

DOMINANCE

Indonesia



Dominance

Consulting editors

Patrick Bock, Henry Mostyn, Patrick Todd

Cleary Gottlieb Steen & Hamilton LLP

Quick reference guide enabling side-by-side comparison of local insights, including into the general legal framework and sector-specific rules, the definition of collective dominance, and relevance of dominant purchasers; abuse of dominance and related defences; specific forms of abuse, enforcement, sanctions, remedies and appeals; and current trends.

Generated 23 March 2023

The information contained in this report is indicative only. Law Business Research is not responsible for any actions (or lack thereof) taken as a result of relying on or in any way using information contained in this report and in no event shall be liable for any damages resulting from reliance on or use of this information. © Copyright 2006 - 2023 Law Business Research

Table of contents

GENERAL FRAMEWORK

- Legal framework
- Definition of dominance
- Purpose of the legislation
- Sector-specific dominance rules
- Exemptions from the dominance rules
- Transition from non-dominant to dominant
- Collective dominance
- Dominant purchasers
- Market definition and share-based dominance thresholds

ABUSE OF DOMINANCE

- Definition of abuse of dominance
- Exploitative and exclusionary practices
- Link between dominance and abuse
- Defences

SPECIFIC FORMS OF ABUSE

- Types of conduct

ENFORCEMENT PROCEEDINGS

- Enforcement authorities
- Sanctions and remedies
- Enforcement process
- Enforcement record
- Contractual consequences
- Private enforcement
- Damages
- Appeals

UNILATERAL CONDUCT

- Non-dominant firms

UPDATE AND TRENDS

- Forthcoming changes

Contributors

Indonesia



Chandrawati Dewi
cdewi@abnrlaw.com
ABNR



Gustaaf Reerink
greerink@abnrlaw.com
ABNR



Nina Cornelia Santoso
nsantoso@abnrlaw.com
ABNR



GENERAL FRAMEWORK

Legal framework

What is the legal framework in your jurisdiction covering the behaviour of dominant firms?

The behaviour of dominant undertakings is covered by Law No. 5/1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition, as amended by Government Regulation in Lieu of Law No. 2/2022 on Job Creation (the Indonesian Competition Law (ICL)). Only two articles of the ICL explicitly refer to dominant position: article 1(4), which defines the concept of dominant position; and article 25, which prohibits the abuse of dominant position. Other provisions specifically applicable to dominant undertakings include article 4 (oligopoly), article 13 (oligopsony), article 17 (monopoly), article 18 (monopsony), article 26 (interlocking directorship), article 27 (cross shareholding) and article 28 (merger control).

Further, the ICL contains several provisions that are not just applicable to undertakings that meet the dominance thresholds but to undertakings with market power, a concept that is broader than dominance.

Undertakings have market power if they can increase prices above the competition level, while still making a profit. They have market power either because they are dominant or hold a significant market share, or because special factors apply – namely, that they hold certain intellectual property rights or an exclusive right (licence); government regulations create a special position for them; they hold market power through a distribution network; they have financial support (eg, from a parent company); an essential facility exists; there is brand loyalty or consumer preference; or there are significant entry barriers.

Provisions that are applicable to undertakings with market power include article 6 (price discrimination), article 15 (closed agreements), article 19 (market control) and article 20 (predatory pricing), which overlap with article 25. Other provisions in which market power is a relevant element to determine a violation include article 11 (general cartel provision) and article 14 (vertical integration).

The Indonesian Competition Commission (KPPU) issued KPPU Regulation No. 6/2010 on Guidelines for the Application of Article 25 (Abuse of Dominant Position) (the Abuse of Dominance Guidelines). (Please note, the English translation erroneously states Regulation No. 7/2010, but the content is the same.) According to the Abuse of Dominance Guidelines, article 25 ICL should only be applied if (1) the abuse of dominant position is not covered by other articles of the ICL and (2) the abuse has a very significant impact on consumer welfare. It should be noted though that even after the introduction of the Abuse of Dominance Guidelines, if the KPPU charges an undertaking with violation of prohibitions under article 25, it would commonly also charge the undertaking with violation of prohibitions under other articles, typically article 17 (monopoly) and article 19 (market control).

