Dian Parluhutan

The Implementation of Circumstancial Evidence pursuant to the European Union Competition Law, the German Cartel Law and the Indonesian Competition Law

Tectum

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Preface

This book provides analysis regarding the implementation of circumstantial (indirect) evidences, notably 'facilitating practices' and 'plus-factors' to prove cartel violations in the German and European Competition law's praxis as well as the Indonesian Competition law's practice. First and foremost, I would like to express my gratitude to Prof. Dr. iur. Dr. rer. pol. Dres. h.c. Franz Jürgen Säcker Hon.Ph.D.(PCCC) for his genuine motivation and fatherhood guidance as well as his staff at the *Institut für Energie- und Regulierungsrecht* Berlin. I would also to thank sincerely Dr. jur. Udin Silalahi, SH., LL.M, Lecturer at *Universitas Pelita Harapan* (UPH) for having inspired and encouraged me to finalize my doctoral research project. Particulary, I would like to thank *Studienförderung Ausland, Hanns-Seidel Stiftung* also Mr. John Riady for having supported my doctoral study in Germany. Furthermore, I would like to thank *Kanzlei* Linklaters LLP Berlin as well as Faculty of Law, State University St. Petersburg for supporting my study through professional and research fellowship experiences. Also, I am very thankful to the *Freie Universität Berlin's* Faculty of Law and International Office's staff members. Moreover, I would like to thank Jusuf Indradewa and Partners, Jakarta.

My deepest gratitude, however, I owe to my family and community-group's friends in Berlin-Potsdam and Jakarta, who showed the best support, unlimited patience, positivity and confidence to accomplish the doctoral research and this publication.

Karawaci, October 2019

Foreword

With delight I write this foreword, not only because Mr. Parluhutan has worked as a Lecturer under my leadership, but also because I believe that his book serves as a contribution to the development of teaching and research on the international business and competition law in Indonesia.

I genuinely hope this book will become a primer for academicians and practitioners to enrich and to foster their expertise in the field of Indonesian and international business and competition law in the contemporaneity and in the future.

Professor Dr. Bintan Saragih, SH
Dean Faculty of Law

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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

1 M. U. Silalahi, *Fusionskontrolle in Indonesien gemäß Regierungsverordnung Nr. 27/1998 und Gesetz Nr. 5/1999 im Vergleich zur deutschen und europäischen Fusionskontrolle* (Friedrich-Alexander-Universität Erlangen, 2001) 55–57.

2 Article 33 of the 1945 Indonesian Constitution (4th Amendment, 2002). ‹http://www.unesco.org/education/edurights/media/docs/b1ba8608010ce0c48966911957392ea8cda405d8.pdf› accessed on 03 January 2019.
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.[3] Even more, *Silalahi* asserts that the Law Number 5/1999 serves as the economic constitutional-order (*Verfassung der Wirtschaftsordnung)* in the Indonesian national developments.[4]

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.[5] In fact, the Indonesian Commission for the Business Competition Supervision ("Komisi Pengawas Persaingan Usaha-KPPU"), as an independent authorithy 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,[6] airlines fuel surcharge cartel,[7] SMS telecommunication cartel,[8] soybean cooking oil cartel,[9] antihypertension pharmacy cartel[10] and the most recent is automotive tire cartel.[11]

3 Wolfgang Kartte and Knud Hansen in F. J. Säcker, et.al (eds.), *Law Concerning Prohibition of Monopolistic Practices and Unfair Business Competition* (GTZ-Katalis, 2001) 1–7. cf. *Säcker and Lohse* in F. J. Säcker, et.al (eds) (n 3) 117–122.

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.

5 *M. U. Silalahi* and D. Parluhutan, 'Circumstantial Evidence in the Substantiation Mechanism against Cartel Infringements in Indonesia' (Jurnal Hukum Bisnis, Vol. 30/Nr. 2, 2011) 2–3.

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).

11 KPPU Decision on the Bridgestone Tire Indonesia (Putusan KPPU No. 08/KPPU–I/2014 *juncto.* MARI Decision 221 K/Pdt.Sus-KPPU/2016).

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 Authorithy ("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

12 EU Commission, *Glossary of terms used in the EU competition policy* (EU Publishing, 2003) 8–10.

13 Wollmann and Herzog, ‚Art. 101 (1) AEUV' in F. J. Säcker, et.al. (eds.), *Europäisches Wettbewerbsrecht (2. Aufl.). Münchener Kommentar europäisches und deutsches Wettbewerbsrecht (Kartellrecht): Kartellrecht, Missbrauchs- und Fusionskontrolle, Band 1 & Band 2* (CH Beck, 2015) 738–40.

