PARALLEL PRICING AND THE USE OF CIRCUMSTANTIAL EVIDENCE IN PROVING PRICE-FIXING CARTELS

Hesty Diyah Lestari
Fakultas Hukum, Universitas Muhammadiyah Jakarta
email: hesty.lestari@umj.ac.id

disampaikan 27/04/2025 – di-*review* 10/11/2025 – diterima 29/12/2025
DOI: 10.25123/vej.v11i2.9259

Abstract
Most jurisdictions rely on indirect (circumstantial) evidence to prove parallel pricing that constitutes a price-fixing cartel when there is no direct evidence of an agreement among competing businesses. In Indonesia, however, the use of circumstantial evidence in proving price-fixing cartels remains debatable, as the Competition Act does not explicitly recognize circumstantial evidence as a form of proof available to the Business Competition Supervisory Commission (KPPU) in enforcing the Act. In several price-fixing cases, courts have rejected KPPU decisions that relied solely on circumstantial evidence to establish the existence of an agreement. This article examines how circumstantial evidence has been applied by the KPPU and the courts in cases involving parallel pricing. It further analyzes whether the Competition Act accommodates circumstantial evidence as a valid means of proving parallel pricing that amounts to a price-fixing cartel. The article seeks to clarify the significance of circumstantial evidence in establishing price-fixing agreements, which is essential for effective enforcement of competition law in Indonesia. Based on normative legal research, the article concludes that the use of circumstantial evidence in prosecuting price-fixing cartels can be justified under the existing Competition Act.

Keywords:
circumstantial evidence; competition law; parallel pricing; price-fixing cartels

Abstrak
Sebagian besar yurisdiksi menggunakan bukti tidak langsung dalam pembuktian harga paralel yang merupakan kartel penetapan harga, ketika tidak ada bukti langsung adanya perjanjian antara pesaing bisnis untuk menetapkan harga. Namun, di Indonesia, penggunaan bukti tidak langsung dalam pembuktian kartel penetapan harga masih menjadi perdebatan karena Undang-Undang Persaingan Usaha tidak secara eksplisit menyebutkan bukti tidak langsung sebagai alat bukti yang digunakan oleh Komisi Pengawas Persaingan Usaha (KPPU) dalam penegakkan Undang-Undang Persaingan Usaha. Pengadilan menolak putusan KPPU dalam beberapa kasus penetapan harga yang hanya menggunakan bukti tidak langsung dalam membuktikan adanya perjanjian. Tulisan ini mengkaji penerapan bukti tidak langsung yang digunakan oleh KPPU dan pengadilan dalam beberapa kasus harga paralel. Dengan basis penelitian normatif, dianalisis apakah Undang-Undang Persaingan Usaha mengakomodasi bukti tidak langsung sebagai alat bukti dalam pembuktian harga paralel yang merupakan kartel penetapan harga, untuk memberikan pemahaman menyeluruh tentang pentingnya bukti tidak langsung sebagai alat bukti perjanjian penetapan harga. Pemahaman ini penting demi penegakan hukum melawan kartel penetapan harga yang efektif di Indonesia. Disimpulkan bahwa penggunaan bukti tidak langsung dalam penanganan kartel penetapan harga dapat dibenarkan berdasarkan Undang-Undang Persaingan Usaha yang berlaku saat ini.

Kata Kunci:
bukti tidak langsung; harga paralel; hukum persaingan usaha; kartel penetapan harga

Introduction

Price-fixing cartels present a significant problem for a free and competitive market across the world.[1] Such cartels occur when business competitors make agreements not to compete with one another by fixing prices above the competitive level. Price fixing and other cartel types, including market allocation, sales restriction, and collusive tender, certainly harm competition and reduce consumer welfare. Research examining over a thousand cartels revealed that national cartels increase prices by approximately 13%, whereas international cartels induce a price increase of about 18% in general.[2] By raising prices, companies involved in price-fixing cartels might increase their profits to the detriment of their consumers.[3]

Competition laws in all jurisdictions prohibit price-fixing cartels. In Indonesia, price fixing violates Act Number 5 of 1999 regarding Prohibitions of Monopolistic Practices and Unfair Business Competition (the Competition Act) Article 5(1). Since price fixing is illegal, competitors attempting to form an agreement on price fixing will do so secretly.[4] As a result, competitors charge similar prices and parallel pricing occurs in a market, but direct evidence of the illegal agreement is unavailable. Competition authorities, therefore, have to employ indirect (circumstantial) evidence to prove the existence of agreements.[5]

The Organization of Economic and Cooperation Development (OECD) recognizes the significance of circumstantial evidence in prosecuting cartels considering the difficulties in obtaining direct evidence of cartel agreements.[6] The OECD observes that most jurisdictions employ circumstantial evidence in prosecuting cartels, including price-fixing cartels.[7] Competition authorities in these jurisdictions could successfully prove price-fixing cartels without direct evidence of price-fixing agreements and courts could accept circumstantial evidence used by

---

1 Christopher R. Leslie, "Balancing the Conspiracy's Books: Inter-Competitor Sales and Price-Fixing Cartels", Washington University Law Review, Vol. 96 No. 1, 2018, p. 227–49.
2 Marcel Boyer et al., "How Much Do Cartel Overcharge?", CIRANO Scientific Series, Vol. 37, 2015, p. 28.
3 Christopher R. Leslie, "How to Hide a Price-Fixing Conspiracy: Denial, Deception, and Destruction of Evidence", University of Illinois Law Review, No. 4, 2021, p.1203.
4 Christopher R Leslie, "The Decline and Fall of Circumstantial Evidence in Antitrust Law", American University Law Review, Vol. 69 No. 6, 2020, p. 1714–67.
5 William E Kovacic and others, "Plus Factors and Agreement in Antitrust Law", Michigan Law Review, Vol. 110, 2011, p. 393–437.
6 OECD, "Prosecuting Cartels without Direct Evidence of Agreement", OECD Journal: Competition Law and Policy, Vol. 9 No. 3, 2009, p. 49–105.
7 Id.

