

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

**Voluntary peer review of competition law and
policy: Indonesia**

Overview

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Note

UNCTAD serves as the focal point within the United Nations Secretariat for all matters related to competition policy. UNCTAD seeks to further the understanding of the nature of competition law and policy and its contribution to development and to create an enabling environment for an efficient functioning of markets.

UNCTAD's work is carried out through intergovernmental deliberations, capacity-building activities, policy advice, and research and analysis on the interface between competition policy and development.

UNCTAD's voluntary peer review of competition law and policies falls within the framework of the Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices (the "United Nations Set of Principles and Rules on Competition"), adopted by the General Assembly in 1980. The set seeks, inter alia, to assist developing countries in adopting and enforcing effective competition law and policy that are suited to their development needs and economic situation.

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UNCTAD/DITC/CLP/2009/1(Overview)

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Introduction

Indonesian competition policy, since the adoption of its law in 1999, has had three main focuses. First has been the enforcement of the competition law against government tender conspiracies, often in cooperation with the Anticorruption Commission. Second has been advocating for government policies to take into account competition objectives in the pursuit of other government objectives. Third has been maintaining public support by including among the criteria for the use of resources whether a case would have a direct and positive impact on citizens and consumers. However, Komisi Pengawas Persaingan Usaha (the Commission for the Supervision of Business Competition hereinafter referred to as KPPU) battles against institutional weaknesses that threaten its independence and technical capabilities. The competition law contains ambiguous language leading to uncertainty. It also contains language inconsistent with its own stated objectives.

The peer review of competition policy seeks to provide competition agencies with an independent and constructive assessment of their institutions, and the substantive content and enforcement of competition law. In addition, UNCTAD's peer review process serves as a needs assessment for capacity-building and technical assistance to interested countries.

I. General framework on economic policy and development

Indonesia is a country of 245 million inhabitants and per capita income of US\$2,271.¹ Though still lower than Asian neighbours such as Malaysia (\$6,948), Singapore (\$30,000) and Thailand (\$3,737), Indonesia's per capita income has almost doubled since 2004.

Indonesia has a market-oriented economy in which government still plays a significant role. From the 1970s to the late 1990s, the Indonesian economy grew at a high rate. Indonesia was considered to be a successful new industrializing economy and an emerging major market. Nevertheless, the rapid economic growth hid some important institutional weaknesses that were exposed during the crisis of the 1990s. The legal and judicial systems were very weak and ineffective: there was no effective way to enforce contracts, collect debts or sue for bankruptcy. Prudential regulation of the banking system was poor. Non-tariff barriers, rent-seeking state-owned enterprises activities, domestic subsidies, barriers to domestic trade, and export restrictions all created economic distortions.²

Near the end of 1990s, Indonesia and the International Monetary Fund (IMF) reached agreement on economic, institutional and structural reforms, including competition policy and a strong fight against corruption. In 1998, a letter of intent was signed between the Indonesian Government and the IMF. The adoption of Law No. 5 on 5 March 1999³ was triggered by this

¹ At prevailing market rates.

² http://wapedia.mobi/en/Economy_of_Indonesia.

³ The law provided for a vacancy of one year to become effective, plus an additional term of six months for the business community to adjust its business to comply with the law (up to September 2000).

agreement, though discussions about a competition law had been ongoing throughout the 1990s, at the initiative of Indonesia itself. There was widespread public concern about monopolies, cartels and corruption. To a limited extent, competition was addressed through provisions in the civil and the criminal codes.⁴ Unusually, the law was not a proposal from the government, but an initiative of the House of Representatives.

Since the enactment of the law, the Komisi Pengawas Persaingan Usaha (the Commission for Supervision of Business Competition, herein referred as KPPU) has been the body responsible for enforcing the law in Indonesia.

In eight years of operation, the KPPU has received an increasing number of reports (denunciations), from 7 to 231, and accordingly has rendered an increasing number of decisions, from 2 to 46, rendered in 2000 and 2008 respectively. The close relationship between anti-corruption and competition policies is expressed in the majority of cases related to government tenders. The success of the KPPU in developing a competition culture in Indonesia is illustrated by the high percentage of KPPU recommendations adopted by the government: 50 per cent of the 57 recommendations issued over 2000–2008.

⁴ These remain in force, per article 52(1) of Law No. 5, provided that there is no conflict.

II. The scope and application of competition law and policy

A. The goals of competition policy and development

Law No. 5 established as its purposes: “(a) to safeguard the interests of the public and to improve national economic efficiency as one of the efforts to improve the people’s welfare; (b) to create a conducive business climate through the stipulation of fair business competition in order to ensure the certainty of equal business opportunities for large-, middle- as well as small-scale business actors in Indonesia; (c) to prevent monopolistic practices and or unfair business competition that may be committed by business actors; and (d) the creation of effectiveness and efficiency in business activities”.⁵ The preamble also adds the promotion of economic growth. It is interesting to note that the law established total welfare, instead of consumer welfare, as its objective, as can be understood by the emphasis on efficiency and effectiveness of business activities.

