

**REGULATION OF
COMMISSION FOR THE SUPERVISION OF BUSINESS COMPETITION
OF REPUBLIC OF INDONESIA
NUMBER 2 OF 2009**

CONCERNING

**EXEMPTION GUIDELINE OF APPLYING LAW NUMBER 5 OF 1999 CONCERNING
BAN OF MONOPOLISTIC AND UNFAIR BUSINESS COMPETITION PRACTICES
AGAINST AGREEMENT IN ASSOCIATION WITH INTELLECTUAL PROPERTY RIGHTS**

Considering : whereas to implement provision in Article 50 point b Law Number 5 of 1999 concerning Ban of Monopolistic and Unfair Competition Practices, particularly in association with Intellectual Property Rights, it is deemed necessary to enact Regulation of the Commission for the Supervision of Business Competition concerning Exemption Guideline of Applying Law Number 5 of 1999 Against Agreement In Association With Intellectual Property Rights;

In viewing of :

1. Law Number 5 of 1999 concerning Ban of Monopolistic and Unfair Competition Practices (State Gazette of Republic of Indonesia Number 33 of 1999; Supplement to State Gazette of Republic of Indonesia Number 3817);
2. Law Number 30 of 2000 concerning Trade Secrets (State Gazette of Republic of Indonesia Number 242 of 2000);
3. Law Number 31 of 2000 concerning Industrial Design (State Gazette of Republic of Indonesia Number 243 of 2000);
4. Law Number 32 of 2000 concerning Integrated Circuit Layout Design (State Gazette of Republic of Indonesia Number 244 of 2000);
5. Law Number 15 of 2001 concerning Trademark (State Gazette of Republic of Indonesia Number 110 of 2001);
6. Law Number 14 of 2001 concerning Patent (State Gazette of Republic of Indonesia Number 108 of 2001);
7. Law Number 19 of 2002 concerning Copyright (State Gazette of

- Republic of Indonesia Number 4220 of 2002);
8. Law Number 19 of 2002 concerning Copyrights (State Gazette of Republic of Indonesia Number 4220 of 2002);
 9. Presidential Decree of Republic of Indonesia Number 75 of 1999;
 10. Presidential Decree of Republic of Indonesia Number 59/P of 2006.

Regarding : Commission Meeting Result on February 25, 2009;
HAS DECREED:

Enacting : REGULATION OF THE COMMISSION FOR THE SUPERVISION OF BUSINESS COMPETITION CONCERNING EXEMPTION GUIDELINE OF APPLYING LAW NUMBER 5 OF 1999 CONCERNING BAN OF MONOPOLISTIC AND UNFAIR BUSINESS COMPETITION PRACTICES AGAINST AGREEMENT IN ASSOCIATION WITH INTELLECTUAL PROPERTY RIGHTS

Article 1

In this Commission Regulation the meaning of:

1. Exemption Guideline of Applying Law Number 5 of 1999 Against Agreement in Association With Intellectual Property Rights associated with Intellectual Property Rights that hereinafter referred to as Guideline is operational guideline document of Article 50 point b, particularly in association with Exemption against Intellectual Property Rights.
2. Commission is the Commission for the Supervision of Business Competition (hereinafter referred to as "KPPU") as meant in Law Number 5 of 1999;

Article 2

- (1) Guideline is elaboration of basic principle, definition of exemption, and examples of implementing provision in Article 50 point b.
- (2) Guideline is addressed to:
 - a. Business actor and interested parties in understanding

provision of Article 50 point b concerning Exemption Guideline of Applying Law Number 5 of 1999 Against Agreement in Association With Intellectual Property Rights

- b. Commission in performing its task and authority as meant in Article 35 and Article 36 Law Number 5 of 1999 vide Article 4 and Article 5 of Presidential Decree Number 75 of 1999 concerning Commission for the Supervision of Business Competition.

Article 3

- (1) Guideline is as included in this Regulation Annex.
- (2) Guideline as meant in paragraph (1) is minimum standard for the Commission in performing its task, which an inherent part of this Regulation, and binding all parties.

Article 4

- (1) Decision and policy relating to Article 50 point b, particularly concerning Intellectual Property Rights, as decided and enacted by the Commission prior to issuance of this Regulation, shall remain valid
- (2) This Regulation shall come into force on the date of its enactment.

Enacted in: Jakarta

On date :13 May 2009

COMMISSION FOR THE SUPERVISION OF
BUSINESS COMPETITION
CHAIRMAN,

BENNY PASARIBU, PhD

Annex: Regulation of the Commission for the Supervision of Business Competition

Number: 2 of 2009

Date: 13 May 2009

**OPERATIONAL GUIDELINES OF LAW NUMBER 5 OF 1999 CONCERNING
EXEMPTED MATTERS
FROM PROVISION OF LAW NUMBER 5 OF 1999 CONCERNING
AGREEMENT THAT ASSOCIATES WITH
INTELLECTUAL PROPERTY RIGHTS (ARTICLE 50 POINT b)**



**DIRECTORATE OF COMPETITION POLICY
COMMISSION FOR THE SUPERVISION OF BUSINESS COMPETITION OF REPUBLIC
OF INDONESIA
2009**

