GUIDELINES FOR ARTICLE 5
CONCERNING PRICE FIXING
UNDER LAW NUMBER 5 YEAR 1999 CONCERNING PROHIBITION OF MONOPOLISTIC PRACTICES AND UNFAIR BUSINESS COMPETITION

CHAPTER I
INTRODUCTION

On the basis of Law Number 5 Year 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition (Law Number 5 Year 1999), particularly article 35 point f, the Commission for the Supervision of Business Competition (the Commission) has a task to prepare guidelines and/or publications related to the Law. One of these is the guidelines for implementation of articles in Law Number 5 Year 1999 with an objective to provide the same understandings to the stakeholders of Law Number 5 Year 1999.

As the part of the efforts, the Commission prepares the guidelines for implementation of article 5 (five) which provides for the prohibited behaviors in term of price fixing by business competitors. These guidelines are expected to be able to provide understandings to all stakeholders.

As noted, price fixing is a behavior strictly prohibited in the development of competition regulation. It is because price fixing always produce prices much higher than that achieved through fair business competition. Higher price will obviously inflict a loss to the society, either directly or indirectly.

In the handling of cases on price fixing at some parts of the world, evidentiary efforts of such behavior continuously develops, not only through hard evidence, but also circumstantial evidence. It occurs due to the fact that it is more difficult to find out hard evidence as the presence of competition supervisory institution has been considered to be factor to be considered by business actors in avoiding things related to the hard evidence. However, the circumstantial evidence shall be used in the evidentiary principles as regulated in Law Number 5 Year 1999.

In considering of some matters above, these guidelines try to accommodate the current developments with an expectation that the same understanding on the implementation of Law Number 5 Year 1999 can be achieved.

CHAPTER II

OBJECTIVES AND SCOPES OF THE GUIDELINES

2.1. Objectives of Preparation of the Guidelines

As regulated in Article 35 point f, the Commission has a task to prepare guidelines and/or publications related to Law Number 5 Year 1999. The guidelines are required to provide clearer description on the provisions set out in Law Number 5 Year 1999.

Therefore, the Guidelines for Article 5 concerning Prohibition of Price Fixing (hereinafter referred to as "the Guidelines"") aim at :

1. Providing a clear and precise meaning of prohibition of price fixing as referred to in Article 5 of Law Number 5 Year 1999.
2. Providing same understandings and clear directions in the implementation of Article 5.
3. Being used by all parties as a basis for code of conducts that does not violate Article 5 of Law Number 5 Year 1999 .
4. Providing understanding on the approaches used by the Commission in assessing agreements on Price Fixing.

2.2. Scope of Guidelines

The Guidelines briefly outline several matters in order that stakeholders are able to understand the definitions in article 5. Systematically, these Guidelines include:

Chapter I Background

This chapter describes the background and urgency of the preparation of the Guidelines on Article 5.

Chapter II Objectives and Scope of Guidelines

This chapter describes the objectives of the preparation of the Guidelines and things included in the Guidelines.

Chapter III Article 5 concerning Prohibition of Price Fixing

This chapter describes elaborations of the elements contained in Article 5 and its relevance to other articles.

Chapter IV Price Fixing and Case Samples .

This chapter elucidates the concept of Price Fixing and approach which may be applied in analyzing the impacts of Price Fixing and some case samples.

Chapter V Rules of Sanctions

This chapter details a number of sanctions which may be imposed by the Commission against any violation of Article 5 of Law Number 5 Year 1999.

Chapter VI Closing

The systematics and language of the Guidelines have been made as simple and clear as possible to be understood, thereby making it easier for each person or party to understand applicable regulations and to avoid legal uncertainty in the enforcement of Law Number 5 Year 1999.

CHAPTER III
SCOPE AND ELUCIDATIONS OF ELEMENTS CONTAINED IN ARTICLE 5

3.1. Article 5 concerning Price Fixing

Law Number 5 Year 1999 prohibits business actors from conducting Price Fixing in Indonesia. It is stipulated in Article 5 of Law Number 5 Year 1999, as follows:

(1) "business actors shall be prohibited from entering into agreements with their business competitors to fix the price of certain goods and or services payable by consumers or customers on the same relevant market".

(2) "the provisions intended in paragraph (1) shall not be applicable to the following:

a. an agreement entered into in the context of a joint venture; or

b. an agreement entered into based on the prevailing laws".

3.2. Elaboration of Elements of Article 5

1. Element of Business Actors

   As referred to in Article 1 paragraph 5 of the General Provisions of Law Number 5 Year 1999, business actors shall be "any individual or business entity, either incorporated or not incorporated as legal entity, established and domiciled or conducting activities within the jurisdiction of the Republic of Indonesia, either independently or jointly based on agreement, conducting various business activities in the economic field".

2. Element of Agreement

   As referred to in Article 1 paragraph 7 of the General Provisions of Law Number 5 Year 1999, agreement shall be "the action of one or more business actors for binding themselves to one or more other business actors under whatever name, either in writing or not in writing".

3. Element of Business Competitors

   Business competitors shall be other business actors in the same relevant market.

4. Element of Market Price

Price shall be the cost which shall be paid in a transaction of goods and services in accordance with agreement between the parties at the relevant market .

5. Element of Goods

As referred to in Article 1 paragraph 16 of the General Provisions of Law Number 5 Year 1999, goods shall be “any physical objects, either tangible or intangible, movable or immovable, which may be traded, used, utilized or exploited by consumers or business actors”.

6. Element of Services

As referred to in Article 1 paragraph 17 of the General Provisions of Law Number 5 Year 1999, services shall be “services in the form of work or performance traded in society to be utilized by consumers or business actors”.

7. Element of Consumers

As referred to in Article 1 paragraph 17 of the General Provisions of Law Number 5 Year 1999, consumers shall be “every user and or utilizer of goods and or services, both for personal use as well as for the interests of other people”.

8. Element of Relevant Market

As referred to in Article 1 paragraph 10 of the General Provisions of Law Number 5 Year 1999, relevant market shall be “the market related to a certain marketing scope or area by business actors for goods and or services of the same or similar type or substitutes for such goods and or services”.

9. Element of Joint Venture

Joint company shall be a company established under agreement by two (2) parties or more to execute economic activities jointly, in which the parties agree to share profits and bear losses proportionally as agreed.

