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Price-Fixing Cartel and Problems of Proof in Indonesia

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Price-Fixing Cartel

- Cartel is an agreement between business competitors not to compete with one another.
- Cartel includes price fixing, output restriction, market allocation, and bid-rigging.
- Price fixing is collusion among business competitors to raise prices above the competitive level.

Price-Fixing Evidence

- Price fixing is hard to detect.
- Direct evidence of such collusions is difficult to obtain, as competitors wishing to engage in such anticompetitive conducts would conclude price-fixing agreement secretly.
- Competition authorities have to rely on indirect or circumstantial evidence of collusion to fix prices.

Indonesian Competition Law

- Price fixing is prohibited by Article 5 (1) of Law No. 5/1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition.
- To implement Article 5 of Law No. 5/1999, the Indonesian Competition Commission (KPPU) issued a Guideline of Article 5 on Price Fixing.

Guideline of Article 5 on Price Fixing

- To prove the violation of Article 5 (1), the KPPU has to prove the existence of agreement among the relevant business actors.
- The KPPU may employ direct evidence and indirect (circumstantial) evidence.
- Direct evidence is evidence that is observable and shows the existence of price-fixing agreement on goods and or services concluded by competing business actors. Examples: fax, records of telephone conversations, electronic mail, video communications, and other concrete evidence.

Circumstantial Evidence

- Circumstantial evidence is a form of evidence that does not directly show a price-fixing agreement.
- It may be: (i) communication evidence (that is not directly expressing an agreement), and (ii) economic evidence.
- The purpose of employing economic evidence is to rule out the possibility of independent pricing behavior.

Parallel Pricing

- Price-fixing investigations are typically triggered by a suspicious parallel pricing.
- Parallel business conduct is not sufficient evidence to prove a price-fixing agreement.
- Additional analysis (plus factors) which can be used as circumstantial evidence is needed to distinguish independent parallel business conduct with illegal agreement.

Plus Factors

- *Rationality of Price Fixing:* strong motive that price-fixing agreements are mutually advantageous And strong reason that price-fixing agreement is not against the interests of the company if it acts independent.
- *Market Structure Analysis:* to describe whether market conditions are more favorable for conducting price-fixing agreements or more favorable for competition.
- *Performance Data Analysis:* to prove whether market performance information describes an outcome of coordination or agreement.
- *Analysis of the Use of Collusion Devices:* to ensure that collusion agreements can be run and monitored.

Case: Honda & Yamaha

- Fact: in 2014 Honda increased its 110-125 cc automatic scooter prices in Indonesia three times, whereas Yamaha did it five times.
- There was no written agreement could be found by the KPPU But it could reveal a fact that there were several meetings between the President Director of Yamaha and the President Director of Honda at the golf course from 2013 until November 2014.

Communication Evidence

- An email dated 28 April 2014 from the Vice President of Yamaha to Yamaha's Marketing Director, Sales Director, General Manager of Marketing, and Chief DDS 3 that forwarded an email from the President Director of Yamaha: *As you can notice, prices of some models are lower Honda, such as Vixion, Fino, etc. We need to send message to Honda that Yamaha follows H price increase to countermeasure exchange rate fluctuation / labor cost increase as a common issue for the industry. So please review the current pricing and where there is a room, please adjust the price.*

Economic Evidence

- Market structure: in 2014 Honda was the market leader by holding 73% of market share, followed by Yamaha with 26%, Suzuki with 1%, and TVS with 0%. The nature of automatic scooter market was thus, oligopolistic, which is prone to conducting cartel.
- Conduct evidence: when Honda increased its prices in 2014, Suzuki and TVS did not follow this conduct in order to maintain their market shares. If Yamaha was competing with Honda, it should not increase its prices.
- Performance data analysis: the prices for the relevant products were higher during the period of the alleged collusion than they were before or after.

The Decision of the KPPU

- The KPPU decided that Honda and Yamaha had breached Article 5 (1) of Law No. 5/1999.
- Honda and Yamaha appealed to the District Court of South Jakarta. The court dismissed the appeal.
- Then Honda and Yamaha lodged an appeal with the Supreme Court. The case is still on the appeal.
- Considering the Supreme Court rejection on circumstantial evidence in the previous price-fixing case, it is a hard task for the KPPU to convince the court to accept circumstantial evidence without direct evidence of agreement in this case.

Japan Competition Law

- Price-fixing cartels are prohibited in Japan as an ‘unreasonable restraint of trade’, stipulated under Article 3 of Law No. 54 of 1947 of the Anti-Monopoly Act (AMA).
- The requirements for proof of ‘unreasonable restraint of trade’ are the existence of a ‘liaison of intention’ among the entrepreneurs concerned.
- An explicit agreement between related entrepreneurs is not necessary in order to prove ‘liaison of intention’.
- A tacit agreement is sufficient.

