ANTIMONOPOLY & UNILATERAL CONDUCT 2020 KNOW HOW

Indonesia

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GCR INSIGHT

Overview

1 What is the legal framework governing unilateral conduct by companies with market power?

Unilateral conduct by companies with dominant position is governed by article 25 of Law No. 5/1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition (the Indonesian Competition Law or ICL). The Indonesian Competition Commission (Komisi Pengawas Persaingan Usaha, KPPU) has also issued guidelines relating to abuse of dominance (ie, KPPU Regulation No. 6/2010 on Abuse of Dominant Position (article 25 ICL) (the Abuse of Dominance Guidelines)). Other articles that cover unilateral conduct by companies with a dominant position or at least market power include article 6 (price discrimination), article 15 (closed agreements), article 17 (monopoly), article 18 (monopsony), article 19 (market control) and article 20 (predatory pricing).

2 What body or bodies have the power to investigate and sanction abuses of market power?

The KPPU has the authority to investigate and sanction abuses of market power. The KPPU's authority is limited to administrative investigation and sanctioning. For criminal investigation and sanctioning, the Police and Public Prosecutor's Office and courts are the competent authorities.

Monopoly power

3 What role does market definition play in market power assessment?

Market definition serves as a starting point to assess market power and the effect of certain agreements or conduct on business competition, particularly in case of abuse of dominant position (article 25 ICL). Market definition is of less importance, but still relevant (see, for instance, question 35) in case of unilateral conduct by companies covered by other articles of the ICL, such as article 6 (price discrimination), article 15 (closed agreements), article 19 (market control), and article 20 (predatory pricing), where the focus is more on behaviour.

4 What is the approach to market definition?

The KPPU defines a market by distinguishing product and geographical markets. The product market is defined by looking at demand side substitution and supply side substitution, which can be measured through consumer preference analysis by using the parameters of price, character and use (function) of product as proxies. In determining the geographical market, the KPPU considers factors that determine the availability of a product, including company policy, transportation cost, travel time, tariffs and regulations that may restrict trade between certain regions. Further details on the KPPU's approach to market definition can be found in KPPU Regulation No. 3/2009 on Guidelines for the Interpretation of article 1 section 10 on Relevant Market Definition (the Relevant Market Definition Guidelines). In practice, the KPPU concludes in most cases that the geographical market is on the national level. The geographical market for online business is always considered national.

5 How is market power or monopoly power defined?

Market power is defined as the ability of an undertaking to increase prices above the competition level, while still making a profit. The ability to increase prices shows that an undertaking can act independently from its competitors. Market power amounts to dominance if an undertaking has no substantial competitors in the relevant market or is in the strongest position of its competitors in the relevant market, as judged by its financial capacity, access to sales and ability to adjust the supply or demand levels for certain products or services.

In addition, it should control 50 per cent or more of the market share of a certain type of products or services or two or three undertakings control or a group of undertakings controls 75 per cent or more of the market share of a certain type of product or service.

6 What is the test for finding of monopoly power?

According to the Abuse of Dominance Guidelines, in assessing a dominant position, the KPPU will determine whether there are certain barriers that can influence an undertaking's conduct in dealing with competition. Three types of barriers are distinguished (ie, barriers of current competitors, barriers of potential competitors and other barriers, 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 shares of the dominant undertaking and its competitors. The KPPU assumes a positive correlation between market share and market power. Barriers of 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, on a case-by-case basis. Other barriers that the KPPU looks at include buying power of consumers. Strong buying power of consumers can prevent an undertaking with a dominant position from abusing its position, although it has a high market share.

7 Is this test set out in statute or case law?

This test is set out in the Abuse of Dominance Guidelines.

8 What role do market shares play in the assessment of monopoly power?

Market share is one of the elements to determine dominance, particularly in abuse of dominant position cases. See questions 5 and 6.

9 Are there defined market share thresholds for a presumption of monopoly power?

As mentioned before, in abuse of dominant position cases, an undertaking can be deemed to hold a dominant position if it controls 50 per cent or more of the market share of a certain type of product or service or two or three undertakings control or a group of undertakings controls 75 per cent or more of the market share of a certain type of product or service.