3.3. Other Relevant Articles

In Law Number 5 Year 1999, there are some articles closely relevant to the practice of Price Fixing. Those articles are among others as follows:

1. **Article 8 shall read :**

   Business actors shall be prohibited from entering into agreements with other business actors setting forth the condition that parties receiving goods and or services shall not sell or resupply goods and or services received by them, at a price lower than the contracted price, potentially causing unfair business competition.

   Arrangement in article 8 shall be applicable for horizontal agreements (among competitors) or vertical agreement with subsidiaries. In the case of horizontal agreement, it is in the contrary to article 5. Resale price maintenance in practice has frequently facilitated collusion, one of its form is price fixing.

2. **Article 9 concerning Division of Territory shall read :**

   Business actors shall be prohibited from entering into agreements with their business competitors which have the purpose of dividing marketing territory or allocating the market for goods and or services, potentially resulting in monopolistic practices and or unfair business competition.

   Either article 5 or article 9 actually illustrates the forms of cartel practice. However, article 5 specifically provides for the price fixing, meanwhile article 9 regulates the division of territory. It is not impossible that division of territory will be in practice followed by the price fixing.

3. **Article 11 concerning Cartel shall read :**

   Business actors shall be prohibited from entering into agreements with their competing business actors, with the intention of influencing prices by arranging production and or marketing of certain goods and or services, which may result in monopolistic practices and or unfair business competition.

   In essence, Article 5 also regulates about cartel, but is in term of price fixing. Meanwhile, article 11 provides for the cartel in the production and marketing with final objective to influence the price. So, if article 5 regulates directly about

prohibition of price fixing, then article 11 provides for the cartel of production and marketing which will gradually influence the prices of products.

4. Article 16 concerning Agreements with Foreign Parties

Business actors shall be prohibited from entering into agreements with foreign parties setting forth conditions that may result in monopolistic practices and or unfair business competition.

Relevance between article 5 and article 16 is that it is very possible that agreement on price fixing is one of the forms of agreement with foreign parties.

5. Article 26 concerning Multiple Positions shall read :

A person concurrently holding a position as a member of the Board of Directors or as a commissioner of a company, shall be prohibited from simultaneously holding a position as a member of the Board of Directors or a commissioner in other companies, in the event that such companies:

a. are in the same relevant market; or

b. have a strong bond in the field and or type of business activities; or

c. are jointly capable of controlling the market share of certain goods and or services, which may result in monopolistic practices and or unfair business competition.

Relevance of article 5 and article 26 is that the behavior of price fixing as regulated in article will be easier if there are multiple positions at the competing companies. Multiple positions will facilitate the process of price fixing as regulated in article 5.

6. Article 27 concerning Share Ownership shall read :

Business actors shall be prohibited from owning majority shares in several similar companies conducting business activities in the same field on the same market, or establishing several companies with the same business activities on the same market, if such ownership causes:

a. one business actor or a group of business actors to control over 50% (fifty per cent) of the market share of a certain type of goods or services;

b. two or three business actors or a group of business actors to control over 75% (seventy-five per cent) of the market share of a certain type of goods or services.

Relevance of article 5 and article 27 is that the price fixing will be easier if there is cross ownership between business actors who should be competing. Arrangement will be easier among companies which are on the same owner.

The Commission may apply Article 5 either in the alleged single violation of the article or the violation of other articles as enumerated above as alleged multi-articles violation.

CHAPTERS IV
PROHIBITION OF PRICE FIXING
AND CASE SAMPLES

4.1. Concept and Definition

In the literature of economics, the price fixing between competing companies at the market is one of the form of collusion. The collusion refers to a situation in which companies at the market coordinate their actions which are aimed at gaining higher profits.

Coordination in the collusion is used to agree on some matters, among others, as follows :

1. Agreement to fix certain prices higher than that achieved through competition mechanism ;
2. Agreement to fix certain quantity lower than that in the competition status;
3. Agreement on division of market.

In a competitive condition, price fixing is a consequence of the fixing of the production quantity or output. The output produced by a company is specified in such quantity that such company is able to earn maximum profit. This maximum profit is based on the company's production cost and condition of demand. In the terminology of economics, this condition will be achieved when additional sale of a unit of the output equal with the additional cost to produce another unit of the product.

Therefore, a company which is able to produce more efficiently will be able to fix lower prices from its competitors. With the presence of competition in term of efficiency of production cost, the price at the market will be lowered.

With the decreased prices in the market, the level of profits of the firms competing in the marketplace will also decrease. The decreased profits make the firms in the market to be motivated to agree **not** to carry out price competition.

Therefore, the firms existing in the market then enter into agreements to fix the prices for goods and or services at certain levels (which are far above production costs) to maintain or increase mutual profits. The profits earned by the firms entering into the agreements will be higher than those earned when they compete with one another.

4.2. Rationality of Prohibition of Price

Price fixing is one of the violations against competition law since the acti to enter into a price fixing agreement will directly eliminate competition that inevitably should have been occurring among firms in the market. Under the competitive conditions, prices will be driven down close to production costs and production quantities in the market will also increase.

When the prices get down close to production costs, the market will become more efficient so that welfare will improve *(welfare improvement).* However, when the firms undertake to enter into a price fixing agreement, the prices will increase far above the production costs. These increased prices are achieved by way of limiting *the outputs* of each company entering into the agreement. The increased prices and decreased production will reduce consumers' welfare *(consumer loss)* since they shall spend for goods and or services with higher prices and less amounts/quantities. In addition, the welfare in the market will also decrease (*welfare loss)* due to reduced quantities of goods and or services in the market.

Therefore, the absence of competition due to price fixing undoubtedly violates the competition law since this harms consumers and the economy as a whole.

4.3. Provisions on Prohibition of Price Fixing

4.3.1. Article 5 paragraph (1) of Law Number 5 Year 1999

Paragraph 1 article 5 of Law Number 5 Year 1999 stipulates that business actors shall be prohibited from entering into agreements with their business competitors to fix the price of certain goods and/or services payable by consumers or customers on the same relevant market. There are some matters to be observed in relation to the above statement.

1. **Agreements to Fix the Price**

   Pursuant to the concept stated above, price fixing is one of the form of **agreements** on collusion. Therefore, price fixing which is prohibited pursuant to article 5 of Law Number 5 Year 1999 shall the price fixing derived from an **agreement**. Without any agreements, the same prices as set by a company and other companies cannot be said to have violated article 5 of Law Number 5 Year 1999 .

