REFORMULATION OF CARTEL CRIMINAL ACT IN INDONESIA

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ABSTRACT

The cartel is a crime entity that is similar to theft but is more detrimental than robbery of property because of its loss to the public. In Indonesia, as a crime, the cartel has not been regulated seriously based on Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition. This research focuses on reformulation of cartel criminal acts in Indonesia because there are various subjective and objective formulations that are unclear and ambiguous, for example the formulation of everyone's typing in general provisions with the substance of the formulation of articles that try to expand the scope, elements of error do not provide opportunities. The method used in this study is normative legal research using three approaches, those are statute approach, conceptual approach and comparative approach. This study yields the conclusion that the formulation of cartel actions is reformulated by expanding the scope of subjective elements, from business people to everyone; strengthen the formulation with intent, intentionally, dishonestly as an excuse for cartel criminal liability. Including affirming the relationship between actions, errors and accountability of legal entities (corporations). The lack of evidence of "unintentional" and "dishonest" elements based on the cartel's action formulation is the entrance to the supervision program (additional punishment) for cartel perpetrators.

Keywords: *cartel, reformulation, criminal, perpetrators.*

INTRODUCTION

Regarding legality principle*/recht beginsel*, The Law No. 5 of 1999 concerning *The Ban On Monopolistic Practices And Unfair Business Competition* regulates every individual, forbid cartel by giving criminal threat, so that it makes the law to be Criminal Law.

The argumentation is, cartel's impact is very powerful for the economy of the society. The cartel has no legitimate purpose and only functions to rob the consumers due to thethe existence of competition. Cartels, therefore, are not properly addressed with a fair obligation regulation designed to compensate victims. Conversely, participation in a cartel is seen as a property crime, similar to theft or robbery, and indeed the existence of a cartel is treated properly as a natural crime.

Like other serious crimes, cartels are never socially wanted, and therefore anti-competition laws must try to find ways to prevent them altogether, not just contract them. As Judge Posner explains, criminal sanctions are not "prices designed to regulate activity; the goal as far as possible is to exacerbate it" (Werden, *et. al*., 2012).

Cartel which is worse than robbing and stealing is *malum in se*, namely "a crime is malum in se if it is intrinsically bad, evil, or morally wrong" (Ibid). So when an act of theft is

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packaged by a civil activity such as a cartel, then "a crime is *malum prohibitum* simply because society has labelled it as such, via statutory law." Generally, intentions or aims are elements of *malum in se* that are needed in crime but not with the crime that *malum prohibitum*. The defendant who violates the *malum prohibitum* is directly responsible and the crime violation is the same by feeling guilty (error) (Gray, 1995).

In Indonesian criminal law, as in other Civil Law countries, criminal acts are generally formulated in codification. However, so far there are no provisions in the Criminal Code or other law and regulations, which details more about how to formulate a cartel criminal acts. Not surprisingly, there should be various formulations of cartel criminal acts which contain matters beyond the characteristics of the deeds and sanctions for such acts, for example Emergency Law Number 7 of 1955 concerning Investigation, Prosecution and Economic Criminal Act Justice (Emergency Law of Economic Criminal Act).

In this case, various criminal acts, especially those contained in the Criminal Code, the formulation is not always in line with "the theory of separation between criminal acts and criminal liability" (Huda, 2004). On the contrary, in the Law No. 5 of 1999, the formulation of cartels is indeed separated (norms and sanctions) as if the law makers want to imply this law as an *administrative penal law* namely in the provisions of Articles 1, 5, 9, 11 and 22 and 48 and 49. The cartel relates to prohibited agreements, the formulation begins from Article 4-16, but those included in the definition of cartel according to OECD (*the Organization for Economic Co-operation and Development*) are only Articles 5, 9, 11 and 22 which are subject to criminal sanctions.

The Articles 5, 9, 11 and 22 contain the formulation of a "ban on cartels" about the order not to do something. The obligation here, according to William Wilson (2003) is not only derived from the provisions of the law. It may be that the obligation arises from an agreement, or obligations arising beyond the agreement, or obligations arising from special relationships, or the obligation to prevent the danger situation due to his actions, even other obligations that arise in social relations, such as the obligation of life neighbor. Thus, the obligations here can be very general, so that they tend to general social expectation and moral aspiration (Ibid).