If an undertaking holds 100 per cent market share and is the only player in the relevant market, the abuse of market position prohibition should not be applicable (see KPPU case No. 03/KPPU-L/2004 on PT Pura Nusapersada, KPPU case No. 05/KPPU-I/2005 on PT Bursa Efek Jakarta, KPPU case No. 65/KPPU-L/2008 on PT (Persero) Angkasa Pura I) and other prohibitions may become relevant.

However, the KPPU has not always been consistent in its approach: in KPPU case No. 22/KPPU-L/2007 on PT Angkasa Pura I (Persero), the KPPU concluded that PT Angkasa Pura I (Persero) had a dominant position, although it held 100 per cent market share and was the only player in the relevant market.

10 How easily are presumptions rebutted?

In abuse of dominant position cases, an undertaking can only be deemed dominant if the market share thresholds are met. However, as mentioned before, other conditions should also be fulfilled (ie, the undertaking should have no substantial competitors in the relevant market or be in the strongest position of its competitors in the relevant market, as assessed by its financial capacity, access to sales, and ability to adjust the supply or demand levels for certain products or services).

11 Are there cases where companies with high shares have been found not to exercise monopoly power?

We are not aware of abuse of dominant position cases where companies controlling 50 per cent or more of the market share of a certain type of products or services individually or 75 per cent with one or two other undertakings that have been found not to exercise monopoly power. In practice we see that undertakings meeting the market share thresholds are deemed to be dominant, without the KPPU or courts explicitly assessing whether the other conditions as referred to in the answer to question 10 have been fulfilled.

12 What are the lowest shares with which companies have been found to exercise monopoly power?

Market power is not sufficient to establish that an undertaking has a dominant position (see for instance, KPPU case No. 02/KPPU-L/2005 on PT Carrefour Indonesia). The lowest market shares with which undertakings have been found to have abused their dominant position is just over 50 per cent. See, for instance, KPPU case No. 09/KPPU-L/2009 on PT Carrefour Indonesia, which held a market share of 57.99 per cent. Sometimes the exact market share is not established, but it is clear that the relevant undertakings have a market share of more than 50 per cent. See, for instance, KPPU case No. 11/KPPU-L/2008 on PT Adhya Tirta Batam, and KPPU case No. 17/KPPU-I/2010 on Pfizer group companies.

In many cases, the market shares were far above 50 per cent. See, for instance, KPPU case No. 04/KPPU-I/2003 on PT Jakarta International Container Terminal and KSO Terminal Petikemas Koja, which held a joint market share of 94 per cent, KPPU case No. 06/KPPU-L/2004 on PT Arta Boga Cemerlang, which held a market share of 89–91 per cent, KPPU case No. 14/KPPU-L/2015 on PT Forisa Nusapersada, which held a market share of 92 per cent, and KPPU case No. 10/KPPU- I/2016 on PT Telekomunikasi Indonesia (Persero) Tbk, which held a market share of 99 per cent (but was not deemed to abuse its dominant position).

13 How important are barriers to entry and expansion for the assessment of monopoly power?

As mentioned before, in assessing a dominant position, the KPPU will determine whether there are certain barriers that can influence an undertaking's conduct in dealing with competition. Three types of barriers are distinguished, ie barriers of current competitors, barriers of potential competitors, and other barriers, eg of consumers or suppliers. Barriers of potential competitors are determined by looking at entry barriers. In KPPU case No. 14/KPPU-L/2015 on PT Forisa Nusapersada, the KPPU refers to three types of entry barriers: legal, factual and strategic entry barriers. High entry barriers can protect a dominant undertaking from potential competition.

14 Can the lack of entry barriers negate a finding of monopoly power?

In theory yes, but we are not aware of any cases in which a lack of entry barriers negated a finding of dominant position.

15 What kind of barriers to entry are typically considered in the analysis?

As mentioned before, the KPPU distinguishes three types of barriers (ie, barriers of current competitors, barriers of potential competitors, and other barriers, eg of consumers or suppliers). Barriers of current competitors are measured by looking at the market shares of the dominant undertaking and its competitors. The KPPU assumes a positive correlation between market share and market power. Barriers of potential competitors are determined by looking at entry barriers. High entry barriers can protect a dominant undertaking from potential competition. Other barriers that the KPPU will look at include buying power of consumers. Strong buying power of consumers can prevent an undertaking with a dominant position from abusing its position, although it has a high market share.

