



COPY

**REGULATION OF THE COMMISSION FOR THE SUPERVISION OF
BUSINESS COMPETITION
NUMBER 4 YEAR 2010
CONCERNING
GUIDELINES ON IMPLEMENTATION OF ARTICLE 11 CONCERNING CARTEL
BASED ON
LAW NUMBER 5 YEAR 1999 CONCERNING PROHIBITION OF MONOPOLISTIC
PRACTICES AND UNFAIR BUSINESS COMPETITION**

THE COMMISSION FOR THE SUPERVISION OF BUSINESS COMPETITION

Considering : that to implement the provisions of Article 11 of Law Number 5 Year 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, it is deemed necessary to enact a Regulation of the Commission for the Supervision of Business Competition concerning Guidelines on Implementation of the Provisions of Article 11 of Law Number 5 Year 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition;

In view of : 1. Law Number 5 Year 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition (State Gazette of the Republic of Indonesia Year 1999

Number 33, Supplementary State Gazette of the Republic of Indonesia Number 3817);

2. Decree of the President of the Republic of Indonesia Number 75 Year 1999 concerning the Commission for the Supervision of Business Competition;
3. Decree of the President of the Republic of Indonesia Number 59/P Year 2006;

Referring to The Resolution of the Commission's Meeting, dated April 7th, 2010;

HAS DECIDED:

To enact : REGULATION OF THE COMMISSION CONCERNING GUIDELINES ON IMPLEMENTATION OF THE PROVISIONS OF ARTICLE 11 CONCERNING CARTEL OF LAW NUMBER 5 YEAR 1999 CONCERNING PROHIBITION OF MONOPOLISTIC PRACTICES AND UNFAIR BUSINESS COMPETITION.

Article 1

In this Regulation of the Commission, referred to as:

1. Guidelines on Implementation of Article 11 concerning Cartel of Law Number 5 Year 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, hereinafter referred to as Guidelines, shall be the document of Guidelines on Implementation of Article 11.
2. Commission shall be the Commission for the Supervision of Business Competition as stated in Law Number 5 Year 1999.

Article 2

- (1) The Guidelines constitute the explanations of basic principles and sample cases on implementation of the provisions of Article 11.
- (2) The Guidelines are intended for:
 - a Business actors and other parties who have an interest in understanding the provisions of Article 11 concerning Cartel of Law Number 5 Year 1999;
 - b The Commission in performing its tasks and authorities as set out in Article 35 and Article 36 of Law Number 5 Year 1999 in conjunction with Article 4 and Article 5 of the Presidential Decree Number 75 Year 1999 concerning Commission for the Supervision of Business Competition/

Article 3

- (1) The Guidelines are as contained in the Appendix to this Regulation.
- (2) The Guidelines as stated in paragraph (1) shall be minimum standard for the Commission in performing its tasks, which shall form an integral part of this Regulation and bind all parties.

Article 4

- (1) Decision and policies in relation to Article 11 as decided and enacted by the Commission prior to the issuance of this Regulation shall remain enforceable.
- (2) This Regulation shall take effect as of the date of its stipulation.

Enacted in Jakarta

On April 9th, 2010

THE COMMISSION FOR THE SUPERVISION OF
BUSINESS COMPETITION

CHAIRMAN,

Prof. Dr. Ir. Tresna Priyana Soemardi, S.E, M.S.

Forewords

As mandated in Article 35 point (f) of Law Number 5 Year 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, the Commission for the Supervision of Business Competition has tasks to prepare guidelines and/or publications related to Implementation of Law Number 5 Year 1999.

In this opportunity, the Commission prepares the Guidelines on Implementation of Article 11 concerning Cartel Based on Law Number 5 Year 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition. Cartel is basically agreements entered into by a business actor with its competing business actors with the intention of removing competition between both parties. Physically, cartel can be done through three things : prices, production and marketing territory. It may result in monopolistic practice by the business actors involved in the cartel thereby, in macro economics aspect, resulting inefficiency of resources allocation as reflected in the rise of deadweight loss. At the consumers side, they will lose price alternatives, competitive quality of goods and good after sales services.

As the impacts caused are so large, the Commission prepares the Guidelines on Cartel to provide complete explanation but easily to be understood to all parties who indirectly participate in an effort to create fair business competition, namely, among others, business actors, government, law enforcement agencies, public in general.

In addition, the Guidelines are also expected to help the Commission in performing its supervising tasks on the implementation of Law Number 5 Year 1999 appropriately and In line with very dynamic and fast growing business activities, this Guidelines might need an improvement in the future.

Chairman of the Commission

Table of Contents

Copy of the Regulation of the Commission for the Supervision of Business Competition Number 4 Year 2010 6		
Guidelines on Article 11 of Law Number 5 Year 1999 concerning Cartel		8
CHAPTER I	Background	8
CHAPTER II	Objectives and Scope	12
CHAPTER III	Related Market and Prohibition of Cartel	15
	3.1. Definition and Scope of Cartel and its Explanation	15
	3.2. Explanation of Elements	15
	3.3. Other Relevant Provisions	17
CHAPTER IV	Cartel and Samples Cases	20
	4.1. Concept and Definition of Cartel	20
	4.2. Indications of Cartel	20
	4.2.1. Initial Indicator of Cartel Identification	20
	4.2.2. Behavior Factors	22
	4.3. Impacts of Cartel	23
	4.3.1. Losses to Economy of a State	23
	4.3.2. Losses to Consumers	23
	4.4. Things to be considered in Analyzing the Existence of Cartel	23
	4.4.1. Evidences	23
	4.4.2. Application of Rule of Reason	24
	4.5. Samples Cases	25
CHAPTER V	Rules of Sanction	27
	5.1. Sanction according to Law Number 5 Year 1999	27
	5.2. Criminal Punishment as required Article 48 of Law Number 5 Year 1999	27

