

The Future of the Leniency Program as an Efforts to Reveal Cartel Practices in Indonesia

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Abstract: The cartel is perceived as the most dangerous form of anti-competitive action and in some jurisdictions it has dealt with cartel cases as a matter of serious and criminal sanctions. Cartel is a main criminal offense in the competition law. The subjects of cartel obtain many benefits from cartel behavior, like price fixing agreements and the territorial division of markets. These behaviors harm to consumers. The nature of the secrecy of the cartel is the biggest obstacle for business competition authorities to prove the existence of a cartel which is also experienced by the Business Competition Supervisory Commission in Indonesia. For this reason a large number of jurisdictions have adopted leniency programs to reveal the existence of cartels. Leniency program arrangement first implemented by the United States and also managed to hit the number cartel violation with the number of reporters or applicant for leniency program. Leniency program arrangement in the United States alone found in Corporate Program Leniency. This study discusses the obstacles faced by the Business Competition Supervisory Commission in Indonesia in revealing cartel practices based on business competition law in Indonesia and the possibility of implementing program leniency in competition law.

Key words: Cartel, leniency program, Anti Monopoly Commission, jurisdictions, anti-competitive action, Business Competition Supervisory Commission

INTRODUCTION

The business actors in carrying out their business have the aim to get the maximum profit, the greater the profits derived from the business will be followed by greater business progress this is what will lead to competition between business actors. The law does not prohibit business people from advancing, prospering or raising a business but in practice business people often do various ways to achieve their goals in a way that is not in accordance with the rules. Business competition, Russell *et al.* (2008) has positive and negative implications some positive aspects of competition are conditions of competition causing the economic power of economic actors not to be centered on certain hands, competition can be a force to encourage the use of economic resources and methods of using them efficiently competition can also stimulate increase product quality, service, production process and technology, so that, consumers have many alternatives in choosing products or services produced by producers (Siswanto, 2002). The negative implications of competition will arise, if

done with negative actions by market participants by taking anti-competitive actions (Stocking and Watkins, 1947).

The competition law in Indonesia draws inspiration from the sherman act in the United States which is the first formal form of enforcement of business competition law. One of the efforts of the government of Indonesia that has been carried out is the ratification of Law No. 5 Year 1999 concerning prohibition of monopolistic practices and unfair business competition (Anti Monopoly/Business competition law), here in after referred to as business competition law. This law is a legal instrument which in principle aims to create a healthy, competitive and conducive business competition and to encourage the creation of efficiency that supports economic growth and the operation of the market economy in a reasonable manner.

Global cartels have become pervasive victimizing both businesses and customers in around the world (Choi and Gerlach, 2012). The cartel in business competition law is one of the anti-competitive actions which includes the types of agreements that are

prohibited. The term cartel itself is generally used to describe agreements, collusion or conspiracy carried out by business actors. The cartel often also arises as a way taken by business actors to respond to price wars and high profits and the existence of business actors in the market (Siswanto, 2002). The enforcement of competition policy against cartel (collusion and fixed pricing agreements) need antitrust intervention (Motta and Polo, 2003). The cartel is considered to be a very dangerous practice because it can be have in a monopoly where business people can determine a very high price level or the amount of production that causes losses to consumers because prices will become expensive and goods or services in the market become limited (Fuady, 2001). This action can harm the social welfare (Hamaguchi *et al.*, 2009) that price-fixing and market allocation cartels reduce economic efficiency (Aubert *et al.*, 2006).

Antitrust authorities act as a detector, prosecutor and penalizer of cartels (Harrington, 2006). So that, the cartel becomes a serious concern for the authority of the Business Competition Supervisory Commission (Anti Monopoly Commission) as an independent institution formed based on the business competition law as a business competition law enforcement agency in Indonesia. In the disclosure of cartel cases, according to business competition law in Indonesia the approach used by Anti Monopoly Commission is to use the rule of reason theory where to prove the existence or absence of violations must investigate the consequences of an event that causes monopolistic practices or unfair business competition. In contrast to other countries such as the United States, the cartel has developed in the direction of per se illegal because of the negative economic consequences that occur with an action this has implications for the handling of cartels in Indonesia.

