

GUIDANCE TO IMPLEMENT PROVISIONS IN ARTICLE 50 Letter b OF LAW NO. 5/1999 ON ANTI MONOPOLY AND UNSOUND BUSINESS COMPETITION WITH REGARD TO FRANCHISE-RELATED AGREE- MENTS

(Decision of the Business Competition Supervisory Council No. 57/KPPU/Kep/III/2009
dated March 12, 2009)

THE BUSINESS COMPETITION
SUPERVISORY COMMISSION

Considering :

- a. that to prevent misinterpretation and create legal certainty in the implementation of Article 50 Letter b of Law No. 5/1999 on Anti Monopoly and Unsound Business Competition with regard to franchise-related agreements, guidance to implement provisions in Article 50 letter b is needed;
- b. that pursuant to Article 35 letter f of Law No. 5/1999 on Anti Monopoly and Unsound Business Competition, the Business Competition Supervisory Commission is tasked with drawing up guidance and/or publication related to Law No.5/1999 on Anti Monopoly and Unsound Business Competition;
- c. that in consideration of the matters in letters a and b, it is necessary to stipulate a Decision of the Business Competition Supervisory Council on Guidance to Implement Provisions in Article 50 letter b of Law No. 5/1999 on Anti Monopoly and Unsound Business Competition with regard to franchise-related agreements;

In view of :

1. Law No. 5/1999 (*BN No. 6288 pages 1A-7A and so on*) on Anti Monopoly and Unsound Business Competition (Statute Book of 1999 No. 33; Supplement to Statute Book No. 3817);
2. Presidential Decree No. 75/1999 (*BN No. 6373 pages*

2A-4A) dated July 8, 1999 on Business Competition Supervisory Council;

3. Presidential Decree No. 59/P/2006;
4. Presidential Regulation No. 80/2008 on Amendment to Presidential Decree No. 75/1999 on the Business Competition Supervisory Council;
5. Decision of the Business Competition Supervisory Council No. 160/Kep/KPPU/VIII/2007 on the Secretariat of the Business Competition Supervisory Council;
6. Decision of the Business Competition Supervisory Council No. 5/KEP/KPPU/I/2009 on the Appointment of Chairman and Deputy Chairman of the Business Competition Supervisory Council;

DECIDES :

To stipulate :

DECISION OF THE BUSINESS COMPETITION SUPERVISORY COUNCIL ON GUIDANCE TO IMPLEMENT PROVISIONS IN ARTICLE 50 LETTER b ON EXCEPTION IN THE APPLICATION OF LAW NO. 5/1999 ON ANTI MONOPOLY AND UNSOUND BUSINESS COMPETITION TO FRANCHISE-RELATED AGREEMENTS.

FIRST :

Guidance to implement provisions in Article 50 letter b of Law No. 5/1999 on Anti Monopoly and Unsound Business Competition serves as guidance for :

Business agents and parties having interests in understanding provisions in Article 50 letter b on exception in the application of Law No. 5/1999 to the franchise-related agreements of the Business Competition Supervisory Commission (KPPU) in performing its duties and authority as referred to in Article 35 and Article 36 of Law No. 5/1999 adj. Article 4 and Article 5 of Presidential Decree No. 75/1999 on the Business Competition Supervisory Commission; and

SECOND :

Guidance to implement provisions in Article 50 letter b on exception in the application of Law No. 5/1999 on Anti Monopoly and Unsound Business Competition as referred to in the FIRST Dictum is contained in the attachment to and is an integral part of this Decision of the Business Competition Supervisory Commission.

Stipulated in Jakarta

on March 12, 2009

THE BUSINESS COMPETITION

SUPERVISORY COMMISSION

CHAIRMAN,

DR. Ir. Benny Pasaribu, M.Ec

CHAPTER I

Background

A. Background

Franchise business in Indonesia has grown rapidly in various fields, including fast food, consulting services, minimarket, health services, recreation and amusement and educational system. The development of franchise business is inevitable due to rapid economic growth in the era of globalization. In response to the rapid growth of franchise business, the Government

is aware of the need to give a moving space to the development of franchise to allow the public to take active part in encouraging economic growth. Therefore, Law No. 5/1999 on Anti Monopoly and Unsound Business Competition gives exception in the application of the law to franchise-related agreements, as provided for in Article 50 letter b.

