

# INTELLECTUAL PROPERTY & ANTITRUST

## Indonesia



# Intellectual Property & Antitrust

Consulting editors

**Matthew Tabas**

*Arnold & Porter*

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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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## Contributors

### Indonesia



**Rusmaini Lenggogeni**  
rusmainilenggogeni@ssek.com  
*SSEK Legal Consultants*



**Dian Kirana**  
diankirana@ssek.com  
*SSEK Legal Consultants*

## 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)?

As a civil law country, Indonesia codifies its positive laws in a set of laws and regulations. Intellectual property regulations are spread out in several laws according to type.

Trademarks and geographical indications are regulated under Law No. 20 of 2016 (Trademarks and Geographical Indications Law), as amended by Law No. 11 of 2020 (Job Creation Law). Trademark rights are given to signs that are 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 the source of goods or services from its competitors. In Indonesia, trademark protections arise from registration and not from use. The protection is given once the trademark is protected and applied retroactively from the filing date for a 10-year period and can be renewed perpetually for another 10 years for each period.

Further, geographical indication is a sign that identifies the place of origin of goods or products that, due to geographical factors, including environmental, human, or a combination thereof, enjoy a particular reputation, quality and characteristic. The geographical indication right is given exclusively by the state to the geographical indication right holder (usually the geographical indication protection society) as long as the reputation, quality and characteristics upon which protection is based are maintained.

Separately, patents are regulated under Law No. 13 of 2016 (Patent Law), as amended by the Job Creation Law. The Patent Law recognises protection over general patents and simple patents. General patent rights are granted to inventions that are novel, have inventive steps, and can be applied in industry. In comparison, simple patent rights are granted to inventions that are novel, improve existing products or processes, have a practical use, and are industrially applicable. 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.

Copyrights are regulated under Law No. 28 of 2014 (Copyright Law). Works protected by copyright include scientific, artistic and literary works resulting from inspiration, ability, thoughts, imagination, dexterity, skill or expertise expressed in a tangible form. Copyright is an exclusive right vested automatically based on the declarative principle once a work is embodied in a tangible form. Copyright protection of persons is valid for 70 years post mortem auctoris (PMA), which exceeds the minimum 50 years of PMA copyright protection under the Berne Convention and the WTO 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 give protection to a novel two- or three-dimensional shape, configuration, the composition of lines or colours or a combination thereof that gives an aesthetic impression, can be realised in a two- or three-dimensional pattern, and can be used to produce products, goods, industrial commodities, or handicrafts. Law No. 31 of 2000 (Industrial Design Law) governs such rights. Protection is given for 10 years from the filing date and cannot be renewed.

Trade secrets are regulated under Law No. 30 of 2000 (Trade Secret Law). Trade secret protection is given to 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 such information is maintained by its owner. The protection is given perpetually as long as the economic value persists and confidentiality is maintained.

Layout designs of integrated circuits are regulated under Law No. 32 of 2000 (Layout Designs of Integrated Circuit

Law). 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 into 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.

Lastly, plant variety protections are regulated under Law No. 29 of 2000 (Plant Variety Protection Law), as amended by the Job Creation Law. Plant variety protection is a specific protection granted by the state to plant breeders for a new, unique, uniform, stable, and named plant species produced through plant breeding activities. The protection is valid for 20 years from the granting of the plant variety protection for seasonal plants and 25 years for annual plants.

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

Aside from the IP Laws, 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 article 382-bis of the Indonesian Criminal Code, which prohibit unfair business conduct. However, in practice, we are unaware of any standalone unfair competition case that has been heard in the courts. Parties who wish to bring unfair competition cases usually have a nexus of conventional IP rights and, most often, trademark rights, which are consequently rendered as a trademark (or other IP) case rather than an unfair competition case.

As regards the limitation on the licensing of IP rights, as a general rule, article 6 of Government Regulation No. 36 of 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 or 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 - 30 August 2022*

## 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) is responsible for granting and administering IP, namely accepting, examining, granting or rejecting trademark, patent, industrial design, geographical indication, and layout design of integrated circuit applications. As for copyrights and trade secrets for which rights do not stem from registration, the DGIP administers the recordation of the same, which can be beneficial for prima facie evidence of ownership and a prerequisite for recording the license agreement.

As for plant variety protection, the authorised party to grant and administer such protection is the Plant Variety Protection Office at the Ministry of Agriculture.