2. **Between Business Actors and Business Competitors**.

Collusion is a type of elimination of competition among firms existing in the market. Without collusions, such firms are competitors against other firms. A competing firm is one that produces a close substitute from a product made by another firm. The relevant market indicates the limit or scope of degree of substitution of goods produced by the firm. Therefore, the violation of Article 5 of Law Number 5 Year 1999 occurs only if there is a price-fixing agreement among business actors existing in the same relevant market.

3. **Price payable by Consumers or Customers**.

Paragraph (1) states that a business actor shall be prohibited from entering into an agreement to fix the price of a product and or service. The price fixing meant here is not only a final price fixing but also an agreement to the price structures or schemes. In such a paragraph, the price fixing does not mean the fixing of the same prices. For instance, when the firms that have been collusive have the production with various different classes, the agreement to prices may be in terms of the agreement to the margin (disparity between price and production cost). Consequently, the prices in the market can be different for firms with different classes of production, but the margins obtained by the firms in the market will be the same.

In general, the forms of price fixing included in the regulation for prohibition of Article 5 of Law No.5 of 1999 are the following (but not limited to):

a. Agreements to increase or decrease the prices;
b. Agreement to use a standard formula as a basis of price determination;
c. Agreements to maintain a fixed comparison of the competing prices of a certain product;
d. Agreements to remove discounts and/or to offer the same discount;
e. Agreements on requirements in providing credits to consumers;
f. Agreements to ban products with lower prices from entering the market, thereby limiting the supplies and maintaining higher prices
g. Agreements on compliance to the prices announced ;
h. Agreements not to sell if the agreed prices are not fulfilled;

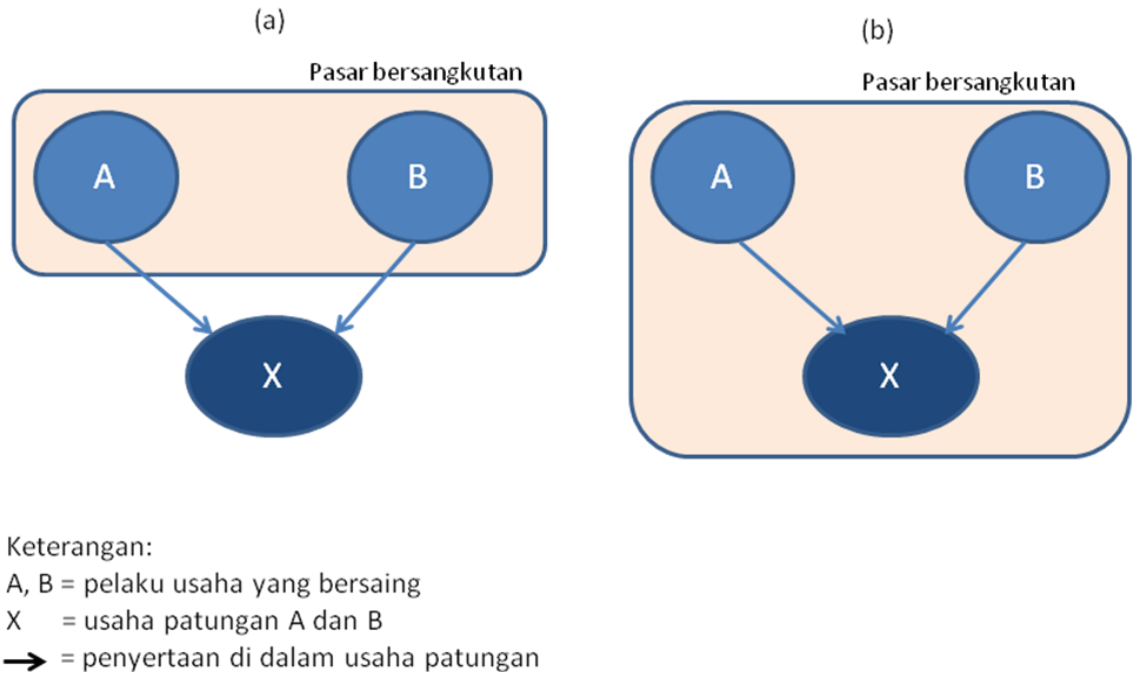
i. Agreements to use the same prices as initial step for negotiation;

4.3.2. Article 5 paragraph (2) of Law Number 5 Year 1999

Paragraph (2) article of Law Number 5 Year 1999 stipulates that agreement to fix the price as stated in paragraph (1) article 5 of Law Number 5 Year 1999 does not violate Law Number 5 Year 1999 if the agreement of price fixing is entered into in the context of a joint venture based on the prevailing laws.

Joint venture is an entity established by two or more business actors to undertake economic activities in which the parties agree to share profits and bear any loss proportionally pursuant to the agreement. The joint venture may be either temporary or continual.

The joint venture will be separate from its parent firm's business units (the parties entering into to an agreement). Accordingly, the prices and quantities of the joint venture are independent in term of the prices and quantities of its parent firm's business unit. Therefore, the price fixing made in a joint venture shows the prices of the joint venture itself and does not necessarily indicate the prices of its parent firm's business units. This does not indicate a violation of the competition law since it does not (directly) eliminate competition between the two parent firms. As an illustration, two types of joint venture can be described, namely (a) where the joint venture is in the relevant market different from its parent firm's market, and (b) where the joint venture is in the same relevant market as its parent firm's market.



Pasar bersangkutan = relevant market

Keterangan : Remarks

A,B = pelaku usaha yang bersaing = business competitors

X = usaha patungan A dan B = joint venture of A and B

→ = penyertaan dalam usaha patungan = participation in joint venture

Whatever the type of the joint venture (both a and b), the price fixing decision issued by the joint venture company X is the decision of a separate business entity, and can not be treated as a price-fixing agreement between business actors A and B. But it does not mean that the exception of the joint venture from the competition law is absolute. Even if the company X's prices are not included in the price-fixing agreement between firms A and B, but the joint venture can be made a facilitating device for firms A and B in carrying out coordination.

4.4. Evidence of Violations of Article 5

As previousy mentioned, theoretically the conduct in price fixing is a clear type of coordination committed by the firms in the market in order to get hold of collusive results. Accordingly, the perception on evidencing of the violation of Article 5 regarding Price-Fixing Agreement cannot be separated from the perception on the guidelines of Article 11 regarding Cartel.

