INDONESIA

Legislation and Jurisdiction

The Law

What is the relevant legislation?

The relevant legislation is Law No. 5 of 1999 concerning the prohibition of monopolistic practices and unfair business competition (the "Law"), together with the Elucidation on the Law, the Decree of the President of the Republic of Indonesia No. 75 of 1999 on the Komisi Pengawas Persaingan Usaha or KPPU (the "Decree"), four procedural regulations and several guidelines, available on the KPPU website at: http://eng.kppu.go.id (English page).

1. Regulation of the Supreme Court of the Republic of Indonesia No. 3 of 2005 regarding the Procedures for Filing Objections to the Decisions of KPPU;
2. KPPU Regulation No. 1 of 2006 regarding the Procedures for Case-Handling in KPPU;
3. KPPU Regulation No. 2 of 2008 regarding the Authorities of the Commission Secretariat in Case-Handling;
4. KPPU Regulation No. 1 of 2010 regarding Case Handling Procedures replaces KPPU Regulation No. 1 of 2006 and No. 2 of 2008 for cases introduced as of 5 April 2010.

To whom does it apply?

The Law applies to all "business actors", defined by Article 1(5) of the Law as "individual(s) or business entities, either incorporated as legal entities or not, established and domiciled or conducting business activities within the jurisdiction of the Republic of Indonesia, either independently or jointly based on agreement, conducting various business activities in the economic field". Therefore, it applies to any business actor doing business in Indonesia, including, amongst other, state-owned enterprises and subsidiaries of foreign enterprises.

Which practices does it cover?

The Law covers practices, which include anti-competitive agreements; anti-competitive activities; abuse of dominant position; and mergers which lessen competition.

Are there proposals for reform?

A new draft law is being prepared. It will mainly reform the procedure (e.g. providing for an extended investigation timeframe and increased investigative powers) and the institutional capacity of the authority (functions of the KPPU).

The Authority

Who is the enforcement authority?

The enforcement authority is the Komisi Pengawas Persaingan Usaha (KPPU).

According to Chapter VI of the Law, the Decree and the regulations, the KPPU is a state-independent institution, free from the Government and other stakeholders' influence, accountable to the President of Indonesia. Its members are appointed and dismissed by the President upon approval of the People's Legislative Assembly.

The KPPU is responsible for supervising and evaluating the conduct of business actors in the

Indonesian markets under the Law. It carries out investigations and enforces the Law (e.g., issues decisions on the alleged violations), provides advice and opinions concerning Government's policies related to monopolistic practices and/or unfair business competition, issues guidelines and submits periodic reports on its activity to the President of Indonesia and the People's Legislative Assembly.

Are there any sector-specific regulatory authorities (RAs) with competition enforcement powers?

The KPPU is responsible for the application of competition law in all sectors. The existing RAs do not have competition enforcement powers.

Anticompetitive practices

Agreements

Which agreements are prohibited?

Chapter III of the Law (Articles 4 to 16) identifies a list of agreements, classified according to their object, which are prohibited "per se" or insofar as they result in monopolistic practices and/or unfair business competition (under the "rule of reason").

The agreements prohibited per se are the following:

- Agreements leading to price fixing (Article 5(1)), except agreements in the context of a joint venture or expressly prescribed by law (Article 5(2));
- Price discrimination (Article 6);
- Agreements aimed at boycott (Article 10) that (a) injure or may injure other business actors or (b) limit access of other competitors to sell or to buy goods and services in the relevant market;
- "Exclusive agreements", i.e. agreements leading to resale restrictions, tying and exclusive supply (Article 15);

The agreements prohibited under the rule of reason, are the following:

- Agreements leading to oligopoly (Article 4(1)). Business actors may be suspected or deemed of being part of oligopolies when two or three of them control the production and or marketing of over 75% of the relevant market (Article 4(2));
- Agreements leading to predatory pricing (i.e. price below cost) (Article 7) and resale price maintenance (Article 8).
- Agreements leading to market partitioning and market allocation (Article 9);
- Cartels (Article 11);
- Trusts (Article 12);
- Agreements leading to oligopsony (Article 13(1)). Business actors may be suspected or deemed of being part of oligopsonies when two or three of them control the purchases or acquisitions of over 75% of the relevant market (Article 13(2));
- Agreements leading to vertical integration (Article 14);
- Agreements with foreign parties (Article 16).

