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The Cartel Proof in Business Competition Law: From the Rule of Reason to Per Se Illegal

Anak Agung Gede Duwira Hadi Santosa[1)], Lily Karuna Dewi[2)] & Ni Ketut Ngetis Megi Megayani[3)]
[1)] Correspondent Author, Udayana University, Indonesia, E-mail: Agung_Santosa@unud.ac.id
[2)] RAH (The House of Legal Experts), Indonesia, E-mail: Lilykaruna@yahoo.com
[3)] Udayana University, Indonesia, E-mail: Megimegayanii@gmail.com

Abstract. *Per se illegal approach is used to deal with cartel cases, which emphasises that cartel acts that have fulfilled the elements in the formulation of the article and are proven to violate the regulation without the need to prove the impact of such acts so that the enforcement of cartels can be resolved more quickly. This article intends to review and evaluate the Anti-Monopoly Law and PUTS in Indonesia regarding how the rule of reason approach is used to handle cartel cases in Indonesia. The research uses the normative method, namely legal research by processing library materials or secondary data. This article suggests that the more appropriate approach to handling cartel cases in Indonesia is the per se illegal approach, given that proving the act with this approach is easier and shorter to do so that the settlement of cartel cases can be resolved quickly. In addition, Indonesian civil procedure law does not yet recognise and regulate economic evidence, so economic evidence cannot be used to prove the case. Whereas economic evidence in the form of economic analysis of the impact of a cartel is mandatory in cartel settlement using the rule of reason approach. By evaluating the performance of the rule of reason in handling cartel cases in Indonesia, this article argues that it is important to change the wording of articles in the Anti-Monopoly Law and PUTS in Indonesia which previously used the rule of reason approach in handling cartel cases to apply the per se illegal approach.*

Keywords: *Cartel; Per Se Illegal; Performances; Rule.*

1. INTRODUCTION

This article is intended to examine the performance of Law No. 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition (hereinafter referred to as the Anti-Monopoly Law and PUTS) as a guideline for the implementation of fair business competition in Indonesia. Business competition is the right of freedom of expression of each individual in order to transact in the scope of market trade. Business competition is a process in which entrepreneurs offer goods or services produced at competitive prices and are favoured by consumers. Business competition

is exist to improve the quality of a product (goods or services) it produces.[1] For this reason, it can be said that fair competition is a benchmark for the future development of industry, business, including the economy as a whole. However, it is aligned with unfair competition that can lead to economic instability with economic and social consequences that disrupt welfare, bring economic injustice to society, and violate laws and regulations. Healthy business competition brings beneficial results for all economic actors due to the creation of intensive to increase productivity, innovation, and quality of products produced. Consumers not only benefit from economic actors, but of course also benefit from healthy competition between companies: lower prices, more choices, higher product quality. On the other hand, if a business competes in an unhealthy manner, it can have an impact not only on consumers but also on the business actors themselves, including the national economy. The enactment of the Anti Monopoly Law and PUTS has become a guideline in Indonesia for the implementation of fair business competition, in order to realise fair business competition, one of which is to prevent and deal with cartels, but so far cartel enforcement in Indonesia is still very difficult to realise through the application of the Rule of Reason approach in the Anti Monopoly Law and PUTS. Unfair business competition between business actors can cause consumers to suffer losses, such as the case of the scarcity of cooking oil and the high price of cooking oil starting at the end of 2021, which until now has not been given a clear solution, it is suspected that one of the causes is cartel action. With a cartel, there will be control over the market by business actors by controlling the amount of production as well as the price, and controlling the amount of supply in accordance with the amount of demand. There is a consortium in which business actors are free to do whatever they want. Whether in the form of prohibited agreements/contracts or activities that are not legalised by law. This article reviews the performance of the Rule of Reason approach in the Anti-Monopoly Law and PUTS in resolving the case of cooking oil scarcity suspected of cartelisation.

