

Dominance

The regulation of dominant firm conduct
in 40 jurisdictions worldwide

2010

Consulting editors: Thomas Janssens and Thomas Wessely



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Indonesia

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General

1 Legislation

What is the legislation applying specifically to the behaviour of dominant firms?

Competition Law in Indonesia is mainly governed by Law No. 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition (Indonesian Competition Law or ICL). There is, however, other legislation, commonly applied to specific sectors, which also deals with the conduct of dominant companies.

There is one chapter, chapter V, in the ICL that has the title of dominant position. This chapter consists of four articles, namely article 25 (general rule on dominant position), article 26 (interlocking directorship), article 27 (cross ownership) and article 28 (merger acquisition or concentration). Apart from those articles, however, there are other provisions that are commonly governed under the rules on dominant position, fragmented in several different chapters or parts of the ICL. For instance, discriminatory practices, refusal to deal or supply and other practices demonstrating abusive conduct of a dominant company are governed in articles 6, 15 and 19 of the ICL.

Under the ICL, it is article 25 that explicitly forbids abusive conduct by dominant companies. There are, however, other provisions in other chapters of the ICL which have, to some extent, similar rules as set out in article 25. Article 17 of the ICL, for instance, prohibits monopolistic practices by way of controlling production or marketing of particular goods or services. Furthermore, articles 18, 19, 20 and 21 deal with the prohibition of market control. In practice, the Commission for the Supervision of Business Competition (KPPU) has also applied other provisions or articles other than those in chapter V to prohibit anti-competitive practices by dominant companies.

2 Non-dominant to dominant firm

Does the law cover conduct through which a non-dominant company becomes dominant?

Yes. There are several articles in the ICL which may apply to practices which have as their object or effect the creation or establishment of a dominant company. Article 19 and other articles may apply to the anti-competitive conduct of non-dominant companies which have as their object or effect the creation or attainment of a dominant position.

3 Object of legislation

Is the object of the legislation and the underlying standard a strictly economic one or does it protect other interests?

As the legislation on dominant companies' conduct is part of general rules on competition law in Indonesia as laid down in the ICL, the objectives of this legislation are similar to those of the ICL. These objectives are:

- to increase national economic efficiency and the consumer welfare;

- to create a conducive business climate that can guarantee business opportunities for all business actors (including small and medium-sized businesses);
- to prevent monopolistic and or unfair business practices in the marketplace; and
- to create effectiveness and efficiency in doing business activities.

In assessing alleged anti-competitive conduct, the KPPU has increasingly applied economic standards, though in certain cases, it appears to pursue other interests as well, such as the protection of small and medium businesses.

4 Non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

From the language used in the ICL, there are provisions or articles that possibly apply to the unilateral conduct of non-dominant companies. For instance, article 19 forbids business persons from engaging in specified activities [as described in this article, such as discriminatory practices and creation of artificial (strategic) entry barriers] that may lead to monopolistic practice and or unfair competition. Though the article does not explicitly require that this company holds a dominant position, some suggest that the company shall have adequate market power to behave relatively independent from competitors.

5 Sector-specific control

Is dominance regulated according to sector?

Rules on the prohibition of abuse of dominant position as set out in the ICL are generally applied to all sectors of economic activity. Additionally, the government of Indonesia has also issued legislation applicable to specific sectors, as it deems necessary. The telecommunication sector, particularly in the provision of fixed-line network and services, for example, has a long history of monopoly by state-owned companies. Following the liberalisation of this sector through the enactment of Law No. 36 of 1999 on Telecommunication (Telecommunication Law), the Ministry of Communication and Information (MCI) issued Decree No. 33 of 2004, in order to break up the previously concentrated market condition. This decree prohibits a dominant operator from abusing its dominance and cross-subsidising other fixed-line network and basic telecommunication services which are non-dominated and remain in a competitive market.