Proof of cartel practice is not an easy matter. In practice, Anti Monopoly Commission often faces obstacles to prove the existence of a cartel. Although, the Anti Monopoly Commission has indicated the existence of cartel behavior it is difficult for Anti Monopoly Commission to find evidence in the form of a cartel agreement because business actors and their competitors often make their agreements unwritten. In addition, problems regarding the limitations of Anti Monopoly Commission's authority in conducting investigations and gathering evidence also become obstacles. The difficulties experienced by the Anti Monopoly Commission to reveal the existence of the cartel gave to a similar understanding for other countries that special treat were needed to detect and punish cartel actors. One of the efforts to uncover cartel practices is the leniency program. The leniency program itself was initiated by the

United States in 1973 and began to have a lot of impact after the revision of the Corporate Leniency Program in 1993. The United States as the country that initiated the birth of the leniency program was also a best practice country in its implementation. At that time, the abuse of private economic power which jeopardized the interests of consumers began to emerge. The economic strength was obtained through the establishment of industrial cartels and the grouping of large businesses under the control of one or more private entrepreneurs (Ibrahim, 2009). A major challenge to stopping cartels is that they are covered in secrecy (Chen and Harrington, 2007). Leniency programs allow competition authorities to penetrate the cloak of secrecy cloak.

For this reason, many jurisdictions have also adopted what is known as a leniency program. Leniency program has been applied in business competition law in at least 50 jurisdictions including Brazil, Mexico, the Russian Federation and Japan. Leniency program arrangements in these countries have similarities and work in parallel with arrangements in the United States and the European Union, two jurisdictions with the largest application of leniency in the world. The United Nations Conference on Trade and Development (UNCTAD) (Taylor and Smith, 2007) survey shows that through at least 100 international cartel practices outside the domestic cartels in countries in the world has been detected (Taylor and Smith, 2007). An effective leniency program will encourage cartel members to give recognition of their involvement in the cartel to the competition authorities even before the investigation phase begins.

Leniency program is an important breakthrough in business competition law in place leads to a reduction in cartel activities (Hinloopen and Soetevent, 2008). An effective leniency program could significantly lower the cartel rate (Chang and Harrington, 2008). More generous forms of leniency that offer a reward and reduced sanctions (Giancarlo, 2000a, b) to at least one party, if he or she self-reports (Buccirossi and Spagnolo, 2006). Actually, leniency program is a modification of the law (Giancarlo, 2000a, b) that offering leniency can indeed help fighting the collusion (Chen and Rey, 2013) that main action in cartel. Leniency program but unfortunately it has not been regulated in competition law in Indonesia. There is a procedure that regulates rigidly providing the leniency program. From the description above what is interesting for the researchers is whether the leniency program can be applied in the business competition legal regime in Indonesia by looking at the implementation of leniency programs in other countries, so, the researcher is interested in raising the legal issue to be appointed as a scientific research entitled "The future of the leniency program as an efforts to reveal cartel practices in Indonesia".

MATERIALS AND METHODS

Research methods experience continuous improvement to find the best way to solve problems (Hartono, 2000). Within the competition law area as part of economic law as in this study, it uses inter-disciplinary and transnational research and presentation methods. Interdisciplinary because competition law has links in various fields of law not only civil law but also closely related to the law of state administration, interdisciplinary law, criminal law and not even ignore international public law and international private law. That the breadth of the field of study of economic law makes it able to accommodate two legal aspects as well as a comprehensive study. The two legal aspects cover aspects of public law and aspects of civil law. Some international and national regulations are used as primary legal materials in this study, in addition to other legal materials in the form of journals and books relating to competition law cartel and leniency programs.

RESULTS AND DISCUSSION

Constraints on handling the cartel case in business competition law in Indonesia: The outline of arrangements in the Indonesian business competition law include the following: banned agreements, prohibited activities, abuse of dominant positions, Anti Monopoly Commission, legal handling procedures, sanctions and exceptions. Explicitly the regulation of the cartel is contained in Article 11 of the business competition law which reads:

“Business actors are prohibited from making agreements with competing business actors which intend to influence prices by regulating the production and or marketing of goods and or services which can lead to monopolistic practices and or unfair business competition”

However, given its characteristics as a horizontal agreement, the cartel is very likely to regulate other matters outside of price fixing, so, some other provisions in the business competition law can also be drawn as the essence of regulating cartel restrictions in Indonesia as contained in Article 5 Paragraph 1 and Article 9 which reads:

The provisions of study Article 5 Paragraph 1 state that “Business actors are prohibited from making agreements with competing business actors to set prices for the quality of goods and or services that must be paid by consumers or customers in the same relevant market”

Article 9 which contains the following provisions:

“Business actors are prohibited from making agreements with competing business actors that aim to divide the marketing area or market allocation towards goods and or services, so that, it can lead to practice and or unfair business competition”

Both Article 5 Paragraph 1 and Article 9 constitute a form of cartel practice, except that specifically Article 5, Paragraph 1 regulates pricing while Article 9 regulates the division of territories. It is not impossible that in practice the process of territorial division is also accompanied by pricing activities. Article 11 regulates production and marketing cartels with the ultimate goal of influencing prices.

