LEGAL TEST OF AGREEMENT ELEMENT ON CARTEL

(The Decision of Commission for The Supervisory of Business Competition Number 08/KPPU- I/2014)

LEGAL CASE STUDY

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INTERNATIONAL PROGRAM

DEPARTEMENT OF LAW

FACULTY OF LAW

UNIVERSITAS ISLAM INDONESIA

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LEGAL TEST OF AGREEMENT ELEMENT ON CARTEL

(The Decision of Commission for The Supervisory of Business Competition Number 08/KPPU- I/2014)

A BACHELOR DEGREE THESIS

Presented as the Partial Fulfillment of the Requirements
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By

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Bismillahirrahmaanir rahiim

Yang bertandatangan di bawah ini, saya:
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Demikian, Surat Pernyataan ini saya buat dengan sebenar-benarnya dalam kondisi sehat jasmani dan rohani, dengan sadar serta tidak ada tekanan dalam bentuk apapun oleh siapapun.

Dibuat di : Yogyakarta
Pada Tanggal : January, 12, 2018
Yang membuat pernyataan,

AIDA ZULFA LARASATI
NIM: 13410075

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DEDICATION

This thesis is wholeheartedly dedicated to:

My beloved parents, Anwar Sodik and Emy Muniroh,

My big sister, Nadhia Azmi,

My little brother, Muhammad Iqbal Zaki Husaini,

Myself and My precious friends

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First of all, *Alhamdulillahirabbil'alamin*, in the name of Allah SWT, The Lord of the Universe. An enormous gratitude for His blessings that has been given in all my life, especially during the creation of my thesis titled, **LEGAL TEST OF AGREEMENT ELEMENT ON CARTEL (The Decision of Commission for The Supervisory of Business Competition Number 08/KPPU- I/2014),** until it is finally completed. Also, *Shalawat* and *Salam* to the messenger, Muhammad SAW., for bringing all the humankind to a brighter era.

During the process of making this thesis, the writer realized that it would never be finished without any contribution, assistance, guidance, and support from various parties. So, the writer would like to extend gratitude to:

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Finally, the writer recognizes that this thesis is still far from being perfect, so the writer expects the readers to give some criticism and suggestions. However, the thesis will hopefully be useful for anyone who reads this.

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A. Context of Study

Competition is an essential element to be used in modern economy.[1] Therefore, ideally business actors are supposed to practice only at level of fair competition to earn their profit. For this, Competition Law, as code of conduct, hopefully could direct the business actors to the fair and pure competition. Therefore, in order to arrange fair and healthy competition atmosphere among business competitors, Indonesian government had to create a law which dealing, especially in regards of business competition. This law contained warnings of violation against the law, and also the punishments. In 1999, Indonesia finally has introduced its first nation competition law in form of Legislation product known as Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition.

Law Number 5 of 1999 has become helpful in dealing competition law cases, for example on Tyre Cartel case. Cartel itself has been acknowledged by most of the countries as illegal activities (agreement), which make this conduct ruled as *per se illegal.* Unusually, in Indonesia, Cartel is ruled as *rule of reason*. Cartel known as one of the most harmful of all types of competition law violations, and necessary to be sanctioned severely.[2] The impacts of the cartel might lead to higher prices, decreased product choice and less innovation.[3] The most important part of a cartel case to prove that such an agreement existed among business competitors. However, obtaining direct evidence to fulfill the agreement element in

[1] Prayoga . A.D et al . *Competition law and Its Regulation in Indonesia*, USAID, Jakarta, 1998, e-book. Page 8

[2] Edward Whitehorn, , *Competition Law and Policy*, Poicy and Brief, OECD, Edition June. 2007, e-book,Page1

[3] http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_02760.html. Accessed on November 2nd, 2017 20.30

Article 11 is fairly difficult. Cartel perpetrators are colluded in secret, and their expressed of consent would not be explicitly made in writings, they would have done it implicitly instead. This implicit agreement relatively is known as The Tacit Agreement. And in order to really establish that the agreement element has been properly fulfilled, such in depth and thorough analysis of this element is necessary to be performed

Article 11 Law Number 5 of 1999 has mentioned Cartel as one of the prohibited agreement to be made among business actors. In connection with Tyre cartel case that was happened in 2014, KPPU has decided all 6 (six) Tyre Manufacture Companies to be found guilty of conducting cartel in form of price-fixing and production arrangements for passenger cars with ring 13, ring 14, ring 15, and ring 16. These are violation of Article 5 (1) and Article 11 of Law Number 5 of 1999.[4] Particularly, Article 11 regulates about the Prohibited Agreement of Cartel, it refers to production and marketing unlawful arrangement through price fixing.

In order to prove violation of these two articles, KPPU decision has to prove the fulfillment of all elements in the violated articles. More specifically, in regards to prove the element of prohibited agreement which has been made illegally by the reported parties. This element is important, considering Article 5 and Article 11 about cartel are categorized as in prohibited agreement section on Law Number 5 of 1999. However, the effort to prove and fulfill this agreement element could be hard without the presence of direct evidence to prove such agreement was made.

[4] KPPU decision Number 08/KPPU-I/2014 Page 209

Which as it happened on Tyre cartel case, KPPU has to prove the existence of unwritten / tacit agreement which was presumably made in that case.

KPPU has discovered supporting hard evidence of documents that could be analyzed as a cartel and price fixing arrangements in the minutes of meetings held by APBI or *Indonesia Tyre Manufacturers Association (*ITMA*)* during period of 2009 - 2012.[5] According to KPPU, the minutes of the executive committee meetings of ITMA clearly revealed that representatives of the 6 tyre manufacturers had agreed to refrain from setting competitive prices, to exercise restraint over production, and to control distribution with the purpose to maintain favorable market conditions in demand. The minutes also noted that the 6 (six) tyre manufacturers had agreed to maintain market stability. These activities and allegedly tacit agreement have presumably occurred between these 6 (six) tyre manufacturers that found by KPPU to have violated Article 5(1) and Article 11 of Law Number 5 of 1999.

KPPU has also mentioned that this case is not the first case KPPU has ever looked into these 6 (Six) tyre manufacturers trade association, for their suspicious activities. In fact, KPPU has found on numerous occasions in the past that communications between members at trade association meetings can directly or indirectly lead to cartel and price fixing practices.[6] This fact as it happened can be considered as potential collusion pattern

[5]http://www.soemath.com/advocates/public/en/Article/read/281/Client.Update...6.Tyre.Manufacturers.Found.To.Have.Operated.As.A.Cartel.And.Engaged.In.Price.Fixing..Fined.Rp150.Billion. accessed on November 2nd, 2017 13.45

[6]*Ibid*

Based on this potential collusion pattern, KPPU has acquire reasonable allegation to believe the meetings held by ITMA have created possibility of cartel practice might be conducted. Another basis of this allegation is that during those meeting there has been a discussion that can be highly considered as a discussion upon matter of price fixing, production, and market arrangement discussion. There are several specific notions were made on meetings held by the Indonesia Tyre Manufacturers Association (ITMA) during period 2009 to 2012, and KPPU has concluded those notions as a form of element tacit agreement. Which it creates reasonable allegation of such illegal agreements was formed by these 6 (six) cartel operators.

Toward this allegation of such agreement has been formed during those meetings, the reported parties have continually disagree following to the every issuance court decisions that strengthened KPPU decision. Especially about the fulfillment of the 'agreement' element on the violated articles. In their defense, they mentioned KPPU has wrongly concluded the agreement element on relevant violated Articles, they have also argued that the meeting events and the meetings minutes they have had cannot be considered as an 'Agreement'. Therefore, they contemplating the agreement element in those Article cannot be considered to be fulfilled.[7]

Based on the background that has been described above, the writer interested to examine KPPU Decision, which has concluded that there is unwritten agreement formed in the meeting. Moreover, in order to test the result KPPU

[7] https://en.tempo.co/read/news/2014/05/26/056580519/Six-Tyre-Producers-Face-US21-Million-Fines. Accessed on November 4th ,2017 13.45

decision in the fulfillment of agreement element, whether or not it is decided in accordance with Article 1 (7) of Law Number 5 of 1999. The writer will elaborate the element of Cartel in Article 11, and element of Agreement according to Article 1 (7). Especially, regarding the meeting and the minutes meeting itself. The fulfillment of agreement element is very important in determining whether or not there is violation of Article 5 and Article 11 of Law Number 5 of 1999.

Therefore, the understanding of element "Agreement" which being disputed between parties in the case at hand is an integral part, in order to determine the violation of the articles according to KPPU Decision Number 08/KPPU-I/2014. This case study will explore further about the determination of element 'Agreement', on how it's being fulfilled to prove cartel violation. It will be legally tested within the regulation in Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition. And also to determine, whether the mechanism conducted by the Commission is in accordance with the aforementioned regulations or not.

B. Parties Identity

1. Reported Party

The reported parties in this case are six Tyre Manufacture Companies, these companies are:

a) PT Bridgestone Tyre Indonesia,

b) PT Sumi Rubber Indonesia,

c) PT Gajah Tunggal Tbk,

d) PT Goodyear of Indonesia Tbk,

e) PT Elang Perdana Tyre Industry, and

f) PT Industri Karet Deli.[8]

All the reported parties aforementioned are lawfully established as a legal entity, in form of limited liability Company, under Indonesian laws and regulation. And their establishments are located in Indonesia territory.

2. The Commission

KPPU or *The Commission Business Competition Supervisory Commission, h*ereinafter referred to as the Commission. The Commission was examining Case Number 08 / KPPU-I / 2014 concerning Alleged Violation of Article 5 (1) and Article 11 of Law Number 5 of 1999, concerning The Prohibition of Monopolistic Practices and Unfair Business Competition. This violation occurred in Automotive Industry related to Vehicle Wheel Tyre.

Article 30 Law Number 5 of 1999 has stated, KPPU is an independent institution, free from government or other parties' intervention or authority. This commission is accountable to President. The commission has duty to oversee the implementation of Law Number 5 of 1999. Another duty of KPPU also includes other duties, such as :

a. Conducting evaluations of agreements that might cause monopolistic practices and/or unfair business competition as regulated under Articles 5 through 16;

[8]Putusan Pengadilan Mahkamah Agung No 221 K/Pdt.Sus-KPPU/2016. Page.2

b. Conducting evaluations of business activities and/or entrepreneurs' behavior that might cause monopolistic practices and/or unfair business competition as regulated under Articles 17 through 24;

c. Conducting evaluations if there is any abuse or not in the dominant position that might cause monopolistic practices and/or unfair business competition as regulated under Articles 25 through 28;

d. Taking actions based on the authority of the Commission as regulated under Article 36;

e. Providing suggestions and consideration on Government policy related to monopolistic practices and/or business competition;

f. Set up guidelines and/or publication related to this Law;

g. Providing periodic report on the work results of the Commission to the President and the House of Representative.[9]

3. Commission Assembly

a. Commission assembly consists of :

a) Kamse Lumbanradja, M.B.A, (Chairman of The Assembly)

b) Dr. Sukarni, SH.,M.H (Member of The Assembly)

c) Dr.Drs. Chandra Setiawan,M.M.,Ph.D (Member of The Assembly)

d) Prof.Tresna Priyana Soemardi, S.E., M.S, (Member of The Assembly)

e) Dr.Syarkawi Rauf, S.E.,M.E (Member of The Assembly)

b. Registrar / clerk :

[9] Article 35 Law Number 5 of 1999 about The Prohibition of Monopolistic Practices and Unfair Business Competition

a) Rosanna Sarita,S.H, (Registrar)

b) Rumondang Nainggolan,S.H (Registrar)

4. Date of Decision

KPPU Decision number 08/KPPU-I/2014 was decided on Wednesday, December 10th,2014. And was publically pronounced on Wednesday, January 7th,2015.

