



# Intellectual Property & Antitrust

Consulting editors

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Quick reference guide enabling side-by-side comparison of local insights, including into intellectual property law, the nexus between competition and IP rights, and consideration of industry standards; competition law, including such issues as interactions with copyright exhaustion or first sale doctrines; merger review; specific examples of competition law violations; remedies; economics and application of competition law; recent cases, remedies and sanctions; and other recent trends.

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## INTELLECTUAL PROPERTY

### Intellectual property law

Under what statutes, regulations or case law are intellectual property rights granted? Are there restrictions on how IP rights may be enforced, licensed or otherwise transferred? Do the rights exceed the minimum required by the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)?

IP rights in Indonesia are regulated by several laws and their implementing regulations.

Trademarks are regulated under Law No. 20 of 2016 regarding Trademarks and Geographical Indications (the Trademarks and Geographical Indications Law), as amended by Law No. 11 of 2020 regarding Job Creation (the Job Creation Law). According to this law, a trademark is a sign that is displayed graphically, in two- or three-dimensional form, as a device, logo, name, word, letter, number, colour arrangement, sound, hologram or a combination of these elements to distinguish goods and services that are produced by other individuals or legal entities. The rights over a trademark are obtained through registration; use of the mark without first registering it does not give rise to a trademark right. Trademark protection is given for 10 years and can be renewed perpetually for 10-year periods.

Geographical indication identifies the place of origin of goods that, due to geographical and environmental factors (including natural factors, human factors or the combination thereof), enjoy a certain reputation and quality.

Patents are regulated under Law No. 13 of 2016 (the Patent Law), as amended by the Job Creation Law. Patent rights are granted to inventions that are novel and have inventive steps that can be applied to industry. In addition to regulating general patents, the Patent Law contains provisions on simple patents, which are given for inventions that are novel, are an improvement of a product or process, have practical utility value and can be applied to industry. Protection for a general patent is valid for 20 years from the filing date and a simple patent is valid for 10 years. Neither can be renewed.

Copyright is regulated under Law No. 28 of 2014 (the Copyright Law). Copyright is an exclusive right that, based on the declarative principle, vests automatically with the author upon a work becoming fixed in tangible form. Works protected by copyright include scientific, artistic and literary works resulting from the inspiration, ability, thoughts, imagination, dexterity, skill or expertise expressed in a tangible form. Copyright protection of persons is valid for 70 years post mortem auctoris (PMA), which exceeds the minimum 50 years PMA copyright protection under the Berne Convention and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPs Agreement). The Copyright Law also includes provisions on related rights, such as the exclusive rights of performers, phonogram producers and broadcasting organisations.

Industrial designs are regulated under Law No. 31 of 2000 (the Industrial Design Law). An industrial design is a two- or three-dimensional shape, configuration, composition of lines or colours or a combination thereof that gives an aesthetic impression and can be used to produce goods, industrial commodities or handicrafts. Protection is valid for 10 years from the filing date for new designs.

Trade secrets are regulated under Law No. 30 of 2000 (the Trade Secret Law). A trade secret is defined as information in the technology or business fields that is not known to the public and has economic value due to its usefulness in business activities. The confidentiality of a trade secret is maintained by its owner. Protection is given perpetually as long as the economic value persists and the confidentiality is maintained.

Layout designs of integrated circuits are regulated under Law No. 32 of 2000. An integrated circuit is a finished or half-finished product that contains various elements, at least one of which is active, which are partly or entirely interconnected and integrated in a semiconductor to produce electronic functions. A layout design is a three-dimensional design formed by various elements, at least one of which is active, of which parts of or all of the

interconnections in a circuit and the three-dimensional layout are intended for the preparation of making an integrated circuit. Protection for layout designs of integrated circuits is valid for 10 years from the filing date.

The laws referred to above are collectively referred to as the IP laws.

Moreover, pursuant to article 10-bis of the Paris Convention, to which the TRIPs Agreement requires member states to adhere, member states are bound to assure effective protection against unfair competition to nationals in such countries.

In theory, the legal basis against unfair competition in Indonesia is provided in the general provisions on unlawful acts stipulated in articles 1365 and 1366 of the Indonesian Civil Code and provisions in article 382-bis of the Indonesian Criminal Code, which prohibit unfair business conduct. However, in practice, we are unaware of any unfair competition case that has been heard in the courts.

As a general rule, article 6 of Government Regulation No. 36 of 2018 dated 26 July 2018 regarding the Recordation of IP Licence Agreements (GR 36/2018) stipulates that an IP licence agreement should not contain any provision that may:

- harm Indonesia's economy and national interest;
- contain any restriction that impedes Indonesian people in transferring, controlling or developing technology;
- cause unfair business competition; or
- contradict the provisions of laws and regulations, religious values, decencies, and public order.

*Law stated - 18 October 2021*

## Responsible authorities

Which authorities are responsible for granting, administering or enforcing IP rights?