Enforcement of competition law in Indonesia is the duty and authority of Anti Monopoly Commission as an independent institution that is independent of the influence and power of the government. Judging from the formulation of its authority in the business competition law, Anti Monopoly Commission has a broad scope of authority, covering the elements of quasi legislative power and quasi judicial power. In handling the cartel case there are several obstacles experienced by Anti Monopoly Commission to uncover cartel practices including.

Proof of a difficult cartel: In fact, the cartel agreement is a difficult case to prove. This is reflected in the number of cases entered into the commission which is around 2.2% of the total alleged violations in the period 2000-2010 (Munadiya, 2011). The cartel became difficult to detect because in fact the colluding company tried to hide the agreement between them in order to avoid the law. Rarely do business people openly make agreements between them make legal documents, capture meetings and publish agreements, so that, in the eyes of competition law can be used as direct evidence of direct agreements.

Further data on the publication of Anti Monopoly Commission’s decisions from 2003-2010 shows that the Anti Monopoly Commission has succeeded in disclosing sixteen cases of cartels and sentenced sanctions for business people in fourteen cases. Of the sixteen cases, ten cases were triggered by a third party report while the investigation of six other cases came from Anti Monopoly Commission’s initiative. Compared to the total number of Anti Monopoly Commission’s decisions during this period, the percentage of cartel cases which amounted to 8.38% did not seem to be significant (Sukarmi, 2011). However, it became a concern that in reality the Anti Monopoly Commission’s decision in the cases of large cartels (cooking oil cartels, fuel surcharge cartels and

pharmaceutical industry drug cartel amlodipine therapy classes) where the source of the investigation came from Anti Monopoly Commission's initiative was later canceled by the district court.

In its consideration, the panel of judges mentioned the reasons for the cancellation which among other things caused by the failure of the Anti Monopoly Commission to prove the existence of the cartel and concerning the use of indirect evidence by the Anti Monopoly Commission which was judged by the judges as not evidence of competition law in Indonesia. This is an obstacle in the evidence made by Anti Monopoly Commission. Provisions regarding evidence of competition law can be found in Article 42, business competition law as follows:

- Witness testimony
- Information from experts
- Letters and/or documents
- Directions
- Description of business actors

Furthermore, Article 72 of Regulation No. 1 of 2010 concerning procedures for handling cases (Perkom No. 1/2010) again mentions the types of evidence that can be used by Anti Monopoly Commission in determining a violation in the form of:

- Witness information
- Expert opinion
- Letters and/or documents
- Directions
- Information reported

Furthermore, regarding the evidence in the handling of the cartel, the commission Regulation No. 4 of 2010 concerning the cartel details it specifically which includes:

- Document or record of price agreement, production quota or division of marketing area
- Documents or recordings of price lists issued by business actors individually for the last several periods (can be annual or per semester)
- Data on price developments, amount of production and number of sales in several marketing regions over the past several periods (monthly or annual)
- Data on production capacity
- Data on operating profit or operating profit and company profits that coordinate with each other
- The results of data processing analysis that show excessive profit
- The results of conscious parallelism data analysis on price coordination, quota production and distribution of marketing areas

- Company financial report data for each member allegedly involved in the last several periods
- Data of shareholders of each company suspected of being involved and their changes
- Testimonies from various parties for communication, coordination and/or information exchange between the cartel participants
- Testimony from customers or other related parties for price changes that harmonize with each other among sellers who are suspected of being involved in a cartel
- Testimony from employees or former company employees suspected of being involved in the occurrence of company policies that are aligned with agreements in the cartel

Documents, records and/or testimonies that strengthen the existence of cartel driving factors, according to the indicators, described in Perkom No. 4/2010 (early indicators of cartel identification, namely structural factors in the form of concentration level and number of companies, company size, product homogeneity, multi-market contacts, inventory or production capacity, linkage of ownership, ease of market entry, character of demand, regularity, elasticity and change, buyer power

The formulation of the provisions of Article 5 Paragraph 1, Article 9 and Article 11 as a set of cartel arrangements in the business competition law, requires the fulfillment or proof of the elements in the study to be able to declare a violation. Proof of the above elements must be done cumulatively. Failure to prove one of the elements will have implications for the decision made by Anti Monopoly Commission not to be passed.