16 Can countervailing buyer power negate a finding of monopoly power?

In theory yes, but we are not aware of any cases in which countervailing buyer power negated a finding of dominant position.

17 What if consumers can easily switch between suppliers?

The Abuse of Dominance Guidelines do not mention this circumstance as a relevant factor to determine abuse of dominant position. We are also not aware of any cases in which this circumstance has been considered.

18 Are there any other factors that the regulator considers in its assessment of monopoly power?

The Abuse of Dominance Guidelines do not mention factors that the KPPU considers in its assessment of dominant position other than those mentioned before. We are also not aware of any cases in which other factors have been considered. Social obligations may be taken into consideration by the KPPU when determining fines though (see question 48).

19 Are any entities or sectors exempt from the antimonopoly regime?

Small businesses and certain cooperatives are exempt from the antimonopoly regime (article 50(h)-(i) ICL). In addition, state-owned enterprises and other bodies and entities that have been established and appointed by the government can hold a monopolistic position or concentrate activities if related to the production or marketing of products and services that affect the livelihood of society at large as well as production units that are of strategic importance to the state as regulated by law (article 51 ICL).

For the avoidance of doubt, many state-owned enterprises have not been established for such purpose and are, therefore, not 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 conduct (see KPPU case No. 1/KPPU-L/2004 on PT (Persero) Pelabuhan Indonesia I, KPPU case No. 22/KPPU-L/2005 on PT Perusahaan Gas Negara (Persero) Tbk, KPPU case No. 2/KPPU-I-2004, and KPPU case No. 22/KPPU-I-2007 on PT Angkasa Pura I, to name but a few).

20 Can companies be deemed to hold collective monopoly power?

Yes, two or three undertakings or a group of undertakings can be dominant if they control or 75 per cent or more of the market share of a certain type of product or service.

21 Can the exercise of joint monopoly power or tacit oligopolistic collusion be treated as an infringement?

Yes, joint dominant position can be treated as an infringement, particularly where undertakings apply similar strategies and policies in the same market.

22 Has the competition authority published guidance on how it defines markets and assesses market power?

Yes, the KPPU has issued KPPU Regulation No. 3/2009 on Relevant Market Definition Guidelines, which gives guidance on how it defines markets. In addition, the Abuse of Dominance Guidelines give guidance for the assessment of market power.

Abuse of monopoly power

23 Is there a general definition for what constitutes abusive conduct? What does it entail?

According to the Abuse of Dominance Guidelines, abuse of dominant position occurs where the conduct of the dominant undertaking has a negative influence on the competitive process.

24 What are the general conditions for finding an abuse?

Conceptually, two types of conduct that amounts to abuse of dominant position are distinguished. The first type is conduct that creates a loss for consumers or suppliers. In the case of consumers, consumer's loss is generally created by excessive high prices. The second type of conduct that is of an exclusive nature. Conduct that can be categorised as exclusive conduct is anticompetitive because it limits or brings an end to competition by existing competitors or even potential competitors.

25 Is there a list of categories of abusive or anticompetitive conduct in the applicable legislation?

An undertaking abuses its dominant position if such position is directly or indirectly used to: (i) determine trade conditions with the objective to prevent and to obstruct the consumers obtain competitive products or services, both from the aspect of price and quality, (ii) restrict market and technological development, and (iii) obstruct other undertakings that have the potential to become a competitor and enter the market concerned.

26 Is this list open or closed?

The list of categories of abuse of dominant position is closed.

27 Has the competition authority published any guidance on what constitutes abusive conduct?

Yes, see the Abuse of Dominance Guidelines.

28 Is certain conduct per se abusive (without the need to prove effects) and under what conditions?

Abuse of dominant position is per se prohibited. However, in practice the KPPU will always take a "rule of reason" approach and assess in case of abuse of dominant position the effects on business competition.

