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**VOLUNTARY PEER REVIEW ON COMPETITION POLICY:
INDONESIA**

Full Text



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NOTE

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ACRONYMS

GBHN	Garis Garis Besar Haluan Negara
BPPC	Badan Penzanga Cengkeh
KPPU	Komisi Pengawas Persaingan Usaha
KPK	Corruption Eradication Commission
HHI	Herfindahl-Hirschman Index
GHHI	General Herfindahl-Hirschman Index
BTS	Base Transceiver Stations
IDR	Indonesia Rupiahs
STT	Singapore Technologies Telemedia
(CPI/ICN)	International Competition Network
Perma	Peraturan Mahkamah Agung
THC	Terminal Handling Charges
JICA	Japan's International Cooperation Agency
JFTC	Japan Fair Trade Commission

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Abstract/Executive summary

Since its adoption in 1999, the three main foci of Indonesian competition policy have been (i) tackling alleged government tender conspiracies, often in cooperation with the Anticorruption Commission, (ii) advocating the consideration of competition objectives in the pursuit of other government policy objectives, and (iii) enhancing public support for competition policy by including the direct and positive impact on citizens and consumers among the criteria for assessing competition cases.

The KPPU has worked hard to address entrenched anticompetitive practices by business and government during its first eight years of existence. However, improvements in the law, institutional capacity and internal procedures would make it yet more effective. The KPPU is confronted by institutional and technical weaknesses that threaten its independence. Moreover, the competition law contains ambiguous language that contributes to uncertainty. It also contains language inconsistent with its own stated objectives.

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CHAPTER I: Overview of the Peer Review Report

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.

1. General framework on economic policy and development

Indonesia is a country of 245 million inhabitants and per capita income of U\$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 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.

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).

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

2. 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.

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.

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

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 to be null and void, order the ceasing of vertical integration or activities "proven to be 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).

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

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

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.

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

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

⁹ Appeals can also challenge the merits of the decision.

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.

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.

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.

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.

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, 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

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

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

3. 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

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

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 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.

4. 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 Bundeskartellamt, 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.

5. 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.

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.

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.

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.

CHAPTER II : Full report

1. GENERAL FRAMEWORK ON ECONOMIC POLICY AND DEVELOPMENT

1.1. Foundations and History of Competition Policy ¹⁶

Indonesia is a country of 245 million inhabitants, living on almost 1800 islands, organised into 32 local governments. Following fifteen years of economic and institutional reforms, Indonesia's per capita income in 2008 grew to US\$ 2,271 – almost double that in 2004¹⁷, although still lower than that of its Asian neighbours such as Malaysia (US\$ 6,948), Singapore (US\$ 30,000) and Thailand (US\$ 3,737).

Indonesia has a market-oriented economy in which government still plays a significant role. , The Indonesian economy grew at high rates from the 1970s to late 1990s. At that time, the country was considered to be a successful newly industrializing economy and an emerging major market. Nevertheless, the rapid economic growth hid some important institutional weaknesses that were exposed by the Asian financial crisis of the 1990s. It became apparent that 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. Various distortions, including non-tariff barriers, rent-seeking, domestic subsidies, export restrictions and other barriers to trade, all frustrated economic growth. At the end of the 1990s many institutional reforms were undertaken, with the Competition Law being among them.

1.2 History

Indonesia's 1945 Constitution enshrines the democratic principles on which the Indonesian economy is to be based and provides direction on its orientations. Article 33 of the 1945 Constitution provides normative guidance for the State's economic policy. Sections "a" and "b" of Article 33 state that Indonesia's economic development should be anchored by the principle of a people's democracy encompassing a commitment to social justice for all achievable through market mechanisms that are aimed at maximising social welfare. Accordingly, the State plays a key role in the achievement of economic goals and objectives.

According to the 1973 State Policy Framework, known as the *GBHN (Garis Garis Besar Haluan Negara)*, cooperative effort rather than a "*free fight liberalism*" system that exploits human

¹⁶ This report is based on documents translated into English. The documents, including Law n. 5, use terminology that is not usually employed by most competition laws and authorities worldwide. Some of the concepts are well established in economic theory, but there are deviations in technical language. The terminology used will likely result in difficulties in application and misunderstandings for the international antitrust community interacting with the Indonesian system.

¹⁷ At prevailing market rates.

beings is the main driver of development. The Policy Framework consigns the control of all natural resources to the State.

From 1973 to 1998, the State Policy Framework provided the concrete normative philosophy governing Government's role in preventing unfair business practices. The philosophy was explicitly articulated by various Congressional Decrees (*Ketetapan MPR*) including, No. IV/MPR/1973 on Economic Development, TAP MPR RI No. IV/MPR/ 1978 on Economic Development for Small Business Enterprises and Private Businesses, TAP MPR RI No. II/MPR/1983 on the State Policy Framework on Economic Development for Private Businesses and Small Medium Enterprises, TAP MPR RI No. II/MPR/1988 on the State Policy Framework of Economic Development of the National Enterprises, TAP MPR RI No. II/MPR/1993 on the State Policy Framework on the Economic Development of the National Enterprises and TAP MPR RI No. II/MPR/1998 on the State Policy Framework of the Economic Development of National Enterprises. These decrees provided the ground rules for attaining the necessary conditions to ensure that all enterprises or business actors, including conglomerates or small and medium-sized enterprises were afforded equal opportunity to thrive. Nevertheless, the evidence suggests that economic growth and development were significantly hampered by unfair competitive advantages granted to a few conglomerates through discriminatory regulations and other monopolistic practices that violated the principles of Article 33 of the 1945 Constitution.

1.3. Economic Development Before the Competition Law Was Established

In the years immediately preceding the enactment of Law No.5/1999, policy makers and the Indonesian public had come to believe that market distortions were being caused by a few businesses that had strong ties to the political elite. It was believed that, through these relationships, businesses obtained privileges, discretionary funding or special treatment with a consequent rise of concentrated market structures characterized by a few strong conglomerates, which exploited their economic power at the expense of consumers and small- and medium-scale businesses. Thus, concentrated market structures were viewed as created and maintained by crony capitalism.

The perceived conduct of these conglomerates left the public with a lingering aversion to big business and a tendency to equate all conglomerate behavior with anticompetitive conduct resulting in widespread misconceptions about business behaviour in general, further compounded by a general lack of understanding of the legal and economic meanings of the term "fair competition".

Fair competition is a complex concept that is often misconstrued. The broader objectives and goals of a country's competition policy often determine what it means in each country. In the case of Indonesia, Government intervention in the market has tended to reinforce misconceptions of what is fair and unfair competition and how well-functioning markets should operate. A case in point is the BPPC (*Badan Penyelenggara Pemasaran Cengkeh*) that regulates clove trade (*BPPC*). The Board is the exclusive buyer and seller of cloves, the vast majority of which are sold domestically for use in the manufacture of Indonesian cigarettes. Since its formation, clove prices have drastically declined and farmers have been discouraged from producing cloves

despite the fact that the aim of the BPPC is to ensure price stability and security of supply of cloves in the national market. The clove industry is one example of how government intervention and political interests have resulted in market distortion. Other examples of extensive government intervention in the economy that have had negative implications for competition exist in the orange, nutmeg, sandalwood and rattan markets. The government has also intervened in the automobile industry with the National Automobile Project (*Proyek Mobil Nasional*) known as *MOBNAS*.

In addition, various studies have shown that in the past thirty years Indonesian industrial policy has caused high levels of concentration in several markets and industries. The structure of the industrial sector is, for the most part, oligopolistic, with more than 40% of the firms in the industrial sector having market shares of 40% or greater.

A competition policy began to emerge when the New Order regime ended in May 1998 and President Habibie's administration began its transition period of rule. There have been quite a few changes since then and progress has been made in the legal arena as part of Indonesia's commitment to the International Monetary Fund ("IMF") loan program. Experts have noted that the IMF played a significant role in requiring the government to implement deregulation. The IMF Letter of Intent clearly played an important role in requiring changes in both legal and economic policies.

As a response to strong public sentiment against the harm that the conduct of monopolies and some conglomerates had up to 1998 inflicted on the economy with perceived Government consent and protection, Indonesia adopted a competition law entitled the "Anti Monopoly and Unfair Business Practices" Law. Subsequent to Indonesia's enactment of Law No. 5/1999, the Special General Assembly (the "MPR") reiterated what was stated in its Decrees on economic reform and restructuring (Decrees No. X/MPR/1998 and No. XVI/MPR/1998).