C. Statement of Fact / Case Position

First of all, it is necessary to study the chronology of how this case happened in the first place. This case began once KPPU has suspected 6 (six) tyre manufacturers of carrying out cartel practices for Ring 13, 14, 15, and 16 ring tires during the period of 2009-2012. On January 21stst2009, located in Hotel Inter-Continental Jakarta, there was a meeting among members of ITMA.[10] The conclusion written on the meeting minutes was to avoid price war, with the purpose so the tires price in the market wouldn't slip.

Another subject found to be discussed during the meeting is about the reach of consent to restraint production, and controlling distribution. Furthermore, in the Sales Director Meeting of ITMA on December 2008, when the result should be submitted to the presidential meeting on 21 January 2009, they were clearly highlighted the notion of "ITMA members must not enter to a price war practice"[11] . This statement were first stated by the Chairman of ITMA, and undisputedly agreed by all members present.

[10] KPPU decision Number 08/KPPU-I/2014 Page 97
[11] KPPU decision Number 08/KPPU-I/2014 Page 98

KPPU has stated in their decision that the agreement element has been fulfilled, and it was supported with the evidence from minutes of ITM presidential meeting, during 2009-2012. These meeting minutes have provided element of consensus which made among the association members who attended the meeting. Also, the minutes meeting itself and the notion mentioned in it are presumably have violated Article 11 and 5(1) of Law Number 5 of 1999 concerning the Prohibition against Monopolistic Practices and Unfair Business Competition.

Moreover, KPPU has presented numbers of presumably acts of violations, despite the fact that the manufacturers have fixed the prices in during ITMA meeting. It was then also reported that during the meeting, all ITMA members were requested to present production, export, raw material use and selling reports. The minutes of the executive committee meetings of ITMA clearly revealed that representatives of the 6 (six) tyre manufacturers had agreed to refrain from setting competitive prices, to exercise restraint over production and to control distribution in order to maintain favorable market conditions for demand. The minutes also noted that the 6 tyre manufacturers had agreed to maintain market stability.

Meanwhile, Again, during the presidential meeting dated on January 26th 2010 at the Hotel Nikko Jakarta, KPPU has also highlighted the notion "to all members of ITMA, once again, to uphold their self and continue to control their distribution and maintain a conducive market condition according to their demand".[12] At the following presidential meeting on 10th April 2010, at the similar meeting, they declared that Market monitoring by ITMA will be reactivated from May 2010, and all members must control their tyre distribution to sustain the market condition.

[12] KPPU decision Number 08/KPPU-I/2014 Page 127

In addition to those facts, KPPU has used the Harrington Model to measure the existence of cartel agreement. This model is the combination of methods in foreseeing cartel in many perspectives. It uses the error correlation analysis or residual regression using panel data between companies. In the econometric analysis, error or residual regression of ten uses as the basis for cartel behavior. Experts use this model to analyze behavioral pattern in the certain time frame and between samples.[13]

Besides using Harrington method to prove the cartel agreement in this case , and particularly to prove collusive behavior and concerted practice, as act of violation Article 11. Furthermore, KPPU has also referred to these series meetings as the meeting of consent among these 6 (six) ITMA members.

Another fact about these ITMA meetings, ITMA has regularly conduct meetings together with the members, either in internal meeting or meetings which involving third parties. For the regular meeting, its generally consists of several meetings, such as team meetings, Sales Director Meeting, Marketing Director Meeting, TAC Technical Team meeting, Raw Materials Team meeting, HRD Team meeting, and Presidium Meetings which has been held every month. ITMA has appear as to where the communication and information exchange circulate among the association members of ITMA.

Therefore, in accordance with the witness testimony about the meeting minutes, Tetty Kurniasih Supena, she has mentioned that during the meeting, the reported parties provides monthly raw data per category, which these data actually

[13] KPPU decision Number 08/KPPU-I/2014 Page 74

shall remained secrets of their own each companies, but in fact what was happened was the opposite. This data was distributed among other members of ITMA. Moreover, that confidential data actually could not be given to any party, even to the agencies, in this case are the government agencies.[14]

Based on the information mentioned above, it has indicate the occurrence of irregularities as well as it has been understood as if the ITMA have acting as a facilitator related to the acts of violation, such as price fixing and cartel practice among the reported parties. Whereas, the irregularity being concerned is if the data is confidential and supposed to not accessed by anyone outside the company, including the Government.[15] This oddity surely arise questions regarding the purpose of ITMA to collects and distributes the raw data that supposed to be confidential, among their members (reported parties), who is clearly the representative of their business competitors.

Another fact mentioned in KPPU decision is that Presidium meetings are mostly would be held at the hotels and / or other places as it written in meeting minutes, and will be reported in the following presidium meetings. Also, the minutes' draft minutes of the ITMA Presidium Meeting is in fact contains consent meeting and approval mechanism which has done at the beginning of the meeting, and approved by all members of ITMA.[16]

This fact is supported by the statements of the accountable witnesses, it has mentioned by the KPPU decision that Presidium Meeting Minutes are always given to ITMA members, then the minutes are read out for approval at the next Presidium

[14] KPPU decision Number 08/KPPU-I/2014 Page 26
[15] *Ibid*
[16] KPPU decision Number 08/KPPU-I/2014 Page 37

Meeting. There has never been any disagreement or rejection response from ITMA members in relation to the approval of the minutes of the previous month's meeting submitted by the Chairman of the ITMA, if there was, it was just in regards on redaction error. And the parties who attend the meeting have always been the representative of the member companies of ITMA, never people outside the companies.

Whereas the another contents of these meeting minutes is refers to the indication of price fixing which based on the minutes of the meeting dated January 21st, 2009, there is also the minutes of the meeting which appears to discussing and approving on the decided tyre warranty claim arrangement which was changed from 3 (three) years to 5 (five) of years. This warranty claim setting can be considered as part of price fixing integral considering the warranty claim is a component of the price structure.[17]

Moreover, the minutes of the presidium meeting also discussing the objections of PT MAS, Tbk related with some indications of price fixing agreement among ITMA members is suggestively occurred. Another agreed matter is in regards to the arrangement of production which initiated through the process of team meetings at the ITMA as described in the section on the minutes of the presidium meeting which essentially discusses the regulation of production and or marketing of tires.[18] And these agreed terms of production and or marketing arrangement was conducted by the reported parties through its approval on the content of Presidium Meeting Minutes.

[17] KPPU decision Number 08/KPPU-I/2014 Page 123
[18] *Ibid*

KPPU has explained the agreement and coordination among the companies incorporated in the ITMA on 2009, have significant and effective consequence in increasing the price of PCR Replacement tires on Ring 13, 14, 15 and 16.

Those activities were strong indication of violation of Article 5(1) of Law Number 5 of 1999 on the prohibition of price fixing, which states that business actors are prohibited from entering into agreements with their business competitors to fix the prices of certain goods and/or services payable by consumers or customers within the same relevant market. In addition, they have also violated Article 11 of Law Number 5 of 1999 on Prohibition of Cartels, which states that business actors are prohibited from entering into agreements with their competitors with the intention of influencing prices, by fixing production and/or marketing of certain goods and/or services, which may result in monopolistic practices and/or unfair business competition.

D. Summary of Decision

In the The Commission for the Supervision of Business Competition Verdict Number 08/KPPU-I/2014, The Commission Council decided:

1. Declared that the Reported I, Reported II, Reported III, Reported IV, Reported V and Reported VI, are proven legally and convincingly violating Article 5 Letter 1 of Law Number 5 of 1999;
2. Declared that the Reported I, Reported II, Reported III, Reported IV, Reported V and Reported VI, are proven legally and convincingly violating Article 11 of Law Number 5 of 1999;

3. Punished the Reported I, to pay fine in the amount of Rp 25,000,000,000.00 (twenty five billion rupiah) that must be paid to the State Treasury as income deposit fine of violations in the field of business competition Unit Business Competition Supervisory Commission through the Government bank, under acceptance code of 423755 (Fine of Violations Income in the Field of Competition);
4. Punished the Reported II, to pay fine in the amount of Rp 25,000,000,000.00 (twenty five billion rupiah) that must be paid to the State Treasury as deposit income fine of violations in the field of business competition Unit Business Competition Supervisory Commission through the Government bank, under acceptance code 423755 (Fine of Violations Income in the Field of Competition);
5. Punished the Reported III, to pay fine in the amount of Rp 25,000,000,000.00 (twenty five billion rupiah) that must be paid to the State Treasury as deposit income fine of violations in the field of business competition Unit Business Competition Supervisory Commission through the Government bank, under acceptance code 423755 (Fine of Violations Income in the Field of Competition);
6. Punished the Reported IV, to pay fine in the amount of Rp 25,000,000,000.00 (twenty five billion rupiah) that must be paid to the State Treasury as deposit income fine of violations in the field of business competition Unit Business Competition Supervisory Commission through the Government bank, under acceptance code 423755 (Fine of Violations Income in the Field of Competition);

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

E. Legal Issue

Referred to the description in the context of study, Statement of facts, as well as summary of decisions, the legal issue arisen from the case is whether KPPU decision Number 08/KPPU-I/2014 has fulfilled the elements of agreement of cartel as it stipulated under Law Number 5 of 1999 or not ?

