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Competition law fact sheet

Indonesia

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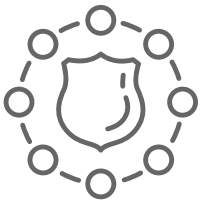
Main features of the law

Prohibitions on restrictive agreements and practices, abuses of dominance and anticompetitive mergers

Restrictions on conglomerate power

Administrative and criminal sanctions



Enforcement trends

Focus on bid-rigging

Numerous sanctions for failure to seek clearance for mergers and acquisitions

Recent focus on fintech and digital economy

Substantive provisions

Main rules

Law No 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition (Law No 5/1999) is administered by the the Commission for the Supervision of Business Competition (the KPPU), which has the authority to issue implementing regulations and guidelines. Law No 5 of 1999 prohibits a range of restrictive agreements and abusive behaviours, including mergers and acquisitions that may result in monopolistic practices or unfair business competition.

In particular, Law No 5/1999 prohibits:

- contracts and activities that would result in monopolistic practices or unfair business competition (restrictive agreements and practices);
- abuse of dominance;
- mergers, amalgamations or acquisitions of companies that can result in monopolistic practices or unfair business competition; and
- the advent of conglomerate power through interlocking directorates or through majority equity stakes in several companies accounting for a market share exceeding 50 per cent.

Monopolistic practices are broadly defined under Law No 5/1999 as the "concentration of economic power by one or more business actors, resulting in the control of the production and/or marketing of certain goods and/or services, thus resulting in unfair business competition and potentially harmful to the interests of the public".

Anticompetitive agreements and practices

Law No 5/1999 prohibits agreements between business operators if the agreement may result in monopolistic practices or unfair competition. The prohibition on restrictive agreements covers both horizontal and vertical agreements. Contrary to the approach in other jurisdictions, Law No 5/1999 does not provide for a broad prohibition of restrictive practices, but instead lists a number of specific prohibited practices. That said, while the law appears quite strict, in its interpretative guidelines the KPPU has largely adopted an effects-based approach, leading to an enforcement which is closer to international practice.

The prohibition of cartels and horizontal restricted agreements under Law No 5/1999 covers:

- oligopoly – forming contracts to jointly control production or the marketing of goods and services, a situation which arises where two or three business actors or groups of business actors jointly account for more than 75 per cent of the market for a certain type of goods or services;
- monopoly and monopsony – business actors are prohibited from entering into agreements controlling production or supply of goods or services in a relevant market that can result in monopolistic practices or unfair business competition;
- entering into cartels – under Law No 5/1999 cartels are generally defined as agreements (in writing or verbally) between a business actor and its competitors, the intent of which is to manipulate price by arranging production or marketing of goods or services in the same relevant market. As such cartels include:
  - dividing market areas or allocating markets for goods/services;
  - boycotts – agreeing with other business actors to refuse (on) selling goods or services of another business actor or hamper other business actors from engaging in the same type of business, either for domestic or export purposes;
  - bid-rigging; and
  - price-fixing between business actors who are in competition with each other in the same market; the prohibition may include frequent exchanges of information on future pricing intentions and price signalling.

While there is no general definition of vertical restraints in Law No 5/1999, the following vertical practices are prohibited:

- price discrimination – business actors are prohibited from entering into agreements causing buyers to pay a different price from that which must be paid by other buyers for the same type of goods or services;
- resale price maintenance;
- vertical integration – business actors are prohibited from making contracts with other business actors with the intention of controlling different levels of the supply chain of certain goods or services, which may potentially result in unfair business competition and/or be harmful to society; and
- exclusive dealing (including tying agreements) – prohibition for business actors to enter into any contracts that impose terms by which the parties receiving the goods and/or services shall or shall not resupply those goods to certain parties; or must be prepared to purchase other goods and or services from the suppliers or shall not purchase other goods and or services from the competitors of the suppliers.

Abuse of dominance

Law No 5/1999 prohibits business actors from abusing their dominant positions. A dominant player is generally defined as:

- one that does not have significant competitors in the relevant market in respect of its market share; or
- an operator that holds the strongest position in a market in respect of its financial ability; ability to access supplies or sales; or ability to shape demand or supply for certain goods or services.

