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## Introduction

1. In 2010 the OECD published an Investment Policy Review for Indonesia. One of the recommendations of that Review was that an in-depth review of Indonesia's competition policy should be undertaken in cooperation with the OECD.

2. Competitive, accessible and efficient markets are centrally important for all free market economies and, in particular, for economies undergoing rapid development. Unless markets are working well, all members of society may not be able to achieve their maximum economic potential, capital and labour resources may not be directed to where the economy most needs them, the nation's wealth cannot grow as rapidly it might otherwise be able to and ultimately consumers will suffer.

3. In general, the OECD and its governments have found that the most effective approach to maximising wealth is that the government should step back and permit markets to determine where and how resources are used and to self-correct when circumstances change. However, one of the government's important roles is to establish a system of laws, policies and institutions that identify and address impediments to competitive markets. To be effective, competition policy must give sufficient weight to two equally important parts that are the subject of this Chapter of the Review:

- central and regional governments need to follow a practice of incorporating competition principles into all government decisions that can affect markets. This includes designing all significant business laws and regulations in a way that achieves their purposes without unduly reducing competition. It also includes taking competition principles into account in other government activities, such as how to structure government owned assets into operational business units or how public procurement should be undertaken; and
- there needs to be an effectively enforced law setting competitive standards of behaviour for all commercial entities, whether they are privately owned businesses or state owned enterprises.

4. Indonesia's competition law,<sup>1</sup> and the extensive enforcement and advocacy efforts of the Commission for the Supervision of Business Competition (KPPU),<sup>2</sup> have been in place for more than a decade. The Indonesian competition law, one of the first in the ASEAN region, was enacted in 1999<sup>3</sup> and constitutes a synthesis of two separate initiatives for such a law that were launched by the Parliament and the Government. Parliament's proposed law responded primarily to popular demands for democracy and more equal economic opportunity. The Government's proposed law sought primarily to improve the performance of the economy. The enacted law combines these considerations.

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1. Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition.

2. Komisi Pengawas Persaingan Usaha.

3. There had been previous proposals for a competition law as early as the 1980's but these were not passed.

5. Like almost all other competition laws around the world, an important purpose of Indonesia's competition law is to enhance economic efficiency. Among its stated objectives are to:

*...improve national economic efficiency as one of the efforts to improve the people's welfare...*<sup>4</sup>

6. The law also has concurrent purposes which are part of a broader National Philosophy ("Pancasila"<sup>5</sup>) and purposes which are part of the societal reform that Indonesia commenced at the time the law was enacted and which are still a focus of national development. At the time, democracy had only just been restored and the process of reforming the whole landscape of economic norms, legal norms and public institutions was underway. A particular concern was that under the previous regime, excessive market concentration had emerged in multiple markets, providing some businesses with too much conglomerate strength<sup>6</sup> and aggregate economic power. The Government and Parliament intended competition law to be one of a number of key reform instruments. The following provisions reflect the link between competition law and a much broader and more ambitious reform agenda within Indonesian society:

*Business activities of business actors in Indonesia must be based on economic democracy, with due observance of the equilibrium between the interests of business actors and the interests of the public.*<sup>7</sup>

*and*

*[The purposes of the law include] 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-, medium- as well as small-scale business actors in Indonesia.*<sup>8</sup>

7. While the aspirations behind the new competition law were considerable, so too were the practical challenges facing the new competition authority. In many respects, they remain so today.

8. In most developing countries, expert economic and legal resources are in short supply. Indonesia has made a significant investment of human and financial resources in the KPPU. Even so, by international standards, the KPPU is a middle sized competition agency tasked with broad responsibilities in a very large country. Over the last 11 with these limited resources, the KPPU has had to develop its own expertise in competition law as well as raising the awareness of competition law and policy across the national and local levels of government, the business community, the academic community and amongst ordinary Indonesian consumers. Throughout the same period, there has been an almost constant process of change in micro-economic policy which, together with continuing reforms to the architecture of government, complicates the KPPU's work and competes for policy makers' attention.

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4. Article 3a and similarly Article 3b which identifies the creation of effectiveness and efficiency in business activities as an aim of the law.

5. This term means the "5 Principles" which are *i*) belief in one God; *ii*) just and civilised humanity; *iii*) the unity of the country; *iv*) democracy guided by the inner wisdom in the unanimity arising out of deliberations amongst representatives and *v*) social justice for all the people of the country.

6. Conglomerate strength refers to the ability exercise market power in any one market drawn from a position or positions of strength in markets that may be distantly connected rather than being markets being part of the same production chain.

7. Article 2.

8. Article 3b.

9. Today Indonesia can rightly be proud of its economic achievements since 1999 and the KPPU can take particular credit for the valuable part that competition law has played in those successes.

10. Nevertheless, accumulated experience of the practice of competition enforcement and advocacy in the specific Indonesian context has revealed a number of significant problems with the original legislative package, which should be addressed in a second generation of reform. A competition policy review by UNCTAD (2009) and a recent review of Indonesia's investment climate by the OECD (2010), have analysed many of these problems. This report will address a number of others.

11. The KPPU has, itself, advocated significant reforms to the competition related regulations since at least 2003. Several concrete reforms have been advanced by the KPPU including, most recently, the 2010 reform on the case handling procedures and new government regulation on merger review 2010. Discussions on necessary reform on the competition law were escalated, especially those related to several substances, including:

- The appointment of the Commissioners, Chairman and Vice Chairman;
- Strengthening the status of the Secretariat and its investigatory powers;
- The substantive prohibitions found in the law; and
- Decision making processes and timeframes both for KPPU decisions and court appeals.

12. In some cases problems or gaps in the original competition law have already been addressed. Other problems still need to be addressed, even though there has been apparent consensus on the desirability of reform for some time. The contribution of competition law and the KPPU to economic development has therefore been less than might have been the case. It seems that competition law and policy has slipped in priority both within the Government and at Parliament House, since the initial passing of the law. For example, as discussed in the following sections, the proportion of KPPU recommendations for changes to proposed legislation to minimise anti-competitive impacts that have been accepted by the government has declined in recent years.

13. Given the substantial competition issues that remain to be addressed in the Indonesian economy, it is essential that competition law and policy issues are restored to their former high levels of priority within the Parliament and Government.

14. In this part of the Report, the OECD seeks to assist Indonesia by building on the analyses of competition law and policy undertaken by UNCTAD and the OECD previously, updating the state of play since those reports were written and by delving more deeply into certain problems.

15. This chapter is organised as follows:

- *Competition Advocacy*: enhancing the ability of the KPPU to contribute to an economy-wide competition policy (Section 1).
- *Competition's contribution to connectivity*: competition policy and the transport sector in Indonesia (Section 2).
- *Stock-take of outstanding problems*: An analysis of what progress has been made since the UNCTAD and OECD reviews of 2009 and 2010 respectively (Section 3).
- *Institutional arrangements*: A deeper examination of key challenges facing the KPPU (Section 4).

## 1. Competition advocacy: Competition reviews of new and existing legislation

16. Government legislation has long constituted one of the most important sources of restrictions on competition in most countries, with a wide range of provisions that limit or distort competition being found in both laws made by parliament and lower-level rules. As discussed above, Indonesia has a substantial legacy of anti-competitive legislation, much of which remains in place despite the considerable efforts made since 1999 in establishing and implementing competition law and policy.

17. Removing or reforming legislative restrictions on competition can substantially improve economic efficiency, lower prices and improve consumer welfare. For these reasons, review of legislative restrictions on competition has been a core element of the horizontal programme of country reviews of regulatory reform conducted by the OECD since 1998. The rationale for a focus on removing legislative restrictions on competition was set out at the commencement of this programme:

*Regulatory reform that permits and even encourages reliance on market forces can enhance competition, lower costs of entry and expansion and provide more competitive and efficient industry structures. Among the principal benefits of reform, to consumers and to producers, are lower prices and higher output, often in the form of greater variety, higher quality, better service, and even entirely new products.<sup>9</sup>*

18. Reforming existing legislation, and scrutinising new legislative proposals, to promote competition can help governments enhance economic growth and the wellbeing of their citizens. This remains a challenge even in OECD countries that have a long history of significant reform programmes. Reflecting this, the OECD Council adopted a *Recommendation on Competition Assessment* in 2009. The recommendation calls on governments to adopt processes to identify existing or proposed public policies that unduly restrict competition, to revise these policies by adopting less anti-competitive alternatives, to ensure that these review processes occur at an early stage in the policy process and to ensure that competition authorities are involved in the processes of competition assessment.<sup>10</sup>

19. In Indonesia, the competition law was only adopted in 1999<sup>11</sup> and a substantial legacy of anti-competitive legislation adopted prior to the competition law is still in place. As a recent review found:

*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.<sup>12</sup>*

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9. OECD (1997), *The OECD Report on Regulatory Reform: Vol. 2 Thematic Studies*, p. 251.

10. OECD (2009), "Recommendation of the Council on Competition Assessment", [C\(2009\)130](#), OECD, Paris, 22 October 2009. See: <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=219&InstrumentPID=215&Lang=en&Book=False><http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=219&InstrumentPID=215&Lang=en&Book=False>.

11. Law 5/1999 Concerning Prohibition of Monopolistic Practices and Unfair Business Practices.

12. United Nations Committee on Trade and Development (UNCTAD) (2009). *Voluntary Peer Review on Competition Policy: Indonesia*, p. 48.

20. Programmes of legislative reform to remove anti-competitive provisions are therefore of particular importance. Legislative restrictions on competition have, in most cases, been adopted in pursuit of some particular social or economic objective. However, as the *OECD Competition Assessment Toolkit*<sup>13</sup> highlights, there are usually several means of achieving these objectives. Governments should choose those that do not restrict competition or, at a minimum, minimise anti-competitive effects.

21. Competition authorities can have a highly influential role in advocating for the reform or repeal of existing anti-competitive legislation, as well as contributing to the development of new legislation by highlighting and opposing anti-competitive proposals and putting forward alternative options that are less restrictive of competition. However, if they are to exercise these roles effectively, competition authorities must have adequate powers and resources and must be located within an institutional structure that allows them to operate in an effective and timely manner.

22. The role of the competition authority in Indonesia in relation to both new legislative proposals and reviews of existing legislation is potentially a particularly important one, given the rapid reform programme that has been undertaken in recent years and which is currently continuing. The following considers the role of the KPPU and the institutional and procedural arrangements under which it operates as they relate to the assessment of new legislative proposals and the review of existing legislation.

### **1.1 Current KPPU Practice**

23. The KPPU is currently involved in competition reviews of proposed and existing legislation at the national and sub-national level. This includes both primary legislation and subordinate regulations, orders and licenses. KPPU's role in this regard is one of competition advocacy: identifying aspects of proposed legislation that may restrict competition and arguing for the removal or modification of such provisions in order to eliminate or, where this is not feasible, to minimise anti-competitive impacts.

24. KPPU may become involved in advising on proposed legislation through several different mechanisms: First, it may be invited to comment on a proposal by the Ministry proposing the legislation. Second, it may be invited to comment by the Co-ordinating Ministry of Economic Affairs. Third, it may seek involvement in the process on its own initiative. Indeed, Article 35 of the Competition Law obliges KPPU to provide advice and opinions on government policies identified as potentially harming competition,<sup>14</sup> indicating that it has clear legislatively based authority in this regard. This "self-identification" of potential restrictions on competition in new legislative proposals occurs through the activities of the KPPU's Bureau of Competition Policy, which monitors the policy landscape to identify areas where competition issues are arising and seeks KPPU participation.

25. In addition to the above mechanisms, KPPU notes that it is also invited by the Parliament to submit comments and recommendations on draft legislation in some cases. Moreover the KPPU will, in addition to conveying its views to agencies responsible for developing legislative proposals, at times provide its comments on a legislative proposal directly to the President. This ability to engage directly at the highest political level indicates a high level of access to the decision-making process.

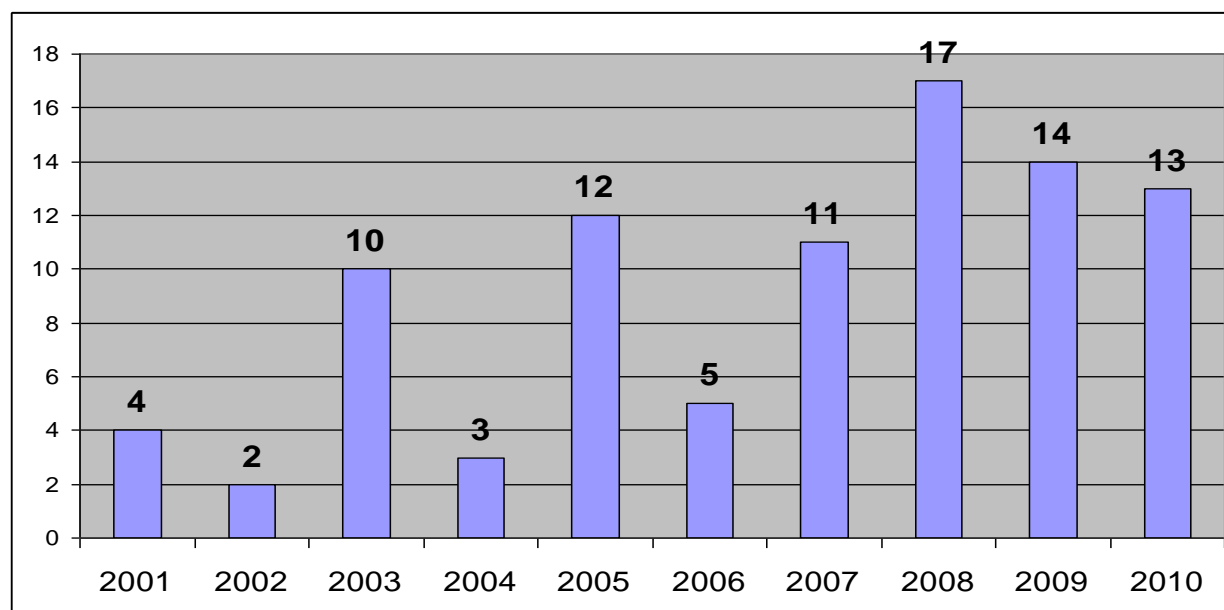
26. The level of KPPU involvement in the legislative process has varied over time, with the organisation reviewing more proposed laws in the period since 2007 than before-hand. The following graph shows the number of policy recommendations issued in each year of the past decade in response to proposed government legislation. Of 91 recommendations made over this period, 60, or approximately two thirds, were made in the second half of the decade.

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13. [www.oecd.org/document/48/0,3746,en\\_2649\\_37463\\_42454576\\_1\\_1\\_1\\_37463,00.html](http://www.oecd.org/document/48/0,3746,en_2649_37463_42454576_1_1_1_37463,00.html).

14. OECD (2010), *OECD Investment Policy Reviews: Indonesia 2010*, p. 118.

Number of Policy Recommendations Issued by KPPU



Source: KPPU.<sup>15</sup>

27. KPPU officials state that processes for involving it in the legislative process have developed "organically" over time, leading to a significant increase their level of involvement. In addition, the Coordinating Minister for Economic Affairs has supported KPPU in its competition advocacy<sup>16</sup> while the Ministry has, in response to a KPPU recommendation, established a specialist unit responsible for evaluating the effects of certain government policies on competition.<sup>17</sup> However, while the above trends suggest a progressively greater degree of integration of competition advocacy into the legislative process has occurred over time, substantial challenges remain. For example, UNCTAD recently found that "*The KPPU has offered more than 60 recommendations to forestall the creation or do away with monopolies created by government regulation*".<sup>18</sup> This suggests that fundamental challenges remain in embedding awareness of competition principles within Ministries.

28. KPPU data does not demonstrate any increase over time in the proportion of its policy recommendations that are *adopted* by government, as illustrated by the following graph. Indeed, to the extent that a trend can be discerned, it appears to be a negative one. Moreover, in the majority of cases in which government has determined not to amend proposed laws in response to KPPU recommendations, no written response to the recommendation has been received.<sup>19</sup>

15. Paper presented to the OECD Capacity Building Event on Competition Advocacy within Government and Competition Assessments, Seoul, Korea, 18 - 20 July 2011.

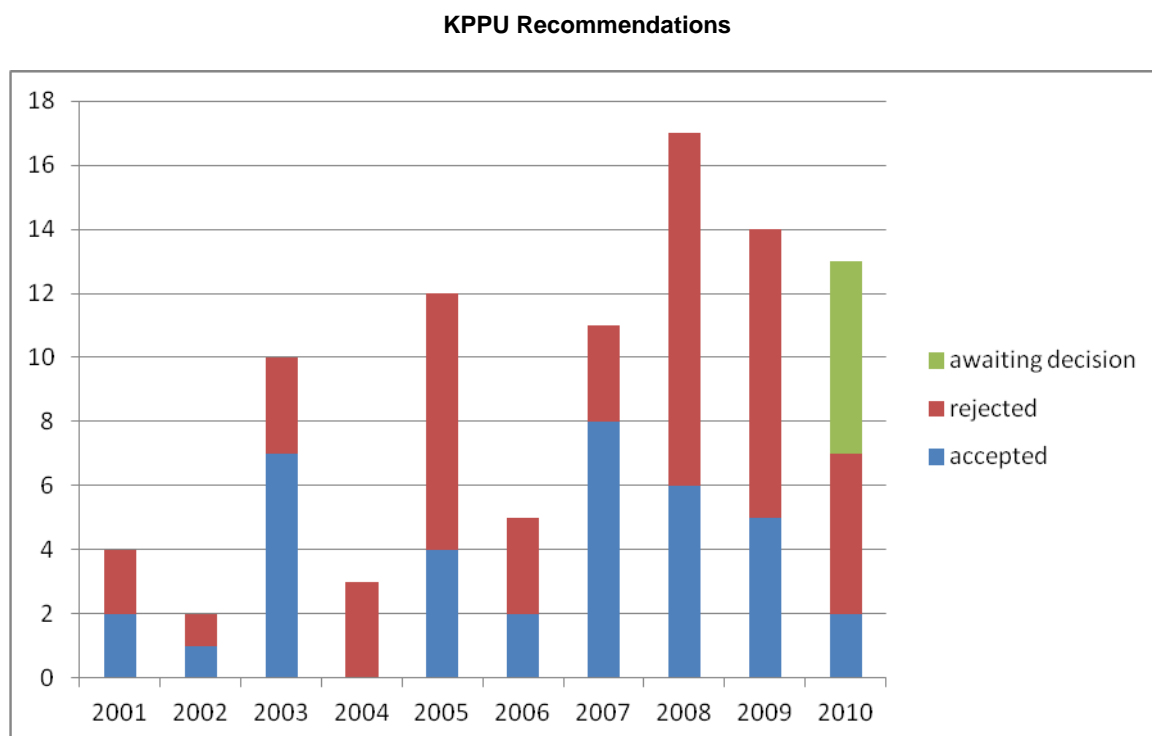
16. UNCTAD (2009), p. 50.