F. Legal Consideration

The Commission Assembly has assess, analyze, conclude and decide this case based on adequate legal consideration in considering whether or not there has been violation of Law Number 5 of 1999, which allegedly committed by the Reported

Parties in this case. At length this consideration leads to the issuance of KPPU decision number 08/KPPU-I/2014. These following considerations are:

1. In general, Commission assembly has several consideration which subjected to Report of the alleged violations, these are Response of Reported Parties toward Report of Alleged Violation, Testimony of Witnesses, Expert testimonies / statements, Statement of Reported Parties, Letters and / or Documents, and Conclusion of the Trial Process delivered either by the Investigator or each Reported Party.
2. The Commission assembly has consider the mechanism of price-fixing agreement and arrangement of production and / or marketing was conducted as follows:
    a. That the mechanism of approval in presidium meeting minutes shall be made at the next following presidium meeting. Particularly, in case related to price fixing, the minutes of the presidium meeting of January 21stst, 2009 were approved at the presidium meeting on February 17th 2009. Likewise, the minutes of the April 28th 2009 presidium meeting were approved at a presidium meeting on May 18th 2009, which during those times they discussed and agreed upon matter production and / or marketing tyre arrangements.
    b. Whereas the meeting minutes of the Presidium meeting were shall be sent to the Reported Parties, and addressed to each President Director, moreover it is a fact that there is no refusal of the meeting minute contents as it has been conveyed by the Reported Parties in the Commission Council Assembly

3. Another subject to consider is the fulfillment of all the elements consisted in Article 5 (1) of Law Number 5 of 1999, in order to prove whether or not there is violation in the violated Article. Especially the fulfillment of the 'agreement' element, reckoning the violation of this Article is regulated under Chapter III (Three) Law Number 5 of 1999 about Prohibited Agreements.
4. Another subject to consider is the fulfillment of the elements consisted in Article 11 of Law Number 5 of 1999, in order to prove whether or not there is violation in the violated Article. Especially the fulfillment of the 'agreement' element, reckoning the violation of this Article is regulated under Chapter III Law Number 5 of 1999 about Prohibited Agreements. And also, the second important element to be proven is the impact created by the agreement itself shall prove can cause a monopolistic practices and/or unfair business competition.
5. The ITMA Presidium Meeting that is defined as a meeting once a month, attended by all president director members of ITMA, and several times attended by relevant government officials.
6. According to the provision of Article 1 (7) of Law Number 5 of 1999 on the Prohibition against Monopolistic Practices and Unfair Business Competition, it is stipulated that the definition of Agreement 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 written or unwritten. Based on this provision, the agreement element is seems to be exists in form of tacit agreement and not-written that was not directly exposing the consents of the reported parties.
7. The minutes of ITMA presidium meeting discussing on matter of the price fixing, namely the consensus not to slam the tyre prices of Passenger Car Radial

(PCR) Replacement Ring 13, Ring 14, Ring 15, and Ring 16 in the territory of the Republic of Indonesia in a span years of 2009 to 2012 conducted by the Reported I, the Reported II, the Reported III, the Reported IV, the Reported V, and the Reported VI.

8. The minutes of ITMA presidium meeting discussing on matter of production arrangements and/ or marketing, namely the consensus to practice self-restraint and continue to control the tyre distribution of Passenger Car Radial (PCR) Replacement Ring 13, Ring 14, Ring 15, and Ring 16 in the territory of the Republic of Indonesia within the period of 2009 to 2012 agreed upon and/ or approved by the Reported I, the Reported II, the Reported III, the Reported IV, the Reported V, and the Reported VI.
9. The mechanism of making an agreement among ITMA members in order to implement the activities and the ITMA agreements. This is the reason why the Commission Assembly considered the presidium meeting is not a social gathering as it was pleaded by the reported parties.
10. The impact of ITMA agreement over the product price.
11. The impact of ITMA agreement over the production and/ or marketing tires.
12. The impact of Industry Collusion and the agreement of ITM A toward Price-Cost Margin (PCM).
13. The compliance of elements over Article 5 (1) of Law Number 5 of 1999.
14. The compliance of elements over Article 11 of Law Number 5 of 1999.

G. Legal Analysis

Referring to the violated articles in this case, which one of them is Article 11 concerning cartel agreement. Article 11 is regulated under Chapter III (Three) of Law Number 5 of 1999 about Prohibited Agreements. Thus, it deemed to be important for the 'Agreement' element on this article to be proven. As it mentioned by the Article 1 (7) Law Number 5 of 1999, which it includes an agreement, arranged either on written or unwritten form.

Unwritten agreement could be concluded as it is, with the help of circumstantial evidence analysis.[19] Suitably with the case, this circumstantial evidence is referring to the agendas during ITMA regular meetings, this fact is supported with the document of the meeting minutes. However, the section requires further examination to ascertain the necessary elements which must be proved to sustain an allegation of cartel agreement exist. And more other analysis of the this case is therefore required.

Cartel definition according to Article 11 of Law Number 5 of 1999 on the Prohibition against Monopolistic Practices and Unfair Business Competition, it states:

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

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

1. Business Actor with other business competitors
2. Enters into agreement

[19] Edward Whitehorn, , *Competition Law and Policy*, Policy and Brief, OECD, Edition June. 2007, e-book, Page.3

3. Influencing the prices by adjusting the production and or the marketing of the goods and or the services
4. May result in monopolistic practices and or unfair business competition

Hereafter are the four elements of cartel that formulated in the Article 11 of Law Number 5 of 1999 on the Prohibition against Monopolistic Practices and Unfair Business Competition:

1. **Business Actor with Business competitors**

   According to Article 1 Letter (5) of Law Number 5 of 1999 about Prohibition against Monopolistic Practices and Unfair Business Competition, It states:

   > "Business actor is an individual person or a company, in the form of legal or non-legal entity established and domiciled or engaged in activities within the legal territory of the Republic of Indonesia, conducting various kinds of business activities in economic sector through agreement, either individually or collectively."

   Based on the description of 'Business actor' in article 1 Letter (5) Law number 5 of 1999. The formulation of this description is consistof :

   a. An Individual Person
   b. A business entity, in the form of legal or non- legal entity, established and domiciled or engaged in activities within the legal territory of the Republic of Indonesia
   c. Conducting various kind of business activities in economic sector
   d. Either individually or collectively, through an agreement

   In conformity to correlate the statement of facts with the fulfillment of the elements above, hereafter are the further elaboration of 4 (four)

elements of the 'Business actor' description in article 1 Letter (5) Law number 5 of 1999 :

a. An Individual person

Under An Individual or natural human being (*natuurlijkepersoon*) is one of the legal subject. As the legal subject, everyone has right and obligation. According to Sudikno Mertokusumo, the legal subject is anything (or anyone) can obtain the rights and obligations preceded from the law.[20] A similar opinion is expressed by Subekti, which he states that the legal subject is the bearer of the right or subject in the law, that is, refers to an individual.[21]

Referring to Article 6 of UDHR (Universal Declaration of Human Rights), it stated:

> " Everyone has the right of recognition everywhere as a person before the law.. "

Therefore it can be said that every human being in anywhere is recognized as person before the law. Also, Indonesian law recognizes every human being as a legal subject, it can be seen in Article 1 Letter (1) of the Indonesian Civil Code which states the enjoyment of civil rights does not depend on the State's rights. This arrangement implies that status as a citizen (who has the meaning as a legal subject) is not dependent on certain conditions set by the state, but rather attaches or appears as a human right that naturally exists inside him/her.

[20] Sudikno Mertokusumo, 1988, *Mengenal Hukum (Suatu Pengantar*, Liberty, Yogyakarta, Page 53

[21] Subekti, *Pokok-pokok Hukum Perdata, Pembimbing Masa*, Jakarta, 1996 Page 19

The formulation of Article 1 of Indonesian Civil Code surely in coherence with what is stipulated in Article 2 and 3 of the Indonesian Civil Code. Article 2 of Indonesian Civil Code states that the circumstances in each case shall determine when a child shall be deemed to be born. In the event that a child is unborn, it shall be deemed to have never existed. Moreover, Article 3 of Indonesian Civil Code states that there is no punishment which resulted in civil death, or the loss of all citizenship rights (*Hak kewargaan).*

However, not everyone can perform a legal act, because not everyone has capacity to commit a legal act. Specifically, on article 1329, it stated each individual shall be authorized to conclude agreements, unless he has been declared incompetent by law. Hence, there are the people who are considered as incapable to commit a legal act. Article 1330 Indonesian Civil Code regulates that the incapable individuals are; Underage individual, Under guardianship Individual, and married woman. Regarding the underage individuals, its regulated for underage to referred as those who have not reached the age of 21 (twenty one) years old and not yet married. In condition, of their marriage dissolved before the age of 21 (twenty one) years, then they are not return to their underage status.

Under Indonesian law, business actors either may be a sole-proprietorship company or business entity.[22] The existence of sole-

[22] Peter Mahmud Marzuki, *An Introduction to Indonesian Legal System.* Setara Press. Malang. 2012. Page. 223

proprietorship is based on Article 6 of Indonesian Commercial Code, it states, "Anyone who runs enterprise is obliged to make records in accordance with the enterprise requirements on his/her assets position and of everything concerning the enterprise in such manner that from the records, it is known his/her rights and obligations from time to time". The word "Anyone" signifies both individual and business entity.

b. Business Entity

Besides Sole proprietorship, business actors would be in the forms of business entity. Under Indonesian Law, business entity may be differentiated into several kind of establishment. Moreover, as the business entity is established for the purpose to conduct a business. Thus, it can be said that business actors are those who operate the companies in manner to engage the activities openly in order to seek profit.

Theoretically, business entities can be classified in 2 (two) forms, which are:

1. Business entity in the form of legal entity
2. Business entity in the form of non-legal entity.[23]

The use of the term 'legal entity' (*rechthspersoon*) as legal subjects is solely to distinguish with natural person (*naturlijkepersoon*) as the legal subjects.[24] Thus, given the formulation term of 'Legal Entity' is not

[23] Abdulkadir Muhammad, 1991, *Hukum Perusahaan,* PT. Citra Aditya Bakti, Bandung, Page 50.

[24] Ali Rido, 1986, *Badan Hukum dan Kedudukan Badan Hukum Bagi Perseroan, Perkumpulan, Koperasi, Yayasan, Wakaf*, Alumni, Bandung, Page 1-9

found in legislation, at that moment some scholars try to arranged certain characteristic of business entity. such as;

1. There is a separation of assets between the company and the owner business.
2. Have a specific purpose
3. Has own interests
4. Coordinated organization.[25]

Thus, if a business entity does not have those characteristic mentioned above, then this business entity cannot be categorized as legal entity.

In addition, Indonesian law has also recognized another legal subject. This other legal subject known as legal entity or *rechtspersoon.* As the legal subject, legal entity is also acknowledged as the bearer of rights and obligation.[26] Thus, a legal subject could be either one of them. Also, according Subekti, legal entities have their own assets and can be sued before the court.[27] Legal entities can do unlawful conduct like natural persons, though that conduct is only limited to assets and properties' legal matters. Considering its form is an institution, the legal entity act as intermediary of its administrator.

The forms business entity which established as legal entity are:

a) *Perseroan Terbatas* (PT) or Limited Liability Company

[25] Ali Rido.*OpCit* Page 10

[26] Sudikno Mertokusumo, 1988, *Mengenal Hukum (Suatu Pengantar*, Liberty, Yogyakarta, Page 55

[27] Subekti, *Pokok-pokok Hukum Perdata*, *Pembimbing Masa*, Jakarta, 1996 Page 23

Limited Liability Company is an established Indonesian legal entity based on the prevailing laws, by fulfilling certain requirements as it has set forth by Law.[28] In this context it refers to Law Number 40 of 2007. According to Article 1 Letter (1) of Law Number 40 of 2007, Limited Liability Company (LLC) is a legal entity which is a capital association, established under an agreement, engaged in business with a capital base that is entirely divided into shares and fulfilled the requirements that set out in the law and its implementing regulations.[29]

On occasion that the Limited Liability Company is a legal entity, then the existence of Limited Liability Company (PT) in matter of legal disputes is recognized as it is a legal subject, meaning that PT can be sue and prosecuted before the court (*Persona Standi Injudicio*).[30]

b) *Koperasi* or Cooperation

Cooperation or *Koperasi* is a business entity in form of legal entity.[31] Also, it has been affirmed in Law Number 25 of 1992 on *Koperasi*. According to Article 1 Letter (1) of Law Number 25 of 1992 is a legal entity that consists of individuals or cooperation legal entity, which establish its business based on the principles of cooperation and people's economic movement based on the principle of kinship.[32]

c) *Badan Usaha Milik Negara* (BUMN) or State-Owned Enterprises

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[28] I.G. Rai Widjaja, 1994, *Pedoman Dasar Perseroan Terbatas (PT),* PT. Pradnya Paramita, Jakarta, Page 11

[29] Law Number 40 of 2007 on the *Limited Liability Company*

[30] Chaidir Ali, 1982, *Yurisprudensi Hukum Dagang*, Alumni, Bandung, Page 310.