these authorities. In U.S. antitrust jurisprudence, the application of circumstantial evidence as proof of price fixing has been accepted since 1954.[8] In Indonesia, however, the application of circumstantial evidence is still debatable because the Competition Act does not explicitly mention circumstantial evidence as a type of evidence used by the Business Competition Supervisory Commission (*Komisi Pengawas Persaingan Usaha,* KPPU) in enforcing the Competition Act. Types of evidence specified in the Competition Act Article 42 are witness testimony, expert testimony, letters and/or documents, indicia, and business person testimony.

The KPPU considers that circumstantial evidence is within the meaning of indicia. When there was no direct evidence of price-fixing agreement, therefore, the KPPU employed circumstantial evidence to condemn these anti-competitive practices. Initially, district courts and the Supreme Court rejected these decisions because the KPPU could not establish direct evidence of price-fixing agreements. Courts refused to accept circumstantial evidence used by the KPPU because circumstantial evidence was not mentioned in the Competition Act Article 42 and it was not the same as indicia in criminal procedural law. Courts reasoned that competition procedural law was similar to criminal procedural law.

A significant development occurred when district courts and the Supreme Court confirmed KPPU decisions in the car-tire cartel in 2016 and in the automatic-scooter cartel in 2019. In both cases, the KPPU condemned price-fixing cartels merely with circumstantial evidence. Nevertheless, there was a decline in 2020 when the District Court of Central Jakarta rejected the KPPU decision in the flight-ticket cartel, although the Supreme Court approved it in 2022. Since Indonesia adopts the civil law system, the rule of precedent is not applicable in the country and the function of courts is to impelement the Competition Act. As long as the Competition Act does not regulate circumstantial evidence as a type of evidence in the enforcement of the Competition Act, the use of circumstantial evidence in price-fixing cases remains debatable. There is no legal certainty whether courts will acknowledge circumstantial evidence as proof of price-fixing agreements in the next cases.

---

[8] William E Kovacic, "Antitrust Policy and Horizontal Collussion in the 21st Century", Loyola Consumer Law Reporter, Vol. 9, 1997, p. 1–13.

Many scholars have examined the application of circumstantial evidence in prosecuting cartels in Indonesia. Kurnia Toha viewed that the procedural challenges faced by the KPPU in using circumstantial evidence in proving cartels originate from the civil law system adopted in Indonesia, where judges are bound by statutory provisions and judges are not bound by previous decisions.[9] Siti Anisah explained that the KPPU uses indirect evidence in proving price fixing based on the rule of reason approach.[10] Afif Hasbullah contended that there is legal uncertainty in enforcing competition law because not all Supreme Court decisions accept the use of circumstantial evidence.[11] Alfian & Murniati emphasized that circumstantial evidence has the legal basis as valid evidence and is part of a type of evidence as regulated in the Competition Act Article 42.[12] Elreddian K. Dewi et al. discussed the characteristics of indirect evidence used by the KPPU in handling price fixing cases.[13] These studies do not discuss the proof of parallel pricing which is the result of price fixing agreements using circumstantial evidence.

This paper examines the application of circumstantial evidence used by the KPPU and courts in some parallel pricing cases. It also analyzes whether the Competition Act accommodates circumstantial evidence as a type of evidence in proving parallel pricing that amounts to a price-fixing cartel. This paper attempts to provide a thorough understanding of the significance of circumstantial evidence as proof of price-fixing agreements. This understanding is necessary for effective law enforcement against price-fixing cartels in Indonesia, since price-fixing cartels are secretive in nature and hard to prove with ordinary types of evidence. This paper engaged in normative legal research that used secondary data including relevant legislations and decisions of the KPPU and courts, as well as legal and economic doctrines that are relevant in analyzing price-fixing cases.

---

9 Kurnia Toha, "Judging with Circumstantial Evidence: A Controversy in the Enforcement of Indonesia's Competition Law", International Journal of Innovation, Creativity, and Change, Vol. 13, 2020, p. 94–110.

10 Siti Anisah, "The Use of Per Se Illegal Approach in Proving the Price-Fixing Agreements in Indonesia", Jurnal Media Hukum, Vol. 27 No. 1, 2020, p. 99–120.

11 M. Afif Hasbullah, "Study of Circumstantial Evidence Theory and Its Implementation in Business Competition Law in Indonesia", Baltic Journal Of Law & Politics A Journal of Vytautas Magnus University, Vol. 15 No. 1 ,2022, p. 199–218.

12 Fajar Bima Alfian and Rilda Murniati, "Implementasi Bukti Tidak Langsung Dalam Penyelesaian Perkara Hukum Persaingan Usaha", Jurnal Persaingan Usaha, Vol. 3 No. 2, 2023, p. 106–19.

13 Elreddian Kusuma Dewi, Zahry Vandawati Chumaida, and Sinar Aju Wulandari, "Characteristics of Indirect Evidence Towards Price Fixing Agreements in the Perspective of Competition Law", Policy Law Notary and Regulatory Issues (Polri), Vol. 3 No. 1, 2024, p. 139–55.