5.3. Additional punishment as required in Article 49 of Law Number 5 Year 1999	27
CHAPTER VI Closing	28

Appendix to the Regulation of the Commission for
the Supervision of Business Competition

Number

Date

Chapter I

Background

The Business Competition Law protects business competition and fair business competition process by way of the prevention and imposition of sanctions against anti-competitive behaviors. The business competition is good for the community and the economic development of a nation for a variety of reasons. One of the reasons is that the business competition promotes to decrease the prices of goods or services, thereby benefiting consumers. In addition, the business competition may also boost efficient production and allocation, and it supports business actors to compete for the sake of innovating both infrastructures and products to win the competition or, at least, be able to survive in the market. On the other hand, the competition also will cause the producers to experience decreasing returns/profits, because they compete to lower the prices in order to expand their market shares. The most alarming thing for the business actors is that if all the business actors lower their prices, they obtain overall declined profits. In order that the business actors may keep maintaining their profits, they shall manage to enter into agreements through the establishments of cartels.

Cartel is an arrangement among competing firms to coordinate their activities so as to control the quantities and prices of goods and or services to earn profits above reasonable levels. The cartel would force consumers to pay more expensively for a product, either it is a luxurious product or it is a common product, such as medicine and vitamin, needed by the community. The cartel will impair the economy, since the business actors as cartel members would agree to undertake any activity impacting on price controls, such as restriction on the quantity of production/products that will lead to allocation inefficiency. The cartel may also give rise to production inefficiency when the

cartel members protect an inefficient plant, thereby increasing the average production cost of goods or services within an industry.

The cartels apply various means to coordinate their activities, such as through production arrangement, horizontal price fixing, tender collusion, territorial division, non-territorial division of consumers, and market share division. However, we also need to realize that an effective cartel is not easy to achieve. Nonetheless, there are tendencies among business actors who will always try to maximize the profits of their respective firms.

One of the requirements for the emergence of a cartel is the agreement or collusion between business actors. There are two forms of collusion in a cartel, namely:

- a. Explicit collusion in which the members directly communicate their agreement that may be evidenced with agreement documents, data on joint audit, cartel management, written policies, sales data and other data.
- b. Tacit collusion in which business actors as cartel members do not communicate directly, and meetings are also held in secret. Usually, the medium used is industry association that the meetings of cartel members are camouflaged with such legal meetings as association meetings. The second form of collusion is very difficult to be detected by law-enforcing personnel/authority. But considerable experience of many countries has proved that at least 30% of cartels involve the associations.

In general, a cartel has several characteristics:

1. There is a conspiracy among several business actors.
2. A cartel involves senior executives of the firms/companies involved. These senior executives usually attend meetings and make decisions.
3. A cartel usually uses an association to cover their activities.

4. A cartel carries out price fixing. In order that the price fixing runs in an effective manner, it is then followed by the allocation of customers, territorial division or production allocation. Usually, the cartel will set the reduction of production.
5. There are threats or sanctions for each member who violates an agreement. If there is no sanction for any violator, the cartel is vulnerable to fraud in order to obtain a greater profit than other cartel members.
6. Information is disseminated to all cartel members. Even if it is possible, audit shall be conducted using data of production and sales reports in a certain period. Auditor will report each cartel member's production and sales and then share the audit results with all cartel members.
7. The mechanisms of compensation from cartel members whose productions are greater than or exceed the quotas of those whose productions are smaller or they are asked to stop their business activities. This compensation system will certainly be successful if the business actors obtain more benefits than when they carry out competition. This will cause the member's adherence to each cartel's decision to be more assured.

Several requirements in which a cartel may run effectively include:

1. Number of business actors. The more business actors are in the market, the more difficult it is for a cartel to be established. A cartel will be easy to be established and run more effectively if the number of business actors is just a few or the market is concentrated.
2. Products on the market are homogeneous. Since the products are homogeneous, it is easier to reach an agreement on price.
3. Elasticity on demand for goods. The demand for such goods does not fluctuate. If the demand is fluctuative, it will be difficult to reach an agreement with regard to the quantity and price of products.
4. Prevention against new business actors from entering the market.

5. The actions of the cartel members are easy to observe. As it has been already elaborated that in a cartel there is a tendency for each of its members to commit a fraud. If the number of business actors is not too many, it is easy to control.
6. Adjustments to market changes may be done at once. The cartel requires the commitment of each of its members to undertake the cartel's agreement in accordance with demand and supply in the market. The cartel will be more effective if it can quickly respond to market conditions and generate a new cartel agreement if necessary.
7. Big Investment. If an industry that needs to enter its market requires a big investment, there will be not many business actors to enter the market. Therefore, a cartel among business actors will be easier to do.

