Draft Amendment of The Anti-Monopoly Law: What Will Change?

On 23 September 2014, the House of Representatives added a draft amendment to Law No 5 of 1999 on Prohibitions of Monopolistic Practices or Unfair Business Competition Law (“Anti-Monopoly Law”) to its list of draft laws to be discussed by the newly sworn in members of the House of Representatives. The following is a summary of the changes to the Anti-Monopoly Law that are being proposed by this draft amendment (“New Draft”). New proposals may be added and the current proposals may be modified significantly or dropped completely by the House of Representatives. However, as they stand, they do represent a significant move to align the Anti-Monopoly Law with international practices. For instance, a switch from post-closing to pre-closing merger review would mean that Indonesia will follow the practice of the vast majority of countries. Likewise, the New Draft will introduce leniency procedure in cartel actions, something that has long been adopted by leading jurisdictions that have anti-trust laws.

Business Actors

The New Draft expands the definition of business actors so it does not only cover those who engage in business activities within Indonesia but also covers those who engage in business activities outside Indonesia that affect the Indonesian economy.

Sanctions

One of the significant changes in relation to sanctions is that the New Draft abolishes all criminal sanctions for violations. On the other hand, the maximum amount of fines is increased to IDR500 billion from IDR25 billion in the current Anti-Monopoly Law.

Further, the New Draft introduces more systematic administrative sanctions. For prohibited agreements, the sanction is cancellation of the agreement. For prohibited actions, the sanction is order to cease from the actions. For abuse of dominant position and prohibited mergers, the sanction is order to cease the abusive conducts and winding up the mergers.

Damages are still possible for each type of violation.

Repeated violations will get additional sanctions in the form of recommendation for the relevant government agencies to revoke the business license and a publication of the business actors to be in a black list.
Merger Control

The New Draft includes acquisitions of assets and formations of joint venture that meet certain criteria for mandatory notification. The current Anti-Monopoly Law only covers mergers, consolidations and acquisition of shares.

Further, the New Draft stipulates mandatory pre-completion notification and abolishes mandatory post-completion notification.

The New Draft stipulates that KPPU must review a merger notification within 21 working days.

The Business Competition Supervisory Commission (KPPU)

The New Draft authorizes KPPU to issue injunctions based on agreements or conducts that are alleged to violate the Anti-Monopoly Law. The injunction is stipulated in an interlocutory decision issued by a commissioners panel.

The New Draft specifically authorizes KPPU to reject proposed mergers and acquisitions if the KPPU's review shows that the mergers and acquisitions have adverse competition effects.

The New Draft also specifies the Commissioners of KPPU will only be nine persons including one chairman and one vice chairman. The chairman and vice chairman are determined by the House of Representatives based on majority votes.

There are more details of the selection procedures, requirements, prohibitions and replacement of commissioners, meeting quorum and KPPU overall organization structure in the New Draft.

Confidentiality

The New Draft provides a specific chapter of confidentiality that stipulates commissioners and all KPPU employees must not disclose any confidential information they receive in doing their jobs. Any violation will be sanctioned according to laws and regulations.

Case Handling Procedures

The New Draft provides details of case handling procedures, i.e., complaint receipt, clarification, investigation, hearing, deliberation, decision announcement, decision implementation, objection and cassation.

Some highlights of the case handling procedures under the New Draft are as follows:

- Leniency: KPPU may grant amnesty or reduced punishment to business actors that admit or report a violation. KPPU will further regulate the procedures.

- Change of behavior: KPPU may consider imposing a stipulation of change of behavior if a reported party accepts the allegation by
investigators in the first hearing stage. There will be no further hearing in those cases.

- Decision implementation: business actors that do not implement a final and binding KPPU decision will be charged with a criminal violation. If the implementation is to pay fines, it will be handled by the State Receivables Office.

- Objections and cassation: Objections to KPPU decisions must be submitted to Commercial Courts after the business actors pay 50% of the amount of fines. The Commercial Courts must decide on an objection within 45 working days. The Supreme Court must decide on a cassation within 60 working days.