Law stated - 01 February 2023

Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

Article 1(4) ICL defines 'dominant position' as a situation in which an undertaking has no meaningful competitors in the

relevant market in view of the market share that it holds, or the undertaking holds a higher position among competitors in the relevant market in view of financial capability, the ability to access supplies and sales, and the ability to adjust offer and demand of certain goods and services.

According to article 25(2) ICL, which should be read in conjunction with article 1(4), there is dominance if: (1) one undertaking controls 50 per cent or more of the market share on one type of good or service; or (2) two or three undertakings or groups of undertakings control 75 per cent or more of the market share for one type of good or service.

The above 50 per cent or 75 per cent market share thresholds are also referred to in or apply to other prohibitions under the ICL: article 4 (oligopoly), article 13 (oligopsony), article 17 (monopoly), article 18 (monopsony), article 26 (interlocking directorship), article 27 (cross shareholding) and article 28 (merger control). However, contrary to the aforementioned articles, the thresholds in article 25 ICL are not presumptions of dominance that can be rebutted: as soon as the thresholds are exceeded, dominance can be established, provided that the elements in the definition of 'dominant position' in article 1(4) ICL have also been fulfilled. In other words, article 25 can stipulate or exonerate companies as being dominant based on market share alone. However, abusive behaviour by undertakings that do not meet these market share thresholds can be – and, in practice, are – caught by other provisions in the ICL, such as article 19 (market control).

According to the Abuse of Dominance Guidelines, in assessing a dominant position under article 25 ICL, the KPPU assesses whether there are certain barriers that can influence an undertaking's independence in dealing with competition. Three types of barriers are distinguished (ie, of current competitors, of potential competitors and others (eg, of consumers or suppliers)).

If the barriers are relatively insignificant, the dominant position of the undertaking is considered strong. Barriers of current competitors are measured by looking at the market share of the dominant undertaking and its competitors. The KPPU also looks at the barrier of buying power of consumers, as strong buying power of consumers can prevent an undertaking with a dominant position from abusing its position, although it has a high market share.

Barriers to potential competitors are determined by looking at entry barriers. High entry barriers can protect a dominant undertaking from potential competition. The KPPU analyses entry barriers through quantitative and qualitative research methods, case by case.

Law stated - 01 February 2023

Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The ICL has objectives to:

- promote public interest and enhance the efficiency of national economics;
- create a sound business environment ensuring equal opportunities for all undertakings;
- prevent monopolistic practices or unfair business, or both; and
- create effectiveness and efficiency in business.

The Abuse of Dominance Guidelines weigh on both the economic purpose (consumer welfare) and interests of potential and existing competitors (prevent unfair practices) in analysing an abuse of dominant position.

Law stated - 01 February 2023

Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

Specific dominance rules, as distinct from the generally applicable dominance provisions, apply to certain sectors, including telecommunications, postal services, broadcasting and transport. However, most of these rules do not differ substantially from the general dominance rules under the ICL and are complementary. They are also not always clearly enforceable; instead, they express an intention of the lawmaker to create healthy competition in the relevant sectors.

Law stated - 01 February 2023

Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

The dominance rules apply to undertakings. Under article 1(5) ICL, an undertaking is defined as an individual or business entity, either a legal or non-legal entity, established and domiciled or carrying out activities within the Republic of Indonesia, either individually or jointly, by virtue of an agreement to carry out various business activities in the economic field. An undertaking can be a group of undertakings that jointly form a single economic entity.

According to article 50(a) ICL, behaviour aimed at implementing prevailing laws and regulations is exempt from the rules (including dominance rules) under the ICL. Further, according to article 51 ICL, a monopoly or concentration of activities related to the production and marketing of goods and services that dominate the lives of many people, as well as branches of production important for the state, is regulated by laws enacted by the parliament and run by state-owned enterprises, bodies or institutions established or appointed by the government. This means that state-owned enterprises, bodies or institutions established or appointed by the government may be exempt from dominance rules under the ICL, to the extent their behaviour is aimed at implementing prevailing laws and regulations.