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CHAPTER I

BACKGROUND

In the last decade, along with free trade and globalization of information and communication, no longer doubt that *issues* of legal systems existence on Intellectual Property Rights (hereinafter referred to as “IPR”) that close associates with technology advancement and industrial growth and acceleration of world trade are the most important problems where their existence have been globally recognized. Assurance to this matter becomes an important issue in the interest of attracting foreign investment into Indonesia. As known, IPR obtained as a form of respect for the *inventor* and/or *innovator* over invested money, time, and energy. This is very important to provide incentives for them to continue working. On the other hand, post-reform of Indonesia economic system is also expected providing as wide as opportunity to the communities in order to develop business and participate in the national economic development leading to people welfare increase. It is extremely expected that domestic business actor could obtain bigger economic pie than foreign; similarly to small and medium business actor can be given equal chance to compete fairly with bigger business actor. Structuring the market to open as wide as opportunity for people welfare, which in practice is the opening of market for new comers (*free entry*), is one of reasons why the legal system needs to prohibit monopolistic practices and healthy business competition so that old actors (*the incumbent*) don't paralyze competition in the market (hereinafter referred to as law of competition). This urges to the establishment of Law No. 5 of 1999 concerning Ban of Monopolistic and Unfair Business Competition Practices, which often called as Law of Indonesian business competition (Law Number 5/1999).

At a glance it may seem that the existence of IPR conception with Law of Competition looks to have diametrical position or seems to contradict each other (in opposition) each other. In fact, even though those both legal domains in brief intersect each other, but actually they are complementary or filling up each other for legal system harmony itself, i.e. to increase efficiency and improve economic system.

The harmony between IPR and law of competition are recognized in the Indonesian legal system, it can be seen from several provisions in the national legislation related to IPR, which prioritizes national economy and free competition as the limit of exclusive rights exploitation the IPR holder owns among others listed in Article 47 (1) of Law Number 19 of 2002 concerning Copyright (hereinafter referred to as Law of Copyrights) and Article 71 (1)

of Law Number 14 of 2002 concerning Patent (hereinafter referred to as Patent Law). On the other hand, in law of business competition, there is any provision that explains the importance of IPR as included in Article 50 point b. The Article stated that "agreements related to intellectual property rights such as licenses, patents, trademarks, copyrights, industrial product design, integrated electronic circuits, and trade secrets, and agreements relating to the franchise" are exempted from provisions of Law Number 5 of 1999.

Furthermore, given the importance of provisions in Article 50 point b as the gate of harmonization between IPR regimes and law of business competition, it is deemed necessary more detailed explanation of the provision. Therefore, based on provisions of Article 35 point f Law Number 5 of 1999, the KPPU needs to arrange Article Guideline concerning Provisions of Article 50 point b.

CHAPTER II GOAL OF GUIDELINE ARRANGEMENT

Article 50 point b sounds as follows:

Exemption from provision of Law Number 5 of 1999:

- b. “agreement that associates with intellectual property rights such as license, patent, trademark, copyrights, industrial product design, integrated electronic circuits, and trade secrets, and agreement that associates with franchises”**

Without understanding correctly essence and formulation of provision in Article 50 point b, it is worried that difficulty or mistake will appear in operation. Accordingly, in order to understand correctly essence and formulation of provision in Article 50 point b so that it can be applied exactly, rightly, and fairly, clarification against provision of Article 50 point b is necessary given.

Ultimately this Guideline arranged in the purpose so as:

1. Similarity of interpretation is found against each element in Article 50 point b, so that there is any legal certainty and occurrence of mistake of dispute in application is avoidable.
2. Article 50 point b can be always applied consistently, exactly, and fairly in each associated dispute.

CHAPTER III

PROVISION OF ARTICLE 50 POINT B IN BUSINESS COMPETITION

When examined at least three items need to internalize from the formulation of Article 50 point b. First, nomenclature of 'license' term followed by 'patent, trademark, copyrights, and so on' as if putting on license as one of rights types in IPR legal regime, but in fact, it is not so. License is one of agreement types within IPR legal regime that applicable in all types of rights in IPR legal regime. Second, use of trademark term that as if overlooks service brand. In fact, the intention is not so. Term of 'trademark' in the Article is used as a synonym of Indonesian language, *merek dagang*; but the meaning of term includes trademark and service brand. Third, the term of 'integrated electronic circuits' is not one of rights types found in IPR legal regime. The true type of rights is rights on integrated circuits layout design.

In connection with the three items, then **each party shall elucidate the provision of Article 50 point b as follows. First, that agreement relating to IPR intended in the Article is license agreement that exists under rights cover of patent, trademark, copyrights, industrial design, integrated circuits layout design, and rights of trade secrets. Second, that term of 'trademark' shall be elucidated as brand that involves trademark and service brand. Third, that term of 'integrated electronic circuits' shall be meant as integrated circuits layout design.**

Some people have opinion that IPR legal regime and law of business competition are in contradictory each other. It is in fact, not so. **Existence of IPR legal regime and Law of Business Competition shall be viewed as complementary legal provision or filling up each other for the harmony of Indonesian national legal system. Similarity those both legal regimes own among others are in goal namely for advancing national economic system at free trade era and globalization, pushing innovation and creativity, and enhancing people welfare.**

On one hand, IPR legal regime talks about intellectual rights protection as a form of *incentive and reward* in order to spur creativity and innovation in developing art, science, and technology and trade expected to improve quality of community civilization. The arrangement provides chance to the creator and/or its rights holder in certain period of time to obtain return of investment or even take profit from it. Thus, IPR legal regime may be said to stay in side of pro-business competition. On the other hand, IPR legal regime talks about protection against *fair* competitive climate for the opening of economic, innovation chance, and opportunity to engage business for all parties. In principle, this law will provide chance

to the certainty of engaging business for entire people by way of releasing market for efficiency and *fair* competition to give the consumer best alternative option in the market.

