

Borobudur Law and Society Journal
ISSN: 2809-9664
Vol. 5 No. 4 (2026)
pp: 11-21
DOI: https://doi.org/10.31603/8664

UNIMMA PRESS
UNIVERSITAS MUHAMMADIYAH MAGELANG

Competition Policy in Indonesia in the Era of Economic Globalisation: Law No. 5 of 1999 and the Constitutional Economic Order

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Abstract

Economic globalisation has bound Indonesia to the trade rules of the World Trade Organization (WTO) and made business competition both unavoidable and a threat to micro, small and medium enterprises (MSMEs). This study asks how business competition policy is regulated in Indonesia in that setting, whether Law No. 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition is consistent with the economic order of Article 33 of the 1945 Constitution, and whether the law gives MSMEs equal opportunity to do business. It is doctrinal legal research using statutory, conceptual and case approaches, based on legislation, a WTO panel report, Constitutional Court decisions and the literature. The study finds that the law is a competition law of general application: it prohibits agreements, activities and abuse of dominant position, enforced by the Commission for the Supervision of Business Competition (KPPU), and it states in Article 3(b) the aim of equal opportunity for large, medium and small businesses. Article 33, read with Constitutional Court decisions, requires a market order based on kinship and economic democracy, not a free market and not a planned economy. The law protects the process of competition, not MSMEs as such, and this study did not assess enforcement outcomes systematically. It recommends enforcement priorities on conduct that excludes small businesses, a sample-based evaluation of KPPU decisions, and clear guidance on partnership between large and small firms.

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Keywords

Competition; Globalisation; Monopoly; MSMEs; KPPU; Indonesia

Introduction

Economic globalisation removes national borders for economic activity, so that goods, capital and services move freely across the world. It is its fastest-moving

form and is often described as an ideology advanced by industrial states to draw all countries into one global society shaped by capitalism and liberalism. It is not new: before independence it took the form of trade in spices and other commodities, but today it is described as a new manifestation of capitalism as an international economic system. Indonesia takes part in it through multilateral and bilateral trade agreements on goods, services and investment.[1][2][3][4]

Indonesia ratified the General Agreement on Tariffs and Trade and the WTO Agreement by Law No. 7 of 1994, and thereby bound itself to their principles.[5] It is also a member of APEC and ASEAN and, from 1 June 2010, of the ASEAN–China Free Trade Area (ACFTA). National legislation touching trade must therefore conform to the principles of trade liberalisation, in particular most-favoured-nation treatment, national treatment and non-discrimination. For MSMEs, which are weak in capital and technology, open competition is both an opportunity and a threat, and the opening of markets under ACFTA raised concern that local industries would be pushed out of business.[6]

The issue also lies within the constitutional economic order. Article 33 of the 1945 Constitution requires that the economy be organised as a common endeavour based on the principle of kinship,[7] and the concern is whether Indonesia can maintain a legal structure that protects the people's economy when binding trade agreements limit the government's room to act for public welfare. Competition law is where that concern becomes concrete, because it decides what firms may do to each other in the market.

Earlier work on this subject has largely stayed at two levels. Indonesian studies of globalisation discuss its effects on the economy, national values and natural resources in general terms,[8][9][10] and studies of the WTO describe the rules binding Indonesia in international trade agreements,[11][12] but they do not examine how the

[1] Nona Widharosa & Sri Andaiyani, "Pengaruh Globalisasi Ekonomi terhadap Inflasi" (2017) 15:2 *Jurnal Ekonomi Pembangunan* 117.
[2] Tony Tampake, "Tantangan Globalisasi terhadap Nilai-nilai Keindonesiaan" (2018) 8:2 *Theologia: Jurnal Teologi Interdisipliner* 17.
[3] Rose Fitria Lutfiana, "Globalisasi Ekonomi, UU Neoliberal dan Masa Depan Kekayaan SDA Indonesia" (2016) 23:2 *Jurnal Pendidikan Ilmu Sosial* 68, DOI: <10.17509/jpis.v23i2.1620>.
[4] Syprianus Aristeus, "Peluang Industri dan Perdagangan Indonesia dalam Pelaksanaan Masyarakat Ekonomi ASEAN" (2014) 3:2 *Jurnal Rechts Vinding* 145, DOI: <10.33331/rechtsvinding.v3i2.37>.
[5] Law No 7 of 1994 on the Ratification of the Agreement Establishing the World Trade Organization (Indonesia).
[6] Aprilia Estina Poae, "Kajian Hukum World Trade Organization dalam Perjanjian Perdagangan Internasional di Indonesia" (2019) 7:6 *Lex et Societatis* 5.
[7] Constitution of the Republic of Indonesia 1945, art 33(1).
[8] Widharosa & Andaiyani, *supra* note 1.
[9] Tampake, *supra* note 2.
[10] Lutfiana, *supra* note 3.
[11] Poae, *supra* note 6.
[12] Aristeus, *supra* note 4.