29 To the extent that anticompetitive effects need to be shown, what is the standard to demonstrate these effects?

No anticompetitive effects need to be shown, but the KPPU will in practice often try to demonstrate that abuse of dominant position harms consumers. The KPPU is concerned about the welfare of consumers. Therefore, if there is any indication of consumer loss, then there would be anticompetitive effect. With abuse of dominant position, consumers will suffer loss of opportunity to have a lower price, to receive more services for a similar price, and suffer intangible loss, eg, limited options for consumers.

30 Does the abusive conduct need to harm consumers?

Abuse of dominant position does not need to harm consumers, but the direct and indirect effect of certain behaviour of an undertaking as felt by consumers can be an initial indicator that such behaviour amounts to abuse. Direct effect that is felt by consumers would, for instance, be excessive price. Indirect effect that is felt by consumers and in the end create a loss for consumers would be a limitation of supply or restriction on alternative distribution channels.

31 What defences are there to allegations of abuses of monopoly power?

We believe no defences are available to allegations that a firm is abusing its dominance or market power, other than contesting the evidence produced by the KPPU. Theoretically, the abuse of dominant position results in: (i) prevention, limitation and reduction of competition and (ii) exploitation. If the undertaking can prove that these conditions are not met, then the allegation of abuse of dominant position cannot be substantiated.

32 Can abusive conduct be objectively justified?

Abusive conduct could at least in theory be objectively justified.

33 What objective justifications have been successful?

There is no case of abuse of dominant position if this creates efficiencies, such as innovation, economies of scale, and economies of scope.

34 How is the burden of proof distributed in an abuse analysis?

The KPPU will need to prove that (i) an undertaking has a dominant position, (ii) the undertaking abuses its dominant position. In practice, the KPPU will also try to prove that the abuse of dominance results in unhealthy business competition.

35 What are the legal conditions to establish an abusive tie?

A tying obligation is prohibited if (i) it substantially or potentially reduces the volume of trade, and (ii) tying obligations are imposed by undertakings that have market power (>10 per cent market share) and the market power can increase due to the exclusive arrangements, (iii) the tying products are different from the main product, and (iv) the tying undertaking has significant market power to force customers to purchase the tying products.

36 What are the legal conditions to establish a refusal to supply or refusal to license?

A refusal to supply is considered anticompetitive if it harms or can be surmised will harm another undertaking or restrict the other undertaking in selling or purchasing any products or services from the market concerned.

37 Do these abuses require an essential facility?

These abuses do not require an essential facility under the ICL. Market power can just be based on market share.

38 What is the test for an essential facility?

Indonesian competition law does not create a clear test for an essential facility.

39 What is the test for exclusivity arrangements?

Exclusive arrangements prohibited if (i) it substantially or potentially reduces the volume of trade, and (ii) exclusive arrangements has been entered into by undertakings that have market power (>10 per cent market share) and the market power can increase due to the exclusive arrangements. However, as mentioned before, in practice the KPPU and the courts will apply a "rule of reason" approach and examine whether closed agreements result in unhealthy business competition.

40 What is the test for predatory pricing?

The ICL prohibits supply of products and/or services by selling at a loss or determining a very low price with the intention to remove or to end the business of a competitor in the market concerned, thus causing the occurrence of monopolistic practices and/or unhealthy business competition. This means that the KPPU and courts must apply a "rule of reason" approach. Guidelines for the interpretation of the predatory pricing prohibition can be found in KPPU Regulation No. 5/2011 on Guidelines in relation to article 20 (Predatory Pricing).

41 What is the test for a margin squeeze?

There is no test for a margin squeeze.

42 What is the test for exclusionary discounts?

The ICL prohibits exclusionary discounts if it constitutes price discrimination. Price discrimination is absolutely prohibited, but in practice the KPPU and courts apply a "rule of reason" approach and examine whether price discrimination results in unhealthy business competition.

43 Are exploitative abuses also considered and what is the test for these abuses?

As mentioned before, an undertaking, inter alia, abuses its dominant position if such position is directly or indirectly used to determine trade conditions with the objective to prevent and to obstruct the consumers obtain

competitive products or services, both from the aspect of price and quality. In practice, the KPPU will take a "rule of reason" approach and assess whether in the case of abuse of dominant position, including exploitative abuses, the effects on business competition. The test is set out in further detail in the Abuse of Dominant Guidelines.

