

The Nature of Cartel Criminal Act in Indonesia

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ABSTRACT

Cartel is an independent producer group that aims to set prices, to limit supply and competition. Under anti-monopoly law, cartels are banned in almost all countries. Nevertheless, cartels remain in the national and international, formal and informal spheres. In the business world, there is a tension in terms of the meaning of the cartel's actions, whether it can be classified as a crime or civil. This ambiguity occurs in the debate about subjective and objective blame. Subjective ignorance originating from cartel actors is generally carried out by entrepreneurs who are normally oriented towards maximizing profits, minimum costs, and efficiency. Meanwhile, objective ignorance neglects that the ban on cartels as a disgraceful act is also not accepted by ordinary people, especially the business community. This research was conducted to find out the reasons for the existence of criminal acts of Cartel in Indonesia based on philosophical aspects in concrete terms. The research was conducted with several approaches including the statute approach, conceptual approach and comparative approach. The results of the study stated that cartel prohibition as a criminal act lies in complex legal protection with the reasons that come from the nature of the general and specific laws (without rights, against the subjective rights of others, and contrary to legal obligations) that is contrary to the protection of legal interests namely social values, morality, justice, kinship, mutual cooperation, good faith and good fair dealing as well as obligations that are prohibited by law because they have tremendous destructive power, having micro and macroeconomic implications of a country. In the context of Indonesia's state interests, the cartel injures the state ideology (Pancasila), the purpose of the state (Opening of the 1945 Constitution) and the constitution.

Keywords: *Cartel, Crime, Anti-Business Competition, Blame Worthiness*

A. INTRODUCTION

Cartel acts as an anti-business competition that has a scope for price fixing, product limitation (quota), distribution of marketing areas and tender conspiracy in the view of the general blurry (unclear) whether it is a criminal or civil act. The lack of clarity is the debate about subjective and objective blame. Subjective ignorance originating from cartel actors is generally carried out by entrepreneurs who are normally oriented towards maximizing profits, minimum costs, and efficiency. In economic values, such behavior is natural and appropriate according to microeconomic principles. Meanwhile, objective ignorance neglects that the ban on cartels as a disgraceful act is also not accepted by ordinary people, especially the business community.

This tension will intensify as the view faces face-to-face with criminal law academicians who understand that the source or origin of a particular act becomes not continuously disgraceful and evil, even though it has been regulated by a law. Therefore, understanding of an evil deed will be different when the jurist separates the moral element and, on the other hand, the jurist incorporates legal morality as a constitutive element rather than the law. This includes *teonomy* and heteronomy from the essence of an act done by the doer.

The problem is that there are differences regarding criminal policies or criminal law politics that differ in each country. Politics of criminal law of European Union countries with the United States are different such as in Australia and Malaysia, Indonesia and Malaysia. If we talk about criminal policies, cartel criminal law politics are basically a unified view of legal experts, economists, legislators, governments and consumer communities in the same space, without this, disgraceful nature, against general law, and criminalization of the cartel will remain behind.

In Indonesia, cartel terminology is only used in Article 11 of Law Number 5 Year 1999 concerning Prohibition of Monopolies and Unfair Business Competition Practices, which are a stipulation of cartel for the regulation of production and marketing. In addition, there are other provisions which constitute cartels, including price fixing (ex Article 5), division of marketing area (ex Article 9), and tender conspiracy (ex Article 22). Violation of these provisions is subject to criminal penalties and confinement in accordance with the provisions of Articles 48 and 49, so that cartel is unwilling or a criminal act.

The basic question is about the reason of criminalizing cartel according to concrete philosophical aspects. For this reason, it is necessary to support logical reasons as strong logical evidences of ethical correspondence and coherence that conclude cartel as evil deeds. These reasons are not only starting from legal argumentum or normative reasons, but also social, economic and social aspects. Criminal law duties must explain how the relationship is towards the willingness to criminalize based on the pure legal purpose, so that the enforcement of criminal law will not hesitate.

B. 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.¹ 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.² 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. Primary legal material is legal material that is authoritative, meaning that it has authority. Primary legal material consists of laws and regulations sorted according to hierarchy:³

- 1) The 1945 Constitution of the Republic of Indonesia.
- 2) Emergency Law Number 7 Year 1955 concerning the Investigation, Prosecution and Judgment of Economic Crimes
- 3) Law Number 1 Year 1946 jo. Law Number 58 Year 1960 concerning the Application of the Criminal Code.
- 4) Law Number 14 Year 1970 concerning Principal Provisions of Judicial Power as amended by Act Number 35 Year 1999 made a comprehensive amendment with the establishment of Law of the Republic of Indonesia Number 4 Year 2004 concerning Judicial Power and Law Number 48 Year 2009 concerning Judicial Power.
- 5) Law Number 5 Year 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition.
- 6) KPPU Regulation on the Regulation of the Business Competition Supervisory Commission Number 4 Year 2010 concerning Cartel.

Then secondary legal materials, are legal materials obtained through literature studies, in the form of: books, journals, magazines, media articles and various other sources that support this writing gained from the internet. Case studies will be used to be a supplementary source of primary and secondary legal materials.

¹ Peter Mahmud Marzuki, *Penelitian Hukum*, Jakarta: Kencana Prenada Media Group, 2005, hlm. 171.

² *Ibid* hlm.7.

³ *Ibid* hlm.141.

The data processed from the research will be analyzed by interpreting and constructing the statements contained in the documents and legislation. It is said in conducting legal research. The steps taken are as follows:¹

- 1) Identify legal facts and eliminate matters that are not relevant to establish legal issues to be solved;
- 2) Collect of legal and non-legal materials that are relevant;
- 3) Review issues based on the materials collected;
- 4) Draw conclusions in the form of arguments that answer legal issues.
- 5) Provide prescriptions based on the arguments that have been written in the conclusions.

