CHAPTER I

INTRODUCTION

1.1. Background

The heart of national economic policy long has been faith in the value of competition.[1] Competition constantly gives firms continuing incentives to make their production and distribution more efficient. It encourage firms to adopt better technology, and to innovate. These sources of productivity improvement will lead to effective competition resulting to state economic growth and poverty reduction.[2] However, in the past decades, effective business competition is often harmed by inappropriate government policies and legislation as well as by the anti-competitive conduct of firms. Hence numerous jurisdiction has promulgate competition law and policy as a preventive steps in protecting healthy business competition sphere. Here, Indonesia has become one of those state who promulgate competition law.

Business activities in Indonesia for about three decades before 1999 has developed without due regard to the principles of fair business practices or fair competition. This subsequently resulted in a number of complicated problems. Experts had pointed out that a primary cause of problems lies on fact that the structure of Indonesian economy was built inefficiently. Such inefficiency stemmed

[1] Maurice E.Stucke, "Is Competition Always Good?", *Journal of antitrust Enforcement*, vol.1, No.1 (Febuary 2013), p. 63.
[2] *Ibid.*

from ignorance attitude towards the principles of fair business competition. [3] As a result, this situation has preclude Indonesia in achieving its greatest economic potential.[4] In response to that issue, in light with economic democracy concept embodied under article 33 of 1945 constitution. The government, as a representative of the state, soon realize that they has responsibilities to promote social welfare by creating or maintaining a favorable condition for the development of national economy as well as to promote fair business environment. It may be achieved by issuing several relevant regulations upon this matter.[5] One of these laws was the law on business competition, which also known as the Law Number 5 of 1999 Concerning Prohibition of Monopolistic Practices and Unfair Business Competition (Competition Law). Those law aim to maintain and enhance a fair business competition in Indonesia.[6] Thereby, hardcore cartel[7] practices is strictly prohibited under this law.[8]

[3] Andi Fahmi Lubis, et all *Hukum Persaingan Usaha: Antara Teks & Konteks*, (Jakarta: Deutche Gesellschaft fur Technische Zusammenarbeit,2009), p.16.
[4] *Ibid*., p. 132.
[5] Rikrik Rizkiyana and Vovo Iswanto, "Indonesian Competition Law, Introduction and Recent Development*", Indonesian Constitutional Court's Journal*, Volume 1, 3, May 2005, p.6.
[6] *Ibid.*
[7] "Hardcore" cartel conduct has been defined by the Organization for Economic Cooperation and Development (OECD) as: "an anti-competitive agreement, anti-competitive concerted practice, or anti-competitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce." (OECD, 1998). See. OECD, *Fighting Hardcore cartels Harm, Effective Sanctions and Leniency Programs*, (Paris: OECD, 2002).
[8] Indonesia, "Prohibition of Monopoly Practices and Unfair Business Competition", Law no. 5 year 1999, Article 11.

Throughout the history, cartels are considered by many to be the most egregious offence against competition laws.[9] The impact of cartel is extremely damaging as such collusive agreement will destroy the supply and demand system within the market and will directly harm the consumer as it has forced the customer to consume goods and or services in a very high price.[10] Cartel will also preclude state economic development and eliminate healthy business competition in the market as cartel has tendencies to cause high barrier to entry for new business actor.[11] Cartel practices, however are difficult to investigate because of the inherent difficulties in detecting covert arrangements as it is most likely to be carried out in strictly confidential manner and also because of the scope and complexity of cartels.[12] On that account legal enforcer often met tremendous difficulties if they rely cartel evidentiary solemnly based on hard evidence alone, since hard evidence such as written agreement has been difficult to find. Because agreement can also be made verbally among cartelist. Thus until today the inability to obtain sufficient evidences

