

Indonesian Legal Digest is a service of
PT Justika Siar Publika owner and operator of
www.hukumonline.com

Puri Imperium Office Plaza UG 15
Kuningan, Jakarta 12319
to subscribe, call 62-21-83701827 or fax to 62-21 83701826
or email layanan@hukumonline.com

Franchise Agreement Exempted Under the Anti-Monopoly Law

Overview

The Constitution guarantees many rights and the amendments that were made to the 1945 Constitution immediately after the fall of the New Order government saw what amounts to a Bill of Rights inserted into the Constitution. These rights among others guarantee that individuals are granted equal protections and equal opportunities in the economic sector. In that sense, the Law on the Prohibition of Monopolistic and Unfair Business Practices (Law No. 5 of 1999) was drafted to ensure that in business all individuals were protected from monopolies and other unfair business practices. However, these protections and opportunities are far from absolute.

Interestingly, the Anti-Monopoly Law limits its application over several agreements, among others, are the agreements relating to Intellectual Property Rights (IPR) and Franchises (Article 50(b)). Consequently, agreements in these areas are exempt from the provisions of the Anti-Monopoly Law.

Unfortunately, the Elucidations to the Anti-Monopoly law are silent on the rationale for the exemptions and merely states that the Article is 'sufficiently clear'. This is unfortunate because there are a number of criticisms of the exemptions offered by the Anti-Monopoly Law, particularly the relevant Article is in conflict with Law No. 20 of 2008 on Micro, Small, and Medium Enterprises (MSMEs), as it prohibits any form of MSMSE partnership, including partnership in a form of franchise, which would create "market control and business centralization." Accordingly, Article 50(b) clearly opens the door to even more of monopolistic and unfair business practices according to its critics.

In an effort to enlighten the stakeholders in this provision, such as business entities and members of the KPPU, and in order to avoid any misinterpretation of the relevant provisions of the Anti-Monopoly Law, the Commission for the Supervision of Business Practices (*Komisi Pengawas*

Table of Contents

Issue 119, 29/5/2009

Overview	1
Why the agreements relating to franchise are exempted	2
Conditions to Qualify for the Exemptions	2
Enforcement	2
Conclusion	2

Persaingan Usaha / KPPU), whose duty includes formulating guidelines relating to the Anti-Monopoly Law (Article 35 (f)), considers that it must provide a universally accepted interpretation of Article 50(b). To this end, the KPPU issued Decision No. 57/KPPU/KEP/III/2009 that consists of the decision and a set of Guidelines to assist in the implementation of Article 50(b).

The Guidelines have been drafted systematically and comprehensively, and deal specifically with matters related to franchising. However, franchise agreements generally include provisions relating to the use of IPR and these are regulated in the guidelines.

This ILD will examine and analyze some key features of the new Guidelines.

Why the agreements relating to franchise are exempted

As was noted in the 'overview' the Elucidations to the Anti-Monopoly Law are silent as to the rationale for the exemptions and as such begs the question as to why these kinds of agreements are in fact exempt from the provisions. Therefore, to ensure that confusion does not reign supreme the KPPU has issued the noted guidelines as a means of clarifying the rationale for the exemption

The primary reason, in reality, is not that difficult to comprehend; the exemptions exist because it is the government's belief that franchising is a critical component in driving future economic growth. A business that has generated considerable success in its home market is often seen as a surefire winner in other locales. In this regard, a successful franchise is seen as a significant contributor not only to the economy generally but more specifically to the employment sector; franchises normally involve more than one location and as such will provide multiple sites of employment. It is felt that by allowing franchise related agreements to be exempt that this will provide ample opportunities for franchising businesses to establish themselves and grow.

Conditions to Qualify for the Exemptions

A cursory reading of Article 50(b) highlights the difficulty that would be faced by any entity trying to comply with the provision provides. Therefore, it is clear why the guidelines are required. The wording of Article 50(b) is as follows:

[A]greements related to intellectual property rights, such as licenses, patents, trademarks, copyrights, industrial product design, integrated electronic circuits, and trade secrets as well as agreements related to franchise.

As has been noted on several occasions the Elucidations are silent on how this Article is to be interpreted. In many respects, if there was a blanket exemption for franchise related agreements then it is reasonable to assume that the franchisor may find themselves in a superior position to the franchisee as they would be able to introduce all manner of clauses that would favour the franchisor over the franchisee. The types of clauses that are most often identified include clauses that require the franchisee to purchase products unrelated to the franchise or prohibitions against entering into similar business ventures at the conclusion of the franchise agreement.

The guidelines go to some length to point out that clauses of this nature are contrary to the spirit of the exemptions

envisaged under the Anti-Monopoly Law as they are likely to jeopardize the prohibition against monopolistic and unfair business practices.

The guidelines make clear what is not so clear from the actual law, namely: franchise related agreements that qualify for the exemptions envisaged under Article 50(b) must first be in accordance with the provisions set out in Government Regulation No. 42 of 2007 on Franchise, namely Articles 4 - 6, and the Law on MSMEs, particularly Articles 26(c) and 29.

The provisions of the Law on Franchise noted above deal with what form of agreement a franchise agreement should be in, what should be included in the agreement, and an optional clause that gives the franchisee the right to make a sub-franchise agreement with a third party. While the provisions of the Law on MSMEs outlines franchise as one of the form of permissible partnerships, and the obligations of franchise businesses (to prioritize MSMEs and national products-as far as the products fit the required standard, among others). The latter obligations are also provided under Article 9 of the Law on Franchise.

To preserve the MSMEs and the usage of national products, the Guidelines add another condition for a franchise agreement to be the object of Article 50(b) and that is the agreement's compliance with the Anti-Monopoly Law. This means that not every franchise agreement is immune from the Anti-Monopoly Law; instead this shows that the exemptions envisaged under Article 50(b) are not absolute.

Enforcement

The Guidelines were confirmed on 12 March 2009.

Conclusion

It is clear that Article 50(b) has confused many stakeholders on the essence of franchise agreement exemptions under the Anti-Monopoly Law. The guidelines therefore exist not just to assist any parties trying to formulate a franchise agreement or others that have an interest in franchising, but it is also aims to provide directives to KPPU members in conducting their respective duties.

It is expected that the guidelines will allow for greater legal certainty with respect to how the KPPU is to interpret franchise related agreements and whether these agreements are exempt from the provisions noted in Article 50(b) of the Anti-Monopoly Law. 