HHI .The use of this index to measure the merger's horizontal effect comprehensive to assess the concentration of industry. Thus it can be seen whether the increase in market share of a company after the merger will hamper the occurrence of competition or not.

Even though it still contains some elementary weaknesses, but in revisions to the Merger Guidelines conducted by the Department of Justice and the FTC on April 2, 1991 and April 8, 1997, the HHI Index remains relevant and abandoned the previous method of CR4.[194]

[193] Johny Ibrahim, *Op.Cit.*, p. 252
[194] *Ibid.*

2.) Equivalent size of the company

Cartel will be more easily formed if the founders are some companies that have an equivalent size. Thus the distribution of production quotas or agreed price levels can be achieved more easily. This is because the level of production and the level of production costs of the company are not much different.

3.) Product Homogeneity

Homogeneous products cause consumer preference to the whole product is not much different. This becomes price competition as the only effective competition variable. Thus encouragement of business actors to form a cartel with the aim of avoiding price wars will be stronger.

From the above explanation, it can be drawn the conclusion that economic theory used by KPPU as well as used in United State that is by using structural factor. Where in Indonesia as in the case of Yamaha and Honda *Skutik* can be used both that are using CRn and HHI analysis in determining the market structure.

That based on the movement of concentration of 2 (two) biggest companies (CR2) during January 2012-December 2014 known that stable movement from CR2 in period of January 2012 until December 2014 in the range of 0.9 to 1. This condition indicates that motor vehicle industry have two strict oligopoly structure. While based on the movement of HHI during January 2012 to December 2014. HHI fluctuates in intervals of 4500 and 7000 (0-10000 scale) so as to classify this industry in a highly concentrated structure.[195]

[195] See the KPPU Decision No : 04 / KPPU-I / 2016. *Op.Cit.*, p. 401

b. Behavior factors

1.) Transparency and information exchange

Cartels will be easily established if business actors are familiar with the exchange of information and transparency between them. A strong association's role is often seen as a medium for sharing this information. Production data and the selling price submitted to the association periodically may be used as a means of controlling compliance with the cartel agreement

2.) Price and contract arrangements

Some pricing and contracting behavior may reinforce the alleged existence of a cartel in an industry. For example the one price policy where the similarity of prices in various regions will be an effective monitoring tool among members of the cartel against cartel price agreement.

The evidentiary process of cartel case in the USA uses both direct and indirect evidence. However, the Department of Justice USA often refuses to impose penalties in cases that use only indirect evidence. The indirect evidence in this case is only used as an additional supplement to corroborate the immediate evidence available. It is only in certain cases that a cartel is punished on an indirect basis. An example is the American Tobacco case that occurred in 1931 in USA.[196] The three companies raised prices by the same rate of increase and in almost the same time as to arouse suspicions of collusion among them. In the

[196] American Tobacco Co. v. United States, 328. U.S 781 (1946)

litigation, the three companies were unable to provide a logical reason to justify their actions. Based on that, the Court then punishes all the companies.

However, only structural factors or behavior factors by business actors are not sufficient to prove the existence of a cartel. In essence both direct and indirect evidence remains in use in the mechanism of evidence in the evidentiary process. Countries that have experience in business competition law such as in the USA tend to use direct evidence in their proofs. Indirect evidence is used only to corroborate the immediate evidence that has been found. However, it needs to be underlined that in using indirect evidence, there are limitations to note:

a. Structural and behavioral factors need to be combined. Both cannot stand independently
b. In using indirect evidence method, it is necessary to find a plus factor that can support the argument of collusion between business actors
c. Existing evidence must be interpreted in its entirety.

Just like a painting, meaning to say that the scratches of brush cannot stand alone on its own but it should be seen together to understand what object to be portrayed in the painting.

B. Guidence Evidence in the Competition Procedural Law

Based on the description above, in this case KPPU acknowledges implicitly that in order to prove the existence of cartel presence in the motorcycle industry, KPPU uses indirect evidence. It consists of two main classifications namely communication evidence and economic evidence.

Evidence where the parties communicate whether to meet or communicate in other ways concerning the cartel agreement is referred to as communication evidence although there is no substance of the meeting and / or communication including:[197]

1. Telephone recording between competitors or travel agents with the same destination, or participation in meetings.
2. Other evidence relating to communication between the parties concerning the assessment, an example note at meeting shich containing a discussion on pricing, demand and supply of goods and / or services. Other documents may be internal documents concerning pricing strategies and marketing of competitors.