14 *Silalahi, 'Circumstantial Evidence Dalam Memberantas Kartel Berdasarkan Hukum Persaingan Usaha' (UPH Law Faculty National Seminar Eradicating Cartel Practices in Indonesia: The Challenges of Indirect Evidence, Lippo Karawaci, 20th January 2012) 2.*

15 *Silalahi,* ibid. 3.

answer 'who commits cartels violation?'[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*".[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.[18] In brief, the *circumstantial (indirect) evidence*s 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."[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.[20] First, KPPU must prevent the 'false positive' (type 1 error).[21] Second, KPPU must avoid the 'false negative' (type 2 error).[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 concering the Guidelines for Adjudication of competition infringement cases.[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

16 *I.M. S. Ruky, 'Economic Evidence Dalam Pembuktian Kartel' (UPH Law Faculty National Seminar Eradicating Cartel Practices in Indonesia: The Challenges of Indirect Evidence, Lippo Karawaci, 20th January 2012) 1–2.*

17 *Silalahi,* ibid. 2.

18 *Silalahi* and D. Parluhutan,*'Circumstantial Evidence in the Substantiation Mechanism against Cartel Infringements in Indonesia' (n 5)* 3–5.

19 Organisation of Economic Developments and Cooperation (OECD), '*Prosecuting Cartel without Direct Evidence of Agreement: Policy Brief'* (OECD Secretariat, 2007) 5.

20 Ruky, *'Economic Evidence', (n 16) 3–8. See also* H. G. Kekevi, *'Can Economics Help Us with Cartel Detection?' (Presentation to the International Competition Network Cartel Workshop Lisbon, Portugal, 28th October, 2008) 2–5.*

21 *Ruky*, "*Economic Evidence*' (n 16) 3–8.

22 ibid. 5–7.

23 KPPU, ‹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 offence. According to *Hofmann,* the principles are of highly importance and serve as the commonly accepted legal foundations of the European Union (EU) Law.[24] 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, freedom, 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-discrimination, tolerance, justice, solidarity and equality between women and men prevail".[25]

Specifically, the European competition law as well as the German cartel law proceedings embrace the principle of *in dubio pro reo*, which literally means 'when in doubt, in favour of the accused' (the presumption of innocence).[26] Also, in the *Rhône-Poulenc* case the *Advocate General Vesterdorf* asserted the importance of procedural law principle in competition law cases, as follows:

> "Considerable importance must be attached to the fact that the competition cases of this kind (cartels) are in reality of a penal nature, which naturally 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."*[27]

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

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24 *H. Hofmann, G. C. Rowe, A. Türk, Administrative Law and Policy of the European Union (1. publ., OUP, 2011) 27–30.*

25 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union – Consolidated version of the Treaty on the Functioning of the European Union – Protocols – Annexes – Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13th December 2007 [Official Journal C 326, 26/10/2012 P. 0001–0390]

26 I. Lianos and C. Genakos, '*Econometric Evidence in EU Competition Law: An Empirical and Theoretical Analysis*' in I. Lianos and D. Geradin (eds.). *Handbook on European Competition Law: Enforcement and Procedure* (Edward Elgar Publishing, 2013) 7–10.

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").[28] 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.[29]

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.[30] Afterward, *Anggraini* highlighted the KPPU's practice in applying the circumstantial (indirect) evidence within cartels violation cases.[31] Accordingly, *Rizkiyana and Iswanto* recommend that KPPU must be empowered with broader investigative powers.[32]

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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.

29 Faculty of Law Pelita Harapan University (FH-UPH), Seminar Publik "Eksaminasi Putusan Komisi Pengawas Persaingan Usaha No. 08/KPPU-I/2014 tentang Dugaan Pelanggaran Pasal 5 ayat (1) dan Pasal 11 Undang-undang No. 5 Tahun 1999. UPH Media, 'Public Seminar: Eksaminasi Putusan KPPU' (UPH News, 14th September 2015), ‹http://www.uph.edu/id/component/wmnews/new/2401.html›, accessed on 16th October 2015.

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

31 A. M. T. Anggraini, '*Penggunaan Bukti Ekonomi dalam Kartel Berdasarkan Hukum Pesaingan Usaha*' (Jurnal Hukum PRIORIS, Vol.3/Nr. 3, 2013) 1–5.

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 Authorithy 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.[33] 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.[34] Moreover, by taking into account the ASEAN Economic Community ("AEC"),[35] the Law Number 5/1999 shall be able to response against cross-borders anticompetitive practices, that is to say, cartel infringement.[36]

33 D. Geradin, A. L. Farrar, N. Petit, *EU Competition Law and Economics* (OUP, 2012) 321–322.

34 Explanation of the KPPU Chairman, M. Nawir Messi, (R. S. Pradana). ‹http://financial.bisnis.com/read/20150127/9/395434/amandemen-uu_ no.51999-soal-monopoli-tuntas-tahun-ini›, accessed on 12th March 2016.

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.

36 *Silalahi*, 'The Role of Competition Law in Supporting the ASEAN Economic Integration' (Paper presentation on the ASEAN Competition Law Conference, Jakarta, July 2015) 3–5. See also A. Stephan, 'The Role of Competition Policy in Promoting the ASEAN Economic Community' (Presentation on the ASEAN Competition Conference, Bali, 2011) 6–10.

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 he statutory elements of cartels prohibition, (3) the application of cartels prohibition according to theEU 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)Sthe 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.

