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Criminalization of Individuals as a Deterrent Effect Upon Cartel Behaviour in Indonesia

Hengki M. Sibuea[1*], Udin Silalahi[2], Henry Soelistyo Budi[3]
[1-3] Faculty of Law, Universitas Pelita Harapan, Indonesia
[*]Corresponding email: hengkisibuea@gmail.com

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Abstract

Cartel behavior is one of the activities that has received serious attention in Indonesian competition law. In some cases, cartels are also carried out by the same business actors, who in previous cases, have been found guilty of cartel. This article proposes that the optimal way to deal with cartels in Indonesia requires the imposition of criminal sanctions, such as imprisonment, against individuals who are responsible for the occurrence of cartels. Imprisonment will have a deterrent effect on the offenders of criminal acts. This paper is carried out with an analytical descriptive method with a normative legal approach by analyzing the Commission's awards that punish the same business actors for repeatedly cartel offenses and also analyzing the laws and regulations of business competition and the Criminal Code as well as related laws and regulations applicable in Indonesia. The criminalization of individuals responsible for the occurrence of cartels is very urgent to be applied in Indonesia to provide a deterrent effect to cartel perpetrators.

A. INTRODUCTION

The purpose of competition law is to create and ensure a competitive market and provide benefits to consumers (Whelan, 2021). Competition laws and regulations in Indonesia, like other laws and regulations, are made to protect specific values (Sugarda & Wicaksono, 2018). There has been a common understanding among competition authorities that protecting consumer welfare is the standard by which competition law is enforced (Hovenkamp, 2011; OECD, 2023; Pittman, 2007). The principle of consumer welfare is welcomed in enforcing competition law consistently and rigidly (Komninos, 2023). The idea to protect of consumer welfare is also very relevant to Indonesia's competition law system, as contained in the preamble of Law No. 5 of 1999 regarding the Prohibition of Monopolistic Practices and Unfair Business Competition ('Law 5/1999') which stated that 'the development in the economic sector must be directed toward the achievement of people welfare based on Pancasila and the 1945 Constitution'. Therefore, to realize this idea, simply upholding the rule of law is not enough; enforcement of competition law in an effective way is essential (Hakopian, 2010; Jones, 2016).

Indonesian Business Competition Supervisory Commission (the 'Commission), according to Law 5/1999, shall be the Commission formed to supervise business actors in conducting their business activities so as not to breach the law and to enforce Law 5/1999 whenever that business actors breach that law. One of the business activities that are of the highest concern to competition law is cartels (Lande & Connor, 2012). The sophistication of a cartel agreement requires many factors to determine an activity as a cartel (Marvão, 2021). Since cartel activity tends to form on much-needed goods and there are rarely substitutes, it will cause a severe effect on the standard of living of individuals (Stephan, 2017; UNCTAD, 2013). When business actors in the same market agree to regulate their competition, such as price fixing, dividing the market, or cheating on tender procedures, they are suspected of having committed cartels in their business (Jaspers, 2019). The construction of cartels is aimed at limiting competition between competitors in the markets in which they operate by adjusting behavior (Clarke, 2011). Members of cartels will always try to conceal their fraudulent activities from customers, and business actors who are not part of the cartel, especially from the Commissions (Baker & Faulkner, 1993).

There has been a growing understanding of the dangers caused by cartels (Cole & Ohanian, 2004). According to MacCulloch (2020), huge economic harm takes place due to the cartel activity of perpetrators. Cartel behavior is a corporate and economic crime that must collude with cartel members (Jaspers, 2017). For Warden (2009a), cartel behavior is a crime against property, such as robbery and theft, and according to Whelan (2013), the economic harm caused is much greater. Therefore, in almost every country that has competition laws, cartels are prohibited *per se* activity (UNCTAD, 2013).

Cartel behavior should be severely sanctioned (Beaton–Wells, 2008; O'Loughlin, 2016). Designing sanctions to optimally deterrent violations of competition law is a relatively prone task in today's perfectly informed world (Mungan & Wright, 2022). Sanctions can be made rigidly where sanctions are given in case it is found that the perpetrator is bringing about the harm, or based on wrongdoing, where the perpetrator as the cause of harm is sanctioned when the perpetrator does not comply with the behavior or rules that have been established as the standards (Polinsky & Shavell, 2007).