According to Article 1(7) of the Law, anti-competitive agreements are prohibited regardless of their form: both formal agreements ("in writing") and concerted practices ("not in writing") are included.

The Law includes both horizontal and vertical agreements.

Which agreements may be exempted?

The Law does not explicitly foresee any possibility of individual exemption. However, some instances, including some categories of agreements, are excluded from the scope of application of the Law (see below, under “Exclusions”).

Monopoly and dominant position

Is monopoly or dominant position regulated?

The Law separately prohibits monopolistic practices (i.e., monopoly and monopsony) (Chapter IV) and the abuse of a dominant position and, in specific cases, the creation thereof (Chapter V).

What is a monopoly/monopsony position?

According to Article 1(1) of the Law, “monopoly” refers to the “control over the production and or marketing of goods and or over the utilization of certain services by one business actor or by one group of business actors”.

According to Article 17(2), business actors are deemed to have a monopoly position if:

- there is no actual substitute available for the goods or services concerned;
- other business actors are unable to compete for the same goods or services; or
- one business actor or a group of business actors control over 50% of the relevant market.

According to Article 18(2), business actors are deemed to have a monopsony position when one business actor or a group of business actors controls over 50% of the relevant market.

What is a dominant position?

According to Article 25(2) business actors are deemed to have a dominant position when:

- one business actor or a group of business actors controls over 50% of the relevant market; or
- two or three business actors or a group of business actors control over 75% of the relevant market.

When are monopoly and dominant position prohibited?

According to Articles 17(1) and 18(1) monopoly and monopsony are prohibited from:

- “controlling the production and or marketing or goods or service” or, respectively,
- “controlling the acquisition of supplies or from acting as sole buyer of goods and or services”

when this may “result in monopolistic practices and or unfair business competition”.

Furthermore, the following practices are prohibited when they may result in monopolistic practices or unfair business competition:

- Market control, defined as:
  - “(a) Reject and or impede certain other business actors from conducting the same business activities in the relevant market; or (b) bar consumers or customers of their competitors from engaging in a business relationship with such business competitors; or (c) limit the distribution and or sales of goods and or services in the relevant market; or (d) engage in discriminatory practices towards certain business actors” (Article 19);
  - Predatory pricing (Article 20);
  - “Determining false production cost and

other costs as part of the price component of goods and or services" (Article 21);

- Conspiracy, defined as:
  - Bid rigging/collusive tendering (Article 22);
  - Violating company secrets (Article 23);
  - Reducing quantity, quality or timeliness or goods or services (Article 24).

According to Article 25(1), business actors are prohibited from using a dominant position either directly or indirectly to:

- Determine the conditions of trading with the intention of preventing and or barring consumers from obtaining competitive goods or services both in terms of price and quality;
- Limit markets and technology development; or
- Bar other potential business actors from entering the relevant market.

Article 26 of the Law also prohibits a person, concurrently holding a position as member of the board of directors or as a commissioner of a company, from simultaneously holding either of the same position in other companies in the event that such companies:

- Are in the same relevant market;
- Have a strong bond in the field and/or type of business activities; or,
- Are jointly capable of controlling the market share of certain goods or services

Which may result in monopolistic practices or unfair business competition.

Likewise, Article 27 of the Law prohibits business actors from owning majority shares in several similar companies conducting business activities in the same relevant market, or establishing several companies with the same business activities when:

- one business actor or a group of business actors control over 50% of the relevant market; or
- two or three business actors or groups of business actors control over 75% of the relevant market.

Can abuses of dominant position be exempted?

No exemption is allowed.

Merger control

What is a merger?

Merger is regulated by Articles 28 and 29 of the Law, and further implemented through Government Regulation No. 57 Year 2010 concerning a Merger and Acquisition which may Cause Monopolistic Practices and Unfair Business Competition (the "Merger Regulation").

According to the Law, a merger includes the following transactions:

- concentration of control of several previously independent business actors into one business actor or a group of business actors; or
- transfer of control (for example, through the acquisition of shares) from one previously independent business actor to another, leading to control or market concentration.

Specifically, the scope of a merger by the Law and the Merger Regulation is limited to a merger (merger of one business actor into another, or merger of some business actors into one new entity) and the acquisition of shares.

Are foreign-to-foreign mergers included?

