Chapter One  Introduction

1.1 Research Background

On 5th March 2000 the Law of the Republic Indonesia Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition (“the Law Number 5/1999”) was enacted by the Indonesian House of Representatives (“DPR”). Notwithstanding the polemics regarding necessity and appropriateness of the Law Number 5/1999, the proponents of it argued that the Law Number 5/1999 is profoundly important for establishing the economic democracy in Indonesia.¹ Indeed, Article 33 of the 1945 Indonesian Constitution mandates the attainment of economic democracy.²

Equally important, according to Säcker and Lohse, the Law Number 5/1999 purports, inter alia, to achieve the economic democracy. Put differently, the Law Number 5/1999 aims to promote further innovations, economic efficiencies as well as to increase consumers’ welfare

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The concept of an economic democracy (Wirtschaftsdemokratie) is in contrast to the following systems of economy:
First, Laissez-faire (free fight liberalism), which refers to a system without the state regulatory intervention and depends largely on market mechanism.
Second, etatism system, which is characterised by the centralised state economic system and thus paralyses private economic activities.
Third, the economic concentration system, which ran through the certain groups (elite groups). See Silalahi, Fusionskontrolle in Indonesien gemäß Regierungsverordnung Nr. 27/1998 und Gesetz Nr. 5/1999 (n 1) 33–55.
optimally. Even more, Silalahi asserts that the Law Number 5/1999 serves as the economic constitutional-order (Verfassung der Wirtschaftsordnung) in the Indonesian national developments.

Whereas the Law Number 5/1999 has been approximately for 17 years implemented, it encounters considerable difficulties to uncover (detect) and prosecute cartel infringement in Indonesia. In fact, the Indonesian Commission for the Business Competition Supervision (“Komisi Pengawas Persaingan Usaha-KPPU”), as an independent authority established to supervise the application of the Law Number 5/1999, had been experiencing profound obstacles to implement the circumstantial (indirect) evidences the competition law enforcement proceedings against cartel. In fact, KPPU encountered difficulties and inconsistencies regarding the implementation of the circumstantial (indirect) evidences in the cement cartel, airlines fuel surcharge cartel, SMS telecommunication cartel, soybean cooking oil cartel, anti-hypertension pharmacy cartel and the most recent is automotive tire cartel.

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4 The concept of „Verfassung der Wirtschaftsordnung“ in Indonesia requires also the economic reforms through the introduction Law Number 8 year of 1999 on Consumer Protection, the Law Number 10 year of 1998 on Banking Sector, and the Law Number 4 year of 1998 on Bankruptcy and Indonesian Commercial Court as the integrated economic reform package to ensure justice and legal certainty for all economic and business actors. M. U. Silalahi, (n 1) 55–60.
6 KPPU Decision on the Industry Cement Cartel (Putusan Perkara No. 01/ KPPU–L/ 2010).
7 KPPU Decision on the Garuda Indonesia Airwarys (Persero) (Putusan Perkara No: 25/KPPU-I/2009).
8 KPPU Decision on the Short Message Service (SMS) Telecommunication Cartel (Putusan Perkara No.26/KPPU-I/2007).
9 KPPU Decision on the Cooking Oil Cartel (Putusan Perkara No.24/KPPU-I/2009).
10 KPPU Decision on the Pharmacy Cartel on Hypertension Amlodipine (Putusan Perkara No. 17/KPPU-I/2010).
According to the European Union Commission (“Commission”), cartel refers to:

“Arrangement(s) between competing firms designed to limit or eliminate competition between them, with the objective of increasing prices and profits of the participating companies and without producing any objective countervailing benefits. In practice, this is generally done by fixing prices, limiting output, sharing markets, allocating customers or territories, bid rigging or a combination of these specific types of restriction. Cartels are harmful to consumers and society as a whole due to the fact that the participating companies charge higher prices (and earn higher profits) than in a competitive market.” ¹²

On the one hand, Wollmann and Herzog describe cartel as an agreement, decision of association of undertakings or concerted practices, which aim to restrict and distort competitions in a market. ¹³ On the other hand, the Indonesian Competition Law Number 5/1999, Article 11 stipulates:

“An undertaking shall be prohibited to make agreements with their business competitors, with the intention of influencing prices by arranging production and/or marketing of a good and/or service, which could result in the occurrence of monopolistic practice and/or unfair business competition.”