17. OECD (2010), *op cit*, p. 118.

18. *Ibid.*, p. 49.

19. Of 29 cases in which no change was made to proposed legislation in response to a KPPU recommendation, a written response from Government was received in only 4 cases. UNCTAD (2009), *op. cit.*, p. 50.

29. The following graph shows the number of recommendations made by KPPU each year and the number accepted and rejected by government.



Source: KPPU.<sup>20</sup>

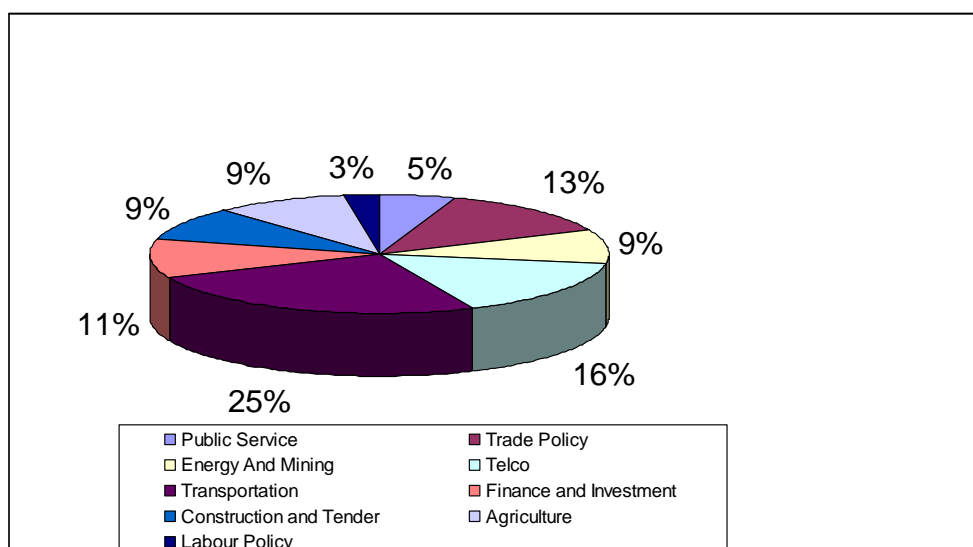
30. The following graph shows the breakdown of KPPU policy recommendations by policy area. The largest single area is that of transportation, which alone comprises 25% of all recommendations. This may reflect the particular importance of transport issues in the context of an archipelago nation with over 17 000 constituent islands, as reflected in the fact that “national and international connectivity” is identified as one of three main elements of the implementation strategy for the recently published Masterplan for the Acceleration of Indonesian Economic Development.<sup>21</sup>

20. *Ibid.*

21. Co-ordinating Ministry of Economic Affairs (2011), *Masterplan: Acceleration of Indonesian Economic Development, 2011-2025*, p. 10.



### KPPU Policy Recommendations by Sector



Source: KPPU.

31. The next largest number of policy recommendations are made in the telecommunications and trade policy spheres, with finance and investment also figuring prominently. In general, however, the graph demonstrates that KPPU exercises its policy recommendation function across a wide range of government policy concerns.

32. The KPPU processes for making competition assessments and policy recommendations are informed in part by economic studies undertaken in relation to the most important sectors of the economy, including telecommunications, ports, insurance, pharmacies, air transport and banking.<sup>22,23</sup> In addition, it has concluded memoranda of understanding with academic and research institutions to establish collaborative relationships in collecting data and publishing research on competition issues. Competition Impact Assessments of legislative proposals typically include qualitative benefit/cost analysis and are conducted in accordance with internal guidelines which have been developed to ensure consistency and quality. Initial screening of regulations focuses on the key tests established in the OECD Competition Assessment Toolkit<sup>24</sup> with problems identified via this screening being subject to further analysis.<sup>25</sup> KPPU's policy recommendations are accompanied by Position Papers, which contain quantitative and qualitative analysis supporting its positions.

33. KPPU involvement is, in most cases, initially sought at a relatively early stage in the legislative process - often at the time of the preparation of the first technical draft. In many cases, subsequent comments are also sought from KPPU in the latter stages of the bill's development, often immediately prior to its introduction to parliament. However, in a number of cases KPPU's involvement has not commenced

22. UNCTAD (2009), p. 49.

23. KPPU (2010). *Annual Report on Competition Policy Developments in Indonesia*. Report to the OECD Competition Committee, [DAF/COMP/AR\(2011\)42](#), pp. 9-10.

24. *I.e.* Does the proposal tend to (1) limit the number of suppliers in the market or (2) limit their ability to compete or (3) incentives to compete vigorously?

25. OECD (2010), p. 120.

until a late stage in the legislative process and has, accordingly, had little or no influence on the outcome, as discussed below.

34. The current arrangements for KPPU to advise on new legislative proposals appear to be largely *ad hoc* in nature. *There is no single, formal process for making a determination* as to whether KPPU should be invited to review it and provide comment. This is particularly problematic given the policy and legislative context, as identified in a recent UNCTAD review:

*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.*<sup>26</sup>

35. KPPU has the right to make recommendations on draft legislation on its own initiative. However, in a number of cases in which significant competition issues have arisen, it has either not been involved in the process or has become involved at a late stage. The result has been that its potential to influence the outcome has been limited. These outcomes can occur where KPPU does not become aware of the legislative proposal until a late stage of its development.

36. An example of recent legislation raising important competition issues where KPPU has not contributed to the process is provided by the recently adopted "hub ports" policy. This was adopted as part of the "Master Plan" for accelerating economic development, published early in 2011.<sup>27</sup> Despite the fact that this constitutes a long-term economic strategy, which necessarily involves significant competition issues in a range of sectors and will necessarily form the basis of substantial legislative activity in the future, it appears that KPPU was not involved in the development of the Master Plan.

37. An example of a case in which KPPU involvement occurred only at a late stage is that of recent legislation relating to airport security, where KPPU did not become involved until the implementation stage. In the event, they made a strong recommendation that the process should be suspended pending a regulatory impact assessment being undertaken.

## ***1.2 A System for Integrating Competition Analysis into National Law Making***

38. A more systematic process governing the involvement of the KPPU in the *legislative process* could yield significantly improved outcomes by ensuring that the competition authority is alerted, in a timely fashion, to all new legislative proposals that have a potentially significant competitive impact. One key requirement appears to be improved communication between the Co-ordinating Ministry of Economic Affairs and the KPPU.

39. Thus, one option for improvement (Option 1) would involve the Co-ordinating Ministry of Economic Affairs providing timely notification to KPPU of all new legislative proposals. This would allow KPPU to make assessments as to whether significant competition issues were likely to arise, possibly in consultation with the sponsoring Ministry. Such a notification process would ideally occur around the time that the academic draft is commenced, thus allowing KPPU's input to influence the early shaping of the proposed legislation.

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26. UNCTAD (2009), *op cit.*, p. 13.

27. Co-ordinating Ministry of Economic Affairs (2011), *op. cit.*

40. A variant of this approach (Option 1a) would see the notification requirement limited to proposed legislation that affects business and/or consumers. This would mean that legislation that related only to social policy, or to national security would not need to be notified or subject to initial scanning by KPPU. This more targeted approach would reduce the resource implications of the proposal both for the Co-ordinating Ministry and for KPPU and would also prevent unnecessary and potentially time-consuming procedural steps being added for non-economic legislation. Thus, this approach could receive a more positive approach from Ministries.

41. An alternative approach (Option 2) would see the Co-ordinating Ministry of Economic Affairs, or some other co-ordinating agency, undertaking its own initial assessment of legislative proposals to determine whether consultation with KPPU appears to be required. Such an initial assessment could be conducted using the OECD's Competition Assessment Toolkit. The toolkit assists non-specialists in making such assessments by posing three, specific considerations designed to identify potential competition issues. These are whether the proposal limits:

- the number of suppliers able to compete in a market;
- the ability of suppliers to compete; and
- the incentives for suppliers to compete vigorously.

42. If any of these three considerations are present, a more extensive assessment should be undertaken. Under Option 2, where the application of the toolkit questions suggests a possible competition issue exists (i.e. there is a positive answer to one or more of the above questions), KPPU would be alerted and asked to conduct an initial assessment.<sup>28</sup>

43. The OECD considers that in Indonesia's circumstances, Option 1 is likely to be superior because at this stage competition expertise is largely centralised within the KPPU. We therefore recommend that the KPPU be notified of all new legislative proposals.

44. Finally, if neither Option 1 nor Option 2 is adopted (or if there is a delay in implementing them), a more limited initiative should be undertaken to enhance KPPU's ability to contribute to more competition-friendly laws in the priority area of *infrastructure*. All legislative proposals relating to major infrastructure investments, such as the recent legislation aiming at enhancing competition in the ports sector and that covering the development of the rail network, should be analysed by the KPPU. Such an approach could be implemented in a number of ways. For example, a Presidential decree or instruction could require ministries responsible for infrastructure-related legislation to consult with KPPU from an early stage of legislative development. The Co-ordinating Ministry for Economic Affairs might be given responsibility for ensuring that this consultation occurred in all relevant cases.

45. *Lower level rules* (i.e. regulations and decrees) also need such scrutiny and may not receive it at present, particularly given that there is frequently a significant delay between the adoption of the Act and the subordinate instruments made under its authority. KPPU notes that many legislative restrictions on competition arise in practice from these lower level rules, including Presidential Decrees, Ministerial Decrees and Government Regulations, rather than being a direct product of the laws passed by Parliament.

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28. It can be noted that the KPPU itself proposed a broadly similar mechanism several years ago: This would have sought to put its involvement in the legislative process on a more systematic footing by relocating the Deputy Minister for Competition Policy into the Co-ordinating Ministry for Economic Affairs. However, this proposal was not adopted by the then government.

46. Moreover, it appears that there are frequently long delays between the passage of the authorising Act and the introduction of these lower-level rules. Thus, in practice, lower level rules might not be subject to the same level of scrutiny as national legislation.

47. Given these factors, a systematic process is needed to ensure KPPU scrutiny of proposed lower level rules. We understand that the Co-ordinating Ministry of Economic Affairs is also involved in the development of many such lower level rules, thus giving rise to the possibility of adopting a parallel process to those proposed above.

48. One means of ensuring KPPU is more systematically involved in reviewing lower level rules would be for it to specifically comment on the parts of the Act that authorise the making of lower-level rules, to assess whether they have potential anti-competitive effects. Where such a potential effect is identified, this could trigger a requirement for KPPU to be consulted prior to the power to make the lower level rule being exercised.

49. The *timing of KPPU advice* is also important. As noted above, KPPU officials report that, under current arrangements, the agency is typically asked for comment at the technical draft stage of the process, and will frequently also be asked for further input prior to the Bill being submitted to Parliament. The fact that KPPU is consulted relatively early in the legislative development process and has a second opportunity to comment are both positive factors in terms of the potential ability of this input to influence the ultimate legislative outcome. However, further potential improvements to the timing and extent of KPPU's role could be considered.

50. First, commencing KPPU involvement at the academic draft stage would be likely to increase the likelihood that fundamentally different approaches to dealing with policy concerns might be identified and given serious consideration, in cases where KPPU's initial comments identify major competition concerns. It is a general principle of regulatory impact assessment that it is likely to be more influential in shaping final outcomes if commenced at the earliest possible stage of the process, before there is a high level of commitment to particular policy solutions.<sup>29</sup>

51. Second, in many cases there may be considerable merit in KPPU remaining engaged with the sponsoring agency throughout the development of the legislative proposal. This reflects the fact that the competition issues in question will not, in many cases, be simple binary choices. Rather, questions of detailed legislative design may be highly important in determining the size and nature of the competition impacts contained in the law finally adopted. In such circumstances, creating the opportunity for an iterative process, with KPPU able to provide feedback and assistance at several stages in the process of designing and drafting the legislation, is also likely to contribute to improved outcomes.

52. Finally, in order to ensure a high level of compliance with such a requirement, consideration could be given to ensuring that KPPU's comments on the final draft bill, as introduced to the Parliament, were made available to members of Parliament to assist in their deliberations.

53. A further consideration is how to *ensure that the KPPU's analysis and recommendations have the greatest chance of being implemented*. As shown above, a large number of KPPU policy recommendations have been adopted by government over the past eleven years. However, the long-term trend indicates a decline in the proportion of recommendations being adopted: while 43% of KPPU recommendations have been adopted since 2001, only 33% of recommendations were adopted from 2008

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29. OECD (2002) *Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance*, p. 48.

to 2011.<sup>30</sup> The recent UNCTAD study commented, "...many of them [the policy recommendations] are not followed by the government and this is still a challenge for competition enforcement and implementation in Indonesia."<sup>31</sup> This suggests that consideration of how to ensure that there is greater responsiveness to KPPU recommendations by legislative proponents is urgently required.

54. Adoption of the reforms proposed above would, in itself, be expected to increase the take up of these recommendations, particularly as they would increase KPPU's ability to provide advice at the earliest stages of the legislative process. However, an additional step that could be given consideration is to ensure that KPPU's recommendations are formally made available to Ministers as part of the Cabinet process, as well as to Parliament at the time that Bills are debated. This would ensure that all legislative decision-makers were aware of any competition issues highlighted and encourage greater discussion of the case for restricting competition and the potential alternatives in each case.

### 1.3 KPPU input into sub-national law making

55. The relatively high degree of legislative authority accorded to regional/local levels of government since the decentralisation reforms implemented a decade ago also raises the issue of ensuring that these sub-national laws are consistent with national legislation. The Indonesian government has prioritised the need to ensure the consistency of national and sub-national laws, with several initiatives being adopted to promote and preserve consistency, in particular:

- Scrutiny of sub-national laws by the Ministry of Law and Human Rights, with a particular focus on consistency between local and national laws. This has led to the repeal of significant numbers of local laws via Presidential Regulations, particularly as a result of significant inconsistencies being identified.
- Advice from the non-governmental organisation, KPPOD<sup>32</sup> ("Regional Autonomy Watch"), on inconsistencies between local and national laws and other concerns regarding local laws. KPPOD is a private sector body established by the Indonesian Chamber of Commerce to monitor the exercise of local government power in the wake of decentralisation, which provides advice at a central government level to the Ministries of Finance and the Ministry of Home Affairs under a Memorandum of Understanding<sup>33</sup> and directly with sub-national governments.

56. From a general regulatory perspective, these issues are important as discussed in [*the regulation making chapter of this report*].

57. The impact of local laws specifically on competition is also a major specific area of concern. KPPU officials indicate that there is a relatively low level of awareness of competition policy issues in most local government contexts. Thus, pro-competitive reform undertaken at the central government level risks being undermined by legislative initiatives taken at local levels.

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30. 14 of 42 recommendations made from January 2008 to June 2011 were accepted by government (see above graph).

31. UNCTAD (200), *op. cit.*, p 50.

32. Komite Pemantauan Pelaksanaan Otonomi Daerah.

33. *Komite Pemantauan Pelaksanaan Otonomi Daerah*, or Implementation Monitoring Committee on Regional Autonomy. KPPOD was founded in 2001 and is supported by Indonesia's Chambers of Commerce.

58. KPPU has historically focused solely on the competitive impacts of national legislation. In recent years, however, it has begun to provide advice in respect of local rules. KPPU reports that it has worked to advocate competition policy principles at the sub-national government level, including by establishing a small number of regional offices (as allowed by Presidential Decree No. 75 of 1999), mostly in remote areas, which focus on sub-national legislation. This shift in priorities accords with recent UNCTAD findings in relation to local government laws. However, UNCTAD also highlights the resource constraints facing KPPU in seeking to deal with the mass of local government laws:

*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.*<sup>34</sup>

59. Similarly, the OECD's recent Investment Policy Review has noted that many local government created monopolies continued to operate.<sup>35</sup> KPPU engagement with regional and local government in relation to legislative restrictions on competition could potentially achieve substantial benefits. However, given the very large number of local governments requiring scrutiny, substantial practical limits on the organisation's ability to operate at these sub-national levels would seem to remain. Another potential issue may arise from possible sensitivities among local governments if an agency of the national government seeks to influence exercise of their own legislative powers.

60. A systematic mechanism should be put in place to ensure that either the KPPU itself is involved in the most important regional and local business law proposals or, as occurs in some other countries, agencies at the sub-national level are appropriately educated, resourced and given responsibility for this task.

#### **1.4 Review of existing legislation**

61. As discussed in the introduction, the genesis of competition policy in Indonesia is relatively recent, with the main competition law dating from 1999 and being developed as part of a broader reform programme which was implemented in response to the economic crisis of 1998-9. Prior to this time, the industrial policy pursued in Indonesia resulted in high levels of concentration in many industries and markets and significant problems in terms of oligopolistic behaviour.<sup>36</sup> Shauki<sup>37</sup> found that:

*...anti-competitive actions conducted by businesspersons with the consent of the government, including cartel like conduct through associations, and monopoly rights granted to individual persons.*

62. Much of the stock of legislation passed before the commencement of the reform programme in the late 1990s contains significant anti-competitive provisions.

