INTEGRATING THE LENIENCY PROGRAM IN INDONESIA'S CARTEL ENFORCEMENT SYSTEM*

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Abstract

Cartel is considered as the most serious violations towards competition law due to its adverse impact towards the consumer and efficiency in the market. However, the secretive nature of cartel made it difficult to detected by the competition authority. As a matter of fact, the competition authority often fails to prosecute cartel practices due to lack of evidences in prosecuting cartel activity. On that account, various countries have implemented the leniency program in their cartel enforcement system in order to detect cartel practices effectively. The leniency program is a policy where it offers reduction of penalty in exchange for insider corporation in detecting cartel practices. Through this leniency program, the competition authority is able to find strong evidences to prove the existence of cartel in practice.

Intisari

Perjanjian kartel dinilai sebagai bentuk yang paling berbahaya dari tindakan anti persaingan karena dampaknya yang luar biasa merugikan konsumen dan juga merusak efisiensi dalam pasar ekonomi. Namun, sifat kartel yang rahasia telah berulang kali menjadi hambatan terbesar bagi otoritas persaingan usaha termasuk Komisi Pengawas Persaingan Usaha dalam membuktikan praktik kartel. Tak jarang upaya-upaya yang dilakukan oleh otoritas persaingan usaha kerap kali berujung pada kegagalan untuk mendapatkan bukti-buktinya. Oleh karena itu sejumlah besar yurisdiksi di negara maju seperti Amerika Serikat telah menerapkan leniency program dalam mengungkap praktik kartel. Leniency program merupakan suatu kebijakan yang menawarkan insentif bagi para pelaku kartel untuk melaporkan tindakannya secara sukarela. Maka dari itu penerapan leniency program dapat menghadirkan bukti-bukti yang kuat bagi otoritas persaingan usaha dalam membuktikan praktik kartel.

Keywords: Unfair Business Competition, Cartel, Leniency Program

Kata Kunci: *Persaingan Usaha Tidak Sehat, Kartel, Leniency Program*

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A. Introduction

Throughout history, cartels are considered by many as the most egregious offence against competition laws due to its adverse impact towards consumers and state economic development. Cartels eliminate competition among business actor enabling them to charge higher prices while selling lower quality with a narrower choice. This does not only make consumers and small competitors suffer, but also adversely affects the competitiveness of the economy as a whole. On that note, various jurisdictions, including Indonesia strictly prohibits any cartel conduct.

Among others, the prohibition of cartel agreements in Indonesia can be found in Article 11 of Law Number 5 of 1999 regarding Prohibition on Monopolistic Practices and Unfair Business Competition ("**Competition Law**"), which states:

"*Business actors are prohibited to enter into an agreement with his business competitor with the purpose to affect the price by controlling the production and or distribution of goods and or services, that might cause monopolistic practices or unfair business competition.*"

Aside from the above article, the prohibition of cartel can also be found in Article 5 regarding price fixing, Article 7 regarding agreement that aims to fix prices below market price, Article 9 regarding division of territory, Article 10 regarding boycott, Article 12 regarding trust, Article 22 regarding conspiracy in tender, and Article 24 regarding conspiracy in production and/or distribution limitation.

The difficulties in finding strong evidences to prosecute cartels has made the Indonesian Commission for the Supervision of Business Competition or *Komisi Pengawas Persaingan Usaha* ("**KPPU**") realize that a mere prohibition is insufficient to eradicate cartels; there must be an effective enforcement system. The evidentiary process of cartel is complicated due to the confidential nature of cartels. As such, KPPU is facing difficulties in finding sufficient evidence to prosecute cartels.

In particular, the Competition Law requires KPPU to present "hard evidence" to prove the existence of a cartel agreement among business actors that led to an unfair business competition. "Hard evidence" refers to a proof that directly identifies a meeting or communication between the subjects and describes the substance of their agreement. The most common form of hard evidence are: printed documents and/or electronic documents that indicates the existence of the cartel agreement and the parties to it, and oral/or written statements by co-operative cartel participants describing the operation of the cartel.

As cartel operates under the cloak of secrecy, it is impossible to always find hard evidences. However KPPU could not rely on indirect evidence, as its legitimacy is still questioned in Indonesia.

In particular, it is stated in case No. *294/K/PDT.SUS/2012 (KPPU v. PT. Pfizer Indonesia, PT. Dexa Medica, Pfizer Inc., Pfizer Overseas LLC, Pfizer Global Trading, and Pfizer Corporation Panama*) that the value of indirect evidence is not equivalent with the value of the types of evidences listed in Article 42 of the Competition Law, which are:

a. witness testimony
b. expert elucidation
c. indication
d. written document
e. testimony of business actor.

This view is further supported by Sutrisno Iwantono's expert elucidation in stating that:

"*Indirect evidence shall serve as an indicator to foresee the possibility of a cartel conduct. However, indirect evidence could not be used directly as a key evidence to prove the existence of cartel.* "

For that reason, the Indonesian Supreme Court rejected the case and ruled in the favor of the defendant. This is because KPPU only relied on indirect evidence using parallel pricing reasoning to conclude that PT. Pfizer is amounted to cartel without further support from any evidences as required under Article 42.