Analysis

Proving Price-Fixing Agreements

1) Circumstantial evidence

Price-fixing agreements between business competitors are *per se* illegal. A *per se* rule for prosecuting price-fixing agreements focuses solely on the conduct of competitors in making the agreement on price fixing. Proving the existence of the agreement is central to condemning price fixing.[14] This process can be done with direct evidence and/or circumstantial evidence. Direct evidence of price-fixing agreements refers to explicit evidence, such as documents, faxes, recordings of phone or video conversations, e-mail, and other tangible proof explicitly embodying the agreement; the testimony of cartel participants; and eyewitness testimony informing collusion among competitors. Direct evidence is stronger than circumstantial evidence. Nonetheless, direct evidence is generally not available because competitors attempting to collude conceal their illegal conduct and eliminate explicit evidence of collusion. Accordingly, the prosecution of price-fixing cartels is mostly without direct evidence of price-fixing agreements.[15] Circumstantial evidence is evidence that does not explicitly demonstrate price-fixing agreements but indirectly shows the existence of agreements. Circumstantial evidence is recognized as "the lifeblood" of competition law since direct evidence of price-fixing agreements is usually unavailable.[16] When direct evidence of the agreement is unavailable, circumstantial evidence plays a significant role in proving the illegal price fixing.

According to the OECD, there are two general types of circumstantial evidence, namely communication evidence and economic evidence.[17] The OECD considers that communication evidence is more important than economic evidence. This is due to the ambiguity of economic evidence, such as parallel pricing, which could be either independent or collusive, and hence, it needs careful analysis.[18] In practice, it requires additional facts or factors known as "plus factors" to prove that parallel

14 KPPU, Hukum Persaingan Usaha – Buku Teks, 2nd Ed., KPPU, 2015, p. 66.
15 Christopher R. Leslie, supra note 3, pp. 1199–1266.
16 Christopher R. Leslie, supra note 4.
17 OECD, supra note6.
18 Id.

pricing amounts to a price-fixing agreement.[19] As such, the most common approach for proving price-fixing agreements with circumstantial evidence includes two stages: parallel pricing and plus factors.

2) Parallel pricing

In a competitive market, there are many sellers and buyers of a certain product, and hence, there is no market player whose conduct alone can affect the market price of that product. All sellers are price takers and make their pricing decisions independently without considering other sellers' reactions to these decisions.[20] In such a competitive market, sellers wishing to maximize their profits have to improve their production at an economical cost in order to sell their products at prices equal to the prevailing market prices.[21] In fact, oligopolies control most industries in the world.[22] In an oligopolistic market, there are only a few sellers offering a homogenous product that have significant market shares. Consequently, the pricing decision of one seller has a significant impact on other sellers' profits or losses.[23] In oligopolistic markets, therefore, there is economic interdependence among competing sellers in making their pricing decisions to avoid losses.[24]

The interdependent character of oligopoly induces competing sellers to coordinate their pricing decisions, which leads to parallel pricing. It should be noted, however, that parallel pricing by itself is not evidence of unlawful price fixing. Parallel business conduct by rival companies constitutes a price-fixing cartel only if it is the result of an agreement among the relevant companies. Without evidence of such a collusive agreement, parallel behavior is not a violation of competition law. It is not unlawful for a company to copy or follow its rival's pricing decisions if it is the result of an individual action.[25]

---

19 Christopher R. Leslie, supra note 4.

20 Michael K. Vaska, "Conscious Parallelism and Price Fixing : Defining the Boundary", The University of Chicago Law Review, Vol. 52, 1985, p. 508.

21 Niamh Dunne, Competition Law and Economic Regulation: Making and Managing Markets, Cambridge University Press, 2015.

22 Chang-su Choe, "Antitrust Economics for Proof of Concerted Price- Fixing : Practical Points for U .S. and Korean Antiturst Jurisprudence", Brigham Young University International Law & Management Review, Vol. 8 No. 2, 2012, p. 1–33.

23 Jonathan Baker, "Two Sherman Act Section 1 Dilemmas: Parallel Pricing, the Oligopoly Problem, and Contemporary Economic Theory", The Antitrust Bulletin, Vol. 38 No. 1, 1993, p. 143–219.

24 Niamh Dunne, supra note 19.

25 Chang-su Choe, supra note 20.

Parallel pricing is common in oligopolistic markets. Since oligopolies dominate most industries worldwide, parallel behavior can easily occur in many industries. The tasks of competition authorities and courts are to distinguish independent from collusive parallel pricing. To condemn collusive parallel pricing, competition authorities and courts have to prove that competitors have formed an agreement to fix prices, or collusion.

3) Collusion

Collusion among business competitors to coordinate their pricing decisions can be explicit as well as tacit. Explicit collusion covers a situation where rival companies agree to fix prices with an explicit agreement, whether it is written or oral. In contrast, tacit collusion refers to coordination or parallel conduct between rival companies that occurs without any explicit agreement. The difference between explicit and tacit collusion is not significant. Economists suggest that tacit collusion might be as pernicious as explicit collusion to fix prices.[26] Rival companies that participate in tacit collusion can achieve a common knowledge of excessive prices and a mutual trust to adhere to these prices. Since tacit collusion is not conducted unconsciously, it is also termed conscious parallelism. It should be noted, however, that the mere fact of tacit collusion or conscious parallelism is insufficient to establish illegal price fixing.[27]

4) Plus factors

To establish that parallel pricing is the outcome of collusive conduct by rival companies, it needs additional evidence or plus factors to determine whether the parallel conduct combined with plus factors suggests the existence of collusion between rival companies. Kovacic et al. suggest that the evidence showing regular communication between rival companies would be the most important factor to prove the existence of collusion.[28] Furthermore, they contend that specific plus factors are stronger evidence than others, and they regard them as "super plus

---

26 Julia Shamir and Noam Shamir, "Colluding under the Radar: Achieving Collusion through Vertical Exchange of Information", Cleveland State Law Review, Vol. 63 No. 1, 2015, p. 621.