For the avoidance of doubt, many state-owned enterprises have not been established for the above purpose and are not, therefore, exempt from the prohibitions under the ICL. The KPPU has also imposed sanctions on state-owned enterprises, in many cases for certain types of unilateral behaviour.

In addition, article 50(b) to (g) ICL list different types of agreements, such as intellectual property, agency, and research and development agreements, that are exempted.

Finally, according to article 50(h) to (i) ICL, small businesses and certain cooperatives are exempt from the rules, including dominance rules, under the ICL.

Law stated - 01 February 2023

Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

The ICL not only provides for the behaviour of undertakings that are already dominant, but also non-dominant companies attempting to become dominant. However, the latter category is not covered by article 25 (abuse of dominant position), but instead by one of the other articles in the ICL that are applicable to undertakings that do not necessarily meet the dominance thresholds (ie, article 6 (price discrimination), article 11 (general cartel provision), article 14 (vertical integration), article 15 (closed agreements), article 19 (market control) and article 20 (predatory pricing)).

Law stated - 01 February 2023

Collective dominance

Is collective dominance covered by the legislation? How is it defined in the legislation and case law?

Two or three undertakings or groups of undertakings can be collectively dominant if they control 75 per cent or more of the market share of one type of good or service.

Law stated - 01 February 2023

Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

The ICL applies to dominant undertakings, which may be dominant purchasers or dominant suppliers. There are no differences between application of the law to dominant purchasers and dominant suppliers.

Law stated - 01 February 2023

Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

According to KPPU Regulation No. 3/2009 on Guidelines for the Application of Article 1(10) on Relevant Markets (the Relevant Market Guidelines), the examination of an alleged violation of Indonesian competition laws generally begins with a determination of the product and the relevant market. Once the relevant market has been determined, clear information can be obtained on the size of the market, undertakings' involvement in the market and the anticompetitive impact of an alleged violation of the Indonesian competition laws.

Under the Relevant Market Guidelines, markets are generally seen from two perspectives: the product market and the geographical market. The product market covers the markets in which the relevant parties run their business operation. According to the Relevant Market Guidelines, the product market is analysed as competition for certain products, in addition to other products that may be substitutes of the original products, with the following elements:

- substitution of consumer demand (demand-side substitution), whose determining factor is consumer preference, where the main indicators are price, product characteristics and product usability; and
- producer substitution (supply-side substitution), indicated by transfer of production capacity for substitute goods.

To determine the geographical market, the KPPU looks at transportation costs, travel time, tariffs and regulations that may restrict trade between cities and regions. The scope of the geographical market is generally an area in which the conditions of competition are sufficiently homogeneous or in which an undertaking could increase its product price without attracting new entrants or without significantly losing consumers who could switch to other undertakings outside this area.

In practice, the KPPU defines markets case by case. This means that the authority is not always consistent in its definition of markets, in some cases defining the same market more narrowly in one instance than in another. Sometimes, the KPPU follows the definition of markets presented in applicable laws and regulations, particularly if the market concerned is a regulated market, and different licences are required for different activities. Although not made explicit in its decisions, the KPPU seems quite willing to consider and follow market definitions used by other competition authorities (eg, the European Commission or competition authorities in the region).

Market-share thresholds are cited in the ICL at which an undertaking will be considered dominant – in other words, (1) one undertaking controls 50 per cent or more of the market share for one type of good or service; or (2) two or three undertakings or groups of undertakings control 75 per cent or more of the market share for one type of good or service. In article 25 (abuse of dominant position), these thresholds are not presumptions of dominance that can be rebutted: as soon as the thresholds are exceeded, dominance can be established, provided that the elements in the definition of dominant position in article 1(4) have also been fulfilled.

We understand that the KPPU is currently updating the Relevant Market Guidelines, mainly in response to Indonesia's fast growing digital economy. The updated Relevant Market Guidelines are expected to be published this year.