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34. UNCTAD (2009), p. 50.

35. OECD (2010), *op cit*, p. 119.

36. Communication from KPPU to the OECD Secretariat, November 2011.

37. Shauki, Ahmad, *Competition Problem in Indonesia* (unpublished paper), cited in Maarif, S. (2001), *Competition Law and Policy in Indonesia*. Report prepared as part of the ASEAN Competition Law Project, Jakarta, 28 March 2001. See [www.jftc.go.jp/eacpf/02/indonesia\\_r.pdf](http://www.jftc.go.jp/eacpf/02/indonesia_r.pdf).

63. As noted above, there is no systematic process for ensuring that the KPPU reviews all new regulatory proposals. It is likely, therefore, that some laws passed since 1999 have escaped KPPU scrutiny and added to the stock of anticompetitive regulation.

64. KPPU states that it has the power to review and make recommendations to reform any existing legislation that is considered to have anti-competitive impacts. However, a combination of limited resources and significant competing priorities mean that its ability to address major anti-competitive impacts of existing legislation is limited in practice. In addition to the concurrent need to scrutinise new legislative proposals, KPPU's role in fighting bid rigging cartel cases that involve corruption has generated an enormous work-load. These and other competing priorities mean that, while KPPU's resources have been substantially increased in recent years, only a very small proportion of its current total of 426 officers is devoted to the assessment of existing legislation. KPPU states that the responsibility for assessing both new and existing legislation falls to the Competition Policy Bureau, which currently has only 12 staff members.

65. The task of ensuring that existing legislation does not unnecessarily restrict competition must involve a balance between addressing the competitive implications of new legislative proposals and action to identify and address anti-competitive elements of the stock of existing legislation. In the Indonesian context, with a substantial legacy of anti-competitive legislation, *substantial priority should be accorded to the task of reviewing and reforming existing legislation to remove unnecessary regulatory impediments to competition. The KPPU should have a central role in this work.*<sup>38</sup>

66. The process of systematically reviewing the entire legislative structure is one that is extremely demanding of expert resources. The experiences of a number of OECD countries in relation to the review of existing legislation to identify and repeal or reform anti-competitive may provide some useful guidance for the Indonesian government in considering the possible development of such a programme and the role of KPPU within it. Appendix 1 includes brief descriptions of the processes adopted in Australia, the Republic of Korea, Mexico and the United Kingdom.

### **1.5 Reforming business licensing**

67. Business licensing constitutes a pervasive form of regulation in many countries and raises particular competition policy issues.<sup>39</sup> Licensing laws have a competition policy dimension because the requirement to obtain a licence can act as a barrier to entry into an industry. In some cases, licence conditions might also impede existing businesses expanding from one geographic area to another or from one business activity to another.

68. The OECD's 2010 review found inefficient licensing practices to be an impediment to investment. Several other studies have also concluded that business licensing constitutes an area of particular concern in Indonesia. The Asia Foundation noted in 2005 that the quantity of licences required was much higher than in most countries, while the processes for obtaining these licences were slow and

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38. Some countries, notably Australia, have set up separate institutions to carry out such reviews, leaving the competition authority free to concentrate on law enforcement and other tasks. However, in Indonesia it is likely that the relatively few competition experts in the country are located in the KPPU, so we recommend that – like most OECD countries – Indonesia should make use of the expertise of its competition authority in this role.

39. See the OECD Competition Assessment Toolkit for further discussion of the anti-competitive impacts of business licensing, [www.oecd.org/document/48/0,3746,en\\_2649\\_37463\\_42454576\\_1\\_1\\_1\\_37463,00.html](http://www.oecd.org/document/48/0,3746,en_2649_37463_42454576_1_1_1_37463,00.html).

costly.<sup>40</sup> Several initiatives have been undertaken to reduce the costs of business licensing in recent years, including the repeal of some national licences in 2010<sup>41</sup> and the development of a One Stop Shop programme. However, the most recent assessment by the IBRD accords Indonesia a low comparative ranking on its ease of starting a business criterion,<sup>42</sup> despite evidence of significant improvements in some areas, including reductions in the number of procedures required to be completed.<sup>43</sup> Moreover, it appears that the IBRD assessment of Indonesian business licensing is based on conditions in Jakarta, while the position is significantly worse in some regional areas.<sup>44</sup>

69. A paper<sup>45</sup> commissioned by the World Bank explains the three key forms of licence that apply to most Indonesian businesses – investment licenses, operations licenses and import or distribution licenses – and gives a sense of the regulatory burden they impose:

*[There are] so-called investment licenses, which comprises an initial approval of investment plan and subsequently a “Permanent Business License”, are effectively business start-up licenses. BKPM (or local governments, depending on the types/characteristics of investments) issues the investment licenses. The operational licenses are those issued by the relevant technical ministries and usually have industry-specific requirements. Both groups of licenses carry with them reporting requirements (including post-license annual reports) and demand data that are duplicative. Another problem concerns bureaucratic processes for some permits (especially import permits and distribution/sales permit from BPOM), which are often outside the services of PTSP centres.*

*A twist of the business licensing story is that there is the differentiation between the so-called BKPM licensure path and non-BKPM licensure path. In fact, only certain medium-sized companies and most (or all) large companies, as well as all foreign companies (PMA) seek BKPM licenses. A larger number of companies operating in Indonesia (mostly comprising small businesses and some medium-sized businesses) take the non-BKPM licensure path. What has resulted is a dualistic system of licensing, which appears to harm no one, but leaves incomplete data of investment in Indonesia.*

*The BKPM licensure path is actually longer than the non-BKPM one. Nevertheless, companies in the BKPM system can take advantage of BKPM-provided investment facilities, such as a Limited Importer Number (to allow the entity to import capital goods and other needed materials), reduction of import duties and assistance with the employment permit and visa for foreign workers, prior to commercial production/operation.*

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40. Asia Foundation (2005). Streamlining Business Licensing: An Evaluation of the Impact of One-Stop Centers, <http://asiafoundation.org/publications/pdf/342>.

41. See: International Bank for Reconstruction and Development (IBRD) (2011). Doing Business 2012 - Economy Profile: Indonesia, p. 20.

42. Indonesia is ranked 21st of 24 East Asian/Pacific nations. See [www.doingbusiness.org/rankings](http://www.doingbusiness.org/rankings).

43. IBRD (2011), op cit, p. 17.

44. Discussion with Asia Foundation officials, Jakarta, 13 October 2011.

45. P. Usanto Njo (2010), An Overview of The Indonesian Business Licensing System: Regulatory Framework and Policy Direction.



70. A recent report<sup>46</sup> notes that the decentralisation programme pursued in since 2001 has created additional problems in relation to business licensing, notably because of:

- Divergences in licensing processes and procedures, as a result of local governments being free to adopt their own arrangements in these areas;
- Increasing use by local governments of their powers to create additional licences and permits, with local licences often being created as revenue generation measures and giving rise to market distortions; and
- Much licence processing being conducted through local government departments with limited capacity.

71. Reform of licensing should be an important part of programmes to review and reform legislative restrictions on competition. The OECD Competition Assessment Toolkit discusses a range of alternative approaches to achieving the objectives that typically underpin business licensing and provides a starting point for consideration of reform opportunities.

72. Where governments decide that a particular business activity should be regulated, there may be a choice of approaches:

- requiring businesses to obtain licenses, which might require them to meet certain conditions, and to impose conditions or regulations upon licensees; or
- passing regulations that apply to anyone who chooses to engage in a particular business or activity.

73. Licensing may be necessary where it is important to impose a strict control on who enters a business, for example when:

- The operation of a business can give rise to significant risks to human safety or health, or property. For example, licenses are often required for businesses to connect telecommunications or energy infrastructure to the existing network because the new equipment has the potential to damage other parties' equipment or even threaten human safety; or
- A business imposes significant financial risks on other parties. For example, the operation of a bank or insurance company must usually be licensed and this is in large part because of the risks that these institutions could pose for other banks and insurance companies in the financial system and ultimately the customers of all the institutions.

74. However, from a competition viewpoint licensing unavoidably has some disadvantages compared with other forms of regulation. Licensing creates a barrier to entry to markets and is also likely to impede innovation and flexibility in the provision of goods and services. Requiring parties to apply for licenses can enable incumbent operators to be forewarned of their competitors' confidential plans to enter a market if the license evaluation process includes a public consultation process (or if the information that a license has been sought is leaked). The barrier to entry that a license constitutes is even higher in countries who face a significant corruption problem because corruption either adds to the money costs of obtaining a license (if the applicant does make an illegal corrupt payment) or to the difficulties in obtaining a licence (if the applicant refuses to make an illegal corrupt payment).

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46. Steer, L. (2006). *Business Licensing and One Stop Shops in Indonesia*, [www.businessenvironment.org/dyn/be/docs/121/Session2.1Paper2.1.2Steer.pdf](http://www.businessenvironment.org/dyn/be/docs/121/Session2.1Paper2.1.2Steer.pdf).

75. Because there are so many licenses required in Indonesia, a reform programme should be undertaken with the following outputs.

- A set of principles should be set out which identify when licensing is appropriate and when other forms of regulation are sufficient. As a general proposition, new or amended regulatory regimes are being introduced, regulations applying to any businesses that choose to engage in the relevant activity should be preferred over a regulatory scheme that requires businesses to obtain licenses.
  - The only circumstances in which there should be a requirement to obtain a license should generally be when it is necessary to check whether a business is capable of safely conducting its business *before* the business is even permitted to enter the industry.
  - There is usually only a need for the government to check the capabilities of businesses *before* it is permitted to enter an industry if the activity involves significant risks to human safety, other parties' property or a risk of financial contagion (such as in the banking industry) because in these areas a fine imposed after the event may not be an adequate disincentive or remedy.
  - Otherwise, regulatory requirements should apply as rules applying to anyone participating in an industry, not as licensing requirements.
- Existing licensing schemes should be evaluated to determine whether their removal or a shift to regulations instead of licenses might lower barriers to entry.
- Where licenses are to remain, the conditions under which they are awarded and any conditions imposed on the operations of licence holders should be scrutinised to ensure they do not unnecessarily restrict competition.<sup>47</sup>

### **1.6 Improving Competition Policy awareness throughout Government**

76. KPPU has a substantial education and outreach effort on broadening understanding of competition principles and the competition law throughout government and the wider society. In 2010, it conducted 51 such activities, including seminars for government agency staff, forums for journalists and other media workers, seminars for parliamentarians and training for judges. In addition, it worked to develop a national competition forum. Almost 2 500 people participated in these activities.<sup>48</sup>

77. These activities are important given the relatively recent adoption of competition law and policy and the lack of experience with open markets in Indonesia. Understanding of key competition issues is likely to be limited in many key institutions.

78. Despite the KPPU's efforts to spread the awareness of how important competition is to all aspects of government business decision making, competition policy appears to have slipped from the priorities of the Parliament and the Government. In fact finding for this report, the OECD team was struck by a 'compartmentalised' policy-making culture in relation to competition. Central agencies tended to acknowledge that competition might be an issue in relation to policy decisions but to regard competition as an issue that could be addressed as an after-thought. They also felt this was an issue that was in the exclusive and narrow domain of the KPPU. Given the generally low level of understanding of these issues within many government Ministries with major regulatory responsibilities affecting competition, consideration should be given to expanding this programme and focussing effort specifically on major regulators both at senior levels and during induction training for policy recruits.

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47. Using the principles set out in the OECD's *Competition Assessment Toolkit*.

48. KPPU (2010), *op. cit.*, p. 9.

79. Training staff is likely to be among the most effective means of changing the culture of central agencies and, ultimately, of the administration as a whole in relation to competition issues. Given resource limitations within KPPU itself, consideration could be given to working with academic and research organisations, particularly those with which KPPU already has Memoranda of Understanding in place, to enable much of this training activity to be carried out by these external bodies.

## **2. The transport sector: competition's contribution to connectivity**

80. In large countries, the efficient operation of transport markets is an important determinant of economic performance. Competition can improve the performance of this important sector itself and also facilitate greater competition between suppliers located in different parts of the country.

81. Conversely, transportation bottlenecks can be a means for operators to engage in anticompetitive conduct and extract monopoly rents either in the transportation markets themselves or through limiting the transport of people or goods between markets. Therefore, there is an important role for the competition law and policy in the transport sector. This has not always been properly recognised in Indonesia.

### **2.1 KPPU's Work in the Transport Sector**

82. The KPPU has been very active in the transport sector both as a law enforcement agency and through advocacy. Examples include:

*"In 2003, KPPU handled the case of JICT where in the cooperation agreement on the establishment of joint venture for the operation of container terminal, PT JICT, between PELINDO and Hutchinson, there was a clause on the limitation of competition (Case No. 04/KPPU-I/2003 Jakarta International Cargo Terminal). The aforementioned clause explicitly required no issuance of new license for the development and construction of new terminal/seaport insofar as the turnover of the existing terminal was still below a certain amount from the existing total capacity. The panel of the Commission was of the opinion that the aforementioned clause was against business competition because it was hampering the market and also led to the abuse of dominant position. After the appeal and cassation processes, KPPU decision finally had a permanent legal force after being confirmed by the Supreme Court in 2004.*

*In 2004, KPPU also handled a case related to market control by the operator of BELAWAN seaport in Medan specifically for dry bulk terminal (Case No. 01/KPPU-L/2004 Stevedoring Services for Oil Palm Kernels in Belawan Seaport). In the aforementioned terminal, PELINDO applied the latest technology using conveyor belt operated only by a subsidiary of PELINDO engaging in stevedoring services. The vertical integration applied by PELINDO and its subsidiary as stevedoring service provider had been proved to hamper the entry of other business actors to provide stevedoring services for oil palm kernels by using manual handling process or other alternative processes. Such behavior also limited the choices for exporters of oil palm kernels in using stevedoring services in the dry bulk terminal of BELAWAN seaport. The panel of the Commission considered the behaviour demonstrated by PELINDO and its subsidiary as violating the principles of business competition as set forth in the business competition law."*<sup>49</sup>

83. The KPPU also enforced the competition law against the following cartels:

- Shipping operators on the Jakarta – Pontianak route in relation to container shipping (Case 02/KPPU-I/2003);

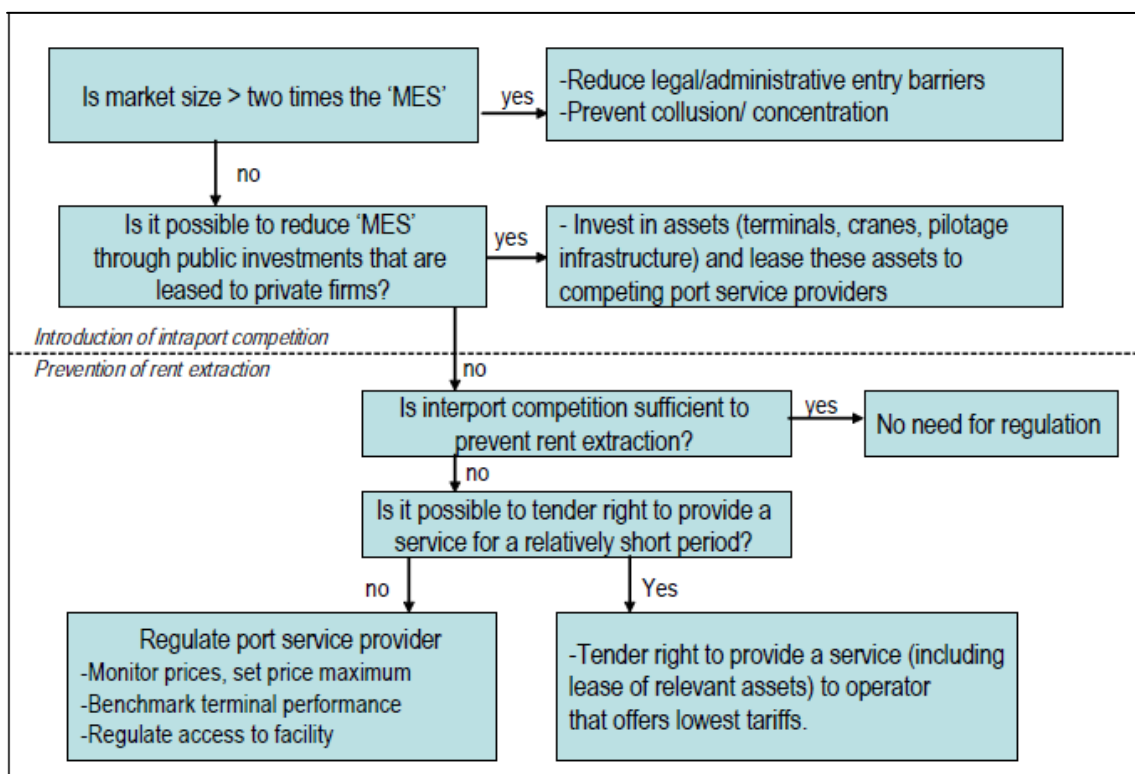
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49. KPPU contribution to the OECD's Round Table.

- Shipping operators on the Surabaya – Makassar route in relation to container shipping (Case 03/ KPPU-I/2003); and
- Tally services in the Port of Tanjung Priok (Case 100/KPPU/PEN/VIII/2009).

84. The KPPU has considered the port industry in detail and its strategic approach to its advocacy and law enforcement work in the sector is summarised in the following figure:

**Strategies to introduce intraport competition / prevent rent extraction**



## 2.2 Priorities for Better Harnessing Competition Policy in the Transport Sector

85. While the KPPU itself is active in the transport sector, it appears that other agencies are not always aware of the important role that the KPPU can and should play.