national competition law, as the instrument that translates the constitutional order into rules of market conduct, responds to the pressure of globalisation. Writing on the constitutional economy, for its part, treats Article 33 as the foundation of economic policy,[13] without testing the competition statute against it. This article joins the three: it reads Law No. 5 of 1999 and its enforcement by the Commission for the Supervision of Business Competition (KPPU) against the trade-law commitments and the constitutional text. The research questions are: (1) how is business competition policy regulated in Indonesia in the era of economic globalisation; (2) is that regulation consistent with Article 33 of the Constitution; and (3) does it give MSMEs equal opportunity in practice? Its purpose is to assess the competition regime and to identify what should change in law or enforcement.

Research Method

This is doctrinal (normative) legal research. It uses a statutory approach, examining the 1945 Constitution, Law No. 5 of 1999 as amended by the Job Creation Law and its implementing regulation, and the law ratifying the WTO Agreement; a conceptual approach, examining the theories of competition and the idea of the constitutional economic order; and a case approach, limited to the WTO panel report in the Indonesian automobile dispute, two Constitutional Court decisions on the meaning of state control under Article 33, and one KPPU case taken as an illustration. Primary legal materials are legislation and decisions; secondary materials are books and journal articles. The materials were gathered by library research and analysed qualitatively. Competition policy is identified here as the set of rules that prohibit anti-competitive conduct, the institution that enforces them and the purposes the law declares for itself; it is assessed against two measures, the text of Article 33 as the Constitutional Court reads it and the aim of equal opportunity stated in Article 3(b) of Law No. 5 of 1999. No interviews were conducted and no systematic sample of KPPU decisions was analysed, so conclusions on enforcement are tentative.

Results and Discussion

Globalisation, Free Trade and the WTO

Globalisation is a complex and contradictory set of processes, and Albrow understands it as the incorporation of all people into a single world society.[14]

[13] Jimly Asshiddiqie, *Konstitusi Ekonomi* (Jakarta: Buku Kompas, 2010).
[14] Martin Albrow, *The Global Age: State and Society Beyond Modernity* (Cambridge: Polity Press, 1996).

Business competition has become unavoidable and ever more open, and for MSMEs globalisation is both an opportunity and a threat to their existence. Free trade is bound by rules drawn up through the WTO, an organisation founded through the Uruguay Round and the GATT with powers of rule-making, review and dispute settlement. Because Indonesia has ratified these rules, its trade legislation must follow them. The WTO is one of the main actors governing the global economy, alongside multinational corporations and international financial institutions such as the World Bank and the IMF, and it supervises free trade and settles disputes among members. It is not, however, a competition authority: the WTO agreements discipline governments' trade measures, not the conduct of private firms in a national market, which remains the business of national competition law.

The Timor national car case shows how trade law constrains national economic policy. Presidential Instruction No. 2 of 1996 on the development of a national car industry gave a national car company exemption from import duties and from luxury-goods sales tax. The European Communities, Japan and the United States complained to the WTO. In its report of 2 July 1998, adopted on 23 July 1998, the panel found that the 1996 national car programme was inconsistent with Article 2 of the Agreement on Trade-Related Investment Measures and with Articles I and III:2 of the GATT 1994, and that the European Communities had shown serious prejudice under the Agreement on Subsidies and Countervailing Measures.[15] The relation between the ruling and the revocation of the incentives must be stated carefully. Indonesia reported to the WTO that it had repealed the programme on 21 January 1998,[16] that is, before the panel report. The ruling therefore confirmed, and did not cause, the change of policy; the revocation came in the financial crisis of 1997–98 and in the shadow of a pending dispute. What the case shows is that a measure that favours a national firm over foreign competitors cannot be defended as development policy within the WTO system, and that the national economic order must be designed with those limits in view.