In accordance with the nature of the cartel as a horizontal agreement between competing business actors a crucial element that must first be proven by Anti Monopoly Commission is the existence of an agreement (written or unwritten) whether regulating price agreements, marketing areas or market allocations or production or marketing quotas (Supriatna, 2016). This is not an easy matter and in response to this fact, competition law in some jurisdictions then allows the use of indirect evidence (indirect or circumstantial evidence) besides of course also using direct evidence.

Limited Anti Monopoly Commission authority: In practice, Anti Monopoly Commission often finds it difficult to collect evidence both those caused by business actors/reported parties who do not want to present provide information or precisely hide the required documents. Anti Monopoly Commission also

faces real obstacles in connection with the period of time to conduct examinations which are limited to 150.

In terms of authority, Anti Monopoly Commission has an obstacle, namely in the business competition law has indeed given authority to Anti Monopoly Commission to request assistance from police investigators to present business actors witnesses, expert witnesses or business actors who are not willing to fulfill Anti Monopoly Commission's summons but Anti Monopoly Commission still has no authority to make a forced effort in the form of a search action to find the evidence needed to reveal the cartel practice.

Furthermore, the business competition law also regulates the possibility for Anti Monopoly Commission to submit cases to police investigators to conduct investigations in terms of:

- Business actor refuses to be examined, refuses to provide information in an investigation/examination or hinders the process of investigation/examination
- Business actors do not carry out Anti Monopoly Commission's decisions

As the implementation of this provision, Anti Monopoly Commission has included forms of collaboration between Anti Monopoly Commission and Investigators in Commission Regulation No. 1/2010. To simplify the technical implementation of the collaboration, the Anti Monopoly Commission and the Indonesian police criminal investigation agency signed a Memorandum of Understanding (MoU) on October 8, 2010 which was followed up by the signing of the memorandum of understanding on May 6, 2011. The substance of the memorandum of understanding included, coaching, operational field, procedure for exchanging information regarding suspected unfair business competition crimes, evaluation and coordination at the central and regional levels and the confidentiality of data, documents and or records that are classified as confidential.

However, the provisions of operational field cooperation in practice cannot be implemented as a result of the attitude of the Indonesian national police Standard Operating Procedure (SOP) which insists on only starting the investigation process after going through the stage of criminal investigation. The Indonesian national police considers that the investigations carried out by the Anti Monopoly Commission previously were not criminal investigations as stipulated in the criminal procedure code, so that, the practice of Anti Monopoly Commission and police's maximum form of cooperation was limited to

requests from investigators to present business actors and other parties needed. This fact resulted in the infertility of criminal provisions in Article 48 and 49 of the business competition law. The fundamental difference in perception between Anti Monopoly Commission and police concerning the process of handling business competition law cases has caused anti-competitive violations in Indonesia to date, cannot enter the realm of criminal law. So, it is very rare to impose criminal sanctions in the case of a cartel even though sanctions that cause a deterrent effect are very necessary in the case of unfair business competition.

The implementation of sanctions that have not been effective: Law No. 5/1999 recognizes three types of sanctions that can be applied to cartel actors, namely in the form of sanctions for administrative actions, basic criminal sanctions and additional criminal sanctions. Administrative sanctions that can be imposed by Anti Monopoly Commission on cartel violations (Article 5 Paragraph 1, Article 9 and 11) can be in the form of: stipulation of cancellation of agreement and/or an order to the business actor to stop the activities that are proven to cause monopolistic practices and or cause unfair business competition and or harm the community and or determination of compensation payments and/or imposition of fines as low as Rp. 1,000,000,000.00 and a maximum of Rp. 25,000,000,000.00.

In the area of competition law an economic approach assumes that cartel actors will always carry out a cost and benefit analysis to calculate whether the benefits to be earned are commensurate with the risks that must be taken when caught and sentenced (Aryani, 2012). Based on this view, effective sanctions are sanctions that are able to take into account the possible benefits of the cartel and the possibility of detection.

Compared to the potential benefits that can be obtained by cartel actors by carrying out their cartel practices, administrative fine sanctions with the lowest amount of Rp. 1 billion and a maximum of Rp. 25 billion will not be able to provide deterrent and preventive effects to be achieved given the profit made successfully. Some business actors that have been decided to have carried out cartels by Anti Monopoly Commission can reach trillions of rupiah. This can be seen in the decision of Anti Monopoly Commission No. 26/Anti Monopoly Commission-L/2007 concerning sms cartels estimating consumer losses during the period 2004, April 2008 at least Rp. 2,827,700,000,000. While the Anti Monopoly Commission decision No. 24/Anti Monopoly Commission-I/2009 concerning the cooking

oil cartel estimates that there is a consumer loss of Rp. 1,270,263,638,175 for packaged cooking oil and Rp. 374,298,034,526 for bulk cooking oil.