Indonesia has 16.38 million hectares (Ha) of oil palm plantations and is the country with the largest area of oil palm plantations in the world, so Indonesia is said to be the largest producer of palm oil in the world in 2006 beating Malaysia's position which has occupied the position for many years until now.[2] Indonesia's palm oil production reached 43.5 million tonnes in 2019, an average increase of 3.61% per year. Indonesia's palm oil production of around 37.3 million tonnes or 55% of the total world demand for palm oil is exported from Indonesia. This makes Crude Palm Oil (CPO) the largest contributor to foreign exchange exports for Indonesia.[3] With this plantation area and high palm oil production and even being the world's main exporter of palm oil, it is very unlikely that there will be cases of scarce cooking oil or even very high prices when referring to these data. However, in reality, the opposite is true, with cases of scarcity and price hikes of cooking oil still repeatedly occurring in Indonesia, as has happened again since the end of 2021.

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[1] Al Qindy, F. H. (2018). Kajian Hukum Terhadap Kasus Kartel Minyak Goreng Di Indonesia (Studi Putusan KPPU Nomor 24/KPPU-1/2009). *Jurnal Hukum Bisnis Bonum Commune*, *1*(1), 39-52.

[2] *Kompas, "*RI Penghasil Sawit Terbesar Dunia, Tapi Harganya Diatur dari Malaysia", https://money.kompas.com/read/2022/01/30/062749426/ri-penghasil-sawit-terbesar-dunia-tapi-harganya-diatur-dari-malaysia?page=all, 31/1/2022, accessed on 10/10/2022.

[3] *Liputan 6, "*Indonesia Jadi Eksportir Minyak Sawit Terbesar di Dunia",https://www.liputan6.com/bisnis/read/4575604/indonesia-jadi-eksportir-minyak-sawit-terbesar-di-dunia , 7/6/2021 accessed on 10/10/2021.

In 2021, Indonesia experienced a spike in oil prices which led to the scarcity of cooking oil and restrictions on the purchase of cooking oil for the public in early 2022. There are many indications of the causes of the increase in cooking oil prices and scarcity, starting with the increase in market prices and global demand for Crude Palm Oil (CPO) which resulted in many exports of crude palm oil outside Indonesia, there was panic buying, and there were distribution constraints.[4] On Tuesday, 19 April 2022, the Attorney General's Office named four suspects in a corruption case who allegedly committed acts of gratification to a subsidiary of Wings Food Group related to the issuance of Export Approval (PE) permits from the Ministry of Trade. The four suspects include: Indrasari Wisnu Wardhana (Director General of Trade at the Ministry of Trade), MPT (Commissioner of PT Wilmar Nabati Indonesia), SMA (Senior Manager Corporate Affairs Permata Hijau Group (PHG)), and PT (General Manager at PT Musim Mas).[5] Prior to the detection of this alleged cartel, the Business Competition Supervisory Commission (KPPU) had also conducted a pre-investigation into the cooking oil scarcity case, which resulted in preliminary evidence of collusion between eight major cooking oil business groups when the government issued a policy with the aim of maintaining cooking oil supplies until its status was upgraded to the investigation stage.[6] At the investigation stage, KPPU will conduct further examinations to seek and find additional evidence and strengthen the previous evidence and then the case will proceed to the examination stage by the Commission Assembly. KPPU continues to seek evidence to uncover the alleged cooking oil cartel with economic and behavioural evidence.[7] The settlement of the alleged cartel in the cooking oil shortage case has not been resolved so far. The term "cartel" can be equated with syndicate, which means an agreement entered into by and between business actors in order to eliminate competition. Cartel can also be said to be an agreement by and between business actors, the purpose of which is to regulate the amount of production, sales, prices, including monopolising a certain commodity and monitoring the market situation.[8] It is usually trade associations and their members that initiate a cartel. A cartel agreement between business actors may take the form of a written agreement containing an agreement to regulate prices, distribution, of course, by minimising competition in order to obtain more profit.[9]

It then becomes a dilemma, when cartel actions that are considered beneficial to producers, can also cause losses to both parties, consumers and business actors. The impact of monopolistic practices in cartel cases can have implications for the inefficient use of resources at the macro level. This can be seen in the deadweight loss, which is

[4] *Liputan 6*, "Penyebab Kelangkaan Minyak Goreng dan Dugaan Praktik Kartel", 9/10/2022

[5] *Suara,* "Kronologi Lengkap Kasus Korupsi Mafia Minyak Goreng, Sudah Dicurigai Sejak 2021", https://www.suara.com/bisnis/2022/04/20/074621/kronologi-lengkap-kasus-korupsi-mafia-minyak-goreng-sudah-dicurigai-sejak-2021, 20/4/2022, accessed on 10/10/20222

[6] *Bisnis*, "Ini Kronologi KPPU Temukan Dugaan Kartel Minyak Goreng", https://ekonomi.bisnis.com/read/20220330/12/1516733/ini-kronologi-kppu-temukan-dugaan-kartel-minyak-goreng , 30/3/2022, accessed on 11/10/2021.

