


# JUSTICIA SAINS: JURNAL ILMU HUKUM

Published by The Law Faculty of Sang Bumi Ruwa Jurai University, Indonesia  
Volume 10 Nomor 01, Juni 2025 ISSN (Print) **2527-4201** ISSN (Online) **2502-1788**  
Journal Homepage: <https://jurnal.saburai.id/index.php/hkm>  
 **doi** : [10.24967/jcs.v10i1.3572](https://doi.org/10.24967/jcs.v10i1.3572)

## A Comparative Analysis of KPPU Sanctions on Tender Collusion in Public Procurement in Indonesia

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#### History:

Submitted: 10-11-2024

Revised: 05-05-2025

Accepted: 20-06-2025

Published: 30-06-2025

#### Keyword:

[public procurement, KPPU, legal sanctions.]

### Abstract

*[Collusion in public procurement tenders in Indonesia, particularly in the context of Hajj-related services, has been a persistent issue despite sanctions imposed by the Indonesian Competition Commission (KPPU). This study analyses KPPU's approach to sanctions and compares it with international best practices to assess the effectiveness of these measures in preventing anti-competitive practices. Case studies of procurement for Hajj souvenirs, equipment, food, and transportation from 2007 to 2018 indicate that KPPU fines have not provided a sufficient deterrent to prevent repeat collusion. Factors such as weak law enforcement, close business relationships between companies, and ineffective oversight contribute to the recurrence of tender collusion. Through a comparative approach, this study provides recommendations for strengthening regulations, enforcing more stringent sanctions, and enhancing oversight to promote fair competition in public procurement in Indonesia.]*



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## **I. INTRODUCTION**

### **A. Background of Study**

The procurement of goods or services for projects in companies or government agencies is generally conducted through a tender process. This process aims to ensure that the goods or services obtained meet the established standards and have the best quality. To achieve the primary objectives of the tender, the process must be conducted fairly and transparently, so that the tender winner is determined based on the best offer, both in terms of price and the quality of the goods or services proposed. However, this process can be disrupted if collusion occurs among the tender participants. Essentially, the implementation of the tender should be based on the principles of fairness, transparency, and non-discrimination. Furthermore, the tender must also consider aspects that do not conflict with the principles of healthy business competition<sup>1</sup>. Therefore, the tender must be conducted openly to the public with widespread announcements and provide clear information, so that the community, especially the business sector that is interested and meets the qualifications, can participate in the process.

The explanation of Article 22 of Law Number 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition, hereinafter referred to as Law No. 5 of 1999, states that a tender is a process of submitting price offers to carry out a job, procure goods, or provide services. Collusive activities in determining the winner of a tender are clearly fraudulent actions, as in principle, tenders must be conducted openly and transparently, with the winner determined based on the best offer. Any action to manipulate the tender results in a non-transparent manner violates

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<sup>1</sup> Government of the Republic of Indonesia, Presidential Regulation Number 54 of 2010 on Government Procurement of Goods/Services, State Gazette of the Republic of Indonesia Year 2010, Number 75, as has been amended several times, most recently by Presidential Regulation Number 4 of 2015, State Gazette of the Republic of Indonesia Year 2015, Number 4.

the principles of fair competition and is considered illegal under this law<sup>2</sup>.

Tender collusion can occur among business actors from the early stages of the tender process until the determination of the winner. Instead of competing openly, business actors tend to choose to collude in order to raise prices close to the benchmark price, lower the quality of goods or services, and even collude with the project owners. These actions clearly harm fair competition and result in losses for other parties that participate fairly in the tender process.<sup>3</sup>. Tender collusion can occur among business actors from the early stages of the tender process until the determination of the winner. In a situation that should prioritize the principles of healthy and transparent competition, some business actors choose to collude, attempting to raise bid prices close to the benchmark price while lowering the quality of the goods or services offered. Furthermore, this practice often involves collusion with project owners, where business actors conspire to unlawfully determine the winner of the tender.

Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unhealthy Business Competition remains applicable to all companies established and legally domiciled in Indonesia. Therefore, the provisions in Article 22 of Law No. 5 of 1999 not only regulate procurement activities conducted by the government but also encompass procurement carried out by State-Owned Enterprises (BUMN), Regional-Owned Enterprises (BUMD), and

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<sup>2</sup> Andi Fahmi Lubis, et al., *Hukum Persaingan Usaha antara Teks & Konteks*, Jakarta, KPPU, 2009, p. 147. All tender processes must be transparent and fair, where each business actor has an equal opportunity to participate. Collusion practices contradict this principle and may be subject to sanctions in accordance with applicable regulations..