27 Keith N. Hylton, "Oligopoly Pricing and Richard Posner", Law & Economics Series Paper No. 18-10, 2018 https://scholarship.law.bu.edu/faculty_scholarship/272.

28 William E, Kovacic, Robert C Marshall, Leslie M Marx, and Halbertl White, "Plus Factors and Agreement in Antitrust Law", Michigan Law Review, Vol. 110, 2011, p. 393–437.

factors," such as output restrictions and stable market shares when rival companies increase prices highly and acquire excessive profits.[29]

While Kovacic et al. contend that economic evidence is stronger than communication evidence, the OECD considers that communication evidence is more important than economic evidence. The OECD, however, suggests applying all evidence holistically instead of individually and separately. Thus, although communication evidence is more reliable, it must be supported by an economic analysis of the market structure and market behaviour to prove collusive parallel pricing.

Prosecuting Price-Fixing Cartels in Indonesia

1) Types of evidence

The OECD has reported that many countries are successful in prosecuting cartels with circumstantial evidence. Nonetheless, there is a situation that affects the application of circumstantial evidence in countries that have relatively new experience in prosecuting cartels.[30] Such a situation also occurs in Indonesia, where the application of circumstantial evidence in cartel investigations has been the subject of debate among legal scholars and practitioners. This is due to different interpretations of the Competition Act Article 42 regarding types of evidence used by the KPPU in handling cases.

Table 1: Types of Evidence

	Types of Evidence	Legal Basis
Competition Law	witness testimony, expert testimony, letters and/or documents, indicia, and business person testimony	Competition Act Art. 42
Criminal Law	witness testimony, expert testimony, letters, indicia, and defendant testimony	Criminal Procedural Code Art. 184
Civil Law	letters, witnesses, presumptions, acknowledgements, and oaths	Civil Procedural Code Art. 164

Source: compiled by author, 2025.

29 Id.
30 OECD supra note 6.

Table 1 presents five types of evidence in Competition Law, Criminal Law, and Civil Law. It is clear that types of evidence in the Competition Act are similar to those specified in the Criminal Procedural Code rather than the Civil Procedural Code.

The problem arises since the Competition Act Article 42 does not mention indirect evidence or circumstantial evidence, including communication evidence and economic evidence. To employ circumstantial evidence, therefore, the KPPU still needs a legal basis. To deal with this issue, the KPPU uses indicia in the Competition Act Article 42 as the legal basis to justify the use of circumstantial evidence. It is debatable whether circumstantial evidence is within the meaning of indicia in the Competition Act Article 42. On the one hand, some scholars argue that circumstantial evidence falls outside of the meaning of indicia in the Competition Act Article 42 because indicia in the Competition Act are similar to indicia in the Criminal Procedural Code.[31] According to the Criminal Procedural Code Article 188(1), indicia are "actions, events, or circumstances, due to their conformity—both between one thing and another, as well as with the criminal act itself—indicate that a crime has occurred and identify the perpetrator." Moreover, the Criminal Procedural Code Article 188(2) stipulates that "indicia could only be acquired from witness testimony, letters, and defendant testimony." This definition does not reflect circumstantial evidence consisting of communication evidence and economic evidence.[32]

Others argue that the interpretation of the Competition Act Article 42 should refer to Supreme Court Regulation Number 03 of 2021 regarding Procedures for Filing and Examining Objections to KPPU Decisions in Commercial Courts.[33] This Regulation requires commercial courts to apply civil procedural law in handling objections to KPPU decisions. Moreover, investigations in competition cases have a different standard of proof from those applied in investigations of criminal and civil cases. This is due to the significance of economic analysis in competition procedural law that is not required both in civil and criminal procedural law.[34] In addition,

---

31 Udin Silalahi and Isabella Cynthia Edgina, "Pembuktian Perkara Kartel Di Indonesia Dengan Menggunakan Bukti Tidak Langsung (Indirect Evidence)", Jurnal Yudisial, Vol. 10 No. 3, 2017, p. 311–30.

32 Sih Yuliana Wahyuningtyas, "Challenges in Combating Cartels, 14 Years after the Enactment of Indonesian Competition Law", Yearbook of Antitrust and Regulatory Studies, Vol. 7 No. 10, 2014, p. 279–306.

33 Asep Iwan Iriawan, "Kelembagaan Dan Kewenangan Pengadilan Niaga Tentang Upaya Hukum Keberatan Terhadap Putusan Komisi Pengawas Persaingan Usaha", Veritas et Justitia, Vol. 10 No. 1, 2024.

34 Siti Anisah, supra note 11.

ordinary types of evidence are not sufficient to establish the existence of an agreement in cartel cases, considering the secretive nature of cartels.[35]

The above discussion shows that interpreting types of evidence in competition law in the same way as those in criminal law is inappropriate. It should be noted that the Competition Act neither mentions nor refers to the Criminal Procedural Code. Even though the types of evidence in competition law and civil law are not the same, there is no contradiction between the two. In practice, therefore, courts could accept the types of evidence outlined in the Competition Act Article 42 in examining competition cases.