The United State of America ("**USA**")'s competition authorities – in which under Section 1 of Sherman Act is obliged to provide hard evidences to prove the existence of cartel – also faces the same difficulty. In response, the USA adopted the leniency program in 1987.

As defined by the International Competition Network, leniency is a generic term to describe a system of partial or total exoneration from the penalties that would otherwise be applicable, in return for reporting its cartel membership and supplying information or evidence related to the cartel to the competition authorities. The leniency program will significantly increase the effectiveness of competition authorities' performance in the cartel evidentiary process. Through this program, competition authorities will no longer face any difficulties in providing sufficient evidence in prosecuting cartels.

Ever since the USA adopted leniency program in its enforcement system, it has successfully unfolded numerous cartel practices, including the biggest international cartel known as vitamin cartel. The USA's success has encouraged other jurisdictions to adopt a similar leniency program, including Indonesia.

Adopting the leniency program within the Indonesian legal regime will become a huge advantage for Indonesia to prove the existence of cartel. Hence, this Article will try to elaborate and examine the concept of leniency program specifically in the USA, and will also discuss the possibility of implementing the leniency program in Indonesia.

B. The Leniency Program

The leniency program offers reduced penalties to cartel members in exchange for revealing direct evidence and cooperating with the antitrust authority during the prosecution phase. Generally leniency program aims at three main objectives namely:

a. to encourage business actor who commits cartel report his violation to the business competition supervisory commission;
b. in the long run, the implementation of leniency program is expected to be able to give a deterrence effect that prevent the existence of cartel in the future;
c. to gain more sufficient evidence in proving the alleged cartel.

In the USA, there are two types of leniency program provided under the law: corporate leniency policy and leniency policy for individuals. The USA's leniency program applies to criminal violations of Section 1 of the Sherman Act and thus, it does not cover civil anti-trust enforcement. The Department of Justice ("**DOJ**") provides three types of leniency program. *First,* Type A corporate leniency, which is available only for the first applicant before the investigation has begun. *Second,* Type B corporate leniency, which is available only for the first applicant

after the investigation began. *Third,* individual leniency, which is available only for the first individual to report antitrust activity before the investigation began.

The DOJ will reward leniency applicant by providing partial or full immunity from criminal prosecution once such applicant has met all of the conditions and requirement. Nevertheless DOJ may also revoke the applicant's conditional acceptance into the leniency program if such applicant fails to comply with the conditions as already agreed upon beforehand.

Generally, people who sought for leniency in the USA must become the first one to come forward and report the illegal activity to the DOJ, fully cooperate with DOJ during the investigation stage by providing DOJ the requested information and supporting documents, take prompt and effective action to terminate its part in the activity, and provides full, continuing and complete cooperation that advances DOJ investigation. Further, where possible, there might be a requirement to make restitution to the injured parties.

The DOJ holds the identity of leniency applicants and the information they provide in strict confidence, much like the treatment afforded to confidential informants. Therefore, the DOJ does not publicly disclose the identity of a leniency applicant or information provided by the applicant. Notwithstanding this policy, the DOJ frequently obtains waivers to share information with another jurisdiction in cases where the applicant has also sought and obtained leniency from that jurisdiction. Such waivers are helpful in ensuring that the Division is able to coordinate investigative steps with the other jurisdictions involved.

C. The Possibility to Implement Leniency Program

In light of the Competition Guidelines made by United Nations Conference on Trade and Development in collaboration with Ministry for Foreign Affairs of Sweden, there are three essential prerequisites that must be met in order to successfully implement leniency program.

Firstly, the cartelist must perceive a high risk of detection by competition authorities. This means that the competition authorities must possess integrity that reflects their commitment and perseverance to eradicate cartel offences. This way, the cartelist will have a greater tendency to seek for leniency program before getting caught and be subject to a greater sanction for not reporting it in the first place.

Secondly, the competition law must provide effective sanctions for those who participate in cartel activities. In other words, the sanctions imposed towards the cartelist must be severe and significant enough to the extent that it encourages them to report the wrongdoing voluntarily to competition authorities. With a greater sanction and penalty imposed, the leniency program will be more appealing to cartelists.

Thirdly, it is paramount for competition authorities must implement the leniency program with transparency and certainty. The prospective leniency application must be able to feel secure and know what to expect when they report the cartel activity. Otherwise, cartelists will be hesitant to report to competition authorities. Therefore, the trust shared between cartelists and competition authorities will likely determine the sustainability of the leniency program in the long run.

In Indonesia, the Competition Law is considered to be insufficient in addressing

the current needs. For instance, the sanction imposed for cartel infringement under the Competition Law is considerably low (maximum penalty of Rp 100.000.000.000). In result, it does not provide effective deterrence effects for cartelists.

If Indonesia plans to apply the leniency program within its cartel enforcement, Indonesia must first increase the amount of applicable penalty for cartel infringement in order to make immunity provided under leniency program more attractive.

