

Challenges in Combating Cartels, 14 Years After the Enactment of Indonesian Competition Law

by

Sih Yuliana Wahyuningtyas*

CONTENTS

1. Introduction
 2. Cartel Prohibition in Indonesian Competition Law
 3. Commission for the Supervision of Business Competition (Kppu)
 4. Competition Law Enforcement Procedures
 - 4.1. Administrative Enforcement of Competition Law
 - 4.2. Criminal and Private Enforcement
 - 4.3. Administrative Procedures and Penalties
 5. Response to Challenges for Combating Cartels
 - 5.1. The Use of Indirect Evidence
 - 5.2. The Possibility to Implement a Leniency Programme
 6. Conclusion
- Acknowledgements

Abstract

Fourteen years after the enactment of Indonesian Competition Law, the public has had the chance to witness the enforcement practice of the Commission for the Supervision of Business Activities (the Kppu), the competition supervisory authority of Indonesia. Being recognized as an aggressive competition agency, the enforcement of Indonesian Competition Law seems to largely rely on the

* Post-doctoral researcher at KU Leuven – Interdisciplinary Centre for Law and ICT (ICRI)/Centre for Intellectual Property Rights (CIR) – iMinds; Lecturer and Researcher at Master Program of International Trade Law, Faculty of Law, Atma Jaya Catholic University of Indonesia, Jakarta, Indonesia, Email: yuli.wahyuningtyas@law.kuleuven.be, yuliasiswartono@yahoo.com.

discretion of the Kppu. However, a review needs to take place not only of how the competition authority accomplishes its tasks, but also how the enforcement process is outlined in the provisions of the Law itself. Around 72% of the cases dealt with by the Kppu concern bid-rigging, 14% cover other types of cartel practices, further types of anticompetitive conduct account for the rest. Despite being criticized as having excessive authority covering the function to investigate, prosecute, and make rulings, the Kppu faces problems in battling cartel practices because major legal flaws exist, for instance concerning collecting evidences. The discussion will be limited to the combat with cartels. Competition law enforcement through the Kppu is administrative in nature albeit with some criminal law influences (evidence). Although it is possible to enforce the law by means of criminal injunctions and private claims, they have rarely been used so far, mainly because Indonesian Competition Law lacks clarity. Problems with existing procedures are rooted in the Kppu's inability to obtain sufficient evidences. Two propositions are made how to deal with these difficulties – using indirect evidence and implementing a leniency programme, both based on existing Indonesian Competition Law or by amending the Law and inserting new provisions which would explicitly allow the use of both indirect evidence and a leniency programme.

Résumé

Quatorze ans après la promulgation de la Loi indonésienne sur la concurrence, le public a eu la chance d'assister à la pratique de l'application accomplie par la Commission pour la Supervision des activités commerciales (la KPPU), l'autorité de surveillance de la concurrence de l'Indonésie. Reconnu comme une autorité de la concurrence agressive, l'application de la Loi indonésienne de la concurrence semble se référer largement à la discrétion de la KPPU. Toutefois, un examen doit avoir lieu non seulement sur la façon dont l'autorité de la concurrence accomplit ses tâches, mais aussi la façon dont le processus d'application est décrite dans les dispositions de la Loi elle-même. Environ 72% des affaires traitées par la KPPU concernent des offres collusoires, 14% d'autres types de pratiques de cartel et encore d'autres types de comportement anticoncurrentiel compte pour le reste. En dépit d'être critiqué comme ayant autorité excessive couvrant des enquêtes, des poursuites, et des jugements sur les affaires de droit de la concurrence, la KPPU fait face aux problèmes relatifs à la lutte contre les pratiques de cartel, car les grandes failles juridiques existent, par exemple en ce qui concerne la collecte des preuves. La discussion sera limitée à la lutte contre les cartels. L'application de la loi de la concurrence par la KPPU est de nature administrative mais avec quelques influences provenant du droit pénal (preuves). Bien qu'il soit possible d'appliquer la loi au moyen d'injonctions pénales et des demandes privées, ils ont été rarement utilisées jusqu'à présent, à cause de manque de clarté par rapport au droit indonésien de la concurrence. Les problèmes avec des procédures existantes sont enracinés dans l'incapacité de la KPPU d'obtenir des preuves suffisantes. Deux propositions ont été faites sur la manière permettant de résoudre ces difficultés

- en utilisant des preuves indirectes et en mettant en œuvre un programme de clémence, tous les deux basés sur la Loi indonésienne actuelle sur la concurrence ou en modifiant la Loi et introduisant des nouvelles dispositions qui permettraient explicitement l'utilisation des deux preuves indirectes et un programme de clémence.

Classifications and keywords: Competition law; law enforcement; Indonesia; cartels

1. Introduction

Indonesian Competition Law entered into force in 2000, a year after it was signed and published as a response to both internal and external pressures¹. To answer the necessity to reform the national economy, two laws were enacted in 1999: Law No. 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Competition (hereafter, Indonesian Competition Law) and Law No. 8 of 1999 concerning Consumer Protection. This paper deals exclusively with Indonesian Competition Law.

Whilst the need for a competition law regime has been recognized in Indonesia as early as the 1980s, the political situation of the country did not make it possible for the enactment of national competition law earlier². The opportunity emerged when a domestic monetary crisis called for reforms, in particular in economic and legal fields. Rent seekers and unfair business practices were deemed responsible for the crisis. As a result, the reformation agenda in the legal field emphasized the establishment of a set of rules that would create a level playing field where fairness to compete would be protected³. In doing so, the Model Law on Restrictive Business Practices issued by UNCTAD (Rev 5)⁴ was used as a model, aside from looking at other jurisdictions, for instance US Antitrust rules, the German Act against Restraints in Competition, and the Japanese Antimonopoly Act.

¹ M. Pangestu, H. Aswicahyono, T. Anas, "The Evolution of Competition Policy in Indonesia" (2002) 21 *Review of Industrial Organization* 213.

² D.J. Rachbini, *Cartel and Merger Control, OECD Global Forum on Competition*, CCNM/GF/COMP/WD(2002)6, 6 February 2002, available at [http://www.oalis.oecd.org/oalis/2002doc.nsf/3dce6d82b533cf6ec125685d005300b4/ce581da03ad9f490c1256b580052d300/\\$FILE/JT00120421.PDF](http://www.oalis.oecd.org/oalis/2002doc.nsf/3dce6d82b533cf6ec125685d005300b4/ce581da03ad9f490c1256b580052d300/$FILE/JT00120421.PDF), p. 3.

³ See the background of the introduction of Indonesian competition law in S.Y. Wahyuningsih, *Unilateral Restraints in the Retail Business: A Comparative Study on Competition Law in Germany and Indonesia*, Munich Series on European and International Competition Law, Vol. 27, Bern Stämpfli Publisher 2011, pp. 86 ff.

⁴ United Nations Conference on Trade and Development, *Continued Work on the Elaboration of A Model Law or Laws on Restrictive Business Practices*, TD/B/RBP/81/Rev.5, 20 February 1998.

Among the anticompetitive conducts prohibited by Indonesian Competition Law, cartel practices have become prominent. They have mostly taken the form of bid rigging, which very often involved corruption by public officials. Indonesian Competition Law carried therefore in its early years the additional expectation of helping eradicate corruption in the country. After the enactment of Law No. 30 of 2002 concerning the Corruption Eradication Commission, the border between combating anticompetitive conduct and combating corruption became clearer. While the Anticorruption Commission (*Komisi Pemberantasan Korupsi – Kpk*) deals with corruption cases involving state officials, the Commission for the Supervision of Business Activities (*Komisi Pengawas Persaingan Usaha – Kppu*) deals with anticompetitive conduct of private business actors, in this regard bid rigging⁵.

2. Cartel Prohibition in Indonesian Competition Law

The prohibition of anticompetitive conduct encompassed by Indonesian Competition Law is divided into three groups each set in a separate chapter. Chapter III (Article 4–16) deals with prohibited agreements, Chapter IV (Article 17–24) covers prohibited activities, and Chapter V (Article 25–29) prohibits the abuse of a dominant position. The last chapter also includes provisions on merger control.