Chapter Two The Cartel Prohibition Pursuant to the European Union (EU) Competition and the German Cartel Laws and the Law Number 5/1999

2.1 The Cartels Prohibition

2.1.1 Conceptual Framework

According to the Black's Law Dictionary a cartel is defined as:

> "A combination of producers or sellers that joint together to control a product's production or prices or an association of firms with common interests, seeking to prevent extreme or unfair competition, allocate markets or share knowledge."[37]

Whereas the EU Commission defines cartel, as follows:

> "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."[38]

37 B. A. Gardner (ed.)., *Black's Law Dictionary* (7th Edition, West Group Publishing, 2000) 205–207.

38 EU Commission, 'Glossary of terms used in the EU competition policy' *(Commission*, 2003) 8–10. cf. Rizkiyana and Iswanto, 'Eradicating Cartel' (n 28) 5–7.

Moreover, the *Organisation of Economic Cooperation and Development* (OECD) provides definition of cartels:

> "A cartel is formal agreement among firms in an olygopolistic industry. Cartel members may agree on such matters as prices, total industry output, market shares, allocation of customers, allocation of territories, bid rigging, establishment of common sales agencies, and the division of profits or combination of these".[39]

In other words, a cartel practice takes place whenever two or more undertakings agreed thorough written or tacit concords to reduce the internal competition and thus to increase each undertaking economic position through cartel in the relevant market.[40] Historically, the term cartel derived from the Latin word 'charta' meaning written certified claim or entitlement. Initially in the year of 1883, the term cartel was introduced by *Friedrich Kleinwächter* in terms of a contract with the written certified claims between the contracting parties which promised not to compete against each other in a respective market.[41] The first modern definition of cartels could be found in the United States Antitrust Law, Sherman Act 1980 Section 1, whereas in Germany the term cartel was for a first time stipulated in the Section 1 *Kartellverordnung (KartVO 1923)* which prescribed none of prohibition. According to Section 4 KartVO 1923, *Der deutsche Reichwirtschaftsminister* was only authorized to file a petition to the *Kartellgericht* in order to rescind and to unallow certain cartel practice. For the first time, through the enactment of the GWB in 1957 the cartel prohibition principle was introduced in Germany.[42]

Furthermore, according to *Wollmannn and Herzog*, agreements, decisions of association of undertakings or concerted practices, whose aims to restrict or to distort the competitions in market are known as cartels. Accordingly, such collusive practices have been widely subject

39 R. S. Khemani and D. M. Shapiro, 'Glossary of industrial Organitation Economics and Competition Law' (OECD, Paris, 1996), 7.

40 K. W. Lange and T. W. Preis (eds.), *Einführung in das europäische und deutsche Kartellrecht Einführung (Verlag Recht und Wirtschaft in Deutscher Fachverlag GmbH, 2. Aufl. 2011), 24–25.*

41 *H. P. Schwintowski, Wettbewerbs-und Kartellrecht* (5. Auflage, C. H.Beck, 2012) 2–10.

42 Lange and Preis (eds.), *Einführung in das europäische und deutsche Kartellrecht Einführung* (n 40), 19–20.

to *Per-se Illegal* rule.[43] The European (EU) Competition Law provides elaboration of cartels agreement in the Article 101 TFEU, in particular hardcore cartels.[44]

The European Commission has a strong opposition against cartels and considers that detection and deterrence of cartels practice would be a central and primary concern of the EU Competition Law enforcement. This stance had been reflected in following statements of the former Commissioner on Competition Policy:

> "Fighting cartels is one of the most important areas of activity of any competition authority and a clear priority of the Commission. Cartels are cancers on the open market economy, which forms the very basis of our Community. By destroying competition, they cause serious harm to our economies and consumers. In the long run cartels also undermine the competitiveness of the industry involved, because they eliminate the pressure from competition to innovate and achieve cost efficiency."

In the words of Adam Smith there is a "tendency for competitors to conspire". This tendency is of course driven by the increased profits that follow from colluding rather than competing. We can only reserve this tendency through effective enforcement that creates effective deterrence. The risk of being uncovered and punished must be higher than the probability of earning extra profits form successful collusion.

Cartels differ from most other forms of restrictive agreements and practices by being "naked". They serve to restrict competition without producing any objective countervailing benefits. In contrast, a joint venture between competitors, for example, while restricting competition may at the same time produce efficiencies such as economies of scale or quicker product innovation or development. In these cases, a proper analysis requires that the positive and negative effects are balanced against one another. This is not so with cartels. In cartels the positive side of the equation is zero.

Cartels, therefore, by their very nature eliminate or restrict competition. Companies participating in a cartel produce less and earn higher profits. Society and consumers pay the bill. Resources are misallo-

43 Wollmann and Herzog in F.J. Säcker, et.al (eds) (n 13) 742–747.

44 Emmerich 'Art. 101 Abs. 1 AEUV' in U. Immenga und E. J. Mestmäcker, *Wettbewerbsrecht Band 1/Teil 1 Kommentar zum Europäischen Kartellrecht* (5 Aufl, CH. Beck, 2012) 198–222.