6 Status of sector-specific provisions

What is the relationship between the sector-specific provisions and the general abuse of dominance legislation?

Under the Indonesian legal system, higher level legislation takes precedence over lower level legislation and specific legislation will take precedence over general legislation. The latter rule applies if the

conflicting pieces of legislation are in the same level of legislation hierarchy. Thus, general rules on abuse of dominant position as laid down in the ICL shall take precedence over sector-specific provisions, provided that there are no laws stipulating the same rules applicable to specific sectors. However, all legislation on competition law is, to the best possible extent, enforced in a mutually complementary fashion.

7 Enforcement record

How frequently is the legislation used in practice?

Article 19 of the ICL is the most frequently applied provision by the KPPU in the examination of alleged anti-competitive conduct through the use (exercise) of market power, followed by articles 17 and 25. Even though the provisions related to abuse of dominance were frequently invoked by companies filing a complaint with the KPPU, only a small percentage led to further investigation and decision. In addition, dominance cases made up only a small percentage of the total cases decided by the KPPU.

8 Economics

What is the role of economics in the application of the dominance provisions? To what extent are economic expert witnesses used in proceedings before the competition authorities and courts?

Economics has played an increasingly important role in the interpretation and application of the dominance rules in Indonesia. In the proceedings before the KPPU, more interested parties have requested or proposed to bring economists as well as employed market surveys in order to support their position or arguments on the case.

9 Scope of application of dominance provisions

To whom do the dominance provisions apply? To what extent do they apply to public entities?

The dominance provisions apply to any natural person or business entity, either incorporated or not incorporated as a legal entity, which is established and domiciled in, or conducts activities in Indonesia, either independently or jointly based on agreement, and engages in various business activities in the economic field. Thus, the provisions apply to individuals, private partnerships, companies, or any other business entities, holding a dominant position. According to the KPPU guidelines on article 51 on monopoly by state-owned companies, state-owned companies granted with monopoly rights shall not abuse or misuse their rights or power. Thus, state-owned companies shall abide by these provisions, in spite of the monopoly rights granted by the government.

It is not clear, at this moment, whether or not these provisions will be applied to public entities. A public entity refers to an entity, body or agency of government (both central and regional) carrying out delegated duties, functions, or power, for the interest of the public. There are views suggesting that when these entities exercise their delegated powers or act under the supervision or instruction of the government or regulations, they shall be excluded from the application of dominance provisions. On the contrary, when they engage in commercial or business activities distinct or unrelated to the genuine power conferred by or duties mandated by applicable regulations or government, these conditions will put them in the position of a business person and therefore all competition rules will apply to these entities.

From empirical data, it is apparent that the KPPU has adopted the view that even government or public entities shall abide by competition law and shall not distort the market nor obstruct the enforcement of competition law, though the KPPU does not have the power to impose sanctions against such entities.

10 Definition of dominance

How is dominance defined?

There are two articles describing the approaches used to establish dominance under the ICL. Article 1 point 4 provides that a dominant position refers to a situation in which a company does not have significant competitors in the relevant market with regard to its acquired market shares or a situation in which a company has the highest position among its competitors in the relevant markets with regard to financial capacity, access to supplies or sales and capability to adjust supply or demand of certain goods or services. In addition, article 25(2) provides that ‘a company [is considered to be] holding a dominant position when it holds 50 per cent or more of market shares of particular goods or services or two or three companies or groups of companies hold 75 per cent or more of market shares of particular goods or services’.

Thus, the ICL has essentially applied two approaches in establishing dominance, from a market share perspective, as set out in article 1 point 4 which is then elaborated in article 25(2), and from other factors indicating dominance (financial capacity, access to supplies or sales and capability to adjust supply or demand), as clarified in article 1 point 4 of the ICL. The KPPU may apply these two approaches separately or simultaneously, depending upon the complexity of the case under investigation or examination.

11 Market definition

What is the test for market definition? Does it differ from that for merger control purposes?