44 Is there a concept of abusive discrimination and under what conditions does it raise concerns?

The ICL acknowledges the concept of discriminative practice (article 19 D ICL). The KPPU must apply a "rule of reason" approach and examine whether discriminative practice results in unhealthy business competition. Guidelines for the interpretation of the discrimination prohibition can be found in KPPU Regulation No. 3/2011 on Guidelines in relation to article 19 D (Discriminative Practice). According to the Guidelines, discrimination is strongly related to market control. There is an indication of market control if an undertaking has a dominant position (see also below) or holds a significant market share, or if special factors apply, ie, the undertaking holds certain intellectual property rights, an exclusive right, government regulations create a special position, or the undertaking has market power through a distribution network.

45 Are only companies with monopoly power subject to special obligations under unilateral conduct rules?

Undertakings without a dominant position may also be subject to special obligations under unilateral conduct rules, such as those set out in articles 6 (price discrimination), 15 (closed agreements), 19 (market control) and 20 (predatory pricing).

46 Must the monopoly power exist in the same market where the effects of the anticompetitive conduct are felt?

The ICL and Abuse of Dominant Position Guidelines do not provide clarity on this. We believe that this creates room to argue that the monopoly power does not need to exist in the same market where the effects of the anticompetitive conduct are felt.

Sanctions and remedies

47 What sanctions can the competition authority impose or recommend?

The KPPU can impose administrative remedies in the form of, in case of vertical restraints or abuse of dominance, orders (i) annulling certain prohibited agreements, such as closed agreements, (ii) to cease prohibited types of vertical integration, (iii) to cease activities proven to have involved monopolistic practices or resulted in unfair business competition in the relevant market or other public harm, (iv) to cease abuse of dominance, (v) to pay damages, and (vi) to pay fines between 1 billion and 25 billion rupiah.

48 How are fines calculated for abuses of monopoly power?

Fines are determined or calculated on the basis of KPPU Regulation No. 4/2009 on Guidelines to Administrative Sanctions under article 47 of the ICL (the Administrative Sanctions Guidelines). Based on the Administrative Sanctions Guidelines, the KPPU will first calculate the value of sales of products by the reported undertaking on the relevant market during the year preceding the violation. The fines shall be determined in proportion with the sales value, also looking at the size of the undertaking, the type of violation, the market share of the reported undertaking, the geographical area in which the violation was committed and whether the reported undertaking has been in violation before. The KPPU will multiply the fine by the number of years that the violation was committed. Finally, fines can be increased or lowered, depending on circumstances of the case. Fines can be increased by 100 per cent in case after the KPPU has identified a violation, the reported undertaking continues or repeats the violation, the undertaking refuses to be investigated, provide information or frustrates the investigation. The KPPU pays special attention to leaders and initiators of violations imposing undue pressure and threats on third parties. Fines can be reduced where the reported undertaking provides evidence that it has already ended the

violation, committed the violation unintentionally, its involvement in the violation was minimal, is cooperative in the investigation, was committed in accordance with a legal obligation or with the approval of competent authorities, or the reported undertaking shows willingness to change its conduct. The fines should have a deterrent effect. Therefore, the KPPU will increase fines if the turnover is higher than the value of the products and services sold while committing the violation or the profits from the violation are higher than the fines. The fines may not be higher than 10 per cent of the turnover of the reported undertaking in the year the fines are imposed. Finally, the KPPU will, at the request of the reported undertaking, take into consideration its ability to pay the fines, looking at social and economic circumstances. Lower fines may be imposed if the fines would lead to bankruptcy of the reported undertaking.

49 What is the highest fine imposed for an abuse of monopoly power?

Based on published cases so far, we understand that the highest fine imposed by the KPPU for abuse of dominant position was 25 billion rupiah. See decisions in KPPU Case No. 09/KPPU-L/2009 on PT Carrefour Indonesia and KPPU Case No. 17/KPPU-I/2010 on Pfizer group companies. In the latter case, a total of five Pfizer group companies, including several foreign entities, were imposed a fine of 25 billion rupiah each, so 125 billion rupiah in total. However, both KPPU Decisions were overturned by the District Court, as confirmed by the Supreme Court. See in relation to KPPU Case No. 09/KPPU-L/2009, Judgment of the District Court of South Jakarta 1598/Pdt.G/2009/PN/Jkt.Sel and Judgment of the Supreme Court No. 502 K/PDT.SUS/2010, and in relation to KPPU Case No. 17/KPPU-I/2010, Judgment of District Court of Central Jakarta No. 05/Pdt.KPPU/2010/PN.Jkt.Pst and Judgment of the Supreme Court No. 294 K/PDT.SUS/2012.