C. RESULT AND DISCUSSION

Argument of Cartel as a Criminal Act

A cartel act in general has several characteristics:²first, there is a conspiracy among several business actors; involving senior executives from the involved companies. These senior executives usually attend meetings and make decisions; second, usually by using associations to cover their activities; third, do price fixing. To make the price fixing more effective, it is followed by the allocation of consumers or the division of regions or the allocation of production. The cartel will usually set a reduction in production; fourth, there are threats or penalties for members who violate the agreement. If there are no penalties for violators, then a cartel is vulnerable to fraud to get a greater profit than other cartel members; fifth, there is the distribution of information to all cartel members. Even if possible, it can conduct an audit using data on production and sales reports for a certain period. The auditor will make a report on 3 (three) production and sales of each member of the cartel and then share the results of the audit with all cartel members; and sixth, the existence of a compensation mechanism from members of the cartel whose production is greater or more than the quota for those whose production is small or those who are asked to stop their business activities. This compensation system will, of course, succeed if business players will get greater profits compared to if they compete. This will make member compliance with cartel decisions more secure.

These characteristics are contrary to Article 1.7 of UNIDROIT provisions regarding good faith and fair dealing in section (1) regulating each party must act in accordance with good faith and fair dealing in international trade (Netherlands: *goude throw*) because good faith and fairness in making trade agreements can be considered as one of the basic ideas that underlie good trade principles. By stating in general that each party must act in good faith and fairness, the provisions of section (1) of this article make it clear that even in the absence of specific provisions in the principles of the behavior of the parties in the entire contract "life", including the negotiation process, must be in good faith and fair.³

The characteristics also contradict Article 1320 of the Civil Code which determines between 4 (four) cumulative conditions for the validity of an agreement, one of which is: "a cause that is permissible (*halal causa*)". As for the element of *halal causa* or a permissible reason it is strongly related to the elements of essence, natural and accidental.⁴If it is not fulfilling "*halal causa*", the contents of the agreement have been against criminal law. Even according to Article 1337 of the Civil Code, it states that: "A cause is prohibited, if the cause is prohibited by law or if the cause is contrary to morality or by public order". From this provision affirms that an agreement which is a territory of civil law cannot release the consideration of public interest.⁵Therefore, John Maynard Keynes in his book "The General Theory of Employment, Interest and Money" justifies the role of the government to restore a balance⁶to the public interest. In other words, the balance or equilibrium point is not by itself, it requires the government intervention in the form of regulations and legislation.⁷This view is reinforced by Clove Smittoff, that economic law is regulation of state interference with the affairs of commerce, industry, and finance.⁸

¹*Ibid.*

²Peraturan KPPU Nomor 4 Tahun 2010 hlm. 8.

³Lihat article 1.7 (1) *Unidroit Principles of International Commercial Contracts* Published by the International Institute for the Unification of Private Law (UNIDROIT), Rome info@unidroit.org ISBN: 978 - 88 - 86449 - 37 - 3 Copyright © UNIDROIT 2016 hlm. 18.

⁴Herlin Budiono *Ajaran Hukum Umum Perjanjian dan Penerapannya di Bidang Kenotariatan* Bandung: Citra Aditya Bakti, 2010, hlm. 67.

⁵Peter Mahmud Marzuki *op.cit* hlm. 195.

⁶*Ibid* hlm. 190.

⁷*Ibid.*

⁸*Ibid* hlm. 188. Lihat Clove Smittoff *the Concept of Economic Law in England*, Stevens and Sons, 1977, hlm. 39.

Evil Nature of Business Actors

In the law of economics there is a school that is right to criticize the anti-competition behavior that is utilitarian. In his view, utilitarian lawyers cannot guarantee people's reactions to various possible actions including economic behavior. Business actors as part of economic actors have an approach called the economic approach which uses the assumption of man is a rational maxim of his satisfaction.¹ Business actors can be motivated to commit unlawful acts to reduce the law by managing selling prices, production quotas and marketing area, and tender conspiracy, if the rational maxima of satisfaction is available or vice versa. Basically, entrepreneurial thinking behavior with an economic approach is "what I want is by definition, what I am willing to pay - either in money, or by the development of some other resources that I have such time and effort".²

In examining more deeply the behavior of anti-business competition actors or conducting cartels that business actors have characteristics that are contrary to the scholar or utilitarian. They behave:³

- Quantitative Hedonism is the understanding adopted by business people who seek pleasure solely quantitatively. The pleasure is physical and sense-based.
- A Summun bonum in the business actor means that pleasures are physical and do not recognize spiritual pleasure and regard it as false pleasure.
- Hedonistic Calculus (Hedonistic Calculus) that business actors consider pleasure to be measured or assessed in order to facilitate the right choice between competing pleasures. A business actor can choose pleasure by using hedonistic calculus as the basis of his decision including against unlawful conduct.

Moral Cartel Errors and Social Reactions

The cartel in the eyes of prominent criminologists, such as Dennis Baker and Joel Feinberg, argues that "action should only be criminalized if it is fair to do it"⁴ or it is unfair to leave it alone. Particularly, the theorists state that "objective reasons are needed to show that it is fair to criminalize actions in certain cases. The objective justification often quoted to call for criminal law is to harm others, but criminal law cannot handle all situations".

Another aspect related to the criminalization of a cartel act is a moral aspect or morally wrong.⁵ Western writers seem to be influenced by Hans Kelsen's view which separates morality from law.⁶ Kelsen states that:⁷

"The Pure Theory describes the positive law as an objectively valid order and states that this interpretation is possible only under the condition that a basic norm is presupposed.... The Pure Theory, thereby characterizes this interpretation as possible, not necessary, and presents the objective validity of positive law only as conditional—namely conditioned by the presupposed basic norm."

The western view of cartel regarding morality is always associated with individualist and secular values towards religion that alienates morality into the reason for criminalizing evil deeds. The western view of the cartel regarding morality is different from the eastern view of collectivity that attaches to legal norms and laws while human life is always a tension between good and bad values, spiritualism-materialism / secularism, individualism-collectivism, innovativeness-conservatism.⁸ Joseph Raz quoted Asworth arguing that the state cannot and should not uphold morality; conversely, efforts to limit individual autonomy must be

¹ Weiss, "The Structure-Conduct-Performance Paradigm and Antitrust", 127 U. Pa. L. Rev. 1104 (1979).

² J.W. Harris *Legal Philosophies* Butterworths, London, 1980, 2nd edition, 1997.