Prospects for application of program leniency in revealing cartel cases in business competition law in Indonesia: This real difficulty can be overcome, if Indonesia has a leniency program. As shown in the statistical data of Anti Monopoly Commission's verdict in the disclosure of the entire cartel case whose source came from reports from third parties, the Anti Monopoly Commission's success rate reached 87.5%. Regarding these decisions, the reported party chose not to pursue an objection mechanism or in the case of taking an objection effort (appeal or cassation) the results actually strengthened the Anti Monopoly Commission's decision. The use of leniency programs as a key tool for identifying the existence of cartels has proven effective in several countries. So that, through the application of leniency in competition law in Indonesia, the difficulties faced by Anti Monopoly Commission, so far will be overcome.

Leniency is a general term to describe a system of exemption both in part and in whole which should be applied to cartel members. Leniency is given to cartel members who complain or give testimony of the practice of cartel activities to business competition authorities. At first glance this concept bears a resemblance to the whistle blower concept in criminal law.

The terminology of leniency, immunity and amnesty is used in many jurisdictions with varying understanding. For example, the United States is familiar with programs known as corporate amnesty and corporate leniency which are used interchangeably to describe criminal convictions and the release or reduction of criminal fines applied to anti-competitive behavior. The foundation of thinking of cartel enforcement in the United States and elsewhere is a commitment to the lenient prosecution of early confessors (Miller, 2009). Following are some countries that have successfully implemented leniency programs in handling cartel cases like USA, South Africa, Germany, Spain, etc (Harrington and Chang, 2015). Next, we will show the applicants of leniency program in the USA and Japan.

Application of leniency programs in the United States: The corporate leniency program set up in the United States in 1978 has been revised in 1993, to grant full amnesty to the first informant, together with amnesty for individuals (Aubert *et al.*, 2006) which is antitrust policy of the corporate leniency program by the Department of Justice (DOJ) (Harrington, 2013). This revision made it

possible for amnesty to be awarded even when an investigation had been started and made it a condition that the DOJ has not received information about the illegal activity being reported from any other source (Harrington, 2008). Since that revision, anti trust authorities has a big way/normal way to detect and hopefully deter cartels has radically changed (Spagnolo, 2006). Leniency arrangements in the United States are contained in the corporate leniency policy and efficiency policy for individuals which although, not a special legislation but are fully recognized by the courts and legislative bodies through the criminal antitrust penalty enhancement and reform act, enforcement of public law competition is the responsibility and authority of the Department of Justice-Antitrust Division (DOJ-AD) which acts as an investigator and public prosecutor in a cartel case. The granting of corporate leniency policy and solution for policy for individuals in the United States is the authority of DOJ-AD.

Leniency in the United States is available to corporations (along with directors, staff and employees) as well as individuals who report cartel practices not as a unit of corporate recognition, the United States adheres to a strict leniency policy and provides immunity or full immunity to criminal prosecutions that bring consequences to cartel offenders from criminal fines or imprisonment (specifically for individuals) only to the first leniency applicant. The application can be submitted before or after the start of the investigation in the event that the applicant is a corporation and before the start of the investigation in the event that the applicant is an individual. But in reality the relief from criminal fines and imprisonment is still possible for other cartel actors without restrictions on the number of recipients, based on the plea bargain mechanism known in the criminal system in the United States. The plea agreement was carried out between the DOJ-AD and the cartel actors. In providing leniency in the United States, the applicant must fulfill several requirements including, DOJ-AD has never received information about the violation, the applicant is not a coercer or cartel ringleader, the applicant has stopped participating in the cartel and is willing to cooperate in full, complete and sustainable in the DOJ-AD investigation. After the start of the investigation phase, leniency is only possible if the DOJ-AD does not have sufficient evidence for the success of the cartel's prosecution (Anggraini, 2011).

Requests for leniency in the United States are addressed to the deputy assistant attorney general for criminal enforcement and can be done orally (by telephone) or in writing. To anticipate the cartel players who are competing to submit their leniency requests, the

DOJ-AD implements a marker system as a means to maintain the place (position) of the first leniency applicant while the concerned person collects more information and evidence to support his petition. This queuing facility is given in a limited period of time which is usually <30 days.