The provisions of Indonesian Competition Law do not specifically define the term “cartel”. However, the term “cartel” is used as the heading of the prohibition of production and distribution cartels in Article 11⁶. The use of the term “cartel” in the heading is not entirely correct because the term is essentially broader than the specific type of cartel actually prohibited in Article 11. Considering the content of the prohibited agreements provided for in Articles 4–16, all agreements should fall under the term “cartel”. Moreover, this term should also cover prohibited conspiracies covered by Articles 22–24, which in the structure of Indonesian Competition Law are instead listed under the prohibition of certain activities.

⁵ United Nations Conference on Trade and Development, *Volunteer Peer Review on Competition Policy: Indonesia*, New York-Geneva United Nations 2009, 1-36, p. 4.

⁶ Art. 11 of Indonesian Competition Law reads: “Undertakings are prohibited from making any agreements with their competitors with the intention to influence the price by determining the production and/or the marketing of goods and/or services that can result in monopolistic practices and/or unfair business competition.” See unofficial English translation in K. Hansen, et.al., *Undang-undang Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat*, Revised edition, Jakarta Katalis 2002.

The definition of the term “cartel” can be found in Kppu Regulation⁷ No. 4 of 2010 concerning the Guidelines on Article 11 of Indonesian Competition Law as: “a cooperation of a number of competing undertakings to coordinate their activities in order to control the volume of production and the prices of goods and or services to gain a profit above reasonable profit”⁸.

Based on the wordings of the aforementioned Kppu Regulation, the Guidelines cover a broader scope than the prohibition of Article 11 of the Law itself. While Article 11 prohibits “any agreements”, the Guidelines prohibit any “cooperation ... to coordinate”. The term “agreement” refers to all kind of meeting of the minds between actors, which means that it does not have to be written and it could take any form of meeting of minds. However, in some cases, it is not easy to determine whether such meeting of minds has taken place⁹. For example, it is problematic to prove the occurrence of a meeting of minds in concerted practices and distinguish the events for instance from an act of following a market trend. Another difficulty is to conclude whether or not there is a meeting of minds when members of association follow the decision of the association. Sometimes they do it because it is the obligation as members to follow any decision of the association without the members having actually been willing to agree on it¹⁰. The application of Article 11 to concerted practices and decisions of associations based on the above argument have not been challenged in practice¹¹. It seems, nevertheless, that the Kppu intends to clarify the enforcement of that provision by providing such a broad

⁷ Kppu Regulation has a similar function to an act of soft law, provides guidelines and interpretation of certain provisions of Indonesian Competition Law and binds Kppu only internally. Thus, it does not have a binding character for courts, for example.

⁸ Kppu Regulation No. 4 of 2010, p. 8.

⁹ Indonesian Civil Code requires a consensus as one of the elements of an agreement (Art. 1320). A consensus is understood as a meeting of minds or wills between parties. There is no valid consensus according to the Indonesian Civil Code Article, when such willingness to agree is given due to oversight, coercion, or fraud (Art. 1321).

¹⁰ Compare to Art. 101 TFEU where cartel covers “...all agreements between undertakings, decisions by associations of undertakings and concerted practices...”. See also the distinction between agreements between undertakings and decisions by associations of undertakings in E.J. Mestmäcker, H. Schweitzer, *Europäisches Wettbewerbsrecht*, München, C.H. Beck 2004, § 9 Margin No. 10, p. 244, and the distinction between agreements between undertakings and concerted practices in K.W. Lange, *Europäisches und Deutsches Kartellrecht*, Frankfurt am Main Recht und Wirtschaft 2006, p. 62; E.J. Mestmäcker, H. Schweitzer, *Europäisches...*, op. cit., § 9 Margin No. 18, p. 248.

¹¹ However, there are already some cases concerning an abuse of association for cartel practices, for instance the case of *Electricity Association* (DPP AKLI, an association of Indonesian electricity and mechanical contractors), KPPU Decision No. 53/KPPU-L/2008, concerning an infringement against the prohibition of market allocation in Article 9 of Indonesian Competition Law.

definition of the term “cartel” in order to avoid doubts on the scope of the prohibition.

The Guidelines explain further that the term “cartel” in general covers any agreement or collusion or conspiracy by undertakings. More specifically, according to the Guidelines, the term includes price fixing, market allocation, bid rigging, consumer allocation¹², and other types of cartels¹³. Thus, the Kppu also believes that Indonesian Competition Law recognizes not only cartels prohibited in Article 11, but also other types of cartels, despite the Law using the term “cartel” only for the prohibition contained in Article 11.

This broad interpretation finds confirmation in another Regulation published a year later – Kppu Regulation No. 4 of 2011 concerning Guidelines on Article 5 of Indonesian Competition Law that prohibits price fixing. The latter Guidelines on Price Fixing explain that not only is price fixing (Article 5 of Indonesian Competition Law) a form of cartels but so is the prohibited agreement to control production and distribution in order to influence product prices¹⁴.

Cartel prohibitions in Indonesian Competition Law can be seen in the catalog below.

As shown in the catalog below, most cartel practices are not prohibited *per se* in Indonesia. This includes the prohibition contained in Article 11. However, price fixing is *per se* illegal, as it is considered a hard core cartel, not unlike in other jurisdictions¹⁵. For a rule of reason analysis, the Guidelines list six elements to examine the illegality of an alleged cartel:

- a. the occurrence of signs of the reduction of production or price increase;
- b. the nature of the respective cartel, whether it is a naked or ancillary cartel;
- c. the level of market power controlled by the cartel¹⁶;
- d. the efficiency level that might be resulted from practicing cartel;

¹² Price fixing, market allocation, bid rigging, and consumer allocation are considered as primary types of cartels according to the Guidelines.

¹³ Kppu Regulation No. 4 of 2010, p. 12.

¹⁴ *Ibidem*, p. 9.

¹⁵ Compare to the practice in the US Sherman Antitrust Act in E.G. Disner, *Antitrust: Questions, Answers, Law and Commentary*, Pennsylvania, American Law Institute/American Bar Association 2006, pp. 27–47; M.A. Utton, *Cartels and Economic Collusion: The Persistence of Corporate Conspiracies*, Cheltenham Edward Elgar 2011, p. 78; in the EU in D. McFadden, *Some Thoughts on Criminalizing Cartels*, Paper presented at the European Competition Day Budapest May 2011, available at <http://www.tca.ie/images/uploaded/documents/2011-05-30%20Some%20Thoughts%20on%20Criminalising%20Cartels.pdf>, pp. 7 ff.; International Competition Network, *Defining Hard Core Cartel Conduct*, ICN 4th Annual Conference, Bonn June 2005, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc346.pdf>, p. 10.

¹⁶ Compare to the application of the rule of reason in the U.S. Sherman Antitrust Act in E.G. Disner, *Antitrust...*, op. cit., p. 45. Consideration of market power is in line with the concept of the “*de minimis* rule” that excludes transactions involving businesses below a certain level of profit or market share which are not able to significantly affect the market. See F.J. Sacker,

- e. the occurrence of reasonable necessity¹⁷; and
- f. the balancing test to measure if the benefit from practicing cartel can justify the resulting loss¹⁸.

Table 1.
Catalog of Cartel Prohibitions according to Indonesian Competition Law

Type of Cartel	Provision	Approach
Price fixing	5	Per se illegal
Price discrimination	6	
Conspiracy to obstruct production and/distribution of competitors' products	24	
Oligopoly		Rule of reason
Selling below market price	7	
Resale price maintenance	8	
Market allocation	9	
Boycott	10	
Production cartel and distribution cartel	11	
Trust	12	
Oligopsony	13	
Vertical integration	14	
Closed dealings	15	
Anticompetitive agreements with foreign parties	16	
Market control with other undertakings	19	
Bid rigging	22	
Conspiracy to get confidential information of competitors	23	

The Kppu provides also guidelines on how to show the existence of a cartel. There are two main indicators applied by the Indonesian competition authority in this context. The first reflects certain structural factors that can be used as early indicators for the existence of a cartel:

- a. Market concentration level
- b. Company scale

A. Lohse [in:] K. Hansen, et. al., *Undang-undang Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat*, Revised edition, Jakarta Katalis, 2002, Art. 11, Margin No. 16, p. 214.