The explicit use of teminology of cartel is only regulated in Article 11 of Law No. 5 of 1999, namely:

"Business actors are prohibited from making agreements with the competitor of business, who intend to influence prices by **regulating the production and or marketing** of goods and or services, which can result in monopolistic practices and or unfair business competition" (article 11, Law No. 5 of 1999).

The sanctions are threatened through Article 48 paragraph (1), (2) and (3) regulating business actors in violation of Article 4, Article 9 to Article 14, Article 16 to Article 19, Article 25, Article 27, and Article 28 threatened with criminal fines as low as Rp. 25,000,000,000.00 (twenty five billion rupiahs) and a maximum of Rp. 100,000,000,000.00 (one hundred billion rupiahs), or imprisonment in lieu of fines substitution for a maximum of 6 (six) months. The formulation of the cartel's criminal act contains the obligation, which if it is not implemented the maker is threatened with a crime so that the formula includes a formal offense which describes the prohibited act, not the result.

Then Article 5 regulates the prohibition of price fixing, Article 9 regulates the prohibition to divide the marketing area or market allocation, and Article 22 prohibits tender conspiracy.

Regarding this, there are several issues concerning the formulation of cartels according to this law; *first*, the term cartel is not generally regulated in general provisions; *second*, the subjective formulation of the cartel has a different scope of understanding between general

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provisions and formulation of norms; third, the nature of against the cartel law is not explicitly sounded; fourth, the discrepancy between the formulation of norms and sanctions attached. Therefore, to provide strong justification regarding cartel violations according to elements against general law and specifically based on this law, it is necessary to formulate a number of reforms regarding the cartel's actions through enactment.

RESEARCH METHOD

The type of this research is normative legal research which is a technique or procedure based on several legal principles and legal rules related to the substance of general and specific laws and regulations. So, it can answer the legal issues raised.

This study used the statute, conceptual and comparative approach. A regulatory approach (statute approach) is needed to examine further the legal basis. The legislative approach is carried out by examining all laws and regulations related to legal issues. This legislation approach is intended to examine and analyze the laws and regulations relating to relevant legal issues.[9] This legislation approach is intended to examine and analyze the laws and regulations related to relevant legal issues.

Conceptual approach, it is derived from the views and doctrines that develop in legal science.[10] This approach tends to examine these views and doctrines with a systematized interpretation of written legal material. Whereas, the comparison approach is one of the methods used in a normative research to compare one legal institution and one legal system with legal institutions (which are more or less the same as the other legal system).

In this micro law comparison approach, the effectiveness of criminal law against fair business competition in other countries will be compared. In this case, it will be compared to the United States, Malaysia, Australia and Indonesia that many private companies or legal entities make investments by establishing subsidiaries to take advantages of anti-fair business competition legal loopholes to maximize profits by unfairly seizing the market even against the law. In regard to this, international institutions such as the United Nations and OECD play a very important role in integrating efforts to harmonize legislation in an international law that are directly related to the handling of criminal acts against fair business competition.

The sources of legal material used in this study are primary and secondary legal materials.

RESULTS AND DISCUSSION

1. Reasons for Reformulating Cartel Criminal Act

The history of Indonesia's economic growth shows that the competitive climate in Indonesia has not happened as expected, where Indonesia has built its economy without giving adequate attention to the creation of a competitive market structure. Especially during the New Order era, at that time there was a stagnation of the competition system in the business world, due to the New Order's style of power which placed great importance on groups and cronies in order to get a benefit of monopolistic market system. Economists say that monopoly occurs when the output of the entire industry is produced and sold by a company, called a monopolist or monopolistic company (Michael-Kantz and Rosen, 1994).

The Indonesian government's economic policy since the Soeharto regime stated in the GBHN has mandated the existence of economic democracy without cheating. However, the facts happened are the opposite, where the government gives privileges to some entrepreneurs. This results in concentration of economic power, distortion of competition, and loss of

[9] Peter Mahmud Marzuki, *Penelitian Hukum*, Jakarta: Kencana Prenada Media Group, 2005, hlm. 171.
[10] *Ibid* hlm.7.