The Directorate General of Intellectual Property (DGIP) at the Ministry of Law and Human Rights (MOLHR) accepts and examines IP applications, grants IP rights and administers trademarks, patents, industrial designs, geographical indications and layout designs of integrated circuits. Copyright protection arises once the work is fixed in a material form and trade secret protection is valid as long as the information is confidential and has economic value. The DGIP administers the recordation of IP rights, and the recordation of the licensing and assignment of IP rights.

Furthermore, IP holders who wish to enforce their IP rights in civil proceedings, including cancellation claims, non-use cancellation (deletion) claims, claims for damages and cessation of infringement, may file their claims with a commercial court (with the exception of trade secret owners). Civil proceedings for trade secret cases are heard at the relevant district court.

Criminal proceedings related to IP infringement are heard by district courts. Investigating officers from the Indonesian police and civil servant investigators from the MOLHR have the authority to investigate criminal offences involving IP rights.

*Law stated - 18 October 2021*

## Proceedings to enforce IP rights

What types of legal or administrative proceedings are available for enforcing IP rights? To the extent your jurisdiction has both legal and administrative enforcement options for IP rights, briefly describe their interrelationship, if any?

Indonesia does not provide separate enforcement options based on the amount in controversy.

Civil proceedings involving IP infringement (with the exception of trade secrets) are heard by the commercial courts, which are special chambers of district courts dealing with IP, bankruptcy and bank liquidation matters. Pursuant to the amendment of the Anti-Monopoly Law, as stipulated in the Job Creation Law, appeals of decisions of Indonesia's Business Competition Supervisory Commission (KPPU) are now filed and heard at the commercial courts (they were previously filed and heard by the district courts). Currently, there are five commercial courts in Indonesia: in Jakarta, Semarang (Central Java province), Surabaya (East Java province), Medan (North Sumatra province) and Makassar (South Sulawesi province).

Commercial courts also hear cancellation claims for IP, except for trade secrets. Trade secret disputes are handled by district courts.

Criminal proceedings involving IP infringements are heard by district courts.

IP disputes can also be handled through alternative dispute resolution methods, such as arbitration, negotiation, mediation and conciliation.

At the administrative stage, rights holders and interested third parties may file oppositions with the DGIP against applications for trademarks, patents and industrial designs on the grounds that the trademarks, patents or industrial designs being applied for should not be registered.

Furthermore, an objection (appeal) to the granting of a patent may also be filed with the Patent Appeal Commission within nine months of the date the patent was granted.

*Law stated - 18 October 2021*

## Remedies

What remedies are available to a party whose IP rights have been infringed? Do these remedies vary depending on whether one utilises judicial or administrative review or enforcement?

As a general rule, remedies for a party whose IP rights have been infringed are claims for damages and cessation of the unlawful act by the infringer, which are filed with the commercial court. Furthermore, criminal sanctions are also provided for infringements of IP rights.

## Trademarks

Article 100 of the Trademarks and Geographical Indications Law sets out the criminal provisions for infringement of registered trademarks as follows.

- Unlawful use of a mark that is similar in its entirety to another party's registered trademark for similar goods or services that are produced or traded shall be subject to a maximum of five years' imprisonment or a maximum fine of 2 billion rupiahs, or both.
- Unlawful use of a mark that is similar in principle to another party's registered trademark for similar goods or services that are produced or traded shall be subject to a maximum of four years' imprisonment or a maximum fine of 2 billion rupiahs, or both.
- Unlawful use of a mark for types of goods that can cause health problems, environmental problems or death shall be subject to a maximum of 10 years' imprisonment or a maximum fine of 5 billion rupiahs, or both.

## Patents

Article 161 of the Patent Law sets out the criminal provisions for violations of article 160 on the prohibition against

patent infringement. Violations are punishable by a maximum of four years' imprisonment or a maximum fine of 1 billion rupiahs, or both. Article 162 stipulates that a violation of article 160 for a simple patent is punishable by a maximum of two years' imprisonment or a maximum fine of 500 million rupiahs, or both.

If a violation of article 161 or 162 causes health or environmental problems, it is punishable by a maximum of seven years' imprisonment or a maximum fine of 2 billion rupiahs, or both (article 163(1)). If the violation results in a person's death, it is punishable by a maximum of 10 years' imprisonment or a maximum fine of 3.5 billion rupiahs, or both (article 163(2)).

## Industrial designs

Article 54 of the Industrial Design Law stipulates that infringement of the rights of an industrial design holder is punishable by a maximum of four years' imprisonment or a maximum fine of 300 million rupiahs, or both.

## Copyright and related rights

Articles 112 to 120 of the Copyright Law regulate criminal provisions for unlawful acts relating to copyright and related rights, with minimum imprisonment of one year and a minimum fine of 100 million rupiahs and maximum imprisonment of 10 years and a maximum fine of 4 billion rupiahs.

All criminal offences involving IP rights are complaint-based offences.

No remedy is provided in the administrative stage.

*Law stated - 18 October 2021*

## Nexus between competition and IP rights

Do any statutes, regulations or case law in your jurisdiction address the interplay between competition law and IP law?

Article 50(b) of Law No. 5 of 1999 regarding the Prohibition of Monopolistic Practices and Unfair Business Competition (the Anti-Monopoly Law) exempts agreements related to IP rights, namely licences and franchise, from the scope of its regulation.

