CLIENT ALERT
2015 APRIL 07

KPPU Finds "Bancassurance" Tying Arrangement Unlawful

In a recent decision (the **"Decision"**),[i] the Indonesia Competition Commission ("**KPPU**") found that a tying arrangement between one of the country's best-known mortgage lenders and two insurance companies violated Indonesia's fair competition regime. The KPPU accordingly annulled the agreements and imposed fines totaling Rp 57 billion (USD 4,397,983) on the three companies involved.

Background

Under the terms of its housing loan / mortgage packages for intending home purchasers, PT Bank Rakyat Indonesia (Persero) Tbk ("**BRI**") required them to purchase life insurance policies from one of either two designated insurance companies – PT Asuransi Jiwa Bringin Jiwa Sejahtera and PT Heksa Eka Life Insurance (the **"Insurance Companies"**).

The Insurance Companies had been appointed by BRI as their sole approved life insurance providers in 2002 following a tender competition that had been participated in by a total of six insurers. A second competition was held between 2013 and 2014, which drew offers from some of Indonesia's best known insurers, including PT Asuransi Jiwa Recapital, PT Sun Life Financial Indonesia, Cigna, PT Avrist Insurance, and PT Asuransi Sequislife. However, none were successful as, according to BRI, they failed to satisfy its criteria.

Legal Considerations

The KPPU took the view that the arrangement between BRI and the Insurance Companies constituted an unlawful "tying arrangement", that is, an arrangement that is prohibited under Article 15 (2) of the Competition Law,[ii] which reads as follows:

"An undertaking is prohibited from entering into agreement with another undertaking that requires a party receiving particular goods and/or services to be willing to purchase other goods and/or services from the supplying undertaking."

The main concern of Article 15 (2) is whether or not there is a tying product and a tied product that must also be purchased by the consumer of the tying product. The KPPU found that such an arrangement existed because under BRI's standard housing loan/mortgage agreement, the borrower is required to purchase a life insurance product from one of the Insurance Companies.

The KPPU also found that the arrangement violated Article 19(a) of the Competition Law, which reads as follows:

"An undertaking is prohibited from engaging in one or a number of activities, either separately or jointly with another undertaking, that could result in a monopolistic practice and/or unfair competition by:

a. preventing and/or hampering a particular undertaking or undertakings from conducting the same type of business in the relevant market"

The primary focus of Article 19(a) is the prevention of trading practices that are intended to impede or prevent the entrance of new players to the market, and identifying whether or not strategic entry barriers have been erected by an undertaking to prevent another undertaking from participating in the same business in the relevant market.

In its decision, the KPPU found that BRI's tying arrangement with the Insurance Companies amounted to the erection of a barrier to the entry of other insurers into the relevant market. The said entry barrier was created by the "unreasonable" terms and conditions imposed by BRI on insurers who wished to partner with it. These terms and conditions included requirements concerning premiums, free-cover limits and claim-payment mechanisms that were aligned with the policies applied by the Insurance Companies, but which were not feasible for their competitors.

© Assegaf Hamzah & Partners

CLIENT ALERT
2015 APRIL 07

Accordingly, the KPPU found that BRI's tying arrangement restricted/prevented fair competition in the relevant market, and harmed the interests of consumers as its housing loan/mortgage customers were not offered an adequate choice of life insurance products and/or insurers.

Generally speaking, In determining whether unfair competition / discriminatory practices exist, the KPPU applies a dual approach that is based on (i) a study of the relevant statutory provisions and regulations (not just those concerning competition law), and (ii) a consideration of economic factors or justifications. Normally, if the relevant statutory provisions have been violated, this will be considered as constituting prima facie evidence of unfair competition / discriminatory practices, although this presumption may be rebutted by economic justifications, such as a good relationship built up over many years, product compatibility, etc. In addition, the possession of substantial market power or dominance is taken into account by the KPPU when assessing the potential anti-competitive effects of restrictions imposed by a company. The greater the market share, the greater the likelihood that the KPPU will find a competition restriction to be anti-competitive. A presumption of anti-competitive harms occurs when a company has a more than 50% market share.

In this case, it is important to note that the KPPU placed considerable reliance on Bank Indonesia Circular No. 12/35/DPNP, which requires that in any arrangements entered into by a bank and an insurer in relation to the purchase of mandatory insurance in connection with a banking product, the borrower must be allowed the right to choose between at least 3 different insurance providers, only one of which may be an affiliate of the bank.

Conclusion

As a result of the Decision, mortgage lenders in Indonesia, and those involved in tying arrangements in general, will need to ensure that their practices comply with the requirements of the competition law regime. If an undertaking enjoys a dominant position in a concentrated market with high entry barriers and poor inter-brand competition, it will need to provide a level playing field in selecting suppliers, and provide its customers with sufficient freedom of choice. This would, for example, mean taking care to ensure that their arrangements with appointed suppliers are based on reasonable economic justifications and that all potential suppliers are treated even handedly. At the same time, they will need to ensure that their customers are afforded sufficient choice as to avoid infringing competition law.