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efficiency. The granting of privileges, namely the monopoly rights, are seen in several industries, for example the clove monopoly by BPPC (Clove Support and Trading Board) during 1991-1998 (Loughlin, *et al*., 1999). The government's intervention turned out to result in the distortion of the competition process so that consumers suffered because of the high prices of clove, and farmers also suffered losses because the price of cloves fell so it reduced the supply to the clove cigarette industry. The same thing happened to the flat glass industry where until mid-1980 the Indonesian flat glass industry was granted monopoly rights, namely Asahimas Flat Glass, which is a joint venture of Asahi Flat Glass from Japan with a local company, Rodamas Group (Ibid). Another case is the pulp and paper industry where anti-competition and government interference occur which has led to the accumulation of market forces and the use of market forces by several parties. This certainly caused the market concentration for industrial paper which was originally 37% to 90% between 1985 and 1995, while the concentration for pulp ratio, namely the main raw material for industrial paper, was always above 90%. The existence of market concentration results in concentration of economic power (Ibid), which leads to concentration of power (Ibid). Entrepreneurs are also given exclusive rights to the marketing of cloves, flour production and soybeans. Government interventions that should be needed to prevent anti-competitive actions, on the contrary provide space and regulations that support the behavior of capital chaser (Ibid).

In the reform era, the hope for the birth of Law No. 5 of 1999 concerning ***The Ban On Monopolistic Practices And Unfair Business Competition*** to overcome anti-competitive behavior turned out to have not changed the cheating behavior of entrepreneurs, for example a cartel for determining airplane ticket prices in a *fuel surcharge*; hypertension drug cartel with type of *amplodipine besylate*; bulk cooking oil cartels; salt cartel; cartel for the determination of short message service (SMS) tariff services, Honda and Yamaha scooter cartels,all of which meet the needs of the people (putusan KPPU No.25/KPPU/2010 Tanggal 4 Mei).

To safeguard the *status quo*, entrepreneurs are competing to approach power boat to encourage regulation and licensing policies and tenders that benefit business groups in order to perpetuate the cartel. Moreover, the Law No. 5 of 1999 only regulates the market structure rather than its behavior aspects, for example the formulation of Article 11 concerning cartels as if prohibiting "the consequences of cartels". This interpretation is very beneficial for business actors even though the formulation of actions that are prohibited according to the criminal law doctrine is an obligation caused not to do something and the cartel is a formal offense, because it is against general law and formal law.

Practically, the formulation of the cartel according to the Law No. 5 of 1999 is inadequate because it does not contain the values of Pancasila justice, namely: *First*, the Values of Justice Based on the One God Almighty, namely the norm of this Law must not ignore the religious teachings *(leer*) applied in Indonesia, all of which prohibits evil deeds, including cartels stealing the rights of others. Theft from a long time ago is still classified as*criminal extra ordinaria* an act, which is disgraceful, detriment and the perpetrator must be punished (*criminal stellionatus)* (Moeljatno, 2002). *Second*, Justice Values Based on Fair and Civilized Humanity, which promotes the protection of Human Rights and the principle of Humanity mandates that the values of justice in the norm of a law must guarantee, protect human rights such as the right to earn a living (economy). These values are elaborated in Article 28H paragraph (2) of the 1945 Constitution, stipulating that "Everyone has the right to get special facilities and treatment to obtain equal opportunities and benefits in order to achieve equality and justice". Thus, a norm of an Act that is not linear with the values of the second principle of Pancasila and Article 28H paragraph (2) of the 1945 Constitution must automatically be "canceled for legal justice" (Fauzan and Prasetyo, 2006). *Third*, the unity of Indonesian

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values of justice, namely the principle of democracy mandates that power must be subject to a just democratic law. The value of Indonesian unity implies an effort towards unity in the unity of the people to foster a sense of nationalism in the Unitary State of the Republic of Indonesia which applies in the aspect of justice in any field social, political, cultural or even economic. Indonesian Unity at the same time recognizes and fully appreciates the diversity of the Indonesian people. Referring to the unity values of Indonesian Justice, the norm of this law must not experience personification or personalization which tends to protect, or even benefit certain groups in Indonesia. Now, strong allegations of the basic policy of the Act have violated the principles of the establishment of the Unitary Republic of Indonesia which was proclaimed by the founding fathers (founder of the state).*Fourth*, the Values of Justice which are led by the democracy under the wiseguidance of representativeconsultations. The value contained in it is that the essence of the state is the embodiment of the nature of human nature as an individual and social being. These values indicate that the Indonesian nation is not anti-social or individualistic, so that every norm of the Law must contain the incarnation of state power that overshadows or safeguards all people, without it the state through authoritarian and despotic laws (Soehino). *Fifth*, the values of social justice for all Indonesian people. The principle of Social Justice mandates that all citizens have the same rights that all people are equal in the presence of law. These values must be represented in the norm of an Act as the universal values of equality presence of law. These values have been elaborated in Article 27 paragraph (1) of the 1945 Constitution, the existence of a norm governing an objective or subjective form of cartels but contrary to the spirit of equality presence of law, the norms of cartel regulation are "flawed from birth" or "legal justice defects", so they must be annulled or ignored or not even enforced (Ashiddiqie, 2006).