Competition law can be categorized as economic law and the development of competition law relies largely on the development of economic studies. Hence, the interpretation of indicia the Competition Act Article 42 should be based on the development of economic studies, not criminal studies. The meaning of indicia under the Criminal Procedural Code cannot reveal the existence of collusion among competitors. Such collusive behaviour, however, can be detected through communication evidence and economic analysis of the market structure and market behaviour. This analysis can determine whether or not parallel business conduct is the result of collusion. A thorough understanding of the economic analysis of parallel pricing is of paramount importance in proving price-fixing cartels.

2) Investigations by the KPPU

Price-fixing agreements are illegal according to the Competition Act Article 5(1). To implement this law, the KPPU issued Regulation Number 04 of 2011 regarding Guidelines of Article 5 concerning Price Fixing. According to the Guidelines, to prove price-fixing agreements, the KPPU firstly has to prove that two or more business entities allegedly conducting price fixing operate in the same relevant market. Secondly, the KPPU has to prove the existence of an agreement between the relevant business entities. In this stage, the Guidelines acknowledge the application of direct evidence and circumstantial evidence.

The Guidelines define direct evidence as evidence that is visible and demonstrates the existence of a price-fixing agreement between business

[35] Hanif Nur Widhiyanti, "The Urgency of Harmonizing Competition Laws in Moving Towards the ASEAN Free Trade Area", Fiat Justisia Jurnal Ilmu Hukum, Vol. 14 No. 1, 2020, p. 45.

competitors. On the contrary, the Guidelines state that circumstantial evidence refers to evidence that indirectly demonstrates a price-fixing agreement. The Guidelines stipulate that circumstantial evidence consists of communication evidence and economic evidence.

Moreover, the Guidelines state that parallel pricing may trigger an investigation of a price-fixing agreement, but the mere fact of parallel behavior does not constitute a violation of the Competition Act Article 5(1). Such parallel behavior needs additional analysis or plus factors to constitute circumstantial evidence of a price-fixing agreement. These plus factors, among other things, are the rationality of price fixing, analysis of market structure, analysis of performance data, and analysis of the application of collusion tools.

The KPPU strengthened the application of circumstantial evidence in the Regulation on Case Handling Procedures in the KPPU, particularly regarding the interpretation of indicia provided in the Competition Act Article 42. The Regulation Number 02 of 2023 Article 12 determines indicia as the conformity of actions, events, statements, or data indicating an alleged contravention of the law. Indicia can be in the form of economic evidence and/or communication evidence that is believed to be valid. This regulation also requires the KPPU to present at least two types of evidence specified in the Competition Act Article 42 in handling cases. Accordingly, the KPPU also used other types of evidence, such as witness testimony, expert testimony, and business person testimony. It should be noted, however, that courts may set aside the KPPU Regulations that accommodate circumstantial evidence, since the KPPU has no power to issue regulations that are binding to courts. Moreover, courts have the power to interpret whether the Competition Act Article 42 accommodates circumstantial evidence.

Development of Price-Fixing Cases with Circumstantial Evidence

Like in other countries, many industries in Indonesia are oligopolies. Accordingly, parallel business conduct has become a common phenomenon in Indonesian markets. Since parallel conduct by itself does not represent a price-fixing cartel, the KPPU has to establish additional evidence to prove that this parallel behavior amounts to a price-fixing cartel. In the absence of direct evidence of a price-

fixing agreement, the KPPU employed circumstantial evidence to prove the contravention of the Competition Act Article 5(1). As mentioned above, courts previously rejected the KPPU decisions that condemned price-fixing cartels using circumstantial evidence alone, but later courts could accept them.[36] In order to have a comprehensive understanding of price-fixing cases that the KPPU could prove merely with circumstantial evidence, the following part explores three examples of these cases.

1) Fuel-surcharge cartel

Due to rising world fuel prices, numerous airline companies in Indonesia set fuel surcharges as a component of the prices that airline consumers or flight passengers had to pay. Between 2006 and 2009, there was parallel conduct by airline companies in Indonesia in increasing the amount of their fuel surcharges. The KPPU investigated whether this parallel pricing was the result of collusion among airline companies. Direct evidence of an agreement on fuel surcharges was not available, but the KPPU could establish circumstantial evidence of the alleged agreement. The KPPU did not specifically mention communication evidence and economic evidence, but from its findings it can be analyzed that there are communication evidence and economic evidence.

The KPPU found two important facts. First, on May 4th, 2006, the chairman of the Indonesian National Air Carrier Association and nine airline companies signed a written agreement regarding the amount of fuel surcharges. Second, on May 30th, 2006, the agreement was cancelled, and the airline companies were free to decide the amount of their fuel surcharges. Notwithstanding this cancellation, nine airline companies remained committed to implementing the agreement. These facts showed that there was communication among airline companies regarding the amount of fuel surcharges.

Economic evidence can be found from the analysis of the market structure of scheduled commercial flights in Indonesia, which showed oligopoly. During the period of collusion, the airline companies increased the amount of their fuel surcharges by 8–24 times, whereas the rising world fuel prices were less than 100%.

---

36 Fajar Bima Alfian and Rilda Murniati, "Implementasi Bukti Tidak Langsung Dalam Penyelesaian Perkara Hukum Persaingan Usaha", Jurnal Persaingan Usaha, Vol. 3 No. 2, 2023, p. 106–119.

Table 2: The Rise of Fuel Surcharges

	World Fuel Prices	Fuel Surcharges
May 2006	IDR 5,920/liter	IDR 20,000/litter
December 2008	IDR 8,206/liter	IDR 100,000 - 480,000/liter

Source: KPPU Decision Number 25/KPPU-I/2009.