IPR legal regime is legal foundation that provides exclusive rights for the rights holder to exploit alone and prohibits other party to exploit IPR object owned. Term of 'exploiting' is intentionally used in this matter, because content of exclusive rights varies. In the range of copyrights, context of exploiting is exclusive rights to reproduce and publish. In the range of patent rights, the context is to execute that including activities such as to make, use, sell, import, lease, deliver, provide for sale, etc. In the range of trademark rights, the context is to use. In the range of industrial design rights, the context is to prohibit that including activities such as to make, utilize, sell, import, export, and distribute. In the range of rights for integrated circuits layout design, the context is to perform.

The exclusive rights is frequently signified by some people as a form of rights to perform monopoly. In law of business competition, monopoly should be meant as domination on production and/or marketing of goods and/or on the use of certain service by one business actor or a group of business actor. The meaning differs with monopolistic practices that must be meant as centralization of economic power by one or more business actors that result in domination of production and/or marketing on goods and/or certain service so that result in unfair business competition and public interest may be inflicted. Law of business competition clearly arranges that monopolistic activity is not anything banned and the prohibition is monopolistic practice and/or unfair business competition resulted in by business actor.

With regard to the matter, **it should be understood that in the present of any exclusive rights does not mean monopolistic practices automatically has occurred in the marketplace.** There are several facts that may describe the matter. First, exclusive right holder may just release use, modification, and reproduction of his/her work to public society, e.g. for copyrights holder on computer program that distributes his/her work in GNU license. Second, exclusive rights holder may just choose not produce his/her work and as well as not ban other people who produce the work without his/her consent. In the situation it is clear that monopolistic practices elements are not qualified.

In other situation, monopolistic practices as implementation of IPR exclusive rights may occur. First, centralization of economic power may occur when holder of rights becomes the only party who engages business for it or when holder of rights designates only certain enterprise as licensee. Second, domination over production and/or marketing may occur when the goods and/or service are only produced and/or sold by holder of rights and its recipient of license. Third, unfair business competition may occur when business activity of rights holder and/or licensee are performed by dishonest manner or unlawful or

inhibit business competition. Fourth, the loss over public interest may occur when business activity of rights holder and/or licensee are considered to victimize the need of many people. However, in order to effectively perform the monopolistic practices the holder of rights should be actively undertaking legal efforts against perpetrators of IPR violation that are considered to inflict his/her exclusive rights.

Relied on various descriptions mentioned above, any legal issue that will be further elaborated here is obtained, i.e. whether IPR license agreement, which its implementation results in monopolistic practices is exempted from provisions in Law of business competition

CHAPTER IV

EXPLANATION TO PROVISION OF ARTICLE 50 POINT B

A. Basic Principle

Based on Law Number 10 of 2004 concerning Formation of Law and Regulation, particularly in Annex part of Point C1 Number 74, then **principle, purpose, and goal that are found in any law and regulation should be meant as general matters that apply for next Articles. In other word, other Articles should be meant harmoniously and may not contrary to provision within the principle, purpose, and goal.**

In Law of business competition principle and goal are arranged in Article 2 and Article 3. Principle meant is that business actor in Indonesia in carrying out his/her business activities has economic democracy principle by considering the balance between business actor interest and public interest. While, goal meant is: (a) to keep public interest and increase national economic efficiency as one of efforts to improve people prosperity; (b) to actualize conducive business climate through arrangement of fair competition, so that certainty of equal business opportunity for bigger business actor, middle business actor, and small business actor is assured; (c) to prevent monopolistic practices and/or unfair business competition created by business actor; and (d) effectiveness and efficiency in business activity are resulted.

Thus exemption arranged in Article 50 point b shall be meant harmoniously and may not contrary to provision within principle and goal arranged in Article 2 and Article 3 from Law of Business Competition.

Similarly in executing application of exemption about IPR license. Everyone **should view that exemption of IPR license agreement from stipulation of business competition can be only performed as long as no IPR license agreement contraries to the principle and goal in Article 2 and Article 3. In order to prevent IPR abuse that causes monopolistic practices and unfair business competition occur, then chief indicator of exemption is domination of market on product and service undertaken by IPR license has no significant effect against the market.**

B. MEANING AND REQUIREMENT OF LICENSE AGREEMENT

License agreement is an agreement between two parties or more, in which one party namely rights holder acting as party who gives license, while other party acting as party who receives license. The meaning of license itself is permit to enjoy economic benefit from an object the IPR secures for certain period of time. As reward of providing the license, the

recipient of license is obliged to pay royalty in certain amount and for certain period of time. In view of economic rights contained in each exclusive rights is many types, then license agreement even may have many variations. There is license agreement that provides the licensee permit to enjoy entire existing exclusive rights, but there is also license agreement that only provides permit for some exclusive rights merely, e.g. license for production only, or license for sale only.

License agreement must be made in writing and must be under signature by both parties.

License agreement at least contains information about:

- (a) date, month, and year of location license agreement are made;
- (b) full name and address and signature of parties who make license agreement;
- (c) license agreement object;
- (d) duration of license agreement;
- (e) whether duration of license agreement may or may not be extended;
- (f) license execution for entire or some of exclusive rights;
- (g) amount of royalty and the payment;
- (h) whether licensee may or may not provide further license to third party;
- (i) area border the license agreement applies when engaged; and
- (j) whether licensor may or may not perform himself/herself work licensed.

According to stipulation in a packet of Law concerning IPR, then any license agreement is obliged to register at Directorate General of Intellectual Property Rights, which then published in Public List with paying a number of fee enacted by Ministerial Decree. However, when license agreement is unregistered, the license agreement has no legal effect against third party, which automatically excluding exemption category as meant in this guideline.