For example, MPR Decree RI No. X/MPR/1998 on the Principles of Development Reform in Accordance with the Rescue and Normalization of National Life as the Nation's Philosophy, in Chapter II, General Condition, Sub A. Economy, states:

"...The development achieved during the 32 years of the New Order regime has substantially declined because of the serious economic crisis, which started in the middle of 1997 and continues. The earlier economic foundation was presumed strong, but in fact has shown that it was not resistant to external turmoil and this is exacerbated with micro- and macro economic problems. This is due to the inadequate implementation of a national economic policy, which is not in accordance with the guidance under Article 33 of the 1945 constitution where it shows clear monopolistic practices. The businesses, which are close to, the elite government officials received substantial special priorities, which have further led to a social gap and other problems. The fundamental weakness was also due to the exclusion of the people's economy, which in fact relies on the natural resource base and human resources as its comparative and competitive advantages. The existence of conglomerates and a few strong business actors, not supported with the true spirit of entrepreneurship, has caused the economy to be tenuous and noncompetitive..."

Similarly, MPR RI Decree No. XVI/MPR/1998 on Political Economy in Accordance with Economic Democratization provides guidance on the new Indonesian paradigm. The decree shows that the Indonesian government has learned from the past and realized that the economic crisis and market distortions resulted from the weak economic foundation created by the behavior of a few conglomerates. In order to prevent this sequence of events from reoccurring, the MPR issued MPR RI Decree No. IV/MPR/1999 on the State Policy Framework, General Conditions in Chapter III on the Vision and Mission of the state economic policy. Hence, Indonesia is currently endowed with a strong legal foundation to implement its national economic objectives.

1.4. Economic Goals of Competition Policy

The purposes and objectives of Law No.5/1999 are defined in Articles 2 and 3 as follows:

- 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 ensure the certainty of equal business opportunities for large, medium, and small-scale business actors.*
- c. *To prevent monopolistic practices and unfair business competition.*
- d. *To create effectiveness and efficiency in business activities.”*

The objectives of the Indonesian competition policy focus on public welfare and the maximization of consumer welfare and national efficiency achieved through the process of fair business competition and equal opportunity for small and medium scale businesses. In the light of Indonesia's practice of protecting small businesses, it has been suggested by some commentators that the law is designed to limit the development of big businesses. The extent of the exemptions contained in the law, particularly in Article 50, lends credence to this belief. Article 50 exempts businesses that qualify as cooperatives or small businesses. The objective of an equal and level playing field for every business can be distorted by unclear exemptions, which, in the long run, can threaten competition policy interfere with the competition process.

The multiple objectives of the law strongly influence the Commissioners when deciding on a case. The arguments and contradictions between the choice of efficiency, consumer welfare, public interest and providing equal business opportunities for large, medium, and small-scale business actors is best reflected in the decisions of the Commission in the early years, such as the Indomaret case. In that case the Commission found that the reported party did not observe the principle of balancing economic democracy in promoting healthy competition between the interests of business and the interest of small-scale retailers, public interest and welfare. Some argue that the decision was also based on the constitutional provision relating to the “Economy Pancasila” which provides special protection for cooperatives and small-and-medium scale enterprises. Since the Indomaret decision, the KPPU has made no explicit reference to Articles 2 and 3 in subsequent decisions.

1.5. Process of Competition Law Drafting

Prior to Law No.5/1999, legal provisions touching on competition could be found scattered throughout numerous other laws, including Indonesia's criminal and civil codes; e.g. Law No. 5/1992 for Cooperatives, Law No. 9/1995 for Small Medium Businesses and Law No. 8/1999 for Consumer Protection. Article 52(1) of Law No.5/1999 leaves in effect all of these laws and regulations concerning monopolistic practices and unfair business competition, as long as they are not contradictory to Law No.5/1999 and are not superseded by any new laws. Private actions, however, may still be brought under pre-existing laws that touch upon competition. Examples of pre-existing laws with a bearing on competition include:

- a. Articles 382 bis, Criminal Law, states that “. . . anyone who, obtaining, executing or expanding a business for their own company or for another person's company, engages in unfair business practices or deceives the public or a party, shall be punished because of the unfair business practices with a penalty of a maximum of one year four months . . .”,
- b. Article 1365 of the Civil Code states that “every act that is proven to be against the law and causes loss to another person, that person shall be liable to pay compensation to remedy the loss.”
- c. Law No. 5/1984, the Industry Law, states that “The government shall regulate, supervise and develop industry to: (1) . . . (2) expand fair competition and avoid unfair competition practices (3) avoid a centralized economy and exploitation of industry by a few actors or only one business actor in the form of monopolistic practices.” Article 9.2 of the Regulation and Supervision of Industry states that it shall be implemented with a view to: “(2) Creating a fair business atmosphere for industrial growth and avoiding unfair business practices between companies in the same industry, to avoid and prevent the centralization of economic power by one or few companies or business actors in the form of monopolistic practices.”
- d. Law No. 1/1995, the Corporate Law, regulates some aspects of mergers, acquisitions and consolidations. It is clearly stated in the Elucidation to Law No. 1/1995 of the General Provisions: “To avoid unfair business practices caused by the centralization of economic power in the hands of a few business actors or a few companies, the law concluded that the prerequisites for mergers, acquisitions and consolidations shall be implemented thoroughly to prevent and avoid monopoly and monopsony in every form which is injurious to the public.” The same concerns can be seen at Article 104.1 (b) which says that legal actions on consolidations, acquisitions and mergers shall also take into consideration the public interest and need and fair business.

The original idea for an Indonesian antitrust law dates back to the early 1990s, when the government, political parties and private organizations prepared draft laws. At one point, as many as seven different draft formulations in circulation were being discussed. Law No.5/1999 itself was written in part to satisfy the conditions of a Letter of Intent entered into between the government of Indonesia and the IMF, signed in July 1998 and also to address public concerns regarding monopolistic practices and closely related concerns about corruption, collusion and nepotism which arose during the “New Order” regime under former Indonesian President Suharto.

In a practice that had rarely been invoked, the House of Representatives (“DPR”) exercised its right of “initiative” to propose the draft law -- rather than relying on the government to do so. The process took only three and half months and a Draft was officially issued on October 18, 1998 by the DPR. Law No.5/1999 was passed by the Indonesian House of Representatives on February 18, 1999 and was signed into law by Indonesian President B. J. Habibie on March 5, 1999 and announced in the State’s Gazette No 33, 1999. Law No.5/1999's effective date was March 5, 2000 incorporating a transitional period of one year for the dissemination and socialization of the law. Businesses were given an additional six-month grace period - until September 5, 2000 – to comply with or adapt to the newly enacted law.

The motivation of the DPR in proposing and passing Law No.5/1999 has been commented upon by various scholars. There seems to be agreement that the primary motivation was to bring the large conglomerates under control because cronies of Suharto headed them and because they were viewed as having been responsible for the economic crisis in 1997. Some have criticized Law No.5/1999 as having simply transplanted the approaches of other countries pointing out that it is essential that laws be consistent with a country’s legal system. Indonesia, however, singled out and adopted best practice from other countries as discussed later on.

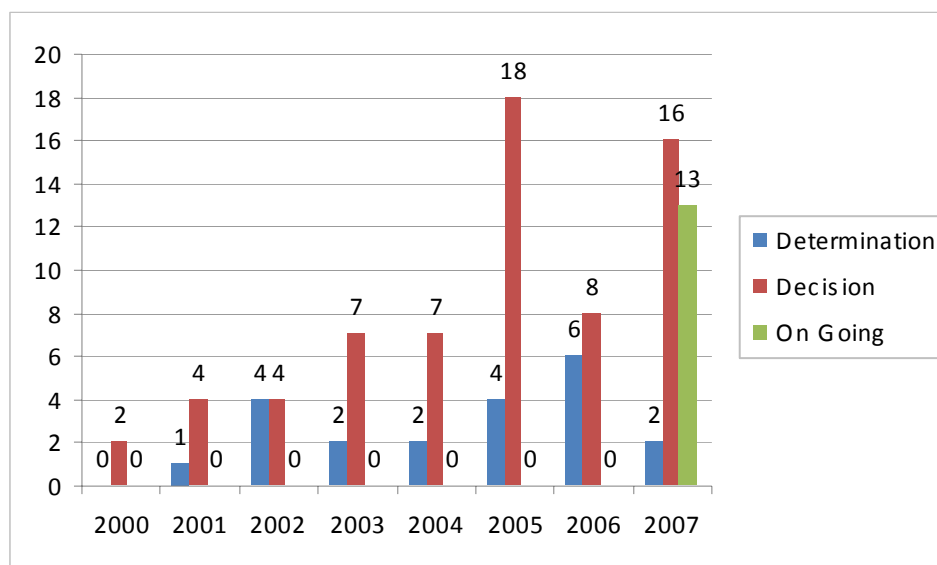
2. THE SCOPE AND APPLICATION OF COMPETITION LAW AND POLICY

2.1. Introduction

Since the enactment of the Law No.5/1999, **Komisi Pengawas Persaingan Usaha** (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, KPPU has received an increasing number of complaints, from 7 to 231, and accordingly has rendered an increasing number of decisions from 2 to 46 rendered in 2000 and 2008 respectively. Graph 1 shows such evolution on KPPU’s work:

Graph 1: Evolution of Competition Cases



Source: KPPU 2007 Annual Report

The close relationship between anti-corruption and competition policies is evidenced by the fact that the majority of competition cases are associated with 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% of the 57 recommendations issued over 2000-2008.

