

International **Comparative** Legal Guides



Cartels & Leniency **2020**

A practical cross-border insight into cartels & leniency

13th Edition

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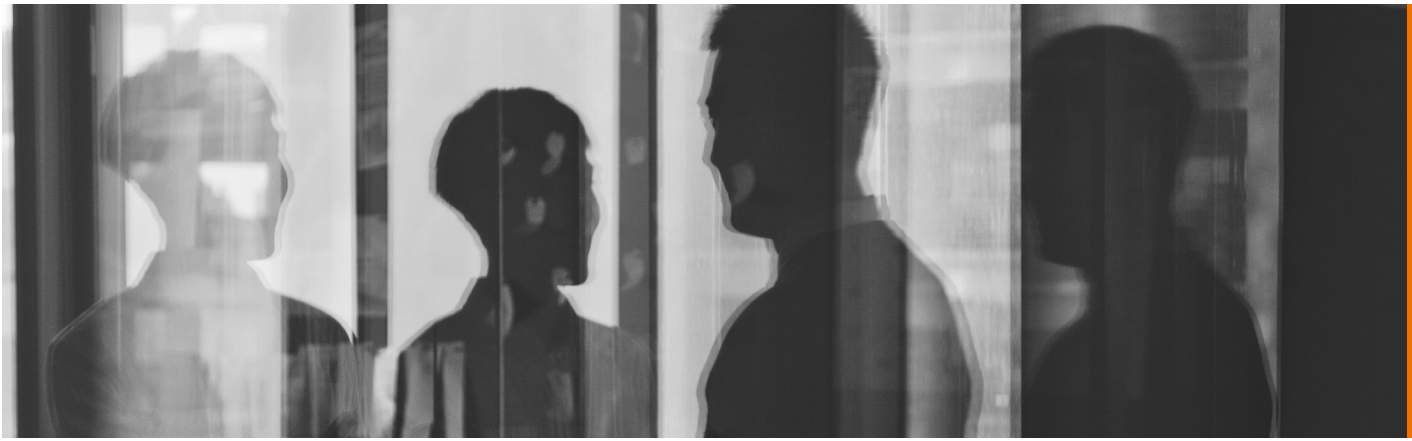
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Cartels & Leniency 2020

13th Edition

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This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

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From the Publisher

Dear Reader,

Welcome to the 13th edition of *The International Comparative Legal Guide to: Cartels & Leniency*, published by Global Legal Group.

This publication, which is also available at www.iclg.com, provides corporate counsel and international practitioners with comprehensive jurisdiction-by-jurisdiction guidance to cartels & leniency laws and regulations around the world.

This year, three general chapters cover trends, decisions and judgments in recent cartels cases.

The question and answer chapters, which cover 29 jurisdictions in this edition, provide detailed answers to common questions raised by professionals dealing with cartels & leniency laws and regulations.

As always, this publication has been written by leading cartels & leniency lawyers and industry specialists, to whom the editors and publishers are extremely grateful for their invaluable contributions.

Global Legal Group would also like to extend special thanks to contributing editors Geert Goeteyn, Matthew Readings and Elvira Aliende Rodriguez of Shearman & Sterling LLP for their leadership, support and expertise in bringing this project to fruition.

Rory Smith
Group Publisher
International Comparative Legal Guides

Indonesia

ABNR Counsellors at Law



Chandrawati Dewi



Gustaaf Reerink

1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The cartel prohibition is based on Law No. 5/1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition (the Indonesian Competition Law or ICL) and several KPPU Guidelines. An undertaking violating the cartel prohibition under the ICL is punishable by administrative sanctions and criminal sanctions. Restrictive agreements are also prohibited under other laws and regulations, including Article 382 – *bis* of the Indonesia Criminal Code, which prohibits unfair competition, and Article 1365 of the Indonesian Civil Code, which prohibits any person from committing an unlawful act that causes loss to another party.