Taking into account the cartel characteristics, Silalahi contends that Competition Authority (“CA”) will find difficulties in investigating and prosecuting cartels violation due to its secretive nature. ¹⁴ Regardless its collusive feature, cartels cause detrimental effects to the competition in a market, for instance increases of price and decreases of consumers’ welfare. ¹⁵ For that reason, Ruky believes that cartel is a provide a most dangerous violation of competition law, because CA must be able to

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¹⁵ Silalahi, ibid. 3.
answer ‘who commits cartels violation?’\textsuperscript{16} Equally important, cartel frequently takes place in an oligopolistic market, in which business actors could be subject to the oligopolistic interdependence (conscious parallelism). At the same time, Adam Smith maintains that „people of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices“.\textsuperscript{17} On account of this reason, the investigation and prosecution of cartels violation prerequisite not only the direct evidence, but also the circumstantial (indirect) one.\textsuperscript{18} In brief, the circumstantial (indirect) evidence refers to “evidence which is appropriate to corroborate the proof of the existence of cartels by way of deduction, common sense, economic analysis or logical inference from the demonstrated facts.”\textsuperscript{19}

Whereas CA such as KPPU, is authorized to employ the circumstantial (indirect) evidence, KPPU must carefully apply the circumstantial (indirect evidence) due to following reasons.\textsuperscript{20} First, KPPU must prevent the ‘false positive’ (type 1 error).\textsuperscript{21} Second, KPPU must avoid the ‘false negative’ (type 2 error).\textsuperscript{22} Accordingly, KPPU is subject to the procedural rules, such as proportionality and due process principles enshrined in the KPPU Regulation (Peraturan Komisi-Perkom) Number 1/2010 concerning the Guidelines for Adjudication of competition infringement cases.\textsuperscript{23} Thus, in the judicial practice of European competition law and German cartel law, the Competition Authorities are subject to the procedural law’s principles in applying both of direct

\textsuperscript{17} Silalahi, ibid. 2.
\textsuperscript{18} Silalahi and D. Parluhutan,’Circumstantial Evidence in the Substantiation Mechanism against Cartel Infringements in Indonesia’ (n 5) 3–5.
\textsuperscript{21} Ruky, “Economic Evidence” (n 16) 3–8.
\textsuperscript{22} ibid. 5–7.
\textsuperscript{23} KPPU, \url{http://www.kppu.go.id/docs/SK/sk_1_2010.pdf}, accessed on 02th January 2019.
and circumstantial (indirect) evidences in order to prove a cartels off-
ence. According to Hofmann, the principles are of highly importance
and serve as the commonly accepted legal foundations of the European
Union (EU) Law. Indeed, Article 2 of Treaty on the Functioning of
the European Union (“TFEU”) provides:

“The Union is founded on the values of respect for human dignity, free-
dom, democracy, equality, the rule of law and respect for human rights,
including the rights of persons belonging to minorities. These values are
common to the Member States in a society in which pluralism, non-dis-
crimination, tolerance, justice, solidarity and equality between women
and men prevail.”

Specifically, the European competition law as well as the German cartel
law proceedings embrace the principle of in dubio pro reo, which liter-
ally means ‘when in doubt, in favour of the accused’ (the presumption
of innocence). Also, in the Rhône-Poulenc case the Advocate General
Vesterdorf asserted the importance of procedural law principle in com-
petition law cases, as follows:

“Considerable importance must be attached to the fact that the competi-
tion cases of this kind (cartels) are in reality of a penal nature, which nat-
urally suggests that a high standard of proof is required (...). There must be
a sufficient basis for the decision and any reasonable doubt must be for the
benefit of the applicants according to the principle of in dubio pro reo.”