Table 1: Effective rate of Advice and Recommendation - Year 2001-2008

	2001	2002	2003	2004	2005	2006	2007	2008
Effective	2	1	7	0	4	1	8	5
In-effective	2	1	3	3	8	4	3	5
Effective Rate	50%	50%	70%	0%	33%	20%	73%	50%

Source: KPPU

2.2. Elements of the Indonesian Competition Law

Law No.5/1999 contains 11 Chapters and 53 Articles, with the major substantive law sections consisting of General Provisions, Prohibited Agreements, Prohibited Activities, Abuse of Dominant Position, The Supervision of Business Competition and District Court and Case Handling Procedure, Sanctions & Penalties and Exemptions.

As is common in civil law systems like Indonesia's, the first part of the law provides General Provisions including the definition of terms used in the law, which are to be referred to at all times when construing the purpose or meaning of the articles of the law and also relate to other

existing law that regulate the same meaning. The following are the terms as defined in Law No.5/1999:

- a. *“**Monopoly** shall be the control of the production and/or marketing of goods and/or utilization of certain services by one business actor or by one group of business actors.*
- b. ***Monopolistic practices** shall be the concentration of economic power by one or more business actors, resulting in the control of the production and/or marketing of certain goods and/or services resulting in unhealthy business competition and could be harmful to the public interests.*
- c. ***Concentration** of economic power shall be the actual control of a relevant market by one or more business actors, so that they are able to determine the prices of goods and/or services.*
- d. ***Dominant position** shall be a situation in which a business actor has not any significant competitor in the relevant market in relation to the market share controlled, or a business actor has the highest position among its competitors in the relevant market in relation to financial capacity, access capacity to supplies or sales, and the ability to influence supply or demand of certain goods or services.*
- e. ***Business actor** shall be any individual or business entity, either incorporated or not incorporated as a legal entity, established and domiciled in or conducting activities in the jurisdiction of the Republic of Indonesia, either individually or jointly based on agreement, conducting various business activities in the economic sector.*
- f. ***Unfair business competition** shall be competition between business actors in undertaking production activities and/or marketing of goods and/or services in a dishonest or illegal fashion or restricting business competition.*
- g. ***Agreement** shall be an action of one or more business actors for binding themselves to one or more other business actors under whatever name, either in writing or not.*
- h. ***Collaboration** or **business conspiracy** shall be the form of cooperation conducted by business actors with other business actors, with the intent to control the relevant market in the interest of the conspiring business actors.*
- i. ***Market** shall be the economic institution where buyers and seller are directly or indirectly able to conduct trade transaction of goods and/or services.*
- j. ***Relevant Market** shall be the market related to a certain marketing range or area by a business actor for the same or similar type of goods and/or services or substitutes of such goods and or services.*
- k. ***Market structure** shall be the market condition that provides an indication of aspects that have significant influence on business actor’s behavior and market performance, among*

others the number of sellers and buyers, barriers to enter and exit the market, product variety, distribution systems and control of market shares.

- l. **Market behavior** shall be acts undertaken by business actors in their capacities as suppliers or buyers of goods and/or services in order to reach the company's objectives, among other achievement of profits, growth of assets, sales targets and the competition method used.*
- m. **Market Share** shall be the percentage of the sales purchase value of certain goods or services controlled by the business actor in the relevant market in a certain calendar year.*
- n. **Market Price** shall be the price paid in a transaction of goods and/or services in accordance with the agreement between the parties in the relevant market.*
- o. **Consumer** shall be any person who uses and/or utilizes goods and/or services, whether in his/her own interests or the interests of others.*
- p. **Goods** shall be any object, either tangible or intangible, either movable or immovable, which can be traded, used, utilized or made use of by consumers or business actors.*
- q. **Service** shall be any assistance in the form of work or performance traded in society to be utilized by consumers or business actors.*
- r. **Business Competition Supervisory Commission** shall be the Commission formed to supervise business actors in conducting their business activities so that they do not conduct monopolistic practices and/or unhealthy business competition.*
- s. **The District Court** shall be the court referred to in laws and regulations existing in the legal domicile of the business actor.”*

2.3. The Goals of Competition Policy and Development

As mentioned, Law n.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”¹⁸. 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.*

¹⁸ Version in English of Article 3 of Law n. 5, provided by KPPU. Emphasis added.

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.

2.4. The Scope of Competition Law

Anticompetitive Practices

Substantive Analysis Issues

As already noticed, Law n. 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. However, 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.

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

Chapter III establishes market share-based threshold that establish legal presumptions. These presumptions are used to screen for the market structure that allow for the occurrence of monopolistic practices and or unfair business competition:

- For oligopoly/oligopsony: if two or three "business actors" control over 75% of the market (article 4(2));
- For monopoly, monopsony: if one "business actor" control over 50% of the market (Articles 17(2)C and 18 (2)); and
- For dominant position: if one "business actors" control over 50% or if two or three "business actors" control over 75% for a group of firms (article 25(2)).

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 assessed 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. This 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 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% of the cases caught under such provision were 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”).

KPPU and KPK signed a memorandum of understanding with the aim of enforcing both laws and to combat 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 comes from tender “losers.” The relationship between the two Commissions seems to be very productive. The only guideline that has been issued by KPPU refers to Article 22 of Law n. 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. Surprisingly, three district court judges were mentioned in the surveys.

Information about the illegal practices comes mainly from tender “losers”, who may submit complaints to both Commissions. Bid-rigging cases are more difficult to uncover, as there are no losers to complain. Even if KPPU can use wiretapping (article 12) and search and seizure procedures, getting the first bit of information is more difficult for the KPPU. Competition Law n. 5 does not provide for leniency agreements or amnesties. There are, however, incentives for whistle-blowing about corruption: first, there is a law on witness protection, provided to help the KPK, second, there is a provision for rewarding complaints up to 0,2% of the value collected by the State.

There is a special Court for corruption cases presented by the KPK. When, however, 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 KPPU, the design of the enforcement of the Law is part of the problem, not part of the solution.

As already said, KPPU has no power to sign leniency agreements or apply amnesty programs. Nevertheless, there are consent agreements by which the party “promises” 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.

According to KPPU’s, the analysis applied to anticompetitive practices will form part of a Guideline. The KPPU reported to be elaborating a Guideline that would contain all applied concepts, definitions and standards of analysis. These will aid transparency and, provided the judiciary is in accordance, aid legal security.

In 2007, KPPU judged an important case, which shows the kind of analysis it may render, as well as the impact of the judicial review over the Commission's decision. It was one of the cases to use economic analysis and on which the judicial review had a significant effect.

Table 2: The Telecom Case – 07/KPPU-L/2007

i. History of the case

After having received a complaint on 5 April 2007, the KPPU’s secretariat conducted a preliminary investigation from 9 April to 22 May 2007. The Temasek Group of companies was investigated for infringement of article 27 and PT Telekomunikasi Seluler for infringement of articles 71 and 25.1.b of Law n. 5, respectively.

The Preliminary Investigation concluded that there was a strong indication that infringements had taken place, which gave the basis for a full investigation, hence further investigations were undertaken and completed on 27 September 2007.

The findings of the investigations confirmed the following suspected infringements¹⁹:

- “1. Temasek Holdings Pte. Ltd (hereinafter referred to as Temasek) owns majority of shares in two business activities of the same fields and relevant market that violates Article 27(a) of the Law No.5 of 1999;*
- 2. PT. Telekomunikasi Selular (hereinafter referred to as Telkomsel) remains the airtime tariff high that violates Article 17 (1) of the Law No.5 of 1999;*
- 3. Telkomsel abuses its dominant position (sic) to restrain market and the development of technology that violates Article 25 paragraph 1.b of the Law No.5/1999.”*

¹⁹ Decision of the case 07/KPPU-L/2007 (herein referred as “Decision”), pg. 5.

ii. The Analysis by the Secretariat

The Secretariat defined the relevant market as cellular telecommunication services in Indonesia (herein referred as the “Relevant Market”)

At the time of the analysis, the cell phone market was composed of six firms: Telkomsel, Indosat, Excelkomindo, Mobile-8, Sampoerna Telekomunikasi Indonesia, and Natrindo Telepon Seluler, with Telkomsel being the market leader.