Pursuant to Article 1 point 1 of Government Regulation No. 42/2007 on Franchise, franchise is defined as : "the special right of an individual or corporate body to a business system which has typical business characteristics to market goods and/or services which have proven successful and can be taken advantage of and/or made use of by other party based on a franchise agreement."

In principle, the definition is different from that specified in the previous government regulation, namely Government Regulation No. 16/1997 on Franchise which has been revoked under Government Regulation No. 42/2008 on Franchise. Pursuant to Article 1 point 1 of Government Regulation No. 16/1997 on Franchise Business, franchise is defined as "an affiliation in which one of the parties is given the right to benefit from and/or make use of intellectual property right or innovation or typical business characteristics owned by other party by giving royalties based on the conditions set by the other party, to supply and/or sell goods and/or services". Viewed from the focus of relations between the franchisee and the franchisor that arise after affiliation, the definition of franchise in Government Regulation No. 16/1997 seems to be more relevant.

In running its business the franchisee uses a business system given by the franchisor based on an agreement. The agreement between the franchisee and the franchisor contains the rights and obligations

of respective parties based on the agreement they have made. The freedom of contract is one of the fundamentals that must be adhered to by respective parties.

However, since a franchise business is a vertical marketing system in which the franchisor is ready to hand all of its franchise business systems to the franchisee, the franchise agreement also covers a license agreement which is one of the types of intellectual property rights (HKI).

Law No. 5/1999 on Anti Monopoly and Unsound Business Competition gives an exception not to apply its provisions to franchise-related agreements as specified in Article 50 letter b. Those excepted from provisions in Article 50 letter b of Law No. 5/1999 include agreements related to intellectual property rights particularly with regard to licenses.

But we must realize that in practice there are franchise-related agreements that may lead to monopoly and/or unsound business competition. Of course, such condition does not belong to the category as referred to in Article 50 letter b. Realizing that there may be franchise-related agreements leading to monopoly and unsound business competition, exceptional provisions in Article 50 letter b of Law No. 5/1999 on Anti Monopoly and Unsound Business Competition need to be applied carefully and wisely so that they will not deviate from the aim of enacting Law No. 5/1999 as meant in Article 3 to create a conducive business climate, among others. As such, agreements excepted from the provisions are those dealing with franchise systems and transfer of licenses from the franchisor to the franchisee. The agreements that may lead to monopoly and unsound business competition practices do not belong to those excepted though they are related to franchise.

Therefore, if franchise-related agreements carry elements that may lead to monopoly and unsound business practices, provisions in Law No. 5/1999 can constantly be applied to the business agents signing the agreements.

In principle, the application of provisions in Law No. 5/1999 is in line with provisions in Article 36 paragraph (1) of Law No. 20/2008 on Micro Small, and Medium Businesses stipulating that in establishing the partnership as referred to in Article 26, the parties have equal legal position and must adhere to the Indonesian law. Article 26 among others deals with partnership under franchise pattern (Article 26 letter c).

Referred to as being subject to the Indonesian law in the business field is Law No. 5/1999 on Anti Monopoly. In order not to misconstrue the application of provisions in Article 50 letter b of Law No. 5/1999, the Commission issues a decision on guidance to implement provisions in Article 50 letter b on exception in the application of Law No. 5/1999 on Anti Monopoly and Unsound Business Competition to franchise-related agreements.

B. The Aim of Making Guidance

1. Implementing provisions in Article 35 letter f of Law No. 5/1999 stipulating that the Business Competition Supervisory Commission is tasked among others with drawing up guidance and/or publication related to Law No. 5/1999.
2. Giving guidance to members of the Business Competition Supervisory Commission so that they will have common vision and understanding in implementing provisions in Article 50 letter b of Law No. 5/1999.

3. Giving clarifications and explanations to franchisors and franchisees as well as interested parties in understanding provisions in Article 50 letter b of Law No. 5/1999 so that they will be careful in formulating any agreement related to franchise so as not to create monopoly and unsound business competition because if that is the case provisions in Law No. 5/1999 can be applied.