2. Cartel Promotion as Economic Crime

Chairul Huda said the error and criminal responsibility, therefore firstly carried out by presenting the conception of criminal acts. According to monolithic teachings, the conception of criminal acts includes both physical and mental elements. At least based on the definition of criminal acts proposed by Simons, Curzon and Schaffmeister, following this view (Huda, 2006). Likewise with Komariah E. Sapardjaja (1994) and Indriyanto Seno Adji (2000).In this case, the criminal act covers both the objective element (the act of doing something, not doing something and the prohibited consequences) and the subjective element (the maker's fault). That matter, then in terms of criminal law conception, to define criminal acts Moeljatno (1995) asserted that criminal acts are "Acts that are prohibited and threatened with crime, whoever violates the prohibition. The act must also be truly felt by the society as an act which is not permissible or hampers the achievement of the order in the society that is aspired by the society."

Based on observations, the makers of the Law No. 5 of 1999 have shown that they are not serious in formulating a cartel as a criminal offense that is detrimental to society. Assuming that a cartel is a purely civil act that only affects business actors, not the society. A cartel is a "true crime" or something that is *mala in se*, is something that "involves moral delinquency or can be punished by imprisonment or severe crime." Almost all legal scholars have agreed that this "true crime" must be based on personal moral mistakes as indicated by and that they cannot be carried out in a representative manner, legal accountability. As Professor Sayre points out, none of the objectives of criminal penalties, which he identifies as reforming offenders on the part of the perpetrators and others and preventing future criminal offenses, may be that individual responsibility is provided in the case of "true crime" but if the defendant has harmed himself intentionally or threaten social interests or not "measured up to social standards imposed by criminal law (Ibid).

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Pound stated "*The fundamental conception in legal liability was the conception of an act"* (Pound, 1992). The cartel requirement as a criminal act has been fulfilled. Thus, the conception of responsibility in cartel law always starts from the conception of cartel's actions, moral and legal errors and negligence. In criminal law, this means that the problem of cartel criminal responsibility begins with the teaching of criminal acts. As Druff said, *"substantive questions about the proper foundations and scope of criminal liability seem to connect with questions about the concept of action* (Druff, 1993). Thus, the fundamental problems and the range in cartel criminal responsibility are related to the problems related to the concept of cartel criminal act according to the Law as positive law.

There are 2 (two) perspectives on distinguishing between crime and violations, namely the first view that sees the difference between crime and violations of qualitative differences. In view of the qualitative differences between crime and violation, it is said that crime is *rechtsdeliten*, namely actions which although not specified in law, as criminal acts, they have been perceived as *onrecht*, as acts that are contrary to the law. The opposite violation is "*wetsdelikten*", that is, actions which are against the law can only be known after the *wet* (laws) that determine this. The second view is the view that states that there are only quantitative differences (the question of the severity or lightness of the criminal threat) between crime and violation. The differences between crime and violation are (Ibid):

1. Prison sentences are only threatened to the crime only.
2. If faced a crime then the form of error (intentional or unintentional) that is needed there, must be proven by the prosecutor, whereas if faced a violation, it is not necessary. Therefore, the crime is also distinguished in the crime of dolus and culpa.
3. Experiments for violations cannot be punished (Article 54 of the Criminal Code). Also assistance to the violations is not convicted (Article 60 of the Criminal Code).
4. The expiry date, both for the right to determine and the right to carry out the criminal offense for violations is shorter than that crimes, each are one year and two years.
5. In the case of conciliation (concurcus) on punishment, it is different for violations and crimes. A criminal cumulationoffered is easier than a serious crime.

Practically, the separation of qualifications between crimes and cartel violations according to this provision is that the threat of criminal sanctions that will be used, for every perpetrator and business entity will definitely be imposed when the cartel is carried out "intentionally", while "unintentional" or "negligent" conduct cartels then *leniency programs* must be "transplanted" to become part of the cartel's criminal law system. *Leniency programs*are a new instrument that will be introduced in the anti-business competition legal system in Indonesia to *non-recidives*cartel actors.