Serious damage by cartel activity is characterized by the need for the criminalization of cartel behavior (Jones & Williams, 2014; Stephan, 2017). The criminalization of cartel behavior is not a new phenomenon (Clarke, 2011). There is growing understanding among countries in the world of the need to criminalize the perpetrators of anti-competitive conduct. And also growing support for competition authorities to criminalize 'hard core' cartel activity (Beaton-Wells & Parker, 2013). Through criminal enforcement, messages are conveyed, and their expression is seen to be stronger than civil or administrative enforcement (Wils,

2005). Various criminal labels will be given by the public as a consequence of involvement in criminal behavior (Hadjimatheou, 2016). It is clear that (economic) deterrence is the main reason for the existence of criminal sanctions against cartel behavior (Whelan, 2022). The imposition of fines on individuals, imprisonment, or both is a criminal sanction that can be imposed. (John M. Connor, 2010). Through criminal sanctions, cartel members will betray other cartel members and will reduce the formation of cartels (Sokol, 2013, 2018).

Wils (2009) argues that for competition law enforcement can run effectively, it should be able to pursue, penalize and deter violations (*deterrence function*). The criminalization of cartels, especially hard-core cartels, in Indonesia, is felt very urgent to be implemented. The idea of criminalization of anti-competitive behavior is based on the understanding that criminalization will lead to optimal deterrence policies because it will increase the severity of penalties (Sokol, 2018). Sanctions in the form of fines alone to companies are not effective in deterring cartels and abuse of dominant positions (Bourgeois, 2008). Usually, fines imposed on cartel perpetrators are suboptimal and below the gains obtained (Whelan, 2014). Canada was the first country to criminalize cartel behavior and was followed by the United States the following year with the introduction of the Sherman Act (Clarke, 2011). Sokol (2018), stated that the basis of antitrust enforcement derives from models of optimal deterrence.

The criminalization of individuals who are responsible for cartels, such as imprisonment, has never been carried out in Indonesia. The United States is one of the countries that conduct criminal prosecutions of individuals involved in cartel activities (Morphet & Hlatshwayo, 2017). In many cases, if the fine is borne only by the company, this will not have a deterrent effect on individuals in the company, because the company cannot effectively control the behavior of its directors (Caliskan, 2019). Prison penalties directly target responsible individuals within companies that cannot be replaced (Marvão & Spagnolo, 2018). Imprisonment of individuals can be one of the most effective incentives for individuals to comply with the rules related to hard-core cartels behavior (Stephan, 2012). Imprisonment is imposed only when the offender, both a company and an individual, is unable to pay the optimal fine imposed (Lande & Connor, 2012). There is ample evidence from experience in the US that imprisonment is an effective way to deter potential cartel perpetrators from cartels (Wirz, 2016). The number of legal systems that do, or are considering the criminalization of individuals, along with hefty fines and imprisonment for those involved in cartels, has increased significantly compared to the previous decade (Harding, 2010).

The criminalization of cartel behavior has the effect of deterring perpetrators from repeating violations. Criminal conduct in economic crimes can be deterred through the application of sanctions (Sloan et al., 2013). Prison is the inferno for business actors and all calculations of profit and loss in committing violations of

competition law collapse when the threat is a prison, so prison is the most effective way to prevent violations of competition law (Pillai, 2014). If law enforcers are still reluctant to apply criminal sanctions, then the expected deterrent effect, in the long run, may be exaggerated (Whelan, 2014). Imprisonment will have a deterrent effect and a hard punch to the offenders of criminal acts (Stephan, 2008).

This paper focuses more on the application of criminal sanctions to a company that violates business competition law and individuals who are responsible for the occurrence of violations of competition law in Indonesia, especially for cartel conduct. This paper offers a criminal approach to prevent violations of competition law in Indonesia. Deterrence theory is used as an analytical framework to provide an overview of the effectiveness of criminal sanctions against that companies and individuals. This paper analyzes the Commission's awards that punish perpetrators who re-violate competition law in Indonesia and aims to explore how the criminalization of perpetrators who violate competition law can create a deterrence effect on competition law violations in Indonesia.