³ Firoz Gaffar "Lima Tahun KPPU: Isu Hukum Persaingan Usaha dan Penegakannya" *Jurnal Hukum Bisnis*, Volume 24-No.3 – Tahun 2005.

⁴ Dennis J. Baker, *The Right Not to be Criminalized: Demarcating Criminal Law's Authority* (Ashgate 2011); Dennis J. Baker and Dennis, "The Moral Limits of Criminalizing Remote Harms", (2007) 11(3) *New Criminal Law Review* 371, Joel Feinberg, *Harm to Others: The Moral Limits of the Criminal Law*, OUP, 1984: New York.

⁵ Hohfeld, Wesley Newcomb. 2001 *Fundamental Legal Conceptions as Applied in Judicial Reasoning With an Introduction by Nigel Simmonds*, edited by David Campbell and Philip Thomas. Dartmouth. Asworth, Andrew. 1991 *Principle of Criminal Law* Clarendon Press, Oxford. 2009 *Principles of Criminal Law*, USA: Oxford University Press; 6 edition. Alschuler, Albert W. 1997 *Law Without Value*, Chicago: The University of Chicago Press.

⁶ Hans Kelsen *Teori Hukum Murni* Bandung: Nusa Media, 2007.

⁷ <https://plato.stanford.edu/entries/lawphil-theory/> dijumpai tanggal 3 Desember 2017.

⁸ Soerjono Sukanto dan Purnadi Purbacaraka *Disiplin Hukum dan Disiplin Sosial* Jakarta; Raja Grafindo Persada, 1987 hlm. 5.

done **only to limit danger**. Certain moral ideals can be justified if they extend autonomy. If **the immoral behavior of another person overrides the autonomy of another person, then it can be regulated (according to the law) against it.**¹

Such a view on his savings at first glance seems good but pragmatic and utilitarianism. Morality as a rejection of cartels is the law and the law because the products of the anti-competition law - the cartel besides being a guiding principle of entrepreneurial behavior (empirical) are also meta-rules which contain collective beliefs regarding an object of a particular business law. Anwarul Yaqin, as quoted by Achmad Ali, stated that "... law plays only one regulates and influences human behavior. Moral and social rules, though less explicit and less formal in their nature and content, also play a significant role in society's efforts to control behavior."²Peter Mahmud Marzuki believes that "moral principles must be adopted at the time of law making. The philosophy that underlies the law is not pragmatism and utilitarianism."³

The 10th United Nations Congress in Vienna, Austria in 2000 also reaffirmed that "Comprehensive crime prevention strategies at the international, national, regional, and local levels must address the root causes and risks of related to crime and victimization factors through social, economic, health, educational, and justice policies."⁴Then the criminal law paradigm has shifted from the perpetrator (*Daad-Dader Strafrecht*)⁵ to the crime victim (*Daad-Dader-Slachtoffer*).⁶

Protection of victims of crime is the mandate of *Pancasila*. *Pancasila* is a meta-rules instrument to assess cartel because their values are imbued with the constitution, and laws which are a source of orderly business competition law - cartel in Indonesia. So putting the cartel as an act that is only detrimental (the parties) will narrow the range of legal interests (law protection) that will be protected through a responsible criminalization process.

Based on the state of nature of Indonesia which is based on *Pancasila*, that the behavior of cartels in the field of business is one of the crimes that have aspects of **behavior that are contrary to the values of Pancasila** which are translated into 5 (five) operational paradigms, namely: first, the religious moral paradigm; secondly, the paradigm of humanity or humanism; third, nationality or unity paradigm; fourth, the paradigm of democracy and; fifth, social justice paradigm.⁷Correspondingly, that cartel behavior has deviated from spiritual values in which there are ratings of values, namely truth values, beauty / aesthetics, goodness / morality and religion.⁸Baker's perspective, he stresses the need for reason to produce inter-subjective understanding to explain the wrongness of action as a justification for criminalization⁹and the cartel fulfills it.

Broken Cartel Power

The cartel according to the LPMPUTS Law includes tender conspiracy, zoning, price regulation, and supply regulation¹⁰has a **considerable economic damage**, because in addition to **disincentives for competition**, it also takes **advantages of the consumer economy**. It is not surprising that KPPU made the cartel an extraordinary economic crime and became a priority of behavior that must be abolished.¹¹For example a ticket price fixing cartel in fuel surcharge; hypertension drug cartel type of *amlodipine besylate*; bulk cooking oil cartels; salt cartel; cartel for the determination of short message service (SMS) tariff services, all of which meet the needs of the life of many people.

¹Ashworth (1999). p. 45. Lihat juga Raz, J., 1980, *The Concept of a Legal System*, (2nd ed.) Oxford: Oxford University Press.—, 1979, 'Kelsen's Theory of the Basic Norm' in Raz, *the Authority of Law*, pp. 122–145, Oxford: Oxford University Press.

²Achmad Ali, *Menjelajahi Kajian Empiris Terhadap Hukum*, Jakarta: PT. Yarsif Watampone, 1998, hlm. 60.

³Peter Mahmud Marzuki, *Pengantar Ilmu Hukum*, Jakarta: Kencana Prenada Media Group, 2005, hlm. 127.

⁴"Crime Prevention in the Context of Development", *Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders* 1985, hlm. 94.

⁵J.Rommelink, "Hukum Pidana":Komentar atas Pasal-Pasal Terpenting dari KUHP Belanda dan Padanannya dalam KUHP Indonesia"; Gramedia, 2003; dan Sudarto, "Hukum dan Hukum Pidana"; 1963.

⁶M. Arief Amrullah *Politik Hukum Pidana Dalam Perlindungan Korban Kejahatan Ekonomi Di Bidang Perbankan* Jogjakarta: Genta, 2015, hlm. 89.

⁷Zudan Arif Fakrulloh "Paradigma dan Jatidiri Hukum Nasional Dalam Struktur Global Hukum Dunia", *Jurnal Keadilan* vol: 2 No. 6, 2002: 50.