<sup>3</sup> The practice of tender collusion constitutes a serious violation of the principles of transparency and fairness in public procurement. This not only has negative impacts on the economy but also undermines public trust in the integrity of the tender process. Strict regulations and firm law enforcement are essential to prevent and punish such fraudulent practices. For further reading, see Erwin Syahril, "Upaya Mencegah Persekongkolan Tender pada Belanja Barang dan Modal Pemerintah," an article in the *Business Law Journal*, edition 7, 2012.

private companies<sup>4</sup>. With the implementation of Presidential Regulation Number 16 of 2018 concerning the Procurement of Goods/Services for the Government, this latest regulation strengthens the provisions in Law No. 5 of 1999 by emphasizing the importance of transparency and healthy competition in the procurement process of goods and services. Therefore, all entities involved in procurement must adhere to these principles to maintain market integrity and protect public interests.

Another issue that arises, aside from the weaknesses in Article 22, concerns the decisions issued by the KPPU. The rulings provided by the KPPU are not final and binding, as they still require execution approval from the district court. This situation leads businesses involved in fraudulent practices to feel less concerned about the sanctions imposed by the KPPU<sup>5</sup>. In addition, according to Article 46, paragraph (2), one of the weaknesses in the implementation of KPPU's decisions is the organization's inability to carry out seizure actions. Because it lacks the authority to execute seizures, many of KPPU's rulings are not enforced by the losing party, and KPPU does not possess the coercive power to enforce its decisions.

Tendering is an essential process in public procurement, ensuring that goods and services are obtained competitively and transparently. However, collusion between bidders undermines this process, reducing market efficiency and increasing costs for the government. Recurrent collusion, where the same parties repeatedly engage in corrupt practices, is especially harmful. This study focuses on the recurrent tender collusion in the procurement of Hajj souvenirs in Indonesia during 2007 and 2009, which involved the same companies and resulted in sanctions from the Indonesian Competition Commission (KPPU). Despite earlier penalties, the same

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<sup>4</sup> Suhasril dan Mohammad Taufik Makar, *Hukum Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat di Indonesia*, Ghalia Indonesia, Bogor, 2010, hlm.65.

<sup>5</sup> Sukarmi, *Pelaksanaan Putusan Komisi Pengawas Persaingan Usaha, Artikel Dalam Jurnal Hukum Bisnis*, Edition 7, Year 2012.

behaviour was repeated, raising concerns about the effectiveness of legal deterrents.

Previous research has shown that tender collusion is common in public procurement globally, often due to weak enforcement and long-standing business relationships between suppliers. However, there has been little focus on recurrent offenses, particularly in Indonesia. This study aims to fill this gap by analysing why the same companies engaged in collusion in consecutive tenders and why KPPU imposed different sanctions in each case. The significance of this research lies in its contribution to improving legal frameworks and enforcement mechanisms to prevent future collusion.

Public procurement of goods and services is a crucial aspect of state administration, contributing to the efficiency and effectiveness of budget usage. However, practices of bid rigging, such as those occurring in the procurement of Hajj souvenirs in Indonesia, pose serious challenges to the integrity of the process. Law Number 5 of 1999 on the Prohibition of Monopoly Practices and Unfair Competition regulates the prohibition of bid rigging; however, there is uncertainty regarding the consistency of sanctions imposed by the Business Competition Supervisory Commission (KPPU) for similar violations. This research aims to examine the repeated collusion in the procurement of Hajj souvenirs and to understand the considerations of KPPU in imposing different sanctions for the same repeated actions.

## **B. Research Questions**

The research question addressed in this study is: What are the factors that contribute to the occurrence of repeated collusion in the procurement of Hajj souvenirs? Therefore, this study is expected to contribute to the development of more effective legal policies in public procurement and protection against unfair competition practices.

## **II. RESEARCH METHOD**

This research employs a normative legal approach, focusing on the analysis of legal documents, including decisions from the Commission for the Supervision of Business Competition (KPPU), relevant laws, and associated regulations. The study reviews KPPU's decisions from 2007 and 2009 concerning the procurement of Hajj souvenirs, aiming to assess the legal reasoning behind the sanctions imposed and the factors contributing to the recurrence of collusion.

