

International **Comparative** Legal Guides



Cartels & Leniency **2021**

A practical cross-border insight into cartels & leniency

14th Edition

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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 general cartel prohibition can be found in Article 11 of 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 Indonesian 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. However, please also refer to the case discussed in our response to question 8.6.

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 (Article 5 of the ICL);
- market allocation (Article 9 of the ICL);
- group boycotts (Article 10 of the ICL);
- bid rigging (Article 22 of the ICL); and
- a general prohibition on anticompetitive agreements with foreign parties, which could also apply to cartels with a cross-border element (Article 16 of the ICL).

Although some provisions create a “*per se*” or “hard core” cartel prohibition, for instance price fixing and group boycotts, 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 has an adverse impact on the market, resulting in monopolistic practices and/or unfair business competition”.

1.3 Who enforces the cartel prohibition?

The cartel prohibition is enforced by the Indonesian Competition Commission (*Komisi Pengawas Persaingan Usaha* or KPPU). However, the KPPU’s authority is limited to administrative investigation and enforcement. In the event 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 procedure, introduced in February 2019, an investigation is opened following the 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 undertakings may offer to change their behaviour and the KPPU may approve behavioural remedies by taking into account:

- a. the type of violation;
- b. the period of violation; and
- c. the damages resulting from the violation.

If the KPPU accepts a reported undertaking’s proposal, the Commissioners will give the undertaking 60 days to change its behaviour as stated in an Integrity Pact. If there is no change of behaviour, the Counsel of Commissioners should then decide whether to conduct a 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 conveyed to the relevant undertakings. An undertaking on which a sanction has been imposed may submit an objection against the decision of the KPPU to the District Court (for further details, please see our response to question 7.1). If no objection is submitted within the prescribed timeframe, the undertaking is required to implement the KPPU’s decision.

If the KPPU concludes that an undertaking has not implemented its decision, the case may be elevated to the stage of further examination. If the KPPU Commissioners issue their decision and the relevant undertaking refuses to comply with such 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?

There are no sector-specific offences or exemptions under the ICL. However, the cartel prohibition does not apply to:

- agreements that aim to implement laws and regulations in force;
- agreements relating to intellectual property rights and franchises;
- agreements stipulating technical standardisation of goods and/or services that 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 (introduced in the *Temasek* case), should be deemed to be part of the same entity as the parent company.

2 Investigative Powers

2.1 Please provide a summary of the general investigatory powers in your jurisdiction.

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

Investigatory power	Civil / administrative	Criminal
■ 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

Please Note: * indicates that the investigatory measure requires the authorisation by a court or another body independent of the competition authority.

2.2 Please list any specific or unusual features of the investigatory powers in your jurisdiction.

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/dawn raids 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 confidentiality rules (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 carry out arrest or seizure, or other forceful investigative powers.

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 from refusing to be examined, refusing to provide the information required, or obstructing 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 of between IDR 1 billion (approx. USD 71,400) and IDR 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, a prohibition on its director or directors from being a director or commissioner for a period of between two and five years, or an order requiring the cessation of certain activities by the company that cause 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), but also 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 for two to a maximum of five years, 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:

- stopped the violation immediately after the KPPU opened the investigation;
- proves that the violation was committed unintentionally;
- proves that its involvement was minimal;

- acts cooperatively during the investigation or examination;
- argues that the conduct was to implement applicable laws and regulations or based on approval from the competent authorities; and
- makes a clear statement on its willingness to change its conduct going forward so as to comply with the ICL.

The above grounds to reduce or waive fines appear not to be limitative. For instance, in its decision related the domestic air ticket cartel in June 2020, the KPPU decided not to impose any penalties, not only because of the airlines' cooperative stance during examination of the case, but also the effects of the Coronavirus pandemic on the national economy and estimated economic recovery, which will take time, particularly for the aviation industry, which suffered losses even before the outbreak. The airlines are only required to report to the KPPU any change of policies affecting the competition landscape, ticket prices paid by consumers, and society at large, for a period of two years after the KPPU's decision has attained final and binding effect.

3.4 What are the applicable limitation periods?

There are currently no clear limitation periods for the KPPU to impose administrative sanctions. However, we note that the maximum imprisonment as a substitute for a fine as set out under the ICL is six months, if the perpetrator fails to pay the fine. Under the Indonesian Penal Code, the limitation period for crimes that carry a maximum prison term of three years 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 KPPU.

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 by signing an Integrity Pact in order to stop the case.

7 Appeal Process

7.1 What is the appeal process?

An undertaking on which an administrative sanction has been

imposed 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 additional 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 ICL does not recognise class actions or representative claims. However, the Supreme Court issued a regulation regarding class-action claims in 2002. Hypothetically, if there is a final binding KPPU decision indicating consumer loss, this can be used as a basis to file a class-action lawsuit. So far, however, class-action and representative claims are not very common in Indonesia. Please also refer to the case discussed in our response to question 8.6.

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 in Indonesia. In September 2019, a representative of consumers submitted a claim to the District Court of Central Jakarta following the sanctions imposed by the KPPU against motorcycle manufacturers for cartel practices. However, in its decision on 7 July 2020, the District Court of Central Jakarta rejected the claim, arguing that it was not competent to handle the case as the KPPU has the exclusive authority to impose sanctions, including an order to pay damages. The claimant has appealed the decision.

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 (please 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. Another significant development in the field of cartel damages claims is the case discussed in our response to question 8.6, which seems to imply that a cartel damages claim must always be based on a KPPU order to pay damages, not on an unlawful act claim under Article 1365 of the Indonesian Civil Code. However, it is not clear if the claimant will appeal the decision. In any event, the doctrine of precedent does not exist in Indonesia and each case must be determined on its own facts and merits, although consideration may be given to previously decided similar cases and academic theories. Accordingly, another court may reach a different decision in a similar case in the future.

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, however, is expected to remain limited. Due to the COVID-19 emergency, the Indonesian Parliament decided in July 2020 to stop the deliberations on the bill that is to replace the ICL. The bill is still listed in the 2020–2024 National Legislation Program. However, it is unclear when the deliberations will continue.



Chandrawati Dewi is a partner who focuses on M&A, foreign direct investment (FDI), competition/antitrust and capital markets. In M&A and FDI, she advises high-end domestic and international clients operating in various sectors including agriculture and plantations, trading, multi-level-marketing, automotive and groundside aviation. She is also head of ABNR's competition/antitrust practice, where she focuses on 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. In capital markets, she specialises in offshore debt and equity offerings by Indonesian companies and multinational corporations with operations in Indonesia. Dewi is recommended for antitrust and competition by *The Legal 500 Asia Pacific 2020* 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 also carries out corporate internal investigations relating to antitrust issues, such as tender rigging.

ABNR is ranked as a top-tier firm for competition/antitrust by both *Chambers Asia Pacific* and *The Legal 500 Asia Pacific*, and was accorded the "Indonesia Law Firm Award for Antitrust & Competition 2020" by *Asia Business Law Journal* (ABLJ).

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