⁸Notonegoro *Beberapa Hal Falsafah Pancasila* Jakarta: Pantjuran Tujuh, 1975, hlm. 62. Notonegoro membagi 3 (tiga) nilai-nilai yakni material, vital dan kerohanian.

⁹Dennis J. Baker, *The Right Not To Be Criminalized: Demarcating Criminal Law.s Authority* Ashgate Publishing Company, 2011 hlm.126.

¹⁰Kompetisi Edisi 39 Tahun 2013 hlm. 3.

¹¹*Ibid.*

From several cartel cases that have occurred, the implications for the people, especially consumers, are increasingly apparent because the community is powerless by circumstances beyond that control. The profits made by the cartelists are also not small. Cartelists can gain profits up to trillions of rupiah in one commodity or 400% more than the fair price. One example is the value of losses suffered by consumers due to cartels in short message service or SMS (Short Message Service) by mobile phone providers that had been stopped by KPPU. Consumers, according to calculations, are expected to lose around 1.6-1.9 trillion Rupiahs in the span of 3 (three) years. The magnitude of consumer losses due to the actions of the cartel did make many parties furious.¹ By developing this cartel in a sustainable manner, it will be difficult for new players to enter the market, so it is created an imperfect and monopolistic competition market.

Micro and Macroeconomic Implications

According to the Australian Competition and Consumer Commission theoretically-empirical cartels is an **evil deed, despicable and detrimental to immoral and illegal characteristics because they not only deceive consumers and other businesses**, but also **hinder healthy economic growth** by:²

- a. Increase prices for consumers and businesses through artificially increasing input and capital costs throughout the supply chain, including building and equipment rental costs, interest and reduced opportunities during the asset period.
- b. Reduce innovation and choice by protecting their inefficient members who no longer have to compete so they do not have to bother investing in research and development.
- c. Reduce investment by blocking the entry of new industrial entrants who might invest in opportunities, economic growth and employment.
- d. Lock resources because they interfere with normal supply and demand forces and can effectively lock other operators from access to resources and distribution channels.
- e. Destroy other businesses by controlling the market and restricting goods and services to the point in which an honest and well-managed company cannot survive.
- f. Destroy consumers' trust in all industrial sectors, including creating negative consumer sentiment towards law-abiding businesses that are not involved in cartel behavior.
- g. Increase taxes and reduce services by targeting the public sector and spend additional costs paid by all consumers through tariffs and taxes.
- h. Reduce infrastructure by rigging offers in public infrastructure projects that increase costs and ultimately reduce the capacity of the public sector to invest in profitable projects.

Therefore, in general, criminal law experts agree that the cartel causes losses to both the economy to a country and consumers. First, the losses for a country's economy are as follows:³

- a. Can cause allocation inefficiencies.
- b. Can result in production inefficiencies.
- c. Can inhibit innovation and the discovery of new technologies.
- d. Inhibit the entry of new investors.
- e. Can cause economic conditions in the country concerned is not conducive and less competitive compared to other countries that implement a right business competition system.

Second, losses for consumers are as follows:⁴

- a. Consumers pay the price of an item or service more expensive than the price in a competitive market.
- b. The goods or services produced can be limited in terms of quantity and quality rather than if there is fair competition among business actors.
- c. Limited choice for business actors.

¹*Ibid.*

²[https://www.accc.gov.au/.../Small%20Business%20and%20thSmall Business And The Competition And Consumer Act: Your rights and responsibilities](https://www.accc.gov.au/.../Small%20Business%20and%20thSmall%20Business%20and%20thSmall%20Business%20and%20th) Australian Competition and Consumer Commission 23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601 © Commonwealth of Australia 2012.

³<http://www.kppu.go.id/docs/Perkom/2010/PERKOM/NOMOR%2004%202010%20PEDOMAN%20PELAKSANAAN%20PASAL%2011%20TENTANG%20KARTEL.pdf> hlm. 23.

⁴*Ibid.*

According to the KPPU (Business Competition Supervisory Commission), it has been explained in the Cartel Guidelines that:¹ in general, experts agree that cartels result in losses both for the economy for a state and consumers:

- (i) Losses for the Economy of a Country namely:
 - (a) Can cause allocation inefficiencies.
 - (b) Can result in production inefficiencies.
 - (c) Can inhibit innovation and the discovery of new technologies.
 - (d) Inhibiting the entry of new investors.
 - (e) Can cause the economic condition of the country concerned is not conducive and less competitive compared to other countries that implement a healthy business competition system.
- (ii) Losses for consumers:
 - (a) Consumers pay the price of an item or service more expensive than the price in a competitive market.
 - (b) The goods or services produced can be limited in terms of quantity and or quality rather than if there is fair competition among business actors.
 - (c) Limited choice for business actors.
- (iii) Losses for the industry concerned:
 - (a) Lack of incentives for business actors in the concerned industry to make efficiency
 - (b) The development of innovation and technology in the concerned industry can be hampered because the cartel reduces incentives for business actors involved in it to create new innovations and technologies.

Therefore, the nature or evil mind of this cartel, the criminal law classifies it as *malum in se*² or it is wrong, or it acts wrong because the concept of a cartel as a crime has exceeded the terms of criminalization and reason for enactment. In line with that, Kelsen asserted that "a norm is valid for legal norms only because it was arrived at in a way that is way-created according to certain rules, issues or sets according to the specific method. The law is valid only as positive law that is only as law that has been issued or set."³

Violating Legal Interest.

Related to the issue of cartel crime in the business field, in the concept of *Pancasila*⁴ economic democracy strongly prohibits the behavior of etatism, free fight for liberalism and exploitation of resources for certain groups. When Indonesia is independent where the rules of law are lacking and limited because they do not have a legislative board, provisions regarding cartel, some of which are regulated in the Civil Code (*burgerlijke wet boek*) and KUH Dagang (*wet boek van kophandel*) and the Criminal Code (*wet boek van strafrecht voor Nederland-Indie*) Dutch colonial inheritance based on concordance principles. In fact, the Criminal Code, KUH Civil, KUH Trade in 1948 applied in Indonesia and was implemented in the Netherlands in 1938. It turned out to have a basic policy and policy to impose a manifestation of the liberal

¹http://www.kppu.go.id/docs/Pedoman/pedoman_kartel.pdf Lihat juga Peraturan KPPU Nomor 10 Tahun 2005 tentang Kartel, hlm. 31.