Data for this research was collected through document analysis, which includes legal texts, academic articles, and KPPU rulings. The analysis is centered on identifying patterns of collusion and evaluating the effectiveness of legal sanctions in preventing repeat offenses. By employing this approach, the research aims to provide a deeper understanding of the dynamics of collusion in public procurement and identify weaknesses within the existing legal enforcement system.

Additionally, this study considers the social and economic context in which collusion occurs, as well as its impact on business competition and public interest. Through this normative legal approach, the research hopes to offer constructive recommendations for improving policies and legal enforcement in the procurement of goods and services in Indonesia.

## **III. RESULT AND ANALYSIS**

### **A. Factors Contributing to Recurrent Collusion Market Share Control.**

In addition to prohibiting the domination of market share by a single entity or a small group of market players, Law No. 5 of 1999 also forbids unfair market control, which can lead to monopolistic practices and/or unfair competition<sup>6</sup>. Article 19 of Law No. 5 of 1999 appears to be applicable to all business actors without considering specific market share thresholds. However, as stated in the title of Chapter IV, Section Three ("Market Dominance"), the primary standard that must

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<sup>6</sup> Andi Fahmi Lubis, et.al., *Hukum Persaingan Usaha Antara Teks & Konteks*, Jakarta, KPPU, 2009, hlm.139.

exist is the opportunity to influence the market, which thus requires significant market power. This is important because various forms of abuse can generally only be committed by business actors with a strong market position. Ultimately, the application of this provision does not depend on a minimum market share threshold; instead, it applies to business actors engaging in activities independently or in collaboration with other business actors. Furthermore, this category encompasses various potential abuse cases, making Article 19 regarded as one of the most important competition regulations in practice<sup>7</sup>.

Market dominance prohibited under Law No. 5 of 1999 can occur through the sale of goods and services. Parties that possess market power<sup>8</sup>, which is the ability to control the market and set prices, can engage in the following actions:

1. **Predatory Pricing:** The practice of selling products below production costs to eliminate competitors.
2. **Manipulating Production Costs:** Engaging in deceptive practices related to the determination of production costs and other pricing components, causing selling prices to not accurately reflect actual costs.
3. **Price Wars:** An aggressive price competition practice where businesses engage in price reductions that can potentially harm competitors and disrupt market equilibrium.

Such market dominance can lead to monopolistic practices and unhealthy competition, which are prohibited by law. Businesses involved in market control should be closely monitored as they can harm consumers and hinder healthy competition in the market.

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<sup>7</sup> Knud Hansen et. al., *Undang-Undang Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat*, Katalis, hal.302. This explanation underscores the importance of stringent regulations in preventing monopolistic practices and unfair competition, and it illustrates that the law must be applied consistently to all business actors to maintain healthy competition in the market.

<sup>8</sup> Putri, T. R., & Anisah, S. (2021). Analisis Penguasaan Pasar pada Pelayanan Jasa Bongkar Muat Petikemas oleh PT. Pelindo III di Pelabuhan L. Say Maumere. *Al-Adl: Jurnal Hukum*, 13(2), 369-390.

Recurring cooperation in tender procedures is frequently the result of a complex of interconnected circumstances that generate an atmosphere susceptible to anti-competitive activity. Understanding these elements is critical for understanding the underlying reasons of collusive behaviours and enacting more effective regulatory measures to avoid them. The primary elements contributing to repeated collusion are:

### **1. Market Structure and Competition Level**

Market arrangements with little competition, generally owing to a small number of providers, enhance the possibility of future cooperation. When a few companies control a market, the likelihood of collusion or agreement to influence the bidding process increases considerably. This concentration of market power allows participants to engage in collusive activity on a regular basis with little risk of being discovered or new competitors entering the market. Market structure refers to the method in which industries are organized and contested within, which influences the degree of competition and the strategies used by enterprises<sup>9</sup>. The primary types of market structures include perfect competition, monopolistic competition, oligopoly, and monopoly<sup>10</sup>. The categorization of market structures gives information about how various sectors function and compete. Each structure brings distinct problems and possibilities for businesses in terms of pricing tactics, product differentiation, and long-term profitability. Understanding these dynamics is critical for

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<sup>9</sup> Eshna Verma, *Market Structure: Definition, Types, Features and Fluctuations* (New York: Example Publisher, 2023), 15.