[31] R. Susanto, 1982, *Hukum Dagang dan Koperasi di Indonesia*, Pradnya Paramita, Jakarta, Page 101.

[32] Law Number 25 of 1992 regarding *Cooperation*

The provision of Article 33 Indonesian Constitution is the Legal Basis which is used as the basis of state involvement in the economic field. The form of state involvement is manifested by government through establishment of a State Enterprise or within the another arrangement is called State-Owned Enterprises (SOE).

According to Article 1 Letter (1) of Law Number 19 of 2003 is a legal entity whose capital is owned entirely by the state through direct investments from the state assets that are separated.[33]

d) *Badan Usaha Milik Daerah (BUMD)* or Regional-Owned Enterprises

According Article 2 Law Number 5 of 1962 concerning Regional-Owned Enterprises is All enterprises established under this law whose capital is wholly or partly of separated Regional assets, unless otherwise provided by or under the law. Overall *BUMN* and *BUMD* have the same concept, only that, what distinguishes them both is the source of funds for the capital. Regional-Owned Enterprises or *BUMD* has source of capital derived from the assets belong to the region.

Furthermore, for the structure of business entities which established as non-legal entities, it mentioned as follows:

a) *Persekutuan Perdata (Maatchap)* or Partnership

Indonesian Civil Code mentioned Partnership or *Maatchap,* as an agreement by which two or more individuals bind themselves to

[33] Law Number 19 Of2003 regarding *State-Owned Enterprises*

contribute something jointly with the intent of sharing the proceeds therefrom among one another.[34]

b) *Persekutuan Firma* or Firm

Firm is a partnership that is established to run the company with joint name.[35] Firm is governed by Article 16 -35 of the Indonesia Commercial Code (*KUHD*). The definition of the Firm is simply described in Article 16 of Indonesia Commercial Code (*KUHD*). The firm is a partnership established to operate the firm under shared name.

c) *Persekutuan Komanditer* (CV)

Persekutuan Komanditer or CV (*Commanditaire Vennotschap*) or Limited Partnership is a limited partnership established by more than one person, consisting of one or more active partners and one or more passive partners, which in charge of managing the partnership and the others only contribute the capital (contributions) without involving in the management of the company. The existence of passive partners is the main characteristic of the CV as limited partnership.[36]

As regards to the scope of implementation of Law Number 5 of 1999 it covers the nationwide territory of Republic of Indonesia only. However, the Commission has determined that the scope implementation of Law

[34] Article 1618 Indonesian Civil Code

[35] Ridwan Khairandy, *Pengantar Hukum Dagang*, FH UII Press, Yogyakarta, 2006, page 23

[36] *Ibid*. page 27

Number 5 of 1999 is not only limited to the territory of Republic of Indonesia where the business actors established and domiciled or carried out their business activities. Moreover, the business actors who have legal establishment outside the territory of Republic of Indonesia who conduct and have an impact on the competition in the market territory of Republic of Indonesia.

Whereas by means of doing business activities in the territory of Republic of Indonesia. It refers to the where business activity carried out by the business actors. In this case, the reported parties have conducted their business within the Indonesian territory. Moreover, KPPU decision has some facts regarding this case which it lead to the idea of such an involvement exists, and participated by the reported parties.

These reported parties were unlawfully influencing the prices by adjusting the production and the marketing of their tyre products and services within the relevant market. In this context, it automatically also refers to the geographical relevant market where the 6 (six) Tyre manufactures have produced and sell their tyre products. And this geographical market is covers the entire territory of Indonesia.[37]

Thus, all the 6 (six) reported parties can be concluded to as have proven fulfilled the element of as a Business Entity. Their companies are established as Legal Entities. Moreover, these companies also established, and domiciled or engaged in activities within the legal territory of the

[37] KPPU Decision Number 08/KPPU-I/2014/ Page 45

Republic of Indonesia. This evidence is provided with the statement facts in KPPU Decision, as stated:

a) **Reported I, PT Bridgestone Tire Indonesia**, domiciled in the registered of fice in the Plaza Of fice Tower 11th Floor, MH Thamrin street Kav. 28-30 Jakarta; A business entity established in form of Legal Entity, established in Indonesia on September 8th 1973based on Decree of Ministry of Industrial Number. 295/M/SK/8/1973 Dated August 11th 1973 and with presidential permit Number B-84/Pres/8/1973 tanggal August 1st 1977.
b) **Reported II, PT Sumi Rubber Indonesia**, domiciled in the registered of fice in the Wisma Indomobil 12th Floor, Letjen M.T. Haryono street Kav. 8, Cawang, East Jakarta; A business entity established in form of Legal Entity, A Limited Liability Company/ *PT*, according to the Deed Number 135 Dated July 17th 1995 yang and revised to Deed Number 265 dated November 30th 2011, both made by Buntario Trigis Darmawan, NG, S.H., Notaris di Jakarta and had validated by Ministry of Law and Human Rights Number AHU60178.AH.01.02. Of 2008 dated January 20th 2009
c) **Reported III, PT Gajah Tunggal Tbk**, domiciled in the registered of fice in the Wisma Hayam Wuruk 8 10th Floor, Hayam Wuruk street, Central Jakarta; A business entity established in form of Legal Entity, A Limited Liability Company/ *PT*, according to the Deed, which already been synchronized with the Deed copy Number 5th dated 22nd July 2009 made by Isyana Wisnuwardhani Sadjarwo, S.H., Notary in Kotamadya Jakarta Pusat and had validated by Ministry of Law and Human Rights Number AHU-0079867.AH.01.09. Of 2009 dated December 1st 2009
d) **Reported IV, PT Good of Indonesia, Tbk**, domiciled in the registered of fice at Pemuda street No. 27 Tanah Sareal Kota Bogor, West Java; . A business entity established in form of Legal Entity, A Limited Liability Company/ *PT*, according to the Deed, Number 29 dated June 26th 2009 made by Haji Syarif Siangan Tanudjaja, S.H., Notary in Kotamadya Jakarta Timur and had validated by Ministry of Law and Human Rights Number AHU-00765.AH.01.09. Of 2010 Dated Desember 06th 2010
e) **Reported V, PT Elang perdana Tyre Industry,** domiciled in the registered of fice at Elang street, Sukahati Village, Citeureup, Bogor Regency, West Java; A business entity established in form of Legal Entity, A Limited Liability Company/ *PT*, based on Deed of Company Establishment Number 5 dated November 15th 1993 ,Made by Syamsul Faryeti, S.H., Notary in Cimanggis, Bogor With revised deed Number 20 Dated September 15th 2008 , both made by Saniwati Suganda, S.H., Notary in Jakarta and had validated by Ministry of Law and Human

Rights Number AHU85731.AH.01.02.Tahun 2008 Dated November 13th 2008 (vide bukti C516, C544 Penyelidikan

f) **Reported VI**, **PT Industri Karet Deli,** domiciled in the registered of fice at K.L Yos Sudarso street Km. 8.3 Medan, North Sumatra. A business entity established in form of Legal Entity, A Limited Liability Company/ *PT*, according to the Deed, which already been synchronized with the Deed copy Number 119 Dated November 22nd 2011, Made by Jhon Langsung, S.H., Notary in Medan and had validated by the Ministry of Law and Human Rights Republic of Indonesia. Number AHU-61015.AH.01.02. Of 2011 Dated December 12th 2011 (vide bukti C447

c. Conducting various kind of business activities in economic sector

Business activity is an activity undertaken by a business entity in an effort to derive economic benefits from such business activities, whether in form of trades of goods or services. And in this case the 6 (six) tyre manufactures are in actively conducting business for sales of tyre product.

Additionally, it is also noted in KPPU decision, the statement from Reported III in its conclusion, it states that the establishment of ITMA itself is motivated by the meeting of several pioneering companies in Tyre Manufactures business activities in the Indonesia since 1971. At that time, Tyre Manufacture business has a very strategic role to support economy in the country.[38]

Thereon, it can be said that the reported parties has a full operated business activities, and its specified in Tyre manufacture business. Thus the element of conducting business activities in economic sector has been satisfied.

[38] KPPU Decision Number 08/KPPU- I/2014 Page 28

d. Either individually or, collectively through agreement.

Referred to Article 1 Letter (1) Law number 40 of 2007, it has been explained related to the establishment of a business entity or company established by two or more parties jointly bind themselves through an agreement.

Moreover, according to Article 1 (7) of Law Number 5 of 1999, It defines Agreement as such:

> "Agreement 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 written or unwritten"

Meanwhile in Article 1313 Indonesian Civil Code, the term definition of 'Agreement' is :

> "An Agreement is an act pursuant to which one or more individuals commit themselves to one another."

Subsequently with the case, it can be said that in fact the reported parties themselves, have intentionally committed legal act by making agreements among them, and knowingly understand the consequences of their legal act. Moreover, an agreement can be legally valid when it fulfills the validity requirements of the agreement. Article 1320 Indonesian Civil Code have construed the requirements as such:

1. There must be consent of the individuals who are bound thereby;
2. There must be capacity to conclude an agreement;
3. There must be a specific subject;

4. There must be an admissible cause.[39]

The establishment of a business entity cannot be separated with the formation of the relevant agreement among the business actors themselves. An agreement is the essential element of business entity establishment among the companies' founder. They are bound through the same purpose and vision to conduct such business in order to gain economic benefit.

Therefore, PT Bridgestone Tire Indonesia , PT Sumi Rubber Indonesia, PT Gajah Tunggal Tbk, PT Good of Indonesia Tbk, PT Elang Perdana Tyre Industry and PT Industri Karet Deli, can be concluded as the business actors who conducting their business within establishment of Business Entities. Specifically, they are established in form of Limited Liability Companies (LLCs).Also, all these business entities are established based on an agreement.

Furthermore, The Writer have conclude, that the meaning of business competitor can be understood as another business actor in the similar relevant market. As it mentioned on Article 1 (10) Law Number 5 of 1999, Relevant market is the market with regard to the range or specific area marketing by business actors for goods or services that are identical or similar, or substitution of goods and or services. Relevant market includes products and geographical dimensions, which in this case, the relevant market in this case is the Tyre Passenger Car Radial

[39] Article 1320 Indonesian Civil Code

(PCR) Replacement Ring 13, Ring 14, Ring 15, and Ring 16 in the territory of the Republic of Indonesia within the period 2009 to 2012.

Thus, its sufficient to say that the element business actors with other business competitors has been fulfilled, as they have colluded among themselves and working with each other to maintained their business in relevant market.

2. Enters into Agreement

Referred to KPPU Decision Number 08/KPPU- I/2014, the 6 (six) reported parties have violated two articles that regulated under Chapter III of Law Number 5 of 1999, particularly concerning about Prohibited agreements. On their violation of Article 11, this is regarding cartel agreement that the reported parties have had it committed together. One of the elements and the most essential element that shall be satisfied in Article 11 is the agreement element.