In addition, in order that a cartel be effective, the cartel members shall meet the requirements which are, among others:

1. A cartel member shall agree decreasing goods production and then raise its prices or divide territories. The effective agreement on cartel may cause the cartel to act as a monopolist that can raise or lower production or prices without any fear that the market share and profits will drop off.
2. Since a cartel is vulnerable to a fraud committed by its members in order to sell product(s) more than the agreed quantity of it or sell the product(s) cheaper than the price(s) already fixed in the cartel, it would require monitoring or punishment mechanism for each cartel member that commits the fraud.
3. Since a cartel principally violates the law, some measures shall be taken to encourage cartel members to work secretly in order to avoid its disclosure or exposure towards any authority for supervising business competition.
4. In order that the continuity of a cartel can be maintained, the cartel members will seek to prevent the entry of any new business actor interested to share the cartel's prices.

Furthermore, there are also some conditions for business actors in conducting cartels. They are, among others, as follows:

1. By undertaking a cartel, the business actors can raise prices. If the demand is inelastic, it will cause consumers to be uneasy to move to other products or services; this will cause the price of a product or service to be higher. Similarly, if there will be a condition when it is difficult for substitute goods to enter the market since there are no other goods or services in the market, the prices will remain high.
2. There is a condition in which the cartel is almost unlikely to be revealed, and in case it comes to be known, the punishment imposed will be relatively insignificant, thereby the cartel members still feel lucky.
3. The costs spent for the cartel and for maintaining it are lower than the expected benefits.

Even if the amounts that the consumers have been suffering owing to the cartel are unknown, the trends have shown that the excessive prices due to the cartel are quite large. This is due to the fact that the prices of a cartel agreement are higher than those arising out of the competition. Much experience in various countries has shown that the cartel prices could reach 400% (four hundred percent) above the market price. Therefore, it is not surprising that the losses due to the cartel could reach billions and even trillions of Indonesian Rupiah.

Furthermore, actually the cartel is not only unfavorable for the consumers, but also detrimental to the development of a nation's economy since the cartel leads to the inefficiency of resources, be it natural resources, human resources and other economic resources.

The handling of the cartels by business competition agencies/bodies in various parts of the world has been growing rapidly considering more and more complex issues on cartels. The existence of competition agencies has been tricked by various business actors in order to avoid pieces of evidence on cartels such as regular meetings,

agreements to carry out arrangements and things that tend to be the pieces of evidence for the competition law enforcing personnel.

In this case, a model for proofing the existence of a cartel flourishes by using *indirect evidence*, which is done, among other things, through the uses of a variety of economic analyses that could prove the presence of a correlation between an economic fact and another economic fact; and eventually this will turn to be a piece of real cartel evidence with identification of a number of losses on the part of the community in it.

Considering the impacts of cartel practices that may hinder the commencement of fair business competition, it is necessary to have guidelines that shall provide a better understanding of prohibition on cartel as meant in Law Number 5 Year 1999.

Chapter II

Objectives and Scopes

2.1. Objectives of Guidelines Preparation

The preparation of guidelines is one of the Commission's tasks as an attempt to provide the community with insights and understandings. In addition, the guidelines are also an effort by the Commission to convey its insights on the meaning of a cartel as meant in Article 11 of Law Number 5 Year 1999. The guidelines are expected to better ensure law convictions in the Business Competition Law.

In so doing, the Guidelines for Implementation of Law Number 5 Year 1999 Article 11 regarding Cartel aims at:

- a. Providing a clear and precise understanding on the cartel as referred to in Article 11 of Law Number 5 Year 1999.
- b. Providing the basis and clear understanding in the implementation of Article 11 of Law Number 5 Year 1999 so there is not any interpretation other than that as detailed in the guidelines.
- c. Being used by all parties as a behavioral basis to generate conditions for fair business competition and grow naturally.
- d. Being the method of approach used by the Commission in examining and implementing the law enforcement that govern the cartel.
- e. Providing a description of the impacts of cartel.

The term "cartel" is essentially a common term used for any agreement, collusion or conspiracy/bid-rigging committed by business actors. The use of the term is also divided into a main cartel and another cartel. Main cartel consists of cartel of price fixing, cartel of area division, cartel of bid-rigging and

cartel of consumers distribution. A cartel is considered highly dangerous since its business actors agree to commit a conspiracy on very essential things in a business transaction involving prices, territories and consumers. And again, cartel is highly perilous since it may perform like a monopolist who can fix very high prices or production quantities, thereby leading to monopolistic practices and unfair business competition. The cartel will do harm to consumers since prices will turn to be costly, and goods or services on the market will be limited.

Law Number 5 Year 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition requires specifically in its separate chapters concerning price fixing, bid rigging, division of territories or customers or markets. Therefore, the meaning of a cartel in Article 11 of Law Number 5 Year 1999 shall not include those meanings already required in other Articles of the Law. The Guidelines on cartel will put emphasis on the prohibition of cartel that focuses on an agreement to regulate the production and/or marketing of goods and/or services intended to influence prices.

Cartels in various countries are considered to be actions that will only upset consumers. Therefore law enforcement against cartel applies a *per-se-illegal* principle. In the meanwhile, Article 11 of Law Number 5 Year 1999 adopts a *rule-of-reason* principle. The formulation of the cartel as a thing examined according to the *rule-of-reason* principle is in conformity with the progresses of business competition law enforcement that tend to understand and examine any business actor's reason in committing an act considered to violate the Business Competition Law. Accordingly, the Commission shall be capable of evidencing that the business actor's reasons are *unreasonable*.