¹⁷ Compare to the concept of “legitimate business purposes” and “whether a lesser restraint could accomplish the same business purposes” for the application of the rule of reason in the U.S. Sherman Antitrust Act in E.G. Disner, *Antitrust...*, op. cit.

¹⁸ Kppu Regulation No. 4 of 2010, pp. 24–25.

- c. Homogeneity of products
- d. Multi market contact
- e. Stock and capacity of products
- f. Linkages of ownership
- g. Level of entry barriers
- h. Demand characters: regularity, elasticity, and change
- i. Buyer power¹⁹

The second indicator reflects behavioral factors including:

- a. Transparency and information exchange
- b. Price regulation and contracts²⁰

In this regard, it is also important to note that the Kppu has been aware of the danger of the misuse of associations for cartel practices²¹. Associations have been regarded as an important part of running the national economy. In many areas, associations are useful for practical reasons for instance, as they assist small undertakings. They can support their members in improving better packaging of their products in order to avoid the risk of transport damage and provide help in moving the products, bearing in mind Indonesia's peculiar geographical conditions and infrastructure problems. Associations can thus be very helpful for some naturally complex products such as cement.

3. Commission for the Supervision of Business Competition (Kppu)

The Indonesian Commission for the Supervision of Business Activities, the Kppu, was established according to Indonesian Competition Law Article 30 as an independent body²² authorized to supervise the implementation of Indonesian Competition Law²³. This independence means that the Indonesian competition authority shall not be under the influences of the Government or any other party including big undertakings or any organization in the society that possesses power over economic or political matters. Such independence also means that the Kppu is not subject to the opinions of the Parliament on the matters being dealt with by the competition authority. Its independence remains, despite the fact that the Kppu is obliged by the Law to regularly

¹⁹ Ibidem, pp. 20–22.

²⁰ Ibidem, pp. 22–23.

²¹ Forum Group Discussion on Trade Association organized by Kppu, Jakarta, 27 June 2012.

²² Indonesian Competition Law, Art. 30(2).

²³ Ibidem, Art. 30(1).

submit a report to the Parliament²⁴ and is liable to the President²⁵. In this context, the Kppu is considered to be a state auxiliary organ²⁶. This issue will be discussed further in the next sub chapter.

Implementing Article 34 of Indonesian Competition Law, the Kppu was established by way of the Presidential Decree No. 75 of 1999 which was later amended with the Presidential Decree No. 80 of 2008. The latter changed the parts of the original act dealing with the costs of the exercise of the tasks and plans of the competition authority, fostering state civil servants in the Kppu's Secretariat, and the remuneration of that Secretariat.

The Indonesian competition authority consists of seven Commissioners appointed and dismissed by the President upon the approval by the Parliament (*Dewan Perwakilan Rakyat – DPR*). The Commissioners are appointed for a 5 years term of office, which can be extended for an additional term. The newest Commissioners were appointed in December 2012 for the term of office 2012–2015²⁷.

4. Competition Law Enforcement Procedures

4.1. Administrative Enforcement of Competition Law

The existence of a state auxiliary organ under the executive authority, such as the Kppu, is permitted in the Indonesian state system in order to improve the performance of the executive power in a particular field. The role of this organ becomes prominent for at least two reasons: *first*, transition to democracy²⁸ introduces certain concepts²⁹

²⁴ A.F. Lubis, N.N. Sirait (eds), *HPU antara Teks dan Konteks*, Jakarta Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) GmbH 2009, p. 312.

²⁵ Indonesian Competition Law Art. 30(3).

²⁶ A.F. Lubis, N.N. Sirait (eds), *HPU...*, loc. cit.

²⁷ New Commissioners of Indonesian Competition Commission, available at <http://eng.kppu.go.id/new-commissioners-of-indonesian-competition-commission/>.

²⁸ J. Asshiddiqie, *Perkembangan dan Konsolidasi Lembaga Negara Pasca Reformasi*, Jakarta Konpress 2006, p. 24; I. Mexsasai, *Dinamika Hukum Tata Negara Indonesia*, Bandung Refika Aditama 2011, pp. 152–156.

²⁹ A new concept is for instance the concept of democracy in the economic field that assure free competition in order to guarantee equal opportunity for people to take part in the economic process. The term “free” competition is not always welcome in Indonesia and thus, is replaced by the term “fair” competition. Free competition is often associated with head to head competition that only allows big players to take over the power in the market and does not allow small players to actively take part in economic life. The concept of fair competition

and functions³⁰ that had not been recognized earlier in an authoritarian system. Even when such concepts and functions had in fact been recognized before, the government must still deal with the skepticism of the society³¹ seeing as the public is not certain that the government is sufficiently reliable to implement such concepts and to carry out such functions. In other words, the government has to regain the trust of the society that it will perform better in the reformation era than was the case before. This can be done by creating a new organ under the executive power that will be specifically responsible for the implementation of a particular concept and function³².

Second, in order to attain social welfare by means of implementing the law, the executive power needs support and reinforcement from a particular body established under its power with a specific task to back up the executive power in a certain field. This means that such body shall consist of experts in the respective field.

The Kppu is an administrative body. The logical implication of such realization is that its authority is also of an administrative character. This realization can be seen, for example in the sanctions that can be imposed by the Kppu on undertakings for violations of Indonesian Competition Law. Although penal sanctions and private injunctions are possible according to the Law, the Kppu is not authorized to impose them. The Kppu is only authorized to impose administrative sanctions as well as to issue guidelines and other acts concerning the implementation of Indonesian Competition Law. It is also allowed to further regulate the exercise of its powers and tasks³³.

The authority of the Kppu to issue Kppu regulations is justified by the function attached to an administrative body to make legal interpretation (*droit function*). Legal acts of an administrative body can be categorized into those to create and those to implement regulations. Furthermore, an Indonesian administrative law expert, Prajudi Admosudirdjo, makes a distinction between administrative discretion (*Beschiking*), planning, concrete norms, and pseudo legislation (*Pseudowetgeving*)³⁴. This concept can be traced back to the idea

contrasts the concept of centralistic economy that submits all power in the market to the hand of the state, including the function to fixing prices in the market.

³⁰ A new function being introduced is that of competition law to ensure that fair competition will be able to take place in the market, which will ultimately result in efficiency and consumer welfare. This function is not recognized in an authoritarian system.

³¹ See S. Sumawinata, *Politik Ekonomi Kerakyatan*, Jakarta Gramedia Pustaka Utama 2004, p. 16.

³² See A.F. Lubis, N.N. Sirait (eds), *HPU...*, op. cit., pp. 135–136.

³³ Presidential Decree No. 75 of 1999 as amended with President Regulation No. 80 of 2008 Art. 10.

³⁴ V. Situmorang, *Dasar-dasar Hukum Administrasi Negara*, Jakarta Bina Aksara 1989, pp. 101–103.

that in order to attain state welfare, the government has the power to take the initiative to solve the problems of its citizen. The right of the government to take such steps also includes the discretion to take necessarily measures to carry out its tasks³⁵. This concept is also recognized in the Indonesian administrative law system.

The implementation of the abovementioned concept can be observed in the Kppu's authority to create guidelines for the implementation of certain provisions of Indonesian Competition Law. However, if the interpretation of the said legal provisions provided for by the Kppu in the Guidelines is in fact too broad, it may result in legal uncertainty³⁶. This point finds its relevance in current discussions concerning how far the Kppu is authorized to define the substance of its guidelines. This issue is important, mainly because the Indonesian competition authority carries a heavy burden of responsibility to implement the Law which contains weaknesses in its provisions that make it difficult for it to be implemented. This consideration will be discussed in more detail below. In this sense, guidelines on how to interpret and implement specific provisions of the Law are very helpful.

In its function to enforce Indonesian Competition Law, the Kppu is authorized by the Law to investigate and to take decisions on whether an undertaking has violated Indonesian Competition Law. The authority can do so either on the basis of a report from the public or taking the action on its own initiative. In this regard, it is important to point out that despite its administrative character, the decision rendered by the Kppu are not decisions of an administrative body subject to Law No. 5 of 1986 concerning the Administrative Court as amended by Law No. 9 of 2004. This means that a decision of the Kppu on a competition law matter cannot be challenged before the administrative court. This view is supported by Supreme Court Regulation No. 3 of 2005 concerning Remedies Procedures for Kppu Decisions³⁷.