86. As discussed more fully in the report, any initiatives to introduce a ‘hub port’ policy in Indonesia should be implemented through government policies that:

- facilitate the establishment of efficient hub ports that are attractive to users; and
- not require users to use the hub-ports nor prevent users from choosing to by-pass hub ports and instead use non-designated hub ports for direct long haul shipments or transshipments. In other words, there should be no statutory monopolies created for hub-ports.

87. Laws that prevent foreign ships from undertaking shipping between two domestic Indonesian ports for domestic cargo are likely to lessen competition in three ways:

- There may be fewer operators on any given route, directly reducing competition, if foreign competitors are excluded;
- The ability for foreign operators to enter the market imposes a competitive discipline on existing operators, even if no foreign operators are actually present. Removing the ability for foreign operators to enter may embolden local operators on particular routes to engage in anticompetitive conduct, safe in the knowledge that foreign operators will not enter; and
- Where entry is closed off, restricting operations to a limited number of players (such as the current domestic shipping operators), there is an increased danger that a cartel may be formed. Indeed there have been a number of cartel cases already in the shipping industry.

88. For these reasons:

- In its advocacy role, the KPPU should have been consulted before this policy was adopted as part of the Master Plan (which would not appear to have been the case) and should be consulted on any further key decisions.
- In its law enforcement role, the KPPU should give particular attention to the domestic shipping sector to ensure that cartels do not emerge on domestic routes, particularly on any routes where foreign competitors have been required to exit.

89. The incumbent operators in the ports and rail industries are substantial government owned businesses that in many cases may be dominant. Much new transport infrastructure will be needed in the forthcoming period and any tenders, licenses, land releases or other opportunities to develop these new facilities should be allocated with a view to fostering new competition where possible.

90. The KPPU:

- should be involved in its advocacy role whenever significant new opportunities are offered by any relevant government agency; and
- should exercise its jurisdiction under the competition law to consider whether any agreements in this activity might breach the competition law. This includes agreements between the incumbent operators and any new operators, or between the government and an incumbent operator by which that operator is chosen to undertake a new opportunity.

91. Under previous reforms to the railway industry the existing state owned railway business was to be separated into a business that was responsible for the maintenance and expansion of the track and selling usage rights to train operators and separately a business to operate the existing trains and train services. This reform is a fundamental first step before any competition can emerge in the areas covered by the existing railway infrastructure. The delay to implementing the separation or even an interim track access arrangement has prevented competition from commencing in any substantial way.

92. The reforms were also designed to facilitate the construction of private railways but none have emerged. In a number of respects, the way in which the reforms have been implemented into law (for example the requirement for the private railway to be owned and operated by a single freight user) significantly reduce the potential for such projects to be attractive and, again, competition to provide new infrastructure has been hampered.

93. These issues, in turn, push cargoes back onto roads that are over-crowded and the delays prevent the suppliers of goods located in one part of Indonesia from effectively competing with suppliers located in other locations.

94. In its advocacy role, the KPPU should monitor and be consulted on key aspects of the implementation of these reforms to ensure that effective competition can emerge in the rail sector as soon as possible.

### **3. Competition law**

95. As previous reports have found, the Indonesian competition law rests upon a sound conceptual framework. The guiding principle underpinning a fully effective modern competition law should be centred, as it is in Indonesia, on economic efficiency and the aggregate economic welfare of the people. Particularly at this point in Indonesia's history, the other purposes identified by the competition law concerning equality of economic opportunity and economic democracy are consistent with the central concept of economic welfare maximisation and should help in making competition a core value for business and the society as a whole.

96. A fully effective competition law should generally comprise at least three core elements<sup>50</sup>:

- the prohibition of anticompetitive horizontal contracts – with particular attention directed towards “hard core cartels” such as price fixing, market allocation and bid rigging;
- the prohibition of monopolization or abuse of dominance – with genuinely anticompetitive conduct captured and not a simplistic notion of protecting small or inefficient business at the expense of larger or more efficient firms; and
- a mechanism to safeguard against anticompetitive mergers.

97. In this regard, the previous UNCTAD and OECD reports recognised that while Indonesia's law does contain these core elements, there were certain problems and anomalies.

#### **3.1 *The prohibition of anticompetitive agreements***

98. With respect to *anticompetitive agreements*, the legal provisions and enforcement practice have not changed since the time of the previous UNCTAD and OECD reports. The key problems identified were that:

- There is no overall prohibition of horizontal agreements that restrict, impede, hinder or substantially lessen competition. Consequently some anticompetitive agreements may not come within the ambit of the law. Indonesia should consider including such a general prohibition in its competition law.

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50. OECD (1998) “Framework for the Design and Implementation of Competition Law and Policy”

- Many prohibitions applying to horizontal agreements that have been included in the law refer to specific forms of conducts, specific market structures and specific circumstances.<sup>51</sup> At best, this structure is complex and makes it hard for business actors to understand their rights and obligations and all the detailed requirements. The absence of a general provision prohibiting anti-competitive agreements may, in turn, give rise to unproductive litigation about exactly which of the provisions is relevant in a given case and whether the detailed specifics of the provision are met, rather than a focus on the simple, central question of whether there has been an agreement with an anticompetitive outcome.

99. There was a discussion within KPPU to address a number of these problems by consolidating several of these provisions into a single prohibition (e.g. Cartel).

100. In considering the substance of the provisions, the UNCTAD report noted that several “hard core” cartel concepts which international best practice treats as ‘*per se*’ offences (i.e. strictly illegal) appear in Indonesia to be subject to a substantive competition or ‘rule of reason’ analysis.

101. There are two common ways in which countries make price fixing, market sharing and other cartels ‘*per se*’ illegal:

- One way is to have a general prohibition applying to all anticompetitive agreements and for the courts to elucidate how this general prohibition is to be applied in particular horizontal agreement cases.<sup>52</sup> The courts interpret the scope and reach of the prohibition through decisions that illustrate when a substantive competition analysis is required<sup>53</sup> for a finding of illegality<sup>54</sup> and when it can be presumed from the nature of the conduct itself that there is an anticompetitive effect.
- The other approach is to codify in the statute itself when a horizontal agreement is ‘*per se*’ illegal (typically in price fixing, market sharing and bid rigging cases) and when a substantive competition analysis is required.<sup>55</sup>

102. The problem with the Indonesian law is that it is a confusing mixture of the two approaches. Article 9 (market allocation) and Article 11 (cartels in general) both provide that specific ‘hard core’ conduct is only illegal if it is “potentially resulting in monopolistic practices and or unfair business competition”. By doing so, the business community and/or the courts may interpret the law to mean that there is an additional question in a market allocation or cartel case to be answered as to whether there has been in that particular case a potential for there to be an monopolistic practice or unfair business

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51. These are Articles 4 and 13 (agreements in an oligopoly or oligopsony context), Article 5 (price fixing), Article 7 (predatory pricing by agreement), Article 9 (market allocation), Article 10 (two or more firms agreeing to boycott another competitor), Article 11 (cartels), Article 12 (trust arrangements), Article 16 (a general prohibition on anticompetitive agreements with foreign parties), Article 22 (tender rigging), Article 23 (agreements to obtain confidential information) and Article 24 (agreements that impede production or marketing of goods or services by other parties).

52. This is the approach under the US statute and European treaty albeit with a very strong hint in the European law to give particular consideration to price fixing and market sharing matters.

53. In the US these circumstances are referred to as the requirement for a ‘rule of reason’ analysis.

54. In Europe these circumstances are referred to as contraventions ‘by object’.

55. This is the approach in the Australian law. As the Australian law reveals, a codification can be a substantial exercise in which there are separate provisions for vertical and other circumstances and detailed rules about exceptions to ‘*per se*’ situations such as in the case of joint ventures.

competition. This is not desirable because market allocation and price fixing agreements should all be regarded inherently anticompetitive without the reason for the anticompetitive effects having to be re-proved again and again every time a cartel is found.

103. Qualifying prohibitions against market allocation and cartels that the conduct is only illegal if a substantive anticompetitive element is present reduces the probability that effective action will be taken against these damaging agreements. It could enable defendants to require the KPPU to undertake a substantive competition analysis or enable a defendant to challenge a KPPU cartel finding on the basis that the competition analysis was not persuasive.

104. Indonesia should consider:

- introducing a general prohibition that covers all anticompetitive horizontal conduct; *and*
- consolidating and simplifying the other horizontal prohibitions, either by subsuming them into the general prohibition or by developing a more structured statement of all the circumstances in which ‘per se’ illegality applies; *or*
- at least repealing the words “potentially resulting in monopolistic practices and or unfair business competition” from its market allocation and cartel provisions.

### 3.2 *The prohibition of abuse of dominance*

105. With respect to *monopolisation and abuse of dominance*, too, the legal provisions and enforcement practice remain unchanged since the time of the previous UNCTAD and OECD reports. Article 25 is the provision most directly concerning abuse of dominance (although there are a series of over-lapping prohibitions, discussed below). The text of the prohibition is as follows:

*“(1) Entrepreneurs are prohibited from taking advantage of their dominant position, either directly or indirectly, in order to:*

*a. impose trade terms with the intention to prevent and/or hamper the consumers to acquire competitive goods and/or services, both in prices or quality; or*

*b. restrict the market and technology development; or*

*c. hamper other entrepreneurs having the potential to become their competitors to enter the relevant market.*

*(2) Entrepreneurs are in the dominant position as referred to under Paragraph (1) of this article if:*

*a. one entrepreneur or a group of entrepreneurs controls 50% (fifty percent) or more of the market share on one type of goods or service; or*

*b. two or three entrepreneurs or groups of entrepreneurs control 75% (seventy five percent) or more of the market share on one type of certain goods or services.”*

106. Dominance should exist, and should only exist, when a firm has such strength that it can distort the market outcomes: for example by raising prices on an enduring basis without significant constraint from its competitors, customers and consumers. A best practice abuse of dominance provision should neither stipulate nor exonerate companies as being dominant based on market shares alone. Firms with



high market shares may not be dominant and in some types of markets, firms with somewhat lower market shares may in fact be dominant.

107. The problem with finding a company to be dominant when in fact it does not have market power is that it creates a disincentive for companies to compete to become large and that certain conduct which can be pro-competitive or anti-competitive depending on the market conditions (such as loyalty discounting) may be misclassified as economically damaging. The problem with failing to recognise that a company with a lower market is dominant is of course that anti-competitive actions might be permitted when they should be stopped. There are some markets (such as electricity) in which a company with a small market share may nevertheless be ‘pivotal’, with the ability to influence price.

108. The second paragraph of Article 25 which deems firms to be dominant if 50% or 75% market share thresholds are exceeded, should *either* be:

- removed and a guideline published by the KPPU explaining that market shares are only an initial, crude indicator of where a position of dominance is more likely to arise but that the real test of dominance is whether the firm(s) are subject to effective control from a the full range of existing and potential competitors; *or*
- amended so that the law provides that the market shares are only presumptions about which firms are (not) dominant and these presumptions can be displaced by actual evidence of whether any accused firm(s) are, or are not, subject to effective control from a the full range of existing and potential competitors.

109. A second concern is that the types of conduct that are includes as a breach of Article 25 are too specific.<sup>56</sup> For example, under paragraph c. of Article 25 it appears that a dominant firm’s conduct is caught if it prevents the entry of a potential new competitor but not if a company has always been present in the market in a small way but now proposes to expand and become a fully fledged competitor. Although other Articles in the law catch other specific conduct (such as predatory pricing or price discrimination discussed below), there are other commonly recognised forms of abusive conduct that are not unequivocally caught (e.g. a refusal by a company operating at two levels of the market to supply a key input to a downstream competitor thus driving the competitor out of business and monopolizing the downstream market).

110. Articles 17 and 18 also apply to cases of monopoly or monopsony respectively. Although the KPPU has indicated that these provisions only apply to conducts that are anticompetitive, they can create confusion and the risk that businesses or the courts may interpret the provisions as outlawing certain market structures. If the concerns outlined above concerning Article 25 were resolved, *Articles 17 and 18 should be repealed* because they would only be independently applicable (i.e. applicable when Article 25 was not breached) in a way that would likely hamper competition.

111. Other provisions seem to be primarily addressing concerns that would arise in abuse of dominance cases, and therefore appear to overlap with Article 25, including:

- Article 4 (oligopoly agreements where oligopoly is deemed or suspected from market shares);
- Articles 7 and 20 (predatory pricing);

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56. UNCTAD expressed concern that the Indonesian abuse of dominance provisions were ‘per se’ and indeed the three types of conduct caught are too specific.

- Article 19 (restricting the activities of competitors or discrimination); and Article 20 (deviations from cost based pricing).

112. Each of these provisions, as well as those mentioned above, takes a significantly different approach to the identification of monopolization or abuse of dominance and this makes the Indonesian competition law very complex indeed. Where provisions are differently worded for no explicit reason, the courts are required to interpret what the law is intended to mean and they may strive to identify a distinct role and a distinct meaning for each provision in order to explain why Parliament decided to include multiple provisions that could cover similar situations.<sup>57</sup> This dynamic can end with unpredictable and unfortunate results. It could result in some of these overlapping provisions being interpreted in an expansive or idiosyncratic way. The duplication, likely over-reach and the sheer complexity of these provisions gives rise to the potential for discouraging some forms of pro-competitive conduct and *Indonesia should consider whether a single, clear, principled abuse of dominance provision would be preferable.*

113. Senior KPPU officials have a good understanding of all the above matters and, as the UNCTAD report notes, one way to deal with the problem of inappropriate or imperfect drafting is to selectively enforce the law. In that regard UNCTAD observed that the KPPU had been very active in enforcing the law in many areas (e.g. public procurement cartels) and not in others (e.g. there had not been any price discrimination cases). Depending upon the degree of discretion afforded to the enforcement agency, this may be a solution, particularly if the agency communicates its expectations clearly. However, such an approach is clearly “second best” in nature, given the undesirability of inconsistent application of the law in any context. Hence, *legislative changes to address the above issues should be considered preferable.*

114. UNCTAD recommended that the KPPU adopt *guidelines* which would assist in clarifying how the provisions will be enforced and what is expected of business. The KPPU has now adopted an extensive number of guidelines covering matters such as market definition, agreements associated with intellectual property rights, mergers and the abuse of dominance.

115. The abuse of dominance guideline describes a process of economic analysis of abuse of dominance cases that accords closely with a best practice approach of taking an economic approach to the identification of dominance and theories of harm. There is extensive discussion of how dominance is established,<sup>58</sup> based on concepts that broadly reflect the substance of both the US and European systems. The discussion of abusive conduct covers territory that would be familiar to both those systems (such as exclusionary conduct and predatory conduct) and consistent with the European system (exploitative conduct).

116. However, this substantive economic approach to the analysis in abuse of dominance cases described above sits uncomfortably with the description of the legal position. The document states that Articles 6, 15, 17, 18, 19, 20, 26, 27 and 28 are all in ‘close correlation’ with Article 25. No further mention is made of Articles 17, 18, 26, 27 and 28 and it is not explained whether these articles are applied in the same way as Article 25. Some discussion of Articles 6, 15, 19 and 20 is provided. It would appear

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57. In the Tanjung Priok Container Terminal case (2004) and the Hansanuddin International Airport Cargo Services case (2008) the KPPU fined the services providers for concurrent contraventions of Articles 17, 19 and 25. On the other hand, in the Carrefour case, the KPPU found only a breach of article 25, rejecting a concurrent finding of illegality under Article 19.

58. The description starts with an off-putting statement that “The firm having the largest market share in an industry is called a dominant firm” which might inaccurately suggest that every market has a dominant firm and that collective dominance may not be possible. Nevertheless, the discussion that follows makes it clear that this is not what is intended.

(although this is not explicitly stated) that the primary role of these other provisions would be in cases in which dominance is alleged by behaviour rather than market share.

117. A further source of confusion is that although the document is referred to as a guideline, it is attached to, and has been adopted by, a regulation which asserts that the guideline is ‘binding on all the parties’.

118. Where the differences between the legal provisions and the enforcement policy are significant, confusion and legal risk will remain.

119. In summary, with respect to the abuse of dominance provisions, Indonesia should:

- consider amending Article 25 in the manner discussed above; and
- reconsider whether it is necessary or desirable to have additional provisions that could apply to an abuse of dominance (other than Article 25) and repeal them unless there is a rationale for them to be maintained in addition to Article 25.

### 3.3 *Preventing Anticompetitive Mergers*

120. The first two paragraphs of Article 28 provide clearly expressed prohibitions, one against anticompetitive mergers and the other against anticompetitive acquisitions of shares. Paragraph 3 of Article 28 requires Government Regulations to set forth further provisions regarding each of the two prohibitions and, at the time of the previous UNCTAD and OECD reports, these regulations had still not been promulgated. The required Government Regulations have now been passed and Indonesia has a fully functioning merger control.

121. An important role of a merger control regime is to provide a mechanism by which the competition authority can become aware of, and take action against, an anticompetitive merger *before* the merger is consummated. This is important because a merger, once implemented, is often difficult to reverse or reversing it will harm innocent parties such as customers and employees. Around the world there are many different mechanisms to ensure competition authorities become aware of mergers *ex ante*, including *mandatory pre-merger notification* for mergers that cross a certain threshold (e.g. the European Commission, the US and China), *voluntary formal pre-merger notification* (e.g. Singapore, New Zealand and the United Kingdom) and *voluntary informal pre-merger notification* (e.g. Australia).

122. Indonesia has adopted a unique combination of a voluntary pre-merger notification (consultation), which existed before the regulations, and a compulsory post-merger notification, which was introduced in the regulations. To assess this framework we consider alternative merger clearance regimes.