Regarding enforcement, the commercial courts hear civil claims, including cancellation claims, deletion (non-use cancellation) claims, claims for damages, and claims to cease the infringement for all IP rights besides trade secrets and plant variety protections. District courts hear the civil proceedings for trade secrets and plant variety protections.

District courts also hear the criminal proceedings related to IP infringement. 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 - 30 August 2022*

## 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 different enforcement options based on the amount in dispute.

Commercial courts and specific chambers of district courts have the authority to deal with civil proceedings for IP matters including IP infringement matters, except for trade secrets and plant variety protections, which the district courts deal with. Currently, there are five commercial courts in Indonesia: Jakarta, Semarang (Central Java province), Surabaya (East Java province), Medan (North Sumatra province), and Makassar (South Sulawesi province).

Aside from plant variety protection-related disputes, 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.

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 - 30 August 2022*

## 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?

Generally, the remedies for parties who suffer from IP rights infringement are claims for damages and cessation of the unlawful act by the infringer. These claims are to be filed with the commercial courts.

Aside from the above-mentioned avenue, criminal sanctions are also provided for infringements of IP rights. All criminal offences involving IP rights are complaint-based offences. Therefore, the party that suffers such infringement must file a claim to the police department or civil servant investigators from the MOLHR before the case can proceed.

## Trademarks

Article 100 of the Trademarks and Geographical Indications Law sets out criminal sanctions for the infringement of registered trademarks, namely:

- a maximum of five years' imprisonment or a maximum fine of 2 billion rupiahs, or both, for 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;
- a maximum of four years' imprisonment or a maximum fine of 2 billion rupiahs, or both, for 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; and
- a maximum of 10 years' imprisonment or a maximum fine of 5 billion rupiahs, or both, for unlawful use of a mark for types of goods that can cause health and environmental problems or death.



## **Geographical indications**

Criminal sanctions for infringement of geographical indications are outlined in article 101 of the Trademarks and Geographical Indications Law. The sanctions are a maximum of four years' imprisonment or a maximum fine of 2 billion rupiahs, or both, for the unlawful use of a sign that is similar in its entirety or in principle with the registered geographical indication for similar goods or products.

## **Patents**

Article 161 of the Patent Law sets out the criminal sanctions for general patent infringement. The sanctions are a maximum of four years' imprisonment or a maximum fine of 1 billion rupiahs, or both. Article 162 sets forth criminal sanctions for simple patent infringement, namely a maximum of two years' imprisonment or a maximum fine of 500 million rupiahs, or both.

If such patent infringement causes health or environmental problems, it is punishable by a maximum of seven years' imprisonment or a maximum fine of 2 (two) billion rupiahs, or both (article 163(1) of the Patent Law). 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) of the Patent Law).

## **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 sanctions for unlawful acts relating to copyright and related rights, with a minimum imprisonment of one year, a minimum fine of 100 million rupiahs, maximum imprisonment of 10 years, and a maximum fine of 4 billion rupiahs.

## **Layout designs of integrated circuits**

Article 42(1) of the Layout Designs of Integrated Circuit Law regulates that infringement against the right holder's layout design of integrated circuits is punishable by a maximum of three years' imprisonment or a maximum fine of 300 million rupiahs, or both.

## **Trade secrets**

Article 17 of the Trade Secret Law stipulates that infringement of the rights of a trade secret holder is punishable by a maximum of two years' imprisonment or a maximum fine of 300 million rupiahs, or both.

## **Plant variety protections**

Article 71 of the Plant Variety Protection Law stipulates that infringement of the rights of a plant variety protection holder is punishable by a maximum of seven years' imprisonment or a maximum fine of 2.5 billion rupiahs, or both.

No remedy is provided in the administrative stage.

*Law stated - 30 August 2022*

### **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 franchises, from the scope of its regulation.

The Business Competition Supervisory Commission (KPPU) issued Regulation No. 2 of 2009 regarding Guidelines on Exceptions to the Application of the Anti-Monopoly Law in Relation to Agreements Related to IP (KPPU Reg 2/2009). KPPU Reg 2/2009 stipulates that licence agreements related to IP are exempted from the Anti-Monopoly Law if they do not contravene the principles and purposes as set out in articles 2 and 3 of the Anti-Monopoly 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:
  1. safeguard the interests of the public and improve national economic efficiency for the sake of people's welfare;
  2. 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;
  3. prevent monopolistic practices and unfair business competition by business actors; and
  4. create effectiveness and efficiency in business activities.

