

Job Creation Act

Legal Insight

Job Creation Act: Changes on Sanctions and Legal Proceedings for Monopolistic Practices and Unfair Business Competition

Law No. 11 of 2020 concerning Job Creation (the “**Job Creation Act**”) has several provisions that amend Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition (“**Law 5/1999**”). In order to implement the provisions under the Job Creation Act which amend Law 5/1999, the Government of the Republic of Indonesia issued Government Regulation No. 44 of 2021 concerning the Implementation of the Prohibition of Monopolistic Practices and Unfair Business Competition (“**GR 44/2021**”).

In this article, we provide key highlights of Law 5/1999 as amended by the Job Creation Act and of its implementing regulation, GR 44/2021.

A. Commission Council

GR 44/2021, affirms the role of a Commission Council (“**Council**”) which will be established by the authority of the Business Competition Supervisory Commission - *Komisi Pengawas Persaingan Usaha* – (“**KPPU**”). As a background, under Law 5/1999 as amended by the Job Creation Act, KPPU exercises the following authorities:

1. To receive reports from the public or the community and/or businesses concerning allegations of monopolistic and unfair business competition practices, to examine and conduct investigations into such allegations, and to summarize investigation results;
2. To conduct research concerning allegations of the existence of business activities and/or actions of business actors which may cause monopolistic practices and/or unfair business competition;
3. To conduct investigation and or examination of allegations of cases of monopolistic practices and or unfair business competition reported by the public or by business actors or discovered by the Commission as a result of its research;
4. To draw conclusions regarding the results of its investigation and/or examination as to whether or not any monopolistic practices and or unfair business competition occurred;
5. To summon business actors alleged to have violated the provisions of Law 5/1999;
6. To summon and present witnesses, expert witnesses, and any persons deemed to have knowledge about a violation of the provisions of Law 5/1999;
7. To seek the assistance of investigators to bring before the Commission business actors, witnesses, expert witnesses, or any persons as intended in sub-articles e and f, who are not prepared to appear in response to the Commission’s summons;
8. To request the statement of Government institutions related to the investigation and or examination of business actors who have violated the provisions of Law 5/1999;

9. To obtain, examine and/or assess letters, documents or other instruments of evidence for the purpose of investigation and or examination;
10. To determine and stipulate the existence or non-existence of losses suffered by other business actors or society;
11. To notify the business actors alleged to have engaged in monopolistic practices and/or unfair business competition about the Commission's decisions; and
12. To impose administrative sanctions on business actors violating the provisions of Law 5/1999.

With respect to the authorities given above, KPPU will establish a Council which will conduct the examination or investigation and impose administrative action against a reported party who is proven to have committed the following violations:

Prohibited Agreements	Prohibited Activities	Other Specific Areas
Oligopoly, price fixing, dividing territories, boycott, cartel, trust, oligopsony, vertical integration, exclusive dealing, agreements with foreign parties that cause monopolistic practices and/or unfair business competition	Monopoly, monopsony, market control, predatory pricing, and conspiracy	Dominant position, interlocking directorates, share ownership (securing of majority shareholdings in several similar companies), and related corporate actions that cause monopolistic practices and/or unfair business competition, i.e., mergers, consolidations and acquisitions

B. Sanctions and Guarantee of Fines

Prior to being amended by the Job Creation Act, Law 5/1999 set a maximum administration fine of Rp. 25,000,000,000 (twenty five billion Rupiah) with Rp. 1,000,000,000 (one billion Rupiah) as the minimum baseline. Under GR 44/2021, the Council has the option of determining maximum fines as either a:

- (i) maximum of 50% of any net profits generated by businesses within the relevant market; or
- (ii) maximum of 10% of any total relevant sales.

GR 44/2021 also introduces the requirement to submit bank guarantees, up to a maximum of 20% (twenty percent) of the amount of the fine imposed by the KPPU as a guarantee for the fulfillment of the KPPU's decision. The guarantee must be deposited with the KPPU no later than 14 (fourteen) business days after receiving the notification of the KPPU's decision.

Determination of the amount of the fine will be based on:

- (i) negative impacts arising from violations;
- (ii) the duration of time the violation occurred;
- (iii) mitigating factors;
- (iv) aggravating factors; and/or
- (v) the ability of businesses to pay.

We expect further guidance from KPPU for the determination of fines above.