To prove that there is any violation of Article 5 of Law Number 5 Year 1999, the proving of the existence of *an agreement* between independent business actors who are competing in fixing the prices for goods and or services is remarkably important. The business actors' conduct in Price Fixing in the market is committed in concert. The firm's action independent of another firm's conduct is not a violation of the competition law.

The type of a written agreement is not an obligation in proving the price-fixing agreement as expressly required in Paragraph (7) of Article 1 of Law Number 5 of 1999: "Agreement shall be the action of one or more business actors for binding themselves to one or more other business actors under whatever name, either in writing or not in writing".

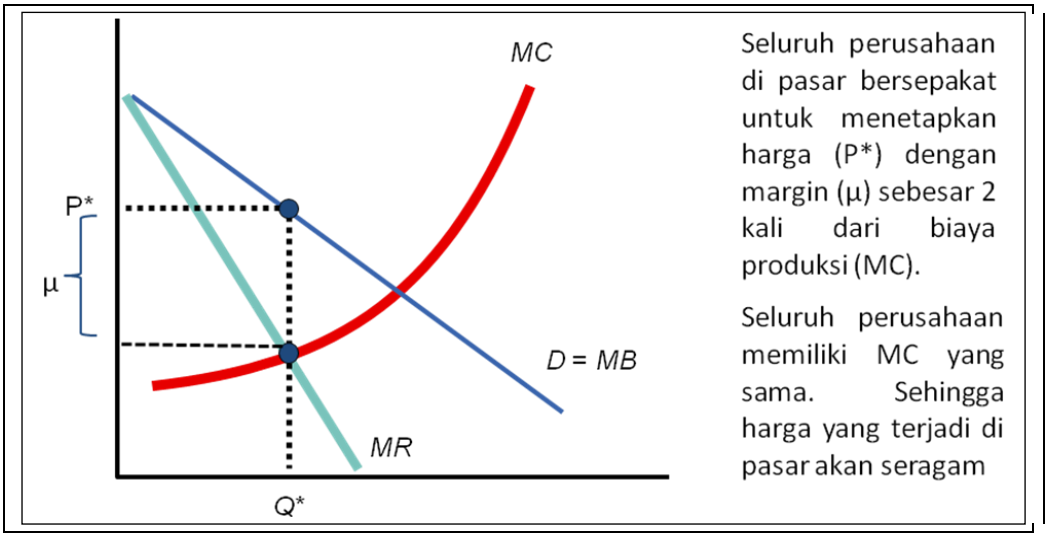
What is needed is evidence that the price fixing is mutually agreed upon and the business actors conform to the agreement. The pieces of evidence needed may be in terms of: i) direct evidence (hard evidence), and ii) indirect evidence (circumstantial evidence).

- **Hard evidence** is the evidence that can be observed (observable elements) and indicates the presence of agreement on price fixing of goods and/or services by competing business actors. In the hard evidence, there are agreements and substance of such agreements. Hard evidence may be in the form of facsimile print out, record of phone conversation, electronic mails, video communication and other observable evidence.

- **Circumstantial evidence** is a form of evidence that indirectly indicates that there are agreements on price fixing. This evidence can be use to provide of the occurrence of a condition which can be an allegation of execution of oral agreement. Circumstantial evidence can be in the form of : (i) communication evidence (but not directly state an agreement), and (ii) economic evidence. The objective of circumstantial evidence by using economic evidence is as an effort to waive the possibility of the behaviors of independent price fixing. A form of circumstantial evidence that is consistent with competition condition and collusion as well cannot prove that a violation of article 5 of Law Number 5 Year 1999 has occurred.

These guidelines will much emphasize on the understanding about the use of indirect evidence *(circumstantial evidence) as* an alleged agreement to fix the prices of goods and services committed by business actors in the market.

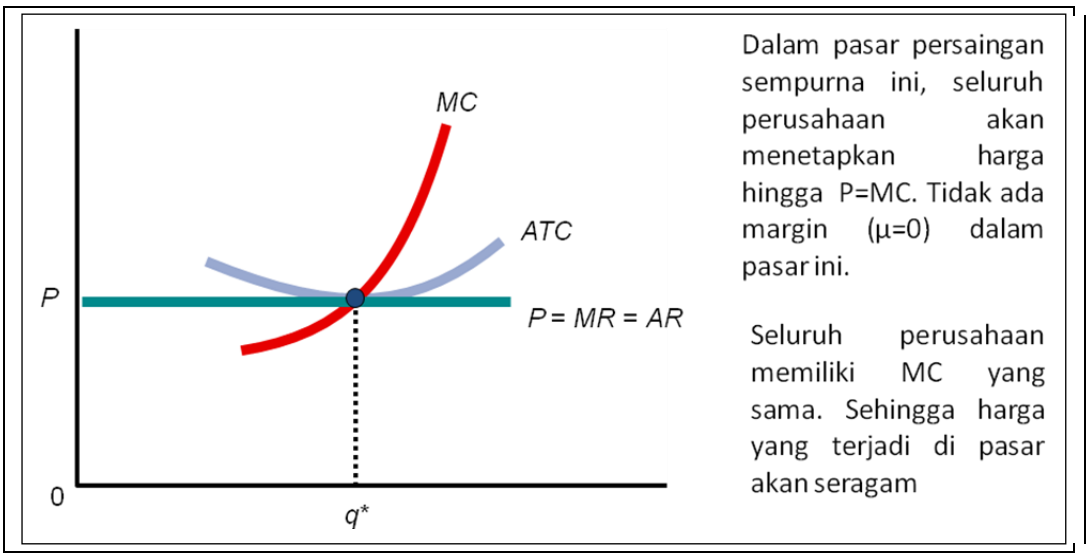
Since, the indirect evidence may refer to the conditions of competition and collusion concurrently, the evidencing in which a *parallel business conduct/strategy* has occurred cannot become sufficient evidence to declare the existence of the price-fixing agreement. An example of the indirect evidence consistent with the conditions of competition and collusion may be illustrated as follows. Suppose that some large firms in XYZ market decide to agree to impose a margin of twice of the production cost. If all firms involved in the agreement have the same production costs, the agreement will result in the same level of selling prices.



Seluruh perusahaan di pasar bersangkutan.... All companies at the market agree to fix the prices (P*) with margin (μ) of 2 times of the production cost .

Seluruh perusahaan memiliki .... All companies have the same MC, thereby the prices at the market are the same.