License agreement can be made specifically, e.g. non-exclusive in nature. When meant so, then it must be explicitly declared in license agreement. Otherwise, then license agreement is deemed not using non-exclusive condition. Accordingly, rights holder or licensor in principle still allowed to perform himself/herself what is licensed or provide equal license to other third party.

License agreement is banned to include direct or indirect provision that may bring about impact that inflicts Indonesian economy or contain limitation that inhibits ability of Indonesian nation in dominating and developing technology in general (**reference to Law of Patent**). Registration and demand of license agreement registration that contains stipulation or such matter must be rejected by Directorate General of Intellectual Property Rights.

Based on description mentioned above, everyone **should view that license agreement that meant in Article 50 point b is license agreement that has been accordance with requirement defined in IPR legal provision.** License agreement that is ineligible excluding in definition of agreement exempted from stipulation of business competition law.

C. DEFINITION OF EXEMPTION ENACTMENT

Literal meaning of 'exemption' is not applying any rule that should be applied. In legal context business competition that in essence to arrange about bans for business actor in association with agreement, activities, and dominant position, 'exemption' stipulation seems to signify not apply absolutely provision about the prohibitions to relevant parties. Actually, it is inappropriate because when no prohibitions are applied then implementation of business competition that occurs later can be monopolistic practices or unfair business competition that in fact, is something that should be prevented and combated in the present of business competition Law.

Therefore, in order that the 'exemption' provision is harmonious with the principle and goal of creating business competition Law, then everyone **should consider literally the 'exemption' stipulation or as absolute release from all existing bans. Everyone should view the 'exemption' term in the following context:**

- a. Whereas no IPR license agreement creates automatically monopolistic practices and unfair business competition;**
- b. Whereas monopolistic practices and unfair business competition that emerge as a result of license agreement performance are condition that should be prevented through law of business competition;**
- c. Whereas to apply law of business competition against execution of IPR license agreement should be proved: (1) the IPR license agreement has been accordance with requirement defined in IPR law and regulation, and (2) the present of real condition that indicates monopolistic practices and unfair business competition occur;**
- d. Whereas exemption from business competition law stipulation against IPR license agreement is only applied in case of no relevant IPR license agreement shows clearly attribute to anti-competition of business.**

In the context then measures undertaken to analyze whether any license agreement is the exemption excepted is as follows:

First, prior to further examination it needs to clarify about matter that will be analyzed on the possibility of applying the exemption of Article 50 point b. When the problem appears is rejection to provide license and not license itself then IPR then it is necessary analyzed IPR that license is required can be categorized as *essential facilities*. When no *essential facilities* are including then exemption can be provided; otherwise when *essential facilities* are including then exemption can not be given so that possibility of violating Law Number 5 of 1999 is followed up.

Second, matter that needs to examine is whether agreement as the subject of problem is IPR license agreement. When the agreement is not IPR license agreement, then no exemption is valid.

Third, it needs to examine whether the IPR license agreement has met with the requirement according to Law, i.e. registration is made at Directorate General of Intellectual Property Rights. When the IPR license agreement is unregistered, then exemption is not valid.

Fourth, it is necessary to examine whether in the IPR license agreement clauses that clearly contain anti-competition attribute. When no clear indication is found, then for the IPR license agreement applies exemption from stipulations of business competition law.

Matter that needs to analyze from an IPR license agreement to obtain clarity about whether the attribute of anti-competition exist or does not exist is clause related to *exclusive dealing*. In this guideline, IPR license agreement considered to contain exclusive agreement element is among others containing clause on 1) Pooling Licensing and Cross Licensing; 2) Tying Arrangement; 3) Limitation in raw material; 4) Limitation in production and sale; 5) Limitation in sale price and resale price; 6) Grant Back.

It is important to note that the present of one or more above elements in any IPR license agreement don't indicate that the IPR license agreement automatically have anti-competition attribute. Certain condition to examine must be present from each clause in order to determine whether it contains anti-competition attribute.

Furthermore, matters that are necessary to consider in analyzing any exclusive agreement clause are described as follows:

1) Pooling Licensing and Cross Licensing

Pooling Licensing is an action of business actors to cooperate each other with their partner in order to gather IPR license related to certain product. While, Cross-Licensing is an action of licensing IPR each other inter business actors with their partner; it usually undertaken in Research and Development (R&D) activities. By performing Pooling Licensing and/or Cross Licensing the business actors may reduce transaction cost of exclusive rights that ultimately makes resulted products cheaper.

In analyzing whether clause concerning pooling licensing and cross licensing has anti-competition of business in nature or not, then each party should consider that licensor in principle may undertake pooling licensing and cross licensing to make the business activity efficient. However, when from the action makes production or marketing to any product is dominated dominantly by a business actor so that other business actor is hard to compete effectively, then the clause may be considered as clause that clearly having anti-competition of business in nature.

2) Tying Arrangement

In analyzing clause concerning tying agreement whether it has anti-competition of business in nature, each party should consider that licensor in principle may combine two or more products that have been protected by IPR for commercializing to the public. However, option for buying one of products only must be given to the consumer. Accordingly, clause that arranges product integration together with obligation for licensee to sell the product as a unity to the consumer so that it may not buy one of products only, then the clause can be clearly considered to have anti-competition of business in nature.

3) Limitation in raw material

In analyzing whether clause concerning limitation of raw material has anti-competition of business or not, then each party should consider that licensor in principle may give restriction to licensee concerning quality of raw material used. It is necessary deemed to maximize function of technology, keep safety, and prevent secret disclosure. Nevertheless, each party even should understand that limitation to raw material provider source may result in absence of freedom for licensee to choose raw material quality and supplier, which ultimately may even make implementation of the license agreement is inefficient from economic point of view.