1.2 What are the specific substantive provisions for the cartel prohibition?

The ICL contains several provisions for the cartel prohibition which, apart from the general cartel provision, relate to price-fixing, market allocation, group boycotts, and bid rigging. The ICL also creates a general prohibition on anticompetitive agreements with foreign parties, which could also apply to cartels with a cross-border element. Although some provisions create a “*per se*” or “hard core” cartel prohibition, most are based on a “rule of reason” approach, which means that sanctions may only be imposed for violation of these provisions where it can be proven that the restrictive agreement “potentially results in monopolistic practices and or unfair business competition”.

1.3 Who enforces the cartel prohibition?

The cartel prohibition is enforced by the Indonesian Business Competition Supervision Commission (KPPU). However, the KPPU’s authority is limited to administrative investigation and enforcement. In case of criminal investigation and enforcement, the Police and Public Prosecutor’s Office are the competent authorities. Only the courts can impose criminal sanctions.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

Pursuant to new KPPU guidelines on case handling, introduced in February 2019, an investigation is opened following receipt of a

report from a third party of a violation under the ICL or at the KPPU’s own initiative. If the report is deemed complete, it can be filed and presented to the Plenary Meeting of Commissioners, which will decide whether the case should progress. If so, a Counsel of Commissioners will be established to conduct a preliminary investigation, which should be completed within 30 days. Under the new guidelines, the reported parties may offer to change their behaviour and the Commissioners will then give the parties 60 days to change their behaviour as stated in an Integrity Pact. If there is no change of behaviour then the Counsel of Commissioners should then decide whether to conduct further investigation, which should be completed within 60 days. If necessary, this period may be extended by another 30 days. Upon completion of the further investigation, the KPPU should decide within 30 days whether there is a violation of the ICL and if so, what administrative remedies are imposed. This decision should be announced in a public hearing and be conveyed to the relevant undertaking. An undertaking that has been imposed with a sanction may submit an objection against the decision of the KPPU to the District Court within a certain timeframe (for further details, see our response to question 7.1). If no objection is submitted within the prescribed timeframe, the undertaking is required to implement the decision of the KPPU. If the KPPU concludes that the undertaking does not implement its decision, the KPPU may refer the case to the Police, which can then initiate a criminal investigation, potentially leading to criminal sanctions. The KPPU may also take other measures to enforce its decision or the decision of the District Court or Supreme Court that is final and binding, including by asking the District Court to issue an execution order and to attach assets or settle claims through third parties.

1.5 Are there any sector-specific offences or exemptions?

The cartel prohibition does not apply to:

- agreements that aim to implement laws and regulations in force;
- agreements relating to intellectual property rights and franchise;
- agreements stipulating technical standardisation of goods and/or services which do not restrict and/or obstruct competition;
- research cooperation agreements that are to enhance or improve the living standard of the public at large;
- international agreements that have been ratified by the Government of Indonesia;
- export-oriented agreements that do not disturb the demand and/or supply of the domestic market;
- undertakings categorised as small-sized enterprises; or
- business activities of cooperatives that especially aim to serve their members.

1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

Cartels outside the Indonesian jurisdiction may be covered by the prohibition where one or several of the undertakings engaged in the cartel are domiciled in Indonesia or directly or indirectly engaged in business activities in Indonesia. Indirect business activities include the activities of an undertaking's subsidiary in Indonesia which, based on the single economic entity doctrine, should be deemed to be part of the same entity as the parent company.