In the United States, the DOJ-AD has a confidentiality policy not to disclose the identity of the applicant for leniency or information provided by him. Exceptions are only possible if there is a disclosure agreement with the applicant or when ordered by the court. The concept of leniency in the United States is conditional and depends on the ability of the leniency applicants to fulfill their obligations before they can issue a final leniency letter confirming unconditional leniency. The obligation is concerned with fulfilling the requirements for granting leniency both to cooperate with the DOJ-AD in its investigation and to submit the required evidence. Failure to fulfill the requirements will result in the cancellation of the granting of leniency and furthermore, the possibility of using the evidence submitted by the applicant to incriminate in the prosecution process.

Application of leniency program in Japan: Japan regulates its leniency policy in the antimonopoly law amendment which came into force in 2006. The provision of leniency in Japan is the authority of the Japan Fair Trade Commission (JFTC) where the application procedure is regulated in the rules on reporting and submission of materials regarding immunity from or reduction of surcharges (leniency guidelines).

The subject of leniency in Japan is a business actor, and in a criminal case a cartel can also include directors, staff and other employees of the business actor. Exemptions for administrative fines will only be given to the first leniency applicant, prior to the start of the investigation phase as for the second to fifth leniency applicants before the investigation phase begins, Japan provides a fine reduction of between 30-50%. Furthermore, Japan still opens the opportunity to reduce the fine by 30% at the time of or after the start of the investigation phase to a maximum of three applicants for leniency, provided there are fewer than five applicants before the investigation phase begins.

While Japan requires several conditions to include, the applicant is not a ringleader, the applicant has stopped the cartel practice, reports, materials and documents submitted do not contain false information and the JFTC has not yet begun its investigation phase in terms of leniency in the form of full release. Japan required a request for leniency before the start of the investigation

to be submitted by facsimile before submitting the original version to the JFTC. Requests for leniency submitted after the start of the investigation phase can be carried out either through direct submission, registered mail, facsimile, e-mail or verbally under certain conditions. Along with the reports, the evidence is submitted which includes, meeting notes, correspondence with other cartel actors and reports on cartel activities.

Marker provisions are not regulated in Japan but it is stated by the JFTC that by submitting a written application to the JFTC the position of the leniency applicant is temporarily declared safe until the relevant person submits supporting evidence which is normally set for 2 weeks. JFTC is also obliged to submit a written notification regarding the eligibility of the applicant to receive a leniency.

Japan does not explicitly regulate the provisions of secrecy in the antimonopoly law and leniency guidelines but in practice JFTC has a policy not to disclose information obtained from applicants for leniency to third parties unless based on requests from applicants for their own leniency. While in Japan, after receipt of the application, the JFTC is obliged to provide written notification regarding the eligibility of the applicant to receive the leniency. As with the United States, the failure of the applicant to fulfill the requirements set by the JFTC will have implications for the cancellation of leniency.

The effectiveness of leniency programs depends on a variety of conditions and the legal environment in which a leniency program is in place (Klein, 2010). Likewise, the leniency programs in several European countries that are members of the European Union. The first version of the European Union leniency program came into force in 1996. The modified leniency program introduced in Europe in 2002 gives complete immunity from fines to firms (Motchenkova, 2004). The adoption of leniency programs is given amnesty to fight organized crime recently became widespread in developed economies. The efficiency of such leniency is of high importance for the enforcement of competition law (Brenner, 2009).

Prospect of normative leniency program in business competition law in Indonesia: In the draft guidelines concerning the cartel, Anti Monopoly Commission once contained provisions regarding leniency. The draft Perkom is then published on the Anti Monopoly Commission website to get input from stakeholders on the possibility of its application. But with the enactment of Regulation No. 4 of 2010 on April 9, 2010 the provisions were actually eliminated. One of the underlying considerations is the absence of a legal basis in the business competition law which gives Anti Monopoly Commission the authority to regulate leniency.

Law No. 12 of 2011 concerning the establishment of legislation (Law No. 12/2011) regulates the principle of the formation of legislation one of which refers to the suitability of types, hierarchies and regulated material content. Law No. 12/2011 further stipulates that in the matter of the contents of the laws and regulations contain criminal provisions these provisions can only be contained in regulations in the form of laws, provincial regulations or regency/city regulations.

The business competition law regulates sanctions for business actors who commit violations either by entering into prohibited agreements, prohibited activities or abuse of dominant positions. For these violations, the business competition law regulates the threat of sanctions in the form of administrative actions imposed by the Anti Monopoly Commission and basic criminal sanctions and additional penalties as stipulated in Article 47 through Article 49. Given the basic essence of leniency is giving forgiveness or reducing sentences there are contradictions among the sanctions setting regulations required by the business competition law and leniency policies that eliminate these sanctions, so that, the consequences of leniency arrangements cannot be carried out in lower levels of legislation.