In addition, the limitation may also inflict companies that provide raw material, because it inhibits access to the marketplace. Therefore, clause in license agreement that

contains licenses obligation to use raw material from source determined by licensor exclusively, even though domestic equal raw material is already available in adequate amount and price and equal quality, may be clearly considered as clause that anti-competition of business in nature.

In analyzing clause concerning limitation in production process whether it has anti-competition of business in nature or not, each party should view that in principle licensor can give limitation to licensee in case of production process or product sale that competes with licensor's products.

In case of the limitation is made according to the purpose for keeping *know how* confidentiality, or to prevent illegal technology use, then the limitation may be considered excluding to disrupt business competition. However, when the limitation will inhibit licensee in using effectively technology, then it may remove competitors from opportunities in the business. Therefore, clause in license agreement that contains limitation in case of production process or product sale that competes with licensor's products so that inhibits licensee in using effectively technology, may be clearly considered as clause that having anti-competition of business.

4) Limitation in production and sale

In analyzing clause concerning limitation in sale whether it is anti-competition of business in nature or not, each party should consider that in principle licensor can define limitation against area of amount of product resulted by using licensee's technology that may be marketed. Nevertheless, each party even should understand that when the limitation makes licensee is unable to perform technology innovation, then it may make product development into inefficient. Accordingly, clause in license agreement that contains limitation of area and amount of product that may be marketed and proven to inhibit licensee in performing technology innovation so that product development being inefficient can be clearly considered as clause that having anti-competition of business in nature.

5) Limitation in sale price and resale price

In analyzing clause concerning limitation in sale price and resale price whether they are anti-competition of business in nature or not, each party should consider that in principle licensor can determine at what level of price the product can be marketed according to investment rationality from relevant products. However, each party even should understand that limitation of the price may result in limitation of business activity

competition between licensee and distributor that will impact on decrease of competition, which it ultimately can make product development being inefficient. Therefore, clause in license agreement that contains limitation of sale price and resale price by defining bottom price, may be clearly considered as clause that having anti-competition of business in nature.

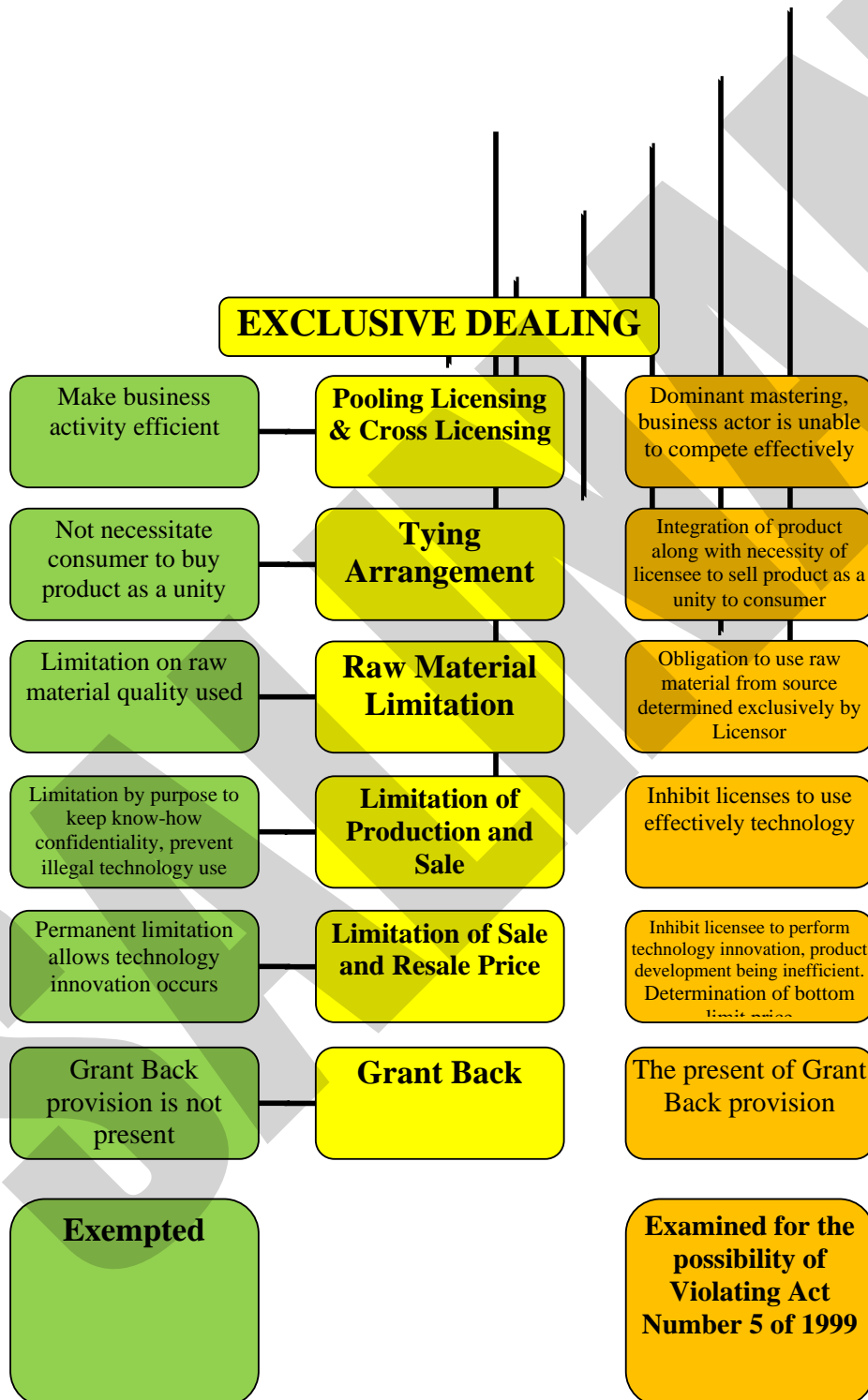
6) Grant Back.