²<http://legal-dictionary.thefreedictionary.com/Malum+in+se> *Malum Inse malum in se (mal-uhm in say) adv. Latin referring to an act that is "wrong in itself," in its very nature being illegal because it violates the natural, moral or public principles of a civilized society. In criminal law it is one of the collection of crimes which are traditional and not just created by statute, which are "malum prohibitum." Example: murder, rape, burglary, and robbery are malum in se, while violations of the Securities and Exchange Act or most "white collar crimes" are malum prohibitum.* Bandingkan Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press 2009) hlm. 16-17. Alasan kriminalisasi yakni: *First, of all branches of law, criminal law is most obviously and directly concerned with shaping and controlling human conduct.. Second, the criminal law enforces the most important behavioral values imposed by a state. Third, the criminal law expresses the highest legal condemnation of acts in a society. Perhaps most important, the criminal law applies the highest legal sanctions available to a society: deprivation of freedom, confiscation of property, and in some societies, death. As a result, the need for fairness of both substantive and procedural rules is at its greatest here.*

³ Kelsen *op.cit* hlm. 56.

⁴ *Pancasila is the big five principles of Indonesia State.*

paradigm of individual freedom.¹This is in accordance with the paradigm of the individualist, liberal and materialist concept of *rechts staat* Netherlands²which is in contrast to the goal of the Republic of Indonesia based on *Pancasila*.

For example, in the context of a cartel as an "agreement" among business actors, there are penalty towards an agreement that harm other people. It is related to the regulatory aspects in civil law which can be seen in Article 1313 of the Civil Code, which explains the agreement as "an act whereby one person or more ties himself to one person or binds himself to one another or more ", and the consequences of the agreement are regulated in Article 1365 of the Civil Code that said:" every act against the law that brings loss to another person, obliges the person to wrongly issue the loss, replaces the loss".³Both of these articles clearly provide paradoxical legal protection of the parties or individual (*private interest*)⁴regarding the impact of cartel and victimization. Below is an illustration of the differences in the scope of cartel legal protection between civil law and criminal law.

Picture 1

The Differences of Civil and Criminal Law Interest Protection

Society Interest	Individual Interest
Statehood (State Against Defendants)	Individual civilization (Citizens Against Citizens)
Prevention and Punishment	Financial Compensation (Losses)
Punish the Actor (State)	Giving Compensation (Citizens)
Based on the enough evidences	Based on <i>Balance of Probabilities</i>
Country represented KPPU and / or Law Enforcement	Personal Representation of Civilization or Legal Attorney

So it is different from the context of civil law protection that cartels are indeed prohibited because their consequences result in the loss of legal interests of other business actors who are not involved in the cartel. Whereas for the context of criminal conduct (objective *onrecht* element) provides legal protection to consumers, society and the state.

Against General and Special Laws.

The argument of cartel as a criminal act is also seen from the criteria against criminal law in a broad and narrow sense. This criterion is a reason also to stigmatize cartel as a crime. For this reason, the criminal law literature is known as "against general law" and "against special law". In the context of a cartel, against the general law is defined as the nature of being against the law as an unwritten condition for the conviction of the cartel perpetrator. In order to get a conviction for an act of cartel, the condition automatically applies that the act is against the law, which in this case means that it is contrary to the law, is unfair.⁵Wiryo Prodjodikoro says it was an act "without rights, contrary to legal obligations⁶and against the subjective rights of others".⁷

The question is whether to get criminal, an act of cartel must be proven to be against the law explicitly? When looking at cartel as illegal acts such as theft, or more powerful than bank robberies and corruption⁸against the rights of consumers and the public and harming up to 400% of the profits achieved

¹ Zudan *op.cit* hlm. 46.

²M. Tahir Azhary *Negara Hukum Suatu Studi tentang Prinsip- Prinsipnya Dari Segi Hukum Islam, Implementasinya pada Periode Negara. Madinah dan Masa Kini*, cet.pertama. Jakarta: Bulan Bintang 1993, hlm. 73.

³ Komariah Emong Sapardjaja, *Ajaran Sifat Melawan Hukum Materiel Dalam Hukum Pidana Indonesia: Studi Kasus Tentang Penerapan Dan Perkembangannya Dalam Yurisprudensi*, Bandung: Citra Aditya Bakti, 2002. Sejak tahun 1919, unsur melawan hukum diartikan dalam arti yang seluas – luasnya, yakni meliputi: (i) Perbuatan yang melanggar undang – undang yang berlaku; (ii) Yang melanggar hak orang lain yang dijamin oleh hukum; (iii) Perbuatan yang bertentangan dengan kewajiban hukum si pelaku; (iv) Perbuatan yang bertentangan dengan kesusilaan (*goede zeden*); (v) Perbuatan yang bertentangan dengan sikap yang baik dalam bermasyarakat untuk memperhatikan kepentingan orang lain (*indruist tegen de zorgvuldigheid, welke in het maatschappelijk verkeer betaamt ten aanzien van anders persoon of goed*).

⁴ Roscou Pound, *an Introduction to Philosophy of Law*, New Brunswick: Transaction Publisher, 1992 hlm. 145.

⁵D. Schafmeister, N. Keijzer dan E.P.H. Sutorius *Hukum Pidana Liberty*, Jogjakarta, 1995 hlm. 43.

⁶ William Wilson, *Criminal Law; Doctrine and Theory*, London:Logman, 2003, p 84-88

⁷ Wirjono Prodjodikoro *Tindak-Tindak Pidana Tertentu* Jakarta: Raja Grafindo Persada, 2005, hlm. 50. Bandingkan dengan Andi Zaenal Abidin Farid dan Andi Hamzah *Bentuk-Bentuk Khusus Perwujudan Delik (Percobaan, Penyertaan dan Gabungan Delik) dan Hukum Penetensier*, Jakarta: Sumber Ilmu Jaya, 2002, hlm. 131.