KPPU Reg 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 - 30 August 2022*

### **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 since 5 September 1997. Indonesia is also a member of the Paris Convention, which allows applicants to claim priority for patent applications from other Paris Convention member states. Moreover, Indonesia has entered into a bilateral 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 using the examination of the corresponding patent examined by the JPO.

*Law stated - 30 August 2022*

### Remedies for deceptive practices

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

Article 9(a) and (d) of Law No. 8 of 1999 (Consumer Protection Law) sets out provisions that prohibit business actors from offering, promoting, or advertising goods or services incorrectly or as if such goods or services have met quality standards, or have a particular style, mode, characteristic, or if a corporation produced such goods or services with a sponsor, approval, or affiliation. In theory, it should be possible to apply these provisions to deceptive practices concerning trademarks. However, the general (preamble) section of the Consumer Protection Law's elucidation stipulates that IP rights violations by business actors do not fall within the scope of the Consumer Protection Law. Consequently, the Consumer Protection Law cannot be used as grounds for seeking remedies against deceptive practices concerning trademarks.

Further, there is no specific provision in the Anti-Monopoly Law regulating remedies for deceptive practices.

*Law stated - 30 August 2022*

### 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 methods or systems that can identify the originality of the author's works and the information code and access code. Article 7(3) of the Copyright Law 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 according 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 unaware of any challenge under competition laws against TPM or DRM protection.

*Law stated - 30 August 2022*

### 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 MOLHR to obtain a compulsory

license. The MOLHR may issue a decree approving the issuance of a compulsory license 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
- the patent resulted from the development of a previously granted patent and cannot be implemented without using another party's patent that is still protected.

*Law stated - 30 August 2022*

## COMPETITION

### Competition legislation

What statutes set out competition law?

Competition law is governed under the Anti-Monopoly Law and its implementing regulation, Government Regulation No. 57 of 2010 regarding the Merger or Consolidation of Business Entities and the Acquisition of Company Shares which Results in Monopolistic Practices and Unfair Business Competition (GR 57/2010).

Indonesia's Business Competition Supervisory Commission (KPPU) has also issued several implementing regulations containing guidance on several Anti-Monopoly Law provisions.

*Law stated - 30 August 2022*

### IP rights in competition legislation

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

The only specific mention of IP rights in the Anti-Monopoly Law is stipulated in article 50(b), which expressly exempts agreements related to IP rights, including licences, patents, trademarks, copyrights, industrial designs, integrated electronic circuits, trade secrets, and agreements related to a franchise from its scope.

*Law stated - 30 August 2022*

### 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 regarding the Recordation of IP Licence Agreements (GR 36/2018) states that an IP licence agreement should not contain any provision that could cause unfair business competition. 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 specified in article 10(4) of GR 36/2018, namely:

- 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 (a 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 license agreement should be examined to determine that it does not contain any provision that may cause unfair business competition. However, in practice, we are unaware that the DGIP is 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, the KPPU has the authority to investigate the competitive effect of conduct related to the licence agreement.

*Law stated - 30 August 2022*

### **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?**

Since 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.

*Law stated - 30 August 2022*

### **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 Reg 2/2009) sets out guidelines on exceptions to the application of the Anti-Monopoly Law concerning IP-related agreements. The guidelines stipulate that the IP-related licence agreements that are exempted 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 business actors may commit; and
  - create effectiveness and efficiency in business activities.

KPPU Reg 2/2009 further stipulates that to be exempted from the scope of the Anti-Monopoly Law, IP-related licences must 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:

- 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 (for the patent licence).

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

*Law stated - 30 August 2022*

### **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 explicitly 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. Additionally, KPPU Reg 2/2009 sets out guidelines under which IP licences can be exempted from the provisions of the Anti-Monopoly Law.

*Law stated - 30 August 2022*

### **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 Copyright Law is silent on the parallel importing of copyrighted works. Without a specific provision on parallel importing, there is no mechanism to prevent grey marketing in the IP sphere.

*Law stated - 30 August 2022*

### **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 Patent Law exempts the parallel importing of pharmaceutical products from its criminal provisions and civil claims.

*Law stated - 30 August 2022*

### **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 and plant variety protections). 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 - 30 August 2022*

## **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 - 30 August 2022*

### **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 (KPPU Reg 3/2019), '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 from any other merger.

*Law stated - 30 August 2022*

### **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 in the Anti-Monopoly Law that deals with challenging a merger involving the transfer or

concentration of IP rights. However, the Anti-Monopoly Law requires the KPPU to be notified of any merger, consolidation, or acquisition involving an asset value or sales value, or both, exceeding a certain threshold no later than 30 days from the date of such merger, consolidation or acquisition.

