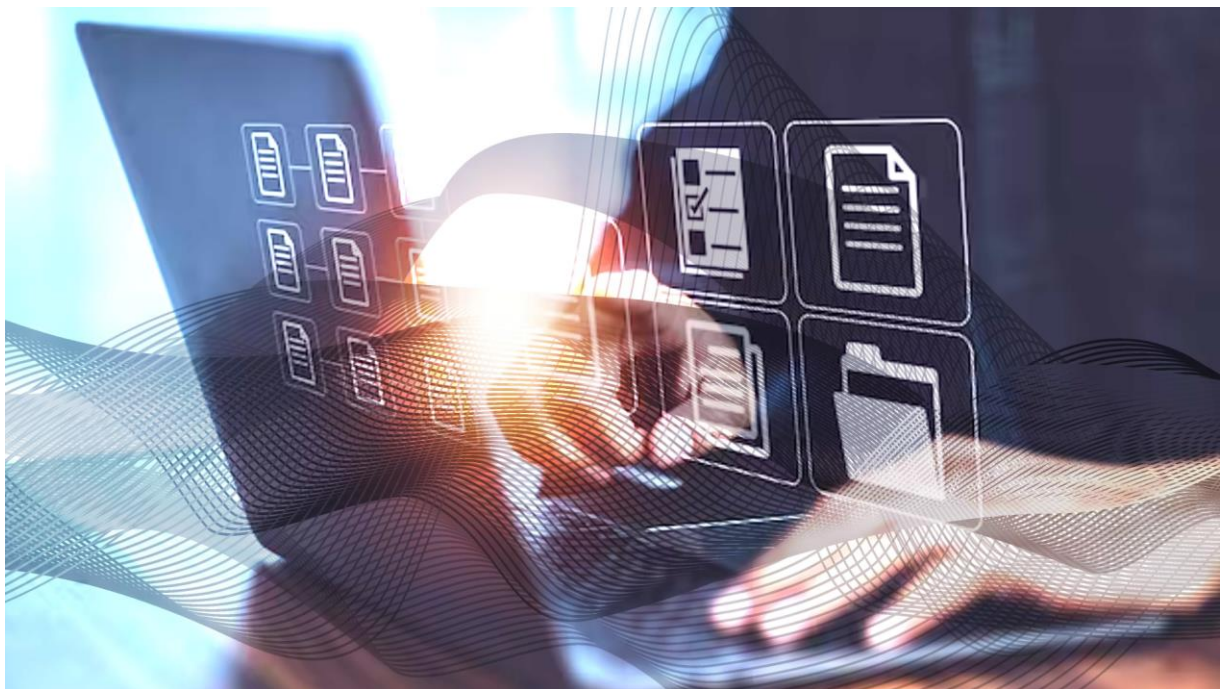


How KPPU'S New Guidelines Use Data and Quantitative Approach to Enforce Antitrust Measures



This year, the Indonesia Competition Commission (“**KPPU**”) has made a series of measures to improve the country’s competition enforcement by issuing new regulations and guidelines. Most recently, the KPPU issued three new guidelines that will play a significant role in the handling of competition cases.

These guidelines, which were issued between December 2022 and February 2023, pertain to:

1. Updating the rules for defining a relevant market, particularly in the framework of today’s digital economy;
2. The criteria, indicators, tests, and steps that the KPPU can apply to measure and determine the negative impacts and the corresponding fine for an antitrust violation; and
3. Updating the guidelines for bid-rigging, including on the use of indirect evidence.

While the KPPU can use these guidelines in handling antitrust cases, they also act as a helpful pointer for the public in understanding the KPPU’s views and methods.

Relevant Market Guideline

The first guideline is KPPU Chairman Regulation No. 4 of 2022 on the Definition of Relevant Market Guideline (“**Relevant Market Guideline**”), which replaced a similar guideline issued in 2009. Highlights of the Relevant Market Guideline are as follows:

1. **Definition of multi-sided market**

The Relevant Market Guideline acknowledges that the relevant market analysis applies to a market that links two or more distinct groups of users and enables them to interact with each other through an intermediary. Previously, this type of market was not covered by the 2009 guideline.

This Guideline further notes that the definition of a multi-sided market must consider:

- a. Whether there are two or more markets;
- b. The dependency between one user group’s demand to the other group’s demand;
- c. The role of the intermediary in connecting the user groups, including the prices charged to them; and
- d. The network effects, i.e., the condition in which a product or service gains higher additional value as more people use it.

2. **Definition of digital market**

In light of Indonesia’s digital industry development, the Relevant Market Guideline seeks to address the issue of defining “market” in a digital economy. The Relevant Market Guideline defines “digital economy” as economic and business activities conducted through the internet, supported by artificial intelligence, or facilitated through a platform.