There are many conflicting objectives in the law: public interest, small business protection, efficiency, etc. Balancing such objectives would be challenging, and different balances may result in inconsistent and unpredictable decisions. The evolving application of the law, within the legal culture and framework, economic environment and society’s characteristics, will shape and define its balance. One dimension of this balancing has already been defined: according to commissioners, the prohibition of unfair competition has consistently been applied to practices that lessen competition, result in consumer losses or harm the public interest.

⁵ Version in English of article 3 of Law No. 5, provided by the KPPU.

B. The scope of competition law – anti-competitive practices

1. Substantive analysis issues

Law No. 5 begins with a section in which concepts are defined. Some definitions are too restrictive or too broad. For example, the law establishes the value of sales or purchases as *the* criterion to assess market share. But other criteria, such as quantity or capacity, might better indicate competitive significance and are commonly used in other jurisdictions. Other concepts are defined more broadly than is common – for example, the law definition of “monopoly” as either “one business actor” or “one group of business actors”.

Indonesian law provides little flexibility in application once terms are defined in law, and the competition law is difficult to alter.

Anti-competitive practices are divided into three main types: (a) prohibited agreements, subdivided into oligopoly, price fixing, territorial division, boycott, cartels, trusts, oligopsony, vertical integration, closed agreements and agreements with foreign parties; (b) prohibited activities, subdivided into monopoly, monopsony, market control and conspiracy; and (c) dominant position, subdivided into general provisions, multiple positions and share ownership.

Chapter III establishes a market share-based threshold that establishes legal presumptions:

For oligopoly/oligopsony: if two or three “business actors” control over 75 per cent of the market (article 4(2));

For monopoly, monopsony: if one “business actor” controls over 50 per cent of the market (articles 17(2)C and 18 (2)); and

For dominant position: if one “business actor” control over 50 per cent or if two or three “business actors” control over 75 per cent for a group of firms (article 25(2)).

These presumptions are used to screen for the market structure that allows for the occurrence of monopolistic practices and or unfair business competition.

Indonesia reverses the common pattern of rule of reason and *per se* illegal treatment. Unusually, it uses a rule of reason to evaluate some horizontal agreements typically judged under a *per se* rule in other jurisdictions, such as price fixing, market division and bid rigging. But it treats much unilateral conduct as *per se* illegal, including price discrimination, exclusive dealing, tying and abuse of dominant position. This would seem contrary to the objectives of the law, not least by its chilling effect on the competition strategies of firms.

One way to deal with legal provisions that do not support the objectives of the law is to decline to enforce them. There is a whiff of this with respect to certain provisions here. For example, price discrimination is illegal *per se*. But in eight years, the KPPU has brought no case of price discrimination. Predatory pricing has been treated similarly. In many cases, price discrimination may generate pro-competitive effects and low prices may be misidentified as predatory. Thus, assessment under a rule of reason would be more appropriate.

Government tenders conspiracy of all sorts (horizontal, vertical and both), mostly related to corruption of public officials, is one of the most successful areas of enforcement by the KPPU. Most KPPU cases involve public procurement frauds. At first glance, having authority over certain corruption cases could appear to threaten the focus on competition issues. But that has not been the experience: almost 90 per cent of the cases caught under such a provision are tender frauds and conspiracies.

The Anti-Corruption Act of 2002 applies only to state officials, and to state company officials involved in public procurement frauds. This law does not apply to private companies or business actors. The need to combat corruption involving private companies and actors prompted the coverage in the competition law. The institution enforcing the Anti-Corruption Act is the Corruption Eradication Commission (KPK). The KPPU and the KPK signed a memorandum of understanding with the aim of enforcing both laws and combating corruption and bid rigging or tender frauds by business actors. The agencies refer cases to each other, reinforcing the fight against corruption and anti-competitive practices simultaneously. Enforcement of both laws is aided by information about the illegal practices which mainly come from tender “losers”. The relationship between the two commissions seems very productive.

The only guideline that has been issued by the KPPU refers to article 22 of Law No. 5, which relates to the prohibition of conspiracy in tenders.

Another strategy of the corruption combat was the creation of an “integrity index”. The index is based on surveys about the bribe payments.

Information about the illegal practices comes mainly from the complaints of the tender “losers”, who may provide “reports” to both commissions.

Bid-rigging cases are more difficult to uncover, as there are no losers to complain. Even if the KPPU can use wiretapping (article 12) and search and seizure procedures, getting the first bit of information is more difficult. Competition Law No. 5 does not provide for leniency agreements or amnesties. There are, however, incentives for whistle-blowing on corruption. First, there is a law on witness protection, provided to help the KPK. Second, there is a provision for rewarding “reports”, up to 0.2 per cent of the value collected by the state.

There is a special court for corruption cases presented by the KPK. When, on the other hand, corruption cases are presented by the Public Prosecutor Office, they go to the district court. The result is two separate procedures, two separate authorities, and the real potential for double standards. According to the KPPU, the design of the enforcement of the law is part of the problem, not part of the solution.

The KPPU has no power to sign leniency agreements or apply amnesty programmes. Nevertheless, there are consent agreements by which the party promises to stop the wrongdoing. Using a consent agreement can form part of a learning process that recognizes the long tradition of monopolistic actions and nepotism through vertical chains.