But, in another market, namely ABC, in which all firms compete intensively so that the pressure of competition forces each firm to charge the same prices as the production costs. Both markets are similar in generating parallel prices for firms in the market. The difference lies in the way in which, if in the market XYZ, the same prices occur due to collusion agreement, while at the ABC market, the same prices occur due to competitive conducts.



In this perfect competition market, all companies will fix the price up to P=MC. No margin (μ=0) in the market

All companies have the same MC, thereby the market price will be the same.

Consequently, additional analyses *(plus factors)* are required that may be used as indirect evidence to distinguish a *parallel business conduct* from an *illegal agreement.* Some required additional analyses are as follows, but not limited to:

- **Rationality of Price Fixing**

  There are at least two types of rationality that shall be proven. Firstly, there is a strong motive that the price-fixing agreement are favorable to one another *(joint profit);* for example, a market that is concentrated and experiences declining demands, the fixed costs and excess capacity are quite large at the same time. Secondly, there is a strong reason that the conduct of the price-fixing agreement is not contrary to the company's interests if it acts alone. For instance, without participating in a price-fixing agreement, a firm can gain the same or even higher profit than the agreement.

- **Analysis of Market Structure**

  An analysis of market structure is needed to describe whether the market conditions are more favorable to enter into any agreement or to compete. A number of aspects/elements of the market structure can be analyzed as follows:

  - **Product homogeneity.** An agreement to commit collusion will be more easily achieved if the products produced by business actors in the market have fairly close similarities. The greater the level of product differentiation is, the more difficult it is to reach a price-fixing agreement.

  - **Absence of close substitutes.** A collusive agreement would be more easily implemented if the business actors involved in the agreement to price fixing produce goods or services that do not have the closest substitute goods, since consumers do not have any other choices than to buy products from the business actors involved in the agreement.

- **Readily observed price adjustments.** The easier it is to obtain information on the price fluctuations made by the business actors, the greater the incentives are to enter into a price-fixing agreement. If this information is difficult and time-consuming to be known, there will be a tendency to commit a fraud (cheating) against a collusive agreement.
- **Standardized prices.** If a products traded in the market has a standard price, the price-fixing agreement would be easier to implement, whereas if a product does not have a standard price, the agreement on the price structure scheme becomes more difficult to be agreed upon and monitored in the event of a fraud/cheating.
- **Excess capacity.** In a market where firms cannot utilize all available capacities, the price-fixing agreement will be a profitable solution for the firms. Inefficiency arising out of excess capacity may be covered by the agreement to high prices.
- **Few sellers.** The fewer the number of firms in the market is, the easier it is to undertake coordination for the price-fixing agreement.
- **High barriers to entry.** The higher the level of barriers to market entry is, the greater the incentives are for firms in the market to commit the price-fixing agreement, since there is not any 'threat' from new firms that could derail the price-fixing agreement of the firms in the market (incumbents).

- **Analysis of Performance Data**

  This analysis is needed to prove whether the information on market performance represents an outcome *(outcome)* of coordination or an agreement. For example, the market performance indicating very high profits obtained by firms in the market or the price level is excessive *(excessive price)* that can not be explicated through the costs of inputs.

- **Analysis of Collusion Facilities (Facilitating Devices)**

  To ensure that the collusive agreements be executed and monitored, the business actors involved in collusion will use some devices to facilitate the

success of collusion. The devices commonly used include, but are not limited to:

- *Resale Price Maintenance (RPM).* This practice can be applied to minimize variations of prices at the consumer level.
- *Most-Favoured Nation (MFN) clause*. *Most-Favoured Nation (MFN) clause.* This practice can be applied to minimize the incentives in providing lower prices than the agreed-upon prices *(cheating).*
- *Meeting-Competition clause.* This practice is used to obtain information on price levels of other business actors on order to minimize incentives in committing any fraud.

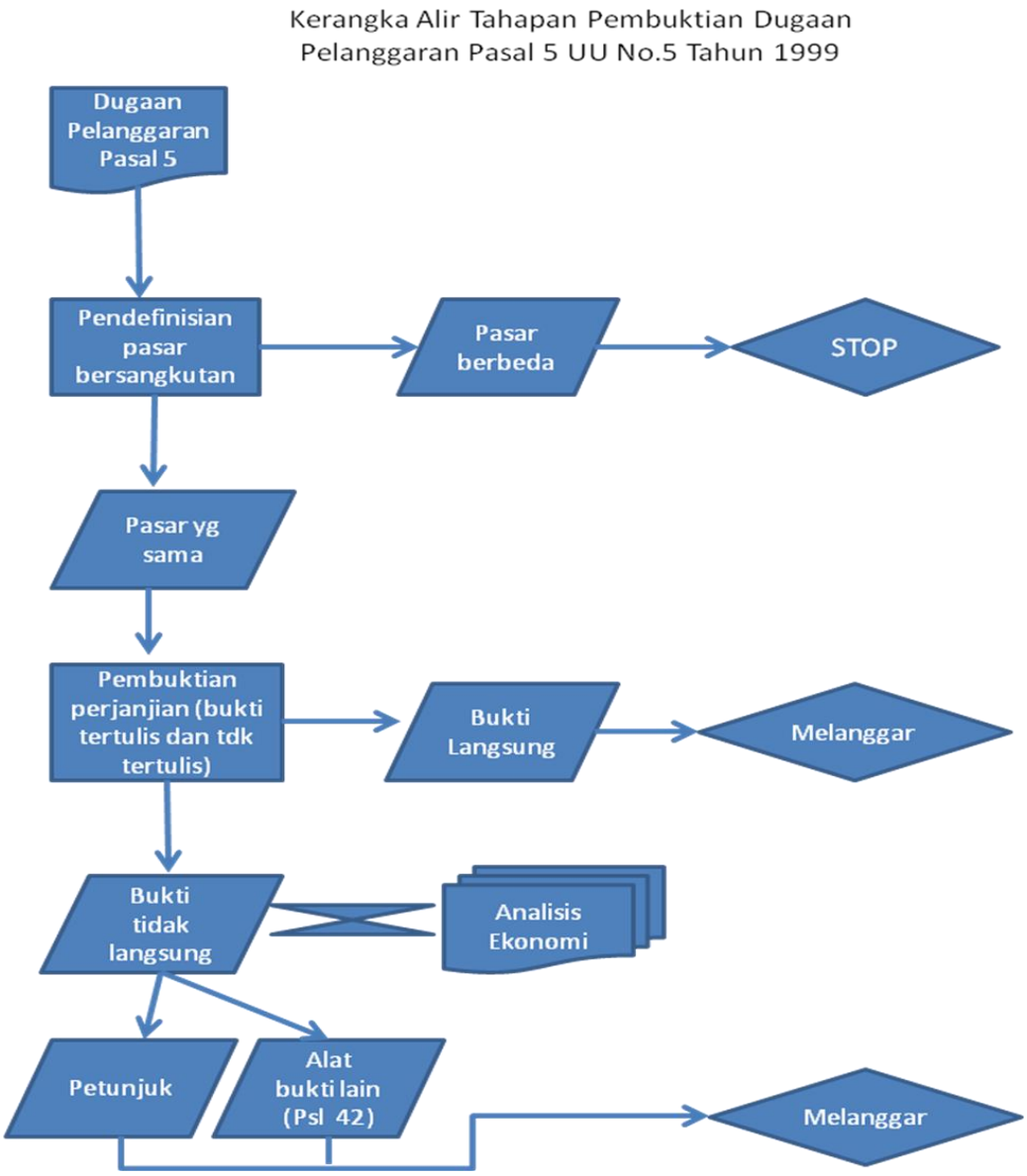
In an effort to prove, not all of the abovementioned additional analysis devices shall be met. The Commission may decide that a particular analysis device is sufficiently used to prove any violation of Article 5 of Law No.5 Year 1999. The best way of evidencing is to jointly use hard evidence and circumstantial evidence. But in a condition where hard evidence is difficult to obtain, the use of circumstantial indirect evidence should be applied carefully. The best use of circumstantial evidence is to combine the communications evidence and economic evidence.