The broader category is economic evidence. Economic evidence not only identifies the company's impressive actions that an agreement is reached, but also conducts the industry as a whole, the elements of the market structure which state that there is a pricing agreement, and certain practices that can be used in cartel agreements. Therefore, the evidence of communication itself is not sufficient to prove the existence of a cartel, but it must be known what the contents of communication as one of the indirect evidence of the cartel. Thus, in using communication evidence and economic evidence as indirect evidence must be proven, in order to support the argument of collusion.

In the case of Yamaha and Honda, there was a meeting of business actors on the golf course. Shortly after the meeting, there was an email message from

[197] OECD, "Prosecuting Cartels without Direct Evidence of Agreement," *Policy Brief* (June 2008).

one of the guys on the golf course to his subordinates and said to always pay attention to the price of his competitors. The email was then passed on to the marketing. Lastly, in the same year, in 2014, KPPU found that Honda made five times price changes. The change was followed by Yamaha with the same amount. The all of three evidences, KPPU believes that indirect evidence can be used in this case.

In the conclusion of the result of the trial in the Yamaha and Honda *Skutik* case submitted by both parties essentially contains the following matters:

> Based on these two emails, the Investigator states that the Yamaha in conducting and forming a price policy takes into consideration the price position of the competitor or market leader, and the email is also a form of price signaling.
> Such behavior shows that Yamaha is not independent in formulating pricing policies. In addition, the Investigator states that the pricing can be proven by the movement of *Skutik* sale price.

The allegations conveyed by the Investigator are completely invalid and inconsistent with the facts of the proceedings in both the Advanced Examination and the Extended Examination in the hearing, there was no valid and convincing evidence showing that Yamaha and Honda had made the pricing as intended in Article 5 paragraph (1) of Law No. 5 of 1999, as follows:[198]

> According to the formal aspect of the Report of Alleged Violation filed by the Investigator is legally flawed because the investigation process is not in accordance with the applicable legal provisions in the investigation process, there is the fact that the Investigator has visited and entered the Yamaha office and allegedly has requested information to Yamaha employee in Yamaha office environment. Investigators even allegedly have requested a number of documents belonging to the company to a particular party without the knowledge of Yamaha. The facts that Investigators have come and entered into the office of Yamaha directly without the knowledge of Yamaha can be clearly seen in the CCTV. Thus, it violates the principles of due process of law. In addition, there is no

[198] *Ibid*, p. 114

> single provision in the applicable laws and regulations, especially Law No. 5 of 1999 which grants the right or authority to the Investigator to visit the office of Yamaha directly and take the company's document without notice or request which must be given in advance properly. Moreover, the actions taken by the Investigator are not accompanied by the authorities. Actions performed by Investigators can be categorized as the act of taking and / or seizure of documents without going through a valid procedure even without based on the authority in accordance with applicable legislation.[199]

In order to enforce the law, the Investigator should undertake the investigation process to uphold the applicable legal requirements including the propriety principle to ensure due process of law in the investigation. In comparison, other law enforcers in any searches, seizures or entering the corporate environment are carried out in accordance with the applicable procedures and the propriety principle, namely a notification letter, witnessed by a local official, even prior to obtaining a permit from the Court. It is because the actions which taken by the law enforcers if it is not in accordance with the law then it can harm the other party. Thus, it must be done properly, according to procedure, one and another also in order to guarantee the rights of all related parties. In fact, the action taken by the Investigator in this case can be categorized as a foreclosure because it has requested certain documents, in which the owner of the document, *in casu* Yamaha, was never informed beforehand.[200]

Based on the above explanation, the investigation process conducted by the Investigator has been done is not in accordance with the applicable law, contrary to the propriety principles, and has violated the rights of the Yamaha as a party that can be harmed by the actions performed by the Investigator. The logical

[199] *Ibid*, p. 116
[200] *Ibid*, p. 117

consequence, the alleged infringement filed by the Investigator is legally flawed because the formal conditions as described above are not met.