B. RESEARCH METHOD

This paper is carried out with an analytical descriptive method with a normative legal approach. This paper focuses on cartel behavior and the criminalization of individuals responsible for the occurrence of cartels in Indonesia. The approach taken is by analyzing the Commission's awards that punish the same business actors for repeatedly cartel offenses and also analyzing the laws and regulations of business competition and the Criminal Code as well as related laws and regulations applicable in Indonesia. Primary legal materials consist of: (1) 1945 Constitution Article 33 paragraph (1); (2) Republic of Indonesia Law Number 5 of 1999 concerning Prohibition of Monopoly Practices and Unfair Business Competition; Republic of Indonesia Law Number 48 of 2009 concerning Judicial Power, Republic of Indonesia Law Number 3 of 2009 concerning the Second Amendment to Law Number 14 of 1985 concerning the Supreme Court; Code of Civil law; (3) Republic of Indonesia Government Regulation Number 44 of 2021 concerning Implementation of Prohibitions on Monopoly Practices and Unfair Business Competition; Republic of Indonesia Government Regulation Number 68 of 2015 concerning Types and Rates of Non-Tax State Revenues Applicable to the Business Competition Supervisory Commission; (4) Decree of the President of the Republic of Indonesia Number 57 of 1999 concerning the Business Competition Supervisory Commission; (5) Business Competition Supervisory Commission Regulation Number 4 of 2009 concerning Guidelines for Administrative Actions in Accordance with the Provisions of Article 47 of Law Number 5 of 1999 concerning Prohibition of Monopoly Practices and Unfair Business Competition; (6) Cassation Decision of the Supreme Court of the

Republic of Indonesia Number 217 K/Pdt.Sus-KPPU/2019 dated 23 April 2019 jo., Decision of the North Jakarta District Court Number 163/Pdt.G/KPPU/2017/PN.Jkt.Utr dated 5 December 2017 jo., Decision of the Business Competition Supervisory Commission of the Republic of Indonesia Number 04/KPPU-I/2016 dated 20 February 2017.

C. RESULTS AND DISCUSSIONS

The types of sanctions given in competition law vary and depend on the type of violation committed. The most common sanction is fine (Beaton-Wells, 2017) especially fines to corporate (Whelan, 2021). In Law 5/1999, the amount of fines that can be imposed on violators is limited by determining the amount with a minimum limit of 1 billion and a maximum limit of 25 billion. The factors that determine the size of the number of fines that can be imposed by the Commission are not determined with certainty. It is based on the subjective considerations of the Commission. Through Law of the Republic of Indonesia Number 6 of 2023 concerning the Stipulation of Government Regulations in Lieu of Law Number 2 of 2022 concerning Job Creation into Law, the Indonesian government has increased the number of fines contained in Law 5/1999 and has also made changes in the formulation of the imposition of fines for violations of competition law.

Penalties against cartel perpetrators based on the revenue earned by cartel perpetrators have recently begun to be implemented by most jurisdictions including the US and the European Union (Katsoulacos et al., 2020). In the Job Creation Law, the amount of the fine is determined using a percentage formulation, at a maximum of 50% (fifty percent) of the net profit obtained by business actors in the relevant market, during the period of the violation; or at a maximum of 10% (ten percent) of total sales in the relevant market, during the period of the violation (Law of the Republic of Indonesia Number 6 of 2023 Concerning the Stipulation of Government Regulations in Lieu of Law Number 2 of 2022 Concerning Job Creation into Law, 2023) see also (Regulation of the Business Competition Supervisory Commission of the Republic of Indonesia Number 2 of 2021 Concerning Guidelines for Imposing Fines for Violations of Monopoly Practices and Unfair Business Competition, 2021). Unlike Law 5/1999, the amount of fines in the Job Creation Law is determined based on: negative impacts caused by violations; duration of time the violation occurred; mitigating factors; aggravating factors; and the ability of business actors to pay.

In the *case of fuel surcharge* (B. C. S. C. of the R. of Indonesia, 2010), nine of thirteen domestic airlines operating in Indonesia, were declared to have violated Article 5 of Law 5/1999 for setting aviation fuel prices for the 2006-2009 period (see **Table 1**). According to the Commission, the loss or *loss of welfare experienced* by consumers during the violation period is between IDR 5 trillion to IDR 13.8 trillion. Some of the perpetrators who have been convicted, that is PT Garuda Indonesia

(Persero); PT Sriwijaya Air; PT Lion Mentari; PT Wings Abadi, in case number 15/KPPU-I/2019 in a case related to the price of airplane tickets for domestic economy class passenger scheduled commercial air transport services (*Business Competition Supervisory Commission of the Republic of Indonesia Award Number: 15/KPPU-I/2019*, 2020), was again convicted of violating Article 5 of Law 5/1999 (see **Table 2**). In the award, the Commission stated that the perpetrators committed violations and strangely were not subject to any fines.