Until 2006, telecommunication services' prices had been controlled by the Government through regulations that established a maximum price for telecommunication services in Indonesia. According to the report, the operators determined their prices on the basis of a formula contained in the most current “Decree of the Minister of Tourism, Post and Telecommunication No. 27/PR.301/MPPT-98 on Connection Service Tariff of Cell Mobile Phone” (herein referred to as Ministerial Decree 27/98), and the “Decree of Ministry of Transportation No. 79/98 on Service Tariff of Prepaid Cell Mobile Phone (hereinafter referred to as Ministerial Decree 79/98)”.

From 2006, the regulation of the Minister of Communication and Information No.12/Per/M.Kominfo/02/2006 on the Procedures of Tariff Fixing Conversion for Basic Telephony Cellular Mobile Network replaced the 1998 Decrees and established as a criterion that “[T]he tariff conversion calculating formula is performed by applying floor price”. According to the Secretariat, “the substance of tariff regulation in the provision does not reenact ceiling price but interconnection tariff as a floor price”. However, the investigation report mentions that the accepted prevailing tariff system is as to the 1998 Decrees²⁰.

Temasek is an investment group with diversified portfolio, but with strong participation in Indonesia telecommunication markets through a number of companies. Through its subsidiary Singapore Telcom Mobile Pte. Ltd., Temasek holds 35% of Telkomsel’s (the lead cellular operator) capital, Temasek also holds 41,9% of the capital of Indosat, the second largest company in terms of market share in the Indonesian cellular telecommunication market. After an extensive analysis over the definition of majority shares and control, the Secretariat concluded that Temasek had control over Telkomsel and Indosat, and that for the purposes of the analysis,

²⁰ Decision, pg. 22, item 55.

²¹ Decision, pg. 92, item 195.

²² IDEM, item 197.

²³ Robert S. Pindyck and Rubinfeld, *Microeconomics Sixth Edition*, Prentice Hall, New Jersey (2005), page 442-463.

²⁴ GHHI was adopted to incorporate cross-ownership in the concentration index. In order to consider the cross-ownership effect to market power, the Modified Herfindahl-Hirschman Index has been adopted elsewhere. See OECD DAF/COMP/WP3(2008)1 on minority shareholding.

²⁵ Decision, pg. 102.

²⁶ Decision, pg 109, item 112.

²⁷ Decision, pg. 1212, item 154.

²⁸ Although it is used as a standard, there is no explanation in the report on the meaning of the term.

²⁹ Decision, pg. 634, item 5.5.2.4.

³⁰ Decision, page 641, item 5.5.5.1.

³¹ Decision, page 646.

³² Decision, pg. 653, item 5.5.5.1.15.

³³ Decision, pg. 659, item 5.5.5.6.4.

they could be considered as “one single entity”.

The analysis was based on the effects of the cross-ownership of Temasek. According to the KPPU secretariat, such effect was demonstrated by the changes in the industry concentration ratio before and after the cross ownership. *“If the level of industrial structure is getting concentrated after cross-ownership, it indicates that the conduct of cross-ownership gives negative impact to competition”*²¹. Such negative impact would represent consumer loss. The analysis assumes that the market concentration indicates market power and the increase of it provides easier opportunity for tariff fixing. The Secretariat established four factors to be observed in deciding whether or not an abuse of market power is occurring: *“i. its high selling price product; ii. its relativity with substitution product; iii. its relativity with production costs; iv. its high profit margin gained by business actor in the relevant market.”*²²

As per the 2006 report, Telkomsel (68.08%) and Indosat (21.55%) had a combined market share of 89.63% of the Relevant Market.

The decision describes the theory of oligopoly as presented in Pyndick and Rubinfeld, 2005²³. The Secretariat arrived at the conclusion that companies are likely to cooperate, especially through interconnection agreements, and then collusion is more likely to happen.

The investigators calculated the HHI (Herfindahl-Hirschman Index) and GHHI (General Herfindahl-Hirschman Index)²⁴ and concluded that the industry was “very concentrated”, that it had remained so and followed a trend towards more concentration every year during the period 2002 to 2006..

Two criteria were used to measure competition in the market; the development of the network as measured by the Base Transceiver Stations (BTS), and prices. For the first step, the investigations found that *“The low aggressiveness of the closest competitor will give a chance to dominant actors to optimize their market power.”*²⁵ With respect to prices, it was found that in general there was a price leadership strategy in the market, led by Telkomsel group.

By balancing high concentration and market ownership, the Secretariat concluded that Telkomsel and Indosat increased market share in the period of cross-ownership by comparing their average market shares between 2003 to 2006 (the cross-ownership period) to the market shares of 2002, 89.61% and 83.58%, respectively. The same effect was obtained using the HHI and GHHI measurements. In 2002, the HHI was 4312 and the average HHI during the cross-ownership period was 4823.73. KPPU found that this index was above the 3000 considered by the USDOJ and USFTC guidelines to cause “limitation on competition”²⁶.

The Secretariat conducted an analysis of the demand function to estimate profit in different conditions of competition, but not specifically for Indonesia. It found that Telkomsel was the first mover because it was the incumbent, had dominant position and had built wide infrastructure. For a more competitive market, the investigators understood that non-first movers should be more aggressive. The Secretariat did not observe such movement from Indosat, the second player, which reinforced the power of Telkomsel in the market. Investigation found that the cross-ownership had weakened the ability of Indosat to act as a threat to Telkomsel, and thus

there was no competition in the Relevant Market. As per summarized in the investigation report: *“The high market power, assumed to be caused by concentrated structure as a result of cross-ownership, can be described by several indications such as high profit margin measured by EBITDA, high selling price compare to other countries, and the high differences between selling price and production cost.”*²⁷

For tariff analysis, the Secretariat applied the t-Statistic test to the prepaid average tariff changes in the period 2002 to 2006 and compared prices of services with prices obtaining in other countries and the ASEAN community. It concluded that the tariffs are higher than *“the amount of interconnection recommendation”*.

The last part of the analysis consisted in assessing the consumer losses by estimating price-elasticity of the demand, further compared to prices in other countries and quantities recommended by OVUM²⁸. The elasticity of the demand estimation was based on a dataset of observed market prices and quantities. There is no discussion on identification problems – this is a very common difficulty in demand function estimation – and how these were overcome.

Under the Secretariat assessment, consumer losses amount to IDR 11.9 trillion annually (when compared to Public Switch Telephone Network interconnection prices) and IDR 76.8 trillion (when compared to the price of interconnection).

The Secretariat estimated the market variables without the ownership and inferred that the cross-ownership had negatively impacted the competition in the market, by weakening the incentive of the second competitor to compete with the leader and thus strengthening the market concentration. Under different circumstances, competition would lower prices, increase consumer surplus and reduce consumer losses, according to the Report.

ii.i. The Secretariat’s Conclusions:

The Secretariat concluded that:

- i. Temasek controlled Telkomset and Indosat through indirect participations (cross-ownership);
- ii. Cross-ownership created high concentration and market power and reduced competition;
- iii. The cross-ownership by Temasek violated Article 27a of Law n. 5/1999;
- iv. The tariff fixed by Telkomsel was excessive;
- v. *“The use of market power by Telkomsel, decreasing competition and creating excessive pricing in cellular telecommunication service in Indonesia violates Article 17 paragraph (1) and Article 25 paragraph (1) of the Law No.5/1999”*.

Examiner Dr. Ir. Benny Pasaribu disagreed with the investigation report conclusions for lack of evidence.

iii. The Commission’s Decision

On November 19, 2007, the Commission concurred with the secretariat's findings, according to the analysis described below:

- i. of article 27 by Temasek, Singapore Technologies Telemedia Pte. Ltd., STT

- Communications Ltd., Asia Mobile Holding Company Pte. Ltd, Asia Mobile Holdings Pte. Ltd., Indonesia Communication Limited, Indonesia Communication Pte. Ltd., Singapore Telecommunications Ltd., and Singapore Telecom Mobile Pte. Ltd (collectively referred as “Defendants”;
- ii. of article 17 by Telkomsel;
 - iii. of article 25(1)(b) by Telkomsel;

As remedies and penalties for the infringements found, the Commission:

- i. Ordered the Defendants to sell their participation either in Telkomsel or in Indosat, within two years of the decision;
- ii. Ordered the Defendants to release voting rights and rights to nominate directors and commissioners in either Telkomsel or Indosat, up until the sale of the shares mentioned in the prior item;
- iii. The mentioned participation should be sold following two conditions:
 - a. Each buyer shall be limited to acquire a maximum of 5% of the total divested shares; and
 - b. The buyer may not be associated to Tomasek and or other buyers in any form.
- iv. Applied a fine of Rp 25,000,000,000 (twenty-five billion) to the Defendants;
- v. Ordered Telkomset to cease practicing “high tariff” pricing and decrease the tariff on the day of the decision by at least 15% (fifteen percent);
- vi. Applied a fine of Rp 25,000,000,000 (twenty-five billion) to Telkomsel;

iv. The Commission’s Analysis

The Commission rebutted the parties’ allegation with respect to (i) KPPU jurisdiction; and (ii) due process.