Grant back is one of provisions in any license agreement where licensee is required for always opens and transfers information to licensor concerning entire improvement and development made against product licensed, including *know-how* in association with the development.

In analyzing clause concerning license back whether it has anti-competition of business in nature or not, each party should consider that this action impedes licensee to obtain advancement in technology mastering and contains element of unfairness because it legitimizes licensor for always has rights on any intellectual work that is not own generated. Therefore, clause in license agreement that contains Grant-back obligation, may be clearly considered as clause that having anti-competition of business in nature.

CHAPTER V
OPERATIONAL EXAMPLE OF ARTICLE 50 POINT B
IN THE CASE

Implementation of stipulation in Article 50 point b can be illustrated in the following scheme:



By regarding above diagram, application of implementing Provision in Article 50 point b can be simplified by answering some following questions:

1) Is the consensus already found or is a form of refusal to license?

Prior to further examination it needs to make clear about matter that will be analyzed concerning the possibility of applying exemption in Article 50 Point b.

When being issues are refusal to give license and not license itself then it needs to analyze IPR that requested license can be categorized as essential facilities. When it excluding essential facilities, but otherwise when it including essential facilities category then no exemption can be given so that the possibility of violating Law Number 5 of 1999 is followed up.

2) Is the matter that wants to be exempted in a form of license agreement?

Exemption of Article 50 point b is only given on license agreement, while other matters that associate with IPR, then no exemption can be applied so that case examination is proceeded to examine on the possibility of monopolistic practice and/or unfair business competition type occur.

3) Is the license agreement already registered to an authorized party (Directorate General of IPR)?

As known that license agreement must be registered to Directorate General of IPR even in the related Copyright provision can influence valid force on third party.¹

In principle in some provisions of related IPR law and regulation have banned any provision that causes monopolistic practices and/or unfair business competition.²

The provisions has spontaneously shown consistency with spirit of Law Number 5 of 1999 so that Directorate General of IPR should have noticed the provision prior to

¹ *Vide Article 47 paragraph (2) Law Number 19 of 2002 Concerning Copyright*

² *Vide some related IPR provisions among others*

1) *Article 47 paragraph (1) Law Number 19 of 2002 Concerning Copyright (Copyright Law) said that "License Agreement banned to contain provision that resulted in effect of inflicting Indonesian economics matter or containing provision that resulted in unfair business competition as arranged in applicable law and regulation."*

2) *Article 71 paragraph (1) Law Number 14 of 2002 Concerning Patent (Patent Law) said that License Agreement was not allowed to include provision, either direct or indirect, that could inflict Indonesian economics matter or contained limitation that inhibited Indonesian nation ability in mastering and developing technology in general and in association with Invention that Patent was given in particular.*

register it, so that initial examination on the possibility of contrary to Law Number 5 of 1991 can be minimized.

When the license agreement has been registered then the possibility of providing exemption as arranged in provision of Law 50 point b is found. Otherwise, when the license agreement is unregistered then exemption may not be applied so that case examination is followed up to examine on the possibility of monopolistic practices and/or unfair business competition type occurs.

4) Does the license agreement include matters with anti-competition in nature?

Further examination concerning the possibility of the license agreement includes matters with anti-competition in nature.

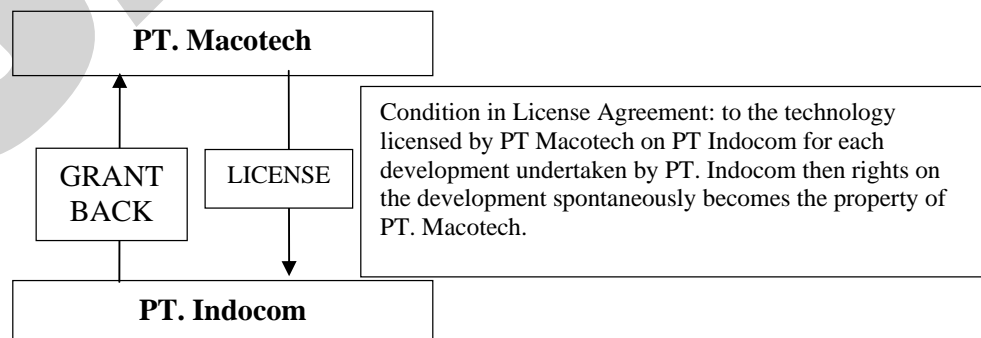
The easiest thing to identify is whether exclusive provision exists or doesn't exist such as Limitation of raw material, Pooling Licensing & Cross Licensing, Tying Arrangement, Limitation of Raw Material, Limitation of Production and Sale, Limitation of Sale and Resale Price, Grant Back. When the exclusive thing found then it is necessary to examine on the background, goal, reason from including the provision.

When no nature of anti-competition found in the license agreement then application of Article 50 point b Law Number 5 of 1999 may be implemented. In other word, the license agreement is exempted.

Otherwise, when nature of anti-competition found in the license agreement then no exemption may be applied so that case examination is proceeded to examine on the possibility of monopolistic practices and/or unfair business competition type occur.