Meanwhile for criminal sanctions, although the Job Creation Act has removed criminal sanction for applying agreement that are prohibited under Law 5/1999 or acts or abuse of dominant position, criminal charges can still be imposed on business actor(s) who refuse to be examined, refuse to provide information required in the investigation and/or examination, or obstruct the process of investigation and/or examination.

GR 44/2021 also provides more clarity between the types of violation and the corresponding

Type of Sanctions		
No.	Sanction	Violation
1.	Determination of the cancellation of a part or the whole of an agreement	Oligopoly, price fixing, dividing territories, boycott, cartel, trust, oligopsony, vertical integration, exclusive dealing, agreements with foreign parties that causes monopolistic practices and/or unfair business competition

Type of Sanctions		
No.	Sanction	Violation
2.	Orders to business actor(s) to cease any vertical integration	vertical integration
3.	Orders to business actor(s) to cease any unfair business activity or any activity which causes unfair business competition and/or is detrimental to the public	Monopoly, monopsony, market control, predatory pricing, and conspiracy, and also interlocking directorates and share ownerships
4.	Orders to business actor(s) to cease any abuse of a dominant position	Any violation regarding dominant position
5.	Cancellation of mergers or share acquisitions	Any violation by corporate actions that cause monopolistic practices and or unfair business competition, i.e., mergers, consolidations and acquisitions

The administrative sanctions will be imposed on the following basis:

1. In accordance with the level or impact of the relevant violations;
2. By taking into consideration of the continuation of business activity of the relevant business actor(s); and/or
3. On a clear and reasonable basis.

Specifically for sanctions in the form of orders to cease any unfair business activity or any activity which causes unfair business competition and/or is detrimental to the public, GR 44/2021 provides more detailed actions:

- a. cessation of activities that result in control over the production or marketing of goods or services;
- b. cessation of activities that result in control of receiving supplies or becoming the sole buyer of goods or services;
- c. cessation of prevention or obstruction of certain business actors from carrying out the same business activities;

- d. cessation of activities that prevent potential consumers or customers of a competing business actor from entering business relations with the competing business actor;
- e. cessation of activities that limit the circulation or sale of goods or services in the Relevant Market;
- f. cessation of discrimination;
- g. cessation of selling loss or setting a very low selling price;
- h. cessation of fraud in determining production costs and other costs that are components of goods or services;
- i. cessation of the conspiracy to arrange or determine a successful bidder;
- j. cessation of the conspiracy to obtain information on business activities of competitors classified as company's secrets,
- k. cessation of a conspiracy to impede the production and/or marketing of competing business actors;
- l. mandate for business actors to dismiss the board of directors or commissioners who hold concurrent positions; and / or
- m. mandate for business actor affiliated to release the cross-share ownership

However, administration sanctions for late notification on mergers, acquisitions and consolidations remain unchanged so that in the event a business actor does not notify the KPPU, the business actor will be subject to sanctions in the form of administrative fines amounting to IDR1,000,000,000 (one billion Rupiah) for each day of delay, on condition that the overall administrative fines do not exceed IDR25,000,000,000 (twenty five billion Rupiah) as currently stipulated in the Government Regulation No. 57 of 2010 on Mergers or Consolidations Of Business Entities And Acquisition Of Company Shares Which May Result In Monopolistic Practices And Unfair Business Competition.

C. Available Legal Actions against the KPPU's Decisions

1. Filing Objection against a KPPU Decision

Under the previous regulation, a business actor(s) that is subject to administrative sanction(s) by a KPPU Decision could file an objection against the KPPU Decision with the District Court which has jurisdiction over the domicile of the business actor at the latest 14 (fourteen) working days after receiving the notification of the KPPU Decision.

Under GR 44/2021, the objection will be filed with the Commercial Court. The change from the District Court to the Commercial Court is expected to improve the proceedings in court considering judges at the Commercial Court are generally experienced in and have more insight into dealing with trade and business aspects, leading to an improvement in the quality of the verifying evidence process in court.

2. Cassation against Commercial Court Decision

Any party who is not satisfied with the Commercial Court decision as described in no. 1 above is entitled to file a cassation against the Commercial Court Decision with the Supreme Court of the Republic of Indonesia within a period of 14 (fourteen) working days after receiving notification of the Commercial Court Decision.

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