⁸ Kasus korupsi individual yang merugikan Indonesia yakni kasus korupsi Eddy Tanzil Golden Key Group di Bank

by the cartels, fighting the general law of a cartel is the same as an act deemed illegal or reprehensible because the reaction of the public and the state are even universal as morality wrong. This is referred to legal literature *mala in se* or wrongs itself (English). So, without being regulated by law, the characteristic and specific actions of a cartel are disgraceful, inappropriate and evil.

For researchers such things need not be proven to be illegal, if the acts of a generic cartel such as price fixing, distribution of marketing areas, limitation of production quotas and tender conspiracy as a result of such actions are disgraceful and understandable, but be different if the cartel is viewed from a particular unlawful aspect through the law.¹ The cartel as a special unlawful act is similar to the terminology against formal law because its unlawful nature is part of the law or in other words the formula of the cartel offense is regulated according to law. Cartel is formulated categorically and hypothetically. This is called *mala prohibita* or prohibited by the act (England) or a cartel act against because it is prohibited by law. So without the formulation of "against the law" in the law by expressive *verbis*, the nature of against the cartel law must be proven that it is detrimental, without getting rights and violating the subjective rights of others and are contrary to legal obligations. Therefore, the aspect of the action of this cartel by referring to Lon Fuller regarding moral aspiration and moral duty has been fulfilled as a prohibited act based on the general will and obligation to leave it as a statutory obligation.²

So the qualification of the cartel as a disgraceful, malicious, and improper act as an element against the general law, then criminalizing the cartel through the current law, the cartel fulfills the criteria against special law (detrimental, without getting rights and violating the subjective rights of others and contrary to legal obligation) because it has been regulated based on the regulation through the LPMPUTS Law concerning the type of cartel regulated in several articles, namely Article 5 concerning price fixing; Article 9 concerning the distribution of marketing areas; Article 11 concerning regulation of production and marketing, and Article 22 concerning tender conspiracy cartels. In addition to those stipulated in these articles, there are still many other types of cartels that are widely known in the business world,³ but they are not regulated in this legislation. Dworkin asserts: *I call a principle that standards are observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice of fairness or some other dimension of morality*⁴ So according to him, the legal norms of this cartel must contain moral principles as the spirit of this law, otherwise, the substance will not be useful because morality is the emanation of the existence of human civilization and simply the cartel has fulfilled all moral principles that do not lead to legal pragmatism and utilitarian views of economists as acts that have qualifications against general and formal law.

The Nature of Cartel Prohibition according to the Law

In Indonesian criminal law, as in other civil law countries, criminal acts are generally formulated in codification. So far, there are no provisions regulating detailed cartels according to Article 382 bis of the Criminal Code. To find out what the cartel is doing meets the criteria against the law or what is known as a formal law which is contained in the LPMPUTS Law. The existence of the formal law can be seen from the matrix and elements of the article as follows:

- Article 5 paragraph (1) states:

"Business actors are prohibited from making agreements with business competitors to⁵ **determine prices** for goods and/or services that must be paid by consumers or customers in the same relevant market. Whereas section (2) says that "The provisions referred to in section (1) do not apply to: a. an agreement made in a joint venture; or b. an agreement based on valid law".⁶

Pembangunan Indonesia (Bapindo) sebesar 1,3 triliun. Yang dapat menandingi kasus serupa adalah korupsi E-KTP tahun 2015 itupun corak perbuatannya menindis Pasal 22 UU LPMPUTS tentang Persekongkolan Tender dan Undang-Undang Nomor 20 Tahun 2001 tentang Perubahan atas Undang-Undang Nomor 31 Tahun 1999 tentang Pemberantasan Tindak Pidana Korupsi.

¹*Ibid.*

² Lon Luvois. Fuller *the Morality of Law* rev. ed. New Haven CT: Yale University Press, 1969, pp. 33-38 and 74.

³ Kartel kondisi (pengaturan syarat-syarat penjualan, penyerahan barang, pemberian diskon, dan sebagainya) dan Kartel Pembagian Laba (Penentuan cara pembagian dan besarnya laba/*polling cartel*).

⁴ Peter Mahmud Marzuki *Pengantar Ilmu Hukum* Jakarta; Kencana Prenada Media Group, 2008, hlm. 67. Ronald M. Dworkin *the Philosophy of Law*, Oxford Press, 1982, hlm. 43.

⁵ Lihat D. Schafmesiter, N. Keijzer dan E.PH Sutorius *op.cit* hlm. 98.

⁶ *Commission Regulation No. 4/2011 on Price Fixing*

Subjective Element	Objective Element	Error Element	Criminal Accountability	Offense Qualification
	Do not make an agreement			Formal offense
	With other business actors			
Business Actors	To determine price	Intention intent (<i>opzet als oogmerk</i>)	Individual or Corporation	
	of the goods or services			
	Which should be paid by customers			
	In the relevant market			

What is meant by business actors is: "every individual or business entity, whether in the form of a legal or business entity, whether in the form of a legal or not a legal entity established and domiciled or carrying out activities within the legal territory of the Republic of Indonesia, both individually and altogether through agreements, organizing various business activities in the economic field "(vide Article 1 section 5).

Ad. 2. Objective Elements.

(a) Elements "prohibited from making an agreement":

The element "is prohibited from making an agreement" namely "an act of one or more business actors who bind themselves to one or more other businesses under any name, either written or unwritten" (vide Article 1 section 7). While section (2) says that " The provisions referred to section (1) do not apply to: a. an agreement made in a joint venture; or b. an agreement based on applicable law ".

(b) Elements "with other business actors":

Competing business actors are other business actors in the relevant market (vide Article 1 point 10). The definition of the relevant market, can be seen in the Regulation of the Business Competition Supervisory Commission Number 3 Year 2009, July 1st, 2009 concerning Guidelines for Article 1 number 10 concerning Related Markets says: "The relevant market is a market related to the range or specific marketing area by business actors on goods and or the same or similar service or substitution of said goods and or services ".

(c) Element "to set prices":

To set the price does not come from or is not a market price, namely the price paid in the transaction of goods and or services according to the agreement between the parties in the relevant market (vide Article 1 point 14).