[7] *Tirto.id*, "Kasus Dugaan Kartel Minyak Goreng, KPPU Ungkap Temuan Alat Bukti", https://tirto.id/kasus-dugaan-kartel-minyak-goreng-kppu-ungkap-temuan-alat-bukti-gqrN , 30/3/2022, accessed on 10/10/2022

[8] Widhiyanti, H. N. (2022). *Bayang-Bayang Kartel dalam Hukum Persaingan Usaha*. Universitas Brawijaya Press, Malang. p. 16.

[9] Rumadi Ahmad, M. Afif Hasbullah, dkk, (2020). *Fikih Persaingan Usaha,* Lakpesdam PBNU, Jakarta. p. 27.

generally known to be caused by production restrictions by producers in order to keep market prices fixed. Losses for consumers can be seen in the absence of good price, quality and service options. The absence of competition between business actors then forces consumers to buy goods at unreasonable prices and even tend to be high because there is no other choice.[10]

The provisions of Article 11 of the Anti-Monopoly Law and the PUTS do not provide a definitive definition of cartels as described below:

"Business actors are prohibited from entering into agreements, with their business competitors, that intend to influence prices by regulating the production and or marketing of goods and or services, which may result in monopolistic practices and or unfair business competition."

Based on the above formulation, Johnny Ibrahim argues that cartel practices are constructive actions based on horizontal agreements with the aim of influencing prices and controlling the amount of production and movement of products, thereby triggering monopolistic practices and unfair business competition.[11] Article 11 of the Anti-Monopoly Law stipulates that resolving cartel cases can be done with a rule of reason approach, as reflected in the words "may cause", meaning that a cartel act cannot be said to be contrary to the law before it is identified as causing unfair business competition.[12] In order to confirm whether or not a cartel has triggered unfair business competition, a rule of reason approach elaborated with economic analysis can be used. Hence, it is not limited to knowledge of the law, but in order to prove that a cartel has caused harm, economic science is also required.[13] This means that not all cartel practices are prohibited, but more indications of unfair competition or monopoly. This is certainly not correct, because it is certain that cartel practices have an adverse impact on competition and consumers who use the products.

For the purposes of a cartel, it is important to find that there is an agreement between business actors who have jointly signed the agreement. The evidentiary requirements for cartel cases can be found in direct and indirect evidence. Direct evidence is evidence which, when viewed directly, directs that competing trade actors have agreed to set a certain price of a product, where it can be said that the object of the circumstantial evidence is the agreement of the traders which can be in the form of electronic mail or other evidence which explicitly shows the existence of an agreement. Circumstantial evidence is evidence if viewed indirectly shows that there has been an agreement between trade actors regarding prices, including evidence that can logically show that a certain condition has occurred, and agreements that are not written. Examples include communicative evidence (if no direct agreement is announced) and economic evidence. A cartel can be proven by the rule of reason approach with economic analysis, but it does not guarantee and show that the cartel's actions have resulted in unfair business competition that needs to be punished. This is because economic evidence is classified as indirect evidence. Meanwhile, the Anti-Monopoly

[10] Suraji, A. (2021). Dua Dekade Penegakan Hukum Persaingan: Perdebatan dan Isu yang Belum Terselesaikan. *Komisi Pengawas Persaingan Usaha (KPPU) Republik Indonesia, Jakarta*. p. 50.
[11] Sudiarto, (2021) *Pengantar Hukum Persaingan Usaha Di Indonesia,* Kencana, Jakarta. p. 22.
[12] Cita Citrawinda (2021), *Hukum Persaingan Usaha*, CV. Jakad Media Publishing, Surabaya. p. 51.
[13] Soepadmo, N. R. (2020), Hukum Persaingan Usaha, Zifatama Jawara, Sidoarjo. p. 36