© Assegaf Hamzah & Partners

Our regional presence

Our regional contacts

RAJAH & TANN | *Singapore*

Rajah & Tann Singapore LLP
9 Battery Road #25-01
Straits Trading Building
Singapore 049910
T +65 6535 3600 24 HR +65 9690 2253 F +65 6225 9630
sg.rajahtannasia.com

R&T SOK & HENG | *Cambodia*

R&T Sok & Heng Law Office
Vattanac Capital Office Tower, Level 17, No. 66
Preah Monivong Boulevard, Sangkat Wat Phnom
Khan Daun Penh, 12202 Phnom Penh, Cambodia
T +855 23 963 112 / 113 F +855 963 116
kh.rajahtannasia.com
**in association with Rajah & Tann Singapore LLP*

RAJAH & TANN REPRESENTATIVE OFFICE | *China*

Rajah & Tann Singapore LLP
Shanghai Representative Office
Unit 1905-1906, Shui On Plaza, 333 Huai Hai Middle Road
Shanghai 200021, People's Republic of China
T +86 21 6120 8818 F +86 21 6120 8820
cn.rajahtannasia.com

RAJAH & TANN NK LEGAL | *Myanmar*

Rajah & Tann NK Legal Myanmar Company Limited
Office Suite 007, Inya Lake Hotel No. 37, Kaba Aye
Pagoda Road, Mayangone Township, Yangon, Myanmar
T +95 9 73040763 / +95 1 657902 / +95 1 657903
F +95 1 9665537
mm.rajahtannasia.com

© Assegaf Hamzah & Partners

ASSEGAF HAMZAH & PARTNERS | *Indonesia*

ASEGAF HAMZAH & PARTNERS | *Indonesia*

Assegah Hamzah & Partners
Menara Rajawali 16th Floor
Jalan DR. Ide Anak Agung Gde Agung Lot #5.1
Kawasan Mega Kuningan, Jakarta 12950, Indonesia
T +62 21 2555 7800 F +62 21 2555 7899
www.ahp.co.id
** Assegaf Hamzah & Partners is an independent law firm in Indonesia and a member of the Rajah & Tann Asia network.*

RAJAH & TANN | *Lao PDR*

Rajah & Tann (Laos) Sole Co., Ltd.
Phonexay Village, 23 Singha Road, House Number 046/2
Unit 4, Saysettha District, Vientiane Capital, Lao PDR
T +856 21 454 239 F +856 21 285 261
la.rajahtannasia.com

CHRISTOPHER & LEE ONG | *Malaysia*

Christopher & Lee Ong
Level 22, Axiata Tower, No. 9 Jalan Stesen Sentral 5,
Kuala Lumpur Sentral, 50470 Kuala Lumpur, Malaysia
T +60 3 2273 1919 F +60 3 2273 8310
www.christopherleeong.com
**in association with Rajah & Tann Singapore LLP*

RAJAH & TANN | *Thailand*

Rajah & Tann (Thailand) Limited
973 President Tower, 12th Floor, Units 12A-12F
Ploenchit Road, Lumpini, Pathumwan
Bangkok 10330, Thailand
T +66 2 656 1991 F +66 2 656 0833
th.rajahtannasia.com

RAJAH & TANN LCT LAWYERS | *Vietnam*

Rajah & Tann LCT Lawyers

Ho Chi Minh City Office
Saigon Centre, Level 13, Unit 2&3
65 Le Loi Boulevard, District 1, HCMC, Vietnam
T +84 8 3821 2382 / +84 8 3821 2673 F +84 8 3520 8206

Hanoi Office

East Tower - LOTTE Center Hanoi Building Level 30,
Unit 3003, 54 Lieu Giai Street, Ba Dinh, Hanoi, Vietnam
T +84 4 6278 2768 F +84 4 6278 2766
www.rajahtannlct.com

Based in Jakarta, and consistently gaining recognition from independent observers, Assegaf Hamzah & Partners has established itself as a major force locally and regionally, and is ranked as a top-tier firm in many practice areas. Founded in 2001, it has a reputation for providing advice of the highest quality to a wide variety of blue-chip corporate clients, high net worth individuals, and government institutions.

Assegaf Hamzah & Partners is part of Rajah & Tann Asia, a network of local law firms in Singapore, China, Lao PDR, Vietnam, Thailand and Myanmar, as well as associate and affiliate offices in Malaysia, Cambodia, Indonesia and the Middle East. Our Asian network also includes regional desks focused on Japan and South Asia.

The contents of this Update are owned by Assegaf Hamzah & Partners and subject to copyright protection under the laws of Indonesia and, through international treaties, other countries. No part of this Update may be reproduced, licensed, sold, published, transmitted, modified, adapted, publicly displayed, broadcast (including storage in any medium by electronic means whether or not transiently for any purpose save as permitted herein) without the prior written permission of Assegaf Hamzah & Partners.

Please note also that whilst the information in this Update is correct to the best of our knowledge and belief at the time of writing, it is only intended to provide a general guide to the subject matter and should not be treated as a substitute for specific professional advice for any particular course of action as such information may not suit your specific business and operational requirements. It is to your advantage to seek legal advice for your specific situation. In this regard, you may call the lawyer you normally deal with in Assegaf Hamzah & Partners.

© Assegaf Hamzah & Partners