The Theory of Business Competition

The free-market view treats competition as the heart of the free enterprise economy: firms must serve consumers better and more cheaply than their rivals, entry and exit are free, and the market therefore yields efficiency, low prices and choice. It

[15] Indonesia — Certain Measures Affecting the Automobile Industry (Complaints by the European Communities, Japan and the United States) (2 July 1998), WTO Docs WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (Panel Report), adopted 23 July 1998.

[16] Indonesia — Certain Measures Affecting the Automobile Industry, Status Report by Indonesia (4 June 1999), WTO Doc WT/DS54, online: <https://www.italaw.com/sites/default/files/case-documents/trade/DS54/italaw18126622%20-%20Indonesia%20-%20Autos%20-%20Status%20Report%20by%20Indonesia%2C%20June%204%2C%201999%20%28English%29.pdf>.

claims two guarantees for the market: equal and fair opportunity to do business with no privileged parties, and clear and fair rules, so that the market is also ethical. In Indonesian writing, capitalism is described as a system of perfect competition.[17] Competition is dynamic: firms enlarge markets and improve products, and some breach ethics and rules, so that binding rules are needed even on this view.

The opposing view starts from market failure. Without rules, firms can agree on prices or divide markets (cartels), a dominant firm can exclude rivals or exploit customers and suppliers, and mergers can remove competitors; the market then delivers high prices and less choice, not the benefits claimed for it. Economic analysis of competition policy accordingly justifies prohibiting such conduct, assessing some of it by its effects and some as harmful in itself.[18] Competition law is therefore not opposed to the market; it is the condition for keeping the market competitive. For Indonesia the point has a particular edge. Small firms are the first to be excluded by cartels among suppliers, by dominant buyers who impose terms, and by exclusive dealing, so that rules which protect the competitive process are also, in part, rules which protect MSMEs. The question for the Indonesian law is how far it goes beyond that, and whether it may favour small firms in the name of Article 33.

Business Competition Policy in Indonesia

Indonesia's rules on the mechanism of business competition are in Law No. 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition. Article 3(b) states that one of its aims is to create a conducive business climate through regulation of fair business competition so as to guarantee certainty of equal opportunity to do business for large, medium and small businesses.[19] The remaining aims are to safeguard the public interest and efficiency of the national economy, to prevent monopolistic practices and to create effectiveness and efficiency in business.[20] The law operates in two parts, set out in Table 1: a substantive part of prohibitions and an institutional part in which KPPU investigates and decides.

Table 1. Structure of Law No. 5 of 1999

Part	Content	Provisions
Prohibited agreements	Oligopoly, price fixing, price discrimination, resale price maintenance, territorial allocation, boycott, cartel, trust, oligopsony, vertical integration, closed agreements, agreements with foreign parties	Articles 4–16

[17] Asshiddiqie, *supra* note 13.
[18] Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge: Cambridge University Press, 2004).
[19] Law No 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition (Indonesia), art 3(b).
[20] *Ibid*, art 3.

Prohibited activities	Monopoly, monopsony, market control, predatory pricing, manipulation of costs, bid rigging, misuse of trade secrets, hindering competitors	Articles 17–24
Dominant position	Abuse of dominant position, interlocking directorates, shareholdings, mergers and acquisitions	Articles 25–29
Enforcement	KPPU investigation and decision; administrative sanctions; objection to the Commercial Court after the Job Creation Law	Articles 30 ff, as amended

Source: Law No. 5 of 1999, as amended by Law No. 11 of 2020 and Law No. 6 of 2023; compiled by the authors.

The prohibitions are assessed by different tests. Some conduct, such as price fixing, is prohibited by its terms; other conduct is prohibited only where it is likely to produce monopolistic practices or unfair competition, so that its effect on the market has to be shown. Dominant position is defined by market share, one firm having fifty per cent or more, or two or three firms together seventy-five per cent or more, of a market,[21] and holding it is not itself unlawful; its abuse is. The law also contains exceptions, notably for agreements and conduct of small business actors.[22] That exception is the one place where size alone changes the legal result, and it shows that the law treats MSMEs by exempting them from its prohibitions, not by protecting them from large firms.