The analysis applied to anti-competitive practices will form part of a guideline. The KPPU is reported to be elaborating a guideline that would contain all applied concepts, definitions and standards of analysis, according both to its 2007 KPPU report and the Japan International Cooperation Agency (JICA) report.

These will aid transparency and, provided the judiciary is in accordance, aid legal security.

The KPPU is reported to be elaborating several guidelines at the same time, including merger review. Nonetheless, only one is already adopted and used. Guidelines are often written on the basis of case experience, and usually reflect judicial decisions. Writing guidelines can be difficult and time-consuming, including the process of reaching internal consensus. For these reasons, guidelines of more limited scope may be more suitable.

As guidelines affect different stakeholders with different perspectives and experiences, it is quite useful to open the proposal to public consultation. Translation into English might attract the international commentary that would provide yet further perspectives and experiences.

2. Procedural issues

Under articles 35 and 36, the KPPU has broad powers, authority and obligations that require and allow it to proceed with investigations and adjudicate competition cases. Among these obligations, it must “evaluate” agreements, business activities and actions of “business actors” and abuse of dominant position. It is also obliged to provide advice and opinions concerning governmental policies, to prepare guidelines and submit annual reports.

Among its powers, the KPPU has the authority to receive “reports” (denunciations), summon parties and witnesses, make conclusions from investigations and hearings, request statements from related governmental institutions, “determine and stipulate the existence or non-existence of losses on the parts of business

actors or society”, and impose sanctions. The investigative powers are disposed in broad wording such as “conduct research”, “conduct investigations”, “obtain, examine and/or evaluate” letters, documents or others instruments of evidence.

An investigative procedure is initiated by either a “report” from any person or a KPPU *ex-officio* measure. The KPPU *ex-officio* measure is a result of a monitoring process carried out within 90 days, extendable for a further 60 days. Although no anonymous complaints are accepted, the identity of the whistleblower can be treated as confidential.

After being accepted as a competition case, the “report” (denunciation) must follow every step of the case procedures. Most of the decisions made by the KPPU, including condemnations, have a small impact on the economy, according to commissioners. The KPPU is not allowed to choose cases, prioritize, or dismiss any case in a fast and simple procedure.

If the report or monitoring process is sufficiently complete to conclude that there is a possible infraction, the KPPU initiates a preliminary investigation. The purpose of a preliminary investigation is to collect early evidence of an anti-competitive practice and determine whether further investigation is necessary. Hearings can be held during this phase. The preliminary investigation should be terminated within 30 business days.

If the preliminary investigation concludes that there has been a possible infraction, the commission initiates a further investigation that shall be carried out within 60 business days, extendable by the commission for up to a further 30 days.

The parties may remain silent or lie for order not to provide evidence against them, but may not refuse to hand over

the documents requested, refuse to testify, nor impede the investigation.

Reasoned decisions shall be rendered by the KPPU in writing, in an open public session within 30 business days after the conclusion of the period of the further investigation. The parties have 30 days to comply with the decision.

The law does not provide for any kind of revision by the KPPU. Factual and simple mistakes that may occur can only be corrected by costly appeal to the judiciary.

Appeal against the KPPU's decisions should be forwarded to the district court within 14 days from notification by the party who has been found guilty. The district court has 30 days to decide. Both the KPPU and the parties may appeal the district court decision directly to the Supreme Court, bypassing the High Court (court of appeals). The Supreme Court has 30 days to render a decision. The judiciary is also called upon by the KPPU to enforce its decisions, in case of non-compliance.

According to the KPPU, 70 per cent of the cases have resulted in convictions. Forty per cent of these 70 per cent are appealed to the judiciary. Eighty-five per cent of KPPU appealed decisions were confirmed in district courts, while the Supreme Court confirmed all decisions that reached it. This is a very good performance when compared to other young jurisdictions.

All the deadlines related to investigation and decision-making of anti-competitive practices are strict without provision for suspension for any reason. Even the period for the parties to comply with the decision may be too short, depending on what kind of remedies are imposed by the commission. Some academics justify this provision based on the slow judiciary

system. However, it is recognized that, while the time limits may work for small and simple cases, they do not for more complex ones.

From a commissioner assessment, it is very difficult to perform good economic studies within the time constraints established by the law.

Time restrictions make it difficult to perform a deep investigation and appropriate economic analysis. A system of suspension of the time limits in order to gather data or additional information, constrained by some rules such as justification or the length of suspensions, could address this problem. At present, the only source of flexibility is that the district court can stretch its deadline to render a decision when the court understands that the case needs to be referred back to the KPPU to further investigation.

An amendment to the law now under discussion would change procedures. Today, the KPPU's decision can be appealed in any district court in Indonesia. There are more than 100 district courts. The draft amendment provides that the Supreme Court appoint one district court to receive appeals of the KPPU decisions. Alternatively, some positive improvements could be observed if appeal were shifted from the district court to the High Court.⁶

3. Sanctions

According to Law No. 5, the KPPU has the power to impose administrative and criminal sanctions. Among the administrative sanctions, the commission can declare agreements

⁶ There are three levels of Courts: district courts, High Court and Supreme Court.

to be null and void, order the ceasing of vertical integration or activities “proven to been causing monopolistic practices, unfair business competition and/or being harmful to society” and misuse of dominant position, stipulate compensation payments, and impose fines between Rp 1 billion and Rp 25 billion (approximately \$82,650 to \$2.07 million, at current market exchange rates).