In the context of antitrust enforcement, the KPPU adopts a multi-sided analysis to define the relevant market in a digital economy, in addition to conducting the following possible additional analysis:

- a. Demand-side substitution through use of platform, business model, user groups, and online sales and transactions;
- b. Supply-side substitution in the form of entry barriers, network effects, lock-in effects, and switching costs;
- c. Product-market factors, namely competition between platforms, differentiation degree, economies of scale, innovation, and technology development;

- d. Geographical-market factors, namely the product's characteristics (durable vs non-durable, time of delivery), platform users' information, prevailing laws and regulations, and online-offline integration; and
- e. Casuistic approach, which is relevant for a global business that operates in Indonesia without having a representative office.

3. **Possible data sources to define a market**

The Relevant Market Guideline confirms that decisions of competition authorities in other jurisdictions may serve as a reference for the KPPU in defining a market. This move is in line with the practice in the field as businesses and their counsels often refer to decisions of competition authorities in other jurisdictions in their relevant market analysis anyways, despite the KPPU not being bound to treat such decisions as a reference under the previous guideline. By confirming the role of other jurisdictions' decisions, the KPPU eliminates doubts for business players in preparing their market analysis.

Furthermore, the KPPU can request data from any undertakings, government institutions, non-government public institutions, trade associations, consumers, experts, and/or other necessary parties via an in-depth interview, laws and regulations analysis, research (e.g., consumer survey or market research), and secondary data survey or analysis.

4. **Specifics for bid-rigging cases**

In a bid-rigging case, the KPPU can define the relevant market as the tender project by considering the specific features of the tender (i.e., its purposes and objectives, applicable regulations, coverage area, and timing).

5. **Temporal (time) dimension**

Lastly, the Guideline introduces a temporal (time) dimension for identifying a relevant market. This is relevant in markets where the competition, demand, or supply may change over specific periods of time. Temporal dimension is usually considered in a relevant market analysis when a product or services is available in the market on a seasonal basis or with peak and off-peak times.

Negative Impacts Guideline

The second guideline is KPPU Chairman Regulation No. 2 of 2023 on Negative Impacts of Monopolistic Practices and Unfair Business Competition Guideline ("**Negative Impacts Guideline**"). This Guideline is the implementing regulation of two higher general regulations, namely Government Regulation No. 44 of 2021 on the Implementation of the Prohibition of Monopolistic Practices and Unfair Business Competition and KPPU Regulation No. 2 of 2021 on the Guideline to Impose Sanctions in the form of

Fines for Monopolistic Practices and Unfair Business Competition Violations. Both regulations set out that one of the factors in calculating the amount of fines is the negative impacts caused by the violation.

The Negative Impacts Guideline contains the criteria, indicators, tests, as well as steps of measurement that the KPPU can apply to measure and determine the negative impact of an antitrust violation. However, when assessing the negative impact of a violation of the Competition Law (Law No. 5 of 1999), the KPPU will apply a case-by-case approach.

This Guideline defines “negative impact” as the consequence of violating any laws or regulations pertaining to competition. Negative impact may present itself as a substantial lessening or elimination of competition (referred to as “SLC”) that harms competition or consumers. The main indicator used by the KPPU to assess negative impact is unreasonable prices, which can be supplemented by other indicators, such as increased market concentration, barriers to entry or expansion for potential entrants or competitors, market player exit, collusive behaviour, reduced choices or innovation, and production or market inefficiencies. Unfortunately, this Guideline does not detail the quantitative criteria to determine unreasonable prices.

To assess the negative impact, the KPPU will apply a counterfactual assessment, utilising the “with and without” test. This test compares the level of market competition that would have existed in the absence of the violation against the level that exists with the violation. This assessment considers factors such as existing competition, potential competitive pressure (including barriers to entry), and countervailing buyer power. Prior to assessing the overall negative impact, the KPPU will define the relevant market and the violation period, while also analysing the market share and position of the relevant businesses. If necessary, the KPPU may seek the assistance of a competition and antitrust expert to enhance their assessment and aid in the calculation of the fines.

Bid Rigging Guideline

The third and last guideline is KPPU Chairman Regulation No. 3 of 2023 on Prohibition of Collusive Tendering Guideline (“**Bid Rigging Guideline**”), which replaced the previous guideline issued in 2010.

Some highlights of this Guideline are as follows:

1. *Meaning of “other parties”*

Before 2016, there was a debate as to whether “other parties” in bid rigging cases include non-business actor parties, such as the tender committee in the bid or public officials involved in the bid.

In 2016, the Constitutional Court issued a decision (Decision No. 85/PUU-XIV/2016) that clarified the meaning of “other parties” in a bid rigging case. In the decision, the Court declared that “other parties” encompasses virtually anyone who has a relationship with the business actor, including non-business actor parties. The Court’s finding is strengthened under the Bid Rigging Guideline.

2. *New scheme of bid rigging*

The Bid Rigging Guideline identifies a new scheme of bid-rigging, in addition to horizontal bid-rigging (between bidders), vertical bid-rigging (between bidders and tenderer), and hybrid bid-rigging (both horizontal and vertical bid rigging).

In this new scheme, anyone outside of the bidders or tenderer can also be named as a reported party if it is involved in or acts as the mastermind of the bid rigging. Thus, any competitors, procuring committees, facilitators, vendors, manufacturers, guarantors, distributors, public officials, individuals, notaries, producers, project owners, or any party with access to the electronic procurement system may be named as a reported party.