KPPU is the institution that gives the law effect: it investigates alleged violations, decides cases and imposes administrative sanctions.[23] The Job Creation Law, now in force through the 2023 enactment, changed the enforcement stage. Objections to KPPU decisions go to the Commercial Court in the domicile of the business actor, not to the district court, with a further appeal to the Supreme Court, and most criminal provisions were removed, except those on non-compliance during KPPU investigations; administrative fines were set under the implementing regulation at a maximum of fifty per cent of net profit in the relevant market during the violation, or ten per cent of sales.[24][25][26] The changes concentrate the review of KPPU decisions in a specialised court and move the law from criminal to administrative enforcement. Whether they strengthen enforcement has not been tested; they make sanctions more predictable, but the review of the merits by the Commercial Court may reopen KPPU's findings of fact.

Review of KPPU decisions has been decisive in practice. In the acquisition of PT Alfa Retailindo, KPPU found Carrefour guilty of violating the law and ordered it to

[21] *Ibid*, art 25(2).
[22] *Ibid*, art 50(h).
[23] *Ibid*, arts 30, 36, 47.
[24] Law No 11 of 2020 on Job Creation (Indonesia).
[25] Law No 6 of 2023 on the Enactment of Government Regulation in Lieu of Law No 2 of 2022 on Job Creation into Law (Indonesia).
[26] Government Regulation No 44 of 2021 on the Implementation of the Prohibition of Monopolistic Practices and Unfair Business Competition (Indonesia).

divest the shares,[27] but the South Jakarta District Court annulled the decision on objection.[28] The case is only one illustration, and the reasons of the court are not analysed here; but it shows that KPPU's findings of market power are tested in full by the general courts, and that the strength of the regime depends on the quality of KPPU's market definition and evidence.

Article 33 and the Constitutional Economic Order

Article 33(1) cannot be read as showing that the Indonesian economic system is a planned economy, or as contrasting with a free market in which the government's role is limited. Article 33(1) provides that the economy shall be organised as a common endeavour based on the principle of kinship; it does not say "planned economy" or "free market". The text must be read as a whole. Paragraph (2) provides that production branches that are important to the state and affect the livelihood of many people are controlled by the state; paragraph (3) that land, waters and natural resources are controlled by the state and used for the greatest prosperity of the people; and paragraph (4), added by amendment, that the national economy is organised on the basis of economic democracy with the principles of togetherness, efficiency with justice, sustainability, environmental perspective, self-sufficiency and a balance of progress and national economic unity.[29] Efficiency is thus a constitutional value, but it is placed beside justice; the competition the Constitution accepts is one that serves the people's welfare, not competition for its own sake.[30]

The Constitutional Court has given the phrase "controlled by the state" a meaning wider than ownership: it covers the state's making of policy, regulation, management, administration and supervision.[31] In the later oil and gas decision the Court applied that reading and set the forms of state control in an order of priority according to their effectiveness for the people's prosperity.[32] Two consequences follow for competition policy. First, regulation and supervision of the market, which is what competition law does, are themselves forms of state control and need no justification as exceptions to the free market. Second, the strongest forms of control are reserved for the branches of production covered by paragraphs (2) and (3); Law

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[27] "Diputus KPPU Bersalah, CEO Carrefour Temui SBY di Prancis", *detikFinance*, online: <https://finance.detik.com/berita-ekonomi-bisnis/d-1261157/diputus-kppu-bersalah-ceo-carrefour-temui-sby-di-prancis>.

[28] "Carrefour Menang Lawan KPPU", *detikFinance*, online: <https://finance.detik.com/berita-ekonomi-bisnis/d-1301378/carrefour-menang-lawan-kppu>.

[29] Constitution 1945, *supra* note 7, art 33(1)–(4).

[30] Asshiddiqie, *supra* note 13.

[31] Constitutional Court of Indonesia, Decision No 001-021-022/PUU-I/2003 (Judicial Review of Law No 20 of 2002 on Electricity).

[32] Constitutional Court of Indonesia, Decision No 36/PUU-X/2012 (Judicial Review of Law No 22 of 2001 on Oil and Gas).

No. 5 of 1999 accordingly exempts activities of the state in those fields from its prohibitions, while leaving the rest of the economy to the competition rules.[33] Law No. 5 of 1999 is in this sense consistent with Article 33: it does not displace the state's control of the key branches and it regulates, and does not abandon, the rest of the market.