C. Materials of Guidance

Guidance to implement provisions in Article 50 letter b on exception in the application of Law No. 5/1999 on Anti Monopoly and Unsound Business Competition is drawn up by observing the background, philosophy and aim of enacting Law No. 5/1999 as specified in Article 2 and Article 3 which read:

Article 2

In carrying out their business activities, business agents in Indonesia shall adhere to economic democracy by observing the balance between their interests and public interests.

Article 3

The aim of enacting this law is to :

- a. maintain public interests and increase national economic efficiency as part of efforts to promote the people's welfare;
- b. create a conducive business climate by controlling sound business competition to ensure equal business opportunities for large-, medium-and small-scale business agents;
- c. prevent monopoly and/or unsound business competition created by business agents; and

- d. create effectiveness and efficiency in carrying out business activities.

In addition, this guidance is also drawn up by adhering to other relevant laws, including Law No. 20/2008 on Micro Small and Medium Businesses and Government Regulation No. 42/2007 on Franchise.

D. Systematical Order

This guidance to implement Article 50 letter b is drawn up based on the systematical order as follows:

CHAPTER I Introduction

CHAPTER II Understanding of Franchise-Related

Agreement Based on Article 50 Letter B

- A. Definition of Agreement
- B. Definition of Franchise
- C. Terms of Franchise Agreement
- D. Elements of Article 50 letter b, particularly those concerning franchise-related agreement

CHAPTER III The Application of Article 50 Letter B

Particularly Those Concerning Franchise-Related Agreement

CHAPTER IV Examples of Cases

CHAPTER V Conclusion

A. Definition of Agreement

The definition of agreement in relation to Law No. 5/1999 on Anti Monopoly and Unsound Business Competition shall constantly refer to provisions in Article 1 point 7 of the law, which reads as follows:

"Agreement is an act of one or more business agents to bind themselves with the other one or more business agents under whatever name, either in writing or not."

In addition to referring to provisions in Article 1 point 7, the principles of agreement specified in Article 1320 and 1338 of the Civil Code must also be observed in making any agreement.

B. Definition of Franchise

The definition of franchise in this Guidance juridically refers to the definition of franchise specified in Article 1 point 1 of Government Regulation No. 42/2007 on Franchise.

Pursuant to Article 1 point 1 of Government Regulation No. 42/2007 on Franchise, franchise is defined as: the special rights of an individual or corporate body to a business system with typical business characteristics to market goods and/or services which have proven successful and can be taken advantage and/or made use of by other party based on a franchise agreement.

The definition of franchise covers elements as follows :

- a. the special rights of an individual or corporate body;
- b. the business system with typical characteristics to market goods and/or services and the system has proven successful; and
- c. the business system can be taken advantage and/or made use of by other party (franchisee) based on an agreement.

It is worth noting that under the definition a corporate body does not necessarily take the form of legal entity, much less Indonesian legal entity.

Article 3 of Government Regulation No. 42/2007 on Franchise stipulates that franchise must meet the following criteria:

- a. having typical business characteristics;
- b. having proven profitable;

- c. having written standards of services and goods and/or services offered;
- d. easily teachable and applicable;
- e. sustained support; and
- f. registered intellectual property rights.

Each of the criteria in the Elucidation of Article 3 is explained as follows:

Letter a

Referred to as typical business characteristics are a business which has advantage or distinction which can not easily be imitated or compared with other similar business, and makes consumers always look for the said typical characteristics. For instance, management system, sales and service method, or layout or distribution method which constitutes the special characteristics of franchisor.

Letter b

Referred to as having proven profitable is the experience of the franchisor for more than 5 (five) years and its business strategies to deal with problems in running its business as can be observed from the continuity and development of its profitable business.

Letter c

Referred to as written standards of services, and goods and/or services offered are written standards designed to enable the franchisee to carry out its business under clear and equal framework (standard operational procedure)

Letter d

Referred to as easily teachable and applicable is easily applicable so that the franchisee which has no experience or knowledge of similar business can

implement

implement it properly according to operational and managerial guidance provided by the franchisor.

Letter e

Referred to as sustained support is continuous support from the franchisor to the franchisee such as operational guidance, training and promotion.

Letter f

Referred to as registered intellectual property rights are those related to businesses such as trade mark, copy right, patent and trade secrecy which have been registered and have certificates or are in the process of being registered with the authorized agency.