Law and PUTS prioritise direct evidence based on Article 42 of the Anti-Monopoly Law and PUTS. Until now, KPPU still uses and recognises the existence of indirect evidence as an effort to prove the occurrence of cartel acts. This is regulated in the Regulation of the Business Competition Supervisory Commission Number 4 Year 2010 on Cartel (hereinafter referred to as the KPPU Regulation on Cartel). However, indirect evidence in the form of communication transcripts and economic analyses is not admissible in the Indonesian civil procedure law to date, due to the fact that economic evidence has not been accommodated in the Indonesian civil justice legal system. Accordingly, widespread cartel cases including the cooking oil cartel are still difficult to prove and prosecute under the applicable rules in Indonesia through the rule of reason approach.

This research intends to analyse and examine two issues. Firstly, how to prove cartels in Indonesia based on the Anti-Monopoly Law and PUTS which adheres to the rule of reason approach in the case study of cooking oil. Second, to offer a change in the cartel settlement approach to per se illegal from the rule of reason by taking into account the effectiveness of proof and settlement of cases under the per se illegal approach.

2. RESEARCH METHODS

This legal research uses the method of normative legal research, namely legal research by examining library materials or secondary data. This research is also supported by several approaches, namely the legislative approach, conceptual approach, and case approach. The use of normative legal research methods as well as various approaches aims to examine and find out how the settlement of cartel cases in Indonesia, which in the anti-monopoly law and PUTS, use the rule of reason approach. Handling cartels with the rule of reason approach has so far been deemed less effective and efficient judging from existing cartel cases, for example the cooking oil cartel case, which is often a problem in Indonesia. For this reason, this study will propose a change in the approach to handling cartels, namely from using the rule of reason approach to using the per se illegal approach whose proof is easier and shorter so that the handling of cartel cases can be resolved quickly and efficiently.[14]

3. RESULT AND DISCUSSION

3.1. The Cartel Proof Using The Rule Of Reason Approach In The Case Study Of Cooking Oil

It is important for a case to be adequately assessed by establishing that an act of unfair competition has been committed by a business actor. To do so requires substantial resources and, of course, professional individuals with extensive knowledge of business to be able to produce economic, business and management analyses related to business competition.[15] This is done by KPPU as the body directly responsible for enforcing laws related to business competition law. KPPU's power in carrying out its role in enforcing fair business competition punishes violators by imposing sanctions. Decisions of the KPPU panel have permanent legal force (inckracht), but can still be appealed to the District Court and cassation to the Supreme

[14] Rianto Adi, (2021), *Metodologi Penelitian Hukum Edisi Revisi,* Buku Obor, Jakarta, p. 104.
[15]Rachmadi Usman, (2022), *Hukum Persaingan Usaha di Indonesia*, Sinar Grafika, Jakarta, p. 97.

Court. The KPPU's powers are directly derived from competition law through judicial and regulatory efforts of competition law in its duties as a supervisor of business competition as well as law enforcer of business competition violations.

Furthermore, the jurisdiction of the KPPU is fourfold: First, KPPU as an institution directly responsible for the supervision and enforcement of competition law. Second, KPPU is an administrative function responsible for the implementation of other related regulations. Third, the mediating function, which is to receive reports of complaints and losses by private parties, conduct discussions with various parties, conduct investigations, and make decisions. Fourth, KPPU is also responsible for executing the decisions it has made. Article 4 to Article 16 of the Anti Monopoly Law and PUTS regulate the obligations and authority of the KPPU to investigate and evaluate prohibited agreements. However, the duties and authorities are still very broad when seen in Article 35 of the Anti-Monopoly Law and PUTS, which is actually not clearly divided into matters that can and are not applied in evaluating agreements, causing a lot of discussion about the powers and duties of the ICC in evaluation issues. KPPU uses two principles in analysing business conduct that is indicated to have violated the Anti Monopoly Law and PUTS. According to Faisal Fachri, the two principles are legal principles and economic principles - per se illegal and rule of reason approaches - as a mechanism to resolve cartel actions.[16]

Indonesian positive law regulates the prohibition of cartels in Article 11 of the Anti-Monopoly Law and PUTS which states that:

"Business actors are prohibited from entering into agreements with their business competitors that intend to influence prices by regulating the production and or marketing of goods and or services that may result in monopolistic practices and or unfair business competition."