2 Investigative Powers

2.1 Summary of general investigatory powers.

Table of General Investigatory Powers

Investigatory Power	Civil/ Administrative	Criminal
Order the production of specific documents or information	Yes	N/A
Carry out compulsory interviews with individuals	Yes	N/A
Carry out an unannounced search of business premises	No	N/A
Carry out an unannounced search of residential premises	No	N/A
■ Right to 'image' computer hard drives using forensic IT tools	No	N/A
■ Right to retain original documents	Yes	N/A
■ Right to require an explanation of documents or information supplied	Yes	N/A
■ Right to secure premises overnight (e.g. by seal)	No	N/A

2.2 Please list specific or unusual features of the investigatory powers referred to in the summary table.

The ICL gives the KPPU a range of investigative powers, including the power to require undertakings to provide evidence and for witnesses to be examined. If they refuse, the KPPU should ask for assistance from the Police to present reported parties or witnesses, or if they refuse to provide information, refer the case to the Police to initiate an investigation. The KPPU has entered into a Memorandum of Understanding with the Police to enhance collaboration between the two authorities and create a standard operating procedure for the handling of competition cases, including cartel cases.

2.3 Are there general surveillance powers (e.g. bugging)?

The KPPU has no general surveillance powers.

2.4 Are there any other significant powers of investigation?

The KPPU has no other significant powers of investigation.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

The KPPU does not have the authority to carry out searches of business and/or residential premises. For this, the authority will need the assistance of the Police. The Police will generally not wait for legal advisors to arrive.

2.6 Is in-house legal advice protected by the rules of privilege?

In-house legal advice is not protected by the rules of privilege, unless it concerns communication between the in-house lawyer and external counsel that is protected by the rules of privilege (in case of attorneys-at-law in Indonesia, under Law No. 18 of 2003 on Advocates).

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

The KPPU does not have the authority to conduct arrest or seizure.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

The ICL prohibits undertakings to refuse being examined or refuse providing the information required, or to obstruct the process of investigation and/or examination. As also mentioned in our response to question 2.2, refusal or obstruction may result in the KPPU referring the matter to the Police, which will start a criminal investigation not only regarding the refusal or obstruction by the undertaking, but also the cartel case itself. We are not aware of any cases in which a cartel case was referred to the Police for criminal investigation as a result of the obstruction of investigations.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

The KPPU may impose administrative sanctions for companies engaged in cartel conduct in the form of orders (a) annulling certain prohibited agreements, (b) to cease activities proven to have involved monopolistic practices or resulted in unfair business competition in the relevant market or other public harm, (c) to pay damages, and (d) to pay fines between IDR 1 billion (approx. USD 71,400) and 25 billion (approx. USD 1,785,000).

In addition, the courts can impose criminal sanctions. According to the ICL, a company can be fined between IDR 1 billion and IDR 100 billion, depending on the type of violation committed, and its

director or directors may be imprisoned for three to six months in case the company fails to pay the fine.

Criminal remedies may be imposed in the form of a revocation of the company's business licence, a prohibition on the company, or its director or directors, to be a director or commissioner for a period between two and five years, and an order requiring the cessation of certain activities by the company that causes loss to another.

3.2 What are the sanctions for individuals (e.g. criminal sanctions, director disqualification)?

The cartel prohibition applies to undertakings (literally: "business operators" or *pelaku usaha*), which could not only be business entities (in the form of a legal entity, such as a company, or a non-legal entity) and individuals. Therefore, the sanctions as referred to in our response to question 3.1, in principle, also apply to individuals who fall under the definition of "business operators". Certain sanctions, such as confinement and director disqualification, specifically apply to individuals.

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

There is no explicit legal basis for a reduction of fines on the basis of "financial hardship" or "inability to pay" grounds. However, according to the KPPU guidelines on administrative sanctions, fines may be reduced in case the undertaking:

- a. stopped the violation immediately after the KPPU opened the investigation;
- b. proves that the violation was committed unintentionally;
- c. proves that its involvement was minimal;
- d. acts cooperatively during the investigation or examination;
- e. argues that the conduct was to implement applicable laws and regulations or based on approval from the competent authorities; and
- f. makes a clear statement on its willingness to change its conduct going forward so as to comply with the ICL.