As in other countries, market definition has played a vital role in establishing an abuse of dominant case under the ICL, either to identify the position of the alleged companies in the market concerned or to assess the impact of the alleged conduct to competition.

The ICL defines relevant market as a market related to a certain marketing scope or area (geographical market) for the same, similar or substitutable goods or services (product market). In defining the product market, according to the KPPU’s guidelines on relevant market and case law, the demand-side approach will be employed first followed by supply-side analysis.

In determining the substitutability of products from demand side, the KPPU will use three indicators, notably price, characteristics and intended-use of the products. From supply side, it will assess the ability of potential players to enter the market in determining the scope of the product market, which has been previously defined using the demand-side approach. On the other hand, the KPPU will use, among other things, the companies’ policy regarding marketing area, transportation costs, time needed to transport products, tariff and regulations which limit trade between cities or area in determining the scope of geographical area.

With regard to market definition in a merger case, the ICL does not provide separate provision. In general, the KPPU will normally apply the same approach as it will use when dealing with a dominance case. It has also considered that in a dominance case the market under examination shall be carefully constructed. The alleged dominant company may have exercised its market power for a certain period of time, as may be implied by its power to charge substantially higher prices than if it does not have a dominant position (similar to monopoly price). When this is the case, the market analysis shall take into account such situation so that relevant substitutes will not be excluded from the relevant market.

12 Market-share threshold

Is there a market-share threshold above which a company will be presumed to be dominant?

There are four articles in the ICL setting out a market-share threshold used to presume the existence of dominance or power to control the

market. Under articles 17 and 18, a company or a group of companies holding more than 50 per cent of the market share will be presumed to have control over that particular market. Articles 25 and 27 provide that a company or a group of companies holding 50 per cent or more of the market share will be presumed to be a dominant company. In addition, article 25(2) also provides a presumption that two or more companies or groups of companies holding 75 per cent or more of the market share are considered as dominant companies. Until recently, however, there is no case law that has applied this 75 per cent threshold. Despite the thresholds, in practice, the KPPU has often looked at and considered other factors in determining the existence of dominance, especially the condition of barriers to entry.

13 Collective dominance

Is collective dominance covered by the legislation? If so, how is it defined?

From the expression used in article 25(2), it is quite clear that the ICL wishes to govern a possible abuse of dominant position by two or more companies, which is generally known as joint or collective dominance. According to article 25, a situation of dominance can also be established when two or three companies or groups of companies have acquired 75 per cent or more of the market share. This means that there are two or more companies jointly engaging in abusive conduct through the exercise of their combined market power (dominant position).

14 Dominant purchasers

Does the legislation also apply to dominant purchasers? If so, are there any differences compared with the application of the law to dominant suppliers?

Article 18 of the ICL deals with dominant purchasers while article 17 deals with dominant suppliers. There are, however, other provisions which may also apply to either dominant purchasers or suppliers, depending on the given case at hand. This is due, to some extent, to the detailed provisions in the ICL which govern one type or category of restrictive practices in several different articles (sometimes it is redundant to provide different modes of the same practice).

Abuse in general

15 Definition

How is abuse defined? Does your law follow an effects-based or a form-based approach to identifying anti-competitive conduct?

Dominance provisions in the ICL are governed in several articles, although the main article or provision of dominance is governed in article 25. Thus, in determining how the ICL defines or establishes an abuse of dominance, reference shall be made to the expression used in the individual article. The KPPU has the view that when a provision in the ICL contains expression of 'which may result in monopoly practices or unfair business competition', then such provision shall be applied under the 'effects-based' approach. Otherwise, the provision shall be applied under 'per se prohibition' or 'form-based' approach.

Article 25, as the main provision of dominance, only provides practices considered as abusive without the expression of 'which may result in monopoly practices or unfair business competition'. Thus, some view that the application of this article shall be based on per se prohibition. However, the general approach of the KPPU on dominance cases is that the prohibition shall be based on the effect of the conduct under investigation on the market or competition.