Law stated - 01 February 2023

ABUSE OF DOMINANCE

Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

Article 25 of the Indonesian Competition Law (ICL) defines abuse of dominance in specific terms. Undertakings are prohibited from taking advantage of their dominant position, either directly or indirectly, to: (1) impose trade terms with the intention to prevent or hamper consumers from acquiring competitive goods or services, in price or quality; (2) restrict the market and technology development; or (3) hamper other undertakings with potential to become their competitors to enter the relevant market. However, other types of abusive behaviour can be caught by other provisions in the ICL.

Article 25 is a per se illegal prohibition (it follows a form-based approach). Therefore, if the required elements have been fulfilled, the Indonesian Competition Commission (KPPU) can conclude that the alleged violation of the article has

been proven legally and convincingly. However, the KPPU can – and, in practice, often does – calculate and present the impact of the abuse of dominant position to strengthen evidence of the violation and, if the violation has been proven, determine the sanctions.

Law stated - 01 February 2023

Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

The concept of abuse covers both exploitative and exclusionary practices. Conceptually, the Abuse of Dominance Guidelines distinguishes between practices that harm consumers or suppliers, on the one hand, and exclusionary practices, on the other. Consumer harm generally manifests itself in excessive high prices. Exclusionary practices reduce or bring an end to competition from existing competitors or potential competitors.

Law stated - 01 February 2023

Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

The wording of article 25 ICL indicates that there must be a causal link between dominance and abuse.

Law stated - 01 February 2023

Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

According to the Abuse of Dominance Guidelines, undertakings cannot be said to abuse their dominant position if their conduct is related to increasing efficiency, such as innovation, economies of scale and economies of scope.

Law stated - 01 February 2023

SPECIFIC FORMS OF ABUSE

Types of conduct

Rebate schemes

Rebate schemes could be abusive if they result in price discrimination – namely, the determination of different prices for the same goods or services at relatively the same time and conditions for different undertakings and without objective justification (articles 6 and 19(d) Indonesian Competition Law (ICL)), or predatory pricing (articles 7 and 20 ICL).

Law stated - 01 February 2023

Tying and bundling

Tying and bundling is covered by article 15(2) ICL, which applies to undertakings with market power. A tying obligation is prohibited if:

- it substantially or potentially reduces the volume of trade;
- obligations are imposed by undertakings that have market power (greater than 10 per cent market share) and the market power can increase due to the exclusive arrangements;
- the tying products are different from the main product; and
- the tying undertaking has significant market power to force customers to purchase the tying products.

Guidelines for the interpretation of the tying and bundling prohibition can be found in KPPU Regulation No. 5/2011 on Guidelines for the Application of Article 15 (Closed Agreements) (the Closed Agreements Guidelines).

Law stated - 01 February 2023

Exclusive dealing

Exclusive dealing as an abuse of dominant position is covered by article 25(1)(b) ICL, which relates to the restriction of market and technological development. This type of abuse is also prohibited for undertakings that are not dominant but have market power (ie, under article 15 (1) ICL).

Exclusive arrangements are prohibited if they: (1) substantially or potentially reduce the volume of trade, and (2) have been entered into by undertakings that have market power (greater than 10 per cent market share) and the market power can increase due to the exclusive arrangements.

However, according to the Closed Agreements Guidelines, and as can be seen in practice, the Indonesian Competition Commission (KPPU) and the courts will apply an 'effects-based approach' (in Indonesia, usually referred to as a 'rule of reason approach') and examine whether closed agreements result in unhealthy business competition.

Law stated - 01 February 2023

Predatory pricing

Predatory pricing is covered by article 20 ICL, which applies to undertakings with market power. article 20 prohibits supply of goods or services by selling at a loss or determining a very low price with the intention of removing or ending the business of a competitor in the market concerned, thus causing the occurrence of monopolistic practices or unhealthy business competition.

This means that the KPPU and the courts must apply an effects-based approach. Guidelines for the interpretation of the predatory pricing prohibition can be found in KPPU Regulation No. 5/2011 on Guidelines for the Application of Article 20 (Predatory Pricing) (the Predatory Pricing Guidelines).