Article 48 adds criminal sanctions to be imposed by the KPPU. Depending on the gravity of the offense, criminal penalties vary from Rp 1 billion to Rp 100 billion (approximately \$82,650 to \$8.27 million) or imprisonment that ranges from three months to six months. The authority may also impose additional sanctions such as “(a) revocation of business licenses; or (b) prohibition of business actors proven to have violated this law from filling the positions of director or commissioner for at least 2 (two) years and for no longer than 5 (five) years; or (c) orders to stop certain activities or actions resulting in losses to other parties”.

Notwithstanding, commissioners reported that the KPPU was not allowed to impose criminal sanctions. Therefore, it is not clear if KPPU has the power to apply criminal sanctions, and, if so, whether it can do so without police or judiciary support. This creates legal insecurity and weakens the enforcement by the KPPU.

The maximum fines are quite low to deter illegal practices, as compared to the largest Indonesian companies’ sales, such Telekom Indonesia (\$5.59 billion in sales in 2008), Bank Rakyat Indonesia (\$2.15 billion in sales) or Bumi Resources (\$1.87 billion in sales).⁷

⁷ Forbes 2008 (www.forbes.com/lists/2008). Figures in latest available United States dollars.

Higher fines should be included in the amendment to the law, and a simple system to review the threshold monetary values should be adopted.

4. Merger review

Merger review is an important role for competition authorities to prevent the creation through merger and acquisitions of high market power or a market structure that fosters coordinated market interaction. In addition, merger decisions are a means of raising the profile of a competition authority.

Although the law provided for merger review, such provisions are still awaiting governmental regulation, as a condition for the law's application and validity. There is strong resistance from some government members. Although treated as a high priority within the KPPU, the organization's initiatives in the last four or five years have had no result. However, while awaiting this regulation, KPPU is reported to be finalizing a merger review guideline.

Merger review is resource-consuming.⁸ In jurisdictions that have merger review and control, merger review occupies a substantial part of the budget and staff. Due to limited staff resources, merger notification should initially, at least, be required only for transactions meeting a very high threshold.

⁸ According to the study prepared under the Competition Policy and Implementation Working Group of the International Competition Network (CPI/ICN): "In most of the cases, these 'reactive' answers reflect the high number of merger reviews submitted to the authorities, which they considered as the principal element that restricts that agency's ability to be proactive".

Some scholars read the original, authentic language of article 28 in Law No. 5, – Indonesian – as giving the KPPU complete freedom to interpret the article as prohibiting all mergers and acquisitions regardless of effect. However, the purpose of reviewing mergers and acquisitions is to assess, case by case, the likely effect of the transaction on competition. Amendment of the law could clarify that only mergers or acquisitions meeting a threshold for competition harm in Indonesia would be prohibited or subject to conditions for clearance.

Article 28 is an illustration of ambiguous drafting leading to uncertainty and harm of the business environment, in turn undermining the objectives of Law No. 5.

5. Judicial review

Any KPPU decision can be submitted to judicial review. According to the Indonesian legal system, the KPPU's decisions must be appealed to the district court. Appeals of district court decisions shall be reviewed by the Supreme Court, bypassing the High Court, as mentioned above.

The KPPU must appeal to a district court to enforce any KPPU decisions that are not voluntarily complied with. Hence, competition law enforcement involves both the KPPU and the judiciary. Thus, the court system plays a major role in competition law and policy implementation and enforcement.

According to KPPU information, less than 0.3 per cent of fines are voluntarily paid! Considering the total fines paid after court execution, the percentage is extremely low as well: 1.4 per cent! A strong effort towards higher effectiveness of KPPU decisions is urgently required.

Most district court decisions involving the competition law are appealed to the Supreme Court. The district court judges are unfamiliar with competition matters and capacity-building is needed. Only about 200 of 6,000 district court judges have received training in competition law. Frequent high-level workshops on law and economics for the Supreme Court would be helpful.

The KPPU asked the Supreme Court to issue procedural guidelines for competition law cases. Law No. 5 has inadequate procedural provisions and the KPPU needs its role and competencies clarified. Many cases appealed to the Supreme Court referred to and challenged the KPPU's procedures.⁹

Following much discussion and research, the Supreme Court issued Perma No. 1/2003 (*Peraturan Mahkamah Agung – Perma*), which is a clear instruction to the district court about how to treat an objection (*keberatan*) to a KPPU decision.

Beyond the effect of making the process transparent and stable, a positive effect was that the Supreme Court guideline instructed the district court to remand the decision back to the commission, in case of lack or incompleteness of evidence, giving a clear message that all the investigative competencies remained exclusively to the KPPU. Such a measure may strengthen recognition of KPPU technical expertise and independence. Moreover, the procedure established by the Supreme Court prevents a technical decision – made by a commission and informed by the work of the secretariat technical staff – from being replaced by a decision of one judge unfamiliar with competition issues.