The economic analysis in terms of the *plus factor* above must be interpreted as a whole and not separately. Although not all uses of additional analyses shall be met, but at least the economic analyses in use includes rationality analysis, structural analysis, performance analysis, and analysis of facilities for collusion.

In case an additional analysis *(plus factor)* supports the circumstantial evidence from price-fixing process, the circumstantial evidence could be made an instrument of evidence in terms of indication as referred to in Article 42 of Law Number .5 of 1999.

4.5. Evidence Process of Violation of Article 5

In carrying out efforts to prove the alleged violations of Article 5 of Law Number . 5 of 1999, the Commission will use several phases as illustrated in the following flow charts.



Kerangka air tahapan pembuktian dugaan... Flowchart of Evidence Phase of Alleged Violation of Article 5 Law Number 5 Year 1999

Dugaan pelanggaran Pasal 5 = Alleged Violation of Article 5

Pendifinisian pasar bersangkutan = Definition of relevant market

Pasar berbeda = Different market

STOP = STOP

Pasar yang sama = Same market

Pembuktian perjanjian (bukti tertulis dan tidak tertulis) – Evidence of agreement (written and oral)

Bukti langsung = Hard evidence

Melanggar = Violating

Bukti tidak langsung = Circumstantial evidence
Analisa ekonomi = Economic Analysis
Petunjuk = Indication
Alat bukti lain (Psl 42) = Other evidence (Art. 42)
Melanggar = Violating

The first stage to do is to prove that two or more business actors suspected of entering into a price-fixing agreement are in the same relevant market. The next stage is to prove the presence of any agreement among business actors suspected of committing any price-fixing agreement. In this stage, the use of indirect evidence (circumstantial evidence) becomes important when not any direct evidence (hard evidence) is found, stating that the agreement exists.

Indirect evidence sought for is the evidence of communications (but it indirectly states that there is an agreement) and economic analysis. The use of economic analysis devices becomes an important key to the use of the indirect evidence to prove the existence of an agreement. Economic analysis serves as a device to infer the presence of any coordination or agreement among business actors in the market. The plus factor analysis described earlier is basically an economic analysis which is required to:

- Prove whether a firm's conduct is rational even in the absence of collusion. It is needed in order to waive the possibility of any behavior consistent with the circumstances of competition.
- Prove whether the market structure supports the incidence of collusion.
- Prove whether market characteristics are consistent as a facility for collusion.
- Prove whether the market performance is an alleged price-fixing agreement.
- Compare a condition occurs arising out of a collusive agreement with the condition arising out of the competition.

The evidencing of the above economic analysis is used to conclude whether the market conditions are conducive to the success of collusion *(Prerequisites for Successful Collusion).* If yes, the indirect evidence can be used to infer the existence of coordination in the market so it can be indicative of a violation of Article 5 of Law Number5 Year 1999.

4.6. Case Samples

4.6.1 Decision of the Commission No.02/KPPU-I/2003 concerning Cargo Jakarta-Pontianak

This case was an initiative by the Commission after it previously carried out monitoring activities of the Business Actors of Special Sea Transportation for Goods from Jakarta to Pontianak (*Pelaku Usaha Angkutan Laut Khusus Barang Trayek Jakarta–Pontianak*). The Parties who were made the Reported Parties in this case since they entered into a Mutual Agreement to Charged Rates for Jakarta-Pontianak-Jakarta route (*Kesepakatan Bersama Tarif Uang Tambang Peti Kemas Jakarta–Pontianak–Jakarta*) were:

1. PT Perusahaan Pelayaran Nusantara Panurjwan (the Reported Party I)

2. PT Pelayaran Tempuran Emas, Tbk. (the Reported Party II)

3. PT Tanto Intim Line (the Reported Party III)

4. PT Perusahaan Pelayaran Wahana Barunakhatulistiwa (the Reported Party IV)

In the phase of examination, testimonies from the parties related to the case were obtained, and data and a number of documents and or pieces of evidence had been assessed; thereby the Assembly concluded that:

a. The Reported Party I, the Reported Party II, the Reported Party III and the Reported Party IV signed a Mutual Agreement to Charged Rates for Containers of Jakarta-Pontianak-Jakarta route (*Kesepakatan Bersama Tarif Uang Tambang Peti Kemas Jakarta–Pontianak–Jakarta*) No: 01/ SKB/ PNP-TE-WBK-TIL/ 06/ 2002 which was known and signed also by Memet Rahmat Kusrin as Chairman of Container Section of INSA Central Management Council (DPP INSA) and Jimmy A. B. Nikijuluw as Director of Sea Traffic and Transportation, Directorate General of Sea Transportation, Ministry of Transportation;