Under the Predatory Pricing Guidelines, recoupment is only one of the preliminary tests that can be applied by the KPPU in assessing a predatory pricing case. The test is not used to prove that an undertaking is carrying out predatory pricing, but to examine whether the undertaking carrying out this practice has succeeded in achieving its goal, which is to push its competitors out of the market and prevent other competitors from entering the market. This test then also looks at whether predatory undertakings will be able to make a profit that exceeds the competitive advantage to cover the losses they suffer while carrying out predatory practices. If the recoupment test shows that the undertaking did indeed increase the price to cover its losses, then a price cost test must be carried out to prove that the undertaking is engaged in predatory pricing.

Law stated - 01 February 2023

Price or margin squeezes

Price or margin squeezes may be covered by article 14 ICL, which prohibits undertakings from entering into an agreement with another undertaking to control the production of goods or the provision of services included in the production chain of certain related goods or services where each production chain constitutes the result of processing or further processing, directly or indirectly.

Guidelines on the interpretation of the vertical integration prohibition can be found in KPPU Regulation No. 5/2010 on Guidelines for the Application of Article 14 (Vertical Integration) .

Law stated - 01 February 2023

Refusals to deal and denied access to essential facilities

Refusal to deal, as an abuse of dominant position, is covered by article 25(1)(a) ICL, which relates to the determination of trade terms intended to prevent and to obstruct consumers from obtaining competitive goods or services, both from the aspect of price and quality.

Denied access to essential facilities as an abuse of dominant position is covered by article 25(1)(b) ICL, which relates to the restriction of market and technological development.

Law stated - 01 February 2023

Predatory product design or a failure to disclose new technology

Failure to disclose new technology as an abuse of dominant position is covered by article 25(1)(b) ICL, which relates to the restriction of market and technological development. Market-limiting behaviour and technology development can be categorised as abuse when the dominant undertaking with a patent on technology refuses (unfairly or exceeds the limits of provisions on intellectual property rights) to grant a licence to another company.

Law stated - 01 February 2023

Price discrimination

Price discrimination as an abuse of dominant position is covered by article 25(1)(b) ICL, which relates to the restriction

of market and technological development. Price discrimination by non-dominant undertakings that do have market power is covered by article 6 ICL (for agreements that create price discrimination) and article 19(d) ICL (for conduct that results in price discrimination).

Guidelines on the interpretation of the price discrimination prohibition can be found in KPPU Regulation No. 3/2011 on Guidelines for the Application of Article 19(d) (Discriminatory Practice) .

Law stated - 01 February 2023

Exploitative prices or terms of supply

An undertaking abuses its dominant position if the position is directly or indirectly used to determine trade conditions with the objective to prevent and to obstruct consumers from obtaining competitive goods or services, from the aspects of price and quality.

Law stated - 01 February 2023

Abuse of administrative or government process

An abuse of an administrative or government process is not specifically considered abusive under the ICL.

Law stated - 01 February 2023

Mergers and acquisitions as exclusionary practices

Government Regulation No. 57/2010 on the Merger or Consolidation of Business Entities and Acquisition of Shares in a Company that May Result in Monopolistic Practices and Unfair Business Competition prohibits undertakings from carrying out mergers, consolidations or acquisitions that may result in monopolistic practices or unfair business competition, by way of, among other things, abuse of dominant position.

In assessing a merger or acquisition case, the KPPU will consider the following aspects: market concentration; entry barriers; potential anticompetitive behaviour; efficiency; and bankruptcy (the KPPU would assess a notifiable transaction more positively if it would prevent the target from going bankrupt).

Further details on the assessment can be found in KPPU Regulation No. 3/2019 on the Assessment of the Merger or Consolidation of Business Entities and Acquisition of Shares in a Company that May Result in Monopolistic Practices and/or Unfair Business Competition and KPPU Guidelines on the Assessment of a Merger, Consolidation or Acquisitions.

Law stated - 01 February 2023

Other abuses

Vertical restraints, such as territorial restrictions or territorial confinements, where manufacturers are the dominant undertakings, specifying certain geographic areas that can be served by certain dealers or retailers, are also a form of

market restriction that could amount to an abuse of dominance.

The same applies to selective distribution and exclusivity from manufacturing that can limit the number of retailers in a certain area – for example, distributor A agrees to enter into an agreement only with retailer A to market the product; as a result, retailer A exclusively sells manufactured products from distributor A.