C. Terms of Franchise Agreement

As described previously, the franchise referred to herein is franchise as provided for in Article 1 point 1 of Government Regulation No. 42/2007 on Franchise, namely the special right possessed by an individual or corporate body to a business system which has typical business characteristics to market goods and/or services which have proven successful and can be taken advantage and/or made use of by other party based on a franchise agreement.

In a franchise agreement, the franchisor usually sets various conditions to the franchisee aimed at safeguarding the typical business characteristics, the standards of services, and goods and/or services marketed. Such conditions are usually designed to safeguard the intellectual property rights and the franchise concept themselves so that they can be excepted from the application of Law No.5/1999. After all, in practice, various conditions of franchise agreement often carry clauses which can impede or limit

franchisees in carrying out their businesses, thereby having the potential to create monopoly and unsound business competition. In the event of such conditions, the franchise agreements are not excepted from the application of Law No. 5/1999.

In line with the aim of enacting Law No. 5/1999, the development of a conducive business climate and the creation of business opportunities for micro, small and medium businesses also serve as consideration in enacting Law No. 20/2008 on Micro, Small and Medium Businesses.

Partnership in the form of micro, small and medium businesses under a franchise scheme is boosted through Law No.20/2008 on Micro, Small, and Medium Businesses. Article 7 paragraph (1) of the Law stipulates that the Government and Regional Governments shall encourage a business climate by enacting laws and regulations covering the following aspects:

- a. funding;
- b. infrastructures and facilities;
- c. business information;
- d. partnership;
- e. business license;
- f. business opportunity;
- g. trade promotion; and
- h. institutional support.

The aspect of partnership in Article 11 letters f and g of the Law is designed to :

- a. encourage the creation of market structure capable of ensuring sound business competition to protect consumers;
- b. prevent market control and business concentration by a certain individual or group which will adversely affect micro, small and medium businesses.

In the elucidation of Article 11 letter g, market control and business concentration must be prevented so as not to adversely affect micro, small and medium businesses. Provisions on franchise agreement serving as a basis for the realization of franchise business are provided for in Article 4 to Article 6 of Government Regulation No. 42/2007 on Franchise and Article 26 letter c and Article 29 of Law No. 20/2008 on Micro, Small and Medium Businesses.

1. Article 4 stipulates that:

- (1) Franchise shall be carried out based on a written agreement between the franchisor and the franchisee by observing the Indonesian law.
- (2) If the agreement as referred to in paragraph (1) is written in a foreign language, it shall be translated into Indonesian language.

2. Article 5 stipulates that any franchise agreement shall at least carry provisions on :

- a. names and addresses of parties;
- b. type of intellectual property right;
- c. business activity;
- d. rights and obligations of parties;
- e. assistance, facilities, operational guidance, training and marketing provided by the franchisor to the franchisee;
- f. business area;
- g. period of agreement;
- h. procedure of paying franchise fees;
- i. ownership, change in ownership, and right of beneficiaries;
- j. settlement of dispute; and
- k. procedures of extending, terminating and severing agreements.

3. Article 6 stipulates that:

- (1) Franchise agreement can carry clauses granting the right to the franchisee to appoint other franchisee.
- (2) The franchisee granted the right to appoint other franchisee shall own and operate at least 1 (one) franchise business site himself/herself.

4. Article 26 letter c of Law No. 20/2008 on Micro, Small and Medium Businesses stipulates :

Article 26

Partnership shall be carried out under the following schemes:

- a. nucleous-plasm;
- b. subcontract;
- c. franchise;
- d. common trading;
- e. distributor and sales agent; and
- f. other models of partnership, such as profit sharing, operational cooperation, joint venture, and outsourcing.

5. Article 29 of Law No. 20/2008 on Micro, Small and Medium Businesses related to franchise stipulates:

- (1) Large businesses expanding their businesses through franchise as referred to in Article 26 letter c shall give a chance and priority to micro, small and medium businesses which have capability.
- (2) Franchisors and franchisees shall give priority to the use of locally-made goods and/or materials, provided that they meet the quality standards of goods and services made available and/or sold based on a franchise agreement.
- (3) Franchisors shall provide guidance in the form of training, operational management, marketing, research and development to franchisees in a sustainable way.

