In June 2016, an Indonesian parliamentary working committee proposed amendments to Indonesia’s principal competition law, Law No. 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition (the “Indonesian Competition Law”).[1] The amendments are expected to be passed by parliament and take effect this year.[2] Indonesia’s antitrust enforcement has principally targeted domestic cartels and transactions, with relatively few cases implicating foreign companies. The proposed amendments would extend the Indonesian Competition Law’s extraterritorial coverage of foreign conduct impacting Indonesia, remove a controversial exemption for intellectual property licensing practices, shift the merger control system from post-merger to pre-merger notification, and delegate substantial new investigative and rulemaking powers to competition authority. If enacted, these revisions may significantly expand the impact of Indonesian competition law on many international commercial practices.

Domestic Focus of Indonesian Antitrust Enforcement

Indonesia's competition law regime emerged from the aftermath of the Asian Financial Crisis and the end of the Suharto period in the late 1990s alongside other economic and financial reforms. The Indonesian Competition Law includes rules prohibiting certain agreements (such as price-fixing and tying), certain commercial conduct (such as monopolization and conspiracy in tenders), and abuse of a dominance position (including rules against cross ownership and merger control rules).[3] Indonesia’s
The principal competition authority is the Indonesian Business Competition Supervisory Commission ("KPPU"), an independent commission with authority to investigate violations, impose fines, and order the business actors to cease and remedy anticompetitive conduct.[4] Although the Indonesian Competition Law incorporates many concepts and principles from other antitrust regimes, there are important differences in the formulation and organization of many substantive rules. Nevertheless, the KPPU has often construed the Indonesian Competition Law in accordance with prevailing international practice, citing decisions and practices of foreign jurisdictions, such as the United States, European Union, Germany, Singapore and Brazil, as persuasive precedents.[5]

From 2000 through 2014, the KPPU initiated 304 enforcement actions under the Indonesian Competition Law.[6] Roughly 80% of these cases, however, involved bid-rigging or other manipulation of tendering processes, and the remaining cases chiefly involved local cartels.[7] While many other Asian competition authorities have visibly intervened in international mergers, penalized international cartels, or scrutinized the commercial practices of globally dominant firms, few KPPU cases have involved foreign parties or their Indonesian subsidiaries. Such cases garner substantial media attention but only account for around 3% of KPPU investigations.[8]

While this may reflect the dynamics and structures of many product markets in Indonesia (including market access restrictions for foreign-controlled firms in some sectors), it also reflects current limitations on the jurisdiction and powers of the KPPU. The proposed amendments may dramatically expand the KPPU’s authority to police anticompetitive conduct by foreign firms both within Indonesia and abroad.

**Significant Features of the Proposed Amendments**

**Extraterritorial Jurisdiction**

The competition laws of many jurisdictions apply extraterritorially to foreign conduct with anticompetitive domestic effects. The current language of the Indonesian Competition Law, however, substantially limits its extraterritorial reach. Its prohibitions apply only to “business actors,” and “business actor” is expressly defined as "any individual or business entity, either incorporated or not incorporated as legal entity, established and domiciled or conducting activities within the jurisdiction of the state of the Republic of Indonesia, either individually or jointly based on agreement, conducting various business activities in the field of economy.” (emphasis added)[9]

Under this definition, foreign entities acting outside Indonesia do not qualify as “business actors” subject to the Indonesian Competition Law.

In the past, the KPPU has asserted jurisdiction over the overseas conduct of foreign firms with Indonesian subsidiaries on the theory that a foreign parent and its controlled Indonesian subsidiary constitute a “single economic entity” and should be treated as a single “business actor.”[10] The KPPU invoked this theory in the Temasek case, further contending that a “single business entity” comprising a foreign company and its Indonesian
subsidaries may be deemed to act within Indonesia either directly or indirectly.\[11\] The KPPU’s decision was upheld on appeal by the Central Jakarta District Court and the Supreme Court of Indonesia.\[12\] However, since judicial precedents are not binding in Indonesia’s civil law system, the KPPU’s reliance on the single-firm doctrine has been challenged in subsequent litigation.\[13\] The proposed amendment would provide the KPPU an explicit basis for asserting extraterritorial jurisdiction.

The proposed amendments would redefine “business actor” as “*any individual or business entity, either incorporated or not incorporated as a legal entity, established and domiciled or conducting activities whether within or outside the jurisdiction of the state of the Republic of Indonesia which has effects on the Indonesian economy, either individually or jointly based on agreement, that conducts various business activities in economic fields.*” (emphasis added)\[14\] This explicit assertion of extraterritorial jurisdiction revision would obviate further reliance on the “single economic entity” doctrine to reach foreign conduct. While this revision raises new questions about the magnitude of domestic impact required to trigger extraterritorial jurisdiction, it equips the KPPU to follow other competition regulators in tackling international cartels impacting Indonesia.