Another selective policy could take the form of certain standards that are not related to the quality of goods or customer satisfaction. Retailers that do not meet these standards are not allowed to sell manufactured products, so this will tend to limit the number of retailers and increase retailer costs.

The division of marketing areas aims to avoid or reduce competition at the retail level (intra-brand competition). By means of these various limitations, manufacturers that are dominant may enjoy excessive profit.

Law stated - 01 February 2023

ENFORCEMENT PROCEEDINGS

Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The Indonesian Competition Commission (KPPU) is responsible for enforcement of the dominance rules. It is a quasi-judicial body responsible for enforcement of the dominance rules. The Indonesian Competition Law (ICL) grants authority to the KPPU to conduct investigations or examinations of cases of alleged monopolistic practices or unfair business competition reported by the public or by undertakings, or based on their own initiative, and subsequently issue decisions and impose sanctions.

Law stated - 01 February 2023

Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

Sanctions under the ICL apply to undertakings. An undertaking may be an individual or business entity, either a legal or non-legal entity, established and domiciled or carrying out activities within the Republic of Indonesia, either individually or jointly, by virtue of an agreement to carry out various business activities in the economic field. An undertaking can be a group of undertakings that jointly form a single economic entity.

Relevant administrative sanctions introduced by the ICL include :

- decisions to cancel agreements (eg, as referred to in articles 6 (price discrimination), 11 (general cartel prohibition), 13 (oligopsony) and 15 (closed agreements));
- orders to terminate the vertical integration as referred to in article 14;
- orders to cease activities proven to have involved monopolistic practices or resulted in unfair business competition in the relevant market or other public harm;

- orders to cease the abuse of dominant position;
- orders to pay damages; and
- orders to pay fines of at least 1 billion rupiah.

Government Regulation No. 44/2021 on Implementation of Prohibition against Monopolistic Practices and Unfair Business Competition and KPPU Regulation No. 2/2021 on Guidelines for Imposing Administrative Fines further determine that the KPPU can impose a base penalty of 1 billion rupiah, plus a certain amount.

The final calculation of fines is subject to the following limits:

- up to 50 per cent of the net profits earned by the undertaking in the relevant market, during the period of the violation; or
- up to 10 per cent of the total sales in the relevant market, during the period of the violation.

The amount calculated is based on:

- negative impact caused by the violation;
- duration of the violation;
- mitigating factors;
- aggravating factors; and
- the ability of the undertaking to pay.

According to Government Regulation in Lieu of Law No. 2/2022, only a refusal to cooperate with a KPPU investigation, or to disclose significant information to a KPPU investigation, would be subject to a criminal sanction, punishable by a maximum fine of 5 billion rupiah or maximum imprisonment of one year (should the fine not be paid), while other prohibited acts and agreements would be subject only to administrative sanctions.

Law stated - 01 February 2023

Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The KPPU can impose sanctions directly.

Law stated - 01 February 2023

Enforcement record

What is the recent enforcement record in your jurisdiction?

The KPPU has imposed sanctions for breach of article 25 ICL in at least six cases: case No. 03/KPPU-L-I/2000 (Indomaret); case No. 04/KPPU-I/2003 (JICT); case No. 06/KPPU-L/2004 (ABC Batteries); case No. 09/KPPU-L/2009 (Carrefour II); case No. 17/KPPU-I/2010 (Pfizer Group); and case No. 14/KPPU-L/2015 (Forisa Nusapersada).

All cases concerned instances of abuse of dominant position through the use of trade terms or by hampering undertakings that have the potential to become a competitor and enter the relevant market, resulting in the reduction of competition with existing or potential competitors or intra-brand competition. The KPPU did not impose sanctions for restricting the market and technology development in any of the cases.

On 15 September 2022, the KPPU issued a press release that it had initiated an investigation in connection with the alleged violation of, among others, article 25 ICL, against Google and its subsidiaries in Indonesia. In the release, the KPPU mentioned that the investigation was made at its own initiative, focusing on Google's policy to require the use of Google Play Billing (GPB) (a method for purchase and payment for digital products and services) on various applications downloaded via Google Play Store, effective as of 1 June 2022.