Instead, an objection³⁸ against a decision of the Kppu concerning a given competition law case can be submitted to a district court the jurisdiction of

³⁵ J. Ginting, "Perwujudan Fungsi Hukum Administrasi Negara dalam Negara dengan Prinsip Welfare State" (2010) 2(1) *Jurnal Moral dan Adil* 13; V. Situmorang, *Dasar-dasar...*, op. cit., pp. 96–97.

³⁶ See M. Lukman quoted by S.S. Panjaitan, "Makna dan Peranan Freies Ermessen dalam Hukum Administrasi Negara" [in:] S.F. Marbun (et. al.), *Dimensi-dimensi Pemikiran Hukum Administrasi Negara*, Yogyakarta UII Press 2001, p. 117.

³⁷ Supreme Court Regulation No. 3 of 2005 concerning Remedies Procedures for Kppu Decisions Art. 3.

³⁸ The term "objection" (*keberatan*) is used in this paper instead of "appeal" (*banding*), because in Indonesian law both have a different meaning and Indonesian Competition Law specifically uses the term "objection", although substantially it means lodging an appeal (in which case it is also possible to translate the word "*keberatan*" as an appeal in general).

which covers the legal seat of the alleged offender³⁹. Furthermore, in the objection case before the district court, the competition authority acts as a party (defendant) against the undertaking (plaintiff). This means that the position before the court of the Kppu is equal to that of the undertaking that lodged the objection⁴⁰. Interestingly, private law procedures apply instead of administrative procedures for objection cases before district courts in competition matter⁴¹. Accordingly, competition law cases are treated as private law cases before the appeal court. In the last instance, a cassation can be lodged before the Supreme Court and treated as special civil suit.

According to the Annual Report of the Kppu in 2012, objections were lodged against 86 Kppu decisions to the district court and 58 cassations were lodged to the Supreme Court. The competition authority won 56% of its cases in the district court and 76% in the Supreme Court. For this performance, the Kppu is recognized as an aggressive competition law enforcement agency⁴². The statistics are shown below⁴³.

Table 2.
Objection cases in the District Court

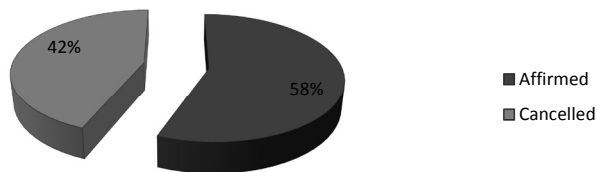
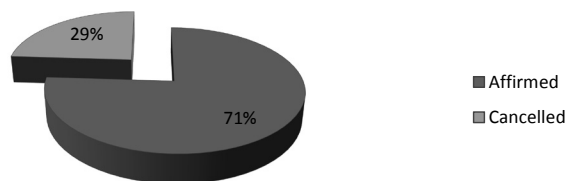


Table 3.
Appeal Cases in the Supreme Court



The use of the term is further regulated in the Supreme Court Regulation No. 2 of 2005 (*Peraturan Mahkamah Agung No. 2 Tahun 2003*). The term “objection” in this paper is thus to be distinguished from the generally speaking of the term used in court proceedings, where an attorney objects to a statement being made.

³⁹ Ibidem, Art. 2(1).

⁴⁰ Ibidem, Art. 2(3).

⁴¹ Ibidem, Art. 8.

⁴² United Nations Conference on Trade and Development, op. cit., p. 7.

⁴³ KPPU, *Laporan Kinerja Kppu 2012*, p. 11.

To supervise the enforcement of Indonesian Competition Law, the task of the Kppu is first of all to assess three issues: agreements, activities that potentially result in monopolistic practices and/or unfair competition, and dominant position. Merger issues are included in the assessment of dominance because mergers are seen from the perspective of the possibility to create dominance in the market and its abuses⁴⁴.

In dealing with competition law cases, the Kppu is authorized to take necessary measures⁴⁵ as shown in the table below.

Table 4.
Scope of authority of the Kppu according to Article 36 of Indonesian Competition Law

Action	Object
Receiving reports from the public or undertakings, making assessments, investigation and/or inquiry	Allegations of monopolistic practices and/or unfair competition
Drawing conclusion	The result from its investigation/inquiry on an allegation of monopolistic practices and/or unfair competition
Summoning	– Undertakings being suspected of violating Indonesian Competition Law – Witness, expert witness, and every person who might have knowledge of the alleged violation
Asking for assistance from police officer*	To present the suspect(s), witness, expert witness, and every person who might have knowledge of the alleged violation, if they do not voluntarily come after being summoned by the Kppu
Requesting information from government agencies	Matters related to the investigation and/or inquiry on undertakings being suspected of having violated the Law
Obtaining evidences, making an evaluation and/or assessment	Letters, documents, or other evidences for the purpose of an investigation and/or inspection
Taking a decision or resolution	The existence of damages on the part of other undertakings or the public
Notice to undertakings	Decision on the case
Impose penalties	Administrative penalties (according to Article 47 Indonesian Competition Law)

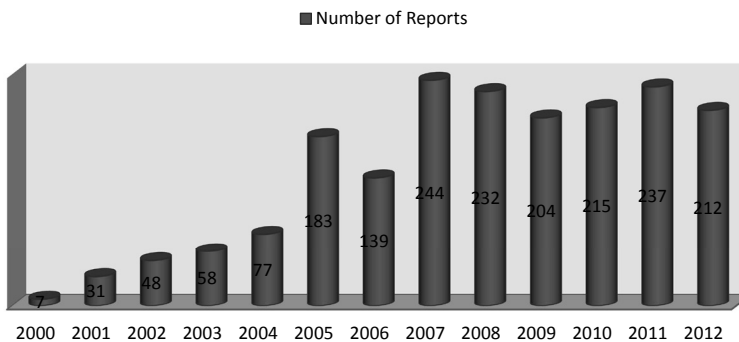
* The term used in the provision is “investigator” referring to Law No. 8 of 1981 concerning Procedural Criminal Law, according to which an investigator can be a police officer or a public servant, assigned by law to conduct an investigation.

⁴⁴ Indonesian Competition Law, Art. 35.

⁴⁵ Ibidem, Art. 36; also B. Nadapdap, *Hukum Acara Persaingan Usaha*, Jakarta Jala Permata Aksara 2009, p. 17.

Between 2000 and 2012, the Kppu has received 1887 reports on possible violations of Indonesian Competition Law.

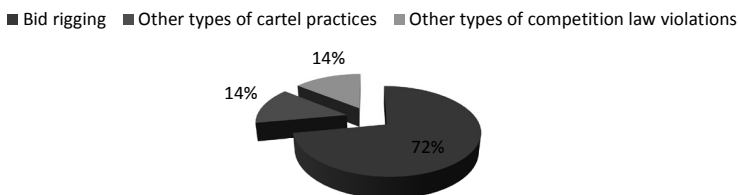
Table 5.
Number of reports to the Kppu on alleged violation of Indonesian Competition Law⁴⁶



157 cases being dealt with by the Kppu in this period of time have been bid-rigging cases – they amount to around 72% of the totally 218 cases⁴⁷. 30 out of those 218 (almost 14% cases) concern cartel practices other than bid rigging⁴⁸.

Table 6.
Bid-Rigging and other types of cartel cases dealt with by the Kppu between 2000–2013⁴⁹

Percentage of Cases



⁴⁶ KPPU, *Laporan Kinerja Kppu 2012*, p. 5.

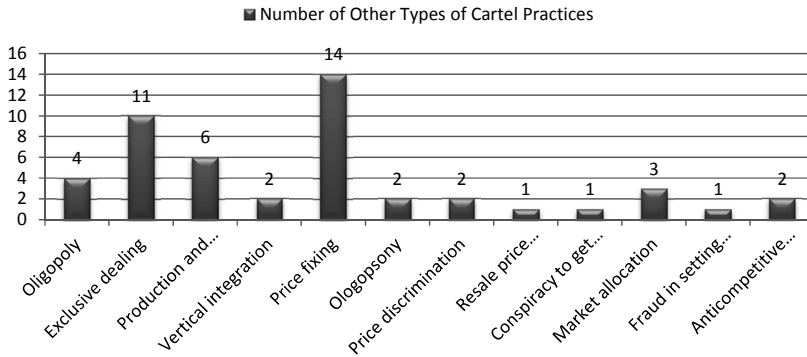
⁴⁷ E. Syahril, *Tanpa „Bintang Penghargaan’ KPPU Selamatkan Uang Negara*, *Majalah Kompetisi*, KPPU 27th Edition 2011, 1-36, p. 19.