[9] OECD, *Fighting Hardcore cartels Harm, Effective Sanctions and Leniency Programs*, (Paris: OECD, 2002), p.11.
[10] Riris Munadiya, "Bukti Tidak Langsung (Indirect Evidence) dalam Penanganan Kasus Persaingan Usaha", *Jurnal Persaingan Usaha*, 5th edition, 2011, p. 159.
[11] Irna nurhayati, "Kajian Hukum Persaingan Usaha: Antara Teori dan Praktik", *Jurnal Hukum Bisnis*, Vol.30 No.02, 2011, p.7.
[12] The International Bank for Reconstruction and Development (The World Bank) and the Organization for Economic Co-operation and Development (OECD), "A Framework for the Design and Implementation of Competition Law and Policy", http://www.oecd.org/dataoecd/10/31/27122270.pdf , Accessed in 1 Mei 2017.

remains as the greatest barriers that must be overcome by the legal enforcer in solving cartel practices.[13]

Indonesia itself also finds it extremely difficult to combat cartel practices. Under Indonesia competition law, prohibition towards cartel practices is specifically stipulated under article 11 which states that:

> " Business actor is prohibited to enter into an agreement with other business actor, whom intent to control the price by arranging the production and or marketing of goods and or services, which may result to monopoly and or unfair business practices."

The formulation of article 11 implies that Indonesia is using *rule of reason* method of approach in proving cartel practices. Under rule of reason approach, an act that is prohibited needs to be proven to what extent such anti competitive action will effect the competition in the market. For that reason, the action is not automatically prohibited until the alleged act is proven.[14] Therefore rule of reason approach often times add burdens for legal enforcer as it requires two steps of evidentiary prior to held someone liable for cartel practices. First, there must be proven there is an act of collusion among business actor and second, the result of such action resulting to monopoly and unfair business competition practices. In the present time, the indication of cartel practices in Indonesia can be obtained through two means of evidence; direct evidence and indirect evidence. Direct evidence of an agreement is an evidence which identifies a meeting or communication between the subjects and

[13] Sih Yuliana Wahyuningtyas, "Challenges in Combating Cartels, 14 Years After the Enactment of Indoneisan Competition Law", *Yearbook of Antitrust and Regulatory Studies*, Vol. 2014, 7(10), p.280.
[14] *Ibid.*

describes the substance of their agreement. The most common form of direct evidence are printed or electronic form of documents which identify an agreement and the parties to it, and oral or written statements by co-operative cartel participants describing the operation of the cartel.[15] Direct evidences are hardly applies in proving cartel practices as cartel is most likely to be conducted secretly thus hardly leave any written evidences.[16] For that reason, the competition authorities nowadays is often relies on indirect evidence to prove cartel practices.

Indirect evidence or circumstantial evidence is evidence that does not specifically describe the terms of an agreement, or the parties to it. It includes evidence of communications among suspected cartel operators and economic evidence concerning the market and the conduct of those participating in it that suggest concerted action.[17] Several economic indicators are often incorporated in indirect evidence, namely Hirschman-Herfindahl Index (HHI), Concentration Ratio (CR), oligopoly market structure, existence of barriers to entry, quotas distribution and many more. The use of indirect evidence, however must be in accordance with the facts as a whole, which obtained through scientific methodology.[18] Indirect evidence has been used widely in various jurisdiction to unfold cartel activity,

[15] The International Bank for Reconstruction and Development (The World Bank) and the Organization for Economic Co-operation and Development (OECD), "A Framework for the Design and Implementation of Competition Law and Policy", http://www.oecd.org/dataoecd/10/31/27122270.pdf , Accessed in 28 November 2017, p. 28.
[16] Organization for Economic Co-operation and Development (OECD), "Using Leniency to Fight Hardcore Cartel", http://www.oecd.org/daf/ca/1890449.pdf, Accessed in 17 November 2017, p.8.
[17] Fahmi Lubis, et al, "Hukum Persaingan Usaha", (Jakarta: Deutche Gesellschaft fur Technische Zusammenarbeit, 2009), p.329.
[18] KPPU, "Sulitnya Membuktikan Praktik Kartel", http://www.kppu.go.id/id/blog/2010/07/sulitnya-membuktikan-praktik-kartel/ , Accessed in 14 August 2017.