The use of locally-made products is set forth not only in Article 29 paragraph (2) of Law No. 20/2008 but also in Article 9 of Government Regulation No. 42/2007 on Franchise stipulating that:

- (1) Franchisors and franchisees shall give priority to the use of locally-made goods and/or services, provided that they meet the quality standards of goods and/or services set in writing by the franchisors.
- (2) Franchisors shall cooperate with local small and medium entrepreneurs as franchisees or suppliers of goods and/or services, provided that they meet conditions set by the franchisors.

In an effort to empower micro, small and medium businesses and encourage the use of locally-made products, the application of Article 50 letter b of Law No. 5/1999 particularly on exception to franchise-related agreements, shall constantly adhere to the principles of anti monopoly and unsound business competition, so as to ensure business opportunities for all business agents, and create a conducive business climate as guaranteed by Law No. 5/1999. The principles are reasserted in Article 4 paragraph (1) of Government Regulation No. 42/ 2007 on Franchise stipulating that : "franchise shall be carried out based on a written agreement between the franchisor and the franchisee by adhering to the Indonesian law". As such, franchise business activities shall not violate the Indonesian law, including Law No. 5/1999 on Anti Monopoly and Unsound Business Competition.

D. The Elements of Article 50 letter b, Particularly on Franchise-Related Agreements

The elements of Article 50 letter b particularly on franchise-related agreements, cover :

1. Agreement

As described previously, any agreement shall refer to provisions in Article 1 point 7 of Law No. 5/1999 on Anti Monopoly and Unsound Business Competition stipulating that : an agreement is an act taken by one or more business agents to bind themselves to one or more other business agents under whatever name, either written or not written.

The principles of making an agreement shall refer to provisions in Articles 1320 and 1338 of the Civil Code.

2. Related to

The phrase "related to" must be evidenced by the fact that the agreement made by the franchisor and franchisee really meets the criteria of franchise as provided for in the law.

The said law is :

1. Law No. 5/1999 on Anti Monopoly and Unsound Business Competition;
2. Law No. 20/2008 on Micro, Small and Medium Businesses (vide Article 26 letter c, Article 29, Article 35, Article 36 paragraph (1), Article 39 paragraphs (1) and (2), and Article 40);
3. Government Regulation No. 42/2007 on Franchise.

3. Franchise

The definition of franchise, criteria of franchise, compulsory clauses of franchise and every thing related to franchise shall refer to Government Regulation No. 42/2007 on Franchise. Article 1 point 1 defines franchise as follows :

"Franchise is the special right of an individual or corporate body to a business system which has typical business characteristics to market goods and/or services which has proven successful and can be taken advantage and/or made use of by other party based on a franchise agreement".

Both the franchisor and franchisee must really consider the three elements in formulating a franchise agreement in order to be able to apply provisions in Article 50 letter b of Law No. 5/1999 on Anti Monopoly and Unsound Business Competition.

CHAPTER III

The Application of Article 50 Letter B, Particularly on Franchise-Related Agreement

1. The Principles of Applying Business Competition in the Franchise Agreement

The principles of applying business competition to the analysis of a franchise agreement are always directed towards achieving the goals as referred to in Article 3 of Law No. 5/1999, namely to increase economic efficiency as part of efforts to promote the people's welfare, ensure equal business opportunities for all business agents, prevent monopoly and/or unsound business competition and create effectiveness and efficiency in carrying out business activities.

Based on Article 50 letter b, franchise-related agreement is one of those excepted from the application of Law No. 5/1999. The principles of excepting franchise-related agreement from the application of the law start from the principle that basically provisions/clauses in the franchise agreement constituting essential matters to maintain the common identity and reputation of franchise network, or to keep the secrecy of intellectual property rights contained in the franchise concept may

be granted exception based on Article 50 letter b. Based on the principle, a franchise agreement may contain provisions/clauses concerning the obligations of the franchisee in an effort to guarantee the concept of franchise and intellectual property right of the franchisor. The provisions/clauses concern among others the obligation to use business method set by the franchisor, to follow complement and presentation standards set by the franchisor, not to change the franchise location without consent from the franchisor, and not to leak the intellectual property right related to franchise to third party, even after the expiry of franchise agreement.