Foreign mergers are defined as (i) mergers between two foreign business entities where both or one of them operate in Indonesia (ii) mergers between a foreign business entity operating in Indonesia and an Indonesian legal entity; (iii) mergers between a foreign business entity which does not operate in Indonesia and an Indonesian business entity; and (iv) other forms of merger involving foreign elements.

Foreign mergers are included when all the parties conduct business activities in the domestic market. Foreign mergers taking place beyond Indonesian jurisdiction are not subject to investigation, insofar as they do not bring any direct or individual control over an Indonesia business entity.

Do mergers need to be notified?

The Law and the Merger Regulation establishes a system of both voluntary consultation (pre-merger notification) and mandatory post-merger notification.

According to the Merger Regulation, the merging parties must notify the KPPU on any merger that meet the following conditions:

- combined asset value of the merged business actors exceeding IDR 2.5 trillion (IDR 20 trillion for banking institutions); and/or
- combined sales value of the merged business actors exceeding IDR 5 trillion.

The notification must be made no later than 30 (thirty) working days after the merger is legally effective.

The mandatory post-merger notification is not applicable to mergers between affiliated business actors.

Any merging business actors that meet the threshold (above) can ask for a voluntary consultation (or in other jurisdiction define as voluntary pre-merger notification) to the KPPU. The result of a consultation should be made within 90 (ninety) working days after the submitted proposal is completed. However, it shall be noted that an opinion from a consultation does not prevent the KPPU from assessing the merger after it has been implemented. Further explanation on the consultation process is described by KPPU Regulation No. 11 Year 2010 regarding Consultation of Merger.

Are there any filing fees?

There are no filing fees.

Are there sanctions for not notifying?

As mentioned above, the Merger Regulation stipulates that any failure to notify (late notification) means an administrative fine can be imposed amounting to IDR 1 billion per day, with maximum fine of IDR 25 billion. Further explanation on the fines for delay is describe by KPPU Regulation No. 4 Year 2012 on Guideline on Imposing Fines to Delay in Merger Notification.

How long does it take for approval?

According to the Merger Regulation, merger assessment by the KPPU should be made within 90 (ninety) working days after the submitted notification document is completed. If the KPPU finds the existence of a competition violation due to the merger, the KPPU can continue the process using the applicable case handling procedure stipulated by KPPU Regulation No. 1 Year 2010 regarding Case Handling Procedures.

Is there any obligation to suspend the transaction pending the outcome of the assessment (standstill clause)?

There is no standstill obligation.

Which mergers are prohibited?

According to the Merger Regulation, the prohibited merger is a merger that results in monopolistic practices and or unfair business competition. In assessing whether the merger will lead to monopolistic practices and or unfair business competition, the KPPU will analyze a number of factors, including market concentration, entry barriers, potential anti competitive practices, business efficiency, and or likely bankruptcy.

For example, market concentration is mainly assessed on the basis of the Herfindahl-Hirschman Index (HHI). If not applicable, then the KPPU can use other tools such the Concentration Ratio (CR) or any other measures of market concentration. Two spectrums are use for the HHI, namely Spectrum I (HHI under 1,800) for a low market concentration, and Spectrum II (HHI over 1,800) for high market concentration.

It is important to note that market concentration is only the first step in the analysis conducted by the KPPU in assessing a merger.

What happens if prohibited mergers are implemented?

If it was being implemented, then the KPPU will enter the investigation process as defined by KPPU Regulation No. 1 Year 2010 regarding Case Handling Procedures, as the violation of Article 28 or 29 of the Law.

Can mergers be exempted/authorized?

Mandatory post-merger notification between affiliated business actors may be exempted from the application of the Merger Regulation.

Procedure

Investigations

How does an investigation start?

Investigations are regulated by Chapter VII of the Law and by the Procedural Regulations. KPPU can start an investigation on its own motion or following a complaint. Any person having knowledge or a reasonable suspicion of infringements of the Law, or suffering losses as a result thereof, may file a complaint to the KPPU.

What are the procedural steps and how long does the investigation take?

The KPPU conducts a preliminary examination and determines, within 30 days, whether or not a follow-up examination is needed. The follow-up examination must be completed within 60 days, which may be extended by not more than 30 days. The KPPU must determine whether or not an infringement occurred within 30 days from the conclusion of the follow-up examination.

What are the investigation powers of the KPPU?