A business is presumed dominant if it controls at least a 50 per cent share of the relevant market. Two or three businesses collectively will be presumed to be dominant if they control at least a 75 per cent share of the relevant market.

Law No 5/1999 does not specify what constitutes an abuse, but the KPPU considers the following practices to amount to abuses of dominance:

- predatory pricing and price discrimination with exclusionary effect;
- margin squeeze;
- refusal to supply an essential input;
- exclusive dealing – arrangements requiring a customer to purchase, directly or indirectly, all or a substantial proportion of its requirements of a particular product from a particular undertaking; and
- territorial restriction or exclusive distribution – where a manufacturer as the dominant business actor specifies a particular geographic area that can be served by a particular dealer or retailer.

Mergers and acquisitions

Business actors are prohibited from merging or consolidating business entities or acquiring shares in companies if these actions may result in monopolistic practices or unfair competition.

Transactions are subject to post-merger control clearance by the KPPU if they meet the following asset or turnover thresholds:

- the parties' combined worldwide asset value exceeds IDR2.5 trillion (approx. US$177 million) during the last financial year or IDR20 trillion (approx. US$1.4 billion) if all parties are from the banking sector); or
- the parties' combined Indonesian turnover exceeded IDR5 trillion (approx. US$355 million) during the last financial year.

Both asset acquisitions and share acquisitions are caught. The asset-based threshold refers to the worldwide value of the parties' assets whereas the turnover-based threshold refers to the value of the parties' sales in Indonesia. Both thresholds are calculated at group level, irrespective of the place of incorporation of the transaction parties.

Notifications must be submitted to the KPPU no later than 60 days after the merger, amalgamation or share acquisition becomes legally effective.[1]

Restrictions on conglomerate power

Law No 5/1999 also contains provisions meant to limit the advent of conglomerate power.

First, the law contains a prohibition on interlocking directorates in some cases. A person who is serving as a director or a commissioner of a company is prohibited from simultaneously holding the position of director or commissioner in another company if these companies operate in the same relevant market, have strong links in terms of their field or type of business, or together have the potential to control the market share of certain products.

Second, the law also prohibits the formation of conglomerates with a single parent company holding the majority of shares in several companies which together account for over 50 per cent of the market, or when two or three companies control over 75 per cent of the market.

Sanctions

Infringements of Law No 5/1999 can attract both administrative and criminal sanctions. To date however, the KPPU has never attempted to seek criminal penalties.

Administrative sanctions

The KPPU may impose a wide range of administrative sanctions, including fines up to 50 per cent of the relevant parties' net profits or up to 10 per cent of the relevant parties' turnover during the infringement period. The KPPU may also declare agreements to be void, award damages or order business actors to cease any practices found to infringe Law No 5/1999.

Criminal sanctions

The criminal courts can also impose a variety of sanctions, including criminal fines ranging from IDR1 billion (approx. US$70,500) to IDR100 billion (approx. US$7 million); imprisonment of individuals for up to five months (for certain violations including price fixing, resale price maintenance, closed agreements and price discrimination) or up to six months (for example, for an oligopoly, territory division, boycott, cartels and market control); disqualification orders for directors and commissioners for between two to five years; and orders revoking business licences.

Extraterritorial effect

An agreement made or conduct that occurred in a foreign country will be caught by Law No 5/1999 as long as it affects the Indonesian market. In that respect, there have been two cases where the KPPU has asserted jurisdiction over overseas tender participants who otherwise did not have any connection with Indonesia.

Enforcement regime

Public and private enforcement

The primary enforcement authority is the KPPU which has the power to investigate alleged violations and impose administrative sanctions. The KPPU also has powers to undertake market studies and review government policies to determine whether they are consistent with fair competition. Criminal courts can also impose sanctions at the request of the public prosecutor's office.

A relevant third party can submit a request for damages, during either the examination or the trial at the KPPU, or following the KPPU's decision. In the former case, the third party must volunteer to be examined as a witness first. In the latter, the request is submitted to the relevant commercial courts, using the KPPU's decision as the legal basis.