The reason provided by a business actor who commits an act that impedes trades is to be expressed as a reasonable restraint or unreasonable restraint on the condition that:

1. The activities of the business actors show the signs of reduced production or increased prices. If those signs exist, they need to be examined further;

2. Is the business actors' activity naked (direct) or ancillary (additional). If the activity is naked, it is against the law. Meanwhile, if the activity is ancillary, it is lawful.
3. The business actors have market powers. If they have the market powers, it is possible that they abuse such market powers.
4. Is there a high barrier to entry into a market? Even if a business actor has the market powers, if there is no significant barrier to entry into the market, it will be easier for a new business actor to enter the market.
5. The business actor's actions result in substantial efficiencies, improved qualities of product or service or innovation. If these reasons are not proven, the actions are illegal.
6. Such business actor's actions are indeed required to achieve efficiency and innovation. This means that the business actor's actions shall be proved whether these actions are the best alternative to achieve a goal.
7. A "balancing test" is required to do. This means that, if compared to their negative consequences, the benefits derived from the business actor's actions are required to be measured. If the benefits are greater than the losses, then the actions are justified.

Consequently, in examining a case with the rule-of-reason principle, such steps mentioned above need to be taken prior to declaring that an action is reasonable restraint or unreasonable restraint.

2.2. Coverage of Guidelines

The Guidelines will expose general principles and basic standards to be applied by the Commission in conducting examinations and analyses on a cartel as required in Article 11 of Law Number 5 Year 1999.

The Guidelines shall be perceived as a general elucidation and is more focused on the definitions of provisions that are considered to violate the principles of

the Business Competition Law. Accordingly, in practice, the application of the Guidelines will be tailored to the courses of investigation and examination of each case. The provisions in the Guidelines shall also be critically and constructively reviewed, especially its applications in the examination of a case and available evidence.

Systematically, these Guidelines cover:

Chapter I Background

This chapter details the cartel in general and circumstances behind it, and effects of the cartel for economic and community development.

Chapter II Objectives and Scopes of Guidelines

This chapter details the purposes for preparing the Guidelines and the subjects included in the Guidelines.

Chapter III Related Articles and Prohibition of Cartels

This chapter details the definition and scopes of cartel according to Law Number 5 Year 1999, the elucidations of elements contained in Article 11 and other Articles in Law Number 5 Year 1999 related to the Cartel.

Chapter IV Cartel Arrangements and Case Examples

This chapter elaborates the concept of a cartel, indication, impact of a cartel and points needed to be considered in analyzing the cartel existence. Furthermore, to provide a clearer picture, several examples of cases will be also described.

Chapter V Rules of Sanction

This chapter details the sanctions to be imposed by the Commission to cartel perpetrators and applicable leniency programs to provide incentives for anyone who reports the emergence of a cartel.

Chapter VI Closing

Chapter III

Related Articles and Prohibition of Cartel

3.1. Definition and Scopes of Cartel and Its Elucidations

Article 11 of Law Number 5 Year 1999 states that a business actor is prohibited from entering into an agreement with his rival business actor with an intention to influence prices by arranging production and or marketing of a type of goods and/or service, which then may result in monopolistic practices and or unfair business competition.

If we examine the formulation of this article, the prohibited thing is the agreement among competitors in which it contains arrangements of production and or marketing of goods and or services intended to have an effect on the price which may result in monopolistic practices and unfair competition.

The agreement as formulated in Article 1 paragraph 7 is the action of one or more business actors to bind oneself or themselves to one or more other business with any name, whether or not the agreement is in writing. Cartel is an action against the law; thereby it is natural that the cartel perpetrators will try to be uneasily detected by law-enforcing personnel. Therefore, agreements or collusions among business actors are rarely expressed in writing so that these are not easy to be detected and no written evidence exists.

In view of the formulation of Article 11 which adheres to *the rule of reason*, it is interpreted that, in conducting the examination and evidencing of a violation against his provision, the business actors' reasons shall be examined, and the monopolistic practices and or unfair business competition shall have to be evidenced firstly. In other words, in examining an alleged cartel, the business actors' reasons for committing the cartel and the agreement consequences towards competition shall be considered. Consequently, an in-depth assessment concerning the reasons of the business actors' agreement is highly

necessary if compared with losses or negative things suffered by cartel for business competition.

3.2. Explanation of Elements

Article 11 of Law Number 5 Year 1999 is read as follows :

“Business actors shall be prohibited from entering into agreements with their competing business actors, with the intention of influencing prices by arranging production and or marketing of certain goods and or services, which may result in monopolistic practices and or unfair business competition”.

The explanation of elements contained in Article 11 of Law Number 5 Year 1999 is as follows:

1. Business Actor

Pursuant to Article 1 point 5, business actors shall be “any individual or business entity, either incorporated or not incorporated as legal entity, established and domiciled or conducting activities within the jurisdiction of the Republic of Indonesia, either independently or jointly based on agreement, conducting various business activities in the economic field”.

In carter, business actors involved in agreements must be more than two. In order that the cartel can work, it needs most of business actors in the relevant market .

2. Agreement

Agreement according to article 1 point 7 shall be the action of one or more business actors for binding themselves to one or more other business actors under whatever name, either in writing or not in writing.