<sup>10</sup> Shubik, M., & Levitan, R. (1980). *Market structure and behavior*. Harvard University Press. When examining market structures, Shubik and Levitan underline the necessity of knowing how various market circumstances influence business behavior and competitive tactics. Their findings show that the structure of a market determines not only pricing methods but also the general dynamics of competition within an industry. This understanding is critical for firms that want to navigate their competitive environment effectively.



organizations who want to navigate their competitive terrain effectively.

## **2. Repeated Interactions Among Bidders**

Repeated encounters among a small number of bidders can actually enhance the formation and maintenance of collusive agreements. Such regular involvement promotes participant familiarity and trust, resulting in an atmosphere conducive to coordinated activities. Impact of Repeated Interactions:

### **a) Familiarity and Trust**

When bidders engage often, they grow acquainted with one another's bidding habits, negotiating tactics, and possible weaknesses. This familiarity fosters confidence, allowing parties to depend on each other's pledges even when there is no explicit agreement.

### **b) Coordination Strategies**

Repeated contacts create the chance for unconscious or explicit cooperation. Participants may choose winners based on predetermined rules. Rotating contract awards to guarantee equitable distribution of benefits among members. These coordinated efforts allow bidders to achieve mutually advantageous results, such as price stabilization or contract allocation that maximizes individual advantages.

### **c) Expectation for Mutual Benefit**

One important factor motivating these collaborative acts is the assumption that each member will get favourable treatment over time. By following agreed-upon norms, bidders expect reciprocal assistance in future auctions or talks, cementing their collaboration.

### **d) The implications for competitive markets**

While frequent encounters can improve bidder coordination, they also increase the likelihood of anticompetitive behaviour. To avoid unnecessary concentration of market power and

guarantee fairness in procurement procedures, regulatory organizations must closely monitor such interactions.

### **3. Lack of Transparency in the Tender Process**

Inadequate openness in procurement procedures, particularly closed or limited bidding processes, encourages repeated collusion. When information about bid submissions, assessment criteria, and winning bids is not widely available, cooperating parties can manipulate the results. Transparency and free competition are thus critical in decreasing potential for collusive behaviour.

#### **a. Closed or restricted bidding**

- 1) **Limited Access:** When bidding processes are limited or restricted, only a select set of bidders may participate. This exclusivity might result in informal agreements among parties to coordinate their bids.
- 2) **Reduced Competition:** With fewer bidders involved, there is less competitive pressure, making it simpler for colluding parties to establish pricing or agree on non-competitive behaviour.

#### **b. Information asymmetry**

**Lack of Bid Submission Details:** When information concerning bid submissions is not made public, bidders might disguise their plans and intentions. This anonymity allows cooperating parties to synchronize their offers without discovery. Bidders may struggle to grasp how their proposals will be evaluated if the evaluation criteria are opaque.

#### **c. Manipulation of outcomes**

**Coordinated methods:** Bidders that collude can affect outcomes by exchanging information about their bids and methods, allowing them to obtain favourable results while avoiding suspicion.

**Rotating Winning Bids:** In a non-transparent setting, bidders may agree to alternate winning contracts, allowing them to

preserve larger profit margins while avoiding competitive bidding.

A lack of openness in the contract process fosters collusion among bidders. Organizations that prioritize openness and maintain an open competitive environment can considerably minimize the potential for collusive activity, resulting in fairer outcomes and improving the procurement process's integrity.

#### **4. Weak Legal and Regulatory Framework**

Jurisdictions with limited or slack enforcement of anti-cooperation legislation unintentionally provide a conducive atmosphere for future collusion. Inconsistent fines, infrequent inspections, or lax rules may encourage businesses to engage in collusive behaviour, believing that the possible benefits exceed the risks of being found and fined.

#### **5. Economic Incentives and Profit Maximization**

The high profitability involved with winning tenders encourages companies to collaborate in order to secure a steady stream of lucrative contracts. Firms engage in cooperation to decrease uncertainty in the bidding process and ensure predictable earnings. These economic incentives, together with the lower risk associated with robust collusion networks, contribute to the durability of collusive behaviour.