Furthermore, the KPPU issued Regulation No. 2 of 2009 dated 13 May 2009 regarding the Guidelines on Exceptions to the Application of the Anti-Monopoly Law in Relation to Agreements Related to IP (KPPU Regulation 2/2009). This stipulates that licence agreements related to IP are exempt from the Anti-Monopoly Law if they do not contravene the principles and purposes of the Law as set out in articles 2 and 3 of the Law, as follows.

- The 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.
- The purposes of the Anti-Monopoly Law are to:
  - safeguard the interests of the public and improve national economic efficiency for the sake of people's welfare;
  - create a conducive business climate through the stipulation of fair business competition to ensure the certainty of equal business opportunities for large, medium-sized and small business actors in Indonesia;
  - prevent monopolistic practices and unfair business competition that may be committed by business actors; and

- create effectiveness and efficiency in business activities.

KPPU Regulation 2/2009 further stipulates that the exempted IP-related licences are those that have met the requirements set out in the IP laws and have been recorded at the DGIP.

*Law stated - 18 October 2021*

### **Patent cooperation treaties and other agreements**

Does your jurisdiction participate in any patent cooperation treaties or other similar agreements?

Indonesia has been a contracting party to the World Intellectual Property Organization (WIPO) Patent Cooperation Treaty (PCT) since 5 September 1997. Indonesia is a member of the Paris Convention, which allows applicants to claim priority for patent applications from other Paris Convention member states. Indonesia also has a Patent Prosecution Highway Agreement with the Japan Patent Office (JPO), which enables applicants to request an accelerated examination process for patent applications filed to the DGIP by making use of the examination of the corresponding patent examined by the JPO.

*Law stated - 18 October 2021*

### **Remedies for deceptive practices**

With respect to trademarks, do competition or consumer protection laws provide remedies for deceptive practices?

Article 9(a) of Law No. 8 of 1999 regarding Consumer Protection (the Consumer Protection Law) stipulates that business actors are prohibited from offering, promoting or advertising goods or services incorrectly or as if such goods or services have been discounted or assigned a special price, have met quality standards, or have a certain style, mode, characteristic, history or use.

However, the Consumer Protection Law also stipulates that if a business actor violates IP rights consumer protection is not regulated under the Law, but rather under the laws and regulations regarding IP. Therefore, article 9(a) of the Consumer Protection Law cannot be used as grounds for seeking remedies against deceptive practices with respect to trademark infringement.

There is no specific provision in the Anti-Monopoly Law that regulates remedies for deceptive practices.

*Law stated - 18 October 2021*

### **Technological protection measures and digital rights management**

With respect to copyright protection, is WIPO protection of technological protection measures (TPMs) and digital rights management (DRM) enforced in your jurisdiction? Do statutes, regulation or case law limit the ability of manufacturers to incorporate TPM or DRM protection limiting the platforms on which content can be played? Has TPM or DRM protection been challenged under the competition laws?

Article 6 of the Copyright Law contains a provision on copyright management information (CMI), which states that authors may use CMI and copyright electronic information to protect their moral rights. CMI includes information on

the methods or system that can identify the originality of the author's works and the information code and access code. Article 7(3) stipulates that CMI and copyright electronic information owned by the authors are prohibited from being removed, changed or damaged.

Furthermore, article 52 of the Copyright Law provides a provision prohibiting anyone from damaging, destroying, eliminating or disabling the function of TPMs used as safeguards for copyrighted works or related rights products, except for state defence and security purposes, and other grounds pursuant to the provisions of laws and regulations, or as otherwise agreed.

There is no provision restricting the ability of manufacturers to incorporate TPM or DRM protections to limit the platforms on which content can be played.

We are not aware of any challenge under competition laws against TPM or DRM protection.

*Law stated - 18 October 2021*

## Industry standards

What consideration has been given in statutes, regulation or case law to the impact of the adoption of proprietary technologies in industry standards?

Article 82 of the Patent Law allows for an interested party to file an application to the Ministry of Law and Human Rights (MOLHR) to obtain a compulsory licence. The MOLHR may issue a decree approving the issuance of a compulsory licence on the following grounds:

- the patent holder has not carried out its obligation to make products or use processes in Indonesia within three years of when the patent was granted, as obliged by article 20 of the Patent Law;
- the patent has been carried out by the patent holder or licensee in a manner that is detrimental to the public interest; or
- patents resulting from the development of a previously granted patent cannot be implemented without using another party's patent that is still protected.

*Law stated - 18 October 2021*

## COMPETITION

### Competition legislation

What statutes set out competition law?

The Anti-Monopoly Law sets out provisions on competition law in Indonesia. The law was drawn up based on the principles of Indonesian state philosophy Pancasila, the 1945 Constitution and economic democracy. It seeks to balance business interests and the public interest to:

- safeguard the public interest and protect consumers;
- develop a conducive business climate through the creation of fair business competition;
- ensure equal business opportunities for every person;
- prevent monopolistic practices and unfair business competition created by business actors; and
- ensure effective and efficient business activities to improve the efficiency of the national economy and the welfare of the people.