The Commission asserted its jurisdiction by considering companies that are not domiciled in Indonesia as part of the Temasek group, applying the single entity and effect doctrines, following the extraterritoriality principle – an interpretation affirmed by the Indonesian Supreme Court.

Among the procedural allegations made by the parties, Defendants argued that Commission had compromised the independence of the investigation process by disclosing the decision to the media. Another interesting procedural challenge refers to the time limit for the issuance of the Investigative report. None of the procedural allegations were sustained.

On the merits, Commission considered the following:

The Commission defined the relevant market as the cellular telecommunication services in Indonesia, aligned to the Secretariat’s findings.

Commission stated that Law n. 5 adopted both a rule of reason and per se analysis. According to the Commission, conducts “with the sentences “causes monopoly practice”, and/or “unfair business competition” are classified to be analyzed by the rule of reason”. All the other conducts should be reviewed under the per se rule. Nonetheless, it decided for a rule of reason analysis, under which the authority should demonstrate the negative impact of the conduct over the market

and consumers.

Regarding to the analysis of the infringement, the Commission agreed with the Secretariat's findings that the share ownerships within the Temasek group configured the infraction. The Commission also agreed with the investigation report that the participation and the terms of such share ownership gave Temasek control over Indosat and Telkomsel, based on capital participation, management and influence over decision-making. KPPU understood “[T]he fundamental meaning of Article 27 is to prohibit business actor controls some competing companies in the market. The control exists through majority shareholder in both companies. If it happens, *de jure*, it is a control. The significant share ownership in both companies is *de facto* able to control management decisions’ of the company.”²⁹

Once the first requirement had been identified, the Commission evaluated the market in order to assess market shares and the behavior. The Commission adopted the market share assessment used by the Secretariat and moved to the analysis of the effects on competition caused by the Temasek Group having control over 50% or more of the market.

The first behavior analyzed by the Commission refers to Indosat efforts, as the second player in the market, to develop the network by building the Base Transceiver Stations (BTS). The Commission concluded that “*the aggressiveness of Indosat*” was lower than that of other competitors due to the conflict of interest of its controller Singapore Technologies Telemedia (herein referred as “STT”), which is controlled by Temasek. The Commission evaluated the impact of Indosat's lower than expected engagement based on five criteria: “(i) *competition in cellular industry*, (ii) *price leadership*, (iii) *price level*, (iv) *profit rate*, and (v) *consumer loss*”³⁰.

It concluded that Indosat, as the closer competitor, had the capacity to oppose the dominant player and that Indosat's under-development strengthened the dominant position of the leader, Telkomsel, in agreement with the findings of the Investigation team.

To support such a conclusion, the Commission found that the market was not competitive. Prices were found to be fixed, having presented minimum fluctuation over the years, which was read by the authority as an evidence of non-competition. The Commission recognized that the price in the Relevant Market was established under a price leadership conduct which was seen as an indicator of lack of competition. It rebutted the idea that price leadership could be a sign of competition by understanding that when prices are not related to costs and the market was found not to be competitive, price leadership indicates market power and lack of price strategies from the other competitors.

Evidence presented to strengthen the market power argument was that Telkomsel, the leader, hadn't employed any price strategy to enhance competition and avoid any threat from its competitors. The Commission concluded: “*Therefore, it is proven that Telkomsel is only decrease competitive pressure and does not try to create competition in the market.*”³¹

However, in the price leadership model, the leader sets prices and quantities where the marginal revenue equals marginal cost, considering the residual demand. The followers are price takers and will set quantities where the price (constant marginal revenue) is equal to the marginal cost.

Therefore, even in price-leadership models, costs are taken into account and the extent of the leader's market power will depend on the number of followers and the elasticity of the followers supply. The leader does not need to adopt a "cross-ownership" strategy to achieve this result. On the contrary, the profit maximizing behavior of independent firms is enough to conduct to the mentioned equilibrium. Cross-ownership could facilitate collusive behavior among rivals, but this was not the reasoning of the Commission decision.

With respect to the conduct of imposing excessive prices, the Commission followed the opinion of the Investigation report that the excessive price is based on the demonstrated high profit rate of the cellular operators. The profit rate is calculated according to the EBITD margin and is defined as "*a price higher than its predicted competitive price, or higher significantly than its cost.*"³².

The Commission also rebutted the argument that the price could not be excessive once it is limited by price cap regulation, by stating that the maximum price established by regulation does not restrain the parties to lower prices through market mechanisms. The conclusion on excessiveness price was also affirmed by the finding of the Secretariat and the Commission that Indonesian prices, profitability rates and EBITDA margins were higher than in other jurisdictions, including other Asian countries.

The next step was to assess consumer losses. Commission also followed and used the investigative analysis and calculation, as to be the difference between the price paid by consumer and the producer's value (cost plus profit). Under this assessment, Commission estimated consumer losses as amounting to between RP 14,7 trillion rupiahs and Rp 30,8 trillion rupiahs in the four years of conduct (2003 to 2006). According to the Commission "*[T]he calculation has considered the balance interest of business actor and consumer*"³³.

By having configured the infringement, as well as the negative impact of the conduct in competition and in consumers, the Commission decided to condemn the parties and applied the mentioned penalties and remedies.

The Commission dismissed possible infringement of the second part of Article 25(1)(b) of Law n. 5, that refers to limitation to technology development due to lack of evidence. The Commission understood that Telkomsel developed and introduced new technologies in the market and that the anticompetitive behavior under analysis created barriers to the development of the market and not to the development of technology.

An interesting point posed by the Commission and the Secretariat was the use of international doctrines and UNCTAD's model and decisions from other jurisdictions. This practice strengthens the decision and makes it more robust.

v. The Judicial Review

A KPPU's Commissioner reported that the parties appealed against the Commission's decision to the judiciary. The Supreme Court changed the Commission's remedy allowing the parties to sell the mentioned participations to any buyer, disregarding the limitation that buyer could not

have any relation to the sellers.

The Decision was carefully justified and the Commission's findings and conclusions were well disclosed in the Decision. However, to better reap the benefits from the educational purposes of a decision like this, the Commission should maintain the Secretariat report, parties' defenses and the Decision itself separate.

The case's description suggests that if merger control was implemented in Indonesia, this case would be the subject of a merger review and would probably have been approved with strong restrictions or would have been blocked. It seems that the acquisition of Temasek's indirect participations in the lead and second player in the Indonesian cellular market would not have been permitted.

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

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 international commentary that would provide yet further perspectives and experiences.

Procedural Issues

Under articles 35 and 36, KPPU has broad powers, authority and obligations that require and allow KPPU to proceed with investigations and adjudicate competition cases. Among these obligations, KPPU has to "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 the powers, KPPU has the authority to receive complaints, 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 complaint 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 anonymous complaints are not accepted, the identity of the whistleblower can be treated as confidential.

The complaint to the Commission shall be in writing and must identify the alleged violation. Article 38(4) requires that the Commission establish specific procedural rules for complaints.

Once accepted as a competition case, the complaint must follow every step of the case procedures. Most of the decisions made by KPPU, including condemnations, have a small impact on the economy, according to Commissioners. The KPPU is not allowed to choose cases, prioritize, dismiss or fast track any case .

If the complaint or monitoring process is sufficient to conclude that there is a possible infraction, KPPU initiates a preliminary investigation. The purpose of a preliminary investigation is to collect early evidence of an anticompetitive 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 there has been a possible infraction, the Commission initiates a Further Investigation that shall be carried out in 60 business days, extendable by the Commission for up to a further 30 days.

The parties may remain silent or lie in order not to implicate themselves but may not refuse to hand over any documents requested, refuse to testify or impede the investigation.

Reasoned decisions shall be rendered by the KPPU in writing, in open public sessions 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 and time-consuming appeal to the judiciary. Appeal against the KPPU's decisions should be forwarded to the district court within 14 days from notification of the party who has been found guilty. The District Court has 30 days to decide. Both 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 KPPU to enforce its decisions, in case of non-compliance.

According to KPPU, 70% of the cases have resulted in convictions. 40% of these 70% are appealed to the judiciary. 85% of the KPPU appealed decisions were confirmed in district courts, while the Supreme Court confirmed all decisions that reached it. This is considered a very good performance when compared to other young jurisdictions.

All the deadlines related to investigation and decision-making of anticompetitive 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 KPPU to further investigation.

An amendment to the Law now under discussion would change procedures. Today, KPPU's decision can be appealed in any district court in Indonesia. There are more than one hundred district courts. The draft amendment provides that the Supreme Court appoints 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 Court³⁴.