Yet, it must be realized that a franchise agreement may also contain provisions/clauses that have the potential to impede competition, such as pricing, limited supply, obligation to buy other products not related to franchise from the franchisor, area restriction, and a ban to carry out similar business activity after the expiry of franchise agreement. Such clauses/provisions have the potential to run counter the effort to achieve the aim of Law No. 5/1999 calling for efficiency, equal business opportunities for all business agents, and the development of technology. If a franchise agreement contains provisions/clauses impeding competition, the franchise agreement will be excluded from the exception as referred to in Article 50 letter b and the Commission will further assess the impact of competition constraint on economic efficiency.

Clauses/provisions on the restriction of areas which are usually found in a franchise agreement to control a franchise network system usually belong to the category of exception. Basically, the franchisor can control exclusive areas for the franchisee and if that is the case exception can be granted to provisions/clauses aimed at restricting the activities of the franchisor in the area

covered in the agreement and the activities of the franchisee outside the area covered in the agreement. After all, exception cannot be granted if the obstacle in the form of area restriction leads to the absolute area protection. If the franchisor and the franchisee directly or indirectly impede consumers to get goods and/or services on the ground that the residence of the consumers is outside the franchise area set in the agreement and divide market, the matter will not belong to the category of exception.

Exception cannot be applied particularly if the area restriction leads to limited competition in the market concerned so that it will have an impact on the economic efficiency.

Clauses/provisions on compulsory supply in the franchise agreement are usually aimed at keeping the quality standards of franchise goods. The guarantee of minimum quality standards of products is very important for franchise business in order not to disrupt the identity of the franchise concept. To that end, the franchisor requires the franchisee to supply goods and/or services only from the franchisor or certain party of the products which serve as the essence of franchise concept particularly those related to the patented intellectual property right which is the main part of the franchise concept. Yet, it is necessary to understand that such an agreement on the supply of goods and/or services may obstruct competition because it restricts other business agents to supply goods and/or services to the franchisee. Therefore, such provisions, if not related to the intellectual property right of products which serve as the essence of franchise concept, are not excepted from the application of Law No. 5/1999.

Franchise agreements usually also carry clauses/provisions on the setting of selling prices. Provisions on

the setting of selling prices are usually designed to prevent franchisees from setting prices that may disrupt the identity/image of franchise. Therefore, the price recommendations made by the franchisor to the franchisee may be excepted from the application of Law No.5/1999. Yet, it is necessary to realize that the setting of prices that may lead to price cartel to eliminate price competition is not excepted from the application of Law No. 5/1999.

Provisions/clauses requiring the franchisee to buy several types of goods from the franchisor with the aim of maintaining the quality standards of franchise concept basically do not violate the principles of business competition. Yet, it is necessary to realize that the obligation may obstruct substitute products and impede competition.

Therefore, the obligation to buy other goods which are not related to the franchise concept and may create an entry barrier for other business agents, cannot be granted exception to the application of Law No.5/1999. Provisions/clauses banning the franchisee from carrying out similar business activities which can compete with the franchise business network can be granted exception based on Article 50 letter b. The ban is aimed at protecting the intellectual property right of the franchise owner as well as at keeping the identity and reputation of the franchise network, particularly if the franchisor has transferred know how in the form of knowledge, experience and expertise as well as technical skill to the franchisee. Yet, it is necessary to realize that the obstacle to similar business activities in the long run will influence competition and have a negative impact on the economic efficiency. Therefore, provisions on obstacles after the end of a franchise agreement in very long time do not belong to the category of

exception to the application of Law No. 5/1999. To set a period of time which does not violate business competition, the Commission will pay attention to various considerations, including technology of the franchise and investment already made. If the technology of franchise has already become public domain and the amount of investment already made is not large, the period of time for not carrying out similar business activity is normally 1 (one) year.

2. The Application of Provisions in Article 50 letter b in Relation to the Franchise Agreement

In applying provisions in Article 50 letter b, particularly franchise-related agreements, the Business Competition Supervisory Commission must consider the matter wisely so as not to violate the aim of enacting Law No. 5/1999 on Anti Monopoly and Unsound Business Competition. The matters that must be considered are among others:

The criteria of franchise as referred to in Article 3 of Government Regulation No. 42/2007 on Franchise must be met:

