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Indonesian Merger Regime: Minor Changes and Introduction of Remedies

Summary

On 27 August 2012, the Indonesian Business Competition Supervisory Commission (**KPPU**) issued KPPU Regulation No. 3 of 2012, amending its merger control guide for the second time, replacing the operative provisions of the previous regulation entirely. However, this amendment is a tweak rather than an overhaul and the overall scheme has not changed substantially. One notable change is the addition of a 'remedies' section. At the same time, the KPPU amended the provisions regarding penalties for late reporting, setting them out in a separate regulation, KPPU Regulation No. 4 of 2012. Changes were made to the method of counting assets and turnover. This update is designed to be read with our merger control advisories of November 2010 and April 2012.

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Merger Notification

KPPU Regulation No. 3 of 2012 (the **Merger Control Guide**) is the second amendment to KPPU Regulation No. 13 of 2010 regarding Guide to the Implementation of Commercial Entity Mergers or Consolidations and Company Share Acquisitions which May Cause Monopolistic Practices and Unfair Competition. It replaces the first amendment, KPPU Regulation No. 10 of 2011.

The basic Indonesian merger control regime set out in Government Regulation No. 57 of 2010 remains unchanged. Certain qualifying mergers, consolidations and acquisitions must be reported within 30 working days as of the date of the transaction occurring[1]. It is a post-transaction reporting scheme and no prior filing is required, although it is possible to conduct formal written consultations for the comfort of the parties conducting the transaction, thereby gaining the benefit of certain assurances. The filing trigger relates to the size of the Indonesian turnover and assets of the relevant entities (discussed further, below).

Remedies

A notable addition to the Merger Control Guide is the inclusion of remedies, i.e. actions the merger participants propose to take in order to reduce the potential anti-competitive impact of a merger. If the KPPU believes the merger may substantially lessen competition in the relevant market, it may ask the reporting merger participant to propose remedies. Remedies may take the form of structural remedies (divestment of shares or assets), behavioural remedies (relating to IP rights, exclusive contracts, consumer switching costs, tying, supply or purchase barriers), production remedies (related to size of output), or other pro-competition remedies.

In terms of process, after filing the KPPU will notify the reporting entity within 90 working days that it (a) approves the merger; (b) disallows the merger; or (c)

1 Unless specified otherwise, this advisory uses the term "merger" to cover all three of these transaction types.

allows the merger with certain remedial actions. If, during the evaluation process, the KPPU finds that a merger will cause a substantial lessening of competition, it may allow participants to propose remedies. In this case, the reporting entity will have 14 working days to propose remedies. The KPPU will then decide whether to accept the proposed remedies or to disallow the transaction. This 14-day remedies process occurs within the overall 90-day evaluation period.

Notification Triggers:

The transaction triggers remain the same: assets over 2.5 trillion Rupiah, or turnover exceeding 5 trillion Rupiah. For transactions involving banks, the threshold is 20 trillion Rupiah, however now there need to be two banks involved in the transaction rather than one for the higher threshold to apply. If only one bank is involved in the transaction, the lower threshold will apply.

The manner in which the assets and turnover will be counted has changed. While the assets or turnover that will be counted are still assets or turnover on the Indonesian territory (excluding sales for export), what is now counted is the assets and turnover of all the companies directly involved in the merger plus those of all the entities directly or indirectly controlled by the ultimate holding company of the entity resulting from the merger. Previously the assets and turnover of sister companies of the parties directly involved in the transaction were not to be counted. This change makes it more likely the notification threshold will be triggered.

Consultations:

One of the weaknesses of the Indonesian merger control regime is its post-transaction application, meaning that a pre-transaction clearance is not mandatory but the KPPU may undo a transaction it disapproves of, after it occurs. This has not occurred since the activation of the merger control regime in 2010, although the KPPU has ordered a divestment in the past under Article 27 of the Anti-Monopoly Law prohibiting certain share cross-ownership[2]. However, the KPPU allows a voluntary pre-transaction 'consultation' to be undertaken, which gives the consulting parties the benefits of certain assurances, as long as certain conditions are met, including no material change in market conditions[3]. This scheme remains largely unchanged but the guide refers to a requirement for the parties to have conducted at least a 'due diligence', presumably to prevent premature or purely speculative consultations (not that the KPPU has been overwhelmed with written consultation requests to date – following this process remains the exception rather than the rule).

Foreign Mergers:

There has been a minor change to the scope of purely foreign mergers which will be caught by the reporting requirements. Previously foreign mergers would only be caught if at least one party had business activities in Indonesia (directly or indirectly, for example via a subsidiary) and the other had either business activities in, or sales into, Indonesia. The KPPU now includes the situation where one party has business activities in Indonesia and the other does not but the second party has a sister company which has business activities in Indonesia.

Vertical Mergers:

The Merger Control Guide now contains more detail about the KPPU's view of vertical mergers – they will only be considered as having a material impact on competition where one of the parties has a dominant position.

Sanctions for Failure to Report:

The penalties for failing to report have been moved again to a separate regulation, namely KPPU Regulation No. 4 of 2012.

Other Changes:

There have been a number of other minor changes and clarifications made, including the removal of the reference to 'primary shareholder' in the definition of affiliated companies. The explanatory diagrams have been improved for clarity. The Merger

2 07/KPPU-L/2007
3 Such as a change in the HHI index exceeding 500. The HHI = $\Sigma(x_i)^2$, where xi is the market share of the ith participant in the relevant market, expressed as a percentage.

Control Guide, as amended, now specifically states the formation of a new joint venture is not reportable (i.e. the establishment of a new joint venture company, not a new joint venture arrangement entered into via a merger). The KPPU does however reiterate that the non-reportable nature of a transaction does not mean the arrangements are exempt from the other articles of the Anti-Monopolies Law (Law No. 5 of 1999), such as the prohibitions on certain shareholding arrangements.

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