Based on the formulation of these provisions, there are several elements that must be fulfilled in order for a cartel to be prohibited, including:

1. There is an agreement or covenant;

2. The agreement or arrangement is made by other business actors;

3. The purpose of the agreement is to influence prices;

4. There is an action to influence the price, quantity of production, and distribution of a particular product;

5. The existence of monopoly or unfair business competition.

The formulation of Article 11 of the Anti-Monopoly Law and the PUTS determines that before deciding on the existence of a cartel, the KPPU must analyse its impact on

[16] Fachri, F., & Joesoef, I. E. (2021). Pertimbangan KPPU Terhadap Pelanggaran Persaingan Usaha Tidak Sehat Dilakukan Oleh Perusahaan Penerbangan BUMN (Studi Kasus Putusan No. 15/KPPU-I/2019). *Zaaken: Journal of Civil and Business Law*, *2*(1), p. 1-24.

competition. This is an application of the rule of reason approach to prove the presence or absence of cartel practices, so that inevitably economic analysis is used by the KPPU. The rule of reason approach always focuses on the assessment aspect of certain activities or existing agreements, whether they have unfavourable implications for business competition activities. Therefore, at the stage of investigation and proving a cartel, it is necessary to investigate the motive or background underlying the business actors and prove from the beginning that there really has been an unfair business competition or monopoly practice.[17]

However, it is not easy to reveal cartel practices, especially now that business actors skillfully hide their agreements with other business actors by entering into verbal agreements. Therefore, in order to reveal cartel cases, KPPU issued KPPU Regulation on Cartel which is a guideline for the implementation of Article 11 of the Anti-Monopoly Law and PUTS. It stipulates that in addition to using evidence as stipulated in Article 42 of the Anti-Monopoly Law and PUTS, KPPU also recognises and uses indirect evidence in the form of communication evidence and economic analysis in revealing cartel cases.

When comparing countries such as Australia, the United States and the European Union, there are differences in the resolution of cartel practices, where a per se illegal approach is used to resolve cartel practices. For example, cartel practices in the United States, also known as "naked resistance", whose main objective is to influence the amount of production and market prices.[18] The rule of reason approach has its pluses but also its minuses, namely from an efficiency point of view. The disadvantages are that accurate judgements often lead to inconsistencies in the analysis results, which leads to uncertainty, investigations are time-consuming and expensive and require complex economic knowledge and economic data.[19]

Until now, law enforcement against the acts of cooking oil cartels has never been decided and found guilty. Although the KPPU as the authorized institution has decided that several business actors are proven to have committed a cooking oil cartel, the KPPU's decision is still subject to appeal and cassation in unfair business competition cases which often decide the opposite. This can be seen in 2009 in the handling of a case of alleged cooking oil cartel practices. In Decree No. 24/KPPU-I/2009 on Cooking Oil Cartel, KPPU stated that:

"Stating that twenty-one cooking oil business actors, namely PT Muktimas Nabati Asahan, PT Sinar Alami Permai, PT Wilmar Nabati Indonesia, PT Multi Nabati Sulawesi, PT Agrindo Indah Persada, PT Musim Mas, PT Intibenua Perkasatama, PT Megasurya Mas, PT Agro Makmur Raya, PT Miki Oleo Nabati Industri, PT Indo Karya Internusa, PT Permata Hijau Sawit, PT Nubika Jaya, PT Smart Tbk, and PT Salim Ivomas Pratama, PT Bina Karya Prima, PT Tunas Baru Lampung. Tbk, PT Berlian Eka Sakti Tanggung, PT Pasific Palmindo Industri, and PT Asian Agro Agung Jaya have been proven legally and convincingly to have violated the provisions of Article 4, Article 5, and Article 11 of Law Number 5 Year 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition."

[17] Primandhika, M. P., & Artha, I. G. (2018). Analisis Penerapan Pendekatan Rule Of Reason Dan Per Se Illegal Terhadap Kasus Kartel Di Indonesia. *Kertha Semaya: Journal Ilmu Hukum*, *6*(7). p. 11.
[18] *Ibid*.
[19] Soepadmo N. R. , *Op cit*, p. 37.