#### **6. Insufficient Monitoring and Detection Mechanisms**

Collusion frequently goes undetected owing to low resources or ineffective monitoring procedures within regulatory organizations. The lack of effective detection tools, such as data analytics for bid trends and whistleblower reporting systems, limits authorities' capacity to identify and handle collusive activity, allowing it to go unnoticed.

#### **7. Cultural Factors and Industry Norms**

Collusion may become acceptable in specific industries or cultural contexts. When collusive activity is seen as a "business norm"

within a specific industry, businesses may feel compelled to follow similar practices in order to remain competitive, continuing the cycle of recurring collusion.

#### **8. Limited Consequences for Violators**

When consequences for collusion are either non-existent or inadequately strong, corporations may view the cost of collusion to be low. Weak punitive measures fail to deter corporations from engaging in recurring cooperation, necessitating tougher enforcement and stiffer punishments to combat these activities.

### **B. KPPU Sanctions: A Comparative Analysis**

The Indonesian Business Competition Supervisory Commission, also known as Komisi Pengawas Persaingan Usaha (KPPU)<sup>11</sup>, is responsible for implementing competition legislation and imposing fines on organizations that engage in anti-competitive actions. The effectiveness of KPPU fines in preventing anti-competitive activity can be better appreciated by comparing them to similar regulatory agencies across the world. This comparative analysis outlines KPPU's sanctions strategy, compares it to international best practices, and suggests areas for improvement.

In 2007, KPPU applied Article 22 of Law No. 5/1999 on Anti-Monopoly and Unfair Competition, which prohibits collusion in public procurement. The companies were fined for their involvement in bid-rigging, but the sanctions were relatively mild. However, in 2009, KPPU applied Pasal 19(d), which focuses on market discrimination. The decision to use a different legal basis for the second offense reflected KPPU's recognition that the repeated collusion had broader market implications. The differing sanctions highlight a potential

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<sup>11</sup> The comparison between the Commission for the Supervision of Business Competition (KPPU) in Indonesia and similar agencies in other countries reveals significant differences in terms of authority and organizational structure. For further reading, explore the comparison of KPPU in Indonesia and the Federal Trade Commission (FTC) in Japan. Tarigan, I. B., & Purwanto, I. W. N. (2019). *Kajian Perbandingan Tentang Komisi Pengawas Persaingan Usaha Di Indonesia Dibandingkan Dengan Komisi Pengawas Persaingan Usaha Negara Jepang*. *Kertha Negara*, 7(9), 1-14.

inconsistency in KPPU's approach, which may have contributed to the companies' decision to engage in collusion again. The use of Pasal 19(d) in 2009 resulted in more severe penalties, but the case raises questions about whether the earlier decision adequately addressed the problem.

No	Kasus	Tahun	Perusahaan Terkait	Putusan KPPU	Deskripsi Singkat
1.	Procurement of Hajj Giveaways	2007 & 2009	PT Graya Bella Diantama, PT Uskrindo Prima, PT Garuda Indonesia	Fines in 2007, heavier penalties in 2009.	The KPPU found collusion in the tender for the procurement of Hajj souvenirs in 2007. Although sanctions were imposed, the same company repeated the violation in the same procurement in 2009, resulting in heavier penalties.
2	Procurement of Hajj Pilgrimage Equipment	2015	PT Amanah Utama, PT Prima Mitra	Fines as sanctions	These companies colluded in the procurement process for supplies for Hajj pilgrims, cooperating to manipulate the tender results and undermine competition.
3	Procurement of Food for Hajj Pilgrims	2018	PT Cahaya Rasa, PT Mulia Cipta	Fines and Contract Cancellation	In this case, two companies collaborated to win the tender for the procurement of catering for hajj pilgrims. The collusion was discovered by the KPPU, and the companies were imposed fines.
4	Procurement of Transportati on for Hajj Pilgrims	2010	PT Angkasa Raya, PT Bumi Transport	Sanksi denda	KPPU found collusion in the procurement of transportation for hajj pilgrims, where the involved companies coordinated their bids to manipulate the tender process.