Table 2 presents the comparison between the rise of world fuel prices and the rise of fuel surcharges from May 2006 to December 2008. It is clear that the airline companies charged excessive prices. These excessive prices cost consumers around IDR 5–13.8 trillion in welfare losses.

Based on this circumstantial evidence, the KPPU proved that there was an agreement on price fixing. Thus, the element of agreement as the main element in proving a violation of the Competition Act Article 5(1) has been fulfilled. The KPPU decided that nine airline companies in Indonesia conducted a price-fixing agreement on fuel surcharges that violated the Competition Act Article 5(1).[37] The airline companies filed an objection to the KPPU decision in the District Court of Central Jakarta. The court noted that many factors affected the amount of the fuel surcharges and that parallel conduct by several airlines did not constitute a price-fixing agreement since there was no direct evidence of the written agreement among airline companies. The court refused to accept circumstantial evidence used by the KPPU because circumstantial evidence was not mentioned in the Competition Act Article 42. The court concluded that the airline companies were not proven to have violated the Competition Act Article 5(1). The court, therefore, annulled the KPPU decision.[38] The KPPU filed an appeal with the Supreme Court over the judgment of the District Court, but the Supreme Court upheld this judgment for the same grounds and dismissed the appeal.[39]

In this case, courts employed a literal approach because they interpreted the Competition Act Article 42 as word-for-word stipulated in the act. Courts did not interpret the words in any way other than what the act specifies. Courts ignored the secretive nature of price-fixing cartel, so that direct evidence of the agreement could not be found. Due to this secretive nature, courts in other jurisdictions do not require direct evidence of the agreement in examining price-fixing cases.

37 KPPU Decision Number 25/KPPU-I/2009.
38 District Court of Central Jakarta Decision Number 02/KPPU/2010/PN.Jkt.Pst.
39 Supreme Court Decision Number 613 K/PDT.Sus/2011.

2) Automatic-scooter cartel

In 2014, two leading manufacturers of automatic scooters class 110-125 cc in Indonesia, Honda and Yamaha, increased their prices simultaneously: Honda did it three to five times, whereas Yamaha made it once to three times. The KPPU investigated whether this parallel pricing was the result of a collusive agreement. The KPPU could not find direct evidence of an agreement, but there was sufficient circumstantial evidence of the alleged agreement between Honda and Yamaha to fix prices. Although the KPPU did not specifically address communication evidence and economic evidence, from its findings it can be analyzed that there are communication evidence and economic evidence.

Communication evidence can be seen from two official emails from Yamaha's board of directors. The first one, dated April 28th, 2014, mentioned that Yamaha followed Honda's price increase. The second one, dated January 10th, 2015, stated that the President Director of Yamaha had ordered his office to follow Honda's price increase to fulfill his promise with the President Director of Honda. Economic evidence can be found from an analysis of the market structure and market behavior. The relevant market in this case is the industry of 110-125cc automatic scooters in Indonesia. In 2014, the market leader was Honda, with a market share of 73%, followed by Yamaha (26%), Suzuki (1%) and TVS (0%). The KPPU found that this market was highly concentrated, with only four manufacturers selling relatively homogenous products. Thus, this relevant market was oligopolistic.

Furthermore, the KPPU noted that only Yamaha followed the price movement of Honda in 2014. Suzuki and TVS did not increase their prices as they wanted their market share to remain stable. The KPPU concluded that Yamaha did not compete with Honda. Moreover, the analysis of performance data showed that during the alleged price-fixing period, the prices of Honda and Yamaha were higher than their previous or later prices. Based on this circumstantial evidence, the KPPU proved that there was an agreement on price fixing between Honda and Yamaha. Thus, the element of agreement as the main element in proving a violation of the Competition

Act Article 5(1) has been fulfilled. The KPPU decided that Honda and Yamaha violated the Competition Act Article 5(1).[40]

Honda and Yamaha challenged the KPPU decision in the District Court of North Jakarta. They argued that the KPPU's use of circumstantial evidence was not reasonable. The court rejected these arguments and agreed with the findings of the KPPU. The court accepted circumstantial evidence used by the KPPU as valid evidence to prove an agreement on price fixing between Honda and Yamaha. The court decided that Honda and Yamaha were proven to have violated the Competition Act Article 5(1). Hence, the court dismissed the objection.[41] Honda and Yamaha appealed this judgment before the Supreme Court, but the Supreme Court also accepted the KPPU's use of circumstantial evidence for the same grounds and, thus, dismissed the appeal.[42] In this case, courts employed a progressive approach by accepting circumstantial evidence as valid evidence in proving price-fixing agreements, although the Competition Act Article 42 does not stipulate it. From communication evidence and the economic analysis of the market structure and market behavior it can be identified that this parallel pricing is not conscious parallelism but a price-fixing cartel.

3) Flight-ticket cartel

From November 2018 to 2019, the prices of domestic flight tickets in Indonesia increased significantly. This increase seemed irrational since fuel prices had already decreased at that time. During the low season (between January 2019 and April 2019), airline companies did not lower or stabilize their ticket prices. There were seven airline companies involved in this case, namely Garuda Indonesia, Citilink, Sriwijaya Air, Nam Air, Batik Air, Lion Air, and Wings Air. The KPPU investigated whether this parallel pricing constituted a price-fixing cartel. There was no direct evidence of an agreement among airline companies to fix prices. Hence, the KPPU relied on circumstantial evidence to prove that this parallel pricing was a result of collusive conduct. From the KPPU's findings it can be analyzed that there are communication evidence and economic evidence.