The thresholds are regulated in article 5(2) of Government Regulation No. 57 of 2010 (GR 57/2010), as follows:

- asset value of 2.5 trillion rupiahs; and
- sales values of 5 trillion rupiahs.

Although the Anti-Monopoly Law and GR 57/2010 only use the term 'shares' in relation to acquisitions, in its Guidance on the Evaluation of Mergers, Consolidations, and Acquisitions, the KPPU says that acquisitions also include, among others, asset transfers and acquisitions of participating interest.

Article 1(18) of KPPU Reg 3/2019 defines assets as all tangible and intangible assets owned by the business actor that are valuable or have an economic value. So, IP rights owned by a business actor are also deemed as assets.

Article 5 of KPPU Reg 3/2019 further stipulates that asset transfers are deemed equivalent to the acquisition of company shares when such transfers:

- result in the transfer of control or control of the asset, or both; and/or
- increase the ability to control a certain market by the acquiring business entity.

If an asset transfer meets the above criteria, such transfer falls within the scope of KPPU supervision and must be notified to the KPPU.

Aside from the above inclusion of IP as an asset, 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.

The KPPU evaluation of a merger, consolidation, or acquisition that meets the above-mentioned thresholds is a two-step process, those being a preliminary and/or thorough evaluation.

The preliminary evaluation is conducted using market concentration analysis. Market concentration is a preliminary indicator to evaluate whether a merger, consolidation or acquisition results in a monopoly and/or unfair business competition. Analysis of changes in market concentration before and after a merger, consolidation or acquisition that is horizontal in nature may be conducted using the Herfindahl-Hirschman Index (HHI) or Concentration Ratio (CRn), or both. In comparison, analysis of a vertical merger, consolidation or acquisition takes into account whether there is any market power or dominance in the upstream or downstream market.

The thorough evaluation will be conducted using the following analysis.

## Entry barriers

Barriers to market entry are costs that are higher than reasonable or other barriers that prevent new business actors from entering the relevant market. This entry barrier provides benefits to existing business actors because it protects the income and profits of these business actors.

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 no dominant business entity results 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; and
- 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 the 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 the 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 advantages enjoyed by customers after the transaction. The efficiency argument may include cost savings, increases in capacity and increases in 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 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.

Aside from the above analysis, the KPPU may also conduct the evaluation using the following analysis:

- policies to increase competitiveness and strengthen national industries: the merger, consolidation or acquisition is conducted in relation to government policy to increase competitiveness, strengthen national industries, or both;
- technology and innovation development: the merger, consolidation or acquisition is conducted to develop technology or to innovate the parties' product;
- protection of micro, small and medium enterprises: the evaluation will consider whether the merger, consolidation or acquisition will have a positive impact on micro, small and medium enterprises;
- impact on workforce: the evaluation will consider whether the merger, consolidation or acquisition will have a positive impact on the workforce or employment, or both, in Indonesia; and
- implementation of laws and regulations: the KPPU will consider whether the merger, consolidation or acquisition is conducted pursuant to laws and regulations.

*Law stated - 30 August 2022*

### **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 remedies that can be proposed are as follows.

- structural remedies: the divestment of assets, shares or other actions that can create business competition; and
- behavioural remedies:
  - 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 the business actor must fulfil. If the KPPU rejects the proposed remedies, it will issue an opinion that monopolistic practice or unfair business competition will result from the acquisition.

*Law stated - 30 August 2022*

## 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 the KPPU's Regulation No. 2 of 2009 (KPPU Reg 2/2009), licence agreements should not contain provisions that may cause unfair business competition.

*Law stated - 30 August 2022*

### 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, suppose the settlement agreement contains a provision that a party will not compete with a patented product, this agreement may be deemed an act of monopolistic practice and unfair business competition as regulated by article 17(2)(b) of the Anti-Monopoly Law. This article stipulates that business actors may be reasonably suspected or deemed to control the production and marketing of goods or services if they cause other business actors to be unable to enter the business competition for the same goods or services.

*Law stated - 30 August 2022*

### 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 - 30 August 2022*

### (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 - 30 August 2022*

### **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?

Although, in general, IP-related agreements are exempted from the scope of the Anti-Monopoly Law, if such agreement incorporates clauses that may be deemed anticompetitive, according to KPPU Reg 2/2009 the said agreement is not exempted from the Anti-Monopoly Law and, therefore, may create liability under the Anti-Monopoly Law.