nevertheless the applicability of indirect evidence in Indonesia is still in questioned. As a matter of fact, Supreme Court of Indonesia often times inconsistent with their decisions in determining the legality of indirect evidence in cartel evidentiary process. For instance in cooking oil and fuel surcharge case, the Supreme Court of Indonesia has annulled Indonesia business supervisory commission decision regarding cooking oil and fuel surcharge cartel. The Supreme Court alleged that indirect evidences presented by the commission is not sufficient in proving the existence of cartel. This was due to the fact that indirect evidences are not recognize under five means of evidence acknowledge under Indonesian law and therefore indirect evidence shall serve limited as a plus factor. Hence in any event, direct evidence is required in proving cartel activity.[19] In the other hand, in Bridgestone tire case, Indonesia business supervisory commission decision was latter affirmed by the Supreme Court even though the commission only relies their cartel evidentiary process solemnly based on indirect evidences which use almost the same method of approach with the previous case.[20] As the legitimacy of indirect evidence remain uncertain it raise a sense of urgency for Indonesia to find an effective method in overcoming the difficulties of cartel authentication.

In the present time various jurisdiction has engage leniency program in their cartel enforcement system to prove cartel activity. Leniency is a generic term to

[19] Supreme Court Decision, No.613/K/Pdt.Sus/2011, Komisi Pengawas Persaingan Usaha Republik Indonesia v. PT. Gaurda Indonesia, p.225.
[20] Supreme Court Decision, No. 221 K/PDT.SUS/2016, Komisi Pengawas Persaingan Usaha Republik Indonesia v. PT. Bridgestone Tire Indonesia, p.223.

describe a system of partial or total exoneration from the penalties that would otherwise be applicable to a cartel participant in return for reporting its cartel membership and supplying information or evidence related to the cartel to the competition authorities.[21] Alike justice collaborator concept in criminal law, leniency program aims to reward the offender who willingly admit his wrongdoing and voluntarily gave out statement as a witness, in order to get penalty reduction. Thereby leniency program will significantly outweigh competition authorities in finding sufficient evidences to prosecute the alleged cartel activity. The application of leniency program enables competition authorities to uncover conspiracies that would otherwise go undetected. Subsequently leniency program will also act as a deterrent to prevent future cartel practices since leniency program has made cartel membership less attractive due to an increased risk of getting caught as there is a possibility that one of the cartel participants might report such practices.[22] Therefore leniency program has been regarded as a breakthrough in cartel enforcement system which significantly advance cartel evidentiary process.

On that note many jurisdictions have developed leniency programs because of the benefits that flow from having one. Leniency program was first implemented in the United States of America through its department of justice.[23] The application of

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[21] International Competition Network, "Drafting and Implementing an Effective Leniency Policy", http://www.internationalcompetitionnetwork.org/uploads/library/doc1005.pdf, Accessed in 20 August p.4.

[22] *Ibid*.

[23] Scott D. Hammond, "Cornerstones Of An Effective Leniency program", http://www.justice.gov/atr/public/speeches/206611.htm, Accessed in 20 April 2017, p.10.

leniency program in the United States has successfully unfolds numerous cartel practices especially after the revision of leniency policy in 1993. Since the United States program was revised, the number of applications has multiplied to more than 20 per year and soon led to dozens of convictions and to fines amounting to over $1 billion. [24]

United States leniency program perceived as a very successful program since it enables the department of justice to prosecute one of the biggest international cartel known as vitamin cartel. In such case the amnesty applicant's co-operation led directly to guilty pleas and fines of $500 million and $225 million against two other firms. [25] Shortly, the success story of United States leniency program in unfolding vitamin cartel begin to inspire numerous jurisdiction such as Japan, Australia, Canada, England, France, German and European Union to adopt and implement leniency program within their cartel enforcement system.[26]

Although the leniency program has been widely recognized as the most successful investigations tools in exposing and eradicating cartels, Indonesia in case at hand have not implement such program because Law No.5 year 1999 did not recognize an institution of clemency as leniency program. Thereby often times business competition supervisory commission fails to prove the existence of cartel as they find it difficult to obtained hard evidences while at the same time they can not