3. Competing Business Actors.

Competing business actors shall be business actors in a relevant market. The definition of relevant market can be seen in the Regulation of the Commission for the Supervision of Business Competition Number 3 Year 2009, dated July

1st, 2009 concerning Guidelines on Article 1 point 10 concerning Relevant Market.

4. Intention of influencing prices

As stated in article 11 that a cartel is intended to influence prices. In order to achieve such purpose, the members of the cartel agree to arrange the production and/or marketing of a good and/or service.

5. Arranging production and or marketing

Arranging production shall be to determine the quantity of production either in the cartel as whole and for every member of the cartel. It may be larger or smaller than the company production capacity or demand for the concerned goods and/or services. Meanwhile, arranging the marketing shall be to arrange the quantity to be sold and/or territory in which the members will sell their products.

6. Goods

Goods according to article 1 point 16 shall be any physical objects, either tangible or intangible, movable or immovable, which may be traded, used, utilized or exploited by consumers or business actors.

7. Services

Services according to article 1 point 17 shall be services in the form of work or performance traded in society to be utilized by consumers or business actors.

8. May result in monopolistic practices

Monopolistic practices according to article 1 point 2 shall be the centralization of economic power by one or more business actors, resulting in the control of the production and or marketing of certain goods and or services thus resulting in unfair business competition. With a cartel, the production and marketing of goods and/or services will be controlled by the members of the

cartel. As the final objective of cartel is to generate maximum profit for the member of the cartel, it is potentially harmful to the interests of the public.

9. May result in unfair business competition

Article 1 point 6 state that unfair business competition shall be competition among business actors in conducting activities for the production and or marketing of goods and or services in an unfair or unlawful or anti-competition manner. Cartel is a collusion or collaboration among some business actors. Therefore, all benefits of a cartel are intended for the interest of the members only, thereby their action is conducted unfairly and dishonestly, for example, by reducing the production or conducting offensive acts or impeding business competition, by fixing prices or division of marketing territory.

3.3. Other Relevant Provisions

The provisions on the prohibition of cartel can be also found at other articles of Law Number 5 Year 1999 , namely:

1. Article 5 concerning fixing prices which is read:

- (1) Business actors shall be prohibited from entering into agreements with their business competitors to fix the price of certain goods and or services payable by consumers or customers on the same relevant market.
- (2) The provisions intended in paragraph (1) shall not be applicable to the following:
 - a. an agreement entered into in the context of a joint venture; or
 - b. an agreement entered into based on the prevailing laws.

Briefly, this article has similarity with article 11 which provides for cartel, the difference between article 11 and article 5 is in article 5, business actors agree to fix prices. Meanwhile, in a cartel, they agree to influence prices by way of arranging production and/or marketing of goods and/or services. So, in a cartel, the business actors agree on the quantity of production and/or marketing of

goods and/or services through agreements which will affect the prices of goods and/or services they produce.

2. Article 7 which is read :

Business actors shall be prohibited from entering into agreements with their business competitors to fix prices below market prices, which may potentially result in unfair business competition.

The differences between article 7 and article 11 are :

1. Article 7 requires the fixing of prices below market prices, meanwhile article 11, there are agreements concerning quantity of production and marketing of goods and/or services.
2. The provisions of article 7 are intended to remove or reduce competition.

3. Article 9 concerning division of territory is read:

Business actors shall be prohibited from entering into agreements with their business competitors which have the purpose of dividing marketing territory or allocating the market for goods and or services, potentially resulting in monopolistic practices and or unfair business competition.

The formulation of article 9 is similar to that of article 11. However, the purpose of agreements in article 9 is to divide the marketing territory or allocate the market for goods and/or services. Article 9 does not require agreements on production of goods and/or services as required in article 11.

4. Article 10 concerning Boycott is read :

- (1) Business actors shall be prohibited from entering into agreements with their competing business actors which could prevent other business actors from engaging in the same business, either for domestic or overseas market purposes.

- (2) Business actors shall be prohibited from entering into agreements with their competing business actors for refusing to sell any goods and or services from other business actors, so that such act:
 - a. causes a loss or may be suspected of potentially causing a loss to other business actors; or
 - b. limits other business actors in selling or buying any goods and or services from the relevant market

Briefly, article 10 does not have similarities with article 11. However, both article 10 and article 11 may influence the quantity of goods distributed in the market . In addition, both can cause a loss to consumers either through cartel or boycott which result in a decrease quantity of goods and/or services in the market which finally cause the hike of the prices. The differences of both articles lay on the instrument used. In a cartel, business actors agree to control production, while in a boycott, business actors agree to impede other business actors. As a result, they will also hinder production of goods and/or services.

5. Article 12 concerning Trust is read :

Business actors shall be prohibited from entering into agreements with other business actors for cooperation by establishing a joint company or a larger company, by keeping and maintaining the continuity of each company or its member, with the aim of controlling production and or marketing of goods and or services, with the result that monopolistic practices and or unfair business competition may occur.

The difference between Trust and Cartel is that the agreements in a trust is to establish a joint company by keeping or maintaining the continuity of each company which become its members. Meanwhile, in a cartel, there is no joint company, but agreements to establish coordination or collusion .

6. Article 22 concerning Conspiracy is read :

Business actors shall be prohibited from entering into conspiracies with other parties in order to determine awardees of tenders which may result in unfair business competition.