*Law stated - 18 October 2021*

## IP rights in competition legislation

### Do the competition laws make specific mention of any IP rights?

The only provision in the Anti-Monopoly Law that mentions IP rights is provided in article 50(b) on the exemption from its scope of the regulation of agreements related to IP rights, including licences, patents, trademarks, copyright, industrial designs, integrated electronic circuits, trade secrets and agreements related to franchises.

*Law stated - 18 October 2021*

## Review and investigation of competitive effects from exercise of IP rights

### Which authorities may review or investigate the competitive effect of conduct related to exercise of IP rights?

Article 6(c) of Government Regulation No. 36 of 2018 (GR 36/2018) includes a provision that an IP licence agreement should not contain any provision that could cause unfair business competition. Furthermore, article 11(2) of GR 36/2018 stipulates that the examination of an application for the recordation of an IP licence is only conducted to check the completeness and conformity of the required documents as stipulated in article 10(4) of GR 36/2018. The required documents are:

- a copy of the licence agreement;
- a copy of the official citation of the certificate of registration for the patent, trademark, industrial design or layout design of the integrated circuit, or evidence of ownership of copyright and related rights, or evidence of the trade secret that is licensed and its validity;
- power of attorney if the application is filed through an IP consultant (prerequisite for foreign parties); and
- evidence of payment.

In theory, as part of the examination process for recording the licence agreement at the Directorate General of Intellectual Property (DGIP), the licence agreement should be examined to determine that it does not contain any provision that may cause unfair business competition. However, in practice, we are not aware of the DGIP conducting any such examination.

Should the licence agreement be deemed to contain provisions that could cause unfair business competition or contravene the principles and purposes set out in articles 2 and 3 of the Anti-Monopoly Law, Indonesia's Business Competition Supervisory Commission (KPPU) has the authority to investigate the competitive effect of conduct related to the licence agreement.

*Law stated - 18 October 2021*

## Competition-related remedies for private parties

### Can a private party recover for competition-related damages caused by the exercise, licensing or transfer of IP rights?

As agreements related to IP rights, including IP licence agreements and franchise agreements, are exempted from the Anti-Monopoly Law, a private party cannot recover competition-related damages resulting from the exercise, licensing or transfer of IP rights.

## Competition guidelines

Have the competition authorities, or any other authority, issued guidelines or other statements regarding the overlap of competition law and IP?

The KPPU's Regulation No. 2 of 2009 (KPPU Regulation 2/2009) sets out guidelines on exceptions to the application of the Anti-Monopoly Law in relation to IP-related agreements. The guidelines stipulate that the IP-related licence agreements that are exempt from the Anti-Monopoly Law are those that do not contravene the principles and purposes set out in articles 2 and 3 of the Law, as follows.

- The 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.
- The purposes of the Anti-Monopoly Law are to:
  - safeguard the interests of the public and improve national economic efficiency for the sake of people's welfare;
  - create a conducive business climate through the stipulation of fair business competition to ensure the certainty of equal business opportunities for large, medium-sized and small business actors in Indonesia;
  - prevent monopolistic practices and unfair business competition that may be committed by business actors; and
  - create effectiveness and efficiency in business activities.

KPPU Regulation 2/2009 further stipulates that the exempted IP-related licences are those that have met the requirements set out in the IP laws and have been recorded at the DGIP.

GR 36/2018 sets out the minimum information required for IP licences, namely the:

- date, month, year and place where the licence agreement was signed;
- name and address of the licensor and the licensee;
- object of the licence agreement;
- provisions on the exclusivity or non-exclusivity of the licence, including sublicensing;
- term (duration) of the licence agreement;
- territorial scope of the licence agreement; and
- party that will attend to the patent annuity fees.

Licence agreements in other languages must be translated into Bahasa Indonesia.

## Exemptions from competition law

Are there aspects or uses of IP rights that are specifically exempt from the application of competition law?

Article 50(b) of the Anti-Monopoly Law exempts from its scope agreements related to IP rights, including licences,

patents, trademarks, copyright, industrial designs, integrated electronic circuits, trade secrets and agreements related to franchises.

Furthermore, KPPU Regulation 2/2009 sets out guidelines in which IP licences can be exempted from the provisions of the Anti-Monopoly Law.

*Law stated - 18 October 2021*

### **Copyright exhaustion**

Does your jurisdiction have a doctrine of, or akin to, 'copyright exhaustion' (EU) or 'first sale' (US)? If so, how does that doctrine interact with competition laws?

Article 11(1) of the Copyright Law stipulates that the economic right to distribute works or copies of works does not apply to works or copies of works that have been sold or assigned. However, the Law is silent on the parallel importing of copyrighted works. With the absence of a specific provision on parallel importing, there is no mechanism to prevent grey marketing in the IP sphere.

*Law stated - 18 October 2021*

### **Import control**

To what extent can an IP rights holder prevent 'grey-market' or unauthorised importation or distribution of its products?

With the absence of a specific provision on parallel importing in IP laws and regulations, there is no mechanism to prevent grey marketing in the IP sphere.

Furthermore, the parallel importing of pharmaceutical products is exempted from the criminal provisions and civil claims regulated in the Patent Law.