Circumstantial Evidence

- In the absence of any explicit, mutually-binding agreement, the existence of a tacit agreement may be proven by indirect (circumstantial) evidence attesting to:
 1. Existence of prior exchange of information and opinions among the parties concerned;
 2. Content of negotiations among the parties concerned;
 3. Concerted act as a result.

Case: Toshiba Chemical

- Fact: Toshiba Chemical Corporation and seven other entrepreneurs increased the delivery prices of paper phenol copper-clad laminates.
- The Japan Fair Trade Commission (JFTC) found that the eight entrepreneurs met regularly during the first six months of 1987 and exchanged information and opinion on ways to prevent the decline of their selling prices and to raise them.
- At their meeting on 10 June 1987, the top three announced their intention to raise their prices by 300 yen per square meter or by 15 percent, and asked the others to do the same.

The Decision of the JFTC

- The JFTC concluded that the information exchange and announcement has ‘in concert with other entrepreneurs,’ mutually restricted the eight entrepreneurs’ business activities.
- Toshiba Chemical argued for the lack of substantial evidence to support the existence of concerted action. It went to the court, seeking to appeal the JFTC's decision.

Tokyo High Court

- The Tokyo High Court supported the JFTC's decision, stating that "if an entrepreneur exchanges information of price-raising among other entrepreneurs and accordingly, takes the same or similar act with others, it is unavoidable for us to presume that the parties had a relationship to expect the concerted act each other and therefore, they said 'liaison of intention' exists unless there is a special occasion to show that the price-raising was implemented individually by a company's own decision that the price-raising is capable of meeting price competition in the relevant market and there is no relationship between that company's price-raising with other companies."

Korean Competition Law

- Price-fixing cartels are prohibited in Korea by Article 19 of the Monopoly Regulation and Fair Trade Act.
- In investigating cartel, when there is no direct evidence of agreement, the Korea Fair Trade Commission (KFTC) employs circumstantial evidence to prove the existence of an agreement.
- The KFTC presumes a cartel agreement if there is i) “uniformity of outward conduct” and ii) “competition-restrictiveness” and iii) circumstantial evidence listed in Guidelines for Collaborative Acts supports the suspected cartel case.

Case: Four Sanitary Paper Manufactures

- Fact: four sanitary paper manufactures held 85% of the sanitary paper market share in Korea.
- During 1996 – 1997 they increased their prices subsequently as follows:
 - The first price increase:
 - On 16 July 1996 company A (the biggest manufacturer) increased its price to 9,306 won.
 - On 1 March 1997 company B dan C (the second and third biggest manufacturers) increased their prices to 8,668 won.
 - In May 1997 company D (the fourth biggest manufacturer) increased its price to 8,668 won.

Facts

- The second price increase:
 - On 1 August 1997 company B, C and D increased their prices to 9,306 won simultaneously.
- The third price increase:
 - On 28 November 1997 company A increased its price to 10,494 won.
 - The rest also increased their prices to 10,494 won in December 1997.

The Decision of the KFTC

- The KFTC concluded that in the first price increase, a cartel agreement could be presumed by Company A, B, and C, whereas in the second and third price hike, the KFTC presumed a cartel agreement by four manufacturers and thus condemned it.
- The four manufacturers appealed the decision of the KFTC to the High Court but the court dismissed it. The manufacturers further appealed to the Supreme Court but the court also dismissed it.

The Supreme Court

- The Supreme Court decided slightly different from the KFTC's decision.
- The Supreme Court did not presume a cartel agreement in the first price increase, since it found that Company C and Company D increased their prices unilaterally two months after Company B increased its price. The Supreme Court, however, presumed a cartel agreement in the second and third price increases by the four companies.

Conclusion

- Circumstantial evidence is treated differently in Indonesia and in Japan.
- Without direct evidence, Indonesian Supreme Court is still reluctant to accept circumstantial evidence of price-fixing cartels. The Indonesian Competition Commission, however, is keen to employ circumstantial evidence in prosecuting price-fixing cases when direct evidence is absent.
- The KPPU uses communication evidence and economic evidence, but heavily relies on the economic evidence as the main factor of circumstantial evidence.

- In contrast, Japanese and Korean courts have widely accepted circumstantial evidence in price-fixing cartels without direct evidence.
- Japanese competition law by and large focuses on the communication evidence, which is the existence of an actual liaison of intent among relevant competitors, rather than relying on the economic evidence for purposes of inferring concerted conduct from competitors' parallel pricing.
- Whereas, Korean jurisprudence employs both communication and economic evidence but gives stress on economic analysis to establish the presumption of cartel agreement.