Sanctions

According to Law n. 5, KPPU has the power to impose administrative and criminal sanctions. Among the administrative sanctions, the Commission can declare agreements 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 one billion Rupiah and twenty-five billion Rupiah (approximately USD 82,650 to USD 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 one billion Rupiah to one hundred billion Rupiah (approximately USD 82,650 to USD 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 KPPU is 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 judicial support. This creates legal insecurity and weakens the enforcement by KPPU.

The maximum fines are quite low to deter illegal practices, as compared to the largest Indonesian companies sales, such as Telekom Indonesia (US\$ 5.59 billion sales in 2008), Bank Rakyat Indonesia (US\$ 2.15 billion sales) or Bumi Resources (US\$ 1.87 billion sales).³⁵

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

³⁴ There are three levels of Courts: District Courts, High Court and Supreme Court.

³⁵ Forbes 2008 (www.forbes.com/lists/2008). Figures in US\$ latest available.

Merger Review

Merger review is an important role for Competition authorities in order to prevent the creation through merger and acquisitions of high market power or a market structure that ease 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 its application and validity. There is strong resistance from some government members. Although treated as a high priority within KPPU, KPPU's initiatives in the last four or five years have had no result. However, while awaiting this regulation, KPPU is reported to have finalized a merger review guideline.

Merger review is resource consuming³⁶. 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. It is also very important that such thresholds could be flexible in order to be fast and easily adapted in case it is perceived that the threshold is too broad or too narrow.

A fair way to charge merger filing fees is to define different levels of filing fees, attached to the value of the transaction. The filing fees categorization follows the idea that small transactions uses less resources to be analyzed and thus make the system fairer. It is important that, like the thresholds, the filing fees levels were created by regulation or any other mechanism that allows KPPU to easy and fast change and adapt those values to the reality. This system is used by the United States and, in terms of developing countries, by South Africa.

Some scholars read the original, authentic language of Article 28 in Law n. 5, that is, 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 n. 5.

Judicial Review

Any KPPU decision can be submitted to judicial review. According to the Indonesian legal system, KPPU's decisions must be appealed to the district court. Appeals of district court

³⁶ 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"*.

decisions shall be reviewed by the Supreme Court, bypassing the High Court, as mentioned above.

KPPU must appeal to a district court to enforce any KPPU decisions that are not voluntarily complied with. Hence, competition law enforcement involves both 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% of fines is voluntarily paid. Considering the total fines paid after Court execution, the percentage is extremely low as well: only 1,4%. A strong effort towards higher effectiveness of KPPU decision is urgently required.

Table 3: Total Fines and Paid Fines – Year 2000-2008

Year	Fines	Paid Fines	
	Total (US\$)	Voluntary (US\$)	After Court Execution (US\$)
2000	-	-	-
2001	-	-	-
2002	13.506.184	-	-
2003	599.129	-	-
2004	17.635.416	-	-
2005	11.082.172	-	1.143.802
2006	4.053.759	-	144.226
2007	78.289.270	423.752	423.752
2008	1.958.649	-	43.639

Source: KPPU

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 6000 district court judges have received training in competition law. Frequent high level workshops on law and economics for the Supreme Court would also be helpful.

KPPU asked the Supreme Court to issue procedural guidelines for competition law cases. Law n. 5 has inadequate procedural provisions and KPPU needs its role and competencies clarified. Many cases appealed to the Supreme Court referred to and challenged the KPPU's procedures³⁷.

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 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 of or incomplete evidence, giving a clear message that all the investigative competencies remained exclusively with the KPPU. Such a measure should strengthen recognition of KPPU technical expertise and independence. Moreover, the procedure established by the Supreme

³⁷ Appeals can also challenge the merits of the decision.

Court avoids that a technical decision made by the Commission and informed by the work of the Secretariat technical staff, would be replaced by a decision of a judge unfamiliar with competition issues.

The judiciary also faces tight time limits for rendering decisions imposed by Law n. 5. Although there is no legal sanction in the case of deadlines not observed, such non-observance would negatively affect the judges' performance evaluation and promotions.

Although to date, no case exceeded the s prescribed deadline 30 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) and it is unlikely that the current deadlines can continue to be observed. The Law should be amended to extend the time limit to, for instance, 90 days for the Supreme Court to render a decision, as already suggested by members of the Supreme Court.

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

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

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 industrial and socio-economic policy goals such as promoting innovation and partially maintaining the *status quo*, such as state monopolies.

Article 50 lists the exemptions to the application of the Law:

- “a. actions and or agreements intended to implement applicable laws and regulations; or*
- b. agreements related to intellectual property rights, such as licenses, patents, trademarks, copyright, industrial product design, integrated electronic circuits, and trade secrets as well as agreements related to franchise; or*
- c. agreements for the stipulation of technical standards of goods and or services which do not inhibit, and or impede competition; or*
- d. agency agreements which do not stipulate the resupply of goods and or services at a price level lower than the contracted price; or*
- e. cooperation agreements in the field of research for the upgrading or improvement of the living standard of society at large; or*
- f. international agreements ratified by the Government of the Republic of Indonesia;*
- or*
- g. export-oriented agreements and or actions not disrupting domestic needs and or supplies; or*

- h. business actors of the small-scale group; or*
- i. activities of cooperatives aimed specifically at serving their members.”*

The list of exemptions does not only refer to small business, as can be found in some other jurisdictions, but can be interpreted to also include a range of business sizes because of the imprecise wording.

One exemption that attracts particular attention is that on cooperatives. Exemption for cooperatives is a political issue. Although KPPU interprets the provision to mean that only cooperatives that provide services to their members are exempted, this limitation is not explicit in the Law. Neither does the Law bring any limitation related to the size of the cooperative. Such a broad exemption may inadvertently authorize anticompetitive effects, not least by offering the possibility of business to be structured in such a way as to bypass the competition law.

2.5. The Application of Competition Law

Institutional

The Komisi Pengawas Persaingan Usaha (Commission for Supervision of Business Competition, or KPPU) was established by the Decision of the President n. 75, of 8 July 1999 (Presidential Decree) and in line with 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 branches of Government. However, it is accountable to and monitored by all of them. Regarding the executive and legislative branches, as per article 35(G) the Commission is required 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, subject to approval by the DPR. The DPR approves the KPPU’s budget. All KPPU decisions may be appealed to the judiciary and compliance with 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, or in some instances the absence of such provisions, regarding dismissal, prolongation without reappointment, number of Commissioners, quorum, and the holding of multiple jobs by Commissioners are sources of concern, particularly as regards political interference.

According to Law n. 5, dismissal of a Commissioner by the president does not require cause, however, Parliament must consent to the dismissal.³⁸ .

The law specifies a minimum number of commissioners, 7, but not a maximum.³⁹ At present, 13 commissioners have been appointed. Of these, 11 are active. Commissioners are appointed for a five-year term, with one reappointment possible. Further, when the mandate of a commissioner expires 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 can 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 n. 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. 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 n. 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 in business or have “*knowledge and expertise*” of law and economics.

Most of the current commissioners are professors of law or economics, such as the current Chairman and Vice Chairman. However, some Commissioners are leaders or members of political parties. Almost all the people interviewed associated with competition policy in Indonesia mention this as a problem and 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 discussion: a) to establish a maximum number of Commissioners, b) to strengthen the staff and Secretariat and c) to require that the Commissioners not hold political positions.

In addition, it is also desirable, in order to transfer expertise and to enhance legal certainty, rules on non- or delayed appointment should maintain staggered expirations of mandates for commissioners. For instance, if there are seven Commissioners, as in the draft amendment, replacement should occur at different times for two to three commissioners. This could be accomplished relatively easily by amending the terms only the one time, after which the expiration of subsequent mandates would not coincide.

The KPPU has a technical Secretariat that is responsible for carrying out the investigations. The Secretariat is staffed by the technical personnel and also draws on external experts who are co-

³⁸ Article 33 lists the hypothesis for the termination of membership as of: “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.

³⁹ The draft amendment to the Law defines seven as the maximum number of commissioners, according to Commissioners.

opted into technical working groups as needs require. Two key challenges are recruitment and retention of personnel with requisite skills for competition enforcement.

Table 4: Development of Human Resources

	2000	2001	2002	2003	2004	2005	2006	2007	2008
Administrative Staff	7	10	14	35	36	35	29	96	135
Technical/Supporting Staff	0	1	10	11	13	13	22	22	33
Competition Policy Analyst	0	0	0	0	5	5	10	10	10
Investigator	0	14	14	17	18	23	18	18	16
Management	3	7	7	8	11	13	23	24	27
Commissioner	10	10	10	10	10	9	7	13	13
TOTAL	20	42	55	81	93	98	109	183	234

Source:

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 incorporate the technical staff into the civil service. Such a move would immediately decrease salaries by 60 percent. At present, the technical staff is not classified as civil servants. The proposal is seen as a positive one in Indonesia. The current economic crisis could reduce the immediate loss of trained technical staff, but probably not in the longer run. Similarly, recruitment in the future would probably be negatively affected.