Table 1. Fuel Surcharge Case

Reported Party	Name of Reported Party	Violation of Article 5 of Law 5/1999	Violation of Article 21 of Law 5/1999	Amount of Fine	Amount of Indemnity
I	PT Garuda Indonesia (Persero)	v	o	IDR 25.000.000.000,-	IDR 162.000.000.000,-
II	PT Sriwijaya Air	v	o	IDR 9.000.000.000,-	IDR 60.000.000.000,-
III	PT Merpati Nusantara Airlines (Persero)	v	o	IDR 8.000.000.000,-	IDR 53.000.000.000,-
IV	PT Mandala Airlines	v	o	IDR 5.000.000.000,-	IDR 31.000.000.000,-
V	PT Riau Airlines	o	o	-	-
VI	PT Travel Express Aviation Services	v	o	IDR 1.000.000.000,-	IDR 1.900.000.000,-
VII	Lion Mentari Airlines	v	o	IDR 17.000.000.000,-	IDR 107.000.000.000,-
VIII	PT Wings Abadi Airlines	v	o	IDR 5.000.000.000,-	IDR 32.500.000.000,-
IX	PT Metro Batavia	v	o	IDR 9.000.000.000,-	IDR 56.000.000.000,-
X	PT Kartika Airlines	v	o	IDR 1.000.000.000,-	IDR 1.600.000.000,-
XI	PT Linus Airways	o	o	-	-
XII	PT Trigana Air Services	o	o	-	-
XIII	PT Indonesia Air Asia	o	o	-	-

Source: Business Competition Supervisory Commission of the Republic of Indonesia Award Number: 25/KPPU-I/2009.

Table 2. The price of airplane tickets for domestic economy class passenger scheduled commercial air transport services case

Reported Party	Name of Reported Party	Violation of Article 5 of Law 5/1999	Violation of Article 11 of Law 5/1999	Amount of Fine
I	PT Garuda Indonesai (Persero), Tbk	v	o	-
II	PT Citilink Indonesia	v	o	-
III	PT Sriwijaya Air	v	o	-
IV	PT NAM Air	v	o	-
V	PT Batik Air	v	o	-
VI	PT Lion Mentari	v	o	-
VII	PT Wings Abadi	v	o	-

Source: Business Competition Supervisory Commission of the Republic of Indonesia Award Number: 15/KPPU-I/2019

As can be seen in Table 1 above, the total amount of fines and damages in the award of the Commission is much lower than the total loss incurred by consumers. The number of fines was so suboptimal that seven perpetrators repeated the same offense. In Table 2, even if the perpetrators are found guilty, the Commission does not punish the perpetrators with fines considering that "*the Corona Virus Disease 2019 (COVID-19) pandemic has a very large effect on the Indonesian economy and economic recovery is expected to take a long time. Aviation industry business actors have experienced many difficulties even before the pandemic*".

Furthermore, the commission in 2010, stated that as many as twenty-one business actors in the cooking oil industry, were legally and convincingly proven to violate Law No. 5/1999 (*Business Competition Supervisory Commission of the Republic of Indonesia Award Number 24/KPPU-I/2009*, 2010), consisting of fourteen business actors violating Article 4 of Law No. 5/1999 for the bulk cooking oil market, six business actors violating Article 4 of Law No. 5/1999 for the packaged cooking oil market (branded), eighteen business actors violated Article 5 of Law No. 5/1999 for the bulk cooking oil market, nine business actors violated Article 5 of Law No. 5/1999 for the packaged cooking oil market (branded), and nine business actors were guilty of violating Article 11 of Law No. 5/1999 for the packaged cooking oil market (branded) (see **Table 3**). In 2023, the Commission stated that as many as seven of the twenty-one business actors were again found guilty of violating Article

19 letter c of Law No. 5/1999 (*Business Competition Supervisory Commission of the Republic of Indonesia Award Number: 15/KPPU-I/2022*, 2022), (see **Table 4**).