*Law stated - 18 October 2021*

### **Jurisdictional interaction between competition laws and IP rights**

Are there authorities with exclusive jurisdiction over IP-related or competition-related matters? For example, are there circumstances in which a competition claim might be transferred to an IP court to satisfy subject matter jurisdiction? Are there circumstances where the resolution of an IP dispute will be handled by a court of general jurisdiction?

The commercial courts have exclusive jurisdiction to handle civil proceedings related to IP (except for trade secrets). Competition matters are handled by the KPPU. Pursuant to the amendment of the Anti-Monopoly Law by the Job Creation Law, appeals of KPPU decisions are now filed and handled by the commercial courts. Prior to the amendment, appeals were filed and heard at the district courts.

*Law stated - 18 October 2021*

## **MERGER REVIEW**

### **Powers of competition authority**

Does the competition authority have the same authority with respect to reviewing mergers involving IP rights as it does with respect to any other merger?

The Anti-Monopoly Law does not specifically distinguish mergers involving IP rights from other mergers. Therefore, the general rules on mergers apply. Indonesia's Business Competition Supervisory Commission (KPPU) has the authority to review mergers.

*Law stated - 18 October 2021*

### **Analysis of the competitive impact of a merger involving IP rights**

Does the competition authority's analysis of the competitive impact of a merger involving IP rights differ from a traditional analysis in which IP rights are not involved? If so, how?

According to article 1(18) of KPPU Regulation No. 3 of 2019 regarding Assessments of Mergers or Consolidations of Business Entities or Acquisitions of Company Shares That May Result in Monopolistic and/or Unfair Business Competition Practices, 'assets' means all assets, tangible and intangible, that are owned by the business actor and are valuable or have an economic value. In that case, IP rights owned by a business actor should also be deemed as assets.

To the best of our knowledge, the KPPU does not analyse the competitive impact of a merger involving IP rights any differently to another merger.

*Law stated - 18 October 2021*

### **Challenge of a merger**

In what circumstances might the competition authority challenge a merger involving the transfer or concentration of IP rights? Does this differ from the circumstances in which the competition authority might challenge a merger in which IP rights were not a focus?

There is no specific provision to challenge a merger involving the transfer or concentration of IP rights. Therefore, the general rules for challenging a merger apply.

To determine whether an acquisition will result in a monopolistic practice or unfair business competition, the KPPU will examine the following five factors.

### **Market concentration**

The KPPU will first assess the effect of the acquisition on market concentration. If the acquisition does not lead to high market concentration, there will be no risk of monopolistic practices or unfair business competition, and the KPPU will not examine other factors.

To assess market concentration, the KPPU first determines the relevant market and then calculates the Herfindahl-Hirschman Index (HHI) for that market. In Indonesia, the HHI grade for most sectors is over 2,000. An HHI grade is calculated from the sum of the squared market shares of all firms in the relevant market. The KPPU's consideration of HHI grades is as follows.

- If the HHI grade is less than 1,800, the KPPU takes the view that the transaction does not violate the law.

- If the HHI grade is over 1,800 after the transaction but the difference in the HHI grades before and after the transaction is less than 150, the KPPU does not consider the transaction as unlawful.
- If the HHI grade is over 1,800 after the transaction and the difference exceeds 150, the KPPU must complete the remainder of the comprehensive evaluation before issuing its decision.

To illustrate the market concentration test, if there are six business actors in the relevant market with market shares of 15 per cent (A), 20 per cent (B), 10 per cent (C), 30 per cent (D), 10 per cent (E) and 15 per cent (F), the HHI grade of the relevant market before the transaction will be  $15^2 + 20^2 + 10^2 + 30^2 + 10^2 + 15^2$ , which is 1,950. If A acquires B, after the acquisition the HHI grade of the relevant market will be  $(15 + 20)^2 + 10^2 + 30^2 + 10^2 + 15^2$ , which is 2,550. As the HHI grade after the transaction is more than 1,800, the KPPU will look at the difference in the HHI grades. As the difference here before and after the merger is more than 150, the KPPU would analyse the other criteria to determine whether this transaction will cause monopolistic practices or unfair business competition.

## Entry barriers

The KPPU will analyse whether there are any barriers to the entry of new competitors to the market. If there are no entry barriers, the KPPU will not object to the transaction.

The evaluation of whether there are entry barriers is based on:

- the historical data of the number of business actors in the relevant market from time to time;
- the number of business actors that may potentially enter the relevant market; and
- the ratio between the costs incurred to enter the relevant market and the estimated revenue, and the estimated time to gain such revenue.

The analysis will consider:

- the ease of entry by new business actors into the relevant market;
- if new business actors are able to put competitive pressure on existing business actors; and
- the time needed to enter the relevant market.

If these factors seem satisfactory, competition in the relevant market is likely to be maintained and the KPPU will not object to the transaction.

## Potential anticompetitive behaviour

The KPPU will analyse the potential anticompetitive behaviour that would result from the merger, based on the following factors.