⁴⁸ Five cases dealt until April 2006 with other types of cartels. See the list in S. Pompe, et.al. (ed.), *Ikhtisar Ketentuan Persaingan Usaha*, Jakarta The Indonesia Netherlands National Legal Reform Program (NLRP) 2010, pp. 47–48; KPPU, *Buku Penjelasan Katalog Putusan KPPU Periode 2000–2009*, 2009; the list of Kppu Decisions available at <http://www.kppu.go.id/id/putusan/>.

⁴⁹ The list of Kppu Decisions available at <http://www.kppu.go.id/id/putusan/>.

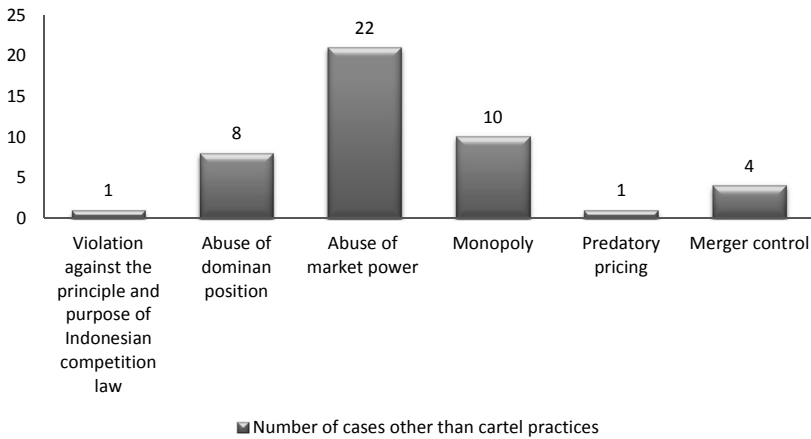
Other types of cartel practices are shown in the list below.

Table 7.
Cartel cases other than bid-rigging dealt with by the Kppu between 2000-2013⁵⁰



Other types of competition law violations are listed as follow:

Table 8.
Types of cases other than cartel practices dealt with by the Kppu between 2000–2013⁵¹



⁵⁰ Ibidem.

⁵¹ Ibidem.

4.2. Criminal and Private Enforcement

As described above, competition law enforcement by the Kppu follows an administrative procedure. In principle, violations of Indonesian Competition Law are regarded as administrative infringements. As such, operating/participating in a prohibited cartel is also considered an administrative violation, unlike in the US Antitrust Law where the Sherman Act sees the involvement in a cartel as a felony⁵². One of the consequences of using an administrative enforcement system for competition law violations in Indonesia is that the sanctions being imposed by the Kppu are also of an administrative character.

However, Indonesian Competition Law also provides for provisions which can be considered as entry points for possible criminal enforcement, although they have not yet been implemented in practice. It remains debatable, if criminal injunctions used in conjunction with administrative enforcement will not prove too burdensome for undertakings.

The first entry point is two provisions concerning criminal sanctions in Article 48⁵³ and 49⁵⁴ of the Law. However, the Kppu does not have the competence to impose criminal sanctions. Thus, filing a criminal case for a violation of Indonesian Competition Law shall be done according to Criminal Law Procedures. In this case, criminal charges shall be filed by public prosecutors before a district court. However, it is not clear from the above provisions whether the case shall be treated as an “offense complaint case” that requires a complaint from the injured party for the prosecution (like in

⁵² R.A. Posner, “An Economic Theory of Criminal Law” (1985) 85 *Columbia Law Review* 1215.

⁵³ Art. 48 of the Law reads: “(1) Violations against the provisions in Article 4, Articles 9–14, Articles 16–19, Article 25, Article 27 and Article 28 of this law are subject to a criminal fine in the amount of at least IDR 25,000,000,000 [around 1,600,000 EUR] and in the amount of IDR 100,000,000,000 [around 6,400,000 EUR] at the most, or imprisonment for a maximum period of 6 months. (2) Violations against the provisions under Article 5–8, Article 15, Articles 20–24, and Article 26 of this law are subject to a criminal fine in the amount of at least IDR 5,000,000,000 [around 320,000 EUR] and in the amount of IDR 25,000,000,000 [around 1,600,000 EUR] at the most, or imprisonment for a maximum period of 5 months. (3) Violations against the provisions under Article 41 of this law are subject to a criminal fine in the amount of at least IDR 1,000,000,000 [around 64,000 EUR] and in the amount of IDR 5,000,000,000 [around 320,000 EUR] at the most, or imprisonment for a maximum period of 3 months”.

⁵⁴ Art. 49 reads: “With reference to the provisions under Article 10 of the Criminal Code concerning a crime as referred to under Article 48 of the Law, additional criminal punishment might be added in the form of: a. revocation of a business permit; or b. prohibition for the undertakings who were proven to have violated this law to hold a position as a director or commissioner at least within a period of 2 (two) years and at the longest within a period of 5 (five) years; or c. termination of certain activities or actions that cause damage to other parties”.

the cases of intellectual property violations), or as a “normal criminal case”, for which police officers can start an investigation on their own initiatives.

The second entry point is filing a competition law case as a criminal case when, during the administrative proceedings before the Kppu, an undertaking fails to comply with the obligations to provide evidence, commits an obstruction of justice, or fails to carry out the decision of the competition authority, when the decision has become final and binding⁵⁵.

In practice, the criminal procedures have never been applied yet. Indonesian Competition Law does not clearly regulate the procedure to be used in such cases and this can result in uncertain implementation. In addition, criminal law enforcement bodies are not yet familiar with competition law violations in Indonesia. Enforcement through the Kppu, in the form of administrative enforcement, remains therefore more preferable in practice than criminal law enforcement.

Private enforcement is not mentioned in Indonesian Competition Law. However, there is no prohibition for filing a civil suit for damages according to the Indonesian Civil Code. The claim is possible on the ground of a wrongful act provided under Article 1365 of the Indonesian Civil Code, which reads: “[a] party who commits a wrongful act which causes damage to another party shall be obliged to compensate therefore.”

The application of private enforcement remains debatable until today⁵⁶. In practice, there is a reluctance to apply the procedure. However, a number

⁵⁵ Art. 41 of the Law reads: “(1) Undertakings and/or other parties being investigated shall be obligated to submit evidence required for the investigation and/or examination. (2) Undertakings are prohibited from refusing to be investigated, refusing to provide information required for the investigation and/or examination, or from hampering an investigation and/or examination process. (3) If there is any violation to the provision under Paragraphs (2) of this article, the [Kppu] shall assign investigators to conduct investigation pursuant to the applicable laws.

The sanction imposed for not carrying out a final decision of the Kppu is provided for in Article 44 of the Law: (1) Within a period of 30 (thirty) days counted from the date the undertakings receive notification of the [Kppu] decision as referred to under Article 43, Paragraph (4) above, the undertakings shall be obligated to carry out that decision and deliver the implementation report to the [Kppu]. (2) Undertakings may submit an objection to the District Court within a maximum period of 14 (fourteen) days upon receiving notification of the [Kppu] decision. (3) Undertakings who do not submit an objection within a period as referred to under Paragraph (2) of this article shall be regarded as to have accepted [Kppu] decision. (4) If provisions as referred to under Paragraph (1) and Paragraph (2) of this article are not carried out by the undertakings, the [Kppu] shall hand over the said decision to the investigators for investigation pursuant to existing law”.

⁵⁶ It is completely different from how private damages are vastly used as part of law enforcement against cartels in the US. This practice is supported by § 4 of the Clayton Act that provides for treble damages and attorney fees to the successful plaintiff. See H. Hovenkamp, *Roundtable on the Quantification of Harm to Competition by National Courts and Competition*

of class actions have already been filed to Indonesian district courts to seek private compensation based on a Kppu decision declaring that a violation of Indonesian Competition Law had taken place. Such actions were filed in the case of *Temasek*⁵⁷ and *Astro*⁵⁸.