In order to prove cartel violations, the KPPU refers to the provisions of Article 1 number 7 of the Anti-Monopoly Law and PUTS by using the element of agreement as a method of proof. This case shows that the agreement is in the form of an unwritten agreement so that it is classified as indirect evidence, with evidence in the form of recorded communications and economic analysis. This economic evidence covers both structure and behaviour. It can be seen that the market structure of the cooking oil industry is concentrated so that it is classified as an oligopoly market, and the behavioural evidence can be seen that there is the same price in a concentrated / oligopoly market.[20]

KPPU suspects that there is a secret conspiracy among cooking oil producers who agree to keep the price of cooking oil high even though the world price of cooking oil/CPO has decreased. The secret conspiracy is known by the discovery of evidence in the form of minutes of meetings between cooking oil producers, where the discussion includes prices, production cost plans, and production quantities. The minutes of the negotiation were then determined to be evidence of communication by KPPU so that its position was indirect evidence. Therefore, KPPU decided that the cartel provisions had been violated by the business actors with the discovery of the communication evidence and the loss suffered by consumers. Calculating consumer losses uses the method of the difference between the average price of oil selling prices and the average revenue of CPO exports. Based on the foregoing, KPPU determines the fines for the reported business actors to be paid to the State Treasury for violations of business competition.[21]

Upon the KPPU Decision, the twenty-one business actors appealed to the Central Jakarta District Court (hereinafter referred to as the Jakpus District Court). The Central Jakarta District Court decided to cancel the KPPU decision by issuing Number 03/KPPU/2010/PN.Jkt.Pst. This was based on the fact that monopolistic practices, oligopili, cartels, and agreements related to production as stated by the KPPU were not proven, because HIR/Rbg had not regulated the qualification of "indirect evidence" as a type of valid evidence.[22] The Panel of Judges in their legal considerations argued that in the settlement of disputes over unfair business competition practices that still use the HIR/Rbg, so that "direct evidence" cannot be used. The opinion of the Judges of the District Court of Jakarta is further strengthened by the Supreme Court Decision Number 582K/Pdt.Sus/2011 which decided that:

"The KPPU's decision on the cooking oil cartel was rejected because the KPPU had applied a wrong law, namely the use of indirect evidence in the settlement of civil disputes has not been regulated in the Indonesian HIR/Rbg."

The decision shows that economics, which is classified as indirect evidence and which is used to analyse cartel effects, does not function as a realisation of the rule of reason approach. For this reason, the settlement of the cooking oil cartel has never been

[20] Jawani, L. (2022). Prinsip Rule Of Reason Terhadap Praktik Dugaan Kartel Di Indonesia. *Lex Renaissance*, *7*(1), 31-40 (35).

[21] Aryadiputra, D., Pribadi, D. S., & Subroto, A. (2022). Perbedaan Penerapan Pendekaran Per se Illegal dan Rule of Reason dalam Putusan KPPU tentang Kartel Penetapan Harga. *Risalah Hukum*, *18*(1), p. 7.
[22] *Ibid,* p. 9.

decided using the rule of reason approach. Considering that it is difficult to prove with the approach adopted and the non-acknowledgement of the existence of indirect evidence to prove the occurrence of a cartel, on the contrary, economic evidence often weakens the proof of cartel conduct.

3.2. The Change from Rule of Reason to Per Se Illegal for Cartel Proof

The application of the two approaches in the law of unfair business competition and monopolistic practices is different. The per se Illegal approach is an approach that emphasises the assessment of an agreement between business actors that violates the applicable rules and has fulfilled the elements of the article violated without the need for further proof, for example proving whether or not the implications of the agreement are detrimental to consumers. Yahya Harahap argues that the concept of per se illegal by using the term 'from the outset illegitimate', so that it is declared as 'unlawful'."[23] Hanafi Rachman opined that:

"The conduct of a business actor that is said to be per se illegal is the conduct of a business actor that the court has deemed to violate fair competition in that the facts surrounding the conduct are no longer important to analyse in order to determine whether the conduct is unlawful, so that business conduct that the court has determined to be per se illegal will be punished without the need for a complex investigation."[24]