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[24] *Ibid*.
[25] Organization for Economic Co-operation and Development (OECD), "Using Leniency to Fight Hard Core Cartels", http://www.oecd.org/daf/ca/1890449.pdf, Accessed in16 April 2017, p.9.
[26] Scott D. Hammond, *Op.Cit*. p.18.

rely on indirect evidence either as the legitimacy of indirect evidences remained question in Indonesia. For this reason it is apparent that Indonesia need to adopt leniency program in their system to obtain strong evidences in the most effective and efficient way. Adopting leniency program within Indonesia legal regime will become a huge advantage for Indonesia to prove the existence of cartel. Hence through this research paper the author will try to elaborate and examine the use of leniency program in other jurisdiction and moreover will also discussed the possibility of implementing leniency program in Indonesia as a solution in overcoming the difficulties in combatting cartel practices.[27] From the elaboration above, this research paper will be titled as **"The Possibility and Challenges to Adopt Leniency Program in Indonesia in Proving The Existence of Cartel Practices."**

1.2. Formulation of Issues

1. How is the regulation and implementation concerning leniency program as an attempt to erradicate cartel practices in United States of America and Japan ?
2. Can leniency program be implemented under Indonesia Competition Law?

1.3. Purpose of Research

In general, the purpose of this research paper is to understand the concept of leniency program as one of the alternative instrument to eradicate cartel

[27] Anna Maria Tri Anggraini, "Program Leniency dalam Mengungkap Kartel Menurut Hukum Persaingan Usaha", *Jurnal Persaingan Usaha*, 6th edition, 2011, p.107.

practices in Indonesia business competition sphere, hence this paper is spesifically aims to:

1. Explain and elaborate regulation and implementation of leniency in United States of America and Japan.

2.Analyze the possibility, suitability and effectivity of leniency program implementation within law no.5 year 1999 concerning prohibition towards monopoly practices and unfair business competition regime.

1.4. Advantages of Research

The benefits obtainable from writing this essay is as follows:

1. Academic Point of View

Academically, research Benefits of this paper is to:

a. To fulfill and complete one of the duty and the academic requirements to earn a law degree at the Faculty of Law, Universitas Pelita Harapan;

b. To understand furthermore about the Competition Law and its development both in Indonesia and in other countries;

c. Provides an understanding and critical attitude towards competition law;

d. Understand and broaden the knowledge towards problem of the phenomenon of monopoly and unfair competition, in particular

regarding the implementation of leniency program as a strategic alternative attempt in eradicating cartel practices.

2. Practical point of view

The result of this research paper is aim to be able to give advantage for the society at large, as well as consideration for further research for academicians related to leniency program in cartel practices, legal practitioners and businesses in the economic field both state and private agents on competition law in Indonesia in order to create fair competition in the business world.

1.5. Systematic Writing

Author decided to divide this paper into five chapters. In brief, the chapter will be discussed as explained below.

CHAPTER I : INTRODUCTION

On the first chapter of this study, will be discussed on an introduction that includes the background of the problems, the statement of problem, objectives of the study, the significance of the study and systematic writing.

CHAPTER II : LITERATURE REVIEW

In the second chapter of this study, will be discussed on a description of the theoretical foundation related to the formulation of the problem contained in

this study and the conceptual basis underlying this research to help answer the problems in research.

CHAPTER III : RESEARCH METHODOLOGY

In the third chapter of this study, will be discussed on methods research approaches, types of research, procedures for obtaining materials research, legal materials, and research techniques used in this study is using a normative legal research method qualitatively by way of finding a solution through legal definitions consisting of expert opinions, theories, and statutory requirements.

CHAPTER IV : DISCUSSION AND ANALYSIS

The author will firstly, elaborate leniency program regulation in United States and Japan. Secondly, discussed the urgency of implementing the leniency program in Indonesia. And Lastly, the author will examine the possibility to adopt leniency program under Law no.5 Year 1999.

CHAPTER V : CONCLUSSION AND SUGESSTION

The legal conclusion and suggestion the author makes after conducting research. Thus the writing of this research paper will include five chapters that flow accordingly.