Leniency

There is no recognition of leniency in Law No 5/1999 or any KPPU implementing regulations.

1 In November 2020, the KPPU relaxed some of the enforcement rules to help the country's economy recover from the impact of the Covid-19 pandemic. As part of the relaxed rules, the post-merger notification deadline was doubled to 60 days after the deal becomes effective. Before relaxation, the deadline for submitting the notification obligation was 30 days. The regulation will be in force until it is repealed.

Investigation powers

To supervise the application of Law No 5/1999, the KPPU has been granted broad powers to proceed with investigations and adjudication in competition cases. The KPPU can start an investigation based on its independent regular market monitoring efforts and findings or information from third parties. In practice, this also covers requests for investigations from other government entities.

The KPPU is able to examine agreements, business activities and actions performed by business actors. This includes the power to summon witnesses of fact and expert witnesses, as well as to order disclosure of documents from private and government institutions.

The KPPU's powers of investigation do not extend to conducting raids on the premises of suspected infringers or other relevant persons.

Sanctions for non-compliance with the KPPU's investigations can lead to three months' imprisonment or fines from IDR1 billion (approx. US$70,500) to IDR3 billion (approx. US$211,500).

Recent enforcement trends

Continuing focus on bid-rigging

Since the entry into force of the law, the vast majority of decisions regarding violations of Law No 5/1999 related to bid-rigging conduct (242 out of 339 decisions as at end 2019). Other decisions concern cartels, abuses of dominance and mergers. In 2019, in line with its past enforcement practice, the KPPU mostly resolved cases that are related to bid-rigging. Out of the 19 decisions relating to cartel practices, 18 related to bid-rigging. The remaining decision relates to cartel practices in the importation and supply of food-grade industrial salt (which ultimately did not result in any fines being imposed).

Since the enactment of the Law No 5/1999, the KPPU has rarely initiated an investigation for cases related to vertical restraint prohibitions or abuses of dominance. In 2019, there was only one decision related to abuse of dominance, where the KPPU imposed a fine of IDR4.2 billion (approx. US$300,000) on the operator of a container terminal in the port of Maumere.

Multiple sanctions for non-compliance with merger notification requirements, leading to an increase of merger clearance procedures

On the merger front, the KPPU has recently increased its enforcement with regard to failure to notify transactions subject to clearance requirements under the Law No 5/1999. Out of the 32 merger decisions issued in 2019, 12 cases related to failure to notify transactions to the KPPU.

It is therefore no surprise that in 2019 a sharp increase in merger notifications was seen. 124 transactions were notified in 2019, an increase of 50 from the 74 transactions notified in 2018. Out the 124 notifications, 86 were made by Indonesian companies whereas the remaining 38 were made by foreign companies.

Increased focus on the digital economy

Following the KPPU's review of the digital economy in 2017, the KPPU has increasingly focused on this sector in recent years. In 2020, it imposed total fines of IDR 49 billion (approx. US$3.4 million) on Grab Indonesia and a partner leasing company as it considered that the preferential terms the parties had agreed were discriminatory and anticompetitive. The decision was overturned by the South Jakarta District Court. Following an appeal by the KPPU, the matter is now pending before the Supreme Court. In August 2019, the KPPU has hinted a possible investigation into the fintech industry which could become one of the industries to be monitored closely by the KPPU in the coming years.

Amendment of Law No 5/1999

Lastly, the recent Law No 11/2020 on Jobs Creation (known as the "Omnibus Law") has revised various provisions of Law No 5/1999, including the removal of the IDR 25 billion (approx. US$1.7 million) cap on administrative fines, the replacement of the District Court by commercial courts to hear appeals on the KPPU's antitrust decisions and the elimination of the additional criminal sanctions that could be imposed under Article 49 (i.e. revocation of licenses, prohibition on the violating party acting as the director or commissioner of a company, or suspension of business activity). How these changes will ultimately be implemented in practice will depend on the government institutions tasked with issuing the required implementing regulations within the coming months.

Key information

Relevant legislation

Law of the Republic of Indonesia No 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition

Competition Authority

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