With the threat of cumulative punishment (Article 6), it will practically strengthen and reinforce the threat of cartel's threat to both the perpetrators and legal entities according to their characteristics. In criminal law, asking for someone's responsibility means wearing the character of reprehensible of the criminal act against that person, so that it is worthy of punishment. Criminal liability is the reproach that is continued objectively is a criminal act, subjectively to the author (Saleh, 1983). This is because the provisions of Articles 48 and 49, especially the criminal threat of fines and confinement that is alternative and it is light arrest, whereas based on the provisions of Article 6 this Emergency Law better reflects the sense of justice because in this article a sentence and disciplinary action are generally imposed against economic criminal act. Paragraphs 1 and 2 regulate the principal criminal penalties while in paragraph 3 is called additional punishment and disciplinary action whose details are regulated in the following articles. The principal punishment is the same as the main sentence

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referred to in the Criminal Code (Article 10 of the Criminal Code) but the maximum sentence is heavier than is commonly used. The reasons have been described in the general explanation.The possibility of jointly dropping escort penalty (supervision) and fine penalties is in accordance with the views of several agencies concerned, that the action in many cases is an act of exact repression.

Because that the provisions concerning the legal subject of Article 1 point 5 of the Law No. 5 of 1999 have ambiguity of meaning (ambiguous) with Articles 5, 9, 11 and 22 which limit only "business actors", whereas the possibility of a cartel is carried out because of the contribution of government officials and other parties, the range of actions of cartels and the accountability system is very broad regarding individuals and legal entities. As for the possibility of imposing direct punishments on a legal entity and so forth according to Article 15 of the Emergency Law, it is more appropriate, especially in its explanation that it contains assertiveness regarding legal doctrine of deeds and responsibilities that are still relevant today such as*rules repondeat superior*and this provision precisely reinforces the existence of the Supreme Court Regulation Number 13 of 2016 concerning Procedures for Handling Corporate Crimes, namely Article 15 of this Emergency Law stipulates, punishments or actions can also be imposed on legal entities, companies, unions and foundations. In economic criminal law the rules are needed, because many economic crimes are carried out by these bodies. Modern criminal law has acknowledged the teaching, that punishment can be pronounced against a legal entity. Article 15 paragraph (1) determines, "an economic criminal act can be carried out by a legal entity, a company, a union or a foundation".Paragraph 2 determines, "in matters where an economic criminal act is deemed carried out by a legal entity, company, association or foundation. These economic criminal acts are carried out by legal entities, companies, unions or foundations, if the economic criminal acts are committed by a person who has a relationship with that body, either based on work relationships, or based on other relationships". Furthermore, it is determined that the person must act "within the legal entity". The elements of economic criminal act do not need to be in one person, but can be shared with more than one person that act, for example a director intends to commit an economic criminal act, that is, for instance a cartel, but the cartel's acts are materially carried out by a subordinate (compare Article 55 of the Criminal Code, order to do or*doen plegen*). Criminal claims are made against officials who represent legal entities, companies, unions or foundations. If the administrator is not determined clearly, the prosecutor has the right to appoint one of them as his representative. The representative can be represented by another person, but the judge has the right to order that an administrator face himself.

As an extension of Article 2 of the Criminal Code, the act of participating abroad can also be punished (Article 3). This provision is very progressive and appropriate considering that cross-country cartel crimes are difficult to avoid. Indonesia with a population of 250 million is a large enough consumer for cartel exploitation. Protection of legal interests must be able to reach consumer welfare. This active national principle is not a taboo matter in international civil law, therefore the criminal law of economy in concordance must provide space for its application in Law Number 5 of 1999.

A regulation prohibiting the existence of "*verkapte bestraffing*"(Article 5) is established, it regulates: "If by law it is not stipulated another, then no other provisions must be held in the sense of laws or disciplinary actions rather than criminal penalties or disciplinary actions. - Terms that can be held in accordance with this emergency law". This article prohibits the use of criminal penalties and other disciplinary actions than those stipulated in this Emergency Law. Although in general the disciplinary action in cartels is regulated in Article 49 of Law No. 5 of 1999, according to the provisions of Article 27 this Emergency Law is more

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balanced by taking into account various factual conditions which are likely to be faced in the field such as confiscation of certain items which do not result in value economical goods and foreclosure expiration.

Experiments that carry out and help to conduct economic criminal act are extended to violations (Article 4). This provision is not contained in Law No. 5 of 1999, so that if there is a realization of a special offense of the cartel concerning participation, it still refers to Article 55 of the Criminal Code in its entirety. However, this Emergency Law through Article 4 reaffirms it, but it does not reach the *zelfstandige vorm van deelneming* (not self-regulating).