16 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

Yes, article 25 covers practices which have exclusionary as well as exploitative effects. In addition, article 17 has been frequently used by the KPPU to punish exploitative practices conducted by dominant companies while article 19 has been used to catch exclusionary practices.

17 Link between dominance and abuse

What link must be shown between dominance and abuse?

Article 25 essentially provides that a company is prohibited from exercising its dominant position, either directly or indirectly, to engage in specified practices. To establish a violation, it has to be shown that the practice is engaged by companies with dominant position. The conduct or the effect, however, does not have to be in the dominated market. For example, in the *Telkom* case, Telkom was convicted of abusing its dominant position in the local fixed-line network by blocking consumer access to international telecommunication services provided by its competitor, Indosat, which was the incumbent and dominant entity in the market in which Telkom had recently entered.

18 Defences

What defences may be raised to allegations of abuse of dominance? Is it possible to invoke efficiency gains?

Companies may argue that its practices have sound business justification or may create efficiency gains. However, for such a defence to be accepted, companies have to show that the restrictions imposed are no more than necessary.

Specific forms of abuse

19 Price and non-price discrimination

Both price and non-price discrimination can violate article 19(d), which prohibits discriminatory practices against certain companies. Price discrimination may also violate article 15(3), which prohibits agreement regarding price or discount on condition of purchasing other products or not purchasing similar product from competitors. Price discrimination occurs when companies sell similar goods or services with different prices for different buyers. Different prices for different buyers that are justified by differences in costs will not be considered as discrimination. The KPPU will deem a price discrimination practice by dominant companies as abusive when it is likely to distort competition in downstream markets by putting the disfavoured buyer in a disadvantageous position (secondary line injury). In *PT Angkasa Pura I* case, for example, the KPPU held that the setting of different floor lease prices for billboards violated article 19(d) as it led to distortion of competition in the provision of billboard services at Juanda International Airport, by putting the disfavoured billboard operators in a less competitive position. In addition, price discrimination will be deemed abusive if it is intended to exclude competitors (first line injury). In the *Telkom* case, Telkom was found guilty of abusing its dominance, in violation of article 15(3)(a), for charging no instalment or monthly fees to retailers that switched to using Telkom exclusively for telecommunication services. Non-price discrimination occurs when a supplier or producer with substantial market power treats certain buyers differently from other buyers in the same or similar position when trying to get the same facility or goods or services from the supplier or producer. It will be considered as abusive if it lessens or distorts competition.

20 Exploitative prices or terms of supply

Exploitative prices or terms of supply may violate articles 17 and 25. In the *Telkomsel* case, Telkomsel was convicted of violating article 17 because, as the price leader in mobile telecommunication services, the tariff of Telkomsel's mobile call services was considered too high and exploitative and harmed consumers because the pricing strategy had been followed by other operators and therefore led to overall high tariffs in the industry. A comparison to costs of production, price of same products and profitability rate in neighbouring areas or countries were used by the KPPU in this case to conclude that the tariff was excessive. In the *Carrefour Indonesia* case, Carrefour Indonesia was deemed to violate articles 17 and 25 for taking financial advantage from its dominant position by setting trading terms that were considered unreasonable and exploitative.

21 Rebate schemes

Rebates schemes can fall within the scope of article 15 (see question 19). In addition, the practice can also violate articles 19 or 25 if it prevents actual or potential competitors from supplying the same products or prevent consumers from obtaining similar products that are competitive in price or quality. In the *Arta Boga Cemerlang* case, Arta Boga as the distributor of ABC battery was convicted of violating the ICL article 15(3)(b) for introducing an additional 2 per cent discount to wholesalers and retailers who agreed not to sell its competitors' products.