50 What is the average fine imposed over the past five years?

Based on published cases for far, we understand that a fine has been imposed for abuse of dominant position in only one case in the past five years (ie, in KPPU case No. 14/KPPU-L/2015 on PT Forisa Nusapersada). The KPPU imposed a fine in the amount of 11.47 billion rupiah. However, in this case too, the KPPU Decision was overturned by the District Court, as confirmed by the Supreme Court. See Judgment of the District Court of Tangerang No. 740/Pdt.G/2016/PN Tng and Judgment of the Supreme Court 1106 K/Pdt.Sus-KPPU/2017.

51 Can the competition authority impose behavioural remedies?

As mentioned before, the KPPU can order an undertaking to cease prohibited types of vertical integration, cease activities proven to have involved monopolistic practices or resulted in unfair business competition in the relevant market or other public harm, to cease abuse of dominance.

52 Can it impose both negative and positive behavioural obligations?

The KPPU can and has in the past imposed negative and positive behavioural obligations. See, for instance, KPPU case No. 04/KPPU-I/2003 on PT Jakarta International Container Terminal c.s., which were ordered to cease activities deemed to violate the abuse of dominant position prohibition and one of their directors to resign from his position, KPPU case No. 22/KPPU-L/2007 on PT Angkasa Pura I (Persero), which was ordered to improve services and safety in providing services and recalculate tariffs (in addition to paying a fine), KPPU case No. 17/KPPU-I/2010 on Pfizer group companies, which were ordered to stop communication regarding price, production and production plan, reduce price of their product, not to have doctors participate in a Health Care Compliance Programme, reduce promotion costs with 60 per cent, and limit sponsorship of doctors in accordance with prevailing ethical codes (in addition to paying fines).

53 Can the competition authority impose structural remedies?

Yes, the KPPU can and has in the past imposed structures remedies. See KPPU case No. 09/KPPU-L/2009 on PT Carrefour Indonesia. However, the KPPU Decision to impose structural remedies in this case was overturned by the District Court, as confirmed by the Supreme Court. See Judgment of the District Court of South Jakarta 1598/Pdt.G/2009/PN/Jkt.Sel. and Judgment of the Supreme Court No. 502 K/PDT.SUS/2010.

54 Can companies offer commitments or informal undertakings to settle concerns?

Pursuant to the Administrative Remedies Guidelines, after the alleged violation of the ICL has been proven, the undertaking concerned may try to convince the KPPU that it will change its behaviour. If no other undertaking or third party has suffered losses, the KPPU may decide that the case is completed without imposition of fines or an order for compensation.

55 What proportion of cases have been settled in the past five years?

We are not aware of any cases that have been settled in the past five years.

56 Have there been any successful actions by private claimants?

The ICL does not create a legal basis for private claims. However, a party that believes to have suffered loss as a result of a violation of the ICL may submit a report to the KPPU, setting out the alleged violation and loss. Based on this report, the KPPU may initiate an investigation, which may result in an administrative remedy in the form of an order to pay compensation. As far as we are aware, the KPPU has never imposed such an order. Furthermore, a party that believes to have suffered loss has a private right of action to submit a tort claim (article 1365 of the Indonesian Civil Code). However, recent case law indicates that it is hard to get damages awarded on the basis of an unlawful act claim for violation of prohibitions under Indonesian competition law. Instead, the KPPU must impose an order to pay damages.

Appeals

57 Can a company appeal a finding of abuse?

An undertaking that has been imposed with a sanction may submit an objection against the decision of the KPPU to the District Court within 14 days after receiving notification of the decision. The District Court is required to issue a decision within 30 days of the commencement of the examination of the objection. If the undertaking does not agree with the decision of the District Court, it may submit a cassation appeal to the Supreme Court within 14 days. The Supreme Court is required to issue a decision within 30 days of the receipt of the cassation appeal.