- Unilateral effect: the KPPU will identify whether there will be a dominant business entity resulting from the merger that would have the ability to abuse its dominant power. One of the elements the KPPU would observe is buyers' bargaining power in the relevant market and whether this would be impacted due to the potential existence of such dominant power.
- Coordinated effect: the KPPU will identify whether there will be coordination between the surviving entity and its main competitors. In other words, even if there is no dominant business entity resulting from the merger, the

KPPU will still try to anticipate whether the merger would create potential coordination between the resulting entity and its main competitors.

- Market foreclosure: the KPPU will analyse any vertical mergers that would increase a rival's costs to enter the same market. As vertical mergers may give rise to closure of access by new competitors, the KPPU will also try to identify whether the merger would create a possible cost-raising strategy, which would be borne by new competitors entering the same market.

## Efficiency

If the business actor justifies the acquisition on grounds of efficiency, the KPPU will examine such claim and the effect on competition.

The business actor may be called upon to support its argument with calculations of efficiency and the advantage enjoyed by customers after the transaction. The efficiency argument may include cost savings, increases in capacity and increases of marketing or quality of the product post-transaction. The KPPU will evaluate this argument in detail. The most important factor in the KPPU's evaluation is whether customers will enjoy lower prices.

## Bankruptcy

If the merger is conducted to avoid a bankruptcy, the KPPU will determine whether consumers would suffer if the business entity went bankrupt. If consumers are likely to suffer a greater loss if the business entity goes bankrupt than the loss caused by the merger, the transaction will likely be found not to have an anticompetitive effect on the relevant market. The KPPU will evaluate whether:

- the company's financial problems are such that without the acquisition, the company would likely go bankrupt;
- it is possible to conduct a reorganisation to save the company; or
- there is no other alternative that could save the company that would not have an anticompetitive effect.

*Law stated - 18 October 2021*

## Remedies to address the competitive effects of mergers involving IP

What remedies are available to address competitive effects generated by a merger when those effects revolve around the transfer of IP rights?

If the KPPU assessment indicates that an acquisition will substantially lessen competition in the relevant market, the parties may be asked to propose remedies.

The types of remedy that can be proposed are as follows.

- Structural remedies: the divestment of assets, shares or other actions that can create business competition.
- Behavioural
  - the acquiring business actor may provide its IP licences;
  - competition can be promoted by eliminating such barriers as exclusive contracts, consumer switching costs, bundling or tie-in of certain products or other barriers to supply or purchase;
  - disclosure of the price and amount of production or output; or
  - other actions that support competition.

The KPPU will review the proposed remedies and assess whether they are effective. If the KPPU accepts the proposal, it will issue an opinion that there is no monopolistic practice or unfair business competition resulting from the acquisition, with notes to conduct certain actions that must be fulfilled by the business actor. If the KPPU rejects the proposed remedy, it will issue an opinion that monopolistic practice or unfair business competition will result from the acquisition.

*Law stated - 18 October 2021*

## **SPECIFIC COMPETITION LAW VIOLATIONS**

### **Conspiracy**

Can the exercise, licensing or transfer of IP rights create price-fixing or conspiracy liability?

The exercise, licensing or transfer of IP rights are not specifically regulated under the conspiracy provisions of articles 22 to 24 of the Anti-Monopoly Law. However, according to the IP laws, Government Regulation No. 36 of 2018 and Indonesia's Business Competition Supervisory Commission's (KPPU) Regulation No. 2 of 2009 (KPPU Regulation 2/2009), licence agreements should not contain provisions that may cause unfair business competition.

*Law stated - 18 October 2021*

### **Scrutiny of settlement agreements**

How would a settlement agreement terminating an IP infringement dispute be scrutinised from a competition perspective? What are the key factors informing such an analysis?

Taking enforcement measures to prevent infringement of one's IP rights should not be deemed as contravening the Anti-Monopoly Law. However, if the settlement agreement contains a provision that a party will not compete with the patented product, this agreement may be deemed an act of monopolistic practice and unfair business competition, which is regulated in article 17(2)(b) of the Anti-Monopoly Law. Article 17(2)(b) states that business actors may be reasonably suspected or deemed to control the production and marketing of goods or services in the event that they cause other business actors to be unable to enter business competition for the same goods or services.

*Law stated - 18 October 2021*

### **Reverse payment patent settlements**

How have the competition laws been applied to reverse payment patent settlements in your jurisdiction?

We are not aware of any case where competition laws have been applied to reverse payment of a patent settlement in Indonesia.

*Law stated - 18 October 2021*

### **(Resale) price maintenance**

Can the exercise, licensing, or transfer of IP rights create liability under (resale) price maintenance statutes or case law?

Article 8 of the Anti-Monopoly Law stipulates that business actors are prohibited from entering into agreements with

other business actors that contain the condition that parties receiving goods or services shall not sell or resupply goods or services received by them at a price lower than the contracted price, potentially causing unfair business competition.

The KPPU has issued KPPU Regulation No. 8 of 2011 regarding Guidance on Article 8 of the Anti-Monopoly Law on Resale Price Arrangements.