An investigator and public prosecutor do not fulfill the demands, based on this emergency law, is an economic crime (Article 26). This provision also threatens everyone, especially with regard to association managers, Ministry of Trade officials, Capital Market authorities, etc., which obstructs obstracle of justice which is also vulnerable to cartel by abused of power. Confirmed by the existence of the formula "intentionally" does not meet the demands of the investigator employees, based on a rule of this emergency law it is an economic criminal act. This is based on the explanation of this article, namely: not fulfilling orders given legally by an investigator according to Article 216 of the Criminal Code is punished by imprisonment for a maximum of 4 months and two weeks or a maximum fine of six hundred rupiah. This provision is considered insufficient for economic criminal act, because an investigator who is only entitled to prosecute a crime is not entitled to make an official report, in which it is called a violation of Article 216 of the Criminal Code. If the person wants to conduct proper and effective supervision, he must always be accompanied by a witness or friend. If not, there is not enough evidence to prosecute the violation referred to in Article 216 of the Criminal Code. The second objection is that the maximum criminal sentence threatened in Article 216 of the Penal Code is too light. Because of that, it is intentionally not to comply with the demands of the investigating staff based on the rules of this Emergency Law, to be used as economic criminal acts. Also the penalties stipulated in Article 6 to 8 of this law can be handed down to people who do not fulfill the above command. Practically, the reference to this provision is also in line with Law No. 20 of 2001 concerning the Eradication of Corruption Crimes, only the threat of punishment is very severe and the norm is not enforced in Law No. 5 of 1999 which should threaten the management of employers 'associations and officials of the Ministry of Trade, Management of Employers' Associations even the Commissioner of the Business Competition Supervisory Commission.

The regulation of additional punishments according to this Emergency Law is very serious, as evidenced by the existence of a separate norm and the threat that regulates, namely to do something that is contrary to additional punishment or disciplinary action imposed, is an economic criminal act (Article 32) (Pasal 32 UU Darurat). This provision can provide an impetus to comply with an additional penalty that has the potential to be less obeyed or the existence of fraud in the supervision and implementation efforts. With this provision on its own or grafted specifically (*provisio*) into Law No. 5 of 1999, so the *leniency programs*that will be applied to the revision of the Law will be protected by its legal interests.

Making withdrawals of parts of wealth to be avoided from bills or execution of punishments or disciplinary actions is an economic criminal act (Article 33) (Pasal 32 UU Darurat). This provision is similar to the provision of Article 32 which regulates the nature of criminal law against anyone who embezzles the assets of a suspect, defendant or convicted person in an effort to avoid additional punishment. This provision does not exist in Law No. 5 of 1999.

Of these two norms it is not against the criminal law with the qualification "intentionally" to be relative and cannot be punished at all when the situation is fulfilled as stipulated in Article 34 of the Emergency Law as follows:

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(1) Laws that are contrary to the provisions in Articles 32 and 33 are null.

(2) The cancellation cannot be used as a detriment which is detrimental to a person, who does not know about the existence of a sentence, disciplinary action or temporary disciplinary action, which is imposed, unless there is reason for him to suspect punishment, disciplinary action or temporary disciplinary action.

(3) Wives (husbands), blood relatives or families are fined up to the third pupil of and those who work for people, for whom punishment, disciplinary action or temporary disciplinary action are imposed, it is considered that there is a reason for them to suspect punishment, disciplinary action or temporary disciplinary action, unless they can prove otherwise.

The application of Article 34 norms is very useful to strengthen the provisions for recovery of losses of business competitors and consumer communities that are not regulated in Law No. 5 of 1995. The provisions of this article are still relevant to the current conditions of cartel law enforcement, namely having subsidiarity in the application of Article 32 (for convicts who do not comply with the implementation of additional penalties). In the event that certain conditions related to the cancellation of Articles 32 and 33 cannot be used as a pretext to sue by the perpetrator or parties in relation to the possibility of alleged violation of Article 33 (embezzlement of convicted assets). But that provision is offset by a reversal burden of proof for convicts and their families. The law of evil contains aspects of moral element, only punishing those who are morally responsible for harmful actions. The mental element of crime is very important so that *mens rea* is considered to be fundamental to criminal (McVisk, 1978), also the cartel.