Furthermore, application on the case may be seen to the implementation in 3 (three) examples of case as follows:

Example of Case 1: Grant Back License



PT. Macotech is an IT enterprise that focusing on software development for the company database system with its reliable product of database calls MX3. PT. Indocom is a competitor of PT. Macotech that also involves in the field that equals to its PI8 reliable product

One of MX3 excellences belongs to PT Macotech is ability to perform realtime data collaboration update. This MX3 software has obtained security in a form of **Copyright**.

Realizing the MX3 excellence, PT. Indocom offers a number of money as compensation to obtain the license for knowing *base code* from the MX3 software. It is addressed to development of PI8 product.

PT. Macotech is attracted to PT. Indocom offer, but it proposes condition in the license agreement namely to include clause "to the technology licensed by PT. Macotech on PT Indocom for each development undertaken by PT. Indocom then rights on the development spontaneously becomes the property of PT. Macotech".

PT. Indocom takes this offer of license agreement from PT. Macotech. Ultimately, both of them agree and then write down in a form of license agreement and register to Directorate General of IPR.

In line with time passed PT. Indocom is then aware that the license agreement inflicts its company so that making it hardly develops and uncompetitive. PT. Indocom then reported the case to KPPU.

Furthermore, when clarification process occurred, PT. Macotech insisted that it is the exclusive rights so that being exempted from Law Number 5 of 1999 as included in Article 50 point b.

Based on legal defense delivered by PT. Macotech, the KPPU then performed analysis concerning the possibility of applying provision in Article 50 point b as follows:

Implementation of Guideline in Article 50 point b:

To the case it can be analyzed by answering some following questions:

- 1) Is there already found consensus or being type of refusal to give license (*refusal to license*)?

Case related to license agreement between PT. Macotech and PT. Indoecom and not a form of *refusal to license*.

- 2) Is thing that wants to be exempted in a form of license agreement?

In above case PT. Macotech and PT. Indocom agreed to make license agreement so that possibly it can be given exemption as arranged in Article 50 point b.

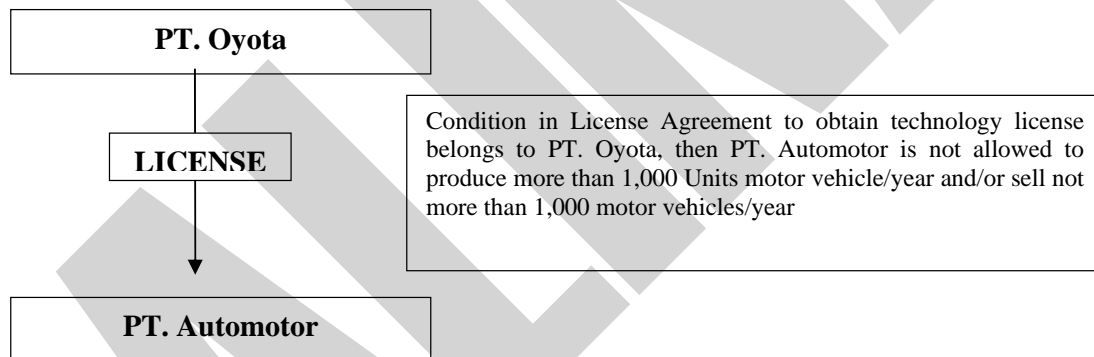
- 3) Is the license agreement already registered to an authorized party (Directorate General of IPR)?

License agreement between PT. Macotech and PT. Indocom has been registered to Directorate General of IPR so that exemption is possibly applied as arranged in Article 50 point b.

- 4) Does the license agreement include anti-competition things?

PT. Macotech and PT. Indocom include *grant back* limitation clause, where to the technology licensed by PT Macotech on PT Indocom for each development undertaken by PT. Indocom then rights on the development spontaneously becomes the property of PT. Macotech. Thus, in this case the license agreement can not be exempted and case examination remains to proceed on the possibility of the agreement brings about monopolistic practices and/or unfair business competition.

Example of Case 2: Limitation of Production and/or Sale



PT. Oyota is an automotive company with its reliable product is motor vehicle in KILANG brand. PT. Automotor is a competitor of Oyota that also involves in the field that equals to reliable product, namely motor vehicle with KANZA brand.

One of excellences from KILANG belongs to PT. Oyota is together with technology so that able to make acceleration quickly. The technology has got protection in a form of **Patent**.

Realizing the excellence of KILANG, PT. Automotor offers a number of money as compensation to find out license for accelerating the technology. It is addressed to development of KANZA product.

PT. Oyota attracted to PT. Automotor's offer, but proposed any condition in license agreement, namely including clause "In order to obtain license of technology belongs to PT.

Oyota, then PT. Automotor is not allowed to produce more than 1,000 Units motor vehicle/year and/or sell not more than 1,000 motor vehicles/year”.

PT. Automotor accepts condition of including the clause from PT. Oyota. Ultimately, both of them agree and then write down in a form of license agreement and register it to Directorate General of IPR.

In line of time passed, PT. Automotor then realized that the license agreement inflicts the company so that making it hardly develops and uncompetitive, because production is limited while demand in the market is extremely high. PT. Automotor then reported the case to KPPU.

Furthermore, when clarification process occurred, PT. Oyota insisted that it is the exclusive rights so that being exempted from Law Number 5 of 1999 as included in Article 50 point b.

Based on legal defense expressed by PT. Macotech, the KPPU then performed analysis concerning the possibility of applying provision in Article 50 point b as follows:

Implementation of Guideline in Article 50 point b:

To the case it can be analyzed by answering some following questions:

- 1) Is there already found consensus or being type of refusal to give license (*refusal to license*)?

Case related to license agreement between PT. Oyota and PT. Automotor and not a form of *refusal to license*.

- 2) Is thing that wants to be exempted in a form of license agreement?