In contrast, in the judicial practice of the Law Number 5/1999, there is
a dubiousness in the implementation of circumstantial (indirect) evi-
dence. Whilst KPPU has decided cartel infringement cases by applying
the circumstantial (indirect) evidence, both of the competition law

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27 Lianos and Genakos, ibid.86 – 87.
practitioners and scholars in Indonesia object the KPPU’s decision. For instance, they contend that the circumstantial (indirect) evidence creates contentious and overlapping impact to the existing evidentiary requirement rules, notably Article 184 (1) of the Indonesian Criminal Procedural Code (“KUHAP”) and Article 1866 of the Indonesian Civil Code (“Burgerlijk Wetboek” or “KUHPerdata”).

To date, by examining the KPPU’s decision in an automotive cartels case, Silalahi indicates that there is an inconsistency in the application of circumstantial (indirect) evidence.

While the implementation of circumstantial (indirect) evidence is profoundly important to ensure effective enforcement of the Law Number 5/1999, there has been deficit of scholarly works regarding the employment of circumstantial (indirect) evidence in Indonesia. Specifically, Silalahi and Parluhutan have introduced academic discourses on the circumstantial (indirect) evidence in accordance with jurisprudential development of the Law Number 5/1999. Afterward, Anggraini highlighted the KPPU’s practice in applying the circumstantial (indirect) evidence within cartels violation cases. Accordingly, Rizkiyana and Iswanto recommend that KPPU must be empowered with broader investigative powers.

28 The Indonesia Law Number 8 year of 1981 concerning the Indonesian Criminal Law Proceedings (“KUHAP”) and The Indonesia Civil Code (“KUH Perdata”) (30 April 1847, Staatsblad No. 23), Book III. Furthermore, this pros and cons of the implementation of circumstantial evidences were manifest in discussions between Indonesian scholars and practitioners on competition law. cf. R. Rizkiyana and V. Iswanto, ‘Eradicating Cartel: The Use of Indirect Evidence’ (UPH Law Faculty National Seminar “Eradicating Cartel Practices in Indonesia: The Challenges of Indirect Evidence’, Lippo Karawaci, 20th January 2012) 5–10.


30 Silalahi and Parluhutan, ‘Circumstantial Evidence in the Substantiation Mechanism’ (n 5), 2–7.


32 Rizkiyana and Iswanto, ‘Eradicating Cartel’ (n 28) 2–7.
Thereby, the dissertation attempts to perform holistic analysis concerning both of the normative (regulatory) framework of circumstantial (indirect) evidence as well as the judiciary practice of Competition Authority on circumstantial (indirect) evidence pursuant to the Indonesia Competition Law Number 5/1999 in comparison to the German Cartel Law and the European Union (EU) Competition Law. Furthermore, by means of juridical comparison with the German Cartel Law and the EU Competition Law, the dissertation’s endeavor is to examine the implementation of Leniency programme in order to eradicate cartels violations optimally. Equally important, this dissertation aims to provide recommendation for the improvement of the Law Number 5/1999 in accordance with the national middle-term 2015–2019. Moreover, by taking into account the ASEAN Economic Community (“AEC”), the Law Number 5/1999 shall be able to response against cross-borders anticompetitive practices, that is to say, cartel infringement.

35 ASEAN is the abbreviation of the Association of Southeast Asian Nations with currently 10 member countries: Indonesia, Singapore, Thailand, Malaysia, Brunei Darussalam, Phillipines, Vietnam, Myanmar, Laos PDR, Cambodia. By virtue of the ASEAN Concord II declared in Bali in 2003, the ASEAN countries have agreed to establish the ASEAN Economic Community (“AEC”) by 2015 which will not only transform ASEAN into a region with free movement of goods, services, investment and skilled labour, and a freer flow of capital, but also it will create a highly competitive region that is fully integrated with the global economy. Thus, through the AEC the currently 10 ASEAN member states determine themselves to achieve the following core objectives gradually: First, the single market and production base. Second, the highly competitive economic region. Third, the region of equitable economic development. Fourth, the region fully integrated into the global and other regional economies. See also ASEAN Secretariat, 'ASEAN Economic Community Blueprint' (Jakarta 2015) http://www.asean.org/asean-economic-community/, accessed on 12th March 2016.
1.2 Discourse of Analysis