22 Predatory pricing

Predatory pricing is covered by article 20 of the ICL. A price scheme will be deemed as predatory if the selling price of the goods or services is below cost or at a very low selling price, with an intention of excluding competitors or consumers. The KPPU will determine that a below-cost price has occurred by using the *Areeda-Turner* test, average total cost (ATC) test or average avoidable cost (AAC) test. So far the KPPU has not determined which test will be used when reviewing a price scheme, so the choice of test will depend on the characteristic of the case and the availability of relevant data. A price will be considered as very low if the selling price is far lower than the selling price of competing products. Thus a horizontal comparison will be needed.

The KPPU will consider that a below-cost price is intended to exclude competitors (abusive) if it is below average variable cost (AVC). Price below average total cost (ATC) but still above AVC will likely be considered as abusive unless the KPPU thinks that there are reasonable justifications behind the price scheme. Meanwhile, a very low price will be suspected as abusive if the profitability rate for such a price is lower than the current interest rate. The KPPU will also use the above-cost test or limit pricing test to decide whether it is abusive or not.

The ability to recoup losses will also be taken into account. An unreasonably low price will not be considered as predatory if its exclusionary effect will not lead to consumer harm. If an alleged company will not be able to raise prices after its competitors have left the market, it is not likely the KPPU will intervene. For this reason, the KPPU states in its draft guidelines on article 20 that it will employ the recoupment test first before trying to prove the existence of a below-cost or very low selling price. In the recoupment test, the KPPU will review many aspects, among other things, the dominance, barriers to entry and re-entry, relative position of financial strength, price elasticity to demand, capacity excess, trend of market share and relative efficiency.

23 Price squeezes

Price squeezes may be caught by articles 19 or 25 of the ICL if the practices are considered to prevent or hamper companies (potential

or existing competitors) from conducting similar business activities in the relevant markets or limiting the market and the development of technology.

24 Refusals to deal and access to essential facilities

Refusal to deal may constitute an abuse if it has no sound business justification and involves the refusal of granting access to essential facilities or selling or supplying factors of production deemed as key input production or premium input in attracting customers.

25 Exclusive dealing, non-compete provisions and single branding

Exclusive dealing, non-compete provisions or single branding constitute an abuse if they are not supported by efficiency justification and will likely distort competition.

26 Tying and leveraging

Tying and leveraging are abusive. Article 15(2) explicitly prohibits a company from supplying goods or services on condition that buyers must buy other goods or services from it. Meanwhile, article 15(3)(b) prohibits suppliers from imposing a price or discount that requires buyers to buy other goods or services from the suppliers.

27 Limiting production, markets or technical development

Limiting production, markets or technical development for maximising profits may constitute an abuse. These kinds of business policies may fall within the scope of articles 17 or 25 when conducted by a monopolist (dominant company) in the provision of certain goods or services that derives its monopoly position from a government concession or owing to the implementation of a statute. The KPPU would consider such practice as abusive because the monopoly right has deprived consumers of their choice to buy from sources other than the monopoly rightholder. Companies in this position have an obligation that its business aim of increasing profits is not achieved by exploiting limited consumer choice. In the context of the exploitation of intellectual property rights (IPRs), the limitation of production, markets or technical development can be considered as abusive if the limitation is likely to hamper innovation and make the development of products becomes insufficient (see question 28).

28 Abuse of intellectual property rights

The exploitation of IPRs is subject to exemption from the ICL according to the provision set out in article 50(b). However, the KPPU states in its guidelines on this article that it will not consider that the exemption laid down in the article is absolute, which means that an exploitation of IPRs is subject to review by the KPPU if it considers that, among other things, the IPR is an essential facility and if the licensing agreement with regard to the exploitation of the IPRs clearly contains anti-competitive clauses. The exploitation of IPRs will be considered abusive when it substantially has an adverse effect on competition and therefore causes harm to consumers. An anti-competitive effect is deemed to emerge when the exploitation of the IPRs creates a situation that is the opposite of the underlying reasons behind the adoption of legislation that protects IPRs, which are to encourage creativity and innovation in technology, science and trade. Thus the KPPU will likely deem that the exploitation of IPRs is abusive when it discourages innovation and restricts the development of new products.