4.3. Administrative Procedures and Penalties

The Kppu can start an investigation on an alleged competition law violation either based on a report from the public or from another undertaking, or on its own initiative. The procedure is provided for in Article 38-46 of Indonesian Competition Law. The Kppu has published its Guidelines on this matter in Kppu Regulation No. 1 of 2010.

In both types of cases, those initiated by a report and the authority's own initiative, the Kppu has 30 days to carry out its investigation from the day it announces that it had started a preliminary investigation. If preliminary evidences of a competition law violation are discovered within this period of time, the Kppu shall release a decree stating that an extended investigation has been opened. From that moment on, the authority has further 60 days to decide whether a violation of Indonesian Competition Law occurred. The second phase can be extended by a maximum of another 30 days.

When the case is based on a report, the Kppu is obliged to keep the confidentiality of the informant's identity⁵⁹ unless the informant seeks compensation by way of the administrative procedure, which is made possible according to the Law⁶⁰.

During the investigation, the Kppu is obliged to summon the alleged undertaking(s) and authorized by the Law to call witnesses, expert witnesses, and other parties relevant to the case. However, the authority does not have the power to conduct searches in the premises or offices of the alleged undertaking(s) or to initiate wire-tapping in order to get evidence of the alleged violation. This makes it difficult for the Kppu to prove the existence of a suspected violation, especially in hard cases such as cartels.

Agencies, OECD Directorate for Financial and Enterprise Affairs Competition Committee, DAF/COMP/WD(2011)19, 7 October 2011, available at <http://www.oecd.org/regreform/liberalisationandcompetitioninterventioninregulatedsectors/48849427.pdf>, p. 2.

⁵⁷ Kppu Decision in *Temasek* case No. 07/KPPU-L/2007; Class action filed under registration No. 111/Pdt.G/2008/PN.Jkt.Pst.

⁵⁸ Kppu Decision in *Barclays Premier League Broadcasting Rights 2007–2010 (Astro case)* No. 03/KPPU-L/2008; Class action filed under registration No. 472/Pdt.G/2008/PN-Mdn; A.F. Lubis, N.N. Sirait (eds), *HPU...*, loc. cit., pp. 346–348.

⁵⁹ Indonesian Competition Law, Art. 38(2).

⁶⁰ *Ibidem*, Art. 38(2) and Art. 47(2) lit. f.

With regard to types of evidence, the procedure is similar to criminal procedure where the purpose of proof is to find and verify the material truth, as opposed to the purpose of proof in civil law procedure which is to find and verify the formal truth⁶¹. For this purpose, Indonesian Competition Law recognizes five types of evidence: witness statements, expert witness statements, letters and/or documents, indications⁶², and statements by undertakings⁶³.

The authority must within 30 days of finishing its investigation arrives at a decision on whether a violation of Indonesian Competition Law had in fact taken place or not⁶⁴. That decision shall be read out in the trial which is declared open to the public and must be notified to the alleged offenders⁶⁵. In the absence of an objection, the addressee shall implement the decision within 30 days after they receive the notification⁶⁶.

Every legally binding decision of the Kppu requires a writ of execution from the Head of the district court⁶⁷, although it can also be voluntarily carried out by the undertaking concerned. This provision has become a contra argument against the opinion that the Kppu is a too powerful body due to the possession of several important functions given by the Law to investigate, prosecute, and make rulings. Such extensive authority has been criticized for the risk of being abused or used without control⁶⁸. This critic is also countered by the fact that the Kppu is not powerful enough to collect evidence.

If the undertaking neither lodges an objection nor implements a final and binding verdict of the Kppu, the authority has two options to execute it. *First*, it can force execution based on a writ of execution provided by a district court whereby the execution is similar to that of a civil suit case. *Second*, it can file the case for criminal enforcement as discussed above⁶⁹.

Against the verdict of the Kppu, the convicted undertaking can file an objection to a district court within 14 days after it receives the notification of the decision⁷⁰. The district court has 14 days after the objection is filed to investigate the case⁷¹ – it has a maximum of 30 days to rule on the case after

⁶¹ A.F. Lubis, N.N. Sirait (eds), *HPU...*, loc. cit., p. 365.

⁶² Further explained under section 5.1 concerning the use of indirect evidence.

⁶³ Indonesian Competition Law, Article 42.

⁶⁴ *Ibidem*, Art. 43(3).

⁶⁵ *Ibidem*, Art. 43(4).

⁶⁶ *Ibidem*, Art. 44(1) jo (3).

⁶⁷ *Ibidem*, Art. 46(2).

⁶⁸ See Sukarmi, *Pelaksanaan Putusan Komisi Pengawas Persaingan Usaha*, Jurnal Persaingan Usaha KPPU, 7th Edition 2012, p. 16.

⁶⁹ A.F. Lubis, N.N. Sirait (eds), *HPU...*, loc. cit., p. 342.

⁷⁰ Indonesian Competition Law, Article 44 par. (2).

⁷¹ *Ibidem*, Art. 45(1).

it receives the objection⁷². A cassation can be filed against the decision of the district court to the Supreme Court within 14 days⁷³. The Supreme Court shall decide on the cassation request within 30 days of receiving the application.

The penalties as provided for in Article 47 of the Law are administrative in their nature⁷⁴. There are three types of penalties provided for in this provision: a cease and desist order (and in merger cases, cancellation of the merger or takeover); and or an order for payment of compensation; and or an imposition of a fine of a minimum amount of IDR 1,000,000,000 [around 64,000 EUR] and maximum IDR 25,000,000,000 [around 1,600,000 EUR].

Although the Kppu can impose any of these penalties, it is clear from their substance and purpose that it is not possible not to impose the cease and desist order, since any proven violation against Indonesian Competition Law must be halted. However, it is possible for the authority to impose the cease and desist order without imposing a compensation order or a fine.

Among the above three types of penalty, the order for the payment of a compensation seems to be misplaced here because, by nature, this type of payment should be regarded as a penalty in civil suit procedures. While a fine is paid to the state treasury, compensation is paid to the injured party. This is why the identity of the party which reports an alleged competition law violation to the Kppu in order to seek compensation is no longer confidential. It has to be proven if the damages being claimed have actually occurred. It must also be clear who is entitled to the compensation.

Since compensation in this provision is regarded as administrative in nature, it is possible that an undertaking might have to pay administrative compensation and an administrative fine as well as be subject to civil damages claims. This can overburden the undertaking. It must be said therefore that the order to pay compensation should be removed from the list of Indonesian administrative penalties and left to civil suit procedures.

Another shortcoming of the above regulation lies in the fact that the amount of fines provided for in the Law⁷⁵ is, in fact, too small for big companies – so much so, that large companies can regard them as part of “operational” cost only. If the purpose of imposing fines is to remove the expected benefit from violating competition law, as long as the expected benefit remains larger than the expected cost (fine), such fine does not create a deterrent effect for the offender. The current amount of the Indonesian administrative fine is thus useful only to combat anticompetitive conducts by medium undertakings

⁷² *Ibidem*, Art. 45(2).

⁷³ *Ibidem*, Art. 45(3).

⁷⁴ *Ibidem*, Art. 47(1).

⁷⁵ *Ibidem*, Art. 47(2) lit. g.

– it fails however to scare big players. Also here, the Kppu is essentially not powerful enough to enforce the Law in an effective manner.

5. Response to Challenges for Combating Cartels

To deal with current difficulties in proving the existence of cartels⁷⁶, the Kppu has considered the use of indirect evidence, which has in fact been already used in some cartel cases, as well as the implementation of a national leniency programme.

5.1. The Use of Indirect Evidence

The Kppu has used indirect evidence in cartel cases but not all Kppu decisions based on indirect evidence were later affirmed by the Supreme Court. Four cartel cases can be mentioned as examples here, namely 1) the crude palm oil cartel concerning the pricing of crude palm oil⁷⁷; 2) the case of fuel surcharge price fixing in the domestic flight service industry⁷⁸; 3) the case of bid rigging for drinking water network building in the Regency⁷⁹ of Lingga⁸⁰; and 4) the case of price fixing and a cartel in the cement industry⁸¹. The Kppu decision rendered in the first case was annulled by the Supreme Court; the second and third decisions were affirmed; and in the fourth case, the Kppu verdict stated that the alleged violation was not evident.