Table 3. The cooking oil 2009 case

Reported Party	Name of Reported Party	Violation of Article 4 of Law 5/1999		Violation of Article 5 of Law 5/1999		Violation of Article 11 of Law 5/1999		Amount of Fine
		Bulk Cooking Oil	Cooking Oil Packaging	Bulk Cooking Oil	Cooking Oil Packaging	Bulk Cooking Oil	Cooking Oil Packaging	
I	PT Multimas Nabati Asahan	v	▪	v	▪	○	▪	IDR. 25.000.000.000,-
II	PT Sinar Alam Permai	v	▪	v	▪	○	▪	IDR 20.000.000.000,-
III	PT Wilmar Nabati Indonesia	v		v		○		IDR 1.000.000.000,-
IV	PT Multi Nabati Sulawesi	v	▪	v	▪	○	▪	IDR 25.000.000.000,-
V	PT Agrindo Indah Persada	v		v		○		IDR 25.000.000.000,-
VI	PT Musim Mas	v		v		○		IDR 15.000.000.000,-
VII	PT Intibenua Perkasatama	v		v		○		IDR 2.000.000.000,-
VIII	PT Megasurya Mas	v		v		○		IDR 15.000.000.000,-
IX	PT Agro Makmur Raya	v		v		○		IDR 5.000.000.000,-
X	PT Mikie Oleo Nabati Industri	v	○	v	▪	○	▪	IDR 20.000.000.000,-
XI	PT Indo Karya Internusa	v		v		○		IDR 15.000.000.000,-
XII	PT Permata Hijau Sawit	○		v		○		IDR 5.000.000.000,-
XIII	PT Nagamas Palmoil Lestari	○			○	○		-
XIV	PT Nubika Jaya	○		v		○		IDR 2.000.000.000,-
XV	PT Smart, Tbk	v	▪	v	▪	○	▪	IDR 25.000.000.000,-
XVI	PT Salim Ivomas Pratama		▪		▪		▪	IDR 25.000.000.000,-
XVII	PT Bina Karya Prima		▪		▪		▪	IDR 25.000.000.000,-
XVIII	PT Tunas Baru Lampung, Tbk	○	○	v	▪	○	▪	IDR 10.000.000.000,-
XIX	PT Berlian Eka Sakti Tangguh	v		v		○		IDR 10.000.000.000,-
XX	PT Pacific Palmindo Industri	○				○		IDR 10.000.000.000,-
XXI	PT Asian Agro Agung Jaya	v	○	v	▪	○	▪	IDR 10.000.000.000,-

Source: Business Competition Supervisory Commission of the Republic of Indonesia Award Number 24/KPPU-I/2009

Table 4. The cooking oil 2022 case

Reported Party	Name of Reported Party	Violation of Article 5 of Law 5/1999	Violation of Article 19 point c of Law 5/1999	Amount of Fine
I	PT AsianagroAgungjaya	○	v	IDR 1.000.000.000,-
II	PT Batara Elok Semesta Terpadu	○	v	IDR 15.246.000.000,-
III	PT Berlian Ekasakti Tangguh	○	○	-
IV	PT Bina Karya Prima	○	○	-
V	PT Incasi Raya	○	v	IDR 1.000.000.000,-
VI	PT Selago Makmur Plantation	○	○	-
VII	PT Agro Makmur Raya	○	○	-
VIII	PT Indokarya Internusa	○	○	-
IX	PT Intibenua Perkasatama	○	○	-
X	PT Megasurya Mas	○	○	-
XI	PT Mikie Oleo Nabati Industri	○	○	-
XII	PT Musim Mas	○	○	-

XIII	PT Sukajadi Sawit Mekar	o	o	-
XIV	PT Pacific Medan Industri	o	o	-
XV	PT Permata Hijau Palm Oleo	o	o	-
XVI	PT Permata Hijau Sawit	o	o	-
XVII	PT Primus Sanus Cooking Oil Industrial	o	o	-
XVIII	PT Salim Ivomas Pratama, Tbk	o	v	IDR 40.887.000.000,-
XIX	PT Smart, Tbk	o		-
XX	PT Budi Nabati Perkasa	o	v	IDR 1.746.000.000,-
XXI	PT Tunas Baru Lampung, Tbk	o	o	-
XXII	PT Multi Nabati Sulawesi	o	o	-
XXIII	PT Multimas Nabati Asahan	o	v	IDR 8.018.000.000,-
XXIV	PT Sinar Alam Permai	o	v	IDR 3.365.000.000,-
XXV	PT Wilmar Cahaya Indonesia, Tbk	o	o	-
XXVI	PT Wilmar Nabati Indonesia	o	o	-
XXVII	PT Karyaindah Alam Sejahtera	o	o	-

Source: Business Competition Supervisory Commission of the Republic of Indonesia Award Number: 15/KPPU-I/2022.