KPPU Regulation 2/2009 shares some guidance in assessing whether an IP-related agreement contains exclusive dealings provisions, tying, and leveraging that may create unfair business competition, namely in relation to the following provisions:

- 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 always to 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.

*Law stated - 30 August 2022*

### **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 - 30 August 2022*

### **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?

According to KPPU Reg 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 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 holder or licensee has used the patent 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 - 30 August 2022*

## **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. However, the issuance of a compulsory licence is one of the options to remedy violations of competition law.

*Law stated - 30 August 2022*

## 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 - 30 August 2022*

## 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 interests of the public 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 national economy's efficiency and the people's welfare.

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 national economy's efficiency and the people's welfare.

Such argument is also supported by the fact that 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, are exempted from the scope of the Anti-Monopoly Law, as stipulated in article 50(b) of the Anti-Monopoly Law.

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

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

*Law stated - 30 August 2022*

## RECENT CASES AND SANCTIONS

### Recent cases

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

There has been a merger between a prominent ride-hailing company and a leading marketplace company in Indonesia. These two giant technology companies combined their e-commerce, on-demand, payment and other services, in what

was believed to be the biggest combination between start-ups in Asia. It was thought that the merger had the potential to result in unfair business competition. In a press conference, as stipulated in Indonesia's Business Competition Supervisory Commission (KPPU) Letter No. 10/KPPU-PR/II/2022, dated 25 February 2022, the KPPU said that the anticompetitive potential or potential impact of the merger could be in the form of vertical integration, abuse of dominant power, market control or discriminatory practices in the use of online platforms.

Although the two companies have rather extensive IP portfolios, being among the most prominent technology companies in Indonesia, the merger evaluation of their transaction was not IP induced.

*Law stated - 30 August 2022*

## Remedies and sanctions

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

After conducting a thorough evaluation on the impacts on, amongst others, market entry, business competition, unilateral conduct, and anticompetition, the KPPU held that the merger between the two tech companies (as discussed under 'Recent cases') did not violate the Anti-Monopoly Law. Namely, it did not create market concentration. Therefore, no remedies or sanctions were given in relation to the merger.

*Law stated - 30 August 2022*

## 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?

The Indonesian House of Representatives is currently deliberating the draft of a new anti-monopoly law (Draft Anti-Monopoly Law), which would replace the current Anti-Monopoly Law. The Draft Anti-Monopoly Law currently in circulation no longer contains a provision exempting intellectual property agreements, including licences, patents, trademarks, copyrights, industrial designs, layout designs of integrated circuits, and trade secrets. Thus, if the Draft Anti-Monopoly Law is passed in its current form, IP-related agreements will fall within the scope of the Anti-Monopoly Law.

The Draft Anti-Monopoly Law also contains new provisions on the following:

- the scope of business entity subject to the Draft Anti-Monopoly Law;
- reclassification of prohibited agreements and business activities;
- a leniency programme by which Indonesia's Business Competition Supervisory Commission (KPPU) may grant an amnesty or reduce any punishment, or both, for business entities that confess to or report any conduct that contravenes the relevant provisions on prohibited agreements, except in the case of any closed agreements;
- pre-notification, which would be a change from the current post-notification system. The House of Representatives is deliberating the pre-notification system, which would require companies to seek official approval from the KPPU before conducting any merger, consolidation or acquisition of shares or assets, as well as establishing any joint venture company;
- abuse of dominant business and bargaining positions;
- the authority of the KPPU. The Draft Anti-Monopoly Law contemplates enhanced KPPU authorities not only to investigate and adjudicate cases involving alleged monopolistic and unfair business practices, but also to

conduct searches and/or seizures, assess mergers and/or the consolidation of companies, acquisitions of shares and assets, as well as the establishment of any joint ventures, and to draft guidelines for the anti-trust law;

- procedural anti-trust law; and
- criminal sanctions.

In the realm of IP regulation, the House of Representatives is deliberating drafts of a new industrial design law (Draft Industrial Design Law) and a new patent law (Draft Patent Law).

The Draft Industrial Law contains provisions on, among other things, the new novelty criteria to avoid unfair competition and the protection of unregistered short life cycle industrial designs for a maximum of three years.











The Draft Patent Law includes provisions on 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 the implementation of patents by the government for pharmaceutical products that cannot be produced in Indonesia.

It appears that all of the above draft laws are moving toward a better alignment between IP laws and anti-monopoly laws, which would strike a fair balance in business competition.

*Law stated - 30 August 2022*



## Jurisdictions

	<b>China</b>	FenXun Partners
	<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