KPPU resources basically originate from the governmental budget (“State and Revenue and Expenditure Budget”). The budget is linked to the Ministry of Trade⁴⁰. Revenue from fines go to central government budget. The Law, however, left open the possibility that the Commission’s budget be supplemented by alternative sources. For instance, if merger review is adopted, it will be possible to charge notification fees that could at least partially cover the costs of the review. This approach is adopted by many jurisdictions and can help meet the costs of the competition authority.

The Secretariat prepares the KPPU's budget proposal based on an annual and a five-year program. The budget proposal is then submitted to the Ministry of Trade and, as already mentioned, approved by the Parliament. Budgetary approval involves two major processes – negotiations with the Government and with the Parliament. The budget proposal is for 2 years, but it is approved on an annual basis. The evolution of the KPPU budget shows a significant increase over the last 4 years. During 2000-2004 the average budget was US\$ 5,53 million dollars, while during 2005-2009 it jumped to US\$ 16 million⁴¹.

⁴⁰ Although there could be a conflict between trade policies and competition, KPPU has not reported having any problem in this sense.

⁴¹ Conversion to US\$ based on implied Purchasing Power Parity conversion rate, as reported by IMF outlook, 2009.

Table 5: Evolution of KPPU's Annual Budget

Year	Total (US\$)
2000	2.154.611
2001	6.683.860
2002	4.840.716
2003	7.464.619
2004	6.510.987
2005	10.751.740
2006	19.432.676
2007	18.009.467
2008	17.152.943
2009	15.130.686

Source: KPPU (Conversion to US\$ based on implied Purchasing Power Parity conversion rate, as reported by IMF outlook, 2009).

3. COMPETITION ADVOCACY

Many of the anticompetitive practices that are outlawed 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.

KPPU identifies public trust and confidence in the authority as an important asset in implementing competition policy. In order to gain and maintain public support, the KPPU prioritizes cases that directly and substantially benefit the public or consumers.

A positive KPPU initiative in this direction was the launching of a newsletter and establishment of the KPPU's website. Such measures provide for transparency and accountability that in turn increase public trust in the body.

Most competition problems in Indonesia stem from Government actions. State-created monopolies were ubiquitous in the Suharto era and many continue to exist due to local government regulations. Many public policy makers and regulators are unfamiliar with the goals or benefits of competition policy. Moreover, they are not used to incorporating competition as a goal of their 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.

More competition advocacy is not yet complete. Certain import rules are flagrantly damaging to competition: for example, products such as textiles, garments, shoes, toys and food can only be imported through five specific ports and by registered importers that are 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. The KPPU issues policy advice and recommendations to the Government (central and regional) on all public policies identified as potentially distorting to competition. The KPPU has offered more than 60 recommendations to forestall the creation or do away with 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 in the economy such as telecommunications, insurance and pharmacies. Port facilities are a major particularly the determination of the Terminal Handling Charges (THC), which has wider implications for the cost of Indonesian exports.

Examples of regulations and decrees contrary to competition law objectives are the protection of traditional retail conferred by the Regulation of the President of the Republic of Indonesia No. 112-2007 concerning Organization and Directions of Traditional Markets, Shopping Centers and Modern Stores and Decree No. 53 Year 2008 concerning Guidance on Arrangement and Management of Traditional Market, Shopping Centre, and Modern Retail.

The regulation establishes operational conditions such as zoning restrictions consistent with spatial planning legislation, restrictions on opening hours, parking conditions, sanitary regulations, rules on negotiations between suppliers and retailers and the requirement to establish partnership with small and medium entrepreneurs (SMEs).

The retailer categories (traditional, minimarket, supermarket, hypermarket, shopping centers) are mainly defined by their size, traded goods, and type of service - if self-service or clerk-service. The size categories and type of service definitions are similar to those used in most countries. Moreover, the regulation follows the rules adopted by developed countries such as France and Germany, especially the zoning policy and the regulation of the contracts between retailers and suppliers.

According to Newsletter vol. 1, 2009:6, the KPPU recommended the adoption by Government of a regulation to address two retail problems: a) the rapid growth of modern retail *vis-a-vis* the traditional retail, and b) the “terms of trading” adopted by the modern retail in their relationship with suppliers.

The KPPU supported the Decree n. 112 and Decree n. 53 arguing that the regulations provide a more balanced field for traditional and modern retail competition. The KPPU argues that “*This is due to lack of capital ability by traditional market to compete with modern store and hypermarket*”.

The KPPU Newsletter recognizes that the zoning policy restricts competition, by protecting the traditional retailing from the head-to-head dispute with the modern retailer. Moreover, the zoning rules limit the number and overall size of operations of modern retailers.

The Regulations on “terms of trading” seeks to reduce the buyer power of modern retailers. In this context, the KPPU argues that even if the regulation negatively affects competition, the

Government can make any intervention if the market mechanism may harm the community. In this case, the traditional retailers and suppliers comprise the community. Few comments are made regarding the consumer. It is assumed that the regulation also guarantees lower price and more choices to consumers. The mechanism to achieve this result is not explained, though.

Neither the regulations, nor the KPPU recommendation address the differences in size and strategies of the modern retailers. There is no distinction between local modern retailers with a few stores or modern retail international chains. The buyer power or market power of big chains, chains or independent supermarkets are quite different. All of them are subject to the same restrictions of “terms of trade” and zoning restrictions.

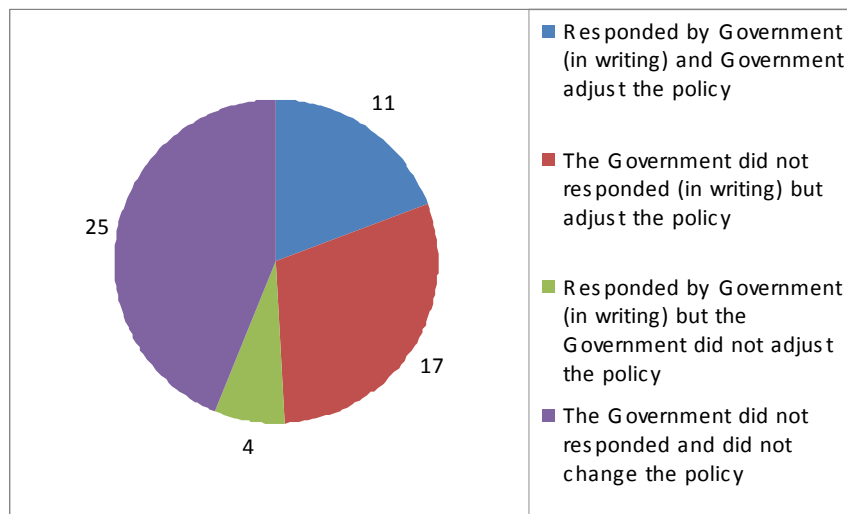
As already mentioned, the KPPU supported the new rules but issued a recommendation. According to KPPU, prices in the traditional retail and supermarkets are more or less the same. However, despite the fact that all retailers are subject to the same sanitary rules, shoppers generally find shopping at supermarkets to be more pleasant, clean and convenient, particularly in the rainy season. By protecting the traditional retail channel, the regulation deprives the low-income population of a more comfortable and cleaner shopping experience. The cost of enforcing the regulation is not low and there is no guarantee that this kind of regulation effectively protects the traditional retail channel. The Presidential Decree may protect small businesses but not consumer welfare.

In another case of regulation, KPPU concluded that the Government had for several years guaranteed monopoly status to a firm exporting mango fruit to South Korea in return for it investing in Indonesia. In 2005, KPPU made a recommendation to the government to end this policy. The Government changed it and abolished the monopoly rights.

The Salt distribution policy was also amended following 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 KPPU's advocacy initiative.

From 2000 to 2009, 50% of 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.

Graph 2: Recommendations to the Government



Source:

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 the KPPU's competition advocacy to other Ministers. KPPU organized a workshop for Ministers with the support of the Coordinating Minister to discuss the competition consequences of government regulations. However, most of the problems are with local governments and the KPPU does not have the capacity to address a myriad of local government-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 anticompetitive practices at the local level. On the other hand, regional offices are costly. A close relationship and cooperation with the public prosecutor's office and local authorities may also address the problem of local competition.