The KPPU has the power to:

- conduct investigations and hearings on allegations of cases of monopolistic practices and/or unfair business competition;
- summon business actors suspected of having infringed the Law or witnesses, expert witnesses, or any person deemed to have knowledge of violations of the Law;
- seek the assistance of investigators to invite the above mentioned persons;

- require business actors and other parties to submit evidence;
- request statements from Government institutions;
- obtain, examine and/or evaluate letters, documents or other evidence for investigations and/or hearings.

What are the rights and safeguards of the parties?

The KPPU is bound by the duty of confidentiality in respect of all information classified as company secrets, as well as all information provided by complainants and reporting parties.

Is there any leniency programme?

The Law does not provide for a leniency programme. However, currently discussions are being held on whether a leniency programme should be introduced as part of the reform.

Is it possible to obtain any informal guidance?

Interested parties can contact the Public Relation and Legal Bureau for any inquiries through the official e-mail address at infokom@kppu.go.id or to Foreign Cooperation Division at international@kppu.go.id. Guidance on mergers may be obtained from the Merger Division at merger@kppu.go.id.

Adjudication

What are the final decisions?

According to Article 43(3) of the Law, at the end of the examination, the KPPU decides whether or not the Law has been violated.

What are the sanctions?

According to Article 47 of the Law, the KPPU may impose sanctions in the form of administrative measures against business actors violating the provisions of the Law. Sanctions include:

- declarations that anti-competitive agreements be null and void;
- orders to stop vertical integration, monopolistic practises, unfair business competition, misuse of dominant position;
- declarations that mergers or consolidation of business entities or acquisition of shares are null and void;
- stipulation of compensation payments;
- fines between IDR 1 billion and IDR 25 billion.

According to Article 48 of the Law, basic criminal sanctions may be imposed by the courts: the most serious infringements are subject to a fine between IDR 25 billion and IDR 100 billion or to imprisonment up to six months. Other infringements are subject to a fine of between IDR 5 billion and IDR 25 billion or to imprisonment up to five months, Procedural infringements (refusal to provide required evidence, or to provide information, or impeding the investigation) are subject to a fine between IDR 1 billion and IDR 5 billion or to imprisonment up to 3 months.

According to Article 49 of the Law, additional criminal sanctions may be imposed, in the form of:

- Revocation of business licenses;
- Prohibition of holding the positions of director or commissioner for a period between two and five years;
- Orders to stop certain activities or actions producing damages to other parties.
- Criminal sanctions are imposed by the courts on the basis of Indonesian criminal law.

Judicial review

Can the enforcement authority's decisions be appealed?

According to Article 44 of the Law, business actors may appeal KPPU's decisions before the District Court no later than 14 days after receiving notification of the decision. District Courts' decisions can be appealed to the Supreme Court of the Republic of Indonesia within 14 days.

Private enforcement

Are private actions for damages available?

Not available.

Exclusions

Is there any exclusion from the application of the Law?

According to Article 5 (2) of the Law, price fixing agreements in the context of joint ventures or expressly prescribed by law are excluded from the application of the Law.

According to Article 50 of the Law, the following are excluded from the provisions of the Law:

(a) actions and or agreements intended to implement applicable laws and regulations;

(b) agreements related to intellectual property rights, such as licenses, patents, trademarks, copyright, industrial product design, integrated electronic circuits and trade secrets, as well as agreements related to franchise;

(c) agreements for the stipulations of technical standards of goods or services which do not inhibit, and/or impede, competition;

(d) agency agreements which do not stipulate the re-supply of goods or services at a price lower than the contracted price;

(e) cooperation agreements in the field of research for the upgrading or improvement of the living standard of society at large;

(f) international agreements ratified by the Government of the Republic of Indonesia;

(g) export-oriented agreements or actions not disrupting domestic needs and/or supplies;

(h) business actors of small scale, according to the provisions of Law No. 20 of 2008 on micro, small and medium enterprises.

(i) activities of cooperatives aimed specifically at serving their members.

In addition, Article 51 specifies that "monopoly and concentration of activities related to the production and or marketing of goods and or services affecting the livelihood of society at large and branches of production of a strategic nature for the state shall be stipulated in a law and shall be implemented by State-Owned Enterprises and or institution formed or appointed by the Government".

Enforcement Practices

Please refer to the Annex I - Case Studies.