> On the other hand, from the conclusions that conveyed by Honda, the investigator has violated the due process of law. As guaranteed by the 1945 Constitution, legal certainty is a basic right of everyone, including business actors. In the Elucidation of Article 3 No. (1) of Law No.28 of 1999 concerning the Implementation of a Clean and Free State of Corruption, Collusion and Nepotism, the "Legal Certain Principles" is a principle within a jurisdiction that prioritizes the legislative- invitations, appropriateness, and fairness in every State Implementation policy.
> Honda also observed that the trial of this Case is not executed as a hearing on the examination of the Report of Alleged Violation as reported by the Investigator Team on the reading of the Report of Alleged Violation in the hearing on July 19, 2016. As stated in Article 1 Paragraph (8) of Commission Regulation No. 1 of 2010 concerning Procedures for Handling Cases, that is a series of activities undertaken by the Commission Assembly against the Report of Alleged Violation to conclude whether or not Advance Examination is necessary, while the Advance Examination is a series of activities undertaken by the Commission Assembly on any alleged violation to conclude the presence or absence of evidence of infringement. In addition, in relation to the KPPU case, the burden of proof to prove the matters conveyed in the Report of Alleged Violation is clearly in the Investigator Team as stated in Article 107 of 1/2014. This provision essentially states that the functional group of Examiner / Investigator has the function of executing technical operational of acceptance and clarification of report, investigation, filing, prosecution, litigation, execution and monitoring of KPPU Decision to Deputy of Law Enforcement.[201]

In the context of examination of a case of KPPU, the Reported Party shall have the legal certainty with the observance of the applicable law of procedure. However, in the process of examining this case, there has been a clear violation of the Principle of Legal Certainty by the Investigator Team which has created legal uncertainty for the Honda.

> With considerable authority the Report of Alleged Violation should be carefully structured and based on sufficient and accurate evidence. However, in the process of Preliminary Investigation it can be seen that the questions asked and disclosed are not the same as the problems described

[201] *Ibid*, p. 288

> in the Report of Alleged Violation, such as the price increase of products, types and products of Yamaha and Honda, as will be submitted further. In the hearing, the Investigator Team looked as if it had been re-examined because of repeated requests for documents, even documents that had been submitted during the investigation phase. This is clearly contrary to the Commission Regulation No.1 of 2010 above which should be obeyed as a form of Due Process of Law implementation. Violation of Due Process of Law causes the trial process to become erratic and does not reach the legal certainty for the litigants.[202]

Besides that, the hearing process in KPPU, Investigator and KPPU members also deliberately attempt to form public opinion that harms Yamaha's position as if he has been guilty based on a decision with permanent legal force.

As the statements contained in the media are as follows:[203]

> Bisnis Indonesia, October 7, 2016, Investigator Finds New Evidence (Appendix T1-9)
>
> "Investigator KPPU Helmi Nurjamil said that both reported in the case No. 04/KPPU-I/2016 is raising the price of one type of motor scooter five times a year. "" The increase of more than two times it is not fair. If the price rises to five times that there must be other factors that are not right, "he said when met after the hearing, Thursday (6/10). The data of the price increase up to five times will be disclosed at the next trial which will be examined by expert witnesses. "Helmi delivered competitors Yamaha and Honda in *skutik* market only raise the price once a year. In fact, they have the same components, materials and spare parts. "" In fact, Helmi continued, the level of domestic content (TKDN) owned by other producers is smaller than the property of the reported. That is, the price set should be reported reportedly cheaper."[204]
>
> Based on KPPU Decision No. 37/KPPU/Kep/II/2009 dated February 25, 2009 on the Code of Conduct of KPPU ("Procedure of KPPU") is clearly stipulated that statement of business competition cases submitted to the public may only be submitted from the procedural aspect and not on the substance of the case concerned. In addition, the statement shall only be submitted by the Chairman of the Examining Team or the Chairman of the Commission Council, as regulated in Article 22 Paragraph 3 of the Code of Procedure of KPPU, as follows:

[202] *Ibid*, p. 290
[203] *Ibid*, p. 118
[204] http://koran.bisnis.com/read/20161007/439/590314/investigatorcoverbisnis-new

> "A statement concerning a business competition case that is being dealt with only concerns the procedural aspect and is submitted by the Chair of the Examining Team or the Chair of the Commission Assembly or its representative."

Based on the foregoing, the action of the Investigator who submits the opinion / statement to the public has clearly violated the due process of law. In addition, the Investigator's actions are suspected to have deliberately formed public opinion to accuse position of Yamaha as if Yamaha had been guilty based on a decision with permanent legal force. Therefore, during the investigation process the Investigator has violated the Code of Conduct of KPPU and the applicable legal principles which must be obeyed by the Investigator as the claimant in a quo case.

The investigator has violated Article 39 Paragraph 3 Law No. 5 of 1999 for having published the confidential information belonging to the Yamaha in the presentation material at the preliminary hearing.[205]

Article 39 Paragraph 3 of Law No. 5 of 1999 stipulates that "The Commission shall keep the confidentiality of information obtained from business actors categorized as corporate secrets."