Protecting MSMEs and Equal Treatment in Competition

The tension is clear once the two positions are set side by side. Article 3(b) promises equal opportunity for large, medium and small businesses, and Article 33 requires an economy built on kinship and economic democracy; but the prohibitions of the law are general, they apply to all business actors alike, and they protect the competitive process, not any class of firm. Equal opportunity in the law is formal: no firm may be excluded by agreement or by abuse of dominance. That formal equality helps MSMEs where the exclusion is the kind the law prohibits, for example a dominant retailer or supplier that imposes terms or refuses to deal, or a cartel among input suppliers. It does not help them where the cause of their weakness is capital, technology or scale, which competition law does not address. Trade commitments sharpen the point, because measures that favour domestic or small firms over others, such as those in the Timor case, are restricted by the WTO rules, while the competition law itself offers only the exemption for small business actors.

The conclusion is that the two aims are reconcilable only at different levels. Competition law should guarantee a market open to small firms, and a policy of strengthening MSMEs, through partnership, finance and technology, should be pursued by other instruments within the limits of the trade agreements. Demanding that competition law itself favour MSMEs would weaken its predictability and expose Indonesia to the objections raised in the automobile dispute. As to the third research question, the text of the law gives equal opportunity in the sense of a protected process; whether MSMEs obtain it in practice depends on the enforcement record of KPPU, which the study did not analyse systematically and which must be left as a limit of the findings.

Comparison with Earlier Research

The findings agree with the Indonesian studies of globalisation in recognising that open markets expose local industry to pressure,[34][35] and with studies of the WTO

[33] Law No 5 of 1999, *supra* note 19, art 51.
[34] Widharosa & Andaiyani, *supra* note 1.
[35] Lutfiana, *supra* note 3.

that treat the agreements as binding on national legislation.[36] They go further in three respects. First, they correct the reading of Article 33(1) as a statement of a planned economy, using the whole of Article 33 and the Constitutional Court's reading of state control. Second, they show that the WTO's influence on competition policy is indirect: the Timor case concerned state measures, not private conduct, and the revocation of the incentives was not caused by the ruling. Third, they place the protection of MSMEs in its right level, as an aim of Article 3(b) which the prohibitions serve only through the competitive process. Compared with economic analysis of competition policy, which supports prohibiting cartels and abuse of dominance on grounds of efficiency,[37] the Indonesian law adds the constitutional objective of fair opportunity, but without a mechanism to pursue it other than the general prohibitions.

Conclusion

Business competition policy in Indonesia is set by Law No. 5 of 1999, which prohibits anti-competitive agreements, activities and abuse of dominant position, is enforced by KPPU, and in Article 3(b) aims at equal opportunity for large, medium and small businesses. Globalisation makes competition unavoidable, and the WTO rules bind Indonesia in trade measures but leave private anti-competitive conduct to national law; the Timor national car case shows the limits on state measures that favour a national firm, and the policy change in that case preceded the ruling. Article 33 of the Constitution does not establish a planned economy or a free market; read with the Constitutional Court's decisions, it requires an economy based on kinship and economic democracy in which the state controls the key branches and regulates the market, and Law No. 5 of 1999 is consistent with that order. The law gives MSMEs equal opportunity in the sense of a protected competitive process, not protection against the advantages of scale. Three recommendations follow. KPPU should give priority to conduct that excludes small businesses, such as abuse of buying power and exclusive dealing, and should publish its decisions in a form that allows the effect on MSMEs to be assessed. The courts and KPPU should be given guidance on market definition and proof, in view of the annulment of KPPU decisions on objection. Support for MSMEs should be pursued through partnership, finance and technology policy, within the trade commitments, and not through exceptions to the competition rules. The study is limited: it is doctrinal, uses one

[36] Poae, *supra* note 6.
[37] Motta, *supra* note 18.

illustrative KPPU case and one WTO dispute, and does not analyse the record of KPPU decisions or the effect of the Job Creation Law amendments in practice. A systematic study of KPPU and court decisions involving MSMEs is needed to answer the question of practice.

Ethics and Data Availability

This normative legal research did not involve human participants or personal data, so ethical approval was not required. All legislation, decisions and publications used are publicly available.

Use of Generative AI

Generative AI was used only to improve the language of this article (grammar, clarity and style). The authors reviewed the output and are responsible for the content of the article.

Funding and Conflicts of Interest

The authors declare no conflict of interest. This research received no external funding.

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