29 Abuse of government process

There is no provision in the ICL that specifically mentions this issue and there is also no precedent. In general, however, the misuse of administrative or judicial procedures can fall within the scope of article 19 or 25 if the practices can be proved as having the intention of preventing or restricting competition.

30 'Structural abuses' – mergers and acquisitions as exclusionary practices

Abuse through mergers and acquisitions (mergers) can be challenged by applying article 28 of the ICL, which prohibits mergers or share acquisitions that may lead to anti-competitive effects. If a merger is found to be anti-competitive under this provision, the KPPU can terminate the merger agreement. As the relevant government regulation required by the ICL for this article has not been issued yet, article 28 is still unenforceable. Despite this, the KPPU can and has used other articles in the ICL, when possible, to control mergers. Article 14, which prohibits vertical integration, can be used to prohibit mergers involving companies at different levels of production that are intended to control the production of one or several products.

Article 27 can be used to prohibit mergers from creating majority shareholders in several companies resulting in a company having more than 50 per cent market share or two or more companies having more than 75 per cent of the market share. In the *Temasek* case, for example, the KPPU ordered *Temasek* to sell its shares in either Telkomsel or Indosat because the possession of control by *Temasek* through its subsidiaries in both companies lessened competition and resulted in high mobile phone tariffs. In a recent case, the KPPU for the first time used article 17 to catch the acquisition by Carrefour Indonesia of Alfa Supermarket. It decided that the acquisition of Alfa Supermarket strengthened Carrefour Indonesia's market power which it abused in the form of exploiting its suppliers. The KPPU ordered Carrefour Indonesia to sell its shares in Alfa Supermarket to restore competition. This case is still awaiting a court decision after Carrefour Indonesia filed an appeal to the district court.

The government regulation is expected to be issued in early 2010. Following the adoption of this legislation, mergers will be more likely to be subject to the provisions set out under article 28. However, it is possible that other articles will also be used when certain mergers escape article 28.

31 Other types of abuse

Provisions in articles 17, 19 and 25 are formulated in relatively broad terms so that numerous forms of conduct can fall under these articles. In determining that abusive practices have occurred, the KPPU will mainly focus on consumers' interest. Even the possession of a monopoly right will not release a company from the requirement to make sure that its products are produced in sufficient quantities and are of sufficient quality to fulfil consumers' needs. In the *Angkasa Pura I* case, for example, the KPPU held that *Angkasa Pura I* was guilty of violating article 17 because as the company that has the monopoly right from the government to manage the Hasanuddin airport, Makassar, North Sulawesi, it did not give optimal services and security as obliged by law when providing cargo services. In *Adyha Tirta Batam*, the KPPU convicted *Adyha*, as the only company with the right to exploit water sources and supply clean water to consumers in Batam Island, of violating article 17 for stopping or limiting the installation of water supplies for new consumers until the local government increased the tariff as it had requested.

Enforcement proceedings

32 Prohibition of abusive practices

Is there a directly applicable prohibition of abusive practices or does the law only empower the regulatory authorities to take remedial actions against companies abusing their dominant position?

The ICL only empowers the KPPU to take remedial actions. The ICL does not mention possible remedial action by private entities. There is, however, a view suggesting that it is possible that private entities pursue such action by applying other rules or legislation.

33 Enforcement authorities

Which authorities are responsible for enforcement and what powers of investigation do they have?

The KPPU is the sole authority responsible for the enforcement of the ICL regarding administrative proceedings. To enforce the law, the KPPU can initiate investigations based on complaints or its own initiative, summon businesses and individuals to be heard before the KPPU, obtain information from the government officials, subpoena documents and request information required for an investigation. In the case of refusal, the KPPU may ask the police or civil investigators to forcibly bring in an executive of a company, a witness or an expert that does not respond to the KPPU's summons.