As it has been also regulated under Article 35 (a) of Law Number 5 of 1999. KPPU has duty to conduct an assessment on all agreements and or activities that may result in monopolistic practices and unfair business competition.[40] Thus, it deemed necessary for the 'Agreement' element on in the violated article to be proven.

Pursuant to the Article 1 (7) Law Number 5 of 1999, Agreement or contract is described as:

[40] Law Number 5 of1999 concerning the Prohibition Against Monopolistic Practices and Unfair Business Competition

> "An action by one or more business actors to bind themselves with one or more other business competitors under any name, either made in written or unwritten "

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

1. An action
2. One or more business actors with more other business competitors
3. Bound themselves
4. Under any name
5. Either made in written or unwritten

Hereafter are the 5 (five) elements of Agreement definition that formulated in the Article 1 (7) of Law Number 5 of 1999 on the Prohibition against Monopolistic Practices and Unfair Business Competition.

1. An action

An action which referred in context, is a legal act. According to Sudikno Mertokusumo, Legal act is the performance of legal subjects intended to cause legal consequences, which deliberately required by the legal subject. Inherently, the consequences of this action determined by law.[41]The elements of legal action are the intention and the further actions of the intent, in which this intention or willpower is intentionally intended to cause legal consequence. Therefore, such events would be created.

[41] Sudikno Mertokusumo, *Hukum Acara Perdata Indonesia*, Liberty, Yogyakarta, 1985, Page. 97

Legal action has two essences, which it could be active or passive. Although a person does not do anything, but if it is passive, it can be interpreted as the implicit express of statement, in which can cause legal consequences, thus a passive act may be considered as a legal action. In doing so, an action might be a considered as legal act, due in certain circumstances it means something.[42]

Legal event are distinguished in two kinds of events, which are an act done by the legal subject, and not an act done by the legal subject. Furthermore, the act done by the legal subject. is the act of a person (*persoon*) either a natural human being or a legal entity, which differentiated again as two, legal act and non-legal act.

Whereas, a legal consequence have arisen because of the acts performed by two parties, such as sale, or business partnership, it could create an agreement of two parties. As it stated in Article 1313 of Indonesian Civil Code, this is a bilateral performed by two parties, committed to each other.

Assessment on whether an act is illegal is insufficient if it is based solely on a violation of the rule of law, but it must also be judged from the point of view of propriety. The fact that a person has committed a violation of the law may become a factor in deciding whether the act that causing disadvan tages is in accordance or not to the propriety that a person is supposed to have in socializing with the society.

Furthermore, according this case, the reported parties have committed a violation of Law Number 5 of 1999 by conducting a cartel. The cartel itself is a

[42] Sudikno Mertokusumo,, *Mengenal Hukum (Suatu Pengantar*), Liberty, Yogyakarta, 1985. Page 51

form of prohibited agreements, which clearly is prohibited by law, and as the consequence of its offense, The perpetrator may be punished.

Also the definition of agreement in the Article 1313 of the Indonesian Civil Code reads, its defined as an act of two or more persons binding themselves to one or more other persons. This action that mentioned in the initial formulation of the Article 1313 of the Indonesian Civil Code wants to explain that the agreement is only possible if there is a real action, either in the form of verbal, or physical action, and not merely in the form of thought.

KPPU has stated in their decision that these meetings and the meeting minutes defined as it doesn't contradict with the validity conditions regulated by Article 1320 Indonesian civil code. By reason of the 'Agreement' description in Article 1 (7) in Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition is one form of adoption derived from of the general definition of term 'Agreement' in Article 1313 Indonesian Civil code.

The term definition of 'Agreement' in Article 1 (7) is:

> "Agreement 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 written or unwritten"

Meanwhile in Article 1313 Indonesian Civil Code, the term definition of 'Agreement' is:

> "An Agreement is an act pursuant to which one or more individuals commit themselves to one another."

According article 1313,the formulation is given to show that an agreement consist of :

a) An action

b) Between at least two persons (can be more than two persons)

c) The act of raising the obligation between the parties that promise.

According Ridwan Khairandy, agreement is a consent made by the parties who made the agreement itself.[43] Even though the description is not yet comprehensive, it seems as it is because this definition is only refers to one sided party in the consent.[44] According J.Satrio, the formulation notion 'An Act' is too broad, in so mentioned, this notion include two kinds of act, which are Lawful Act (*zaakwaarneming)* and Unlawful Act (*Onrechtmatigedaad*).[45]

The definition of agreement in Article 1 (7) Law Number 5 of 1999 and are systematically consistence with each other, it is just in Article 1 (7), the definition was made compatible and more specified with context of Indonesian competition law. Nevertheless, still there is no essential contradictory among those two phrases.

In this context, the anti-competitive behavior of the 6 (six) tyre manufacturer can be considered as an act against the law or, as the violation in Article 11 of Law Number 5 of 1999. Thus, their act is included in this 'An act' definition. Specifically, their acts together are known as a concerted action.

Based on comparative interpretation, refers to Section 1 of the US Sherman Act, United States (US) has describe an Agreement, in the category of

[43] Ridwan Khairandy, *Hukum Kontrak Indonesia, Dalam Perspektif Perbandingan* Bagian Pertama. FH UII Press. 2013. Page 84

[44] *Ibid* Page 58

[45] J.Satrio, *Hukum Perikatan, Perikatan Yang Lahir Dari Perjanjian,* Buku I. Bandung. 1995. PAGE27

agreements that include contracts, combinations or conspiracies, which all of those require a joint action of two or more persons to form them. Meanwhile, concerted action can only be justified if it consist of three things, such as unity of purpose, unity of understanding, and have occurred meeting of minds between them.[46]

Following to that explanation, hereafter are the contain of the several meetings that have been arranged. The minutes of presidium meeting that was held on April 28th, 2009 at Grand Melia Hotel was led by the Chairman of ITMA and was attended by the members of ITMA. This meeting was known has agenda to seek discrepancies of sales during three months in 2009, as the result of the meeting, it has concluded that the export sales of four-wheel tyre was foreseen to fall abruptly. Therefore, the all members of ITMA were told to restraint and continue to control the distribution.

Furthermore, in the next meeting, on presidium meeting that was held on May 26, 2009 at Nikko Hotel, was chaired by the Chairman of ITMA and attended by the members of ITMA. The minutes of this presidium meeting contained a discussion regarding these matters, such as:

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

[46] KPPU decision Number 08/KPPU-I/2014 Page 88

Another presidium meeting that was held on January 26, 2010 at Nikko Hotel in Jakarta, was chaired by the Chairman of ITMA and attended by the members of ITMA. In the minutes of presidium meeting consisted this following notions:

a) In 2009, we have been through several difficulties, but with the good cooperation among all members of ITMA, the troubles could go through. Many things can be learned and be an experience to be able to fight the problems that exist, so that each member of ITMA is still able to survive, and the existence of ITMA which can be better than the previous of . We would like to thank the entire presidium and board, and chairman of the respective teams, which have provided good understanding and cooperation to all members, so that all the existing problems can be solved well as it should be.
b) We ask to the Chairman of the Team and the members of ITMA to submit the report on its activities, either production, sales or export as the basis for writing the ITMA report of 2009 (in accordance with the letter AS-107 dated November 23, 2009) which then would be conveyed to the Government and relevant agencies as Annual report, so that the existence of National Tyre Industry can be secured.
c) To all ITMA Members, once again, is requested to restraint and continue to control the distribution and keep the market conditions remain favorable in accordance to the development of the tyre demand.
d) We are going to face 2010, the of that is expected to be better than 2009. However, the potential market disruptions is inevitable, notably the entry into force of the ASEAN-China FTA on January 1, 2010.

Furthermore, during the Presidium Meeting that was held on February 25, 2010 at Nikko Hotel, which was also chaired by the Chairman of ITMA and attended by the members of ITMA. This time, the minutes of the presidium meeting contained this following matters:

a) The situation in the domestic tyre market is quite stable in the first two months of 2010. According to the ITMA Sales Director's Meeting that was held at hotel yesterday, security measures will be taken jointly by the respective companies so that the market stability can be continuously maintained.

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

KPPU has concluded that those series of presidium meetings above are the form actions of the Reported parties to arrange the production and the marketing of tyre product in this case. Furthermore, KPPU also agreed with the expert witness testimony from Andi Fahmi, he was commenting on the Article 11 of Law Number 5 of 1999 concerning Cartel, in order to the arrange the production, it is not necessarily in the form of specific quotas but can be an agreement to determine the output of the resultant business actors. The arrangement of the production in question does not have to precise in one value of production.[47]

Therefore, those series of meetings they have done can be considered as a form of agreement among them, with purpose to attempt arranging the production and/ or the marketing, are considered as the consent of the parties in initiating the agreement among them.

In the investigation report, Roy Karelz have also stated that no member or meeting members object to refuse nor reject the report from ITMA Chairman related to report result of sales director meeting of December 2008.[48] Which meant there is no disagreement among them, but there is a high probability of mutual consent and mutual understanding that was established among them concerning the discussed matters. As it was mentioned in the Presidium Meeting dated January 21st[st], 2009, the Chairman of ITMA conveyed a prologue which

[47] KPPU Decision number 08/KPPU-I/2014 Page 133
[48] KPPU Decision number 08/KPPU-I/2014 Page 139

in essence discusses the security measures will be taken in order to maintain stability. The witness also mentioned a request to enable the market monitoring team to maintain distribution in the meeting.

Furthermore, as it has been noted, during the preliminary investigation into an alleged cartel, the KPPU has tried to identify cartel based on preliminary evidence derived from reports, or the KPPU takes the initiative to obtain evidence of the alleged violation of Article 5 of Law Number 5 of 1999. The evidence required is of mutually agreed price-fixing and of the business actors' compliance with the agreement. Which it indicates the conformity of the indirect evidence/ circumstantial evidence.

However, in order to prove the existence of illegal agreement in this case, KPPU is most likely using circumstantial evidence from the ITMA meeting minutes and the behavior anti-competitive pattern conducted by the reported parties. To uphold circumstantial evidence, the KPPU requires further analysis of all the evidences, to differentiate parallel business conduct from illegal agreements.

Besides the ITMA meeting minutes, KPPU has also use analysis of the market structure to determine whether the relevant market would be supportive of collusive behavior among the members. If so, indirect evidence may be used as an initial indication to determine the existence of coordination in the relevant market, which can be used as an indication there is an illegal agreement.

Given the explanation above, after KPPU attempt to obtain sufficient evidence (at least two elements of evidences) based on the facts found during the investigation, the question will be whether there is evidence of an agreement,

either direct or indirect. The use of economic analysis evidence becomes one of the important keys in indirect evidence, i.e. to prove the existence of an agreement. Economic analysis plays its role to elucidate coordination or agreement among the business actors in the relevant market.

2. One or more business actors with more other business competitors

Law number 5 of 1999 Article 1 (7) about the definition of Agreement, and Article 11 about the definition of Cartel have one essence of element that exactly similar. These two articles have consists the element of business actors with other business competitors. Particularly, the subjects in both articles have referred to business actors. Therefore, The Writer would elaborate this element only at the sufficient level, and for the further explanation it could be found on the explanation of this element, under the 2nd (second) point elaboration of Cartel Element.