(d) Goods:

Goods according to Article 1 point 16 are: "every object both tangible and intangible, whether movable or immovable, can be traded, used, used or utilized by consumers or business people".

(e) And or Services:

Services according to Article 1 point 17 are: "every service in the form of work or performance traded in the community to be used by consumers or business people".

(f) In the same relevant market:

According to Article 1 point 10 that the relevant market is a market that is related to a certain range or marketing area by a business actor on the same or similar goods and/or services or substitution of goods and/or services. The relevant market definition can be seen in the Regulation of the Competition Supervisory Commission Usaha No. 3 Year 2009, July 1st, 2009 concerning Guidelines for Article 1 point 10 concerning Related Markets says: "The relevant market is a market that is related to the scope or

specific marketing area by a business actor on the same or similar goods and services or substitution of goods and/or the service".

- Article 9 states:

"Business actors **are prohibited from making agreements** with business competitors who aim to **divide the marketing area or market allocation** towards goods and/or services so that it can cause monopolistic practices and/or unfair business competition".¹

Subjective Element	Objective Element	Error Element	Criminal Responsibility	Qualification offense
	Are prohibit to make an agreement			Formal offense
	With the business competitors			
Business actors	Aim to divide the marketing are or market allocation	Deliberate intent (<i>opzet als orgmerk</i>)	Individual and Corporation	
	Towards goods and services			
	So it can cause monopolistic practice and unfair business competition.			

Ad. 1. Subjective Elements:

What is meant by business actors is: "every individual or business entity, whether in the form of a legal entity or business entity, whether in the form of a legal entity or not a legal entity established and domiciled or carrying out activities within the legal territory of the Republic of Indonesia, both individually and altogether through agreements, organizing various business activities in the economic field "(vide Article 1 point 5).

Ad. 2. Objective Elements.

(a) Elements "prohibited from making an agreement":

The element "is prohibited from making an agreement" namely "an act of one or more business actors to bind themselves to one or more other businesses under any name, both written and unwritten" (vide Article 1 point 7). The intended agreement is prohibited including a written (*scriven*) agreement and not written (*onscriven*). Explanation of Article 9 of the LPMPUTS Law that: "The agreement can be vertical or horizontal. This agreement is prohibited because businesses eliminate or reduce the competition by dividing the market area or market allocation.

(b) Elements "with rival business actors":

Competing business actors are other business actors in the relevant market (vide Article 1 point 10).

(c) Elements "that aim to divide the marketing area or market allocation":

The marketing area can mean the territory of the Republic of Indonesia or part of the territory of the Republic of Indonesia for example a district, province, or other regional region. Dividing a marketing area or market allocation means dividing the area to obtain or supply goods, services, or goods and services, from whom can obtain or supply goods, services, or goods and services.

(d) Elements of "an item":

Goods according to Article 1 point 16 are: "every object both tangible and intangible, whether movable or immovable, can be traded, used, used or utilized by consumers or business people".

(e) Elements "and or services":

Services according to Article 1 point 17 are: "every service in the form of work or performance traded in the community to be used by consumers or business people".

¹ Commission Regulation No. 8/2011 on Resale Price Maintenance

(f) Elements "may result in monopolistic practices":

Monopolistic practices according to Article 1 point 2 are: "concentration of economic power by one or more business actors which results in the control of production and / or marketing of certain goods and or services so that it creates unfair business competition. With a cartel, production and marketing of goods and/or services will be controlled by cartel members. Because the ultimate goal of the cartel is to get a large profit for the cartel members, this will cause harm to the public interest".

(g) Elements "and or unfair business competition":

Article 1 point 6 states that: "unfair business competition is competition among business actors in running activities of production and or marketing of goods or services carried out in an unfair manner". A cartel is a collusion or collaboration of business actors. Therefore, all the benefits of a cartel are intended only for the interests of its members, so that their actions are involved to unhealthy and dishonest. In this case, for example, by reducing production or against the law or hamper business competition, for example by setting prices or dividing regions.

- Article 11 Cartel which reads:

"Business actors are prohibited from making agreements, with rival business actors, 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".

Subjective Element	Objective Element	Error Element	Criminal Responsibility	Offense Qualification
	Are prohibit to make an agreement			Formal Offense
	With other business actors			
Business Actors	Which aims to regulate the price	Deliberate intent (<i>opzet als orgmerk</i>)	Individual or Corporation	
	By regulating production and marketing			
	Goods and services			
	Which cause monopolistic practice and/or unfair business competition			

Ad. 1. Subjective Elements:

What is meant by business actor is: "every individual or business entity, whether in the form of a legal entity or business entity, whether in the form of a legal entity or not a legal entity established and domiciled or carrying out activities within the legal territory of the Republic of Indonesia, both individually and altogether through agreements, organizing various business activities in the economic field "(vide Article 1 point 5).

Ad. 2. Objective Elements:

(a) Element "it is not allowed to make an agreement":

What is meant by business actors is: "every individual or business entity, whether in the form of a legal entity or business entity, whether in the form of a legal entity or not legal entity established and carrying out within the legal territory of the Republic of Indonesia, both individually and altogether through agreements, organizing various business activities in the economic field "(vide Article 1 point 7).

The intended agreement is prohibited including a written (*scriven*) agreement and not written (*onscriven*). Explanation of Article 9 of the LPMPUTS Law that: "The agreement can be vertical or horizontal. This agreement is prohibited because businesses eliminate or reduce competition by dividing the market area or market allocation.

The marketing area can mean the territory of the Republic of Indonesia or part of the territory of the Republic of Indonesia, for example a district, province, or other regional territory. Dividing a marketing area

or market allocation means dividing the area to obtain or supply goods, services, or goods and services, from whom can obtain or supply goods, services, or goods and services.”

The agreement according to Subekti "agreement is defined as follows:" An agreement is an event in which a person promises to another person or when the two people promise to do something.¹

(b) Elements "with rival business actors":

Competing business actors are other business actors in the relevant market (vide Article 1 point 10). The definition of the relevant market, can be seen in the Regulation of the Business Competition Supervisory Commission Number 3 Year 2009, July 1st, 2009 concerning Guidelines for Article 1 point 10 concerning Related Markets reads: "The relevant market is a market related to the range or specific marketing area by business actors on goods and/or the same or similar service or substitution of goods and or services ".