A case may turn into a criminal case if the defendants do not cooperate during the KPPU's investigation process, for example, by refusing to provide documents required by the KPPU, or they do not comply with the KPPU's legally binding decision. Criminal cases will be prosecuted by state attorneys before the district court. The KPPU has no power to investigate or decide on criminal cases. There is view, however, suggesting that the KPPU may cooperate with criminal investigators, or vice versa, in dealing with an alleged criminal violation of the ICL.

34 Sanctions and remedies

What sanctions and remedies may they impose?

The KPPU may:

- impose fines on a company ranging from a minimum of 1 billion rupiahs to a maximum of 25 billion rupiahs. Several companies, such as PricewaterhouseCoopers and Carrefour Indonesia, have received 25 million rupiah fines for their violation of the law;
- order the companies concerned to end the practices identified as abusive and terminate any abusive contractual agreement;
- order structural remedies when it considers that the structure was the root of the problem. In the *Carrefour* case, for example, the KPPU ordered Carrefour Indonesia to sell its shares in Alfa Supermarket because the exploitative behaviour it had conducted was caused by the strengthening of its dominant position following the acquisition of Alfa Supermarket; and
- award damages to companies or individuals harmed by anti-competitive conduct.

In the case of a criminal conviction, a company may be fined between 5 billion rupiahs and 100 billion rupiahs, or the executives may be sentenced to a maximum of six months' imprisonment. An additional sanction may be imposed in the form of the revocation of the company's business licence, a prohibition on an individual becoming a director or commissioner in a company for two to five years and an order to end activities that cause damage to other parties. So far, no criminal proceedings have been initiated.

35 Impact on contracts

What are the consequences of an infringement for the validity of contracts entered into by dominant companies?

A contract entered into by dominant companies is not automatically void when there is a violation related to the contract. A contract or a clause in a contract is void if the KPPU, in its decision, uses its authority to terminate the contract or clause due to its anti-competitive effect.

36 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or authority to order a dominant firm to grant access (to infrastructure or technology), supply goods or services or conclude a contract?

The ICL does not contain provisions on the possibility of private enforcement.

The KPPU can order companies to stop practices that constitute an abuse. In practice, it can order remedies that are considered necessary to restore competition in the relevant market by ordering the convicted dominant company to grant access to its infrastructure, give non-discriminatory terms in the supply of goods or services or even to conclude a contract in fair and non-discriminatory terms. In the *Telkom* case, for example, the KPPU ordered Telkom to grant access to consumers that wanted to use its rivals' international telecommunication services through its local fixed-line networks to restore competition.

37 Availability of damages

Do companies harmed by abusive practices have a claim for damages?

Under the ICL, the KPPU can award damages. Companies or individuals harmed by abusive practices can seek damages before the KPPU by filing a complaint showing that abuse has occurred and propose a damages claim in the complaint report. At this time, there have been no damages claims related to abuses of dominant positions granted by the KPPU. In the *EMI* case, however, the KPPU awarded damages to Aquarius Musikindo of approximately 3.8 billion rupiahs for EMI's violation of article 24, which prohibits conspiracies to obtain the confidential information of rival companies.

According to the new Commission Regulation on the Case Handling Process before the KPPU, which will be adopted in early 2010, parties that seek damages before the KPPU must not only prove the injury but also to establish the violation. So when such a claim is made before it, the KPPU will not act to prove the violation; this will rest with the plaintiff. The proceedings, therefore, will be more like a private litigation but under the KPPU's roof. Companies may also seek damages in the courts through civil action if there has been a binding KPPU decision. This kind of decision can be used as initial evidence for damages in court. However, such cases are rare and, to date, none have succeeded.

38 Recent enforcement action

What is the most recent high-profile dominance case?

The most recent high-profile case is the *Carrefour Indonesia* case. See questions 20 and 30.

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