Special additional penalties (Article 7) (Pasal 7 ayat (1) UU Darurat), are held, and disciplinary actions (Article 8) (Pasal 8 ayat (1) UU Darurat) are completed to complete the principal cumulative punishment system which affirms that economic crimes are not violations of civil law between traders and traders who are not involved. Unlike the formulation of sanctions imposed by Law No. 5 of 1999 which signals that the anti-competition law prohibiting cartels to positions it as the golden rule. Although the nominal amount of the fine must undergo a revaluation, the norm is still in accordance with the current situation.

3. Reformulation of Provision terms of Cartel Crime

Based on research that a cartel is a criminal act and there are rules of criminal sanctions according to Law No. 5 of 1999. Provisions regarding the actions of cartels that are prohibited and punitive sanctions according to legislation are called terms of provisions or special provisions (Ashiddiqe, 2017). This provision cannot be said to be a "closing rule" because it functions as an enforcer of all existing norms and is regulated in the Act. Chairul Huda called it a subjective and objective formula or in Dutch it was called*subjectief onrecht element* and*objectief onrecht element* (Huda, op. ct).

This provision is important for composing indictments(*acte van verwijzing*) and claim letters (*requisitoire*) for proof (*bewijs*) and (*vonnis*) of establishing criminal liability in cartel cases. The 2015 Criminal Code Bill stipulates Errors based on Article 38 paragraph (1) No one who commits a crime is punished without error. Paragraph (2) Errors consist of the ability to be responsible, deliberate, negligent, and there is no reason to forgive. Article 39 paragraph (1) For certain criminal acts, the law can determine that a person can be convicted solely because the elements of the crime have been fulfilled without regard to errors. The provision of paragraph (2) is "in the case that it is determined by law, each person can be accounted for a crime committed by another person".

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The criminal responsibility of the cartel must exist and be relevant, with "physical" elements and elements of "mistakes" which are stipulated in the formulation of the actions of the cartel. The "physical" element of the cartel's actions must involve an actual action to participate in the cartel, namely making or giving effect to agreements with other competitors on the bid price, tender (procurement of goods-services), distribution of market allocations or production restrictions.

Therefore, the formulation of the actions of cartels in the Act should be that ***"every person and / or legal entity is deliberately and dishonestly (KPPU) and gets benefits"*** **by (**Article 9 of Law No. 5 of 1999**)**:

1) Making a contract, arrangement or agreement (broadly an agreement) (Subekti, 2007) which contains the provisions of the cartel; or
2) Applying the specific provisions of the cartel listed in an agreement.

This section stipulates that a cartel provision is a provision of agreement between competitors that:

1) **Have a purpose** or influence, or tend to have an effect, directly or indirectly on the price of the goods or services provided or obtained (including goods or services to be supplied again); or
2) **Have the purpose** of limiting output directly or indirectly (ie, limiting production, capacity or supply), market share (ie, sharing customers, suppliers or regions) or tender offers.

The definition of the word "every person" and / or "business actor" is not limited to business actors, corporate administrators but also managers of associations and government officials against the law with the intention of committing acts of *aquo* which have a detrimental effect on the community and the state, whereas the notion of legal entities is not limited to companies (The Indonesian LLC, CV/LP, Firm, and Public Corporation and Foundations and Cooperatives) but also employing associations and organizations participating in enjoying the consequences of these actions (UNCATOC 2000). The formulation of each business actor that has been applied in the Law No. 5 of 1999 has been amended with the formulation of **"every person"** as intended by **anyone** (***hijdie***) **so that not only business actors are affected by the formula, but individual officials, managers of employers' associations and foreigners as well as foreign government officials.**

What is also important from the provisions of this provision is that it is also a violation to have the effect of enforcing the cartel provisions, namely the element **"with the intention of being dishonest to obtain profits"**. This special provision, including the above provisions, applies retrospectively. **In the absence of evidence that someone wants the act dishonestly to get a profit, the behavior can be punished with special provisions of civil penalties including small losses and not have a big impact on the consumer community (Mark, 2005).** Here the role of additional punishment for *leniency programs* for supervision is not for *recidives*.

The formulation of the "dishonest" qualification in terms of accommodating from the provisions of Article 382 of the Crinimal Code which uses the term "fraudulent acts" in *a contrario*gives the meaning "dishonest".This "dishonest" word is different from the "negligence" or "accidental" formulation used in Emergency Law No. 7 of 1995 to distinguish "crime" or "offense" qualifications, but there is little similarity when the embodiment of the cartel offense is carried out but "dishonest" it will give a different

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punishment effect with a cartel that is done with" honest" that there is the possibility of the perpetrator getting leniency programs.