The only way to be able to implement the leniency policy in business competition law in Indonesia is to adopt it into business competition law in this case through amendments to the business competition law. At present, regarding the leniency policy it has been stated in Article 70 of the business competition bill but has not yet been ratified which reads (<http://www.dpr.go.id/doksileg/proses2/RJ2-20161111-041211-1939.pdf>):

- Anti Monopoly Commission can provide forgiveness and/or reduce penalties for business actors who acknowledge and/or report their actions that are suspected of violating the provisions of Article 4, 5, 7, 9, 10, 11, 12, 13, 15, 16 and Article 18
- Provisions regarding amnesty and/or reduction of law as referred to in paragraph 1 are regulated in Anti Monopoly Commission regulations

In the study explaining that leniency can be imposed on cartel cases in a broad sense not only in Article 11 and this is still a matter of debate. But in this case according to what is stated in the study, Anti Monopoly Commission is given the authority to make technical regulations regarding the implementation of leniency.

In order to enforce the implementation of the business competition law system in Indonesia relating to

the leniency program, the main thing that must be considered is the substance of regulation. In relation to the implementation of provisions regarding leniency programs in business competition law in Indonesia an alignment is needed at all levels of legal instruments that will become the legal basis for the enactment of leniency programs in Indonesia. The first legal instrument that must be harmonized is Law No. 5 of 1999. As a rule with the highest strata in business competition law, it is necessary to add a leniency program clause in a special chapter which can then become a legal umbrella for the implementation of this program.

Furthermore, in order to implement provisions regarding leniency programs after the amendment of Law No. 5 of 1999 a government regulation that rigidly contains the following aspects including definition of leniency policy, leniency providing institutions, recipient subjects, types of leniency giving, requirements for granting leniency, procedures for submitting leniency requests, marker systems, provisions on confidentiality, cancellation of leniency.

CONCLUSION

Anti Monopoly Commission has several obstacles in handling cartel cases. First, Anti Monopoly Commission often has difficulty in obtaining direct evidence in the form of a cartel agreement while the use of circumstantial evidence has not been accepted because it is often canceled at the district court level. Second, in terms of Anti Monopoly Commission's authority, it is not authorized to carry out forced efforts such as searches and seizures of evidence and not having the authority to force the business actors to be examined. And the third, implementation of sanctions that have not been effective, administrative sanctions do not cause a deterrent effect because they are not comparable with the profits obtained by business actors from cartel practices.

In handling cartel cases and various obstacles, business competition law should adopt one of the leniency program policies that has proven effective in several countries such as the United States and Japan. Program leniency is possible to be applied in business competition law in Indonesia can be seen by the existence of the clause in the amendment to the business competition law but rigid arrangement has not been regulated in detail and clearly because it has not been ratified. In order to produce real improvements we recommend the following: Anti Monopoly Commission in handling cartel cases should pay more attention to existing provisions, so that, they can overcome existing obstacles and Anti Monopoly Commission must also

improve the capacity of human resources at Anti Monopoly Commission to be able to carry out strong evidence analysis.

For cartel-related regulations, changes in some of the provisions in the business competition law such as changes in the value of fines and criminal sanctions must be exacerbated, the addition of circumstantial evidence as evidence and other provisions that need to be adjusted to developments. If later the revision of the business competition law which contains the program leniency clause has been ratified it is better for Anti Monopoly Commission and the government in accordance with the mandate of the law to immediately make regulations that are technical in nature, so that, the policy can be implemented immediately. For business actors as far as possible avoid the practice of cartels with fellow other business actors because this can negate competition and harm consumers and other business actors.