123. The advantage of *mandatory pre-notification* is that it provides the highest likelihood of detection before the deal is consummated<sup>59</sup>; but mandatory pre-notification suffers the disadvantage of being a more prescriptive form of regulation. In other words, requiring mandatory process steps, and imposing a delay while an assessment is made, unavoidably imposes some level of compliance costs for businesses and for the competition authority *even in cases where there is a very low likelihood of there being a competition problem*. By contrast, a voluntary formal notification process runs a higher risk of non-detection; but provides a less prescriptive approach because the parties have the choice in low risk cases not to subject themselves to the merger clearance process at all.

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59. However, the risk cannot be eliminated even with a mandatory filing requirement. There can be, and have been, mergers in which the parties have not notified in breach of the mandatory requirement.

124. Providing parties with the flexibility as to whether to notify an intended merger (and additional flexibility about what will happen if they do file) can be beneficial in a merger context because most mergers do not pose competition concerns and a significant minority of mergers are time sensitive – unless a deal can be concluded quickly, it may not be commercially possible to complete the merger at all.

125. An *informal voluntary notification process* provides the least prescriptive and most performance based approach. Unusual cases sometimes arise in which the deal is so time sensitive that it would not survive if the full assessment process was adhered to. Some failing firm cases fall into this category. With an informal, voluntary process, the parties and the authority can agree to redesign the timing and content of the standard process or agree to adopt a non-standard clearance decision that limits the protection afforded by the clearance, for example by excluding any protection for the merging parties in relation to matters that the competition authority and the parties agreed would not be fully tested in the abridged process.<sup>60</sup>

126. At a conceptual level, the unique Indonesian combination of a voluntary pre-merger notification (consultation) option and a compulsory post-merger notification requirement may provide a good system that could achieve a good balance between detection and minimising the burdens for legitimate mergers. The compulsory post-merger notification system could provide a means to detect whether the parties who have chosen not to make a pre-merger notification (consultation) made that choice responsibly and the voluntary pre-notification (consultation) system could enable time sensitive non-problematic mergers to be consummated without delay.

127. On the other hand, if not carefully administered this unique Indonesian system could result in the worst of all worlds – anticompetitive mergers being consummated without being first notified to the KPPU and, if the post-merger notification system is onerous or duplicative, the merger parties and KPPU bearing significant post implementation costs for all mergers be they pro-competitive or anti-competitive and in some cases, after irreversible damage to the market has already been done.

128. The performance of Indonesia's unique merger notification system should therefore be monitored and, if necessary, adjusted once the system has been in use for some years.

129. An important requirement for both formal and informal voluntary notification is that the competition authority needs to create incentives for businesses to notify where there is a real risk the merger may be anticompetitive. The authority should also monitor the market for potential anticompetitive mergers that have not been notified. If anticompetitive mergers are detected, significant sanctions must be imposed, in order to maintain incentives for businesses to comply with the law. Depending upon the country and the merger, potential sanctions may need to include both monetary penalties and divestiture.

130. The post-merger compulsory thresholds are denominated in money terms rather than market shares (which is the preferable approach because it is less open to controversies over market definition). The thresholds are triggered when there is *i*) a total asset value of Rp. 2.5 trillion (approx USD 280 million) and/or *ii*) a total acquisition value of Rp. 5.0 trillion (approx USD 560 million). These thresholds appear to be of a similar order to comparable countries.<sup>61</sup>

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60. Examples of how this can be useful include failing firm cases where the firm has only days to be saved preventing the standard clearance process and the factual issues to be checked are narrow permitting an adequate 'slimmed down' assessment process; or an unusual industry like aspects of defence procurement where the competitors and the government-customers are very few enabling a clearance process to be conducted on a completely confidential basis.

61. For example, the South African merger thresholds are of the same order of magnitude.

### 3.4 Other Competition Law Prohibitions

131. As well as the three main prohibitions (against anticompetitive horizontal agreements, abuse of dominance and anticompetitive mergers), it may be appropriate for a competition law to include *additional prohibitions*, where they are not inconsistent with the above prohibitions and they promote long run competitive outcomes. Indonesia has included a number of additional prohibitions in its law.

132. The Indonesian law contains a number of *vertical prohibitions of a 'per se' nature*: these are Article 6 (price discrimination), Article 8 (resale price maintenance) and Article 15 (limited exclusive dealing). As noted, there is a theoretical case for retaining *per se* illegality for resale price maintenance<sup>62</sup> but in the other two prohibitions should be made subject to a competition analysis. In particular, it is widely acknowledged that prohibiting price discrimination in some circumstances can:

- i. actually harm competition by enabling inefficient resellers who impose costs on producers to free ride on other more efficient resellers; or
- ii. prevent producers from efficiently using price differences to encourage distributors or their customers to behave efficiently.<sup>63</sup>

133. Consequently, many countries have long since repealed their specific laws concerning price discrimination (e.g. Australia) or made very extensive exceptions to the prohibition against price discrimination (e.g. the US) and instead economically harmful price discrimination conduct is identified and prevented under the abuse of dominance prohibition. Currently, the KPPU is thinking of retaining but amending Article 6 to align it more closely to circumstances of actual anticompetitive conduct.

134. A particular purpose of the Indonesian competition law (as noted in the introduction to this chapter) is to curb excess levels of concentration that accumulated prior to the law taking effect. The Indonesian competition law contains *specific prohibitions against certain ownership structures*, outlawing trusts (Article 12), cross-directorships (Article 26) and majority cross-shareholdings (Article 27). Of these, the first prohibition is subject to a purpose based competition test, the second is subject to an effects based competition test and the third is subject to a market share test (a single firm market share of 50% or a three firm concentration ratio of 75%). Given the specific problem of excess concentration that Indonesia faces, these prohibitions appear to be appropriate at this time. However, the effect of these provisions should be monitored in the future with a particular focus on whether the prohibitions continue to be needed and/or whether there are circumstances in which these prohibitions may prevent business from adopting efficient structures. This is particularly a problem in relation to Article 27 which contains a market share test rather than a competition test.

135. An unusual feature of the application of the Indonesian competition law, and the institutional assignment of responsibilities, is that *certain forms of corruption can be caught by the competition law* where there is concurrent anticompetitive damage. For example, where cartelists agree with a public procurement official that the official will overlook the illegal cartel behaviour, or even actively reinforce or 'police' the illegal decisions of the cartel in return for a bribe, the competition law can apply to the procurement official as well as the cartelists. To assist in coordinating law enforcement in these cases, the

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62. Although not all competition experts agree on this. Particularly in relation to managing complex distribution chains where distributors may free ride on each others' efforts, where there are information failures and price is a key form of communication to the customer and in the context of luxury goods where customers as a whole actually gain utility through higher prices, there are economic arguments to suggest that even resale price maintenance may be pro-competitive.

63. For a further discussion of these points, see Tirole J., 1998 *Theory of Industrial Organization*, Chapter 3.

KPPU and KPK have entered into a memorandum of understanding and the KPPU takes the lead in certain circumstances.

136. As detailed above, there are a number of provisions of the current Indonesian competition law that are not consistent with current international best practices, particularly in relation to the prohibitions against horizontal agreements, abuse of dominance and price discrimination. The following policy options distinguish short term and medium to long-term approaches to these issues.

137. In the short term, the KPPU should continue to adopt a selective, “principles based” approach to enforcement and, where possible, publish more explanatory papers and guidelines to explain this approach, thereby creating greater certainty and predictability, as well as better understanding of its enforcement approach.

138. In the medium term, however, it would be preferable for Indonesia to undertake a process of review and amendment of its competition law to:

- organise the prohibitions on anti-competitive behaviours in a clear and logical thematic structure;
- eliminate duplication, overlap and inconsistency;
- standardise language within and between the provisions;
- better match the language of each prohibition to the harm it seeks to address; and
- where appropriate, repeal existing prohibitions or establish significant exceptions to them, in order permit pro-competitive conduct in relevant circumstances.

### 3.5 *Investigatory Powers*

139. For a competition law enforcement system to be fully effective, the enforcement agency requires certain *investigatory powers* including the ability to obtain evidence and other information from businesses and third parties even if those parties do not wish to provide that information.

140. On its face, the Indonesian competition law gives the KPPU a range of formal powers to obtain information<sup>64</sup> including the power to require businesses to produce evidence and for witnesses to be examined. Nevertheless, the legal position appears to be uncertain in key respects.

141. First, the KPPU has noted that:

*“The institutional conditions of the KPPU’s Secretariat, which is not yet a part of the Civil Service, have created a barrier in the performance of the formal investigation function, as the formal investigation functions must be undertaken by state apparatuses, namely by police officers or civil service investigators.”*

142. Second:

*“Pursuant to the law, the KPPU has the authority to investigate, examine and impose sanctions for competition violations. However, in investigation, KPPU investigators have not been given the authority to conduct search, interception, arrest or seizure.”<sup>65</sup>*

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64. Articles 39 and 41.

143. The effectiveness of the existing specific competition law powers by the KPPU is uncertain<sup>66</sup> and one way that the KPPU has sought to address this is to cooperate with the police.

144. All Indonesian competition law prohibitions can attract criminal penalties and the KPPU therefore shares enforcement responsibility with the police. The KPPU has entered into a Memorandum of Understanding with the police to cooperate in investigations but this does not seem to be a complete solution.<sup>67</sup>

145. The powers in the competition law to demand information, enter onto private property, search and take or copy material are all significant intrusions upon property rights and the right to privacy. In the absence of express, detailed provisions, many justice systems will construe the provisions providing such powers narrowly. Consequently, in most countries the equivalent powers are considerably more detailed, with extensive provisions concerning who makes the decision to use compulsory powers and how, what the document advising the target of the decision should contain and what is the jurisdiction of the court to enforce the decision against a non-cooperative target.<sup>68</sup> Neither the KPPU nor the Police unequivocally assert that the three short sentences in Article 41 of the Law give them the ability to conduct a ‘dawn raid’ at the premises of a business where the business does not consent.<sup>69</sup> No mandatory dawn raids appear to have been conducted and many cartel cases show that even the less intrusive statutory powers to demand information or documents have not been used either.

146. The power to conduct a dawn raid is one of challenges addressed by KPPU in reviewing or amending its competition law, in addition to synchronizing procedures with other national legal procedures, such as the Criminal Procedure Code.<sup>70</sup>

147. The current uncertainty presumably results in fewer cases being proved than otherwise would be the case, with those cases that do proceed tending to be based solely or largely on indirect evidence. That tends to be less reliable than direct evidence that could be obtained if the KPPU had effective compulsory powers and used them. *These problems should be addressed through a review and reform of the law to:*

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65. Annual Report on Competition Policy Developments In Indonesia by the KPPU to the OECD’s Competition Committee (2010).

66. The KPPU’s 2010 Annual Report indicated that there were a number of Supreme Court challenges to the previous exercise of these powers.

67. In particular, there is a jurisdictional question for the police because the link between the criminal provisions of the competition law and the Criminal Code lacks clarity.

68. For example, the equivalent Australian provisions (*Competition and Consumer Act 2010*, Part XID “Search and Seizure” and section 155 “Power to obtain information, documents and evidence”) cover [10] pages and the equivalent French provisions (Commercial Code, Book IV, Title V “Investigatory Powers”) cover three and a half pages.

69. This is a matter of how to interpret Indonesian law. Although there is a consistent view expressed by several respondents that there is a problem in this respect, different reasons have been suggested to the OECD at different times. These include a belief that the KPPU’s staff are not public servants in the conventional Indonesian sense and that they cannot be invested with (or enforce) such powers. Another suggestion is that under Indonesian law for such a power to be effective there needs to be ancillary legal machinery sitting behind the information gathering powers themselves which would provide for subpoenas or documents of demand to be issued, how they should be issued and vesting a particular court with the power of enforcement.

70. *Hukum Acara Pidana*.

- Provide explicitly for dawn raid powers, powers to demand documents and information and the ability to require a witness to answer questions<sup>71</sup>;
- Determine what powers and roles are assigned to each of the police and the KPPU staff;
- Clarify or ensure that KPPU employees have the ability to undertake a dawn raid, even if they are not civil servants;
- Provide sufficiently detailed provisions to ensure that it is clear which decision making steps and documentation are required for the exercise of the powers; and
- Explicitly vest at least one court with jurisdiction to adjudicate questions about the exercise of the powers by the law enforcement agencies, as well as about non-compliance by target firms, and provide that court with sufficient remedy powers.

### 3.6 *Leniency and Immunity Policies*

148. Many competition authorities<sup>72</sup> have found that cartel detection is greatly enhanced by an *immunity policy* (where the first cartel member to disclose their role and fully cooperate with the authority is completely immune from penalty) and/or a *leniency policy* (where a penalty is still imposed but is reduced in return for cooperation).

149. Competition law enforcement occurs in a broader framework of the justice system which often contains important checks, balances and ethical norms that can differ significantly from country to country. In some countries the concept of immunity and leniency policies fit comfortably with the country's legal norms while in other countries such policies challenge deeply rooted societal values.

150. Many competition authorities have found these policies useful even in countries where their adoption has required a significant change in approach by the government, prosecutors, judges, business, the general public and even internal elements of the authority.<sup>73</sup> In almost all cases, such policies have only been adopted after concerted advocacy efforts by the competition authority with other parts of the government and judiciary as well as with business and the community.

151. Immunity and leniency policies are only fully effective where there is an incentive to report the conduct and this only exists if cartellists have a real fear that the cartel may be discovered even without them applying for leniency. In an unstable cartel, or one in which the members have a very low level of trust with each other, the fear of another party reporting may be enough. In other words, the dynamic of a race between them to claim leniency may be sufficient. However, many agencies find that a really effective

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71. Together with any protections for the accused that are appropriate under the Indonesian legal system as a qualified right to silence.

72. Note: The terms 'immunity policy' and 'leniency policy' are often used inconsistently around the world with one term covering both concepts or the nomenclature reversed.

73. This change of approach has been most difficult in some Asian countries such as Korea and Japan where the administrative enforcement system is used and the traditional approach to business tends to be more collaborative and consensus based. However, even in countries such as Australia and New Zealand which have the adversarial system and a more individualistic business tradition, the initial adoption of these policies, and their expansion to include public prosecutors when criminal sanctions have been introduced, has involved intensive advocacy efforts and a considerable shift in thinking.



enforcement system requires both traditional methods of cartel detection<sup>74</sup> and immunity and leniency policies.

152. For a considerable period, the KPPU itself and external commentators on the Indonesian system<sup>75</sup> have recognised that an immunity and/or leniency policy would be a very helpful addition to the suite of investigatory tools, but the law has not been changed to provide for these policies to be implemented<sup>76</sup>.

153. The first question is whether immunity and leniency programmes can be adopted as an enforcement policy of the KPPU *without* any explicit legislative mention<sup>77</sup> or whether a change in law is preferable or perhaps even necessary. This is a question on which Indonesian experts within and outside the KPPU have differed over time. The OECD understands that the prevailing view is now that a law change *is* required. *We therefore recommend considering legislative change to introduce a system of immunity or leniency for cartel offences.*

154. It typically takes at least one round of substantial amendments after gaining implementation experience for immunity or leniency policies to be effective. For this reason it is generally better not to exhaustively specify the full details of the policy in the primary legislation. Instead, it is preferable (if possible in the legal context of the country) to enact<sup>78</sup>:

- a general power for the agency to grant immunity or leniency; and
- a power to make regulations or establish guidelines to establish the details of the practical operation of these policies, to provide the maximum in certainty and predictability for potential applicants.

154. These forms of legislative provision enable the agency to make adjustments to the policy in light of implementation experience without needing further Parliamentary law changes. In either case the instrument (the guidelines or the regulations) should be capable of amendment by the authority but, in order to ensure predictability for applicants, any existing immunity or leniency applicants must not be adversely affected by any change to the guideline or regulation.

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74. Such as anonymous ‘whistle-blowing’ by employees and bid rigging detection programmes in which the competition agency works closely with procurement agencies to look for suspicious signs.

75. UNCTAD (2010).

76. To understand why this (and other important competition law reforms) suffer from extensive delays and to help remove impediments, two factors should be borne in mind. First, the challenge of successfully completing a sustained advocacy effort by senior executives is made more difficult in Indonesia by the short terms of tenure of the Chairperson and the complete change of the Membership which occurs each five years. Second, the task of stewarding a law change through from the preparation of an academic draft through to the enactment of any law in Indonesia is daunting and compounded through the distance that is placed between the independent KPPU and the central Government.

77. As was initially the case in the US, Australia and many other countries.

78. For example, see Article 46 of China’s Antimonopoly Law for a law with very little detail or for a law with more detail but still extensive discretion in France, Article L464-2 of of the Commercial Code, paragraph III for leniency and paragraph IV for immunity.

### 3.7 *Decision Making Processes and Appeals*

#### 3.7.1 *Deadlines*

156. Once the investigation process is completed, the *decision making* stage of the process occurs. The KPPU must conduct a preliminary examination within 30 days and if it progresses to a 'Phase II' examination, the examination period is extended for 60 days. If significant evidence is found during this 'Phase II' examination, the period can be extended further until the Commissioner in charge decides to stop it. But the decision must be rendered 30 days after the further examination is complete.

157. Clearly, a delay in reaching a conclusion to correct a competition law breach could result in lasting damage to the market and, equally, taking too long to exculpate an accused could cause significant damage to that company's business. A particular consideration in merger matters is that investigations need to be completed reasonably quickly to enable the transaction to proceed. Tight deadlines can therefore be valuable, particularly for mergers.

158. In other countries, deadlines are more common in merger matters than non-merger matters and it is rare that authorities do not have an ability to extend the deadline if the parties are being slow to provide information. Requiring decisions to be taken in too hasty a time frame poses the significant risk of inadequate fact finding, inadequate analysis and decisional errors. The Indonesian limits look tight, in international comparison, particularly for abuse of dominance cases. Throughout the world an efficient detailed investigation in a complex abuse of dominance case could easily take a full year to complete.