The Anti-Monopoly Law prohibits the following types of minimum resale price maintenance agreements:

- manufacturers or suppliers determine the minimum selling price for the resale of their products;
- manufacturers or suppliers require retailers not to sell their products for less than a determined minimum selling price;
- producers or suppliers enter into an agreement with distributors or retailers for the procurement of goods where there are requirements regarding a certain minimum selling price;
- manufacturers or suppliers will stop or withhold the supply of goods to distributors or retailers unless the distributors or retailers agree not to sell the goods for less than a specified minimum selling price; and
- manufacturers or suppliers withhold the supply of goods to distributors or retailers that have sold the product for less than a determined minimum selling price.

If an IP licence agreement contains clauses on minimum resale price, especially if such clauses are drafted in any of the above forms, the agreement can be viewed as anticompetitive, which falls under the scope of the Anti-Monopoly Law.

*Law stated - 18 October 2021*

## **Exclusive dealing, tying and leveraging**

**Can the exercise, licensing, or transfer of IP rights create liability under statutes or case law relating to exclusive dealing, tying and leveraging?**

KPPU Regulation 2/2009 stipulates that to assess whether an IP licence agreement contains provisions creating unfair business competition, the exclusive dealing clauses should be considered, as follows.

- Pooling licensing and cross-licensing: in principle, the licensor may use pool and cross licences to streamline its business activities. However, if this results in the production or marketing of a product being dominated by a particular business actor, which subsequently hampers other business actors from competing effectively, the clause may be viewed as anticompetitive.
- Tying arrangement: in principle, the licensor may combine two or more of its products that have been protected by IP rights to sell to consumers. However, consumers should be given the option to buy only one product. If there is an obligation for the licensee to sell the combined products to consumers as an integral product, such that consumers cannot buy one product only, the clause may be deemed anticompetitive.
- Limitation on raw materials: if there is a clause in the licence agreement that obliges the licensee to use raw materials that are exclusively determined by the licensor, while similar raw materials are available domestically in an adequate amount, price and quality, the clause can be deemed anticompetitive.
- Limitation on production and sale: in principle, the licensor can set limitations on the area or number of products produced using the licensee's technology that may be marketed. However, if the limitations prevent the licensee from innovating technology, this can make product development inefficient. Therefore, a clause in the licence agreement that contains limitations on the area and number of products that can be marketed, which is proven to hinder the licensee from making technological innovations so that product development becomes inefficient, can

be viewed as anticompetitive.

- Limitation on selling price and reselling price: clauses in the licence agreement that contain restrictions on selling prices and resale prices by setting a lower price can be viewed as anticompetitive.
- Grant-back licensing: grant-back provisions require the licensee to always disclose and transfer information regarding improvements made to the licensed product and know-how related to the development of the licensed technology or product to the licensor. If this impedes the licensee in advancing and controlling the technology by legitimising the licensor in owning IP rights that it does not create, the clause may be deemed anticompetitive.

If the licence agreement incorporates clauses that may be deemed anticompetitive, pursuant to KPPU Regulation 2/2009, the agreement is not exempted from the Anti-Monopoly Law and, therefore, may create liability under the Anti-Monopoly Law.

*Law stated - 18 October 2021*

### **Abuse of dominance**

Can the exercise, licensing, or transfer of IP rights create liability under statutes or case law relating to monopolisation or abuse of dominance?

Since agreements related to IP rights, including IP licence agreements and franchise agreements, are exempted from the Anti-Monopoly Law, the exercise, licensing or transfer of IP rights are not deemed as monopolisation or an abuse of dominance, as long as the licensing of IP does not contain provisions that might cause unfair business competition.

*Law stated - 18 October 2021*

### **Refusal to deal and essential facilities**

Can the exercise, licensing, or transfer of IP rights create liability under statutes or case law relating to refusal to deal and refusal to grant access to essential facilities?

Pursuant to KPPU Regulation 2/2009, if particular IP rights can be deemed essential facilities, the refusal to license such rights may be assessed on the possibility of unfair business competition. However, if the IP rights cannot be deemed essential facilities, the refusal to grant a licence for the same is lawful.

Furthermore, article 82 of the Patent Law allows for an interested party to file an application to the Ministry of Law and Human Rights (MOLHR) to obtain a compulsory licence. The MOLHR may issue a decree approving the issuance of a compulsory licence on the following grounds:

- the patent holder has not carried out its obligation to make products or use processes in Indonesia within 36 months of the date the patent was granted, as obliged by article 20 of the Patent Law;
- the patent has been used by the patent holder or licensee in a form and manner that is detrimental to the public interest; and
- patents resulting from the development of previously granted patents cannot be implemented without using another party's patent that is still protected.

*Law stated - 18 October 2021*

## REMEDIES

### Remedies for violations of competition law involving IP

What sanctions or remedies can the competition authorities or courts impose for violations of competition law involving IP?

There are no specific remedies under the Anti-Monopoly Law involving IP matters. Nevertheless, the issuance of a compulsory licence is one remedy for violations of competition law.

*Law stated - 18 October 2021*

### Competition law remedies specific to IP

Do special remedies exist under your competition laws that are specific to IP matters?

There are no special remedies under the Anti-Monopoly Law that are specific to IP matters.