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REFERENCES

- Anggraini, A.M.T., 2011. [Leniency program in revealing cartel according to business competition law (In Indonesian)]. *J. Bus. Competition*, 6: 103-118.
- Aryani, C., 2012. Comparative study of program leniency for proof of cartel in antitrust law in the United States and antimonopoly law in Japan. Master Thesis, Universitas Indonesia Jakarta Indonesia.
- Aubert, C., P. Rey and W.E. Kovacic, 2006. The impact of leniency and whistle-blowing programs on cartels. *Intl. J. Ind. Organ.*, 24: 1241-1266.
- Brenner, S., 2009. An empirical study of the European corporate leniency program. *Intl. J. Ind. Organ.*, 27: 639-645.
- Buccirossi, P. and G. Spagnolo, 2006. Leniency policies and illegal transactions. *J. Publ. Econ.*, 90: 1281-1297.
- Chang, M.H. and J.E. Harrington, 2008. The impact of a corporate leniency program on antitrust enforcement and cartelization (No. 548). Master Thesis, Department of Economics, The Johns Hopkins University, Baltimore, Maryland.
- Chen, J. and J.E. Harrington Jr, 2007. The Impact of the Corporate Leniency Program on Cartel Formation and the Cartel Price Path. In: *The Political Economy of Antitrust*, Ghosal, V. and J. Stennek (Eds.). Emerald Group Publishing Limited, Bingley, UK., ISBN:9780444530936, pp: 59-80.
- Chen, Z. and P. Rey, 2013. On the design of leniency programs. *J. Law Econ.*, 56: 917-957.
- Choi, J.P. and H. Gerlach, 2012. Global cartels, leniency programs and international antitrust cooperation. *Int. J. Ind. Organiz.*, 30: 528-540.
- Fuady, M., 2001. *Antitrust Law Towards the Era of Healthy Competition*. Citra Aditya Bakti, Bandung, Indonesia.
- Giancarlo, S., 2000a. Optimal leniency programs. Master Thesis, Fondazione Eni Enrico Mattei, Milan, Italy.
- Giancarlo, S., 2000b. Self-defeating antitrust laws: How leniency programs solve Bertrand's paradox and enforce collusion in auctions. Master Thesis, Fondazione Eni Enrico Mattei, Milan, Italy.
- Hamaguchi, Y., T. Kawagoe and A. Shibata, 2009. Group size effects on cartel formation and the enforcement power of leniency programs. *Intl. J. Ind. Organ.*, 27: 145-165.
- Harrington Jr, J.E. and M.H. Chang, 2015. When can we expect a corporate leniency program to result in fewer cartels?. *J. Law Econ.*, 58: 417-449.
- Harrington Jr, J.E., 2008. Optimal corporate leniency programs. *J. Ind. Econ.*, 56: 215-246.
- Harrington Jr, J.E., 2013. Corporate leniency programs when firms have private information: The push of prosecution and the pull of pre-emption. *J. Ind. Econ.*, 61: 1-27.
- Harrington, J., 2006. Corporate leniency programs and the role of the antitrust authority in detecting collusion. Master Thesis, Competition Policy Research Center, Japan.
- Hartono, S.R., 2000. *Economic Law*. Mandar Maju, Bandung, Indonesia.
- Hinlopen, J. and A.R. Soetevent, 2008. Laboratory evidence on the effectiveness of corporate leniency programs. *RAND. J. Econ.*, 39: 607-616.
- Ibrahim, J., 2009. *Hukum Business Competition: Philosophy, Theory and Implications of its Application in Indonesia*. Bayumedia Publishing, Indonesia.
- Klein, G.J., 2010. *Cartel Destabilization and Leniency Programs: Empirical Evidence*. Zentrum fur Europ Wirtschaftsforschung, Mannheim, Germany.
- Miller, N.H., 2009. Strategic leniency and cartel enforcement. *Am. Econ. Rev.*, 99: 750-768.

- Motchenkova, E., 2004. Effects of leniency programs on cartel stability. Master Thesis, Tilburg University, Tilburg, Netherlands.
- Motta, M. and M. Polo, 2003. Leniency programs and cartel prosecution. *Intl. J. Ind. Organ.*, 21: 347-379.
- Munadiya, R., 2011. [Indirect evidence in handling cases of business competition (In Indonesian)]. *Bus. Competition J.*, 5: 157-196.
- Russell, R., M. Atchison and R. Brooks, 2008. Business plan competitions in tertiary institutions: Encouraging entrepreneurship education. *J. Higher Educ. Policy Manage.*, 30: 123-138.
- Siswanto, A., 2002. *Business Competition Law*. Ghalia Indonesia, Jakarta, Indonesia,.
- Spagnolo, G., 2006. *Leniency and Whistleblowers in Antitrust*. Centre for Economic Policy Research, London, England, Pages: 50.
- Stocking, G.W. and M.W. Watkins, 1947. *Cartels in Action: Case Studies in International Business Diplomacy*. Twentieth Century Fund, Washington, USA., Pages: 533.
- Sukarmi, S.H., 2011. [Proof of the cartel in business competition law (In Indonesian)]. *J. Bus. Competition*, 6: 119-149.
- Supriatna, S., 2016. [Business conspiracy in the form of a cartel agreement (In Indonesian)]. *Positive Legal J.*, 1: 124-140.
- Taylor, I. and K. Smith, 2007. *United Nations Conference on Trade and Development (UNCTAD)*. Routledge, Abingdon, UK., ISBN:978-0-415-37019-6, Pages: 131.