159. For example, in the years leading up to 2010, some 26 Portuguese competition law investigations had been in progress for more than three years and the authority launched and completed an initiative to bring all these matters to conclusion. The Portuguese authority now assures the business community that it has reduced the time investigations take to be less than 1 ½ years which is considered by the authority to be a time frame that strikes a reasonable balance between the need for sufficient time to do good work and the need to deliver a timely result from the process.<sup>79</sup>

160. Indonesia should *maintain the existing deadlines only for merger matters but for other matters consider:*

- extending the deadlines for preliminary and final KPPU examination, particularly in complex abuse of dominance cases, to be up to 12 to 18 months; or
- adopting measures that provide the KPPU with some timing flexibility. For example, the law could provide an ability to 'stop the clock' or trigger fixed extensions of time in certain circumstances such as where a dawn raid has been undertaken, where there are large numbers of defendants or where quantitative economic analysis is to be undertaken.

161. Providing more time for investigations would be even more important if the reforms suggested above concerning enhancing the KPPU's investigatory powers were adopted, to ensure that the KPPU has adequate time to use those powers and properly evaluate the information gathered.

#### 3.7.2 *Transparency*

162. Until 2010, the *investigation process* was undertaken largely behind closed doors within the KPPU. However, to improve fairness and rigor in decision making, an important reform was introduced in

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79. Chairman Sebastião, per *Jornal de Negócios*, 11 January 2010 ([www.jornaldenegocios.pt](http://www.jornaldenegocios.pt)).

2010 (through the KPPU Regulation No. 1/2010 on Case Handling Procedures). The staff of the KPPU must now present their case to the Commissioners. Parties such as the defendant and the complainant also have a right to be heard.<sup>80</sup>

### 3.7.3 Appeals

163. Consistent with international practice, Indonesia provides for accountability of the KPPU on a case by case basis through the *court system* and for the administration of the law as a whole through Parliamentary oversight. Article 45 of the law provides for appeals as follows:

- an application must be made within 14 days to the District Court and the decision must be made within 30 days of the commencement of the hearing; and
- within 14 days from a decision being made by the District Court, an application for appeal may be filed to the Supreme Court. That Court must make its decision within 30 days from the time the appeal is received.

164. Unlike the specialist competition tribunals that some countries have created, these are courts of general jurisdiction. One challenge is therefore how to equip judges with the necessary expertise. The KPPU<sup>81</sup> and the OECD<sup>82</sup> have sought to address this issue by providing training to Indonesian judges. There were discussions in Indonesia of moving the appeal process to the High Court rather than to the District Court because that Court's bench is better equipped to deal with the complexity and significance of the subject matter of competition law cases. It was being discussed as one of considerations by KPPU in reforming its competition law.

165. Although the law itself does not specify what grounds may support an appeal or the standard of persuasion that the applicant must reach, the OECD understands from those with experience of the process that the grounds of appeal tend to be narrowly construed. Even if it were technically possible to open the full substance of the KPPU decision, in almost all types of competition law cases an appeal that dealt with the full substance of a decision within the tight timeframes provided would simply not be feasible. There is insufficient time for the litigants to prepare the submissions and for the court to consider the material.

166. Without a deadline, courts may take too long in dealing with complex commercial litigation and that real justice can be defeated simply by delay. However, justice cannot be done if there is not time for the parties to assemble and submit material or if there is not enough time for the court to hear, review, consider, decide and render reasoned judgement.

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80. It is too early for an assessment to be made about whether this reform is adequate to address this need. If Indonesia wished to take further steps in this regard, a key resource would be the reports of recent discussions at the OECD concerning a number of different aspects of procedural fairness conducted in 2010 and 2011. Indonesia and a wide range of other countries provided written descriptions of their experiences and practices and these country specific contributions are published with the report.

81. The KPPU's contribution to the OECD's Roundtable Discussion on the Institutional and Procedural Aspects of the Relationship Between Competition Authorities and the Courts, 2011 indicates that after an initial period of intensive work with District Court judges, the KPPU has now settled into a pattern of conducting two workshops per year for judges from these courts.

82. In November 2011, the OECD-Korea Policy Centre held an inaugural, pilot training programme for Asian judges hearing competition law cases which was attended by two judges and an interpreter.

167. The key questions in competition law cases are highly fact intensive and sometimes conceptually complex. In most countries it is extremely difficult to predict how long a competition law case might take. The following table provides estimates of durations of appeals in certain other countries with administrative systems of competition law enforcement.<sup>83</sup>

**Duration of Competition Law Cases in Selected Countries**

Country	First level court consideration in competition law case	Appeal to most senior court
Netherlands	1 to 3 years	1 to 3 years
Germany	At least 1 year	No estimate reported
France	6-12 months	12-18 months
European Union	Average: almost 3 years	18 months
Korea	1 to 2 years	4 months to several years

168. Compared with OECD countries, therefore, the 14 and 30 day timeframes are extremely short and it is very difficult to conceive of how a substantive reconsideration of key questions can take place within these periods.

169. *Indonesia should consider amending the court time frames to enable sufficient time for the court to consider the substance of each case.* One approach would be:

- to keep the concept of a strict time limit for the District Court (to ensure that cases do not become indefinitely blocked) but to make that period significantly longer than the law currently provides; and
- for the Supreme Court process to be similarly lengthened and for there to be a limited discretion to deviate from strict time limits (such as an ability for all the parties to the case to consent to a longer period and/or for the Court itself to extend the process in complex cases or cases where there is a large volume of evidence presented to it).

### 3.8 Remedies

170. The most important *remedies* for competition laws are:

- penalties (to deter businesses from contravening the law);
- forward-looking orders requiring or prohibiting particular behaviour (to enable the markets affected by contraventions to become more competitive);
- divestitures in anticompetitive merger cases (to restore the competition that previously existed in the market);
- disqualification of employees from holding executive positions in companies and revocation of a company's business licence (where applicable); and
- compensation for victims.

83. International Comparative Legal Series: [www.iclg.co.uk](http://www.iclg.co.uk). For common law jurisdictions with a court enforcement model such as Australia and the United States, the typical time-frame for the first level of court decision is at least 2 years and no data was reported for the appeal level.

171. The Indonesian law provides for all of the above remedies<sup>84</sup> including both civil financial penalties and criminal financial and imprisonment penalties. Civil and criminal penalties can apply to all the substantive contraventions but there is a two-tier approach for criminal sanctions. The higher level of criminal sanctions applies to the prohibitions against anticompetitive mergers, abuse of dominance and some anticompetitive agreement prohibitions. The lower level applies to some anticompetitive agreement provisions such as Article 5 (price fixing) and Article 22 (bid rigging).

### 3.8.1 *Financial penalties*

172. The KPPU reports that by the end of 2010 it had imposed, in total for over 10 years, more than Rp.949 billion (USD 125 million) in administrative penalties and a similar amount in compensation payments. The amount of fines that have permanent legal force<sup>85</sup> is Rp.182 billion (USD 20 million) and the amount that has been already paid by the parties to the State Treasury is only Rp.10 billion (USD 1 million). However, fines cannot always be recovered, since the fine execution is in the hand of judiciary (court). The figures presented indicate that there is a need to more rigorously enforce the payment of penalties and this has been recognised as a key priority by the KPPU in its 2010 annual report. It is important for the KPPU to enforce its penalty orders because other countries have found that, where orders are not enforced, it negatively affects the overall level of compliance with competition law.<sup>86</sup>

### 3.8.2 *Criminal penalties*

173. The Indonesian law allows for criminal penalties in a wider range of cases than is standard, internationally. In most competition law systems, it is important that competition agencies can impose administrative or other civil penalties in response to contraventions that involve a competition assessment (usually abuse of dominance and merger cases). This is because most legal systems require that criminal cases are proved to a high level of certainty ('beyond reasonable doubt') and it is rare that this standard can be reached where detailed economic analysis, theories and evidence are concerned. It can also be argued that applying criminal sanctions to anticompetitive merger cases, vertical conduct cases and abuse of dominance cases could be undesirable if it creates a strong disincentive for businesses to engage in forms of conduct (e.g. large companies providing selective discounts) that can be pro-competitive or anticompetitive depending upon the market circumstances.

174. By contrast, 'hard core' cartels' are usually the highest enforcement priority.<sup>87</sup> These are usually 'per se' violations which do not require a detailed economic case to be proved, so stronger sanctions are often applied in these cases. About one third of countries apply criminal sanctions in these high enforcement priority areas of competition law. Although criminal sanctions can apply to companies in these cases too, the most important role of criminal sanctions is that they lead to the imprisonment of

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84. This is assuming that Article 47(2)e which provides for an order that is a "stipulation of the cancellation of mergers or consolidations of business entities and acquisitions of shares" could be made prospectively to prevent a merger or retrospectively to unwind one that has already occurred.

85. *Inkracht*.

86. In Brazil, for example, a problem emerged when a slow collection process for fines resulted was found to result in a fall in the level of compliance with the law. A specific programme was undertaken to remedy this situation, the details of which are discussed in the OECD's 2010 peer review of Brazil. On a similar theme, from about 2008, in response to a systematic problem of non-compliance by businesses with the merger commitments that they had made, the ACCC created a special team to monitor and enforce such undertakings.

87. See OECD Council Recommendation concerning effective action against hard core cartels.

individual business people. This is likely to deter anti-competitive conduct more effectively than financial sanctions.

175. Countries that impose criminal sanctions take different approaches to achieving a delineation between civil and criminal exposure for business people: in some countries there are specific prohibitions only applying specifically to hard core cartels<sup>88</sup>; in some countries criminal sanctions apply only if there is an element of dishonesty as well as familiar competition law concepts<sup>89</sup>; and some countries there are strong norms of case allocation between agencies applying a criminal enforcement process or agencies applying a civil enforcement process.<sup>90</sup> In all cases, the law makes it clear that the criminal penalties can apply to an individual business executive *involved* on behalf of their company in the contravention and not only the business entity that is the primary party to the contravention.

176. Taking these considerations into account, *Indonesian should reconsider its approach to applying criminal sanctions to competition law contraventions* in the following respects:

- There should be a clear signal to the business community as to when their executives risk criminal sanctions. This should be designed so as to ensure that potentially pro-competitive behaviour (such as efficiency-enhancing mergers between large companies and large companies providing selective discounts) is not ‘chilled’ or discouraged. This could be achieved through narrowing the scope of criminal liability in the law itself or through a clearly articulated enforcement policy.
- In high priority areas such as cartels, the law should provide a clear basis for applying criminal sanctions to the individual employees involved in the contraventions as opposed to the business entities that employ them. In particular, when there are different employees involved in different aspects of the conduct, the principle that determines when each particular business executive been sufficiently involved to be exposed to a prison term should be clearly articulated.
- The nature and timing of any such changes to the scope of criminal sanctions should be linked to the review of the KPPU’s investigation powers which, as noted above, currently rely in part on an MOU with the police.<sup>91</sup>

### **3.9 Redress for Parties who have Suffered Loss from Contraventions of the Competition Law**

177. Most countries consider that *parties who have suffered losses* through breaches of competition law should have an avenue of redress but a significant number of countries (including many OECD countries) continue to look for effective ways to achieve this within their respective legal systems.<sup>92,93</sup> The

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88. For example the Australian, Japanese and UK laws.

89. For example the French law.

90. For example the US enforcement practice.

91. The jurisdiction of the police is linked to the existence of criminal sanctions.

92. In 2001 the UK the Department of Trade and Industry commenced a process of reform by publishing “A World Class Competition Regime”, Chapter 8 of which recognised that at that time no private actions had been recorded in the UK under either domestic or European Union Law. After one round of reforms, the Office of Fair Trading recommended further amendments in its paper titled: “Private actions in competition law: effective redress for consumers and business”.

93. In 2005 the European Commission issued a Green Paper, and in 2008 a White Paper, on “Damages Actions for Breach of the EC antitrust rules”.

Indonesian law attempts to provide strong rights for parties who have suffered losses, but there appear to be impediments which are undermining the adoption of this principle in practice.

178. Before turning to the details of the provisions and the problems with them, it is useful to bear in mind four specific public policy reasons why it may be appropriate to provide avenues for third party redress (in addition to deterrence, which can also be achieved through other means):

- Notions of justice often include the principles that perpetrators should not benefit from illegal conduct *and* that victims should not suffer. If the only pecuniary remedies are fines collected by the state, the victims will not necessarily receive any individual redress unless there is a separate provision for damages or compensation.
- If victims are compensated following public enforcement action, they may be incentivised to provide information to the authority that they would not otherwise provide.
- If a private party has an ability to take its own enforcement action, it may remove the necessity to spend public funds undertaking enforcement action in that case altogether.<sup>94</sup>
- Finally, if there is no avenue for compensation or damages, or if it is not reasonably certain, it can distort the investment decisions of competitors, potential competitors and customers. For example, if a new competitor is considering trying to enter an industry in which there is a dominant player, it may not be willing to do so unless there is a predictable (or even privately enforceable) right to have an abuse of dominance complaint processed and any losses recovered.

179. There are three main legal mechanisms by which victims of competition law contraventions might participate in the enforcement system. First, in almost all competition law systems such parties may make a complaint to the competition authority. In some countries (such as in Indonesia<sup>95</sup>) complainants have a legally enforceable right for their complaint to be properly investigated. In Indonesia's case, the KPPU must complete a preliminary examination of a complaint within 30 days after receiving it and decide whether a further examination is required.

180. Second, the competition authority may have the discretion when making a finding that a contravention has occurred and that remedies will be imposed that the orders should include the payment of compensation. Under the Indonesian law the KPPU 'may stipulate' that a compensation payment must be made<sup>96</sup> and indeed by the end of 2010 it had awarded Rp.950 billion (USD104 million). The law itself does not provide any explicit requirements or guidance as to how the KPPU should exercise this discretion but the KPPU has issued Regulations<sup>97</sup> that provide some additional detail (although still very little). In practice, however, it is not always transparent or predictable how this discretion is exercised and there are instances in which the KPPU has,<sup>98</sup> and has not,<sup>99</sup> ordered compensation even when the same provision of the law is breached.

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94. This, for example, is the primary rationale for trebling the damages available to private litigants in the US and some other countries.

95. Article 38(1) and (2) and 39(1).

96. See Article 47(2)(f).

97. Regulation No. 4 of 2009.

98. KPPU Case No. 23/KPPU-L/2010 in which the KPPU ordered the national airline, PT Garuda Indonesia, to repay, via the Ministry of Religion, an anticompetitive surplus margin charged on travel for Hajj

181. Finally, there may be a direct private right of action which is either pursued only after the competition authority has made a decision or is a completely independent right for complainants to take enforcement action in court against alleged contraventions of the law even if the competition authority has not investigated the case.

182. In Indonesia, there is a general legal provision that if a party is a victim who has suffered loss from a breach of a publicly enforceable law, they are entitled to take court action to recover any losses occasioned.<sup>100</sup> On its face, this would enable claimants to take action in competition law cases. Indonesia ultimately inherited this provision from the Code Napoleon/French Civil Code as have many other countries from the civil code legal tradition<sup>101</sup>. In the Netherlands, Germany and other countries their equivalent provisions are indeed the main basis upon which private competition law litigation proceeds.<sup>102</sup>

183. The competition law itself did not explicitly set out how its provisions would interact with the general provisions in the Civil Code and it has been left up to the Courts to resolve this question. So far these provisions have been considered in only a small number of District Court cases and the approach appears to be that the courts will may enable parties to take ‘follow-on’ actions where the KPPU has decided that the competition law has been breached but that victims cannot seek redress directly in the court where the KPPU has not previously make a finding of breach.<sup>103</sup>

184. The operation of the complaint and compensation provisions within the competition law, and the provision in the civil code for private claims, appear in practice to be flawed in at least two respects:

- The two possible avenues for redress (a KPPU award of compensation and a follow-on action in the courts) are both unpredictable. This significantly undermines the achievement of the three types of benefit described above that can flow from giving parties rights to compensation; and
- The KPPU states that the obligation to investigate all validly lodged complaints constitutes a significant call on its resources. The current approach by the courts of only permitting parties to sue for damages if there has first been a finding by the KPPU that the law has been breached, encourages victims to lodge complaints with the KPPU. KPPU has indicated that it is required to investigate all validly filed complaints and that this reduces the agency’s flexibility to allocate resources to the allegations that are the best substantiated or towards the cases that are likely to cause the greatest economic damage to the economy as a whole. Requiring private litigants to

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passengers and Case No. 19/KPPU-L/2007 concerning, where the Reported Parties were ordered to pay a compensation for damages to the injured party, PT Aquarius Musikindo.

99. Case No. 35/KPPU-I/2010 in which the KPPU did not stipulate any order that the Reported Parties pay compensation of damages to the injured party, PT LNG-EU, even though the decision specifically identified that party as the victim of the conduct. In this case, the same provision was violated as in the Case No. 19/KPPU-L/2007 where a compensation order was stipulated.

100. See Article 1365 of Indonesian Civil Code and Article 279 of the *Reglement op de Burgerlijk Rechtsvordering* (Indonesian Code of Civil Procedure).

101. For example, the Dutch and German civil codes have similar provisions and it is via the Dutch code that Indonesia has most directly received this provision into its law.

102. Although it should be noted that such cases are rare for a range of reasons: in some countries class actions cannot be launched using this provision, in some countries it is difficult to obtain the discovery of the necessary evidence to mount a case and in most countries issues of quantification of the loss and pass-on mean that the cases are often difficult for the plaintiff to prove.

103. KPPU Case No. 35/KPPU-I/2010 concerning the violations by Mitsubishi Corporation and KPPU Case No. 7/KPPU-L/2007 concerning violations by Temasek Group.



first pursue a KPPU complaint process appears to compound the burdens on the KPPU's resources.

185. To address these problems and better achieve one or more of the above three policy objectives, in the long run, *Indonesia could consider better delineating a separate private enforcement channel from the public enforcement channel* and identifying an optimal interaction between the two. In the short run, *the KPPU could improve predictability by issuing guidelines* on how it exercises its discretion to award compensation.