58 Which fora have jurisdiction to hear challenges?

The District Court and, for cassation, the Supreme Court.

59 What are the grounds for challenge?

Grounds for challenge can be that the KPPU has applied the (procedural or material) law wrongly or it has failed to prove (i) that an undertaking had a dominant position, (ii) this dominant position was abused, or (iii) such abuse of dominant position resulted in unhealthy business competition. In most cases, the undertakings that challenge a KPPU decision use procedural law grounds.

60 How likely are appeals to succeed?

Based on historical data, in abuse of dominant position cases, it is very likely that appeals succeed. See questions 49 and 53. However, overall, that is, also in cases not related to abuse of dominant position, the KPPU wins appeal in the majority of cases. In the period between 2002 and 2019, the KPPU won 106 and lost 75 in the first instance, won 102 and lost 43 in cassation, and won 34 and lost 3 following judicial review.

Topical issues

61 Summarise the main abuse cases of the past year in your jurisdiction.

In July 2020, PT Solusi Transportasi Indonesia (GRAB), which runs the well-known ride-hailing digital app, and PT Teknologi Pengangkutan Indonesia (TPI), which offers ride hailing services, were imposed with penalties for violating, inter alia, article 19 D (discrimination) of the ICL. The penalties amounted to, in the case of GRAB, 22.5 billion rupiah, and for TPI, 15 billion rupiah for violation of article 19 D of the ICL. According to the KPPU, a cooperation agreement between GRAB and TPI had the purpose of controlling the services offered through the app, resulting in a decrease of orders for riders that did not collaborate with TPI. The KPPU also investigated the existence of a tying arrangement, but it decided to drop the allegation.

62 What is the hot topic in unilateral conduct cases that antitrust lawyers are excited about in your jurisdiction?

A hot topic in competition case generally and particularly in unilateral conduct cases is the use by the KPPU of indirect evidence. The KPPU has so far been little successful in winning cases that relied on indirect evidence. The authority is lobbying the government and the parliament, trying to convince them to acknowledge the importance of indirect evidence in a new bill, which is to replace the ICL.

Another hot topic is the increase of penalties for violations of the prohibitions under the bill that is to replace the ICL, to be a percentage of the sales value generated. It appears that the government and the parliament agree on the concept, but the exact percentage (ie, 25 per cent or 30 per cent) is still to be determined.

63 Are there any sectors that the competition authority is keeping a close eye on?

In recent years, the KPPU's enforcement priorities have been on the food commodities industry and other industries that are important to fulfil the Indonesian people's basic needs. In April 2018, new Commissioners were appointed to the KPPU. The new Commissioners announced the following enforcement priorities: food commodities, education, healthcare, energy, telecommunication, logistics, banking and finance, and industries or businesses that are controlled by state-owned enterprises.

64 What future developments can we expect?

The Indonesian government and parliament are planning to enact a bill that is to replace the ICL. As mentioned before, it is proposed to increase administrative fines, to be a percentage of sales value (25 per cent or even 30 per cent). Another proposal is to introduce a leniency programme. The new law should also form a stronger basis for extra-territorial application of anticompetitive prohibitions, including those related to abuse of dominant position. The bill was planned to be enacted this year, but due to the covid-19 crisis the Parliament has decided to halt the deliberations for this year. However, it is unclear when the deliberations will continue.

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Bilal Anwari is a senior associate and a seasoned commercial litigator. He is a member of the firm's disputes & ADR department, which focuses on competition and anti-trust, restructuring & insolvency, arbitration and alternative dispute resolution, manpower disputes, shipping and maritime, cybercrime, corporate crime and environmental disputes, plus anti-corruption and compliance matters in a variety of industries. Bilal has also handled a great number of merger control matters before the KPPU. In 2008, he successfully defended a well-known Singaporean State-Owned Enterprise in a ground-breaking class action in the telecommunications sector, which involved a claim against a number of telecommunications companies based on several KPPU's decisions. Bilal is recommended for antitrust and competition by The Legal 500 Asia Pacific 2019.

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