The use of indirect evidence by the Kppu in dealing with cartel cases covers both communication and economic evidence. For instance, in the

⁷⁶ A.M.T. Anggraini, *Mekanisme Mendeteksi dan Mengungkap Kartel dalam Hukum Persaingan*, available at <http://sekartrisakti.wordpress.com/2011/06/08/mekanisme-mendeteksi-dan-mengungkap-kartel-dalam-hukum-persaingan/>, p. 16.

⁷⁷ See Kppu Decision *Crude Palm Oil Cartel* No. 24/KPPU-I/2009.

⁷⁸ See Kppu Decision *Fuel Surcharge Price Fixing in Domestic Flight Service Industry* No. 25/KPPU-I/2009.

⁷⁹ Regency (*Kabupaten*) is an administrative region having autonomy as a local government (according to Law No. 22 of 1999 concerning Local Government). The administrative territory of Indonesia is divided into 34 provinces (*provinsi*, similar to states in federal countries except that provinces have no power to self-govern their region to such a large extent like states; they are seen more as an extension of the central government), each of which covers a number of regencies. See D.S. Bratakusumah, D. Solihin, *Otonomi Penyelenggaraan Pemerintah Daerah*, Jakarta Gramedia Pustaka Utama 2001, p. 6.

⁸⁰ See Kppu Decision *Bid Rigging for Drinking Water Network Building in the Regency of Lingga* No. 12/KPPU-L/2009, Supreme Court Decision on Cassation No. 906 K/Pdt.Sus/2010.

⁸¹ See KPPU Decision *Price Fixing and Cartel in Cement Industry* No. 01/KPPU-I/2010.

Crude Palm Oil case, the Kppu relied on the parallelism in conduct and facilitating practices by means of price indicators. In the case, communication evidence was referred to as “facts of meetings and/or communication between competitors” and further, Kppu held that such fact was already sufficient to become evidence without having to prove the content of the meetings and/or the communication⁸². Although in the case the Kppu found that the meeting and communication discussed important information for indicating a cartel, i.e. prices, production capacity, and production cost structure, such definition is too broad. It might include any type of meeting or communication that has nothing to do with cartel. There is no prohibition in Indonesian law for undertakings either to meet or to communicate with other undertakings, including with their competitors, and such activity is common in doing business, also it does not make sense to hinder undertakings from doing so. It is the content of such meeting and communication, which is decisive.

This approach for using indirect evidence formed the basis for a conviction for price fixing prohibited by Article 5 of the Law⁸³ and a distribution cartel prohibited by Article 11 of Indonesian Competition Law⁸⁴. However, the use of indirect evidence in this specific case was rejected both by the district court and by the Supreme Court⁸⁵.

In the *Price Fixing and Cartel in the Cement Industry* case, the Kppu examined both communications, to identify the existence of concerted actions, and economic evidence, to detect price parallelism. However, the examination has ultimately led to negative results. In this case, the Kppu has neither proven the existence of an agreement to fix prices⁸⁶ nor to control cement distribution in order to affect prices by the Indonesian Cement Association (*Asosiasi Semen Indonesia – Asi*)⁸⁷.

⁸² KPPU Decision *Crude Palm Oil Cartel* No. 24/KPPU-I/2009, Legal Consideration on indirect evidence, Point 2.2.1., p. 57.

⁸³ KPPU Decision *Crude Palm Cartel* No. 24/KPPU-I/2009, Legal Consideration on price fixing allegation against Article 5 of Indonesian Competition Law, Point 7.2.4.-7.2.8, p. 64.

⁸⁴ Kppu Decision *Crude Palm Oil Cartel* No. 24/KPPU-I/2009, Legal Consideration on distribution cartel allegation against Article 11 of Indonesian Competition Law, Point 9.2.2-9.2.4., pp. 65–66.

⁸⁵ S.D. Mayestika, *20 Produsen Minyak Goreng Lolow Dakwaan KPPU*, Bisnis.com 11 December 2011, available at <http://www.bisnis.com/articles/20-produsen-minyak-goreng-lolos-dakwaan-kppu>.

⁸⁶ Kppu Decision *Price Fixing and Cartel in Cement Industry* No. 01/KPPU-I/2010, Legal Consideration on price fixing allegation against Article 5 of Indonesian Competition Law, Point 8.b.2(e), p. 421.

⁸⁷ Kppu Decision *Price Fixing and Cartel in Cement Industry*, No. 01/KPPU-I/2010, Legal Consideration on distribution cartel allegation against Article 11 of Indonesian Competition Law, Point 9.b.2(e), p. 422.

The problem with the use of indirect evidence lies in the lack of a provision that allows the use of such evidence in Indonesian Competition Law. As explained in the previous part of this paper, Indonesian Competition Law names only five types of admissible evidence: witness statements, expert witness statements, letters and/or documents, indications, and undertakings' statements⁸⁸. The Law does not define the term "indication". However, the types of evidences in the Law are similar to those recognized in the Procedural Criminal Law⁸⁹, in which an "indication" is defined as "any act, event, or circumstance that due to the aptness with each other or with a crime, indicates the occurrence of the crime and the actor"⁹⁰. By analogy such definition can be used to interpret the meaning of "indication" in competition law cases as any act, event, or circumstance that due to the aptness with each other or with a competition law infringement, indicates the occurrence of the infringement and the actor.

Nothing in these provisions mentions indirect evidence. However, the Kppu argues that the notion of "indications" can be seen as covering indirect evidence also. An argument that goes against this reasoning is that applying such an extremely broad interpretation of this term will create legal uncertainty.

If one intends to use indirect evidence based on the current content of Indonesian Competition Law, a compromise can be proposed in this regard based on two points. As has been recognized in Indonesian legal practice, indications cannot be used as sole evidence – they must be supported by at least two other types of evidence. The Kppu shall abide by this principle. Arguing that doing otherwise is necessary because of existing difficulties in getting evidence is not sufficiently strong argument for the use of indirect evidence – in order to punish an alleged wrongdoer, the authority must prove beyond reasonable doubt that the company is actually guilty⁹¹.

Another option would be to amend the current Law and insert indirect evidence into the catalog of evidence currently listed. This would be the preferred solution in order to ensure legal certainty. However, amending laws takes time and there is no guarantee that the purpose for amending the respective legal provisions will in fact be attained.

⁸⁸ Indonesian Competition Law, Art. 42.

⁸⁹ Law No. 8 of 1981 concerning Procedural Criminal Law, Art.184(1).

⁹⁰ Ibidem, Art.188.

⁹¹ William Blackstone states: "it is better that ten guilty persons escape, than that one innocent suffer" as quoted in M. Rizzolli, M.Saraceno, *Better that X Guilty Persons Escape than that One Innocent Suffer*, 16 June 2009, available at <http://www.side-isle.it/4sided/assets/Rizzolli-Saraceno.pdf>, p. 2.

5.2. The Possibility to Implement a Leniency Programme

In order to respond to the difficulties in proving cartels, typically characterized as anticompetitive conduct which is “continuative, collective, and hard to detect”⁹², the Kppu considers introducing a national leniency programme. However there still are certain issues that must be resolved. First of all, there is a question whether it is possible to apply a leniency programme based on current Indonesian Competition Law.

The idea to implement a leniency programme to combat cartels in Indonesia is based on the following arguments:

First, to impose sanctions lies within the discretion of the Kppu, rather than being an obligation placed upon the Kppu. In the case of a violation of Law No. 5 of 1999, the authority has therefore discretion to consider whether it will impose a sanction onto the offender or not. This approach is possible on the basis of the wording of the Article 47 whereby: “[t]he Commission is authorized to impose ...”. Nevertheless, the Law does not mention what shall be the basis for not imposing sanctions.