As a start, it is advisable for the amount of maximum penalty to be increased from from Rp 100.000.000.000 to Rp 1.000.000.000.000.0000. Other than that, the amount of fines may also be set at double the gross amount gained by the defendants or lost by the victim. Consequently, the increasing amount of the applicable penalty must be coupled by strong cartel enforcement by KPPU.

Moreover, the KPPU must maintain its integrity by implementing the law accordingly. Presently, Indonesia does not formally recognize any clemency institution, such as the leniency program. Subsequently, Indonesia must first acknowledge the existence of leniency program and amend its its Competition Law to regulate seven interrelated aspects of the leniency program.

The first amendment should be concerning the subject of the leniency program, which is currently still limited to corporations. Individuals should therefore be included as one of the subjects of the leniency program.

The second amendment should be concerning the granting institution of the leniency program. The KPPU, the authorized body to supervise the implementation of the Competition Law, should be the authority to enforce the leniency program.

The third amendment should be concerning the leniency program. Some of the requirements under the USA's leniency program can used as a reference in formulating the most suitable requirements for Indonesia's leniency program. In this line, there are several crucial requirements that the Indonesian leniency program must have.

The applicant must be able to provide the KPPU with substantive information regarding the alleged cartel activity. In this regard, the information provided by the applicant must be valid, and does not contain any falsehood. Further, the applicant should not be the mastermind of the alleged cartel activity, and should be fully committed in assisting the KPPU at all times; since the beginning up until the issuance of a final and binding decision.

The fourth amendment should be concerning the procedure of the leniency application. In the USA, the application is filed to the deputy assistant of the attorney general for a criminal enforcement. Meanwhile, Indonesia's current procedure does not provide any specific division to handle leniency cases. As such, the KPPU is recommended to establish a division to specifically handle such cases.

As for the procedure, Indonesia is advised to implement the following steps for its leniency program:

1. The leniency applicant should file the request to KPPU's specific division who is responsible for leniency program.
2. The leniency applicant will then receive a receipt upon filling its request. This receipt secures the place of the applicant for the leniency program.
3. After the KPPU confirms the validity of the reported information, KPPU will

then proceed to the investigation stage.
4. In the investigation stage, the leniency applicant shall assist KPPU by providing information that can prove the existence of the alleged cartel conduct.
5. Once KPPU has issued a final and binding decision upon the informed cartel activity, the leniency applicant will receive incentives in return of its corporation.

The fifth amendment should be concerning the incentives of the leniency program. Article 47 of the Competition Law imposes administrative sanction in the form of fines up to Rp. 100.000.000.000, while Article 49 imposes additional criminal punishment that consists of:

a. revocation of business permit;
b. prohibition for the entrepreneurs who are proven to have violated the Competition Law to hold a position as director or commissioner at least within a period of 2 years and at the longest within a period of 5 years;
c. termination of certain activities or actions that cause damage to other parties.

Thus, the first leniency applicant who is able to satisfy all of the requirements might be exempted from the above sanction.

The sixth amendment should be concerning the grounds for the revocation of the leniency program. Noticing the importance of having a fully committed leniency applicant, it is necessary for Indonesia to revoke the offer provided under the leniency program in certain circumstances. This includes when the leniency applicant: fails to cooperate with the KPPU by refusing to provide information regarding the alleged cartel activity, still participates after the filling of the leniency request, or provides false documents to the KPPU. These will ensure the effectiveness of the implementation of the leniency program at all times.

The seventh amendment should be regarding confidentiality. The USA emphasized the importance of upholding confidentiality. The identity of the application must be kept confidential until the authoritative court has issued a final and binding decision upon the relevant cartel case. Similarly, to ensure the safety and security of the leniency applicant, Indonesia must also protect his or her identity until the cartel case has been decided.

Aside from that, the KPPU should also maintain the secrecy of the submitted information. The KPPU should not disclose any information, unless ordered by the court or requested by the leniency applicant. Simply put, the KPPU is obliged to maintain the confidentiality of any document and/or information that was submitted by the leniency applicant.

D. Conclusion

All in all, Indonesia can borrow several elements from the leniency program created by the USA, which is regulated under the corporate leniency policy (1993) and leniency policy for individuals (1994). The enforcement of such policies remains under the prosecutorial discretion of the DOJ's Antitrust Division.

As the USA's leniency program applies to criminal violations, it does not cover civil anti-trust enforcement. The DOJ provides three types of leniency program and will reward the leniency applicant by providing partial or full immunity from criminal prosecution once such applicant has met all of the conditions and requirement.

There is no doubt that the leniency program will significantly advance the cartel enforcement system in Indonesia. However, the leniency program will only

compatible to be applied in Indonesia if there is an acknowledgement of such program within its Competition Law. This in turns requires several amendments, as per discussed earlier in this Article. Additionally, Indonesia should also provide an effective penalty for cartel infringements to invite participation of potential leniency applicants. Collectively, these will keep the possible practice of the leniency program functioning and fruitful in Indonesia.

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