1. The criteria of franchise agreement and its registration as referred to in Article 4, Article 5, Article 10, Article 11 of Government Regulation No. 42/2007 on Franchise must be met;
2. Any agreement must be made by adhering to provisions in Article 1 point 7 of Law No. 5/1999 adj. Article 1320 and Article 1338 of the Civil Code;
3. Franchise agreement is the form of partnership as referred to in Article 26 letter c adj. Article 29, Article 35, and Article 36 paragraph (1) of Law No. 20/2008 on Micro, Small and Medium Businesses; and

4. The content of franchise agreement does not have the potential to violate the principles of Anti Monopoly and Unsound Business Competition.
5. Several examples of the criteria of franchise agreement which have the potential to violate the principles of anti monopoly and unsound business competition so that provisions in Article 50 letter b cannot be applied:

a. Resale Price Maintenance

Franchisor makes an agreement with franchisee containing resale price maintenance the franchisee must follow. As a self-reliant business agent, franchisee basically has the freedom to set the selling prices of goods and/or services obtained from the franchisor. From the perspective of business competition, the resale price maintenance in franchise is prohibited because it will eliminate price competition among franchisees.

The matter will result in uniform prices among franchisees and consequently, consumers will be encountered with uniform prices too. The resale price maintenance is not excepted from the application of Law No. 5/1999. Yet, to keep the economic value of franchise business, franchisor is allowed to make a recommendation on selling prices to franchisee, provided that the selling prices do not bind the franchisee.

b. Requirements to buy goods and/or services only from franchisor or other party appointed by the franchisor

Franchise agreement contains requirements requiring franchisee to buy goods or services as part of the franchise concept only from franchisor or other party appointed by the franchisor. The

requirements.....

requirements can be excepted provided they are designed to maintain the identity and reputation of franchise normally aimed at keeping the franchise concept created by the franchisor.

Yet, franchisor is not allowed to ban franchisee from buying goods and/or services from other party provided that the goods and/or services meet the quality standards required by the franchisor. The purchase of goods or services only from franchisor or certain party may pose an obstacle to other business agents capable of supplying goods of the same quality. Therefore, franchisor is not allowed to set absolutely access to purchase or supply required by franchisee, provided that the matter does not disrupt the concept of franchise business.

- c. Requirements to buy other goods and/or services from franchisor Franchisor requires franchisee to buy other goods or services from the franchisor (tie-in). It is necessary to realize that the obligation to buy other products which are not part of franchise package are not excepted from the application of Law No. 5/1999

d. Restricted areas

Franchisor restricts areas by setting certain areas to franchisee.

Franchise agreement usually carries clauses on business areas. The clauses are aimed at forming a franchise network system. In this connection, the setting of business areas is not considered violation of business competition so that it can be excepted. Yet, the restriction of areas which is not conducted to form a franchise network system but to restrict the market and consumers is not excepted from the application of

Law No. 5/1999.

- e. Requirements not to carry out similar business activity within a certain period of time after the expiry of franchise agreement.

Franchisor requires franchisee not to carry out business activity similar to franchise business within a certain period of time after the expiry of franchise agreement.

The requirements can be excepted from Law No. 5/1999 provided that they are intended to protect and/or related to the intellectual property right (HKI) of the franchisor or to keep the identity and reputation of franchise business. Yet, the requirements in the long run can lead to obstructed competition and technological advancement. Therefore, the requirements not to carry out business activity similar to franchise business in the long run are not excepted from the application of Law No. 5/1999. In considering the length of time considered having the potential to violate Law No. 5/1999, the Commission pays attention to various matters including the technology of franchise products, the cost of franchise products, and the characteristics of franchise products (be it they have become public domain or not).

CHAPTER IV

Examples of Cases

1. Example of the Content of Franchise Agreement

Mini market franchisor makes a mini market franchise agreement with franchisee to set up a mini market using the brand from the franchisor registered at the Directorate General of Intellectual Property Rights, Ministry of Law and Human Rights of the Republic of

Indonesia. Franchise granted to franchisee is the right to use name/trade mark of franchisor, along with the whole concept and mechanism of working system according to the operational standards of the franchisor. The franchise right obtained by franchisee from franchisor directly or indirectly cannot be granted to other party for whatever reason and by whatever means and anywhere, except if the franchise agreement carries clauses as referred to in Article 6 of Government Regulation No. 42/2007. Franchise agreement usually stipulates:

a. The Obligation of Franchisor as follows:

1. Helping franchisee during the shop pre-operation period in relation to:
 - a. a recommendation on the feasible location for the shop in question;
 - b. assistance to select employees according to the qualifications of shop P employees;
 - c. planning, realization and supervision of shop renovation according to the standards of shop P.
2. Giving training to franchisee and all shop employees in an integrated training program with specified materials and schedules.
3. Providing practical operational and administrative guidance to the shop as reference of franchisee in carrying out the routine activity of the shop.
4. Sending goods according to demand from franchisee by adhering to provisions on the management of merchandise as specified in this agreement.
5. Providing consulting services to franchisee to ensure that the shop carries out activities according to the operational standards of shop P.