In the literature of competition law at some countries, bid rigging is one of the forms of cartel. However, if compared to the content of article 11, then article 22 is not similar to that. Conspiracy in article 22 is to determine awardees of tenders, meanwhile the conspiracy or collusion in article 11 is to influence prices by arranging quantity of production or marketing of goods and/or services. In this matter, the essential similarity between both articles lays on the existence of horizontal agreement between business actors which may result in unfair business competition.

7. Article 24 concerning Conspiracy is read :

Business actors shall be prohibited from conspiring with other parties in order to impede the production and or marketing of goods and or services of their competitors with the aim of causing the goods and or services offered or supplied to the relevant market to become less, either in quantity, quality or in timeliness required.

Article 24 also has similarity with article 11, however the difference lays on the conspiracy in article 24 is aimed to impede production of goods and/or services by the business competitors. However, the acts in both articles similarly cause the allocation of the quantity of goods and/or services in the market .

Chapter IV

Cartel and Case Samples

4.1. Cartel Concept and Definition

A cartel emerges when a group of firms/companies within a particular industry that should compete with one another, but they agree to coordinate their activities by arranging production, area division, collusive tendering and anti-competitive activities of others in order that they can raise product prices and take profits above competitive prices.

In general, the cartel is secretly undertaken. Nevertheless, it is quiet likely that it is performed openly, just as practiced by OPEC.

4.2. Indications of Cartel

An institution entrusted with a task to supervise the business competition, the Commission assumes the responsibility to prevent and take legal action against any of cartel practices in Indonesia. The Commission as defined in Article 36 of Law Number 5 Year 1999 has the authority to effect law enforcement on every cartel case derived from either the Commission's own initiative or the community's report.

4.2.1. Initial Indicators for Cartel Identification

To meet the requirements of adequate initial evidence, the Commission is allowed to check out some early indicators that can be summed up as a driving factor for the establishment of a cartel. Theoretically, there are several factors that encourage or facilitate the establishment of a cartel, both structural and behavioral factors. Some or all of these factors can be used by the Commission as initial indicators in identifying the existence of a cartel on certain business sectors. Some of these factors will be detailed below.

a. **Structural Factor:**

a.1. **Concentration Level and Number of Firms**

Principally, a cartel will be easier to manage if the number of firms is just a few. In this case, the indicators of market concentration level such as CR4 (the relative share of total industry output accounted for by the four largest firms) and HHI (*Herfindahl-Hirschman Index*) are good indicators to find whether a certain market structurally supports the cartel's existence.

a.2. **Firm Size**

The cartel will be more easily established if its founders or pioneers are a number of firms of an equal size. Accordingly, production quota distribution or agreed price levels can be achieved more easily since production capacity and production cost level of all these firms do not differ much.

A.3. **Product Homogeneity**

Homogeneous products, in terms of goods or services, cause the consumer's preference for the entire products not to differ much. This makes the price competition to be the only variable for effective competition. Hence, the business actors' encouragement to come to an agreement to establish a cartel will be stronger to avoid price competition that ruins their profit levels. The Commission may carry out a survey to its customers of certain products in order to determine the level of customer's preferences and make conclusions on product homogeneity level.

A.4. Multi-market Contact

The extensive marketing of a product enables multi-market contacts with competitors who also have targets of broad markets. Multi-market can be interpreted as competition in several market areas or in some market segments. These frequent contacts can encourage entrepreneurs who should compete for collaboration, for example by allocation of regions or prices. In addition, there is no incentive for those business actors not to participate in the cartel since there is a concern of "retaliation" from cartel members in all areas or target market segments.

A.5. Production Inventory and Capacity

An oversupply in the market indicates that there has been an *overstock*. Similarly, an installed capacity which is above a demand indicates that supply capability is above current demand level. To prevent harmful price competition, under these conditions the business actors will be easily caught in price cartel behaviors, i.e. agreeing to a specific price or a minimum price. In addition, this oversupply prevents the cartel members from deviating, considering that the available supply is quite a lot in order to "punish" deviants, by flooding the market so that the prices will fall and employers will find it difficult to market their products. Data for production supply and capacity may be used as an early indicator for identifying a cartel.

A.6. Ownership Relation

The linkage of both minority and majority ownerships encourages business persons to optimize profits through behavioral harmonization among the firms they control. The

shareholders of two or more firms that should be to compete tend to take advantage of this cross-ownership to strengthen the cartel in order to optimize profits. Various cartel arrangements will take place more easily with the presence of this cross-ownership.

A.7. Ease to Market Entry:

The high *entry barrier* as a hindrance for a new firm to enter the market will strengthen the existence of a cartel. The chances for newcomers to fill the absence of markets as a result of cartel's high prices are somewhat blocked. The cartel thereby will be capable of surviving the new comers' competition.

A.8. Characters of Demand: regularity, elasticity and changes

Regular and inelastic demands with a steady growth will facilitate the establishment of a cartel. This occurs due to the facility for the cartel participants in order to predict and calculate the production level and price level that may optimize their profits. Conversely, if the demands are very fluctuative, elastic and irregular, it will be difficult to establish a cartel. The cartel participants will get orders uncontrollably at the time of high demands and are forced to compete to decrease prices, considering the elastic nature of demands. The Commission may assess the characters of these demands by way of surveys, market research and manufacturers' information.