The definition of business actor in this article is based on Article 1(5) Law number 5 of 1999. The full elaboration of this article were explained before on 2nd (second) point elaboration of Cartel Element.

The formulation are elaborated into 4 (four) elements below:

a. An Individual Person
b. A business entity, in the form of legal or non- legal entity, established and domiciled or engaged in activities within the legal territory of the Republic of Indonesia
c. Conducting various kind of business activities in economic sector
d. Either individually or collectively, through an agreement

The condition of the reported parties have fulfilled those element as it was concluded on the 2nd (second) elaboration of Cartel element.

In addition to that conclusion, here is additional information that hasn't been explained before. The six reported parties have adjacent professional business association, and this association have lasted long enough for quite sometimes. This business relationship is mostly facilitated through the establishment of ITMA. And based on the annual report of ITMA, it has been found at least there are 13 (thirteen) Tyre Manufactures Companies. Among those ITMA members, the 6 (six) reported parties are also listed as the prime members.

Table 1.1 List of ITMA Members

No	Tyre Manufacture Company	Business field
1.	PT Bridgestone Tire Indonesia	Manufacturers of 4 (Four) Wheel Tires
2.	PT Goodyear Indonesia, Tbk.	Manufacturers of 4 (Four) Wheel Tires
3.	PT Sumi Rubber Indonesia	Manufacturers of 4 (Four) Wheel Tires
4.	PT Gajah Tunggal, Tbk.	Manufacturers of 4 (Four) Wheel Tires and 2 (two) wheel
5.	PT Elang Perdana Tyre Industry	Manufacturers of 4 (Four) Wheel Tires
6.	PT Industri Karet Deli	Manufacturers of 4 (Four) Wheel and Tires 2 (two) wheel
7.	PT Hung-A Indonesia	Manufacturers of 4 (Four) Wheel Tires
8.	PT Suryaraya Rubberindo Industries	Manufacturers of 4 (Four) Wheel Tires
9.	PT Banteng Pratama	Manufacturers of 4 (Four) Wheel Tires
10.	PT Surabaya Kencana Tyre Industries	Manufacturers of 4 (Four) Wheel Tires
11.	PT King Land	Manufacturers of 4 (Four) Wheel Tires

12.	PT Multistrada Arah Sarana	Manufacturers of 4 (Four) Wheel Tires and 2 (two) wheel
13.	PT Hankook Tire Indonesia	Manufacturers of Four Wheel Tires

From the list of members above, it can be seen that the 6 (six) reported parties have bound themselves to certain legally established association, which is ITMA. Furthermore, according KPPU Decision, KPPU has mentioned ITMA as such :

> "That ITMA is an association which established for the benefit of its members as they are competitors with one another, for the purpose to assist the progress and interests of the members altogether and more focused on economic goals rather than with individual interests"[49]

Thus, as the element of business actors has been explained, all the 6 (six) reported parties have proven fulfilled the element of as a Business Entity, in the form of a Legal Entities, and also established, and domiciled or engaged in activities within the legal territory of the Republic of Indonesia. Moreover, hereafter is the evidence is provided with the statement facts in KPPU Decision, as stated:

a) **Reported I, PT Bridgestone Tire Indonesia**, domiciled in the registered of fice in the Plaza Of fice Tower 11th Floor, MH Thamrin street Kav. 28-30 Jakarta; A business entity established in form of Legal Entity, established in Indonesia on September 8th 1973based on Decree of Ministry of Industrial Number. 295/M/SK/8/1973 Dated August 11th 1973 and with presidential permit Number B-84/Pres/8/1973 tanggal August 1st 1977.
b) **Reported II, PT Sumi Rubber Indonesia**, domiciled in the registered of fice in the Wisma Indomobil 12th Floor, Letjen M.T. Haryono street Kav. 8, Cawang, East Jakarta; A business entity established in form of Legal Entity, A Limited Liability Company/ *PT*, according to the Deed Number 135 Dated July 17th 1995 yang and revised to Deed Number 265 dated November 30th 2011, both made by Buntario Trigis Darmawan, NG, S.H., Notary in Jakarta and had validated by Ministry of Law and Human Rights Number AHU60178.AH.01.02. Of 2008 dated January 20th 2009

[49] KPPU Decision Number 08/KPPU-I/20114

c) **Reported III, PT Gajah Tunggal Tbk**, domiciled in the registered of fice in the Wisma Hayam Wuruk 8 10th Floor, Hayam Wuruk street, Central Jakarta; A business entity established in form of Legal Entity, A Limited Liability Company/ *PT*, according to the Deed, which already been synchronized with the Deed copy Number 5th dated 22nd July 2009 made by Isyana Wisnuwardhani Sadjarwo, S.H., Notary in Kotamadya Jakarta Pusat and had validated by Ministry of Law and Human Rights Number AHU-0079867.AH.01.09. Of 2009 dated December 1st 2009

d) **Reported IV, PT GoodyearIndonesia, Tbk**, domiciled in the registered of fice at Pemuda street No. 27 Tanah Sareal Kota Bogor, West Java; . A business entity established in form of Legal Entity, A Limited Liability Company/ *PT*, according to the Deed, Number 29 dated June 26th 2009 made by Haji Syarif Siangan Tanudjaja, S.H., Notary in Kotamadya Jakarta Timur and had validated by Ministry of Law and Human Rights Number AHU-00765.AH.01.09. Of 2010 Dated Desember 06th 2010

e) **Reported V, PT Elang Perdana Tyre Industry,** domiciled in the registered of fice at Elang street, Sukahati Village, Citeureup, Bogor Regency, West Java; A business entity established in form of Legal Entity, A Limited Liability Company/ *PT*, based on Deed of Company Establishment Number 5 dated November 15th 1993 ,Made by Syamsul Faryeti, S.H., Notary in Cimanggis, Bogor With revised deed Number 20 Dated September 15th 2008 , both made by Saniwati Suganda, S.H., Notary in Jakarta and had validated by Ministry of Law and Human Rights Number AHU85731.AH.01.02.Tahun 2008 Dated November 13th 2008 (vide bukti C516, C544 Penyelidikan

f) **Reported VI**, **PT Industri Karet Deli,** domiciled in the registered of fice at K.L Yos Sudarso street Km. 8.3 Medan, North Sumatra. A business entity established in form of Legal Entity, A Limited Liability Company/ *PT*, according to the Deed, which already been synchronized with the Deed copy Number 119 Dated November 22nd 2011, Made by Jhon Langsung, S.H., Notary in Medan and had validated by the Ministry of Law and Human Rights Republic of Indonesia. Number AHU-61015.AH.01.02. Of 2011 Dated December 12th 2011 (vide bukti C447

3. Bound themselves

Related with the fact of all the reported parties are actively involved with the same legal-established business association, and none of them have ever bailed out from ITMA. It can be said, that the reported parties have established their strong commitment to this association. This fact has also suggested that the

reported parties have bound themselves to ITMA as legitimate members who will always protect the interest of the ITMA, before their own.

Table 1.2 List of ITMA Members

No	Tyre Manufacture Company	Business field
1.	PT Bridgestone Tire Indonesia	Manufacturers of 4 (Four) Wheel Tires
2.	PT Goodyear Indonesia, Tbk.	Manufacturers of 4 (Four) Wheel Tires
3.	PT Sumi Rubber Indonesia	Manufacturers of 4 (Four) Wheel Tires
4.	PT Gajah Tunggal, Tbk.	Manufacturers of 4 (Four) Wheel Tires and 2 (two) wheel
5.	PT Elang Perdana Tyre Industry	Manufacturers of 4 (Four) Wheel Tires
6.	PT Industri Karet Deli	Manufacturers of 4 (Four) Wheel and Tires 2 (two) wheel
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11.	PT King Land	Manufacturers of 4 (Four) Wheel Tires
12.	PT Multistrada Arah Sarana	Manufacturers of 4 (Four) Wheel Tires and 2 (two) wheel
13.	PT Hankook Tire Indonesia	Manufacturers of Four Wheel Tires

From the list of members above it can be seen that the 6 (six) reported parties have bound themselves to ITMA. Furthermore, according KPPU Decision, KPPU has mentioned ITMA as such :

> "That ITMA is an association which established for the benefit of its members as they are competitors with one another, for the purpose to assist the progress and interests of the members altogether and more focused on economic goals rather than with individual interests"[50]

Besides that, there are also other findings concluded by KPPU regarding the price fixing agreement among members of ITMA, which had done by the reported parties is allegedly to have had conducted through series of meetings facilitated by ITMA. In these meetings, the members of ITMA, who also includes the 6 (Six) reported parties in this case, have reached a consent by approving the substance as outlined in the form of Minutes of Presidium Meeting. And by reaching that consent the members involved in the meetings have consciously bound themselves to follow up the result occurred during presidium meeting.

Considering KPPU has concluded the meeting minutes as the written consensual evidence of the alleged Illegal agreement made by the reported parties, the resume of the meeting shall be proven agreed upon or signed by individuals who has the capacities or obtained the power of attorney from the company to bind the company in an agreement. If those individuals obtained such no authorization of the company to represent the company in an agreement, thus the agreement solely applies only to themselves but not to the company. Only, if there is no further impact, it means the impact that benefitted to the relevant companies from the signed agreement, done by their employee. This will relate throughout further analysis with other circumstantial evidence.

[50] KPPU Decision Number 08/KPPU-I/2014

Regardless of the absence such authorization from the company to represent the company in agreement, the companies still conducted the agreement on the relevant market. This action might lead to a conclusion that Board of Directors agreed to the resume of ITMA Presidium Meeting. It is revealed from the prompt increase of tyre sales of Passenger Car Radial (PCR) Replacement Ring 13, Ring 14, Ring 15 and Ring 16 which are appropriate with the notion that is stipulated in the resume of ITMA presidium which states a prohibition for ITMA members to slash the tyre prices in the Indonesian market. In addition, the prohibition for ITMA members to slash the tyre prices in the Indonesian market is defined as the increasing price of the tyre.

In spite of the lack of capability to represent the company, the companies consistently carried out the agreement, which means that the individual agreed upon the agreement are considered to be proficient and capable by the Board of Directors of the companies themselves.

2) Under any name

According to KPPU, the minutes of ITMA executive committee meetings clearly revealed that representatives of the 6 (six) Tyre manufacturers had agreed to refrain from setting competitive prices, to exercise restraint over production and to control distribution in order to maintain favorable market conditions for demand. The minutes also noted that the 6 Tyre manufacturers had agreed to maintain market stability.

Historically, Law Number 5 of 1999, the legislators are known to have intent to develop the definition of agreement in the Law Number 5 of 1999. The development of the definition is intended, that the definition of agreement

refers to, but not limited to the definition as stipulated as the definition of agreement in the Indonesian Civil Code.

The extension of this definition is intended, that the definition of the term 'Agreement' refers to but is not limited to the definition of the Agreement set forth in the Indonesian Civil Code.[51] This idea can be seen in the Matrix of Inventory Problem List or *Matriks Daftar Inventoris Masalah (DIM*). The formulation of this change is stated in the Revised version of Legislation Bill on Prohibition of Monopolistic Practices Law, proposed as the initiatives of DPR-RI. It cited as follows:

> "In order to avoid the dismissal of certain anti-competitive practices from this law, the agreement must include both written and unwritten, including concerted action of the business actors. Even though without necessarily binding themselves to each other"

This revised formulation aforementioned above, has introduced an additional content which is the 'Concerted action'. In relevant with the Tyre Cartel case, the collusion done by the 6 (six) tyre manufactures is proven by the KPPU as an act of The concerted action. Concerted action or concerted practice has already been recognized and regulated in the Competition Law of several countries'. Such as European Union countries, UK, Australia, and US.