186. Continuing the theme of reforms to the legal framework, the next section addresses institutional arrangements issues for the KPPU to administer the competition law and policy effectively. These issues include appointing system of Commission members and their tenures, employing more KPPU staff and financial resources.

#### **4. Institutional Arrangements for the KPPU**

187. The KPPU has been established as an independent agency<sup>104</sup> rather than an agency within a Ministry. This is consistent both with the domestic priorities of reform at the time the competition law was passed and international best practice. Independence in this context means that the executive government does not have the power to instruct the Commissioners and staff of the KPPU whether or how to pursue investigations or affect decisions.

188. The approach to the competition law enforcement tasks of the KPPU has implications for its institutional arrangements. The two predominant models for enforcing competition law around the world are the administrative model<sup>105</sup> and the adversarial model.<sup>106</sup> Consistent with Indonesia's legal heritage and the choices made by its most immediate neighbours, Indonesia has primarily adopted the administrative model of enforcement.<sup>107</sup> In the administrative model, the competition authority investigates allegations, makes a decision whether or not there has been a breach of the law and also generally determines what penalty (if any) is applied. By contrast, in the adversarial model, the competition authority undertakes the investigation but cannot make a binding decision that the law is contravened nor impose penalties. Rather the authority must take action in court seeking a ruling that the competition law has been breached and what penalty should apply.

189. Although this formally established independence is important to the integrity of the KPPU, there are a number of aspects of the particular way in which independence has been implemented within Indonesia that appear to be significantly hampering the KPPU's effectiveness and these are discussed below.

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104. See Article 30.

105. This is the model, for example, administered by the European Commission and which is also applied in Indonesian and the majority of Indonesia's Asian neighbours such as Singapore, Vietnam, India, China, Korea and Japan.

106. This is the model, for example, by which the US Department of Justice takes action against anti-competitive conduct. It is also the main model used by some of Indonesia's other Pacific neighbours such as the Philippines, Australia, Papua New Guinea and New Zealand.

107. Note, however, that the competition law also applies criminal sanctions for competition law violations and, consistent with other countries that have adopted the administrative enforcement model and criminal liability such as Japan, Germany and France, for criminal liability to apply, there needs to be a prosecution with a trial held in court.

#### **4.1 *The Appointment of the Chairperson, Vice Chairperson and Members of the Commission***

190. The first problem concerns the tenure of Members, Chairperson and Vice Chairperson:

- The Members of the Commission are appointed for a fixed five year term<sup>108</sup> and they are eligible for reappointment for only one subsequent term.<sup>109</sup> While it is not clear to the OECD whether the government regards this as an implicit legislative requirement or simply a matter of administrative practice, the same five year term applies to all the Members of the Commission. There is a ‘spill’ of all the Member positions at the same time rather than having individual Commissioners appointed in different, over-lapping five year terms.
- The Chairperson and Vice Chairperson are elected by all the Members of the Commission each year for a period of only one year. To the OECD’s knowledge, this approach to the selection of the Chairperson and Vice Chairperson is unique.

191. These arrangements are apparently in place for three reasons: to reinforce independence by ensuring that the Commissioners have security of tenure for a reasonable period; ensuring that no one Member obtains a long term dominant or powerful role; and to guard against corruption.

192. Although it is common for competition authorities to have Commissioners, each with a fixed term, it is not normal for the term of all Commissioners to expire at the same time and for the Members to elect a Chairperson and Vice Chairperson for only one year. The abrupt change of the whole leadership of the Commission at the same time and the very short tenure of the most senior leadership of the Commission creates instability both within the Commission and for the broader business community. It is particularly difficult under this structure for long term strategic issues to be addressed (for example advocating for changes to the law as discussed below in relation to the leniency policy or regulations as discussed below in relation to merger notification).

193. Options to address these problems while still maintaining the concept of fixed term tenure and rejuvenation of the membership include:

- staggering appointments so that one or two Members are appointed each year for a period of five years; and
- either appointing a Chairperson and Vice Chairperson for a five year term or continuing the election process but for a longer term than just one year.

#### **4.2 *Employing KPPU Staff***

194. Although the staff are clearly employed by the State, most are not ‘public servants’ in the strict Indonesian sense. The process, number and terms of employment of public servants in Indonesia is tightly controlled by a central government agency and it appears that in some respects the KPPU has benefited from a degree of flexibility through employing many of its staff outside this regulatory framework.

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108. The five year term can only be brought to a conclusion prematurely through voluntary resignation, death, mental or physical illness, the member commencing to reside outside Indonesia or through dismissal.

109. See Article 31.

195. However, this non-public servant status puts the relevant staff in an uncertain position with respect to their present terms and conditions of employment and for their future remuneration prospects. This, in turn, poses a challenge for the KPPU in competing with both the private sector and the public service in recruiting and retaining highly qualified staff.

196. One common option employed in other countries to address this problem include making the staff of the competition authority ‘public servants’ but specifying by law (usually in a subordinate instrument) that the staff report only to the Commissioners of the agency, not to the executive government. This could be more difficult in the Indonesian framework in which there is extensive involvement and decision making by the Ministry responsible for the public service into the numbers and nature of public service posts and many other significant questions that would have the potential to undermine the KPPU’s independence or flexibility. An alternative would be to specify under the legislation that applies to the KPPU that key aspects of the terms and conditions of employment and the powers of the staff are to the same as those applicable from time to time to public servants. In order to ensure that the KPPU has access to quality staff who see their long term career prospects as being within the broader public service, Indonesia could consider enabling retirement benefits to be transferable by staff between the public service and their KPPU employment.

197. The ambiguous status of KPPU staff, being employed by the State but not being public servants, has also been linked to other important issues connected with the ability of staff to exercise coercive powers such as the lack of an effective capacity to conduct dawn raids or compel businesses to provide information and witnesses to attend for questioning (discussed below).<sup>110</sup> It is expected that further amendment of the law or to subordinate legislation could facilitate proposals of strengthening the status of the staff as a whole and the Secretary General (i.e. the chief of staff) in particular.

### **4.3 KPPU Resourcing**

198. The costs of staffing the competition agencies are met by Government, which has other demands on scarce public funds. Although the cost to the budget of a competition agency is off-set by the fines it collects through its competition law enforcement function, the better policy reason for investing government money in a competition agency is that a sound competition law and policy contributes to increasing national income. If the optimal investments are made, as national income increases, the expenditure by the government on the competition agency should be recovered in increased tax revenue. Of course there is a limit beyond which any additional expenditure will not create sufficient additional national income for it to be worthwhile.

199. As discussed above Indonesia has an acknowledged problem of corruption and much of the enforcement burden for this work falls upon the KPPU. Fighting cartel cases that involve corruption has generated an enormous work-load for the KPPU in responding to allegations of bid rigging, predominantly in government tenders. Although this work is important, it appears that the level of resources required to carry this work out does not leave the KPPU with enough resources to undertake other important activities that have the potential to generate substantial additional national wealth such as:

- a systematic programme of preventative work in relation to bid rigging which, as the statistics on bid rigging cases demonstrate, should be a priority for Indonesia;<sup>111</sup>

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110. Annual Report on Competition Policy Developments In Indonesia by the KPPU to the OECD’s Competition Committee (2010).

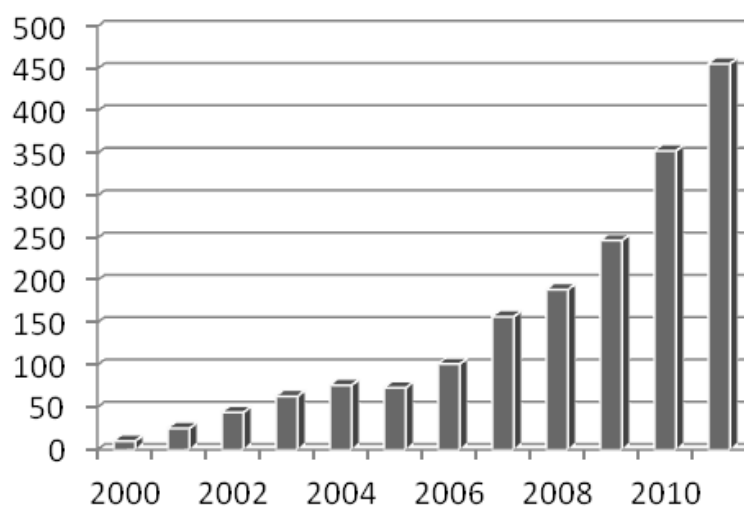
111. Such as the systematic work with procurement officials discussed in OECD (2007) “Public Procurement” and detailed in the OECD’s Bid Rigging Guidelines or a different mode of proactive interaction with

- significant advocacy efforts in relation to new laws which also should be a priority because the other parts of government who propose regulations do not appear to have a solid awareness of the importance of competition policy and therefore new laws frequently contain impediments to competition;
- market studies to address the substantial back-log of anticompetitive regulations (discussed in more detail above); and
- fighting abuse of dominance cases and controlling mergers.

200. Furthermore, implementing the suggestions in this report to increase the scope of work undertaken (for example in relation to competition assessments on new and existing legislation) and the depth of work (for example using dawn raid powers in competition law investigations) would require more staff resources.

201. Indonesia has, indeed, made a substantial investment of resources in the area of competition law and policy with 426 Members and staff of the KPPU and this has been continually growing as depicted in the following graph<sup>112</sup>:

**KPPU Staff Numbers**



202. Despite this rapid growth, however, the KPPU remains constrained by insufficient resources, particularly insufficient qualified staff. The requirement to investigate all complaints imposes a heavy requirement on the organisation's resources. Together with the prioritisation of enforcement, especially fighting bid-rigging in public procurement (a focus that the OECD strongly endorses) this leaves little available for advocacy or other non-enforcement work. Given the size and population of Indonesia, 450 is not a large number of people to work in the competition agency.

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procurement officials that recognises that procurement officials in developing countries may more often aligned with dishonest bidders than is usually the case in developed countries.

112. Annual Report on Competition Policy Developments In Indonesia by the KPPU to the OECD's Competition Committee (2010).

203. Yet, as noted throughout this chapter, the historical development of Indonesia's economy has resulted in legislation and regulations that themselves directly restrict competition to the detriment of the economy. The KPPU therefore needs increased resources in order properly to review regulations and effectively advocate change. Some of the other recommendations in this chapter – such as increased use of dawn raids – also require increased resources, in order for them effectively to enhance the competition regime in Indonesia.

204. We therefore recommend that Indonesia further increase the staff and financial resources available to the KPPU, in the light of the recommendations in this chapter, and particularly to ensure that the advocacy function can be effectively delivered, with no loss of focus on enforcement of the law.

## **5. Summary of recommendations**

### **5.1 Recommendations: competition advocacy**

- Establish a formal system under which the Co-ordinating Ministry of Economic Affairs notifies KPPU of all new legislative proposals around the time the academic draft is commenced, to enable KPPU to influence the early shaping of proposed legislation.
  - Optionally, for procedural simplicity, this system could exclude legislation related only to social policy, or to national security.
  - As an immediate priority ensure that KPPU is consulted on all legislative proposals relating to major infrastructure investments, perhaps through a Presidential decree or instruction.
  - KPPU should remain involved with the sponsoring agency or Ministry throughout the development of the legislative proposal.
  - Make KPPU's comments on the Bill available to Ministers as part of the cabinet process and to Members of Parliament at the time the Bill is debated.
- Ensure KPPU is more systematically involved in reviewing lower-level rules, through commenting on those parts of new Acts that authorise the making of lower-level rules. Where such a potential effect is identified, this could trigger a requirement for KPPU to be consulted prior to the power to make the lower level rule being exercised.
- Either KPPU should be involved in the most important regional and local business law proposals, or agencies at the sub-national level should be appropriately educated, resourced and given responsibility for this task.
- KPPU and the Government of Indonesia should give priority to reviewing and reforming existing legislation to remove unnecessary regulatory impediments to competition.
- Reform the business licensing system:
  - Set out principles to identify when licensing is appropriate and when other forms of regulation are sufficient.
  - Otherwise, regulatory requirements should apply as rules applying to anyone participating in an industry, not as licensing requirements.
  - Existing licensing schemes should be evaluated to determine whether their removal or a shift to regulations instead of licenses might lower barriers to entry.

- Where licenses are to remain, the conditions under which they are awarded and any conditions imposed on the operations of licence holders should be scrutinised to ensure they do not unnecessarily restrict competition.
- Train staff in Government in competition awareness, perhaps using academic and research organisations with whom KPPU has MOUs.

## **5.2 *Recommendations: the transport sector***

- There should be no statutory monopolies created for hub-ports.
- Laws that prevent foreign ships from undertaking shipping between two domestic Indonesian ports for domestic cargo are likely to lessen competition, so KPPU should be consulted on any further key decisions.
- In its law enforcement role, the KPPU should give particular attention to the domestic shipping sector to ensure that cartels do not emerge on domestic routes, particularly on any routes where foreign competitors have been required to exit.
- Any tenders, licenses, land releases or other opportunities to develop new port facilities should be allocated with a view to fostering new competition where possible.
- The KPPU should exercise its jurisdiction under the competition law to consider whether any agreements in the ports activity might breach the competition law. This includes agreements between the incumbent operators and any new operators, or between the government and an incumbent operator by which that operator is chosen to undertake a new opportunity.
- KPPU should monitor and be consulted on key aspects of the implementation of reforms to the rail sector to ensure that effective competition can emerge as soon as possible.

## **5.3 *Recommendations: competition law***

- Regarding anti-competitive Agreements, Indonesia should consider: introducing a general prohibition that covers all agreements which have an anticompetitive object or effect. At a minimum Indonesia should consider repealing the words “potentially resulting in monopolistic practices and or unfair business competition” from its market allocation and cartel provisions.
- The second paragraph of Article 25 which deems firms to be dominant if 50% or 75% market share thresholds are exceeded, should either be removed or amended so that the law provides that market shares are only presumptions, not determinative of dominance.
- Articles 17 and 18 should be repealed because they would only be independently applicable (i.e. applicable when Article 25 was not breached) in a way that would likely hamper competition.
- Indonesia should consider whether a single, clear, principled abuse of dominance provision would be preferable to Articles 4, 7, 19 and 20 outlawing specific practices.
- The performance of Indonesia’s unique merger notification system should be reviewed once the system has been in use for some years.
- Regarding the additional prohibitions discussed in Section 3.4, above:

- In the short term the KPPU should continue to adopt a selective, “principles based” approach to enforcement and, where possible, publish more explanatory papers and guidelines to explain its approach;
- In the medium term, however, it would be preferable to amend the law to:
  - organise the prohibitions on anti-competitive behaviours in a clear and logical thematic structure;
  - eliminate duplication, overlap and inconsistency;
  - standardize language within and between the provisions;
  - better match the language of each prohibition to the harm it seeks to address; and
  - where appropriate, repeal existing prohibitions or establish significant exceptions to them, in order permit pro-competitive conduct in relevant circumstances.
- Resolve uncertainty about KPPU staff’s powers to conduct dawn raids by reforming the law to:
  - Provide explicitly each of for dawn raid powers, powers to demand documents and information and the ability to require a witness to answer questions;
  - Determine what powers and roles are assigned to each of the police and the KPPU staff;
  - Clarify or ensure that KPPU employees have the ability to undertake a dawn raid, even if they are not civil servants;
  - Provide sufficiently detailed provisions to ensure that it is clear which decision making steps and documentation are required for the exercise of the powers; and
  - Explicitly vest at least one court with jurisdiction to adjudicate questions about the exercise of the powers by the law enforcement agencies, as well as about non-compliance by target firms, and provide that court with sufficient remedy powers.
- Legislate to introduce a system of immunity or leniency for cartel offences.
- Maintain the existing deadlines only for merger matters but for other matters consider:
  - extending the deadlines for preliminary and final KPPU examination, particularly in complex abuse of dominance cases, to be up to 12 to 18 months; or
  - adopting measures that provide the KPPU with some timing flexibility, such as an ability to ‘stop the clock’.
- Consider amending the court time frames to enable sufficient time to consider the substance of each case.
- The KPPU should prioritise enforcement of its penalty orders, as the level of recovery of fines is very low.
- Reconsider the approach to applying criminal sanctions to competition law contraventions:
  - Provide a clear signal to the business community as to when executives risk criminal sanctions to ensure that potentially pro-competitive behaviour is not discouraged. This could be achieved through narrowing the scope of criminal liability in the law itself or through a clearly articulated enforcement policy.

- In high priority areas such as cartels, the law should provide a clear basis for applying criminal sanctions to the individual employees involved in the contraventions.
- Enhance redress for parties who have suffered losses by delineating a separate private enforcement channel from the public enforcement channel. In the short run, the KPPU could improve predictability by issuing guidelines on how it exercises its discretion to award compensation.

#### **5.4 *Recommendations: institutional arrangements***

- Avoid problems associated with all members and chairperson leaving office at the same time by:
  - staggering appointments so that one or two Members are appointed each year for a period of five years; and
  - either appointing a Chairperson and Vice Chairperson for a five year term or continuing the election process but for a longer term than just one year.
- Clarify the status of KPPU employees.
- Ensure KPPU has adequate resourcing, especially staff, to allow it to implement the recommendations in this chapter, and particularly to engage in effective advocacy work to Government, without diverting resources from enforcement work.



## APPENDIX 1: EXAMPLES OF PRO-COMPETITIVE LEGISLATIVE REVIEW PROGRAMMES IN OECD COUNTRIES

### Australia's National Competition Policy Legislative Review Programme

1. An important example of such a policy is provided by the legislative review programme implemented in Australia under the National Competition Policy (NCP) agreements, concluded between the Federal and State/Territory governments in 1994. This programme initially involved an initial assessment of all current legislation to determine which Acts imposed restrictions on competition. Over 1 800 Acts were found to contain such restrictions and require systematic review. The large number of reviews required meant a staged process had to be adopted, with priority areas for review being identified. The completion of the programme ultimately took around ten years, substantially longer than the initial target of around four years.