One of the objectives of Law 5/1999, as mentioned in Article 3, is to prevent unfair business competition by business actors. Sanctions in the form of fines are one way to realize these objectives. Fact, the occurrence of repeated violations of competition law by business actors in Indonesia, as can be seen through Award number 25/2009 and Award number 15/2019, is caused by the suboptimal fines imposed on the perpetrators compared to the benefits obtained. According to Sloan (2013), one of the causes of the failure of punishment in deterring violations is the suboptimal punishment imposed on the perpetrator. Where deterrence is the critical function of competition law (Mungan & Wright, 2022), and in order for fines to have a deterrent effect, they must be in optimal amounts (Werden et al., 2011). The optimal fine can be determined by taking into account additional profits illegally obtained by cartel members and how likely the cartel's behavior is to be detected by competition authorities (Combe & Monnier, 2011).

The main target for violations of competition law is still specific to companies, even if violations of competition law are deliberately committed by directors (Caliskan, 2019). Article 1 point 5 of the Indonesian Law 40 of 2007 regarding Limited Liability Company stated that The Board of Directors is an organ of the company that is authorized and fully responsible for the management of the company for the benefit of the company and represents the company, both inside and outside the court (also see Article 92 paragraph (1)) Indonesian Government, 2007). All business plans and decisions to benefit the company, are certain with the knowledge and approval of the Board of Directors, including the decision to commit or to engage in acts that violate competition law in running the company's business. Therefore, the prime sanctions for violations of competition law are not

only the nullification of responsible directors (Whelan, 2021). According to Warden (2009b), cartels are equated with criminal acts of theft and robbery, deliberately done to gain profit by harming other people or other companies as well as to avoid their obligations (Clarke, 2011). Theft and robbery are crimes punishable by imprisonment (G. of Indonesia, 1958). The crime is committed to obtaining substantial profits for the company (Whelan, 2007), and with the knowledge and approval of the Board of Directors, therefore the Board of Directors, as an individual, is legally responsible for the crime (Charles & Packer, 1970).

Moral reasons and their usefulness are perfect reasons to emphasize the need for increased sanctions against individuals and criminals for violations of competition law (Kovacic et al., 2016). The sanctions that potential violators will face are expected to equal the social harm resulting from such violations (Mungan & Wright, 2022). Criminal sanctions in the form of detention of individuals are the prerogative of the courts (ICN Working Group on Cartels, 2005). The Director, as an individual and a human being, with every effort, will avoid imprisonment. Wirz (2016), stated that the threat of imprisonment to individuals responsible for violations of competition law can prevent violations or repetition of violations of competition law.

Business actors who run their businesses in violation of competition laws have also committed fraudulent competition. This fraudulent competition, in Article 382 bis of the Indonesian Criminal Code, is categorized as a crime punishable by imprisonment. Imprisonment will lead to loss of public trust in the perpetrator, and loss of reputation, and is a great shame for the Board of Directors, and will at all costs avoid it even by paying a large amount of security deposit. Companies that have benefited greatly from violations of competition law, will be willing to pay the security deposit, with the aim that the individual who has made the company earn a significant profit is not imprisoned, in the hope that the individual can provide even greater profits to the company in the future. The threat of a large fine coupled with imprisonment will prevent perpetrators, both the Board of Directors and the company, from repeating their actions and also as other business actors who intend to violate competition law. Recidivist penalties may be applied if there is a close relationship between one competition law violation and the next committed in the same market, by the same company, or by the same individual (Riley, 2010).