These countries have mentioned 'concerted action' in their term definition of 'Agreement', for their Anti-Monopoly law.[52] The notion of concerted practice encompasses every kind of (anticompetitive) concentration: "the definitions of 'agreement', 'decisions by associations of activities' and 'concerted practice' are

[51] KPPU decision Number 08/KPPU-I/2014 Page 87

[52] William E. Kovacic. *Identifying Anticompetitive Agreements in The United States and The European Union : Developing a Coherent Antitrust Analytical Framework*. George Washington University Law School.2017. Page 5

intended, from a subjective point of view, to catch forms of collusion having the same nature which are distinguishable from each other only by their intensity and the forms in which they manifest themselves".[53]

In the ITMA meeting minutes, it clearly stated what was happened during the meeting session and what it seem, it can be seems like it possessed the characteristics of a concerted action. In accordance to other comparative interpretation, in Article 81 EC (European Community) Agreement and the Chapter I prohibition contained in the Competition Act 1998 (the Act), Article 81 and the Chapter I mentioned that the prohibition apply to concerted practices as well as to agreements. The boundary between the two concepts is imprecise.

The key difference is that a concerted practice may exist where there is informal co-operation without any formal agreement or decision.[54] OFT has organized the factors which may be considered as trigger factors of concerted practice exists. According to OFT, these factors are :

a) Whether the parties knowingly entered into practical co-operation
b) Whether behavior in the market is influenced as a result of direct or indirect contact between activities
c) Whether parallel behavior is a result of contact between activities leading to conditions of competition which do not correspond to normal conditions of the market
d) The structure of the relevant market and the nature of the product involved

[53] http://awa2013.concurrences.com/business-Articles-awards/Article/concerted-practices-and-exchange. Accessed on November, 11 2017 13.45

[54] (OFT) Office of Fair Trading. *Agreements and Concerted Practices. Understanding competition law.* Competition Law Guideline. 2004. Page. 9

e) The number of activities in the market, and where there are only a few activities, whether they have similar cost structures and outputs.[55]

Also, KPPU Decision has found that the price movement in percentage terms had wide variations and even in absolute terms. Hence, it can be concluded against the existence of price parallelism. Thus, toward this conclusion, KPPU has also took into account the plus factor to assess if there was price parallelism on account of concerted action. And in accordance with the result of economic analysis, there is a price parallelism created in the relevant market.

3) Either made in Written or Unwritten

Agreement directive has an open characteristic, which means that the parties have the greatest freedom to enter into agreements that contain and constitute basically anything, as long as it doesn't contradict with public order and/ or morals.[56] This can be seen in Article 1338 of Indonesian Civil Code which basically states that all legally-made agreements shall rule as laws for those who make them.

Subsequently, Article 1320 of Indonesian Civil Code provide the essential requirements for the elements of agreement, there are four of them which are:

1. There must be consent of the individuals who are bound thereby;
2. There must be capacity to conclude an agreement;
3. There must be a specific subject;
4. There must be an admissible cause.[57]

[55] *Ibid. Page 7*

[56] Ridwan Khairandy, *Hukum Kontrak Indonesia, Dalam Perspektif Perbandingan* Bagian Pertama. FH UII Press. 2013. Page 100

[57] Article 1320 Indonesian Civil Code

The provisions mentioned above in Indonesian Civil Code are becomes the general principles and rules that apply to all agreements in general. As well as it has been regulated in Law Number of 1999. With that definition, it can be seen that Law Number 5 of 1999 have regulated the agreement may be in written or unwritten form, and both of them shall be recognized or used as an evidence in Tyre cartel case. Hence, referring to this law is most certainly in accordance with Indonesian civil code. And KPPU uses these legal bases to prove the element of agreement in this Tyre cartel case.

ITMA meeting minutes have clearly stated what was happened during the meeting session and what it seem, it can be seems like it possessed the characteristics of illegal tacit agreement. In accordance to other comparative interpretation, in Article 81 EC (European Community) Agreement and the Chapter I prohibition contained in the Competition Act 1998 (the Act), Article 81 and the Chapter I mentioned that the prohibition apply to concerted practices as well as to agreements. The boundary between the two concepts is imprecise. The key difference is that a concerted practice may exist where there is informal co-operation without any formal agreement or decision.[58]

As it has been mentioned before, OFT has organized the examples of factors which may be considered, to conclude such concerted practice exists. According to OFT, these factors are :

a. Whether the parties knowingly entered into practical co-operation

[58] (OFT) Office ofFair Trading. *Agreements and Concerted Practices. Understanding competition law.* Competition Law Guideline. 2004. Page. 9

b. Whether behavior in the market is influenced as a result of direct or indirect contact between activities
c. Whether parallel behavior is a result of contact between activities leading to conditions of competition which do not correspond to normal conditions of the market
d. The structure of the relevant market and the nature of the product involved
e. The number of activities in the market, and where there are only a few activities, whether they have similar cost structures and outputs.[59]

From the KPPU decision, it has been found out that the price movement in percentage terms had wide variations and even in absolute terms, and hence concluded against the existence of price parallelism. In arriving at this conclusion, KPPU has also took into account the plus factor to assess if there was price parallelism on account of concerted action. And in accordance with the result of economic analysis, there is a price parallelism created in the relevant market.

In KPPU Decision, an expert witness, Nindyo Pramono mentioned that The minutes of the presidium meeting is the result of *gesamtakt*. He stated that while the content of the minutes of the presidium meeting is a recommendation and subsequently the presidium meeting members obey the recommendation, this condition could not indirectly be considered as an agreement, the consent was made in the decision of the meeting but not the consent that resulted form of an agreement. [60] *Gesamtakt* is a joint action made by group of people is consent of a group of people to establish a decision about a matter and the decision is binding

[59] *Ibid. Page 7*
[60] KPPU decision Number 08/KPPU-I/2014 Page 107

all subjects of the law that related to the decision-making or all the members of the related group.[61] As the example legal act of *Gesamtakt,* it is manifested in the form of an agreement. In the establishment of LLC, The LLC founders are performing a joint action to achieve their same goal.

The statement above has said that there is a consent established, even though this consent does not necessarily create an agreement, not without further analysis of another agreement element. However, this has established that there is a consent was made during those presidium meetings. Also this consent shall be recognized as one element of a contract based on Article 1320, which is consent between the parties. In proving the agreement element, KPPU has also used Article 1234, Article 1313, Article 1320, Article 1329, and Article 1337 of Indonesian Civil Code. As well as using the provisions in Article 1 (7) of Law Number 5 of 1999. Accordingly, the KPPU has also acknowledge that Indonesian Civil Code can be considered as legal basis that applies to interpret the terminologies of 'Agreement', and 'Consent'.

Those provisions does not really mention that the only form of an agreement which can and / or shall be recognized is the written one. Moreover, all the compliance upon those rules can be satisfied with the support of facts and analysis of the circumstantial evidence in this case.

As the defense toward the allegations, the reported parties have seemed to conclude that the element of the agreement was not properly fulfilled. Their reason is because it was not in accordance with the definition of agreement in the

[61]https://www.ru.ac.za/media/rhodesuniversity/content/law/documents/10students/2012courseoutlines/Law%20of%20Contract%20A.pdf, accessed on 30 August, 2015 at 02.00

applicable law, Law Number 5 of 1999 and Indonesian Civil Code. Whereas, in fact there is no discrepancy or contradiction in using these legal bases, to prove the agreement element, particularly in this case.

Another validity of general agreement element, that needed to be examined is regarding the certainty of the object (*een bepaald onderwerp)* which forms the subject matter of the agreement. [62]

Article 1333 Letter (1) Indonesian Civil Code determines the *eene overeenkomst moet tot oderwerp hebben eene zaak welke ten minste ten aanzien hare sort bepaald is* (an agreement must have the subject of an object that can at least be determined). *Zaak* in dutch not only means 'goods' in the narrow sense, but also means in a broader sense, which is the 'subject matter'.[63] *Zaak* referred in Article 1333 Letter (1) Indonesian Civil Code, is in the sense of performance in the form of "certain behavior.[64] Therefore it refers toward the behavior which resulted to something at the end of the performance which was done.

In this case, collusive behavior of the reported parties, which led to concerted result is relevant with this element. The certain object in the this case is the clause within the resume of ITMA presidium meeting that was held in January 2009 which assigned the ITMA members to present production, export, raw material use, selling reports, and not to slash the tyre prices of Passenger Car Radial (PCR) Replacement Ring 13, Ring 14, Ring 15 and Ring 16 in the territory of Republic of Indonesia, during period of 2009 to 2012.

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[62] Herlien budiono, *Hukum Perjanjian dan Penerapannya di Bidang Kenotariatan.* Citra Aditya Bakti. Bandung. 2010 . Page. 107

[63] Ridwan Khairandy, *Hukum Kontrak Indonesia, Dalam Perspektif Perbandingan* Bagian Pertama. FH UII Press. 2013. Page 186

[64] J.Satrio,*opcit*., Page 32

At length, one other validity requirement that required by the law is the existence of a legal or permissible cause an agreement. An agreement will only have legal effect if it meets two conditions. [65] The first condition is that the purpose of the agreement has a proper or appropriate basis (*redelijkground*). The second condition is that the agreement must contain a valid Nature (*een geoorloof d karakter dragen*). Lawful or *Halal* in this context means that the existing legal cause does not conflicted with decency norms or public order. If the object of the agreement is illegal, or is contrary to decency or public order, then the agreement shall become null and void.[66] For example, in the case of this cartel, reported parties conspire to make agreements to arrange the price with a purpose to gain more profits and bring disadvantages to their consumers as the consequence. This is an illegal form of objective object, so this agreement is illegal.

Article 1335 *jo* 1337 Indonesian Civil Code states that a cause is prohibited if it is contrary to decency law, and public order. A cause would be declared against the law, if the term in the agreement concerned contents contrary to applicable law. Such as the form of a price fixing agreement and a cartel agreement, which has been clearly regulated as prohibited agreement under Law Number 5 of 1999.

According to explanation above, it is clearly obvious that practically almost none of agreements has no cause. The agreement in the context of Law Number 5 of 1999 cannot properly meet the conditions of contract as stated in the Article 1320 of the Indonesian Civil Code. Substantially, Law Number 5 of 1999 on the

[65] Herlien budiono, *Opcit* Page 33

[66] Sudargo Gautama, *.Himpunan Yurisprudensi Indonesia yang Penting untuk Praktek Sehari hari (Landmark Decisions) Berikut Komentar, Jilid 9.* Citra Aditya Bakti. Bandung. Page. 80

Prohibition against Monopolistic Practices and Unfair Business Competition consists of 3 (three) parts, namely: the prohibited agreement, the prohibited activities, and the dominant position.