Per se illegal assumes that a particular contract or business activity is illegal without further evidence of the consequences of the contract or business activity. Per se illegal considers that agreements between business actors relating to price fixing are directly determined to be anticompetitive and harmful. Therefore, the per se illegal approach determines that it is an unlawful act without the need for further assessment of the purpose and impact of the act. The reason is related to economic welfare so that such acts are strictly prohibited because they are certainly not beneficial. In the opposite direction, rule of reason is an approach that evaluates whether an agreement or activity has an impact that inhibits or otherwise favours competition.[25] The disadvantage is that it requires a lot of consideration in proving a cartel, which results in a long period of case settlement because it must be observed in a conferehensip manner whether the act has an impact on the economy or not. Therefore, the proof is not limited to the knowledge of law but also economics in order to be able to prove that the cartel has caused unfair business competition. Another weakness of the rule of reason is that the process of proof is costly. These costs include the costs of losses that must be borne by consumers during the price fixing conspiracy. The application of the rule of reason begins with a search for supporting facts that show the existence of adverse effects on business competition. The rule of reason requires the use of

[23] Harahap, M. Y. (1997). *Beberapa Tinjauan Tentang Permasalahan Hukum*. PT. Citra Aditya Bakti, Bandung, p. 28.

[24] Rachman, H. (2004). *Per Se Illegal dan Rule of Reason dalam Undang-Undang Larangan Praktek Monopoli Dan Persaingan Usaha Tidak Sehat* (thesis, AIRLANGGA UNIVERSITY), p. 2.

[25] Nababan, R., & Saragih, J. (2020). Tinjauan Yuridis terhadap Perjanjian yang Dilarangdalam Undang-undang Nomor 5 Tahun 1999 Tentang Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat yang Dilakukan oleh Pelaku Usaha Keramba Jaring Apungdi Haranggaolhorison Kabupaten Simalungun. *Visi Sosial Humaniora*, *1*(2), p. 125.

economic science including a number of complex economic data, which knowledge is not necessarily possessed by those making rational decisions.[26]

The regulation of Per Se Illegal and Rule of Reason approaches in the Anti Monopoly Law and PUTS does not explicitly state which acts use per se illegal and rule of reason, but the difference is seen in the formulation of each article, if there is a sentence "may result in monopolistic practices and/or unfair business competition" it is the realisation of the rule of reason approach. Where the formulation of the article has no optional meaning or possible implications, it is the realisation of the per se illegal approach. The Anti Monopoly Law and PUTS have implemented these two approaches and the determination is also left to the KPPU in carrying out its duties in accordance with Article 35 of the Anti Monopoly Law and PUTS. From a number of regulations in the Anti Monopoly Law and PUTS, there are 2 (two) articles that use the per se illegal approach, which means that normatively, such acts are prohibited. However, the KPPU in its decisions resolving cases that violate these provisions uses a rule of reason approach in which the act is considered violating if it has been proven that there is a negative impact of the act on competition.

Although Indonesia adopts the rule of reason approach in disclosing cartel cases, which means that it is necessary to analyse the impact of the cartel in economic terms, economic analysis is not a recognised and valid evidence in the practice of civil law in Indonesia. Therefore, economic analyses that make cartel handling longer cannot be used. The handling of cartels would have been more concise if the economic analysis of cartel effects had not been conducted from the outset as a realisation of the per se illegal approach to handling cartel practices. Considering that other countries in the world in resolving cartel cases predominantly use this type of approach, it can be seen from the direct practice of determining that an act is infringing if the elements of the provisions of the law have been fulfilled without the need to analyse the impact of the act or the reason for its enactment, so that law enforcement against cartel practices can be quickly resolved.[27] In addition, the rule of reason requires a lot of support in its application. If Indonesia wants to apply the rule of reason approach in uncovering cartels, it must have economic experts who also have good legal knowledge in the KPPU. Cartels are a major source of monopoly so it is necessary to consider an approach that can be used to uncover cartels easily. It can be said that the rule of reason application in proving cartels is not appropriate because cartel actions are certainly detrimental to competition and consumers. For this reason, Indonesia can adopt the approach of other countries in dealing with cartels by using the per se illegal approach, such as the United States.