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

For more than 5 years, the departments of economics of the universities have offered courses in industrial organization economics and competition matters. There is a research program on competition issues at the university, carried out by independent institutes of research and consultancies. Competition studies started before the KPPU were developed and funded by international organizations such as GTZ, World Bank, and Japan's International Cooperation

Agency (JICA). The Commission reported that the KPPU and several academics are to prepare a textbook on competition law aimed to be used as a standard curriculum for all universities nation wide

The successful enforcement of the competition law in the district courts depends on the continuing education of judges. Most judges are still unfamiliar with competition issues although the situation should improve because in the last three to five years most law schools have begun to offer courses on competition law.

Surprisingly, judges accepted to come to the KPPU to learn about competition issues. This was endorsed by the Chairman of Supreme Court, who also recognized that in addition to the district courts judges, Supreme Court judges also need to learn about competition issues.

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

4. INTERNATIONAL COOPERATION AND TECHNICAL ASSISTANCE

The KPPU and other Indonesian institutions have benefited from a variety of bilateral and multilateral technical assistance programs. 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, Korea Fair Trade Commission, Chinese Taipei Fair Trade Commission, and the Australian Competition and Consumer Commission and UNCTAD. These institutions have also facilitated training programs for academics 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 Commission's (EC) Competition Directorate and the European Court of Justice. 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) programs to enhance competition policies in young jurisdictions, in partnership with the Japan Fair Trade Commission (JFTC). Moreover, KPPU has benefited from in-depth evaluations such as those by JICA and OECD. KPPU was an observer at the OECD Competition Committee for two periods. KPPU is a member of several international organizations concerned with competition, namely the ICN, the ASEAN Expert Group on Competition, and the East Asia Competition Forum.

5. FINDINGS AND POSSIBLE POLICY OPTIONS

Recommendations

Anticompetitive 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 for the possibility of more measurement criteria than “sales”, since it may be difficult to apply to some specific sectors (e.g. definition of “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 often aids in the achievement of the law's objectives, such as efficiency. Pro-competitive unilateral conduct should not be discouraged. Other anticompetitive 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 would 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 comprehensive 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 covering 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 established concepts. The ICN discussions and recommendations could be useful in this regard. All Guidelines should be available for public consultation before adoption, for comment by the whole society, including academics and the judiciary. If translated into English, draft guidelines might attract useful international commentary.

Procedures to suspend deadlines for investigation and decision-making should be adopted. All the deadlines related to investigation and decision-making with regard to anticompetitive practices, either by 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 on acceptable reasons for the suspension, the number of suspensions possible and the length of suspensions. According to the KPPU's assessment, 120 days with a possibility for extension if justified would be a reasonable deadline for the investigation stage (i.e. further investigation),

A procedure to allow the KPPU to correct factual mistakes that do not affect the merits of the decision should be adopted. Since there is no specialized body at a superior level within the KPPU to hear appeals on KPPU decisions, the KPPU should be granted a very limited kind of review that would avoid unnecessary and costly appeals to the judiciary. The review should be restricted to the correction of material 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 devote 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 tender conspiracies and the close relationship with KPK was an important factor in strengthening competition policy. KPPU should now move on to strengthen its fight against other types of cartels or conduct that harms competition. The KPPU may benefit from the experiences of other young jurisdictions in combating cartels.

Last but not least, the enforcement of KPPU decisions must be improved as less than 1,4% of the fines are collected even after intervention by the Courts. KPPU should dedicate more effort to the enforcement of its Decisions.

Institutional

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

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

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

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

Commissioners should have staggered terms. This would help to retain experience and enhance legal certainty.⁴² Elaboration of further provisions to address delays in appointments and reinforce and entrench the staggered terms would be desirable.

⁴² A transition rule could be established as if, as an 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.

There should be a specific rule obliging the government to appoint a new member within a reasonable timeframe in case of a vacancy. Ensuring a full complement of fixed-term commissioners would help maintain independence.

Consideration should be given to limit Commissioners to serving a single term. There should be no reappointments, since the possibility of reappointment may alter the incentives and independence of commissioners.

The Secretariat should be strengthened. Trained professionals, with the expertise to handle competition cases and make reasoned recommendations, should staff it. The need to attract and retain appropriately skilled 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 in order to address competition distortions at the local level and to aid in the collection of information on anticompetitive practices at the local level.

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

The KPPU should establish an internal library with reference material specific to competition. Besides information on 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 that it can serve the operations of the KPPU, including strict procedures for lending.

Merger Review

Although merger review is an important aspect of competition enforcement, it is also resource- and time-intensive. Due to resource limitations, the threshold for any compulsory notification of mergers should be reasonably high.

The merger review threshold should not be included in the law and the law should contain a rule where the threshold could be adapted as necessary and in a timely manner.

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 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.

Judiciary

The Law should be amended to extend the time limit for the Supreme Court to render a decision.

Since competition issues require that decisions be issued speedily, consideration should be given to whether a change can be made so that appeals against KPPU decisions could be directly forwarded to the High Court (court of appeal) rather than reviewed by the district court.

Consumer Protection

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

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.

Table 6: Recommendations and to whom it is addressed

Recommendation	Who is able to address it
Anticompetitive Practices	
Definitions of analytical concepts should be limited to those that are essential for and facilitate the interpretation of the law. Definitions, if necessary, should be structured in a way and provided in a mechanism that allows easy and speedy adaptation to the factual circumstances of individual cases.	Legislators
The definition of oligopoly should allow for the possibility of more measurement criteria than just “sales”	Legislators
Unilateral conduct should be made subject to a rule of reason analysis.	Legislators
Certain horizontal conducts should be reviewed under a per se rule, such as price fixing and market division	KPPU
Guidelines focused on specific subject matter should be issued.	KPPU
The Authority should disclose the source of the concepts and definitions used in the Guidelines. The Guideline should use, as much as possible, international and already established concepts.	KPPU

Procedures should be adopted that allow deadlines to be suspended if necessary. Such suspension should be constrained by strict rules on reasons for the suspension, the number of suspensions possible and the length of suspension.	Legislators
The KPPU recommends 120 days as a reasonable deadline for further investigation, with possibility to extend if justified.	Legislators
A procedure should be adopted to allow KPPU to correct errors of fact that do not affect the merits of the decision, under clear and restricted situations.	Legislators/KPPU
The KPPU should have a mechanism to filter and handle quickly and at low cost, trivial and no- or low impact cases.	Legislators/KPPU
Efforts should devoted to enforcing Decisions and the payment of fines	KPPU
The KPPU should now move to strengthen its fight against other types of cartels. The Commission should benefit from the experiences of other young jurisdictions that have strengthened their cartel policy.	KPPU
Institutional	
All Guidelines should be available for public consultation before their adoption.	KPPU
The Annual Reports should be mandatory and publicly available, at least in electronic form.	Legislators
Commissioners should be dismissed by the president of the Republic only for limited and well-defined reasons by law.	Legislators
Commissioners should be required to be unaffiliated with political parties, or at least hold no administrative or political positions in political parties.	Legislators
The exact number of commissioners should be established by law.	Legislators
a) Commissioners should have staggered terms; b) Further provisions could address delays in appointments and reinforce and entrench the staggered terms.	Legislators
Vacancies for Commissioners should be filled within a reasonable timeframe.	Legislators

The length of appointment should be limited and commissioners should not serve beyond their terms.	Legislators
No reappointments should be allowed.	Legislators
The Secretariat should be strengthened. Trained professionals, with the expertise to handle competition cases and make reasoned recommendations, should staff it.	Legislators/KPPU
The KPPU should establish close relationships and cooperation with local authorities and public prosecutors' offices.	KPPU
A handbook of compulsory internal procedures, including one on procedures for handling cases, should be issued.	KPPU
The KPPU should establish an internal competition-specific library. The body should also adopt strict procedures over the lending of these books.	KPPU
Merger Review	
The threshold for compulsory notification of mergers should be reasonably high.	Legislators/KPPU
The merger review threshold should not be specified in the law and the law should contain a rule whereby the threshold could be adapted in an easy and in timely manner.	Legislators/KPPU
The wording of Article 28 should be altered to provide that mergers shall be reviewed and authorized by the KPPU, with the possibility for the KPPU to impose conditions, deny or block a transaction.	Legislators
As a transition rule, KPPU should adopt non-mandatory merger control.	Legislators
Judiciary	
The Law should be amended to extend the time limit for the Supreme Court to render a decision.	Legislators
Appeals against KPPU decisions should be directly forwarded to the High Court (court of appeal), rather than be reviewed by the district courts.	Legislators
Advocacy	
The KPPU's advocacy initiatives should also be directed at the business community.	KPPU
The KPPU should move towards developing and enforcing consumer protection policy.	KPPU
General Consideration	

<p>The Commission should release clarifications and guidelines and get involved in capacity building initiatives. The authority should devote its efforts to enforcing specific provisions of the law while revisions to the Law are in process.</p>	<p>Legislators/KPPU</p>
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REFERENCES

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