Furthermore, the violation in this case that is conducted by the Reported parties is included in the prohibited agreement, which are Article 5 (1) and Article 11 of Law Number 5 of 1999 on the Prohibition against Monopolistic Practices and Unfair Business Competition. Thus, this agreement is still an agreement, but only it is a form of an illegal agreement, due to the reason it cannot fulfill the condition of a legal cause of the obligation or permissible cause.

3. Influencing the price by determining production and/or marketing of goods and/or services

Based on Article 11 of Law Number 5 of 1999, cartel is conducted with intent to affect the price. So as there will be more profits gained by the business actors. In order to pursue this intention, the cartel members agreed to organize the production and or marketing of the goods and or the services. Article 1 (Letter 16) of Law Number 5 of 1999, the meaning of goods shall be any object, tangible or intangible, movable or immovable, that can be traded, used, utilized, or taken advantaged by the consumers or business actors. Meanwhile at this context the goods are the *Passenger Car Radial* Tires (PCR) Replacement Ring 13, Ring 14, Ring 15 and Ring 16 in the territory of the Republic of Indonesia within the period of 2009 to 2012.

Hereinafter, what is meant by affecting prices is by there is an effort trying to organize the production and / or marketing of goods and / or services and it creates a collective agreement in order to refrain and then continue to control

the distribution of Passenger Car Radial Tires (PCR) Replacement Ring 13, Ring 14, Ring 15 and Ring 16 in territory of the Republic of Indonesia within the period of 2009 to 2012. And this agreement has been acknowledged and approved by Reported Party I - Reported VI. Therefore this conduct of organizing the production and marketing of goods have affected the price.

In order to prove the impact of such production and/or marketing of goods being arranged to affects its price, KPPU has to use Harrington Method. Harrington's method uses the method to analyze the error relationship or residual regression between the (reported parties) companies from the panel data estimation results to detect the cartel. And then the next step is to analyze the correlation between errors to determine price fixing among independent Tyre manufacturers are not influenced by other companies by testing contemporaneous correlation to see whether there is a relationship in price fixing between firms as a whole.

By using this method. KPPU has concluded that the existence of such coordination and agreement between companies incorporated with the ITMA has a positive and significant influence on significance level through a collective consensus to conduct self-restraint and control the distribution to the actual and real prices of Tyre products PCR (Passenger Car Radial) Replacement on Ring 13 , 14, 15 and 16. This explains that the coordination or agreement between companies incorporated in the ITMA within a certain time, in this case carried out in 2009 effectively pushed up the price of PCR (Passenger Car Radial) Tires replacement on ring 13, 14, 15 and 16.

In addition, The Harrington Method can be considered as reliable source of evidence due to the fact this method is widely used by international competition authorities to prove whether a cartel exists and to measure the impact of an alleged cartel.[67]

4. May result monopolistic practices and/or unfair business competition.

Refers to Article 1 (Letter 2) Law Number 5 of 1999, the definition of Monopolistic Practice is defined as the centralization of economic power by one or more business actors causing the control of production and/or marketing of certain goods and/or services, resulting in an unfair business competition and can cause damage to the public interests. The kind of damage which could exposed harm the public interest , in form of inefficiencies and price increases which can cause consumer losses. The Commission have also explained the unusual conditions in which the reported parties in case have reflected an unfair-competitive action, which ideally they should've compete with each other and be efficient, while in fact what happened is in contrary.

H. Indication of Other Article Violation

According to KPPU decision. there is another violation of Law Number 5 of 1999, beside violation of Article 11. It is the violation of Article 5 (1) and concerning Price fixing agreement. Substantially, Price fixing agreement and cartel agreement. Both of them are regulated under the same chapter, Chapter III of Law

[67]http://www.soemath.com/advocates/public/en/Article/read/281/Client.Update...6.Tyre.Manufacturers.Found.To.Have.Operated.As.A.Cartel.And.Engaged.In.Price.Fixing..Fined.Rp150.Billion.. Accessed on October, 01 2017. 20.30

Number 5 of 1999 about Prohibited agreements. Thus, it is necessary for the 'Agreement' element on both articles to be proven.

In regards the price fixing agreement violation, it proves not only refers to the contents of the minutes of the presidium meeting on January 21st[st], 2009, but also refers to the all minutes of meeting as it was described before. Another contents of meeting minutes reinforcing the indication of price fixing in addition to minutes of the meeting dated January 21st[st], 2009, is the minutes of the meeting discussing and approving on the agreed tyre warranty claim agreement which was changed from 3 (three) years to 5 (five) years. This warranty claim setting can be considered part of price fixing, considering the warranty claim is a component of the price structure.[68]

In addition, relating to the attempt done by the reported parties to arrange the production. It begins through the process of team meetings at the ITMA as outlined in the section on the minutes of the Presidium meeting, which essentially discussing the production and or marketing of tyre arrangement. And this arrangement was conducted by the Reported Parties through its approval of the content of the Presidium Meeting Minutes.

The recognition and inclusion of an unwritten agreement in the definition of agreement in Article 1 (7) in Indonesian Competition Law is exceptionally appropriate, and has been in accordance with the competition law which mostly adopted in many other countries.[69] However, even though this notion rule might have created certain barrier for the disobedient business actors to arrange some

[68] *Ibid Page 140*

[69] E. Fox , e*t.al.* Cases and Materialson U.S Anti Trust in Global Context, Edition 2. West Pub, New York. 2004. Page 35

prohibited agreement. Nevertheless, in fact it does not rule out the possibility for them to attempt their anti-competitive collusion by making a secret-tacit agreement. In fact, this condition have challenged these business actors to be more creative in arranging prohibited agreements with their business competitors. For example, the establishment of an association that sometimes becomes a cover up of a conspiracy to conduct unfair business competition.[70]

In an ideal concept, with the purpose to achieve a fair business competition, business competitors must operate independently. Each of them must determine independently the policy which he intends to adopt on the common market.[71] The exchange of information between competitors is liable to be incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between activities has been undermined. Those exchange information of ten happened inside a gathered business community, or known as Association. This Association is consist of bunch of business actors who have their business established on common market. Thereby, these business actors are actually business competitors among their own.

There are so many cases of cartel violation conducted by these association, they generate a 'tacit agreement' among themselves with the purpose to achieve higher profits through anticompetitive behavior, which clearly against competition law in many countries. Including Indonesian competition law, which specifically regulating this violation under Chapter III Law Number 5 of 1999

[70] *Ibid* Page 37
[71] M. Yahya Harahap, *Segi-segi Hukum Perjanjian*, Alumni, Bandung, 1986. Page 36

Basically, cartel is the agreement of a business actor with their competitors to eliminate the competition between them. Cartel can be done through three things: price, production, and marketing territory.[72] Which it's automatically includes Price fixing arrangement under cartel category. Both, price fixing agreement and cartel are regulated on Chapter III of Law Number 5 of 1999 concerning Prohibited agreements. Even though these two agreements have shared a common essence, they are regulated under two different characteristic approaches.

Price fixing has Per Se Illegal characteristic. Meanwhile, Cartel has Rule of Reason characteristic. Particularly for Cartel agreement, it's violation has to be proven that the agreement have create an impact which resulting a monopolistic practices by the cartel actors so that macroeconomic results in the inefficiency of resource allocation as reflected by the emergence of deadweight loss. And another bad impact is the consumers will lose the choice of price, the quality of competing goods, and good after-sales service.[73]

Under KPPU Regulation Number 4 of 2011 regarding Guideline to Article 5, price-fixing is a violation of Law Number 5 of 1999 because it eliminates competition within the market. In a competitive market, the sales price of goods and services moves toward the marginal cost of production and the production amount of the goods and services will increase accordingly.[74] A competitive market will be efficient and benefit consumers. Further, the effect of price-fixing is basically the same as in a monopoly. Due to the fact of the suppliers controlling

[72] KPPU Regulation Number 4of2010 About Cartel, *Guidance of Article 11 about Cartel* .Page 16

[73] *Ibid*

[74] KPPU Regulation Number 4 of 2011, Page 6

monopolies in order to obtain monopolistic profits. Price competition is eliminated through price-fixing. Under a price-fixing arrangement, however, a group of suppliers or suppliers and buyers together agree to maximize the selling price (to maximize income), to temporarily lower the prices (as a barrier to a new entrant) or to stabilize prices (to avoid price wars). Which was exactly was verbally mentioned in the ITMA meeting. And as the fact in doing so, final consumers do not get benefit from productivity gains, economies of scale, or competitive price movements. [75]

I. Conclusion

Based on legal analysis presented, the legal test set to determine the fulfillment of agreement element on *Business Competition Supervisory Commission* or KPPU Decision number 08/KPPU- I/2014. This case is about the violation of Price fixing and cartel agreement made among 6 (six) tyre manufacturers, and in regards of the agreement element in these violation has been fulfilled, but not entirely fulfilled.

Based on the legal analysis presented before, there are several elements of this agreement on this case, which cannot properly met the conditions of Agreement according Article 1320 Indonesian Civil Code. However, in general, in accordance with Article 1(7) Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition, KPPU has concluded his decision accordingly with this article.

KPPU has comprehensively analyzed and determine the agreement element in this case, as the practice of concerted action among the reported parties, that led to

[75] https://www.globallegalinsights.com/practice-territorys/cartels/global-legal-insights---cartels-5th-ed./Indonesia. Accessed on November 6, 2017 14.45

the result of an illegal tacit agreement of cartel, and price fixing agreement. The meeting minutes of presidium meetings that were started from April 28th, 2009 until February 25th, 2010 have provided the consensual essence of the agreement. It established the fact that there is collusion in an unwritten for of agreement among the reported parties to arrange the price, market and production of the tires product the produced.

The reported parties have committed an illegal act, which in this context they have conducted monopolistic practices in form of cartel and price fixing. These illegal acts have created a prohibited impact that recognized by Law Number 5 of 1999 as unfair business competition. Furthermore, KPPU has recognized that during ITMA meeting, the reported parties have bound themselves under ITMA association. Also their status in ITMA has been acknowledged with the fact, that they are business actors, and they are business competitors with each other.

During ITMA meeting, the reported parties have created an agreement through concerted action that they have done, they enters to an unwritten agreement, without necessarily entering into an explicit agreement between them. As the result of this agreement they have achieved their same purpose, from their similar understanding. Also, this similar understanding are created from the result of command made by ITMA chief, during ITMA Meetings.

Nonetheless, the writer also have found that the provision that is stipulated in the Article 1320 of the Indonesian Civil Code have also been satisfied in measuring the legitimate requirements of the agreement in the context of Law Number 5 of 1999. The agreement in the context of Law Number 5 of 1999 certainly may never fully met the conditions of agreement as stated in the Article 1320 of the Indonesian

Civil Code. However the validity agreement that referred by Indonesian Civil Code is the validity of a non-prohibited or a legal agreement in general. Meanwhile, agreement that particularly referred in violation of Article 5 (1) and Article 11 is categorized in a section of illegal agreement, Chapter III of Law Number 5 of 1999 concerning Prohibited agreements.

In this view, despite of agreement concept in Article 1 (7) Law Number 5 of 1999 have not fully met the validity requirements of the general agreement under Indonesian Civil Code, and KPPU has proven that there existed reciprocal co-operation or contact intended to influence the conduct of competitors in such manner as to make it anti-competitive. Which in this case it has been properly informed by the meeting minutes and several witness testimonies of the meeting participants.

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