3. *Acknowledgment of indirect evidence of OECD and BRIAS*

Further, unlike the previous guideline, which was silent on the use of indirect evidence, the Bid Rigging Guideline emphasises the use of indirect evidence in proving bid rigging. The Guideline explicitly refers to the OECD's Journal on Prosecuting Cartels without Direct Evidence of Agreement.

Moreover, the Bid Rigging Guideline recognises the use of algorithmic evidence found in the Bid Rigging Indicator Analysis System, also known as BRIAS, as an indirect evidence of bid rigging.

Key Takeaways

These three new guidelines share the common goal of the KPPU in using a data-driven and economics and quantitative-based approach in antitrust enforcement. This is a major, yet expected, progress as it signifies the KPPU's determination to evolve and advance in line with the industries that they oversee.

While we have yet to see how the KPPU will implement these guidelines, our recommendation is for businesses to revisit their competition law training and procurement policy. With respect to the Relevant Market and Antitrust Guidelines, businesses should consider refreshing their competition law training, not only for the legal department but also for other business departments as these guidelines may, to some extent, affect the way businesses assess their products' positioning in the market. Such reassessment may, in turn, influence the business' strategic decision.

Meanwhile, with respect to the Bid Rigging Guideline, it is interesting to see the KPPU's take on BRIAS, which was first developed by the Korea Fair Trade Commission ("**KFTC**"). The KFTC is known to use BRIAS as a red flag detection system for bid rigging issues in a public procurement. Although it is still unclear whether this acknowledgment of BRIAS means that the KPPU will develop a similar algorithmic system or not, by recognising BRIAS' algorithm, this may mean that the KPPU is preparing to initiate investigation into more bid-rigging cases than it has had already. Therefore, it would be wise for businesses to revisit their procurement policy to ensure compliance with Indonesia's competition rules.

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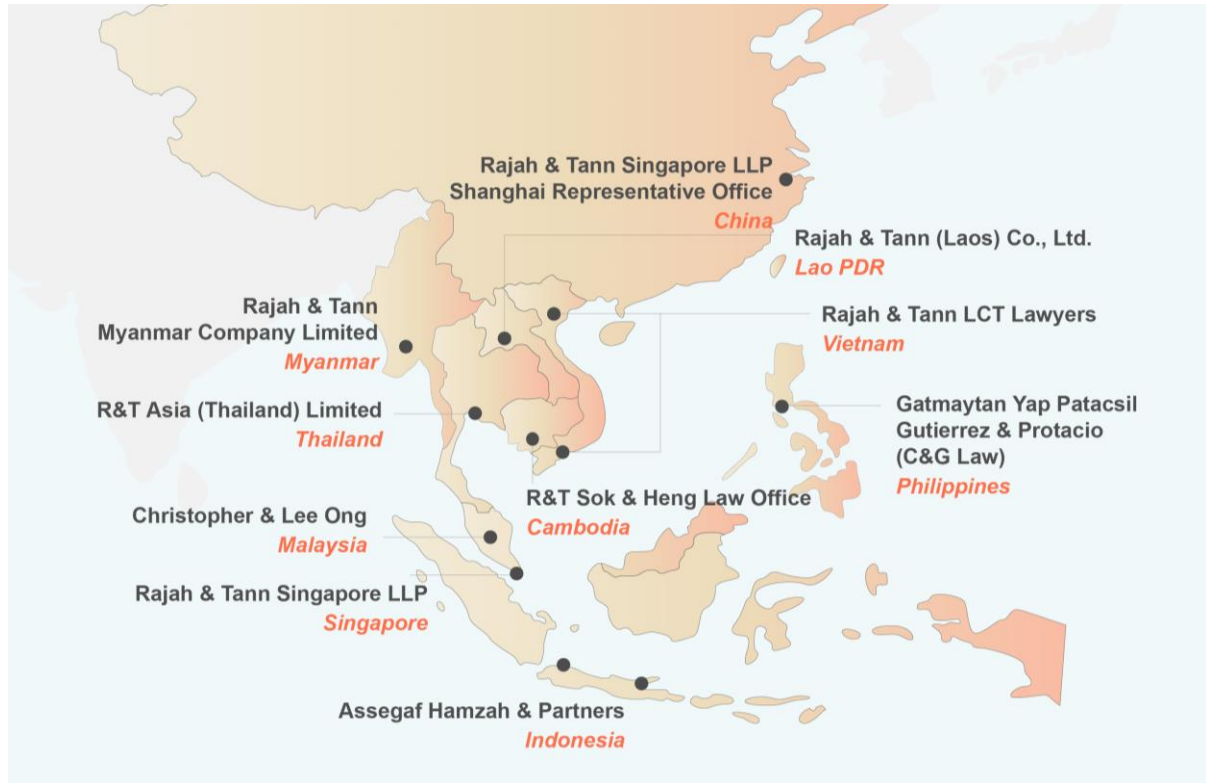
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