So the formulation of the regulation of cartel provisions is one thing related to price fixing, production quota restrictions or supply chains, allocation of customers, suppliers or territories, or tender offers, by which parties, on the contrary, they should compete with each other. Specific provisions of the cartel must contain both, namely: (i) **conditions of purpose** / influence relating to prices, supply restrictions, customer allocations or tender conspiracy; and (ii) **a specific provision** of competition, consisting of at least two parties in the contract, arrangement or agreement or perhaps, in the form of contracts and others, which they should compete with each other.

As shown above, a key if not for the main justification given for criminalizing cartels is that fear of criminal sanctions and imprisonment in particular will prevent potential offenders. This reflects the assumption of the classic antidote theory that people know the law and consider, rational and self-interested decisions to obey or not comply. It is assumed that the potential of cartelists calculates guarantees of increased financial profitability from cartel behavior against the possibility of being detected and prosecuted by law enforcement agencies and the nature and size of sanctions to be applied. Therefore, the amendment to the Law No. 5 of 1999 should prevent cartel behavior by ensuring that sanctions are 'fast, sure and substantial', and that 'optimal' sanctions are billed to the cartel (Beaton-Wells, 2013).

Determination of cartel arrangements relating to the type of "price fixing" cartel is explained that: this particular provision has a purpose, or has or may have an influence, either directly or indirectly (Ibid):

i. By setting, controlling or maintaining prices, or for the provision of discounts, allowances, discounts or credits related to goods or services supplied, or may be supplied by one or all parties to the contract, goods, or services acquired or possibly acquired by one or all parties to the contract and so on;

ii. Goods or services are re-supplied, or the possibility of being re-supplied by a person or group of people whose goods or services are supplied by or all parties to the contract and so on;

iii. Goods or services which are likely to be supplied by a person or group of people whose goods or services may be supplied by one or all parties to the contract and so on.

Determination of cartel arrangements related to the type of "production quota limitation" cartel action is explained that: if the provision has a purpose, or tends to have an effect, directly / indirectly prevents, inhibits or limits production or the possibility of producing goods by one or all parties to the contract etc., the capacity or capacity (production capability) that may be from one or all parties to the contract and others, the supply or possible supply of goods or services to people or groups of people by one or all parties to contract and others (Ibid).

Determination of cartel arrangements related to the type of cartel deeds "marketing area division" explained that: if the provisions have a purpose, or tend to have influence, directly / indirectly allocate between one or all of those who have obtained or are likely to obtain services from, or supply of goods or services to, one or all parties to the contract and others, allocating geographic areas for goods or services supplied, or likely to be supplied, or obtained or may be obtained, from or to one or all parties to the contract and etc (Ibid).

Determination of cartel arrangements related to the types of actions of the cartel "conspiracy of tender offer" is explained that if the provision has a purpose, or the possibility of having a

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direct or indirect effect, which ensures the occurrence of an offer request in connection with the offer or acquisition of goods or services, one or more parties in the offer contracts and others, but one or more, two or more parties not in a contract offer, unless at least two of them do so on the basis that one of these offers is more likely to succeed than another, or not all parties continue their offer up to a certain time limit, or at least two parties continue the offer on the basis that one of the offers is more likely to succeed than another, or at least one bid is made in accordance with the contract (Ibid).

Although the explanation of the formulation of the action of the cartel uses the word "influence" does not mean this offense is a material offense, because not doing a cartel is an obligation not only born of law but agreement and so on.

CONCLUSION

The reason for the cartel was included in the regime of the Emergency Law of Economic Criminal Act, because the formulation was clear between the qualification of an act (crime or violation); element of error (intentionally or unintentionally); affirmation of criminal participation for foreigners; the formulation of other offenses related to the Economic Criminal Act as well as the provisions that give room for other laws that govern similarly to submit themselves.

The formulation of the actions of cartels is reformulated by expanding the scope of subjective elements, from business actors to everyone; reinforce the formulation with the intent, intentionally, dishonestly as an excuse for cartel criminal liability. Including affirming the relationship between actions, mistakes and accountability of legal entities (corporations). The lack of proof of the element of "unintentional" and "dishonest" based on the formulation of the cartel's actions is the entrance to the supervision program (additional punishment) for cartel perpetrators.

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