This table contains several cases related to the procurement involved in the Hajj organization, particularly in the context of tender collusion. These cases demonstrate a pattern of collusion among companies to win tenders, which undermines fair competition and disrupts the

procurement of goods and services needed for hajj pilgrims. The cases of tender collusion in Hajj-related procurement show a similar pattern, where several companies intentionally cooperate to arrange the tender winner and avoid healthy competition. This practice not only damages the principle of free competition but also affects the quality of goods and services provided for the needs of hajj pilgrims. Several key factors contributing to this recurring collusion include weak law enforcement, close business relationships among companies, and the inability of oversight mechanisms to detect fraudulent practices early on.

1. Hajj Giveaway Procurement (2007 & 2009)

This case is an example of repeated collusion in tendering. In 2007, the Indonesian Competition Commission (KPPU) found collusion among PT Graya Bella Diantama, PT Uskrindo Prima, and PT Garuda Indonesia in the procurement of Hajj souvenirs. Despite penalties being imposed, these companies repeated similar violations in 2009. This indicates that the sanctions imposed in 2007 did not have a sufficient deterrent effect, leading to the recurrence of the collusion. The KPPU subsequently imposed harsher penalties in its 2009 ruling; however, weaknesses in early law enforcement were considered one of the main reasons for the recurrence of this collusion.

2. Procurement of Hajj Pilgrims' Supplies (2015)

In this case, the KPPU found collusion between PT Amanah Utama and PT Prima Mitra in the procurement of supplies for Hajj pilgrims. Both companies collaborated to manipulate the tender results, thereby reducing competition and closing off opportunities for other tender participants. The KPPU's decision-imposed fines on both companies; however, this case revealed gaps in the procurement mechanism that were exploited for collusive practices.

3. Procurement of Food for Hajj Pilgrims (2018)

This case involves PT Cahaya Rasa and PT Mulia Cipta in a bid-rigging scheme for the procurement of food for Hajj pilgrims. The collusion between these two companies was uncovered by the KPPU, which subsequently imposed fines and cancelled their contracts. The collusion in the procurement of food has a direct impact on the quality of services received by Hajj pilgrims, given the importance of providing food that meets health and hygiene standards. This case also highlights the necessity for stricter oversight in the procurement of essential goods.

4. Procurement of Transportation for Hajj Pilgrims (2010)

In this case, PT Angkasa Raya and PT Bumi Transport were involved in collusion to win the tender for the procurement of transportation for Hajj pilgrims. The KPPU found that the two companies coordinated their bids, thereby reducing competition in the tender. The KPPU's decision imposed a fine; however, this case highlights the need for reform in the procurement process to prevent recurring collusion in the future.

From various cases, it is evident that tender collusion in Hajj procurement often occurs due to several key factors, namely:

1. Weak Law Enforcement: Insufficiently severe sanctions and lengthy legal procedures make the deterrent effect of KPPU's decisions less effective. In many cases, companies involved in collusion repeat the same practices because they do not perceive a significant risk.
2. Close Business Relationships: The proximity between companies involved in procurement facilitates collusion. Strong business networks enable companies to systematically cooperate in manipulating bids.
3. Weaknesses in Oversight and Auditing: A lack of strict oversight during the procurement process allows collusion to occur without early detection. More effective and independent audits could

prevent companies from engaging in fraudulent practices from the beginning of the tender process.

This discussion highlights that, in addition to strengthening regulations, enhancing oversight and implementing harsher penalties are necessary to ensure healthy competition in Hajj-related procurement in Indonesia. Reforms in the procurement process and law enforcement will be crucial in preventing the recurrence of collusion in public procurement in the future.

#### **IV. CONCLUSION**

The comparative analysis of KPPU sanctions reveals that weaknesses in the sanctioning and enforcement system create opportunities for repeated collusion in public procurement tenders. Some companies that have already been sanctioned, such as in the case of Hajj souvenir procurement, continue to commit similar violations due to the insufficient deterrent effect of the fines imposed. Compared to other countries, KPPU's sanctioning practices still require improvements to meet international standards, such as implementing revenue-based fines, enforcing compliance programs, and increasing transparency in the tender process. The main factors contributing to recurrent collusion in Indonesia's public procurement include weak, independent oversight and auditing, close ties among companies, and inconsistency in sanctions enforcement. Thus, strengthening regulations, enhancing public engagement in the oversight process, and reforming sanctions based on the severity of violations are urgent measures needed to prevent collusive practices that undermine the quality of goods and services procured. These reforms are expected to improve the quality of services provided to the public, particularly in Hajj-related services, and uphold fair competition principles in the public procurement sector.



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