In order to provide systematic and sound expositions, this dissertation is structured as follows. After the introduction and structure of analysis have been exposed, the second part of dissertation analyses systematically both of conceptual and substantive regulatory frameworks of cartels prohibition in accordance with the European Union (EU) Competition Law, the German Cartel Law (*Gesetz gegen Wettbewerbsbeschränkungen*—"GWB") and the Indonesia Competition Law Number 5/1999. The second part describes the following substances: (1) cartels in an oligopolistic market by taking into consideration the ‘oligopolistic interdependence’ (conscious parallelism) therein, (2) analysis of the statutory elements of cartels prohibition, (3) the application of cartels prohibition according to the EU Competition and German Cartel Law, both in terms of horizontal and vertical applications, (4) the substantial matter in the German Cartel Law, notably “hub-and-spoke cartels” and interpretative rule, (5) the cartel prohibition according to the Law Number 5/1999 and the KPPU’s Regulation and guideline on cartels prohibition. Afterwards, the third part of dissertation will describe the procedural framework of cartels prohibition in accordance with the EU Competition Law, the German Cartel Law and the Law Number 5/1999. Specifically, this part devotes with the following matters regarding cartel prohibition enforcement proceeding: (1) the guiding procedural principles of European Competition and German Cartel Law, for instance legality, presumption of innocence (in dubio pro reo), the protection of fundamental human rights, (2) the stages of cartel prohibition enforcement procedure in the EU, notably the administrative procedure, which is then followed by the judiciary proceedings, (3) the guiding principle and rule concerning evidentiary requirement, notably, the burden and standard of proof as well as evaluation and categorization of evidences, (4) the recognised cartel enforcement proceedings in Germany, namely, the Administrative Procedure (*Verwaltungsverfahren*), the Imposition of Fines (*Bußgeldverfahren*) and the Civil Litigation Process (*Bürgerliche Streitigkeiten Verfahren*), (5) the evidentiary requirement in Indonesia legal system and the Law Number 5/1999, specifically the judge conviction theory (*conviction intime*), positive law theory (*positief wettelijke bewijstheorie*), restricted judge
conviction theory (*conviction raisonee*) and negative law theory (*negatief wettelijke*). Furthermore, the third part’s last section, provides comprehensive discussions and analysis concerning the evidentiary rules’ implementation as well as the implementation of indirect (circumstantial) evidences. In addition, the application of “Plus factors” or “parallelism plus” in accordance with the European Competition and the German Cartel Laws in conjunctions with the United States (US) Antitrust law as well as the Law Number 5/1999 are to be explained.

Afterwards, the fourth part of the dissertation primarily explains, not only the conceptual and normative aspect of the circumstantial (indirect) evidence, but also the judiciary practices in the EU, Germany and Indonesia with respect to the indirect (circumstantial) evidences, which comprises: the Decision of KPPU and the Judgement of Indonesian Supreme Court (MARI) concerning the Automotive Tire Cartel, the Decision of KPPU on the Cement, the Decision of KPPU on the Short Message Service (SMS) Telecommunication, the Decision of KPPU on the Amlodipine Anti-Hypertension Pharmaceutical Cartels. In addition, the EU Competition and German Cartel Laws’ precedents, such as *Bundesverband der Arzneimittel-Importeure v Commission of the European Communities* (Bayer Adalat Cartel) and ‘*Toshiba Court v European Union Commission*’ (Gas Insulated Switchgear-GIS Cartel) in the years of 2004 and 2017. Eventually, the fifth part of the dissertation provides the conclusion and feasible recommendations concerning the implementation of circumstantial (indirect) evidence, notably in the Indonesia Competition Law, by means of the juridical comparisons with the EU Competition Law and the German Cartel Law, in order to substantially improve the Competition Law Number 5/1999 within the perspective of regional economic integration in the Association of the South East Asian Nations (ASEAN) respectively.