The actions of cartels cause enormous harm to society, one of them is the loss of people's welfare. The actions of this cartel are equated with the crimes of theft and robbery, so they must be subject to criminal sanctions. The criminalization of cartel behavior is motivated by the harm it causes (Stephan, 2017). Criminalization is an act or determination from the state regarding specific actions that the community or groups of society consider as acts that can be punished into criminal acts. Competition policymakers face major challenges in designing law

enforcement systems capable of realizing optimal deterrence (Mateus & Moreira, 2010; Whelan, 2021). Through the Indonesian National Police as the investigator authorized to conduct investigations into a criminal act (Law of the Republic of Indonesia Number 2 of 2002 Concerning the National Police of the Republic of Indonesia, 2002), and the Prosecutor's Office of the Republic of Indonesia as an institution authorized to conduct prosecutions by transferring cases to the District Court in accordance with the provisions in the criminal procedure law (Indonesian Law Number 11 of 2021 Regarding Amendments to Law Number 16 of 2004 Concerning The Attorney General of The Republic of Indonesia, 2021), as well as the Judicial Power of the Republic of Indonesia as a state institution authorized to administer justice in order to uphold law and justice for the implementation of the State Law of the Republic of Indonesia (K. S. N. R. Indonesia, 2009), the criminalization of business actors who violate competition law in Indonesia, in order to realize optimal deterrence, is not impossible to do.

In the development of law enforcement cartel law is happening today, almost every country acknowledges its existence indirectly evidence in cartel enforcement. Deep Brazil the Steel Cartel case, for example, although it recognizes the existence of economics evidence, but the decision of CADE (Council for Economic Defense) not solely based on economic considerations evidence, but also based on what known as "plus parallelism theory". In Malaysia, indirect evidence is used cannot stand alone, it must be supported by other evidence. In Australia, for determine the existence of an agreement (meeting of the mind) which is required in proof there is an agreement that violates the law competition, situational evidence (circumstances) can use. This evidence can be in the form of clues parallel actions, hints of joint action, hints of collusion, hints the existence of a similar pricing structure (in price fixing cases). However, deep Proof still requires goods direct evidence. Thus, if indirect evidence is used, its position only as a support or reinforcement from one of the pieces of evidence in question. (Veri, 2019)

Indonesia already has regulations regarding cartel regulation, namely in Law Number 5 of 1999. However, there are several shortcomings in this regulation, one of which is criminal sanctions for perpetrators for cartel criminal efforts contained in it. Article 48 paragraph (1) Law Number 5 of 1999 concerning Prohibition of Practice. It is felt that monopoly is no longer effective to implement at this time. Referring to Law No. 5 of the Year 1999, this regulation has not been effective in its enforcement laws related to cartels in Indonesia remember many reports have been submitted to the KPPU so far. KPPU as the authority body for competition supervision the business does not have the authority to obtain, research and/or assess letters, documents, or other evidence to investigate or inspection. Apart from that, there are difficulties faced by the KPPU in proving there is an agreement to hold this cartel. Looking at the leniency program that has been implemented

successfully carried out in a number of countries, Indonesia deemed necessary to implement immediately cartel leniency. Regarding this matter, the Bill on Amendments to Law No.5 of 1999 concerning Prohibition of Monopoly Practices and Competition Unfair Business is one of the bills which is included in the National Legislation Program 2015-2019 and National Legislation Program DPR-RI Priority Draft Law (both 2015 and 2016) and is a bill proposed by the DPR RI initiative. Therefore, to achieve prosperity people and the efficiency of the national economy in creating social justice, then some efforts to improve Indonesian regulations in Investigating cartel practices needs to be done as following: First, apply leniency towards cartel practices, in the form of (i) forgiveness of sanctions administrative fine in the form of 100% of calculation of administrative sanctions in the form of fines imposed on the first complainant; and (ii) reduction of administrative sanctions in the form of fines of 50% of the administrative sanction calculation in the form of a fine imposed on the reporter second or 30% to the third reporter. Second, revision of the amount of administrative fines against perpetrators business proven to be a cartel. Competition Healthy business needs to become a collective value system nation, so that in the long term the economy Indonesia can grow and develop sustainably and sturdy. Third, strengthening the role of the KPPU by granting authority to obtain, examine and/or assess letters, documents, or other evidence for investigation or examination.