A.9. Buyer Power

A buyer with a strong bargaining position will be able to weaken and ultimately dissolve the cartel. With this position, the buyer will easily find a seller who is willing to supply at low prices. This

means that the buyer encourages a seller not to comply with cartel's agreed pricing. Finally, the cartel will not perform effectively and it will get dissolved by itself.

b. Behavioral Factor

b.1. Transparency and Information Exchange

Cartel will be easily established if the business actors are familiar with information exchange and transparency among them. The strong role of the association is frequently seen as a medium of this exchange. The data of production and selling prices sent periodically to the association may be used as a means of controlling compliance with the cartel agreement. Additionally, in case the exchanges of price information and production data are found without going through the association, it would seem awkward if fellow business actors give the prices and production data to one another among them without a specific purpose so that the suspicion towards the presence of a cartel would get strong.

b.2. Price and Contract Regulations

Several behaviors in price and contract arrangements may strengthen an alleged cartel in an industry. An example is a *one-price* policy in which the equal prices in various areas will be an effective monitoring tool among cartel members towards cartel's pricing agreements. Similarly, the obligation to obtain the same price as in MFN (*Most Favored Nations*) clause or *meet the competition* in a contract will facilitate the control over any deviating cartel member. Therefore, even if the price and contract setting behaviors are not necessary and sufficient conditions in identifying the cartel, those behaviors should be

closely observed by the Commission as part of efforts to identify the existence of the cartel.

4.3. Impacts of Cartel

In general, experts agree that cartel results in losses for both a country's economy and consumers.

4.3.1. Losses for a Country's Economy

1. These may result in inefficient allocation.
2. These may result in production inefficiencies.
3. These may inhibit innovations and inventions of new technologies.
4. These may inhibit the entry of new investors.
5. These may cause the concerned country's economic conditions to be not conducive and less competitive than other countries that apply a fair business competition system.

4.3.2. Losses for Consumers

- a. A consumer pays a product or service with a more expensive price than the price in a competitive market.
- b. A product or service produced may be limited in quantity and or quality if compared to the condition in case a fair competition arises among business actors.
- c. The limited choices of business actors.

4.4. Things to Consider In Analyzing the Presence of a Cartel

4.4.1. Item of Evidence

In order to prove that there has been a cartel in an industry, the Commission manages to acquire one or more items of evidence as detailed underneath. In obtaining an item of evidence, the Commission will apply its authority as required in Law Number 5 Year 1999 in terms of a document request both in *hard copy* and *soft copy*, have witnesses and conduct field investigations. If necessary, cooperation with police authorities to overcome barriers in obtaining needed evidence will be undertaken. In certain cases, the Commission may also obtain items of evidence through cooperation with the personnel of companies involved in a cartel with certain compensation.

Some items of evidence for handling a cartel case are, among others:

1. Documents or records of agreed prices, production quotas or division of marketing areas.
2. Document or recorded price list issued by an individual business actor over some recent periods (either annually or per semester).
3. Data of price fluctuations, quantity of products and quantity of sales in several marketing areas during some recent periods (monthly or annually).
4. Data of production capacity.
5. Data of operational profits or business profits, and profits of companies that coordinate with each other.
6. Results of data processing analysis that indicate *excessive profit*.
7. Results of data analysis of *conscious parallelism* on price coordination, production quotas or division of marketing areas.
8. Data of corporate financial statements for each member allegedly involved during some recent periods.

9. Data of shareholders of each company allegedly involved and the alterations.
10. Testimonies from various parties on the existence of communications, coordination and/or information exchange among cartel participants.
11. Testimonies from customers or other related parties on the existence of price changes in harmony with each other among the sellers/traders allegedly involved in a cartel.
12. Testimony of a company's employee or former employee allegedly involved in the emergence of a company policy made in accordance with the agreements in the cartel.
13. Documents, records and/or testimonies supporting the existence of cartel driving factor according to indicators described in point 4.2.1 above.

4.4.2. Application of *Rule of Reason*

After sufficient evidence is obtained, the next step is to prove whether actually there has been a cartel that shall be wronged among the business actors. In accordance with the formulation of Article 11 of Law Number 5 Year 1999 with *Rule of Reason* characteristics, and in order to prove whether there has been a prohibited cartel, then an in-depth investigation on the reasons why the business actors commit a cartel needs to be done. Business competition law enforcing personnel shall check whether the business actor's reasons for committing this cartel are *reasonable restraints*. A cartel or collaboration can be identified from, among others, the following:

- a. Are there signs of reduction in the production of goods and or services, or are there signs of increases in price? If there are not

any, then the business actors' acts do not conflict with the Business Competition Law. Meanwhile, if there are, then;

- b. Is the action *naked* in nature (merely, directly aiming at reducing or terminating the competition), or *ancillary* (not the goal of collaboration but only a follow-up effect)? If the collaboration is *naked* in nature, it will be against the law, whereas if it is *ancillary*, then:
- c. That the cartel has a market power. If the cartel has a sufficient market power, then it has the power to abuse it. But if there is no market power, then it is almost unlikely that the cartel will be able to influence the market.
- d. There is strong evidence that a cartel produces slightly substantial efficiency, thereby exceeding resulting losses. If the cartel does not give rise to efficiency, then it only causes losses.
- e. Reasonable necessity. This means that the cartel perpetrators' actions indeed logically need to be undertaken. In other words, to achieve pro-competitive benefits, the cartel's actions need to be carried out, and there are no other ways or alternatives that should be thought of by the business actors.
- f. Balancing test. After other factors mentioned above are checked, measurements are to be performed on the benefits obtained from the cartel and the losses that it causes. If the benefits obtained are greater than the losses caused, the business actors' actions can be justified.