⁹ Appeals can also challenge the merits of the decision.

The judiciary also suffers from the time limits for rendering decisions imposed by Law No. 5. A time limit of only 30 days is too short. Although there is no legal punishment in case the deadlines are not observed, such non-observance would negatively affect the judges' performance evaluation and promotions. To date, no case has exceeded the deadline.

The law should be amended to extend the time limit to, for example, 90 days for the Supreme Court to render a decision, as suggested by members of the Supreme Court itself. Thirty days is an impossible time limit with which to comply, as 10,000 new lawsuits arrive each year (approximately 10 to 20 cases a day for each judge).

There is a proposal for appeals of the KPPU decisions to go directly to the High Court or to the Commercial Court. This would imply that fewer judges would have to be trained and the capacity-building process would be more effective.

While both the KPPU and the Supreme Court understand that only questions of law (procedure) and not substance (merits) should be brought to the Supreme Court, the court recognizes that judges need to deeply understand the merit and the methodology of economic analysis in order to properly perform their functions.

6. Exemptions: article 50

The Indonesian Competition Law contains a number of exemptions that use broad or undefined concepts, making the provisions unclear. Some of the exemptions were included to address weaknesses of the country, such as innovation; others were to maintain part of the status quo, such as state monopolies.

One exemption that attracts attention concerns cooperatives. Exemption for cooperatives is a political issue. Although the KPPU understands that only cooperatives that provide services to their members are exempted, this limitation is not in the law. Such a broad exemption may inadvertently create anti-competitive effects, not least by offering the possibility of business to be structured in a way to bypass the competition law.

C. The application of competition law – institutional

The KPPU was established by the Decision of the President No. 75, of 8 July 1999 (Presidential Decree) following article 34 paragraph (1) of Law No. 5, as an independent and autonomous body. The process of forming the commission was completed by the appointment of its members on 7 June 2000.

The KPPU is not part of the judicial, executive or legislative branch. However, it is accountable to and monitored by all of them. Regarding the executive and legislative branches, as per article 35(G) the commission has to submit annual reports to the President and to the People's Legislative Assembly (DPR, the House of Representatives). Additionally, the President is responsible for the appointment and dismissal of the commissioners, both procedures upon approval of the DPR. The DPR approves the KPPU's budget. With respect to the judiciary, all KPPU decisions may be appealed to the judiciary. Compliance with the KPPU's decisions is enforced through the courts. The public may also monitor KPPU activities, since all of its decisions are rendered in public sessions. However, there is no requirement that the annual report be made publicly available.

Provisions in the law regarding the commissioners themselves are sources of concern. Provisions – or in some

instances the absence of provisions – regarding dismissal, prolongation without reappointment, number, quorum, and commissioners holding multiple jobs can raise the question of political independence.

Dismissal of a commissioner, according to Law No. 5, does not require cause.¹⁰ Parliament must, however, give its consent to a dismissal by the President.

The law specifies a minimum number of commissioners, seven, but not a maximum.¹¹ At present, 13 commissioners have been appointed. Of these, 11 are active. Commissioners are appointed for five-year terms, with one reappointment possible. Further, when the mandate of a commissioner has expired and no replacement commissioner has been appointed, the existing mandate may be extended. Both the possibility of reappointment and of prolongation may affect commissioners' decisions, and conversely their decisions affect their prospects for reappointment or prolongation.

The minimum quorum for the commission to make a decision is inconsistent with the number of members. Law No. 5 specifies that the quorum for decision is three members, but does not specify the maximum number of members. Three members are fewer than the majority of the minimum possible composition.

¹⁰ Article 33 lists the causes for the termination of membership as “(a) demise; (b) resignation upon own request; (c) residing outside the territory of the State of the Republic of Indonesia; (d) continuous physical or mental illness; (e) expiration of term of membership in the Commission; or (f) dismissal”.

¹¹ The draft amendment to the law specifies seven as the maximum, according to commissioners.

A decision taken by three among seven or more members may be argued to lack legitimacy, and the argument is stronger the higher the number of commissioners.

Law No. 5 does not require the position of commissioner to be an exclusive, full-time function. The law does require, among other things, that the commissioners have some experience with business or have “knowledge and expertise” of law and economics, but it happens to be just a political appointment. Most of the current commissioners are professors of law or economics, such as the current Chair and Vice-Chair.

However, some commissioners are leaders or members of political parties. Almost all the people interviewed engaged in competition policy in Indonesia mention this as a problem, a vehicle for undermining the independence of the KPPU. They see some commissioners as having too close a relationship with party politics.

Three main recommendations follow from the above: (a) establish a maximum number of commissioners; (b) strengthen the staff and secretariat; and (c) require that the commissioners be unrelated to political positions.

A fourth recommendation also concerns the commission. In order to keep experience and to enhance legal certainty, the commissioners should not be replaced over a short period. For instance, if there are seven commissioners, as in the draft amendment, replacement should occur at different times, of two, two and three commissioners. This could be accomplished by a transition period during which the mandate would be shorter than five years according to the appointment. After this transition period, the end of mandates would not coincide. Rules in case of

non- or delayed appointment should maintain staggered expirations of mandates.