3.4 What are the applicable limitation periods?

There are currently no clear limitation periods for the KPPU to impose administrative sanctions. The limitation period for criminal sanctions is six years.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

There is currently no legal restriction for a company to pay the legal costs and/or financial penalties imposed on a former or current employee.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

There is currently no legal basis for an employer to hold an implicated employee liable for the legal costs and/or financial penalties imposed on the employer. However, the employer may try to hold the implicated employee liable for the legal costs and/or financial penalties imposed on the employer on the basis of an unlawful act claim.

3.7 Can a parent company be held liable for cartel conduct of a subsidiary even if it is not itself involved in the cartel?

It would at least in theory be possible to hold a parent company liable for cartel conduct of a subsidiary, even if it is not itself involved in the cartel, on the basis of the single economic entity doctrine.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

There is currently no leniency programme for companies under Indonesian law. However, please also refer to our response to question 9.2 regarding the possible future introduction of a leniency programme.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

There is currently no "marker system" under Indonesian law.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

This is not applicable.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

This is not applicable.

4.5 At what point does the 'continuous cooperation' requirement cease to apply?

This is not applicable.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

This is not applicable.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

There are currently no procedures for individuals to report cartel conduct independently of their employer. However, generally, any person who knows or suspects that a violation of the ICL has occurred, may submit a report to the ICL.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

As mentioned in our response to question 1.4, the new KPPU guidelines on case handling introduce the possibility for a defendant to plead guilty at the beginning of a hearing and to agree to change their behaviour in order to stop the case.

7 Appeal Process

7.1 What is the appeal process?

An undertaking that has been imposed with an administrative sanction may submit an objection against the decision of the KPPU to the District Court within 14 days after (i) the date of the hearing decision, if attended by the appellant, or (ii) the date of the notification of the KPPU decision, if the appellant did not attend the hearing. The appeal must be filed to the District Court whose jurisdiction covers the domicile of the appellant. The appeal can be submitted online and should consist of a power of attorney, a request for appeal, and a copy of the KPPU decision. Until recently, the District Court could refer a case back to the KPPU for further examination, but a new Supreme Court regulation now requires that the District Court's review of the case be solely based on the KPPU files. The District Court is required to issue a decision within 30 days of the commencement of the examination of the objection.

In case the undertaking does not agree with the decision of the District Court, it may submit a cassation appeal to the Supreme Court within 14 days. The Supreme Court is required to issue a decision within 30 days of the receipt of the cassation appeal. Until recently, it was allowed for a party after the Supreme Court decision, to apply for civil review in case the party could present new material evidence. However, the new Supreme Court regulation makes it impossible to apply for civil review in cases related to KPPU decisions.

In case of a criminal sanction, the undertaking may appeal to the Court of Appeal before filing for cassation at the Supreme Court.

7.2 Does an appeal suspend a company's requirement to pay the fine?

An appeal will indeed suspend a company's requirement to pay the fine.

7.3 Does the appeal process allow for the cross-examination of witnesses?

There is currently no legal basis for the cross-examination of witnesses in the appeal process.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

As discussed in our response to question 3.1, the KPPU has the authority to impose an administrative sanction in the form of an order to pay damages. The damages may be requested by a party which believes it has suffered losses, by submitting a report to the KPPU.

8.2 Do your procedural rules allow for class-action or representative claims?

The Supreme Court has issued a regulation regarding class-action claims in 2002. However, so far, class-action and representative claims are not so common in Indonesia.

8.3 What are the applicable limitation periods?

As mentioned in our response to question 3.4, there are currently no clear limitation periods for the KPPU to impose administrative sanctions, including the sanction to order the payment of damages. The applicable limitation period for damages actions based on unlawful action under the Indonesian Civil Code is, in principle, 30 years.