The criminalization of individuals in cartel cases has various impacts. Based on Peter W. Low's view, criminalization is necessary measure the effects that may arise from the implementation of criminalization. There are three (3) effects that need to be measured, namely, first, the benefits of criminalization towards society. is there more criminalization whether it brings many benefits to society or not. In the case of cartels, it is believed that providing individual criminalization to cartel perpetrators can have a deterrent effect on the perpetrators so that it can reduce cartel cases that are detrimental to society. Second, measuring the costs of criminalization which includes the prevention aspect socially valuable behavior, expenditure on enforcement, effects on individuals, effects on privacy, criminogenic effects, and crime rates. Prevention of socially valuable behavior through criminal prohibitions can preventing lawful conduct from entering into conduct which is prohibited by law. The magnitude of this effect varies as it does not the certainty of the prohibition and the instrumental nature of the prohibited behavior. Regarding this second aspect, further studies are needed that specifically discuss the technicalities, methods and financing that may be needed to implement individual criminalization in cartel cases. The third thing that needs to be considered is also regarding the advantages and disadvantages of implementing this criminalization. Regarding the impact of individual criminalization on perpetrators of cartel cases, it is of course predicted that it will provide more benefits for Indonesia, namely providing a deterrent effect for perpetrators and

suppressing the occurrence of cartel cases which ultimately harm society. (Salman, 2009).

Other countries have implemented strict sanctions in cartel cases. The rise in sanctions for criminal cartels today can be traced back to the enactment of the Sherman Act in 1890 in the US. This makes cartel activity a misdemeanor under article 1 (prohibition of collusive conduct) punishable by up to one year in prison. Congress upgraded cartel activity to a felony in 1974 and increased the maximum prison sentence from one to three years. In 2004, the Antitrust Criminal Penalty Improvement and Reform Act increased the maximum individual fine from US$350,000 to US$1 million and the maximum prison sentence from three to ten years. In Canada, criminal antitrust laws have been around longer than in the US, dating back to 1889. And on paper, Canada has the most severe cartel sanctions against individuals in the world. In 2010, the maximum penalty was increased so that conspiracy (i.e. engaging in price fixing, allocating customers or markets, or restricting production) is now punishable by a fine of up to CA$25 million, and/or imprisonment for a term of up to 14 years. Penalties for bid rigging in Canada include fines at the discretion of the court and/or imprisonment of up to 14 years. Outside North America, cartel enforcement is generally administrative and civil – targeting companies only. Criminal sanctions have crept into the antitrust enforcement regimes of other jurisdictions gradually, over the past decade or two. In the UK, the criminal offense of cartel came into force in 2003, providing that a person has acted dishonestly by entering into or implementing a prohibited cartel agreement (direct or indirect price fixing, limiting or preventing production or supply, division of customers or markets) . or tender rigging), a prison sentence of up to five years may be imposed. In Brazil, price fixing has been prosecuted as a criminal offense since the 1990s. Individual cartel violators can be sentenced to prison for two to five years. Denmark is the latest European country to fall foul of criminal cartels. Since 2013, being involved in a cartel has been a personal criminal offense that can be punishable by imprisonment if an individual's participation in the cartel is deliberate and serious based on its scale and negative impact. The maximum sentence is 18 months; However, this can be extended to six years if there are aggravating circumstances. A number of other EU Member States have criminalized cartel actions to a lesser extent. In France, Greece and Romania, cartel behavior can be prosecuted under fraud offense provisions. This shows that developed countries such as Erpoa have begun to criminalize cartel cases. It is time and has become an urgency for Indonesia to implement individual criminalization in cartel cases.

D. CONCLUSION

Cartel behavior can be linked to criminal acts of theft and robbery of public welfare. There is no doubt that cartels cause enormous harm to society and the

economy. The occurrence of cartels can be ascertained with the knowledge and permission of the directors. From the awards that have been described in this paper, the author finds that the suboptimal number of fines for cartel offenses compared to the large number of profits obtained, and the absence of individuals responsible for the occurrence of cartels, both criminal and civil, cause perpetrators to repeat cartel behavior. Sanctions in the form of fines alone to companies are not effective in deterring cartels. The criminalization of individuals responsible for the occurrence of cartels is very urgent to be applied in Indonesia to provide a deterrent effect to perpetrators and a preventive effect so that other business actors do not carry out cartel actions. Indonesia is expected to no longer turn a blind eye to the world's tendency to criminalize cartel perpetrators. With the legal and law enforcement tools owned by Indonesia, the author firmly believes that criminalization of cartel perpetrators in Indonesia is very possible to apply. Combining fines with criminal sanctions, such as imprisonment, improves the deterrence levels significantly in Indonesia. The application of criminalization of cartel behavior in Indonesia will certainly cause pros and cons. The results of this research are expected to be a guideline for all stakeholders in implementing criminalization against cartel behavior in order to prevent and provide a deterrent effect on violations of business competition law, especially cartels. The authors also suggest the need for further research on how to more effectively criminalize competition law violators.

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