4.5. Case Sample

- 1. The Commission's Decision No.10/KPPU-L/2005 regarding Cartel of Salt as Raw Material in North Sumatra.**

This case started from a public report on the difficulty in delivering salt as raw material to North Sumatra. In addition, there were also difficulties in purchasing salt as raw material in North Sumatra. The Reported Parties in this case were PT G, PT B, PT GA and PT GR, PT SP, UD JW, UD SS.

From the investigation results, a fact was obtained that verbal agreements were made by PT G, PT B, PT GA (G3) and PT GR, PT SP, UD, UD SS JW (G4) to fix that the prices of PT G products were higher than those of PT B and PT GA products. And, there were higher prices for salt as raw material purchased by companies outside G3 and G4.

The marketing monopoly of salt as raw material by G3 and G4 in North Sumatra reflects an oligopolistic market structure where there are coordination between the PT G, PT B, PT GA and PT GR, PT SP, UD JW, UD SS for jointly controlling the supply and marketing of salt as raw material in North Sumatra. These are reflected in the following:

1. The artificial competition among G3 in the terms of supply quantity control and a policy on selling price fixing of salt as raw material.
2. The marketing system that creates barriers against business actors besides G3.
3. Consumers shall bear relatively high and unfair prices due to the marketing system in which the supply of salt is not certainly the same as the consumers' demand.

In compliance with such pieces of evidence, the Reported Parties were declared legally and convincingly to have violated Law Number 5 Year 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition; the Reported Parties were proven to have violated, among others, Article 11 of Law Number 5 Year 1999 applied to PT G, PT B, PT GA. The Reported Parties, as stated by the Commission, were business actors that control the supply and marketing of salt in North Sumatra; the Reported Parties

were proved to have controlled the supply and marketing of salt as raw materials in North Sumatra.

A cartel as required in Article 11 of Law No.5 Year 1999 may also occur when several companies A, B, C, D, E and F producing the same goods or service commit a conspiracy and establish a cartel. The senior officers or heads of company A, B, C, D and E meet regularly and set a production quota or quantity of each company. It is agreed that it may vary according to the agreement among them. Production is always adjusted to market demand and production by business actors who are not members of the cartel. Overall, the market share of all the cartel members is above 60%, so it has the power to regulate the quantity of products and prices. As a result of this cartel, the goods prices of goods in the market can be arranged by the cartel according to the amount of profit they would earn.

Chapter V

Rules of Sanction

1. Sanctions Pursuant to Law Number 5 Year 1999

Pursuant to Law Number 5 Year 1999, there are several sanctions that may be imposed against violators of the Business Competition Law which can be either administrative action, penal punishment and additional penal punishment. Under regulations, the violations against Article 11 of Law Number 5 Year 1999 can be as follows:

5.1.1 Administrative measures as required in Article 47 of Law Number 5 Year 1999:

- a. Affirmation of agreement cancellation.
- b. Order the business actors to stop activities that are proven to lead to monopolistic practices and unfair business competition and/or unfavorable to society.
- c. Fixing of compensation payments.
- d. Imposition of a fine amounting to a minimum of Rp.1,000,000,000 (one billion Rupiah) and a maximum of Rp.25,000,000,000 (twenty five billion Rupiah).

5.1.2. Criminal Punishment as required in Article 48 of Law Number 5 Year 1999:

- a. Punishment to pay a fine at a minimum of Rp.25,000,000,000 (twenty five billion Rupiah) and a maximum of Rp.100.000.000.000 (one hundred billion Rupiah), or
- b. Imprisonment punishment as fine substitution at a maximum of 6 (six) months.

**5.1.3 Additional punishment as required in Article 49 of Law Number 5
Year 1999:**

- c. Revocation of business licenses; or
- d. Prohibition to any business actor who has been proved to violate this Law in order to hold the office of a Director or a Commissioner for a minimum of 2 (two) years and a maximum of 5 (five) years.
- e. Termination of a certain activity/action causing another party to suffer a loss.

Chapter VI

Closing

Cartel in Law No. 5 of 1999 is one of the prohibited agreements. A cartel is prohibited since the business actors who are members of a cartel can gain profits above competitive prices through regulating the quantity of production/products by its members, so it will affect the goods prices in the market. Through a cartel, the business actors will benefit just like companies that monopolize a market. But on the other hand, a cartel could harm the economy of a nation since it will lead to allocation inefficiency and production inefficiency. A cartel can also harm consumers since they are forced to pay a product or service more expensive than it should be; it can even cause some consumers not to afford to buy goods or services, but if a price complies with the market price or competition price they can afford to buy it.

Cartels in various countries are considered to be actions that will only make consumers suffer; that is why in law enforcement against cartels, it is usually done by applying *per-se-illegal* principle. While the cartel arrangements in Law No. 5 of 1999, section 11 requires proof of the emergence of monopolistic practices and/or unfair business competition before determining whether a business actor practicing cartel is guilty or innocent. As a consequence, in Act No.5 of 1999, the Business Competition Law Enforcing Authority shall examine deeply the reasons why business actors commit a cartel, and then the Authority decides whether or not the cartel committed by the business actors is unlawful.