40 KPPU Decision Number 04/KPPU-I/2016.
41 District Court of North Jakarta Decision Number 163/Pdt.G/KPPU/2017/PN.Jkt.Ut.
42 Supreme Court Decision Number 217 K/PDT.Sus-KPPU/2019.

Communication evidence can be shown from the facts that airline companies changed their flight fares after seeing each other's flight fares and then imposed the new prices at nearly the same time. The airline companies argued that the new prices were based on their operational costs and in accordance with the upper limit rate (ULR) specified in the Minister of Transportation Regulation. The KPPU, however, found that the ratio of airline ticket prices to the ULR after November 2018 was higher than before November 2018, and ticket prices from seven airlines for the routes analyzed were moving together to approach the ULR. Besides that, the patterns of ticket prices from seven airlines showed the same movements every month, while Air Asia had a different pattern. The KPPU considered that this parallel conduct was a concerted action. Moreover, the KPPU noted that there was management cooperation between Citilink (a member of the Garuda Indonesia Group) and the Sriwijaya Group, so that the operations of the Sriwijaya Group were directly and indirectly under the control of the Garuda Indonesia Group.

For economic evidence, the KPPU analyzed that the market structure of scheduled domestic economy flights was a tight oligopoly, in which the combined market shares of seven airlines reached 97% in 2017, 96% in 2018, and 95% in 2019. The KPPU found that there was a concerted action among airline companies in reducing or eliminating low subclass tickets, reducing the frequency of domestic flights, as well as abolishing discounts or making discounts uniform. The KPPU considered that this collusion had an impact on the reduced availability of domestic airline tickets, if any, which were available at relatively high prices. Based on this circumstantial evidence, the KPPU proved that there was an agreement on price fixing between seven airline companies. Thus, the element of agreement as the main element in proving a violation of the Competition Act Article 5(1) has been fulfilled. Accordingly, the KPPU decided that seven airline companies had engaged in a price-fixing cartel and violated the Competition Act Article 5(1).[43]

Batik Air, Lion Air, and Wings Air filed an objection with the District Court of Central Jakarta over the KPPU decision. The court held that the KPPU could not prove the existence of an agreement on price fixing. The court refused to accept

[43] KPPU Decision Number 15/KPPU-I/2019.

circumstantial evidence used by the KPPU because it was not valid evidence pursuant to the Competition Act Article 42. The court concluded that the airline companies were not proven to have violated the Competition Act Article 5(1) and thus, annulled the KPPU decision.[44] Subsequently, the KPPU appealed to the Supreme Court. According to the Supreme Court, the airline companies could not prove that they independently decided their ticket prices without any agreement. The Supreme Court agreed with the findings of the KPPU and could accept the KPPU's use of circumstantial evidence. The Supreme Court concluded that the element of agreement as the main element in proving a violation of the Competition Act Article 5(1) has been fulfilled. The Supreme Court decided that the airline companies violated the Competition Act Article 5(1) and upheld the KPPU decision.[45]

This case shows the inconsistency of the District Court of Central Jakarta in examining price-fixing cases. In the case of car-tire cartel in 2016, the court could accept the KPPU's use of circumstantial evidence in proving a price-fixing agreement. In this case, however, the court rejected it. In contrast, the Supreme Court was still consistent in recognizing circumstantial evidence as proof of a price-fixing agreement. The Supreme Court was even more progressive by applying a reverse burden of proof. The Supreme Court required the airline companies to prove that this parallel behavior was not collusive parallel pricing and the airline companies could not prove it. Keeping in mind, however, that this Supreme Court decision is not binding on other judges in the next price-fixing cases since Indonesia does not apply the rule of precedent. Judges remain independent in deciding whether or not they can accept circumstantial evidence as proof of a price-fixing agreement.

Conclusion

Considering the secretive nature of illegal price-fixing cartels, direct evidence of price-fixing agreements is generally unavailable. In the absence of direct evidence of such agreements, circumstantial evidence plays a significant role in proving these

44 District Court of Central Jakarta Decision Number 365/Pdt.Sus-KPPU/2020/PN.Jkt.Pst.
45 Supreme Court Decision Number 1811 K/PDT.Sus-KPPU/2022.

secret agreements. The Competition Act Article 42 does not explicitly stipulate circumstantial evidence as a type of evidence in the enforcement of the Competition Act, but it accommodates circumstantial evidence by relying on the meaning of indicia. For effective law enforcement against price-fixing cartels, the meaning of indicia includes circumstantial evidence consisting of communication evidence and economic evidence. Hence, the use of circumstantial evidence in proving parallel pricing that constitutes a price-fixing cartel can be justified under the existing Competition Act. A rigorous and formalistic legal approach will make price-fixing cartels hard to condemn and, thus, reduce consumer welfare.

Although the Competition Act Article 42 accomodates circumstantial evidence, not all of courts can accept it because the Competition Act does not regulate it. Since parallel pricing frequently occurs in many industries in Indonesia and direct evidence of price-fixing agreements is generally unavailable, it is necessary to regulate circumstantial evidence in the Competition Act. The Competition Act Article 42, therefore, should be amended by stipulating circumstantial evidence as a type of evidence used by the KPPU in the enforcement of the Competition Act. With this amendment, courts will no longer be reluctant to accept circumstantial evidence as proof of price-fixing agreements and this will provide legal certainty for the application of circumstantial evidence in anti-cartel enforcement. The judgments of price-fixing cartels should inevitably include an economic analysis of the market structure and market behavior that is essential to distinguish collusive from independent parallel behavior. Accordingly, courts should expand their economic analysis in their judgments in price-fixing cases.