Second, in terms of administrative sanctions provided for by Article 47 of Indonesian Competition Law, the penalties imposed can form a combination of the alternative sanctions available in the aforementioned catalog or any one of them. Article 47 provides three types of sanctions: the terminations of the infringement (cease and desist), order to pay compensation, and an administrative fine. The cease and desist order cannot, however, be omitted in any case simply because it is substantially required to stop the violation. There is therefore essentially at least one type of penalty according to Article 47 para (2) of the Law that will always be imposed for substantive reasons. However, as already explained, the wording of Indonesian Competition Law leaves the Kppu the discretion to not impose any compensation order or fine.

Third, a leniency programme is essentially a means to eliminate or reduce fines or other sanctions: administrative fines, criminal sanctions, or civil injunctions (like in the United States), but does not eliminate or reduce the sanction of terminating the infringing actions (cease and desist order). Therefore, the use of a leniency programme is not contradictory, does not deviate, and is not an exception to the power of the Kppu provided by the Law. The use of a leniency programme is thus possible without having to insert a specific provision into the legislation that explicitly regulates it.

⁹² See the rationale for implementing leniency programmes to uncover cartels in N. Zingales, “European and American Leniency Programmes: Two Models Towards Convergence?” (2008)5(1) *The Competition Law Review* 5-60, December 2008, available at <http://www.clarf.org/CompLRev/Issues/Vol5Iss1Art1Zingales.pdf>, p. 7.

A prominent function of leniency programmes used to combat cartels lies in its ability to destabilize cartels as explained by Bucicrossi and Spagnolo⁹³: “...leniency programs introduce and exploit a new form of deterrence which is completely different from that associated to all the other sanctions both pecuniary or non-pecuniary. In a nutshell: the latter aim at deterring an illegal conduct by modifying the ‘participation constraint’ of the potential offender, that is they increase the (expected) cost of behaving illegally; leniency programs, on the contrary, may prevent the formation of a cartel (or of any multi-agent crime) by modifying the ‘incentive constraint’ of the potential offender; that is, they increase the (opportunity) cost of sticking to the ‘agreement’ that keeps together the criminal team by tempting them with better conditions in case they betray their partners.”

Furthermore, in order to implement a leniency programme, technical issues arise on how to do it best. The first option is by issuing guidelines on the implementation of Article 47 of the Law (giving technical guidance on the programme) to later implement them in standard operating procedures.

However, despite its practicality, this option is problematic. For instance, how to protect confidentiality of whistleblowers in the case of an objection or cassation, as well as, when the case is filed as a criminal or a civil case. These problems may arise because there will be institutions other than the Kppu that will be involved in such cases – institutions not bound by the Kppu Guidelines.

To address this problem, it is necessary to include a leniency programme into the national legal system, which in turn means that existing laws shall be amended. It is not sufficient to regulate leniency by legislation below the level of an act of parliament, because the programme needs to have binding power for institutions other than KPPU also, i.e. the courts, the attorney office, and the police department. With regard to the protection of confidentiality of whistleblowers in the case of a civil claim following administrative procedures, a lesson can be learned from the judgment in the *Pfleiderer*⁹⁴ case in Germany where leniency materials remained protected against disclosure. In the last instance of the EU judicial system, the Court of Justice ruled that it is up national courts to decide whether leniency materials are subject to disclosure in the case of damages actions⁹⁵. Such concept has been adopted in the Proposal

⁹³ P. Bucicrossi, G. Spagnolo, *Antitrust Sanction Policy in the Presence of Leniency Programs*, available at <http://www.gianca.org/PapersHomepage/Bucicrossi%20Spagnolo%20-%20Antitrust%20Sanction.pdf>, p. 1.

⁹⁴ Case C-360/09 *Pfleiderer v. Bundeskartellamt* [2011] OJ C232/5.

⁹⁵ G. De Stefano, “Access of Damage Claimants to Evidence Arising out of EU Cartel Investigations: A Fast-evolving Scenario” (2011) 3 *Global Competition Litigation Review* 102.

for the EC Directive on Certain Rules Governing Actions for Damages under National Law for Infringements of Competition Law provisions of the Member States and of the European Union⁹⁶, as adopted by the European Parliament on 17 February 2014⁹⁷.

Another problem is that striking a delicate balance between the carrot and the stick will be hard to do when administrative fines are not severe enough to make leniency, or a fine amnesty, sufficiently interesting for large companies. That is so especially where business impact, not to mention the risk for the safety and well-being of the whistleblowers, is at stake⁹⁸. Thus, without amending the amount of fines that the Kppu is able to impose, the implementation of a leniency programme will not be sufficiently effective.

The second option is implementing it by amending the current Indonesian Competition Law. This option provides a solution to the abovementioned difficulties. However, two problems occur in this regard. *First*, amending a law will require political will and actions on the part of both the government and the parliament. This will take time and political effort, the results of which are difficult to be estimated. *Second*, there is a risk that the current Law will become weakened further and the authority of the Kppu will lessen if there is no sufficient power and understanding of the importance of its work for the improvement of economic life in the country.

The discussion on the possible implementation of a leniency programme has taken place within the Kppu in 2012 but the question remains open – will it go further or will it stop there.

6. Conclusion

The procedures for competition law enforcement in Indonesia through the functions of the Indonesian competition authority – the Kppu – follow administrative procedures. They are however, in some parts, influenced by criminal law procedures, for instance with respect to evidence. Against the

⁹⁶ COM(2013) 404 final C7-0170/2013 – 2013/0185 (COD). The proposal has been adopted by the European Parliament Corrigendum on 10 September 2014.

⁹⁷ European Parliament Press Release, Antitrust: Commission welcomes Parliament vote to facilitate damages claims by victims of antitrust violations, 17 February 2014.

⁹⁸ Compare to criminal sanction imposed in the US in cartel cases in E.G. Disner, *Antitrust...*, op. cit., pp. 107 ff; G. Harrison, M. Bell, “Recent Enhancement in Antitrust Criminal Enforcement: Bigger Sticks and Sweeter Carrots” (2006) VI *Houston Business and Tax Law Journal* 208-240, available at http://www.hbtlj.org/v06p2/v06p2_harrisonbell.pdf, p. 211.

decisions rendered by the Kppu, an objection can be filed to the district court followed by a cassation to the Supreme Court in the last instance. In both instances, the Kppu is treated as a party of an equal standing to the opponent in the respective instance. The case in the district court is dealt with according to civil suit procedures; special civil suit procedures apply in front of the Supreme Court. Although the use of criminal enforcement and private injunctions is not excluded, reluctance persists to do so, mainly for lack of clarity in the provisions of Indonesian Competition Law.

Problems in dealing with cartel cases on the basis of existing procedures are rooted in the Indonesian competition authority's inability to obtain sufficient evidences. For example, the Kppu is not authorized to conduct searches in the alleged offender's premises or offices; there are also no provisions allowing the use of wiretapping. Moreover, the Kppu is not authorized to seize evidence directly or force alleged offenders to present themselves at the authority's office for an investigation. Rather, it must rely on the assistance of the police department for that purpose.

To improve existing procedures, two suggestions are proposed, namely to use indirect evidence and to implement a national leniency programme. This can be done either based on existing Indonesian Competition Law or by amending current legislation. In the latter case, new provisions have to be inserted into the Law to allow both the use of indirect evidence and a leniency programme. However, in order for the Law to be amended, political will and actions on the part of both the government and the parliament will be needed. In the meantime, the Kppu can issue guidelines and standard operating procedures to provide directions for its commissioners and staff to implement a leniency programme. For the use of indirect evidence, until the Law is amended, the Kppu should use indirect evidence only if supported by two other legally specified types of evidence. The authority should also not base its argumentation exclusively on indirect evidence covered by the meaning of the term "indications". Instead, the arguments shall be based on detailed technical and economic reasoning supporting both communication and economic evidence and their clear link to the alleged violation.

Acknowledgements

The research presented in this paper has been funded by iMinds, KU Leuven (OT-project "Legal Norms for Online Social Networks: Case Study of Data Interoperability") and IWT (EMSOC project). The author would like to thank the participants of the 9th ASCOLA Conference on Procedural

Fairness in Competition Proceedings and Workshop on Competition Policy Developments Worldwide, Centre for Antitrust and Regulatory Studies, University of Warsaw (Warsaw, 26–28 June 2014) and the reviewers of YARS for their useful comments.