In above case PT. Oyota and PT. Automotor agreed to make license agreement so that possibly it can be given exemption as arranged in Article 50 point b.

- 3) Is the license agreement already registered to an authorized party (Directorate General of IPR)?

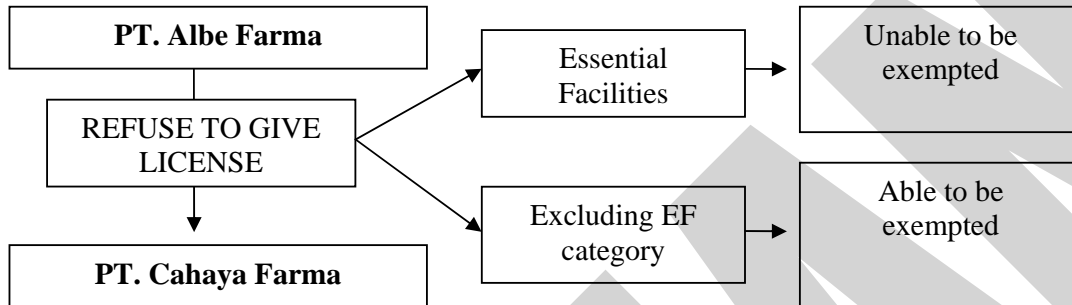
License agreement between PT. Oyota and PT. Automotor has been registered to Directorate General of IPR so that exemption is possibly applied as arranged in Article 50 point b.

- 4) Does the license agreement include anti-competition things?

PT. Oyota and PT. Automotor include *grant back* limitation clause, where to obtain license technology belongs to PT Oyota then PT. Automotor is not allowed to produce more than 1,000 Units motor vehicle/year and/or sell not more than 1,000 motor vehicles/year”. Thus, in this case the license Agreement can not be exempted and

case examination remains to proceed on the possibility of the agreement results in monopolistic practices and/or unfair business competition.

Example of Case 3: Refuse to License



PT. Albe Farma is a biggest pharmacy enterprise in Indonesia. It has many IPRs in association with drugs, vaccine, and other pharmacy products. Some patents belong to this pharmacy company are vaccine to natural potency of human brain cancer and medicine to bleaches skin. In line with time passed, drug for whitening skin belongs to PT. Albe Farma is best seller in the market because in consumer eyes this drug power is proven efficacious. This also occurs in natural vaccine of human brain cancer, in line with awareness of the important vaccine for people health increases to result in demand against the vaccine also rapid increases.

PT. Cahaya Farma is a competitor of PT. Albe Farma that being new player in the pharmacy industry with quite minimum IPR ownership.

In the interest of developing the business, PT. Cahaya Farma desires to produce seller product in the market. Realizing the best seller of vaccine product to natural potency of human brain cancer and drug for bleaching skin from PT. Albe Farma, PT. Cahaya Farma wants to produce equal product. Therefore, PT. Cahaya Farma proposes an offer to PT. Albe Farma in order to obtain the vaccine license and whitener drug in a number of money compensation. Furthermore, realizing the possibility of PT. Cahaya Farma is the potential competitor, PT. Albe Farma refused PT. Cahaya Farma's offer.

PT. Cahaya Farma felt that refusal from PT. Albe Farma is a form of monopolistic practices and/or unfair business competition. Therefore, PT. Cahaya Farma reported it to KPPU.

Furthermore, when clarification process occurred, PT. Albe Farma insisted that it is the exclusive rights so that being exempted from Law Number 5 of 1999 as included in Article 50 point b.

Based on legal defense expressed by PT. Albe Farma, the KPPU then performed analysis concerning the possibility of applying provision in Article 50 point b as follows:

Implementation of Guideline in Article 50 point b:

To the case it can be analyzed by answering some following questions:

- 1) Is there already found consensus or being type of refusal to give license (*refusal to license*)?

Case related to license agreement between PT. Oyata and PT. Automotor and not a form of *refusal to license*.

In above case PT. Albe Farma and PT. Cahaya Farma have not agreed anything then there is no possibility to give exemption as arranged in stipulation of Article 50 point b. However, considering that it is still Business to Business (B2B) in nature so that civil context becomes thick in it. Thing that is necessary to further analysis is concerning refusal type of providing the license.

PT. Albe Farma refuses to give vaccine-related license to natural potency of human brain cancer and drug of bleaching skin. For license in association with drug to whiten skin this matter ought to be settled in civil case because it can not be categorized as essential facilities.

However, for refusal of providing vaccine-related license to natural potency of human brain cancer it is possible to categorize as essential facilities. Therefore, it needs to learn in more depth.

When result of KPPU's elaboration states that those vaccine-related licenses are essential facilities, case examination concerning possibility of the license agreement brings about monopolistic practices and/or unfair business competition remains to proceed.

CHAPTER VI CLOSING

In performing provision of business competition law that associates with license agreement, **law enforcer of business competition should not have prejudice that IPR ownership is a form of creating power in the market according to business competition legal context.** Law enforcer of competition must have common view that IPR is pro-competition of business in nature and goal of creation is in line with law of business competition, i.e. to develop national economics system in free trade and globalization era, to push innovation and creativity, and to enhance people welfare.

On the other hand, holder of IPR exclusive rights **should not abuse IPR as properly (*intellectual property misuse*), in view that 'exemption' in business competition Law is legal foundation for them to perpetrate monopolistic practices and/or unfair business competition.** Holders of IPR exclusive rights are expected to constantly perform innovation and creativity, because those behaviors are actually required by legal maker of IPR and business competition. Therefore, in performing its exclusive rights, holder of rights always avoids monopolistic practices and/or unfair business competition.