6. Supplying routine shop needs, such as plastic bags, label stickers, computer sets and the like according to the usage standard of shop P.

Franchise agreement carries clauses on the management of merchandise to be supplied by franchisor to franchisee. It is the right of franchisor to:

1. determine merchandise, including types, selling prices and sources of shop merchandise.
2. All shop merchandise must be bought from franchisor and sold at maximum prices as contained in the list of merchandise prices prevailing at that time, plus a 2% mark up.
3. If franchisor sees good prospect or deems it necessary to take a preventive step so that a new shop needs to be opened within a radius of 100 (a hundred) meters from the franchisee shop, franchisee will have priority to receive an offer in writing before it is offered to other party or opened by franchisor.

b. The Obligation of Franchisee:

1. paying shop merchandise bought from franchisor according to the quantity of goods received.
2. checking all the merchandise of shop P to see if they are worth selling.
3. refraining from receiving, storing, displaying and selling goods other than shop merchandise specified in this agreement.
4. recording merchandise according to the practical operational and administrative guidance for shop.
5. in running shop P, using hardware and software as well as telecommunication network systems

according to the standards specified by franchisor, which will periodically be revised by franchisor according to the need and technological development.

6. running own shop according to the specified operational and administrative guidance.
7. giving information/evidence of transactions when internally audited by franchisor.

2. Analysis of Settlement to Cases

Conceptually, any franchise agreement is excepted if it meets terms of franchise agreement as specified in Article 3 of Government Regulation No. 42/2007 on Franchise. The above examples of franchise agreement contain clauses having the potential to cause unsound business competition, namely those related to resale price maintenance set by franchisor. In the franchise agreement, franchisee is required to sell franchise goods according to the list of prices set by the franchisor, plus a 2% mark up. The fixing of prices in the agreement does not violate Law No. 5/1999 because franchisee is given the freedom to raise the price as much as 2% although the list of selling prices has been set. Meanwhile, the fixing of final selling prices may be subject to provisions in Law No. 5/1999 because it does not give the freedom to the franchisee as a self-reliant business agent to set the selling prices of the franchise goods himself/herself. If a 2% mark up becomes a standard rule to which franchisee must adhere so that the franchisee cannot freely set selling prices and intra-brand competition will not happen, the rule may be subject to provisions on exception pursuant to Article 50 letter b of Law No. 5/1999.

The afore-mentioned examples of franchise agreement carry neither requirements to buy goods and/or services only from franchisor or other party appointed by the franchisor and area restriction, nor requirements not to carry out similar business activities during a specified period of time after the expiry of franchise agreement.

As such, the franchise agreement may be subject to exception pursuant to Article 50 letter b.

CHAPTER V

Conclusion

1. Article 50 letter b of Law No. 5/1999 on Anti Monopoly and Unsound Business Competition deals with exception in the application of Law No. 5/1999 to franchise-related agreements.
2. The exception referred to in Article 50 letter b cannot be absolutely applied, considering that franchise-related agreements may contain clauses which have the potential to result in monopoly or unsound business competition.
3. The exception referred to in Article 50 letter b can be applied, provided that it meets the criteria of franchise as provided for in Article 26 letter c, Article 29, Article 35, and Article 36 paragraph (1) of Law No. 20/2008 on Micro, Small, and Medium Businesses and Government Regulation No. 42/2007 on Franchise.
4. Provisions in Article 50 letter b cannot be absolutely applied so that the aim of enacting Law No. 5/1999 as specified in Article 3 of the Law will not be fruitless. Therefore, the conduct of franchise business agents that may lead to monopoly and unsound business competition is not excepted from provisions in Article 50 letter b.

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