The KPPU also includes a secretariat that is responsible for carrying out the investigations. The secretariat includes the technical staff and also has working groups composed of external experts. Two key problems are recruitment and retention of the technical staff. Turnover is high, as the technical quality of most of the staff is far above the market average and salaries are relatively low within the KPPU. This disparity of salaries may be worsened if a proposal to turn the technical staff in to civil servants is accepted. It would immediately decrease salaries by 60 per cent. At present, the technical staff is not composed of civil servants. While very unusual, this was seen as positive in Indonesia. The current economic crisis could reduce the immediate loss of trained technical staff, but probably not in the long run. Recruitment has the same issues of salary disparity with the private sector.

KPPU resources basically originate from the governmental budget (“State and Revenue and Expenditure Budget”). The budget is linked to the Ministry of Trade.¹² Fines go to central government budget. The law, however, left open the possibility of the commission’s budget being supplemented by other alternative sources. For instance, if merger review is adopted, it is possible to charge a notification fee that could cover the costs of the review, at least partially. This is adopted by many jurisdictions and can help with the costs of the competition authority.

Internally, the secretariat prepares the budget proposal based on the five-year programme and an annual program. The proposal is submitted to the Government and, as mentioned,

¹² Although there could be a conflict between trade policies and competition, the KPPU reported not having any problem in this sense.

approved by the Parliament. Budget establishment involves two major processes – negotiations with the government and with the Parliament. The proposal is for two years, but it is approved on an annual basis. The evolution of the KPPU budget shows a significant increase over the last four years. During 2000–2004, the average budget was \$5.53 million dollars, while during 2005–2009 it jumped to \$16 million.¹³

¹³ Conversion to United States dollars based on implied Purchasing Power Parity conversion rate, as reported by IMF Outlook, 2009.

III. Competition advocacy

Many of the practices that are now combated by the Competition Law were widely practiced for many years. With the adoption of the Competition Law, these well-established practices were suddenly declared illegal. In this situation, it is expected that society, business and the judiciary would be unfamiliar with the purposes and concepts of competition law. Misunderstandings – such as that the competition authority exists to combat big business and protect, at any cost, small companies – are very common.

The KPPU identifies public trust and confidence in the authority as an important asset in implementing competition policy. In order to maintain public support, it includes in its priorities the choice of cases that directly and substantially benefit the public or consumers.

Most of the competition problems in Indonesia come from the government. State-created monopolies were ubiquitous in the former President Suharto's era. However, many monopolies persist due to local government regulations. Many public policymakers and enforcers are unfamiliar with either the goals or the effects of competition policy. They are not used to considering competition as a goal of public policy. In response to the KPPU's advocacy, the Prime Minister's office established a special unit to evaluate the competitive effects of certain government policies.

However, competition advocacy is not yet complete. Certain import rules exemplify outrageously competition-damaging public policy. For example, some products – e.g. textiles, garments, shoes, toys and food – must be imported only

through five specified ports and by registered importers jointly appointed by the Ministries of Trade and of Agriculture.

The KPPU tries to create and maintain close relationships with and get support from the government and sector regulators. It issues policy advice and recommendations to the government (central and regional) regarding all governmental policies identified as potentially distorting competition. The KPPU has offered more than 60 recommendations to avoid or reduce monopolies created by government regulation. The KPPU reports some positive results and responses from such initiatives.

The KPPU recommendations come from economic studies of the most important sectors, such as telecommunications, insurance and pharmacies. Port facilities are a major issue. A particular conflict relates to the determination of the Terminal Handling Charges (THC). The issue is relevant, as it determines the costs of Indonesian exports.

An example of government actions contrary to some of the Competition Law's objectives is provided by protection of traditional retail. A Presidential Decree of December 2008 was issued to protect traditional markets. The KPPU supported the new rules, but issued a recommendation.¹⁴ This kind of regulation has spread worldwide, from developed countries such as Italy or France to developing ones such as Argentina. According to the KPPU, prices in the traditional retail stores and supermarkets are more or less the same. However, supermarkets are much more comfortable, clean and convenient, particularly in the rainy season. By protecting the traditional retail channel, the regulation deprives low-income population from buying in more comfortable

¹⁴ Presidential Decree No. 112 Of 2007 and Trading Minister Decree No. 53 of 2008. (KPPU Newsletter, Vol 1, II, 2009).

and cleaner places. The cost is not low, and there is no guarantee that this kind of regulation effectively protects the traditional channel. The Presidential Decree may protect small businesses, but not consumer welfare.

In another case, the KPPU concluded that the government had, for several years, guaranteed a monopoly to a firm to export mango fruit to the Republic of Korea in return for its investment in Indonesia. In 2005, the KPPU made a recommendation to the government to end this policy. The government changed it and abolished the monopoly rights.

Salt distribution policy was also changed following the KPPU's advice. Regional and central government had different policies with respect to salt distribution, and such inconsistency created an artificial barrier to entry in this market. The restriction imposed by local governments was suppressed after the KPPU's advocacy initiative.

From 2000 to 2009, 50 per cent of the KPPU's recommendations resulted in a positive response. Nevertheless, many of them are not followed by the government and this is still a challenge for competition enforcement and implementation in Indonesia.