(c) Elements "intending to influence prices":

A cartel is intended to influence prices. To achieve this goal the cartel member agrees to regulate the production and or marketing of an item or service.

(d) Elements "by regulating production and or marketing":

Regulating production means determining the amount of production both for the cartel as a whole and for each member. This can be greater or smaller than the company's production capacity or demand for the goods or services concerned. Regulating marketing means regulating the amount to be sold and/or the area in which the members sell their production.

According to the explanation of Article 14 of LPMPUTS Law, what is meant by controlling production of a number of products included in the production series or commonly called vertical integration is the mastery of a series of production processes on certain goods ranging from upstream to downstream or an ongoing process of a particular service by business actors certain. The practice of vertical integration can produce goods and services at low prices, but can lead to unfair business competition that damages the economic foundations of the community. These practices are prohibited as long as they create unfair business competition and/or harm the community. Then the production and/or marketing that is intended is not including the trading system that is regulated and/or determined by the government, not the association (vide Article 51).²

(e) Element "an item":

Goods according to Article 1 point 16 are: "every object both tangible and intangible, whether movable or immovable, can be traded, used, used or utilized by consumers or business people".

(f) Elements "and or services":

Services according to Article 1 point 17 are: "every service in the form of work or performance traded in the community to be used by consumers or business people".

(g) Elements "may result in monopolistic practices":

Monopolistic practices according to Article 1 point 2 are: "concentration of economic power by one or more business actors which results in the control of production and/or marketing of certain goods and or services so that it creates unfair business competition. With a cartel, production and marketing of goods and or services will be controlled by cartel members. Because the ultimate goal of the cartel is to get a large profit for the cartel members, this will cause harm to the public interest ".

(h) Elements "and/or unfair business competition":

Article 1 point 6 states that: "unfair business competition is competition between business actors in carrying out activities of production and or marketing of goods or services carried out in an unfair manner". A cartel is a collusion or collaboration of business actors. Therefore, all the benefits of a cartel are intended only for the interests of its members, so that their actions are carried out unhealthy and dishonest. In this case, for example, by reducing production or against the law or hamper business competition, for instance, by setting prices or dividing regions.

- Article 22 concerning tender conspiracy which reads:

"Business actors are prohibited from **conspiring with other parties to regulate and or determine the winner of the tender** so that it can lead to unfair business competition".³

¹ R. Subekti *Hukum Perjanjian* Bandung: Citra Aditya Bakti, 2007 hlm. 1.

² Peraturan KPPU Nomor 5 Tahun 2011 tentang Penjelasan Pasal 51.

³ *Commission Regulation No. 2/2010 on Bid Rigging*.

Subjective Element	Objective Element	Error Element	Criminal Responsibility	Offense Qualification
	Do not conspire			Formal offense
	With other parties			
Business Actors	To regulate and/or determine the winner of the tender	Deliberate intent (<i>opzet als orgmerk</i>)	Individually and Corporation	
	So it can lead to unfair business competition			

Ad. 1. Subjective Elements:

What is meant by business actors is: "every individual or business entity, whether in the form of a legal entity or business entity, whether in the form of a legal entity or not a legal entity established and domiciled or carrying out activities within the legal territory of the Republic of Indonesia, both individual and altogether through agreements, organizing various business activities in the economic field "(vide Article 1 point 5).

Ad. 2. Objective Elements.

(a) Elements of "Prohibited conspiracy":

Article 1 point 8 Business conspiracy or conspiracy is a form of cooperation carried out by business actors with other business actors with the intention of controlling the relevant market for the benefit of conspiring business actors.

(b) Elements "with other parties":

The element "with other parties" is not explained in the explanation of the article in this Law. By using teleological interpretations, "other parties" can be interpreted by fellow competitors or parties involved and interested in the process and results of the tender.

(c) Elements "to regulate and or determine the winner of the tender":

The meaning of the word "regulates" is to make (compile) something ...¹while the meaning of the word "set" is to determine; ensure; make decisions; decide: confirm; strengthen: ...²the meaning of the word "winner" is the person (party) who wins,³whereas the explanation of Article 22 explains the word "tender" is an offer to propose prices to buy a job, to procure goods, or to provide services.

(d) Elements "so that it can lead to unfair business competition":

Article 1 point 6 states that: "unfair business competition is competition between business actors in carrying out activities of production and or marketing of goods or services carried out in an unfair manner". A cartel is a collusion or collaboration of business actors. Therefore, all the benefits of a cartel are intended only for the interests of its members, so that their actions are carried out unhealthy and dishonest. In this case, for example, by reducing production or against the law or hamper business competition, for instance, by setting prices or dividing regions.

Overall, it is concluded that Articles 5, 9, 11 and 22 contain the formulation of a "ban on cartels" about the order not to do something. Obligation here, according to William Wilson⁴is not only derived from the provisions of the law. It may be that the obligation arises from an agreement, or obligations arising outside 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 neighbors and even community and state. Thus the obligations here can mean very general, so that they are more general social expectation than moral aspiration.⁵

D. CONCLUSION

¹ <https://kbbi.web.id/atur>

² *Ibid.*

³ *Ibid.*

⁴ William Wilson, *Criminal Law; Doctrine and Theory*, London: Logman, 2003, p 84-88

⁵ *Ibid* p 83.

Prohibition of a criminal act always starts with legal protection. The legal protection can be administrative dimensions (obeying permits), civil (individual interests), and criminal (public interest). Logical reasons that are important for banning cartels as criminal acts are located in complex legal protection. A systematic reason comes from the nature of the general and specific laws (without rights, against the subjective rights of others, and against legal obligations) that is contrary to the protection of legal interests namely social values, morality, morality, justice, kinship, teamwork, good faith and good fair dealing and obligations that are prohibited by law because they have a devastating destructive power, have micro and macroeconomic implications of a country. In the context of Indonesia's state interests, the cartel injures the state ideology (*Pancasila*), the purpose of the state (Opening of the 1945 Constitution) and the constitution.

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