**Leniency**

The proposed amendments would authorize the KPPU to grant full amnesty or reduce the penalties for business actors that disclose their own conduct related to violations of the Indonesian Competition Law involving oligopoly, price fixing, predatory pricing, territorial separation, boycott, cartel, trust, oligopsony, agreement with foreign party which may cause monopolistic practices, or unfair business competition.\[15\] The amendments direct the KPPU to issue implementing regulations for the new leniency policies.\[16\] The KPPU currently has authority to order remedial measures or impose fines of 1 billion to 25 billion rupiah (approximately US$75,000 to US$ 1.9 million), and cooperative defendants tend to receive lower penalties.\[17\] The proposed amendments, however, would explicitly authorize the KPPU to grant amnesty, paving the way for the establishment of a formal antitrust leniency program. The proposed amendments would also increase the maximum penalty for antitrust violations to 30% of the total sales of the respondent business actor during the period of infringement, raising the stakes of Indonesian antitrust and the relative value of amnesty.\[18\] For many competition regulators worldwide, antitrust “leniency” or “amnesty” programs are critical tools for combatting cartels. Schemes among competitors to fix prices, restrict supply, allocate customers or markets, or rig bids are generally secretive, making them difficult for customers or regulators to detect (or prove). Leniency programs disrupt cartels with an upfront offer of material reductions in penalties for the first cartel members that voluntarily disclose the cartel to regulators, cease misconduct, and assist in the investigation of other cartel members. While many government authorities have discretion to reward confessions and assistance with
factors, favorable charging and penalty decisions, the prospects of leniency remain uncertain at the point in time when companies must decide whether to disclose misconduct voluntarily. Cartel leniency programs, in contrast, encourage a race to confess by providing clear assurances that successful leniency applicants will achieve significant benefits, by limiting these benefits to the first successful leniency applicants, and by levying substantial penalties on remaining cartel members that fail to qualify for leniency. Many leniency programs offer full exemptions from penalties for the first successful leniency applicant, with diminishing penalty discounts for subsequent applicants; others, such as the U.S. amnesty system, only guarantee leniency for the first successful candidate.

Significantly, the proposed amendment allows leniency for a wide range of antitrust violations—not limited to horizontal cartels. The KPPU might follow foreign precedents by structuring its leniency policies as a formal amnesty program limited to cartels, while other violations would be subject to more flexible charging principles. At any rate, the amendment gives the KPPU greater discretion to encourage voluntary disclosures of misconduct (and cooperation in investigations).

**Pre-Merger Notification**

Most antitrust laws establish a mandatory, suspensory merger review scheme: covered transactions must be notified to competition regulators in advance and consummation of the transaction must be suspended until the regulator decides to clear, block, or impose remedial conditions on the deal or until the expiration of a waiting period. The current Indonesian Competition Law, in contrast, provides for post-closing reporting of covered transactions to the KPPU “no later than 30 (thirty) days from the date of such merger, consolidation or acquisition.” (emphasis added)\[19\] The KPPU has long advocated the shift to a pre-notification scheme, as pre-merger notification systems avoid the inefficiencies and waste of unwinding consummated deals or improvising retrospective remedies.\[20\] Accordingly, under the proposed amendments “the plan to merge or plan to consolidate entities, plan to acquire shares, plan to acquire assets or plan to form a joint venture as mentioned in Article 28 resulting in the asset value and or selling price thereof exceeding a certain amount, must be notified to the KPPU before the merger or consolidation of entities, share acquisition, asset acquisition, or the formation of joint venture becomes legally effective.” (emphasis added)\[21\] Shifting to a pre-merger notifications scheme would add urgency to Indonesian merger review, as KPPU clearance would become a procedural gating item for closing covered transactions.

**Delegation of Merger Rule-Making Authority to KPPU**

One of the most important amendments may be the delegation to the KPPU of the authority to issue new merger-review rules. Currently, most merger control regulations must be issued and signed by Indonesia’s president\[22\]. Rulemaking authority has already been delegated to the KPPU with respect
The proposed amendments would dramatically expand the KPPU’s rulemaking authority, allowing it to “regulate further concerning merger or consolidation of entities” and “acquisition of shares, acquisition of assets or formation of joint venture” covered by the merger review provisions of the Indonesian Competition Law. The amendments would also empower the KPPU to make “regulations concerning determination on the value of assets and/or revenue and the notification procedure” under the merger control provisions. Significantly, this would enable the KPPU to adjust the merger notification thresholds to capture more international transactions.

**Expansion of KPPU Investigation Powers**

The current text of the Indonesian Competition Law does not currently authorize the KPPU to seek police assistance in compelling defendants, witnesses, or experts to participate in KPPU proceedings. Although a 2010 Memorandum of Understanding between the KPPU and police provides for such assistance, the proposed amendments would codify this arrangement. In addition, the amendments allow the KPPU to request the police to conduct searches and seize evidence in cases where business actors refuse to provide requested evidence.