The state also sets the prices in important economic sectors such as petroleum and gas, although the law says that the prices are determined by the market. Consumers and public transport are subsidized.

The Coordinating Minister of Economic Affairs has supported KPPU competition advocacy to other ministers. The KPPU organized a workshop with the ministers, with the support of the Coordinating Minister, to discuss the competition

consequences of government regulations. However, most of the problems are in local governments and the KPPU is not equipped to face a myriad of local state-created monopolies. Moreover, local governments are independent.

Presidential Decree 75 of 1999 allows the commission to open regional branches. This may be a way to monitor regional government initiatives that may distort competition, as well as to be better aware of local anti-competitive practices. On the other hand, regional offices are costly. A cooperation and close relationship with the public prosecution office and local authorities may also address the problem of local competition.

At the end of the 1990s, the environment was not friendly to competition policy. The main sectors were controlled by monopolies. At that time, economic research on antitrust started to be stimulated in Indonesia. Therefore, academics were involved since the very beginning of competition policy implementation. The number of economists with knowledge of competition law is growing, according to an academic researcher.

For more than five years, the departments of economics of the universities have offered courses in industrial organization economics and competition matters. There is a research programme on competition issues at the university, carried out by independent institutes of research and consultancies. Competition studies started before the KPPU was created and have been funded by international organizations such as GTZ, the World Bank, and JICA. The KPPU reported that it and several academicians were to prepare a textbook on competition law aimed to be used as a standard curriculum for all universities nationwide.

Successful adoption of competition law in the district courts depends on the continuing education of judges. While most law schools now offer courses on competition law, this was not the case three to five years ago. Therefore, most judges are unfamiliar with competition issues.

Surprisingly, the judges accepted to come to the KPPU to learn about competition issues. This was endorsed by the Chair of Supreme Court, who also recognized that, if the district courts judges needed to learn about competition issues, then so did the Supreme Court judges.

Conferences for the media bring many journalists to discuss competition issues. Every week, the KPPU meets journalists to discuss the most recent cases or recommendations.

IV. International cooperation and technical assistance

KPPU and other Indonesian institutions have benefited from a variety of bilateral and multilateral technical assistance programmes. Capacity-building of KPPU technical staff has been facilitated by bilateral cooperation, with the German Bundeskartellamt, United States Federal Trade Commission, Japan Fair Trade Commission, Republic of Korea Fair Trade Commission, Chinese Taipei Fair Trade Commission, and the Australian Competition and Consumers Commission. These institutions have also facilitated training programmes for academicians and judges, among others. Furthermore, in 2007, members of the Supreme Court received technical assistance related to competition law from Germany and visited the Bunderskartellamt, the European Union (EU) Competition Commission and the EU Supreme Court. This kind of initiative is quite unusual for Supreme Courts to undertake and must be encouraged.

Multilateral assistance has included KPPU participation in International Competition Network (ICN) programmes to enhance competition policies in young jurisdictions, in partnership with the Japan Fair Trade Commission. Moreover, the KPPU has received deep evaluation reports, such as from the JICA and the Organization for Economic Cooperation and Development (OECD). The KPPU was an observer at the OECD Competition Committee for two periods. It is also a member of several international organizations concerned with competition: the ICN, the Association of South-east Asian Nations (ASEAN) Expert Group on Competition, and the East Asia Competition Forum.

V. Findings and possible policy options

A. Recommendations

1. Anti-competitive practices

Given the inflexibility in the use of concepts defined in the law, the inclusion of definitions should be subject to a high threshold. That threshold depends on Indonesian legal practice. For those definitions of concepts that are included, careful thought should be given to their wording and content so that the application of the law can be adapted to the factual circumstances of individual cases.

In particular, the definition of oligopoly should allow more possible measurement criteria than “sales”, since it may be difficult to apply to some specific sectors (e.g. “sales” for financial services) or misleading in other sectors.

Much unilateral conduct should be made subject to a rule of reason analysis. This is because much unilateral conduct aids in the achievement of the law’s objectives, such as efficiency. Pro-competitive unilateral conduct should not be discouraged. Other anti-competitive unilateral conduct can be confused with competition, e.g. predation can be confused with aggressive but legal competition.

Decisions related to horizontal conduct should be reviewed with the aim to determine whether certain horizontal conduct should be made subject to a *per se* rule. A *per se* rule for price fixing and for market division can make the law easier to administer, releasing resources for other purposes.

Guidelines focused on specific subject matter should be issued. The commission is preparing a complete guideline, which will include all types of conduct and concepts. A guideline is helpful for everybody: the authority itself, society and the judiciary. It is recommended that, rather than a large document concerning all practices, the authority instead release several guidelines, each with more limited scope. Guidelines of more limited scope are easier to adjust, update or change. It is also recommended that the authority disclose the source of the concepts and definitions used in the guideline. It is recommended that the guideline use, as much as possible, international and already settled concepts. The ICN discussions and recommendations should be consulted in this regard. All guidelines should be available for public consultation before adoption, for comments of the whole society, including academicians and the judiciary. If translated into English, draft guidelines might attract international commentary.