The United States, as the pioneer of competition law in the world, discloses cartel practices using the per se illegal approach. The competition law in the United States is known as the Antitrust Law, and the Sherman Act specifically regulates cartelisation and monopolisation. The consideration for the use of the per se illegal approach by the United States is effectiveness and efficiency. The per se illegal approach does not require specialised economic analysis. The simple process of proof is the reason for the use of the per se illegal approach. In addition, this approach has a preventive function by allowing the rejection of costs and prohibited acts such as the formation of business

[26] Soepadmo N. R. , *Op cit*, p. 39.
[27] Sudiarto, *Op cit*. p. 22.

formations, the costs of regulating and enforcing an agreement, the costs borne by the public when the price (price fixing) exceeds the fair market price. Ultimately the cost-saving application of per se illegality results in real pro-competitive efficiency.[28]

As per Article 5 paragraph (1) of the Anti-Monopoly Law and PUTS, the article clearly stipulates as follows:

"Business actors are prohibited from entering into agreements with their competitors to fix the price of goods and or services that must be paid by consumers or customers in the same relevant market."

The formulation of the above provisions shows the nature of the per se illegal approach, which can directly determine that a business actor's actions are unlawful if the elements of the article are fulfilled by looking at the actions committed without the need to look at the consequences of the actions. Article 5 expressly states "prohibited" which indicates that the article adopts a per se illegal approach. Where the settlement contains anti-competitive legal certainty, because there is a real picture that an activity is illegal or anti-competitive and clearly causes consumer harm.

The application of per se illegal in the settlement of cartels is a form of logical and rational thinking of the United States government by considering that cartels are one of the economic criminal practices that need special attention because of their broad and massive implications. This is because the majority of cartel actions damage the legal climate of fair business competition more than they benefit both business actors and the wider community. In the application of the USA Antitrust Law, there are a number of business acts on the per se illegal approach, so that in proving it, there is no need to assess the effect of the act on competition and the conditions surrounding it. There is ease of administrative proceedings under the per se illegal approach, as it only requires identification of the illegal conduct and the adjudicator is allowed to refuse in-depth examination which is not effective and efficient. In addition, the self-enforcing power of the per se illegal approach is more binding and broad when compared to the rule of reason which requires an evaluation of the impact on competition. The test of whether there is competition by per se illegal provides certainty, the existence of a strict prohibition provides certainty for companies to run their companies without fear of lawsuits that can cause harm.[29] Based on these facilities, Indonesia needs to change its approach in handling cartel cases from the rule of reason approach to the per se illegal approach. This is particularly important given that cartel cases have had a negative impact on competition and economic evidence has not yet been recognised in Indonesian civil court cases as a type of evidence to disclose cartel cases in Indonesia.

4. CONCLUSION

Based on the analysis above, this article concludes that the use of the rule of reason approach is not appropriate in handling cartel practices in Indonesia because until now the handling of cartels, especially the cooking oil cartel, has not been effective. In

[28] Soepadmo N. R. , *Op cit*, p. 40.

[29] Darmawan, S. A. (2022). Kekuatan Indirect Evidence Dalam Pembuktian Kasus Persekongkolan Tender dan Penerapannya di Dalam Proses Tender. *Jurnal Pengadaan Barang dan Jasa*, *1*(1), p. 15.

addition, the rule of reason approach, which requires an economic analysis to assess whether a cartel has a negative impact on business competition, is not a valid evidence in court because it has not been regulated in the Indonesian HIR/Rbg. Therefore, the economic analysis has made the examination of the cartel take longer due to the need for in-depth examination, and the losses suffered by consumers due to the cartel's actions have increased due to the slow handling of the cartel. The second conclusion in this article is that the per se illegal approach is more appropriate for handling cartel cases in Indonesia, given the weak points of applying the rule of reason approach, namely that it requires a long time to prove, is complicated, costly, and requires economic analysis. The per se illegal approach is quicker to deal with cartels because it does not require in-depth proof and analysis of the impact of a cartel, only whether the conduct fulfils the elements of the article violated. Moreover, Indonesian civil procedural law does not yet accommodate economic evidence, so it is not necessary to analyse the economic impact of a cartel. For this reason, the cartel regulation in the Anti-Monopoly Law and PUTS needs to be amended, namely in Article 11 of the Anti-Monopoly Law and PUTS to eliminate the word "may result" which is a characteristic of the rule of reason so that the cartel provisions use a per se illegal approach.

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