**Interim Remedial Orders**

Under Article 47 of the Indonesian Competition Law, the KPPU has the authority to impose fines and issue remedial orders in its final decisions. However, the KPPU is not authorized to issue interim orders to suspend challenged conduct. Sanctions only become effective upon the issuance of a final order and exhaustion of any appeals. The draft amendment would empower the Panel of KPPU Commissioners to issue an interim decision to order a temporary suspension of challenged conduct. The amendment does not specify the standards for determining when interim relief is appropriate, so the KPPU might adopt the Indonesian courts’ test of permitting interim relief to prevent irreversible harm.

**Elimination of “Exception” for Intellectual Property Matters**

The complex interplay of antitrust rules and intellectual property rights has given rise to many cutting-edge issues now confronting competition regulators worldwide, such as the licensing of standard-essential patents, failure to disclose relevant patents in standard-setting, and intellectual property licensing as a remedy for anticompetitive effects of mergers. However, most intellectual property licensing practices are currently exempt from the Indonesian Competition Law. Article 50b provides that “contracts related to intellectual property rights such as license, patent, trademark, copyright, industrial product design, integrated electronic series, and trade secrets, and contracts related to franchise” are “exempted from the provisions of this law.” In 2011, the Central Jakarta
The amendments are also expected to empower courts to hear cases related to intellectual property matters with greater discretion to encourage voluntary disclosures of misconduct (and industry cooperation) and to reduce the chances of cartel members being penalized. However, the KPPU is not authorized to issue interim orders to suspend business activities, plan to acquire shares, plan to acquire assets or plan to form a joint venture. Nevertheless, the proposed amendments would authorize the KPPU to seek police assistance in compelling defendants to disclose relevant documentation, a final order and exhaustion of any appeals.

**Repositioning Indonesian Antitrust Risk**

If the proposed amendments are adopted as expected, many commercial practices and transactions involving foreign companies may become subject to the Indonesian Competition Law. If the KPPU expands its active enforcement efforts to match its expanded jurisdiction, then Indonesian antitrust enforcement may pose a greater regulatory risk to multinational companies active in Indonesia and elsewhere in Asia than it has in the past.

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[36] District Court construed this language to bar antitrust liability for conduct involving the enforcement and licensing of patents by a multinational pharmaceutical company.

[37] Paradoxically, Indonesian intellectual property statutes suggest that general competition rules should apply to licensing of trade secrets, industrial designs, and integrated circuits, and that the licensing of patents and trademarks may not harm the Indonesian economy or impede the “capabilities of the Indonesian people to master and develop technology.”

[38] In this vein, the KPPU issued policy guidelines in 2009 suggesting that Article 50b should be narrowly construed to permit the KPPU to challenge anticompetitive practices involving intellectual property in order to achieve the goals of the Indonesian Competition Law. Indonesian courts, however, have not embraced this view. The proposed revisions would delete Article 50b, enabling the KPPU to tackle intellectual property issues more directly.

[39] While this revision raises new questions about the magnitude of domestic impact required to trigger extraterritorial jurisdiction, it equips the KPPU to follow through on its stated goal to increase the share of its cases with an international flavor.

[40] Expansion of KPPU Investigation Powers

The KPPU has long advocated the shift to a pre-notification scheme, as pre-notification of mergers may pose a greater regulatory risk to multinational companies operating in Indonesia. However, such assistance, Memorandum of Understanding between the KPPU and police provides for authorizing the KPPU to seek police assistance in compelling defendants, and applying the merger notification thresholds.

**Rulemaking Authority**

Rulemaking authority has already been delegated to the KPPU with respect to certain issues, such as methodologies for gauging anticompetitive effects of joint ventures and strategic mergers. Nevertheless, the proposed amendments would explicitly authorize the KPPU to adopt new rules and regulations governing the merger review process. KPPU has long advocated the shift to a pre-notification scheme, as pre-notification of mergers may pose a greater regulatory risk to multinational companies operating in Indonesia.

**Pre-Merger Notification**

Significantly, the proposed amendment allows leniency for a wide range of anticompetitive practices, including price-fixing, tying contracts, and applying the merger notification thresholds. Nevertheless, the KPPU is not authorized to issue interim orders to suspend business activities, plan to acquire shares, plan to acquire assets or plan to form a joint venture. Nevertheless, the proposed amendments would authorize the KPPU to seek police assistance in compelling defendants, and applying the merger notification thresholds.

**Significant Features of the Proposed Amendments**

By foreign firms both within Indonesia and abroad. Dramatically expand the KPPU’s authority to police anticompetitive conduct and apply the merger notification thresholds.

**Budgetary and Funding**

KPPU has long advocated the shift to a pre-notification scheme, as pre-notification of mergers may pose a greater regulatory risk to multinational companies operating in Indonesia.

**Supervisory Commission**

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