b. The Mutual Agreement to Charged Rates for Containers was an effort by the Reported Parties I and II in order to maintain the rates at a level where the Reported Party I and the Reported Party II could enjoy profit margins just as when they were in the duopolistic market structure;

c. The Mutual Agreement to Charged Rates for Containers was also an effort to prevent the more significant decline in market share and the Reported Parties I and II due to the imposition of the rates by the Reported Party III that were

lower than the rates of the Reported Parties I and II. The oligopolistic characteristics of the market structure has enabled the Reported Party I and/or II to condition the incidence of conspiracies among the business actors competing one another by involving the interventions of the Government and the INSA Central Management Council (*DPP INSA*);

d. The involvement of the Reported Parties III and IV in the signing of the Mutual Agreement to Charged Rates for Containers was more due to the anxiety of getting discriminatory treatments from the Government, in this case the Director of Sea Traffic and Transportation, Directorate General of Sea Transportation, Ministry of Transportation and the INSA Central Management Council (*DPP INSA*);

e. The Mutual Agreement to Charged Rates for Containers would never be effective if there was not any intervention from the Government or the Ministry of Transportation and the INSA Central Management Council (*DPP INSA*). In this case the form of government intervention that the Ministry of Transportation to give legitimacy to the Mutual Agreement to Charged Rates for Containers among the business actors competing one another on the relevant market of goods delivery service in containers by sea in ships with the Jakarta-Pontianak-Jakarta route can not be justified, since Law 21 No.21 Year 1992 regarding Shipping does not govern the government's authority to fix the charged rates;

f. The argument that the mutual agreement to avoid competition of rates or the occurrence of cut-throat competition can not be justified. In addition to reducing competition and eliminating the alternative rate options that will be offered by service providers in accordance with variations in service quality and the alternative rate options that will be selected by consumers according to their needs, this agreement would also be very detrimental to the relevant industry since the significant conditioning of *entry barriers* encumbers new business actors to enter the relevant market;

g. The Government intervention to ensure the survival of national shipping services business should be regulated through policies that do not conflict with the applicable laws.

In conformity with some examinations including those on economic aspects and exceptions, the Commission Assembly decided to Declare that the Reported Parties I, II, III, and IV were proven legally and convincingly to have violated Paragraph 1 of

Article 5 of Law No.5 Year 1999 and Affirm the cancellation of the agreement as set forth in the Mutual Agreement to Charged Rates for Containers of Jakarta-Pontianak-Jakarta route (*Kesepakatan Bersama Tarif Uang Tambang Peti Kemas Jakarta–Pontianak–Jakarta*) No.01/SKB/PNP-TE-WBKTIL/06/2002 signed on 26th June 2002 by the Reported Parties I, II, III, and IV as THE PARTIES and Witness II being Chairman of Container Section of the INSA Central Management Council (*DPP INSA*) as THE SUPERVISING PARTY and Witness I being Director of Sea Traffic and Transportation as THE FACILITATING/REGULATING PARTY, since the Agreement was contrary to Article 5 paragraph 1 of Law No.5 Year 1999.

4.6.2. Decision of the Commission No.03/KPPU-I/2003 concerning Cargo Surabaya - Makassar

Case No. 03/KPPU-I/2003 is an initiative case arising out from the Commission's finding results in the monitoring activities initiated by the publication of news in a newspaper concerning joint agreement on fixing of the sea cargo fees of Surabaya–Makassar. The agreement was based on the price discount by shipping companies serving Surabaya–Makassar–Surabaya route and the willingness of Pelindo IV to rise the THC/ port charge.

The agreement on fixing the cargo rate for the Surabaya-Makassar route was executed on December 23, 2002 signed by seven shipping companies, namely :

1. PT Pelayaran Meratus (Reported Party I)
2. PT Tempuran Emas Tbk. (Reported Party II)
3. PT (Persero) Djakarta Lloyd (Reported Party III)
4. PT Jayakusuma Perdana Lines (Reported Party IV)
5. PT Samudera Indonesia Tbk. (Reported Party V)
6. PT Tanto Intim Line (Reported Party VI)
7. PT Lumintu Sinar Perkasa (Reported Party VII)

The agreement stipulates among others the price fixing and quantity of loading-unloading quota of each shipping company. In addition, it also regulates about penalty mechanism which will be imposed in the case of any over quota ad if shipping company does not pay for the penalty, it will not get port facilities services from Pelindo IV Makassar Branch. The first phase implementation of the agreements commenced from January 1, 2003 to March 31, 2003.

Based on the results of examination, it is identified that the agreement on price and quota fixing had been in force but its implementation at the field was found ineffective as many shipping companies committed fraud by offering discounts to

their customers. When evaluation on the first phase implementation of the agreement, it was agreed to continue the price and quota agreement and not to impose sanction to the shipping companies which exceed the quota in the first phase implementation.

The implementation of the second phase agreement on price and quota only lasted for one (1) month as a meeting was held among shipping companies, INSA, Pelindo IV and Makassar Port Administrator on April 28, 2003 and it was agreed to revoke or annul such price and quota agreement.

After the Commission Assembly examined and analyzed all data and information obtained in the course of the aforementioned examination phases, the Commission Assembly decided that the seven shipping firms that signed the agreement have violated the provisions of Article 5 of Law No.5 Year 1999 regarding Price Fixing and decided to terminate the agreement on rates and quotas as set out in the Report of Business Meeting (*Berita Acara Pertemuan Bisnis*) at Hotel Elmi – Surabaya on 23rd December 2002.

4.6.3. Decision of the Commission No.08/KPPU-I/2003 concerning Survey Services for Sugar Import by PT Sucofindo dan PT Surveyor Indonesia

The *monitoring* activities undertaken by the Commission for the provision of services of technical verification or investigation of sugar imports by PT Superintending Company of Indonesia (Persero) and PT Surveyor Indonesia (Persero) become the initial stage for the examination of this case. The results obtained from the examination indicate a violation of paragraph (1) of Article 5, Law Number 5 Year 1999. .

Such an examination informed that PT Superintending Company of Indonesia / Sucofindo (the Reported Party I) and PT Surveyor Indonesia/SI (the Reported Party II) were appointed as the executing surveyor for technical verification or investigation of sugar imports by the Minister of Industry and Commerce through Decree No. 594/MPP/Kep/9/2004 dated 23rd September 2004. On 24th September 2004, PT Superintending Company of Indonesia (*Sucofindo*) and PT Surveyor Indonesia (*SI*) signed a Memorandum of Understanding [MoU] in the form of a Joint Operation (KSO) in which both firms acted as the executing agents for technical verification or investigation of sugar imports.