However, in fact during the first trial in the Preliminary Examination on July 18, 2016 in KPPU, the Investigator has disclosed in the hearing open to the public data and confidential information owned by Yamaha in Report of Alleged Violation. Presentation materials presented at the Commission Council session open to the public, namely the Market Performance section that has been clearly

[205] See the KPPU Decision No : 04/ KPPU-I/2016.*Op.Cit.*, p.123

stated by Yamaha as Secret / Confidential has been disclosed in advance of the trial by Investigator.[206]

In this case, it can be seen some weaknesses in the consideration of KPPU in proving the existence of cartels among business actors in *Skutik* industry. In addition to the above mentioned formal aspects, KPPU is also not appropriate in analyzing the material aspects, such as relevant market. The definition of the relevant market determined by the Investigator is not based on sound evidence. It can be seen from the argument used by the Investigator in determining the relevant market is done without any research and / or comprehensive research according to best practice in determining the relevant market.

The determination of the relevant market must be through consumer preference analysis conducted through a comprehensive research and / or research to assess whether a product is mutually substituted or not. However, in this case the Investigator unilaterally determines the relevant market without a strong analysis of consumer preferences. Therefore, the determination of the relevant market in the case is invalid and cannot be used for further analysis.[207]

In addition, KPPU also attempts to describe the parallel behavior or strategy that Yamaha and Honda perform in the form of price parallelism, in fact the pattern and price policy between Yamaha and Honda are different. Even if there are conditions that seem to be interpreted as a parallelism, it can not necessarily be an indication of violation of Article 5 of Law No. 5 of 1999.[208]

[206] *Ibid*, p. 129
[207] *Ibid*, p. 132
[208] *Ibid*, p. 133

According to the conclusion given by Honda in the decision of the case, the Investigator Team does not comply with the applicable Law of Procedure. The real violations of applicable procedural laws conducted by the Investigator Team are:

1. In the process of examining the first (*inzage*) evidence dated January 3, 2017, Honda was not granted *BAP* Investigation: Whereas Article 8 Paragraph 2 Sub-paragraph e of the No. 1 of 2010 clearly stipulates that the Reported Party in the Inspection has the right to inspect the evidence before preparing the Conclusion. This means that in the *inzage* process, Honda has the right to examine the documents used as the basis for the Investigator Team in preparing the Report of Alleged Violation, including the *BAP* of Investigation, to assist Honda in preparing the arguments of their defense. However, Yamaha and Honda conducted the first *inzage* process on 3 January 2017, the Investigator Team through the Registrar did not provide the *BAP* investigation and other documents obtained during the (non-confidential) investigation process used to prove the excuses in the Report of Alleged Violation
2. It is a standard practice of law in Indonesian law that the Reported Party as an interested party has the right to see the BAP of Inquiry and the documents obtained during the investigation process prepared by the Investigator Team. It is indispensable that Honda has a thorough

understanding of the alleged violation alleged to him, and to be able to exercise his rights in preparing a legal defense

3. Honda feels burdened with the burden of proof that should be on the Investigator Team. Nevertheless, Honda still respects the KPPU by providing the requested data and documents. The Investigator Team through the Commission Assembly repeatedly requested the same documents and which had been submitted and finally handed over to Honda. By requiring the same documents and data repeatedly, it is evident that the Investigator Team actually has no evidence or at least does not understand the contents of these documents, which may serve as the basis for allegations of alleged violations in the Report of Alleged Violation.

The Investigator Team seeks to obscure the evidence that can be submitted in the examination by disregarding the procedural law and the law of evidence.

In this case, the analysis of the Investigator Team based on inaccurate and inconsistent data and information poses a real potential mistake in the process of preparing the alleged violations of the Report of Alleged Violation. It can be conclude that the Report of Alleged Violation is not based on deep analysis, thus it becomes invalid.

Another thing related to the alleged price fixing deal between Yamaha and Honda is that there is no economic evidence and communication evidence, which proves the concerted action between Yamaha and Honda. Concerning this concerted action, the Investigator Team simply cannot prove that there is

economic evidence and communication evidence between Yamaha and Honda, which leads to an action that can be qualified as a concerted action, since there is no economic motive for Honda to enter into a pricing agreement with Yamaha. Honda has been dominated of automatic scooter market since 2012 until now. Honda's market share holds about 70%, which is very much greater than Yamaha which only has a market share of about 20%.[209]