According to the KPPU, Google charges a service fee of 15 to 30 per cent to developers for each purchase via their applications, without allowing other alternative payment methods on Google Play Store. Failure to comply with this requirement results in either removal of the application from Google Play Store or restriction on updates of the application, which would ultimately result in the applications losing their customers.

From its initial study, the KPPU found that Google Play Store has a 93 per cent share in the market for application distribution in Indonesia. Other players include Galaxy Store, Mi Store, and Huawei App Gallery, but the KPPU does not regard them as 'perfect substitutes' for Google Play Store, as the majority of end-users/consumers in Indonesia still use Google Play Store to download applications. The KPPU suspects that Google's mandatory GBP policy is a form of abuse of market dominance, given Google Play Store's dominant market share in Indonesia.

In addition, the KPPU suspects Google for having carried out tying and discriminatory practices.

The investigation is still ongoing – the KPPU stated in the press release that the investigation would be carried out for a period of 60 business days (as of the date of the Commission Meeting on 14 September 2022, at which the Commission decided to initiate the investigation). At this stage, no further public information on the status of the investigation is available.

Law stated - 01 February 2023

Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

The KPPU may invalidate a contract or a clause in a contract involving a dominant undertaking if the contract or clause in the contract is incompliant with the ICL.

Law stated - 01 February 2023

Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

Private parties may file a report on alleged unfair business practices, including abuse of dominance, based on which the KPPU may launch an investigation against the reported undertakings. Upon receiving a report from private parties on an alleged violation of the ICL, the KPPU will examine whether the report meets the criteria for an investigation. These criteria are as follows: the report satisfies the administrative requirements under KPPU Regulation No. 1/2019 on Procedure for Case Handling of Monopolistic Practices and Unfair Business Competition ; it has been substantiated by at least one item of evidence; the reported offence can be regarded as a prohibited act or agreement under the ICL; and the KPPU has exclusive jurisdiction to investigate the reported allegation.

Further, private parties that have suffered losses resulting from an anti-competition offence may claim damages. First, they claim damages based on a decision of the KPPU in which it explicitly orders the undertaking violating the ICL to pay compensation. If the KPPU does not order the payment of compensation, private parties that have suffered losses resulting from an anti-competition offence may file a claim under article 1365 of the Indonesian Civil Code (which prohibits any party from committing an unlawful act that causes loss to another party) with the general district court.

It should be noted that a recent court decision seems to imply that a damages claim must always be based on a KPPU order to pay damages, not on an unlawful act claim under article 1365 of the Indonesian Civil Code: in September 2019, a representative of consumers submitted a claim to the District Court of Central Jakarta following the sanctions imposed by the KPPU against motorcycle manufacturers for cartel practices. However, in its decision on 7 July 2020, the District Court of Central Jakarta rejected the claim, arguing that it was not competent to handle the case as the KPPU had exclusive authority to impose sanctions, including an order to pay damages. The consumers' representative appealed the decision and it is unclear whether it will be upheld.

In any event, the doctrine of precedent does not exist in Indonesia and each case must be determined on its own facts and merits, although consideration may be given to similar, previously determined cases and academic theories. Accordingly, another court may reach a different decision in a similar case in the future.

Law stated - 01 February 2023

Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Similar to other private parties, companies harmed by abusive practices would, in principle, have a claim for damages. However, no company appears to have submitted a claim for damages to the KPPU or an Indonesian court.

Law stated - 01 February 2023

Appeals

To what court may authority decisions finding an abuse be appealed?

KPPU decisions that find abuse may be appealed to the Commercial Court, which may review the facts and the law. A losing party may also petition for cassation and, under certain circumstances, judicial review to the Supreme Court. The Supreme Court may review the law.

Law stated - 01 February 2023

UNILATERAL CONDUCT

Non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

Article 19 (market control) and article 20 (predatory pricing) of the Indonesian Competition Law, which overlap with article 25, set out rules applying to the unilateral conduct of undertakings with market power, a concept that is broader than dominance. Undertakings have market power if they can increase prices above a competitive level and still make a profit.