8.4 Does the law recognise a "passing on" defence in civil damages claims?

Indonesian law currently does not recognise a "passing on" defence in civil damages claims.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

The cost rules for civil damages follow-on claims in cartel cases are based on the general cost rules of the Indonesian Civil Procedure Code. According to these rules, the losing party has to bear the legal costs (bailiff, registry, court-appointed expert, etc.). However, any costs to defend a case must be borne by the respective parties and cannot be claimed against the opponent. The reasoning for this is that there is no obligation under the Indonesian Civil Procedure Code for litigating parties to be represented by counsel in court proceedings. A party can appear in person to defend themselves before the court and the appointment of a legal attorney is optional.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

We are not aware of any successful follow-on or stand-alone civil damages claims, whether decided in court or settled out of court, for cartel conduct Indonesia.

9 Miscellaneous

9.1 Please provide brief details of significant, recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

The new KPPU guidelines on case handling try to create more room in KPPU investigations for the use of indirect evidence, in particular in the form of economic analysis. Considering the KPPU's limited

investigative powers, the use of indirect evidence is of major importance to the authority. The KPPU has already used such indirect evidence in various cases in the past, but on appeal, the authority always had to rely on substantial direct evidence, consisting of witness statements, expert opinions, letters and/or documents, and statements from undertakings, to win. Given the unlikelihood that the KPPU's investigative powers will be reinforced in the near future (see also our response to question 9.2 below), it can be expected that the KPPU will try to rely more on indirect evidence to prove that certain antitrust prohibitions, including the cartel prohibition, have been violated. However, it is yet to be seen whether the courts will accept an increased role for indirect evidence in antitrust cases.

9.2 Please mention any other issues of particular interest in your jurisdiction not covered by the above.

In recent months, the Indonesian Parliament has been discussing a new bill that is to replace the ICL. The current bill removes certain exemptions, such as the exemption for intellectual property agreements discussed in our response to question 1.5, imposes heavy sanctions for violation of the cartel prohibition and other antitrust prohibitions, and introduces a leniency programme. The KPPU's authority in investigations is expected to remain limited though. The bill may be enacted as early as late 2019 or 2020, depending on the legislative agenda of the newly inaugurated Parliament following elections earlier this year.



Chandrawati Dewi, who joined ABNR in 1997 and was made partner on 1 January 2009, focuses on competition/antitrust, FDI, capital markets and M&A. She is head of ABNR's competition practice and handles cartel, dominant-position, and merger-control matters for multinational clients and international and regional law firms, including advising on deal structuring to avoid triggering mandatory post-notification.

With the Indonesian Competition Authority (KPPU) now actively monitoring the impacts of overseas MCA transactions on the Indonesian market, she is increasingly called on to advise on foreign-to-foreign deals. In addition, she has provided compliance training to a number of major multinational companies. She recently advised on the competition aspects of South Korea-based LG International's acquisition of two Indonesian palm oil companies.

Dewi is recommended for antitrust and competition by *The Legal 500 Asia Pacific 2019* and recognised by *Vantage Asia/Asia Business Law Journal* as one of Indonesia's top-100 lawyers.

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As one of Indonesia's top commercial law firms, ABNR Counsellors at Law is active across the entire spectrum of antitrust law, including cartel, dominant-position, and merger-control matters, serving multinational clients and assisting global and regional law firms with strategic advice on their transactions, and on compliance and litigation matters.

At the deal inception stage, ABNR is frequently called upon by clients to conduct assessments of relevant economic and market factors so as to ensure that their proposed transactions do not infringe merger-control law. ABNR also advises on how deals may best be structured so as to avoid triggering mandatory post-MCA notification.

In addition, ABNR reviews commercial agreements from an antitrust perspective, e.g., focusing on pricing and distribution arrangements, including for clients with a (potentially) dominant/market control position in Indonesia.

ABNR does also corporate internal investigations relating to antitrust issues, such as tender rigging.

ABNR is a *Legal 500 Asia Pacific* Tier 1 firm for Antitrust & Competition and was awarded the "Indonesia Law Firm Award for Antitrust & Competition 2019" by *Asia Business Law Journal (ABLJ)*.

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