*Law stated - 18 October 2021*

## ECONOMICS AND APPLICATION OF COMPETITION LAW

### Economics

What role has competition economics played in the application of competition law in cases involving IP rights?

The Anti-Monopoly Law was drawn up based on the principles of the Indonesian state philosophy, Pancasila, the 1945 Constitution and economic democracy. It seeks to balance business interests and the public interest to:

- safeguard the public interest and protect consumers;
- develop a conducive business climate through the creation of fair business competition;
- ensure equal business opportunities for every person;
- prevent monopolistic practices and unfair business competition created by business actors; and
- ensure effective and efficient business activities to improve the efficiency of the national economy and the welfare of the people.

IP rights in general do not contradict the principles and purposes of the Anti-Monopoly Law. On the contrary, the robust protection of IP rights supports the purposes of the Anti-Monopoly Law to ensure effective and efficient business activities to improve the efficiency of the national economy and the welfare of the people.

This is also reflected in the exemption of agreements related to IP rights, including licences, patents, trademarks, copyrights, industrial designs, integrated electronic circuits and trade secrets, as well as agreements related to franchises from the scope of the Anti-Monopoly Law, as stipulated in article 50(b) of the Anti-Monopoly Law.

To balance IP protection and competition law, the IP laws contain provisions requiring that IP licence agreements should not contain any provision that could cause unfair business competition.

Indonesia's Business Competition Supervisory Commission also issued guidelines on IP licence agreements that cannot be exempted from the scope of competition laws due to their anticompetitive nature in its Regulation No. 2 of 2009.

## RECENT CASES AND SANCTIONS

### Recent cases

Have there been any recent high-profile cases dealing with the intersection of competition law and IP rights?

We are not aware of any recent high-profile cases dealing with the intersection of competition law and IP rights. However, on 4 July 2001, the KPPU issued its decision No. 03/KPPU-L-I/2000 regarding the alleged violation of the Anti-Monopoly Law by PT Indomarco Prismatama (the respondent), the owner of the Indomaret trademark, for its chain of self-owned and franchised retail convenience stores. The claimant, an NGO, alleged that PT Indomarco Prismatama had contravened articles 1(4) and 25 of the Anti-Monopoly Law on dominant position and articles 1(8) and 22 on conspiracy. The KPPU found indications that the respondent had violated the Anti-Monopoly Law on closed agreements, conspiracy and dominant position, and proceeded to open a monitoring process. Ultimately, the KPPU held that the respondent had violated the harmonious principle of economic democracy under article 2 of the Anti-Monopoly Law by failing to give sufficient attention to the equilibrium between its interests and the public interest.

Law stated - 18 October 2021

### Remedies and sanctions

What competition remedies or sanctions have been imposed in the IP context?

In the Indomaret case, the KPPU stated that the respondent, in running its business, must do more to involve local communities by, among other actions, increasing the portion of its franchise activities. Although this requirement is not in an IP context per se, the Indomaret trademark is one of the elements being franchised.

Law stated - 18 October 2021

## UPDATE AND TRENDS

### Key developments

Are there any emerging trends or hot topics in the law of IP and antitrust policy? Have changes occurred recently or are changes expected in the near future that will have an impact on the application of competition law to IP rights?

Although the Patent Law contains provisions on the use of patents by the government, on 7 July 2020, the government issued Presidential Regulation No. 77 of 2020 regarding Procedures for the Implementation of Patents by the Government (PR 77/2020).

Article 2 of PR 77/2020 stipulates that the government can self-implement patents in Indonesia if they relate to state defence and security or are urgently needed for the public interest.

The implementation of patents related to state defence prohibits the patent holders from implementing their exclusive rights over patents implemented by the government, while the implementation of a patent related to urgent public interest does not reduce the patent holder's exclusive rights. Further, the implementation of patents that interfere with or are contrary to the interest of state defence and security would prohibit the patent holders from carrying out their patent rights or, if permitted, would require prior approval from the government.

These provisions will have an impact on the exercise of IP rights and competition law.

Furthermore, a draft of a new Patent Law is currently being discussed by the House of Representatives. New provisions being deliberated include:

- the possibility of granting second medical use;
- introducing a requirement for submitting a statement of patent implementation;
- cancellation of a compulsory licence if it does not prevent the implementation of a patent in a manner that is detrimental to the public interest; and
- implementation of patent by the government for pharmaceutical products that cannot be produced in Indonesia.

Once the new Patent Law is passed in its final form, it will undoubtedly affect the exercise of IP rights and competition law.

*Law stated - 18 October 2021*

## Jurisdictions

	<b>Germany</b>	Meissner Bolte
	<b>India</b>	Chadha & Chadha Intellectual Property Law Firm
	<b>Indonesia</b>	SSEK Legal Consultants
	<b>Japan</b>	Anderson Mōri & Tomotsune
	<b>Kazakhstan</b>	Baker McKenzie
	<b>Mexico</b>	Calderón & De La Sierra
	<b>Portugal</b>	PLMJ
	<b>Turkey</b>	ACTECON
	<b>United Kingdom</b>	Arnold & Porter
	<b>USA</b>	Crowell & Moring LLP