> Price parallelism[210] which is always used as a reference by Investigators as economic evidence does not meet the qualifications as evidence as referred to in Article 42 of Law No. 5 of 1999. Price parallelism which tries to be built by Investigator as a circumstantial evidence does not qualify to be made as evidence, because parallelism (in the context of price, price parallelism) is very common in oligopolistic markets. Moreover, circumstantial evidence is not known in the Indonesian legal system (Kurnia Toha, testimony in the hearing of December 15, 2016).[211]
>
> Expert, Dr. Kurnia Toha, S.H., LL.M., in the hearing of December 15, 2016, states:
> - In the procedural law system in Indonesia, direct evidence and circumstantial evidence system is not exist as known in business competition law in US, EU or other developed countries.
> - According to Indonesian law, the evidence only recognizes such as witnesses, letters of guidance and business acts, in Article 42 of Law No.5 of 1999. An allegation can not only be based on indirect evidence. Evidence with indirect evidence must also be supported by plus factors such as (i) communication evidence and (ii) economic evidence.
> - Characteristics in the oligopoly market is a market in which the business actor is small, and the goods are homogeneous so that the business actors interdependent (interdependent in the oligopolistic market), then there is likely to be a market leader. Under the law of business competition, and in the context of an oligopolistic market, the likely price of a product is very similar. This is done by business actors to be able to compete with their competitors.

[209] *Ibid*, p. 317

[210] Price parallelism is one indication that can be used to determine the presence of a cartel or not, but not enough with just one indication but there must be another indication, regardless of what price parallelism. See the KPPU Decision No : 04/KPPU-I/2016. *Op.Cit*., p. 209

[211] *Ibid*, p. 318

- The character of the *Skutik* market in Indonesia can be categorized as one example of an oligopoly market form.[212]

In addition to the above mentioned experts, further Prof. Expert. Dr. Ine Minara S. Ruky in the hearing on December 22, 2016 stated that it is an undisputed fact *(notoir faiten*) that Honda is the master of market share for scooter matic product with percentage reaching 70% range. Meanwhile, market share of Yamaha is only about 20%. As a market authority, it is a reasonable phenomenon if the price set by the Honda (price maker) will be seen and made reference by other business actors (price taker).
in the hearing of December 14, 2016, [213] Expert Dr. Martin Daniel Siyaranamual, S.E., DEA., Ph.D. argues that what can determine the price in the market is the most dominant (manufacturer). Many factors to cause a company to be the most dominant, where one of them is the company's product brand have been very strong and good in the community. The trend of similarity in price patterns cannot be directly established cartel. Not also a cartel if there are economic factors that can be used as justification basis to make adjustments, such as changes in exchange rates, *BBN, UMR* and so forth. The behavior in determining the price for a non-dominant firm is following a movement similar to that of a dominant firm. Non-dominant companies are the follower companies of dominant companies. So if the dominant company rises, then the follower will rise as well. Technology can also affect the cost or price of the product.

[212] *Ibid.*
[213] *Ibid*, p. 333

CHAPTER IV

CONCLUSION AND RECOMMENDATION

A. Conclusion

Based on the description of the previous chapters, then the conclusions of this thesis are:

1. The legal considerations of KPPU's decision in the Yamaha and Honda *Skutik* case are based on indirect evidence that conducted an analysis using the methods of structural and behavioral factors to meet sufficient preliminary evidence requirements as the guidance evidence. However, only structural factors or behavior factors by business actors are not sufficient to prove the existence of a price fixing. In essence both direct and indirect evidence remains in use in the mechanism of evidence in the evidentiary process. Just like a painting, the starches of brush cannot be stand alone on its own but it should be seen together to understand what object to be portrayed in the painting.
2. Indirect evidence can only be used with very strict requirements. There are two kinds of indirect evidence which are communication evidence and economic evidence. Both of them cannot be stand-alone without the direct evidence. However, as long as both communication evidence and economic evidence forming a series of events that can be concluded it is a violating the law then the qualifications is part of guidance evidence. While guidance evidence is the knowledge of the Commission Assembly

by which it is known and believed to be true. In Yamaha and Honda *Skutik* case, besides it is using the guidance evidence which is supported by the indirect evidence. There are also the expert testimony and witness testimony using in this case. Thus, it is already compatible with the evidentiary process in the Competition Procedural Law.

B. Recommendation

In connection with the conclusion above, there are things that need to be examined further, namely:

1. KPPU is a business law enforcement institution which relatively young. The direction of its development in enforcing the law of business competition is actively trying to remove the barriers of trade, especially cartel. However, it should be emphasized that to prove the existence of a cartel requires a high consistency in order to make KPPU way much better in facing the next cases to create legal certainty and its application in Indonesia**.**
2. The competition law does not explicitly permit indirect evidence in the evidentiary process. In this case there is no clear limit on what kind of indirect evidence that qualifies as a valid and convincing evidence. It would be better if the improvements in the Law No. 5 of 1999 discussed specifically about the position of economic evidence as evidence.

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