Through the Joint Operation (KSO), PT Superintending Company of Indonesia (*Sucofindo*) and PT Surveyor Indonesia (*SI*) fixed the amount of *surveyor fee* and offered it to sugar importers in socialization held 4 (four) times. The sugar

importers received the amount of the *surveyor fee* set by Sucofindo and SI since they had no other choices and were worried about finding it difficult to import sugar. In the carrying out of technical verification or investigation of sugar imports, the Joint Operation (KSO) issued a Survey Report (LS) to be made a document by the Directorate of Customs (*Direktorat Bea & Cukai*) in order to clear the goods from the customs area. Meanwhile, in the implementation of verification of sugar import in the country of origin of goods, Sucofindo and SI always appoint Societe Generale de Surveillance Holding SA, Geneva (SGS) as the overseas affiliate of SI and Sucofindo.

Such a variety of actions were then investigated any further, whether or not they had elements of unfair competition, as already indicated. After going through a series of investigations through the Commission's Decision No.08/KPPU-I/2005, the Commission Assembly decided to:

- Declare that Sucofindo and SI were proven legally and convincingly to have violated the provision of paragraph (1) of Article 5 of Law No.5 Year 1999;
- Order Sucofindo and SI to cancel the Memorandum of Understanding [MoU] between both parties regarding the Implementation of Technical Verification or Investigation of Sugar Imports, No. MOU-01/SP-DRU/IX/2004 (805.1/DRU-IX/SPMM/2004) on 24th September 2004 and stop all activities of Technical Verification or Investigation of Sugar Imports through the Joint Operation (KSO) not later than 30 (thirty) days as of the receipt of notification of this decision.

4.6.4. Agreements on Price Fixing of Salmon

For the example of this third case, a case will be illustrated in which this occurred in another country to demonstrate the use of the indirect evidence in price-fixing. In a salmon-producing area (Bristol Bay), the fishermen sold their catches of salmon to salmon-processing firms. The fishermen alleged that the firms purchasing and processing their catches of salmon had been committing a conspiracy to suppress the prices of salmon sold by the fishermen. While, the salmon-processing firms argued that the falling prices were due to the world market conditions.

The fishermen assisted by their legal advisor filed indirect evidence *(circumstantial evidence)* to declare the presence of a conspiracy or an agreement among the firms, namely in which the fishermen received the same price *(parallel price)* from the salmon-processing firms. Other pieces of evidence were the presence

of other agreements from the firms connected with the canning of salmon and the presence of common operational activities such as the use of the same warehouses among the firms.

Through the uses of information supplied by economic experts, the legal advisor for the fishermen presented an economic analysis showing that, in the salmon-producing areas, there was a sufficiently high concentration level of the firms; hence, this was vulnerable to collusion. Other economists suggest that other fish species living around the salmon-producing area were not substitutions of the salmon being sold by the fishermen, thereby the movement and *shock* in other fish markets would not impact on the salmon market in the area.

Although there was not any direct evidence stating the presence of the price-fixing agreement by the firms, competition authorities stated that the circumstantial evidence was sufficient to submit the case to the trial.

CHAPTER V
SANCTIONS

Pursuant to Law Number 5 Year 1999, the Commission is authorized to impose an administrative sanction against a business actor who violates the provisions of Article 5 as regulated in Article 47 paragraph (2). In addition, the violation of article 5 may also subject to the basic and additional criminal sanctions as set forth in Articles 48 and 49.

5.1 Administrative Sanction

Administrative sanctions may be imposed by the Commission in term of :

1. Article 47 point a
   stipulation on revocation of agreement as contemplated in Articles 4 to 13, Articles 15 and 16; and/or

2. Article 47 point c
   order to a business actor to stop its activity that has been proved to cause a monopolistic practice and/or unfair business competition and/or have been harmful to the interest of the society.

3. Article 47 point f
   stipulation on payment of a compensation; and/or

4. Article 47 point g
   imposition of a minimum fine of IDR.1,000,000,000 (one billion Indonesian Rupiah) and a maximum fine of IDR. 25,000,000,000 (twenty-five billion Indonesian Rupiah).

5.2 Basic Criminal Sanctions

In addition to administrative sanction that may be imposed by the Commission, violation of Article 5 shall be subject to criminal sanctions in accordance with the prevailing laws and regulations under conditions as regulated in article 48.

1. Article 48 paragraph (2)

Violation of the provisions of Article 5 to Article 8, Article 15, Article 20 to Article 24, and Article 26 of this Law shall be subject to the criminal sanctions of minimum IDR. 5,000,000,000 (five billion Indonesian Rupiah) and a maximum of IDR.25,000,000.000 (twenty five billion Indonesian Rupiah), or imprisonment as the fine substitute for maximum 5 (five) months.

2. Article 48 paragraph (3)

Violation of the provisions of Article 41 of this Law shall be subject to criminal sanctions of minimum IDR.1,000,000,000 (one billion Indonesian Rupiah) and a maximum of IDR.5,000,000.000 (five billion Indonesian Rupiah), or imprisonment as the fine substitute for maximum 3 (three) months.

5.3 Additional Criminal Sanctions

In addition to the basic criminal sanctions as set out in Law Number 5 Year 1999, it also sets forth additional criminal sanctions as regulated in Article 49, in term of :

a. revocation of business licenses;
b. prohibition for the business actor who has been proved to violate this Law in order to hold the position of either a director or a commissioner for a minimum term of 2 (two) years and for a maximum term of 5 (five) years, or
c. Cessation of a certain activity or action that causes another party to suffer a loss

CHAPTER VI
CLOSING

The guidelines for the implementation of Article 5 of Law Number 5 Year 1999 are prepared as an actualization of the performance of the tasks and authorities of the Commission in implementing Law Number 5 Year 1999.

Further, pursuant to the provisions of Article 35 point f of Law Number 5 Year 1999, the Commission has a task to prepare guidelines and/or publications for explanations to related parties concerning the Commission's consideration in applying the provisions of Article 5. Other guidelines and/or publication that may be prepared by the Commission in its development shall be further regulated in other provisions.

Finally, it is expected that the guidelines for Article 6 can provide legal certainty to business and improve the rationality of business actors not to commit monopolistic practices and unfair business competition.

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