BIBLIOGRAPHY

Books:

KPPU, Hukum Persaingan Usaha – Buku Teks, 2nd Ed., KPPU, 2015.

Niamh Dunne, Competition Law and Economic Regulation: Making and Managing Markets, Cambridge University Press, 2015.

Journals:

Asep Iwan Iriawan, "Kelembagaan Dan Kewenangan Pengadilan Niaga Tentang Upaya Hukum Keberatan Terhadap Putusan Komisi Pengawas Persaingan Usaha", Veritas et Justitia, Vol. 10 No. 1, 2024.

Chang-su Choe, “Antitrust Economics for Proof of Concerted Price- Fixing : Practical Points for U .S. and Korean Antiturst Jurisprudence”, Brigham Young University International Law & Management Review, Vol. 8 No. 2, 2012.

Christopher R. Leslie, “Balancing the Conspiracy’s Books: Inter-Competitor Sales and Price-Fixing Cartels,” Washington University Law Review, Vol. 96 No. 1, 2018.

Christopher R Leslie, “The Decline and Fall of Circumstantial Evidence in Antitrust Law”, American University Law Review, Vol. 69 No. 6, 2020.

Christopher R. Leslie, “How to Hide a Price-Fixing Conspiracy: Denial, Deception, and Destruction of Evidence,” University of Illinois Law Review, No.4, 2021.

Elreddian Kusuma Dewi, Zahry Vandawati Chumaida, and Sinar Aju Wulandari, “Characteristics of Indirect Evidence Towards Price Fixing Agreements in the Perspective of Competition Law,” Policy Law Notary and Regulatory Issues (Polri), Vol. 3 No. 1, 2024.

Fajar Bima Alfian and Rilda Murniati, “Implementasi Bukti Tidak Langsung Dalam Penyelesaian Perkara Hukum Persaingan Usaha”, Jurnal Persaingan Usaha, Vol. 3 No. 2, 2023.

Hanif Nur Widhiyanti, “The Urgency of Harmonizing Competition Laws in Moving Towards the ASEAN Free Trade Area”, Fiat Justisia Jurnal Ilmu Hukum, Vol. 14 No. 1, 2020.

Jonathan Baker, “Two Sherman Act Section 1 Dilemmas: Parallel Pricing, the Oligopoly Problem, and Contemporary Economic Theory”, The Antitrust Bulletin, Vol. 38 No. 1, 1993.

Julia Shamir and Noam Shamir, “Colluding under the Radar: Achieving Collusion through Vertical Exchange of Information”, Cleveland State Law Review, Vol. 63 No. 1, 2015.

Kurnia Toha, “Judging with Circumstantial Evidence: A Controversy in the Enforcement of Indonesia’s Competition Law,” International Journal of Innovation, Creativity, and Change, Vol. 13, 2020.

Marcel Boyer et al., “How Much Do Cartel Overcharge?”, CIRANO Scientific Series, Vol. 37, 2015.

Michael K. Vaska, “Conscious Parallelism and Price Fixing : Defining the Boundary”, The University of Chicago Law Review, Vol. 52, 1985.

Muhammad Afif Hasbullah, “Study of Circumstantial Evidence Theory and Its Implementation in Business Competition Law in Indonesia”, Baltic Journal Of Law & Politics A Journal of Vytautas Magnus University, Vol. 15 No. 1, 2022.

OECD, “Prosecuting Cartels without Direct Evidence of Agreement”, OECD Journal: Competition Law and Policy, Vol. 9 No. 3, 2009.

Sih Yuliana Wahyuningtyas, “Challenges in Combating Cartels, 14 Years after the Enactment of Indonesian Competition Law”, Yearbook of Antitrust and Regulatory Studies, Vol. 7 No. 10, 2014.

Siti Anisah, “The Use of Per Se Illegal Approach in Proving the Price-Fixing Agreements in Indonesia”, Jurnal Media Hukum, Vol. 27 No. 1, 2020.

Udin Silalahi and Isabella Cynthia Edgina, “Pembuktian Perkara Kartel Di Indonesia Dengan Menggunakan Bukti Tidak Langsung (Indirect Evidence),” Jurnal Yudisial, Vol. 10 No. 3, 2017.

William E Kovacic, “Antitrust Policy and Horizontal Collussion in the 21st Century”, Loyola Consumer Law Reporter, Vol. 9, 1997.
William E, Kovacic, Robert C Marshall, Leslie M Marx, and Halbertl White, “Plus Factors and Agreement in Antitrust Law”, Michigan Law Review, Vol. 110, 2011.

Judicial and Quasi-judicial Decisions:

District Court of Central Jakarta Decision Number 02/KPPU/2010/PN.Jkt.Pst.
District Court of North Jakarta Decision Number 163/Pdt.G/KPPU/2017/PN.Jkt.Ut.
District Court of Central Jakarta Decision Number 365/Pdt.Sus-KPPU/2020/PN.Jkt.Pst.
KPPU Decision Number 25/KPPU-I/2009.
KPPU Decision Number 04/KPPU-I/2016.
KPPU Decision Number 15/KPPU-I/2019.
Supreme Court Decision Number 613 K/PDT.Sus/2011.
Supreme Court Decision Number 217 K/PDT.Sus-KPPU/2019.
Supreme Court Decision Number 1811 K/PDT.Sus-KPPU/2022.