2. Reviews were largely the responsibility of the government (whether Federal or State/Territory) responsible for the relevant legislation, although some national reviews were carried out in circumstances in which most or all States had substantially similar legislation in place. In practice, ministries responsible for the legislation in question generally commissioned external consultants to conduct major reviews, or established review teams comprising internal and external members in other cases.

3. A crucial element of the process was that an independent body – the National Competition Council<sup>1</sup> – was responsible for assessing the reviews undertaken, including the implementation of recommended reforms. In recognition of the fact that the expected efficiency gains would increase the national government's taxation revenues, a series of "competition payments" were to be made to State governments. However, these payments were contingent on reforms being implemented. Hence, the NCC assessment process constituted a strong mechanism for encouraging reform by sub-national governments.

4. The programme leads to the repeal of much anti-competitive legislation and, in many cases where restrictions on competition were retained, the reform of the relevant legislation to limit its anti-competitive impact. Major areas of reform included:

- Removal of many restrictions on the conduct of a wide range of professions, particularly in relation to health practitioners and lawyers;
- Repeal of many restrictions on the marketing of agricultural produce, both domestically and for export;
- Reform of many areas of communications legislation, notably including improved means of allocating scarce spectrum resources; and
- Removal of restrictions on shop trading hours in many States.<sup>2</sup>

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1. The NCC was established under the joint responsibility of the Federal, State and Territory governments.

2. For a detailed discussion of the outcomes of the legislative review programme, see: National Competition Council (2005), *Assessment of Governments' Progress in Completing the National Competition Policy and Related Reforms: 2005*, Chapters 9-19. Available at: <http://ncp.ncc.gov.au/docs/2005%20assessment.pdf>

5. Key success factors included:

- The use of a clear public benefit test in carrying out reviews;
- The adoption of an open and transparent process, with stakeholder involvement occurring in the great majority of cases and a high proportion of review reports being published; and
- A strong programme aimed at educating the public about the benefits of pro-competitive reform, including the use of economic modelling to indicate the benefits for national income.<sup>3</sup>

6. The specific public benefit test adopted (known as the "Guiding Legislative Principle") was that legislative restrictions on competition should only be maintained where:

- The benefits to society as a whole of maintaining the restriction outweighed the costs imposed; and
- There was no alternative way of achieving the identified benefits that was less restrictive of competition.

7. Moreover, where restrictions on competition were retained, after being assessed in terms of these tests, the agreements required these laws to be subject to further reviews, using the same tests, at intervals of not more than ten years.

8. The benefits achieved through this policy were highly substantial: as noted above, they have been estimated at up to 5.5% of GDP. However, very substantial resources were devoted to the task over many years. While such a resource commitment may not be considered immediately feasible in the current Indonesian environment, it is notable that some criticism of the NCP legislative review programme argued that the approach taken was too comprehensive, with the result that significant review resources were devoted to assessing minor, or even trivial, restrictions on competition. This implies that the adoption of more effective targeting could allow substantial review and reform activity to be undertaken with far fewer resources committed to the task. In this context, the wider use of the OECD's Competition Assessment Toolkit would constitute a promising mechanism for conducting an initial assessment of legislation to identify only those Acts which impose significant restrictions for further review.<sup>4</sup>

### **Korea's legislative review programme**

9. The experience of Korea is potentially of particular relevance to Indonesia since, prior to the Asian economic crisis of 1997, it had also accumulated a legislative structure that was largely inimical to the development of an open, market economy in which competitive forces were given full play. As a key part of its response to this crisis, the Korean government determined that, given the pressures of a global market economy, it must move to a more market oriented system. Regulatory reform was adopted as a key element in this move and, guided by a Cabinet level Regulatory Reform Committee, a review of 11,000 regulations led to the abolition of half that number.

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3. Deighton-Smith, R (2001), "National Competition Policy: Key Lessons for Policy-Making from its Implementation", *Australian Journal of Public Administration*, Vol. 60, No. 3, September, 2001.

4. One criticism of the Australian approach is that, in some areas, the range of legislation identified for review was too broad, in that the restrictions on competition contained in many Acts were relatively trivial in nature.

10. A key principle enunciated was that of eliminating all anti-competitive economic regulations. However, in moving to implement this very general commitment, the government identified four priority areas:

*...reform of foreign exchange and transaction regulations to encourage foreign investment, reform of industrial and land use regulations to liberalised business activities, reform of monetary and business regulations to improve industrial competition, and reform of procedures and regulations related to everyday life for the citizen.*<sup>5</sup>

11. Moreover innovations were also adopted in the implementation context. For example, omnibus bills were introduced to Parliament, following negotiation with regulating ministries, which repealed 20 legalised cartels by specific anti-competitive provisions in 18 legislations, all via a single piece of the Omnibus Cartel Repeal Act, 1999. The followings are examples of repealed cartels once protected by laws:

- fixing fee levels of specialised consulting services by lawyers, accountants, tax accountants, patent agents etc (in total 9 areas);
- Restricting rice wine producers' supplying areas;
- The alcohol association's power to set its members' selling prices;
- Formula to set tariffs for non-life insurance and
- Designating specific producers/collectors/processors/exporters for specific items of agricultural products, etc.

### **United Kingdom - Market Studies approach**

12. The above examples, particularly those drawn from Australia and Korea, constitute highly ambitious programmes for reforming existing legislation. While the Indonesian context of an accumulation of laws that have substantial anti-competitive elements suggests that such broad-scale programmes could yield major benefits, careful consideration would need to be given as to whether a sufficient level of resources and expertise could be committed to such a programme. Given this, an alternatives approach that has been adopted in the United Kingdom could also be given consideration. This approach, based on launching specific market studies where certain criteria are met, can be adopted on a more limited scale and may prove to be more realistic in the current Indonesian environment.

13. The UK Office of Fair Trading<sup>6</sup> *actively investigates markets that do not appear to be meeting the needs of consumers and publishes the results. It uses a range of sources to identify markets for study, including complaints from businesses, trade associations or consumer bodies and suggestions made by other Government departments, local authority Trading Standards Services (TSS) and regulatory bodies. It may also commence studies on its own motion, typically where information acquired in the course of its enforcement and advocacy work or other OFT research indicates that significant issues may exist.*

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5. OECD (2000) *Regulatory Reform in Korea*, p. 137.

6. Office of Fair Trading (2010). *Market Studies: Guidance on the OFT Approach*. United Kingdom Government. See: [www.offt.gov.uk/OFTwork/markets-work/market-studies-further-info/](http://www.offt.gov.uk/OFTwork/markets-work/market-studies-further-info/) for information on this aspect of OFT's work.

14. The purpose of market studies is to analyse why markets are not functioning well and, as a result, propose the most appropriate means of addressing the identified problems. OFT notes that:

*As well as investigating adverse effects on competition caused by business and consumer behaviour, market studies can also examine restrictions on competition that can arise through Government regulation or public policy. Whether intentionally or not, public sector restrictions may create barriers to entry into markets, distort the conditions under which market players compete, prevent competitive markets from developing, and even take markets or sectors outside the scope of competition scrutiny altogether.<sup>7</sup>*

15. The UK government has made a commitment to consider the advice presented in OFT market study reports and respond within 90 days. This commitment, combined with the fact that the market study reports are typically published on the OFT website, provides a strong incentive for government to act on these recommendations, including in circumstances where the result of the study is a recommendation for regulatory reform.

16. Given that KPPU already conducts market studies as part of its current activities, the use of this mechanism as a driver of a larger programme of review and reform of existing legislation could be given further consideration.

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7. OFT (2010), *op. cit.*, pp. 2-3.

## **APPENDIX 2: SUBSTANTIVE PROVISIONS OF THE INDONESIAN COMPETITION LAW**

### **CHAPTER III PROHIBITED AGREEMENTS**

#### **Part One Oligopoly**

##### **Article 4**

(1) Entrepreneurs are prohibited from making any agreements with other entrepreneurs with the intention to jointly control the production and/or the marketing of goods and services that can cause monopolistic practices and/or unfair business competition.

(2) Any entrepreneur can be suspected or considered as jointly controlling production and/or marketing of goods and/or services, as referred to under Paragraph (1) of this article, if two or three entrepreneurs or groups of entrepreneurs own more than 75% (seventy five percent) of the market share of one type of certain goods or services.

#### **Part Two Price Fixing**

##### **Article 5**

(1) Entrepreneurs are prohibited from making any contract with other competing entrepreneurs in order to fix prices on certain goods and/or services to be borne by the consumers or clients in the same relevant market.

(2) Provisions as referred to under Paragraph (1) of this article shall not be applicable to:

- a. a contract made in a joint partnership; or
- b. a contract made based on the existing law.

##### **Article 6**

Entrepreneurs are prohibited from making agreements which cause buyers to pay a different price from the price that must be paid by other buyers for the same type of goods and/or services.

## **Article 7**

Entrepreneurs are prohibited from making any agreements with other competing entrepreneurs in order to fix the price below the market price, that can cause unfair business competition.

## **Article 8**

Entrepreneurs are prohibited from making any agreements with other entrepreneurs which sets the condition that the receivers of the goods and/or services are not to resell or resupply the goods and/or services they receive, under a price lower than the price agreed upon, thus causing unfair business competition.

### **Part Three Market Allocation**

## **Article 9**

Entrepreneurs are prohibited from making any agreements with other competing entrepreneurs with the intention to divide the marketing areas or market allocation of the goods and/or services that can cause monopolistic practices and/or unfair business competitions.

### **Part Four Boycott**

## **Article 10**

(1) Entrepreneurs are prohibited from making any agreements with other competing entrepreneurs that could hamper other entrepreneurs in engaging in the same type of business, either for domestic or export purposes.

(2) Entrepreneurs are prohibited from making any agreements with other business competitors in order to refuse to sell goods and/or services from the other entrepreneurs which:

- a. causes losses or could be suspected to cause damage to other entrepreneurs; or
- b. restricts other entrepreneurs to sell or buy goods and/or services from the relevant market.

### **Part Five Cartel**

## **Article 11**

Entrepreneurs are prohibited from making any agreements with other competing entrepreneurs with the intention to influence the price by determining production and/or marketing of goods and/or services, that can cause monopolistic practices and/or unfair business competition.

## **Part Six Trust**

### **Article 12**

Entrepreneurs are prohibited from making any agreements with other entrepreneurs in a form of joint cooperation by combining the companies into a bigger holding company or larger limited liability, by keeping and maintaining the continuation of each subsidiary or member company, with the intention to control production and/or marketing of goods and/or services, thus causing monopolistic practices and/or unfair business competition.

## **Part Seven Oligopsonies**

### **Article 13**

(1) Entrepreneurs are prohibited from making any agreements with other entrepreneurs with the intention to jointly control the buying or receiving of supplies in order to control prices of the goods and/or services in the relevant market, that can cause monopolistic practices and/or unfair business competition.

(2) Entrepreneurs can be suspected or considered as jointly controlling the buying or receiving of supplies as referred to under Paragraph (1) of this article if two or three entrepreneurs or group of entrepreneurs control more than 75% (seventy five percent) of the market share of one type of certain foods or services.

## **Part Eight Vertical Integration**

### **Article 14**

Entrepreneurs are prohibited from making any agreements with other entrepreneurs with the intention to control production of several products belonging to a chain of certain goods and/or services production in which each chain of production is a result of the continued process, either in one direct or indirect chain, which can cause unfair business competition and/or damages to the public.

## **Part Nine Exclusive Dealing**

### **Article 15**

(1) Entrepreneurs are prohibited from making any agreements with other entrepreneurs which imposes terms by which the parties receiving the goods and/or services shall or shall not resupply the said goods and/or services to certain parties and/or at certain places.

(2) Entrepreneurs are prohibited from making any agreements with other parties which imposes terms by which the parties receiving certain goods and/or services must be willing to purchase goods and/or other services from the supplier company.

(3) Entrepreneurs are prohibited from making any agreements regarding prices or certain discount prices of the goods and/or services, which impose terms by which the entrepreneurs receiving the goods and/or services from the supplier company:

- a. must be willing to purchase the goods and/or other services from the supplier company;
- b. shall not purchase the same or similar type of goods and/or services from other entrepreneurs which are the competitors of the supplier company.

**Part Ten  
Contracts with Foreign Parties**

**Article 16**

Entrepreneurs are prohibited from making any agreements with other parties overseas which imposes provisions that can cause monopolistic practices and/or unfair business competition.

**CHAPTER IV  
PROHIBITED ACTIVITIES**

**Part One  
Monopoly**

**Article 17**

(1) Entrepreneurs are prohibited from controlling any production and/or marketing of goods and/or services that can cause monopolistic practices and/or unfair business competition.

(2) Entrepreneurs can be suspected or considered as controlling production and/or marketing of goods and/or services as referred to under Paragraph (1) of this article if:

- a. the said goods and/or services do not have substitutions at that time; or
- b. it causes other entrepreneurs to not be able to enter business competition for the same type of goods and/or services; or
- c. one entrepreneur or one group of entrepreneurs controls more than 50% (fifty percent) of the marketing share of one type of certain goods or services.

**Part Two  
Monopsony**

**Article 18**

(1) Entrepreneurs are prohibited from controlling the supplies receiving or being the sole buyers of goods and/or services in the relevant market which can cause monopolistic practices and/or unfair business competition.



(2) Entrepreneurs can be suspected or considered as controlling the supplies receiving or being the sole buyer as referred to under Paragraph (1) of this article if one entrepreneur or a group of entrepreneurs controls more than 50% (fifty percent) of the market share of the same type of certain goods or services.

### **Part Three Market Controlling**

#### **Article 19**

Entrepreneurs are prohibited from conducting one or more activities, either separately or jointly with other entrepreneurs, which can cause monopolistic practices and/or unfair business competition by:

- a. refusing and/or hampering certain entrepreneurs from conducting the same type of business in the relevant market; or
- b. hampering the consumers or clients of their company's competitors from conducting any business contact with those company's competitors; or
- c. restricting distribution and/or selling of the goods and/or services in the relevant market; or
- d. conducting discrimination practices against certain entrepreneurs.

#### **Article 20**

Entrepreneurs are prohibited from supplying goods and/or services by selling without making any profits or by setting a very low price with the intention to eliminate or end their competitors' business in the relevant market, thus causing monopolistic practices and/or unfair business competition.

#### **Article 21**

Entrepreneurs are prohibited from cheating in setting the production cost and other expenses which is part of the goods' and/or services' component, that can cause unfair business competition.

### **Part Four Conspiracy**

#### **Article 22**

Entrepreneurs are prohibited from conspiring with other parties to arrange and/or determine the winner of the tender thus causing unfair business competition.

#### **Article 23**

Entrepreneurs are prohibited from conspiring with other parties to obtain information of their competitor's business activities classified as company's secret thus causing unfair business competition.

#### **Article 24**

Entrepreneurs are prohibited from conspiring with other parties to hamper production and/or marketing of the goods and/or services of their competitors with the intention to reduce the quantity, quality, and the required delivery punctuality of the goods and/or services offered or supplied in the relevant market.

## **CHAPTER V ABUSE OF DOMINANT POSITION**

### **Part One General**

#### **Article 25**

(1) Entrepreneurs are prohibited from taking advantage of their dominant position, either directly or indirectly, in order to:

- a. impose trade terms with the intention to prevent and/or hamper the consumers to acquire competitive goods and/or services, both in prices or quality; or
- b. restrict the market and technology development; or
- c. hamper other entrepreneurs having the potential to become their competitors to enter the relevant market.

(2) Entrepreneurs are in the dominant position as referred to under Paragraph (1) of this article if:

- a. one entrepreneur or a group of entrepreneurs controls 50% (fifty percent) or more of the market share on one type of goods or service; or
- b. two or three entrepreneurs or groups of entrepreneurs control 75% (seventy five percent) or more of the market share on one type of certain goods or services.

### **Part Two Interlocking Directorate**

#### **Article 26**

A person who serves as the director or commissioner of a company is prohibited from concurrently being the director or commissioner at other enterprises, if the said enterprises:

- a. are in the same relevant market; or
- b. are closely related to the field and/or type of business; or
- c. can jointly control the market share of certain goods and/or services, which could cause monopolistic practices and/or unfair business competition.

### **Part Three Share Ownership**

#### **Article 27**

Entrepreneurs are prohibited from holding majority shares at several firms engaged in the same business sector in the same relevant market, or establish several firms engaged in the same business activities in the same relevant market, if the said ownership causes:

- a. one entrepreneur or a group of entrepreneurs to control 50% (fifty percent) or more of the market share on one type of goods or service; or
- b. two or three entrepreneurs or groups of entrepreneurs to control 75% (seventy five percent) or more of the market share on one type of certain goods or services

#### **Part Four**

#### **Merger, Dissolution and Acquisition**

##### **Article 28**

(1) Entrepreneurs are prohibited from conducting merger or dissolving companies that might cause monopolistic practices and/or unfair business competition.

(2) Entrepreneurs are prohibited from acquiring shares of other entrepreneurs if the said action can cause monopolistic practices and/or unfair business competition.

(3) More detailed provisions concerning prohibited merger of companies as referred to under Paragraph (1) of this article, and provisions concerning acquisition of company shares as referred to under Paragraph (2) of this article, are stipulated in the government regulation.

##### **Article 29**

(1) Merger of the companies or acquisition of shares as referred to under Article 28, causing its assets value and/or sales value to exceed a certain amount, must be reported to the Commission at the latest within a period of 30 (thirty) days after the merger or acquisition takes places.

(2) Provisions regarding determination of the assets value and/or sales value and procedure of reporting as referred to under Paragraph (a) of this article are stipulated in the government regulation.