Undertakings have market power because they are dominant or hold a significant market share, or because special factors apply (ie, they hold certain intellectual property rights, an exclusive right, government regulations create a special position or they hold market power through a distribution network).

Law stated - 01 February 2023

UPDATE AND TRENDS

Forthcoming changes

Are changes expected to the legislation or other measures that will have an impact on this area in the near future? Are there shifts of emphasis in the enforcement practice?

On 30 December 2022, the President of the Republic of Indonesia issued Government Regulation in Lieu of Law No. 2/2022, which revokes the previously enacted Law No. 11 of 2020 on Job Creation (Job Creation Law), effective as of the date of the regulation coming into force. However, the Government Regulation is still pending approval from Parliament, which must be obtained within a specified period. Failure to obtain approval within this period means the regulation will be invalid. As a consequence of the enactment of the Government Regulation, all implementing regulations of the laws amended by the regulation as well as all implementing regulations of the Job Creation Law (including Government Regulation No. 44/2021, which was issued after the introduction of Job Creation Law) will remain in force, insofar as it does not conflict with the Government Regulation.

The Indonesian Competition Commission (KPPU) has recently named four priorities for 2023: (1) strengthening the supervision of partnerships for micro, small and medium scale enterprises (MSMEs); (2) increasing the compliance of undertakings; (3) development of digital systems to support supervision; and (4) simplification of procedural law or other rules relating to the public.

From the KPPU's press release and news articles, it appears that the Google investigation is also seen as one of KPPU's attempts to protect SMEs and support local content, while also taking into account the rapid development and significance of the digital economy. Thus, in the near future, we expect enforcement to focus on dominant/big players active in the digital market.

As regards the digital market, the KPPU is still in a learning phase; therefore, there is still regulatory uncertainty, particularly on the definition of relevant markets. The KPPU has so far carried out six studies on the digital economy, and as mentioned above, is currently revising its guidelines on relevant markets, which will include digital economy-related markets. The guidelines are expected to be issued this year. Other challenges from this uncharted territory remain, particularly from algorithms (establishing an agreement based on tacit collusion) and artificial intelligence (enforcement on AI, as there is complete isolation of the 'human' element from algorithms making strategic decisions).

In addition, there will be an election of new KPPU commissioners this quarter of 2023, who will start office in the second quarter of 2023. The new commissioners may overhaul current KPPU policies.

Last, the plans to amend the current ICL have halted. The bill is included in the five-year legislative program (2020-2024), but Parliament has not set the bill as a priority for legislative deliberation this year.

Law stated - 01 February 2023

Jurisdictions

	Australia	Gilbert + Tobin
	Austria	Schima Mayer Starlinger
	Belgium	Cleary Gottlieb Steen & Hamilton LLP
	Bulgaria	Wolf Theiss
	Canada	Baker McKenzie
	China	DeHeng Law Offices
	Denmark	Bruun & Hjejle
	Ecuador	Robalino
	European Union	Cleary Gottlieb Steen & Hamilton LLP
	France	UGGC Avocats
	Germany	Cleary Gottlieb Steen & Hamilton LLP
	Greece	Nikolinakos & Partners Law Firm
	Hong Kong	Eversheds Sutherland (International) LLP
	India	Shardul Amarchand Mangaldas & Co
	Indonesia	ABNR
	Ireland	Matheson LLP
	Italy	Rucellai & Raffaelli
	Japan	Anderson Mōri & Tomotsune
	Morocco	UGGC Avocats
	Norway	Advokatfirmaet Thommessen AS
	Portugal	Gomez-Acebo & Pombo Abogados
	Saudi Arabia	Al Tamimi & Company
	Singapore	Drew & Napier LLC
	Slovenia	Odvetniska druzba Zdolsek
	South Korea	Yoon & Yang LLC

 Switzerland	CORE Attorneys Ltd
 Turkey	ELIG Gurkaynak Attorneys-at-Law
 United Kingdom	Cleary Gottlieb Steen & Hamilton LLP
 USA	Cleary Gottlieb Steen & Hamilton LLP