Procedures to suspend deadlines for investigation and decision-making should be adopted. All the deadlines related to investigation and decision-making regarding anti-competitive practices – either in the KPPU, the district courts or the Supreme Court – are tight and there are no provisions for suspension of such deadlines for any reason. Such suspension should be constrained by strict rules governing reasons for the suspension, the quantity of suspensions available and the length of suspension. The KPPU assessed that 120 days would be a reasonable deadline for the investigative stage labeled further investigation, with the possibility for extension if justified.

A procedure to allow the KPPU to correct factual mistakes that do not impact the merits of the decision should be adopted. Since there is no superior level body within the KPPU to allow

appeals for the KPPU itself, the KPPU should accept a very limited, restricted kind of review in case of factual mistakes that would avoid unnecessary and costly appeals to the judiciary. The review to the authority should be restricted to correction of formal mistakes only.

The KPPU should have a mechanism to filter and handle, quickly and at low cost, trivial and no- or low-impact cases. Given its limited resources, it should be able to “choose” the most important cases on which to apply its resources and develop high-quality and strong decisions. Such decisions could also be used to educate society about competition policy.

To date, most of the KPPU’s cases involve public tenders conspiracies, and the close relationship with the KPK was important to strengthen competition policy. The KPPU should now move on to strengthen its combat against other types of cartels, or other conduct that harms competition. The KPPU may benefit from other young jurisdictions’ experiences with combating cartels.

Last, but not least, enforcement of KPPU decisions must be improved, as less than 1.4 per cent of the fines are collected even after the court’s execution.

2. Institutional

Annual reports should be mandatory and publicly available, at least in electronic form.

Commissioners should be dismissed only for limited, well-defined reasons. This would provide more legal security and objectivity, and reduce political influence over the body.

Commissioners should be required to be unaffiliated with political parties, or at least have no administrative or political positions in political parties.

The exact number of commissioners should be established in law. This definition would reduce the possible political use of the body.

Commissioners should have staggered terms. This would help to retain experience and enhance legal certainty. For instance, if there are seven commissioners, as proposed in the draft amendment, replacement should occur at different moments, of two, two and three commissioners. This could be accomplished by a transition period in which designated commissioners are appointed for periods shorter than five years.¹⁵ Further provisions may address delays in appointments to ensure the rule does not lose its effect.

Commissioners should not serve beyond their terms. There should be a more specific rule obliging the government to appoint a new member within a reasonable time in case of vacancy. Ensuring a full complement of fixed-term commissioners helps to maintain the body's independence.

There should be no reappointments, since the possibility of reappointment may alter the incentives and independence of commissioners.

¹⁵ A transition rule could be established as, for example, three years for the first two appointed commissioners, four years for the next two and five years for the three remaining commissioners. After this transition period, there will be no coincidence between the ends of the mandates.

The secretariat should be strengthened. Trained professionals, with the expertise to handle the cases and make reasoned recommendations, should form it. The need to attract and retain appropriate staff should be recognized. A stronger secretariat would result in more efficiency and effectiveness.

The KPPU should establish close relationships and cooperation with local authorities and public prosecutors' offices, to address local competition distortions and aid in the local collection of information on anti-competitive practices.

A handbook of compulsory internal procedures, including procedures for handling cases, could be very helpful. This measure could enhance transparency and predictability, and result in fewer appeals of decisions on the basis of procedural errors. It may also reduce the effect of high staff turnover.

The KPPU should establish an internal library with contents specific to competition. Besides factual information about the Indonesian economy, it should include and maintain up-to-date books and journals on relevant economic theory. Procedures should be adopted to maintain the collection in a way it can serve the operation of the KPPU, including strict procedures for lending.

3. Merger review

Although merger review is important in competition authorities' duties, it is also resource- and time-consuming. Due to resource limitations, the threshold for any compulsory notification of mergers should be very high.

Article 28 should be modified to clarify that only mergers or acquisitions meeting a threshold for competition harm in Indonesia would be prohibited or subject to conditions for clearance. At present, the original and authentic language of article 28 is ambiguous on the criteria for prohibition.

As a transition rule, non-mandatory merger control could be established. There would be no mandatory notification, but the KPPU would be fully invested with powers to investigate a transaction for its effect on competition. In this case, the KPPU should also have powers to impose conditions or block the transaction in Indonesia.

4. Judiciary

The law should be amended to extend the time limit for the Supreme Court to render a decision. Since competition issues require fast decisions, consideration should be given as to whether a change should be made so that appeals of the KPPU's decisions would be directly forwarded to the High Court (court of appeals), rather than be reviewed by the district court.

5. Advocacy

Consumer protection appears to be a distant second in the KPPU's priorities. Since the law attributes competencies over consumer protection to the KPPU, the commission should move towards creating and implementing a consumer protection policy.

B. General consideration: amendment of the law

In view of the costs associated with amending the law, not least the generation of legal uncertainty, amendment should be postponed. In the short and medium terms, it is recommended to improve enforcement of the present law and to issue explanations and guidelines, and to engage in capacity-building initiatives. However, a technical amendment to adjust conceptual definitions and time limits, as mentioned above, is recommended.